

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis  
Bankruptcy Judge  
Sacramento, California

September 4, 2013 at 2:30 p.m.

1. [10-27399](#)-E-13 DAN GOODLOW  
[12-2195](#)  
GOODLOW V. MARTIN ET AL

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
4-27-12 [[1](#)]

Plaintiff's Atty: Peter G. Macaluso  
Defendants' Atty:  
Kelly M. Raftery [EMC Mortgage Corp.]  
Douglas B. Jacobs [Dorice Goodlow]  
unknown [Acqura Loan Services; Calvin Hutson; Antoinette Johnson; Robert Martin]

Adv. Filed: 4/27/12  
Answer:  
5/29/12 [Johnson, Goodlow, Martin, Wellington]  
7/30/12 [EMC, LLC]

Nature of Action:  
Declaratory judgment

**Tentative Ruling: The Status Conference is continued to 2:30 p.m. on -----  
---, 2013.**

**STATUS CONFERENCE - SEPTEMBER 4, 2013**

The Parties filed a Joint Status Conference Statement on August 29, 2013. The parties report that one of the Defendants is currently receiving medical treatment. The medical treatment impairs the ability of the parties to resolve this matter, though all parties remain hopeful that resolution is possible in light of the dispute being down to the "last \$10,000."

The Parties request a three month continuance.

Notes:

Continued from 7/31/13. The parties reported that one of the parties suffered from a medical ailment which impaired that person's ability to actively participate in resolving the last \$10,000.00 which is in dispute. Both parties expressed confidence that they should be able to further whittle down the amount at issue.

Plaintiff's Status Conference Statement filed 8/28/13 [Dckt 60]

Joint Status Conference Statement filed 8/29/13 [Dckt 62]

**CONT. FROM 6-26-13**

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Proper Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 11, 2012. By the court's calculation, 41 days' notice was provided. 35 days' notice is required.

**Tentative Ruling: The hearing on the Motion to Confirm is continued to 2:30 p.m. on -----, 2013.**

**PRIOR HEARINGS**

The Status Conference Statement filed by Dorice Goodlow in Adversary Proceeding 12-2195 advises the court that the parties are proceeding with the Eastern District Bankruptcy Dispute Resolution Program (mediation), with the BDRP Conference set for June 14, 2013, with Russell Cunningham serving as the mediator.

On January 9, 2013 the court continued the hearing to the date of the status conference in adversary proceeding number 12-2195.

On October 17, 2012 the court continued the hearing to allow the court to conduct a status conference. The Debtor is prosecuting an adversary proceeding which must be resolved or made part of the Chapter 13 Plan.

On April 25, 2013 the court continued the hearing to follow the tentatively schedule June 14th BDRP date in adversary proceeding number 12-2195.

On June 26, 2013 the court continued the hearing to follow the tentatively schedule June 14th BDRP date in adversary proceeding number 12-2195.

**History of Hearings**

On September 5, 2012 the court continued the hearing to allow Debtor to file and serve evidence in support of the court's tentative ruling from the September 5, 2012 hearing.

On May 22, 2012 the court continued the hearing on Motion to Confirm and ordered Debtor to file and serve evidence as set forth in the tentative ruling. A review of the docket indicates that Debtor has not filed any additional information.

**Adversary Proceeding**

The Debtor filed adversary proceeding number 12-02195 to determine the estate's interest in the Bald Creek Road Property and that of asserted

co-owners. The proposed plan modification does not take that litigation into account and the consequences of a determination that the Debtor does not have any interest in the property. The court cannot identify what is asserted to be the "unknown transfers of title to [the Debtor's] property."

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor seeks to modify the plan because of a restraining order was entered against him, title to his property was allegedly transferred to others without his knowledge, and he has retained an attorney to defend him in an unidentified action. Debtor does not explain how these issues changed his ability to make plan payments; no expense related to any of these matters is listed on Schedules I or J. However, Schedule I states that Debtor is not residing in his home and is "in a fight over the home." Debtor does not budget for rent, but is proposing to maintain mortgage payments on the home he does not live in.

The Trustee challenges the feasibility of the proposed plan payment in light of the unknown costs associated with the attorney the Debtor has hired – who may be a professional of the estate – and the unknown costs associated with the Debtor's living arrangements outside of his home. These unknown costs impair the feasibility of the proposed plan payment and are cause to deny confirmation. 11 U.S.C. § 1325(a)(6).

Additionally, the Trustee suggests that payment on the claim secured by the loan may work unfair discrimination to holders of general unsecured claims. However, the court declines to reach this issue in light of the pending adversary proceeding the Debtor has commenced to determine his interest in the property and the independent cause to deny confirmation.

The court is further concerned that the proposed modification to the plan does not comport with the reality of this case. The Motion requesting the modification does not state with particularity the grounds relating to a restraining order or possession on the residence being changed by an order of a non-bankruptcy court. The confirmed plan in this case provides that the property of the estate has not reverted in the Debtor. (Dckt. 5). The Motion merely instructs the court to read the Debtor's declaration and choose whatever statements made therein the court thinks the Debtor should allege as the grounds for this Motion.

The declaration makes a reference to there being a domestic violence restraining order, an unknown transfer of title to the property (which is property of the bankruptcy estate), and that the Debtor now has to hire an attorney to represent him (presumably with respect to the restraining order and title issue). The Debtor testifies that he is \$2,500.00 in arrears in the confirmed plan, and that he owes \$6,552.67 on the obligation secured by his home (which is the subject of an unidentified title transfer). He further states that this claim, which is held by Acqua Loan Servicing, will be paid off during the term of the plan.

In support of the Motion the Debtor has provided current financial information using the Schedule I and J forms filed as Exhibits 1 and 2. Dckt. 40. These exhibits are not authenticated by the Debtor and he does not attest that the information provided therein is true and correct under penalty of perjury. The information provided therein raises significant questions.

First, the Debtor states that the total income for he and his wife is \$1,084.00, consisting solely of his social security income. No income is shown for his wife, who is listed as retired. Though not stated by the Debtor, presumably there has been a separation and her income of \$1,400 a month (as stated on Original Schedule I, Dckt. 1) is no longer available to the Debtor. The expense information, Exhibit 2, lists only \$409 a month in expenses, which does not include any utilities, insurance, medical expenses, taxes or other amounts. It provides for a food expense of \$150.00.

Second, the information concerning the Debtor's interest in real property is conflicting. On Schedule A the Debtor lists one property identified as 1148 Bald Rock Road, Berry Creek, California. Dckt. 1. It states that the Debtor's interest in the property is \$184,500, and the property is subject to a secured claim in the amount of \$129,000. Further on Schedule A the Debtor states that he has a 1/4 interest in this property and that 1/4 interest is worth \$87,500.00.

Schedule D states that EMC Mortgage Corporation has a 1<sup>st</sup> Deed of Trust against an unidentified property in the amount of \$42,600, with the collateral having a value of \$148,000.00. (This appears to be a typographical error given that on Schedule A the Debtor states that the only real property he owns has a value of \$184,000.) A second secured claim is listed in the amount of \$20,000.00 secured by a judgment lien, with the Debtor stating that he asserts this obligation has been paid in full and is listed only as a precaution.

On Schedule C the Debtor states that he asserts a \$150,000.00 homestead exemption. The Bald Creek Road Property is listed as the Debtor's address on his petition.

In the present Motion the Debtor asserts that the creditor having a deed of trust on the Bald Creek Road Property has a claim of only \$6,552.67, not the \$42,600 as listed on Schedule D.

#### **Debtor's Supplemental Declaration**

The court first addressed these issues at the initial hearing on May 22, 2012 and has continued the hearing three times to allow the Debtor to file supplemental information.

On October 2, 2012 Debtor filed a supplemental declaration that is identical to the original declaration filed in support of the motion to modify. Debtor has not provided any additional evidence that would resolve Trustee's concerns regarding attorneys' fees for the adversary proceedings or the unknown costs associated with the Debtor's living arrangements outside of his home. Debtor still has not explained how these issues affect his ability to make plan payments.

#### **Analysis**

In addition to unresolved issues raised by the Chapter 13 Trustee, the Status Conference Statement filed on October 10, 2012 indicates that issues surrounding the ownership of the real property have not been resolved. (Adv. Proc. No. 12-02195, Dckt. 33).

The court's review of the docket in Adversary Proceeding Number 12-02195 indicates that the following has occurred since the court continued the hearing in bankruptcy case number 10-27399. The court entered an order allowing Wargo & French LLP to withdraw as counsel of record for EMC Mortgage Corp. and permitting McCarthy & Holthus LLP to substitute in as counsel of record. On October 17, 2012 the court continued the status conference in the adversary proceeding in order to allow the parties to negotiate the terms of a potential settlement since all parties are now represented by counsel. (Dckt. 39). There is no indication that the parties have reached a settlement.

Debtor has not addressed the Trustee's or the court's concerns with regard to feasibility of the proposed plan. Further, Debtor's potential ownership interest in the Bald Creek Road Property has not been resolved and it appears that settlement negotiations in the adversary proceeding are ongoing.

#### **PRIOR STATUS CONFERENCE STATEMENT**

The court's review of the docket in adversary proceeding number 12-2195 indicates that on July 22, 2013 the parties filed a status conference statement. The statement indicates that the parties made great progress towards resolving the dispute after the BDR conference. Plaintiffs counsel submitted a written proposal to Defendant and hopes for fair and equitable resolution of the matter. Defendant asserts that she has been in the hospital with pneumonia and has not conferred fully with counsel and is hopeful when she is released from the hospital the matter will be concluded shortly.

The most recent Status Conference Statement in the Adversary Proceeding reports that one of the Defendants continues to be receiving medical treatment which impairs the ability of the parties to consummate a settlement in that Proceeding which would then allow for the confirmation of a plan.

3. [09-34904-E-13](#) WILLIAM/DIANE METZELAAR  
[13-2015](#)  
METZELAAR ET AL V. UNITED  
GUARANTY RESIDENTIAL INSURANCE

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
1-9-13 [[1](#)]

Plaintiff's Atty: Peter G. Macaluso  
Defendant's Atty: unknown

Adv. Filed: 1/9/13  
Answer: none

Nature of Action:  
Validity, priority or extent of lien or other interest in property  
Injunctive relief - other  
Declaratory judgment

**Final Ruling: The Status Conference is continued to November 13, 2013 at 2:30 p.m.** On or before November 1, 2013, the Plaintiff shall file and serve a Status Conference update report if this Adversary Proceeding has not been dismissed or judgment entered. No appearance at the September 4, 2013 Status Conference is required.

The court has continued this Status Conference and the Plaintiffs' motion for entry of default judgment several times based on the representation that the parties were engaged in "settlement discussions." This Adversary Proceeding was filed on January 9, 2013. On March 14, 2013, the Plaintiffs first filed their request for entry of default against the Defendants. On March 20, 2013 the court entered the defaults of the Defendants. Dckts. 14, 15.

The court continued the March 27, 2013 Status Conference (second continuance) to allow the Plaintiffs to timely and diligently prosecute motions to enter default judgments. Civil Minutes, Dckt. 16. The court continued the hearing to June 20, 2013, affording Plaintiffs three months to obtain entry of the default judgments (with only 28 days notice of the motion required under the Local Bankruptcy Rules). On April 12, 2013 the motions for entry of default judgment were filed. Dckts. 17, 21.

The Civil Minutes for the May 16, 2013 hearing on the motions for entry of default judgments reflect that the hearings were continued to June 6, 2013 to afford Plaintiffs the opportunity to file and serve supplemental pleadings in support of the motion rather than the court denying the motions. Dckts. 25, 26. At the June 6, 2013 hearings on the motions for entry of default judgment the court denied the motions without prejudice for failing to state with particularity grounds upon which the requested relief could be granted, nor providing the court with evidence in support of such relief. Orders, Dckts. 39, 40; Civil Minutes, Dckts. 35, 37.

The court continued the June 26, 2013 Status Conference to September 4, 2013, to "afford the Plaintiff-Debtors the opportunity to prepare and have heard the motion for entry of default judgment. Civil Minutes, Dckt. 43. New motions were set and hearings were conducted on August 8, 2013. The Plaintiffs appeared at the hearings and advised the court that "settlement discussions" were on-going. The court continued the hearing on the motion for entry of a default judgment to August 29, 2013. Civil Minute, Dckt. 53.

On August 22, 2013, the Plaintiffs filed a notice that they were unilaterally continuing the hearing to October 3, 2013. Counsel for the Plaintiffs is well aware that under the Local Bankruptcy Rules no such unilateral continuances are permitted. See August 8, 2013 Civil Minutes, Dckt. 53.

This Adversary Proceeding is a relatively simple proceeding - the Plaintiffs clearing title to their real property after completion of their Chapter 13 Plan and providing for payment in full of a creditor's secured claim in the amount determined by the court pursuant to 11 U.S.C. § 506(a). The Defendants have not asserted any opposition to the Complaint or Motion. The Defendants have not appeared in this Adversary Proceeding.

The Plaintiffs' prosecution of this uncontested Adversary Proceeding has dragged on for eight months. The court has conducted multiple hearings and repeated continued not only this Status Conference but motions for entry of default judgment. The Plaintiffs are not actively and productively prosecuting this case. Possibly, they are being deluded by the Defendants who are seeking to delay the inevitable.

Based on the lack of prosecution of this Adversary Proceeding, the court shall enter an order dismissing this Adversary Proceeding without prejudice if (1) the Adversary Proceedings has not been dismissed, (2) judgment has not been entered, or (3) a responsive pleading (after having the order(s) entering the default(s) have been vacated) has not been filed by the Defendant(s). Such an order dismissing the Adversary Proceeding is necessary and proper based on the lack of prosecution of this Adversary Proceeding by Plaintiffs.

By the November 19, 2013 further continued Status Conference, this Adversary Proceeding for which no defendant filed an answer or other responsive pleadings, will be 11 months old. The Plaintiffs having more than 300 days to obtain a judgment in an unopposed adversary proceeding is more than sufficient.

Notes:

Continued from 6/26/13

[PGM-3] Motion for Entry of Default Judgment Against Defendant United Guaranty Residential Insurance filed 7/10/13 [Dckt 44], set for hearing 8/8/13, due to settlement discussions continued to 8/29/13 at 1:30 p.m., further continued to 10/3/13 at 1:30 p.m.

Plaintiff's Status Conference Statement filed 8/28/13 [Dckt 58]

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 Continued Status Conference having  
been conducted by court, the Plaintiffs having  
obtained multiple continuances of this Status

Conference and motions for entry of default judgment, this unopposed Adversary Proceeding having been pending for more than 300 days by the time of the November 19, 2013 further continued Status Conference, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Status Conference is continued to November 13, 2013 at 2:30 p.m. On or before November 1, 2013, the Plaintiff shall file and serve a Status Conference update report if this Adversary Proceeding has not been dismissed or judgment entered.

**IT IS FURTHER ORDERED** that, based on the lack of prosecution of this Adversary Proceeding by the Plaintiffs, the court may, without further notice, enter an order dismissing this Adversary Proceeding without prejudice if (1) the Adversary Proceedings has not been dismissed, (2) judgment has not been entered, or (3) a responsive pleading (after having the order(s) entering the default(s) have been vacated) has not been filed by the Defendant(s). Such an order dismissing the Adversary Proceeding is necessary and proper based on the lack of prosecution of this Adversary Proceeding by Plaintiffs.

4. [13-29106](#)-E-11 RAMON/SILVIA GUERRERO

STATUS CONFERENCE RE: VOLUNTARY  
PETITION  
7-8-13 [[1](#)]

CASE DISMISSED 8/9/13

Dismissed 8/9/13

**Final Ruling:** The court having dismissed the Chapter 11 case on August 8, 2013, the Status Conference is removed from the calendar. No appearance at the September 4, 2013 Status Conference is required.



5. [09-45610-E-13](#) RICK LAMB  
[13-2130](#)  
LAMB V. CITIMORTGAGE, INC.

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
4-17-13 [[1](#)]

Plaintiff's Atty: Douglas B. Jacobs  
Defendant's Atty: unknown

Adv. Filed: 4/17/13  
Answer: none

Nature of Action:  
Validity, priority or extent of lien or other interest in property  
Other (e.g. other actions that would have been brought in state court if  
unrelated to bankruptcy case)

**Final Ruling:** The Plaintiff has filed a motion for entry of default judgment on August 1, 2013, with hearing on said motion set for September 18, 2013. **The Status Conference is continued to 2:30 p.m. on November 13, 2013,** to afford Plaintiff the opportunity to obtain entry of a default judgment and conclude any post judgment bill of costs and motion for award of attorneys' fees, if any. No appearance at the September 4, 2013 Status Conference is required.

Notes:

Continued from 6/26/13

[DBJ-2] Motion for Default Judgment Including An Award of \$1,955.00 in Attorney Fees filed 8/1/13 [Dckt 22], set for hearing 9/18/13 at 1:30 p.m.

Plaintiff's Status Conference Statement filed 8/20/13 [Dckt 27]

6. [11-31221-E-13](#) ANTHONY/TERESA LANDRY  
[12-2675](#)  
LANDRY ET AL V. BANK OF  
AMERICA, N.A. ET AL

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
11-23-12 [[1](#)]

Plaintiff's Atty: Richard A. Hall  
Defendants' Atty: Daniel B. Ruby

Adv. Filed: 11/23/12  
Answer:  
Bank of America 4/15/13  
U.S. Bank, N.A. 4/15/13

Nature of Action:  
Recovery of money/property - other  
Declaratory judgment

**Final Ruling:** The Parties reporting that they are actively drafting documents which are part of the settlement of this Adversary Proceeding, **the**

**Status Conference is continued to 2:30 p.m. on November 13, 2013.** This is to afford the parties the opportunity to conclude this Adversary Proceeding. No appearance at the September 4, 2013 Status Conference is required.

Notes:

Continued from 6/26/13. The parties reported that a settlement had been reached which resolves this Adversary Proceeding and it is in the process of being documented.

Joint Stipulation Continuing Status Conference Hearing Date filed 8/29/13 [Dckt 39]; order pending

7. [13-26330-E-13](#) BARRY HENNING  
[13-2167](#)  
HENNING V. LINCOLN FINANCIAL  
SERVICES ET AL

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
5-15-13 [[1](#)]

Plaintiff's Atty: Peter G. Macaluso  
Defendant's Atty:  
Thomas V. Clements [Lincoln Financial Services]  
Carl P. Blaine [A-1 Adjustment Services, Inc.]

Adv. Filed: 5/15/13

Answer:  
Lincoln Financial Services 6/5/13  
A-1 Adjustment Service, Inc. 6/20/13

Cross-Complaint Against Defendant Lincoln Financial Services:  
filed by A-1 Adjustment Service, Inc. 6/20/13

Answer to Cross-Complaint Against Defendant Lincoln Financial Services:  
7/3/13

Cross-Complaint Against Defendant A-1 Adjustment Service, Inc.:  
filed by Lincoln Financial Services 7/3/13

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

**Final Ruling:** The parties have filed a statement that the issues in this  
Adversary Proceeding have been resolved, with a hearing set for September  
17, 2013, for approval of the settlement. **The Status Conference is  
continued to November 13, 2013, at 2:30 p.m.** No appearance at the September  
4, 2013 Status Conference is required.

Notes:

Continued from 7/31/13

Joint Status Conference Statement filed 8/28/13 [Dckt 24]

8. [13-27532-E-13](#) JOSEPH/MARY RAMOS

STATUS CONFERENCE RE: MOTION TO  
DISMISS CASE, MOTION FOR RETURN  
OF PLAN PAYMENTS  
8-15-13 [[27](#)]

Debtors' Atty: Richard A. Chan

**September 4, 2013 STATUS CONFERENCE**

The Debtors commenced this Chapter 13 case on May 31, 2013. This is their first bankruptcy case filed in the Eastern District of California. The Chapter 13 Trustee filed an objection to confirmation asserting the following grounds:

- A. The proposed Plan does not satisfy the Chapter 7 liquidation test. The Debtors' non-exempt equity in property is listed on the Schedules to be \$24,057.00 and the proposed Plan provides for a 31.43% dividend for creditors holding general unsecured claims. However, the Trustee believes that the Debtors' real property has a value that is greater than listed on Schedule A, which would result in an additional \$22,628.00 in equity - for a total of \$46,685.00 in non-exempt equity. The 31.43% dividend provides for only a \$23,731.74 distribution for creditors holding general unsecured claims. The Debtors are not over-median income debtors. Form B22C, Dckt. 1 at 44-45.

Objection, Dckt. 18. The Objection was set for an evidentiary hearing on October 23, 2013. Civil Minutes and Order, Dckts. 25, 23.

On August 15, 2013, the Debtors, in pro se, filed a handwritten motion requesting that they be returned their "Planned Payments" totaling \$966.00. In another part of the Motion the states "Reason for Dismissal - [our attorney] misled us in our whole process and refuses to return our fees that he promised to return on 8-15-13 @ 3:00 p.m. today at his office!" Motion, Dckt. 27.

The Disclosure of Compensation filed by counsel for the Debtors states that he has been paid \$2,000.00 prior to the commencement of this bankruptcy case and was to receive an additional \$2,000.00. On August 16, 2013, this court entered its order setting a status conference on the Debtors' motion and ordered the Debtors and Debtor's counsel to personally appear at the September 4, 2013 Status Conference, no telephonic appearances permitted.

**Notes:**

Set by order of the court dated 8/16/13 [Dckt 30]; the Debtors and Debtors' attorney, Richard A. Chan, ordered to appear in person, no telephonic appearance is authorized; an evidentiary hearing on the Trustee's objection to confirmation of the plan is scheduled for 10/23/13 at 1:30 p.m.

9. [10-53637-E-13](#) G./KATHLEEN ULBERG

CONTINUED PRE-TRIAL CONFERENCE

[11-2122](#)

ULBERG, JR. ET AL V. BANK OF  
AMERICA, N.A. ET AL

RE: AMENDED COMPLAINT FRAUD  
NEGLIGENT MISREPRESENTATION  
UNFAIR BUSINESS PRACTICES  
INTENTIONAL INTERFERENCE SET  
ASIDE OR RESCIND THE SALE QUIET  
TITLE

3-15-11 [[11](#)]

Plaintiffs' Atty: John G. Downing

Defendants' Atty:

Adam N. Barasch [Bank of America, N.A.]

Scott A. CoBen [Pacific Crest Partners, Inc.; John Mudgett]

unknown [Recontrust Company, N.A.]

Adv. Filed: 2/22/11

Amd Cmplt Filed: 3/15/11

Answer: 5/10/11 [Pacific Crest Partners, Inc.; John Mudgett]

Counterclaim: 5/10/11

Nature of Action:

Recovery of money/property - other

Injunctive relief - other

Declaratory judgment

**Final Ruling:** The court having the Motion under submission, **the Status Conference is continued to 2:30 p.m. on November 13, 2013.** No appearance at the September 4, 2013 Status Conference is required.

Notes:

Continued from 6/26/13. The court having taken the Motion for Summary Judgment under submission and this Related To Matter is to be transferred to the District Court for final ruling.

10. [11-34049](#)-E-13 NEE LAU  
MET-3

CONTINUED OBJECTION TO CLAIM OF  
EMPLOYMENT DEVELOPMENT  
DEPARTMENT, CLAIM NUMBER 13  
1-2-13 [[117](#)]

Local Rule 3007-1(c)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on January 2, 2013. By the court's calculation, 55 days' notice was provided. 44 days notice is required.

**Tentative Ruling:** The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

**The court's tentative decision is to sustain the Objection and enter an order and determining that Creditor's priority claim has been amended to be in the amount of \$3,500.00, and Creditor not claiming any amounts in excess thereof.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

#### **PRIOR HEARING**

The Proof of Claim at issue, filed by Employment Development Department, listed as claim number 13 on the court's official claims registry, asserts \$69,195.19 claim, \$43,409.87 which is claimed as priority pursuant to 11 U.S.C. § 507(a)(8). The Debtor objects to the Claim on the basis that Debtor Nee Lau never incurred debt with the creditor.

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); see also *United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

Employment Development Department ("Creditor") asserts that both the priority claim and secured claim are for "unpaid California payroll taxes under Section 507(a)(8)(C) of the United States Bankruptcy Code for State

Disability Insurance and State Personal Income Tax withholdings (trust funds) and Section 507(a)(8)(E) for Unemployment Insurance and Employment Training Tax (non-trust funds)" relating to corporate liability of L&L Italian Restaurant LLC ("Company"). Creditor claims that Nee Lau ("Debtor") is a corporate officer of the Company and is consequently liable for these payments.

Debtor provides a declaration, arguing that he merely invested in the Company and was never an officer, director, shareholder, or member of the Company. Debtor states that both the Debtor and the sole manager of Company, Alice Liu, sent letters to the Creditor explaining Debtor's limited role. Creditor is treating these letters as a tax petition. The Company has been dissolved.

#### **CREDITOR'S OPPOSITION**

Creditor filed an Opposition to the Debtor's Objection to Allowance of Claim. Creditor argues that it's claim is presumptively valid, and Debtor has failed to provide sufficient evidence to defeat the claim. Creditor also argues that Debtor is personally liable for unemployment taxes of the Company on the basis that Debtor was 50% owner, and became a managing member of the Company in 2008 per the Statement of Information filed with the California Secretary of State on July 25, 2008. Dckt. 131. As further evidence that Debtor was a managing member of the Company, Creditor asserts:

1. Debtor had the authority to discuss and negotiate unpaid taxes with Creditor
2. Employees recognized Debtor as the manager of the restaurant and Debtor had managerial duties
3. Debtor had the authority to sign payroll checks on behalf of the Company and did in fact sign payroll checks
4. The business had sufficient funds to pay taxes when they were due.

#### **DEBTOR RESPONSE**

Debtor responds that all of the evidence that Creditor presents were prepared and signed by Alice Liu. Debtor states that none of the documents were prepared or signed by the Debtor. Debtor asserts that the Articles of Incorporation, filed with the Secretary of State were not prepared or signed by the Debtor. Debtor also states the Statement of Information was not prepared, signed, nor does it mention, the Debtor. The Registration Form for Commercial Employers indicates that Debtor is a 50% owner in the Company, but Debtor states that this form was not prepared or signed by Debtor and Debtor did not consent nor was made aware of the form when it was filed. The Statement of Information, filed July 25, 2008, which indicates Debtor is a manager, Debtor states was not prepared or signed by the Debtor and Debtor states he never consented to being named manager.

Debtor asserts that he managed the restaurant, but did not consider himself a manager of the Company. Debtor states that he had authority to write payroll checks, but he was never a member, officer, manager or

shareholder of the Company and that he never consented to being involved in any such position.

#### **EVIDENTIARY HEARING CONFERENCE**

The court is presented with a dispute which can only be resolved through an evidentiary hearing. The court must assess the credibility of the Debtor and evidence which the Employment Development Department intends to submit to establish responsible officer/person liability. FN.1.

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FN.1. To the extent that the Debtor is correct that he should not be liable because it was Alice Liu's responsibility, but is liable because of his management position, one may question if there is a claim or cause of action for reimbursement which is also an asset of the estate which may or should be prosecuted in conjunction with this objection to claim.  
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The court set an evidentiary hearing conference on the Objection to Proof of Claim for 3:20 p.m. on September 4, 2013.

#### **STIPULATION**

On October 20, 2013, the parties filed a Stipulation Regarding Position of Priority Creditor, California Employment Development Department ("EDD"), Under Chapter 13 Proceeding. The parties agree that Creditor EDD shall be allowed a \$3,500.00 priority claim under the Chapter 13 case, to be paid through Debtor's Chapter 13 plan as a Class 5 priority claimant. The Stipulation is signed by Attorney for Debtor, Attorney for Creditor EDD and the Chapter 13 Trustee.

The court interprets this Stipulation to be an amendment of the EDD Proof of Claim, reducing that amount to \$3,500.00 as a priority claim and not to claim in amounts in excess thereof. This amendment resolves the Debtors' Objection to Claim.

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 Objection to the California Employment Development Department Proof of Claim, No. 13, file dbv Nee Nga Lau, "Debtor," having been presented to the court, the court having set an evidentiary hearing on the Objection, the Parties having filed a Stipulation resolving the Objection, the Chapter 13 Trustee having provided a statement of non-opposition to the Stipulation, the substantive effect of the Stipulation to be that the creditor reduces the \$69,195.19 priority and general unsecured claim to \$3,500.00, and good cause appearing,

**IT IS ORDERED** that the Objection to Claim is sustained and the California Employment Development



Department Proof of Claim in this case is reduced to \$3,500.00 as a priority unsecured claim, with no further amounts being asserted as a claim by the Creditor in this case. The Stipulation constitutes an amendment by the Creditor reducing the amount of its claim.

11. [13-20155-E-13](#) JEFFREY AKZAM  
[13-2103](#)  
AKZAM ET AL V. OPTION ONE  
MORTGAGE CORPORATION ET AL

CONTINUED STATUS CONFERENCE RE:  
FIRST AMENDED COMPLAINT  
8-12-13 [[61](#)]

Plaintiff's Atty: Pro Se  
Defendant's Atty: Nichole L. Glowin

Adv. Filed: 3/26/13  
Amd Cmplt Filed: 8/12/13

Answer: none

Nature of Action:  
Injunctive relief - imposition of stay  
Injunctive relief - other  
Recovery of money/property - preference  
Recovery of money/property - other  
Validity, priority or extent of lien or other interest in property

Notes:

Continued from 7/31/13. The court granted Defendants' motion to dismiss and an amended complaint, if any, must be filed and served on or before 8/12/13.

Amended Complaint filed 8/12/13 [Dckt 61]

#### **STATUS CONFERENCE - SEPTEMBER 4, 2013**

The court granted the Defendants Motion to Dismiss the Complaint in this Adversary Proceeding. Order, Dckt. 59. The Plaintiff-Debtor was afforded to August 12, 2013, to file an amended complaint. In addition, the court considered whether litigation of these non-bankruptcy issues in this court was appropriate. 28 U.S.C. § 1334(c) abstention.

The court is also cognizant of exercising federal court jurisdiction over related to matters which do not arise under the Bankruptcy Code or in the bankruptcy case. *Stern v. Marshall*, 564 U.S. \_\_\_\_ , 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). The substance of the complaint asserts various state law and some federal non-bankruptcy law claims.

In the Plaintiffs bankruptcy case, No. 13-20155, the court recently denied confirmation of the proposed Chapter 13 Plan. Civil Minutes, Id. Dckt. 55. There were numerous deficiencies, including the failure to provide basic documents to the Trustee, failure to provide for priority tax claims, failure to disclose prior bankruptcy filing, and no provision made for addressing any claim secured by the property.

While Congress granted a broad jurisdiction to be exercised by federal court on federal and state law issues that touch bankruptcy cases, Congress also empowered the trial judge to in the interest of justice, or in the interest of comity with State court 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. 28 U.S.C. § 1334(c)(1).

From a review of the Complaint and the proposed plan, there appears to be little if any reason for this court to properly exercise federal court jurisdiction to resolve this state law issue over ownership of property which is part of a probate estate. If the Plaintiff elects to file an amended complaint, he should clearly set forth the grounds as to why the exercise of jurisdiction is proper. If not, the parties can anticipate an order to show cause as to why the court should not abstain, and leave the parties to the state court forum, to address their non-bankruptcy law and case related disputes.

Civil Minutes, Dckt. 53.

The court review of the Plaintiff-Debtor's Second Amended Complaint is summarized as follows:

- A. On January 7, 2013, the Plaintiff-Debtor commenced Chapter 13 case number 13-20155.
- B. This is a core proceeding to determine the extent, validity, and priority of a lien. 28 U.S.C. § 157(b)(2)(K).
- C. Plaintiff-Debtor lives in the the 631 Steffan Street Property. Dianna Akzam (a non-debtor co-plaintiff) lives in the 631 Steffan Street Property.
- D. Plaintiffs assert that they have been appointed to be the Administrators of the estate of Charles Akzam, their brother.
- E. Plaintiffs assert that they acquired the 631 Steffan Street Property after the death of their brother.
- F. In 2006 their brother obtain a loan in the amount of \$234,000.00 from OOMC, which is evidenced by a note. The lender is listed as OMCC on the deed of trust.

- G. In July 2009 Plaintiffs entered into a loan modification with AHMSI.
- H. In November 2009, Plaintiffs discovered inconsistencies with the original loan documentation and a blank notice of cancellation.
- I. Plaintiffs claim a superior title to any of the Defendants asserting an interest under the deed of trust.
- J. In April 2010 the defendants recorded a notice of default under the deed of trust.
- K. In July 2010, the defendants recorded a substitution of trustee, executed by a SCC for OOMC.
- L. On March 9, 2011, Jeffrey Akzam filed a Chapter 13 case ("First Bankruptcy Case") to stop the pending foreclosure sale. Case No. 11-25844. That case was subsequently converted to one under Chapter 7. FN.1.

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FN.1. In Case No. 11-25844 Jeffrey Akzam received a Chapter 7 discharge. Schedule A filed by Jeffrey Akzam lists the 631 Steffan Street Property as an asset, listing his interest as "co-debtor." 11-25844, Dckt. 21 at 3.  
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- M. In the First Bankruptcy Case WFB, Trustee, filed a proof of claim and motion for relief from the automatic stay. It is alleged that in that case, the bankruptcy judge ruled that WFB, Trustee had neither Constitutional or Prudential standing to bring the motion since only a blank allonge was provided as evidence of WFB, Trustee asserting an interest in the Property.
- N. In the First Bankruptcy case WFB, Trustee filed a second motion for relief, which is alleged to have been denied for the same reasons. FN.2.

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FN.1. The Civil Minutes for the September 13, 2011 hearing on the WFB, Trustee motion for relief state that evidentiary objections asserted by Jeffrey Akzam were sustained. These objections went to the personal knowledge of an employee of loan servicer AHMI and his ability to testify as to the books, records, and interests asserted by WFB, Trustee. The court sustained the objection and struck the loan servicer's testimony. With that testimony struck, the bankruptcy judge concluded that he did not have any evidence of WFB, Trustee having an interest in the note sufficient to have standing to bring the motion. The court denied the motion without prejudice. Civil Minutes, 11-25844 Dckt. 99. The court did not determine that WFB, Trustee did not have either Constitutional or Prudential standing and make a final determination thereon, but that there was no evidence of what interest, if any, WFB, Trustee had. The motion was denied without prejudice, leaving WFB, Trustee to refile the motion and have the issues litigated to a final determination.  
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- O. It is asserted that since WFB, Trustee "did not have standing to bring or succeed in a relief from stay motion, they surely did not have standing to file a proof of claim, or it makes the proof of claim invalid."
- P. On October 12, 2011, WFB, Trustee cancelled the non-judicial foreclosure sale because more than one year had passed since it had first been set for sale.
- Q. A new non-judicial foreclosure sale was set by a notice in March 2012. A transfer of interest document from OOMC to WFB, Trustee, via SCC, was recorded in January 2012.
- R. Plaintiffs allege that the January 2012 transfer document is fraudulent and void.
- S. The Plaintiffs commenced a state court action in April 2012, for which the defendants (in that action) demurrer was sustained and Plaintiffs were denied leave to file a second amended complaint. Plaintiffs have appealed that ruling in the state court.
- T. In January 2013 Jeffery Akzam filed a second Chapter 13 case, No. 13-201155, ("Second Chapter 13 case) to avoid losing the 631 Steffan Street Property at a purported non-judicial foreclosure sale.
- U. WFB, N.A. has filed a proof of claim in the Second Bankruptcy Case. It is alleged that this proof of claim constitutes "an act to collect a debt as a personal liability of the Debtor, in direct violation of the discharge injunction.
- V. Notwithstanding the commencement of the Second Bankruptcy Case in January 2013, defendants "continued to set a foreclosure sale date every month from the start of April 2012 in direct violation of the stay."
- W. Plaintiffs allege that "defendants claim is invalid and no lien exists that is not void along with the assignment of the deed of trust."
- X. The note upon which WFB, Trustee, asserts its claim has been placed in a securitization pool. Each transfer must include the note and deed of trust. It is asserted that the note was not properly transferred to the securitized pool as required under the trust agreement and New York law.
- Y. It is asserted that the note was assigned separate and apart from the deed of trust, which leaves it "naked and unenforceable."
- Z. Failure to comply with the Internal Revenue Service Rules, the trust agreement, and New York Law should render the notice of trustee's sale void.

- AA. The First Cause of Action alleges that the automatic stay was violated because of attempts to enforce the deed of trust after Jeffrey Akzam obtained his discharge in the First Bankruptcy case. The continued setting of foreclosure sale dates violated the automatic stay in the Second Bankruptcy Case.
- BB. The Second Cause of Action asserts that the defendants violated the discharge injunction in the First Bankruptcy Case by filing a proof of claim in the Second Bankruptcy Case. It is asserted that the proof of claim was false, since no assignment of the note was shown by WFB, Trustee.
- CC. The Third Cause of Action is an objection to the claim of defendants. This is based on any purported transfer to the trust being void under New York Law. It is asserted that the "deed of trust" was not effectively transferred to the trust, and that precluded WFB, Trustee, from receiving the note."
- FN.3. Proof of Claim No. 1 has been filed by WFB, Trustee.

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FN.3. For the convenience of the parties, this court has ruled on a number of occasions, that under operation of California law the deed of trust (as would any security) always is transferred by operation of law with a transfer of the note (underlying secured obligation). The court's general analysis of the applicable law is as follows,

With the creation of securitized loan portfolios and the trafficking of bundled home mortgages, much litigation has arisen over who is entitled to enforce a promissory note and the deed of trust securing the note. While many consumers have blunted their spears on the issue of whether the deed of trust was assigned, it is clear under California law that the issue rests with who owns or has the right to enforce the note. A "Person entitled to enforce" an instrument means (a) the holder of the instrument, (b) a non-holder in possession of the instrument who has the rights of a holder, or (c) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to 3309 or 3418(d). Cal. Com. Code § 3301 (2010). *In re Lee*, 408 B.R. 893, *In re Vargas*, 396 B.R. 511 (C.D. California 2008).

A holder of a note can enforce that note, even if it is in wrongful possession of the note (ie, they found or stole the note), when that note has been endorsed in blank or to bearer. FN. XX. Also, a person may be a holder of a note (and so have standing to do things like bringing a relief from stay motion) even if that person already sold the loan to someone else. *In re Kang Jin Hwang*, 438 B.R. 661 (C.D. Cal. 2010) and Cal. Com. Code § 1201(b)(21).

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FN.XX.

"If an indorsement is made by the holder of an instrument and it is not a special indorsement [specifically identifies the person to whom

the instrument is payable], it is a 'blank endorsement.' When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed."

Cal. Com. Code § 3205(b).

"'Person entitled to enforce' an instrument means (a) the holder of the instrument, (b) a nonholder in possession of the instrument who has the rights of a holder, or (c) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3309 or subdivision (d) of Section 3418. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Cal. Com. Code § 3301.

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In 2011 the Ninth Circuit Court of Appeals addressed this note-deed of trust issue in *Cervantes v. Countrywide Home Loans, Inc. et. al.*, 656 F.3d 1034, 9th Cir. 2011). The court addressed the general proposition that notes and deeds of trust remain together as a matter of law, with it being the right of the note owner to exercise the power under the deed of trust.

It is well-established law in California that a deed of trust does not have an identity separate and apart from the note it secures. "The note and the mortgage are inseparable; the former as essential, the later as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." *Carpenter v. Longan*, 83 U.S. 271, 274 (1872); accord *Henley v. Hotaling*, 41 Cal. 22, 28 (1871); *Seidell v. Tuxedo Land Co.*, 216 Cal. 165, 170 (1932); Cal. Civ. Code §2936. Therefore, if on party receives the note and another receives the deed of trust, the holder of the note prevails regardless of the order in which the interests were transferred. *Adler v. Sargent*, 109 Cal. 42, 49-50 (1895). Notwithstanding the Plaintiffs' arguments concerning "robo-signing," the issue is whether Defendant is the owner of the note today.

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DD. The Fourth Cause of Action is for "contempt of court." This cause of action does not specify the conduct which is alleged to be in contempt of court, but the court infers that it is the alleged violation of the automatic stay and the violation of the discharge injunction.

EE. The Fifth Cause of Action asserts a claim for promissory estoppel based upon a Consent Order entered into by WFB, N.A. with the Comptroller of the currency.

12. [12-25461](#)-E-13 GUILLERMO/JESSICA SOLSONA PRE-TRIAL CONFERENCE RE:  
[12-2261](#) COMPLAINT TO DETERMINE  
AUNGKHIN V. SOLSONA DISCHARGEABILITY OF DEBT, AND  
FOR CONSTRUCTIVE TRUST AND OR  
EQUITABLE LIEN AGAINST DEBTOR'S  
REAL PROPERTY  
6-13-12 [[1](#)]

Plaintiff's Atty: David Brian Lally  
Defendant's Atty: Kaipo K.B. Young

Adv. Filed: 6/13/12  
Answer: 11/6/12

Nature of Action:  
Dischargeability - fraud as fiduciary, embezzlement, larceny  
dischargeability - willful and malicious injury  
Other (e.g. other actions that would have been brought in state court if  
unrelated to bankruptcy case)

Notes:

12/21/12 Scheduling Order -  
Close of discovery 4/30/13  
Dispositive motions heard by 6/6/13

Pretrial Conference set for 7/11/13; rescheduled by the court to 9/4/13.

[KKY-4] Motion for Summary Judgment filed 5/8/13 [Dckt 64]; Order denying  
filed 7/19/13 [Dckt 88]

Defendants' Pre-Trial Conference Statement filed 8/23/13 [Dckt 89]

#### **FINAL BANKRUPTCY COURT JUDGMENT**

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶ 3, Dckt. 1. The Complaint seeks a determination that the claim of Plaintiff is nondischargeable pursuant to 11 U.S.C. § 523, and to enforce an equitable lien and constructive trust with respect to the obligation to be determined nondischargeable. In her answer, Defendant admits the allegations of jurisdiction and core proceedings. Answer ¶ 3, Dckt. 40. These are core proceedings arising under the Bankruptcy Code and the rights and obligations created by Congress thereunder for which the bankruptcy judge issues final orders and judgment.

The Parties in their respective Pretrial Conference Statements, Dckts. 91, 89, and as stated on the record at the Pretrial Conference, have agreed to and establish for all purposes in this Adversary Proceeding the following facts and issues of law:

| Plaintiff(s)   | Defendant(s)  |
|--|---|
| <p>Jurisdiction and Venue:</p> <p>1. 28 U.S.C. §§ 1334, 157, and this is a core proceeding.</p>  | <p>Jurisdiction and Venue:</p> <p>1. 28 U.S.C. §§ 1334, 157, and this is a core proceeding.</p>   |
| <p>Undisputed Facts:</p> <p>3. Plaintiff is a creditor of the Defendant-Debtor.</p> <p>5. Plaintiff has a life Annuity Policy with AAA Life Insurance Company and two checking accounts with JPMorgan Chase Bank.</p> <p>6. On or about June 22, 2010, Plaintiff met in person with Scott Allison ("Allison") at AAA's business location to facilitate a transfer of \$150,000.00 from Plaintiff's AAA life annuity policy to one of his checking accounts at Chase. The money was to be used toward the purchase of a home for Plaintiff. Since Plaintiff did not have his Chase account number with him, Allison offered to call his personal contact at Chase to ascertain Plaintiffs account number. Allison made the telephone call to Chase and was provided with an account number. Plaintiff did not speak to the Chase representative.</p> <p>7. Allison completed AAA's Annuity Withdrawal Service Form for Plaintiff, presumably using the account number provided by Chase. AAA's Annuity Withdrawal Service Form states "'ATTACH VOIDED CHECK,'" however, neither AAA nor Allison requested a voided check from</p> | <p>Undisputed Facts:</p> <p>1. The \$149,860.38 which is the subject of the Adversary Proceeding was property of the Plaintiff.</p> <p>A. Plaintiff had a life annuity policy with AAA Life Insurance Company ("AAA").</p> <p>B. Plaintiff also had two checking accounts with JPMorgan Chase Bank, N.A., also known as JPMorgan Chase &amp; Co., also known as J.P. Morgan Chase National Corporate Services, Inc. ("Chase").</p> <p>C. On or about June 22, 2010, plaintiff met with a Scott Allison ("Allison") at AAA's business location to facilitate a transfer of \$150,000.00 from plaintiff's AAA life annuity policy to one of his checking accounts at Chase. The money was to be used toward the purchase of a home for plaintiff.</p> <p>D. Since plaintiff did not have his Chase account number with him, Allison offered to call his personal contact at Chase to ascertain plaintiff's account number. Plaintiff did not speak to the Chase representative and chose to rely on Allison to obtain the correct account number.</p> <p>E. Allison completed AAA's Annuity Withdrawal Service Form (the "Service Form") for plaintiff, presumably using the account number provided by Chase.</p> <p>F. The Service Form states "ATTACH VOIDED CHECK", presumably to make sure that AAA would issue a check to the correct account. However, neither</p> |



Plaintiff. AAA and/or Allison did not follow AAA's procedure related to withdrawing funds from Plaintiff's account. The Chase bank account number entered on AAA's Annuity Withdrawal Service Form was a combination of Plaintiff's two Chase bank account numbers. Thus, the wrong account number was placed on the Service Form.

8. Plaintiff reasonably relied on Allison's completing the AAA's Annuity Withdrawal Service Form, as Allison is the professional who does this as part of his employment with AAA and since he contacted Chase directly. Allison also previously completed a AAA Annuity Withdrawal Service Form for Plaintiff for an unrelated transaction. When Plaintiff signed the AAA Annuity Withdrawal Service Form he had no way of knowing the Chase account number was incorrect.

9. AAA instructed Chase to transfer Plaintiffs \$150,000.00 into the wrong Chase bank account number but in the correct name of "A.B. Aungkhin." The wrong Chase account belongs to Defendant, who is in no way affiliated with Plaintiff. Plaintiff notified AAA as soon as he noticed the \$150,000.00 had not been deposited in his Chase bank account. Plaintiff also notified Chase and was told by a Chase representative that Plaintiff's \$150,000.00 deposit was sitting in a third party account that was closed and that third party account and owner owed money to Chase.

10. Chase requested Plaintiff to provide AAA with a Service Request to recall the funds from the wrong Chase bank account. On or about July 14, 2010, pursuant to AAA's request and instruction, Plaintiff specifically requested AAA to recall the funds from the wrong account and deposit those funds in the correct bank account via a Service Request.

AAA nor Allison requested a voided check from plaintiff. Thus, AAA and/or Allison did not follow AAA's procedure related to withdrawing funds from plaintiff's account.

G. The Chase bank account number that Allison entered on the Service Form was a combination of plaintiff's two Chase bank account numbers. As a result, the wrong account number was placed on the Service Form.

H. Plaintiff insists that he reasonably relied on Allison's filling out of the Service Form, because Allison was a professional who handles such transactions as part of his employment with AAA, because Allison contacted Chase directly and relied on Chase. Allison had also previously completed a Service Form for plaintiff for an unrelated transaction. Plaintiff claims that he had no way of knowing the Chase account number was incorrect, when he signed the Service Form.

I. AAA instructed Chase to transfer plaintiff's \$150,000.00 into the wrong Chase bank account number but using the correct name of "A.B. Aungkhin."

J. The wrong Chase account number was actually belonging to Ms. Solsona, who is in no way affiliated with plaintiff.

K. As soon as plaintiff noticed that the \$150,000.00 had not been deposited in his Chase bank account, he notified AAA.

L. Plaintiff also notified Chase about the situation, and he was told by a Chase representative that plaintiff's \$150,000.00 deposit was sitting in a third party account that was closed. He was also told that the third party account owner owed money to Chase.

M. Chase requested plaintiff to provide AAA with a Service Request to recall the funds from the wrong Chase bank account.

N. On or about July 14, 2010, pursuant to AAA's request and instruction, plaintiff specifically requested AAA to recall the funds from the wrong account and deposit those funds in the correct bank account via a Service Request.

Subsequent to the July 14, 2010, Service Request, Plaintiff's Chase bank account statement for Account No. XXXXXX8201 showed a deposit of \$150,000.00 on July 21, 2010. However, the very next day, July 22, 2010, a withdrawal from this account for \$150,000.00 was debited to Plaintiff's Chase Account No. XXXXXX8201. Thus, Plaintiff still did not have the \$150,000.00 in his Chase account, and he needed these funds to close escrow for the purchase of a home.

11 . After contacting AAA, Chase, and Allison, Plaintiff was reassured by AAA, Chase, and Allison the matter would be immediately resolved. On or about August 5, 2010, a deposit of \$150,000.00 was credited to Plaintiff's Chase Account No. XXXXXX8201. This deposit was used to close escrow. Plaintiff reasonably assumed the matter had been resolved having not heard anything to the contrary from AAA, Chase and/or Allison and because he received the \$150,000.00 in the correct Chase account. In January 2011, Plaintiff received from AAA his quarterly statement reflecting transactions on the subject AAA account occurring between the period of September 12, 2010, and December 12, 2010, and noticed a withdrawal of \$150,000, and a penalty of \$9,574.35.

12. As Plaintiff did not make a withdrawal of \$159,574.35 from his AAA life annuity account, he immediately contacted AAA to inquire about the withdrawal. He was informed by AAA. for the first time, that the withdrawal was made by AAA because AAA never received the \$150,000.00 back from Chase. Plaintiff learned, while attempting to informally resolve this matter, that the August 5, 2010, deposit to his correct Chase bank account was made from AAA's own account, not Plaintiff's AAA account. Plaintiff

O. Subsequent to the July 14, 2010 Service Request, plaintiff's Chase bank account statement for Account No. XXXXXX8201 showed a deposit of \$150,000.00 on July 21, 2010. However, the very next day, July 22, 2010, a withdrawal from this account for \$150,000.00 was debited to plaintiff's Chase Account No. XXXXXX8201. Thus, plaintiff still did not have the \$150,000.00 in his Chase account, and he needed these funds to close escrow for the purchase of a Home.

P. After contacting AAA, Chase and Allison, plaintiff was reassured by each that the matter would be immediately resolved.

Q. On or about August 5, 2010, a deposit of \$150,000.00 was credited to plaintiff's Chase Account No. XXXXXX8201. This deposit was used to close escrow. Plaintiff reasonably assumed the matter had been resolved, having not heard anything to the contrary from AAA, Chase and/or Allison, and because he received the \$150,000.00 in the correct Chase account.

R. In January 2011, plaintiff received from AAA his quarterly statement reflecting transactions on the subject AAA account occurring between the period of September 12, 2010, and December 12, 2010, and noticed a withdrawal of \$150,000, and a penalty of \$9,574.35.

S. As plaintiff did not make a withdrawal of \$159,574.35 from his AAA life annuity account, he immediately contacted AAA to inquire about the withdrawal. He was informed by AAA, for the first time, that the withdrawal was made by AAA because AAA never received the \$150,000.00 back from Chase.

T. Plaintiff learned, while attempting to informally resolve this matter, that the August 5, 2010, deposit to his correct Chase bank account was made from AAA's own account, not plaintiff's AAA account.

U. Plaintiff made many attempts to informally resolve this matter, however, neither AAA, Chase nor Allison have returned plaintiff's money.

V. Plaintiff subsequently learned that the funds were erroneously deposited into Ms. Solsona's bank

made many attempts to informally resolve this matter, however, AAA, Chase, and/or Allison initially did not return Plaintiffs money.

13. Plaintiff subsequently learned that the funds were erroneously deposited into Defendant's bank account. It was only after Plaintiff filed a Superior Court Complaint and sent written discovery to Chase, and received the responses from Chase, that Chase identified the party who had been sent the money by Chase~ it was Defendant. Defendant improperly received \$149,860.38 from these third parties, yet those funds belonged to Plaintiff. Defendant was sent a check for \$149,860.38, which funds were admittedly in her possession and control thereafter.

14. Chase, without making any inquiry, sent a cashier's check to the last known address of Defendant for \$149,860.38 drawn from the closed account. Chase kept \$139.62 of Plaintiffs money to pay fees owed by Defendant. Chase subsequently made no effort to contact Defendant or retrieve the funds despite being on notice (by AAA) of the mistaken deposit. Defendant retained the funds and spent the funds, inter alia, by paying off the mortgage on the Property and making improvements to the Property

15. Defendant has failed and refused to return the funds to Plaintiff.

16. Plaintiff filed a Complaint in the Superior Court of the State of California against AAA, Chase, Defendant and Allison. Several State Court Defendants have settled with Plaintiff however Plaintiff still has significant damages of over \$245,000.

17. Plaintiff repeatedly attempted to recall the \$150,000.00 from the wrong Chase account and put same in his correct Chase account. At no

account.

W. Ms. Solsona received a cashier's check in an envelope from Chase in the amount of \$149,860.38 on or about June 30, 2010.

X. Ms. Solsona deposited the check in her Wells Fargo account.

Y. Plaintiff filed a State Court Action (entitled Aungkhin v. JPMorgan Chase Bank, et al., Orange County Superior Court Case No. 30-2011-00484632) naming as defendants JPMorgan Chase Bank, AAA and Allison.

Z. After plaintiff filed a State Court Action and sent written discovery to Chase, Chase identified the party who had been sent the money by Chase as Ms. Solsona.

AA. Ms. Solsona was added as a named defendant and serve with the Summons and Complaint on September 13, 2011.

BB. On March 21, 2012, Ms. Solsona filed her voluntary petition under Chapter 13 of the Bankruptcy Code.

CC. On June 13, 2012, plaintiff Aungkhin filed his Complaint to Determine Dischargeability of Debt, And For Constructive Trust And Or Equitable Lien Against Debtor's Real Property.

DD. Plaintiff eventually settled with defendants JPMorgan Chase Bank, AAA and Allison in the State Court Action for the aggregate sum of \$72,500.00.

time has Plaintiff received his \$150,000.00. Plaintiff never gave Defendant consent to use Plaintiff's funds.

18. Defendant used Plaintiff's funds to pay \$106,351.68 toward the mortgage on her Property, and an additional approximate amount of \$18,000 toward repairs of the Property, including re-roofing. Plaintiff has recorded a Lis Pendens upon the Property.

19. On September 20 and 23, 20 11 , Defendant sent a series of e-mails to Plaintiffs Superior Court attorney. In these e-mails, Defendant maintains she thought the check came from Countrywide as part of a settlement. On September 20, Defendant states:

"I told my grandpa that countrywide sent me the settlement from our forcloser (sic) of our home in 2007. because (sic) thats the only explanation of where it could of came from! he told me that it was good! he looked it up and lots of people were getting free credit help and settlements! I even looked it up and called countrywide and they could not tell me if they sent me a settlement because (sic) my info was not coroeing (sic) in! so countrywide never sent me the check! so my only thought was that my kids father who i havent (sic) talked to in fourteen years who called and told me he wanted to send me something! before he went back to costa rica! he never called back or sent anything! in a box form so i thought it came from him! I had all these thoughts and when chase was telling me it was a good check i beleaved (sic) them! my grandpa is 90 years old! i will talk to him and ask if i could give his info out! i dont (sic) realy (sic) want to wony him! I havent (sic) told him yet about all this mess! he will worry and it would be bad for his

|   |   |
|---|---|
| <p>health! I spent 106,000 to pay off the house! can you please tell me why he wants to talk to my grandpa and if i give his info out if he is going to put stress on him? if he could help me in this case i will talk to him right away! thanks!"<br/>(Emphasis Added)</p> <p>20. On September 23, 2011 , Defendant states in an e-mail to Plaintiff's Superior Court attorney "I told her it must of been the country wide (sic) settlement'" On the same day she says "we should pay 40,000 each!!"</p>   |   |
| <p>Disputed Facts:</p> <ol style="list-style-type: none"> <li>1. What was the source of the approximately \$150,000 that Defendant received?</li> <li>2. Did Defendant believe the funds came from a Countrywide Settlement?</li> <li>3. Did Defendant believe the funds came from her former husband whom admittedly she had not seen for 14 years?</li> <li>4. Did Defendant take and use Plaintiff's funds knowing the funds did not rightfully belong to her?</li> <li>5. Did Defendant have the requisite intent to commit larceny of Plaintiffs funds?</li> <li>6. Did Defendant wrongfully take Plaintiffs funds knowing the funds did not belong to her?</li> <li>7. Did Defendant spend Plaintiff's funds with actual knowledge that the funds did not belong to her?</li> <li>8. Did Defendant have a reasonable belief that the funds came from Countrywide Home Loans?</li> </ol> | <p>Disputed Facts:</p> <ol style="list-style-type: none"> <li>1. Did defendant have actual knowledge that the funds did not belong to her at the time she received, deposited and spent the funds?</li> <li>2. Did defendant act with fraudulent intent at the time she received, deposited and spent the funds?</li> <li>3. Did defendant have a good faith and reasonable belief that the funds belonged to her at the time she received, deposited and spent the funds?</li> </ol> |

|   |   |
|---|---|
| <p>9. Did Defendant have a reasonable belief that the funds came from her former husband whom she had not seen in 14 years?</p> <p>10. Has Defendant sufficiently explained why she believed she was entitled to retain and spend Plaintiff's funds?</p> <p>11. Do Defendant's e-mails to Plaintiffs Superior Court attorney admit-and confirm that Defendant believed the funds did not come from her former husband?</p> <p>12. Does Defendant have any evidence, other than her own statement, that the funds came from her former husband, whom Defendant did not speak with for 14 years?</p> <p>13. Regarding Defendant's e-mails. do they show Defendant's state of mind, and show Defendant herself believed the funds did not belong to her?</p> <p>14 . As a direct and proximate cause of Defendant's conduct, has Plaintiff been damaged in an amount in excess of \$250,000.00, including attorneys' fees and costs pursuant to applicable law, and interest at the maximum legal rate since the date of Defendant's conduct?</p> <p>15. Based upon the facts of this case, is Plaintiff entitled to an equitable lien or constructive trust against the Property?</p> |   |
| <p>Disputed Evidentiary Issues:</p> <p>1. None Stated.</p>  | <p>Disputed Evidentiary Issues:</p> <p>1. Authentication of emails.</p> <p>2. The emails plaintiff intends on introducing are barred by Federal Rule of Evidence 408. Rule 408 states that evidence relating to furnishing promising on offering a valuable consideration in compromising or attempting to compromise</p> |

|  |   |
|--|---|
|  | <p>the claim is not admissible to prove or disprove a claim. Fed. R. Evid., Rule 408. As some of the email threads are contained as part of one document, the entire document is tainted and must be stricken.</p>  |
| <p>Relief Sought:</p> <p>1. Not Stated</p>             | <p>Relief Sought:</p> <ol style="list-style-type: none"> <li>1. Monetary damages and determination of dischargeability.</li> <li>2. State court action, to which Defendant was named as a Doe Defendant, was settled, with Plaintiff being paid \$72,500.00, in what was determined by the state court to be a good faith settlement.</li> </ol>  |
| <p>Points of Law:</p> <p>1. 11 U.S.C. § 523(a)(4).</p> | <p>Points of Law:</p> <ol style="list-style-type: none"> <li>1. Larceny. <i>Ormsby v. First American Title Company of Nevada (In re Ormsby)</i>, 591 F.3d 1199 (9th Cir. 2010); the court considers the totality of the circumstances in judging whether there was wrongful conduct and fraudulent intent.</li> <li>2. Conversion. 11 U.S.C. § 523(a)(4) does not specify conversion as this basis for nondischargeability.</li> <li>3. 11 U.S.C. § 523(a)(6), willful and malicious injury, is the proper grounds to consider any claim for conversion.</li> <li>4. Constructive Trusts and Resulting Trust are remedies and not substantive “trust relationships” for purposes of 11 U.S.C. § 523(a)(4).</li> </ol> |
| <p>Abandoned Issues:</p> <p>1. None Stated</p>         | <p>Abandoned Issues:</p> <ol style="list-style-type: none"> <li>1. Embezzlement</li> <li>2. Claim under 11 U.S.C. § 523(a)(6).</li> </ol>   |
| <p>Witnesses:</p>                                      | <p>Witnesses:</p>   |

|   |   |
|---|---|
| 1. Plaintiff<br>2. Defendant  | 1. Jessica Lynn Solsona<br>2. Aungkhin B. Aungkhin  |
| Exhibits:<br><br>1. The Debtor's Petition, Schedules and Statement of Financial Affairs.<br><br>2. Plaintiffs Rule 7026 Disclosures.<br><br>3. All documents provided by Plaintiff to Defendant during discovery.<br><br>4. Plaintiffs Interrogatories to Defendant.<br><br>5. Defendant's Responses to Plaintiffs Interrogatories.<br><br>6. Plaintiffs Request For Production of Documents.<br><br>7. Defendant's Responses to Plaintiffs Request For Production of Documents.<br><br>8. Defendant's Motion to Dismiss Complaint and supporting Declarations of Defendant and Kaipo K.B. Young, Esq., and Exhibits .<br><br>9. Plaintiffs Opposition to Motion to Dismiss Complaint, Points & Authorities in Support of Opposition, and supporting Declaration and Exhibits .<br><br>10. Defendant's Motion For Summary Judgment and Supporting Declarations and Exhibits.<br><br>11. Plaintiffs Opposition to Motion For Summary Judgment and supporting Declarations and Exhibits.<br><br>12. Defendant's Reply to Opposition | Exhibits:<br><br>1. Chase Cashier's Check No. 50068 made payable to Jessica L. Solsona and dated June 28, 2010.<br><br>2. Application and Restraining Order Against Ex-Husband.<br><br>3. Certified Copy of the Notice of Motion and Joint Motion for Good Faith Settlement; Memorandum of Points and Authorities and Declarations of Julia J. Rider; Jeffrey Gubernick and Nathaniel J. Tarvin in Support Filed on September 26, 2012 in the State Court Action.<br><br>4. Certified Copy of the State Court Minute Order Granting Motion for Good Faith Settlement Filed on September 26, 2012 in the State Court Action. |



|  |  |
|--|--|
| to Motion For Summary Judgment.<br><br>13. E-mails from Defendant to Plaintiffs Superior Court attorney. |  |
| Discovery Documents:<br><br>1. Included in Exhibits Identified by Plaintiff                              | Discovery Documents:<br><br>1. None  |
| Further Discovery or Motions:<br><br>1. None   | Further Discovery or Motions:<br><br>1. None                                     |
| Stipulations:<br><br>1. None   | Stipulations:<br><br>1. None   |
| Amendments:<br><br>1. None   | Amendments:<br><br>1. None   |
| Dismissals:<br><br>1. None   | Dismissals:<br><br>1. None   |
| Agreed Statement of Facts:<br><br>1. None as of Pre-Trial Conference.                                    | Agreed Statement of Facts:<br><br>1. Suggested, none as of Pre-Trial Conference. |
| Attorneys' Fees Basis:<br><br>1. None Stated.  | Attorneys' Fees Basis:<br><br>1. None claimed.                                   |
| Additional Items<br><br>1. None  | Additional Items<br><br>1. Settlement conference suggested on issue of damages.  |
| Trial Time Estimation: Total Trial One Day   | Trial Time Estimation: One-Half Day for Defendant.                               |

13. [12-26563](#)-E-13 YASWANT/KAMINI SINGH  
[13-2007](#)  
SINGH ET AL V. SATTERFIELD ET  
AL

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
1-8-13 [[1](#)]

Plaintiff's Atty: Peter G. Macaluso  
Defendant's Atty: Andrew David Smith

Adv. Filed: 1/8/13  
Answer: 2/6/13

Nature of Action:  
Declaratory judgment  
Injunctive relief - other

**Final Ruling: The Status Conference is continued to 2:30 p.m. on November 13, 2013.** No appearance at the September 4, 2013 Status Conference is required.

Notes:

Continued from 6/26/13. The court being advised that a loan modification had been agreed to. Hearing on loan modification heard in the parent case on 7/2/13 and granted by order of the court dated 7/16/13.

Plaintiffs' Status Conference Statement filed 8/28/13 [Dckt 17]

**STATUS CONFERENCE - SEPTEMBER 4, 2013**

Plaintiff reports that the court has approved (July 2, 2013 hearing) a loan modification with the Defendants. Recordation of the documents relating to the modification is pending. The Plaintiff-Debtors are preparing an amended plan which incorporates the loan modification. With the loan modification, the disputes in this Adversary Proceeding are resolved. The docket for the Plaintiff-Debtors' bankruptcy case, No. 12-26563, shows that the amended plan and motion with supporting pleadings to confirm were filed on August 15, 2013 (Dckts. 191, 192-196). The hearing on the motion to confirm the amended plan is set for October 8, 2013.

14. [10-23577-E-11](#) GLORIA FREEMAN  
[13-2027](#)  
FREEMAN V. FLEMMER

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
1-29-13 [[1](#)]

Plaintiff's Atty: Pro Se  
Defendant's Atty: Daniel L. Egan

Adv. Filed: 1/29/13  
Answer: 2/27/13

Counterclaim Filed: 2/27/13  
Answer: 4/24/13

Nature of Action:  
Declaratory judgment

**Final Ruling: The Status Conference is continued to October ----, 2013, at -  
----- a.m.** The court has continued the Status Conference pursuant to a  
separate order. No appearance at the September 4, 2013 Status Conference is  
required.

At a hearing on August 29, 2013 in the Gloria Freeman bankruptcy case,  
Laurence Freeman appeared and advised the court that he had not yet engaged  
independent legal counsel to represent him. In other pleadings prepared by  
Gloria Freeman which Laurence Freeman is purported to have read, understood,  
and then signed, he and Gloria Freeman assert that he suffers from a mental  
impairment arising from health issues. Laurence Freeman has advised the  
court at another hearing that he suffers from Aphasia and has difficulty  
reading and understanding the written word.

The court is sufficiently concerned with the ability of Laurence  
Freeman to participate in these proceedings and make legal decisions of his  
own free will, that the court is conducting a status conference on October  
3, 2013 to consider (1) whether he has obtained and is represented by  
independent legal counsel, (2) if he is able to knowingly, and of his own  
free will and independent determination, make legal and financial decisions  
in connection with the litigation in and related to the Gloria Freeman  
bankruptcy case, and (3) whether it is necessary and appropriate for the  
court to appoint a substitute representative for him in this Adversary  
Proceeding and the proceedings in the Gloria Freeman bankruptcy case. Fed.  
R. Civ. P. 25(b), 17; and Fed. R. Bankr. P. 7025, 7017.

Notes:

Continued from 6/26/13. Lawrence Freeman to meet with David Chandler the  
middle of July to discuss substituting in as his counsel.

Plaintiff's Substitution of Counsel filed 7/2/13 [Dckt 49]; Order granting  
filed 7/2/13 [Dckt 49]

15. [13-20477-E-13](#) RAFAEL/VIANA LARA  
[13-2218](#)

STATUS CONFERENCE RE: COMPLAINT  
7-1-13 [[1](#)]

**LARA, JR. ET AL V. AMERICAN  
HOME MORTGAGE CORP ET AL**

Plaintiff's Atty: Mark Lapham  
Defendant's Atty: unknown

Adv. Filed: 7/1/13  
Answer: none

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

**STATUS CONFERENCE - SEPTEMBER 4, 2013**

The Plaintiff-Debtors Chapter 13 bankruptcy case was dismissed by the court on July 16, 2013. The case was dismissed based on the lack of prosecution (Debtors failing to file evidence in support of motion to confirm plan).

The 27 page Complaint seeks relief in the form of Quiet Title; Wrongful Foreclosure; Failure to Follow Conditions Precedent of the Deed of Trust; Declaratory Relief; Violation of Business and Professions Code §§ 17200 et seq.; Injunction; Cancellation of Instruments; Truth in Lending; Real Estate Settlement Procedures Act; Violation of California Civil Code § 2932.5; and Unjust Enrichment. Dckt. 1. No claim arising under the Bankruptcy Code or arising in the bankruptcy case (which has been dismissed) appear to be stated.

Notes:

16. [12-28879-E-11](#) ANNETTE HORNSBY

CONTINUED STATUS CONFERENCE RE:  
VOLUNTARY PETITION  
5-8-12 [[1](#)]

Debtor's Atty: Sunita Kapoor

**Final Ruling: The Status Conference is continued to 2:30 p.m. on November 13, 2013.** No appearance at the September 4, 2013 Status Conference is required.

The Debtor in Possession and counsel have been appearing before the court on several matters in this case. For purposes of a status conference, that is sufficient for the court at this time. The court continues the Status Conference to afford the Debtor in Possession and counsel sufficient time to draft and file a proposed Chapter 11 Plan and disclosure statement, and set a hearing for the approval of the disclosure statement.

Notes:

Continued from 6/26/13

Operating Reports filed: 7/8/13, 8/6/13

[SK-1] Motion to Approve Loan Modification Agreement filed 4/24/13 [Dckt 110]; Order granting filed 6/12/13 [Dckt 130]

[SK-2] Motion for Determination of Secured Claim of Wells Fargo Bank, N.A. filed 5/15/13 [Dckt 115]; heard 7/25/13 at 10:30 a.m.; continued to 8/29/13 at 10:30 a.m.; stipulation filed 8/15/13 [Dckt 163]

[SK-3] Motion for Determination of Secured Claim of Stan Shore Trust filed 5/15/13 [Dckt 119]; Order granting filed 7/29/13 [Dckt 150]

[SK-4] Motion to Vacate the Order Lifting the Automatic Stay and for an Order Reinstating the Bankruptcy Stay filed 8/8/13 [Dckt 153]; Ex Parte Application to shorten time filed 8/8/13 [Dckt 152]; Order denying application shortening time filed 8/15/13 [Dckt 158]

17. [12-34482](#)-E-13 PETER BOWLING AND MARILYN CONTINUED OBJECTION TO CLAIM OF  
LRR-8 MOWRY ROBERTO MADRIGAL VALEZ, CLAIM  
NUMBER 20  
2-15-13 [[93](#)]

**CONT. FROM 4-2-13**

Local Rule 3007-1(b)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on February 15, 2013. By the court's calculation, 46 days' notice was provided. 44 days' notice is required.

**Tentative Ruling:** This Objection to a Proof of Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1) and Rule 3007-1(d).

**The court's tentative decision is to xxxx.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

**PRIOR HEARING**

The Proof of Service filed on February 19, 2013 indicates that the Notice of Hearing was served on February 19th. The Notice of Hearing was not served with the Objection and Declaration, on February 15th. Because the objection and declaration correctly stated the hearing date, time, and location the court waives the service defect.

The Proof of Claim at issue, listed as claim number 20 on the court's official claims registry, asserts \$73,199.68 claim. The Debtors object to the Claim on the basis that the claim was filed on December 12, 2012 while the claims bar date was December 5, 2012. Debtors state that if the claim is allowed Creditor Madrigal, who was employed by Oasis Ranch, Inc., would be given a claim against the Debtors personally. Debtors state that the instant proof of claim is the first that Debtors have heard of this claim and Creditor has not filed a separate lawsuit. Debtors state that Creditor claims a priority under § 507(a)(4) and Creditor has not demonstrated that Debtors have caused the alleged damage.

**Opposition of Creditor Roberto Madrigal Velez**

Creditor filed a 14-page opposition stating that the claim was filed after the bar date due to excusable neglect. Creditor states that he was employed by Oasis Ranch, Inc. between February 2011 and May 2012. Creditor states that the corporation violated state labor laws and that the instant proof of claim is based on an estimate of wages owed, damages, penalties, and other amounts based on the aforementioned violations.

Creditor argues that Debtors are the alter egos of the corporation, Oasis, and are therefore liable to Creditor. Creditor argues that Debtors list a default judgment entered on October 25, 2011 against Oasis and argues that Debtors are bringing collection actions against Oasis to protect Debtors' individual bankruptcy filing.

First, Creditor argues that Debtor did not list Creditor on the Master Address list and did not provide notice of the meeting of creditors. Creditor argues that its late filed claim should be allowed since Creditor was denied due process, such that the late filing can be considered excusable neglect.

Second, Creditor argues that Debtors have not satisfied their evidentiary burden to rebut the presumption that a proof of claim is prima facie valid.

Third, Creditor argues that Debtors are alter egos of Oasis and that Debtors have not provided evidence to refute this assertion. Creditor argues that the elements required to pierce the corporate veil are present and that several documents filed in the instant case support the theory that Debtors are the alter ego of Oasis.

Fourth, Creditor argues that Bankruptcy Courts must rely on state law with regard to labor and employment issues. Creditor argues that he was employed by Debtor Marilyn Mowry who had control over his wages.

#### **Analysis**

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); see also *United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

Debtors object first on the ground that the claim was late filed and second on the basis that Debtors are not personally liable to Creditor. Debtors argue that Creditor should assert its claims against Oasis Ranch, Inc. The court's review of the Master Address List indicates that Creditor was not provided notice of the instant bankruptcy case. Presumably, no notice was given because Debtors believe that they do not owe any debt to Creditor. Since Creditor did not have notice, then he was not afforded the opportunity to state his asserted claim.

Federal Rule of Bankruptcy Procedure 3002(c) establishes the claims bar date at 90 days after the first date set for the meeting of creditors. 11 U.S.C. § 502(b)(9) provides that untimely filed proofs of claims may be disallowed, except to the extent tardy filing is permitted by provisions of the Bankruptcy Code. However, a creditor must have been afforded the minimum due process mandated by the Constitution before a claims bar date may be

enforced against a creditor's late-filed claim. 4 Collier on Bankruptcy ¶ 501.02 (Alan N. Resnick & Henry J. Sommer eds. 16<sup>th</sup> ed.).

Since the Creditor did not have notice of the bankruptcy case, he cannot be barred from filing a claim once he learned of the bankruptcy filing - even if the Debtors failed to give notice because they assert they do not owe him any money. Creditor has established that he be granted leave to file his proof of claim on December 12, 2012, and that Proof of Claim No. 20 is deemed timely filed.

Proof of Claim No. 20, asserts a claim in the amount of \$73,199.68 for "wages and housing damages owed to employee." Attachment 1 to Proof of Claim No. 20 includes a narrative of the basis for the claim and an itemization of how the claim is computed. In the narrative he asserts that he was employed by Marilyn Mowry (one of the Debtors) doing business as Oasis Ranch, Inc. He asserts that this Debtor provided him with housing that was in uninhabitable, unsafe, and substandard condition. He further asserts that his employment violated various California labor laws.

The court's review of Creditor's Exhibits, See docket number 137, indicates that Creditor has not provided sufficient evidence to substantiate its claim. Creditor's exhibits consist of:

1. Docket from Sacramento Superior Court case number 00110688;
2. Complaint from case filed in Sacramento Superior Court by Northern California Collection Service, Inc. against Oasis Ranch, Inc. and Does One through Ten;
3. Default judgment from Sacramento Superior Court filed by Northern California Collection Service, Inc. against Oasis Ranch, Inc.; and
4. Minute Order from Sacramento Superior Court in the Northern California Collection Services Inc vs. Oasis Ranch Inc. action.

In the Opposition to the Objection to Claim, Creditor asserts that Oasis Ranch, Inc. is the alter-ego of Debtor Marilyn Mowry. As such, Creditor asserts the right to have a claim against her personally. In support of this alter ego contention Creditor directs the court's attention to the Debtors having included some of the Oasis Ranch, Inc. debts as their own debts on the Schedules filed in this case.

#### **EVIDENTIARY HEARING**

The court set a discovery schedule in this Contested Matter and the September 4, 2013, Pre-Evidentiary Hearing Conference to set the dates and deadlines for the evidentiary hearing:

- A. On or before -----, 2013, each party shall file a Pre-Evidentiary Hearing Statement listing the witnesses, exhibits, and discovery documents to be presented for their respective cases in chief (non-rebuttal witnesses, exhibits, and discovery documents) at the evidentiary hearing.



- B. Evidence shall be presented according to Local Bankruptcy Rule 9017-1.
- C. Debtor and Creditor shall both clarify .....
- D. Peter and Marily Mowry, the Objecting Debtors, shall lodge with the court and serve their Testimony Statements and Exhibits on or before -----, 2013.
- E. Robert Madrigal Velez, the Creditor, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before -----, 2013.
- F. Evidentiary Objections and Hearing Briefs shall be lodged with the court and served on or before -----, 2013.
- G. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before -----, 2013.
- H. The Evidentiary Hearing shall be conducted at -----m. on -----, 2013.

Debtors' Atty: Len Reid Reynoso  
Creditor's Atty: Shannon M. Going

Notes:

19. [08-35291](#)-E-13 VICTOR/PATRICIA GUZMAN  
[10-2141](#)  
GUZMAN ET AL V. ONEWEST BANK,  
FSB ET AL

CONTINUED PRE-TRIAL CONFERENCE  
RE: AMENDED COMPLAINT  
5-29-12 [[87](#)]

Plaintiff's Atty: Mark A. Wolff  
Defendant's Atty:  
Joshua A. del Castillo [OneWest Bank, FSB; IndyMac Mortgage Servicing]  
unknown [IndyMac Federal Bank]

Adv. Filed: 3/15/10  
Amd Cmplt filed: 5/29/12

Answer: 4/14/10 [OneWest Bank, FSB; IndyMac Mortgage Servicing]  
Answer to Amd Cmplt: 6/29/12 [OneWest Bank, FSB; IndyMac Mortgage Servicing]

Nature of Action:  
Injunctive relief - other  
Recovery of money/property - other  
Validity, priority or extent of lien or other interest in property  
Notes:

Continued from 7/31/13 to afford the parties an opportunity to engage in  
final settlement discussions before incurring the costs and expense of  
preparing pre-trial statements.

20. [12-30992](#)-E-11 MACHELLE HOLLOWAY

STATUS CONFERENCE RE: VOLUNTARY  
PETITION  
6-8-12 [[1](#)]

Debtor's Atty: Scott D. Schwartz

Notes:

Case filed 6/8/12. Order setting status conference filed 7/11/13 [Dckt 164]

Operating Reports filed: 7/16/12, 8/15/12, 9/17/12, 10/15/12, 11/16/12,  
12/17/12, 1/16/13, 2/18/13, 3/18/13, 4/15/13, 5/20/13, 6/17/13, 7/17/13,  
8/16/13, 8/21/13, 8/21/13

Status Report filed 8/2/13 [Dckt 173]

#### **STATUS CONFERENCE - SEPTEMBER 4, 2013**

Though this case was filed on June 8, 2012, no prior status conference  
has been conducted by the court. From a review of the docket it appears  
that by October 2012, the Debtor in Possession had resolved § 506(a) claim  
valuation disputes the plan treatment for creditors having claims secured by  
the estate's rental properties. Other than filing Operating Reports, there  
appears to have been no prosecution of this case since that time.

The Monthly Operating Report for July 2013 (Dckt. 183) provides the  
following information.

|   | July 2013    | Case to Date of<br>Monthly Operating<br>Report |  |
|---|--------------|--|--|
| <b>Income</b>                                       |              |  |  |
| Rents Collected                                     | \$10,990     | \$139,276                                      |  |
| Cash From Sales                                     | <b>\$305</b> | <b>\$277</b>                                   |  |
| Federal and State<br>Tax Refund                     | \$6,239      | \$6,239  |  |
| Ghirardelli<br>Payroll                              | \$3,167      | \$51,687                                       |  |
| ATT Pension   | \$989        | \$13,578                                       |  |
| 401K Withdrawal                                     | \$0          | \$15,000                                       |  |
| <b>Return of Partial<br/>Retainer to<br/>Lawyer</b> | <b>\$0</b>   | <b>\$1,200</b>                                 |  |
| Security Deposits                                   | \$0          | \$3,930  |  |
|   |              |  |  |
| <b>Expenses</b>                                     |              |  |  |
| Real Property<br>Taxes                              | \$0          | (\$5,092)                                      |  |
| Rental Related<br>Expenses                          | (\$1,926)    | (\$35,162)                                     |  |
| Secured Debts                                       | (\$9,598)    | (\$35,162)                                     |  |
| Household<br>Expenses                               | (\$4,164)    | (\$35,162)                                     |  |