

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number <u>99-10296</u>
LORENZO LAWSON,	)	
	)	
Debtor	)	
_____	)	
LORENZO LAWSON, Debtor and	)	Filed
BARNEE C. BAXTER, Trustee	)	at 8 O'clock & 30 min. a.m.
	)	Date 9-22-00
Plaintiffs	)	
v.	)	
	)	
NATIONSBANC MORTGAGE	)	
CORPORATION,	)	
First Defendant	)	
	)	
GOVERNMENT NATIONAL MORTGAGE	)	Adversary Proceeding
ASSOCIATION,	)	Number <u>99-01079A</u>
Second Defendant	)	
	)	
BARRETT, BURKE, WILSON, CASTLE,	)	
DAFFIN & FRAPPIER, L.L.P.	)	
Third Defendant	)	
_____	)	

**ORDER**

Each of the three defendants in this adversary proceeding has moved to dismiss the Second Recast Complaint of Lorenzo Lawson,

chapter 13 debtor, and Barnee C. Baxter, chapter 13 trustee (together "Plaintiffs", individually "Debtor" and "Trustee"). Defendant, NationsBanc Mortgage Corporation ("NationsBanc"), moves that Plaintiffs' claims against NationsBanc be dismissed with prejudice. Barrett, Burke, Wilson, Castle, Daffin & Frappier, L.L.P. ("Barrett"), also moves for dismissal. Government National Mortgage Association ("Ginnie Mae") moves for dismissal with prejudice, or in the alternative, summary judgment. NationsBanc, Ginnie Mae, and Barrett are together referred to as "Defendants". The motions are granted in part and Ginnie Mae is dismissed as a defendant.

The Court has jurisdiction to determine these motions as the causes of action alleged are core bankruptcy proceedings under 28 U.S.C. § 157(a) & (b)(2)(A), (B), (E), (H) & (O) and 28 U.S.C. § 1334 (1994). Defendants' motions to dismiss are brought under Federal Rule of Civil Procedure (FRCP) 12(b)(6), which is incorporated by Federal Rule of Bankruptcy Procedure (FRBP) 7012(b). Ginnie Mae's alternative motion for summary judgment is brought under FRCP 56, which is incorporated by FRBP 7056.

The standard for determining a FRCP 12(b)(6) motion is that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no

set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S.41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). "The issue is not whether a plaintiff will ultimately prevail but whether a claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). The court may consider facts alleged in the complaint as well as official public records such as Debtor's bankruptcy case file. Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3<sup>rd</sup> Cir. 1993) (citations omitted); Watterson v. Page, 987 F.2d 1, 3 (1<sup>st</sup> Cir. 1993) (citations omitted). For purposes of a motion to dismiss, the factual allegations of the complaint are taken as true and are construed favorably to the pleader. Waterson, 987 F.2d at 3; Solis-Ramirez v. U.S. Dept. of Justice, 758 F.2d 1426, 1429 (11<sup>th</sup> Cir. 1985). However, conclusions of law asserted in the complaint need not be accepted as true. The court makes its own determination of legal issues. Solis-Ramirez, 758 F.2d at 1429. Finally, ". . . a Rule 12(b)(6) motion to dismiss need not be granted nor denied in toto but may be granted as to part of complaint and denied as to the remainder." Decker v. Massey-Ferguson, Ltd., 681 F.2d 111, 115 (2<sup>nd</sup> Cir. 1982) (citations omitted).

Under FRCP 56, this court will grant summary judgment only

if "...there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FRCP 56(c). The moving party has the burden of establishing its right of summary judgment. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11<sup>th</sup> Cir. 1991). The evidence must be viewed in a light most favorable to the party opposing the motion. See Adickes v. S.H.Kress & Co., 398 U.S. 144, 57, 90 S.Ct. 1598, 1608, 26 L.Ed. 2d 142 (1970). However, "[t]o defeat a motion for summary judgment, the non-moving party may not rely on 'mere allegations.' It must raise 'significant probative evidence' that would be sufficient for a jury to find for that party." LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11<sup>th</sup> Cir. 1998), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986).

Debtor filed a chapter 13 bankruptcy petition on February 2, 1999. He listed NationsBanc as a secured creditor holding a first mortgage on real property. On May 14, 1999, NationsBanc filed a proof of claim in the total amount of \$81,911.33, of which \$1,573.16 was arrearage. The proof of claim included bankruptcy attorney fees of \$125.00, uncollected late charges of \$27.32, and accrued late charges of \$54.64 (together referred to as "Fees"). Ginnie Mae was listed on the proof of claim.

In the chapter 13 case, Debtor filed an objection to the proof of claim on July 22, 1999. He alleged that the Fees were unauthorized and that the claim lacked proof of assignment, and sought to have the claim reduced by \$206.96 (the sum of the Fees) and to have the proper party in interest required to file the proof of claim. NationsBanc answered the objection which was set for hearing at confirmation August 30, 1999. On July 26, 1999, Debtor filed the complaint which initiated this adversary proceeding. His chapter 13 plan was confirmed on August 30, 1999 and the claim objection was continued pending the outcome of this adversary proceeding. A recast complaint was filed in September in which Trustee was added as a plaintiff. The Second Recast Complaint was filed October 20, 1999.

Plaintiffs' Second Recast Complaint lists six counts brought generally against Defendants. Count I alleges that the Fees are unauthorized and seeks return of collected amounts and an injunction preventing collection of Fees. Count II alleges that the proof of claim violated the automatic stay and seeks damages. Count III seeks certification of a class of debtors in whose bankruptcies Defendants filed claims that included Fees, and then seeks declaratory judgment, injunctive relief, turnover of amounts collected, and damages on behalf of that class. Count IV asks that

Defendants be found in contempt of court for alleged violation of Local Bankruptcy Rule 3001-2, which requires that all claims be filed for the net principal balance only as of the date of the bankruptcy filing. Count V seeks certification of a class of debtors in the Southern District of Georgia and requests damages pursuant to Local Bankruptcy Rule 3001-2 on behalf of that class. Last, Count VI alleges that violation of the Local Rule in turn violated FRBP 9011, and asks that sanctions be imposed under that rule.

Arguments pertaining to the adversary proceeding as a whole are discussed first, followed by arguments pertaining to the individual counts of the complaint.

#### Proper Party

\_\_\_\_\_Ginnie Mae alleges that it is not a proper party to this adversary proceeding because it has no relationship with Plaintiffs and did not file or authorize filing of proofs of claim in Debtor's bankruptcy case. Ginnie Mae is a government corporation within the U.S. Department of Housing and Urban Development. 12 U.S.C. § 1717(a)(2)(A). Pursuant to 12 U.S.C. § 1721(g), Ginnie Mae operates a Mortgage-Backed Securities Program ("MBS Program"), in which private entities known as "Issuers" are authorized to issue

securities backed by the home mortgage loans and federal guarantees. NationsBanc is such an Issuer. An Issuer either originates loans to borrower-mortgagors (home buyers such as Debtor) or buys existing loans from originating lenders. The loans are then packaged into "pools", each pool backing a mortgage-backed security. The mortgage-backed security is sold to private investors.

The Issuer, whether the loan originator or transferee, serves as mortgagee and is solely responsible for servicing the pooled mortgages and the securities backed by those mortgages. The Issuer collects monthly payments from the mortgagors and remits monthly principal and interest payments to the holders of the securities. The Issuer has sole responsibility for deciding whether to hire attorneys to collect the mortgage debt, pursue foreclosure, or participate in a borrower-mortgagor's bankruptcy proceedings. The Issuer also bears sole responsibility for deciding which fees or advances it should seek to collect. The Issuer keeps any attorneys' fees or escrow advances recovered. It does not turn such funds over to Ginnie Mae.

Ginnie Mae guarantees that holders of the mortgage-backed securities receive timely payment of principal and interest. Ginnie Mae alleges that it neither assesses the Fees Plaintiffs complain of nor profits from their collection.

\_\_\_\_\_Ginnie Mae denies any contractual relationship with borrower-mortgagors, including Plaintiffs. Ginnie Mae also denies that Issuers, such as NationsBanc, have any authority to bind Ginnie Mae to any servicing obligations under a mortgage, such as responsibility for assessment of attorneys' fees or escrow advances.

\_\_\_\_\_In summary, Ginnie Mae alleges that NationsBanc, as an Issuer in the MBS Program, is responsible for servicing Debtor's mortgage. Ginnie Mae denies that it had any role in or knowledge of NationsBanc's filing of the proof of claim or NationsBanc's efforts to collect the Fees. Ginnie Mae claims that it does not authorize Issuers to act on its behalf in such matters, and that it does not receive funds such as the Fees when collected by Issuers.

Plaintiffs' response is:

"[Ginnie Mae] is listed on the proof of claim. [Ginnie Mae] asserts that it does not have an ownership interest in the mortgage and is not attempting to collect fees and charges. The facts alleged by the plaintiffs create a possibility that [Ginnie Mae] could receive the benefit of the fees collected through the bankruptcy process. [Ginnie Mae] is not immune from suit or has waived such immunity to the extent that it has filed a claim or benefits from the filing of a claim."

Whether Ginnie Mae is correctly named as a Defendant to this proceeding is an issue of law appropriate for summary judgment. Under FRCP 56, this court will grant summary judgment only if

"...there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FRCP 56(c). Here, one fact is alleged by Plaintiffs: Ginnie Mae is listed on the proof of claim. That fact is undisputed. The question is whether Ginnie Mae's name was correctly included on the proof of claim.

The moving party has the burden of establishing its right of summary judgment. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11<sup>th</sup> Cir. 1991). Ginnie Mae offers an explanation of its relationship to NationsBanc and to Debtor, and its lack of either financial or administrative interest in the Fees included by NationsBanc in the proof of claim. This evidence must be viewed in a light most favorable to the party opposing the motion. See Adickes v. S.H.Kress & Co., 398 U.S. 144, 57, 90 S.Ct. 1598, 1608, 26 L.Ed. 2d 142 (1970). However, "[t]o defeat a motion for summary judgment, the non-moving party may not rely on 'mere allegations.' It must raise 'significant probative evidence' that would be sufficient for a jury to find for that party." LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11<sup>th</sup> Cir. 1998), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986). Plaintiffs offer no probative evidence to refute summary judgment. The strongest statement made

in response to Ginnie Mae's motion is that Plaintiffs have alleged facts that "create a possibility that [Ginnie Mae] could receive the benefit of the fees collected through the bankruptcy process." This, even viewed favorably to Plaintiffs, is insufficient to defeat Ginnie Mae's motion for summary judgment. No evidence is offered that Ginnie Mae was properly included in the proof of claim. Plaintiffs have not responded to Ginnie Mae's motion with either legal issues or facts in dispute. Summary Judgment is granted to Ginnie Mae and it is dismissed from this adversary proceeding. No further issues raised by Ginnie Mae's motion will be discussed.

#### Res Judicata

Barrett argues that, because Debtor's chapter 13 plan was confirmed, res judicata bars any claim objection or cause of action which was raised or could have been raised prior to confirmation. 11 U.S.C. § 1327(a); In re Clark, 172 B.R. 701, 703 (Bankr.S.D.Ga. 1994). Barrett contends that Plaintiffs failed to raise any concerns with the proof of claim at the confirmation hearing, and therefore the confirmation of the plan should bar this entire adversary proceeding. Barrett is factually incorrect. At confirmation the claim objection was continued pending the outcome of this already pending adversary proceeding. Confirmation has no res judicata effect on this pending adversary proceeding.

### Procedural Flaws

NationsBanc maintains that the Second Recast Complaint must be dismissed in its entirety because the Plaintiffs were limited to seeking relief via an objection to claim. NationsBanc asserts that neither the Bankruptcy Code nor case law authorizes the filing of an ancillary adversary proceeding attacking its claim. NationsBanc is mistaken.

Objections to claims are governed by FRBP 3007, which concludes, "If an objection to a claim is joined with a demand for relief of the kind specified in FRBP 7001, it becomes an adversary proceeding." FRBP 7001 mandates that proceedings for injunctions or for declaratory judgments be brought as adversary proceedings. FRBP 7001(7) & (9). The Second Recast Complaint seeks both of these types of relief. Plaintiffs properly brought this matter as an adversary proceeding. Motion to dismiss on procedural grounds is denied.

### Count I

In Count I of the Second Recast Complaint, Plaintiffs allege that the Fees were not authorized by the loan documents and that Defendants were required to, but did not, obtain approval of

the Fees pursuant to 11 U.S.C. § 506<sup>1</sup>. Plaintiffs seek return of any collected amounts and an injunction preventing further collection of the Fees, and cite 11 U.S.C. §105<sup>2</sup> as providing

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<sup>1</sup>11 U.S.C. §506 provides:

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--

(1) such claim was disallowed only under section 502(b) (5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

<sup>2</sup>11 U.S.C. §105 provides in part pertinent here:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the

authority for such relief. Although the language is at times ambiguous, Count I does not seek relief on behalf of a class and is considered to pertain to Debtor's bankruptcy case alone.

NationsBanc and Barrett claim that Count I should be dismissed because the Bankruptcy Code does not create a private cause of action under either §506 or §105, and because Plaintiffs do not meet the requirements for injunctive relief.

Count I is essentially an objection to claim, permitted under 11 U.S.C. §502(a) and (b)<sup>3</sup> and FRBP

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provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation. . . .

<sup>3</sup>11 U.S.C. §502(a) and (b) provides:

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

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(b) Except as provided in subsections (e) (2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that--

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a) (5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds--

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of--

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds--

(A) the compensation provided by such contract, without acceleration, for one year following

3007<sup>4</sup>. Section 502(b) confers upon the court "power" to determine claims if an objection is made. "Grounds" for such objection will always be found in other sections of the Bankruptcy Code. Here,

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the earlier of--

(i) the date of the filing of the petition; or  
(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus  
(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide.

<sup>4</sup>FRBP 3007 provides:

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

Plaintiffs allege grounds for their objection to NationsBanc's proof of claim exist under §506.

Plaintiffs invoke §105 as conferring power on the court to fashion a remedy. However, §502 and §549(a)(1)&(2)(B)<sup>5</sup> provide authority to grant the relief that Plaintiffs request: determination of NationsBanc's claim; recovery of any excess paid out under the plan, to the extent that the recovered funds represent property of the estate; and prevention of further collection of unauthorized amounts by allowing the claim in the correct amount. An injunction preventing collection is not needed, and § 105 is unnecessary to Count I. Whether § 105 has been properly invoked and whether the requirements for injunction have been met are therefore moot as to Count I.

Lenior v. GE Capital Corp. (In re Lenoir) 231 B.R. 662 (Bankr.N.D.Ill. 1999) and Holloway v. Household Automotive Finance Corp. 227 B.R. 501 (N.D.Ill. 1998) are cited in support of the argument that no private cause of action exists under §506.

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<sup>5</sup>11 U.S.C. §549(a)(1)&(2)(B) provides:

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate--

(1) that occurs after the commencement of the case; and

. . .

(2)(B) that is not authorized under this title or by the court.

Defendant's reliance is misplaced.

In Lenoir, §506 is referred to as conferring jurisdiction to the bankruptcy court for claim valuation as well as providing a remedy to a debtor. 231 B.R. at 671 (stating "two specific and adequate procedural remedies are available to Plaintiff to obtain the monetary redress sought for asserted violation of §506: (1) 'lien stripping' pursuant to 11 U.S.C. §506 itself, and (2) imposition of sanctions under FRBP 9011"). Lenoir supports determination of whether NationsBanc's claim in Debtor's bankruptcy complies with the provisions of §506, as well as appropriate adjustment of the plan and recovery of any excess paid.

Holloway held "no private remedy exists under §§105 or 502." 227 B.R. at 504. However, the Holloway court's only discussion of §502 was that the plaintiff had made no claim pursuant to §502, and that no private right to action is provided either on the face of §502 or by implication. 227 B.R. at 507. Section 502 provides that a party in interest may object to a claim, and that upon such objection the court shall determine the amount of the claim and allow the claim in that amount, which is precisely the remedy sought here. Under §502, Plaintiffs are authorized to ask this Court to determine whether NationsBanc's claim complies with the provisions of §506, and to order an appropriate adjustment.

Motion to dismiss Count I is denied. Count I consists of requests for determination of NationsBanc's allowed claim in Debtor's bankruptcy case in compliance with the provisions of §506, adjustment of the chapter 13 plan to accord with the allowed amount of NationsBanc's claim, and recovery of any disallowed amounts already paid out. As pled the Second Recast Complaint is sufficient to overcome the 12(b)(6) motion to dismiss Count I.

### Count II

Plaintiffs allege in Count II that Defendants have filed an inaccurate proof of claim, and that such filing is an attempt to collect a debt in violation of the automatic stay. Plaintiffs' briefs in opposition to the motion to dismiss characterize the Fees as attempts to possess or control property of the estate, in violation of 11 U.S.C. §362(a)(3), and as attempts to enforce a lien, in violation of 11 U.S.C. §362(a)(4).<sup>6</sup> They seek actual,

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<sup>6</sup>11 U.S.C. §362(a) provides in pertinent part

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

statutory and punitive damages, as well as attorney's fees and costs.

Count II is dismissed. Requests for damages pursuant to §362 which appear in other Counts are also dismissed. I recently held that a proof of claim, or amounts claimed in a proof of claim, cannot violate the automatic stay. Bradley v. Rich's (In re Bradley), Ch. 13 Case No. 95-10084, Adv. No. 97-01035 (Bankr. S.D.Ga. Aug. 8, 2000). Filing a false proof of claim does not violate bankruptcy's automatic stay. See, 11 U.S.C. §362. "We agree that the stay does not apply to proceedings commenced against the debtor in the bankruptcy court where the debtor's bankruptcy is pending." Prewitt v. North Coast Village, Ltd. (In re North Coast Village, Ltd.), 135 B.R. 641, 643 (9<sup>th</sup> Cir. BAP 1992) (automatic stay does not bar adversary proceedings against debtor in bankruptcy court; construing stay to apply to all bankruptcy proceedings would lead to "absurd results" such as needing relief from the stay to file proof of claim); accord Civic Center Square, Inc. v. Ford (In re Roxford Foods, Inc.), 12 F.3d 875 (9<sup>th</sup> Cir. 1993); Armco Inc. v. North Atlantic Ins. Co. Ltd. (In re Bird), 229 B.R. 90, 94-95 (Bankr. S.D.N.Y. 1999) (citing North Coast Village and adding

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(4) any act to create, perfect, or enforce any lien against property of the estate;

"[s]uch suits against the debtor can be considered the functional equivalent of filing a proof of claim against the bankruptcy estate"); see also Brown v. Sayyah (In re I.C.H.Corp.), 219 B.R. 176, 190 (Bankr. N.D.Tex. 1998) (rev'd on other grounds, 230 B.R. 88 (N.D.Tx. 1999) (discussing right of setoff in bankruptcy, citing North Coast Village, "[t]he automatic stay is not applicable to assertion of a claim in a proof of claim filed in a Bankruptcy Court.")

The purposes of the automatic stay are (1) to give the debtor a breathing spell from creditors' collection efforts, (2) to protect creditors from each other by preserving assets for the benefit of all, and (3) to provide for an orderly liquidation or administration of the estate. North Coast Village, 135 B.R. at 643 (citing House Report No. 95-595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 340-41 (1977); Bird, 229 B.R. at 94. The stay, and provisions for relief from the stay, vest in the bankruptcy court control over all claims against the debtor. By centralizing all actions in the bankruptcy court, order is imposed and the objectives of the automatic stay are met. North Coast Village, 135 B.R. at 643; Bird, 229 B.R. at 95. Therefore, the automatic stay does not apply to actions or claims brought before the bankruptcy court with jurisdiction over the debtor's bankruptcy case. Id.

[Allegation] that the Bank violated the protective provisions of the automatic stay provided by Section 362(a) by filing the complaint to determine dischargeability. . . is absurd. . . .

In In re Hodges, 83 B.R. 25 (Bankr. N.D.Cal.1988), the Bankruptcy Court held that a nondischargeability action can never violate the automatic stay as a matter of law. The Bankruptcy Code expressly provides that all claims asserting nondischargeability based on 11 U.S.C. §§ 523(a)(2), (4), (6) and (15) must be filed in the bankruptcy court, the only court which has exclusive jurisdiction to determine the nondischargeability of a debt based on those exceptions. The contention that the exercise of a mandated statutory right under the Bankruptcy Code is a violation of the automatic stay is almost as absurd as a contention that any creditor who files a proof of claim in bankruptcy violated the automatic stay.

Nelson v. Providian Nat'l Bank (In re Nelson), 234 B.R. 528, 534 (Bankr. M.D.Fla. 1999).

The Bankruptcy Code provides for proofs of claim to be filed, for objections to claims to be filed, and for disputed claims or claim amounts to be determined by the bankruptcy court. 11 U.S.C. §501 & 502. Defendants have filed proofs of claim to which Plaintiffs may object. However, objections to proofs of claim cannot be sustained on §362 grounds.

Count III

\_\_\_\_\_Plaintiffs seek certification of a class of individuals who are debtors in bankruptcy and in whose bankruptcies Defendants filed claims including Fees. On behalf of this class, Plaintiffs request declaratory judgment, injunctive relief, turnover of amounts collected, and damages and costs.

The first issue addressed under Count III is whether a class of debtors similar to this Debtor can be certified. While this case was under advisement, the Honorable Anthony A. Alaimo Judge of the United States District Court for the Southern District of Georgia, issued a decision in Williams v. Sears, Roebuck and Co. 244 B.R. 858 (S.D.Ga. 2000) limiting the available class size on jurisdictional grounds in a case involving a Chapter 7 bankruptcy issue. The parties were requested to brief me on the impact of the Williams decision in this case.

In Williams, the plaintiff, a chapter 7 debtor, sought to recover on behalf of a nationwide class of debtors allegedly subjected to routine violations of §§362 and 524 by the defendant creditor by the creditor's unilaterally cancelling reaffirmation agreements. Id. The court characterized the claims raised by the plaintiff on behalf of the putative class as property of each individual debtor's bankruptcy estate. Id. at 866, (citations

omitted). Under 28 U.S.C. §1334(e),<sup>7</sup> jurisdiction over the property of the debtor's estate is exclusively reserved to the district court wherein the bankruptcy case is commenced. Williams, 244 B.R. at 866. Judge Alaimo read §1334(e) to preclude the district court from exercising jurisdiction over the class claims beyond the bankruptcy cases commenced in this district. Id. Therefore, the defendant's motion to dismiss the class action components of the plaintiff's claims was granted with respect to the claims of the putative class members who commenced their bankruptcy cases outside the Southern District of Georgia, but denied with respect to the claims of those debtors who commenced their bankruptcy cases within the District. Williams, 244 B.R. at 866-67.

Jurisdiction over bankruptcy cases is granted to the district courts by 28 U.S.C. §1334(a).<sup>8</sup> A district court, in turn, may refer all bankruptcy matters to its bankruptcy judges. 28

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<sup>7</sup>§1334. Bankruptcy cases and proceedings . . .  
(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

<sup>8</sup> §1334. Bankruptcy cases and proceedings  
(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

U.S.C. §157(a)<sup>9</sup>. Because a bankruptcy court's jurisdiction is derived from that of the district court, a bankruptcy court's jurisdiction can be no greater than that of the district court. 28 U.S.C. §§ 1334(a) & 157(a). If the district court from which this bankruptcy court derives jurisdiction holds that its jurisdiction is limited to class members who filed their bankruptcy cases in this District, then the jurisdiction of this bankruptcy court is equally limited. Conversely, this bankruptcy court does have jurisdiction to entertain a class action if the class is not limited by the restrictions of §1334(e) and fulfills the requirements of FRBP 7023. Williams, 244 B.R. at 866. But see, Noletto v. Nationsbank Mortgage, et al. (In re Noletto) 244 B.R. 845 (Bankr. S.D. Ala. 2000). Regardless of whether I concur with Judge Mahoney's analysis in Noletto, Williams is binding precedent on this court. In re Wright 144 B.R. 943, 949 (Bankr.S.D.Ga. 1992) (stating the bankruptcy court, a unit of the district court, 28 U.S.C. §151, is bound by the decisions of the district court [citations omitted]). However, Williams is binding precedent on this court only to the extent that the Williams analysis applies here.

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<sup>9</sup> §157. Procedures

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

In Williams, Judge Alaimo rested his determination of limited subject matter jurisdiction upon the requirements of §1334(e), that the cause of action constituted "property of the estate". To the extent that the cause of action was not "property . . . of the debtor as of the commencement of [the] case," or . . . "property of the estate" the jurisdictional limitation of §1334(e) is inapplicable. Obviously, the issues raised in this adversary proceeding surrounding the filing of a proof of claim could not have existed prior to the filing of the debtor's bankruptcy case and therefore could not have been property of the debtor as of the commencement of the bankruptcy case.

Remaining for resolution is whether the cause of action constitutes property of the estate. In addition to debtors having filed Chapter 7 cases for which Williams controls, this debtor, proceeding in a Chapter 13 case, seeks to represent a class of debtors in not only Chapter 7 but also in Chapters 11, 12 and 13. In Chapter 11, 12, 13 cases, upon confirmation, property of the estate vests in the debtor. The controlling language is the same in all three chapters.

Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

11 U.S.C. §1141(b), 1227(b) and §1327(b).

In confirmed Chapter 11, 12 and 13 cases, all property, including any cause of action not otherwise provided for in the order confirming the plan and not necessary to fulfillment of the plan, re-vested in the debtor and no longer constitutes property of the estate. Telfair v. First Union Mortgage Corp. (In re: Telfair) 224 B.R. 243 (Bankr. S.D. Ga. 1999) affirmed 216 F.3d 1333 (11<sup>th</sup> Cir. July 7, 2000); In re McKnight 136 B.R. 891 (Bankr.S.D.Ga. 1989). There is no similar re-vesting provision under Chapter 7. Therefore, Williams is not binding precedent as to Chapter 11, 12 or 13 debtors.

Defendants' motion to dismiss the class action component of Count III is granted as to debtors who commenced their Chapter 7 cases in bankruptcy courts other than the Southern District of Georgia but denied as to all Chapter 11, 12 and 13 debtors in confirmed cases regardless as to district where property of the estate reverts in the debtor and Chapter 7 debtors who commenced their bankruptcy cases within this district.

The remaining question under Count III is, can the relief requested on behalf of the punitive class be granted. Plaintiffs may only represent a class to the extent that they have standing to bring individual claims. FRBP 7023, Jones v. Firestone Tire and

Rubber Co., Inc., 977 F.2d 527, 531 (11<sup>th</sup> Cir. 1992). It appears from the text of Count III that punitive damages are sought pursuant to §362. Having determined that no §362 violation could have occurred, punitive damages are not applicable. Thus, Count III is reduced to a request for declaratory judgment that NationsBanc cannot collect attorney fees, and uncollected and accrued late charges, an injunction on such basis, return of improperly collected monies, and an award of actual damages and costs for each alleged improper charge included in proofs of claim filed by NationsBanc in the potentially certified class' bankruptcy cases.

In Williams Judge Alaimo considered whether the remedies of declaratory relief and injunction could be granted on behalf of a class. 244 B.R. at 867-68. He held that a declaratory judgment would be, in effect, a finding that discharge injunctions entered by bankruptcy courts inside and outside the Southern District of Georgia had been violated. Id. at 867. Because relief for violation of an injunction may be sought only in the court that entered the injunction, the district court's jurisdiction to grant declaratory relief was limited to class members whose discharge had been received in this district. Id. In this case, declaratory relief is sought as to proofs of claim filed by NationsBanc not a declaration that an injunction has been violated. As pled the

Second Recast Complaint is sufficient to overcome a motion to dismiss Plaintiff's request for declaratory judgment under Count III.

Judge Alaimo also held that if the district court eventually concluded that the Bankruptcy Code had been violated, then §105(a) gave the court power to enjoin future violations. 11 U.S.C. §105(a); Williams, 244 B.R. at 867-68. "Such a prospective injunction would not constitute property of any bankruptcy estate. Section 1334(e), therefore, poses no obstacle to granting relief." Williams, 244 B.R. at 867-68. Defendants' motion to dismiss the injunctive component of Count III is also denied.

Motion to dismiss as to return of alleged overpayment and award of actual damages and costs is denied. Such relief will depend on facts to be determined upon consideration of the proper amount of the allowed claims in the bankruptcy cases of the class members should a class meet the certification criteria of FRBP 7023.

Count IV

\_\_\_\_\_Count IV alleges that NationsBanc habitually violates Local Rule 3001-2:

Without in any way limiting or amending any provision of the Code or Rules that govern the filing of proofs of claim, all claims filed in this Court shall be filed for the net principal balance only as of the date of the debtor's filing of his or her case.

Plaintiffs argue that NationsBanc's claim exceeded the net principal

balance as of the date of the filing of the bankruptcy case. They ask that Defendants be held in contempt of court for violation of Local Bankruptcy Rule 3001-2 and that damages for contempt be imposed.

If NationsBanc was entitled to a certain amount as of the date that the bankruptcy case was filed, then that amount is part of the net principal balance. Whether NationsBanc was entitled to the contested charges as of the date of filing or authorized pursuant to §506(b) is an issue based at least in part on facts yet to be determined. It is not "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41. Motion to dismiss Count IV is denied.

#### Count V

In Count V, Plaintiffs seek to bring a class action on behalf of debtors in the Southern District of Georgia, as an alternative to its nationwide class of debtors. Having determined the jurisdictional limits as to class size, no further determination is required as to this alternative class.

Additionally, Count V incorporates Count IV's claim for damages for violation of Local Bankruptcy Rule 3001-2. Whether Plaintiffs have standing to bring such a charge will depend on the resolution of Count IV. Whether a subclass may be certified for prosecution of such a charge will be addressed by subsequent

hearings on class certification. Again, the motions to dismiss fail to establish "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson 355 U.S. at 45. Motion to dismiss count V is denied.

#### Count VI

Plaintiffs claim that the alleged violation of Local Rule 3001-2 in turn violated FRBP 9011, and seek sanctions as provided by this rule.

FRBP 9011(c) (1) (A) states how a motion for sanctions under the rule must be brought. Although an alternative procedure applies if sanctions are imposed on a court's initiative, such is not the case here.

FRBP 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(c) Sanctions.

(1) How initiated

(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the

court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

Plaintiffs have sought sanctions within the framework of the Second Recast Complaint. Under FRBP 9011, Plaintiffs were required to seek sanctions by separate motion, and file that motion with the court only after 21 days from service of the motion. Motion to dismiss Count VI is granted. See Hedges v. Yonkers Racing Corp., 48 F.3d 1320, 1328 (2<sup>nd</sup> Cir. 1995) (sanctions could not be imposed where movant did not meet service requirements of FRCP 11(c)(1)(A), which corresponds to and includes the same 21-day "safe harbor" period as FRBP 9011(c)(1)(A)); In re Smith, 230 B.R. 437, 441 (Bankr.N.D.Fla. 1999) (debtors' request for sanctions failed procedurally where requirements of FRBP 9011 were not met; creditors must be given 21-day safe harbor to correct their proof of claim before possible imposition of sanctions, and motion for sanctions must be filed separately from other motions or requests.).

I also note that in the prayers for relief concluding the Second Recast Complaint, Plaintiffs pray for an order declaring a violation of 11 U.S.C. §524. Section 524 of the Bankruptcy Code is titled "Effect of discharge." Debtor's bankruptcy case is pending. There has been no discharge. Plaintiffs have no standing to bring any claims pursuant to §524.

It is, therefore, ORDERED that the motion for summary

judgment brought by Government National Mortgage Association is granted and Government National Mortgage Association is dismissed from this adversary proceeding;

Further ORDERED that the motions to dismiss brought by NationsBanc Mortgage Corporation and Barrett, Burke, Wilson, Castle, Daffin & Frappier, L.L.P. are granted as to Count II and any other references to violations of the automatic stay; granted in part as to class composition excluding only debtors whose chapter 7 bankruptcy cases were commenced outside the Southern District of Georgia, and granted as to Count VI seeking imposition of sanctions under FRBP 9011 and any §524 discharge violation. The motions to dismiss are denied as to all other Counts and claims brought in the Second Recast Complaint.

JOHN S. DALIS  
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 21st Day of September, 2000.