**UNITED STATES BANKRUPTCY COURT**
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

**May 15, 2014 at 1:30 p.m.**

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**1. 10-43410-E-13 MARIANN BINGHAM**
**14-2020 DBJ-1**
**BINGHAM V. OCWEN LOAN SERVICING, LLC**

**CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT**
**3-4-14 [10]**

**Tentative Ruling:** The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on March 4, 2014. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered.

**The Motion for Entry of Default Judgment is denied without prejudice.**

**CONTINUANCE**

The Parties filed a Stipulation to continue the hearing on this Motion from the April 3, 2014 hearing date. Though the Stipulation does not state the reason for the continuance or a date for the continued hearing, given the nature of the Adversary Proceeding the court will infer that the

parties are in active, responsible settlement discussions. The Complaint seeks a determination that the Defendants deed of trust is void, the full amount of its secured claim having been paid through the Chapter 13 Plan. It is asserted that the discharge has been entered and the Defendant is now enjoined pursuant to 11 U.S.C. § 524 from attempting to enforce the unsecured portion of its claim against the Plaintiff or Plaintiffs assets. FN.1.

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FN.1. As discussed below the court has previously valued the secured claim of Ocwen Loan Servicing, LLC. No proof of claim was filed for Ocwen Loan Servicing, LLC. However, Ocwen Loan Servicing, LLC did file Proof of Claim No. 1 for HSBC Bank, USA, N.A., as Trustee. Official Registry of Claims in the Plaintiffs bankruptcy case. Bankr. E.D. Cal. 10-43410. The Proof of Claim Form states that Notices and Payments to and for HSBC Bank, USA, N.A., as Trustee, are to be mailed to Ocwen Loan Servicing, LLC.

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**REVIEW OF MOTION**

Plaintiff Mariann Bingham, seeks entry of a default judgment against Defendant Ocwen Loan Servicing, LLC ("Defendant"), in this adversary proceeding. Entry of a default judgment is authorized by Federal Rule of Civil Procedure 55(b)(2), as made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7055.

This adversary proceedings was commenced on January 17, 2014. Dckt. No. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on January 17, 2014. Dckt. No. 3. The complaint and summons were properly served on Defendant. Dckt. No. 7.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055(a) by the Clerk of the United States Bankruptcy Court on February 25, 2014. Dckt. No. 9.

**FACTS**

IT appears that Defendant Ocwen Loan Servicing, LLC is the servicer for HSBC Bank USA, N.A., as Trustee for the holders of Nomura Asset Acceptance Corporation, Alternative Loan Trust, Series 2006-S3 ("HSBC"), the owner of the note and second deed of trust recorded against Plaintiff-Debtor's residence (6177 Oliver Road, Paradise, California). *See* Proof of claim No. 1.

On September 8, 2010, Plaintiff-Debtor filed a Motion to Value Collateral of Ocwen Loan Servicing, LLC, which the court granted on October 13, 2010. Dckt. Nos. 10 & 17 in Underlying Bankruptcy Case No. 10-43410. On November 1, 2010, Plaintiff confirmed a plan that purported to value the second note and deed of trust held by Defendant at $0.00. Dckt. Nos. 5 & 19. Plaintiff obtained a discharge in their bankruptcy case on January 6, 2014. The Debtor has completed her Chapter 13 Plan. Plaintiff filed this adversary proceeding against Defendant in order to determine the validity, priority or extent of Defendant's lien.

**APPLICABLE LAW**

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

(1) the possibility of prejudice to the plaintiff,
(2) the merits of plaintiff's substantive claim,
(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action,
(5) the possibility of a dispute concerning material facts,
(6) whether the default was due to excusable neglect, and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

*Id.* at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee,* 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

**DISCUSSION**

Applying these factors, the court finds that the Complaint is not sufficient and the relief requested therein is therefore not meritorious. Specifically, this Adversary Proceeding (and the underlying Motion to Value Collateral) were filed against Ocwen Loan Servicing, LLC, not HSBC, the actual owners of the subject note and second deed of trust. The court's review of the dockets for both the underlying bankruptcy, and this adversary, show that HSBC has never been a party to either the Motion to Value Collateral or this Adversary Proceeding. No motion has been filed seeking to value the claim of the actual creditor, no service has been attempted on the actual creditor, and no effort made to afford the actual creditor any due process rights. Any order issued by the court would be void as to the actual creditor.

Therefore, the court is unable to enter default against Ocwen Loan Servicing, LLC, the servicing agent for HSBC Bank USA, N.A., as Trustee for the holders of Nomura Asset Acceptance Corporation, Alternative Loan Trust, Series 2006-S3.

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 Entry of Default Judgment filed by the Plaintiff 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 for Entry of Default Judgment is denied.

**2. 10-30359-E-13 ELIZABETH LUCHINI — CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT**
**13-2321 PLC-3 — 3-10-14 [21]**
**LUCHINI V. JPMORGAN CHASE BANK N.A.**

**Tentative Decision:** The court's tentative decision is to grant the Motion and enter judgment determining the Second Deed of Trust to be null and void, award attorneys' fees, and award $500.00 in statutory damages pursuant to California Civil Code § 2941(d), and deny all other relief.

Plaintiff Elizabeth Luchini ("Plaintiff"), moves the court for a Default Judgment against JPMorgan Chase Bank N.A. (also referred to herein as "Defendant"). Jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(a), and the referral of bankruptcy cases and all related matters to the bankruptcy judges in this District. ED Cal. Gen Order 182, 223. This Adversary Proceeding is a core matter arising under Title 11, including 11 U.S.C. §§ 523(a). 28 U.S.C. § 157(b)(2)(I).

**BACKGROUND**

The Plaintiff owns real property located at 1916 Devon Avenue, West Sacramento, California, which has a fair market value of $245,0000. Exhibit A, Dckt. No. 26. Plaintiff filed her Chapter 13 bankruptcy case on April 21, 2010. As of the petition filing date, there were two liens that encumbered the subject property: a first Deed of Trust in favor of JPMorgan Chase Bank N.A. in the amount of $171,633.00 (Exhibit B, Dckt. No. 26), and a Second Deed of Trust in favor of JPMorgan Chase Bank N.A. in the amount of $43,640.14. Exhibit C, Dckt. No. 26.

Plaintiff states that as of the date of filing of the Chapter 13 bankruptcy case, only the first deed of trust was a secured claim under 11

U.S.C. §506(a). The second deed of trust was entirely unsecured. On July 2, 2010, this court determined that the second deed of trust, held by the Defendant creditor, had a secured value of zero. Exhibit E, Dckt. No. 26. Plaintiff completed her confirmed Chapter 13 Plan and was granted a discharge on November 4, 2013.

In her Adversary Complaint, Dckt. No. 1, Plaintiff alleges that the Defendant, JPMorgan Chase Bank, N.A. refused to reconvey the deed of trust in her principal residence upon her completion of her Chapter 13 plan and issuance of discharge in Plaintiff's bankruptcy. Plaintiff claims that Defendant ignored Plaintiff's repeated requests to reconvey the Second Deed of Trust, and as a result of the lack of cooperation on the Defendant Creditor's part, Plaintiff filed the instant Adversary Proceeding on October 21, 2013.

Having received no reply from the Defendant after the court issued a Summons and Notice, Dckt. No. 3, the Plaintiff served Defendant a Re-Issued Summons and Complaint on December 18, 2013. Pursuant to Federal Rule of Bankruptcy Procedure § 7012, JPMorgan Chase Bank N.A. had 30 days to respond to the summons and complaint. JPMorgan Chase Bank N.A. did not respond. Plaintiff filed its Request to Enter Default, 54 days after the Re-Issued Summons was issued under Federal Rule of Bankruptcy Procedure § 7012.

On February 12, 2014, the clerk of the bankruptcy court entered the default of Defendant JPMorgan Chase Bank, N.A. in this matter. To date, Plaintiff's counsel has not heard from any agents, employees, or counsel of JPMorgan Chase Bank N.A. regarding this proceeding.

Plaintiff claims that in preparing the Default, Plaintiff learned that JPMorgan Chase Bank N.A. recorded a reconveyance on December 17, 2013. Exhibit G, Dckt. No. 26. The reconveyance was returned back to Chase Bank. However, no one from Chase Bank contacted Plaintiff or Plaintiff's counsel of such a recording. The recording was made substantially after the adversary complaint had been filed and served, and after the 30 days given to Defendant under Civil Code 1941.

**STANDARD**

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

(1) the possibility of prejudice to the plaintiff,
(2) the merits of plaintiff's substantive claim,
(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action,
(5) the possibility of a dispute concerning material facts,
(6) whether the default was due to excusable neglect, and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

*Id.* at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee,* 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

**ANALYSIS**

The court will proceed to consider the sufficiency of the complaint and merits of Plaintiff's substantive claims, as pled in Plaintiff's Adversary Complaint filed on October 21, 2013. Dckt. No. 1.

Plaintiff owns a parcel of real property commonly known as 1916 Devon Avenue, West Sacramento, California. As of the date of filing of the petition, the property had a fair market value of approximately $245,000.00. Plaintiff filed the bankruptcy case on April 21, 2010. The following liens encumbered the property: a first Deed of Trust in the amount of $171,633.00; and a Second Deed of Trust in favor of JPMorgan Chase Bank N.A., in the amount of $43,640.14. Plaintiff states that as of the date of the filing of the Chapter 13 bankruptcy case, the second deed of trust was entirely unsecured.

On July 2, 2010, the court determined the secured claim of Creditor JPMorgan Chase Bank, N.A. to be $0.00. Exhibit B, Dckt. 1. Order, Bankr. E.D. Cal. No. 10-30359, Dckt. 22, July 2, 2010.

Plaintiff's Complaint requests a judgment ordering Defendant to reconvey a second deed of trust for her property located at 1916 Devon Avenue, West Sacramento, California, back to Plaintiff upon her completion of the Chapter 13 Plan, and the court's entry of discharge. The Complaint asserts that the Defendant is attempting to collect a debt which the Plaintiff-Debtors do not have a legal obligation to pay, since the Defendant's claim had previously been valued by the court to be a $0.00 secured claim.

The Complaint also requests attorneys fees, costs, and injunctive relief for violations of the Rosenthal Fair Debt Collection Practices Act; infringement of the Plaintiff's right of privacy under California Constitution Article 1, Section 1; and a violation of California Civil Code

§ 2941(d) for failure to reconvey a deed of trust when there is no underlying obligation for it to secure Defendant's claim. The Plaintiff also seeks an injunction against Defendant for reporting derogatory information under the Federal Fair Credit Reporting Act. Dckt. No. 1.

The court evaluates the merits of each claim asserted.

**First Claim for Relief: Ratification of Valuation of Security**

Plaintiff requests that the Court "ratify" the value stated in the Motion to Value ruled by the Honorable Ronald Sargis on July 2, 2010, pursuant to 11 U.S.C. § 506(a) and Federal Rule of Bankruptcy Procedure 3012. The Complaint appears to request that the court affirm its finding that the claim of Defendant Creditor, secured by the property commonly known as 1916 Devon Avenue, West Sacramento, California, is valued at $0.00.

On July 2, 2010, this court granted Plaintiff Debtor's Motion to Value the Secured Claim of Bank One/ Chase. Plaintiff contends that the fair market value of the subject property was $245,0000 as of the petition filing date. The court determined the secured claim of the creditor to be $0.00. The court also ordered that the balance of the allowed claim be paid as a general unsecured claim. Order, Bankr. E.D. Cal. No. 2010-30359, Dckt. 22, July 2, 2010.

Having already determined that the secured claim of Defendant Creditor to be $0.00, the court finds no reason to issue a judgment stating that the court's prior final order is "really" effective. The court's order determining the value of JPMorgan Chase Bank, N.A.'s secured claim to have a value of $0.00 is final and cannot be relitigated. The requested relief on the First Claim for Relief is not warranted and judgment shall be issued denying such relief.

**Second Claim for Relief: Determination of the Extent of the Second Trust Deed Claim**

Pursuant to 11 U.S.C § 506(a) and Federal Rule of Bankruptcy Procedure § 3012, Plaintiff requests that the Court ratify that the nature and extent of the second deed of trust was determined to be $0.00 on July 2, 2010 by order of this court. Exhibit B, Dckt. No. 1. This appears to be a rehash of the First Claim for Relief.

The court first notes that the requested relief, that the nature and extent of the Second Deed of Trust is "zero" as stated in the court's order determining the amount of the secured claim misstates the court's prior order. The court determined that the value of the "secured claim" is $0.00, not that the Second Deed of Trust is "zero." A deed of trust is an interest in real property to secure an obligation. An interest in real property is not, and does not, become "zero."

The court has already issued a final order determining that JPMorgan Chase Bank, N.A.'s secured claim, for which the Second Deed of Trust is the collateral, has a value of $0.00. The court will not issue a judgment merely restating that there is a prior final order. Plaintiff has not pleaded a claim for declaratory relief or a basis for this court making a

declaratory determination of respective disputed rights and duties of Plaintiff and JPMorgan Chase Bank, N.A. The requested relief on the First Claim for Relief is not warranted and judgment shall be issued denying such relief.

**Third Claim for Relief: Extinguishment of the Second Trust Deed Claim**

Plaintiff states that has completed her Chapter 13 Plan and requested that the Defendant remove its lien. Defendant called the Plaintiff's counsel on October 21, 2013 to tell Plaintiff that they refused to discuss the matter without separate written authorization from the debtor. No notification that the reconveyance would be issued was discussed and the Defendant's staff who called refused to discuss the matter any further.

Plaintiff now requests judgment from the court to extinguish the second deed of trust legally described as:

> The real property in the City of West Sacramento, County of Yolo, State of California, described as:
>
> Lot 104, Arlington Oaks Unit 2, in the City of West Sacramento, County of Yolo, State of California, as on the Map filed April 30, 1953 in Book 4, Page(s) 57 and 58 of Maps, in the Office of the County Recorder of said County.
>
> APN: 045-051-08-01 20.

According to the Trustee's Final Report and Account in the Plaintiff's bankruptcy case, Case Number: 2010-30359, Debtor's Plan was confirmed on July 2, 2010, and completed on May 22, 2013. Bankr. E.D. Cal. No. 10-30359, Dckt. 53, September 10, 2013. The discharge of Debtor was entered on November 4, 2013. Bankr. E.D. Cal. No. 10-30359, Dckt. 60. Plaintiff states that more than 30 days have passed and Defendants have not reconveyed, and that Plaintiff has been required to file an adversary proceeding.

Here, it appears that Plaintiff is entitled to the full reconveyance of the Deed of Trust on the property. This court has addressed in detail the California state law, standard note and deed of trust contractual basis, and possible 11 U.S.C. § 506(d) basis for a creditor having the obligation to reconvey a deed of trust upon a debtor has successfully completed the Chapter 13 Plan which provides for the payment of the secured claim in the 11 U.S.C. § 506(a) determined amount. *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien striping" in Chapter 13 case); *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. CA 2013).

Upon completion of the Chapter 13 Plan and its terms becoming the final, modified contract between the Debtor, JPMorgan Chase Bank, N.A., and creditors, there remains no obligation which is secured by the Second Deed of Trust. As a matter of California law, the Second Deed of Trust is void. FN.1. The lien is also rendered void by operation of 11 U.S.C. § 506(d) upon completion of the Chapter 13 Plan. *Martin v. CitiFinancial Services,*

*Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. CA 2013).

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FN.1. 4 WITKIN SUMMARY OF CALIFORNIA 9 LAW, TENTH EDITION, § 117, citing California Civil Code § 2939 et seq.; Rest.3d, Property (Mortgages) § 6.4; 4 Powell § 37.33; C.E.B., 2 Mortgage and Deed of Trust Practice 3d, § 8.84; and 13 Am.Jur. Legal Forms 2d, § 179:511.

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In addition, California Civil Code § 2941(b)(1) imposes a statutory obligation on the beneficiary under the deed of trust (JPMorgan Chase Bank, N.A. in this Adversary Proceeding) to reconvey the deed of trust when the obligation secured has been satisfied. The Chapter 13 Plan having been completed and JPMorgan Chase Bank, N.A. having been paid the full amount of the secured claim as determined pursuant to 11 U.S.C. § 506(a), that secured obligation has been satisfied.

Plaintiff directs the court to the Second Deed of Trust which is presented as Exhibit C in support of the Motion in connection with the Third Claim for Relief – Extinguishment of the Deed of Trust. However, Plaintiff does not direct the court to any specific portion of the Second Deed of Trust with respect to this Third Claim. The court, in reading through the Second Deed of Trust, has identified that Paragraph 23 is titled "Reconveyance." It provides that upon payment of all sums secured by the Second Deed of Trust, lender shall have the interests under the Second Deed of Trust Reconveyed. This is a contractual obligation to reconvey the Second Deed of Trust now that the Chapter 13 Plan has been completed.

The Plaintiff is entitled to a determination that the Second Deed of Trust, though not reconveyed by JPMorgan Chase Bank, N.A., is void and of no force and effect. *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012).

The relief requested under the Third Claim for Relief is granted. The court shall issue a judgment that the Second Deed of Trust is null and void, and of no force and effect, with respect to the following property:

> The real property in the City of West Sacramento, County of Yolo, State of California, described as:
>
> Lot 104, Arlington Oaks Unit 2, in the City of West Sacramento, County of Yolo, State of California, as on the Map filed April 30, 1953 in Book 4, Page(s) 57 and 58 of Maps, in the Office of the County Recorder of said County.
>
> APN: 045-051-08-01 20

**Fourth Claim for Relief: Violations of Rosenthal Fair Debt Collection Practices Act**

Plaintiff alleges that Defendant has violated the Rosenthal Fair Debt Collection Practices Act ("RFDCPA").

If a debt is incurred primarily for personal, family, or household

use, collection efforts will be subject to both federal and state statutes regulating collection practices, principally the Federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692-1692o) and the California Fair Debt Collection Practices Act (Rosenthal Fair Debt Collection Practices Act) (California Civil Code §§ 1788-1788.32). 1-1 MB Practice Guide: CA Debt Collection 1.17. The Rosenthal Fair Debt Collection Practices Act is California's version of the Fair Debt Collection Practices Act ("FDCPA"), which mimics or incorporates by reference the FDCPA's requirements and makes available the FDCPA's remedies for violations. *Diaz v. Kubler Corp.*, S.D.Cal.2013, 2013 WL 6038344.

The California Rosenthal Fair Debtor Collection Practices Act incorporates many provisions of the FDCPA, which was enacted with the purpose eliminating abusive debt collection practices by penalizing debt collector businesses that violated certain regulations on misrepresentation, deceit, collection efforts made outside a specified time fame, the use of profane or obscene language, and other actions in communicating with debtors. The Rosenthal Act includes many portions of the federal FDCPA addressing (1) "acquisition of location information" (§ 1692b), (2) "communications with the debtor and third parties" (§ 1692c), (3) "harassing and abusive" collection activities (§ 1692d), (4) "false and misleading" representations (§ 1692e), (5) "unfair" collection practices (§ 1692f), (6) "validation of debts" (§ 1692g), (7) application of payment for debtors with multiple debts (§ 1692h), (8) "venue" provisions (§ 1692i), and (9) "furnishing of deceptive collection forms" (§ 1692j).

The FDCPA and the state Rosenthal Act differ in one key respect: the Rosenthal Fair Debt Collection Practices Act provides broader protection for consumers than the federal law, because the Fair Debt Collection Practices Act applies to any person or employee collecting consumer debt. Thus, a creditor might be exempt from federal law but might be subject to the regulations under California law [*see Pirouzian v. SLM Corp.* (2005 SD Cal) 396 F Supp2d 1124, 1131 (California's more inclusive definition of "debt collector" not inconsistent with FDCPA; state statute merely provides a separate state remedy beyond what the federal provides).

Plaintiff contends that Defendant is a debt collector under the RFDCPA, as it is the current owner of the obligation. ¶ 25, Adversary Complaint, Dckt. No. 1. Plaintiff additionally contends that the subject loan transaction meets the definition of "debt" under the RFDCPA pursuant to California Civil Code § 1788.2(d), and that the underlying loan qualifies as a "consumer credit transaction" under California Civil Code §§ 1788.2 (e) and (f).

However, not much further into the Complaint, Plaintiff acknowledges the debt is "attempting to be collected by Specialized Loan Servicing," which is not named in the subject complaint. ¶ 31, Adversary Complaint, Dckt. No. 1. Specialized Loan Servicing, LLC, is listed on the California Secretary of State's business entity search as an active limited liability company, with an entity address listed in Highlands Ranch Colorado, and indicating that jurisdiction over the business resides in Delaware.

Plaintiff offers no evidence that JPMorgan Chase Bank, N.A., has been collecting the debt. Moreover, Plaintiff acknowledges that another

company has been servicing the loan secured by the second Deed of Trust on Plaintiff's property. The complaint fails to set forth enough factual matter to establish plausible grounds for relief against the Defendant. Plaintiff states that Specialized Loan Servicing, and not Defendant, is attempting to collect debt "which they are not legally entitled to collect." Plaintiff further alleges that:

> 33. Defendant is repeatedly calling the Plaintiffs and representing the debt is valid and demanding payment. This repeated calling further supports the Plaintiff's contention that Defendants are refusing to reconvey the deed of trust.
>
> 34. Defendant is sending notices to Plaintiff after discharge stating the amount is owed by the Plaintiff in violation of Rosenthal.
>
> 35. Said actions and violations of Rosenthal are independent from the Bankruptcy law and are beyond a violation of the discharge stay.

Adversary Complaint, Dckt. No. 1 at 6. Plaintiff makes vague allegations concluding that Defendant has violated the Rosenthal Fair Debtor Collection Practices Act. Plaintiff does not cite to any particular provisions of the Rosenthal Fair Debtor Collection Practices Act to support a showing that the Defendant has engaged in practices prohibited by the Act. The only subdivison of the statute the Plaintiff offers as legal authority for this misconduct is 15 U.S.C. § 1692(e).

15 U.S.C. § 1692(e), which states that a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt, is a provision of the Federal Fair Debt Collection Practices Act, and not the state California Rosenthal Fair Debtor Collection Practices Act, which is the statute under which Plaintiff's Fourth Claim for Relief arises. It appears that Plaintiff is citing to the wrong legal authority. Even if Plaintiff cited to the appropriate state provision of the statute, however, Plaintiff fails to plead that the Defendant has made false or misleading representations in connection with the collection of any debt. Furthermore, the described acts may have been the acts that were committed loan servicing company that Defendant has contracted with, and may have wrongfully been attributed to the Defendant.

The lack of evidence supporting Plaintiff's contentions is particularly conspicuous. Plaintiff offers no declarations, documentation showing Defendant's apparent harassment of the Plaintiff and attempts to collect a discharged debt, notices and representations that the debt is still valid, and demands for payment. Plaintiff merely provides a "Demand for Reconveyance" letter drafted by Plaintiff's Counsel, dated October 3, 2013. Dckt. No 1 at 31. The letter merely advises the Defendant that it is in violation of the Rosenthal Fair Debtor Collection Practices Act, and that the deed should be reconveyed.

Plaintiff asks the court to accept all of her assertions, which are not supported by any meaningful evidence of the Defendant's actions, to determine that Defendant or some other entity is in violation of the

Rosenthal Fair Debtor Collection Practices Act. The court declines to do so, as Plaintiff has not presented any sufficient factual allegations against to show any violation of the Rosenthal Fair Debtor Collection Practices Act. Relief on the Fourth Claim is therefore denied.

**Fifth Claim for Relief: Violation of Plaintiff's California Constitutional Right of Privacy**

Plaintiff alleges that her constitutionally protected right of privacy was invaded when Defendant continue to contact and harass the Plaintiff. The California Supreme Court in *Hill v. National Collegiate Athletic Assn.*, 865 P. 2d 633 (1994) articulated a private cause of action against a business for violating a Californians right of privacy. Plaintiff argues that Defendant is still contacting Plaintiff and demanding payment on a discharged loan, despite having obtained a stay under 11 U.S.C. §362 and a discharge injunction under 11 U.S.C. §524.

The California Supreme Court in *Hill* held that the elements of a private cause of action for invasion of the state constitutional right of privacy were:

> (1) A legally protected privacy interest which consists of either "informational privacy" or "autonomy privacy." "Informational privacy" is an interest which precludes the dissemination or misuse of sensitive and confidential information. "Autonomy privacy" is an interest in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference.
>
> (2) A reasonable expectation of privacy. Consent, customs, social practices, and physical settings can create or inhibit a reasonable expectation of privacy. This is an objective entitlement founded on "broadly based and widely accepted community norms."
>
> (3) A serious invasion of the privacy interest. Not every invasion is a legal wrong. The invasion must be "sufficiently serious" to constitute "an egregious breach of the social norms underlying the privacy right."

The court notes that on this Claim for Relief, a number of cases have dismissed a claim for invasion of the California Constitutional right of privacy on the ground that the behavior was not highly offensive and/or that the alleged injury was not serious. 1 Rights of Publicity and Privacy § 6:19 (2d ed). *See e.g. Ruiz v. Gap, Inc., 540 F. Supp*. 2d 1121, 1128 (N.D. Cal. 2008), aff'd, 380 Fed. Appx. 689 (9th Cir. 2010) (Theft of a retail store's laptop containing social security numbers of job applicants did not constitute an egregious breach of privacy in violation of the California Constitutional right to privacy. "The only harm Ruiz alleges in his Complaint is that, as a result of the laptop thefts, he is now at an increased risk of identity theft."); *Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 992, 125 Cal. Rptr. 3d 260 (2d Dist. 2011), as modified, (June 7, 2011) (Plaintiff had neither a Constitutional privacy claim nor a common law privacy claim because any privacy interest in his home address to

prevent receiving unwanted mailed marketing materials from a company plaintiff bought a product from was not a "serious" invasion of privacy, but rather was "routine commercial behavior.").

Plaintiff's statements in this portion of her Complaint are conclusory and of themselves do not state a right to relief. Plaintiff does not first establish that she has informational or autonomy privacy in the context of her interactions with the Defendant creditor in executing the subject loan. Plaintiff merely argues that continuous calling by the debt collecting entity interferes with her "intimate personal decisions." Plaintiff states that,

> [T]he continual calling by phone to the Plaintiff after stays and injunctions prevent them from doing so and interferes with the Plaintiffs intimate personal decisions and interferes with the Plaintiffs ability to conduct personal activities without observation, intrusion, or interference ("autonomy privacy").

Plaintiff's allegations seem to be lacking the elements of the "Five Ws" a formula inculcated in students in grade school, to answer basic interrogative questions regarding the "who, what, where, when, why" in providing a complete picture of a situation or subject. Plaintiff fails to make any factual contentions, supported by sworn evidence, regarding any specific actions undertaken by the named Defendant, showing that Defendant violated Plaintiff's constitutionally protected privacy interest.

Second, Plaintiff states that after obtaining her "rights under bankruptcy law it was reasonable that the Plaintiff would expect that he/she would no longer be contacted by the Defendants and did not have to give concern that the Defendants would contact him." ¶ 43, Adversary Complaint, Dckt. No. 1. Again, Plaintiff gives no indication of who made these calls, when they were made (whether the dates fell after the post-discharge period), and whether efforts were made by Plaintiff to correct the misinformation ostensibly held by Defendant on Plaintiff's satisfaction of its claim.

Third, Plaintiff underscores the severity of the harm inflicted by Defendant's actions, arguing that "calling by telephone is no different than the Defendants coming to their door and banging on it." Plaintiff request an injunction against. Plaintiff does not provide any legal authority suggesting that calling Plaintiff rises to the level of a violation of Plaintiff's right of privacy, as protected by the California constitution. Plaintiff also does not state how often she is called by this entity, what hours Defendant is calling, any attempts to cease communication upon request, the frequency at which Defendant is contacting Plaintiff, communicating with Plaintiff at the place of her employment, etc. (all of which may also indicate that the collection practices are abusive under the Rosenthal Fair Debt Collection Practices Act).

Not having offered sufficient factual allegations establishing that Plaintiff's constitutionally protected right to privacy has been violated by the Defendant, in a manner that satisfies the test set out by *Hill v. National Collegiate Athletic Assn.*, the court will not issue an injunction

against Defendant for some unknown acts. Relief is denied on Plaintiff's Fifth Claim for Relief under California Constitution Article 1, Section 1.

**Sixth Claim for Relief: Violation of California Civil Code Section 2941(d)**

Plaintiff states that on August 22, 2007, Plaintiff, for a valuable consideration, made and delivered a promissory note in the sum of $ 43,000.00. Plaintiff executed and delivered to defendant Washington Mutual, as beneficiary, a certain trust deed recorded in Yolo County, California, on August 27, 2007 as Doc # 2007-003027823, and covering the property.

On June 11, 2013, Debtor completed her Chapter 13 plan and received a discharge, requiring the Defendant to reconvey the Deed of Trust on said property. Plaintiff notified Defendants on October 3, 2013 that they had yet to reconvey the Deed of Trust and a demand for the reconveyance was made. Exhibit C, Demand for Reconveyance Letter, Dckt. No 1. Plaintiff states that Defendant failed and refused, and continues to refuse to do so.

California Civil Code § 2941(b)(1) requires that within 30 days after an obligation secured by a deed of trust has been satisfied, the beneficiary or the assignee, Defendant herein, shall execute and deliver a full reconveyance.

As stated above, upon the Debtor's completion of the Chapter 13 Plan and payment of the § 506(a) claim, the debtor can then demand reconveyance of the deed of trust or release of the lien pursuant to the terms of the underlying note, deed of trust, security instrument, applicable law, or 11 U.S.C. § 506(d). *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien striping" in Chapter 13 case). The secured claim amount has been paid at that point, and there is no remaining obligation secured by the lien. Plaintiff states that the Defendant has not executed and delivered to the original note, deed of trust, request for a full reconveyance, and other documents under California Civil Code § 2941, within 30 days of the entry Debtor's discharge.

California Civil Code § 2941(d) provides that a violation of Civil Code 2941 shall make the violator liable to the Plaintiff for all damages sustained by the Plaintiff. As a result, Plaintiff requests damages equal to all attorneys fees sustained as a result of bringing an action to enforce California Civil Code § 2941, in addition to a statutory penalty of $500.00.

The Plaintiff has pled the elements of California Civil Code 2941(b)(1) and adequate grounds for relief under the Defendant's violation of Civil Code § 2941(b)(1), but provides no evidence that the second deed of trust was not reconveyed. To the contrary, the Declaration of Plaintiff's counsel testifies that the Second Deed of Trust was reconveyed on December 17, 2013. Declaration ¶ 12, Dckt. 24.

This Adversary Proceeding was filed on October 21, 2013. Quite possibly the filing of the Adversary Proceeding prompted JPMorgan Chase Bank, N.A. to reconvey the Second Deed of Trust. The evidence presented is that JPMorgan Chase Bank, N.A. did not notify the Plaintiff or Plaintiff's counsel of the reconveyance.

There is evidence supporting Plaintiff's factual allegations that the Defendant's deed of trust was not reconveyed timely reconveyed to Plaintiff. The court awards the $500.00 damages imposed by California Civil Code § 2924(d) to be paid Plaintiff by JPMorgan Chase Bank, N.A. pursuant to the Sixth Claim for Relief is denied.

**Seventh Claim for Relief: Violation of the Fair Credit Reporting Act**

Plaintiff alleges that the Defendant is reporting derogatory information about Plaintiff to one or more consumer reporting agencies (credit bureaus) as defined by 15 U.S.C. § 1681a. Plaintiff has obtained a copy of their credit report, and has seen the reported derogatory information as reported by Defendants to the consumer reporting agencies.

Plaintiff states that the Defendant has not removed the derogatory information they are reporting to the credit reporting agencies, and has not provided notice of this disputed matter to the credit bureaus and is therefore in violation of 15 U.S.C. § 1681s-2 which requires this notice. According to Plaintiff, Defendant did not complete an investigation of Plaintiff's written dispute and provide the results of an investigation to Plaintiff within the 30 day period as required by 15 U.S.C. § 1681s-2. Defendant allegedly has not notified Plaintiff of any determination that Plaintiff's dispute is frivolous within the 5 days required by 15 U.S.C. § 1681s-2.

The purpose of the Fair Credit Reporting Act 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. The provision cited by Plaintiff, 15 U.S.C. § 1681s-2, outlines the responsibilities of furnishers of information to consumer reporting agencies. The Fair Credit Report Act imposes a duty on furnishers of credit reporting information to provide accurate information, and bars agencies from reporting information with actual knowledge, after receipt of notice and confirmation of such errors, or that have reasonable cause to believe that the information being reported is inaccurate. 15 U.S.C. § 1681(a). Agencies and credit bureaus covered by the act pursuant to 15 U.S.C. § 1681a have an affirmative duty to correct and update information, and furnishers of information must notify agencies of any information that may not be complete or accurate, of closed accounts, delinquent accounts, and disputed information.

15 U.S.C. § 1681s-2(7)(I) of the Fair Credit Reporting Act states that if any financial institution that extends credit and regularly and in the ordinary course of business furnishes negative information to such an agency regarding credit extended to a customer, the financial institution shall provide a notice of such furnishing of negative information, in writing, to the customer. After providing such notice, the financial institution may submit additional negative information to a consumer reporting agency described in section 1681a(p) of this title with respect to the same transaction, extension of credit, account, or customer without providing additional notice to the customer.

15 U.S.C. § 1681s-2(8) establishes procedures for a consumer to

dispute information directly with a furnisher of information. After receiving notice of the dispute, a consumer reporting agency must conduct an investigation with respect to the disputed information; review all relevant information provided by the consumer with the notice; complete such person's investigation of the dispute; and report the results of the investigation to the consumer before the expiration of the period under section 1681i(a)(1) within which a consumer reporting agency would be required to complete its action if the consumer had elected to dispute the information under that section.

If the investigation finds that the information reported was inaccurate, the agency must promptly notify each consumer reporting agency to which the person furnished the inaccurate information of that determination and provide to the agency any correction to that information that is necessary to make the information provided by the person accurate. 15 U.S.C. § 1681s-2(8)(e).

In the instant Adversary Complaint, Plaintiff has not offered copies of the offending reports, and provides little detail on the errors or discrepancy in information being relayed to the consumer reporting agency. Plaintiff does not state whether the Defendant is providing false or unverified information to agencies on the satisfied debt, and the false information that Defendant has furnished to credit reporting agencies. Plaintiff alleges that Defendants "have not provided notice of this disputed matter to the credit bureaus and is therefore in violation of 15 U.S.C. § 1681s-2," but does not state how Plaintiff has knowledge that the Defendant has not furnished notice to any consumer reporting agencies that the information is disputed by the consumer under 15 U.S.C. § 1681s-2(3).

Plaintiff also does not allege whether she followed the procedures set out by § 1681s-2(8) in reporting the disputed information. Plaintiff does not state how she has knowledge that the Defendant did not investigate the dispute, and review the information provided by the consumer Plaintiff when she contested the information on her reports. Additionally, Plaintiff provides little detail on the "derogatory information" being supplied by Defendant to the consumer reporting agencies, and does not state why she is entitled to statutory and actual damages under 15 U.S.C. § 1681. Plaintiff does not elaborate on whether the "derogatory information" consists of misinformation on Plaintiff's debt, and whether Defendant is reporting the debt on the subject loan as an active debt, information which has not been updated since Plaintiff received her discharge after completing her Chapter 13 Plan.

Rather, Plaintiff simply states that she seeks a judgment against Defendant for willful noncompliance of the Fair Credit Reporting Act and requests statutory remedies as defined by 15 U.S.C. § 1681. Plaintiff's allegations are insufficient to establish that relief should be granted on the basis that Defendant has violated the Fair Credit Reporting Act.

Thus, the court denies relief under the Seventh Claim in Plaintiff's Adversary Complaint.

**Attorney's Fees**

Plaintiff makes a request for attorneys' fees, which is not pled as a separate cause of action. The requirements of claims for attorneys' fees in the Bankruptcy Code are set out by Federal Rule of Bankruptcy Procedure 7008(b), which provides that

> A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third party complaint, answer, or reply as may be appropriate.

Courts have split on the issue of what constitutes a party having properly "pleaded as a claim in a complaint...., answer or reply" the right to attorneys' fees. This court identifies one line of cases from bankruptcy courts holding that a "claim" for attorney's fees does not need to be pleaded in the body of a complaint. *See First Nat'l Bank v. Bernhardy* (In re Bernhardy), 103 B.R. 198, 199 (Bankr. N.D. Ill. 1989) (holding, without discussing Rule 7008(b), that "[t]here is no provision in the Code or the rules that requires [a debtor] to plead a request for attorney's fees" and that if there were such a provision requiring specific pleading, a prayer for "'such other relief as is just' is sufficient"); accord, *Thorp Credit, Inc. v. Smith* (*In re Smith*), 54 B.R. 299, 303 (Bankr. S.D. Iowa 1985) ("[T]here [is no] good reason to hold that such pleading is required. 'Since § 523(d) clearly states that the debtor is entitled to costs and reasonable attorney's fees, the creditor is on notice that loss of his claim could result in his being assessed those fees and costs.'") (quoting *Commercial Union Ins. Co. v. Sidore* (*In re Sidore*), 41 B.R. 206, 209 (Bankr.W.D.N.Y.1984)).

This court applies a plain language reading of the requirements of Federal Rule of Bankruptcy Procedure 7008 (a) and (b), and Federal Rule of Civil Procedure 8(b). FN.2.

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FN.2. The Supreme Court has been very clear in reading and applying 30 the "plain language" stated by Congress in statutes. *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989). The basic direction is that Congress says in a statute what it means and means in a statute what it says. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992); (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917)); *United Savings Association of Texas v. Timbers of Inwood Forest Associates*, LTD., 484 U.S. 365, 371 (1988). This court will not presuppose that the Supreme Court or Congress, in adopting the Federal Rules of Bankruptcy Procedure, did so expecting that the inferior court would not first look to the plain language meaning of the Rule.

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This is consistent with the holding of the Bankruptcy Appellate Panel in *In re Carey*,31 finding,

> [t]he Complaint clearly stated in its first paragraph that Appellant sought an award of attorney's fees from the Debtor. In Paragraph 1 of the Complaint, Appellant identified the Promissory Note as a basis for its claim. In

> Paragraph 7 of the Complaint, Appellant referenced the Debtor's execution of the Replacement Guarantee. In Paragraph 10 of the Complaint, Appellant noted that it previously filed a complaint against the Debtor in the Marin County Superior Court seeking damages including attorney's fees. In its First Claim for Relief in the Complaint, Appellant realleged the first 18 paragraphs of the Complaint, including Paragraphs 1, 7 and 10. Finally, in its Prayer for Relief, Appellant requested a judgment for damages "including principal, accrued and accruing interest, costs, and attorney's fees."

*In re Carey*, 446 B.R. at 392.

The general pleading requirements for a complaint in federal court were addressed by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

While Plaintiff's Complaint does not state a separate cause of action for attorneys fees, the court finds that within the body of the Complaint grounds are stated in support of such relief. These include the following:

a. Allegations that secured claim, as determined pursuant to 11 U.S.C. § 506(a), has been satisfied.

b. JPMorgan Chase Bank, N.A. has failed to reconvey the Second Deed of Trust and clear title to the Plaintiff's property of that void lien.

c. Attorneys' fees are requested pursuant to California Civil Code § 2941.

d. The Second Deed of Trust, ¶ 9, provides a contractual attorneys' fees provision, which is reciprocal as provided in California Civil Code § 1717.

e. Federal Rule of Bankruptcy Procedure 7008(b).

The provision that Plaintiff references in the Second Deed of Trust states the following:

> 9. Fees and Costs. Trustor shall pay Beneficiary's and Trustee's reasonable costs of searching records, other reasonable expenses as allowed by law and reasonable layers' fees; in any lawsuit or other proceeding to foreclose this Deed of Trust in any lawsuit or proceeding which Beneficiary or Trustee prosecutes or defends to protect the lien of this Deed of Trust; in any other action taken by Beneficiary to collect the Debt, including any disposition of the Property under the State Uniform Commercial Code; and any action taken in bankruptcy or appellate proceeding.

In addition, the Promissory Note evidencing the obligation secured by the Second Deed of Trust provides an additional contractual attorneys' fees provision. In the event of a default, under the Note or Second Deed of Trust, Plaintiff is obligated to pay reasonable costs, including attorneys' fees and expenses relating to any bankruptcy or civil proceeding. These provisions may be enforced by the Plaintiff pursuant to California Civil Code § 1717.

Plaintiff further references California Civil Code § 2941(d) as furnishing an independent basis for the recovery of attorneys fees and costs. However, that paragraph makes a violation of this section grounds for the recovery of damages, actual and $500.00 statutory damages. It does not provide for the awarding of prevailing party attorneys' fees.

While the better practice is to plead a clear "claim" which states the basis for the requested attorneys' fees, sprinkled throughout the Complaint are sufficient.

Plaintiff seeks the recovery of $4,774.75 in attorneys' fees. The evidence in support of these fees and costs is provided by the Declaration of Peter Cianchetta, counsel for Plaintiff, and Exhibit F, a detailed billing statement documenting the fees and costs. Dckts. 24 and 26, respectively. The detailed billing statement documents the services provided, the hourly rates charged, and the time expended for each charge.

These services include the pre-adversary proceeding "due diligence" to check the county real property records to confirm that JPMorgan Chase Bank, N.A. had failed to reconvey the Second Deed of Trust. The $4,774.75 fees include the pre-action due diligence, preparation and finalization of the Complaint, obtaining the original and a Re-Issued Summons, obtaining the entry of the default, preparing and filing the Motion for entry of default judgment, including the required supporting evidence. The requested fees do not include fees for the hearing on the Motion for Entry of Default Judgment or preparation of a proposed judgment.

The court makes an adjustment in the fees requested to address the failure to grant judgment for Plaintiff on the Rosenthal Act claims, Fair Credit Reporting Act Claims, and California Constitutional Right of Privacy Claims. The detailed billing statement does not provide a breakdown of how much time and charges relate to these denied claims for relief. Plaintiff is not warranted in obtaining an award of attorneys' fees for such claims.

However, the court notes that counsel for Plaintiff appears to have

been very judicious in his billings and use of time in prosecuting this case. Clearly it is not a situation where a plaintiff's attorney saw an opportunity to excessively bill, hoping to have it slide by the court on a default judgment. The court concludes that only $500.00 of time was expenses on these three disallowed claims. FN.3.

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FN.3. This determination is not merely a "guess" by the court, but based on the stated hourly rates, the nature of the allegations, the appearance that such claims may be in a format generated for use in other actions, and the detail rich allegations necessary for the claims on which Plaintiff has prevailed.

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Plaintiff has requested an additional $113.00 "costs and expenses" on the Motion. These are not listed on the detailed billing statement. Counsel's declaration does not provide any testimony as to what these "costs and expenses" consist of in this Adversary Proceeding. The court notes that the filing fee for an Adversary Proceeding is $293.00. No order waiving the filing fee appears on the Docket in this Adversary Proceeding. The court infers that the $113.00 is to recover a portion of the filing fee.

The court allows $4,274.75 in attorneys' fees and $113.00 in costs for Plaintiff to be paid by JPMorgan Chase Bank, N.A.

**CONCLUSION**

Before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *In re Kubick*, 171 B.R. at 661-662. With respect to the claims for relief alleging violations of Plaintiff's California Constitutional Right of Privacy under California Constitution Article 1, Section 1; the Fair Credit Reporting Act; and for the "ratification" of previous orders issued by this court, the court finds that Plaintiff has not sufficiently pled such claims, and that default judgment cannot be entered on those claims because the allegations were either inadequately pled, lacked evidentiary support, or could not support a cognizable claim.

The court enters judgment against the Plaintiff on the on the First, Second, Fourth, Fifth, and Seventh Claims for Relief.

The court grant Judgment on the Third Cause of Action, determining that the Second Deed of Trust is void and of no force and effect.

The court grants the Plaintiff $500.00 in statutory damages pursuant to California Civil Code § 29541(d) pursuant to the Sixth Cause of Action.

The awards $4,274.75 in attorneys' fees and $113.00 in costs for Plaintiff to be paid by JPMorgan Chase Bank, N.A.

3. 13-31975-E-13 JACK/LINDA GANAS
14-2080 PD-1
GANAS ET AL V. WELLS FARGO BANK, N.A.

MOTION TO DISMISS ADVERSARY PROCEEDING
4-14-14 [7]

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant and Defendant's Attorney on April 14, 2014. By the court's calculation, 31 days' notice was provided. 28 days' notice is required. That requirement was met.

**Final Ruling:** The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The hearing on the Motion to Dismiss is continued to June 5, 2014 at 1:30 pm.** No appearance is required at the May 15, 2014 hearing.

Defendant Wells Fargo Bank, N.A. ("Defendant") seeks an order pursuant to Federal Rule of Civil Procedure 12(b)(6), dismissing all claims alleged in Plaintiffs Jack and Linda Ganas's ("Plaintiffs") Complaint. Defendant argues that Plaintiffs have failed to state a claim upon which relief can be granted, and request that all of Plaintiffs' claims be dismissed.

**FEDERAL RULE OF BANKRUPTCY PROCEDURE 7007**

Law and motion pleading practice in adversary proceedings is governed by Federal Rule of Civil Procedure 7(b). Fed. R. Bankr. P. 7007. A motion filed in an adversary proceeding, "must,"

A. be in writing unless made during a hearing or trial;

B. **state with particularity the grounds** for seeking the order; and

C. state the relief sought.

Fed. R. Civ. P. 7(b).

In the present Motion, the below grounds are stated with

particularity. Defendant alleges the following:

A. Plaintiffs' first cause of action for Objection to Claim of Defendant fails because Rule 7001 does not apply to resolution of a claim objection when the creditor has filed a proof of claim. Plaintiffs have failed to meet their burden in pleading sufficient allegations to negate the prima facie validity of Defendant's Proof of Claim.

B. Plaintiffs' second cause of action for violation of the Rosenthal Fair Debtor Collection Practices Act ("RFDCPA") fails because it is preempted by the Bankruptcy Code. Even if Plaintiffs' claim was not preempted by the Bankruptcy Code, it fails as a matter of law because Wells Fargo is not considered a "debt collector" pursuant to RFDCPA.

C. Plaintiffs' third cause of action for negligence fails because it is preempted by the Bankruptcy Code and Plaintiffs have failed to meet the requisite elements to establish a negligence claim.

D. Plaintiffs' fourth cause of action for fraud and intentional misrepresentation fails because it is preempted by the Bankruptcy Code and fails to meet the "particularity" pleading requirements of Federal Rule of Civil Procedure Rule 9(b).

E. Plaintiffs' fifth cause of action for violation of the Real Estate Settlement Procedures Act ("RESPA") fails because it is precluded by the Bankruptcy Code. Even if Plaintiffs' claim was not preempted by the Bankruptcy Code, it fails as a matter of law because Plaintiffs' have failed to plead sufficient facts detailing they have private right of action for a "wrongful act" committed by Wells Fargo.

F. Plaintiffs' sixth cause of action for breach of contract fails because it is preempted by the Bankruptcy Code and Plaintiffs fail to plead sufficient facts to indicate that they ever entered into a contract with Wells Fargo that it breached.

G. Plaintiffs' seventh cause of action for conversion fails because it is preempted by the Bankruptcy Code and Plaintiffs have failed to please sufficient facts to support a claim for conversion against Wells Fargo."

Motion, Dckt. 7. These grounds, stated with particularity, are what the Movant has based its request for relief – dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012. See *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982); *Martinez v. Trainor*, 556 F.2d 818, 819-820 (7th Cir. 1977).

**Review of Allegations in the Complaint**

Before ruling on the Motion the court must review the Complaint to

determine what is alleged and whether the above stated grounds support a motion to dismiss for failure to state a claim. The Complaint, subject to the "short and plan statement showing that the pleader is entitled to the relief" required by Federal Rule of Civil Procedure 8(a) and Federal Rule of Bankruptcy Procedure 7008, as applied by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), alleges that:

A. Jurisdiction exists pursuant to 28 U.S.C. §§ 157 and 1334.

B. Defendant has filed a claim against Plaintiff, as defined by 11 U.S.C. § 101(5).

C. This court also has jurisdiction pursuant to FRBP 3007(b) as this matter involves an objection to a claim with related other causes of action and as such, constitutes a "core" proceeding pursuant to 28 U.S.C. §157(b)(2).

1. The state causes of action in this are part of the core proceedings as they would only arise but for the accountings filed in relation to the Proof of Claim filed by the Defendant.

2. The state causes of action are not preempted by the Bankruptcy Code as the Bankruptcy Code does not provide a specific remedy at the time of this complaint being filed as the demands made in the Proof of Claim violate the contract between the parties and merely striking the Proof of Claim does not adequately arrive at the proper amounts necessary for an effective plan of reorganization.

D. Plaintiffs own a parcel of real property commonly known as 613 McDevitt Drive, Wheatland, California.

E. Plaintiffs Linda Mae Ganas and Jack George Ganas are debtors in Case No. 2013-31975, which is a pending case in this court.

F. The Proof of Claim filed with the Court on January 15, 2014 by the Defendant, Wells Fargo Bank, N.A., contends that the amount of the arrearage is $32,856.92. The Proof of Claim also details an escrow shortage of $529.34 and also reveals that there are no offsets for unapplied funds.

G. However, the Plaintiffs received a statement dated January 6, 2014 from Defendant, which details extensive amounts in unapplied funds and several offsetting entries completely inconsistent with the Proof of Claim filed with the Court. Further, the statement details that the total amount due is $35,701.36 on the statement.

H. Plaintiffs' review of the escrow analysis in Defendant's claim makes assertion that their analysis determines that a

shortage of $529.34 exists. Plaintiffs claim that this number does not appear in Defendant's analysis.

I. Plaintiffs contend that this analysis does not accurately reflect the amount of any shortage on the date the petition was filed nor does the Proof of Claim properly reflect the amounts owing to Defendant on the date the petition was filed.

J. The First Claim for Relief stated in Plaintiffs' Complaint is an Objection to the Defendant's claim pursuant to 11 U.S.C. § 502(b) and Federal Rule of Bankruptcy Procedure 3007(b).

K. The Second Claim for Relief alleges violations of the Rosenthal Fair Debt Collection Practices Act, California Civil Code §§ 1788-1788.32.

L. Plaintiffs allege negligence in their Third Claim for Relief, alleging that Defendant breached their duty to file a claim in the Debtor's bankruptcy case that had some semblance of accuracy under Federal Rule of Bankruptcy Procedure 9011 and Federal Rule of Civil Procedure 11.

M. For their Fourth Cause of Action, Plaintiffs allege Fraud and Intentional Misrepresentation under California Civil Code § § 1572, 1709, and 1710 for fraudulent statements made on the Proof of Claim.

N. Plaintiffs allege in their Fifth Cause of Action that Defendant violated the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et. seq.

O. Plaintiffs allege breach of contract in their Sixth Cause of Action, arguing that Defendant breached the contract created by the Note and Deed of Trust that the parties executed, when Defendant used the payment funds for a purpose "other than indeed by the Plaintiff and called for under the contract."

P. For the Seventh of Action, Plaintiffs allege conversion under California Civil Code § 3336 with the funds paid by Plaintiffs under the contract.

Complaint, Dckt. 1.

**OPPOSITION TO MOTION TO DISMISS**

Plaintiff contends that complaint, as filed, pleads sufficient facts to state a claim that is plausible and the pleadings conform to the liberal pleading requirements of Federal Rules of Civil Procedure 8(a)(2).

First, Plaintiff argues that it has done nothing inconsistent with the holdings of the 9th Circuit Court in *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910 (9th Cir. 1996) and *Walls v. Wells Fargo Bank*, 276 F.3d 502 (9th Cir. 2002). Plaintiff states that they have valid causes of

action that are not preempted by the Bankruptcy Code related to the adversary complaint filed in this case. For instance, Plaintiff argues that the Rosenthal Fair Debtor Collection Practices Act creates strict liability for certain violations. Plaintiffs assert that Defendant's argument that all state law causes of action, including Plaintiffs' causes of action under the Rosenthal Fair Debtor Collection Practices Act, and various negligence and breach of contract state law claims, should be excluded would immunize Defendant from the court's consideration of their bad acts.

Plaintiffs further argue that Wells Fargo Bank is treated as a Class 1 Creditor in the confirmed plan, so that all applicable state contract law applies to the contract between the Plaintiff Debtors and Defendant Creditor. Plaintiffs then discuss the constitutional protections of the Contract Clause, Article I, Section 10 of the U.S. Constitution. Plaintiffs argues that there is substantial impairment of a contract in this matter, and that Plaintiffs's due process rights and the Contracts Clause of the Constitution entitles them to contractual remedies against the Defendant under their confirmed Chapter 13 Plan.

Plaintiffs also offer an analysis in which they conclude that the Real Estate Settlement Procedures Act is not preempted based on Congressional intent, and that the Act is not preempted by bankruptcy laws as held by the court in *Conley v. Central Mortg. Co.*, 414 BR 157 (2009). Plaintiff also correctly points out that Defendant's description of the Rosenthal Fair Debtor Collection Practices Act is erroneous, by stating that a creditor and mortgage servicing company cannot, as a matter of law, be considered a debt collector under the Rosenthal Act. This court has previously ruled that such a contention is incorrect.

Plaintiffs also argue that the negligence related cause of action is "feasible," and that the Plaintiffs have sufficiently stated facts as to fraud and have properly pled their cause of action for fraud under Federal Rule of Civil Procedure 9(b). Plaintiffs also assert that the breach of contract and conversion claims were properly pled, and that Defendant has produced sufficient evidence to negate the *prima facie* validity of Defendant's Proof of Claim. Lastly, Plaintiffs object to Defendant's request for judicial notice of their exhibits, and request for leave to amend the Complaint to cure any valid deficiencies in the Complaint. Dckt. No. 14.

**STIPULATION**

On May 12, 2014, the parties filed a signed stipulation between Defendant and Plaintiffs to continue the hearing and reply deadline regarding the instant Motion to Dismiss. Dckt. No. 18. In the stipulation, the parties state that their respective attorneys have engaged in communications regarding the Plaintiff's Adversary Complaint, and Wells Fargo's Motion to Dismiss.

The parties state that they have also discussed a possible resolution to this matter, but because of a scheduling conflict and to allow additional time to discuss a possible resolution to this matter, the parties have agreed to continue the hearing for Wells Fargo's Motion to Dismiss, and the deadline for Wells Fargo to submit its reply to the Plaintiffs'

opposition.

Based on the foregoing, the parties stipulate to continuing the haring on this matter from May 15, 2014, at 1:30 pm, to June 5, 2014, at 1:30 pm. The parties have also agreed that the Defendant, Wells Fargo Bank N.A.'s deadline to file a reply to "Plaintiff's Motion to Dismiss" (presumably Plaintiff's opposition to the Defendant's Motion to Dismiss; no Motion to Dismiss by the Plaintiff has been filed with the court) will be May 21, 2014.

Pursuant to the stipulation signed by counsel for both parties, the hearing on this matter is continued.

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 filed by 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 Defendant's Motion to Dismiss is continued to June 5, 2014, at 1:30 pm.
>
> **IT IS FURTHER ORDERED THAT** Defendant Wells Fargo Bank, N.A.'s reply to Plaintiffs' Opposition to the Motion to Dismiss must be filed and served with the Defendant and the court by May 21, 2014.