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

10 In re) Case No. 10-20007-E-13
11)
12 KATHY DIANE DITTIMUS,)
13)
14 Debtor.)
15)
16 KATHY DIANE DITTIMUS,) Adv. Pro. No. 10-2174
17) Docket Control No. BH-4
18)
19 Plaintiff,)
20)
21 v.)
22)
23 INDYMAC BANK FSB, et al.,) Motion to Dismiss First Amended
24) Complaint as to Fidelity
25) National Information Services,
26) Inc.
27 Defendants.)
28)

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

21 **MEMORANDUM OPINION AND DECISION**

22 Defendant Fidelity National Information Services, Inc.
23 ("Fidelity") seeks to dismiss this adversary proceeding pursuant to
24 Federal Rule of Civil Procedure 12(b)(6) as made applicable to this
25 adversary proceeding by Federal Rule of Bankruptcy Procedure 7012.
26 The First Amended Complaint ("FAC") was filed by Kathy Diane
27 Dittimus, the Plaintiff-Debtor, on June 30, 2010. In relevant
28 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, ¶ 22.

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, ¶¶ 11, 22.

4 5. IndyMac Federal Savings Bank, FSB purchased the Note.
5 FAC, ¶ 14.

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

8 a. IMB HoldCo, LLC, FAC, ¶¶ 15, 24;

9 b. IMB Management Holdings, LLC, FAC ¶¶ 17, 24;

10 c. OneWest Venture, LLC, FAC, ¶¶ 18, 24;

11 d. OneWest Bank Group, LLC, FAC, ¶¶ 19, 24; and ultimately
12 to

13 e. OneWest Bank, FSB, FAC, ¶¶ 12, 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, ¶ 20.

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, ¶¶ 33, 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, ¶ 35.

2 12. An unnamed "Defendant," conducted an "Escrow Analysis"
3 pursuant to RESPA upon notice of a bankruptcy filing. FAC, ¶ 43.

4 13. Unnamed "Defendants" do not distinguish between pre and
5 post-petition escrow advances when conducting a post-petition
6 escrow analysis. FAC, ¶ 44.

7 14. By filing a proof of claim an unnamed "Defendant,"
8 notified the Chapter 13 Trustee of a post-petition monthly plan
9 payment increase to \$2,276.00. FAC, ¶ 40.

10 15. An unnamed "Defendant" generated no less than eight (8)
11 notices of changes in the monthly post-petition mortgage payment
12 amount. FAC, ¶ 47.

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

16 17. Actions of unidentified "Defendants" were willfully and
17 intentionally done to obtain payment on pre-petition claims through
18 increased post-petition Note payments. FAC, ¶¶ 80, 81.

19 18. Unidentified "Defendants'" use of the post-petition
20 notices of Note payment increases are intentional, with knowledge
21 of the automatic stay, systematic, and to collect pre-petition
22 amounts owed by Plaintiff-Debtor. FAC, ¶¶ 66, 67, 68, 71.

23 19. Unidentified "Defendants" knew that when the Chapter 13
24 Trustee received the notices of post-petition increased Note
25 payments, the Trustee would collect the increased amount from the
26 Plaintiff-Debtor for the unidentified "Defendants." FAC, ¶ 99.

27 20. Unidentified "Defendants" increased the post-petition
28 Note payments with the knowledge that it was improper and would not

1 be permitted by the court unless it was so provided in a confirmed
2 Chapter 13 plan or pursuant to an order granting relief from the
3 automatic stay. FAC, ¶ 106.

4 21. As a direct result of the post-petition notices of
5 changes in the mortgage payments, objections to confirmation, and
6 motions to dismiss, the Debtor made four (4) overpayments on the
7 post-petition mortgage payments. FAC, ¶ 51.

8 22. Unidentified "Defendants'" post-petition escrow analysis
9 includes "both post-petition advances of pre-petition escrow
10 advances and fails to distinguish between escrow advances."
11 FAC, ¶ 64.

12 23. Unidentified "Defendants'" acts have resulted in
13 Plaintiff-Debtor paying pre-petition taxes through the increased
14 post-petition Note payments. FAC, ¶ 74.

15 24. Unidentified "Defendants'" acts have resulted in
16 Plaintiff-Debtor paying for improper forced place insurance through
17 the increased post-petition Note payments. FAC, ¶ 75.

18 25. Unidentified "defendants" are alleged to have conspired
19 to collect escrow advances through post-petition Note payment
20 increases. FAC, ¶ 97, 98.

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

23 Upon information and belief defendant, Fidelity National
24 Information Services, Inc., is a Delaware corporation
25 with its principal place of business at 601 Riverside
26 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.

27 FAC, ¶ 20.

28 Allegations are made in the Fifth Cause of Action for Civil

1 Conspiracy that unnamed defendants assist assignees in
2 systematically concealing the collection of pre-petition arrearage
3 through miscomputing post-petition mortgage payments in a
4 Chapter 13 case. FAC, ¶¶ 101, 104, 105, 106, 108.

5 Plaintiff-Debtor's Opposition attempts to state additional
6 allegations not in the FAC. These include contentions that
7 Fidelity is an "outsource provider" of the NewTrak software which
8 is used to miscompute the post-petition monthly mortgage payments
9 in a Chapter 13 case. Plaintiff-Debtor believes that support of
10 the collection of pre-petition arrearage through miscalculation of
11 post-petition monthly mortgage payments is with "reckless disregard
12 for the results." With Fidelity's support (software), creditors
13 and their attorneys are circumventing both the Bankruptcy Code and
14 the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et. seq.*,
15 ("RESPA"). Plaintiff-Debtor contends that Fidelity should not be
16 dismissed because its software "fails to distinguish between pre-
17 and post-petition escrow claims when conducting applications
18 involving escrow analysis and proof of claims, their programing
19 that initiates the bankruptcy litigation in support of the
20 collection of pre-petition claims, and/or resulting in the denial
21 of Chapter 13 confirmation, conversion to Chapter 7, and eventual
22 foreclosure of the debtor's home." Plaintiff-Debtor Opposition,
23 pg. 4:23-27, 5:1-11. Dckt. 59.

24 **THE COMPLAINT**

25 Plaintiff-Debtor filed this adversary proceeding on March 29,
26 2010. Dckt. 1. The complaint seeks (1) declaratory relief and
27 injunctive as to the rights and obligations of the respective
28 parties to this adversary proceeding, including a statement of the

1 amount of contractual payments due, an accounting, and a detailed
2 analysis of pre-petition and post-petition escrow shortages (Dckt.
3 1 at 11); (2) Money damages for violation of the automatic stay of
4 11 U.S.C. § 362(a) (Dckt. 1 at 12); (3) Money damages for violation
5 of the automatic stay pursuant to 11 U.S.C. § 362(k)(1) (Dckt. 1 at
6 13); (4) Money damages for violation of the RESPA (Dckt. 1 at 15);
7 and (5) Money Damages for civil conspiracy (Dckt. 1 at 16). The
8 court will consider each of the foregoing claims in turn.

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

25 **ANALYSIS**

26 In considering a motion to dismiss, the court starts with the
27 basic premise that the law favors disputes being decided on their
28 merits, and a complaint should not be dismissed unless it appears

beyond doubt that the Plaintiff-Debtor can prove no set of facts in support of their claim which would entitle them to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss will be granted should be resolved in favor of the plaintiff. *Pond v. Gen. Electric Co.*, 256 F.2d 824, 826-27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true. *Kossick v. United Fruit Co.*, 365 U.S. 731, 732 (1961).

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

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim 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.

Ashcroft v. Iqbal, 556 U.S. ___, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, 884 (2009) (citations and quotation marks omitted). Rule 8

1 also requires that allegations be "simple, concise, and direct."
2 Fed. R. Civ. P. 8(d)(1).

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

14 **DECLARATORY RELIEF**

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

27 The court may only grant declaratory relief where there is an
28 actual controversy within its jurisdiction. *Am. States Ins. Co. v.*

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

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

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

24 **VIOLATION OF THE AUTOMATIC STAY**

25 The Plaintiff-Debtor asserts that the conduct of recalculating
26 and increasing the post-petition payments violated the automatic
27 stay. The Plaintiff-Debtor alleges that OneWest Bank has asserted
28 the claim in this case and sought to obtain payment on the

1 obligation evidenced by the Note. As to Fidelity, no allegation is
2 made as to any conduct or act on its part, other than having
3 provided NewTrak software to some of the Defendants at some time,
4 which was used by OneWest Bank in computing the post-petition
5 monthly mortgage payments.

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

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

22 The motion to dismiss is granted and the Second and Third
23 Causes of Action¹ for violation of the automatic stay against
24 Fidelity are dismissed without prejudice and without leave to
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 amend.

2 **REAL ESTATE SETTLEMENT PROCEDURES ACT**

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

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

21 **CIVIL CONSPIRACY**

22 To establish a civil conspiracy in California one must show
23 that Defendants jointly engaged in a tort. There is no separate
24 civil action for conspiracy to commit a tort without there being an
25 actual wrongful act committed. *Favila v. Katten Muchin Rosenman,*
26 *LLP*, 188 Cal. App. 4th 189, 206 (2010); see also 5 WITKIN SUMMARY OF
27 CALIFORNIA LAW TORTS, 10TH EDITION, §45. The effect of the "conspiracy"
28 is that each of the Defendants involved is individually liable.

1 Through incorporating the general allegation paragraphs and the
2 RESPA cause of action allegations, the general allegations of a
3 conspiracy are generally made as to unidentified Defendants.

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

25 In *Younan v. Equifax Inc.*, 111 Cal. App. 3d 498 (1980), the
26 court rejected a conspiracy claim for constructive fraud alleged to
27 be based on a breach of fiduciary duty owed by a disability
28 insurer. The insurer's agents did not owe the plaintiff a

1 fiduciary duty, and only the insurer itself owed the fiduciary
2 duty. However, the court allowed to stand a claim for conspiracy
3 to commit actual fraud, since even the agents owed a duty to the
4 plaintiff to "abstain from injuring the plaintiff through express
5 misrepresentations, independent of the insurer's implied covenant
6 of good faith and fair dealing."

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

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

17 [t]he formation and operation of the conspiracy and
18 damage resulting to a plaintiff from an act or acts done
19 in furtherance of the common design . . . In such an
20 action the major significance of the conspiracy lies in
21 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.

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

25 In this case, all of the operative allegations have been made
26 against OneWest Bank, FSB for the remaining causes of action in
27 this Adversary Proceeding for which the non-specific conspiracy is
28 alleged. The Plaintiff-Debtor only makes boilerplate allegations

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

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

20 In their Opposition, the Plaintiff-Debtor argues that each of
21 the unnamed Defendants use various software systems and programs
22 which improperly fail to distinguish between pre-petition and post-
23 petition escrow arrearage. This improper payment calculation is
24 streamed through a nationwide network of attorneys who file proofs
25 of claims and escrow disclosure statements which misstate the claim
26 and post-petition monthly mortgage payments. The Plaintiff-Debtor
27 has not alleged what duty to this Plaintiff-Debtor owed by the
28 unnamed Defendants has been breached. Further, the Plaintiff-

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

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

12 **CONCLUSION**

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

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

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

Dated: October 3, 2011

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