UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 17, 2017, at 11:00 a.m.

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1. **17-21173-E-13** **ODETE CABRAL** **MOTION TO DISMISS ADVERSARY PROCEEDING**
17-2056 **Peter Macaluso**
ETL-1 **7-3-17 [11]**
CABRAL V. NATIONSTAR MORTGAGE, LLC

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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

FN.1. Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). The Notice of Motion states that a hearing will be held will be based upon submitted pleadings as well as argument at the hearing. It does not state if and when written opposition must be filed as required by Local Bankruptcy Rule 9014-1(d)(5). Because this Motion is filed in an adversary proceeding, the Motion is required to be served pursuant to Local Bankruptcy Rule 9014-1(f)(1), with at least twenty-eight days' notice and a written opposition being filed. A written opposition has been filed, demonstrating that opposing counsel applied the Local Bankruptcy Rule 9014-1(f)(1) requirement for written opposition, obviating any possible dispute as to defective notice having been provided.

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 July 3, 2017. By the court's calculation, 45 days' notice was provided. 28 days' notice is required. FED. R. BANKR. P. 4004(a) (requiring twenty-eight days' notice).

The Motion to Dismiss Adversary Proceeding was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Debtor,

creditors, the Trustee, the U.S. Trustee, and any other parties in interest were required to file a written response or opposition to the motion.

The Motion to Dismiss Adversary Proceeding is granted, with leave to file an amended complaint. Defendant's request for this court to abstain from adjudicating this adversary proceeding is denied without prejudice.

Nationstar Mortgage LLC ("Defendant") moves for the court to dismiss all claims against it in Odete Cabral's ("Plaintiff") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

APPLICABLE LAW

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

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

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

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

REVIEW OF MOTION

As with all motions, the court begins it consideration with the grounds upon which the relief is based that are stated with particularity in the Motion. FED. R. CIV. P. 7(b); FED. R. BANKR. P. 7007. The court summarizes these grounds to be:

A. Defendant first requests that this court should abstain pursuant to 28 U.S.C. § 157(b)(1)(B) and 28 U.S.C. § 1334(e)(1).

1. The court could not identify a 28 U.S.C. § 157(b)(1)(B) provision. 28 U.S.C. § 157(b)(1) provides that bankruptcy judges may hear and determine all causes under title 11, all core proceedings arising under title 11or arising in the bankruptcy case. 28 U.S.C. § 157(c)(1) provides that for non-core proceedings, the bankruptcy judge will make proposed findings and conclusions for non-core matters, for which the district court judge will then enter the final orders and judgment, unless, as provided in § 157(c)(2) the parties consent to the bankruptcy judge issuing the final orders and judgment in for the non-core matter.

2. 28 U.S.C. § 1334(e)(1) provides:

> "(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; . . . ."

The court notes that there are mandatory and permissive abstention provisions found in 28 U.S.C. § 1334(c)(1) and (2) that provide:

> (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.
>
> (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."

B. Abstention is proper because the Property at issue, which secures Defendant's claim in this case, is no longer property of the bankruptcy estate—it having been revested in Debtor under the terms of the confirmed Chapter 13 Plan.

C. The issues in dispute do not involve the allowance or disallowance of Defendant's claim, so therefore the dispute is not a core matter, "pursuant to 28 U.S.C. § 157(b)(1)(B)." (It appears that this reference to § 157(b)(1)(B) is a typographical error, with the intended reference to the statutorily defined core proceeding for the allowance or disallowance of claims and exemptions as stated in 28 U.S.C. § 157(b)(2)(B).

It appears that Defendant's assertion is that the only possible grounds for this court concluding that there are core proceedings (for which 28 U.S.C. § 157(b)(2) provides a non-exclusive listing) or that the dispute is sufficiently related to the bankruptcy case is only whether the court determines that the Complaint is in the nature of an objection to claim.

Defendant asserts that the disputes in the Complaint "do not involve interpretation, execution or administration of the confirming plan." Motion, p. 4:15–18.

In addition, on the sufficiency of the claims as pleaded in the Complaint, the Defendant also asserts that:

D. The First Cause of Action for "Declaratory Relief" is merely re-pleading of Plaintiff's claim for actionable negligence based upon the conduct of Defendant.

E. The Second Cause of Action for "Negligence" is insufficient, there is no asserted breach of an identified duty.

F. The Third Cause of Action for "Breach of the Covenant of Good Faith and Fair Dealing" is asserted to be insufficient, it alleging that Defendant "breached its covenant of good faith and fair dealing by purchasing forced place insurance and arranging for kickbacks." Defendant argues that the "contract" at issue is a loan agreement that Plaintiff-Debtor breached by defaulting in the mortgage. Defendant then argues the merits that because of the defaults, Defendant was warranted in obtaining forced place insurance.

G. The Fourth Cause of Action for "Unjust Enrichment" is insufficient because the Plaintiff-Debtor was in the process of making the trial loan modification payments at the time the Complaint was filed. No final determination was made as to whether a loan modification would be granted or denied at that time. Further, that Debtor has a duty to make the loan payments, whether they be a trial modification or not, and

therefore without regard to Defendant's intention and conduct, inducing the Plaintiff-Debtor to make the "trial" payments could not be unjust.

H. The Fifth Cause of Action for "Violation of California Business and Professions Code § 17200" is insufficient because the request for a loan modification after the Notice of Sale was recorded and prior to filing bankruptcy. As admitted by Plaintiff, even though it was after the Notice of Sale was recorded, Plaintiff-Debtor was afforded the opportunity to proceed with a trial loan modification and be considered for a final loan modification. No facts of any "kickbacks" or "commissions" based on the trial loan modification have been alleged.

I. The Sixth and Seventh Causes of Action under the California Homeowner's Bill of Rights (CAL. CIV. C. §§ 2923.6, 2924.1) are insufficient because the alleged misconduct does not violate those sections—the prohibited conduct in the statute stated to be: (1) recording a notice of default, (2) recording a notice of sale, or (3) holding a foreclosure sale while a loan modification application is pending. It is asserted that the loan modification application was not submitted until after the Notice of Sale was recorded, and it is not alleged that any sale has occurred in violation of the cited Civil Code Sections.

J. Defendant also disputes the assertion that Plaintiff-Debtor has a right under California Civil Code § 2924.1 to a written determination on the loan modification application within five days after it is received. It is asserted that the statute only requires that receipt of the loan modification application is to be given within five days of receipt, not a decision on the application.

PLAINTIFF'S OPPOSITION

In the Opposition, Dckt. 22, Plaintiff-Debtor first asserts that it was agreed at the June 21, 2017 Status Conference that Plaintiff-Debtor would file an amended complaint. (The use of the Complaint form at issue has been addressed in the context of other adversary proceedings, in which counsel for Plaintiff-Debtor has filed amended complaints).

In reviewing the Civil Minutes for the June 21, 2017 Status Conference, they indicate that no appearances were made for Defendant. As set forth in the Civil Minutes, the court addressed some fundamental concerns with the form of the Complaint and the facial validity of some of the claims as pleaded. Dckt. 10.

While it may have been that Plaintiff-Debtor intended to file an amended complaint, the court cannot identify where at the June 21, 2017 Status Conference there was any "agreement" to file an amended complaint. FN.2.

FN.2. It appears that counsel for Plaintiff-Debtor may be confusing this with a similar, but unrelated, adversary proceeding in which he is actively addressing the issues, agreed to file an amended complaint, and has filed an amended complaint.

Plaintiff filed an Opposition on August 1, 2017. Dckt. 22. Plaintiff opens with an assertion that the Motion to Dismiss was filed late because the Complaint was served on April 24, 2017, and the Motion was filed on July 3, 2017. As this court noted as of the June 21, 2017 Status Conference, the entry of default had not been requested by Plaintiff-Debtor, even though this Adversary Proceeding had been pending for seventy-one days. Plaintiff-Debtor offers no legal authority for the proposition that in the absence of a default having been entered, why a motion to dismiss is time-barred.

In response to Defendant's contention that there is no administrative purpose for adjudicating this proceeding in bankruptcy court, Plaintiff alleges that the underlying matter is a core proceeding. Plaintiff states that she "seeks a loan modification which if approved would change the plan terms that presently seek to cure the arrears and provide the on-going mortgage payments." *Id.* at 6:24–26.

While a subheading for the Complaint's first cause of action for declaratory relief indicates that the cause should be dismissed, Plaintiff argues that the cause should stand because "declaratory relief involves Defendant's Duty and obligations to properly process the loan modification without duel tracking, which caused the bankruptcy case to be filed." *Id.* at 7:7–9.

For the second cause of action (negligence), Plaintiff alleges flatly that "Defendant failed to meet their fiduciary duty to not negligently deny the loan modification. Defendant negligently denied the loan modification." *Id.* at 7:15–17.

For the third cause of action (breach of the covenant of good faith and fair dealing), Plaintiff argues that Defendant added inappropriate fees to the proof of claim and failed to properly process Plaintiff's loan modification application without dual tracking.

On the fourth cause of action (unjust enrichment), Plaintiff alleges that "the unjust enrichment is the amount that Defendant is collecting absence the loan modification." *Id.* at 8:2–3.

Regarding the fifth cause of action (violation of California Business and Professions Code § 17200), Plaintiff argues that the violation involves the dual tracking alleged in the Complaint.

For the sixth cause of action (Homeowner's Bill of Rights), Plaintiff states that a loan servicer must not pursue foreclosure while a loan modification application is pending.

Plaintiff requests leave to amend the Complaint as to any deficiencies.

DISCUSSION

In the Opposition to the Motion, Plaintiff-Debtor argues various "facts" and asserts that such "facts" must be determined under the standard used for summary judgment motions. The court is unsure why Plaintiff-Debtor has pointed to the evidentiary standard to be used in determining motions for summary judgment in light of this being a Motion to Dismiss based on insufficient pleadings. The court reviews the Complaint to determine what has been alleged, and then applies the standards most recently refined by the

Supreme Court in the *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) line of cases, whether the mere allegations are sufficient.

The court's review of the allegations in the Complaint discloses the following. Plaintiff-Debtor has filed a complaint seeking to state claims for relief for:

> (1) DECLARATORY RELIEF
> (2) NEGLIGENCE
> (3) BREACH OF THE COVENANT OF GOOD
> PLAINTIFF FAITH AND FAIR DEALING
> (4) UNJUST ENRICHMENT
> (5) VIOLATION OF CA. BUSINESS PROFESSIONAL CODE 17200 et seq.
> (6) VIOLATION OF C.C.C. 2923.6(C)
> (7) VIOLATION OF C.C.C. 2924.10

The First Cause of Action is one for "Declaratory Relief." In it, Plaintiff-Debtor asserts that certain real property (the "Property") became property of the bankruptcy estate when Plaintiff-Debtor commenced a Chapter 13 case. Plaintiff-Debtor asserts that a claim or controversy exists and Plaintiff-Debtor demands that the court make a declaration:

> A. Of "Defendant's duty to pay the Trustee in a timely fashion, pursuant to the Local Bankruptcy Court Rules, or lose the offered trial loan Modification."
>
> B. That "Defendant has a fiduciary duty to timely prosecute the loan modification application and to adhere to the California Homeowners Bill of Rights."
>
> C. "Plaintiff therefore seeks a declaratory judgment pursuant to F.R.B.P. § 7001(9), invoking F.R.B.P. § 7001(2) & F.R.B.P. § 7001(6), determining that Defendant is liable for negligence processing of the loan modification, costs, and attorney fees."

Complaint, ¶¶ 29, 30, 31; Dckt. 1.

Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. *See* Declaratory Relief Act, 28 U.S.C. § 2201. FN.3 "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). There is an implicit requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

FN.3. 28 U.S.C. § 2201,

> § 2201. Creation of remedy

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
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> (b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

Reading the First Cause of Action, it may be that Plaintiff-Debtor could have asserted contractual or statutory claims for relief, but has chosen not to do so. Rather, Plaintiff-Debtor's counsel is seeking merely an advisory opinion from the court, to use in some other litigation if counsel so chooses.

In the Second Cause of Action, it is asserted that Defendant has breached its obligations under a loan modification. Further, it is alleged that "Defendant systematically and pervasively grants loan modifications after participating in the Chapter 13 confirmation process, filing proof of claims, notice mortgage payment changes, and accepting confirmation of such plans." Complaint ¶ 45, Dckt. 1. Thus, Plaintiff-Debtor asserts a right to receive damages from Defendant. The court cannot identify in the Second Cause of Action the duty from which a tort claim for negligence could arise. Rather, it appears that Plaintiff-Debtor states that there is some sort of contractual duty (without specifying the contract and the terms).

In the Third Cause of Action, Plaintiff-Debtor states that there is a contractual relationship between Plaintiff-Debtor and Defendant, and pursuant thereto a duty of good faith and fair dealing exists. Plaintiff-Debtor then alleges that this duty of good faith and fair dealing was breached by Defendant in unstated ways, which include purchasing forced place insurance. It is alleged in the Complaint that Defendant (and the underlying creditor having a claim secured by the Property) could not obtain forced place insurance (presumably if Plaintiff-Debtor had allowed the insurance to lapse on the Property that secured the claim).

The Fourth Cause of Action asserts that Defendant has been "unjustly enriched" by its conduct. This conduct is asserted to include entering into a trial loan modification "that on its face [Plaintiff-Debtor] would be in default . . . ." *Id.*, ¶ 58. Plaintiff-Debtor also asserts that there are unidentified "kickback,

commissions, or other compensation" received by Defendant or its "affiliates" (who are not identified). *Id.* ¶ 60.

The Fifth Cause of Action seeks to assert a claim for unfair business practices pursuant to California Business and Professions Code §§ 17200 et seq. It is asserted that the practices upon which such a claim are based are:

> "a. Manipulating the loan modification process,
>
> b. Failing to maintain and pay the regular insurance policy,
>
> c. Arranging for kickbacks, commissions, or other compensation for itself and/or its affiliates in connection with loan modifications, ..."

Id., ¶ 66.

The Sixth Cause of Action asserts that a claim exists under the California Home Owners Bill of Rights. The complaint states the following as the basis for such relief:

> "73. The C.C.C. 2923.6, provides the legal duty to use reasonable care.
>
> 74. The C.C.C. 2923.6, provides the legal duty to provide a written determination as to the loan modification application.
>
> 75. The C.C.C. 2923.6, provides the legal duty not to dual track the foreclosure of the debtor's home while a loan modification is in submission, and the appeal time has expired.
>
> 76. Plaintiff did not receive a denial of the loan modification application.
>
> 77. Nationstar continued the foreclosure by setting a notice of sale while a loan modification was submitted."

Id., ¶¶ 73–77.

The Seventh Cause of Action asserts another California Homeowners Bill of Rights claim arising under California Civil Code § 2924.1, stating that no denial of the requested loan modification was given and Defendant "dual-tracked" by noticing a foreclosure sale.

In the Complaint, Plaintiff-Debtor asserts the following timeline of events:

> 13. On January 20, 2017, Plaintiff obtained a loan modification application from Nationstar representatives.

14. On February 2, 2017, Plaintiff submitted a loan modification application to Nationstar.

15. On February 8, 2017, having not been contacted by Nationstar, Plaintiff sought bankruptcy advice.

16. On February 9, 2017, Plaintiff was notified of the Notice of Sale which was set for February 27, 2017.

17. On February 25, 2017, Plaintiff filed the underlying Chapter 13 case.

18. Plaintiff has a mortgage secured by a residential property, and was offered a trial loan modification (hereinafter "Trial Loan Modification") by Nationstar.

19. Nationstar has offered a Post-Petition Trial Loan Modification; Defendant has done so after having accepted a loan modification application on, or around February 2, 2017.

20. Nationstar has failed to send written acknowledgment within five (5) business days.

21. Nationstar set a Notice of Sale (hereinafter "Sale") for February 27, 2017.

22. The submitted Trial Loan Modification was not denied prior to the notice of sale.

23. On February 2, 2017, Plaintiff filed the underlying voluntary petition under Chapter 13 of the bankruptcy code as case number 17-21173-E-13C.

[Paragraph 24 intentionally not included.]

25. Nationstar generated a "Trial Period Plan" on March 14, 2017, which required payments of $1,757.12 to be due on April 1, May 1, and June 1, 2017.

Complaint, Dckt. 1.

These alleged "facts" are slightly different than argued by Defendant. Plaintiff-Debtor asserts that Plaintiff-Debtor was notified of the Notice of Sale on February 27, 2017, which was twenty-five days after the loan modification application was submitted. Defendant recasts this as merely saying that the loan modification application was not submitted until after the Notice of Sale was recorded.

In looking at the Complaint, Plaintiff-Debtor asserts a violation of California law, specifically citing to California Civil Code § 2923.6. as to the above, it provides in pertinent part,

> (c) If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending.

It is not alleged in the Complaint that Defendant: (1) recorded a notice of default, (2) recorded a notice of sale, or (3) conducted a trustee's sale under the deed of trust on which the loan modification application was pending.

In reviewing this Complaint, the court concurs with Plaintiff-Debtor that an amended complaint should be, and needs to be, filed. Much of the Complaint fails to allege actual facts upon which the court can see a colorable claim. Rather, it parrots legal conclusions and arguments based on legal conclusions. Much of this appears to be part of a prior boilerplate complaint form, which Plaintiff-Debtor's counsel has now evolved into a new generation of focused claims. In paragraph 50 of the Complaint, Plaintiff-Debtor states the legal conclusion that Defendant's conduct included "arranging for kickbacks, commissions, or other compensation for itself and/or its affiliates in connection with lender-placed insurance," but no particular "kickback," "commission," or compensation is identified. The next time the word "kickback" appears in the complaint is in paragraph 58, with Plaintiff-Debtor asserting that the trial loan payments constituted some type of "kickback," "commission," or "other compensation."

The court grants the Motion and dismisses the Complaint, without prejudice, and with leave to amend. The amended complaint shall be filed and served on or before September 8, 2017.

DENIAL WITHOUT PREJUDICE OF MOTION TO ABSTAIN

Defendant requests that the court abstain from hearing a complaint concerning the obligation owed to Defendant and Plaintiff-Debtor's contention that she has claims arising therefrom. Defendant's request for abstention is based on the assertion that the Complaint does not assert an objection to claim—there the Complaint cannot be a core proceeding. Further, Defendant alleges that adjudication of this dispute could have nothing to do with the administration of the bankruptcy case. Finally, since under the confirmed plan the property that secures Defendant's claim (which is being paid pursuant to the terms of that Plan in Plaintiff-Debtor's bankruptcy case) has revested in the Debtor, it is not property of the bankruptcy estate.

Consideration of abstention begins first with the grant of federal jurisdiction by Congress established in 28 U.S.C. § 1334, which 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.

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. 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), as discussed above.

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). Those 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.
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> 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.

Factors and Analysis for Abstention by a Federal Judge

The grant of federal court jurisdiction pursuant to 28 U.S.C. § 1334 being very broad, it brings 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. 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,
>
> (2) the extent to which state law issues predominate over bankruptcy issues,
>
> (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,
>
> (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

(12) the presence in the proceeding of nondebtor parties.

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

Here, Plaintiff-Debtor has pending her Chapter 13 bankruptcy case in which there is a confirmed Chapter 13 Plan. Bankr. E.D. Cal. No. 17-21173. The confirmed Chapter 13 Plan requires Debtor to fund the Plan with $1,550.00 per month for a period of sixty months. 17-21173; Plan, Dckt. 10. From this payment, Defendant's secured claim is to be paid the current monthly installment payment of $995.25 and a monthly arrearage cure payment of $325.00. *Id.* at 2. From the face of the Plan, the bankruptcy case appears to be a two-party reorganization, with the Plaintiff-Debtor availing herself of her rights under the Bankruptcy Code to cure the default on the obligation owed to Defendant, and through that cure prevent the foreclosure by Defendant on Plaintiff-Debtor's property. FN.4.

FN.4. The apparent unusual situation of this bankruptcy debtor not having any other creditors holding significant claims can be explained by Debtor having in 2012 completed a Chapter 7 case and receiving a bankruptcy discharge therein. Bankr. E.D. Cal. No. 12-27236, discharge entered July 30, 2012.

Defendant has chosen not to file a proof of claim in Plaintiff-Debtor's bankruptcy case (as of the court's August 16, 2017 review of the Claims Register in that bankruptcy case). The deadline for filing a proof of claim by Defendant was July 12, 2017. The Plaintiff-Debtor or Chapter 13 Trustee may elect to file a proof of claim for Defendant's claim in the bankruptcy case, to the extent that either believes there is a proper purpose to serve thereby. 11 U.S.C. § 501(c); FED. R. BANKR. P. 3004; LOCAL BANKR. R. 3004-1.

At the core of Plaintiff-Debtor's contention is that the amount being demanded by Defendant for its secured claim in this bankruptcy case (the obligation secured by Plaintiff-Debtor's residence to be paid through the Chapter 13 Plan) is not the amount that is being demanded. Plaintiff-Debtor asserts that her ability to perform, and complete, her Chapter 13 Plan is impacted by the correct amount of Defendant's secured claim that must be paid through the Chapter 13 Plan.

Plaintiff-Debtor goes further, now asserting that she has affirmative rights against Defendant, from which monetary recovery is believed to be an asset. A review of Schedule A/B filed by Plaintiff-Debtor in her bankruptcy case does not list any such asset. 17-21173; Dckt. 11 at 3–8. No such asset was taken into account by parties in interest and the court when the Chapter 13 Plan was confirmed. The adjudication and enforcement of such rights may directly impact the bankruptcy plan, leading to increasing the assets that may be used to fund the plan. 11 U.S.C. § 1328 (amendment of Chapter 13 Plan).

Additionally, while the Chapter 13 Plan provides that "property of the estate" is to revest in the Debtor upon confirmation, such revesting is not absolute. First, the issue exists whether an undisclosed asset "revests." Second, if the court orders or the Plaintiff-Debtor elects to convert her case to one under Chapter 7, all of the "revested" property returns to be property of the estate.

In looking at the *Tucson Estate* factors, they weigh in favor of the court not abstaining. The determination of this issue weighs directly on the payment terms to be made in and through the Chapter 13 Plan. While it is true that these are state law issues, they are neither difficult nor unsettled. Rather, they are

in the very nature of the type of state law issues bankruptcy judges are called on to make determinations daily. FN.4.

FN.4. Unlike district court judges, who in the absence of diversity jurisdiction, base the exercise of federal judicial power on there being a claim or controversy arising under the U.S. Constitution, a federal statute or regulation, federal treaty, admiralty and maritime, ambassadors, public ministers and consuls, and claims between the states (U.S. Const. Art. III, Sec. 2, Cl. 1), the Article I bankruptcy powers granted by Congress bring into federal bankruptcy courts and to bankruptcy judges all of the "routine" state law matters that relate to the bankruptcy case.

As of this time, there is no pending state court proceeding that is or can be prosecuted to determine this dispute. The practical reality is that due to the overwhelming case load in state court (civil, criminal, family law, probate, political, and the like), it would not be unrealistic to believe that trial could not be conducted on such a matter until the sixty month term of the confirmed Chapter 13 Plan is coming to an end.

At this point, the court does not make a determination whether the dispute is core or non-core. In the current Complaint, it appears that many of the claims asserted are non-core—to the extent that such determinations are not necessary in determining the terms of the Chapter 13 Plan. More significantly, it will be necessary to make such determination based on the amended complaint. If there are non-core matters, this court and the district court can easily handle such as proscribed by Congress in 28 U.S.C. § 157(c)(1) or (c)(2).

It appears that at the core of the Complaint is a dispute between the Plaintiff-Debtor (Chapter 13 Debtor) and the Defendant (Chapter 13 Creditor) over the Defendant's claim to be paid through the Chapter 13 Plan. No other non-bankruptcy parties are involved.

The denial of the request that the court abstain is made without prejudice in light of the court granting Plaintiff-Debtor leave to amend.

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 Nationstar Mortgage, LLC, 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 granted, and Adversary Proceeding No. 17-02056 is dismissed without prejudice.

IT IS FURTHER ORDERED that the request by Defendant to have this court abstain from adjudicating the issues in this Adversary Proceeding is denied without prejudice.

IT IS FURTHER ORDERED that Odete Cabral, the Plaintiff-Debtor, is given leave to filed an amended complaint, with such amended complaint to be filed and served on or before September 8, 2017.

2. 17-21173-E-13 ODETE CABRAL
17-2056 Peter Macaluso
CABRAL V. NATIONSTAR MORTGAGE, LLC

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-11-17 [1]

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: Erica T. Loftis

Adv. Filed: 4/11/17
Answer: none

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Status Conference is continued to 2:00 p.m. on November 1, 2017.

Notes:
Continued from 6/21/17

[ETL-1] Defendant's Motion to Dismiss Plaintiff's Complaint filed 7/3/17 [Dckt 11], set for hearing 8/17/17 at 11:00 a.m.

Plaintiff's Status Statement filed 7/19/17 [Dckt 17]

AUGUST 17, 2017 STATUS CONFERENCE

At the hearing, the court granted the Motion to Dismiss, denied the request for the court to abstain, and gave leave to Plaintiff-Debtor to file an amended complaint on or before September 8, 2017.

Plaintiff-Debtor filed a Status Statement on August 9, 2017. Dckt. 24. Plaintiff-Debtor notes that Defendant filed a motion to dismiss, which Plaintiff has opposed. Plaintiff-Debtor and Defendant have not met and conferred.

JULY 26, 2017 STATUS CONFERENCE

The court took a preliminary look at the Complaint and the Motion to Dismiss. The Complaint identifies Causes of Action titled: (1) Declaratory Relief, (2) Negligence, (3) Breach of the Covenant of Good Faith and Fair Dealing, (4) Unjust Enrichment, (5) Violation of California Business and Professions §§ 17200 et seq., (6) Violation of California Civil Code § 2923.6(C), and (7) Violation of California Civil Code § 2924.10. FN.1.

FN.1. The request for declaratory relief stated in the Complaint is "Plaintiff therefore seeks a declaratory judgment pursuant to F.R.B.P. § 7001(9), invoking F.R.B.P. § 7001(2) & F.R.B.P. § 7001(6), determining that Defendant is liable for negligence processing of the loan modification, costs, and attorney fees." Complaint ¶ 31, Dckt. 1. Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. *See* Declaratory Relief Act, 28 U.S.C. § 2201. "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

It appears that the parties have acted, the bell has rung, and to paraphrase the catch line of a late twentieth century cinema hero, "Sue for damages or sue not: There is no declaration of what your rights would be if you sued for what has happened."

In the Motion to Dismiss, Nationstar Mortgage, LLC, "Defendant," asserts that because under the Chapter 13 Plan the real property that secures the obligation that is Defendant's claim in Plaintiff-Debtor's bankruptcy case, the court should abstain from determining the claims asserted in this Adversary Proceeding. It is asserted that determination of the claims asserted do not have any impact on the administration of this bankruptcy case with a confirmed Chapter 13 Plan. Defendant also attacks the claims on the legal merits.

The confirmed Chapter 13 Plan provides for the payment of 100% of general unsecured claims, which are stated to be in the amount of $1.00. The Plan provides for the payment of Defendant's secured claim through the plan, including curing the arrearage on the claim during the term of the Plan. No other claims are provided for in the Chapter 13 Plan. 17-21173; Plan, Dckt. 10.

The court continued the Status Conference to 11:00 a.m. on August 17, 2017. Dckt. 21.