

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

October 14, 2015 at 2:30 p.m.

1. [13-23119](#)-E-13 CYNTHIA MCDONALD
[14-2210](#)
MCDONALD V. JPMORGAN CHASE
BANK, N.A. ET AL

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
7-21-14 [[1](#)]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Amy M. Spicer

Adv. Filed: 7/21/14
Answer: none

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

OCTOBER 14, 2015 STATUS CONFERENCE

This Adversary Proceeding was filed on **July 21, 2014**. No answer or other responsive pleading has been filed by Defendant. Both the Plaintiff and Debtor have represented to the court on multiple occasions that the Adversary Proceeding has been settled.

A. October 15, 2015 Status Conference Civil Minutes, Dckt. 11:

"Plaintiff states that the parties have stipulated to allow Defendant until September 30, 2014 to file a response to the Complaint. This was granted in light of the Parties engaging in settlement negotiations. The Plaintiff requests that the court continue the Status Conference for a sufficient amount of time for the Parties to conclude the settlement discussions."

B. Stipulation to Extension of Time, filed December 12, 2014, Dckt. 12:

"The Parties are engaged in on-going discussion in an attempt to resolve this adversary proceeding without litigation. Defendants have requested and Plaintiff has agreed to extend the time for Defendants' response to the complaint to and including January 15, 2015."

October 14, 2015 at 2:30 p.m.

C. Stipulation to Extension of Time, Dckt. 14:

"The Parties are engaged in on-going settlement discussion in an attempt to resolve this adversary proceeding without litigation. The Parties have agreed to extend the time for Defendants' response to the complaint to and including February 27, 2015."

D. April 1, 2015 Status Conference Civil Minutes, Dckt. 19:

"The attorneys reported that this matter appears to be resolved, and counsel for plaintiff will be meeting with his client (who has been out of town) to finalize a settlement."

E. Joint Scheduling Conference Statement, filed on June 10, 2015, Dckt. 20:

"Plaintiff Cynthia Renee McDonald ("Plaintiff") and Defendants JPMorgan Chase Bank N.A. and US Bank N.A. as Trustee successor in interest to Bank of America, National Association as Trustee, successor by merger to LaSalle Bank National Association, as Trustee for Structured Asset Investment Loan Trust Mortgage Pass-Through Certificates, Series 2004-10 (collectively "Defendants" and jointly with Plaintiff, the "Parties"), by and through their attorneys of record, advise the Court that the Parties have settled this dispute. The Parties are in the process of memorializing the settlement terms in a written settlement agreement, which they will submit to the Court for approval."

F. Joint Scheduling Conference Statement, filed August 26, 2015, Dckt. 23:

"The Parties are pleased to report that they have now completed the preparation of their written settlement agreement, which is currently being circulated for signature by the Parties. The Parties are hopeful that the settlement agreement will be signed prior to the currently scheduled Scheduling Conference. Among other things, the settlement agreement provides for the dismissal of this proceeding with prejudice."

This Adversary Proceeding has been pending for 436 days. As of June 10, 2015, the parties affirmatively represented to the court that this Adversary Proceeding and all that remained was to prepare the settlement agreement. Though 126 days have passed since so affirmatively stating that this Adversary Proceeding has been settled, no settlement agreement has been

presented to the court.

This is not a situation where two newly minted attorneys, not experienced in the practice of law are stumbling through settling a lawsuit.

It appears that the parties are not diligently prosecuting this Adversary Proceeding. Though settlement has been promised since June 10, 2015, settlement has not been consummated.

At the Status Conference ~~XXXXXXXXXXXXXXXXXXXXX~~.

APRIL 1, 2015 STATUS CONFERENCE

The attorneys reported that this matter appears to be resolved, and counsel for plaintiff will be meeting with his client (who has been out of town) to finalize a settlement.

OCTOBER 15, 2014 STATUS CONFERENCE

Plaintiff states that the parties have stipulated to allow Defendant until September 30, 2014 to file a response to the Complaint. This was granted in light of the Parties engaging in settlement negotiations. The Plaintiff requests that the court continue the Status Conference for a sufficient amount of time for the Parties to conclude the settlement discussions.

As of the court's October 12, 2014 review of the Docket (twelve days after the deadline stipulated to for a response to the Complaint) no answer or responsive pleading has been filed. No motion for further extension of time to respond to the Complaint has been filed. Defendant has not appeared in this Adversary Proceeding.

The Complaint was filed on July 21, 2014. The October 15, 2014 Status Conference is eight-six (86) days after the Complaint was filed. The Complaint, with exhibits, is fifty-two (52) pages. The Complaint itself is thirteen (13) pages long. The Complaint states the following Causes of Action:

I. First Cause of Action Objection to the JPMorgan Chase Bank Proof of Claim.

A. The substance of this Objection is that Proof of Claim No. 2 filed by JPMorgan Chase Bank, N.A. misstates the claim because it lists the following information,

1.Principal Balance.....\$187,774.58
2.Arrearage.....\$ 22,403.04
3.Which Amounts Total.....\$210,177.62.

B. However, JPMorgan Chase Bank, N.A. has filed the claim for the lesser amount of \$204,873.32, which is \$5,300.00 less than the total of the principal amount and arrearage.

C. The amount of the Proof of Claim and the total of the Principal Balance and Arrearage cannot be reconciled.

D. This difference which cannot be reconciled is sufficient to disallow

October 14, 2015 at 2:30 p.m.

the Proof of Claim.

II. Second Cause of Action for Violation of California Rosenthal Act.

A. It is asserted that Plaintiff misapplied non-specific payments made by Plaintiff in 2012 and 2013, and that by misapplying the payments Defendant violated the Rosenthal Act.

B. It is asserted that the Proof of Claim filed is a misrepresentation of the debt, and such misrepresented Proof of Claim is a violation of the Rosenthal Act.

III. Third Cause of Action for Negligence.

A. It is alleged that JPMorgan Chase Bank, N.A. had a duty to file a Proof of Claim in Plaintiffs bankruptcy case which has some semblance of accuracy.

B. JPMorgan Chase Bank, N.A. violated the duty to file such proof of claim when it filed Proof of Claim No. 2 in Plaintiffs bankruptcy case.

IV. Fourth Cause of Action for Fraud and Intentional Misrepresentation (Cal. Civ. §§ 1572, 1709, and 1710)

A. It is alleged that when JPMorgan Chase Bank, N.A. filed Proof of Claim No. 2 it knew that the information therein was false. It is alleged that the Bank misapplied payments made by Plaintiff.

V. Fifth Cause of Action for Violation of Real Estate Settlement Procedures Act (12 U.S.C. §§ 2601 et seq.).

A. JPMorgan Chase Bank, N.A. misapplied nonspecified payments made by Plaintiff for the loan upon which Proof of Claim No. 2 is based.

VI. Sixth Cause of Action for Breach of Contract

A. It is alleged that JPMorgan Chase Bank, N.A. has breached the terms of the contract (promissory note) with Plaintiff. The breach of contract arises from misapplying nonspecified payments made by Plaintiff.

VII. Seventh Cause of Action for Conversion.

A. It is alleged that JPMorgan Chase Bank, N.A. misapplying nonspecified payments made by Debtors to the Bank on the loan constitutes a conversion of said monies.

VIII. Eight Cause of Actions for Attorneys Fees.

A. Pursuant to a nonspecified term of the Note and Deed of Trust and the California Civil Code, Plaintiff is entitled to attorneys fees.

Recently the court addressed an adversary proceeding in which the Plaintiff-Debtor was represented by counsel for Plaintiff in this case and Nationstar Mortgage, LLC, in which similar claims were asserted. Adv. Pro. 14-2187. In considering a motion to dismiss the first amended complaint in that case, the court reviewed the contention that because the amount of the secured claim stated on the proof of claim form was less than the amount of the principal balance and arrearage. In that Adversary Proceeding the court noted that merely adding the principal balance to the arrearage (which includes the

missed monthly payments) would not necessary accurately state the amount of the claim. This is because the missed monthly payments each contain a small principal payments. Attempting to add the principal balance and the arrearage, as done by Plaintiff, would necessary overstate the amount of the claim (double counting a portion of the principal).

Proof of Claim No. 2 filed by JPMorgan Chase Bank, N.A. is attached as Exhibit 2 to the Complaint. The amount of the claim is stated to be \$204,873.32. Included as Proof of Claim No. 2 is the Mortgage Proof of Claim Attachment [Form 10 (Attachment A)]. The information on Attachment is,

A. Principal.....\$187,774.58

B. Interest Due as of Commencement.....\$ 15,356.30

C. Pre-petition Fees and Expenses.....\$ 2,707.17

D. Total Claim Computed From Part 1 and Part 2 of Attachment.....\$205,838.05

Though less than Plaintiffs Principal + Arrearage Calculation, it is still higher than the \$204,403.04 amount stated by JPMorgan Chase Bank, N.A. on the Proof of Claim (Section 4).

From a review of the Proof of Claim attachment the court cannot readily identify the \$1,435.01 overstated amount.

2. [14-20352-E-11](#) PATRICK GREENWELL

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
1-9-14 [[1](#)]

Debtor's Atty: Patrick B. Greenwell

Notes:

Continued from 6/24/15 to allow for the filing and adjudication of post-confirmation motions, including the administrative closing of the case if appropriate.

The Status Conference is XXXXXXXXXX .
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OCTOBER 14, 2015 STATUS CONFERENCE

The Chapter 11 Plan was confirmed on April 28, 2015. Order, Dckt. 128.

The Status Conference was continued to allow for the filing of post-confirmation motions.

3. [09-27153](#)-E-13 GIL/JOANNE RAPOSO
[15-2095](#)
RAPOSO ET AL V. OCWEN LOAN
SERVICING, LLC ET AL

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
5-14-15 [[1](#)]

Final Ruling: No appearance at the October 14, 2015 Status Conference is required.

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Nichole L. Glowin

Adv. Filed: 5/14/15
Answer: none

Nature of Action:
Declaratory judgment

The Status Conference is continued to 1:30 p.m. on November 19, 2015, to be conducted in conjunction with the court's order for the appearance of the attorneys identified as representing Defendants.

Notes:

Continued from 9/9/15 to be conducted in conjunction with pending motions for entry of default judgment.

4. [09-27153](#)-E-13 GIL/JOANNE RAPOSO
[15-2095](#) PLC-2
RAPOSO ET AL V. OCWEN LOAN
SERVICING, LLC ET AL

CONTINUED MOTION FOR ENTRY OF
DEFAULT JUDGMENT
7-28-15 [[16](#)]

Final Ruling: No appearance at the October 14, 2015 hearing is required.

The hearing on the Motion for Entry of Default Judgment has been continued to 1:30 p.m. on November 19, 2015, by prior order of the court .

5. [15-25168-E-13](#) DEBRA MCCLAIN
[15-2152](#)
MCCLAIN V. SULLIVAN ET AL

STATUS CONFERENCE RE: COMPLAINT
8-3-15 [[1](#)]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Kirk Steven Rimmer

Adv. Filed: 8/3/15
Answer: 9/11/15 [jury demand]

Nature of Action:
Declaratory judgment
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)

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Notes:

Stipulation re Discovery, Disclosures, and Status Conference Statement filed 9/30/15 [Dckt 13]

SUMMARY OF COMPLAINT

The Complaint states for a First Cause of Action an objection to the claim of Defendants be disallowed as arising from a transaction which violates ERISA. Though the Second Cause of Action is titled "Declaratory Relief," the actual relief requested is (1) voiding of the deed of trust and underlying loan, (2) rescission of the loan, and (3) contractual attorneys' fees. The Third Cause of Actions seeks recovery of damages under state law fraud theories and statutory unfair business practices (Cal. B&P §§ 17200 et seq.) as to all Defendants. The Fourth Cause of Action seeks relief against Defendant Dusty Sullivan on state law theories of fraud and statutory unfair business practices (Cal. B&P §§ 17200 et. seq.). Plaintiff requests attorneys' fees based on contract and statute.

SUMMARY OF ANSWER

Dusty Sullivan, Dusty Sullivan Profit Sharing Plan, Sierra Investments Robert Chonka Profit Sharing Plan, Poly Comp Trust Company and West America Bank for the benefit of Marilyn Chiang IRA, Dean A. Howell Profit Sharing Plan, Kenneth Meyer IRA, Connie Holt IRA, Westamerica Bank FBO Margo Glendenning, IRA, David N. Muraki and Judy Muraki as joint tenants custodian for Peter Muraki, minor child (collectively "Defendants") have filed their Answer. Defendants admit and deny specific allegations in the Complaint. Defendants state four affirmative defenses.

FINAL BANKRUPTCY COURT JUDGMENT

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157, and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 2,3; Dckt. 1. Plaintiff-Debtor alleges this is a core proceeding based on the Proof of Claim filed in Plaintiff-Debtor's bankruptcy case. To the extent that the claims are non-core, Plaintiff-Debtor consents to the bankruptcy judge issuing all orders and the final judgment.

In its answer, Defendants admit the allegations of jurisdiction and core proceedings. Answer ¶¶ 2, 3; Dckt. 11. Defendants further state in Paragraph 6 of the Answer that they do not consent to the bankruptcy judge issuing orders and the final judgment for non-core matters.

Defendants also request a jury trial.

At the hearing the Parties addressed for the court what are asserted to be core and non-core matters in this Complaint. The following claims are identified as core matters: **XXXXXXXXXXXXXXXXXXXXX**.

The following matters were identified as non-core matters: **XXXXXXXXXXXXXX**.

The court shall issue a Pre-Trial Scheduling Order setting the following dates and deadlines:

- a. The Plaintiff alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157, and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 2,3; Dckt. 1. Plaintiff-Debtor alleges this is a core proceeding based on the Proof of Claim filed in Plaintiff-Debtor's bankruptcy case. To the extent that the claims are non-core, Plaintiff-Debtor consents to the bankruptcy judge issuing all orders and the final judgment.

In their Answer, Defendants admit the allegations of jurisdiction and core proceedings. Answer ¶¶ 2, 3; Dckt. 11. Defendants further state in Paragraph 6 of the Answer that they do not consent to the bankruptcy judge issuing orders and the final judgment for non-core matters.

Defendants also request a jury trial.

At the hearing the Parties addressed for the court what are asserted to be core and non-core matters in this Complaint. The following claims are identified as core matters: **XXXXXXXXXXXXXXXXXXXXX**.

The following matters were identified as non-core matters: **XXXXXXXXXXXXXX**.

- b. Initial Disclosures shall be made on or before **-----, 2015**.
- c. Expert Witnesses shall be disclosed on or before **-----,**

October 14, 2015 at 2:30 p.m.

2016, and Expert Witness Reports, if any, shall be exchanged on or before -----, 2016.

- d. Discovery closes, including the hearing of all discovery motions, on -----, 2016.
- e. Dispositive Motions shall be heard before -----, 2016.
- f. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at ----- p.m. on -----, 2016.

6. [13-31975](#)-E-13 JACK/LINDA GANAS
PLC-3

CONTINUED OBJECTION TO NOTICE
OF MORTGAGE PAYMENT CHANGE
AND/OR MOTION FOR ATTORNEY'S
FEES
11-13-14 [[55](#)]



OCTOBER 14, 2015 HEARING

XXXXXXXXXXXXXXXXXXXXX.

JUNE 24, 2015 HEARING

At the hearing, Plaintiff-Debtor's counsel reported that a settlement offer has been presented. There is a \$1,500.00 issue, which the parties are now investigating. Based on the representation of the various attorneys for the parties that this matter has been resolved, the court continues the status conference.

OBJECTION TO NOTICE OF PAYMENT CHANGE

Jack and Linda Ganas ("Debtors") filed the instant Objection to Notice of Mortgage Payment Change and Request for Attorney's Fees on November 13, 2014. Dckt. 55.

Debtors state that Wells Fargo Bank, N.A. filed Proof of Claim No. 4 on January 15, 2014 where they claimed an arrearage existed at the time of the bankruptcy filing. The escrow shortage they listed was \$529.34 as of the petition date. On October 28, 2014, Wells Fargo Bank, N.A. filed a Notice of Payment Change. The documents submitted with their Notice of Mortgage Payment Change state that there was an escrow shortage on the date of the petition of (\$8,977.23). Debtors argue that this pre-petition shortage was not listed on Wells Fargo's Proof of Claim and is unsupported by any explanation on an amended proof of claim or on the Notice of Mortgage Payment Change.

Wells Fargo Bank, N.A.'s Notice of Mortgage Payment Change requests that the current escrow payment change from \$167.74 to \$348.05.

Debtors allege that the inconsistencies are the result of pre-petition arrearage escrow amounts not being properly credited in the analysis which result in the pre-petition arrearage also being paid post-petition, thereby resulting in a duplicate payment. The deed of trust only provides for payment of collection fees in to protect their security interest as stated in paragraph 18 of the deed of trust note attached to Proof of Claim 4.

Debtor additionally requests that the court grant reasonable attorney's fees pursuant to California Civil Code § 1717.

FEBRUARY 18, 2015 STATUS CONFERENCE

The parties reported that due to illness of counsel they have not been able to advance their settlement discussions. However, all attorneys are now available and actively addressing the issues. The court continues the Status Conference as requested. At the Status Conference, the court continued the hearing to 2:30 p.m. on June 24, 2015 to be heard in conjunction with the Status Conference. Dckt. 71.

WELLS FARGO BANK, N.A.'S OPPOSITION

Wells Fargo Bank, N.A. filed an opposition to the instant Objection on February 4, 2015. Dckt. 68. Wells Fargo Bank, N.A. objects on the following basis:

1. Debtors' objection should be overruled because it lacks merit as it fails to accurately represent Wells Fargo Bank, N.A.'s escrow analysis and has failed to establish an inconsistencies with Wells Fargo Bank, N.A. Proof of Claim.

Debtors misstate the escrow shortage as provided in Wells Fargo Bank, N.A.'s Notice. Debtors contend that the escrow shortage totals \$8,977.23. However, the quoted amount is the actual escrow balance, not the escrow shortage. The correct escrow shortage is \$1,998.08 (Notice, pg. 6). The reason for this escrow shortage was that Wells Fargo Bank, N.A. made several post-petition tax and hazard disbursements on the subject loan. As the Debtors have misinterpreted the escrow analysis, their premise that the Notice is inconsistent with Wells Fargo Bank, N.A.'s Proof of Claim is misrepresented.

Furthermore, Debtors contend that inconsistencies between the Notice and Proof of Claim are the result of pre-petition arrearage escrow amounts not being properly credited to Debtors' account. The alleged result of pre-petition escrow amounts not being properly credited is pre-petition arrears are being collected post-petition, resulting in a duplicate payment. However, there are no inconsistencies between the Proof of Claim and the Notice. In addition the Debtors have not offered any evidence the pre-petition arrearage escrow amounts not being properly credited to their account. As provided in the Proof of Claim, the pre-petition escrow shortage is \$529.34. This amount was not included in the post-petition escrow analysis. It was included on the Notice as a negative balance since it was claimed in the pre-petition arrears and also notes that "an escrow adjustment of \$529.34 is scheduled to be repaid through the bankruptcy."

2. Debtors' Objection is substantially related to the adversary proceeding and should be continued until the Adversary Proceeding is concluded. The sole remaining cause of action is Debtors' objection to Wells Fargo Bank, N.A.'s Proof of Claim. Specifically, Debtors are alleging that the pre-petition accounting regarding the loan is incorrect. The resolution of

this matter directly relates tot he issues raised in the instant Objection. Wells Fargo Bank, N.A.'s counsel and Debtor's counsel are working towards a potential resolution of the Adversary Proceeding which will likely result in a global resolution of the Objection. Wells Fargo Bank, N.A. requests that the court continue the hearing so that the parties may reach a global resolution regarding Debtor's Adversary Proceeding and Objection.

TRUSTEE'S RESPONSE

The Trustee filed a response on May 28, 2015. Dckt. 75. The Trustee first states that he does not oppose the matter being continued as being substantially related to the pending adversary proceeding.

The Trustee agrees that the Escrow Analysis may be insufficient without further explanation. The Trustee states that he has examined the Notice of Mortgage Payment change filed on October 28, 2014 and notes that on page 6, a starting December 2014 balance of -<\$2,153.75> in the Projected Escrow balance column. This number appears to be the actual escrow balance as of November 2014, which appears to include pre-petition amounts as the analysis commences July 2013. No explanation is provided for the \$7,203.85 payment to escrow posted September 2014. Additionally, the Trustee notes the Projected Payments to escrow do not agree with the Escrow Disclosure Statement filed with Proof of Claim No. 4-1.

The Trustee states that the projected disbursements from escrow total \$2,178.50 or \$181.54 per month. The new monthly escrow payment computed per the Notice is \$348.05. Property taxes and insurance appear escrowed in the payment, and for 2014 were \$736.75 x 2 (\$1,473.50) and \$705.00 for a total of \$2,178.50; this would require payments of \$181.55 per month on average.

REVIEW OF NOTICE OF MORTGAGE PAYMENT CHANGE

Wells Fargo Bank, N.A. filed Proof of Claim 4 on January 1, 2014. In the Proof of Claim, Wells Fargo Bank, N.A. states that the "Escrow shortage or deficiency" as of the petition date is \$529.34.

Wells Fargo Bank, N.A. filed a Notice of Mortgage Payment Change on October 28, 2014. The Notice states the following:

1. Date of payment change: 12/1/2014
2. New total payment: \$1,138.35
3. Part 1: Escrow Account Payment Adjustment:
 - a. Current escrow payment: \$167.74
 - b. New escrow payment: \$348.05

The Notice of Mortgage Payment Change also has attached an escrow statement that, in part, outlines the Debtors' escrow account history. In relevant part, for September 2013, the statement provides:

Payments to escrow			Payments from escrow		Escrow balance	
Date	Projected	Actual	Projected	Actual	Projected	Actual
Sep. 2013	\$164.01	\$348.54	\$0.00	\$0.00	\$772.50	(\$8,977.23)

A review of the Objection, Proof of Claim No. 7, and the Notice of Mortgage Payment Change shows that there is no evidentiary basis for the substantial increase in escrow shortage. Wells Fargo Bank, N.A. does not explain how they calculated the escrow shortage to determine that, at the time of the petition, the (\$529.34) listed on the Proof of Claim 4 (filed on January 15, 2014) is actually (\$1,998.23) as listed on the Notice of Mortgage Payment Change (filed on October 28, 2014).

While Wells Fargo Bank, N.A. gives generic, nonspecific answers such as "several post-petition tax and hazard disbursements on the subject loan" were the cause of the recalculated escrow shortage, Wells Fargo Bank, N.A. gives no evidence or specifics of how the escrow shortage nearly quadrupled in amount. Instead, Wells Fargo Bank, N.A. attempts to shift the burden onto the Debtors.

The Escrow Analysis attached to the Notice of Mortgage Payment Change provides the following information. Page 4 of the Escrow Analysis provides the actual payments made during the period July 2013 through August 2014, and estimates for September - November 2014. Through August 2014, Wells Fargo Bank, N.A. reports receiving actual escrow payments totaling \$3,921.70. For these fourteen months, escrow payments of \$2,296.98 (14 x \$164.07 a month) were required.

For the period December 2014 through November 2015, Wells Fargo Bank, N.A. projects disbursements from escrow for taxes and insurance to total \$2,178.50. Escrow Analysis, pg. 3. During that period, monthly escrow payments of \$181.54 would be required. This portion of the Escrow Analysis states, "Scheduled escrow payment \$181.54." *Id.*

However, Wells Fargo Bank, N.A. then states on page 1 of the Escrow Analysis that the monthly principal and interest payment is \$790.30 and the Escrow payment will be \$348.54. The court cannot identify the basis for the additional \$167.00 a month in escrow payments for the twelve months through November 2015 - which total \$2,004.00 (12 x \$167.00).

Wells Fargo Bank, N.A.'s response concentrates on the fact that the pending Adversary Proceeding deals with the treatment and calculation of the pre-petition payments has a direct effect on the outcome of the instant Objection. As part of this foundational argument, Wells Fargo Bank, N.A. does not provide any specific pieces of evidence or explanation as to how the escrow shortage was calculated and instead just points to the same information the court initially reviewed at the first hearing on the Objection.

REQUEST FOR ATTORNEYS' FEES

As to the Debtor's request for attorney's fees under California Civil Code § 1717, the Debtor has not pleaded with particularity under Local Bankr.

R. 9013 to justify such relief.

In support for attorney fees, the Objection states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

- A. California Civil Code Section 1717 provides for attorney fees for the prevailing party whenever there is an attorney fee provision, there has been notice and a hearing, wherein the reasonable attorney's fees shall be fixed by the Court.

The Objection does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 for attorneys' fees because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states the code section. This is not sufficient.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

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

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin

to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; see also *In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities - buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

While the Debtor's counsel does provide for a time sheet, the Debtor failed to provide the specific contract provisions that justify an award for attorneys' fees nor does Debtor provide how the applicable statute applies to the instant case. The court does not have the resources to fill-in the blanks for Debtor and Debtor's counsel.

DECEMBER 16, 2014 HEARING

At the hearing, the court continued to 2:30 p.m. on February 18, 2015 to be heard in conjunction with the Status Conference in Adversary case number 14-2080-E. Dckt. 67.

7. [13-31975-E-13](#) JACK/LINDA GANAS
[14-2080](#)
GANAS ET AL V. WELLS FARGO
BANK, N.A.

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
3-14-14 [[1](#)]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Eddie R. Jimenez

Adv. Filed: 3/14/14
Answer: none

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

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Notes:

Continued from 6/24/15

DECEMBER 3, 2014 STATUS CONFERENCE

The parties report that this Adversary Proceeding is being resolved. They requested a continuance to continue with the discussions in light of the courts ruling on the motion to file a First Amended Complaint.

On August 7, 2014 the court issued an order continuing the Status Conference to December 3, 2014. Dckt. 50. In pertinent part the order provides,

A. The Plaintiff-Debtors Motion to filed a First Amended Complaint was denied without prejudice.

B. In light of the substantive settlement negotiations and the nature of the issues in this Adversary Proceeding, pursuant to the agreement of the parties all matters in this Adversary Proceeding are stayed until further order of the court.

C. The Parties are to continue with the informal discovery as part of their settlement discussions.

D. Defendant Wells Fargo Bank, N.A. is granted an open extension for filing a responsive pleading to the Complaint.

The court shall set a deadline for such responsive pleading at the continued status conference.

A detailed discussion of the claims as pleaded by the Plaintiff-Debtors

is provided in the courts Civil Minutes for the hearing on the motion for leave to file first amended complaint. Dckt. 48.

As of the court's December 2, 2014 review of the Docket, for further pleadings or a Status Conference Statement was filed by any of the parties.

8. [15-22182](#)-E-13 RUTH CLARK
[15-2084](#)
CLARK V. EL DORADO SAVINGS
BANK ET AL
ADV. PROCEEDING DISMISSED:
09/15/2015

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
4-29-15 [[1](#)]

Final Ruling: No appearance at the October 14, 2015 Status Conference is required.

Adv. Proceeding Dismissed 9/15/15

<p>The Adversary Proceeding having been dismissed, the Status Conference is removed from the Calendar.</p>

9. [11-41387-E-13](#) STEVE/ROBIN GRIGSBY
[14-2340](#)

CONTINUED STATUS CONFERENCE RE:
COMPLAINT

GRIGSBY ET AL V. WELLS FARGO
BANK N.A.

12-11-14 [[1](#)]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Austin P. Nagel

Adv. Filed: 12/11/14
Answer: 2/13/15

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

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Notes:

Continued from 6/24/15

OCTOBER 14, 2015 STATUS CONFERENCE

On October 7, 2015, Defendant filed a unilateral Status Report. Defendant states that the parties have reached a settlement. Counsel for Defendant states that he signed the settlement agreement and returned it to counsel for Plaintiff. Counsel for Defendant does not say when the agreement was signed and returned to counsel for Plaintiff.

Defendant requests that the court continue the Status Conference another thirty days "for completion of the settlement terms." In making this request, Defendant does not say what must be "completed" or why this Adversary Proceeding has not been dismissed if it has been settled.

At the Status Conference xxxxxxxxxxxxxxxxxxxxxx.

JUNE 24, 2015 STATUS CONFERENCE

None of the Parties to this Adversary Proceeding have filed a Status Report for the June 24, 2015 Conference. Nothing has been filed since the Wells Fargo Bank, N.A. ("Defendant") Status Report filed on February 13, 2015. As of February 2015, Defendant reported:

- a. Ninety (90) days is requested for discovery.
- b. The parties have conducted preliminary settlement discussions.

No settlement having been presented to the court, the matter will be set

for the discovery schedule and pre-trial conference as set forth below.

The parties reported at the Status Conference that this matter has been settled, with the agreement out for final review.

FEBRUARY 18, 2015 STATUS CONFERENCE

The parties reported that due to illness of counsel they have not been able to advance their settlement discussions. However, all attorneys are now available and actively addressing the issues. The court continues the Status Conference as requested.

SUMMARY OF COMPLAINT

This Adversary Proceeding is to obtain clear title to real property after the completion of the Chapter 13 Plan. Plaintiff-Debtor alleges that Defendants claims, secured pursuant to a second deed of trust, was valued by the court to be \$0.00 as a secured claim. Plaintiff-Debtor alleges that the Chapter 13 Plan has been completed. Therefore, Plaintiff-Debtor seeks a determination that Defendants deed of trust is void and does not encumber Plaintiff-Debtors Plaintiff-Debtor also seeks damages pursuant to California Civil Code § 2941(b), alleging that Defendant has not complied with its statutory duties to reconvey the deed of trust and clear title to the property of that void lien.

SUMMARY OF ANSWER

Defendant admits and denies the specific allegations in the Complaint. Defendant also states twelve affirmative defenses.

FINAL BANKRUPTCY COURT JUDGMENT

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157, and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 1, 2 Dckt. 1. In its answer, Wells Fargo Bank, N.A. ("Defendant") admits that the Complaint "arises out of and is related to [the Plaintiff-Debtor's] Chapter 13 case..." Answer ¶ 1, Dckt. 7. Defendant denies the allegations in Paragraph 2 of the Complaint. *Id.*, ¶ 2. Paragraph 2 of the Complaint alleges,

"2. Defendant herein has a claim against Plaintiff, as defined by 11 U.S.C. §101(5). The complaint, as set forth herein, involves the voiding of the secured status of a claim pursuant to 11 U.S.C. §506, and as such, constitutes a "core" proceeding pursuant to 28 U.S.C. §157(b)(2)."

The court construes this denial as not only denying the contention that this is a core proceeding, but also denying that Wells Fargo Bank, N.A. has a claim against the Plaintiff-Debtor. This denial (or admission that Defendant has no claim against Plaintiff-Debtor) is inconsistent with Proof of Claim No. 6 filed by Wells Fargo Bank, N.A. asserting a claim in the amount of \$81,386.07. Wells Fargo Bank, N.A. further states in Proof of Claim No. 6 that the claim is secured by the real property commonly known as 6151 26th St, Rio Linda, California. Plaintiff-Debtor's confirmed Chapter 13 Plan provides for this secured claim of Wells Fargo Bank, N.A. as a Class 2 Claim to be paid \$0.00 though the Plan. 11-41387; Plan, Dckt. 5, and Order Confirming, Dckt. 19. The court determined pursuant to 11 U.S.C. § 506(a) that the Wells Fargo Bank, N.A. secured claim had a value of \$0.00. *Id.*

The Complaint seeks relief based upon the completion of the confirmed Chapter 13 Plan and operation of Chapter 13 plan provisions enacted by Congress under Chapter 13 of the Bankruptcy Code. The Complaint seeks a determination of the effect of the Wells Fargo Bank, N.A. deed of trust arising under the Bankruptcy Code. 11 U.S.C. §§ 1325 (confirmation), 1322 (terms of chapter 13 plan), 1327 (effect of confirmation), 1328 (discharge), 506(a) (valuation of secured claim), and 506(d) (voiding claim to extent claim exceeds value of collateral). These are all federal law matters arising under the Bankruptcy Code itself and core proceedings as provided for by Congress in 28 U.S.C. § 157(b), including, but not limited to, 11 U.S.C. § 157(b)(2)(A), (B), (E), (I), (K), and (O). Jurisdiction for this Adversary Proceeding (as the complaint is currently drafted) exists pursuant to 28 U.S.C. §§ 1334 and 157(a), and the referral of bankruptcy cases and all related matters to the bankruptcy judges in this District. ED Cal. Gen Order 182, 223.