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

9 In re) Case No. 10-20007-E-7
10)
11 KATHY DIANE DITTIMUS,)
12)
13 Debtor(s).)
14)
15 KATHY DIANE DITTIMUS,) Adv. Pro. No. 10-2174
16)
17 Plaintiff(s),) Docket Control No.: None
18 v.) Provided
19)
20 ONEWEST BANK FSB, et al.,)
21)
22 Defendant(s).)
23)
24)
25)
26)
27)
28)

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

21 **MEMORANDUM OPINION AND DECISION**

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

1 7012(b). Kathy Dittimus, the Plaintiff-Debtor, opposes the motion.

2 The court's decision is to grant the Motion, without prejudice
3 and without leave to amend, as to Mortgage Electronic Systems,
4 Inc., IMB HoldCo, LLC, IMB Management Holdings LP, OneWest Bank
5 Group LLC, OneWest Venture Holdings, LLC as to all Causes of
6 Actions and claims. The court grants the Motion, without prejudice
7 and without leave to amend, as to the First Cause of Action to the
8 extent that it requests injunctive relief or restitution, Fourth
9 Cause of Action (R.E.S.P.A. Claims) and Fifth Cause of Action
10 (Civil Conspiracy) and denies the Motion as to the First Cause of
11 Action (Declaratory Relief) and the Second and Third Cause of
12 Action (Violation of Automatic Stay and Damages) as against OneWest
13 Bank, FSB. Further amendments of the Complaint shall be as
14 authorized by the court by further order, if any.

15 **STANDARD OF REVIEW**

16 The standard of review under Federal Rule of Civil Procedure
17 ("Fed. R. Civ. P.") 12(c) is the same as the standard under Fed. R.
18 Civ. P. 12(b)(6). See *Great Plains Trust Co. v. Morgan Stanley*
19 *Dean Witter & Co.* 313 F.3d 305, 308 n.8 (5th Cir. 2002); *Quest*
20 *Communications Corp. v. City of Berkeley*, 208 F.R.D. 288, 291 (N.D.
21 Cal. 2002), *aff'd* 433 F.3d 1253 (9th Cir. 2006), *overruled in part*
22 *on other grounds by Sprint Telephony PCS, L.P. v. County of San*
23 *Diego*, 543 F.3d 571, 577 (9th Cir. 2008). In addition, under the
24 Supreme Court's most recent formulation of Rule 12(b)(6), a
25 plaintiff cannot "plead the bare elements of his cause of action,
26 affix the label 'general allegation,' and expect his complaint to
27 survive a motion to dismiss." *Ashcroft v. Iqbal*, 129 S.Ct 1937,
28 1954 (2009). Instead, a complaint must set forth enough factual

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

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

26 Generally, the court may consider only the allegations made in
27 the complaint and the answer; extrinsic evidence and factual
28 contentions may not be taken into account. *Powe v. Chicago*, 664

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

8 **EXTRINSIC EVIDENCE CONSIDERED**

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

23 Moreover, Plaintiff-Debtor's 417-page exhibit document lodged
24 with chambers is not properly considered in this context.
25 Plaintiff-Debtor uses the exhibit document to attempt to bolster
26 the substance of general allegations made in the FAC or make new
27 allegations. This is not permitted.

28 ///

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, FSB.

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

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 complaint does not allege any
20 particular statement which was generated by OneWest Bank, FSB.

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

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

26 **ALLEGATIONS IN COMPLAINT AS TO NON-ONEWEST BANK, FSB DEFENDANTS**

27 The court's consideration of this Motion begins with the
28 allegations actually made in the FAC as to the Defendants other

1 than OneWest Bank, FSB. The FAC makes generic references to
2 "Defendants" in making broad allegations of misconduct, which
3 requires the court to consider the specific allegations of
4 misconduct, which defendant is alleged to have engaged in the
5 conduct, and then interpret what alleged misconduct relates to
6 which subgroup of "Defendants" in the FAC.

7 The specific allegations in the Complaint include:

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

11 2. IndyMac Bank, FAB received an adjustable rate promissory
12 note in the principal amount of \$255,000 ("Note"), which provides
13 for interest only payments until August 1, 2017. The monthly
14 payment on the Note is \$1,859.38. The Note provides that no change
15 shall be made in the interest on the loan until July 2012.
16 FAC, ¶ 22.

17 3. The Deed of Trust securing the Note ("Deed of Trust")
18 does not provide for an escrow account or any change in the
19 interest rate on the Note until 2012. FAC ¶ 30.

20 4. MERS was assigned the servicing responsibilities for the
21 Note. FAC, ¶¶ 11, 22.

22 5. The FDIC was appointed as receiver for IndyMac Bank and
23 its assets were passed through:

24 a. IMB HoldCo, LLC, FAC, ¶¶ 15, 22;

25 b. IMB Management Holdings, LLC, FAC ¶¶ 17, 22;

26 c. OneWest Venture, LLC, FAC, ¶¶ 18, 22;

27 d. OneWest Bank Group, LLC, FAC, ¶¶ 19, 22; and
28 ultimately to

1 e. OneWest Bank, FSB, FAC, ¶¶ 12, 22.

2 6. A general allegation that unidentified "Defendant(s)"
3 were the agents for the FDIC during the period the assets were
4 passed to OneWest Bank, FSB. FAC ¶ 25.

5 7. A general allegation that unidentified "Defendant(s)"
6 were the agents for OneWest Bank, FSB. FAC ¶ 26.

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

11 9. Plaintiff-Debtor's Chapter 13 Plan provides for payment
12 of the note as a Class 1 claim in this bankruptcy case.
13 FAC, ¶¶ 33, 36, 38.

14 10. OneWest Bank, FSB filed a proof of claim on or about
15 February 26, 2010, based on the Note and Deed of Trust which
16 includes all past due mortgage payments, property tax or insurance
17 advances, and escrow balances. FAC, ¶ 35.

18 11. "Defendants" have not generated or provided an escrow
19 account disclosure statement showing a post-petition mortgage
20 increase. FAC, ¶ 39.

21 12. The Proof of Claim filed by OneWest Bank, FSB states that
22 the monthly payments due on the Note are \$2,276.00. FAC, ¶ 40.

23 13. Unnamed "Defendants" objected to Plaintiff-Debtor's
24 motion to confirm a Chapter 13 plan. FAC, ¶ 42.

25 14. An unnamed "Defendant," conducted an "Escrow Analysis"
26 pursuant to RESPA upon notice of a bankruptcy filing. FAC, ¶ 43.

27 15. Unnamed "Defendants" do not distinguish between pre and
28 post-petition escrow advances when conducting a post-petition

1 escrow analysis.

2 16. An unnamed "Defendant" has generated no less than (8)
3 eight post-petition mortgage changes in this case based on post-
4 petition escrow analyses. FAC, ¶ 47.

5 17. Unnamed "Defendants" acts of issuing the post-petition
6 mortgage changes were for the purpose of collecting pre-petition
7 claims. FAC, ¶ 48.

8 18. Unidentified "Defendants'" acts of collecting pre-
9 petition claims were accompanied by unidentified coercion,
10 harassment, or pressure on the Plaintiff-Debtor to induce payment.
11 FAC, ¶ 49.

12 19. Unidentified "Defendants" acted purposefully and
13 systematically to utilize the Chapter 13 procedures and rules, the
14 Chapter 13 Trustee, and local rules to put pressure on the
15 Plaintiff-Debtor to pay the increased post-petition loan payments.
16 FAC, ¶ 50.

17 20. 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, ¶¶ 80, 81.

20 21. 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, ¶¶ 65, 66, 67, 68, 71.

24 22. 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, ¶ 99.

28 23. 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, ¶ 106.

5 24. 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 ¶ 51.

9 25. 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, ¶ 64.

13 26. Unidentified "Defendants" have collected pre-petition
14 escrow advances through the post-petition increase of the Note
15 payment. FAC, ¶ 65.

16 27. Unidentified "Defendants" acts have resulted in
17 Plaintiff-Debtor paying pre-petition taxes through the increased
18 post-petition Note payments. FAC, ¶ 74.

19 28. Unidentified "Defendants" acts have resulted in
20 Plaintiff-Debtor paying for improper forced place insurance through
21 the increased post-petition Note payments. FAC, ¶ 75.

22 29. Unidentified "defendants" are alleged to have conspired
23 to collect escrow advances through post-petition Note payment
24 increases. FAC, ¶ 52.

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

26 In the First Amended Complaint the Plaintiff-Debtor makes
27 broad sweeping allegations of conduct against unidentified
28 "Defendants" or "Defendant." All but OneWest Bank, FSB, are

1 alleged to have held an interest in the Note sometime in the past
2 or provided loan servicing, but only OneWest Bank, FSB, is alleged
3 to have asserted any rights or interest in the Note in this
4 bankruptcy case. As discussed in this ruling, merely alleging that
5 someone was involved in a conspiracy does not make them responsible
6 for the conduct of the defendant alleged to have engaged in the
7 improper conduct.

8 As to the first four causes of action, the only Defendant
9 alleged to have engaged in the conduct at issue is OneWest Bank,
10 FSB. From the allegations in the Complaint, all of the other
11 parties interests alleged interests in the note and deed of trust
12 predate the bankruptcy filing. For Fidelity National Information
13 Services, Inc., the only allegation is that it provides software
14 which OneWest Bank, FSB may have used in computing the post-
15 petition mortgage payments. No plausible claims are stated against
16 the non-OneWest Bank, FSB defendants. Rather, it appears that the
17 Plaintiff-Debtor is attempting to wrap them into this action by
18 alleging a civil conspiracy.

19 The Fifth Cause of Action, Civil Conspiracy, merely re-alleges
20 the allegations in paragraphs 83 through 95 of the Complaint (RESPA
21 alleged violations), which incorporates other allegations in the
22 Complaint, and further asserts,

23 1. Defendants have a common objective and course of action
24 to improperly obtain payment of the pre-petition arrearage by
25 incorrectly computing the post-petition installments due on the
26 Note.

27 2. Defendants intended by the notice of the post-petition
28 installment increase to cause the Chapter 13 Trustee to collect the

1 incorrect amounts from the Plaintiff-Debtor and pay those amounts
2 to OneWest Bank, FSB.

3 3. OneWest Bank, FSB filed an objection to confirmation
4 asserting the incorrect post-petition installment amount as part of
5 its efforts to collect the incorrect amount.

6 4. The Defendants collectively concealed the practice of
7 incorrectly computing post-petition installments and that OneWest
8 Bank, FSB was improperly collecting the pre-petition arrearage as
9 part of the post-petition installments, as well as collecting the
10 pre-petition arrearage under the terms of the Chapter 13 Plan.

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

21 The California District Court of Appeal in *Black v. Bank of*
22 *America*, 30 Cal. App. 4th 1 (1994) conducted the review of a
23 conspiracy claim and the proper basis for such a claim when the
24 parties involved were a corporation and the agents or employees of
25 the corporation. The court concluded that it is well established
26 California law that employees or agents of a corporation cannot
27 conspire with their principal or employer when acting in their
28 official capacity. In *Gruenberg v. Aetna Ins. Co*, 9 Cal.3d 566

1 (1973), the California Supreme Court concluded that an insured
2 could not state a conspiracy claim against his insurance company
3 and a separate insurance adjusting firm, a separate law firm, and
4 employees of the two separate firms because only the insurance
5 company had a duty of good faith and fair dealing with the insured.
6 The two separate firms were not a party to the insurance contract
7 and did not have such a duty to the plaintiff. In its *Doctors' Co.*
8 *v. Superior Court*, 49 Cal3d 39 (1989), decision the California
9 Supreme Court held that an attorney and an expert witness employed
10 by an insurance company could not be held liable for conspiring to
11 violate the company's statutory duties, again because the statutory
12 duties were owed only by the insurance companies.

13 In *Younan v. Equifax Inc.*, 111 Cal.App. 3d 39 (1980), the
14 court rejected a conspiracy claim for constructive fraud alleged to
15 be based on a breach of fiduciary duty owed by a disability
16 insurer. The insurer's agents did not owe the plaintiff a
17 fiduciary duty, and only the insurer itself owed the fiduciary
18 duty. However, the court allowed stand a claim for conspiracy to
19 commit actual fraud, since even the agents owed a duty to the
20 plaintiff to "abstain from injuring the plaintiff through express
21 misrepresentations, independent of the insurer's implied covenant
22 of good faith and fair dealing."

23 This issue is further addressed by the Supreme Court in
24 *Applied Equipment Corp. v. Litton Saudi Arabia Ltd*, 7 Cal. 4th 503
25 (1994). The Supreme Court first distinguished between alleged
26 conspiracies arising out of tort claims and contract claims. For
27 contract claims, there is no tort obligation for one contracting
28 party not to interfere with the performance of the contract. There

1 is merely a contractual obligation to perform as promised.
2 Therefore, a party to a contract cannot be bootstrapped into a
3 conspiracy tort.

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

13 In this case, all of the operative allegations have been made
14 against OneWest Bank, FSB for the remaining claims in this case for
15 which the nonspecific conspiracy is alleged: (1) Declaratory Relief
16 to determine the correct amount of the post-petition mortgage
17 payments and (2) alleged violation of the automatic stay by OneWest
18 Bank, FSB in increasing the post-petition mortgage payment and its
19 actions to obtain payment of that increased amount. The Plaintiff-
20 Debtor only makes boilerplate allegations that unnamed Defendants
21 "conspired" for the "recouping of pre-petition claims from post-
22 petition estate property resulting in systematic injury to debtors
23 such as Dittimus." FAC ¶ 97. Further, there is no allegation as
24 to what duties, if any, that these unnamed Defendants owe to the
25 Plaintiff-Debtor and the damages to this Plaintiff-Debtor caused by
26 the breach of those duties.

27 The court grants the motion to dismiss the Complaint in *toto*
28 as to Mortgage Electronic Registration Systems, Inc., IMB HoldCo,

1 LLC, IMB Management Holdings, LLC, OneWest Venture, LLC, FAC, and
2 OneWest Bank Group, LLC without prejudice. The court does not
3 grant leave to amend at this time, in part because this is the
4 first amended complaint which has been fashioned after considerable
5 effort by the Plaintiff-Debtor and the lack of any allegations that
6 any of these Defendants have been involved in any way in this
7 bankruptcy case or conduct of OneWest Bank, FSB. If the Plaintiff-
8 Debtor believes that she subsequently identifies facts sufficient
9 to allege claims against the other Defendants, she may seek leave
10 to amend from the court.

11 It has not been alleged that OneWest Bank, FSB and others
12 breached their duties to the Plaintiff-Debtor by conspiring with
13 others. OneWest Bank, FSB cannot conspire with itself to violate
14 an obligation it owes to the Plaintiff-Debtor. The court dismisses
15 the Fifth Cause of Action for conspiracy as to OneWest Bank, FSB
16 without prejudice and without leave to amend.

17 **FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF**

18 The court may only grant declaratory relief where there is an
19 actual controversy within its jurisdiction. *Am. States Ins. Co. v.*
20 *Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be
21 definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S.
22 227, 240-41 (1937). OneWest Bank, FSB argues that Plaintiff-Debtor
23 has failed to set out any facts demonstrating that a RESPA Notice
24 was generate to collect pre-petition claims. However, in reading
25 the complaint in the light most favorable to the Plaintiff-Debtor,
26 the Complaint does state that OneWest Bank, FSB conducted an escrow
27 analysis, that the escrow analysis caused pre-petition escrow
28 shortfalls to be included in post-petition payments, and that

1 Plaintiff-Debtor and Chapter 13 Trustee were notified of this
2 improper increased amount so that such amount would be paid post-
3 petition to OneWest Bank, FSB. Further, it is alleged that OneWest
4 Bank, FSB has received the improper post-petition payments.

5 The Plaintiff-Debtor asserts that the correct post-petition
6 monthly payment on the Note is \$1,859.38,¹ while OneWest Bank,
7 FSB, contends that the correct post-petition amount is \$2,203.24.
8 See OneWest Bank, FSB, objection to confirmation, p. 2:16-18.
9 Docket Entry No. 29. OneWest Bank, FSB directs the court to
10 review the Escrow Account Disclosure Statement which it filed as
11 Exhibit 1 in objection to confirmation. Docket Entry No. 30. The
12 Escrow Statement is dated April 15, 2010, after the January 2010
13 commencement of this case, and states that beginning on February 1,
14 2010, the Plaintiff-Debtor's mortgage payment is \$2,330.69. In
15 smaller, non-bold font, the Statement further advises the
16 Plaintiff-Debtor that her payment may be \$2,203.24 if she pays her
17 shortage in a lump sum.

18 The Escrow Account Disclosure Statement tells the Plaintiff-
19 Debtor that her payment is \$2,330.69 is based on an escrow shortage
20 of \$1,520.34. The objection to confirmation filed by OneWest Bank,
21 FSB in this case clearly states that the current payment which the
22 Plaintiff-Debtor must make to OneWest Bank, FSB is \$2,203.24 if the
23 Plaintiff-Debtor is to confirm a plan or not have the case
24 dismissed.

25
26 ¹ The Plaintiff-Debtor's Chapter 13 Plan provided for
27 monthly payments of \$2,097.00. Whether the dispute is between
28 \$1,859.38 or the \$2,097.00, there is a dispute between what the
Plaintiff-Debtor states the amount to be and the \$2,330.69
demanded by OneWest Bank, FSB.

1 From a fair reading of the Complaint it is clear that
2 Plaintiff-Debtor alleges that a dispute exists between OneWest
3 Bank, FSB and Plaintiff-Debtor concerning the correct amount of the
4 post-petition installments which are properly due on the secured
5 claim. The request for declaratory relief is not duplicative of
6 other causes of action. Only after the court determines the
7 correct amount of the post-petition payments will the Plaintiff-
8 Debtor, OneWest Bank, FSB, and the Chapter 13 Trustee know the
9 correct amount to be paid monthly. Determination of this amount is
10 independent of any determination as to whether OneWest Bank, FSB's
11 conduct violated the automatic stay. Merely because the parties
12 disagree as to the correct computation of a post-petition payment
13 does not automatically create an actionable violation of the
14 automatic stay.

15 The Motion is denied as to the claim for Declaratory Relief
16 against OneWest Bank, FSB.

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

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

1 1. OneWest Bank, FSB generated no less than (8) eight post-
2 petition mortgage changes in this case based on post-petition
3 escrow analyses. FAC, ¶ 47.

4 2. OneWest Bank, FSB the issued the post-petition mortgage
5 changes for the purpose of collecting pre-petition claims.
6 FAC, ¶ 48.

7 3. OneWest Bank, FSB purposefully and systematically
8 utilized the Chapter 13 procedures and rules, the Chapter 13
9 Trustee, and local rules to put pressure on the Plaintiff-Debtor to
10 pay the increased post-petition loan payments. FAC, ¶ 50.

11 4. OneWest Bank, FSB willfully and intentionally sought to
12 obtain payment on pre-petition claims through increased post-
13 petition Note payments. FAC, ¶¶ 80, 81.

14 5. OneWest Bank, FSB's use of post-petition notices of Note
15 payment increases was intentional, with knowledge of the automatic
16 stay, systematic, and to collect pre-petition amounts owed by
17 Plaintiff-Debtor. FAC, ¶¶ 65, 66, 67, 68.

18 6. OneWest Bank, FSB knew that when the Chapter 13 Trustee
19 received the notices of post-petition increased Note payments, the
20 Trustee would collect the increased amount from the Plaintiff-
21 Debtor for the unidentified "Defendants." FAC, ¶ 99.

22 7. OneWest Bank, FSB increased the post-petition Note
23 payments with the knowledge that it was improper and would not be
24 permitted by the court unless it was so provided in a confirmed
25 Chapter 13 plan or pursuant to an order granting relief from the
26 automatic stay. FAC, ¶ 106.

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

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

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

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

1 claim subject to the automatic stay provisions of 11 U.S.C.
2 § 362(a). *Id.* at 354. However, the only conduct by Countrywide in
3 *Campbell* was filing a proof of claim stating the higher installment
4 amount. Filing a proof of claim, even one which grossly overstates
5 the claim, was not held to be a violation of the automatic stay.
6 *Id.* at 356.

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

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

1 which are accompanied by coercion or harassment. *Zotow*, 432 B.R.
2 at 259. Relying on *Morgan Guar. Trust Co. Of N.Y. v. Am. Sav. And*
3 *Loan Ass'n*, 804 F.2d 1487, 1491 (9th Cir. 1986), the Panel
4 concluded that a mere request for payment and informational
5 statement are permissible communications which do not violate the
6 automatic stay. *Id.* The Bankruptcy Appellate Panel also recognizes
7 that, "Whether a communication is a permissible or prohibited one
8 is a fact-driven inquiry which makes any bright line test
9 unworkable." *Id.* at 258.

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

27 ²/ This predated the amendment to 11 U.S.C. § 362(b)(10)
28 which exempts presentment of a negotiable instrument from the
automatic stay.

1 collect a delinquent account, (5) college refusing to release
2 transcripts as a method to force payment, and (6) a creditor who
3 made repeated visits and telephone calls to a debtor. *Id.*
4 Examples of communications not violating the automatic stay
5 included: (1) letter sent to debtor's attorney that a credit union
6 would not have further business dealings with the debtor unless
7 debt was reaffirmed, and (2) communications setting out the basis
8 of the claim (informal proof of claim). *Id.*

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

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

26 The present adversary proceeding is significantly different
27 than *Zotow*. A review of the FAC reveals the following allegations
28 are that:

1 1. OneWest Bank, FSB conducted an improper post-petition
2 escrow analysis to assert an improper post-petition installment
3 amount due;

4 2. OneWest Bank, FSB repeatedly and intentionally collected
5 the improper post-petition installments.

6 3. OneWest Bank, FSB's improper post-petition escrow
7 analyses were part of the post-petition improper collection
8 activities of OneWest Bank, FSB.

9 4. OneWest Bank, FSB notified the Chapter 13 Trustee of the
10 improper post-petition installment amounts as part of its
11 intentional conduct.

12 5. OneWest Bank, FSB routinely fails to distinguish between
13 pre- and post-petition bankruptcy claims when conducting post-
14 petition escrow analyses. FAC ¶¶ 3, 64.

15 6. OneWest Bank, FSB's failure to distinguish between pre-
16 and post-petition bankruptcy claims is done with the knowledge that
17 it will result in the collection of higher post-petition mortgage
18 payments. FAC ¶¶ 3, 44.

19 7. The Proof of Claim filed by OneWest Bank, FSB all past
20 due mortgage payments, property taxes and insurance actually
21 advanced, and escrow advances. FAC ¶ 41.

22 8. OneWest Bank, FSB generated no less than eight (8)
23 notices of post-petition changes in mortgage payments since the
24 commencement of the case. FAC ¶ 47.

25 9. OneWest Bank, FSB's purpose in generating the eight (8)
26 notices of post-petition changes in mortgage payments was geared to
27 collect pre-petition claims. FAC ¶ 48.

28 10. OneWest Bank, FSB purposely and systematically utilized

1 the Chapter 13 procedure and rules, Chapter 13 Trustee, and local
2 rules to pressure the Plaintiff-Debtor to pay the increased post-
3 petition installments, FAC ¶ 50, which included pre-petition
4 claims, FAC ¶¶ 48, 65, 66, 68.

5 11. Through OneWest Bank, FSB providing the eight (8) notices
6 of post-petition payment increases, motions to dismiss the case
7 (for failure to pay the full post-petition increased mortgage
8 payment), and objections to confirmation (for failure to pay the
9 full post-petition increased mortgage payment), OneWest Bank, FSB
10 received at least four (4) payments of pre-petition claims through
11 the increased post-petition payments. FAC ¶ 51.

12 12. OneWest Bank, FSB's failure to distinguish between pre-
13 and post-petition bankruptcy claims is done with the knowledge that
14 it will result in the collection of higher post-petition mortgage
15 payments is part of an intentional, systematic, practice to
16 improperly obtain payment on pre-petition claims. FAC ¶¶ 51, 71.

17 13. OneWest Bank, FSB's repetitive conduct in including pre-
18 petition claim amounts in post-petition mortgage payments resulted
19 in OneWest Bank, FSB receiving significantly more than what it was
20 entitled to receive in distributions under the Bankruptcy Code.
21 ¶ 73.

22 14. OneWest Bank, FSB knew that each time it sent the eight
23 (8) notices of a post-petition increase in mortgage payment the
24 result would be that the Chapter 13 Trustee would collect that
25 amount for payment to OneWest Bank, FSB. ¶ 99.

26 15. OneWest Bank, FSB knew that the Chapter 13 Trustee would
27 collect the increased post-petition payment from the Plaintiff-
28 Debtor by objecting to confirmation of the Plaintiff-Debtor's plan

1 on feasibility if it did not provide for payment of the amount
2 computed by OneWest Bank, FSB. ¶ 99.

3 16. OneWest Bank, FSB filed objections to confirmation
4 asserting the right to the increased post-petition payments as part
5 of its systematic efforts to obtain payment of pre-petition claims
6 through increased post-petition mortgage payments. ¶¶ 100, 101.

7 17. OneWest Bank, FSB acted with the knowledge that it was
8 not permitted to obtain payment of pre-petition claims through an
9 increase in post-petition mortgage payments absent a specific
10 provision in a Chapter 13 plan or express order of the court.
11 ¶ 106.

12 With respect to OneWest Bank, FSB, the only named Defendant
13 who has participated in this bankruptcy case and to whom the above
14 conduct is identified in the FAC, the Plaintiff-Debtor alleges a
15 pattern of conduct in which OneWest Bank, FSB attempts to obtain
16 payment on a pre-petition claim outside the strictures of the
17 Bankruptcy Code. As in *Rodriguez and Campbell*, the allegation is
18 that OneWest Bank, FSB has used the process of sending notices that
19 its post-petition mortgage payments are in an increased amount with
20 the intention and knowledge that the increased amount is to recover
21 pre-petition claims which should properly be paid through a Chapter
22 13 plan. This is not a situation, as in *Zotow* where one notice was
23 sent informing the trustee and debtor of the computed post-petition
24 mortgage payment. Rather, it has been specifically alleged that
25 OneWest Bank, FSB knowingly and intentionally did so on multiple
26 occasions to induce the Chapter 13 Trustee to collect for OneWest
27 Bank, FSB the pre-petition claim as part of a post-petition
28 mortgage payment.

1 Recently the Ninth Circuit Court of Appeals addressed whether
2 conduct in a judicial proceeding immunized a creditor from
3 contentions that the conduct violated federal law. In *McCollough*
4 *v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939 (9th Cir.
5 2011), the Ninth Circuit addressed a claim under the Federal Fair
6 Debt Collection Practices Act, 15 U.S.C. § 1692a et. seq.
7 ("FDCPA"). In that case the conduct of the creditor at issue
8 related to discovery which had been promulgated in a state court
9 action. The FDCPA prohibits a debt collector from engaging in
10 false, deceptive or misleading means in the collection of a debt.
11 The creditor requested the admission of alleged facts which the
12 creditor knew to be false. Additionally, the creditor failed to
13 include in the request for admissions the required state notice
14 that failure to respond would be a deemed admission. The Court
15 found that requests for admissions in the state court action were
16 a violation of federal law protecting the consumer debtor.
17 Admission, was a false, deceptive, misleading means in collecting
18 a debt. The court rejected the collector's contention that such
19 misconduct would be solely governed by the local court rules and
20 state law corrective remedies. The court is to apply the clear
21 statutory language as enacted by Congress, and not rewrite the
22 statute for policy reasons. *Id.*, p. 951.

23 The same, plain language rationale applies to the Bankruptcy
24 Code and RESPA. OneWest Bank, FSB's argument that RESPA creates a
25 free floating exemption from the automatic stay for however it
26 computes and seeks payment of post-petition mortgage installments
27 is as unpersuasive with this court as that argument has been with
28 the courts in *Rodriguez* and *Campbell*. While the Bankruptcy Code

1 does not prohibit adjustments for post-petition changes authorized
2 by RESPA, the automatic stay provisions of 11 U.S.C. §362(a)
3 prohibit the collection of pre-petition debts outside of the
4 bankruptcy. Had Congress intended to exempt only demands for
5 payment cloaked in RESPA from the automatic stay it would have said
6 so in a clear and unambiguous manner. Congress clearly knows how
7 to make an exception to the automatic stay, see 11 U.S.C. §362(b),
8 and the court will not imply that Congress gave Central Mortgage
9 Company and other servicers or note owners free reign to do
10 whatever they sought to obtain payment on pre-petition claims
11 without regard to the Bankruptcy Code.

12 As compared to the creditor in *Morgan* who made one, innocent
13 (without knowledge of the bankruptcy filing by Johns Manville)
14 communication, it is alleged that OneWest Bank, FSB has engaged in
15 multiple acts, with full knowledge of the bankruptcy case, which
16 are specifically intended to collect pre-petition claims through
17 post-petition mortgage payments which are not otherwise authorized
18 by the Bankruptcy Code. It is further specifically alleged that
19 these multiple acts are done with the further knowing and
20 intentional coercive conduct of OneWest Bank, FSB having the
21 Chapter 13 Trustee require the payment of the improperly computed
22 amounts under the threat of dismissing the Plaintiff-Debtor's
23 bankruptcy case. Additionally, it is alleged that OneWest Bank,
24 FSB affirmative asserting that it is entitled to the improperly
25 computed post-petition mortgage payments in objecting to the
26 Plaintiff-Debtor's Chapter 13 plan. Further, it is alleged that
27 OneWest Bank, FSB has not only received multiple improperly
28 computed post-petition mortgage payments, but that such payments

1 improperly divert distributions of monies under the bankruptcy
2 plan, thereby hindering the proper administration of this case.

3 In connection with a motion to dismiss, the court does not
4 determine the merits of the allegations, but only whether a
5 plausible claim is asserted. Whether the Plaintiff-Debtor can
6 actually prove facts to support the allegations is left to the
7 trial or other dispositive proceeding. But would be improper of
8 the court to prejudge the provability of the merits of these
9 allegations on a motion to dismiss.

10 The motion to dismiss the Second and Third Causes of Action³
11 for violation of the automatic stay against OneWest Bank, FSB is
12 denied.

13 **FOURTH CAUSE OF ACTION**
14 **VIOLATION OF REAL ESTATE SETTLEMENT PROCEDURES ACT**

15 Plaintiff-Debtor alleges that the Note is subject to loan
16 servicing provisions of RESPA. It is further alleged that under
17 RESPA the Defendants were required to provide Plaintiff-Debtor with
18 written notice of each sale or transfer of the assignment, sale or
19 transfer of the loan or changes in the servicer for the loan.

20 The Complaint alleges that the various Defendants alleged to
21 have acquired and transferred the note, until it ultimately ended
22 up with OneWest Bank, FSB failed to provide such written notices.
23 Plaintiff-Debtor further asserts that the Defendants have violated
24 RESPA by improperly computing the monthly post-petition

25
26 ³ The Third Cause of Action asserts a "violation" of 11
27 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 installments which have been demanded and collected from the
2 Plaintiff-Debtor. Additionally, that Defendants have failed to
3 refund or credit back charges for improperly placed insurance, and
4 have sent Plaintiff-Debtor incorrect post-petition RESPA escrow
5 analyses.

6 As correctly stated by Defendants, while a private right of
7 action exists for the failure to provide the servicing notice, the
8 Plaintiff-Debtor must assert a damage claim caused by the failure
9 to provide the notice. 12 U.S.C. § 2605(f), *Jensen v. Quality Loan*
10 *Serv. Corp.*, 702 F. Supp. 2d 1183, 1196-1197 (E.D. Cal. 2010), and
11 *Wilson v. JP Morgan Chase Bank*, 2010 U.S. Dist. LEXIS 63212 (E.D.
12 Cal. 2010). From a review of the Amended Complaint, the Plaintiff-
13 Debtor does not assert any damages arising from the failure to
14 provide the notices of change in servicer.

15 An additional RESPA claim has been asserted for the improper
16 calculation of post-petition installments. The Complaint is clear
17 that the only alleged conduct in asserting an increase in post-
18 petition installments has been by OneWest Bank, FSB. However, as
19 asserted by Defendants, no private right of action is provided for
20 a violation of the limitation on the requirements for advance
21 deposits in escrow accounts pursuant to 12 U.S.C. §2604. See
22 *Hensley v. Bank of N.Y. Mellon*, 2010 U.S. Dist. LEXIS 135812 (ED
23 Cal. 2010), and *Brohpy v. Chase Manhattan Mortgage Co.*, 947 F.
24 Supp. 879, 883 (E.D. Penn. 1996).

25 The Fourth Cause of Action is dismissed, without prejudice.
26 No leave to amend is granted at this time.

27 CONCLUSION

28 The court grants the Motion and dismisses the Complaint and

1 all causes of action as to Mortgage Electronic Registration
2 Systems, Inc., IMB HoldCo, LLC, IMB Management Holdings, LLC,
3 OneWest Venture, LLC, FAC, and OneWest Bank Group, LLC without
4 prejudice and without leave to amend.

5 The court grants the Motion and dismisses the Fourth and Fifth
6 Cause of Action as to OneWest Bank, FSB, without prejudice and
7 without leave to amend.

8 The court denies the Motion as to the First, Second, and Third
9 Causes of Action as to OneWest Bank, FSB.

10 This Memorandum Opinion and Decision constitutes the court's
11 findings of fact and conclusions of law pursuant to Fed. R. Civ. P.
12 52, and Fed. R. Bankr. P. 9014 and 7052.

13 The court shall issue an order consistent with this ruling.

14 Dated: June 30, 2011

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