UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

July 27, 2017, at 11:00 a.m.

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1. **13-24610-E-13** **DAX/TINA CHAVEZ**
17-2076 **RMP-1**
CHAVEZ ET AL V. GREGORY FUNDING LLC ET AL

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING
5-22-17 [7]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff, Plaintiff's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on May 22, 2017. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss Adversary Proceeding is denied.

U.S. Bank National Association, as Indenture Trustee on Behalf of and with Respect to Ajax Mortgage Loan Trust 2016-B, Mortgage-Backed Notes, Series 2016-B ("U.S. Bank") (erroneously sued as AJX Mortgage Trust I) and Gregory Funding LLC ("Gregory Funding") (collectively, "Defendants") move for the court to dismiss all claims against them in Dax Chavez and Tina Chavez's ("Plaintiff") Complaint according to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction under 28 U.S.C. § 157(b)–(c).

The grounds stated with particularity in the Motion (Federal Rule of Civil Procedure 7(b), Federal Rule of Bankruptcy Procedure 7007, Local Bankruptcy Rule 9004-1, and the Revised Guidelines for Preparation of Documents for the Eastern District of California) are stated to be:

> This Motion is made on the grounds that this Court lacks subject matter jurisdiction to adjudicate the causes of action stated in the Adversary Proceeding under 28 U.S.C. §§ 157(b)–(c), or alternatively, this Court must abstain from adjudicating the matter under 28 U.S.C. § 1334(c). Defendants do not consent to jurisdiction by this Court and similarly does not consent to entry of any judgment, in favor of either Plaintiffs or Defendants, by this Court.

Motion, Dckt. 7, at 2:20–24. The Motion merely states a legal conclusion, not "grounds" upon which the court may draw conclusions.

The Motion also tells the court to canvas the "Notice of Motion to Dismiss Adversary Proceeding, the Memorandum of Points and Authorities in Support of the Motion to Dismiss Adversary Proceeding filed concurrently herewith, the complete files and records in this action and the underlying bankruptcy action" to assemble for Defendants whatever "grounds" this court believes that Defendants would or should state for "grounds" as the basis for the relief requested. That is improper.

That instruction by Defendants for the court to research all of the files in this Adversary Proceeding, the bankruptcy case, and other supporting pleadings is a common practice in California state court, and counsel may be attempting to import (improperly) state judicial rules and process into this court. Giving Defendants the benefit of the doubt, and because of the court's sua sponte responsibility to determine that federal jurisdiction exists, the court also has plowed through the arguments, contentions, citations, quotations, and speculation in the Points and Authorities to identify other "grounds" that may be stated indirectly with particularity.

From the Points and Authorities, Dckt. 9, the court identifies the other grounds being asserted by Defendants:

A. "The Court lacks subject matter jurisdiction over the Adversary Proceeding pursuant to 28 U.S.C. § 1334. This is not a core proceeding pursuant to 28 U.S.C. § 157(b)(2)." *Id.*, at 2:10–11.

B. "Defendants do not consent to jurisdiction by this Court to hear this matter and similarly does not consent to entry of any judgment, in favor of either Plaintiffs or Defendants, by this Court." *Id.*, at 2:12–14.

C. "Debtors filed [a post-petition] Objection to the [Federal-Bankruptcy-Rule-required Notice of Mortgage Payment Change] on January 23, 2017 as Docket Nos. 138-142 in the Underlying Bankruptcy." *Id.*, at 2:19–20.

D. "On March 27, 2017 this Court entered an Order sustaining the Objection ('Order'), stating that the payment increase would not be allowed, and that U.S. Bank was to pay

Debtors' attorney fees. See, Docket No. 189 in the Underlying Bankruptcy." *Id.*, at 2:26–28.

E. "'Bankruptcy courts are courts of limited jurisdiction, possessing only such powers as the Congress expressly or impliedly confers upon them.'" For that proposition, Defendants cite to cases from 1924, 1938, 1939, and 1949. *Id.*, at 3:9–13.

F. "Under *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594 (2011), bankruptcy courts only have jurisdiction to enter final orders in core proceedings, subject only to an analysis of the Court's Article I powers (versus the Article III judicial powers of the District Courts)." *Id.*, at 3:13–16.

G. "Under the *Pacor* test, a claim is related to a bankruptcy case when 'the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.' *Pacor,Inc. v. Higgins*,743 F.2d 984, 994 (3d Cir. 1984)." *Id.*, at 3:25, 4:1–2.

H. "The outcome of this adversary proceeding will have no impact on the bankruptcy estate. The creditors as a whole will not be better off, nor will they be worse off, as a result of the outcome of the litigation. The crux of Plaintiffs' claims pertains to post-petition cancellation of an insurance policy, and claimed damage to the Plaintiffs' property due to Plaintiffs' subsequent failure to mitigate damages." *Id.*, at 4:9–13.

I. "Moreover, the claims made in the Adversary Proceeding have no relation to the factors related to the NOPC. More specifically, the only issue in the NOPC was whether Defendants could increase the monthly installment payments due to an increase in property taxes and also increased insurance for which the Plaintiffs negotiated the premium." *Id.*, at 4:18–21. FN.1.

FN.1. On this contention, the court notes that this is a misstatement of the proceedings in this court relating to the Objection to Notice of Mortgage Payment Change and the subsequent proceedings on Defendants' Motion to Reconsider the court's order on that Objection. This court has expressly determined that Defendants never contended that the proposed change in the mortgage payment was based on property taxes but defended the proposed mortgage payment change based on the cancellation of the insurance and forced place insurance being put into place by Defendants and their loan servicer. 13-24610; Civil Minutes, Dckt. 225, and June 15, 2017 Order, Dckt. 229.

The court's findings of fact and conclusions of law in denying Defendants' Motion to Reconsider the court's Order sustaining the Objection to the Notice of Mortgage Payment Change include:

> It must be remembered that the Objection to Notice of Mortgage Payment Change was expressly stated to be based on Creditor having obtained forced place insurance and increasing the mortgage payment to make Debtor pay for the expensive forced place insurance (Debtor having already paid for the insurance, the payment of the premium being the responsibility of Creditor).

> The Opposition stated by Creditor is clearly: (1) Creditor received the monies to make the insurance payments from Debtor, (2) Creditor (having somehow failed to pay the insurance premium) has let the insurance company cancel the policy for failure to make the payment, (3) Creditor has obtained forced place insurance, and (4) Debtor is obligated to pay for the forced place insurance. The court understood, and still understands the Opposition filed by Creditor to be that **Debtor's Objection to the Mortgage Payment Change for the cost of Forced Place Insurance should be denied.**
>
> . . .
>
> Ms. Barney's [Defendants' witness] declaration confirms that Creditor obtained the forced place insurance, which in the Opposition Creditor argues that Debtor is obligated to pay, therefore the Objection to Notice of Mortgage Payment Change should be denied. This is all consistent with **Creditor Arguing that the Objection to Notice of Mortgage Payment Change**, which is based on the repayment of forced place insurance, **Should Be Denied Because Debtor Is Obligated to Pay for Forced Place Insurance**.
>
> . . .
>
> No mention is made of property taxes, no evidence concerning any property taxes were provided in response to the Objection to Notice of Mortgage Payment Change that was based on the forced place insurance. The Opposition and evidence presented by Creditor is that Creditor had the right to obtain forced place insurance and Debtor had to pay for the forced place insurance.
>
> . . .
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> Most of Creditor's arguments continue to be "the Debtor's fault" that the insurance was cancelled and not reinstated. Creditor continues to ignore that the last written communication it provided concerning the insurance from the insurance company was a "your premiums are paid, we are happy to be providing you with insurance" letter dated November 22, 2016. Creditor's Exhibit F, Dckt. 164.
>
> In addition to carefully reading the Opposition filed by Creditor to the Objection to Notice of Mortgage Payment Change (Dckt. 161), the court has run a word search of that document for the words: "tax," "taxes," "property tax," and "property taxes." None of those words or word phrases appear. However, the word "insurance" appears twenty-five times. . . .

13-24610; Civil Minutes, at 8, 9, 10, 12, Dckt. 226.

J. "Plaintiffs' claims are all based in California State law and on state law claims; not one claim is based on Federal or Bankruptcy law." *Id.*, at 4:23–24.

K. "Accordingly the Adversary Proceeding must be dismissed for lack of subject jurisdiction since it is not a core proceeding." *Id.*, at 4:25–26.

L. "The Court in *In re Roman Catholic Archbishop of Portland* (338 B.R. 414, 420-21 (2006)) looked to California and Ninth Circuit law to articulate fourteen factors used in determining whether the Bankruptcy Court should abstain from causes of action so that, pursuant to 28 U.S.C. § 1334(d), they may be litigated in state court." *Id.*, at 5:7–10.

M. "Here, like *Fietz* and *Houghton*, Plaintiffs are attempting to make a weak and tenuous relationship between the Adversary Proceeding and administration of the Bankruptcy Estate solely in the belief the outcome will be favorable based on past events. The Plaintiffs' Chapter 13 Plan was confirmed years ago, administration of the Chapter 13 Plan has no dependency on the outcome of this litigation, and all property of the estate vested in Plaintiffs when their Plan was confirmed (see, Underlying Bankruptcy, Dkt. 110 at ¶ 5.01, which states: 'Property of the estate [choose one] shall **X** shall not ☐ revest in Debtor upon confirmation of the plan.')." *Id.*, at 7:24–28, 8:1–2.

N. "Here the claims are not interdependent. Cancellation of Plaintiffs' insurance policy by Ameriprise is completely unrelated to the facts underlying the NOPC. Defendants had no control over or contractual privity with Ameriprise, and Plaintiffs' consent was required in order to reinstate the policy (see, Underlying Bankruptcy, Dkt. 193 for a declaration attesting to this fact). There is no need for this Court to 'vindicate its authority and effectuate its decrees' since this Court enjoys comity with any state or district court.

The NOPC did not incorporate any aspect of cancellation of the Ameriprise policy (Id.). As a result there is no ancillary jurisdiction this Court could exercise and the Adversary Proceeding must be dismissed." *Id.*, at 8:9–17. FN.2.

FN.2. Again, as stated above, the contention to "re-relitigate" that this court's adjudication of the Objection to Notice of Mortgage Payment Change was unrelated to any "facts" concerning the cancellation of the insurance policy is a misstatement of this court's rulings (both on the Objection and Defendants' Motion to Reconsider). This raises the specter of how Defendants would present (or misrepresent) this court's prior orders to other courts.

O. "Article III permits bankruptcy judges to adjudicate *Stern* claims only with the parties' knowing and voluntary consent. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1942-1947, (2015). Defendants do not consent to the jurisdiction of the Bankruptcy Court to adjudicate the claims arising from cancellation of the Plaintiffs' insurance policy." *Id.*, at 8:19–22.

PLAINTIFF'S OPPOSITION

Plaintiff filed an Opposition on June 15, 2017. Dckt. 13. Plaintiff argues against a finding of summary judgment in Defendants' favor. Plaintiff argues that a motion to dismiss for failure to state a claim will be granted if and only if it appears beyond doubt that the plaintiff can prove no set of facts in support

of his claim that would entitle him to relief. *Id.* at 2. Plaintiff reminds the court that it must view the facts in the light most favorable to the non-moving party when making this determination. *Id.* at 3.

Plaintiff asserts that Plaintiff's adversary proceeding is a core proceeding in this bankruptcy matter. *Id.* at 5. Plaintiff asserts that Federal Rule of Bankruptcy Procedure Rule 12(b) applies in adversary proceedings and that a finding of whether or not a matter is core or non-core does not preclude a bankruptcy court hearing a matter and sending findings of fact and conclusions of law to the district court. *Id.*

Plaintiff requests leave to amend the Complaint and, alternatively, states that it consents, to transfer to the District Court.

DEFENDANTS' RESPONSE

Defendants filed a Response on June 23, 2017. Dckt. 15. Defendants argue that Plaintiff's Opposition is misleading in making a procedural argument claiming that Federal Rule of Bankruptcy Procedure Rule 7012(b) requires certain denials of "core" or "non-core" to be stated on the face of the pleading. Dckt. 15 at 2. Defendants argue that the pleading was procedurally correct, stating that this Court did not have jurisdiction in both the Motion and the Points and Authorities. *Id.* Specifically, Defendants point to Page 2 of the Motion, which states, "Defendants do not consent to jurisdiction by this Court and similarly does not consent to entry of any judgment, in favor of either Plaintiffs or Defendants, by this Court."

Further, Defendants assert that dismissal is limited to the face of the Complaint and may not go beyond the face of the pleadings or any documents incorporated into the Complaint by reference. *Id.* at 3. Defendants state that Plaintiff made additional arguments outside of the Complaint here. *Id.*

APPLICABLE LAW

Federal Court Jurisdiction and Exercise of Federal Judicial Power

Subject matter jurisdiction defines a court's power to hear cases. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998). Before a federal court exercises its jurisdiction over parties, it must determine that there is a sufficient "case" or "controversy as required by the United States Constitution, Article III, Section 2, Clause 1, which states,

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

> of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> As stated by the Ninth Circuit Court of Appeals in *Southern Pacific Company v. McAdoo*,
>
> Unless this proceeding was within the original jurisdiction of the District Court, it could not be brought within that jurisdiction by removal. *In re Winn*, 213 U.S. 458, 464, 29 S. Ct. 515, 53 L. Ed. 873. Unless it presents a "case" or "controversy," within the meaning of section 2, art. 3 of the Constitution, it is not within the jurisdiction of any federal court. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 259, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191; *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289, 48 S. Ct. 507, 72 L. Ed. 880; *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 74, 47 S. Ct. 282, 71 L. Ed. 541.

82 F.2d 121, 121–22 (9th Cir. 1936).

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

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

> § 1334. Bankruptcy cases and proceedings
>
> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
> . . .
> (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction–(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and
> (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

Congress provides that the District Court may then assign the bankruptcy cases and all proceedings relating thereto—core and non-core—to the bankruptcy judges in that District.

> § 157. Procedures
>
> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

28 U.S.C. § 157(a). The statutory provisions for the Article I bankruptcy judge adjudicating non-core matters is provided for in 28 U.S.C. § 157(c), in which Congress states:

> (c) (1) A bankruptcy judge may hear a proceeding that is **not a core proceeding** but that is otherwise related to a case under title 11. In such proceeding, **the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court**, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
>
> (2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, **with the consent of all the parties** to the proceeding, may refer a proceeding related to a case under title 11 to a **bankruptcy judge** to **hear and determine and** to **enter appropriate orders and judgments**, subject to review under section 158 of this title [28 USCS § 158, appeals from bankruptcy judge issued orders and judgment].

28 U.S.C. § 157(c) (emphasis added).

The Supreme Court has addressed Congress's creation of federal subject matter jurisdiction for matters arising under the Bankruptcy Code, in bankruptcy cases, and related to bankruptcy cases over the decades, beginning with *Northern Pipeline* in 1984 through the three recent decisions in *Stern v. Marshall*, 564 U.S. 462, 473–75 (2011), *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165, 2171–72, 189 L. Ed. 2d 83, 92–93, (2014), and *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015). These three recent Supreme Court decisions nail down the proper exercise of the federal judicial power between bankruptcy judges and district court judges within the federal jurisdiction provided for in 28 U.S.C. § 1334.

In *Stern v. Marshall*, the Supreme Court addressed the basic grant of federal jurisdiction under 28 U.S.C. § 1334, stating:

> With certain exceptions . . . , the district courts of the United States have "original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a). Congress has divided bankruptcy proceedings into three categories: those that "aris[e] under title 11"; those that "aris[e] in" a Title 11 case; and those that are "related to a case

> under title 11." § 157(a). District courts may refer any or all such proceedings to the bankruptcy judges of their district . . . . District courts also may withdraw a case or proceeding referred to the bankruptcy court "for cause shown." § 157(d). Since Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 . . . , bankruptcy judges for each district have been appointed to 14-year terms by the courts of appeals for the circuits in which their district is located. § 152(a)(1).
>
> The manner in which a bankruptcy judge may act on a referred matter depends on the type of proceeding involved. Bankruptcy judges may hear and enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." § 157(b)(1). "Core proceedings include, but are not limited to," 16 different types of matters, including "counterclaims by [a debtor's] estate against persons filing claims against the estate." § 157(b)(2)(C). Parties may appeal final judgments of a bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards. *See* § 158(a); FED. R. BANKR. P. 8013.
>
> When a bankruptcy judge determines that a referred "proceeding . . . is not a core proceeding but . . . is otherwise related to a case under title 11," the judge may only "submit proposed findings of fact and conclusions of law to the district court." § 157(c)(1). It is the district court that enters final judgment in such cases after reviewing *de novo* any matter to which a party objects.

Stern, 564 U.S. at 473–75.

The Supreme Court followed *Stern* with its 2014 decision in *Executive Benefits Insurance Agency v. Arkison*. In developing the exercise of federal judicial power by a bankruptcy judge for non-core matters, the Supreme Court states:

> The 1984 Act largely restored the bifurcated jurisdictional scheme that existed prior to the 1978 Act. The 1984 Act implements that bifurcated scheme by dividing all matters that may be referred to the bankruptcy court into two categories: "core" and "non-core" proceedings. See generally § 157. **It is the bankruptcy court's responsibility to determine whether each claim before it is core or non-core.** § 157(b)(3); cf. Fed. Rule Bkrtcy. Proc. 7012. **For core proceedings**, the statute contains a nonexhaustive list of examples, including—as relevant here—"proceedings to determine, avoid, or recover fraudulent conveyances." § 157(b)(2)(H). **The statute authorizes bankruptcy judges to "hear and determine" such claims and "enter appropriate orders and judgments" on them.** § 157(b)(1). A final judgment entered in a core proceeding is appealable to the district court, § 158(a)(1), which reviews the judgment under traditional appellate standards, Rule 8013.
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> **As for "non-core" proceedings—i.e.**, proceedings that are "not . . . core" but are "otherwise related to a case under title 11"**—the statute authorizes a bankruptcy court to "hear [the] proceeding," and then "submit proposed**

> **findings of fact and conclusions of law to the district court**." § 157(c)(1). The district court must then review those proposed findings and conclusions de novo and enter any final orders or judgments. *Ibid.* **There is one statutory exception to this rule: If all parties "consent,"** the **statute permits the bankruptcy judge "to hear and determine and to enter appropriate orders and judgments"** as if the proceeding were core. § 157(c)(2).
>
> Put simply: If a matter is core, the statute empowers the bankruptcy judge to enter final judgment on the claim, subject to appellate review by the district court. **If a matter is non-core, and the parties have not consented to final adjudication by the bankruptcy court, the bankruptcy judge must propose findings of fact and conclusions of law.** Then, the district court must review the proceeding de novo and enter final judgment.

Exec. Benefits. Ins. Agency v. Arkison, 134 S. Ct. at 2171–72 (emphasis added). The Supreme Court clearly addresses that the core/non-core issue relates to which federal judge issues the final order and judgment, not whether "federal jurisdiction exists."

The Supreme Court rounds out the trilogy of recent cases addressing the proper exercise of federal court judicial power in *Wellness International Network, Ltd. v. Sharif*. In *Wellness International*, the Supreme Court expressly confirms that the Article I bankruptcy judge may properly issue final orders and the judgment on non-core matters with the consent, whether express or implied, of the parties.

DISCRETIONARY AND MANDATORY ABSTENTION

The grant of federal court jurisdiction pursuant to 28 U.S.C. § 1334 is very broad, bringing into federal court many non-federal law matters into federal court to allow parties to assert and have their rights and interests timely adjudicated in and through the bankruptcy laws enacted by Congress as provided in Article I of the U.S. Constitution. Because the grant of jurisdiction is so broad, Congress has also provided the statutory structure for bankruptcy judges and district court judges determining to abstain from determining issues, electing or being required to allow such matters to be adjudicated pursuant to non-bankruptcy jurisdiction. The abstention provisions created by Congress are:

> § 1334. Bankruptcy cases and proceedings
>
> (c) (1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
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> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the

> district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c).

The decision to abstain is discretionary, except when the issues in the proceeding are only "related to" the bankruptcy case (not arising under the Bankruptcy Code or in the bankruptcy case), no federal jurisdiction would otherwise exist but for 28 U.S.C. § 1334, and if there is an action that has been commenced and could be timely adjudicated in a state court forum.

When evaluating whether to abstain, the Ninth Circuit Court of Appeals has established that the court considers twelve factors:

> (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention,
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> (2) the extent to which state law issues predominate over bankruptcy issues,
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> (3) the difficulty or unsettled nature of the applicable law,
>
> (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,
>
> (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,
>
> (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
>
> (7) the substance rather than form of an asserted "core" proceeding,
>
> (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,
>
> (9) the burden on the bankruptcy court's docket,
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> (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,
>
> (11) the existence of a right to a jury trial, and
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> (12) the presence in the proceeding of nondebtor parties.

In re Tucson Estates, 912 F.2d 1162, 1167 (9th Cir. 1990).

STANDARD FOR A MOTION TO DISMISS

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

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Calhoun v. United States*, 475 F. Supp. 1 (S.D. Cal. 1977), *aff'd*, 604 F.2d 647 (9th Cir. 1979). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958).

Challenges to Subject Matter Jurisdiction

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction "must include an inquiry by the court into its own jurisdiction." *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980). The court takes all facts alleged in the complaint as true and draws all reasonable inferences in favor of the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Federal Rule of Bankruptcy Procedure 7012 also incorporates Federal Rule of Civil Procedure 12(h)(3), which states that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court *must* dismiss the action." FED. R. CIV. P. 12(h)(3) (emphasis added). That consideration may be made at any time by the court, whether by a party's motion or by the court *sua sponte*, even if after final judgment or appeal. *See Kontrick v. Ryan*, 540 U.S. 433, 455 (2004).

A motion to dismiss cannot be granted for lack of subject matter jurisdiction if the complaint purports to set out a federal claim, and that claim must not be insubstantial and frivolous. *Buchler v. United States*, 384 F. Supp. 709 (E.D. Cal. 1974). Relatedly, if the complaint avers jurisdiction generally while allegations in other portions of the complaint negate jurisdiction, then the court should dismiss the action. *Smith v. Gross*, 604 F.2d 639, 641 n.2 (9th Cir. 1979) (citation omitted).

DISCUSSION

The court begins with a review of the Complaint filed in this Adversary Proceeding. The court notes that the Complaint asserts numerous causes of action that appear to be "standard boilerplate" used by Plaintiff-Debtor's counsel in presenting issues to this court. The caption of the Complaint lists the following claims for which relief is sought:

(1) DECLARATORY RELIEF

(2) BREACH OF CONTRACT

(3) BREACH OF THE COVENANT OF GOOD PLAINTIFFS, FAITH AND FAIR DEALING

(4) UNJUST ENRICHMENT

(5) VIOLATION OF CA'S UNFAIR COMPETITION LAW GREGORY FUNDING LLC, (BUSINESS PROFESSIONAL CODE 17200 et seq.)

Complaint, Dckt. 1.

The basic allegations in the Complaint are that Defendants allowed the insurance on Plaintiff-Debtor's property to lapse, Plaintiff-Debtor paid to Defendants all monies required for payment of the property insurance, then Defendants put in place forced place insurance for which they tried to obtain additional monies from Plaintiff-Debtor, Defendants' property has been damaged, and because of the lapse in insurance, the damage is not covered by the property insurance for which Plaintiff-Debtor has paid Defendants.

Beyond the damages for the alleged breach of the contract between Plaintiff-Debtor and Defendants, the Complaint then winds through various contentions that there is some far-reaching scheme of unfair business practices, taking of kickbacks, related company transactions, and non-good-faith dealings by Defendants. Much of this portion of the Complaint appears to consist of non-specific allegations.

As Defendants assert, in Debtor's Chapter 13 case there is a confirmed Chapter 13 Plan. 13-24610; July 19, 2017 Order Confirming Third Modified Chapter 13 Plan, Dckt. 236. As shown by having to confirm a Third Modified Plan, Plaintiff-Debtor has faced some challenges to perform the confirmed Plan in the bankruptcy case. The term of the Plan in this case is sixty months, ending in April 2018. The Plan requires that all arrearages on the Class 1 Claim of Defendants be cured by the end of the Plan. *Id.*; Third Modified Plan, Dckt. 185. It requires Debtor to make payment of all of Debtor's $3,700.00 per month projected disposable income to cure the arrearage and prevent foreclosure on Debtor's home. Other than a 5% dividend being paid on general unsecured claims, Defendants are the beneficiary of the payments made by Debtor through the Chapter 13 Plan.

It is asserted that because of the insurance lapsing, damage that has occurred to Debtor's home may not be covered by the forced place insurance obtained by Defendants (after the termination of the insurance policy that Plaintiff-Debtor had maintained and paid monthly insurance escrow payments to Defendants). It is a simple line to draw that if Debtor has to divert monies from the $3,700.00 per month of projected disposable income to cover the asserted uninsured damages to the property, then Debtor cannot perform the Chapter 13 Plan. If Debtor cannot perform the Plan, then the Plan and this bankruptcy case fail.

If the Debtor defaults on the Plan, the case may well be converted to one under Chapter 7 for a Trustee to administer the assets of the estate, which will include both the house and the claims asserted in this case. 11 U.S.C. §§ 541(a), 348(d) and (f).

While Defendants assert that the claims relating to the asserted lapse of insurance, the forced place insurance, the possible lack of insurance coverage for the damage done to Debtor's home, and the prosecution of such claims having nothing to do with or having no impact on the Plaintiff-Debtor's case is clearly incorrect. (Much in the same manner as Defendants' protestations that there is no federal court jurisdiction for non-core matters is without merit.)

Subject Matter Jurisdiction Is Not Affected by Core or Non-Core Proceeding

Pursuant to Federal Rule of Bankruptcy Procedure 7008, the Complaint alleges that this Adversary Proceeding is a core proceeding, and it specifically references 28 U.S.C. § 157(b)(2)(K) & (L). Dckt. 1 at 3:16–19. The Complaint also consents to this court entering a final judgment for any matter that is deemed non-core. *Id.* at 3:20–21.

Pursuant to the 2016 amendments to Federal Rule of Bankruptcy Procedure 7012, the Motion to Dismiss (a responsive pleading) states that "Defendants do not consent to jurisdiction by this Court and similarly [do] not consent to entry of any judgment, in favor of either Plaintiffs or Defendants, by this Court." Dckt. 7 at 2:23–24. Therefore, the parties have stated whether they consent to this court entering a final judgment in what is a "related to" non-core proceeding determined by 28 U.S.C. § 157(c)(1). Determining that this "related to" matter is non-core does not resolve whether the court has jurisdiction, though. Subject matter jurisdiction and determination of core proceedings are different concepts.

In Plaintiff's Opposition, there is an entire section dedicated to why Plaintiff believes this Adversary Proceeding is a core proceeding. Dckt. 13 at 5:1–26. That entire section argues that Defendants have failed to respond correctly under Federal Rule of Bankruptcy Procedure 7012 because there is no allegation of whether this proceeding is core or non-core, but as addressed in the 2016 amendments to the rule, that standard no longer applies. As mentioned above, a responsive pleading has to indicate whether a party consents to a bankruptcy judge entering a final judgment. Here, Defendants have explicitly not consented to the bankruptcy judge issuing orders and final judgment on non-core matters.

As shown above, determination of core or non-core is not related to whether this court has subject matter jurisdiction. Defendants do not have the right or power to "reject" the federal jurisdiction created by Congress in 28 U.S.C. § 1334. Defendants do have the right for an Article III judge to consider the proposed findings and conclusions of the Article I bankruptcy judge for non-core matters and then, after *de novo* review, have the Article III judge issue the final orders and judgment in this Adversary Proceeding, however.

Federal court jurisdiction exists for this Adversary Proceeding as either arising in the bankruptcy case based on Defendants having made the federally required Notice of Mortgage Payment Change as part of asserting its claim to be paid in this bankruptcy case or as a related to matter. Whether it is a core proceeding "arising in" the bankruptcy case or a related to matter is left for another day when Defendants clearly address any such contentions.

ABSTENTION IS NOT REQUIRED IN THIS ADVERSARY PROCEEDING

Defendants have argued that the court **must** abstain from hearing this proceeding, and they have presented the following points corresponding to those factors, respectively:

1. Administration of the bankruptcy estate would not be affected by litigation, and the case is nearing its sixtieth month.

2. All of the issues are based in state law, outside of bankruptcy.

3. The issues are not difficult or unsettled, but they are fact-intensive.

4. No other proceedings have been commenced in state court.

5. State court has jurisdiction over all claimed causes of action.

6. The litigation is only remotely related to the bankruptcy case based on dicta in the Notice of Payment Change, but it was not caused by or created by the bankruptcy and would have existed even in the absence of the bankruptcy case.

7. The substance of litigation is not core to the bankruptcy case, could be heard in state or district court, and is only related in form because Plaintiffs claim a relation.

8. The bankruptcy court could easily sever this Adversary Proceeding to be heard in state court, with enforcement by the bankruptcy court only in the event that a monetary judgment is awarded to Defendants.

9. The Adversary Proceeding would place a significant burden on the bankruptcy court's docket because of its fact-intensive nature.

10. Plaintiffs are engaging forum shopping solely based upon statements made by this court at prior hearings.

11. Plaintiffs have not demanded or waived a jury trial.

12. The matter should be heard in a non-bankruptcy forum because the non-debtor insurer (Ameriprise) may become a party to litigation.

The only time the court "must" abstain is when the conditions of 28 U.S.C. § 1334(c)(2) are satisfied. In addition to there being a "timely" motion, it must be only a "related to" matter, with respect to a matter that would not otherwise be in federal court (not merely bankruptcy court), an action on that matter is already commenced in state court, and the state court can timely adjudicate the matter.

While there may be some related to matters in the (shotgun allegation) Complaint, it appears that there may be some core matters. At the core of the Complaint is an objection to the claim being asserted by Defendants in the bankruptcy case. The alleged conduct relates to determination of the proper payment under the Chapter 13 Plan for Defendants' claim.

There are no allegations in the Motion (even the extended pleadings) that "an action is commenced" in state court on these matters. Further, there is no allegation that there can be a timely adjudication of these various claims in state court. To the contrary, Defendants stress that there are only sixteen months left in the plan—the very Chapter 13 Plan that may live or die depending on the adjudication of these claims to the extent that they relate to the amount of Defendants' claim, the proper amount of the payment to Defendants through the Plan, and whether there is insurance to cover the damages to the house or plan payment monies have to be diverted to such repairs.

Discretionary Abstention is Not Appropriate

Defendants then argue that discretionary abstention is proper because the administration of the bankruptcy estate would not be affected by litigation in state court. In going through the factors as stated by Defendants, the court's analysis differs as follows:

1. Administration of the bankruptcy estate would not be affected by litigation, and the case is nearing its sixtieth month.

    1. All of the issues are based in state law, outside of bankruptcy.

It is true that many of the issues arise under state law. However, that is true of most matters addressing claims in bankruptcy court.

    2. The issues are not difficult or unsettled, but they are fact-intensive.

Federal trial courts, district and bankruptcy, address fact-intensive matters in many matters. Some argue that matters in federal court, especially bankruptcy, may be some of the most fact-intensive presented to the judiciary. That they are not "difficult or unsettled" state law issues reflects that it will not be a problem for a federal judge to properly rule on those issues.

    3. No other proceedings have been commenced in state court.

There is no competing proceeding in state court. If Plaintiff-Debtor started now in Sacramento County Superior Court, trial could occur likely in 2020 or 2021. In creating the bankruptcy courts and making bankruptcy judges as officers of the district court, Congress recognized that debtors and creditors attempting to have their rights determined in good faith often "financially die" in the time it takes state court, or even a district court, to get such simple litigation to trial in light of all the criminal, political, and other priority items that bump such simple civil matters. In creating bankruptcy judges whose sole purpose is to promptly adjudicate core and non-core matters, parties prosecuting their adversary proceedings in good faith can have discovery completed and have trial concluded in less than one year.

4. State court has jurisdiction over all claimed causes of action.

Both the state court and federal court by virtue of 28 U.S.C. § 1334 have jurisdiction. Many of the claims sound in state law, but as discussed below, some have a substantial impact on and may result in the default of the Chapter 13 Plan confirmed by this court.

5. The litigation is only remotely related to the bankruptcy case based on *dicta* in the Notice of Payment Change, but it was not caused by or created by the bankruptcy and would have existed even in the absence of the bankruptcy case.

Some of the claims could well exist outside of the bankruptcy case, living on for years in state court without impacting this case negatively. At the core is the contention that Defendants are liable for the uninsured loss (if any) for the damages to Plaintiff-Debtor's house, though. At issue is how much is Defendants' claim and how much must it be paid through the Chapter 13 Plan so that all arrearages are cured upon completion of the Plan. This court cannot complete the bankruptcy case and enter all of the required orders concerning the Plan if this litigation is dragging through four or five years of solely trial court litigation in state court.

6. The substance of litigation is not core to the bankruptcy case, could be heard in state or district court, and is only related in form because Plaintiffs claim a relation.

Some of the claims are related to and not core bankruptcy case matters. Defendants appear to acknowledge that federal court jurisdiction otherwise exists for them, though, stating that they can be heard in the district court, for which the bankruptcy judges are judicial officers. Some of the claims may well sound as core matters as discussed above. Adjudication of the underlying dispute and the question of insurance liability for the damage to the home (which was and will be property of the bankruptcy estate if the case is converted to one under Chapter 7) appear to sound as core proceedings. They also relate to property of the estate, for which the district court, and the bankruptcy judges exercising the federal judicial power, have exclusive jurisdiction. 28 U.S.C. § 1334(e).

7. The bankruptcy court could easily sever this Adversary Proceeding to be heard in state court, with enforcement by the bankruptcy court only in the event that a monetary judgment is awarded to Defendants.

That is not an accurate statement because the bankruptcy judge cannot sever the determination of what must be paid under the plan to a state court proceeding. Further, it cannot be "easily done" in that even the related to issues can be timely and promptly adjudicated in state court.

8. The Adversary Proceeding would place a significant burden on the bankruptcy court's docket because of its fact-intensive nature.

Though the court appreciates Defendants' concern about the court's docket, Defendants can rest assured that trying a case like this in federal court does not "place a significant burden" on this court's docket. If Defendants press their defense (whether by dispositive motion or trial), the court can have them at trial in less than one year.

9. Plaintiffs are engaging in forum shopping solely based upon statements made by this court at prior hearings.

That contention may well show Defendants' true motive—Defendants' forum shopping. One need only read the court's rulings on the Objection to Notice of Mortgage Payment Change and then on the Motion for Reconsideration to believe that Defendants do not like this court because Defendants and their attorneys are required to actually follow the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and Federal Rules of Evidence. One might think that Defendants fear that litigation strategy has been exposed and that they will be forced to actually address the claims on their merits in federal court. Defendants will have to live by the allegations they make, the evidence they present, and the law their attorneys present in this federal court.

10. Plaintiffs have not demanded or waived a jury trial.

If someone wants a jury trial, the court can address it at that time. On prior occasions when there has been a jury trial in an adversary proceeding, the district court judge and bankruptcy judge have been capable of coordinating the ultimate jury trial in the district court (presuming the parties do not consent to a jury trial in bankruptcy court).

11. The matter should be heard in a non-bankruptcy forum because the non-debtor insurer (Ameriprise) may become a party to litigation.

That is a red-herring point asserted by Defendants. Ameriprise is the insurance company to whom Plaintiff-Debtor paid as part of the Class 1 Plan payments, through Defendants, for post-petition and post-confirmation insurance. Ameriprise, as presented by Defendants, is stated to have confirmed to Plaintiff-Debtor that the insurance was in place and the home was covered by insurance. Ameriprise has happily accepted the plan payments made by Plaintiff-Debtor for insuring this property.

That point is a red-herring for a second reason. In the post-*Stern-Executive Benefits-Wellness International* line of cases, it is clear that the bankruptcy judges, as officers of the district court, are merely exercising the federal judicial power that the district court judge would otherwise exercise. Other than being on a different floor of the courthouse, the proceedings are conducted just as they would be in district court. The old, "special bankruptcy court jurisdiction" fiction has been debunked. The bankruptcy judge hearing a non-core matter is no different than a magistrate judge hearing a matter referred to him or her by a district court judge.

The weight of factors tip heavily in favor of this court exercising federal court jurisdiction not only because the issues are grounded in the federally required notice of mortgage payment change, the payments for the insurance having been made through the Chapter 13 Plan, the damage to the home effecting the ability of Debtor to perform the Plan, and the damage at issue (if uninsured) impacting property of the bankruptcy estate, but also because there is no presented non-federal-court forum that can timely address these issues. Additionally, the issues tie to the rulings on core matters made by the bankruptcy court in Plaintiff-Debtor's bankruptcy case.

The court having considered the parties' arguments, having clarified that core/non-core determination is not the same as federal subject matter jurisdiction, and having evaluated whether to abstain, the Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding 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 Motion to Dismiss is denied.