

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**

Bankruptcy Judge  
Sacramento, California

**December 4, 2013 at 2:30 p.m.**

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1. [11-26716-E-13](#) ROLANDO/NYMPHA ZAPANTA CONTINUED STATUS CONFERENCE RE:  
[11-2440](#) COMPLAINT  
SEHR V. ZAPANTA ET AL 6-20-11 [[1](#)]

Plaintiff's Atty: Mark Gorton  
Defendant's Atty: Pro Per

Adv. Filed: 6/20/11  
Answer: 8/10/11

Nature of Action:  
Dischargeability - false pretenses, false representation, actual fraud

**Final Ruling: The Status Conference is continued to 2:30 p.m. on December 3, 2014.** No appearance at the December 4, 2013 Status Conference is required.

Notes:

Continued from 12/5/12

**DECEMBER 4, 2013 STATUS CONFERENCE**

The Plaintiff filed his updated status report on December 2, 2013. Dckt. 28. He reports that the Debtors are continuing to perform under their stipulation by making the required payments under the confirmed First Amended Chapter 13 Plan. Plaintiff requests that the court continue the Status Conference for a year to allow the Debtors the opportunity to continue with the performance under the Stipulation and minimize further cost and expense to the parties and the court.

December 4, 2013 at 2:30 p.m.

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2. [11-25921](#)-E-11 HENRY/CARMEN APODACA

CONTINUED STATUS CONFERENCE RE:  
VOLUNTARY PETITION  
3-9-11 [[1](#)]

Debtors' Atty: Douglas A. Crowder

Notes:

Continued from 8/29/13

Operating Report filed: 10/18/13

[DAC-8] Order granting Motion to Compel Disgorgement of Attorney's Fees filed 9/20/13 [Dckt 266]; \$15,000.00 to be returned to Henry and Carmen Apodaca on or before 9/27/13; on or before 10/4/13 counsel to file and serve a written statement under penalty of perjury confirming payment.

#### **DECEMBER 4, 2013 STATUS CONFERENCE**

The court entered the order confirming the Chapter 11 Plan in this case on May 21, 2013. Dckts. 240, 244. The court has issued orders approving the final fee applications for one of the attorneys for the pre-confirmation Debtors in Possession. Dckt. 262. Counsel Douglas Crowder has obtained interim approval of fees, but has not filed an application for final approval of fees pursuant to 11 U.S.C. § 330. Order, Dckt. 233.

On September 23, 2013, the court entered its order requiring the original counsel for the Debtors in Possession to return \$15,000.00 on or before September 27, 2013, to the Plan Administrators for an attorneys' fee retainer received from the Debtors. Dckt. 266. Original counsel was to file a statement under penalty of perjury on or before October 4, 2013, confirming payment of such amounts to the Plan Administrators. No statement has been filed by original counsel.

3. [11-21422-E-13](#) [13-2300](#) SHMAVON MNATSAKANYAN AND YERMONIYA ARTUSHYAN MNATSAKANYAN ET AL V. BAC HOME LOANS SERVICING, LP ET AL STATUS CONFERENCE RE: COMPLAINT 9-25-13 [[1](#)]

Plaintiff's Atty: Peter G. Macaluso  
Defendant's Atty:  
Bernard J. Kornberg [Green Tree Servicing, LLC]  
unknown [BAC Home Loans Servicing, LP]

Adv. Filed: 9/25/13  
Answer: none

Nature of Action:  
Declaratory judgment

**Final Ruling: The Status Conference is continued to 2:30 p.m. on March 19, 2014.** No appearance at the December 4, 2013 Status Conference is required.

Notes:

[SW-1] Green Tree Servicing, LLC's Motion to Dismiss Adversary Proceeding filed 10/25/13 [Dckt 8], set for hearing 12/4/13 at 1:30 p.m.; Amended Notice of Hearing filed 11/15/13 [Dckt 15], hearing set for 1/9/14 at 1:30 p.m.

[PD-1] Stipulation Staying Adversary Proceeding Pending Loan Modification Review filed 10/30/13 [Dckt 13]

#### **DECEMBER 4, 2013 STATUS CONFERENCE**

On November 27, 2013, the Plaintiffs filed a Status Conference Statement. This Adversary Proceeding has been stayed to allow the parties to review a proposed loan modification which is represented to be a vehicle for resolution of this Adversary Proceeding. On November 25, 2013, the court entered its order staying the Adversary Proceeding. Order, Dckt. 17. Plaintiffs request that the Status Conference be continued 90-days to allow the parties to continue in their efforts to resolve the dispute. This is consistent with the Stipulation of the parties to stay these proceedings. Stipulation, Dckt. 13.

4. [09-43625-E-13](#) ANTHONY/NADIA BRADLEY  
[13-2297](#)

STATUS CONFERENCE RE: COMPLAINT  
9-23-13 [[1](#)]

BRADLEY ET AL V. GMAC MORTGAGE  
COMPANY ET AL

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

Adv. Filed: 9/23/13  
Answer: none

Service of Summons and Complaint:

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:

#### SUMMARY OF COMPLAINT

It is alleged in the Complaint that the defendants have a claim secured by a second deed of trust recorded against the Debtors' residence for which there was not value in the collateral after the debt secured by the first deed of trust. On January 17, 2013 the court issued an order determining the value of Defendant's secured claim to be \$0.00. 09-43625 Order, Dckt. 58. This order was issued to insure that the actual holder of the claim secured by the second deed of trust was provided with notice of the motion to value secured claim and had an opportunity to respond. The prior motion to value this secured claim named Central Mortgage Co. as the creditor. 09-43625 Order, Dckt. 32.

Tn this Complaint the Plaintiff-Debtors assert various claims. These are:

**First Cause of Action:** Judgment ratifying the court's order determining the secured claim to have a value of \$0.00.

**Second Cause of Action:** Judgment ratifying "the nature and extent of the SECOND DEED OF TRUST on the (Real) Property as determined by [the court in the January 17, 2013 Order].

Third Cause of Action: Judgment determining that the Second Deed of Trust, upon completion of the Chapter 13 Plan, has been extinguished.

**Fourth Cause of Action:** Judgment for violation of the California Rosenthal Fair Debt Collection Practices Act based on,

Specialized Loan Servicing calling the Plaintiff-Debtors, who are represented by counsel, demanding payment of the debt which has now been discharged in bankruptcy.

Specialized Loan Servicing sending notices to Plaintiff-Debtors stating that an amount is owed to be paid for the debt which has been discharged in bankruptcy.

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Specialized Loan Servicing refusing to reconvey the Second Deed of Trust notwithstanding the valuation of the secured claim and the completion of the Plaintiff-Debtors' Chapter 13 Plan.

**Fifth Cause of Action:** Violation of the California Constitutional Right to Privacy by Specialized Loan Servicing contacting Plaintiff-Debtors for payment of the debt which has been discharged in bankruptcy.

**Sixth Cause of Action:** Violation of California Civil Code § 2941(d) damages for Defendants' failure to reconvey the Second Deed of Trust upon completion of the Chapter 13 Plan.

**Seventh Cause of Action:** Violation of the Federal Fair Credit Reporting Act by "Defendant" for reporting "derogatory information" and failure to notify the consumer reporting agencies that the Plaintiff-Debtors dispute the reported information.

**SUMMARY OF ANSWER**

None Filed.

**IDENTIFY OF PARTIES ISSUES**

The Complaint names GMAC Mortgage Company and Specialized Loan Servicing LLC as Defendants. The California Secretary of State reports that GMAC Mortgage Corporation surrendered its corporate status. <http://kepler.sos.ca.gov/>. The Certificate of Service states that GMAC Mortgage, LLC was served, and GMAC Mortgage Company as merged into Ally Financial, Inc. was served. Ally Financial, Inc. is not named in the Complaint. Specialized Loan Servicing, LLC was served at both the address listed by the California Secretary of State and at its registered agent for service of process listed by the California Secretary of State. *Id.* In light of it being necessary for the court to have the actual creditor who has the claim secured by the Second Deed of Trust properly before it, amendment of the Complaint and service on the current creditor completed.

**FINAL BANKRUPTCY COURT JUDGMENT**

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 1, 3 Dckt. 1. No Answers have been filed by any the named defendants. In its answer, ----- admits the allegations of jurisdiction and core proceedings. Answer ¶¶ X, X, Dckt. X. **To the extent that any issues in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.**

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

a. The Plaintiff alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. § 1334 and 157, 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). Complaint ¶¶ 1, 3 Dckt.

1. The Defendant admits the jurisdiction and that this is a core proceeding. Answer, ¶¶ X, X, Dckt. X. To the extent that any issues in this Adversary Proceeding are related to proceedings, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c) (2) for all claims and issues in this Adversary Proceeding referred to the bankruptcy court.

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

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

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

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

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

5. [10-26337-E-13](#) CERLITO/LORNA TACULAD

CONTINUED STATUS CONFERENCE RE:  
VOLUNTARY PETITION  
3-15-10 [[1](#)]

Debtor's Atty: Peter A. Bermejo

Notes:

Continued from 7/31/13. On or before 10/29/13 Debtors to file and serve declarations and other evidence to address the assets of the estate, insurance policies and proceeds (if any), and the surviving Debtor's prosecution of this case. Trustee to file and serve any reply on or before 11/12/13.

Trustee's Status Report filed 11/8/13 [Dckt 89]; exhibits [Dckt 90]; declaration of Stephanie Lewandowski [Dckt 91]

Suggestion of Death Upon the Record filed 11/26/13 [Dckt 93]

[PAB-5] Motion to Substitute Deceased Party filed 11/26/13 [Dckt 95], set for hearing 1/14/14 at 3:00 p.m.

#### **DECEMBER 4, 2013 STATUS CONFERENCE**

No pleadings were filed or action taken by the surviving Debtor to address the death of the co-Debtor until November 26, 2013, with the filing of a Motion to Substitute Deceased Party. Dckt. 95. In that Motion it is stated,

a. Debtor Cerlito Taculad passed away on April 22, 2012.

b. Surviving Debtor Lorna Taculad seeks to be appointed as the representative for the deceased Debtor pursuant to Federal Rule of Bankruptcy Procedure 7025.

c. Surviving Debtor has continued to make the plan payments with the assistance of family members, notwithstanding the reduction in income due to the death of the other Debtor.

d. \$12,000.00 of life insurance proceeds were received upon the death of the co-Debtor. These proceeds were disbursed by the Surviving Debtor as follows:

i. \$7,333.29 for mortuary services.

ii. \$403.19 for death certificate, permit, and floral arrangement.

iii. \$3,175.00 paid to Sylvan Cemetery District.

iv. \$23.43 to the insurance company for an unpaid premium.

v. \$1,056.09 spent on food and expenses for people who visited the Surviving Debtor.

**December 4, 2013 at 2:30 p.m.**

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**JULY 31, 2013 STATUS CONFERENCE**

The court ordered that a Status Conference be conducted concerning the possible discharges to be granted in this case. The Debtor Cerlito Taculad is reported by the surviving Debtor Lorna Taculad to having passed away on April 22, 2012, one year prior to the completion of the Chapter 13 Plan.

The Chapter 13 Trustee has filed a Status Report confirming that all payments required under the Chapter 13 Plan were made by the Debtor.

The Trustee further reports that he was not made aware of the death of Cerlito Taculad until the Status Conference was set by the court. There has been no notice of death or a substitution of a representative of the deceased debtor to continue the prosecution of this case.

No disclosure has been made to the trustee of the existence or non-existence of any life insurance in which the bankruptcy estate may have an interest. None was disclosed on Schedule B.

The Trustee also states that no information was provided as to how the surviving Debtor was able to continue with the plan payments or what were the change in expenses with the death of one Debtor.

Schedule I lists Cerlito Taculad as having monthly income of \$2,440.53 a month. Dckt. 1 at 27. Loran Taculad is listed as having income of \$669.15 a month. The Debtors listed expenses of \$2,825.63 a month in expenses, including a \$1,200.49 a month mortgage payment. Schedule J, *Id.* at 29. The Debtors state their Monthly Net Income to be \$180.97 on Schedule J.

Under the Debtors' First Amended Plan confirmed in this case, they are required to make monthly plan payments of \$312.01. To make these payments, the Debtors needed contributions from two other family members.

6. [11-48050-E-7](#) STAFF USA, INC.

CONTINUED STATUS CONFERENCE RE:  
VOLUNTARY PETITION  
9-1-11 [[1](#)]

Debtor's Atty: Pro Se

**Final Ruling:** The court having converted the case to one under Chapter 7 (Order, Dckt. 351) and the interim Trustee having been appointed (Dckt. 352), **the Status Conference is removed from the calendar.** No appearance at the December 4, 2013 Status Conference is required.

Notes:

Continued from 7/31/13

Operating Reports filed: 8/6/13, 9/13/13, 10/7/13, 11/4/13

[MHK-5] Trustee's Motion to Approve Compromise with David Flemmer and Steven Berniker filed 8/7/13 [Dckt 267]; Order granting filed 10/29/13 [Dckt 347]

[GMF-17] Motion to Convert or Dismiss filed 8/8/13 [Dckt 274]; Order denying filed 9/5/13 [Dckt 292]; Appeal filed 9/29/13 [Dckt 297]

[MHK-4] Trustee's Motion for Order to Show Cause [W. Austin Cooper, APC] filed 7/18/13 [Dckt 257]

[MHK-5] Trustee's Motion to Approve Compromise with David Flemmer and Steven Berniker filed 8/7/13 [Dckt 267]; Order granting filed 10/29/13 [Dckt 347]

[MHK-6] Jon Tesar's Motion for First and Final Allowance of Compensation as Chapter 11 Trustee filed 9/25/13 [Dckt 308]; Order granting filed 10/29/13 [Dckt 348]

[MHK-7] Meegan, Hanschu & Kassenbrock's Motion for First and Final Allowance of Compensation as Counsel for the Trustee filed 9/25/13 [Dckt 303]; Order granting filed 10/29/13 [Dckt 349]

[MHK-8] Trustee's Motion to Convert Chapter 11 Case to a Case Under Chapter 7 filed 9/25/13 [Dckt 315]; Order granting filed 10/29/13 [Dckt 351]; Notice of Conversion filed 10/30/13 [Dckt 353]

Final Report and Account of Chapter 11 Bankruptcy Trustee filed 11/19/13 [Dckt 357]

Trustee's Status Conference Statement filed 11/20/13 [Dckt 360]

7. [09-46360-E-13](#) MARGUERITE GALVEZ  
[13-2313](#)  
GALVEZ V. WELLS FARGO BANK,  
N.A.

STATUS CONFERENCE RE: COMPLAINT  
10-9-13 [[1](#)]

Plaintiff's Atty: Peter L. Cianchetta  
Defendant's Atty: David M. Newman

Adv. Filed: 10/9/13  
Answer: none

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

Notes:

[AFR-1] Wells Fargo's Motion to Dismiss Adversary Complaint filed 11/8/13  
[Dckt 7], set for hearing 12/12/13 at 1:30 p.m.

Joint Status Conference Report-Discovery Plan filed 11/21/13 [Dckt 15]

#### SUMMARY OF COMPLAINT

The complain alleges names Wells Fargo Bank, N.A. as the defendant, which is asserted to be a creditor in the Plaintiff-Debtor's Chapter 13 bankruptcy case. It is alleged that the Debtor's residence was encumbered by two deeds of trust securing obligations owed to World Savings. The Complaint identifies the creditor to whom the debts were owed as "World Savings (now Wells Fargo Bank, N.A.). It is further alleged that the court has determined that the claim secured by the second deed of trust has a value of \$0.00. The Plaintiff-Debtor has completed her Chapter 13 Plan and has received her discharge.

The following causes of action are alleged:

**First Cause of Action:** Judgment ratifying the court's order determining the secured claim to have a value of \$0.00.

**Second Cause of Action:** Judgment ratifying "the nature and extent of the SECOND DEED OF TRUST on the (Real) Property as determined by [the court in the January 17, 2013 Order].

**Third Cause of Action:** Judgment determining that the Second Deed of Trust, upon completion of the Chapter 13 Plan, has been extinguished.

**Fourth Cause of Action:** Violation of California Civil Code § 2941(d) damages for Defendants' failure to reconvey the Second Deed of Trust upon completion of the Chapter 13 Plan.

**Fifth Cause of Action:** Judgment for violation of the California Rosenthal Fair Debt Collection Practices Act based on,

Defendant calling the Plaintiff-Debtor, who is represented by counsel, demanding payment of the debt which has now been discharged in bankruptcy.

Defendant sending notices to Plaintiff-Debtor stating that an amount is owed to be paid for the debt which has been discharged in bankruptcy.

Defendant refusing to reconvey the Second Deed of Trust notwithstanding the valuation of the secured claim and the completion of the Plaintiff-Debtors' Chapter 13 Plan.

**Fifth Cause of Action:** Violation of the California Constitutional Right to Privacy by Defendant contacting Plaintiff-Debtor for payment of the debt which has been discharged in bankruptcy.

**Seventh Cause of Action:** Violation of the Federal Fair Credit Reporting Act by Defendant for reporting "derogatory information" and failure to notify the consumer reporting agencies that the Plaintiff-Debtors dispute the reported information.

**MOTION TO DISMISS FILED BY WELLS FARGO BANK, N.A.**

Wells Fargo Bank, N.A. has filed a Motion to Dismiss the Complaint. Dckt. 7. The Motion states with particularity (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007) the following grounds:

A. First Claim:

1. Claim is not alleged against Wells Fargo Bank, N.A.
2. Plaintiff failed to follow (unspecified) procedure pursuant to Eastern District local procedures.

B. Second Claim:

1. Claim is not alleged against Wells Fargo Bank, N.A.
2. Plaintiff failed to follow (unspecified) procedure pursuant to Eastern District local procedures.

C. Third Claim:

1. Claim is not alleged against Wells Fargo Bank, N.A.
2. Plaintiff failed to follow (unspecified) procedure pursuant to Eastern District local procedures.

D. Fourth Claim:

1. Plaintiff failed to follow (unspecified) procedure pursuant to Eastern District local procedures.

E. Fifth Claim:

1. Wells Fargo Bank, N.A. is exempt from the provisions of the FDCPA. [The Complaint alleges claims under the California Rosenthal Act, not the Federal Fair Debt Collection Practices Act.]

F. Sixth CLaim:

1. Claim is not alleged against Wells Fargo Bank, N.A.
2. Plaintiff failed to follow (unspecified) procedure pursuant to Eastern District local procedures.

The other "grounds" stated with particularity are instructions to the court to read the supporting points and authorities and pick out what other grounds should be stated by Wells Fargo Bank, N.A. in its Motion.

Wells Fargo Bank, N.A. has filed a ten page points and authorities (Dckt. 10) in support of the grounds which it has stated with particularity in the Motion. The Points and Authorities contains significant factual allegations, however no declaration has been filed providing personal knowledge testimony or to authenticate any exhibits. Additionally, Wells Fargo Bank, N.A. has filed 103 pages of exhibits in support of the Motion, none of which have been authenticated. Fed. R. Evid. 901, 902. FN.1.

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FN.1. Wells Fargo Bank, N.A. has filed a request for the court to take "judicial notice" of various documents, including: Deed of Trust recorded on July 1, 2005; Open End Deed of Trust recorded on June 19, 2006; Certificate of Corporate Existence dated April 21, 2006; letter dated November 19, 2007 issued by the Office of Thrift Supervision; and Charter of Wachovia Mortgage, FSB; Printout form the website of the FDIC.

Federal Rule of Evidence 201 provides when judicial notice may be taken by a federal court,

Rule 201. Judicial Notice of Adjudicative Facts

- (a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
- (b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
  - (1) is generally known within the trial court's territorial jurisdiction; or
  - (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
- (c) Taking Notice. The court:
  - (1) may take judicial notice on its own; or
  - (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
- (d) Timing. The court may take judicial notice at any stage of the proceeding.
- (e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
- (f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive.

In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

While Wells Fargo Bank, N.A.'s counsel has dumped more than 100 pages of unauthenticated exhibits on the court and says, take judicial notice of the documents and accept everything stated therein as true, such is not proper. First, this court has no idea where these documents came from, who created them, and whether they are true and accurate copies. For public records, such as real estate records, the Federal Rules of Evidence provide two alternatives for authenticating the documents. First, a person may provide personal knowledge testimony to authenticate. Fed. R. Evid. 901(b)(1). This could include a bank officer who is a custodian of records for the bank. Alternatively, the document can be a certified copy. Fed. R. Evid. 902(4). Wells Fargo Bank, N.A. asks the court to ignore those two simple methods and adopt a Judicial Notice loophole through which anything and everything can be authenticated because a party argues contends, "well it must be true."

The court rejects such a dilution of the Federal Rules of Evidence, and does not find the various unreported decisions relied upon by Wells Fargo Bank, N.A. to be persuasive.

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From an initial review of the ten page points and authorities, the court notes the following:

A. Wells Fargo Bank, N.A. alleges that the Debtors must seek an order avoiding the lien, not filing an adversary action. For this proposition, Wells Fargo Bank, N.A. cites to the California Practice Guide: Bankruptcy (Rutter Group 2012), ¶ 18.225.4. The court's review of ¶ 18.225 (not being able to locate a ¶ 18.225.4 on the Westlaw on-line version of this treatise) in the this section of the Rutter Group Guide disclosed the following discussion,

"(3) [18:225] Lien must be secured solely by debtor's principal residence: A claim secured by the debtor's real property principal residence is protected from lienstripping only if the creditor's security interest is limited to the debtor's principal residence. The § 1322(b)(2) lienstripping prohibition does not apply when the security interest extends to other property in addition to the debtor's principal residence. [*Nobelman v. American Sav. Bank* (1993) 508 US 324, 330-332, 113 S.Ct. 2106, 2110-2112—implying (but not directly holding) that Chapter 13 debtors can lienstrip on secured debts other than debts secured by their real property principal residence]"

- B. Wells Fargo Bank, N.A. contends that the Plaintiff-Debtor,
1. Was first required to bifurcate the claim into the secured and unsecured portions of the claim pursuant to 11 U.S.C. § 506(a).
  2. That the Plan must provide for the payment in full of the secured claim, as determined under 11 U.S.C. § 506(a) over the term of the Plan.
  3. The confirmed Chapter 13 Plan the Plaintiff-Debtor's case does not provide for the secured claim.

a. The court's review of the Plan confirmed in this case discloses that a \$25,336.00 secured claim of World Savings & Loan is provided to be paid \$0.00, with that claim being subject to valuation under 11 U.S.C. § 506(a). The order of the court filed on February 12, 2010, values the secured claim of World Savings and Loan to be \$0.00, with the security interest identified as the second deed of trust.

C. It is asserted that the preferred procedure in the Eastern District of California is to have the lien avoided by a motion, again citing to the Rutter Group ¶ 18.225.4. Thought the court cannot find this referenced authority,

1. The court is unaware of any of the judges in the District (at least the Sacramento and Modesto Divisions) which adjudicate the lien rights of a creditor upon completion of a plan by Motion; and
2. The court is unaware of the basis for waiving the requirements of Federal Rule of Bankruptcy Procedure 7001 that interests in property be determined by adversary proceedings.
3. This court has address in several reported decisions the state and federal law legal theories by which a "lien strip" occurs in a Chapter 11, 12, or 13 case. *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012); *Martin v. CitiFinancial Services, Inc. (In re Martin)*, Adv. No. 12-2596, 2013 LEXIS 1622 (Bankr. E.D. CA 2013).

D. Wells Fargo Bank, N.A. contends that the provisions of California Civil Code § 2941(D) do not apply to it because the Plaintiff-Debtor has not obtained an order avoiding the second deed of trust.

E. Wells Fargo Bank, N.A. asserts that the Rosenthal Act does not apply to creditors who are enforcing debts secured by real property. This court has addressed that issue, and the perceived errors in the unreported decisions relied upon by Wells Fargo Bank, N.A., in *Landry v. Bank of America, N.A.*, 493 B.R. 541 (Bankr. E.D. Cal. 2013). Wells Fargo Bank, N.A. appears to make the fundamental error of replacing the California Fair Debt Collection Practices Act definition of a "debt collector" with the more limited definition under the Federal Fair Debt Collection Practices Act.

F. Wells Fargo Bank, N.A. makes the curious argument that the Plaintiff-Debtor's claim based "on a violation of the FCRA is 'expressly pre-empted by the FCRA'." citing to *Mora et al v. Harley-Davidson Corp.*, 2009 U.S. Dist. LEXIS 61851, at 13-1026 (E.D. Cal. 2009). Upon review of the unreported decision, this court sees that it does not stand for the proposition that "FCRA claims are pre-empted by the FCRA," but holds that California Business and Professions §§ 17200 et. seq claims based on credit reporting violations are preempted by the Federal Fair Credit Reporting Act.

**FINAL BANKRUPTCY COURT JUDGMENT**

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 1, 2, Dckt. 1. **No answer has been filed.** In its answer, ----- admits the allegations of jurisdiction and core proceedings. Answer ¶¶ X, X, Dckt. X. **To the extent that any issues in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.**

#### **JOINT STATUS CONFERENCE REPORT - DISCOVERY PLAN**

The parties have filed a Joint Status Conference Report and Discovery Plan. Dckt. 15. In it the parties suggest the following:

A. Wells Fargo Bank, N.A. requests that the Rule 26(a) disclosures be delayed until after the pleadings (presumably the Answer) are at issue. The hearing on the Motion to Dismiss is set for hearing on December 12, 2013.

B. Plaintiff requests that the court authorize discovery to proceed immediately, notwithstanding the pending Motion to Dismiss.

C. Wells Fargo Bank, N.A. opposes discovery commencing until after the Motion to Dismiss is decided and the pleadings (presumably Answer) are at issue.

D. The Plaintiff-Debtor requests that the matter be referred to alternative dispute resolution. Wells Fargo Bank, N.A. does not oppose, but requests that the bank officer be allowed to appear by phone since he is based in San Antonio, Texas.

E. The Plaintiff-Debtor anticipates completing discovery by March 1, 2014, while Wells Fargo Bank, N.A. states that discovery should be stayed.

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

a. The Plaintiff alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. § 1334 and 157, 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). Complaint ¶¶ 1, 2, Dckt. 1. The Defendant admits the jurisdiction and that this is a core proceeding. Answer, ¶¶ X, X, Dckt. X. **To the extent that any issues in this Adversary Proceeding are related to proceedings, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all claims and issues in this Adversary Proceeding referred to the bankruptcy court.**

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

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

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

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

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

8. [13-27771-E-11](#) ANGELA CATARATA

CONTINUED STATUS CONFERENCE RE:  
VOLUNTARY PETITION  
6-6-13 [[1](#)]

Debtor's Atty: Pro Se

Notes:

Continued from 10/2/13. On or before 11/22/13 the Chapter 11 Trustee is to file and serve a status conference statement.

Operating Report filed: 10/17/13

[CWS-1] Application to Approve Trustee Gary Farrar's Employment of Attorney filed 10/18/13 [Dckt 179]; Order granting filed 10/22/13 [Dckt 183]

Trustee's Statement of Investigation filed 10/29/13 [Dckt 186]

[CWS-2] Application to Approve Trustee Gary Farrar's Employment of Broker filed 11/8/13 [Dckt 188]; Order granting filed 11/12/13 [Dckt 194]

[CWS-3] Application to Approve Trustee Gary Farrar's Employment of Accountant filed 11/8/13 [Dckt 191]; Order granting filed 11/12/13 [Dckt 195]

#### **DECEMBER 4, 2013 STATUS CONFERENCE**

The Chapter 11 Trustee reports that he has met with the Debtor on multiple occasions, inspected the real properties, and reviewed the pending adversary proceedings. The Trustee has requested information from the creditors who are the defendants in the Adversary Proceedings, but the responses are sporadic and are taking time.

9. [09-42376-E-13](#) TRY/LILY KHOU  
[13-2298](#)  
KHOU ET AL V. HSBC MORTGAGE  
SERVICES, INC.

STATUS CONFERENCE RE: COMPLAINT  
9-23-13 [[1](#)]

Plaintiff's Atty: Peter L. Cianchetta  
Defendant's Atty: Austin T. Beardsley

Adv. Filed: 9/23/13  
Answer: 11/15/13

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:

Plaintiff's Unilateral Status Conference Report-Discovery Plan filed  
11/21/13 [Dckt 8]

Defendant HSBC Mortgage Services Inc.'s Status Conference Statement and  
Discovery Plan filed 11/25/13 [Dckt 10]

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

Adv. Filed: 9/23/13  
Answer: none

Service of Summons and Complaint:

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:

#### SUMMARY OF COMPLAINT

It is alleged that Plaintiff-Debtors owned real property in Elk Grove which was foreclosed on June 9, 2009, and the Trustee's Deed was recorded on June 11, 2009. The foreclosing creditor purchased the property and then resold it, with the grant deed being recorded on October 13, 2009, which was eight days after the Debtors filed their Chapter 13 bankruptcy case. The creditor then filed a proof of claim in the Chapter 13 bankruptcy case in the amount of \$265,403.56.

In this Complaint the Plaintiff-Debtors assert various claims. These are:

**First Cause of Action:** Objection to the claim of the Creditor based on,

A. Creditor having foreclosed on the real property security.

**Second Cause of Action:** Judgment for violation of the California Rosenthal Fair Debt Collection Practices Act based on,

A. Attempting to collect a debt which previously has been satisfied.

**Third Cause of Action:** Judgment for Negligence, including punitive damages, in asserting a claim notwithstanding having foreclosed on the real property collateral.

**Fourth Cause of Action:** Judgment for Fraud and Intentional Misrepresentation for filing the proof of claim notwithstanding Creditor having conducted a foreclosure sale.

#### **SUMMARY OF ANSWER**

HSBC Mortgage Servicing, Inc. admits and denies specific allegations in the Complaint. In its answer, this Defendant asserts eight affirmative defenses.

#### **FINAL BANKRUPTCY COURT JUDGMENT**

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 1, 3 Dckt. 1. In its answer, HSBC Mortgage Services, Inc. admits the allegations of jurisdiction and core proceedings. Answer ¶¶ 1, 3, Dckt. 7. **To the extent that any issues in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.**

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

a. The Plaintiff alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. § 1334 and 157, 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 pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 1, 3 Dckt. 1. In its answer, HSBC Mortgage Services, Inc. admits the allegations of jurisdiction and core proceedings. Answer ¶¶ 1, 3, Dckt. 7. **To the extent that any issues in this Adversary Proceeding are related to proceedings, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all claims and issues in this Adversary Proceeding referred to the bankruptcy court.**

b. Initial Disclosures shall be made on or before **December 20, 2013.**

c. Expert Witnesses shall be disclosed on or before **February 1, 2014**, and Expert Witness Reports, if any, shall be exchanged on or before **February 1, 2014.**

**December 4, 2013 at 2:30 p.m.**

**- Page 18 of 25 -**



entered thereon, is based solely on a breach of contract claim. The Answer asserts thirteen affirmative defenses.

#### **FINAL BANKRUPTCY COURT JUDGMENT**

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157. The Complaint seeks to have debts determined nondischargeable pursuant to 11 U.S.C. § 523(a)(2), and (a)(6). The right to discharge debts has been created by Congress under the Bankruptcy Code and are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(I). Complaint ¶ 1, Dckt. 1. In his answer, Christopher Crosby admits the allegations of jurisdiction. Answer ¶ 1, Dckt. 8. **To the extent that any issues in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.**

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

a. The Plaintiff alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. § 1334 and 157, 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 pursuant to 28 U.S.C. § 157(b)(2)(I). Complaint ¶ 1, Dckt. 1. In his answer, Christopher Crosby admits the allegations of jurisdiction. Answer ¶ 1, Dckt. 8. **To the extent that any issues in this Adversary Proceeding are related to proceedings, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all claims and issues in this Adversary Proceeding referred to the bankruptcy court.**

b. Initial Disclosures shall be made on or before **December 12, 2014**.

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

d. Non-Expert Witness Discovery, including the hearing of discovery motions, closes on June 6, 2014.

e. Expert Witness Discovery closes, including the hearing of all discovery motions, on July 18, 2014.

f. Dispositive Motions shall be heard before **August 28, 2014**.

g. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at **2:30 p.m. on October 15, 2014**.

11. [10-27399-E-13](#) DAN GOODLOW CONTINUED MOTION TO MODIFY PLAN  
PGM-2 Peter G. Macaluso 4-11-12 [[37](#)]

**CONT. FROM 9-4-13**

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

Proper Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 11, 2012. By the court's calculation, 41 days' notice was provided. 35 days' notice is required.

**Tentative Ruling: The hearing on the Motion to Confirm is continued to 2:30 p.m. on -----, 2013.**

**DECEMBER 4, 2013 STATUS CONFERENCE**

On November 5, 2013, counsel for Dorice Goodlow filed a motion to withdraw as her counsel in an adversary proceeding which must be resolved as part of a plan in this case.

**PRIOR HEARINGS**

The Status Conference Statement filed by Dorice Goodlow in Adversary Proceeding 12-2195 advises the court that the parties are proceeding with the Eastern District Bankruptcy Dispute Resolution Program (mediation), with the BDRP Conference set for June 14, 2013, with Russell Cunningham serving as the mediator.

On January 9, 2013 the court continued the hearing to the date of the status conference in adversary proceeding number 12-2195.

On October 17, 2012 the court continued the hearing to allow the court to conduct a status conference. The Debtor is prosecuting an adversary proceeding which must be resolved or made part of the Chapter 13 Plan.

On April 25, 2013 the court continued the hearing to follow the tentatively schedule June 14th BDRP date in adversary proceeding number 12-2195.

On June 26, 2013 the court continued the hearing to follow the tentatively schedule June 14th BDRP date in adversary proceeding number 12-2195.

**History of Hearings**

On September 5, 2012 the court continued the hearing to allow Debtor to file and serve evidence in support of the court's tentative ruling from the September 5, 2012 hearing.

On May 22, 2012 the court continued the hearing on Motion to Confirm and ordered Debtor to file and serve evidence as set forth in the tentative ruling. A review of the docket indicates that Debtor has not filed any additional information.

### **Adversary Proceeding**

The Debtor filed adversary proceeding number 12-02195 to determine the estate's interest in the Bald Creek Road Property and that of asserted co-owners. The proposed plan modification does not take that litigation into account and the consequences of a determination that the Debtor does not have any interest in the property. The court cannot identify what is asserted to be the "unknown transfers of title to [the Debtor's] property."

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor seeks to modify the plan because of a restraining order was entered against him, title to his property was allegedly transferred to others without his knowledge, and he has retained an attorney to defend him in an unidentified action. Debtor does not explain how these issues changed his ability to make plan payments; no expense related to any of these matters is listed on Schedules I or J. However, Schedule I states that Debtor is not residing in his home and is "in a fight over the home." Debtor does not budget for rent, but is proposing to maintain mortgage payments on the home he does not live in.

The Trustee challenges the feasibility of the proposed plan payment in light of the unknown costs associated with the attorney the Debtor has hired – who may be a professional of the estate – and the unknown costs associated with the Debtor's living arrangements outside of his home. These unknown costs impair the feasibility of the proposed plan payment and are cause to deny confirmation. 11 U.S.C. § 1325(a)(6).

Additionally, the Trustee suggests that payment on the claim secured by the loan may work unfair discrimination to holders of general unsecured claims. However, the court declines to reach this issue in light of the pending adversary proceeding the Debtor has commenced to determine his interest in the property and the independent cause to deny confirmation.

The court is further concerned that the proposed modification to the plan does not comport with the reality of this case. The Motion requesting the modification does not state with particularity the grounds relating to a restraining order or possession on the residence being changed by an order of a non-bankruptcy court. The confirmed plan in this case provides that the property of the estate has not reverted in the Debtor. (Dckt. 5). The Motion merely instructs the court to read the Debtor's declaration and choose whatever statements made therein the court thinks the Debtor should allege as the grounds for this Motion.

The declaration makes a reference to there being a domestic violence restraining order, an unknown transfer of title to the property (which is property of the bankruptcy estate), and that the Debtor now has to hire an attorney to represent him (presumably with respect to the restraining order and title issue). The Debtor testifies that he is \$2,500.00 in arrears in the confirmed plan, and that he owes \$6,552.67 on the obligation secured by his home (which is the subject of an unidentified title transfer). He

further states that this claim, which is held by Acqua Loan Servicing, will be paid off during the term of the plan.

In support of the Motion the Debtor has provided current financial information using the Schedule I and J forms filed as Exhibits 1 and 2. Dckt. 40. These exhibits are not authenticated by the Debtor and he does not attest that the information provided therein is true and correct under penalty of perjury. The information provided therein raises significant questions.

First, the Debtor states that the total income for he and his wife is \$1,084.00, consisting solely of his social security income. No income is shown for his wife, who is listed as retired. Though not stated by the Debtor, presumably there has been a separation and her income of \$1,400 a month (as stated on Original Schedule I, Dckt. 1) is no longer available to the Debtor. The expense information, Exhibit 2, lists only \$409 a month in expenses, which does not include any utilities, insurance, medical expenses, taxes or other amounts. It provides for a food expense of \$150.00.

Second, the information concerning the Debtor's interest in real property is conflicting. On Schedule A the Debtor lists one property identified as 1148 Bald Rock Road, Berry Creek, California. Dckt. 1. It states that the Debtor's interest in the property is \$184,500, and the property is subject to a secured claim in the amount of \$129,000. Further on Schedule A the Debtor states that he has a 1/4 interest in this property and that 1/4 interest is worth \$87,500.00.

Schedule D states that EMC Mortgage Corporation has a 1<sup>st</sup> Deed of Trust against an unidentified property in the amount of \$42,600, with the collateral having a value of \$148,000.00. (This appears to be a typographical error given that on Schedule A the Debtor states that the only real property he owns has a value of \$184,000.) A second secured claim is listed in the amount of \$20,000.00 secured by a judgment lien, with the Debtor stating that he asserts this obligation has been paid in full and is listed only as a precaution.

On Schedule C the Debtor states that he asserts a \$150,000.00 homestead exemption. The Bald Creek Road Property is listed as the Debtor's address on his petition.

In the present Motion the Debtor asserts that the creditor having a deed of trust on the Bald Creek Road Property has a claim of only \$6,552.67, not the \$42,600 as listed on Schedule D.

#### **Debtor's Supplemental Declaration**

The court first addressed these issues at the initial hearing on May 22, 2012 and has continued the hearing three times to allow the Debtor to file supplemental information.

On October 2, 2012 Debtor filed a supplemental declaration that is identical to the original declaration filed in support of the motion to modify. Debtor has not provided any additional evidence that would resolve Trustee's concerns regarding attorneys' fees for the adversary proceedings or the unknown costs associated with the Debtor's living arrangements

outside of his home. Debtor still has not explained how these issues affect his ability to make plan payments.

**Analysis**

In addition to unresolved issues raised by the Chapter 13 Trustee, the Status Conference Statement filed on October 10, 2012 indicates that issues surrounding the ownership of the real property have not been resolved. (Adv. Proc. No. 12-02195, Dckt. 33).

The court's review of the docket in Adversary Proceeding Number 12-02195 indicates that the following has occurred since the court continued the hearing in bankruptcy case number 10-27399. The court entered an order allowing Wargo & French LLP to withdraw as counsel of record for EMC Mortgage Corp. and permitting McCarthy & Holthus LLP to substitute in as counsel of record. On October 17, 2012 the court continued the status conference in the adversary proceeding in order to allow the parties to negotiate the terms of a potential settlement since all parties are now represented by counsel. (Dckt. 39). There is no indication that the parties have reached a settlement.

Debtor has not addressed the Trustee's or the court's concerns with regard to feasibility of the proposed plan. Further, Debtor's potential ownership interest in the Bald Creek Road Property has not been resolved and it appears that settlement negotiations in the adversary proceeding are ongoing.

**PRIOR STATUS CONFERENCE STATEMENT**

The court's review of the docket in adversary proceeding number 12-2195 indicates that on July 22, 2013 the parties filed a status conference statement. The statement indicates that the parties made great progress towards resolving the dispute after the BDR conference. Plaintiffs counsel submitted a written proposal to Defendant and hopes for fair and equitable resolution of the matter. Defendant asserts that she has been in the hospital with pneumonia and has not conferred fully with counsel and is hopeful when she is released from the hospital the matter will be concluded shortly.

The most recent Status Conference Statement in the Adversary Proceeding reports that one of the Defendants continues to be receiving medical treatment which impairs the ability of the parties to consummate a settlement in that Proceeding which would then allow for the confirmation of a plan.

12. [10-27399-E-13](#) DAN GOODLOW  
[12-2195](#)  
GOODLOW V. MARTIN ET AL

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
4-27-12 [[1](#)]

Plaintiff's Atty: Peter G. Macaluso  
Defendants' Atty:  
Kelly M. Raftery [EMC Mortgage Corp.]

Douglas B. Jacobs [Dorice Goodlow]  
unknown [Acqura Loan Services; Calvin Hutson; Antoinette Johnson; Robert  
Martin]

Adv. Filed: 4/27/12

Answer:

5/29/12 [Johnson, Goodlow, Martin, Wellington]

7/30/12 [EMC, LLC]

Nature of Action:

Declaratory judgment

Notes:

Continued from 9/4/13

Motion of Douglas B. Jacobs to Withdraw as Counsel for Defendant, Dorice  
Goodlow filed 11/5/13 [Dckt 65], set for hearing 12/4/13 at 1:30 p.m.