UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

March 21, 2019 at 11:00 a.m.

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1. **15-28908-E-13** **WILLIAM/SARAH MCGARVEY** **CONTINUED MOTION FOR SUMMARY**
18-2053 **DKM-3** **JUDGMENT**
MCGARVEY V. USAA SAVINGS BANK **1-16-19 [41]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served only on Plaintiff's counsel on January 16, 2019. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion for Judgment on the Pleadings has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Judgment on the Pleadings is denied.

Sarah McGarvey ("Plaintiff") filed the instant case on April 27, 2018, against USAA Savings Bank ("Defendant"). On July 6, 2018, Plaintiff filed an Amended Complaint. Dckt. 18.

Plaintiff seeks claims for willful violation of the automatic stay. The grounds (stated in the Amended Complaint) upon which these claims are based are as follows:

A. The Consumer Data Industry Association (the "CDIA") sets the industry standard for credit reporting. *Id.* , ¶ 12.

B. A guide published by the CDIA recommends creditors not report ongoing delinquencies after a bankruptcy is filed. *Id.* , ¶ 15.

C. A guide published by the CDIA recommends creditors fill out a Consumer Information Indicator ("CII") where a consumer has a special condition such as bankruptcy. *Id.* , ¶ 14–19.

D. The CDIA recommends using CII designation "D" to indicate a consumer has filed bankruptcy to indicate that creditors are not free to collect against the consumer. *Id.* , ¶ 20–24.

E. Creditors use credit reporting as a means to coerce payment from debtors; "Specifically, when consumers become delinquent on their debts creditors will often warn consumers that failure to pay their delinquent balance will result in their delinquency being reported to the major credit reporting agencies." *Id.* , ¶ 26–27.

F. Defendant "as a policy to enhance collection activities will call and send letters to debtors warning that failure to pay a debt will result in a delinquency being reported to the main credit bureaus." *Id.* , ¶ 35.

G. Defendant reports delinquencies for the purpose of coercing debtors to pay. *Id.* , ¶ 34.

H. Defendant knows that by failing to report the CCI "D" designation to indicate a consumer filed bankruptcy, together with continued reporting of the delinquency, that the Plaintiff-Debtor would be coerced into making payments because Defendant "knows that such reporting alerts other lenders that this debt SHOULD be paid but has not been paid." *Id.* , ¶ 36.

I. Defendant was sent actual notice of the automatic stay in Plaintiff-Debtor's Chapter 13 bankruptcy case, filed on November 16, 2015. *Id.* , ¶ 9–10; Dckt. 1.

J. Post-filing, Defendant continued to report on Plaintiff-Debtor's credit report that her account was in collections with a past-due balance owed. *Id.* , ¶ 11.

K. Defendant filed two separate claims in Plaintiff-Debtor's Chapter 13 bankruptcy case on January 26, 2016. *Id.* , ¶ 15.

L. Defendant, by failing to update its reporting on Plaintiff-Debtor's credit report, acted with intent and Plaint-Debtor believes the collections

notation and past-due balance related to Defendant's claims will only be removed by paying the Defendant. *Id.* , ¶ 20–21.

M. Defendant is "simultaneously attempting to receive payment from" the Plaintiff-Debtor as well as under the Chapter 13 plan. Id. , ¶ 22.

N. Defendant's employee Beverly Bain ("Bain") received notice of Plaintiff-Debtor's dispute over the credit reporting and her bankruptcy filing, but intentionally failed to update the CII and continued reporting delinquency in an attempt to coerce payment. *Id.* ¶ 46–51.

O. Plaintiff-Debtor argues Defendant willfully violated the automatic stay under 11 U.S.C § 362(a)(6) by reporting Plaintiff-Debtor delinquent and in collections on her credit report, by failing to report that the account was included in bankruptcy, and by continuing to report that information after Plaintiff disputed it with the credit reporting agencies. *Id.* , ¶¶ 48-54.

12(b)(6) Motion To Dismiss &
Remaining Cause of Action

Defendant filed a Motion To Dismiss for failure to state a claim on July 18, 2018. Dckt. 22. After a hearing, the court issued an Order granting the Motion To Dismiss and dismissing all claims with the exception of:

> The claim stating relief for the alleged failure of Defendant to update, correct, or include in the information reported to the consumer reporting agencies that the asserted obligation owed to Defendant is included in or subject to Plaintiff-Debtor's bankruptcy case.

Motion for Judgment on the Pleadings

On January 16, 2019, Defendant filed the instant Motion for a Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c). Dckt. 41. Movant asserts the following:

1. The Fair Credit Reporting Act limits but does not require a creditor to report a bankruptcy filing to credit bureaus. Dckt. 41 at 2:18.5-23.5.

2. Until the debt has been discharged in bankruptcy, the delinquent debt still exists. Because indicating a bankruptcy has been filed does not affect the existence of a debt (without a discharge), neither reporting or not reporting the bankruptcy are an act to collect debt. [FN. 1]

FN. 1. As a point of bankruptcy law, even after a discharge the debt does still exist, but the discharge injunction imposed by Congress in 11 U.S.C. § 524 prevents a creditor from attempting to enforce it against the debtor personally, community property of the debtor included in the bankruptcy case, and post-petition property of a debtor. It does not make unenforceable a pre-petition lien against property of the debtor to which it attached prior to the commencement of the bankruptcy case.

DEFENDANT'S SUPPLEMENTAL REPLY

Defendant filed a Reply and Notice of Non-Opposition on February 14, 2019. Dckt. 45. Defendant argues that Plaintiff failed to serve a reply by February 7, 2019, and therefore the Motion should be resolved without oral argument, with any subsequent opposition stricken. Defendant states he contacted counsel for Plaintiff on February 13, 2019 and learned Kyle Shumacher was no longer with the firm Sagaria Law, P.C.

This pleading raises an interesting question concerning Defendant providing incomplete information. The pleading is titled as a Reply and "**NOTICE OF NON-OPPOSITION**." Thus, it appears that there is an affirmative statement of non-opposition by the Plaintiff to Defendant's Motion. As shown by the Opposition filed, a statement giving Notice of Non-Opposition is clearly inaccurate and misleading.

Reading the pleading further, Defendant states that it affirmatively states the "**NOTICE OF NON-OPPOSITION**" based solely on the ability of the court to enter a party's default when no opposition is filed and the court **may** decide the matter on the pleadings. Such discretion of the court is not a mandated "**NOTICE OF NON-OPPOSITION**."

At the hearing, Defendant's counsel addressed filing an affirmative "NOTICE OF NON-OPPOSITION" and the basis therefore (beyond merely that the court **may** decide a contested matter on the pleadings if no opposition is filed), stating xxxxxxxxxxxxxxx.

PLAINTIFF'S OPPOSITION

Plaintiff filed an Opposition on February 14, 2019. Dckt. 47. Plaintiff states that she filed an untimely response because the counsel of record Kyle Shumaker left the Sagaria Law firm in December 2018 after Scott Sagaria passed away. Plaintiff consents to moving the hearing date to provide more time for Defendant to reply to Plaintiff's grounds for opposing the Motion.

Plaintiff argues in its Opposition that Defendant is relitigating the same issue decided by this court in a prior Motion To Dismiss. *See* Dckt. 22. Plaintiff disputes Defendant's assertion there is no requirement to report a bankruptcy filing to credit reporting agencies.

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION

Defendant filed a Reply to Plaintiff's Opposition on February 15, 2019. Dckt. 48. Defendant argues the present Motion is aimed at the issue remaining from the prior Motion To Dismiss, specifically whether Defendant has a legal obligation to report a bankruptcy filing. Defendant asserts that the following in its Reply:

1. The Opposition is untimely and should be stricken.

2. The case law cited by McGarvey does not address whether USAA SB has a legal obligation to report a bankruptcy filing.

3. Plaintiff ignores the distinction between a bankruptcy filing and discharge.

4. The Fair Credit Report Act ("FCRA") does not require a creditor to report a bankruptcy filing

5. A credit report is not inaccurate because a bankruptcy filing is not reported in the tradeline

FEBRUARY 21, 2019 HEARING

The February 21, 2019, hearing, was conducted by the judge remotely by phone. Civil Minutes, Dckt. 50. As the court was finishing the 10:30 calendar, a brief recess was taken. Counsel for Defendant believed that it would be a "normal" length recess of ten minutes or more. Counsel stepped out of the courtroom. However, the "recess" was less than a minute. The court quickly finished the last matter on the 10:30 a.m. calendar and immediately called this item. Counsel for Plaintiff did not realize opposing counsel was in the courtroom but had stepped out. The judge, not being in the courtroom, was not aware of an attorney who was present and not yet appearing in a matter. The court concluded the matter, making the tentative ruling final.

Counsel for Defendant then returned to the courtroom and explained the situation. Counsel being present and the court not yet having entered an order, the court continued the hearing to the next available date, March 21, 2019, at 11:00 a.m. Order, Dckt. 51.

APPLICABLE LAW

Federal Rule of Civil Procedure 12(c) Standard

On a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), the allegations of the non-moving party must be accepted as true, while the allegations of the moving party, which have been denied, are assumed to be false. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*,

896 F.2d 1542, 1548 (9th Cir. 1989). Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Id.* Dismissal is proper only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim that would entitle him to relief. *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1115 (C.D. Cal. 2004). While the court must construe the complaint and resolve all doubts in the light most favorable to the plaintiff, the court does not need to accept as true conclusory allegations or legal characterizations. *Id*. (*citing General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988)).

A motion for judgment on the pleadings based on Federal Rule of Civil Procedure 12(c) is a functional equivalent of a motion to dismiss under Federal Rule of Civil Procedure 12(b), requiring the same underlying analysis. *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). Thus, for a complaint to withstand a Rule 12(c) motion for judgment on the pleadings, it must contain more detail than "bare assertions" that are "nothing more than a formulaic recitation of the elements" required for the claim. *Ashcroft v. Iqbal,* 556 U.S. 662, 681 (2009). Courts must draw upon their "experience and common sense" when evaluating the specific context of the complaint and whether it contains the necessary detail to state a plausible claim for relief. *Id.* at 679. The factual content on the face of the complaint—not conclusory statements in the pleading—and reasonable inferences drawn from those facts must plausibly suggest that the plaintiff could be entitled to relief for the pleading to survive a Rule 12(c) motion. *See id.* at 677.

FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act (the "FCRA") provides the following:

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies

exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures

It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C § 1681. The FCRA also provides:

(a) Duty of furnishers of information to provide accurate information

(1) Prohibition

(A) Reporting information with actual knowledge of errors

A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.

(B) Reporting information after notice and confirmation of errors

A person shall not furnish information relating to a consumer to any consumer reporting agency if–

(I) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and

(ii) the information is, in fact, inaccurate.

. . .

(2) Duty to correct and update information. A person who--

(A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and

> (B) has furnished to a consumer reporting agency information that the person determines is not complete or accurate, shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.

15 U.S.C. § 1681s-2.

DISCUSSION

Defendant seeks to make the sole remaining claim in the Amended Complaint a legal issue, where there is clearly a dispute of fact.

The Amended Complaint alleges:

> **Defendant was sent actual notice** of the automatic stay in Plaintiff-Debtor's Chapter 13 bankruptcy case, filed on November 16, 2015. Dckt. 18 , ¶ 9–10.
>
> Post-filing, **Defendant continued to report** on Plaintiff-Debtor's credit report that her account was in collections with a past-due balance owed. *Id.* , ¶ 11.
>
> **Defendant, by failing to update its reporting on Plaintiff-Debtor's credit report, acted with intent** and Plaintiff-Debtor believes the collections notation and past-due balance related to Defendant's claims will only be removed by paying the Defendant. *Id.* , ¶ 20–21.
>
> Defendant is "simultaneously attempting to receive payment from" the Plaintiff-Debtor as well as under the Chapter 13 plan. Id. , ¶ 22.
>
> **Defendant's employee Beverly Bain** ("Bain") received notice of Plaintiff-Debtor's dispute over the credit reporting and her bankruptcy filing, but **intentionally failed to update the CII and continued reporting delinquency in an attempt to coerce payment**. *Id.* ¶ 46–51.
>
> Plaintiff-Debtor argues Defendant willfully violated the automatic stay under 11 U.S.C § 362(a)(6) by reporting Plaintiff-Debtor delinquent and in collections on her credit report, by failing to report that the account was included in bankruptcy, and by continuing to report that information after Plaintiff disputed it with the credit reporting agencies.

Id. , ¶¶ 48-54(emphasis added).

The Amended Complaint extensively discussed the industry standard with respect to reporting. *See Id.*, ¶¶ 12-24. As addressed above, 15 U.S.C. § 1681s-2(a)(2) provides that if a furnisher of information learns that information is not complete or accurate, the furnisher "shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate. . . ." Plaintiff asserts that failing to include reporting that the obligation was subject to Plaintiff's bankruptcy case rendered the reported information "not complete" and "not accurate."

The court notes that in connection with the prior Motion To Dismiss already noted there does not appear to be an obligation to report bankruptcy filings, the court stated:

> On its face, 15 U.S.C. § 1681s-2 does not require the reporting when a consumer files bankruptcy. 15 U.S.C. § 1601c(d) does require the consumer reporting agency to include the chapter under which a consumer has or had a bankruptcy case, if the consumer reporting agency includes information about the filing of a bankruptcy case by the consumer. But this provision does not mandate the reporting of the bankruptcy.

Civil Minutes, Dckt. 29. While not mandating reporting the bankruptcy information, that Code section is written in the negative, prohibiting furnishing inaccurate information.

Assuming Plaintiff's allegations are true (as is required), Defendant failed to update credit reporting to reflect a bankruptcy filing with the specific intent to coerce Plaintiff into paying on the underlying obligation. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1548 (9th Cir. 1989). This claim is substantiated with allegations that it is industry practice to update filings, and that businesses are generally knowledgeable that failing to update a credit report could exert pressure on a debtor.

On the pleadings, Defendant does not prevail on the law, the question existing as to whether failing to report the bankruptcy rendered the information furnished incomplete or inaccurate. The court can anticipate a number of witnesses addressing the standards of the credit furnishing and reporter industries and the effect of including and not including information that a debt is included in a bankruptcy case.

Defendant makes an "interesting argument" that may manifest a shortcoming in appreciating the FCRA. In contending that failing to include information that a reported debt is the subject of a pending bankruptcy case cannot be inaccurate information about the debt reported, Defendant argues:

> Fourth, a credit report is not inaccurate because a bankruptcy filing is not reported in the tradeline. If a lender needs to know exactly what credit accounts are included in the bankruptcy, that information is public information that is not subject to any sort of imagination.

Reply, p. 2:23.5-26.5. No authority is shown for the proposition that Congress intends that information

is not “inaccurate” so long as some other user of information can spend time and money completing incomplete information provided by a furnisher to a consumer reporting agency.

Movant

The Motion is denied.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Judgment on the Pleadings filed by USAA Savings Bank (“Defendant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied.

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2. **18-27039-E-13 NADIA KOSTYUK**
18-2195

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
2-28-19 [41]

KOSTYUK V. BBV PROFIT SHARING PLAN ET AL
REISSUED SUMMONS SET FOR MAY, 29, 2019 AT 2:00 P.M.

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty:
Joyce K. Lau; Harris L. Cohen [BBV Profit Sharing Plan; Milestone Financial, LLC; Bear Bruin Ventures, Inc.; William R. Stuart]
unknown [Del Toro Loan Servicing; Independent Note & Contract Services, LLC; Mortgage Lender Services, Inc.; Nationwide Posting & Publication]

Adv. Filed: 12/6/18
Answer: none

Amd. Cmplt. Filed: 2/28/19
Answer: none

Nature of Action:
Recovery of money/property - turnover of property
Recovery of money/property - preference
Recovery of money/property - fraudulent transfer
Recovery of money/property - other
Validity, priority or extent of lien or other interest in property

The Status Conference is xxxxxxxxxxxxxxxxxx

Notes:
Continued from 2/20/19

Amended Complaint filed 2/28/19 [Dckt 41]; reissued summons set for 5/29/19 at 2:00 p.m.

[PGM-1] Plaintiff's Motion for a Preliminary Injunction and/or Temporary Restraining Order filed 3/7/19 [Dckt 43], set for hearing 4/4/19 at 11:00 a.m.

3. **18-27039-E-13 NADIA KOSTYUK**
18-2195 JKL-1
KOSTYUK V. BBV PROFIT SHARING PLAN ET AL

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING
1-23-19 [9]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided - Opposition Filed. The Proof of Service states that the Motion and supporting pleadings were served solely on Defendant's attorney(s) on January 23, 2019. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is granted and the Complaint is dismissed without prejudice. No leave to file an amended complaint is granted.

REVIEW OF MOTION

BBV Profit Sharing Plan, Milestone Financial, LLC, Bear Bruin Ventures, Inc., and William R. Stuart ("Defendant") moves for the court to dismiss all claims against it in Nadia Kostyuk's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

The Defendants have filed a Motion to Dismiss which merely states the legal conclusion that each of the claims should be dismissed. Motion, Dckt. 9. Federal Rule of Civil Procedure 7(b)(1)(B), as incorporated by Federal Rule of Bankruptcy Procedure 7007 requires that the motion itself must state with particularity the grounds, not merely the relief requested. Defendants have filed a Points and Authorities that may state grounds; among the legal authorities, arguments, and contentions; but the

court is reluctant to try and state for the parties the required grounds that it may mine from those buried in a points and authorities.

APPLICABLE LAW

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* (citing 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. 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 and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 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*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

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

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor filed an Opposition on February 6, 2019. Dckt. 22. Plaintiff-Debtor does not oppose the dismissal of claims #1, 2, 4-7, and 10-12. However Plaintiff-Debtor argues the foreclosure sale on her residence is void. Plaintiff-Debtor requests time to amend the complaint to add allegations of violation of the automatic stay, breach of contract, rescission, quiet title, and wrongful foreclosure.

DEFENDANT'S RESPONSE

Defendant filed a Memorandum in response to Plaintiff's Opposition on February 12, 2019. Dckt. 29. Defendant notes Plaintiff does not oppose dismissal of claims #1, 2, 4-7, and 10-12, and asserts the remaining claims are 3–recision, 8–quiet title, and 9–wrongful foreclosure.

As to those remaining claims, Defendant argues :

1. Recision is not its own claim, but is rather a remedy.

2. Plaintiff is not on title and therefore lacks standing to bring quiet title.

3. A wrongful foreclosure claim is without merit because: (1) impacts to Plaintiff's credit are not grounds for wrongful foreclosure; (2) Plaintiff defaulted on her loan; (3) Plaintiff has not offered tender and therefore cannot bring a wrongful foreclosure action.

FEBRUARY 21, 2019 HEARING

At the February 21, 2019 hearing, the court noted various counsel of Plaintiff-Debtor having provided conflicting information concerning this Complaint. The former counsel said that it was to be amended. Replacement counsel then advocated for a May 2019 trial - notwithstanding no answer yet having been filed.

The court also noted there was a hearing on the Chapter 13 Trustee's Motion to Dismiss the Plaintiff-Debtor's Chapter 13 case the same day. The court's tentative decision was to grant the motion and dismiss the case.

Given that a dismissal of the Plaintiff-Debtor's bankruptcy case may render this proceeding inappropriate, the court continued the hearing on the Motion to Dismiss, also allowing Debtor and Debtor's Replacement Counsel to consider whether the Complaint and the causes of action they really intend to pursue, the discovery they require, and when they actually will be ready to go to trial.

Continuing the hearing also allowed Defendants to review their Motion and determine, after considering the applicable Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure, whether their Motion is sufficient or it needs to be amended to avoid having it denied.

DISCUSSION

Since the prior hearing, on February 25, 2019, the Plaintiff-Debtor's Chapter 13 case was dismissed. 18-27039; Order, Dckt. 121. In the month that has transpired since the dismissal, Plaintiff-Debtor has not sought to vacate the dismissal and no appeal was taken from the order dismissing the bankruptcy case.

What Plaintiff Debtor has done is file a "Motion for Preliminary Injunction and/or Temporary Restraining Order." Motion, Dckt. 43. The hearing on the Motion is set for April 4, 2019.

In stating the basis for federal court jurisdiction Plaintiff-Debtor states:

> 2. The predicates for the relief requested herein are section 105(a) of the Bankruptcy Code, Bankruptcy Rule 9006, and Local Rule 9013-1(N).

Id. ¶ 2. Here, it appears that Plaintiff-Debtor is seeking a preliminary injunction, for which Federal Rule of Civil Procedure l56 and Federal Rule of Bankruptcy Procedure 7001 and 7056 are applicable.

The Motion continues, stating:

> 4. Plaintiff filed the instant First Amended Adversary Proceeding on February 28, 2019, against Defendant for Violation of 11 U.S.C. 362(c)(4) and assorted causes of action (see Exhibit #1) which results in a void sale.

Id. ¶ 4. The provision of 11 U.S.C. § 362(c)(4) do not provide for the automatic stay existing in a bankruptcy case, but expressly provide "the stay shall not go into effect upon the filing of the latter [bankruptcy] case [the one at issue in Plaintiff-Debtor's most recently dismissed bankruptcy case]." 11 U.S.C. § 362(c)(4). It is unclear how Plaintiff-Debtor asserts that the provisions of 11 U.S.C. § 362(c)(4) would render a foreclosure sale void. In Paragraph 4 of the Motion Plaintiff-Debtor also states that based on unspecified "assorted causes of action" the sale would also be void, referencing the court to read Exhibit 1 to discern such "associated causes of action" (and not stating them with particularity as required in Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007). *Id.*

Going to Exhibit B, Plaintiff-Debtor is correct in stating that in addition to seeking injunctive relief, the title to the pleading lists a series of eleven various state and non-bankruptcy federal law claims. Exhibit B, Adversary Complaint, p. 1; Dckt. 46. In conducting a word search of the nineteen page Amended Complaint, no reference is made to 11 U.S.C. § 362. The Plaintiff-Debtor does cite to 11 U.S.C. § 542 (turnover of property of the bankruptcy estate), 11 U.S.C. § 547 (avoidance of a pre-petition preferential transfer), 11 U.S.C. § 548 (avoidance of a pre-petition fraudulent transfer), and 11 U.S.C. § 506 (determination of secured claim status). The bankruptcy case having been dismissed, whatever property that existed (including the rights to avoid transfers) were revested back in the Plaintiff-Debtor. 11 U.S.C. § 349(b)(3).

A review of Exhibit 1 discloses that it alleges various non-bankruptcy law related claims, which should properly be asserted in the California Superior Court or, to the extent that they are based

on federal law, in the United States District Court - but not the Bankruptcy Court where the underlying bankruptcy case has been dismissed.

As the court has been told by Plaintiff-Debtor's counsel in several hearing in the bankruptcy case, the Plaintiff-Debtor is prosecuting a mirror action in the California Superior Court, having retained her experienced state court counsel to seek relief in that court system. 18-27039; Civil Minutes, p. 3 and 13, Dckt. 120. That appears to be the correct court for all of the various causes of action that appear to be asserted in the Amended Complaint filed as Exhibit 1.

At the hearing, xxxxxxxxxxxxxx.

DECISION AND CONSIDERATION OF CONSTITUTIONALLY SUFFICIENT CASE OR CONTROVERSY FOR EXERCISE OF FEDERAL COURT JURISDICTION

Based on the Motion and the events in this Adversary Proceeding, the new Amended Complaint that Plaintiff-Debtor seeks to prosecute (with no claims arising under the Bankruptcy Code or in the bankruptcy case) being secondary to a parallel state court action Plaintiff-Debtor has sought to prosecute in the California Superior Court, and Plaintiff-Debtor having forgone the prosecution of a bankruptcy case and Chapter 13 Plan, dismissal of the Complaint without prejudice is proper. With this dismissal, the court makes no judgment or determination of the merits of any of the claims asserted or sought to be asserted.

Further, there being no bankruptcy related reason for this federal court exercising jurisdiction pursuant to 28 U.S.C. § 1334 and § 157, this court purporting to so do is improper. The exercise of federal court jurisdiction is Constitutionally limited to a "case" or "controversy" as required by the United States Constitution, Article III, Section 2, Clause 1, which states,

> Sec. 2, Cl 1. Subjects of jurisdiction.
>
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States,–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

As stated by the Ninth Circuit Court of Appeals in *Southern Pacific Company v. McAdoo*,

> Unless this proceeding was within the original jurisdiction of the District Court, it could not be brought within that jurisdiction by removal. *In re Winn*, 213 U.S.

> 458, 464, 29 S. Ct. 515, 53 L. Ed. 873. Unless it presents a "case" or "controversy," within the meaning of section 2, art. 3 of the Constitution, it is not within the jurisdiction of any federal court. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 259, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191; *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289, 48 S. Ct. 507, 72 L. Ed. 880; *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 74, 47 S. Ct. 282, 71 L. Ed. 541.

82 F.2d 121, 121–22 (9th Cir. 1936).

Bankruptcy courts are courts created by Congress under Article I of the United States Constitution to administer the federal Bankruptcy Code, found in Title 11 of the United States Code. A bankruptcy court is designated as "a unit of the district court," and, each district court is given the ability to refer all bankruptcy matters to a bankruptcy court. 28 U.S.C. § 151(a) (positioning bankruptcy court within district court); 28 U.S.C. § 157(a) (providing for referral to bankruptcy court). Bankruptcy judges are judicial officers of the district court. 28 U.S.C. § 157(a).

The grant of federal jurisdiction by Congress established in 28 U.S.C. § 1334 is very broad and expansive, including not only matters arising under the Bankruptcy Code and arising in the bankruptcy case, but all other matters "related to" the bankruptcy case, whether federal jurisdiction would otherwise exist for that state law matter to be adjudicated in federal court.

While very broad in nature (and well outside the "normal" exercise of federal court jurisdiction), 28 U.S.C. § 1334 is limited to there being an issue arising under the Bankruptcy Code, in the bankruptcy case, or related to the bankruptcy case. There is no bankruptcy case, it having been dismissed. There are no issues arising in the dismissed bankruptcy case. There are no issues related to the dismissed bankruptcy case, with all rights and property of the prior bankruptcy estate now being revested in the Plaintiff-Debtor.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by BBV Profit Sharing Plan, Milestone Financial, LLC, Bear Bruin Ventures, Inc., and William R. Stuart ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Dismiss is granted and the Complaint is dismissed in its entirety.
>
> **IT IS FURTHER ORDERED** that Plaintiff-Debtor not stating to the court any claims she is seeking to prosecute for which Federal Court Jurisdiction may be exercised pursuant to 28 U.S.C. § 1334, no leave to file an amended

complaint is granted..

4. **16-22482-E-7** **TIMOTHY MUNSON** **MOTION BY G. MICHAEL WILLIAMS**
17-2206 **GMW-2** **TO WITHDRAW AS ATTORNEY**
FARRAR V. MUNSON **3-7-19 [40]**

Final Ruling: No appearance at the March 21, 2019 hearing is required.

Local Rule 9014-1(f)(1) Motion

The Motion to Withdraw as Attorney is dismissed without prejudice as moot, the court having issued an order substituting counsel.

G. Michael Williams and the firm of Ganzer and Williams (the "Movant"), counsel of record for the defendant in this Adversary Proceeding, Christie Munson ("Defendant"), filed this Motion to Withdraw on March 7, 2019. Dckt. 40.

Subsequently, a Substitution of Attorney was filed seeking to substitute Jenny D. Baysinger in as counsel for Defendant. Dckt. 46.

The court issued an Order granting the Motion, substituting Jenny D. Baysinger as attorney of record in place and stead of Movant. Order, Dckt. 47.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Withdraw as Attorney for Defendant filed by G. Michael Williams ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Withdraw as Attorney is dismissed without prejudice as moot, the court having previously issuing an order authorizing the withdrawal and substitution of counsel (Dckt. 47).