UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

June 5, 2014 at 1:30 p.m.

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1. 10-36505-E-13 DONNA VICKS
14-2022 PLC-5
MICHAEL VICKS, JR., SUCCESSOR IN INTEREST TO DONNA V. WELLS

CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT
3-20-14 [10]

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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

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 the respondent creditor on March 20, 2014. By the court's calculation, 35 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). 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 non-responding parties 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 Motion for Entry of Default Judgment is granted.

APRIL 24, 2014 HEARING

The court continued the Motion for Entry of Default Judgment to allow Plaintiff to correct service issue.

PRIOR HEARING

Plaintiff, Donna Vicks, seeks entry of a default judgment against Defendant Wells Fargo Bank, N.A. ("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 proceeding was commenced on January 17, 2014, and a summons was issued by the Clerk of the United States Bankruptcy Court on January 21, 2014. The complaint and summons were properly served on Defendant.

Defendant failed to file a timely answer or response or a 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 March 13, 2014. Dckt. No. 8.

COMPLETION OF SERVICE

Plaintiff failed to serve Defendant Wells Fargo Bank, N.A. by certified mail. The Motion on its face identifies the Defendant as being Wells Fargo Bank, N.A., which is a federally insured financial institution. Congress created a specific rule to provide for service of pleadings, including this contested matter, on federally insured financial institution, Federal Rule of Bankruptcy Procedure 7004(h), which provides

> (h) Service of process on an insured depository institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless–
>
> (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
>
> (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
>
> (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

Here, Plaintiff served Wells Fargo Bank, N.A. at two locations, including at the address stated on the FDIC and California Secretary of State for the Bank, but neglected to serve any of the addresses by certified mail to an officer as required by the Federal Rules of Bankruptcy Procedure. None of the exceptions in Federal Rule of Bankruptcy Procedure 7004(h) apply.

Plaintiff filing a Notice of Continued Hearing and properly serving Wells Fargo Bank, N.A., Dckt. 18, the court determines this matter on its merits.

FACTS

Defendant Wells Fargo Bank, N.A. is the owner of the note which is secured by a second deed of trust recorded against the Debtor's residence. On August 17, 2010 Plaintiffs confirmed a plan that valued the second note and deed of trust held by Defendant at $0.00.

Plaintiff obtained a discharge in their bankruptcy case on December 13, 2013. Included in the debts discharged is the claim of Defendant. The Chapter 13 Plan provided for the payment of the value of Defendant's secured claim as determined by the court pursuant to 11 U.S.C. § 506(a). The Debtor has completed her Chapter 13 Plan. Defendant failed to execute a reconveyance after the completion of the Chapter 13 Plan. Plaintiff filed this adversary proceeding against Defendant in order to determine the validity, priority or extend 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

The Complaint alleges the following causes of action:

1. Ratification of valuation of security: Plaintiff requests that the court ratify the value stated in the Motion to Value ruled on August 17, 2010.

2. Determination of the Extent of Second Trust Deed Claim: Plaintiff requests that the court ratify the nature and extent of the Second Deed of Trust on the real property.

3. Extinguishment of the Second Trust Deed Claim: Plaintiff requests that the Court extinguish the Defendant's Second Deed of Trust.

4. Violation of California Civil Code Section 2941(d): Plaintiff requests damages equal to all attorneys fees and costs and the statutory penalty of $500.00.

First Cause of Action

Plaintiff first seeks to have the Court "ratify" the value of the Residence which was determined as part of the court's final order determining the value of Defendant's Secured Claim to be $0.00. The court reads this First Claim for Relief to request that the court issue a judgment reaffirming the prior final order and supporting findings of fact valuing the Residence in determining that Defendant's Secured Claim has a value of $0.00.

The court having already determined Defendant's Secured Claim to have a value of $0.00, the court finds no reason to issue a judgment stating that the court's prior findings of fact are "affirmed." That prior order and the findings of fact thereunder are not subject to attack or dispute. The findings and that final order stand, are enforceable, and binding on the parties. No "reaffirming" is required. No case or controversy with respect to the findings and order has been shown or exists, and no basis exists for granting such relief. U.S. Constitution, Article III, Section 2.

The requested relief on the First Claim for Relief is not warranted and the Motion requesting such relief is denied.

Second Cause of Action

Plaintiff asserts that pursuant to 11 U.S.C. § 506(a) and Federal Rule of Bankruptcy Procedure § 3012, she requests that the Court "ratify" that the nature and extent of the Second Deed of Trust was determined to be $0.00 on August 10, 2010, by order of this court. Exhibit B, Dckt. No. 1. This appears to be a rehash of the First Claim for Relief with a slight twist by focusing on the Second Deed of Trust, not the claim.

The court first notes that the requested relief, that the nature and extent of the Second Deed of Trust is "zero," 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, not a debt. *Monterey S.P. Partnership v. W. L. Bankgham, Inc.*, 49 Cal. 3d 454, 460 (1989); *Bank of Italy National Trust and Savings Association v. Bentley*, 271 Cal. 644 (1933). An interest in real property is not, and does not, become "zero."

The court has already issued a final order determining that Defendant's Secured Claim has a value of $0.00. There has been no ruling that "[t]he nature and exent of the SECOND TRUST DEED on the (Real) Property...of zero as stated in the attached order..." Complaint ¶ 10.

The Motion requesting entry of a default judgment on the Second Claim for Relief is denied.

Third Cause of Action

As for the third cause of action, and applying the factors for a default judgment, the court finds that the Plaintiff will be prejudiced if the second deed of trust is not reconveyed, or the court does not enter judgment determining the Deed of Trust is void and the property held free of such purported interests thereunder. The continued existence of record of the Deed of Trust will cloud title and restrict Plaintiff's full and unfettered use of her real property and her interests therein. The court recently discussed the effect of a completed Chapter 13 Plan and the effect on a secured claim determined by the court pursuant to 11 U.S.C. § 506(a) in *Martin v. CitiFinancial Services (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013).

The court finds that the Complaint is sufficient and the requests for relief requested therein are meritorious. It has not been shown to the court there is or may be any dispute concerning material facts. Defendant has not contested any facts in this Adversary Proceeding, nor did it dispute facts presented in the Plaintiff's bankruptcy case regarding the motion to value Defendant's secured claim to have a value of $0.00 or confirmation of the Chapter 13 Plan. Further, there is no evidence of excusable neglect by the Defendant. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant has been given several opportunities to respond and there is no indication that Defendant has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding. Failing to fulfill one's contractual and statutory obligations, and then failing to respond to judicial process, is not a basis for denying relief to an aggrieved plaintiff. The court finds it necessary and proper for the entry of a default judgment against the Defendant.

The Motion for Entry of Default Judgment is granted. The court shall enter judgment for Michael Vicks, Jr., successor in interest to Donna Vicks, Plaintiff, and against Wells Fargo Bank, N.A., Defendant, determining that the second deed of trust, and any interest, lien or encumbrance pursuant thereto, held by Wells Fargo Bank N.A. against the real property commonly known as 6880 Peck Drive, Sacramento, California recorded with the Sacramento County Recorder on March 8, 2005 in Book 20050308, Page 0280 is void, unenforceable, and of no force and effect. Further, the judgment shall adjudicate and determine that Defendant Wells Fargo Bank, N.A., has no interest in the real property pursuant to the deed of trust.

Fourth Cause of Action - Attorney's Fees

As for the fourth cause of action, Plaintiff seeks attorneys fees pursuant to California Civil Code § 1717 and the statutory penalty of $500 provided in California Civil Code § 2941(d).

Civil Code Section 1717(a) provides for attorney fees where the contract specifically provides attorney's fees, which are incurred to enforce the contract, to the prevailing party. Plaintiffs state Paragraph 7 of the note specifically provide for an award of attorney fees. Plaintiffs asserts that as a result of the failure of Wells Fargo Bank, N.A. to provide a reconveyance, they have incurred attorney fees totaling $4,927.75 and costs for recording fees of $113.00.

The prevailing party must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). California Civil Code § 1717 provides for application of a contractual attorneys' fees provisions to any prevailing party to the contract and that the reasonable attorneys' fees shall be determined by the court.

California Civil Code section 1717(a) provides:

> In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Here, Plaintiffs direct the court to a specific contractual provision for attorney fees: Paragraph 7 of the note. Paragraph 7 of the Note provides for the Note Holder to have costs and expenses, including reasonable attorney fees, for enforcing the note.

Plaintiff's counsel has also provided a billing statement, showing approximately 25.2 hours working on the complaint, status conference, preparation of entry of default, and hearing. The hourly rate for attorney fees is $325.00 for Peter Cianchetta and $175.00 for David Pereira. The court finds the rate and time charged reasonable.

The court therefore grants Plaintiff's request for attorney's fees in relation to the Motion for Entry of Default in the amount of $4,927.75 and costs in the amount of $113.00.

CALIFORNIA CIVIL CODE SECTION 2941

Plaintiffs also seek an award of $500 pursuant to California Civil Code Section 2941, which requires lenders to reconvey deeds of trust when the debt is satisfied.

California Civil Code Section 2941(d) provides,

> The violation of this section shall make the violator liable to the person affected by the violation for all damages which that person may sustain by reason of the violation, and shall require that the violator forfeit to that person the sum of five hundred dollars ($500).

California Civil Code § 2941(b)(1) imposes an affirmative obligation on the beneficiary (creditor) when the obligation secured by the deed of trust has been satisfied. When no obligation remains, the beneficiary must instruct the trustee under the deed of trust to issue a full reconveyance of the deed of trust. Once the obligation no longer exists, resulting in the lien being extinguished by operation of law, the trustor or mortgagor (debtor) is entitled to a certificate of discharge, the mortgage cancelled or satisfied as of record, and the deed of trust reconveyed.

Here, Defendant Wells Fargo Bank, N.A. failed to have the deed of trust reconveyed after the obligation secured had been satisfied, as required by California Civil Code § 2941(b)(1). Therefore, the violation of that section allows Plaintiff to seek the penalty of $500 pursuant to California Civil Code Section 2941(d).

CONCLUSION

The court grants the default judgment in favor of Plaintiffs and against Defendant Wells Fargo Bank, N.A. and holds that the deed of trust is void. The court further awards attorney fees in the amount of $4,927.75 and costs in the amount of $113.00 and additionally awards $500 pursuant to California Civil Code Section 2941(d).

Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order. The judgment shall further provide that any attorneys' fees and costs allowed by the court shall be enforced as part of the judgment.

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 Michael Vicks, Jr., successor in interest to Donna Vicks, Plaintiff ("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 Motion for Entry of Default Judgment is granted. The court shall enter judgment for Michael Vicks, Jr., successor in interest to Donna Vicks, Plaintiff, and against Wells Fargo Bank, N.A., Defendant, determining that the second deed of trust, and any interest, lien or encumbrance pursuant thereto, held by Wells Fargo Bank N.A. against the real property commonly known as 6880 Peck Drive, Sacramento, California recorded with the Sacramento County Recorder on March 8, 2005 in Book

20050308, Page 0280 is void, unenforceable, and of no force and effect. Further, the judgment shall adjudicate and determine that Defendant Wells Fargo Bank, N.A., has no interest in the real property pursuant to the deed of trust.

IT IS FURTHER ORDERED that the First Claim for Relief and the Second Claim for Relief are dismissed without prejudice.

IT IS FURTHER ORDERED that the Plaintiff is granted attorney fees in the amount of $2,975.00.

IT IS FURTHER ORDERED that the Plaintiff is awarded $500 pursuant to California Code Section 2941(d).

All Claims for Relief asserted in the Complaint having been adjudicated, Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order. The judgment shall further provide that any attorneys' fees and costs allowed by the court shall be enforced as part of the judgment.

2. 10-38007-E-7 GLENDA/JOSHUA GOLDEN — **ORDER TO APPEAR FOR EXAMINATION (JOSHUA GOLDEN)**
11-2741 — **4-18-14 [98]**
CHUNG ET AL V. GOLDEN ET AL
ADV. CASE CLOSED 11/22/13

Final Ruling: Pursuant to the Stipulation of the parties, the hearing on this matter is continued to **1:30 p.m.** on **July 10, 2014**. Dckt. 100. No appearance required at the June 5, 2014 hearing.

3. 10-45051-E-13 RONALD/JUANITA TYESKEY
13-2352 PLC-1
TYESKEY ET AL V. JPMORGAN CHASE BANK N.A.

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH JPMORGAN CHASE BANK, N.A.
5-5-14 [23]

Tentative Ruling: The Motion to Approve Compromise 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.

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 attorney for Defendants on May 5, 2014. By the court's calculation, 31 days' notice was provided. 35 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3) 21 day notice and L.B.R. 9014-1(f)(1) 14-day opposition filing requirement.)

The Motion For Approval of Compromise 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 in interest are entered.

The Motion For Approval of Compromise is denied without prejudice.

Ronald and Juanita Tyeskey ("Debtor-Plaintiff") moves for an Order Approving the Settlement Agreement and Release between them and Defendant JPMorgan Chase Bank, N.A. ("Defendant").

Debtor-Plaintiff moves pursuant to Local Bankruptcy Rule 9013-1(f)(1). Federal Rule of Bankruptcy Procedure 2002(a)(3) requires 21 day notice and Local Bankruptcy Rule 9014-1(f)(1) requires 14-day opposition, which together require 35 days' notice. By the court's calculation, 31 days' notice was provided. This is sufficient to deny the motion without prejudice.

However, if the Debtor-Plaintiff can show that notice was proper, the court will issue the following alternative ruling:

Debtor-Plaintiffs Ronald and Juanita Tyeskey ("Movant") requests that the court approve a

compromise and settle competing claims and defenses with Defendant JPMorgan Chase Bank, N.A. ("Settlor"). The claims and disputes to be resolved by the proposed settlement are set out in the Complaint, which sought judgment for (1) ratifying this Court's order on the valuing the Debtor's residence; (2) ratifying this Court's order determining that value of the Debtor's residence was insufficient to provide any security for JPMC's deed of trust encumbering the Debtor's residence; (3) extinguishing JPMC's claimed lien on the Debtor's residence (4) for damages based upon the following claims for relief asserted against JPMC: (a) violation of the Rosenthal Fair Debt Collections Practices Act (Cal. Civ. Code §§ 1788, et seq.), (b) violation of Debtors' right to privacy, (c) violation of California Civil Code § 2941(d), which requires lenders to reconvey a deed of trust within 30 days following the satisfaction of the obligation secured by the deed of trust and (d) violation of the Fair Credit Reporting Act (15 U.S.C. § 1681a).

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 25):

A. JPMorgan Chase Bank, N.A. will pay $7,500.00 to Debtors and their attorney.

1. $1,461.15 is to be allocated to Debtors.

2. $6,038.85 is to be allocated to Debtors' attorney.

B. JPMorgan Chase Bank, N.A. will provide certain information to the public credit reporting agencies regarding the claim at issue in Adversary Proceeding.

C. JPMorgan Chase Bank, N.A. will reconvey the deed of trust securing its claim (this has already occurred).

D. This Court will retain jurisdiction over the settlement agreement should enforcement of any term be necessary.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir.

1988).

Under the terms the Settlement all claims of the Estate, including any pre-petition claims of the Debtor, are fully and completely settled, with all such claims released. Settlor has granted a corresponding release for Debtor and the Estate.

Movant believes that the proposed settlement is in the best interest of their estate in that it unconditionally resolves the matters in dispute related to the release of lien and avoids further costly litigation.

Probability of Success

Movant states that the outcome of the litigation is uncertain. JPMorgan Chase Bank, N.A. did not dispute that the Debtors were entitled to an order expunging its deed of trust. Whether the Debtors' discharge, which merely barred JPMorgan Chase Bank, N.A. from seeking to impose personal liability upon the Debtors, obligated JPMorgan Chase Bank, N.A. to take affirmative steps to reconvey its deed of trust or to provide updated reporting to the credit reporting agencies was hotly disputed. Also, even assuming that JPMorgan Chase Bank, N.A. was obligated to take some affirmative act in response to the Debtor's discharge, it is unclear whether or not the Debtors' suffered any damage as a result of JPMorgan Chase Bank, N.A.'s failure to take those actions. The proposed settlement resolves those disputes by causing JPMorgan Chase Bank, N.A. to pay funds to the Debtors and their attorneys.

Difficulties in Collection

This was not a factor in the Parties' consideration of the proposed settlement.

Expense, Inconvenience and Delay of Continued Litigation

Movant argues that the settlement of this matter occurred at an early stage in the litigation, after JPMorgan Chase Bank, N.A. filed its answer to the Debtors' complaint and prior to the commencement of any discovery. The costs of continued litigation would have exceeded the amount at issue and distracted the Parties from other, more productive activities.

Paramount Interest of Creditors

Movant argues that the interests of creditors are not affected by the proposed settlement. The proposed settlement, however, will facilitate the completion of the Debtors' chapter 13 case by clearing title to their residence, resolving the Adversary Proceeding and making the settlement payment available to the Debtors and their counsel.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate. The motion is granted.

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 Approve Compromise filed by Debtor-Plaintiffs Ronald and Juanita Tyeskey, ("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 Approve Compromise between Movant and Defendant JPMorgan Chase Bank, N.A. ("Settlor") is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion(Docket Number 25).

4. 09-46360-E-13 MARGUERITE GALVEZ
13-2313 PLC-4
GALVEZ V. WELLS FARGO BANK, N.A.

MOTION TO DISMISS CAUSE(S) OF ACTION FROM COUNTERCLAIM
4-23-14 [46]

Tentative Ruling: The Motion to Dismiss Counter Claim 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.

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 the Office of the United States Trustee on April 23, 2014. By the court's calculation, 43 days' notice was provided. 28 days' notice is required. That requirement was met.

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).

The Motion to Dismiss is denied.

BACKGROUND

The Plaintiff in this adversary proceeding, Marguerite Galvez, moves to dismiss the counterclaim of Wells Fargo Bank ("Defendant"), for the Defendant's alleged failure to state a cause of action under Federal Rule of

Civil Procedure 12(b)(6).

The Plaintiff filed this adversary proceeding on October 9, 2013. Plaintiff owns a parcel of real property commonly known as 9609 Heron Point Court, Elk Grove, California. As of the date of filing of her Chapter 13 bankruptcy case, the fair market value of the property was approximately $205,000.00. The following liens encumbered the property: a first Deed of Trust in favor of World Savings (which Plaintiff identifies is now the entity known as Wells Fargo Bank, N.A.), in the amount of approximately $285,178.00; and a Second Deed of Trust in favor of World Savings (now Wells Fargo Bank, N.A.) in the amount of approximately $25,336.00.

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 claim was entirely unsecured. On February 9, 2010, this court determined that the second deed of trust claim, held by the Defendant creditor, had a secured value of zero. Exhibit B, Dckt. No. 48.

The Plaintiff's Chapter 13 Plan was confirmed on March 4, 2010. Over a year and half after the Plan was confirmed, Wells Fargo Bank, the holder of both the first and second deeds of trust on the debtor property, entered into a loan modification related to the first deed of trust which was set for hearing and approved by the Court on August 1, 2011. Plaintiff states that her Chapter 13 Plan was "uneventful," and that Plaintiff performed all of her requirements throughout the bankruptcy case.

On January 8, 2013, the Trustee noticed all parties that the Plaintiff had completed her Plan payments. The Trustee's final report and deadline to object thereto was filed and served on February 12, 2013. On April 8, 2013, the Plaintiff was granted a discharge. Approximately 6 months later, after requesting from Wells Fargo Bank the reconveyance on her second deed of trust satisfied by her plan, the Plaintiff was required to file this subject Adversary Proceeding. Introduction, Memorandum of Points and Authorities in Support of Motion to Dismiss Counterclaim, Dckt. No. 49 at 2.

PROCEDURAL HISTORY

Plaintiff's Adversary Complaint, Dckt. No. 1, sets forth seven different claims for relief, which includes a request that the court "ratify the value stated in the Motion to Value," by way of a minute order dated on February 12, 2010. The Plaintiff also asks that the court determine the extent of Plaintiff's Second Trust Deed Claim and extinguish the Second Trust Deed. The Complaint further alleges that Defendant violated California Civil Code Section 2941(d), the Plaintiff's California constitutional right of privacy, as well as the Fair Credit Reporting Act. Adversary Complaint, Dckt. No. 1.

On November 8, 2013, Defendant Wells Fargo Bank filed a Motion to Dismiss the Adversary Complaint that was set for hearing on December 12, 2013. The Motion to Dismiss raised similar issues presented in Defendant's Counterclaim. On December 4, 2013, the Court dismissed the Motion to Dismiss without prejudice. By stipulation, the Plaintiff filed an Amended Complaint on March 25, 2014.

On April 18, 2014, Wells Fargo filed an Answer and Counterclaim to the Plaintiff's Amended Complaint. Dckt. No. 37. In its Answer to the Amended Complaint, Defendant denies the jurisdictional allegations raised by Plaintiff, and states that to the extent that the matter is a non-core proceeding, Defendant does not consent to final orders being entered by the bankruptcy court.

Defendant admits that the Plaintiff filed her Chapter 13 bankruptcy action, and that Plaintiff obtained two loans from Defendant's predecessor, which were secured by deeds of trust against real property, and that a minute order on the Plaintiff's Motion to Value was entered on February 12, 2010, but denies Plaintiff's contention that Plaintiff's Second Trust Deed was entirely unsecured as of the date of Plaintiff's Chapter 13 bankruptcy case, asserting that it is a legal conclusion to which no response is required.

The Answer to the Amended Complaint sets forth the following denials and defenses.

1. Defendant denies each and every averment contained in Plaintiff's First Claim for Relief, which requests that the Court "ratify" the value stated in the Motion to Value ruled by the Honorable Ronald Sargis on February 12, 2010, pursuant to 11 U.S.C. § 506(a) and Federal Rule of Bankruptcy Procedure 3012. Defendant denies each and every averment contained in Plaintiff's Second Claim for Relief, which requests that the Court ratify that the nature and extent of the second deed of trust claim was determined to be $0.00 on February 12, 2010 by order of this court, pursuant to 11 U.S.C. § 506(a) and Federal Rule of Bankruptcy Procedure § 3012.

2. With respect to the Plaintiff's Third Claim for Relief, Defendant admits that the bankruptcy court has the authority to confirm a Chapter 13 Plan. Defendant denies the remaining portions of the Claim for Relief, which asserts that the court has the authority and should extinguish Plaintiff's second trust deed in this case.

3. Defendant responds to Plaintiff's Fourth Claim for Relief, which alleges that Defendant alleged California Civil Code § 2941(b)(1, which imposes a statutory obligation on the beneficiary under the deed of trust to reconvey the deed of trust when the obligation secured has been satisfied, by asserting that this Claim for Relief is vague and contains legal conclusions to which no response is required. With the exception of admitting to the fact that Plaintiff received or discharge on or about April 8, 2013, defendant denies the rest of the averments contained therein.

4. Regarding Plaintiff's Fifth Claim for Relief, Defendant incorrectly asserts that it is not a debt collector within the meaning of the Rosenthal Fair Debt Collection Practices Act, which provides more inclusive definition of "debt collector" (covering owners of the subject debt obligations,

in addition to those collecting the consumer debt) than the federal Fair Debt Collection Practices Act. Defendant asserts that this Claim for Relief is vague and asserts legal conclusions to which no responses are required.

5. Defendant denies the contentions presented in Plaintiff's Sixth Claim for Relief, which alleges that Plaintiff's constitutionally protected right of privacy was invaded when Defendant continue to contact and harass the Plaintiff, after Plaintiff completed her Chapter 13 Plan and earned her right to the reconveyance of the property.

6. Defendant also denies the allegations contained in Plaintiff's Seventh Claim for Relief, which accuses Defendant of reporting derogatory information about Plaintiff to one or more consumer reporting agencies as defined by 15 U.S.C. § 1681a.

Defendant's Answer to the Amended Complaint, Dckt. No. 37.

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 Plaintiff's Motion to Dismiss the Counterclaim of Wells Fargo Bank, the following grounds are stated with particularity;

A. Plaintiff requests that the court dismiss all of the Defendant's counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(6).

B. This Motion is made on the basis that Defendant Counter-Claimant's first claim for declaratory relief fails due to the: (1.) res judicata and collateral estoppel effects of the court's order, entered on February 12, 2010, determining the secured portion of Defendant's claim at $0.00 pursuant to 11 U.S.C. §506(a); and (2.) confirmation of the Debtor's Plan on March 4, 2010 and completion of the Debtor's Plan.

C. An order valuing the junior deed of trust of Defendant was entered on February 12, 2010. The Chapter 13 plan of the debtor was confirmed on March 4, 2010.

D. Over a year and half after the Plan was confirmed, Defendant, the holder of both the first and second deeds of trust on the Plaintiff Debtor's property, entered into a loan modification related to the first deed of trust which was set for hearing and approved by the Court on August 1, 2011.

E. On January 8, 2013, the Trustee noticed all parties that the Plaintiff Debtor had completed her Plan payments. The Trustee's final report and deadline to object thereto was filed and served on February 12, 2013.

F. On April 8, 2013, the Plaintiff Debtor was granted a discharge. Approximately 6 months later, after requesting from Wells Fargo Bank reconvey her second deed of trust that was apparently satisfied by her plan, the Plaintiff was forced to file the instant proceeding when the Defendant refused to reconvey their security interest in the junior lien.

G. Plaintiff argues that the principles of res judicata and collateral estoppel preclude Defendant from re-litigating the claims submitted in the Defendant's Counter-Claim. The court's order valuing the Defendant's secured interest in the real property located at 9609 Heron Point Court, Elk Grove, California, at $0.00 is final and non-appealable.

H. Plaintiff also asserts that the Plaintiff Debtor's Chapter 13 Plan having been confirmed and completed, the Defendant's obligation will be permanently fixed at $0.00 pursuant to 11 U.S.C. § 506(a).

I. The confirmed plan having been completed, the Defendant's lien under 11 U.S.C. § 506(a) must be reconveyed against the property, and is void by operation of 11 U.S.C. § 506(d).

J. The Defendant's assertion that, despite the final order valuing the second deed of trust at $0.00 (resulting from Plaintiff's Motion to Value the Defendant's Secured Claim) and completion of the Chapter 13 Plan, that the lien reattaches as the value of the property has increased, is incorrect and not rooted in existing law. On this basis, Plaintiff argues that the Counterclaim does not properly state a cause of action for which relief can be granted, and should therefore be dismissed.

Motion to Dismiss Complaint Objecting to Claim of Wells Fargo Bank, N.A., 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 Counterclaim

Before ruling on the Motion the court must review the Defendant's Answer and Counterclaim for Declaratory Relief 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.

A. This is a counterclaim for declaratory judgment pursuant to 28 U.S.C. sections 2201 and 2202 for the purpose of determining a question of actual controversy between the parties as more fully set forth below.

B. The court has jurisdiction over the subject matter of this Counterclaim pursuant to 28 U.S.C. sections 157 and 1334. This counterclaim is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K) and (O).

C. Venue of the counterclaim before the court is proper pursuant to 28 U.S.C. sections 1391(b) and 1409(a).

D. Defendant made a loan to Galvez on June 27, 2005, in the amount of $295,000.00 (the "Loan"). The Loan was secured by a deed of trust in first priority against Counter-defendant's residence located at 9609 Heron Point Court, Elk Grove, California.

E. Defendant made a revolving equity line of credit loan to Plaintiff Debtor on June 14, 2006, in the amount of $25,500.00 (the "ELOC"). The ELOC was secured by a deed of trust in second priority against Plaintiff's Property.

F. On or about February 12, 2010, the court issued a minute order valuing Wells Fargo's security interest under the ELOC loan and trust deed at $0.00.

G. Plaintiff "never sought relief from the Court to strip, or otherwise determine the validity, extent and priority of Wells Fargo's second lien against the Property."

H. On June 3, 2011, Defendant and Plaintiff entered into a loan modification in connection with the Loan. The June 2011 loan modification reduced the principal balance of the Loan by $49,674.44 to $226,294.66.

I. On information and belief, Wells Fargo alleges that the value of the Property as of the time of the June 2011 loan modification was in excess of $226,294.66.

J. An actual controversy has arisen and now exists between the parties concerning their respective rights and duties in that Plaintiff contends that Wells Fargo's security interest under the ELOC is valued at $0.00 and that she is entitled to compel Wells Fargo to reconvey the deed of trust securing the

ELOC, whereas Wells Fargo asserts that its security interest in the Property securing the ELOC is not valued at $0.00 after the modification of the Loan and/or any increase in the value of the Property over the plan period, and, therefore, Defendant Wells Fargo is entitled to retain its second lien rights under applicable law including, without limitation, 11 U.S.C. § 1322(b)(2).

K. Plaintiff also contends that Defendant is prohibited from contacting Plaintiff in connection with the Loan and/or the ELOC. Defendant, however, contends that the 2011 loan modification and principal reduction under the Loan placed equity back in the Property and thus Wells Fargo's security interest in the Property under the ELOC loan agreements should not be valued at $0.00.

L. Defendant further contends that the Property, which remained property of the estate, has increased in value over the plan period.

M. Defendant further contends that its security interest in the Property in connection with the ELOC should not be reconveyed, stripped or otherwise adversely affected.

N. In order to resolve these controversies, pursuant to 28 U.S.C. § 2201, Defendant requests a judicial determination of its rights and duties, and a declaration as to whether or not it is required to reconvey the deed of trust securing the ELOC.

O. In light of the modification of the Loan and/or any increase in the value of the Property, Defendant seeks a judicial declaration that there is value in Wells Fargo's security interest in the Property in connection with the ELOC and, further, that such value is not affected under Plaintiff's plan pursuant to 11 U.S.C. § 1322(b)(2).

Defendant's Answer to First Amended Complaint and Counterclaim for Declaratory Relief, Dckt. 37.

OPPOSITION TO MOTION TO DISMISS COUNTERCLAIM

Defendant Wells Fargo Bank, N.A., successor by merger with Wells Fargo Bank Southwest, N.A., f/k/a Wachovia Mortgage, FSB, f/k/a World Savings Bank, FSB ("Defendant") opposes the Motion to Dismiss the Counterclaim of Wells Fargo on the basis that the counterclaim states a valid claim for declaratory relief. Dckt. No. 57.

Defendant argues that the bankruptcy courts of the Ninth Circuit have not squarely addressed the impact of a Chapter 13 debtor's post-confirmation loan modification of a senior lien against debtor's principal residence where the loan modification reduces the amount of the indebtedness of the senior lien sufficient to support an underwater junior lien.

Defendant states that the post plan confirmation loan modification agreement required the Debtor to obtain an order modifying her Chapter 13 Plan under Bankruptcy Code § 1329, since the loan modification significantly altered the terms of debtor's Chapter 13 Plan, which did not occur in this case. Instead, Plaintiff only obtained an order approving the loan modification – apparently pursuant to 11 U.S.C. § 364(d).

Defendant states that the June 2011 loan modification created equity to support Wells Fargo's junior lien, since the June 2011 loan modification reduced the principal balance of the Loan by $49,674.44 to $226,294.66. The value of the Property as of the time of the June 2011 loan modification was in excess of $226,294.66. Defendant states that a motion under Bankruptcy Code section 1329 to approve modification of Plaintiff's confirmed Chapter 13 Plan would have addressed the impact the loan modification had on Wells Fargo's junior lien.

In the absence of an order under 11 U.S.C. § 1329 approving modification of debtor's Chapter 13 Plan, Defendant argues that the Plaintiff cannot now rely on the terms of her Chapter 13 Plan, as unmodified, to require the junior lien holder to reconvey its lien interest based on a full compliance discharge. Defendant argues that it should be permitted the opportunity to factually develop the impact that the loan modification had on its lien position.

Defendant brings up a tentative ruling issued in the case of *In re Gutierrez*, 503 B.R. 458 (Bankr. C.D. Cal. 2013), in which the court "struggled" with the applicable dates for the determination of the value of the collateral, and the amount of senior lien indebtedness in determining whether the junior lien was entirely underwater. Defendant argues that given the unsettled state of the law regarding the appropriate valuation dates, the issue of whether valuation of the collateral and a determination of the amount of the senior lien indebtedness should be reconsidered (when the debtor enters into a loan modification that reduces the principal balance of the senior lien indebtedness) must be adjudicated.

Additionally, Defendant argues that the issues raised in the Counterclaim have not been fully adjudicated by virtue of this court's earlier confirmation of debtor's Chapter 13 Plan. In confirming debtor's Chapter 13 Plan, the court was not presented with the changed circumstances of a post-confirmation loan modification of the senior lien against debtor's principal residence. Defendant argues that the issues presented in the Counterclaim have not been adjudicated and cannot form the basis for application of the res judicata or collateral estoppel doctrine.

REPLY TO OPPOSITION TO MOTION TO DISMISS COUNTERCLAIM

Plaintiff responds to the Defendant's opposition with several arguments. First, Plaintiff characterizes Defendant's opposition as "based on a lie." Dckt. No. 61. The Defendant asserts that the loan modification of the senior lien against the Plaintiff Debtor's principal residence created equity to support the underwater junior lien.

When the court granted the Debtor's Motion to Value Collateral, it was based on the value of the property asserted by the debtor of $205,000.00. Plaintiff correctly points out that the petition date is the

governing date for purposes of determining whether junior liens are entirely underwater and can be treated as unsecured claims. *See In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002); *In re Lam*, 211 B.R. 36 (B.A.P. 9th Cir. 1997), appeal dismissed, 192 F.3d 1309, 1311 (9th Cir. 1999), *In re Serda*, 395 B.R. 450 (Bankr. E.D. Cal. 2008). Plaintiff asserts that by doing the math and applying the principles outlined in case law, no equity was ever created by the loan modification executed in June, 2011.

Indeed, the court notes that Defendant states that the adjusted loan balance after the loan modification is $226,294.66. This amount still exceeds the fair market valuation adopted by the Plaintiff Debtor and the court when the court granted Plaintiff's Motion to Value the Secured Claim. In its Counterclaim, however, Defendant alleges that the value of the Property as of the time of the June 2011 loan modification was in excess of $226,294.66. ¶ 15 , Counterclaim, Dckt. No. 47 at page 18. The Defendant has not, however, provided competing evidence showing a different valuation of the property in this case.

Second, Plaintiff argues that the Defendant has committed fraud by misleading the Plaintiff Debtor in believing that Defendant reduced the amount owned Defendant by $49,674.44. Plaintiff interprets this reduction as meaning that the junior loan re-attached at the time the loan modification was given; Plaintiff Debtor maintains that she had a valid lien strip which valued the junior lien of approximately $25,000.00 at zero.

If the junior lien of Defendant reattached, the actual amount of the modification was only $49,674.44, less the $25,000.00 junior reattaching, or $24,674.44. A review of the loan modification does not show that Defendant disclosed this fact to Plaintiff. Plaintiff states that Defendant made a material misrepresentation of the facts in providing Plaintiff with the misleading information contained in the loan modification, thereby fraudulently inducing Plaintiff into entering into the loan modification. If it is found that Defendant's junior lien reattached at time of modification, Plaintiff seeks leave to amend her complaint to include this fraud committed by Defendant.

Third, Plaintiff argues that the loan modification of the senior lien of Defendant did not require the existing plan. Defendant was a Class 4 creditor and as such, the loan modification would not have altered the plan. No stay was in place related to Defendant's senior lien.

Fourth, the loan modification was filed and served on all creditors in the case, including the junior lien of Defendant. If Defendant, as to their junior lien, had any objection to the court's approval of the loan modification, the hearing to approve the loan modification was the proper time to address said objections. Plaintiff argues that the Defendant failure to raise any objection to the loan modification or to move concurrently therewith a motion to require a modified plan is barred by latches. Plaintiff accuses Defendant of being deceptive by withholding from the court and the Plaintiff that their loan modification was really a disguise to revive the junior lien.

Lastly, Plaintiff reiterates her argument that the court order valuing the Defendant's secured claim at $0.00, and the discharge obtained by Plaintiff upon completion of her Chapter 13 Plan, should be given

preclusive effect. Plaintiff protests Defendant's efforts to ask that the court "tunnel back" on its final orders.

STANDARD

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 complaints contain 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 to 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 which would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader. *Pond v. General Electric Co.*, 256 F.2d 824, 826-27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal, 129* S.Ct. 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-66 (2007). ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment]' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

In ruling on a 12(b)(6) motion to dismiss, 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 be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

DISCUSSION

The broad strokes of the Defendant's Answer to First Amended Complaint and Counterclaim for Declaratory Relief are the three primary arguments outlined below. Defendant draws upon the following arguments to advance its request for a court order, determining that the Defendant's security interest in the second deed of trust claim is not valued at $0.00,

and that the same security interest relating to the ELOC loan agreements shall not be reconveyed or otherwise adversely affected by the Plaintiff Debtor's Completion of her Chapter 13 Plan.

In the Counterclaim Defendant requests a declaration of the rights and obligations of the parties under the ELOC loan agreements and that Wells Fargo's security interest in the Property in connection with the ELOC loan agreements shall not be reconveyed or otherwise adversely affected. Alternatively, Defendant requests a declaration for the respective rights and obligations of the parties, including and without limitation, the parties' respective rights concerning the deed of trust securing the obligations that are owed under the second deed of trust claim.

Pursuant to the Declaratory Judgment Act, the parties must present actual controversy, in order to obtain a declaratory judgment stating the rights and other legal relations of any interested party seeking the declaration. A party seeking declaratory relief must present an "actual controversy" in order to satisfy the "case or controversy" requirement of Article III. 28 U.S.C. § 2201(a). *MedImmune v. Genentech*, 549 U.S. 118 (2007). See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 325 (1936) (upholding constitutionality of the Act under Article III). See also *Already LLC v. Nike Incorporated*, 133 S. Ct. 721, 726-27 (2013); *Columbian Financial Corporation v. BancInsure Incorporated*, 650 F.3d 1372 (10th Cir. 2011) (applying MedImmune decision); *Prasco LLC v. Medicis Pharmaceutical Corporation*, 537 F.3d 1329, 1336 (Fed. Cir. 2008) (applying M*edImmune* decision).

The purpose of the Declaratory Judgment Act is to allow parties to have their disputes adjudicated before either suffers great damage. Moore's Federal Practice, Civil § 57.03[2]. It allows the parties to act before either has the ability to seek a coercive remedy and avoid the accrual of otherwise unnecessary damages before the rights can be adjudicated. *Starter Corp. V. Converse, Inc.,* 84 F.3d 592, 597 (2nd Cir. 1996); *Kunkel v. Continental Casualty Co.*, 866 F.2d 1269, 1273-1274 (10th Cir. 1989); *Pratt v. Wilson*, 770 F. Supp. 539, 545 (E.D. Cal. 1991).

As shown from the pleadings, there is a concrete controversy that exists between the Parties. The Plaintiff's real objection to the Counterclaim is that Plaintiff believes she prevails on the merits of her Complaint, thereby defeating the rights asserted in the Counterclaim. That is not the standard for dismissing a claim in a complaint or counterclaim.

Further, the Counterclaim can be read as merely requesting that Defendant be granted judgment stating its rights and interests in the note and deed of trust at issue. It is merely the converse to what Plaintiffs request in the Complaint. In adjudicating the Complaint, the court will be determining all of the issues. The Counterclaim appears to insure that the final judgment issued by the court will determine the rights of Defendant, if it prevails, and not merely state that judgment is granted and all relief for Plaintiff denied (if Defendant should prevail).

Therefore, the Motion to Dismiss the Counterclaim is denied. Plaintiff may litigate the merits of the Counterclaim, as her own Complaint, at trial, summary judgment, or for judgment on the pleadings (if no evidence is required).

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 the Counterclaim filed by 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 to Dismiss is denied.

5. 09-46360-E-13 MARGUERITE GALVEZ
13-2313
GALVEZ V. WELLS FARGO BANK, N.A.

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
3-25-14 [31]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: David M. Newman; Matthew J. Pero

Adv. Filed: 10/9/13
Answer: 1/6/14

Amd Complaint: 3/25/14
Reissued Summons: 3/25/14
Amd Complaint Answer: 4/18/14

Counterclaim: 4/18/14

Nature of Action:
Recovery of money/property - other
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:

Continued from 3/19/14. The Parties are to file a stipulation to amend the complaint and to engage in BDRP.

Joint Status Conference Report filed 5/22/14 [Dckt 55]

Joint Stipulation Regarding Bankruptcy Dispute Resolution Program filed 3/25/14 [Dckt 30]; Order Appointing Resolution Advocate and Assignment to the BDRP filed 4/4/14 [Dckt 35]

First Amended Complaint filed 3/25/14 [Dckt 31]

Joint Stipulation Regarding Plaintiff Filing Amended Complaint filed 3/25/14 [Dckt 34]

Statement Regarding Ownership of Corporate Debtor/Party filed 4/18/14

[Dckt 39]

[PLC-3] Notice of Motion to Discontinue BDRP and to Begin Discovery filed 4/23/14 [Dckt 45]; Notice of Withdrawal of Motion filed 5/6/14 [Dckt 54]

[PLC-4] Motion to Dismiss Counterclaim of Wells Fargo Bank filed 4/23/14 [Dckt 46], set for hearing 6/5/14 at 1:30 p.m.

6. 13-31975-E-13 JACK/LINDA GANAS
14-2080 PD-1
GANAS ET AL V. WELLS FARGO BANK, N.A.

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

Tentative Ruling: The Motion to Dismiss Complaint 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.

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 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.

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).

The Motion to Dismiss is granted and the Second, Third, Fourth, Fifth, Sixth, and Seventh Causes of Action in Plaintiffs' Adversary Complaint are dismissed.

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 ("Rosenthal Act") 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 Rosenthal Act.

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.

Adversary 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 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.

The stipulation continued the hearing on this matter from May 15, 2014, at 1:30 pm, to this hearing date. 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.

REPLY TO OPPOSITION TO MOTION TO DISMISS

Defendant accuses Plaintiffs of ignoring the underlying facts of this case, and instead devoting the majority of their Opposition to addressing preemption and the Bankruptcy Code. Defendant argues that Plaintiffs have changed their position and now contend that the claims included in their Complaint that arose pre-petition are "independent from the act of filing the Proof of Claim." Opposition, Dckt. No. 14 at 4. Plaintiff's Complaint is nothing more, Defendant asserts, than a standard objection to claim governed by 11 U.S.C. § 502 and Federal Rule of Bankruptcy Procedure 3007.

Defendant states that Plaintiffs have now changed their position from alleging that Wells Fargo filed an incorrect Proof of Claim, to mishandling payments that were made pre-petition, independent from the act of filing the Proof of Claim. Defendant interprets this shift in strategy as an attempt to circumvent preemption of Plaintiffs' state law causes of action and preclusion of their federal cause of action. Defendant argues that Plaintiffs failed to include any of the alleged pre-petition causes of action in their sworn bankruptcy schedules or confirmed Chapter 13 Plan, and as a result are judicially estopped from asserting undisclosed pre-petition causes of actions against Defendant in this proceeding.

Furthermore, Defendant states that the Plaintiffs' confirmed Chapter 13 Plan substantiates the arrears included in Wells Fargo's Proof of Claim, and fails to include any indication that Plaintiffs have pre-petition legal claims against the Defendant. Based on Plaintiff's failure to list the alleged pre-petition claims in their bankruptcy schedules or Chapter 13 Plan, Defendant argues that the Plaintiffs must be judicially estopped from now attempting to prosecute the claims against Wells Fargo.

Defendant then reiterates its claims that Plaintiffs' Causes of Action under the Rosenthal Act, Real Estate Settlement Procedures Act, and claims for negligence, fraud, breach of contract, and conversion are preempted or precluded by bankruptcy law. Defendant also states that Plaintiffs have failed to state a claim for the causes of action. Defendant also argues that Plaintiffs fail to produce sufficient allegations to negate the prima facie validity of the Defendant's Claim, in that instead of making payments on the loan, Plaintiffs have instead filed successive bankruptcy cases since 2011 are now using the adversary process "in an attempt to obtain a windfall."

DISCUSSION

The court will consider each cause of action set forth in Plaintiff's Complaint, and evaluate the sufficiency of Plaintiffs' allegations and whether they pass muster under Federal Rule of Civil Procedure 12(b)(6). The court

will not dismiss the cause of action assessed, unless it appears beyond doubt that the Plaintiffs can prove no set of facts in support of their claim which would entitle them to the relief sought. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976).

First Claim for Relief

Defendant argues that Plaintiffs' first cause of action for an Objection to Claim of Defendant fails because Plaintiffs have failed to meet their burden in pleading sufficient allegations to negate the prima facie validity of Defendant's Proof of Claim, and because Federal Rule of Bankruptcy Procedure 7001 does not provide for the adjudication of an objection for claim in an adversary proceeding.

Federal Rule of Bankruptcy Procedure 3007(b) expressly prohibits a party in interest from including a demand for relief of a kind specified in Federal Rule of Bankruptcy Procedure 7001 in an objection to claim. Wells Fargo Bank, N.A. provides no legal authority for its statement that a party in interest is prohibited from including an objection to claim in an adversary proceeding asserting demands for relief pursuant to Rule 7001. In fact, it appears that Wells Fargo Bank, N.A. has either ignored, or withheld from the court, the express language of Federal Rule of Bankruptcy Procedure 3007(b) which states (emphasis added);

> "(b) Demand for Relief Requiring an Adversary Proceeding. A party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim, **but may include the objection in an adversary proceeding.**"

The Federal Rule of Bankruptcy Procedure clearly and expressly authorize the objection to claim to be part of an adversary proceeding against that creditor when there are other demands for relief for which an adversary proceeding is filed.[1]

Federal Rule of Bankruptcy Procedure 7001 allows for proceedings to determine the validity, priority, or extent of a lien or other interest in property (other than objections to claims of exemptions). Here, Plaintiffs seek a determination of the Defendant's security interest in the deed of trust on Plaintiff Debtors' real property, and the exact amount owed on the Defendant's Claim.

Further, Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial

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[1] When a party's lead contention is bereft of any legal authority it does not bode well for the credibility of the sophisticated creditor, lawyer or law firm representing the creditor. Often times it is indicative of canned pleadings which are passed out by the creditor to various local counsel with instructions to not change anything.

factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

Not all Proof of Claims are deserving of this presumption of prima facie validity, however; only a properly completed and filed proof of claim is prima facie evidence of the validity and amount of a claim. FRBP 3001(f). A proof of claim that lacks the documentation required by Rule 3001(c) does not qualify for the evidentiary benefit of Rule 3001(f), but a lack of prima facie validity is not, by itself, a basis to disallow a claim. The court must look to 11 U.S.C. § 502(b) for the exclusive grounds to disallow a claim. *In re Heath*, 331 B.R. 424, 426 (B.A.P. 9th Cir. 2005).

Here, the Defendant, Wells Fargo Bank, filed Proof of Claim No. 4 on the claims registry of the Plaintiffs' pending bankruptcy case, Case No. 13-31975-E-13. The Proof of Claim filed asserts a claim of $96,957.30, of which the basis for perfection is a Mortgage/Deed of Trust. The amount of arrearage at the time the case was flied is listed as $32,856.92. Proof of Claim No. 4, filed January 4, 2014, Case No. 13-31975. As Plaintiffs point out in the Adversary Complaint, Dckt. No. 1, however, the Mortgage Proof of Claim Attachment filed as supporting documentation to the Defendant's Proof of Claim contains inconsistent figures.

The Mortgage Proof of Claim Attachment lists the principal due as $73,238.69. The total amount listed as the amount necessary to cure the default as of the petition date is $32,856.92. The addition of both of those numbers totals $106,095,61, which is over $9,000.00 beyond the stated claim. The inconsistencies on the face of the Defendant's Proof of Claim itself negates the prima facie validity of the claim. The lack of prima facie validity of the claim, is not by itself a basis to disallow the claim, but the Plaintiffs have stated sufficient allegations in challenging the presumption of prima facie validity of Defendant's Claim.

Thus, Plaintiffs' First Claim for Relief shall not be dismissed.

Second Cause of Action

Defendant states that the Plaintiffs' second cause of action for violation of the Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act") fails because it is preempted by the Bankruptcy Code, and argues that 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 Rosenthal Act.

Rosenthal Act Statutory Definition of Debt Collector

This court has previously addressed, and rejected the contention that merely because a creditor has a secured claim it cannot be a "debt collector." *Landry v. Bank of America, N.A. (In re Landry)*, 493 B.R. 541 (Bankr. E.D. Cal. 2013). That decisions includes a review of the legislative history for the Rosenthal Act and an addendum with excerpts from the legislative history. The decision also concluded that the reliance on some trial court rulings that the creditors with secured claims and mortgage services are excluded from the FDCPA

rests on unsound footings. The issue having been raised, the court restates its prior ruling as part of this decision.

This court acknowledges that some trial courts have interpreted the Rosenthal Act in a manner that mortgage service companies, taking actions to obtain payment for the original creditor or the assignee of the original creditor, are not "debt collectors" as defined under the FDCPA and Rosenthal Act because the activities are related to the ultimate foreclosure on real property securing the debt. In its extensive Reply Brief, Defendants cite a series of mostly unreported decisions from several district courts. These decision include *Patacsil v. Wilshire Credit Corporation*;[2] *Pittman v. Barclays Capital Real Estate, Inc.*;[3] *Pok v. American Home Mortgage Servicing, Inc.*;[4] *Gallegos v. Recontrust Co.*;[5] *Fuentes v. Deutsche Bank*;[6] *Padayachi v. Indymac Bank*;[7] *Sipe v. Countrywide Bank*;[8] *Pontiflet-Moore v. GMAC Mortgage*;[9] and *Rosal v. First Federal Bank of California*.[10]

Defendant adds several cases to the list, the most recent being *Hepler v. Washington Mutaul Bank, F.A.*, 2009 WL 1045470 at *4 (C.D. Cal. 2009). In reliance on *Izenberg v. ETS Services, LLC*, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008), the *Hepler* court concluded that foreclosure under a mortgage (and demanding payment of monies to prevent the foreclosure) does not constitute a debt under the Rosenthal Act. The *Izenberg* court concluded that the plaintiff did not identify what provisions of the Rosenthal Act had been violated or allege that the defendant was a "debt collector." *Id.* at 1199. The *Izenberg* court also concluded that foreclosure on a mortgage did not constitute a debt because "it does not appear that plaintiff can cure this deficiency."

A common thread running through these decisions is the conclusion that a debt secured by a deed of trust cannot be subject to the Rosenthal Act, and therefore any collection activities to obtain payment on that secured debt are not subject to the Rosenthal Act. Many of the cases relied on by Defendants cite to *Ines v. Countrywide Home Loans, Inc.*,[11] as the seminal case for this proposition. The court in *Ines* came to the conclusion that since foreclosing

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[2] 2010 U.S. Dist. LEXIS 10414, at *8-9 (E.D. Cal. Feb. 5 2010).

[3] 2009 U.S. Dist. LEXIS 34885, at *3 (S.D. Cal. Apr. 24, 2009).

[4] 2010 U.S. Dist. LEXIS 9016, at *7-8 (E.D. Cal. Feb. 2, 2010)

[5] 2009 U.S. Dist. LEXIS 6365, at *3 (S.D. Cal. Jan. 29, 2009)

[6] 2009 U.S. Dist. LEXIS 57931, at *3 (S.D. Cal. July 8, 2009)

[7] 2010 U.S. Dist. LEXIS 46115, at *6 (N.D. Cal. April 7, 2010)

[8] 2010 U.S. Dist. LEXIS 70320, at *46-*47 (E.D. Cal. July 13, 2010)

[9] 2010 U.S. Dist. LEXIS 11043, at *6 (E.D. Cal. Jan. 15, 2010)

[10] 671 F. Supp. 2d 1111, 1135 (N.D. Cal. 2009)

[11] 2008 U.S. Dist. LEXIS 88739at * 3 (S.D. Cal. Nov. 3, 2008).

on real property is not the collection of a debt under the FDCPA, then it would similarly not be a debt under the Rosenthal Act because some provisions of the FDCPA have been incorporated into the Rosenthal Act. As discussed herein, the incorporation of several FDCPA provisions into the Rosenthal Act does not amend the California definition of debt collector under the Rosenthal Act and replace it with the more limited definition under the FDCPA.

The court also notes that a proposition that a debt is not subject to the FDCPA if it is secured by real or personal property, and therefore neither should the collection of such debts be subject to the Rosenthal Act, is not universally accepted. Contrary decisions not supporting the Defendants arguments, which were not cited to or addressed by Defendants in their original Memorandum of Points and Authorities or the extensive Reply Brief, include both Circuit Court of Appeals and District Court decisions. One example is *Wilson v. Draper & Goldberg, P.L.L.C.*,[12] in which the Court of Appeals concluded that the debt secured by a deed of trust continued to be subject to the FDCPA even after the foreclosure was commenced.

> We disagree. Wilson's "debt" [secured by a deed of trust] remained a "debt" even after foreclosure proceedings commenced. See *Piper v. Portnoff Law Assocs.*, 396 F.3d 227, 234 (3d Cir. 2005) ("The fact that the [Pennsylvania Municipal Claims and Tax Liens Act] provided a lien to secure the Pipers' debt does not change its character as a debt or turn PLA's communications to the Pipers into something other than an effort to collect that debt."). Furthermore, Defendants' actions surrounding the foreclosure proceeding were attempts to collect that debt. See *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 116 (2d Cir. 1998) (concluding that an eviction notice required by statute could also be an attempt to collect a debt); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo. 1992) ("[A] foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt.").
>
> Defendants' argument, if accepted, would create an enormous loophole in the Act immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt. We see no reason to make an exception to the Act when the debt collector uses foreclosure instead of other methods. See *Piper*, 396 F.3d at 236 ("We agree with the District Court that if a collector were able to avoid liability under the [Act] simply by choosing to proceed *in rem* rather than *in personam*, it would undermine the purpose of the [Act].")(internal quotation marks omitted).[13]

Other cases rejecting a non-statutory exemption from the FDCPA or Rosenthal Act because the debt is secured by real or personal property include:

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[12] 443 F.3d 373 (4th Cir. 2006).

[13] *Id.* at 376.

Glazer v. Chase Home Finance LLC,[14] (finding a home loan is a debt subject to the FDCPA, which governs the conduct of debt collectors for both secured and unsecured debts); *Reese v. Ellis, Painter, Ratteree & Adams, LLP*,[15] (finding a promissory note secured by a mortgage is a debt subject to the FDCPA); *Vargas v. HSBC Bank USA, N.A.*,[16] (finding the FDCPA covers foreclosure-related debt collection activities); *McGrew v. Countrywide Home Loans, Inc.*,[17] (stating "[i]t is plain that the California legislature understands the Rosenthal Act may apply to foreclosure proceedings...the omission of the lenders and servicers from Cal. Civ. Code § 2924(b) means that such actors may be held liable for any unlawful debt collection activities during foreclosure."); *Castrillo v. American Home Mortgage Servicing, Inc.*,[18] (finding a debt collector is not immunized from liability for violating the FDCPA merely because the debt is secured by a deed of trust and the collector is proceeding with a foreclosure sale); and *Kojetin v. C U Recovery, Inc.*,[19] (finding a promissory note secured by a vehicle is a debt subject to the FDCPA).

Statutory Construction of the Rosenthal Act

The court's analysis begins with the plain language of the Rosenthal Act itself. It is incumbent on this court to interpret and apply state law as would the California Supreme Court.[20] The rules of statutory construction utilized by the California Supreme Court are essentially the same as used by the courts for interpreting federal law. To determine the intent of the statute or ordinance, the court first looks to the plain language and ordinary meaning of the words used. The words are read in context of the statute, considering the nature and purpose of the enactment. If the language is clear, then no further interpretation of the statute is necessary. If the language is ambiguous, then the court considers extrinsic evidence, which includes the legislative history, public policy, and the statutory scheme of which the statute is a part.[21] Finally, if after reviewing the plain language and extrinsic aids the meaning of the statute remains unclear, the court, proceeding cautiously, applies reason, practicality, and common sense to the statute.[22]

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[14] 704 F.3d 453, 460 (6th Cir. 2013).

[15] 678 F.3d 1211, 1216-1217 (11th Cir. 2012).

[16] 2012 U.S. Dist. LEXIS 128661, at *16 (S.D. Cal. 2012).

[17] 628 F. Supp. 1237, 1243 (S.D. Cal. 2009).

[18] 670 F. Supp. 2d 516, 523-24 (E.D. La. 2009).

[19] 212 F.3d 1318 (8th Cir. 2000).

[20] *Aetna Cas. & Sur. Co. v. Sheft*, 989 F.2d 1105, 1108 (9th Cir. 1993).

[21] *Professional Engineers in California Government v. Kempton*, 40 Cal. 4th 1016, 1037 (2007).

[22] *Woodland Park v. City of East Palo Alto Rent Stabilization Board*, 181 Cal. App. 4th 915, 920 (2010).

Basic Statutory Definitions Under the Rosenthal Act

The California Legislature defines who is a "debt collector" for purposes of California law in the Rosenthal Act, as follows,

> The term "debt collector" means any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection. The term includes any person who composes and sells, or offers to compose and sell, forms, letters, and other collection media used or intended to be used for debt collection, but does not include an attorney or counselor at law.[23]

California law defines "debt collection," to be "any act or practice in connection with the collection of consumer debts."[24] A consumer debt is statutorily defined to be "money, property or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction."[25] Finally, a "consumer credit transaction" is statutorily defined to be "a transaction between a natural person and another person in which property, services or money is acquired on credit by that natural person from such other person primarily for personal, family, or household purposes."[26]

This is a very broad definition requiring only,

A. That a person (natural or fictitious, § 1788.2(g)),

B. In the ordinary court of his, her, or its business,

C. On behalf of him/her/itself or others,

D. Engage in any act or practice in connection with the collection of,

E. Money, property or their equivalent, due or owing relating to,

F. A transaction between a natural person and another person,

G. For property, services or money is acquired on credit by that natural person from such other person, and

H. Was primarily for personal, family, or household purposes of the natural person.

Nothing in the statutory definition excludes a consumer debt from the Rosenthal Act merely because it is secured by real or personal property. Further, nothing in the statutory definition excludes a person from the Rosenthal Act merely because he, she, or it is attempting to collect a consumer debt that is for

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[23] Cal. Civ. Code § 1788.2(c).

[24] *Id.* § 1788.2(b).

[25] *Id.* § 1788.2(f).

[26] *Id.* § 1788.2(e).

a transaction that he, she or it entered into with the consumer. By its plain language, the term "debt collector" as used in the Rosenthal Act includes a creditor who is attempting to collect any consumer debt owed to that creditor.[27]

In 1999 the California Legislature grafted several FDCPA provisions onto the Rosenthal Act. California Code of Civil Procedure § 1788.17 provides,

> Notwithstanding any other provision of this title, every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j, inclusive, of, and shall be subject to the remedies in Section 1692k of, Title 15 of the United States Code. However, subsection (11) of Section 1692e[28] and Section 1692g[29] shall not apply to any person specified in paragraphs (A) and (B) of subsection (6) of Section 1692a of Title 15 of the United States Code or that person's principal. The references to federal codes in this section refer to those codes as they read January 1, 2001.

The California Legislature carefully excluded a limited subclass of

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[27] The widely used California Practice Guide, *Enforcement of Judgments and Debts*, also states, "**Creditors included:** Thus, the state FDCPA [Rosenthal Act] applies both to *third party debt collectors* (e.g. collection agencies) and to *creditors* who regularly collect consumer debts." California Practice Guide, Enforcement of Judgments and Debts ¶ 2:127 (Judge Alan M. Ahart, The Rutter Group 2012, Rev. # 1 2011 (emphasis in original).

[28] 15 U.S.C. 1692e(11) requires that the FDCPA debt collector provide the Mini-Miranda, a disclosure in the initial written communication, and initial oral communication if it precedes the initial written communication, with the debtor that the communication is from a debt collector and that it is an attempt to collect a debt.

[29] 15 U.S.C. § 1692g requires that the initial written communication disclose to the debtor (1) the amount of the debt, (2) the name of the creditor to whom the debt is owed, (3) a statement if the debtor does not dispute the debt in writing within 30 days the debt collector will assume the debt is valid, (4) that if the debt is disputed in the 30-day period the debt collector will obtain verification of the debt from the creditor, and (5) that upon written request within the 30-day period the debt collector will provide the debtor with the name and address of the original creditor, if different from the current creditor for whom the debt is being collected.

A statutory exception is provided in 1692(g)(e) that forms and notices not relating to the collection of the debt and required by the Internal Revenue Code (26 USCS §§ 1 et seq.), title V of Gramm-Leach-Bliley Act (15 USCS §§ 6801 et seq.), or federal or state law relating to notice of data security breach or privacy are not treated as a "communication" under the FDCPA.

Rosenthal Act statutorily defined debt collectors from only two of the state law obligations arising under grafted on 15 U.S.C. § 1692e(11) (initial disclosure, commonly called the Mini-Miranda, to be given in the first collection communication with the consumer debtor) and § 1692g (requirement to validate the debt if consumer requests in writing within 30 days of the initial collection communication). However, all of the other grafted FDCPA provisions apply in full force and effect for all Rosenthal Act defined debt collectors.

The subclass of Rosenthal Act defined debt collectors given an exemption from these two provisions are (1) "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;" or (2) "any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;...."[30] Clearly, the only reason that such exceptions were required to be created by the California Legislature to the definition of a Rosenthal Act debt collector can be that without them, officers or employees of the creditor, the creditor, and a creditor owned and controlled collection agency subsidiary, are otherwise within the broad Rosenthal Act definition of a debt collector.

In considering the Defendants' argument and the authorities it has cited, it is critical to understand that the FDCPA statutory definition of a debt collector differs significantly from the California state law definition of a debt collector under the Rosenthal Act. Under the FDCPA a debt collector is defined to be,

> [**a]ny person who** uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who **regularly collects** or attempts to collect, directly or indirectly, **debts owed or due or asserted to be owed or due another**. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the **term includes any creditor who**, in the process of collecting his own debts, **uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts**. For the purpose of section 808(6) [15 UCS § 1692f(6)], such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests....[31]

First, with the limited exception of a creditor using an alias to make it appear that a third-party is involved, the FDCPA defined debt collector is limited to a person attempting to obtain payment on an obligation which was originally owed to another person. Commonly an FDCPA covered debt collector is called a "third-party debt collector." (The original creditor and debtor being the first two parties to the transaction.)

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[30] 15 U.S.C. 1692a(6)(A), (B).

[31] 15 U.S.C. § 1692a(6) (emphasis added).

In grafting the FDCPA onto state law, the California Legislature recognized this difference, creating the limited exceptions for the Mini-Miranda and validation notice requirements for creditors who are debt collectors under the Rosenthal Act. However, the basic provisions of the Rosenthal Act that a person shall not lie, cheat, steal, threaten, or abuse a consumer in attempting to obtaining payment on a consumer debt do not interfere with the good faith collection of the consumer debt – whether it be secured or unsecured. To the extent that state law provides a procedure for obtaining payment on the debt, such as a statutory non-judicial foreclosure process, the California Legislature has provided the creditor, third-party debt collector, servicing agency, and consumer with clear benchmarks by which the collection activities can be measured. There is nothing inconsistent with the requirements of the Rosenthal Act and it being applied to a creditor with a secured claim.

State Law Provides an Express Exemption From The Rosenthal Act Only For The Trustee Under a Deed of Trust

California Civil Code § 2924(b) provides a statutory exemption from the Rosenthal Act for a trustee under a deed of trust as follows,

> In performing acts required by this article, the trustee shall incur no liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage. **In performing the acts required by this article, a trustee shall not be subject to Title 1.6c (commencing with Section 1788) of Part 4.**[32]

The California Legislature has carefully constructed the exemption to apply only (1) to the trustee under a deed of trust and (2) only to that trustee performing the acts required under Article 1, Mortgages in General, of Chapter 2, Mortgages, of Title 14 of the California Civil Code, Lien. In enacting this exemption from the Rosenthal Act, the California Legislature has clearly limited to the acts of a trustee exercising the powers under a deed of trust. The California Legislature has not created, or intended to create an implied, free ranging exemption by which a trustee under a deed of trust (and thereby the creditor owed the consumer debt) becomes an unregulated debt collector for any and all purposes.

If Defendant were correct that the Rosenthal Act did not apply to debts which were secured by real property or for which foreclosure proceedings could be commenced or were being prosecuted, then no legislative reason would have existed for enacting California Civil Code § 2924(b).

Legislative History of the Rosenthal Act[33]

Given the dearth of statutory analysis presented to the court by the

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[32] Cal. Civ. Code § 2924(b)(emphasis added).

[33] The legislative history documents are an Addendum to this court's reported decision in *Landry*, and may be reviewed using PACER access to the court's public records, at the courthouse itself, or using commercial case reporting services.

parties, in addition to the plain language of the statute the court has reviewed the legislative history available from the California State Archives maintained by the California Secretary of State. California Senate Bill 237, 1977, is the legislation by which the Rosenthal Act (formerly known as the Robbins-Rosenthal Fair Debt Collection Practices Act) was enacted. It is clear from the legislative history that the plain language of the statute means what it says – all debt collectors, whether original creditors, agents of original creditors, or third-party collection agencies, for all consumer credit transaction debts, whether secured or unsecured, are covered by the Rosenthal Act.

The Assembly Judiciary Committee Analysis issued for the August 11, 1977 hearing on for SB 237, states,

> This measure governs all debt collection practices arising from the extension of credit if the credit was obtained primarily for personal, family, or household purposes. **Regulated debt collectors include any person who**, in the **ordinary course of business, on behalf of himself** or others, **engages in debt collection** and any person who composes and sells forms, letters, and other collection media used for debt collection. Debt collectors currently licensed by the Bureau of Collections and Investigations [traditional third-party collection agencies] would be subject to regulation by this measure. Attorneys are specifically exempted.[34]

After SB 237 was passed by the Legislature, the California Department of Consumer Affairs issued its Enrolled Bill Report to then Governor Edmund G. Brown, Jr., stating,

> The collection practices of collection agencies licensed by the Bureau of Collection and Investigative Services [traditional third-party collection agencies] are regulated by the Bureau. Licensed collection agencies are responsible for about 10% of the debt collection in California. The other 90% is performed by in-house collectors (for banks, retailers, finance companies, and so on.)...
>
> The Robbins-Rosenthal Fair Debt Collection Practices Act [renamed the Rosenthal Act in AB 969, 1999] would be **a comprehensive act governing the debt collection practices of all person who in the ordinary course of business on behalf of themselves** or others engage in the collection of consumer debts. The Act would thus **apply to debt collectors licensed by the Bureau of Collection and Investigative Services (CIS) and to in-house collectors** (such as bankers, credit unions, savings and loans, personal property brokers, industrial loan companies, and retailers)...
> ...
>
> A. SPECIFIC FINDINGS

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[34] Fair Debt Collection Practices Act Bill Digest: Hearing on California SB 237 Before the Assembly Comm. on Judiciary, August 11, 1977 (emphasis added).

> The Robbins-Rosenthal Fair Debt Collection Practices Act would be a comprehensive act governing the debt collection practices of **all persons who in the ordinary course of business on behalf of themselves or others** engage in the collection of consumer debts. The Act would thus apply to debt collectors licensed by the Bureau of Collection and Investigative Services (CIS) and to in-house collectors (such as bankers, credit unions, savings and loans, personal property brokers, industrial loan companies, and retailers)...
>
> D. RECOMMENDATION: Sign
>
> The Department of Consumer Affairs worked with Senator Robbins on the August amendments and we are satisfied that this amended bill would constitute a significant improvement in consumer protection against unfair debt collection practices. While the bill's provisions are in some cases less strict than the new regulations governing the collection agencies licensed by the Bureau of Collection and Investigative Services, **we believe that the bill's impact on the presently unregulated collection practices of in-house collectors – whose activities make up more than 90% of debt collection --** would represent a positive gain for consumers.[35]

The Rosenthal Act was enacted specifically to make the creditor, not merely the third-party collection agency, subject to the California debt collection laws. This is consistent with the plain language of the statute defining debt collector expansively, so as to address the 90 percent of the otherwise unregulated creditor debt collection activities.

The court has also reviewed the legislative history for the 1999 amendments to the Rosenthal Act, AB 969, by which specific provisions of the FDCPA were made part of state law. The Senate Rules Committee Report, issued for the Third Reading of AB 969 on the Senate Floor, states,

> This bill provides that **every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j**, inclusive, of Title 15 of the United States Code. These sections provide, among other provisions, that a collector may not harass, oppress, or abuse a debtor, nor use obscene language. Third parties may only be

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[35] California Department of Consumer Affairs, Enrolled Bill Report for SB 237, September 15, 1977 (emphasis added). *See also* California Department of Finance, Enrolled Bill Report for SB 237, September 15, 1977, stating,

> This bill would substantially expand the coverage of debt collection law. Under existing law, only the debt collection practices of <u>licensed</u> collection agencies are regulated. This bill would increase the coverage of such law as to include in-house debt collectors such as banks and retailers (approximately 90 percent of the debt collectors in the State).

> contacted with the debtor's permission.
> ...
> This duel scheme of regulation [FDCPA and Rosenthal Act] can sometimes become confusing, rendering state law unused. The sponsor argues this bill is needed in order to establish clear lines of acceptable behavior, pointing out that other states, such a Pennsylvania and Massachusetts, have similarly incorporated federal provisions to harmonize state and federal law. The [California Attorney General] adds that, **"consistent federal and state standards** would facilitate compliance and enforcement and **provide a level playing field for all engaged in debt collection activity.**"[36]

The Senate Judiciary Committee Analysis contains similar language that the FDCPA provisions shall apply to all debt collectors (with the specified two exceptions), and adds the further information from the sponsor of AB 969, the California Attorney General,

> The bill's sponsor, the Attorney General, (AG) adds, "the Attorney General's office has sponsored AB 969 to **harmonize state and federal law by applying federal debt collection standards and remedies to all parties defined as debt collectors under California law.**"[37]

Again, with the 1999 amendments the legislative history is clear – all provisions of the Rosenthal Act, including the grafted on FDCPA provisions (subject to the two express exceptions), shall apply to all debt collectors as defined under the Rosenthal Act. There is no evidence of any non-statutory intent or belief that an unstated general exception was created using the federal definition of debt collector to change the definition in the Rosenthal Act.

Preemption

Though Defendant may well be a “debt collector” as defined by the Rosenthal Act, that does not result in it being subject to the claim asserted in the Complaint. In the situation involving the FDCPA, the Bankruptcy Appellate Panel the Ninth Circuit has stated that Congress did not intend for the and its debt validation provisions to apply in context of proofs of claim filed in bankruptcy case. Rather, a Chapter 13 debtor's sole remedy, to extent that creditor's proof of claim sought to recover on time-barred or nonexistent debts, lay in objecting to proof of claim and, perhaps, in moving for award of sanctions pursuant to federal bankruptcy law, not in adversary proceeding under the FDCPA, whose provisions conflicted with claims processing procedures contemplated by the Bankruptcy Code and Rules. 11 U.S.C. § 502. *B-Real, LLC v. Chaussee (In re Chaussee)*, 399 B.R. 225 (B.A.P. 9th Cir. 2008).

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[36] California Senate Rules Committee, Senate Floor Analysis for AB 969, July 23, 1999 (emphasis added).

[37] Hearing on AB 969 Before the California Senate Judiciary Committee, 1999-2000 Regular Session, July 7, 1999 (emphasis added).

The Plaintiffs' Complaint asserts that the Rosenthal Act has been violated based on the following grounds.

A. Plaintiff objects to Proof of Claim No. 4 filed by Defendant.

B. Defendant had no right to file a proof of claim and by doing so committed a misrepresentation of a debt in violation of the Rosenthal Act.

C. The debt which is the subject of Defendant's claim was satisfied in full prior to the commencement of this case.

D. Sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011 and Federal Rule of Civil Procedure 11 are appropriate for Defendant's conduct in filing Proof of Claim No. 4.

Complaint, General Allegations and Allegations in the First Claim for Relief, which are incorporated into the specific Allegations in the Second Claim for Relief.

The collection of debts incurred primarily for personal, family, or household use, are 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).[38] The Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act") is California's version of the Fair Debt Collection Practices Act ("FDCPA"), which pre-dated the FDCPA and now incorporates by reference specific FDCPA's requirements and remedies.[39]

The FDCPA and the state Rosenthal Act differ in one key respect: the Rosenthal Act provides broader protection for consumers than the federal law. The FDCPA applies to any person or employee collecting consumer debt – not merely third-party debt collectors.[40] Thus, a creditor might be exempt from the FDCPA, but subject to the Rosenthal Act, which imposes exactly the same limitations and restrictions as the FDCPA.[41]

In a persuasive, unpublished decision by the Bankruptcy Appellate Panel, the court concluded that the Rosenthal Act was completely preempted by

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[38] 1-1 MB Practice Guide: CA Debt Collection 1.17.

[39] *Riggs v. Prober & Raphael*, 681 F.3d 1097, 1100 (9th Cir. 2012); Cal. Civ. § 1788.17.

[40] Cal. Civ. § 1788.2(a)(c), (b), (f), and (e); and 15 U.S.C. § 1692a(6), California and Federal definitions of "debt collector" subject to the collection laws.

[41] *Pirouzian v. SLM Corp.*, 396 F Supp2d 1124, 1131 (S.D. Cal. 2005) ("By enlarging the pool of entities who can be sued, the [Rosenthal Act] merely affords a separate state remedy, which grants protection beyond what is provided by the FDCPA.")

the Bankruptcy Code in a case where a Debtor alleged that a Creditor had filed a proof of claim for a non-existent and/or time-barred debt in Debtor's bankruptcy case. *In re McCarther-Morgan,* BAP SC-08-1093KWMOJU, 2009 WL 7810817 (B.A.P. 9th Cir. Jan. 27, 2009)

The Ninth Circuit Court of Appeals has addressed the preemption issue in connection with the Bankruptcy Code in a line of cases tracing back to *MSR Exploration, LTD v. Meridian Oil, Inc.*, 74 F.3d 910 (9th Cir. 1995). The Ninth Circuit Court of Appeals recognized that the federal court conducting bankruptcy proceedings (whether the district court judge or the bankruptcy court judge) the jurisdiction for those matters is exclusively federal. There is not concurrent federal and state court jurisdiction over bankruptcy matters.

Further, the Ninth Circuit Court of Appeals considered the comprehensive structure of the Bankruptcy Code established by Congress. This mitigates further against superimposing non-bankruptcy law remedies over the Bankruptcy Code. The bankruptcy claims process is one in which it is the Bankruptcy Code, Federal Rule of Civil Procedure 11, Federal Rule of Bankruptcy Procedure 9011, and the inherent powers of the federal judges "police" the claims process and conduct of the parties.

In *MRS Exploration* the Ninth Circuit Court of Appeals rejected a debtor's contention that the filing of a disputed proof of claim could be the basis for an independent malicious prosecution claim. In a subsequent decision the Ninth Circuit Court of Appeals in *Miles v. Okun (In re Miles)*, 430 F.3d 1083 (9th Cir. 2005), concluded that the Bankruptcy Code provided the exclusive remedy for damages arising from the improper filing of multiple involuntary bankruptcy petitions against a debtor. The Court concluded that the various state law tort claims were preempted by the Bankruptcy Code as they related to the conduct of the person filing the involuntary bankruptcy petitions.

The fact that the bankruptcy judicial process preempts various state law and non-bankruptcy law statutory and tort claims does not leave a party without relief. As discussed by the Ninth Circuit Court of Appeals in *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002) , the Court concluded that a claim alleging a violation of the discharge injunction (11 U.S.C. § 524(a)) cannot be the basis for a private right of action under the FDCPA. The proper remedy for an alleged violation of the bankruptcy discharge injunction is to seek relief through the federal court contempt powers.

The Plaintiffs argue in their Opposition to the Defendant's Motion to Dismiss, Dckt. No. 14, that the provisions of the Rosenthal Act are consistent with the Bankruptcy Code, and that this cause of action is not preempted by the Bankruptcy Code. While the federal court properly policing the practices in the court, including the filing of claims, through its inherent powers, Rule 9011, and Rule 11, it is not for the Plaintiffs to create rights were Congress provided for none.

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 Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961). All the Plaintiffs assert is that Defendant filed a proof of claim they dispute and that the proof of claim filed in federal court should be the basis for asserting a state law claim under the Rosenthal Act. That is

incorrect. Plaintiffs may address their dispute through the claims objection process and then seek to relief for damages under the proper procedures relating to claims made and pleadings filed in federal court.

Plaintiffs' second cause of action is dismissed.

Fifth Cause of Action

The courts are equally divided when looking at whether the Real Estate Settlement Procedures Act is preempted by the Bankruptcy Code. See, e.g., *In re Figard*, 382 B.R. 695, 2008 WL 501356 (Bankr.W.D.Pa.2008)(court finds that Bankruptcy Code does not preempt provisions of Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(e)(2)); *In re Holland*, 374 B.R. 409 (Bankr.D.Mass.2007)(Bankruptcy Code does not preempt Real Estate Settlement Procedures Act); *In re Nosek*, 354 B.R. 331 (D.Mass.2006)(court finds Bankruptcy Code preempts Real Estate Settlement Procedures Act and state statutory and common law).

As the Defendant states, the Real Estate Settlement Procedures Act creates a private rights of action to redress three types of wrongful acts: (1) a payment of a kickback for real estate settlement services (12 U.S.C. § 2607(d)); (2) requiring a buyer to use a title insurer selected by the seller (12 U.S.C. § 2608(b)); and (3) a failure by a loan servicer to give proper notice of a transfer of servicing rights or to respond to a QWR for information about a loan (12 U.S.C. § 2605(f)). A RESPA claim based on payment for no services in violation of 12 U.S.C. § 2607 must be brought within one year of the violation. 12 U.S.C. § 2614; *see also Edwards v. First Am. Corp.*, 517 F.Supp.2d 1199, 1204 (C.D. Cal. 2007); *Blaylock v. First Am. Title Ins. Co.*, 504 F.Supp.2d 1091, 1106 (W.D. Wash. 2007).

Here, Plaintiffs' Complaint is unclear as to what provision of the Real Estate Settlement Procedures Act has been violated, and what type of violation would entitle Plaintiffs to actual damages, the requested statutory penalty of $1,000, and attorney's fees and costs. Plaintiffs merely state that the escrow analysis provided in the Proof of Claim "does not conform to the RESPA," in that the starting point of the escrow analysis does not take into account the impound beginning balance, based on the payments made from the pre-petition arrearage.

Although this is a specific allegation regarding the error that Defendant may have committed in preparing the Proof of Claim, Plaintiffs fail to allege the misconduct that fits the criteria of the type of wrongful act contemplated and covered by the Real Estate Settlement Procedures Act. Plaintiffs do not allege how the miscalculated escrow analysis may rise to the level of misconduct encompassed by the Real Estate Settlement Procedures Act, in punishing acts that are committed during the origination of the loan, or in notifying a mortgagee about the transfer of servicing rights for a loan.

Additionally, this remedy under RESPA is stated to be based on the filing of Proof of Claim No. 4 in the bankruptcy case. If the only basis for the RESPA relief is the filing of a proof of claim, then Plaintiff must seek relief under the Bankruptcy Code, Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the inherent powers of this court, not through an ancillary claim based on non-bankruptcy law or procedure.

Plaintiff's allegations for their Fifth Cause of Action lack clear evidentiary and pleading support. Thus, Plaintiffs' Fifth Cause of Action is dismissed.

Third, Fourth, Sixth, and Seventh Causes of Action

Defendant argues that the Plaintiffs' Third Claim for Relief for Negligence, Fourth Claim for Relief for Fraud and Intentional Misrepresentation fail, Sixth Claim for Relief for Breach of Contract; and Seventh Claim For Relief for Conversion each fails because they are preempted by the Bankruptcy Code and Plaintiffs have failed to please sufficient facts to support a claim for each relief sought.

All of the Plaintiffs' Claims for Relief in the instant Adversary Proceeding are based on the filing of Proof of Claim No. 4 as the only grounds for negligence, fraud, misrepresentation, breach of contract, and conversion. The remedial schemes of 11 U.S.C. §§ 501, 502, Federal Rules of Bankruptcy Procedure 3001-3008, Federal Rule of Bankruptcy Procedure 9011, and the inherent power of this court and the United States District Court establish appropriate procedures for those who wish to contest a Proof of Claim and remedies for misconduct by creditors in the claims process.

All persons have the right to petition the court to assert rights and defenses. Such conduct is generally privileged, subject to very specific rights and remedies structured to avoid one lawsuit spawning a multiplicity of lawsuits. *Rusheen v. Cohen*, 37 Cal. 4th 1048 (2008)*, Jacob B. v. County of Shasta*, 40 Cal.4th 948, 956 (2007); *Johnson v. JP Morgan Chase Bank DBA Chase Manhattan*, 536 F. Supp. 2d 1207, 1210-11 (E.D. Cal. 2008).

This is consistent with the Ninth Circuit rulings on federal preemption of these types of state law claims relating to proofs of claim and other pleadings (such as involuntary petitions) filed in federal court. The proper remedies lie within that judicial proceeding itself, not a myriad of state and other non-bankruptcy law claims. Malicious prosecution, bankruptcy statutory remedies, Rule 9011 compensatory and corrective sanctions, and the inherent power sanctions of the bankruptcy and district (including punitive sanctions) are the proper remedies. In addition, for proofs of claim, submitting a fraudulent claim may subject the violating party to a fine of up to $500,000.00 and imprisonment of up to five years. 18 U.S.C. §§ 152 and 3571.

Here, the Defendant Proof of Claim, Claim No. 4, on January 15, 2014 in Plaintiffs' open bankruptcy case, Case No. 13-31975. The Proof of Claim asserted, as required by the Bankruptcy Code, what Defendant asserted was its rights as a creditor. Plaintiff may object to Proof of Claim No. 4 and have that dispute litigated as part of the claims process in the bankruptcy case.

In their Complaint, Plaintiffs have made no allegation about the Defendant's misconduct, other than filing, preparation, and prosecution of Defendant's Proof of Claim. The Plaintiffs offer no "short and plain statement of the claim" for any other grounds upon which relief is requested. The various state law claims by which Plaintiffs now seek remedy are preempted by the bankruptcy claims process and relief which Plaintiff may obtain thereto.

Thus, Plaintiffs' Third, Fourth, Sixth, and Seventh Causes of Action

are dismissed.

Having determined that the Plaintiffs have failed to state a claim for relief under each of the following Claims for Relief, and that each of them are preempted by the Bankruptcy Code, the Motion is granted and the court dismisses the Second, Third, Fourth, Fifth, Sixth, and Seventh Claims for Relief. The Motion is denied as to the First Claim for Relief.

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 Second, Third, Fourth, Fifth, Sixth, and Seventh Causes of Action in Plaintiffs' Adversary Complaint, Dckt. No. 1, are dismissed.
>
> **IT IS FURTHER ORDERED** that a motion for leave to file an amended complaint to restate any of the dismissed causes of action or state other causes of action in light of the Ruling on the present Motion to Dismiss, shall be filed and served on or before June 20, 2014. A copy of the proposed amended complaint shall be filed as an exhibit in support of the motion for leave to file an amended complaint.
>
> **IT IS FURTHER ORDERED** that Defendant Wells Fargo Bank, N.A. time to file an answer to the Complaint is extended through and including July 15, 2014. If a motion to file an amended complaint is filed, the time to file an answer to the Complaint is further extended to a date which shall be set upon the court ruling on the motion for leave to file an amended complaint.

ISSUANCE OF SEPARATE ORDER CONTINUING STATUS CONFERENCE

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 Court having granted Defendant Wells Fargo Bank, N.A.'s motion to dismiss the Second, Third, Fourth, Fifth, Sixth, and Seventh Claims for Relief, the Plaintiff having been granted until June 20, 2014, the Defendant having been granted an extension to filing an answer to the remaining First Claim for Relief; upon review of the files in this Adversary Proceeding, and good cause appearing,
>
> **IT IS ORDERED** that the Status Conference in this

Adversary Proceeding is continued to 1:30 p.m. on August 5, 2014 (specially set for the Chapter 13 Motion for Relief From Stay Calendar).

7.	**13-32494-E-13** **CAH-2**	**THEODORE/MOLLY MCQUEEN** **C. Anthony Hughes**	**HEARING RE: MOTION TO CONTINUE HEARING O.S.T.** **6-2-14 [116]**

No Tentative Ruling.