NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	Case No. 02-17718
DARRELLWHAPLES,	Chapter 13
Debtor.	Judge Pat E. Morgenstern-Clarren
DARRELL WHAPLES,	Adversary Proceeding No. 08-1083
Plaintiff,	
v.	**MEMORANDUM OF OPINION**
MIDLAND MORTGAGE CO., et al.,	
Defendants.	

I. INTRODUCTION

The debtor Darrell Whaples filed this eight count adversary proceeding to determine the interest of the defendants in his residence, located at 10111 Russell Avenue, Garfield Heights, Ohio, among other causes of action. Defendant Aurora Loan Services, LLC filed a motion to dismiss and for abstention, which is opposed by the plaintiff. For the reasons stated below, the court finds that it has jurisdiction over each claim asserted against Aurora. The court finds further, however, that it will abstain from hearing counts three, five, six, seven, and eight under the doctrine of permissive abstention. The court declines to abstain from hearing counts one, two, and four. On consideration of those counts, the court finds that each fails to state a claim upon which relief may be granted against Aurora under federal rule of civil procedure 12(b)(6), and each will be dismissed.

II. FACTUAL BACKGROUND

A. History of the Bankruptcy Case

Darrell Whaples (plaintiff or debtor) and Darlene Whaples[1] filed a voluntary petition for relief under chapter 13 of the bankruptcy code[2] on July 18, 2002 (the petition date). On that same date, the debtor filed his chapter 13 plan.[3] On September 24, 2002, Union National Mortgage Company (Union National) filed an objection to confirmation of that plan regarding the treatment of its claim, secured by the real estate located at 10111 Russell Avenue, Garfield Heights, Ohio (the Russell Avenue property).[4] An order captioned "AGREED ORDER RESOLVING OBJECTION OF UNION NATIONAL MORTGAGE COMPANY, its successors and assigns and AURORA LOAN SERVICES, INC., its servicing agent TO CONFIRMATION OF DEBTOR'S CHAPTER 13 PLAN" was entered on December 2, 2002 (the agreed order).[5] That order provided in part:

> It further appearing to the Court that there is a dispute as to the actual arrearage owed AURORA and AURORA anticipates filing an amended arrearage claim.
>
> It further appearing to the Court that by agreement of the parties the Objection of AURORA to confirmation should be withdrawn, and in the event the Debtors file an objection to AURORA's Proof of Claim, the amount of arrearages set forth in the Debtors' Plan,

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[1] Darlene Whaples was dismissed as a party to the bankruptcy case by order entered February 25, 2003. (Docket 33).

[2] All references to the bankruptcy code refer to Title 11, United States Code in effect prior to October 17, 2005.

[3] Docket 2, case no. 02-17718.

[4] Docket 11, case no. 02-17718.

[5] Docket 15, case no. 02-17718.

> once confirmed, shall not be Res Judicata as to the amount of AURORA's pre-petition arrearage claim.

Although Aurora Loan Services, LLC (Aurora) did not file the objection to confirmation, the agreed order names Union National, Aurora Loan Services, Inc.,[6] and the debtors as the parties bound by the order.

"Aurora Loan Services" filed a proof of claim on September 16, 2002, numbered claim 2-1 on the claims register. Claim 2-1 was amended by claim number 5-1 on November 25, 2002 by "Aurora Loan Services." The claim is designated as secured by real estate valued at $97,776.55, and claims an arrearage of $12,031.30. The documents attached to the claim show:

- a promissory note was given by the debtors[7] to Union National Mortgage Co. on July 21, 1997 for the amount of $87,720.00;
- the note was endorsed to Source One Mortgage Services Corp. by Union National on July 25, 1997;
- a blank page placed between the note and an allonge to the note referring to the Department of Veteran's Affairs bears a blank endorsement by Source One Mortgage Services Corporation; and
- a mortgage deed was given to Union National Mortgage Co. on July 21, 1997 by the debtors.

No assignments of the mortgage are attached to the proof of claim.

With the agreed order resolving the Union National objection having been entered, an order confirming the interlineated chapter 13 plan was entered on February 15, 2003.[8] The

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[6] Aurora Loan Services, Inc. is identified in the agreed order as the servicing agent for Union National.

[7] Darlene Whaples was also a co-maker of the note.

[8] Docket 24, case no. 02-17718.

confirmed plan did not contain a reservation of jurisdiction provision, and Union National is not provided for in the plan. The arrearage amount listed in the plan as owed to Aurora is quantified at $8,000.00, consistent with the agreed order. The last substantive paragraph of the plan also provides:

> The treatment of the claims of creditors as set forth in this plan shall become absolute upon confirmation, pursuant to 11 U.S.C. Sec. 1327. Therefore, if a creditor or contract party named herein objects to this plan, including specifically the valuation of security and the treatment of executory contracts and unexpired leases, a formal objection to confirmation must be filed before the date fixed by the Bankruptcy Court.

On August 24, 2004, a year and a half after confirmation, the plaintiff filed a motion seeking an accounting from Aurora.[9] No order was ever entered regarding that motion. Then, on February 16, 2005, the plaintiff filed an objection to "Claim #2" as "being overstated," alleging that it should be limited to $8,000.00.[10] Aurora's response stated only that the claim accurately showed the prepetition arrearages.[11] On June 17, 2005, Aurora transferred its claim, without referencing a claim number, in the amount of $12,889.46 to Midland Mortgage Co. (Midland's claim).[12] The plaintiff's objection to "Claim #2" was withdrawn over a year later, on March 24, 2006.[13]

No further action was taken regarding claims to or liens against the property until

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[9] Docket 56, case no. 02-17718.

[10] Docket 83, case no. 02-17718.

[11] Docket 89, case no. 02-17718.

[12] Docket 94, case no. 02-17718.

[13] Docket 95, case no. 02-17718.

September 18, 2007, when "MidFirst Bank, servicing agent for Aurora Loan Services, Inc." filed a motion for relief from stay.[14] The note attached to the motion for relief is dated July 21, 1997, and is issued to Union National Mortgage Co. by Darrell L. and Darlene M. Whaples. The note bears an endorsement to Source One Mortgage Services Corp., which is dated July 25, 1997.[15] The mortgage attached to the motion for relief is given to Union National and recorded on July 23, 1997. A series of mortgage assignments followed:

- on July 23, 1997 by Union National to Source One Mortgage Services Corporation, which does not appear to be recorded.
- on August 1, 2000 by White Mountains Services Corporation fka Source One Mortgage Services Corporation, et al. to Mortgage Electronic Registration Systems, Inc. (MERS), recorded on September 19, 2000.
- on April 11, 2002 by MERS to Aurora Loan Services, Inc., recorded on May 30, 2002.

In a response and supplemental response to the motion for relief, the plaintiff asserted that the movant lacks standing to seek relief from stay because the documents attached did not show that MidFirst Bank was the holder of the note.[16] The responses also asserted that the arrearage amount is incorrect.

Another motion for relief was filed by MidFirst Bank on November 6, 2007,[17] and was entered on the docket prior to the entry of the court's order denying the first motion for relief for

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[14] Docket 101, case no. 02-17718.

[15] Attached to the note is a "V.A. ASSUMPTION POLICY ALLONGE AMENDING NOTE," which identifies the property address and relates to policies of the Department of Veterans Affairs. This "allonge" does not affect the issues in this proceeding.

[16] Docket 106, 107, case no. 02-17718.

[17] Docket 108, case no. 02-17718.

lack of prosecution, entered November 15, 2007.[18] The second motion contained only one additional document: an allonge to the note dated 7/21/97 in favor of Union National Mortgage Company, endorsed to MidFirst Bank, and executed by MERS. On November 19, 2007, MidFirst Bank filed an amended motion for relief from stay.[19] The amended motion adds two mortgage assignments: one from Aurora Loan Services, LLC fka Aurora Loan Services, Inc. to MERS, dated November 9, 2007 and recorded November 16, 2007; and another from MERS to MidFirst Bank, dated October 31, 2007 and recorded November 16, 2007. The debtor responded to the amended motion of MidFirst Bank, again asserting that payments had not been properly credited to his account.[20] MidFirst Bank responded with supplemental documents appearing to be a payment history, in support of the amended motion for relief.[21]

On January 23, 2008, a stipulated order was entered granting conditional relief from stay to MidFirst Bank.[22] In the stipulated order, Midland Mortgage Co. (Midland) was identified as the servicing agent for MidFirst Bank, with payments to be made to Midland as follows:

- regular monthly payments beginning with the payment due for February 2008;
- post-petition arrearages of $6,590.28 to be paid by one payment of $549.15, and eleven payments of $549.19, in addition to regular mortgage payments.

Further, the stipulated order provided that if the above payments were not timely made, MidFirst

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[18] Docket 110, case no. 02-17718.

[19] Docket 112, case no. 02-17718.

[20] Docket 113, case no. 02-17718.

[21] Docket 114, case no. 02-17718.

[22] Docket 115, case no. 02-17718.

Bank would provide a notice of default to the debtor, which would give the debtor an opportunity to cure the default within ten days of the notice. Failure to cure would permit MidFirst Bank to file an affidavit attesting to the default, and obtain an order granting relief from stay without a hearing. Based on the plaintiff's apparent noncompliance with the stipulated order, MidFirst Bank filed an affidavit of default on April 9, 2008, which was executed by Cindy Jager, a bankruptcy manager for Midland Mortgage Co., servicing agent for MidFirst Bank.[23] On April 11, 2008, the court entered an order granting relief from stay to MidFirst Bank, and authorizing the trustee to "discontinue plan payments to MidFirst Bank on its secured claim."[24]

B. Procedural History

The plaintiff filed this adversary proceeding on March 10, 2008, seeking judgment against Midland, the Cuyahoga County Treasurer[25] and Aurora to determine the validity of Midland's claim; to determine the extent, priority and validity of liens against the property; for an accounting; and for violations of the Real Estate Settlement Procedures Act (RESPA) and the Ohio Consumer Sales Practices Act (OCSPA); as well as for attorney's fees. The plaintiff filed an amended complaint (the complaint) on July 14, 2008.[26] Aurora filed an answer on July 31,

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[23] Docket 121, case no. 02-17718.

[24] Docket 122, case no. 02-17718.

[25] The Cuyahoga County Treasurer filed an answer to the original complaint on April 22, 2008. (Docket 17). According to the adversary case management order entered on June 27, 2008 (docket 30), the parties were to submit an agreed order regarding the Treasurer's lien on or before July 3, 2008. No such order was ever submitted for the court's consideration.

[26] Docket 37.

2008, followed by an amended answer on August 11, 2008.[27] On August 29, 2008, Aurora filed a motion to dismiss the complaint under rule 12(b)(6) (the motion).[28] The plaintiff opposed the motion, and Aurora filed a reply.[29]

C. Factual Allegations

The complaint contains eight causes of action,[30] by which the plaintiff generally contends that Aurora and Midland failed repeatedly to properly account for and apply mortgage payments made by the plaintiff, and that such failures caused the plaintiff to seek bankruptcy protection. The plaintiff acknowledges that Midland is the "transferee of Aurora Loan Servicing LLC," and may claim an interest in the property by virtue of a mortgage.[31] Count one seeks to determine the extent and validity of any liens on the Russell Avenue property, and alleges that Midland's claim is overstated. Count two seeks an accounting from Midland. Based upon the alleged accounting errors of Aurora and Midland, count three claims Midland is liable for violations of RESPA. The fourth count is subtitled "Unlawful collection on the note—Fraud on the Court." It alleges that under 11 U.S.C. § 105, the plaintiff is entitled to damages for the actions of Aurora and MidFirst Bank in filing motions for relief from stay. The plaintiff also seeks damages in count

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[27] Docket 39, 40.

[28] Docket 42. The court recognizes that it is procedurally incorrect for Aurora to have filed a motion to dismiss under rule 12(b)(6) after filing an answer to the complaint. However, the court may consider the motion without prejudice to the plaintiff where the defense was raised in the answer. *See, e.g. Beebe v. Williams College*, 430 F.Supp.2d 18, 21 (D. Mass. 2006). The court elects to consider the 12(b)(6) motion on its merits.

[29] Docket 47, 48.

[30] For the sake of brevity, the causes of action will be referred to as "counts."

[31] Complaint, ¶ 15.

five for Aurora and Midland's alleged conversion of payments and/or their improper application to the plaintiff's loan account. Based upon Midland's alleged failure to provide a satisfactory accounting and required state and federal disclosures, count six seeks damages from Midland for violations of OCSPA. Count seven seeks damages for violation of the OCSPA by Aurora, based upon its allegations in motions for relief from stay. Finally, the eighth count seeks attorney's fees for Midland's violations of the OCSPA and RESPA.

III. POSITIONS OF THE PARTIES

Aurora's motion to dismiss asserts that (1) the court lacks subject matter jurisdiction[32] because the complaint is not a core proceeding under 28 U.S.C. § 157; (2) abstention is appropriate under 28 U.S.C. § 1334(c)(1) and (2); (3) the complaint fails to state a claim upon which relief can be granted under rule 12(b)(6); (4) the plaintiff's claims are barred by *res judicata*; and (5) the debtor lacks standing to assert the claims. Specifically, Aurora asserts count one should be dismissed because it is barred by *res judicata* of the confirmed plan. Aurora also seeks dismissal of counts one, two, six, and eight because they are purportedly not asserted against Aurora. Counts three and five should be dismissed, Aurora argues, because the debtor allegedly has no standing to pursue them. Count four is not specifically mentioned; however, Aurora asserts that the entire complaint should be dismissed because the claims do not constitute core proceedings and accordingly, the court allegedly lacks jurisdiction to entertain the claims. In addition, Aurora asserts that abstention is mandatory because the claims can be heard by the state court, and there is a pending foreclosure action in which they could be adjudicated.

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[32] Although not cited by Aurora, its motion to dismiss for lack of subject matter jurisdiction falls within rule 12(b)(1), and the court will consider it as such.

Permissive abstention is alternately sought by Aurora.

The plaintiff's response alleges that combined, Union National, Aurora, Midland, and MidFirst have filed so many inconsistent documents that the ownership of the note and mortgage, as well as the amount owed, is indeterminable. The plaintiff claims that he tried on several occasions to verify ownership of the note and mortgage and the amount owed, but he was unsuccessful. Specifically, the plaintiff controverts each and every substantive aspect of Aurora's motion, argues that the matters raised by the complaint are core, and that as a result, abstention need not be addressed.

In its reply, Aurora notes that its motion incorrectly stated that it *currently* owns the note and mortgage on the Russell Avenue property. Further, Aurora specifically and expressly disclaims any interest in the Russell Avenue property or the debtor's estate.

IV. JURISDICTION

A. Jurisdiction under 28 U.S.C. § 1334

This court has jurisdiction to determine its own jurisdiction. Aurora argues that all counts of the complaint are unrelated to the bankruptcy, and as a result, this court lacks jurisdiction. The court notes that in Aurora's answer to the original complaint filed May 19, 2008, Aurora admitted this court's jurisdiction and that the adversary proceeding was a core proceeding.[33] Then, in the Defendants' Pretrial Statement filed June 2, 2008, Aurora joined Midland in admitting that this court has jurisdiction, that the action is a core proceeding, and that a motion for abstention would not be filed.[34] Later, in the joint pretrial statement filed June 19, 2008, to

[33] Docket 19.

[34] Docket 20.

which Aurora was a party, jurisdiction was again admitted.[35] Yet again, Aurora admitted this court's jurisdiction and the core nature of the proceeding in its answer to plaintiff's first amended complaint.[36] It was not until Aurora's amended answer to the plaintiff's first amended complaint that jurisdiction and the core nature of the proceedings were challenged.[37]

Bankruptcy courts derive jurisdiction from 28 U.S.C. §§ 1334 and 157. Section 1334 provides the district court with "original and exclusive jurisdiction of all cases under title 11," and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a), (b). A district court, therefore, has jurisdiction to hear and determine the following types of cases:

(1) cases under title 11;

(2) civil proceedings arising under title 11;

(3) civil proceedings arising in a case under title 11; and

(4) civil proceedings related to cases under title 11.

28 U.S.C. § 1334; *Michigan Employment Security Commission v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co., Inc.)*, 930 F.2d 1132, 1141 (6th Cir. 1991), *cert. dismissed Michigan Employment Security Commission v. Wolverine Radio Co., Inc.*, 503 U.S. 978 (1992). District courts routinely refer such jurisdiction to the bankruptcy court under 28 U.S.C. § 157(a), and the Northern District of Ohio has done by General Order 84, entered on July 16, 1984.

At a minimum, a district court has jurisdiction when it finds that a civil proceeding is

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[35] Docket 28.

[36] Docket 39.

[37] Docket 40.

related to bankruptcy cases generally.

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to the bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Celotex Corp. v. Edwards, 514 U.S. 300, 309 n.5 (1995), *remanded to Edwards v. Armstrong World Inds.*, 56 F.3d 24 (5th Cir. 1995) (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), *overruled on other grounds, Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995)) (emphasis in original); *Wolverine*, 930 F.2d at 1142 (citing *Pacor*). A proceeding that is "related to" bankruptcy includes proceedings based upon "(1) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. § 541, and (2) suits between third parties which have an effect on the bankruptcy estate." *Id.* This adversary proceeding falls into the first type of "related to" case.

The court finds that the matters alleged in the complaint could have a conceivable effect on the debtor's bankruptcy estate. Count one challenges the amount owed to the entity entitled to collect payments under the note secured by the Russell Avenue property. In addition, it also seeks to determine the validity and extent of the liens on the Russell Avenue property. If the plaintiff were to recover damages based on the complaint's allegations, because the plaintiff's claims are property of the bankruptcy estate under 11 U.S.C. §§ 541 and 1306, any recovery would be property of the bankruptcy estate. Any additional funds that become property of the bankruptcy estate would affect the distribution to unsecured creditors. Regardless of whether the

plaintiff may actually exact a recovery on the claims alleged in the complaint, they may *conceivably* have an effect on the bankruptcy estate, and so are "related to" the bankruptcy estate. Therefore, this court has jurisdiction under 28 U.S.C. § 1334(b).

B. Post-Confirmation Jurisdiction

Once a chapter 13 plan is confirmed, the bankruptcy court's jurisdiction is limited to matters that have "a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction." *Morris v. Zelch (In re Regional Diagnostics, LLC)*, 372 B.R. 3, 22 (Bankr. N.D. Ohio 2007) (citing *In re Resorts Int'l, Inc.*, 372 F.3d 154, 166-67 (3d Cir. 2004)). "Matters that will typically have this 'close nexus' include those that 'affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan.'" *Resorts*, 372 F.3d at 167. However, the court's jurisdiction is still predicated upon 28 U.S.C. § 1334 post-confirmation; "neither the bankruptcy court nor the parties can write their own jurisdictional ticket." *Thickstun Brothers Equipment Co., Inc. v. Encompass Servs. Corp. (In re Brothers Equipment Co., Inc.),* 344 B.R. 515, 522 (B.A.P. 6th Cir. 2006) (citing *Resorts, supra*). The absence of a retention of jurisdiction provision in a confirmed plan does not destroy the court's subject matter jurisdiction. *Holly's, Inc. v. City of Kentwood (In re Holly's, Inc.)*, 172 B.R. 545, 555 (Bankr. W.D. Mich. 1994), *aff'd In re Holly's, Inc.*, 178 B.R. 711 (W.D. Mich. 1995). Therefore, the court's post-confirmation jurisdiction over this adversary proceeding is based not upon the terms of the confirmed plan, but depends upon whether the proceeding involves the interpretation, implementation, consummation, execution, or administration of the confirmed plan.

The plaintiff's complaint alleges that Midland's claim is overstated, and that the validity

and extent of any liens against the Russell Avenue property need to be determined. The debtor's bankruptcy case has been pending since mid-July 2002. Substantial amounts have presumably been paid to and distributed by the chapter 13 trustee; yet, the debtor's plan has not been completed. Given that this adversary proceeding involves a challenge to a creditor's claim, the administration, execution, and completion of the debtor's plan and the resulting distribution to creditors are dependent on a determination as to the amount of Midland's claim. Therefore, the court finds that it has post-confirmation jurisdiction over this adversary proceeding to review the administration, execution, and completion of the debtor's plan.

C. Core Proceedings under 28 U.S.C. § 157(b)(2)

The determination that the plaintiff's claims are "related to" the bankruptcy case is sufficient to confer jurisdiction on this court, but does not answer the question of whether the court *should* exercise jurisdiction. To resolve that issue, the court must determine whether the plaintiff's claims constitute core proceedings.

The scope of a bankruptcy court's jurisdiction to enter appropriate order and judgments is defined by 28 U.S.C. § 157, which provides, in relevant part:

> (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.
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> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
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> * * *

> (c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding, but that is otherwise related to a case under title 11.

28 U.S.C. § 157(a), (b)(1), (c)(1). Subsection 2 of 28 U.S.C. § 157(b) specifically lists matters that are core proceedings, but the list is not exclusive. If a matter is not specifically listed, it is nonetheless a core proceeding if the cause of action is either created by some provision of the bankruptcy code, and thus *arises under* title 11; or if the cause of action involved could not exist outside the bankruptcy, and thus *arises in* a case under title 11. *Wolverine*, 930 F.2d at 1144. In deciding the core nature of proceedings, the court must analyze each count independently. *N.Parent, Inc. v. Cotter & Co. (In re N. Parent, Inc.)*, 221 B.R. 609, 626 (Bankr. D. Mass. 1998); *Peterson v. 610 W. 142 Owners Corp. (In re 610 W. 142 Owners Corp.)*, 219 B.R. 363, 368 (Bankr. S.D.N.Y. 1998); *Ralls v. Docktor Pet Centers, Inc.*, 177 B.R. 420, 425 n.6 (D. Mass. 1995).

> Each claim within the same cause of action must be analyzed claim by claim and each alone must satisfy this test in order to be considered a core proceeding. A single cause of action may include both core and non-core claims. The mere fact that a non-core claim is filed with a core claim will not mean the second claim becomes "core."

Pacific Dunlop Holdings (USA) Inc. v. Exide Holding Europe (In re Exide Technologies), 544 F.3d 196, 206 (3d Cir. 2008) (citations omitted).

Aurora asserts that the claims contained in the complaint "are not created by bankruptcy law and they exist outside of bankruptcy law."[38] The first cause of action alleges that Midland's claim is overstated, and also seeks to determine the validity and extent of any claimed liens on the Russell Avenue property. It is clear, however, that the complaint challenges Midland's proof

[38] Docket 48, at 5.

of claim—a claim that would not exist but for the bankruptcy being filed. *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987), *remanded to In re Wood*, 84 B.R. 432 (S.D. Miss. 1988) (specifically recognizing proceedings involving proofs of claim as core). Because proofs of claim seek recovery for money owed on the petition date, Midland's claim necessarily refers to the debtor's alleged prepetition default. 11 U.S.C. § 502(b); Official Form 10.[39] Further, it is clearly the prepetition claim which has been at issue since before confirmation of the plan and continues in this adversary proceeding; particularly because MidFirst Bank was granted relief from stay based solely upon the debtor's postpetition default. In addition, subsections (B), (C) and (K) of §157(b)(2) expressly designate causes of action disputing liens and claims as core proceedings. While the lien dispute will require application of Ohio state law, bankruptcy courts routinely apply state law, and such application alone is insufficient to render it a non-core proceeding.[40] Therefore, the court finds that the first cause of action is a core proceeding over which jurisdiction is proper under 28 U.S.C. § 157(b)(2)(B), (C) and (K).

Although Aurora did not specifically address count four, its motion generally seeks

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[39] Aurora cites *BN1 Telecommunications, Inc. v. Lomaz (In re BN1 Telecommunications, Inc.)*, 246 B.R. 845, 849 (B.A.P. 6th Cir. 2000) for the proposition that "the date of maturity of a cause of action or the date the debtor in possession decides to file the complaint does not determine necessarily that the action arose 'in a case under title 11.'" Here, however, count one alleges in part that improper pre-petition accounting practices created the "overstated" Midland claim. *See* complaint, ¶ 18. Thus, the court need not rely on any allegation regarding improper *post*-petition accounting practices by Aurora or Midland in making the determination that count one is a core proceeding.

[40] Aurora cites *Dayton Title Agency, Inc. v. Philadelphia Indemnity Ins. Co. (In re Dayton Title Agency, Inc.)*, 264 B.R. 880 (Bankr. S.D. Ohio 2000) for the proposition that because the plaintiff's claims could be resolved in state court, the adversary proceeding is a non-core proceeding. However, the court's determination that the matters involved in *Dayton Title* were non-core was not based solely upon the fact that resolution of the issues were based upon state law; such a position is contrary to statute. *See* 28 U.S.C. § 157(b)(3).

dismissal of the entire complaint for lack of subject matter jurisdiction. Count four directly attacks the actions of Aurora and MidFirst Bank with respect to statements made in several motions for relief from stay, which would not have occurred had the bankruptcy not been filed. Based upon those actions, the plaintiff seeks damages under 11 U.S.C. § 105. Because a motion for relief from stay is only filed after a bankruptcy case is commenced, and would not exist but for the operation of bankruptcy code § 362, proceedings involving motions for relief arise in a bankruptcy case under 28 U.S.C. §§ 1334(b) and 157(b)(1). Furthermore, count four directly implicates the power of the court to enforce its orders under § 105. Therefore, the court finds that count four is also a core proceeding.

The remaining causes of action set forth in plaintiff's complaint assert state and nonbankruptcy federal law claims against Aurora and Midland, including a claim for an accounting, violations of RESPA, conversion, violations of the OCSPA, and damages. None of these claims sets forth a cause of action that arises under any provision of the bankruptcy code. None of these claims involves the administration of the bankruptcy case, nor did they arise in the conduct of the bankruptcy case itself. Further, the plaintiff alleges that the acts and omissions giving rise to his claims occurred, in substantial part, prepetition. The fact that some of the acts and omissions complained of by the plaintiff occurred while his bankruptcy case was pending does not automatically render them core in nature. These claims are only tangentially related to the bankruptcy because they involve the debtor, a creditor, and a former creditor. As a result, the court finds causes of action two, three, five, six, seven, and eight are non-core proceedings which are related to the bankruptcy case.

V. THE DEBTOR'S STANDING

Aurora contends that the debtor lacks standing to pursue the third and fifth causes of action for violation of RESPA and conversion, because those claims became property of the bankruptcy estate on the petition date, and can only be prosecuted by the trustee. Based upon the debtor's alleged lack of standing, Aurora claims that this court lacks subject matter jurisdiction. In support of this argument, Aurora quotes *Honigman v. Comerica Bank (In re Van Dresser Corp.)*, 128 F.3d 945 (6th Cir. 1997), *appeal after remand*, No. 227325, 2003 WL 231563 (Mich. App. Jan. 31, 2003) and *Cundiff v. Cundiff (In re Cundiff)*, 227 B.R. 476 (B.A.P. 6th Cir. 1998). However, *Van Dresser* involved a chapter 11 debtor, while *Cundiff* involved a chapter 7 debtor. The instant case involves a chapter 13 debtor and a confirmed plan of reorganization.

> Because of these differences between Chapter 7 and Chapter 13 bankruptcies, the four circuit courts to consider this issue have all concluded that Chapter 13 debtors have standing to bring claims in their own name on behalf of the bankruptcy estate.

Smith v. Rockett, 522 F.3d 1080, 1081 (10th Cir. 2008). The distinction is especially relevant when determining whether a particular asset is property of the bankruptcy estate and the debtor's rights in a chapter 13 case.

Property of the bankruptcy estate in a chapter 13 case includes any cause of action which existed on the petition date. 11 U.S.C. § 1306; *Helbling v. Josselson (In re Almasri)*, 378 B.R. 550, 555 (Bankr. N.D. Ohio 2007) (citing *In re Graham Square, Inc.*, 126 F.3d 823, 831 (6th Cir. 1997), *remanded to* 224 B.R. 614 (Bankr. N.D. Ohio 1998)). Here, the plaintiff's claims based upon Aurora's prepetition acts or omissions became property of the debtor's bankruptcy estate on the petition date. To the extent the plaintiff is also challenging postpetition acts and omissions of

the defendants, they too, are property of the bankruptcy estate under 11 U.S.C. § 1306, which provides that property of the bankruptcy estate also includes all property acquired after the petition date until the case is closed, dismissed or converted. 11 U.S.C. § 1306(a); *see also Gordon Sel-Way, Inc. v. United States (In re Gordon Sel-Way, Inc.)*, 270 F.3d 280, 286 (6th Cir. 2001); *Houston v. Eiler (In re Cohen)*, 305 B.R. 886, 896 (B.A.P. 9th Cir. 2004). Therefore, the causes of action alleged in the plaintiff's complaint are property of his bankruptcy estate.

Contrary to Aurora's assertion, the debtor has standing to prosecute such claims for the benefit of the bankruptcy estate. The bankruptcy code provides chapter 13 debtors with the right to use property of the estate:

> Subject to any limitations on a trustee under this chapter, the debtor shall have, *exclusive of the trustee*, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title.

11 U.S.C. § 1303 (emphasis added). Therefore, a debtor is vested with the exclusive right to use property of the estate, including the right to sue and be sued. *Cohen*, 305 B.R. at 896 ("The one chapter 7 trustee duty that is omitted from the duties of the chapter 13 trustee or debtor is the § 704(1) duty to 'collect and reduce to money the property of the estate.'"); *In re Wirmel*, 134 B.R. 258, 260 (Bankr. S.D. Ohio 1991); *see also In re Hutchinson*, 354 B.R. 523, 533 (Bankr. D. Kan. 2006).

Even after confirmation of the debtor's chapter 13 plan, the debtor has standing to assert the complaint's claims against Aurora and Midland under 11 U.S.C. § 1327(b), which provides:

> 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. § 1327(b). While some courts have interpreted this to mean that the bankruptcy estate ceases to exist after confirmation, "the concept of vesting must be construed in harmony with § 1306(a)(1) . . ." which provides that post-confirmation property is property of the bankruptcy estate. *Cohen*, 305 B.R. at 898. Just as § 1303 gives the debtor the right to use property of the estate, § 1306(a) continues that concept after confirmation, unless the plan provides otherwise. In this case, there was no provision in the plan which limited the debtor's interest in estate property post-confirmation. As a result, the debtor regained ownership of his claims upon confirmation by operation of § 1327(b). Accordingly, the debtor has standing, post-confirmation, to prosecute his claims against both Aurora and Midland. Aurora's motion to dismiss for lack of standing is, therefore, denied.

VI. ABSTENTION

A. Mandatory Abstention

Aurora alternatively asserts that this court must abstain from hearing this case because the claims against Aurora are based on state law and can be timely adjudicated in the pending state court foreclosure action. Mandatory abstention is governed by 28 U.S.C. § 1334(c)(2), and requires a bankruptcy court to refrain from hearing a proceeding when it:

(1) is based upon a state law claim or cause of action;

(2) lacks a federal jurisdictional basis absent the bankruptcy;

(3) is already pending in a state forum of appropriate jurisdiction;

(4) is capable of timely adjudication; and

(5) is a non-core proceeding.

See 28 U.S.C. § 1334(c)(2); *Lindsey v. Dow Chemical Co. (In re Dow Chemical Co.)*, 113 F.3d

565, 570 (6th Cir. 1997), *cert. denied, Official Committee of Tort Claimants v. Dow Corning Corp.*, 522 U.S. 977 (1997). All five elements must be satisfied for mandatory abstention to apply. *Nationwide Roofing & Sheet Metal, Inc. v. Cincinnati Ins. Co. (In re Nationwide Roofing & Sheet Metal, Inc.)*, 130 B.R. 768, 778 (Bankr. S.D. Ohio 1991).

As the court has determined the first and fourth causes of action to be core proceedings under 28 U.S.C. § 157(b)(2)(B), (C) and (K), the court is not required to abstain from hearing those claims. In addition, there is a federal jurisdictional basis for the plaintiff's RESPA claim outside of the bankruptcy because it is based upon federal law, precluding mandatory abstention as to count three. With respect to the remaining causes of action, they are all based upon state law, lack a federal jurisdictional basis outside of bankruptcy, and constitute non-core matters. However, these particular claims are not currently pending in state court. Although the court recognizes Aurora's assertion that the state court foreclosure action constitutes a possible venue for adjudication of such claims, that is not the relevant inquiry. Section 1334(c)(2) requires the proceeding to actually be pending in state court, not that some state court action may be an available venue to hear the claims. Here, the only proceeding pending in state court is Aurora's 2002 foreclosure action—not the plaintiff's claims against Aurora and Midland. For these reasons, the court finds that the necessary elements of mandatory abstention have not been met. Accordingly, Aurora's motion based upon 28 U.S.C. § 1334(c)(2) is denied.

B. Permissive Abstention

Permissive abstention gives the court discretion to abstain from hearing a core proceeding when the interests of justice would be served, or when abstention would provide comity with state courts or respect for state law. 28 U.S.C. § 1334(c)(1). The factors established by the court

in *Republic Reader's Service, Inc. v. Magazine Service Bureau, Inc. (In re Republic Reader's Service, Inc.)*, 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987) are widely accepted as the factors to review when a bankruptcy court is considering permissive abstention. As modified by Ohio federal decisions, those factors are:

1. the effect or lack thereof on the efficient administration of the estate if a court abstains;

2. the extent to which state law issues predominate over bankruptcy issues;

3. the difficulty or unsettled nature of the applicable state law;

4. the presence of a related proceeding commenced in state court or other nonbankruptcy court;

5. the jurisdictional basis, if any, other than 28 U.S.C. § 1334;

6. the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;

7. the substance rather than form of an asserted "core" proceeding;

8. the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;

9. the burden of this court's docket;

10. the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;

11. the existence of a right to a jury trial;

12. the presence in the proceeding of nondebtor parties;

and

13. any unusual or other significant factors.

Hughes-Bechtol, Inc. v. State of Ohio (In re Hughes-Bechtol, Inc.), 141 B.R. 946, 955-56 (Bankr. S.D. Ohio 1992). Abstention should be exercised narrowly and in extraordinary circumstances–it is the exception, not the rule. *McDaniel v. ABN AMRO Mortgage Group*, 364 B.R. 649 (S.D. Ohio 2007). "The decision whether to abstain is within the sound discretion of the bankruptcy judge." *Id.* at 650. Further, the court may exercise its discretion to abstain as to some, but not all, claims set forth in the complaint. *Bricker v. Martin*, 348 B.R. 28, 38 (W.D. Penn. 2006), *aff'd* 265 Fed. App'x 141 (3d Cir. Feb. 20, 2008); *see also Dunes Hotel Assoc. v. Hyatt Corp. (In re Dunes Hotel Assoc.)*, 1996 WL 33340785, at *3 (Bankr. D.S.C. July 11, 1996) (citing *Republic Reader's Serv., Inc., supra*, that "partial abstention is appropriate to divisible state law claims."). However, where the core and non-core claims are "inextricably woven," abstention should be denied. *See Shell Materials, Inc. v. First Bank of Pinellas Cnty. (In re Shell Materials, Inc.)*, 50 B.R. 44, 46 (Bankr. M.D. Fla. 1985). The court turns to the analysis of each count.

1. The First Cause of Action

The plaintiff seeks to establish the extent of Midland's claim, as well as the extent and validity of liens on the Russell Avenue property in count one of the complaint. The state law issues involved are not difficult or unsettled, and in 2002, Aurora instituted a related proceeding in state court, which is still pending. In addition, there is no independent federal jurisdictional basis to hear count one, other than its relation to the bankruptcy. Both Aurora and Midland are nondebtors, though Midland is a creditor of the estate. These factors weigh in favor of abstention.

However, many more factors caution against abstention. First, the debtor's plan cannot be completed nor the estate finally administered until the amount of Midland's claim, and any additional amount to be paid on that claim by the plaintiff, is determined. Therefore, the administration of the estate would be slowed by abstention. Although count one must be decided under Ohio law, the issues raised are not solely state law issues—they are core matters. The allegations challenging the amount of Midland's claim are directly related to the main bankruptcy case because they affect the debtor's ability to complete his plan. Severance of the state law claims from the adversary proceeding is not only feasible, but would promote a timely determination of Midland's claim, and further the ability of the debtor to move on with his plan. Although there is a possibility that the debtor may recover on the state law claims and produce additional funds, that possibility is insufficient to further delay the bankruptcy case, given that no recovery may be had at all. Severance would also promote efficiency in the court's docket by requiring a determination of only the core matters, while permitting the state courts to hear the state law claims. Finally, count one involves core proceedings. The substance of count one requires a determination of the amount of Midland's claim, which impacts not only the amount the debtor must pay to complete his plan, but the resulting dividend to unsecured creditors.

Although Aurora makes a bare statement that the plaintiff was forum shopping by filing this adversary proceeding, there is no other indication that this is the case. As neither plaintiff nor defendants have requested a jury trial, this issue is inconsequential. Further, Aurora has alleged, and the plaintiff has not disputed, that there is a pending state court action commenced by Aurora in 2002. There are no unusual or significant factors to consider.[41]

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[41] Because these factors apply equally to all counts, they will not be addressed further.

On balance, consideration of the permissive abstention factors clearly weigh against abstention of count one. Therefore, the court declines to abstain from hearing count one.

2. The Second Cause of Action

Count two seeks an accounting from Midland from the inception of the loan, but does not identify the legal basis for this demand. Because an accurate and complete accounting is necessary to resolve the amount of Midland's claim, the court finds that this count is so intertwined with count one that abstention would be inappropriate. The resolution of count one is dependent on determining whether payments made by the debtor were applied according to law and the parties' contract. This matter is also closely related to the bankruptcy case, and administration of the estate would be hampered by returning this matter to state court for a determination. Therefore, the court declines to abstain from hearing count two.

3. The Third Cause of Action

Count three alleges violations of RESPA by both Aurora and Midland, and seeks damages against Midland. While a finding that either defendant has violated RESPA may result in a recovery for the estate, the resolution of this claim will not impact administration of the estate. Further, there are no bankruptcy issues raised by this count, it is not a core proceeding, and it is not related to the bankruptcy other than through Midland's status as a creditor. Further, it is entirely feasible to permit the state court to determine these issues, and allow the bankruptcy court to administer any judgment. Although federal question jurisdiction could be invoked, hearing this court would burden this court with issues unrelated to this case or bankruptcy in general. Therefore, the court will abstain from hearing count three, under 28 U.S.C. § 1334(c)(1).

4. The Fourth Cause of Action

Count four alleges that Aurora and Midland perpetrated a fraud on the court by attempting to collect payments under the note when they were not entitled to do so, and asserting the same in various motions for relief from stay filed in the bankruptcy case. Because this is a core proceeding, arising in the bankruptcy case out of the motions for relief from stay, that directly implicates the court's power under 11 U.S.C. § 105(a), the court will not abstain from hearing this count.

5. The Fifth Cause of Action

In count five, the plaintiff contends that Aurora and Midland converted payments made by the debtor, because the defendants allegedly did not have a right to collect such payments. Hearing this count will slow the efficient administration of the estate because it is not a core proceeding and is only remotely related to the bankruptcy, has no federal jurisdictional basis outside of bankruptcy, involves only state law issues which are not unsettled or difficult, and could readily be determined by the state court under Ohio law.[42] Further, the facts needed to prove this cause of action have not yet been developed on the record, in contrast to count one. Accordingly, the court will abstain from hearing count five.

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[42] Aurora correctly states that the RESPA claims can be heard in state court under 12 U.S.C. § 2614, which provides that "Any action pursuant to the provisions of section 2605, 2607, or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred . . . ." Ohio state courts have, in fact, heard and disposed of RESPA claims. *See, e.g. Mortgage Electronic Registration Systems, Inc. v. Lambert*, 2008 WL 2477082 (Ohio Ct. App. June 12, 2008); *Cairns v. Ohio Savings Bank*, 109 Ohio App.3d 644, 672 N.E.2d 1058 (Ohio Ct. App. 1996).

6. The Sixth and Seventh Causes of Action

The plaintiff asserts, in counts six and seven, that Midland and Aurora violated the OCSPA, and seeks damages for those violations. For the reasons stated in the analysis of count five, the court will abstain from hearing counts six and seven, which can best be resolved by the state court.

7. The Eighth Cause of Action

Although captioned "Attorney's Fees," count eight seeks damages against Midland for alleged violations of RESPA and OCSPA. As a result, the court believes that the administration of the bankruptcy estate would best be served by abstention, for the same reasons that the court will abstain from hearing counts three, five, six and seven.

VII. RULE 12(b)(6)

A. The Standard

Rule 12(b)(6) permits a defendant to assert "failure to state a claim upon which relief can be granted" as a defense to the complaint, which may be asserted by motion. FED. R. CIV. P. 12(b)(6). A plaintiff must set forth the "'grounds' of his 'entitle[ment] to relief,'" which requires more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (citations omitted). Instead, a complaint must contain enough factual allegations "to state a claim for relief that is plausible on its face." *Id.* at 1974. Further:

> [T]he purpose of a motion under Rule 12(b)(6) is to test the sufficiency of the complaint. When considering a motion to dismiss pursuant to Rule 12(b)(6), a court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded allegations in the complaint as true. *See Scheuer v.*

> *Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90(1974). The court will grant a motion for dismissal under Rule 12(b)(6) only if there is an absence of law to support a claim of the type made, or of facts sufficient to make a valid claim, **or if on the face of the complaint there is an insurmountable bar to relief indicating that the plaintiff does not have a claim.** *See generally Rauch v. Day & Night Mfg.*, 576 F.2d 697, 702 (6th Cir. 1978); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1369 (6th Cir. 1975); *Brennan v. Rhodes*, 423 F.2d 706 (6th Cir. 1970).

Ashiegbu v. Purviance, 76 F.Supp.2d 824, 827-28 (S.D. Ohio 1998) (emphasis added), *aff'd* 194 F.3d 1311 (6th Cir. 1999), *cert. dismissed*, 529 U.S. 1001 (2000). Thus, "a 12(b) motion to dismiss on the basis of an affirmative defense can be granted only where the defense appears clearly on the face of the complaint." *Basile v. Merrill Lunch, Pierce, Fenner & Smith*, 551 F.Supp. 580, 591 (S.D. Ohio 1982), *citing McNally v. American States Insurance Co.*, 382 F.2d 748 (6th Cir. 1967), and Wright & Miller *Federal Procedure and Practice: Civil* § 1357 and cases cited therein; *Banco Santander De Puerto Rico v. Lopez-Stubbe (In re Colonial Mortgage Bankers Corp.)*, 324 F.3d 12, 16 (1st Cir. 2003) ("an affirmative defense may be adjudicated on a motion to dismiss for failure to state a claim," but only if (1) "the defense [is] definitively ascertainable from the allegations of the complaint;" and (2) the facts gleaned from the complaint "conclusively establish the affirmative defense."); *see also Pierce v. County of Oakland*, 652 F.2d 671, 672 (6th Cir. 1981) (affirmative defense may properly be raised in a motion to dismiss); *accord, Campbell v. Wonderland Music Company*, 2007 WL 674697 at *4 (E.D. Mich. Mar. 2, 2007), *reconsideration denied*, No. 05-CV-72292-DT, 2007 WL 1139562 (E.D. Mich. Apr. 17, 2007). To state the rule another way:

> Although a motion pursuant to Rule 12(b)(6) invites an inquiry into the legal sufficiency of the complaint, not an analysis of potential defenses to the claims set forth therein, dismissal

> nevertheless is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense.

Brooks v. City of Winston-Salem, North Carolina, 85 F.3d 178, 181 (4th Cir. 1996) (citations omitted).

B. Res Judicata

Aurora's motion raises the defense of *res judicata* to defend count one.[43] Although *res judicata* is an affirmative defense, it is properly raised in a motion to dismiss, *Pierce*, 652 F.2d at 672, but the motion should not be granted unless the defense appears clearly upon the face of the complaint. *Ashiegbu*, 76 F.Supp.2d at 827-28. Aurora's motion makes the blanket statement that *res judicata* of the confirmation order binds the parties here, but without any analysis of the elements required for such a determination. Even without this deficiency, Aurora's affirmative defense of *res judicata* does not clearly appear on the face of the complaint. The complaint merely refers to Midland's claim, allegedly improper collection and application of mortgage note payments, the validity of defendants' interests in the property, if any, and damages allegedly incurred by the debtor. Thus, there is no indication in the complaint that count one is barred by *res judicata*, and Aurora's motion to dismiss fails on that basis.

Even if *res judicata* did appear on the face of the complaint, the elements are not met in this case because the extent of Midland's claim has not been litigated to a final decision. Stipulated orders bearing directly on issues involved in the confirmation of reorganization plans

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[43] The doctrine of res judicata requires "(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies;' (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action." *Browning v. Levy*, 283 F.3d 761, 771-72 (6th Cir. 2002) (citing *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 880 (6th Cir. 1997)). The party asserting *res judicata* has the burden of proof. *Id.* at 772.

survive confirmation, where the stipulation limits the binding effect of the confirmation order. *See Meyer v. Lenox (In re Lenox)*, 902 F.2d 737, 739 (9th Cir. 1990) ("[S]tipulations are not to be lightly set aside.").[44] In this case, the agreed order entered on December 2, 2002, which resolved Union National's objection to confirmation, limited the scope of the confirmation order as to Aurora.[45] Even though the confirmation order did not specifically preserve the debtor's right to contest then-Aurora's now-Midland's claim, the agreed order was specific enough to do so. *See In re Porter*, 382 B.R. 29, 41 (Bankr. D. Vt. 2008). As a result, the confirmation order did not establish the amount of Midland's claim. Further, any *post*-confirmation conduct complained of by the plaintiff would not be barred by *res judicata* of the confirmation order. *Donaldson v. Bernstein*, 104 F.3d 547, 555 (3d Cir. 1997). Even if, as Aurora argues, the confirmation order did finally determine the amount of Midland's claim, it is the amount in the confirmation order that would control, not the proof of claim. In that case, Midland would be limited to the $8,000.00, and not the approximately $12,000.00 it seeks.

Neither did the stipulated order arising from MidFirst Bank's motion for relief from stay finally determine the amount of Midland's claim. The stipulated order resolving MidFirst Bank's motion for relief entered on January 22, 2008 addressed only postpetition payments.[46]

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[44] In *Lenox*, the parties entered into a pre-confirmation stipulated order regarding relief from stay, with the caveat that the stipulation would bind the parties in any confirmed plan. *Id.* at 739. Recognizing the court had the power to set aside the stipulation, it refused to do so where the interests of justice did not require it, and the parties could not be returned to the position they occupied prior to the stipulation. *Id.* at 740; *distinguished by Anatom Investment Corp. v. Allen (In re Allen)*, 300 F.3d 1055, 1059 (9th Cir. 2002).

[45] Docket 15, case no. 02-17718.

[46] Docket 115, case no. 02-17718.

Aurora's attempt to establish the amount of Midland's prepetition claim through the stipulated order resolving the debtor's postpetition delinquencies compares apples to oranges. The confirmed plan which addressed only the prepetition arrears cannot be *res judicata* as to the post-petition delinquency, specifically addressed by the stipulated order. *See Taumoepeau v. Manufacturers & Traders Trust Co. (In re Taumoepeau)*, 523 F.3d 1213, 1218-19 (10th Cir. 2008). As a result, the stipulated order is not *res judicata* as to the amount of Midland's claim; therefore, that portion of Aurora's motion is also denied.

C. The First Cause of Action

Aurora argues that the first, second, sixth, and eighth causes of action fail to state a claim against it under Rule 12(b)(6). Having decided that the court will abstain from hearing counts three, five, six, seven, and eight, only the first, second, and fourth are left for consideration under rule 12(b)(6). There are only two substantive paragraphs of the first cause of action: paragraphs numbered 18 and 19. Paragraph 18 alleges that Midland's claim is overstated and that Midland is Aurora's successor. It contains no other allegations as to Aurora and does not reference any current claim against the estate held by Aurora. Aurora transferred its claim to Midland.[47] When a claim is transferred after a proof of claim is filed, as long as the transferee files evidence of the transfer, the transferee is substituted for the transferor. FED. R. BANKR. P. 3001(e)(2); *Dellamarggio v. B-Line, LLC (In re Barker)*, 306 B.R. 339, 347-48 (Bankr. E.D. Cal. 2004). Because paragraph 18 seeks relief only against Midland, and Aurora no longer has a claim

[47] Docket 94, case no. 02-17718.

against the estate, the paragraph fails to state a claim against Aurora under rule 12(b)(6).[48]

In addition, paragraph 19 seeks to determine the validity, priority and extent of any liens on the Russell Avenue property claimed by any entity. However, Aurora has expressly disclaimed any interest in the Russell Avenue property. In fact, the plaintiff acknowledges this fact in his motion for partial summary judgment.[49] It is clear that Aurora makes no claim to the Russell Avenue property, and is no longer a creditor of the debtor, as its original claim was transferred to Midland.[50] As a result, paragraph 19 does not state a claim against Aurora. The first cause of action, therefore, is dismissed as against Aurora under rule 12(b)(6) for failure to state a claim.

D. The Second Cause of Action

Other than incorporation by reference, count two states, in whole: "Mr. Whaples hereby demands that Midland Mortgage supply an accounting to Mr. Whaples from the inception of the loan."[51] Although the plaintiff fails to identify the legal basis upon which his demand is based, this court has recognized a debtor's right to receive a complete payment history of his mortgage loan in plain English. Whether or not the payment history previously provided to the plaintiff is sufficient or understandable is not an issue to be decided in a motion to dismiss. The court finds

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[48] The plaintiff's assertion in his brief in opposition to the motion (docket 47) that "for the most part, reference [in the allegations of the complaint] to one or the other [defendant] was intended to encompass both . . . ." is unavailing. The complaint is the relevant document. Incorporation by reference does not create an allegation where none exists. The plaintiff did not allege Aurora currently has a disputed claim.

[49] Docket 64.

[50] Docket 94, case no. 02-17718.

[51] Complaint, ¶ 21.

count two is sufficient to state a claim for relief against *Midland*. However, the allegations of count two are not directed to *Aurora*. As a result, count two is dismissed as to Aurora for failure to state a claim upon which relief can be granted under rule 12(b)(6).

E. The Fourth Cause of Action

In the fourth cause of action, the plaintiff seeks damages under bankruptcy code § 105 for Aurora's alleged "fraud on the court" for "unlawful collection" on the note. Count four is based upon the motions for relief from stay filed by both MidFirst and Aurora, which plaintiff alleges contained false information and constituted a fraud upon the court.[52] As a result of those motions, the plaintiff complains that he incurred substantial attorney fees, and therefore, he should recover damages under § 105 of the bankruptcy code.[53]

To the extent the plaintiff relies on § 105 to invoke this court's jurisdiction, his reliance is misplaced. Section 105(a) provides bankruptcy courts with the power to enforce its own orders and the remedies created by Congress; it "does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law . . . ." *Pertuso v. Ford Motor Credit Company*, 233 F.3d 417, 423 n.1 (6th Cir. 2000) (citing *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986) (citing *Southern Ry. Co. v. Johnson Bronze Co.*, 758 F.2d 137, 141 (3d Cir. 1985))). The Sixth Circuit has acknowledged that § 105 does not create a private right of action. *Id., citing Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439 (1st Cir. 2000); *see also Joubert v. ABN AMRO Mortgage Group, Inc. (In re Joubert)*, 411 F.3d 452 (3d Cir. 2005); *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart*

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[52] Complaint, ¶ 31-43.

[53] Complaint, ¶ 44-45.

Convenience Stores, Inc.), 351 F.3d 86 (2d Cir. 2003). Thus, the plaintiff is not permitted to assert a private cause of action under § 105, based upon *Pertuso, supra*. Therefore, the court finds that the fourth cause of action fails to state a claim upon which relief can be granted under rule 12(b)(6). As a result, Aurora's motion to dismiss the fourth cause of action is granted.

VIII. CONCLUSION

For the reasons stated above, the motion of Aurora Loan Services, LLC to dismiss (docket 42) is granted in part, as follows:

> The court declines to abstain from hearing count one. On consideration of the motion, the count is dismissed as against Aurora for failure to state a claim;
>
> The court declines to abstain from hearing count two. On consideration of the motion, the count is dismissed as against Aurora for failure to state a claim;
>
> The court abstains from hearing count three under the doctrine of permissive abstention;
>
> The court declines to abstain from hearing count four. On consideration of the motion, the count is dismissed as against Aurora for failure to state a claim;
>
> The court abstains from hearing count five under the doctrine of permissive abstention;
>
> The court abstains from hearing count six under the doctrine of permissive abstention;
>
> The court abstains from hearing count seven under the doctrine of permissive abstention; and
>
> The court abstains from hearing count eight under the doctrine of permissive abstention.

The remaining portions of Aurora's motion are denied. A separate order will be entered consistent with this opinion.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-17718
	)	
DARRELLWHAPLES,	)	Chapter 13
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
DARRELL WHAPLES,	)	Adversary Proceeding No. 08-1083
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER GRANTING, IN PART, MOTION OF AURORA LOAN SERVICES, LLC TO DISMISS**
	)	
MIDLAND MORTGAGE CO., et al.,	)	
	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion issued this same date, the motion of Aurora Loan Services, LLC to dismiss (docket 42) is granted in part, as follows:

> Count one–the court declines to abstain from hearing this count. On consideration of the motion, the count is dismissed as against Aurora for failure to state a claim;
>
> Count two–the court declines to abstain from hearing this count. On consideration of the motion, the count is dismissed as against Aurora for failure to state a claim;
>
> Count three–the court abstains from hearing this count under the doctrine of permissive abstention;
>
> Count four–the court declines to abstain from hearing this count. On consideration of the motion, the count is dismissed as against Aurora for failure to state a claim;
>
> Count five–the court abstains from hearing this count under the doctrine of permissive abstention;

Count six–the court abstains from hearing this count under the doctrine of permissive abstention;

Count seven–the court abstains from hearing this count under the doctrine of permissive abstention;

Count eight–the court abstains from hearing this count under the doctrine of permissive abstention.

The remainder of Aurora's motion is denied.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge