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6 UNITED STATES BANKRUPTCY COURT
7 EASTERN DISTRICT OF CALIFORNIA
8 SACRAMENTO DIVISION
9

10 In re) Case No. 09-40067-E-13L
11 CHRISTINA STANLEY,)
12 Debtor(s).)
13 _____)
14 CHRISTINA STANLEY,) Adv. Pro. No. 10-2043
15 v.) Docket Control No. BH-4
16 Plaintiff(s),)
17 ONEWEST BANK, FSB, et al.,) Motion to Dismiss First Amended
18 Defendant(s).) Complaint as to Fidelity
National Information Services,
Inc.
_____)

19 **This memorandum decision is not approved for publication and may**
20 **not be cited except when relevant under the doctrine of law of the**
21 **case or the rules of claim preclusion or issue preclusion.**

22 **MEMORANDUM OPINION AND DECISION**

23 Defendant Fidelity National Information Services, Inc.
24 ("Fidelity") seeks to dismiss this adversary proceeding pursuant to
25 Federal Rule of Civil Procedure 12(b)(6) as made applicable to this
26 adversary proceeding by Federal Rule of Bankruptcy Procedure 7012.
27 The First Amended Complaint ("FAC") was filed by Christina Stanley,
28 the Plaintiff-Debtor, on July 28, 2010. In relevant part,
Defendant argues that:

1 1. Fidelity is neither a lender, servicer, generator of
2 mortgages, nor a successor in interest or an assignee of
any of those persons.

3 2. It is not alleged that any dispute exists between
4 the Plaintiff-Debtor and Fidelity under any claim or
payment on a note in which Fidelity asserts any interest.

5 3. It is not alleged that any contract or privity
6 exists between the Plaintiff-Debtor and Fidelity.

7 4. The FAC does not contain any allegations of conduct
against Fidelity.

8 5. The FAC sole reference to Fidelity is that Fidelity
9 "provide[d] defendants with software and/or usage of
10 NewTrak, and is in privity with the actual holder of this
bankruptcy claim."

11 The court's decision is to grant the Motion as to all claims and
12 Causes of Action, without prejudice and without leave to amend.

13 **Allegations in First Amended Complaint**

14 The court's consideration of this Motion begins with the
15 allegations actually made in the FAC as to the Defendants other
16 than OneWest Bank. The FAC makes generic references to
17 "Defendants" in making broad allegations of misconduct, which
18 requires the court to consider the specific allegations of
19 misconduct, which defendant is alleged to have engaged in the
20 conduct, and then interpret what alleged misconduct relates to
21 which subgroup of "Defendants" in the FAC.

22 The specific allegations in the Complaint include:

23 1. Plaintiff-Debtor is the debtor in this Chapter 13 case
24 and resides in real property which secures an obligation of the
25 Plaintiff-Debtor on a promissory note. FAC, ¶ 10.

26 2. IndyMac Bank, FSB received an adjustable rate promissory
27 Note ("Note") FAC, ¶ 23.

28 3. The Deed of Trust securing the Note ("Deed of Trust")

1 does not provide for an escrow account. FAC ¶ 30.

2 4. MERS was assigned the servicing responsibilities for the
3 Note. FAC, ¶¶ 12, 23.

4 5. IndyMac Federal Savings Bank, FSB purchased the Note.
5 FAC, ¶ 15.

6 6. The FDIC was appointed as receiver for IndyMac Bank and
7 its assets were passed through:

8 a. IMB HoldCo, LLC, FAC, ¶¶ 16, 24;

9 b. IMB Management Holdings, LLC, FAC ¶¶ 18, 24;

10 c. OneWest Venture, LLC, FAC, ¶¶ 19, 24;

11 d. OneWest Bank Group, LLC, FAC, ¶¶ 20, 24; and ultimately
12 to

13 e. OneWest Bank, FSB, FAC, ¶¶ 16, 24.

14 7. A general allegation that unidentified "Defendant(s)"
15 were the agents for the FDIC during the period the assets were
16 passed to OneWest Bank, FSB. FAC ¶ 26.

17 8. A general allegation that unidentified "Defendant(s)"
18 were the agents for OneWest Bank, FSB . FAC ¶ 25.

19 9. Fidelity National Information Services, Inc. is a
20 defendant with default software and/or usage of NewTrak, and is in
21 privity with the actual holder of the secured claim in this
22 bankruptcy case. FAC, ¶ 21.

23 10. Plaintiff-Debtor's Chapter 13 Plan provides for payment
24 of the Note as a Class 1 claim in this bankruptcy case.
25 FAC, ¶¶ 34, 38.

26 11. OneWest Bank filed a proof of claim on or about
27 December 10, 2009, based on the Note and Deed of Trust which
28 includes all past due mortgage payments, property tax or insurance

1 advances, and escrow balances. FAC, ¶ 37.

2 12. An unnamed "Defendant," conducted an "Escrow Analysis"
3 pursuant to RESPA upon notice of a bankruptcy filing. FAC, ¶ 51.

4 13. Unnamed "Defendants" do not distinguish between pre and
5 post-petition escrow advances when conducting a post-petition
6 escrow analysis. FAC, ¶ 52.

7 14. On November 30, 2009, IndyMac Mortgage Services, a
8 Division of OneWest Bank, FSB notified the Plaintiff-Debtor that
9 the monthly payment on the note increased from \$911.01 to
10 \$1,480.10. FAC, ¶ 32.

11 15. On December 14, 2009, based upon a notification from an
12 unnamed "Defendant," the Chapter 13 Trustee demanded an increased
13 monthly plan payment from \$1,500.00 to \$2,125.37. FAC, ¶ 41.

14 16. Unnamed "Defendants" acts of issuing the post-petition
15 mortgage changes were for the purpose of collecting pre-petition
16 claims. FAC, ¶ 54, 56.

17 17. Actions of unidentified "Defendants" were willfully and
18 intentionally done to obtain payment on pre-petition claims through
19 increased post-petition Note payments. FAC, ¶¶ 81, 82.

20 18. Unidentified "Defendants'" use of the post-petition
21 notices of Note payment increases are intentional, with knowledge
22 of the automatic stay, systematic, and to collect pre-petition
23 amounts owed by Plaintiff-Debtor. FAC, ¶¶ 67, 68, 69, 72.

24 19. Unidentified "Defendants" knew that when the Chapter 13
25 Trustee received the notices of post-petition increased Note
26 payments, the Trustee would collect the increased amount from the
27 Plaintiff-Debtor for the unidentified "Defendants." FAC, ¶ 100.

28 20. Unidentified "Defendants" increased the post-petition

1 Note payments with the knowledge that it was improper and would not
2 be permitted by the court unless it was so provided in a confirmed
3 Chapter 13 plan or pursuant to an order granting relief from the
4 automatic stay. FAC, ¶ 107.

5 21. As a direct result of the post-petition notices of
6 changes in the mortgage payments, the Chapter 13 Trustee collected
7 the post-petition increased mortgage payments on the Note. FAC,
8 ¶ 55.

9 22. Unidentified "Defendants'" post-petition escrow analysis
10 includes "both post-petition advances of pre-petition escrow
11 advances and fails to distinguish between escrow advances."
12 FAC, ¶ 65.

13 23. Unidentified "Defendants'" acts have resulted in
14 Plaintiff-Debtor paying pre-petition taxes through the increased
15 post-petition Note payments. FAC, ¶ 75.

16 24. Unidentified "Defendants'" acts have resulted in
17 Plaintiff-Debtor paying for improper forced place insurance through
18 the increased post-petition Note payments. FAC, ¶ 76.

19 25. Unidentified "Defendants" are alleged to have conspired
20 to collect escrow advances through post-petition Note payment
21 increases. FAC, ¶ 98.

22 The Plaintiff-Debtor makes reference to Fidelity in one place
23 in the FAC.

24 Upon information and belief defendant, Fidelity National
25 Information Services, Inc., is a Delaware corporation
26 with its principal place of business at 601 Riverside
27 Ave., Jacksonville, Florida 32204-2901, and Fidelity
representatives provide defendants with default software
and/or usage of NewTrak, and is in privity with the
actual holder of this bankruptcy claim.

28 FAC, ¶ 21.

Allegations are made in the Fifth Cause of Action for Civil Conspiracy that unnamed defendants assist assignees in systematically concealing the collection of pre-petition arrearage through miscomputing post-petition mortgage payments in a Chapter 13 case. FAC, ¶¶ 101, 104, 106, 108.

Plaintiff-Debtor's Opposition attempts to state additional allegations not in the FAC. These include contentions that Fidelity is an outsource provider of the NewTrak software which is used to miscompute the post-petition monthly mortgage payments in a Chapter 13 case. Plaintiff-Debtor believes that support of the collection of pre-petition arrearage through miscalculation of post-petition monthly mortgage payments is with "reckless disregard for the results." With Fidelity's support (software), creditors and their attorneys are circumventing both the Bankruptcy Code and the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et. seq.*, ("RESPA"). Plaintiff-Debtor contends that Fidelity should not be dismissed because its software "fails to distinguish between pre- and post-petition escrow claims when conducting applications involving escrow analysis and proof of claims, their programing that initiates the bankruptcy litigation in support of the collection of pre-petition claims, and/or resulting in the denial of Chapter 13 confirmation, conversion to Chapter 7, and eventual foreclosure of the debtor's home." Plaintiff-Debtor Opposition, pg. 4:23-27, 5:1-3. Dckt. 45.

THE COMPLAINT

Plaintiff-Debtor filed this adversary proceeding on January 26, 2010. Dckt. 1. The complaint seeks (1) declaratory relief and injunctive as to the rights and obligations of the

1 respective parties to this adversary proceeding, including a
2 statement of the amount of contractual payments due, an accounting,
3 and a detailed analysis of pre-petition and post-petition escrow
4 shortages (Dckt. 1 at 10); (2) Money damages for violation of the
5 automatic stay of 11 U.S.C. § 362(a) (Dckt. 1 at 12); (3) Money
6 damages for violation of the automatic stay pursuant to 11 U.S.C.
7 § 362(k)(1) (Dckt. 1 at 12); (4) Money damages for violation of the
8 RESPA (Dckt. 1 at 14); and (5) Money Damages for civil conspiracy
9 (Dckt. 1 at 15). The court will consider each of the foregoing
10 claims in turn.

11 In considering a motion to dismiss, it is necessary to
12 identify what has actually been alleged by the Plaintiff-Debtor and
13 against whom. The only Defendant identified to have actually
14 engaged in the complained of conduct is OneWest Bank. Only OneWest
15 Bank is alleged to have filed a claim in this case, only OneWest
16 Bank is alleged to have sent a notice of increased post-petition
17 mortgage payments, and only OneWest is alleged not to have sent the
18 notice required under RESPA. In their Opposition, the Plaintiff-
19 Debtor can only make general, non-specific contentions as to
20 Fidelity in this Adversary Proceeding. In addressing the
21 declaratory relief cause of action, the Plaintiff-Debtor states
22 that the declaration of rights she seeks concerns the systematic
23 business practices of "these defendants" who fail to distinguish
24 between the pre- and post-petition arrearage when computing the
25 post-petition Chapter 13 monthly mortgage payments. Notice of the
26 wrong use is imputed through the use of the NewTrak software.

27 **ANALYSIS**

28 In considering a motion to dismiss, the court starts with the

1 basic premise that the law favors disputes being decided on their
2 merits, and a complaint should not be dismissed unless it appears
3 beyond doubt that the Plaintiff-Debtor can prove no set of facts in
4 support of their claim which would entitle them to the relief.
5 *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt
6 with respect to whether a motion to dismiss will be granted should
7 be resolved in favor of the plaintiff. *Pond v. Gen. Electric Co.*,
8 256 F.2d 824, 826-27 (9th Cir. 1958). For purposes of determining
9 the propriety of a dismissal before trial, allegations in the
10 complaint are taken as true. *Kossick v. United Fruit Co.*, 365 U.S.
11 731, 732 (1961).

12 The complaint must provide more than labels and conclusions,
13 or a formulaic recitation of a cause of action; it must plead
14 factual allegations sufficient to raise more than a speculative
15 right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
16 (2007). Federal Rule of Civil Procedure 8(a), made applicable to
17 this adversary proceeding by Federal Rule of Bankruptcy Procedure
18 7008, requires that complaints contain a short, plain statement of
19 the claim showing entitlement to relief and a demand for the relief
20 requested. As the Court held in *Bell Atlantic*, the pleading
21 standard under Rule 8 does not require "detailed factual
22 allegations," but it does demand more than an unadorned accusation
23 or conclusion of a cause of action. *Bell Atlantic*, 550 U.S. at
24 555.

25 To survive a motion to dismiss, a complaint must contain
26 sufficient factual matter, accepted as true, to state a
27 claim to relief that is plausible on its face. A claim
28 has facial plausibility when the plaintiff pleads factual
content that allows the court to draw the reasonable
inference that the defendant is liable for the misconduct
alleged.

1 *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1949, 173 L. Ed.
2 2d 868, 884 (2009) (citations and quotation marks omitted). Rule 8
3 also requires that allegations be "simple, concise, and direct."
4 Fed. R. Civ. P. 8(d)(1).

5 In ruling on a 12(b)(6) motion to dismiss, the Court may
6 consider "allegations contained in the pleadings, exhibits attached
7 to the complaint, and matters properly subject to judicial notice."
8 *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court
9 need not accept unreasonable inferences or conclusory deductions of
10 fact cast in the form of factual allegations. *Sprewell v. Golden*
11 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the
12 court required to "accept legal conclusions cast in the form of
13 factual allegations if those conclusions cannot be reasonably drawn
14 from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d
15 752, 754-55 (9th Cir. 1994).

16 **DECLARATORY RELIEF**

17 Declaratory relief is an equitable remedy distinctive in that
18 it allows adjudication of rights and obligations on disputes
19 regardless of whether claims for damages or injunction have arisen.
20 "In effect, it brings to the present a litigable controversy, which
21 otherwise might only be tried in the future." *Societe de*
22 *Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th
23 Cir. 1981). The party seeking declaratory relief must show (1) an
24 actual controversy and (2) a matter within federal court subject
25 matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 744 (1998).
26 There is an implicit requirement that the actual controversy relate
27 to a claim upon which relief can be granted. *Earnest v. Lowentritt*,
28 690 F.2d 1198, 1203 (5th Cir. 1982).

1 The court may only grant declaratory relief where there is an
2 actual controversy within its jurisdiction. *Am. States Ins. Co. v.*
3 *Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be
4 definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S.
5 227, 240-41 (1937). Defendant argues that Plaintiff-Debtor has
6 failed to set out any facts demonstrating that a RESPA Notice was
7 generated to collect pre-petition claims. However, in reading the
8 complaint in the light most favorable to the Plaintiff-Debtor, the
9 Complaint does state that OneWest Bank conducted an escrow
10 analysis, that the escrow analysis caused pre-petition escrow
11 shortfalls to be included in post-petition payments, and that
12 Plaintiff-Debtor and Chapter 13 Trustee were notified of this
13 improper increased amount so that such amount would be paid post-
14 petition to OneWest Bank.

15 But the Motion makes no allegation as to there being a dispute
16 as to what should be the post-petition monthly mortgage payments
17 between Fidelity and the Plaintiff-Debtor. No interest in Fidelity
18 in the claim is asserted. At best, Plaintiff-Debtor asserts that
19 OneWest is using Fidelity's software to miscalculate the post-
20 petition monthly mortgage payments.

21 There is no colorable dispute between the Plaintiff-Debtor and
22 Fidelity alleged for this court to determine in this Adversary
23 Proceeding. The Motion is granted and the claim for Declaratory
24 Relief against Fidelity is dismissed without prejudice and without
25 leave to amend.

26 **VIOLATION OF THE AUTOMATIC STAY**

27 The Plaintiff-Debtor asserts that the conduct of recalculating
28 and increasing the post-petition payments violated the automatic

1 stay. The Plaintiff-Debtor alleges that OneWest Bank has asserted
2 the claim in this case and sought to obtain payment on the
3 obligation evidenced by the Note. As to Fidelity, no allegation is
4 made as to any conduct or act on its part, other than having
5 provided NewTrak software to some of the Defendants at some time,
6 which was used by OneWest Bank in computing the post-petition
7 monthly mortgage payments.

8 The court has addressed in a related motion to dismiss why the
9 FAC fails to state a claim for violation of the automatic stay as
10 to OneWest Bank. As to Fidelity it is a much simpler discussion,
11 no act or action by Fidelity is alleged. The Opposition to the
12 Motion merely argues that Fidelity makes software and that software
13 is used by persons who the Plaintiff-Debtor asserts violate the
14 automatic stay. But it is never alleged that Fidelity or any of
15 its agents acting for Fidelity have done anything to violate the
16 stay.

17 The FAC is devoid of any allegations against Fidelity
18 concerning an alleged violation of the automatic stay. Merely
19 listing a party to an action and then having general allegations
20 against unnamed defendants does not state a plausible claim. The
21 Plaintiff-Debtor's opposition to the Motion, try as she might,
22 shows that she has no plausible claim for violation of the
23 automatic stay against Fidelity.

24 The motion to dismiss the Second and Third Causes of Action¹
25

26 ^{1/} The Third Cause of Action asserts a "violation" of
27 11 U.S.C. § 362(k). Subparagraph (k) is a remedies provision for
28 violation of the other provisions of § 362. The court reads the
Second and Third Causes of Action as one claim for statutory
damages under § 362(k), as opposed to a request for sanctions
under 11 U.S.C. § 105 and the inherent powers of this court.

1 for violation of the automatic stay against Fidelity is granted and
2 the causes of action are dismissed without prejudice and without
3 leave to amend.

4 **REAL ESTATE SETTLEMENT PROCEDURES ACT**

5 Plaintiff-Debtor further asserts that the Defendants have
6 violated RESPA by (1) failing to provide the transfer of servicing
7 notice, (2) improperly computing the monthly post-petition
8 installments, and (3) sending incorrect post-petition RESPA escrow
9 analyses to the Plaintiff-Debtor. The FAC does not allege that
10 Fidelity was an assignee, transferee, or servicer of any loan
11 subject to RESPA. It is clear from the FAC and the Opposition to
12 the Motion, that at best Plaintiff-Debtor contends that OneWest
13 Bank used Fidelity software to compute the post-petition monthly
14 mortgage payments which Plaintiff-Debtor asserts are incorrect.
15 This fails to state a plausible claim under RESPA against Fidelity.
16 The court need not address the substantive defects in the
17 Plaintiff-Debtor's failure to state a plausible RESPA claim as it
18 has for OneWest Bank and other persons who may be assignees,
19 transferees, and servicers. There are no allegations against
20 Fidelity for the RESPA Cause of Action.

21 The Fourth Cause of Action is dismissed as to Fidelity without
22 prejudice and without leave to amend.

23 **CIVIL CONSPIRACY**

24 To establish a civil conspiracy in California one must show
25 that Defendants jointly engaged in a tort. There is no separate
26 civil action for conspiracy to commit a tort without there being an
27 actual wrongful act committed. *Favila v. Katten Muchin Rosenman,*
28 *LLP*, 188 Cal. App. 4th 189, 206 (2010); see also 5 WITKIN SUMMARY OF

1 CALIFORNIA LAW TORTS, 10TH EDITION, §45. The effect of the "conspiracy"
2 is that each of the Defendants involved is individually liable.
3 Through incorporating the general allegation paragraphs and the
4 RESPA cause of action allegations, the general allegations of a
5 conspiracy are generally made as to unidentified Defendants.

6 The California District Court of Appeal in *Black v. Bank of*
7 *America*, 30 Cal. App. 4th 1 (1994) conducted the review of what
8 constitutes a conspiracy claim and the proper basis for such a
9 claim when the parties involved were a corporation and the agents
10 or employees of the corporation. The *Black* Court concluded that it
11 is well established California law that employees or agents of a
12 corporation cannot conspire with their principal or employer when
13 acting in their official capacity. In *Gruenberg v. Aetna Ins. Co*,
14 9 Cal. 3d 566 (1973), the California Supreme Court concluded that
15 an insured could not state a conspiracy claim against his insurance
16 company and a separate insurance adjusting firm, a separate law
17 firm, and employees of the two separate firms because only the
18 insurance company had a duty of good faith and fair dealing with
19 the insured. The two separate firms were not a party to the
20 insurance contract and did not have such a duty to the Plaintiff-
21 Debtor. In its *Doctors' Co. v. Superior Court* decision, the
22 California Supreme Court held that an attorney and an expert
23 witness employed by an insurance company could not be held liable
24 for conspiring to violate the company's statutory duties, again
25 because the statutory duties were owed only by the insurance
26 companies. 49 Cal. 3d 39 (1989).

27 In *Younan v. Equifax Inc.*, 111 Cal. App. 3d 498 (1980), the
28 court rejected a conspiracy claim for constructive fraud alleged to

1 be based on a breach of fiduciary duty owed by a disability
2 insurer. The insurer's agents did not owe the plaintiff a
3 fiduciary duty, and only the insurer itself owed the fiduciary
4 duty. However, the court allowed to stand a claim for conspiracy
5 to commit actual fraud, since even the agents owed a duty to the
6 plaintiff to "abstain from injuring the plaintiff through express
7 misrepresentations, independent of the insurer's implied covenant
8 of good faith and fair dealing."

9 This issue was further addressed by the Supreme Court in
10 *Applied Equipment Corp. v. Litton Saudi Arabia Ltd*, 7 Cal. 4th 503
11 (1994). The Supreme Court first distinguished between alleged
12 conspiracies arising out of tort claims and contract claims. For
13 contract claims, there is no tort obligation for one contracting
14 party not to interfere with the performance of the contract. There
15 is merely a contractual obligation to perform as promised.
16 Therefore, a person who is not a party to a contract cannot be
17 bootstrapped into a conspiracy tort.

18 For there to be a civil conspiracy there must be,

19 [t]he formation and operation of the conspiracy and
20 damage resulting to a plaintiff from an act or acts done
21 in furtherance of the common design . . . In such an
22 action the major significance of the conspiracy lies in
23 the fact that it renders each participant in the wrongful
act responsible as a joint tortfeasor for all damages
ensuing from the wrong, irrespective of whether or not he
was a direct actor and regardless of the degree of his
activity."

24 *Id.* at 512. However, each of the actors must have a duty to the
25 person alleging a conspiracy. The conspiracy is to have a co-
26 conspirator do the act that breaches everyone's respective duties.

27 In this case, all of the operative allegations have been made
28 against OneWest Bank, FSB for the remaining causes of action in

1 this Adversary Proceeding for which the non-specific conspiracy is
2 alleged. The Plaintiff-Debtor only makes boilerplate allegations
3 that other unnamed Defendants "conspired" for the "recouping of
4 pre-petition claims from post-petition estate property resulting in
5 systematic injury to debtors." Further, there is no allegation as
6 to what duties, if any, that these unnamed Defendants owe to the
7 Plaintiff-Debtor and the damages caused to them by the breach of
8 those duties.

9 The court is also not persuaded by the general argument that
10 all of these parties are participating in a chain of events which
11 culminate with OneWest Bank, FSB intentionally miscomputing post-
12 petition mortgage installments. Though this Plaintiff-Debtor and
13 counsel are convinced that a grand conspiracy exists to demand
14 excessive payments because the co-conspirators believe that "nobody
15 really cares because the debtor owes the money," this Plaintiff-
16 Debtor may pursue claims against identified defendants, not merely
17 a generic complaint where nobody is sure which unnamed defendant is
18 an unidentified defendant under the various causes of action. A
19 complaint is not a free floating pleading in which persons are
20 named, with the allegations against them to be determined at a
21 later date.

22 In their Opposition, the Plaintiff-Debtor argues that each of
23 the unnamed Defendants use various software systems and programs
24 which improperly fail to distinguish between pre-petition and post-
25 petition escrow arrearage. This improper payment calculation is
26 streamed through a nationwide network of attorneys who file proofs
27 of claims and escrow disclosure statements which misstate the claim
28 and post-petition monthly mortgage payments. The Plaintiff-Debtor

1 has not alleged what duty to this Plaintiff-Debtor owed by the
2 unnamed Defendants has been breached. Further, the Plaintiff-
3 Debtor has not identified the damages flowing from a breach of duty
4 by the unnamed Defendants. At best, the contention is that the
5 Plaintiff-Debtor asserts that she does not like what the other
6 unnamed Defendants may do as part of their business practices to
7 other persons, and therefore seeks to recover damages from them as
8 part of a larger conspiracy of creditors and credit providers
9 against debtors in general. This does not sufficiently state a
10 conspiracy claim against any of the Defendants with respect to this
11 Plaintiff-Debtor.

12 The court dismisses the Fifth Cause of Action for conspiracy
13 as to Fidelity, without prejudice and without leave to amend.

14 CONCLUSION

15 The motion to dismiss is granted in *toto* for all claims and
16 Causes of Action in the FAC as to Fidelity. The dismissal is
17 without prejudice and without leave to amend. The Plaintiff-Debtor
18 has previously availed herself of one amendment of this Complaint.
19 Further amendments must be sought by noticed motion, with a copy of
20 the proposed amended complaint filed as an exhibit in support of
21 such motion.

22 In granting this Motion the court does not make any
23 determination as to the propriety of any software or services sold
24 by Fidelity to creditors asserting claims in bankruptcy cases, or
25 the validity of any potential claims which this or other debtors
26 may assert against Fidelity. Nor does this ruling address any
27 rights which creditors may or may not have against Fidelity arising
28 from claims or post-petition monthly mortgage payments improperly

1 asserted in bankruptcy cases. Those issues will be for another day
2 and likely another court.

3 This Memorandum Opinion and Decision constitutes the court's
4 findings of fact and conclusions of law pursuant to Rule 52, Fed.
5 R. Civ. P. and Rule 7052, Fed. R. Bankr. P., and the court shall
6 issue a separate order consistent with this ruling.

7 Dated: July 7, 2011

8
9 /s/ Ronald H. Sargis
10 RONALD H. SARGIS, Judge
11 United States Bankruptcy Court
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