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

9 In re ) Case No. 09-44890-E-13L  
10 )  
11 VICTOR M. MONTANEZ, )  
12 )  
13 Debtor(s). )  
14 )  
15 VICTOR M. MONTANEZ, )  
16 )  
17 Plaintiff(s), )  
18 v. ) Adv. Pro. No. 10-2048  
19 ) Docket Control No.: None  
20 ) Provided  
21 ONEWEST BANK, FSB, et al., )  
22 )  
23 Defendant(s). )  
24 )  
25 )  
26 )  
27 )  
28 )

18  
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 Defendants Mortgage Electronic Registration Systems, Inc.  
24 ("MERS"), IMB HoldCo LLC, IMB Management Holdings LP, OneWest Bank  
25 Group LLC, OneWest Ventures Holdings LLC, and OneWest Bank, FSB  
26 ("OneWest") move for judgment on the pleadings on all Causes of  
27 Action in the First Amended Complaint ("FAC") pursuant to Federal  
28 Rule of Civil Procedure 12(c) as made applicable to this adversary  
proceeding by Federal Rule of Bankruptcy Procedure 7012(b).

Victor M. Montanez, the Plaintiff-Debtor, opposes the motion.

The court's decision is to grant the Motion and dismiss, without prejudice and without leave to amend, as to Mortgage Electronic Systems, Inc., IMB HoldCo, LLC, IMB Management Holdings LP, OneWest Bank Group LLC, OneWest Venture Holdings, LLC as to all Causes of Actions and claims. The court grants the Motion, without prejudice and without leave to amend, as to the First Cause of Action to the extent that it requests injunctive relief or restitution, Second and Third Cause of Action (Violation of Automatic Stay and Damages, Fourth Cause of Action (R.E.S.P.A. Claims) and Fifth Cause of Action (Civil Conspiracy) and denies the Motion as to the First Cause of Action (Declaratory Relief) to the extent that it requests declaratory relief as against OneWest Bank, FSB. Further amendments of the FAC shall be as authorized by the subsequent order of the court.

#### **STANDARD OF REVIEW**

The standard of review under Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12(c) is the same as the standard under Fed. R. Civ. P. 12(b)(6). See *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.* 313 F.3d 305, 308 n.8 (5th Cir. 2002); *Quest Communications Corp. v. City of Berkeley*, 208 F.R.D. 288, 291 (N.D. Cal. 2002), *aff'd* 433 F.3d 1253 (9th Cir. 2006), *overruled in part on other grounds by Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 577 (9th Cir. 2008). In addition, under the Supreme Court's most recent formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 129 S.Ct 1937,

1 1954 (2009). Instead, a complaint must set forth enough factual  
2 matter to establish plausible grounds for the relief sought. See  
3 *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-66 (2007). (“[A]  
4 plaintiff’s obligation to provide ‘grounds’ of his ‘entitle[ment]’  
5 to relief requires more than labels and conclusions, and a  
6 formulaic recitation of the elements of a cause of action will not  
7 do.”). Factual allegations must be enough to raise a right to  
8 relief above the speculative level. *Id.*, citing to 5 C. WRIGHT & A.  
9 MILLER, *FED. PRACTICE AND PROCEDURE* § 1216, at 235-36 (3d ed. 2004)  
10 (“[T]he pleading must contain something more . . . than . . . a  
11 statement of facts that merely creates a suspicion [of] a legally  
12 cognizable right of action”). However, all allegations of fact by  
13 the party opposing the motion are accepted as true and are  
14 construed in the light most favorable to that party. *McGlinchy v.*  
15 *Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

16 A motion for judgment on the pleadings under Rule 12(c) is  
17 “essentially equivalent to a Rule 12(b)(6) motion to dismiss, so a  
18 district court may ‘dispose of the motion by dismissal rather than  
19 judgment.’” *Technology Licensing Corp. v. Technicolor USA, Inc.*,  
20 2010 WL 4070208 (E.D. Cal. Oct. 18, 2010) (quoting *Sprint Telephony*  
21 *PCS, L.P. v. County of San Diego*, 311 F.Supp.2d 898, 902 03  
22 (S.D.Cal.2004)). The moving parties have expressly requested that  
23 the court dismiss the adversary proceeding. Given the nature of  
24 the pleadings in this case and the requested relief, the court  
25 shall proceed to consider the request and rule on this in the same  
26 manner as a Rule 12(b) motion to dismiss.

27 Generally, the court may consider only the allegations made in  
28 the complaint and the answer; extrinsic evidence and factual

1 contentions may not be taken into account. *Powe v. Chicago*, 664  
2 F.2d 639, 642 (7th Cir. 1981). If extrinsic matters are offered  
3 and not excluded by the court, then the motion for judgement on the  
4 pleadings is converted to a motion for summary judgement. Fed. R.  
5 Civ. P. 12(d); *Hal Roach Studios, Inc.*, 896 F.2d at 1550. The  
6 court shall not treat the present motion as a summary judgment, but  
7 limited it to what has been expressly requested by the Defendants,  
8 a motion to dismiss the FAC.

#### 9 **EXTRINSIC EVIDENCE CONSIDERED**

10 Both the Defendants and Plaintiff-Debtor offer extensive  
11 extrinsic evidence in support of their positions. In both cases  
12 these facts were not included in the pleadings which the court must  
13 look to in deciding a Fed. R. Civ. P. 12(c) motion. Defendants'  
14 exhibits are offered under the guise of being judicially  
15 noticeable; they are not. Only those facts which are generally  
16 known within the territorial jurisdiction of the court or capable  
17 of accurate and ready determination by resort the sources whose  
18 accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b).  
19 The exhibits offered by Defendants—a deed of trust and notices  
20 issued pursuant to the Real Estate Settlement Procedures Act  
21 ("RESPA"), 12 U.S.C. §§2601-2617—are not sources whose accuracy  
22 cannot reasonably be questioned. See, e.g., Fed. R. Evid. 802,  
23 901.

24 Moreover, Plaintiff-Debtor's 148-page exhibit document lodged  
25 with chambers is not properly considered in this context.  
26 Plaintiff-Debtor uses the exhibit document to attempt to bolster  
27 the substance of general allegations made in the FAC or make new  
28 allegations. This is not permitted.

1                   **GROUND****S STATED IN MOTION FOR RELIEF REQUESTED**

2           In this case the various Defendants bring the present motion  
3 to dismiss the FAC as to all Defendants for failure to state a  
4 claim against any of the Defendants. The grounds for relief on  
5 this Motion stated with particularity as required by Rule 7,  
6 Federal Rules of Civil Procedure, and Rule 7007, Federal Rules of  
7 Bankruptcy Procedure are:

8           1. There are no charging allegations against any defendants  
9 other than OneWest Bank.

10          2. As to OneWest Bank, are meritless and predicated on  
11 demonstrably inaccurate allegations that OneWest Bank -

12           a. Prepared and issued informational statements  
13 pursuant to the Real Estate Settlement Procedures Act,

14           b. (b) Which statements advised of an escrow account  
15 payment increase in the post-petition period,

16           c. Which the Plaintiff-Debtor wrongly characterizes as  
17 an impermissible effort to collect a debt in violation of  
18 the automatic stay.

19          3. Plaintiff-Debtor's FAC does not allege any particular  
20 statement which was generated by OneWest Bank.

21          4. Plaintiff-Debtor also advances a theory that the filing  
22 of the proof of claim by OneWest Bank violates the automatic stay.

23          Therefore, the Defendants conclude that the FAC should be  
24 dismissed as to all Defendants without leave to amend.

25                   **ALLEGATIONS IN FAC AS TO NON-ONEWEST DEFENDANTS**

26          The court's consideration of this Motion begins with the  
27 allegations actually made in the FAC as to the Defendants other  
28 than OneWest Bank. The FAC makes generic references to

1 "Defendants" in making broad allegations of misconduct, which  
2 requires the court to consider the specific allegations of  
3 misconduct, which defendant is alleged to have engaged in the  
4 conduct, and then interpret what alleged misconduct relates to  
5 which subgroup of "Defendants" in the FAC.

6 The specific allegations in the FAC include:

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

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

12 3. The Deed of Trust securing the Note ("Deed of Trust")  
13 does not provide for an escrow account. FAC ¶ 30.

14 4. MERS was assigned the servicing responsibilities for the  
15 Note. FAC, ¶¶ 12, 23.

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

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

20 a. IMB HoldCo, LLC, FAC, ¶¶ 16, 24;

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

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

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

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

26 7. A general allegation that unidentified "Defendant" was  
27 the agent for the FDIC during the period the assets were passed to  
28 OneWest Bank, FSB. FAC ¶ 26.

1           8.    A general allegation that unidentified "Defendant" was  
2 the agent for OneWest Bank, FSB .   FAC ¶ 25.

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

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

10          11.   OneWest Bank filed a proof of claim on or about  
11 December 10, 2009, based on the Note and Deed of Trust which  
12 includes all past due mortgage payments, property tax or insurance  
13 advances, and escrow balances.   FAC, ¶ 37.

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

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

19          14.   On November 30, 2009, IncyMac Mortgage Services, a  
20 Division of OneWest Bank, FSB notified the Plaintiff-Debtor that  
21 the monthly payment on the note increased from \$911.01 to  
22 \$1,480.10.   FAC, ¶ 32.

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

26          16.   Unnamed "Defendants" acts of issuing the post-petition  
27 mortgage changes were for the purpose of collecting pre-petition  
28 claims.   FAC, ¶ 55, 56.

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

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

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

12        20. Unidentified "Defendants" increased the post-petition  
13 Note payments with the knowledge that it was improper and would not  
14 be permitted by the court unless it was so provided in a confirmed  
15 Chapter 13 plan or pursuant to an order granting relief from the  
16 automatic stay. FAC, ¶ 107.

17        21. As a direct result of the post-petition notices of  
18 changes in the mortgage payments, the Chapter 13 Trustee collected  
19 the post-petition increased mortgage payments on the Note. FAC,  
20 ¶ 55.

21        22. Unidentified "Defendants'" post-petition escrow analysis  
22 includes "both post-petition advances of pre-petition escrow  
23 advances and fails to distinguish between escrow advances."  
24 FAC, ¶ 65.

25        23. Unidentified "Defendants" acts have resulted in  
26 Plaintiff-Debtor paying pre-petition taxes through the increased  
27 post-petition Note payments. FAC, ¶ 75.

28        24. Unidentified "Defendants" acts have resulted in



1 Plaintiff-Debtor paying for improper forced place insurance through  
2 the increased post-petition Note payments. FAC, ¶ 76.

3 25. Unidentified "defendants" are alleged to have conspired  
4 to collect escrow advances through post-petition Note payment  
5 increases. FAC, ¶ 98.

6 **CLAIMS ASSERTED AS TO THE NON-ONEWEST BANK, FSB DEFENDANTS**

7 In the FAC the Plaintiff-Debtor makes broad sweeping  
8 allegations of conduct against unidentified "Defendants" or  
9 "Defendant." All but OneWest Bank, FSB, are alleged to have held  
10 an interest in the Note sometime in the past or provided loan  
11 servicing, but only OneWest Bank, FSB, is alleged to have asserted  
12 any rights or interest in the Note in this bankruptcy case. As  
13 discussed in this ruling, merely alleging that someone was involved  
14 in a conspiracy does not make them responsible for the conduct of  
15 the defendant alleged to have engaged in the improper conduct.

16 As to the first four causes of action, the only Defendant  
17 alleged to have engaged in the conduct at issue is OneWest Bank,  
18 FSB. From the allegations in the FAC, all of the other parties'  
19 interests alleged interests in the Note and Deed of Trust predate  
20 the bankruptcy filing. For Fidelity National Information Services,  
21 Inc., the only allegation is that it provides software which  
22 OneWest Bank, FSB may have used in computing the post-petition  
23 mortgage payments. No plausible claims are stated against the non-  
24 OneWest Bank, FSB defendants. Rather, it appears that the  
25 Plaintiff-Debtor is attempting to wrap them into this action by  
26 alleging a civil conspiracy.

27 The Fifth Cause of Action, Civil Conspiracy, merely re-alleges  
28 the allegations in paragraphs 84 through 96 of the FAC (RESPA

1 alleged violations), which incorporates other allegations in the  
2 FAC, and further asserts,

3 1. Defendants have a common objective and course of action  
4 to improperly obtain payment of the pre-petition arrearage by  
5 incorrectly computing the post-petition installments due on the  
6 Note.

7 2. Defendants intended by the notice of the post-petition  
8 installment increase to cause the Chapter 13 Trustee to collect the  
9 incorrect amounts from the Plaintiff-Debtor and pay those amounts  
10 to OneWest Bank.

11 3. OneWest Bank filed an objection to confirmation asserting  
12 the incorrect post-petition installment amount as part of its  
13 efforts to collect the incorrect amount.

14 4. The Defendants collectively concealed the practice of  
15 incorrectly computing post-petition installments and that OneWest  
16 Bank was improperly collecting the pre-petition arrearage as part  
17 of the post-petition installments, as well as collecting the pre-  
18 petition arrearage under the terms of the Chapter 13 Plan.

19 To establish a civil conspiracy in California one must show  
20 that defendants jointly engaged in a tort. There is no separate  
21 civil action for conspiracy to commit a tort without there being an  
22 actual wrongful act committed. *Favila v. Katten Muchin Rosenman,*  
23 *LLP*, 188 Cal.App.4th 189, 206 (2010), and 5 WITKIN SUMMARY OF CALIFORNIA  
24 LAW TORTS, §45. The effect of the "conspiracy" is that each of the  
25 defendants involved is individually liable. Though incorporating  
26 the general allegation paragraphs and the RESPA cause of action  
27 allegations, the general allegations of a conspiracy are generally  
28 made as to unidentified Defendants.

1       The California District Court of Appeal in *Black v. Bank of*  
2 *America*, 30 Cal. App. 4th 1 (1994) conducted the review of a  
3 conspiracy claim and the proper basis for such a claim when the  
4 parties involved were a corporation and the agents or employees of  
5 the corporation. The court concluded that it is well established  
6 California law that employees or agents of a corporation cannot  
7 conspire with their principal or employer when acting in their  
8 official capacity. In *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566  
9 (1973), the California Supreme Court concluded that an insured  
10 could not state a conspiracy claim against his insurance company  
11 and a separate insurance adjusting firm, a separate law firm, and  
12 employees of the two separate firms because only the insurance  
13 company had a duty of good faith and fair dealing with the insured.  
14 The two separate firms were not a party to the insurance contract  
15 and did not have such a duty to the plaintiff. In its *Doctors' Co.*  
16 *v. Superior Court*, 49 Cal3d 39 (1989), decision the California  
17 Supreme Court held that an attorney and an expert witness employed  
18 by an insurance company could not be held liable for conspiring to  
19 violate the company's statutory duties, again because the statutory  
20 duties were owed only by the insurance companies.

21       In *Younan v. Equifax Inc.*, 111 Cal.App. 3d 39 (1980), the  
22 court rejected a conspiracy claim for constructive fraud alleged to  
23 be based on a breach of fiduciary duty owed by a disability  
24 insurer. The insurer's agents did not owe the plaintiff a  
25 fiduciary duty, and only the insurer itself owed the fiduciary  
26 duty. However, the court allowed stand a claim for conspiracy to  
27 commit actual fraud, since even the agents owed a duty to the  
28 plaintiff to "abstain from injuring the plaintiff through express

1 misrepresentations, independent of the insurer's implied covenant  
2 of good faith and fair dealing."

3       This issue is further addressed by the Supreme Court in  
4 *Applied Equipment Corp. v. Litton Saudi Arabia Ltd*, 7 Cal. 4<sup>th</sup> 503  
5 (1994). The Supreme Court first distinguished between alleged  
6 conspiracies arising out of tort claims and contract claims. For  
7 contract claims, there is no tort obligation for one contracting  
8 party not to interfere with the performance of the contract. There  
9 is merely a contractual obligation to perform as promised.  
10 Therefore, a party to a contract cannot be bootstrapped into a  
11 conspiracy tort.

12       For there to be a civil conspiracy there must be "the  
13 formation and operation of the conspiracy and damage resulting to  
14 plaintiff from an act or acts done in furtherance of the common  
15 design . . . In such an action the major significance of the  
16 conspiracy lies in the fact that it renders each participant in the  
17 wrongful act responsible as a joint tortfeasor for all damages  
18 ensuing from the wrong, irrespective of whether or not he was a  
19 direct actor and regardless of the degree of his activity." *Id*,  
20 p. 512.

21       In this case, all of the operative allegations have been made  
22 against OneWest Bank for the remaining claims in this case for  
23 which the nonspecific conspiracy is alleged: (1) Declaratory Relief  
24 to determine the correct amount of the post-petition mortgage  
25 payments and (2) alleged violation of the automatic stay by OneWest  
26 Bank in increasing the post-petition mortgage payment and its  
27 actions to obtain payment of that increased amount. The Plaintiff-  
28 Debtor only makes boilerplate allegations that unnamed Defendants

1 "conspired" for the "recouping of pre-petition claims from post-  
2 petition estate property resulting in systematic injury to  
3 debtors." FAC ¶ 97. Further, there is no allegation as to what  
4 duties, if any, that these unnamed Defendants owe to the Plaintiff-  
5 Debtor and the damages to these Plaintiff-Debtor caused by the  
6 breach of those duties.

7 The court grants the motion to dismiss the FAC in *toto* as to  
8 Mortgage Electronic Registration Systems, Inc., IMB HoldCo, LLC,  
9 IMB Management Holdings, LLC, OneWest Venture, LLC, and OneWest  
10 Bank Group, LLC without prejudice. The court does not grant leave  
11 to amend at this time, in part because this is the FAC which has  
12 been fashioned after considerable effort by the Plaintiff-Debtor  
13 and the lack of any allegations that any of these Defendants have  
14 been involved in any way in this bankruptcy case or conduct of  
15 OneWest Bank, FSB. If the Plaintiff-Debtor believes that he  
16 subsequently identify facts sufficient to allege claims against the  
17 other Defendants, he may seek leave to amend from the court.

18 It has not been alleged that OneWest Bank and others breached  
19 their duties to the Plaintiff-Debtor by conspiring with others.  
20 OneWest Bank, FSB cannot conspire with itself to violate an  
21 obligation it owes to the Plaintiff-Debtor. The court dismisses  
22 the Fifth Cause of Action for conspiracy as to OneWest Bank, FSB  
23 without prejudice and without leave to amend.

#### 24 **FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF**

25 The court may only grant declaratory relief where there is an  
26 actual controversy within its jurisdiction. *Am. States Ins. Co. v.*  
27 *Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be  
28 definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S.

1 227, 240-41 (1937). OneWest argues that Plaintiff-Debtor has  
2 failed to set out any facts demonstrating that a RESPA Notice was  
3 generated to collect pre-petition claims. However, in reading the  
4 FAC in the light most favorable to the Plaintiff-Debtor, the FAC  
5 does state that OneWest Bank conducted an escrow analysis, that the  
6 escrow analysis caused pre-petition escrow shortfalls to be  
7 included in post-petition payments, and that Plaintiff-Debtor and  
8 Chapter 13 Trustee were notified of this improper increased amount  
9 so that such amount would be paid post-petition to OneWest Bank.  
10 Further, it is alleged that OneWest Bank has received the improper  
11 post-petition payments.

12 From a fair reading of the FAC it is clear that Plaintiff-  
13 Debtor alleges that a dispute exists between OneWest Bank and  
14 Plaintiff-Debtor concerning the correct amount of the post-petition  
15 installments which are properly due on the secured claim. The  
16 request for declaratory relief is not duplicative of other causes  
17 of action. Only after the court determines the correct amount of  
18 the post-petition payments will the Plaintiff-Debtor, OneWest Bank,  
19 FSB, and the Chapter 13 Trustee know the correct amount to be paid  
20 monthly. Determination of this amount is independent of any  
21 determination as to whether OneWest Bank, FSB's conduct violated  
22 the automatic stay. Merely because the parties disagree as to the  
23 correct computation of a post-petition payment does not  
24 automatically create an actionable violation of the automatic stay.

25 The court reads OneWest Bank's Motion to also object to the  
26 Plaintiff-Debtor sliding a reference to injunctive relief and  
27 restitution into the First Cause of Action. To the extent that the  
28 Plaintiff-Debtor is seeking injunctive relief, restitution, or

1 other adjudication of rights in the First Cause of Action, such are  
2 improper as part of this declaratory relief claim. To the extent  
3 that a "dispute" exists as to whether any of the Defendants have  
4 violated rights of the Plaintiff-Debtor, then the appropriate  
5 action may be commenced asserting those rights and damages which  
6 may be recoverable. Plaintiff-Debtor has not plead claims for the  
7 additional relief, but has merely added those words to the relief  
8 requested. The court will not, and cannot, issue a precursory or  
9 advisory opinion as to other rights or interests the  
10 Plaintiff-Debtor may or may not have against any of the Defendants.

11 The Motion is denied as to the claim for Declaratory Relief  
12 against OneWest Bank, and is granted to the extent that the First  
13 Cause of Action includes a request for injunctive relief or  
14 restitution, that portion is dismissed without prejudice. No leave  
15 to amend is granted.

16 **SECOND AND THIRD CAUSES OF ACTION FOR**  
17 **VIOLATION OF AUTOMATIC STAY**

18 The Plaintiff-Debtor asserts that the conduct of OneWest Bank,  
19 FSB in increasing the post-petition payments violated the automatic  
20 stay by recovering payment of pre-petition arrearage outside of a  
21 Chapter 13 plan. The Plaintiff-Debtor alleges that OneWest Bank,  
22 FSB has asserted the claim in this case and sought to obtain  
23 payment on the obligation evidenced by the Note. The Plaintiff-  
24 Debtor does not allege that any of the other persons named as  
25 Defendants filed a claim or attempted to obtain payment on the  
26 Note.

27 OneWest argues that Plaintiff-Debtor failed to alleged  
28 sufficient facts to establish a controversy, Plaintiff-Debtor

1 failed to plead the existence of a post-petition RESPA Notice,  
2 that a RESPA Notice could not violate the automatic stay as a  
3 matter of law, the request for declaratory relief is impermissibly  
4 duplicative, and Plaintiff-Debtor failed to allege sufficient facts  
5 to establish a controversy with regarding a proof of claim.

6 OneWest Bank, FSB, places great reliance on the Bankruptcy  
7 Appellate Panel decision in *Zotow v. Johnson, et. al.*, 432 B.R. 252  
8 (9th Cir. BAP 2010). In seeking to dismiss this cause of action,  
9 OneWest Bank, FSB asserts that a RESPA Escrow Account Disclosure  
10 Statement, as a matter of law, is merely informational and not an  
11 attempt to collect a debt. In *Zotow*, BAC Home Loan Servicing, LP  
12 ("BAC") sent one post-petition notice to the debtors showing an  
13 increase in the post-petition monthly mortgage payment. It was  
14 further alleged that BAC received several payments from the  
15 Chapter 13 trustee at the increased amount. The Bankruptcy  
16 Appellate Panel was reviewing the decision of the bankruptcy court  
17 after an evidentiary hearing on an objection to claim, not on a  
18 motion to dismiss.

19 The *Zotow* court first considered the decision of the Fifth  
20 Circuit Court of Appeals in *Campbell v. Countrywide Home Loans,*  
21 *Inc.*, 545 F.3d 348 (5th Cir. 2008). In *Campbell*, the Fifth Circuit  
22 Court of Appeals concluded that the automatic stay precluded  
23 Countrywide Home Loans, Inc. ("Countrywide") from attempting to  
24 obtain payment on pre-petition arrearages other than as permitted  
25 by the Bankruptcy Code. The obligation owing for a pre-petition  
26 arrearage, even if the claim is subject to the anti-modification  
27 provision of 11 U.S.C. § 1325(b)(2), is a pre-petition claim  
28 subject to the automatic stay provisions of 11 U.S.C. § 362(a).



1 *Id.* at 354. However, the only conduct by Countrywide in *Campbell*  
2 was filing a proof of claim stating the higher installment amount.  
3 Filing a proof of claim, even one which grossly overstates the  
4 claim, was not held to be a violation of the automatic stay. *Id.*  
5 at 356.

6 The Third Circuit Court of Appeals has also addressed this  
7 issue, again with Countrywide increasing the post-petition  
8 installments to recover a pre-petition arrearage. After the  
9 bankruptcy case was filed, Countrywide issued a revised escrow  
10 analysis and demand for payment to the debtors. The Third Circuit  
11 Court of Appeals concluded that the pre-petition arrearage was part  
12 of the pre-petition claim which was governed by the Bankruptcy  
13 Code. Countrywide was entitled to be paid the pre-petition  
14 arrearage portion of its claim, but Countrywide could not violate  
15 the automatic stay to obtain payment of the pre-petition arrearage.  
16 The Third Circuit concluded that an attempt to obtain payment of a  
17 pre-petition arrearage outside the plan payment could be a  
18 violation of the stay. The matter was remanded to the trial court  
19 to determine if the violation was willful to support an award of  
20 damages pursuant to 11 U.S.C. § 362(k). *In re Rodriguez*, 629 F.3d.  
21 136, 143-144 (3rd Cir. 2010). This decision was issued after the  
22 Bankruptcy Appellate Panel ruling in *Zotow*.

23 The Panel in *Zotow* considered the scope of the automatic stay  
24 with respect to communications relating to pre-petition claims.  
25 Not every communication is prohibited. Rather, prohibited  
26 communications are those which, based on direct or circumstantial  
27 evidence, are geared toward collection of pre-petition debt, and  
28 which are accompanied by coercion or harassment. *Zotow*, 432 B.R.

1 at 259. Relying on *Morgan Guar. Trust Co. Of N.Y. v. Am. Sav. And*  
2 *Loan Ass'n*, 804 F.2d 1487, 1491 (9th Cir. 1986), the Panel  
3 concluded that a mere request for payment and informational  
4 statement are permissible communications which do not violate the  
5 automatic stay. *Id.* The Bankruptcy Appellate Panel also recognizes  
6 that, "Whether a communication is a permissible or prohibited one  
7 is a fact-driven inquiry which makes any bright line test  
8 unworkable." *Id.* at 258.

9 In *Morgan Guar. Trust Co.*, the Ninth Circuit addressed the  
10 issue of whether the presentment of a Note issued by Johns Manville  
11 violated the automatic stay.<sup>1</sup> Because the automatic stay seeks to  
12 ensure the orderly administration of the debtor's estate, provide  
13 a breathing spell for the debtor, maintain the status quo, and  
14 prevent harassment of a debtor by sophisticated creditors, a  
15 request for payment (as with the presentment of a negotiable  
16 instrument) does not violate the automatic stay unless it is  
17 accompanied by coercion or harassment, such as immediately or  
18 potentially threatening the debtor's possession of property.  
19 *Morgan*, 804 F.2d at 1491. Examples of communications cited by the  
20 Ninth Circuit as violating the automatic stay included: (1) notice  
21 of intent to terminate lease, (2) notice of intent to terminate  
22 franchise, (3) notice of medical clinic refusal to provide future  
23 medical services because of refusal to pay for prior services,  
24 (4) letter informing debtor that an attorney had been hired to  
25 collect a delinquent account, (5) college refusing to release  
26 transcripts as a method to force payment, and (6) a creditor who

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28 <sup>1/</sup> This predated the amendment to 11 U.S.C. § 362(b)(10)  
which exempts presentment of a negotiable instrument from the  
automatic stay.

1 made repeated visits and telephone calls to a debtor. *Id.*  
2 Examples of communications not violating the automatic stay  
3 included: (1) letter sent to debtor's attorney that a credit union  
4 would not have further business dealings with the debtor unless  
5 debt was reaffirmed, and (2) communications setting out the basis  
6 of the claim (informal proof of claim). *Id.*

7       The *Zotow* court concluded that the stay had not been violated  
8 on the facts of that case because Countrywide sent a single notice  
9 which did not request payment. The one notice communicated the  
10 information obtained in the recent escrow analysis computed by  
11 Countrywide. The record established at the evidentiary hearing  
12 revealed no indication that Countrywide attempted to collect the  
13 pre-petition arrearage outside the bankruptcy court. The Panel  
14 placed significant weight on there being only a single notice sent  
15 to the debtor. Given that there was one notice, no other action  
16 taken to obtain payment, and undisputed facts which did not  
17 constitute harassment or coercion, the Panel concluded that the  
18 single notice did not violate the automatic stay.

19       Applying both the spirit and letter of *Morgan Guar. Trust Co.*,  
20 creditors and debtors are allowed to communicate their disparate  
21 positions and rights they seek to assert. It is when coercion or  
22 harassment is coupled with the communication that they can be a  
23 violation of the automatic stay.

24       In this case, the Plaintiff-Debtor argues that the calculation  
25 itself, in addition to the filing of the notice of change in  
26 mortgage payment, violates the automatic stay. It is asserted that  
27 filing the notice of change in mortgage payment will result in the  
28 Chapter 13 Trustee forcing the Plaintiff-Debtor to pay the pre-

1 petition arrearage as a post-petition mortgage installment rather  
2 than as a proper plan payment. However, the Plaintiff-Debtor  
3 alleges nothing more to indicate that there was any harassing or  
4 coercive conduct by OneWest Bank. Merely that it asserted the  
5 right to a higher post-petition payment based upon its  
6 interpretation of RESPA.

7 With respect to OneWest Bank (the court having identified  
8 OneWest Bank as the only potential defendant being referenced under  
9 the Second and Third Causes of Action), the Plaintiff-Debtor makes  
10 generic broad sweeping allegations of a pattern of conduct in which  
11 OneWest Bank attempted to obtain payment on a pre-petition claim  
12 outside the strictures of the Bankruptcy Code. But the specific  
13 allegations in this case are that OneWest Bank communicated to the  
14 Plaintiff-Debtor, Chapter 13 Trustee, and everyone else in the case  
15 that OneWest Bank computed an increase in the post-petition  
16 payments. At best, the Plaintiff-Debtor argues that he knew the  
17 Chapter 13 Trustee could seek to dismiss the case if he failed to  
18 pay an undisputed post-petition mortgage payment or otherwise  
19 assert their contention as to the correct amount.

20 The allegations in this indicate that there was some  
21 communication and correction made by OneWest Bank to the extent  
22 that a dispute was identified. While stating that the post-  
23 petition monthly mortgage payments were noticed as increasing to  
24 \$2,125.37 in December 2009 (FAC, ¶ 41), it is not alleged as to  
25 what harassing or coercive conduct is undertaken in a credit  
26 stating what it computes the correct amount of a payment to be  
27 post-petition.

28 Glaring in its absence in the FAC are any allegations

1 contending that OneWest Bank, either directly or indirectly,  
2 threatened or harassed the Plaintiff-Debtor. Commonly in the  
3 context of consumer harassment one sees multiple phone calls,  
4 multiple letters, and communications stating that adverse  
5 consequences will occur if the consumer does not immediately comply  
6 with the demands made by the creditor. In this case, nothing is  
7 alleged. Merely that Central Mortgage provided notice that it  
8 computed a post-petition installment payment increase and the  
9 Plaintiff-Debtor did not object to the increased payment. The fact  
10 that inaction by the Plaintiff-Debtor would result in the payments  
11 being made or it being asserted that the plan is in default does  
12 not, in and of itself, arise to the *Morgan Guar. & Trust* level of  
13 harassment or coercion.

14 The court rejects Plaintiff-Debtor's apparent contention that  
15 he has no obligation to address disputes concerning the proper  
16 post-petition payment amounts to be made for Class 1 or Class 2  
17 Claims, or the correct determination of a creditor's pre-petition  
18 arrearage to be paid through the Chapter 13 Plan. Plaintiff-Debtor  
19 appears to have adopted a strategy that rather than addressing such  
20 issues as part of confirming or enforcing their Chapter 13 plan, he  
21 can elect instead to sue the creditor alleging a violation of the  
22 automatic stay and seek monetary recovery.

23 Plaintiff-Debtor has the option of choosing to file a  
24 Chapter 13 reorganization or Chapter 7 liquidation. Choosing a  
25 reorganization necessarily entails much more significant emotional,  
26 financial, and time commitments than merely filing a Chapter 7 and  
27 proceeding directly to a fresh start. However, a properly  
28 prosecuted Chapter 13 case can yield a significantly advantageous

1 economic benefit for debtors. In many cases debtors strip junior  
2 liens from their residence and cure the arrearage on the senior  
3 lien, thereby saving their home and realizing future appreciation  
4 without paying the junior liens.

5 In this setting, it is not unreasonable for a Chapter 13  
6 debtor, advancing the interests of the estate and the debtor, to  
7 address a pre-petition claim dispute consisting of the correct  
8 computation of the post-petition payment. This includes  
9 determining the correct amount of the pre-petition arrearage to be  
10 paid through the plan. A debtor has many different tools in his or  
11 her arsenal, including filing a claim for the creditor, objecting  
12 to a claim, obtaining a determination of a plan term as part of a  
13 confirmation hearing, supplemental proceedings in enforcement of a  
14 plan,<sup>2</sup> and a declaratory relief action. To the extent that there  
15 exists a contractual attorneys' fees provision, presumably a  
16 prevailing debtor would seek to recover attorneys' fees and costs  
17 for the benefit of the estate and other creditors.

18 Though creditors' counsel may argue that the present type of  
19 situation arises because a debtor fails to communicate with the  
20 creditor, the court is cognizant of the realities of modern home  
21 loan debt servicing. The persons computing the current (post-  
22 petition) mortgage payments are separate from the bankruptcy group  
23 and the attorney (if any) attempting to represent the creditor in  
24 the bankruptcy case. Whether because of the volume of defaulted

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25  
26 <sup>2/</sup> 11 U.S.C. Section 1327(a) provides, "The provisions of a  
27 confirmed plan bind the debtor and each creditor,..., and whether  
28 or not such creditor has objected to, has accepted, or has  
rejected the plan." This is the new "contract" to be enforced  
between the parties. *Max Recovery v. Than (In re Than)* 215 B.R.  
430 435 (9th Cir. BAP 1997).

1 home loans or a conscious management decision, a thoughtful  
2 response to a debtor's dispute of a mortgage payment or arrearage  
3 calculation often does not occur until the creditor and counsel are  
4 forced to a court hearing.

5 OneWest Bank's argument that RESPA creates a free floating  
6 exemption from the automatic stay for however it computes and seeks  
7 payment of post-petition mortgage installments is as unpersuasive  
8 with this court as that argument has been with the courts in  
9 *Rodriguez* and *Campbell*. While the Bankruptcy Code does not  
10 prohibit adjustments for post-petition changes authorized by RESPA,  
11 the automatic stay provisions of 11 U.S.C. §362(a) prohibit the  
12 collection of pre-petition debts outside of the bankruptcy. Had  
13 Congress intended to exempt only demands for payment cloaked in  
14 RESPA from the automatic stay it would have said so in a clear and  
15 unambiguous manner. Congress clearly knows how to make an  
16 exception to the automatic stay, see 11 U.S.C. §362(b), and the  
17 court will not imply that Congress gave OneWest Bank and other  
18 servicers or Note owners free reign to do whatever they sought to  
19 obtain payment on pre-petition claims without regard to the  
20 Bankruptcy Code.

21 The motion to dismiss the Second and Third Causes of Action<sup>3</sup>  
22 for violation of the automatic stay against OneWest Bank is granted  
23 and the causes of action are dismissed without prejudice. No leave  
24 to amend granted.

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25  
26 <sup>3/</sup> 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                                   **FOURTH CAUSE OF ACTION**  
2                                   **VIOLATION OF REAL ESTATE SETTLEMENT PROCEDURES ACT**

3           Plaintiff-Debtor alleges that the Note is subject to loan  
4 servicing provisions of RESPA. It is further alleged that under  
5 RESPA the Defendants were required to provide Plaintiff-Debtor with  
6 written notice of each sale or transfer of the assignment, sale or  
7 transfer of the loan or changes in the servicer for the loan.

8           The FAC alleges that the various Defendants alleged to have  
9 acquired and transferred the Note, until it ultimately ended up  
10 with OneWest Bank failing to provide such written notices.  
11 Plaintiff-Debtor further asserts that the Defendants have violated  
12 RESPA by improperly computing the monthly post-petition  
13 installments which have been demanded and collected from the  
14 Plaintiff-Debtor. Additionally, that Defendants have failed to  
15 refund or credit back charges for improperly placed insurance, and  
16 have sent Plaintiff-Debtor incorrect post-petition RESPA escrow  
17 analyses.

18           As correctly stated by Defendants, while a private right of  
19 action exists for the failure to provide the servicing notice, the  
20 Plaintiff-Debtor must assert a damages claim caused by the failure  
21 to provide the notice. 12 U.S.C. § 2605(f), *Jensen v. Quality Loan*  
22 *Serv. Corp*, 702 F. Supp. 2d 1183, 1196-1197 (E.D. Cal. 2010), and  
23 *Wilson v. JP Morgan Chase Bank*, 2010 U.S. Dist. LEXIS 63212 (E.D.  
24 Cal. 2010). From a review of the FAC, the Plaintiff-Debtor does not  
25 assert any damages arising from the failure to provide the notices  
26 of change in servicer.

27           An additional RESPA claim has been asserted for the improper  
28 calculation of post-petition installments. The FAC is clear that



1 the only alleged conduct in asserting an increase in post-petition  
2 installments has been by OneWest Bank. However, as asserted by  
3 Defendants, no private right of action is provided for a violation  
4 of the limitation on requirement of advance deposits in escrow  
5 accounts pursuant to 12 U.S.C. §2604. See *Hensley v. Bank of N.Y.*  
6 *Mellon*, 2010 U.S. Dist. LEXIS 135812 (ED Cal. 2010), and *Brohpy v.*  
7 *Chase Manhattan Mortgage Co.*, 947 F. Supp. 879, 883 (E.D. Penn.  
8 1996).

9 The Fourth Cause of Action is dismissed as to OneWest Bank,  
10 without prejudice. No leave to amend is granted at this time.

#### 11 CONCLUSION

12 The court grants the Motion and dismisses the FAC and all  
13 causes of action as to Mortgage Electronic Registration Systems,  
14 Inc., IMB HoldCo, LLC, IMB Management Holdings, LLC, OneWest  
15 Venture, LLC, FAC, and OneWest Bank Group, LLC without prejudice  
16 and without leave to amend.

17 The court grants the Motion and dismisses that portion of the  
18 First Cause of Action which requests injunctive relief or  
19 restitution, and the Second, Third, Fourth and Fifth Cause of  
20 Action as to OneWest Bank, FSB, without prejudice and without leave  
21 to amend.

22 The court denies the Motion as to the First Cause of Action  
23 for Declaratory Relief as to OneWest Bank, FSB.

24 This Memorandum Opinion and Decision constitutes the court's  
25 findings of fact and conclusions of law pursuant to Fed. R. Civ. P.  
26 52, and Fed. R. Bankr. P. 9014 and 7052.

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1           The court shall issue an order consistent with this ruling.  
2 Dated: September 26, 2011

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4                                   /s/ Ronald H. Sargis  
5                                   RONALD H. SARGIS, Judge  
6                                   United States Bankruptcy Court  
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