FILED & ENTERED

OCT 13 2016

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY ghaltchi DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Rubye E. Taylor, Debtor(s).	CHAPTER 13 Case No.: 2:14-bk-31128-NB Adv No: 2:15-ap-01183-NB
Rubye E. Taylor, *et al.,* Plaintiff(s), v. James B. Nutter and Company, *et al.,* Defendant(s).	**AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW AWARDING SANCTIONS AGAINST PLAINTIFFS AND THEIR COUNSEL FOR FAILURE EITHER TO PROSECUTE OR DISMISS ACTION** Continued Hearing Date Date: August 2, 2016 Time: 2:00 PM Courtroom: 1545

These "Amended Findings of Fact and Conclusions of Law Awarding Sanctions Against Plaintiffs and Their Counsel for Failure Either to Prosecute or Dismiss Action" are identical to this court's "proposed" findings of fact and conclusions of law entered on May 3, 2016 (adv. dkt. 75), except for correction of some typographical errors and the fact that, on further reflection (dkt. 107, Ex. A) and as explained below, this court has concluded that it has the authority to issue a final judgment or order.[1] *See Stern v. Marshall*, 131 S. Ct. 2594 (2011). *See also In re White Crane Trading Co.*, 170 B.R. 694, 700-01 (Bankr. E.D. Cal. 1994) (at any time prior to appeal, bankruptcy court could change its mind based on new information or argument or "just fresh thoughts").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiffs have had to face the trauma of losing their home and their expected inheritance. They have, understandably, attempted to fight against that loss. But they have used improper tactics to do so.

When faced with insufficient grounds to prosecute this action, the plaintiffs and their counsel nevertheless failed and refused to dismiss it. That forced the defendants to incur costs they should not have had to incur, in particular the costs associated with a motion to dismiss to which the plaintiffs had no good defense. The plaintiffs and their lead counsel Matthew D. Resnik, Esq., are jointly and severally liable for the resulting attorney fees and costs incurred by the defendants.

I. BACKGROUND

A. Facts Leading The Plaintiffs To Suspect Fraud In Reverse Mortgage

The plaintiffs appear to be among the expected heirs of Mr. Lawrence Taylor (the "Decedent"), who died in 2011. Plaintiff Ms. Rubye E. Taylor ("Ms. Taylor") is the debtor in this bankruptcy case, and she was 87 years old when this action was commenced on April 13, 2015. The other plaintiff, Andre Del Monte Freeman ("Mr. Freeman") is the Decedent's son.

They claim that the Decedent had promised them the property at 424 East 95th Street, Los Angeles, California (the "Home"). They believe that someone must have forged the Decedent's signature on reverse mortgage documents that ultimately

[1] For brevity, filed documents are referred to by docket number, and generally a short title, rather than their full title ("adv. dkt. __" for documents filed in this Adversary Proceeding, or "case dkt. __" for documents filed in the bankruptcy case itself). Unless the context suggests otherwise, references to a "chapter" or "section" ("§") refer to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Bankruptcy Code"), a "Rule" means one of the Federal Rules of Bankruptcy Procedure, Federal Rules of Civil Procedure, or other federal or local rule, and other terms have the meanings provided in the Bankruptcy Code, the Rules, and the parties' briefs.

resulted in their loss of the Home through a foreclosure sale. *See* Complaint (adv. dkt. 1), para. 14, 15, 16, 19, 24, 25, 27, 31, 36, 38, 39.

The plaintiffs have no direct evidence of any forgery, but they point to some troubling facts. They learned that in 2004 the Decedent had transferred the Home to himself and his daughter, Ms. Latanya Hill, as joint tenants, then in 2007 Ms. Hill and the Decedent transferred the property back to the Decedent, and a few days later the reverse mortgage deeds of trust were recorded. Although the defendants assert that over $240,000 was disbursed when the reverse mortgage was entered into, the plaintiffs had no knowledge of any such funds despite the fact that Ms. Taylor shared a joint bank account with the Decedent, managed their finances "for more than a decade due to [the Decedent's] deteriorating health," and had lived with him in the Home since approximately 1980. *See* Complaint (adv. dkt. 1), para. 19, 22-25, 29-30. The plaintiffs also allege that the Decedent never discussed the reverse mortgage loan and that he "did not believe in incurring debt for any reason." *Id.*, para. 30.b. and c.

These facts could be interpreted to suggest that someone (perhaps Ms. Hill) either persuaded the elderly Decedent to obtain a reverse mortgage, or forged his name or the reverse mortgage documents, so as to take out $240,000 in cash, which was then promptly dissipated or transferred (to Ms. Hill or, given her alleged poverty after the transaction, to other unknown persons). Such a scenario would be typical of financial elder abuse.

Sad to say, it is not unknown for unscrupulous brokers, notaries, and lenders to be knowing participants in such schemes. In other words, there were valid reasons for Ms. Taylor and Mr. Freeman to question whether the defendants might have been involved in some sort of fraudulent scheme to create the reverse mortgage.

B. The Plaintiffs' Prior Attempts To Investigate, And To Stay In The Home

The plaintiffs apparently have not been able to locate or contact Ms. Hill. *See* Kritzer Decl. (adv. dkt. 58) p. 4:15-16. In addition, if the plaintiffs have attempted to

//

locate and obtain documents from the entity that handled the escrow (or any successor) they were unsuccessful.

The only other persons who apparently would have knowledge of the alleged transactions are the defendants. They are (a) the original beneficiary under the deed of trust, James B. Nutter and Company ("Nutter and Co."), (b) its principal, James B. Nutter, and (c) its transferee, Federal National Mortgage Association ("Fannie Mae").

Suspecting fraud, but lacking any solid evidence, Mr. Freeman previously attempted to retain the Home by filing an action against Nutter and Co. in the California Superior Court (Case No. BC492597) (the "State Court Fraud Action"). The Resnik firm[2] was unaware of the State Court Fraud Action when this adversary proceeding was filed, and apparently only became aware of it through the defendants' request for sanctions. *See* Opposition to Sanctions (adv. dkt. 58), p. 6:9-10. *Cf*. adv. dkt. 52 at PDF pp. 8-9, carryover paragraph (brief reference to an unspecified prior action in an attachment that the defendants added to a mediation order lodged on or about June 19, 2015, but without any case number or other specific information).

After foreclosure the plaintiffs had also attempted to defend against eviction in an unlawful detainer proceeding (Superior Court Case No. 14U07323). *See* Requests For Judicial Notice (adv. dkt. 52, para. 1-4. and adv. dkt. 20, para. 2-13).

Prior bankruptcy cases also delayed any foreclosure and eviction. The plaintiffs (or perhaps one of the many foreclosure prevention "services" that dupe desperate homeowners) apparently transferred interests in the Home to two third parties (the "Other Debtors") and used the automatic stay in those Other Debtors' bankruptcies for delay (a scheme known as "hijacking" a third party's bankruptcy case to stay foreclosure). There is no precise evidence as to the circumstances, but it is not uncommon for such schemes to be implemented without any knowledge of the homeowners. In other words, the plaintiffs have not been shown to have had any

[2] This term is used because Mr. Resnik was the plaintiffs' principal attorney, and because it is the term that has been used by the parties. No disrespect is intended. *See* adv. dkt. 58, p.3, n.2 (preferring "SRH" abbreviation of Simon Resnik Hayes LLP, but using the defendants' terminology for consistency).

knowledge of, or participation in, these schemes to use the Other Debtors' bankruptcy cases to delay foreclosure. *See also In re 4th St. E. Investors, Inc.*, 474 B.R. 709 (Bankr. C.D. Cal. 2012) (explaining hijacking).

Ms. Taylor also filed her own earlier bankruptcy petition. That case was dismissed when, allegedly through ill health, she failed to prosecute it. *See* Requests For Judicial Notice (adv. dkt. 20, para. 14-17 and adv. dkt. 52, para. 1-4 and Ex. 21-24).

C. The Plaintiffs' Attempts In This Bankruptcy Case To Stay In The Home

On November 10, 2014 (the "Petition Date"), Ms. Taylor, acting without an attorney, filed a voluntary petition for Chapter 13 bankruptcy (case dkt. 1). She filed a motion (case dkt. 7) to continue the automatic stay (which was due to expire 30 days after the Petition Date under § 362(c)(3) because of her prior, dismissed bankruptcy case). That motion was heard and granted without opposition on December 2, 2014, but this Court outlined for Ms. Taylor the difficulty of attempting to proceed without legal counsel. On January 22, 2015 the Resnik firm became her counsel of record (case dkt. 19).

On February 2, 2015, Fannie Mae filed a motion for relief from the automatic stay (the "R/S Motion") (case dkt. 26). Among other things, the R/S Motion pointed out that the Home had already been foreclosed upon, and that Fannie Mae had a basis to proceed with eviction pursuant to an order (the "In Rem R/S Order") issued in one of the Other Debtors' bankruptcy cases (*In re Tracy Jones*, Case No. 2:12-bk-42325-WB).

The In Rem R/S Order granted Fannie Mae relief under Section 362(d)(4), which provides that relief from the automatic stay is effective in subsequent cases, such as this present case. *See* R/S Motion, Ex. "1" or "A" (case dkt. 26-1, at PDF pp. 1-8).

Ms. Taylor's written response pointed out that the motion seeking the In Rem R/S Order had never been served on her – *i.e.,* that the order might not be binding on due process grounds. *See* Opposition (case dkt. 31, p. 11:24-27). *See also* case dkt. 71 at PDF p. 13 (proof of service of motion in *Tracy Jones* case, which does not show service on Ms. Taylor).

On February 17, 2015, at the hearing on the R/S Motion, this Court continued the hearing to allow the parties additional time to address the due process issues, and to permit Ms. Taylor to seek remedies such as relief from the In Rem R/S Order. At a continued hearing on April 4, 2015, this Court was persuaded to grant conditional and limited relief from the automatic stay: first, any such relief would only be effective after May 12, 2015, and second, such relief was subject to reconsideration if (as later transpired) Ms. Taylor obtained relief from the In Rem R/S Order on May 7, 2015. *See* Order Granting Motion To Vacate Order Granting James B. Nutter And Company In Rem Relief Under 11 U.S.C. § 362(d)(4) (Case No. 2:12-bk-42325-WB, dkt. 83, the "Order Vacating In Rem R/S Order").

Meanwhile the plaintiffs' counsel orally requested a stay of any eviction. This Court pointed out, however, that any injunctive relief would require an adversary proceeding (under Rule 7001). On April 13, 2015 the plaintiffs filed their complaint commencing this adversary proceeding, which asserts claims for fraud based on forgery against all defendants except Fannie Mae; civil conspiracy against all defendants except Fannie Mae; cancellation of the foreclosure trustee's deed upon sale against defendant Fannie Mae only; quiet title against defendants Fannie Mae and all others claiming an interest in the subject property; and declaratory relief against all defendants (adv. dkt. 1). The summons and complaint were not served on all defendants immediately (adv. dkt. 3, 6) and the parties stipulated to several continuances of the time to file an answer or other response (adv. dkt. 8, 11, 15).

At a continued hearing on Fannie Mae's R/S Motion, on May 12, 2015, this Court was persuaded that, despite the entry of the Order Vacating In Rem R/S Order, the foreclosure of the Home had already occurred on January 31, 2014 when there was no automatic stay. Therefore this Court concluded that it was bound by the State Court's unlawful detainer judgment, so some sort of relief from the automatic stay would be required – without prejudice to the ability of Ms. Taylor and Mr. Freeman to seek nonbankruptcy remedies such as damages for wrongful foreclosure or even avoiding the foreclosure if they could prove their allegations that the reverse mortgage was fraudulent. In addition, this Court was persuaded again to impose conditions. First, the automatic stay would not be immediately terminated, so that there could be no lockout prior to midnight on August 12, 2015, and second, this Court ordered the parties to mediation.

D. The Much Delayed Mediation

This Court set a deadline of May 19, 2015 for the parties to lodge a proposed order assigning them to mediation (or separate orders, if they could not agree). *See* case dkt. 63 (transcript), p. 27:12-20. Eventually this Court issued three separate orders for mediation and it took until October 28, 2015 before the parties actually attended a mediation session.

Initially the parties could not agree on a mediator. The plaintiffs made one suggestion on May 13, 2015; the defendants made four counter-proposals on May 15 and, not having heard back, followed up on May 18 and, a few hours later, lodged a unilateral proposed form of order. The form of order lodged by the defendants included an attachment objecting to the scope of mediation (and asserting that the plaintiffs had been non-cooperative in attempting to select mediators) (*see* case dkt. 46 at PDF pp. 6-7). No alternative proposed order was lodged by the plaintiffs, so on May 20, 2016 this Court issued the order (case dkt. 47) designating the mediator and alternate mediator proposed by the defendants (without the defendants' argumentative attachment). *See generally* Heafner Decl. (adv. dkt. 51), Ex.H, pp. 169-71 (emails regarding selecting mediators and lodging orders).

On June 15, 2015 the principal selected mediator filed a notice of non-availability (case dkt. 51) and the same day the parties agreed on another mediator and an alternate. Heafner Decl. (case dkt. 51), Ex. K, p. 207. The defendants' counsel wrote to the plaintiffs' counsel requesting, "Can you please prepare the order this time?" (adv. dkt. 51, Ex. K, p. 207.) On June 16, 2015, the defendants' counsel asked the plaintiffs' counsel to send the proposed order as soon as possible (*id*. at Ex. K, p.206) but was told that the Resnik firm “had a few fires to put out” and was asked, “Can you please prepare the stipulation in a manner your clients would feel appropriate” (*id.*). The defendants’ counsel prepared the stipulated order and on June 19, 2015 this Court entered it (case dkt. 52).

The defendants’ counsel then wrote, “We trust you will now handle the service and filing requirements set forth in Section 1(a) on pages 3-4 of the order” (adv. dkt. 51, Ex. K, p.206). On June 23, 2015 and twice on July 6, 2015 defendants’ counsel repeated this request (*see* adv. dkt. 51, Ex. B, p.12; Ex. D, p.138; Ex. K, p.213). In an email on August 11, 2015 defendants asserted that “[Plaintiffs’ counsel’s] failure to timely serve, notify, and/or follow up with [the principal mediator] and the alternate [mediator] to diligently schedule the mediation before the 90 day window [before the lockout] elapsed, cuts against whatever exigency [the plaintiffs’ counsel] hope to convey.” Adv. dkt. 51, Ex. G, p. 162.

At a hearing on September 17, 2015 counsel for the plaintiffs represented that the parties had participated in mediation as ordered. Adv. dkt. 39 (transcript), p. 31:15-16. It is now undisputed that this was not accurate.

In any event, at that hearing for the third time this Court orally ordered the parties to mediation (this time primarily based on the sanctions issues). On September 21 and 22, 2015 counsel for both sides exchanged a series of emails (1) disputing whether the plaintiffs’ counsel had agreed to prepare the mediation order and (2) disagreeing over each side’s proposed mediators (*see* dkt. 51, Ex. L, pp. 222-24). On September 25, 2015 the plaintiffs inquired about the proposed order from the defendants (*id*. at 222). On September 28 and 29, 2015 the parties continued to go back and forth regarding the selection of a mediator (*id.* at 217-220). On September 29, 2015, the defendants’ counsel notified the plaintiffs’ counsel: “We are still open to using … the two mediators everyone agreed to before – as we indicated to you immediately after the hearing” (*id.* at 217). On October 1, 2015 counsel for the plaintiffs lodged a fully executed proposed

//

order designating those two mediators (adv. dkt. 40), which this Court issued the next day (adv. dkt. 41).

On October 28, 2015 a mediation finally occurred. It was unsuccessful. *See* adv. dkt. 43 (mediator's certificate).

E. The Plaintiffs' Failure Either (1) To Prosecute Their Claims Or Alternatively (2) To Voluntarily Dismiss Them

Meanwhile, on May 12, 2015, the parties met and conferred and they agreed to some informal discovery. Adv. dkt. 19, para. 2 and Ex.A. Starting on or about June 10, 2015 the defendants notified the plaintiffs that the relevant documents were assembled and could be reviewed. Adv. dkt. 51, Ex.B, p. 8.

After some scheduling issues one of the plaintiffs' attorneys from the Resnik firm came to the offices of the defendants' attorneys on July 1, 2015 and reviewed various documents. Those documents included evidence that appears on its face to completely undermine the plaintiffs' claims: (a) pre-loan disclosures and counseling certifications and acknowledgements by the Decedent, including that he had been advised to discuss the reverse mortgage with his family members and those upon whom he relied for financial advice; (b) notary certifications of the Decedent's signatures (including one in the Home); (c) photographs inside the Home; (d) photocopies of the Decedent's driver's license and Social Security card; (e) escrow records showing the disbursement to the Decedent in cash; (f) the Decedent's acknowledgement of receipt of the funds in cash; (g) post-closing correspondence including annual confirmations of the reverse mortgage; and (h) the Decedent's repeated representations that Ms. Hill was his next of kin. *See* Chelgren Decl. (adv. dkt. 19), para. 3-6, and Heafner Decl. (adv. dkt. 51), para. 6-8 and Ex.C-1 though C-5.

The plaintiffs assert that they had no opportunity to copy those documents and fully examine them. The defendants allege that they offered to provide copies. This dispute is irrelevant because, as the defendants point out, the plaintiffs cannot point to

//

any written request for copies of the documents so they cannot use the absence of such documents as an excuse for otherwise sanctionable conduct.

Thereafter the defendants repeatedly asked the Resnik firm if the plaintiffs would consent to dismiss their complaint (without leave to amend). On July 6, 2015 the defendants asserted that the documents they had shared with the Resnik firm "prove the loan proceeds were properly transmitted to the borrower and disprove [plaintiffs'] allegations of fraud and identity theft" (adv. dkt. 51, Ex. D, p. 138). The defendants advised the Resnik firm that if the plaintiffs did not agree to dismiss the lawsuit, thereby forcing them to respond to the complaint with a motion to dismiss, they would file a motion for sanctions and "seek all of [their] attorneys' fees and costs incurred […] jointly and severally from Plaintiffs and [the Resnik] firm" (id.). The Resnik attorney responded that he had not yet spoken to his client "but [was] trying to do so ASAP" (adv. dkt. 51, Ex. K, p. 213).

Emails on July 13 and 15, 2015 from the defendants' counsel to the Resnik firm inquired whether that client consultation had occurred (adv. dkt. 51, Ex. D, p. 140). The Resnik firm responded that the plaintiffs were "still reviewing the information," but that the firm would follow up with them again (adv. dkt. 51, Ex. D, p. 141) (the firm had difficulty reaching the plaintiffs). Kritzer Decl. (adv. dkt. 58, commencing on PDF p. 63 of 122), at para. 27.

On July 20, 2015, not having received a response from the Resnik firm, the defendants again warned that they would "need to proceed with next steps," if the plaintiffs "refuse[d] to dismiss [this adversary proceeding] and if [the Resnik firm] continued to prosecute this action on their behalves" (*id.* at 143). The Resnik firm responded the same day, explaining that their investigation was "taking longer than anticipated" (adv. dkt. 51, Ex. E, p. 148).

On July 24, 2015, the defendants informed the Resnik firm that unless they immediately agreed to dismiss the complaint with prejudice they would serve that firm with a motion seeking sanctions against them and their clients, jointly and severally (adv. dkt. 51, Ex. E, pp.147-48). The defendants added that they would not delay the case any further and would "aggressively obtain a dismissal of the action on the merits along with substantial sanctions" (*id.* at 148).

On August 11, 2015 the defendants' counsel were informed by telephone that the plaintiffs were not prepared to dismiss their complaint. Chelgren Decl. (adv. dkt. 19) p. 3:11-20. On August 14, 2015 the defendants filed their motion to dismiss (adv. dkt. 18, as amended at adv. dkt. 25). That motion included a request (adv. dkt. 25, p. 3:12-18) for "sanctions in the amount of $90,162.00 against both Plaintiffs and their counsel, jointly and severally."

On September 1, 2015 the plaintiffs responded (adv. dkt. 27, 28) by requesting a voluntary dismissal of their complaint. The next day this Court issued an order (adv. dkt. 29) dismissing the complaint while retaining jurisdiction to address the defendants' request for sanctions.

II. JURISDICTION AND AUTHORITY

This Bankruptcy Court has jurisdiction under 28 U.S.C. § 1334 because these sanctions proceedings arise in this bankruptcy case and are related to it. *See In re AWTR Liquidation, Inc.*, 547 B.R. 831, 834 (Bankr. C.D. Cal. 2016). In addition, for the following reasons, this Bankruptcy Court concludes that it has authority to enter a final order on the defendants' request for sanctions.

Under the plain words of *Stern*, the ability of a court to manage the proceedings before it stems from "the bankruptcy case itself," and therefore sanctions proceedings are "core" both as a statutory matter and a constitutional matter. At least one other reported decision has reached the same conclusion. *See* 28 U.S.C. § 157(b)(2)(A); *In re David*, 487 B.R. 843, 867 (Bankr. S.D. Tex. 2013) (holding that bankruptcy courts have authority under *Stern* to enter a final order imposing sanctions pursuant to their inherent powers). *See also AWTR*, 547 B.R. at 836 (under controlling decisions, the bankruptcy courts' authority to issue final judgments ends where jury rights begin); *In re Lehtinen*, 564 F.3d 1052, 1060-61 (9th Cir. 2009) (affirming sanctions under bankruptcy court's inherent power, and rejecting argument that due process required procedures akin to criminal proceedings, such as a jury trial).

That ends the analysis. But alternatively, supposing for the sake of discussion that the plain meaning of *Stern* were insufficient to establish that sanctions proceedings are constitutionally core, any ambiguity is resolved by policy considerations and analogous authority that favor the same conclusion. In other words, bankruptcy courts have authority to issue sanctions rulings that are final (subject, as always, to appellate review).

First, it is important to recognize that the constitutional principles addressed in *Stern* cut both ways: (i) on the one hand *Stern* perceived a threat to separation of powers and individual liberties from granting too much leeway to Article I courts to issue final rulings (apparently, although it is not entirely clear, the perceived threat is that Congress could react to such rulings by reducing Article I judges' salaries, or taking away from Article III judges the power to reappoint Article I judges, thereby threatening the impartiality of Article I judges) (*see AWTR*, 547 B.R. at 840-41), and (ii) on the other hand, a respect for separation of powers also requires due deference to Congress' power to enact statutes, such as 28 U.S.C. § 157(b) which grants bankruptcy judges the power to issue final rulings, and that deference includes not ruling such statutes unconstitutional unless truly necessary. *Id.* In other words, this court should be careful not to adopt too broad a reading of *Stern*.

Second, as a practical matter, this Bankruptcy Court has "lived with" this case as it has unfolded, which includes observing counsel and hearing arguments in open court. All of that has aided this court in assessing sanctions issues, such as whether Mr. Resnik had vexatious intent when he continued to argue irrelevant Rule 9011 issues at oral argument (which is addressed in a separate memorandum decision). It would place an undue burden on the District Court (and unnecessarily expand *Stern*) if it had to parse the "cold record" to assess Mr. Resnik's intent at oral argument.

//

Third, interpreting sanctions rulings as mere proposals – not final rulings – takes the teeth out of them. That would impede the ability of bankruptcy courts to manage their cases (and ultimately that would impede the District Court's management of bankruptcy cases, because the Bankruptcy Court is a "unit" of the District Court to which bankruptcy cases are referred). *See* 28 U.S.C. § 151.

Fourth, although *de novo* review does not necessarily require a complete re-litigation of all issues (*AWTR*, 547 B.R. at 840), the mere possibility of having to re-litigate the issues is an undue deterrent against any party seeking sanctions. To the extent that re-litigation is required, it can add considerable expense, delay, and inconvenience to all parties. *Id.*

Fifth, much if not most bankruptcy-related litigation is at least partially "core" (both statutorily and constitutionally). If sanctions are non-core then the District Court will have to conduct another layer of analysis about what standard of review to apply – to further "unscramble the eggs," and the parties will bear the expense of this "meta-litigation" over how the District Court should review this Bankruptcy Court's decisions.

Sixth and finally, it is analogous that even when an Article III court lacks jurisdiction (and hence any authority) over the underlying dispute, it can still issue sanctions pursuant to its inherent powers. *See Kloberdanz v. Martin*, 203 F.3d 831 (9th Cir. 1999) (*citing Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992) (determinations regarding sanctions are collateral to the merits of the underlying action and thus do not raise constitutional concerns over "a district court adjudicating the merits of a 'case or controversy' over which it lacks jurisdiction")). Just as a District Court's issuance of sanctions is collateral and thus does not involve constitutional concerns regarding jurisdiction, this court concludes that a bankruptcy court's issuance of sanctions is also collateral does not involve the constitutional concerns outlined in *Stern*.

Additionally and alternatively, the plaintiffs and the Resnik firm have consented to this court's entry of a final order in this adversary proceeding. *See* adv. dkt. 86. Such

//

consent is sufficient to satisfy *Stern* pursuant to the U.S. Supreme Court's decision in *Wellness Intern. Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015).

III. SANCTIONS PROCEEDINGS AND LEGAL STANDARDS

The defendants request "sanctions in the amount of $90,162.00 against both Plaintiffs and their counsel, jointly and severally, pursuant to 28 U.S.C. § 1927, Federal Rule of Bankruptcy Procedure 9011(c)(1)(B) [*i.e.,* requesting this Court to act on its own motion], Local Bankruptcy Rule 7054-1 [governing costs and attorney fees], and this Court's inherent powers, as Plaintiffs and their counsel have needlessly and improperly compounded the costs of this litigation [in that they] have maintained this frivolous lawsuit in bad faith and for nothing other than the improper purposes of harassing Defendants and needlessly increasing the costs of litigation for Defendants." Adv. dkt. 18, p.3:12-18, *and* adv. dkt. 25, p.3:12-18 (emphasis omitted). At hearings on November 10, 2015 and February 2, 2016, this Court ruled that the asserted grounds for sanctions are inapplicable, except for this Court's inherent powers. Nevertheless, those oral rulings are reiterated below because the Resnik firm's briefs continue to confuse all the other grounds with the sole basis for sanctions.

A. 28 U.S.C. § 1927 Is Inapplicable

By its terms 28 U.S.C. § 1927 only empowers a "court of the United States" to impose sanctions. The Court of Appeals for the Ninth Circuit has ruled that, under the statutory definition of the quoted phrase, this Bankruptcy Court cannot impose sanctions under this statute. *In re DeVille*, 361 F.3d 539, 546 (9th Cir. 2004) (quoting with approval the BAP's summary that "28 U.S.C. § 1927 does not suffice [for sanctions] because the Ninth Circuit does not regard a bankruptcy court as a 'court of the United States.'").

B. Rule 9011 is Inapplicable

As noted in the defendants' reply (adv. dkt. 61, p. 2, n.2), this Court expressly stated at the status conference on November 10, 2015 that this matter is proceeding solely under this court's inherent sanctioning powers, not Rule 9011. *See* Transcript

11/10/15 (adv. dkt. 55), p. 7:7-23. Despite that fact, the plaintiffs' counsel have raised numerous arguments under Rule 9011, including their assertion that an order to show cause is required (adv. dkt. 58, p. 19:12-15), or that a 21 day "safe harbor" provision applies, or that a separate motion is required to request sanctions (*id.* at pp. 20:1-26:14), or that absent such a separate motion sanctions can only be payable to the Court, not the defendants. The plaintiffs have not cited any authority that these same requirements apply to the current proceedings, which are <u>not</u> under Rule 9011.

It is true that a separate motion for sanctions would have been the better practice, but Ninth Circuit authority (cited by the plaintiffs themselves) has affirmed an award of sanctions under the bankruptcy courts' inherent authority despite the lack of a separate motion. *See DeVille*, 361 F.3d 539, 544, 551 (9th Cir. 2004) (agreeing with the BAP that a declaration seeking attorney fees could not qualify as a separate "motion," but also ruling that, partly for this very reason, the rules and statutes were "inadequa[te]" to award attorney fees so "the bankruptcy court correctly relied upon its inherent power as a sanctioning tool").

DeVille also held that sanctions under the Bankruptcy Court's inherent authority can include attorney fees payable to a party. The award need not be payable to the Court. *See id.* at 545, *and compare id.* at 551-53.

In any event, even if a separate motion normally would be required outside of the Rule 9011 context, the plaintiffs (and the Resnik firm) abandoned any such requirement at the end of the hearing on February 2, 2016. This Court pointed out that the plaintiffs (and the Resnik firm) had plenty of notice of the alleged misconduct and if they insisted on a separate motion it would only result in a repetition of identical proceedings, which would increase the expenses of all parties and, in all likelihood, the damages to which they were exposed.

C. LBR 7054-1 Is Not An Independent Basis For Sanctions

The defendants' motion to dismiss also requests sanctions pursuant to Local Bankruptcy Rule 7054-1 (dkt. 18, p. 3:14). This local rule, titled "Taxation of Costs and

Award of Attorneys' Fees," simply provides instructions for a prevailing litigant to recover costs and fees awarded by the court. As a local rule of bankruptcy procedure, it "cannot be applied in a manner that conflicts with the federal rules; it must be consistent with the Code, the Rules and the Civil Rules," and it neither purports to nor does expand this Court's authority to award sanctions. *See In re Pham*, 536 B.R. 424, 432 (9th Cir. BAP 2015).

D. The Bankruptcy Court's Inherent Sanctioning Powers Are Applicable

The sole remaining basis for sanctions is this Bankruptcy Court's inherent powers. The parties appear to agree (adv. dkt. 58, p. 18:15-17 *and* adv. dkt. 61, p. 2:10-15) that "[t]o impose inherent power sanctions, a court must find that a party acted 'in <u>bad faith, vexatiously, wantonly, or for oppressive reasons</u>.'" *Deville*, 361 F.3d 539, 544 (9th Cir. 2004) (citation omitted, emphasis added). In other words, "[m]ere ignorance or inadvertence is not enough to support a sanction award under the inherent authority," and "specific intent or other conduct in 'bad faith or conduct tantamount to bad faith' is necessary to impose sanctions under the bankruptcy court's inherent power." *In re Dyer*, 322 F.3d 1178, 1196-97 (9th Cir. 2003) (quoting *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001)).

(1) "Clear and convincing" standard applies

At the November 20, 2015 status conference, this Court invited the parties to brief whether the defendants must prove sanctionable conduct by clear and convincing evidence or by a preponderance of the evidence. *See* adv. dkt. 55, pp. 10:3-8, 22:17-23:3. The Ninth Circuit has not yet resolved that issue. *See In re Lehtinen*, 564 F.3d 1052, 1061 n. 4 (9th Cir. 2009); *In re Dyer*, 322 F.3d 1178, 1197 n. 20 (9th Cir. 2003); *F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, Inc.*, 244 F.3d 1128, 1143 n. 11 (9th Cir. 2001).

The defendants have cited one decision in the Northern District of California applying the preponderance of the evidence standard (adv. dkt. 49, p. 6:7-12, citing *In re Napster, Inc. Copyright Litig.*, 462 F.Supp.2d 1060, 1072 (N.D. Cal. 2006) (dismissal sanction for destruction of evidence)). While respecting that decision from the District Court of another district, this Bankruptcy Court is not bound by it and is persuaded that the most analogous and persuasive authority requires proof by clear and convincing evidence. *See, e.g., Shepherd v. Am. Broadcasting Co's, Inc.,* 62 F.3d 1469, 1476-78 (D.C. Cir. 1995) (cited in *Hanshaw*, 244 F.3d 1128, 1143 n. 11); *Parsi v. Daioleslam*, 778 F.3d 116, 131 (D.C. Cir. 2015) (following *Shepherd*).

Alternatively, this Bankruptcy Court would reach the same results stated below regardless whether the "preponderance of the evidence" or "clear and convincing" standard applies.

(2) "Punitive" sanctions

The plaintiffs argue that the sanctions requested by the defendants are punitive in nature and are not awardable by this court under its inherent authority (or under Rule 9011, but as explained above that rule is inapplicable). *See* adv. dkt. 58, p. 36:8-26. Actually, as the plaintiffs concede, the Ninth Circuit has held that punitive damages are awardable under the court's inherent sanctioning power, although any such punitive damages cannot be "significant." *See Dyer*, 564 F.3d at 1059. Regardless, the defendants have not requested punitive damages; rather they have requested compensatory damages in the form of their fees incurred in prosecuting this matter. Reasonable attorney's fees are awardable as compensation. *See Deville*, 361 F.3d 539.

E. Evidentiary Issues

At the September 17, 2015 hearing, this Court noted that it was not contemplating any evidentiary hearing with live testimony, in an effort to keep the parties' costs down. *See* Transcript 9/17/15 (adv. dkt. 39), pp. 10:8-19 and 39:12-16. At the hearing on November 10, 2015 this Court reiterated that expectation and set a schedule for the parties to file short briefs and comprehensive declarations addressing the issues set forth below in lieu of holding an evidentiary hearing. *See* Transcript

//

11/10/15 (adv. dkt. 55), pp. 2:11-15, 24:13-20 and 25:7-22. The parties did not object to that procedure.

The defendants' evidentiary objections (adv. dkt. 63-66) are overruled, with the following limited exceptions. As for the Resnik declaration (adv. dkt. 58, commencing on p. 44 of 122), the following are excluded from evidence:

- "I then became aware from Mr. Kritzer that Defendants were unwilling to consent to the proposed Voluntary Dismissal unless [certain alleged conditions were satisfied]." (Adv. dkt. 58, commencing on p. 44 of 122, para. 41 at 11:5-11.) All objections (adv. dkt. 65, Obj. 25, at 23:7-24:14) are sustained – *e.g.,* hearsay – except for alleged irrelevance (because Mr. Resnik's understanding of any preconditions on dismissal bears to some extent on his intent, which is relevant to bad faith or other grounds for sanctions).
- "For some reason, all of Alston[']s attacks have been leveled at me or the firm. They have even gone as low as indicating I was part of some conspiracy to put Tracy Jones on the title. This is slanderous and representative of the scorched earth mentality Defendants have used throughout this Bankruptcy [case] …" (and similar statements). (Adv. dkt. 58, commencing on p. 44 of 122, para. 49-54 at 12:16-13:14.) All objections (Adv. dkt. 65, Obj. 26-31, at 24:15-29:9) are sustained.

As for the Kritzer declaration (adv. dkt. 58, commencing on p. 63 of 122), the following is included in evidence only for limited purposes:

- "Unfortunately, Defendants' counsel would not provide copies of any of the documents sought so I had to make mental and written notes about their contents and report back to Plaintiffs." (Adv. dkt. 58, commencing on p. 63 of 122, para. 25 at 9:8-10.) Objection (adv. dkt. 63, Obj. 20, pp. 22:5-14, objecting to "mischaracterization" of the evidence) sustained in part: although this Court accepts this statement in evidence to the extent that it bears on the intent of Mr. Kritzer, and therefore is relevant to "bad faith" and other mental states that could lead to sanctions, this Court need not and does not decide whose version of events to believe when it comes to making copies. As explained elsewhere in this Memorandum Decision, that is immaterial. Even if the plaintiffs' version of events regarding the initial review of the documents is accurate, they failed to follow up with a written request (formal or informal) for copies of any specific documents, so any lack of copies would not justify their failure to do anything: either to prosecute or to voluntarily dismiss their complaint.

The principal grounds for overruling the remaining evidentiary objections are that the declarations of the plaintiffs' lawyers are admitted in evidence not for the truth of any hearsay, nor for their legal conclusions, nor for any pejorative assessments (*e.g.,* "pestering" (*see* adv. dkt. 63, p. 22:21)), but instead to show whether the Resnik firm's attorneys and the plaintiffs themselves had the mental state to have acted in bad faith, or any alternative mental state that would warrant sanctions under the foregoing legal standards. In addition, the objections mostly go to the weight and not the admissibility of the evidence (*e.g.,* the objection (adv. dkt. 65, Obj. 7, at 5:15-7:8) to Mr. Resnik's declaration (adv. dkt. 58, commencing on p. 44 of 122, pp. 3:26-4:6) that one of the suspicious characteristics of the reverse mortgage, in his view, was that the loan to value ratio was too high). Alternatively, regardless of how this Court were to rule on the evidentiary objections, that would not change the following analysis.

IV. DISCUSSION

A. Adverse Rulings In The Unlawful Detainer Proceeding Do Not Render The Commencement Of This Adversary Proceeding Sanctionable

The defendants have not shown that the existence of the unlawful detainer proceeding should have caused the plaintiffs or their counsel to conclude that this adversary proceeding was barred by claim or issue preclusion. To the contrary, this Court takes judicial notice that such proceedings typically are very limited in scope, and their preclusive effect is probably limited. *See*, *e.g.*, *Lebbos v. Judges of Superior Court, Santa Clara County*, 883 F.2d 810, 815 (9th Cir. 1989) ("Because an unlawful detainer action is a summary proceeding designed to facilitate owners in obtaining possession of their real property, cross-complaints, countercomplaints, and affirmative defenses are inadmissible."); *see also Thomas v. Housing Authority of the County of Los Angeles*, 2005 WL 6136432, at *9 (C.D. Cal. June 3, 2005) ("California does not permit a tenant in an unlawful detainer action to assert counterclaims.").

In sum, the defendants have not shown that the unlawful detainer proceeding gives rise to preclusion at all, let alone that the plaintiffs or their counsel acted in "bad faith, vexatiously, wantonly, or for oppressive reasons" by commencing this adversary proceeding after any adverse judgment or rulings in the unlawful detainer litigation. To that extent, their request for sanctions is denied.

B. Mr. Friedman's State Court Fraud Action Was Dismissed Without Leave To Amend, And Although It Was Inappropriate For Mr. Friedman To Bring Essentially The Same Claims In This Adversary Proceeding, That Is Not A Sufficient Basis For Sanctions Under The Circumstances

Ms. Taylor was not a party to the State Court Fraud Action. Mr. Freeman filed the State Court Fraud Action *in pro per* and listed three causes of action in his complaint for (1) predatory lending; (2) elder financial abuse; and (3) declaratory judgment (adv. dkt. 52, Ex. 21, at PDF pp. 3-4). Mr. Freeman's complaint and amended complaint (adv. dkt. 52, Ex. 21 and 22), both recount essentially the same factual allegations and the same theory of fraud and forgery as asserted in this adversary proceeding. The State Court Fraud Action was dismissed on March 22, 2013, and a judgment was entered on June 10, 2013 (adv. dkt. 52, Ex. 24). Presumably (although the issue has not been briefed) claim preclusion and issue preclusion barred Mr. Freeman from renewing essentially the same claims in this adversary proceeding, and that is strong evidence that he has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in continuing to bring the same claims. *Deville*, 361 F.3d 539.

Nevertheless, weighed against these concerns are the facts that (a) the defendants did not argue at the inception of this adversary proceeding that claim or issue preclusion applied; (b) they continued not to raise preclusion issues until it was too late, when these sanctions proceedings had already commenced (except for a brief reference on June 19, 2015 when the possibility of preclusion was mentioned, without citation to any case number or any other information that would identify the State Court Fraud Action, dkt. 52 at PDF pp. 8-9, carryover paragraph); and (c) there is no evidence that the defendants presented authority on claim or issue preclusion to the plaintiffs, or used any such authority as a basis to demand dismissal of this action. If preclusion had been raised earlier then that might have resulted in a faster and less costly disposition of this matter and, particularly relevant for present purposes, it would have given Mr. Freeman the opportunity to demonstrate his lack of bad faith or other sanctionable intent, or to mitigate damages by agreeing to a judgment against himself or otherwise acknowledge preclusion from his dismissed State Court Fraud Action.

In addition, the defendants have not cited factual or legal support for applying any preclusion against Ms. Taylor or the Resnik firm. Ms. Taylor was not a party to the State Court Fraud Action. The Resnik firm alleges (and there is no evidence to the contrary) that it did not know about the action.

For all of these reasons, it is true that Mr. Freeman's attempt to relitigate the issues that were decided against him in the State Court Fraud Action is troubling. But this Court is not persuaded that this is a sufficient basis to award any sanctions against him, or Ms. Taylor, or the Resnik firm.

C. The Defendants Have Not Shown That Commencing This Adversary Proceeding Without More Evidence Was Sanctionable

Investigation by the plaintiffs and the Resnik firm before filing the complaint revealed the suspicious circumstances described at the start of this memorandum decision. The defendants have not shown that it was improper to file the complaint in these circumstances, let alone that the plaintiffs or their counsel acted in "bad faith, vexatiously, wantonly, or for oppressive reasons." *Deville*, 361 F.3d 539, 544 (9th Cir. 2004) (citation omitted).

The Resnik firm's investigation before commencing this adversary proceeding included that it "(a) met with Plaintiffs on several occasions, including 5 attorneys and discussed the facts of the case, (b) conducted a title search and reviewed it thoroughly with the client, (c) reviewed Lawrence's [the Decedent's] will, (d) conducted a credit report search and discussed the results with the Plaintiffs, (e) called and spoke to the police investigators regarding the file and lastly (f) discussed with the Ch. 13 Trustee Senior Attorney Aki Koyama as an independent third party who interviewed the Debtors under oath." Adv. dkt. 58, p. 6:16-22. The defendants argue that obtaining a credit report was meaningless because a reverse mortgage typically does not appear on a credit report. That misses the point. A credit report could reveal something like gambling debts or a spending spree that might have explained why the Decedent would have taken out a reverse mortgage and why he would have hidden any such transaction; and the absence of those things supported the plaintiffs' suspicions.

The defendants argue that the Resnik firm did not adequately investigate the plaintiffs' standing. The Resnik firm relied on Mr. Freeman's claim to have an interest in the Home "by virtue of a Grant Deed from the Trustee of a Living Trust" established by the Decedent before his death (adv. dkt. 1, p. 5). The firm also relied on Ms. Taylor's claim to have a common law marriage or at least a promised life estate in the Home, based on statements by the Decedent.

It is true that these assertions may be subject to factual and legal challenges. For example, the defendants have argued that California does not recognize common law marriage. *See* adv. dkt. 61, pp. 5:23-6:13. In addition, the plaintiffs are strangers to the reverse mortgage loan and Mr. Freeman was held to lack standing in State Court Fraud Action (*see* adv. dkt. 59, Ex. 1 (minute order in State Court Fraud Action)).

Nevertheless, those things are not conclusive. Again, there is no evidence that the Resnik firm knew of the State Court Fraud Action when it filed this action. In addition, the plaintiffs had colorable grounds to assert an interest or expectancy in the Home, having done many things for the Decedent over many years; and if the defendants actually had been participants in elder abuse and fraud that harmed the plaintiffs' alleged interests in the Home, then the plaintiffs had a colorable basis to assert standing to redress that wrong, or at least the defendants have not established the contrary.

In any event, the defendants must do more than show that the plaintiffs and the Resnik firm were wrong about the issue of standing: they must show bad faith or other sanctionable intent, and they have not done so. *See* Resnik Decl. (adv. dkt. 58), starting on p. 44 of 122, para. 16 at 6:7-11 ("we reasonably believed that [Ms. Taylor's] life estate and possession of the subject property formed a viable the basis for her standing, notwithstanding her misstatement to us regarding her relationship to [the Decedent]. Part of her misstatement is due to her age and the possibility of shame from other [family] members.")

It is true that conceivably more could have been done. The defendants argue (*e.g.,* adv. dkt. 61, p. 5:2-23) that before commencing this action the Resnik firm should have attempted to find out if the Decedent had deposited the funds from the reverse mortgage into a bank account. Initially that was this Court's presumption (*see id.*, quoting transcript). But the plaintiffs point out that Ms. Taylor managed the Decedent's known finances, and if there were additional hidden bank accounts then it is unlikely that such accounts could be readily discovered. The banks probably would not readily share such information due to privacy concerns (just as the defendants have been reluctant to share comparable information), and by definition if an account was intended to be hidden then it might well be in a different name, at a different bank, or otherwise difficult if not impossible to discover.

Similarly, although the better practice might have been to attempt to locate Ms. Hill prior to filing the complaint (*see* adv. dkt. 61, p. 7:3-14), the Resnik firm relied on the plaintiffs' information that she was unlikely to have received the funds. According to the plaintiffs, after the reverse mortgage transaction Ms. Hill did not own a car and appeared to have limited financial resources. True, her name was on the reverse mortgage documents and she might have provided insights that would help identify what happened to the funds, but this Court cannot find (either by clear and convincing evidence or, if it were the applicable standard, by a preponderance of the evidence) that the plaintiffs or the Resnik firm acted in "bad faith" or with other sanctionable intent by not attempting to locate Ms. Hill before filing the complaint.

The defendants have not shown what else the plaintiffs and the Resnik firm reasonably should have done to investigate before filing this action, particularly given the plaintiffs' lack of financial resources. In addition, as the defendants have conceded, there was no opportunity for the plaintiffs to review the critical loan documents without commencing an adversary proceeding. *See* adv. dkt. 58, p. 1:7-9 (quoting the defendants' attorney: "the adversary proceeding is the first instance when [the plaintiffs] had a right to get this documentation [the loan documents]." Transcript (5/12/15) (case dkt. 63), p. 21:17-18.). For all of these reasons, the defendants have not established that in filing the complaint without more evidence the plaintiffs or the Resnik firm acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

D. The Mediation Issues

The defendants argue that the plaintiffs failed to abide by this Court's multiple oral and written orders directing the parties to mediation, and as a result they (the defendants) incurred substantial costs preparing for mediations that did not occur. It is true that the mediation took an inordinately long time to occur; but the evidence is insufficient to lay the blame for the delays and the failure to abide by this Court's first two written mediation orders squarely at the feet of the plaintiffs and their counsel. (It is a separate issue who should bear the costs of the mediation that did finally occur in response to this Court's third mediation order.)

To recap the background noted above, this Court orally ordered the parties to mediation at a hearing on May 12, 2015 but, as this Court noted at that time, no meaningful mediation could occur until after the plaintiffs had reviewed the defendants' documents. *See* case dkt. 63 (transcript), p. 27:12-20. That did not occur until July 1, 2015 (and there is insufficient evidence that the lack of any sooner document review can be attributed to the plaintiffs or their counsel acting in bad faith or with any other sanctionable intent).

Thereafter, there is a gap in any email correspondence that would clearly show who is to blame for the additional delays, until an email on August 11, 2015 in which the defendants asserted that "[the Resnik firm's] failure to timely serve, notify, and/or follow up with [the principal mediator] and the alternate [mediator] to diligently schedule the mediation before the 90 day window elapsed [when no lockout was permitted], cuts against whatever exigency [the plaintiffs' counsel] hope to convey" (adv. dkt. 51, Ex. G, p.162). It is true that this Court has the impression that the plaintiffs were not eager to engage in mediation, but that general impression is insufficient to find (under either the "clear and convincing" or "preponderance" standard) that the plaintiffs or the Resnik firm acted in bad faith or with other sanctionable intent.

It is also true, as noted above, that at the hearing on September 17, 2015 counsel for plaintiffs incorrectly represented that the parties had participated in mediation as ordered (adv. dkt. 39 (transcript), p. 31:15-16). But this Court cannot find that this statement was anything more than a mistake, probably caused by the fact that multiple attorneys at the Resnik firm were involved in the matter and that the firm has a high volume of cases.

In sum, the defendants have not established that the lack of progress toward mediation was as a result of the plaintiffs or the Resnik firm acting in bad faith, vexatiously, wantonly, or for oppressive reasons. But as noted above, that is a separate issue from who should bear the costs of the mediation that finally did occur.

This Court concludes below that as of July 28, 2015 the plaintiffs and the Resnik firm made a conscious decision to proceed with the complaint in a manner that improperly imposed the costs of the motion to dismiss on the defendants. The mediation, when it finally occurred, was principally to address the sanctions issues that flowed from the necessity of filing the motion to dismiss. Accordingly, the plaintiffs and the attorney(s) at the Resnik firm who made that decision are jointly and severally liable for the mediation costs after July 28, 2015.

E. Miscellaneous Alleged Grounds For Sanctions

The defendants advance various other alleged grounds for sanctions. Except as noted in the following section of this decision, those grounds are unpersuasive.

For example, it is true that the Resnik firm made a very aggressive argument (*see, e.g.,* dkt. 51, Ex. H, pp. 164-65) in attempting to limit the scope of the In Rem R/S Order. The firm appeared to argue that relief under Section 362(d)(4) does not to apply to a possessory interest, based on a (mis)reading (in the opinion of this Bankruptcy Judge) of *In re Perl*, 513 B.R. 566 (9th Cir. BAP 2014) (which, in any event, was subsequently reversed, 811 F.3d 1120 (9th Cir. 2016)). But the defendants have not shown that this aggressive argument meaningfully increased their costs in litigating the R/S Motion because the Resnik firm made other arguments that were more persuasive, including that the In Rem R/S Order had not been served on the plaintiffs and therefore was subject to due process concerns; and in fact Judge Brand later issued the Order Vacating In Rem R/S Order.

Another example is that the defendants object (a) to the plaintiffs recording a *lis pendens* without following the proper notice procedures under Cal. Code Civ. P. § 405.22, and (b) to some delays in releasing it. The Resnik firm counters that, although it made some mistakes, their recording of the *lis pendens* could not have interfered with the defendants' efforts to evict the debtor for most of the relevant time period because any eviction was deferred anyway by the "no lockout" provisions of this Court's orders on the R/S Motion. *See* Opposition (adv. dkt. 58), p. 15:1-21. The evidence is that the Resnik firm intended to withdraw the *lis pendens* on approximately September 10, 2015 – just over a week after this Court issued its order dismissing the complaint – and the release was not initially effective due to a notarizing error. The release subsequently was accomplished on October 8, 2015 within two days after a letter from the defendants' counsel alerting the Resnik firm to the issue. *See* adv. dkt. 51, Ex. I and J, at pp. 174-97.

While these things are somewhat troubling, this Court cannot find (either under the "clear and convincing" or the "preponderance" standard) that they were more than oversights. This Court is not persuaded that the plaintiffs or the Resnik firm acted in bad faith, vexatiously, wantonly, or for oppressive reasons in these matters.

F. The Plaintiffs And Their Counsel Failed To Dismiss Unsupported Claims After Repeated Requests

Once the plaintiffs had obtained voluntary discovery, the defendants repeatedly asked them to dismiss their claims. Instead of doing so (or prosecuting their complaint, if they had any basis for doing that) they did nothing, thereby imposing on the defendants the costs of their motion to dismiss, and everything flowing from that.

Initially the parties agreed to informal discovery. On May 14, 2015 the plaintiffs asked for information about "the circumstances regarding the loan" including "to whom" the disbursement was made and to "what account." Adv. dkt. 19, Ex. A.

On July 1, 2015 the plaintiffs examined extensive evidence (summarized above) about the bona fides of the loan. At this point the plaintiffs had only the thinnest theoretical basis for supposing the defendants could have had any connection with any wrongdoing.

There was ample evidence that the loan transaction had been properly documented and the funds actually had been disbursed; the Decedent had signed multiple loan documents including express disclosures; he had designated Ms. Hill (not the plaintiffs) as his next of kin; and he had ongoing correspondence with the defendants re-confirming that Ms. Hill (not the plaintiffs) was his next of kin. *See* Chelgren Decl. (adv. dkt. 19), para. 3-6, *and* Heafner Decl. (adv. dkt. 51), para. 6-8 and Ex.C-1 though C-5. It is possible, of course, that someone (*e.g.,* Ms. Hill, or an unknown individual) had engaged in a scheme of elder abuse or other wrongdoing that had tricked the Decedent into entering into the reverse mortgage and transferring away the proceeds (although it is also possible that the Decedent knew all along exactly what he was doing and intentionally kept it hidden from the plaintiffs). But supposing for the sake of discussion that there might have been some sort of elder abuse or other scheme, there was nothing tying the defendants to such a scheme.

The defendants requested in emails on July 6, 13, 15, 20, and 24, 2015 that the plaintiffs dismiss their complaint. The defendants repeatedly warned that if they were forced to file a motion to dismiss then they would seek sanctions.

The plaintiffs' remaining hope apparently was that if they could "follow the money" and confront the recipient of the funds then they could establish some sort of elder abuse or other scheme (by Ms. Hill or some other person), and theoretically that person could in turn implicate the defendants as participants in the scheme. Although the defendants had already produced (in informal discovery) all of the documents that they claimed were the key documents, the plaintiffs attempted to reopen this line of inquiry without the expense of initiating formal discovery (assuming without deciding that such discovery would not have been too speculative to have been permissible, and that the plaintiffs, as non-borrowers, would have standing to obtain such discovery).

Specifically, after several weeks of inaction since reviewing the documents, on July 20, 2015 the plaintiffs asked about an account into which they thought the proceeds had been disbursed: "We did not know about this account until you provided the documents for my review so it is incumbent that we complete the investigation before a decision can be made regarding dismissal." Adv. dkt. 51 (Ex. E), p. 148. But on July 28, 2015, the defendants' counsel responded (in addition to reiterating once again their request for voluntary dismissal): "I'm not sure what account you are referring to – <u>it's my understanding that the funds were disbursed to the borrower in cash</u>, so perhaps you inadvertently wrote down the number for the escrow account." Adv. dkt. 51 (Ex. E), p. 147 (emphasis added). The loan documents are consistent with the defendants' understanding: they appear to show a bank account number for funds coming into escrow but not going out of escrow. *See, e.g.,* adv. dkt. 51 at pp. 59 (Ex. C-1), 64-66 and 74-88 (Ex. C-2)).

The plaintiffs have never explained how the pursuit of information about what the Decedent did with the proceeds would be an adequate basis for maintaining an action against the defendants; but assuming for the sake of discussion that it would be, there is no evidence that the defendants could provide any more information on this issue. (To the contrary, they have since re-confirmed that they could not provide any additional information. *See* Guyol-Meinrath Decl. (adv. dkt. 62), pp. 2:23-3:1 ("In the ordinary course [the reverse mortgage lender] does not receive proof of disbursement of funds" and, in this matter, it "<u>does not currently have and never had</u> any record reflecting the actual disbursement of funds to [the Decedent], such as the outbound escrow instructions, and does not know how he specifically elected to receive his lump sum payment. These records are maintained by the title and/or escrow agent at closing and are, in the ordinary course, not shared with [the reverse mortgage lender].") (emphasis added).)

In sum, after reviewing the defendants' documents on July 1, 2015, the plaintiffs had a choice. On the one hand, if they believed that they had a sufficient basis to do so, they could seek to initiate more formal discovery to "follow the money" (starting with the required meeting under Rule 26(f)). They could seek such discovery both from the defendants (to confirm under oath that there were no other relevant documents) and from third parties such as the title and/or escrow agent (if those entities still existed and had retained their records) or Ms. Hill (if they could locate her). On the other hand, if they lacked the funds to do those things (or if such discovery would have been too speculative or otherwise exceed the scope of what would be permissible for non-borrowers to discover about this loan), then they could voluntarily dismiss their complaint before the defendants had to incur the costs of a motion to dismiss.

Instead of doing either of those things, the evidence is that both the plaintiffs and the responsible attorney(s) at the Resnik firm made two conscious decisions: first, several weeks after reviewing the documents on July 1, 2015 they opted to reiterate their informal request for more evidence about the disbursement of the funds (the July 20, 2015 inquiry about the supposed bank account) and, second, meanwhile they failed and refused to dismiss their complaint. Although they might have misunderstood the bank account issue prior to July 28, 2015, they had no basis for any such misunderstanding after the defendants' counsel re-confirmed on July 28, 2015 that her understanding was that the disbursement was in cash rather than to any bank account. Yet they still refused to dismiss their complaint, as communicated to the defendants on August 11, 2015. That was a conscious decision: "we spoke with [the plaintiffs] and they made the decision to continue with the lawsuit because the question of where the funds went could not be answered from the documentation available on either side." Resnik Decl. (adv. dkt. 58, commencing at PDF p. 44 of 122), para. 33 (emphasis added). *See also* Chelgren Decl. (adv. dkt. 19) p. 3:11-20 (telephonic notice on August 11, 2015 that the plaintiffs refused to dismiss their complaint).

In other words, they made a conscious decision to impose the subsequent costs of a motion to dismiss on the defendants, because they were unwilling to concede that they could not prosecute their complaint (regardless whether that was due to lack of funds or lack of merit, or both). This Court finds, by clear and convincing evidence, that in making this conscious decision both the plaintiffs and the responsible attorneys at the Resnik firm acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *In re Deville*, 361 F.3d 539, 544 (9th Cir. 2004) (citation omitted).

Additional support for this finding comes from the fact that this decision came after repeated requests to dismiss the complaint, and over six weeks after the Resnik firm had inspected the documents that on their face completely undermined the plaintiffs' claims against the defendants. It was also four months after commencement of the adversary proceeding (on April 13, 2015), nine months after the Petition Date (November 10, 2014), over one and a half years after the foreclosure sale (on January
//

31, 2014), and over three years after the Decedent's death (in 2011). *See, e.g.,* case dkt. 26, Ex. B or "2" (Trustee's Deed Upon Sale).

G. Reasonable attorney fees

Contrary to the plaintiffs' argument, the defendants' motion to dismiss was not "simple." It required multiple legal arguments, considerable documentary support, and several filed documents. Adv. dkt. 18-25. In addition, the necessity of preparing the motion to dismiss led this Court to issue its third order for mediation and to require further briefing, evidence, and hearings on sanctions, so the defendants also must be compensated for those things.

It is not so straightforward, however, to determine exactly what fees are attributable to these things. The defendants request the following fees that potentially encompass or flow from the conduct that this Court has found to be sanctionable:

- Following up with Plaintiffs' counsel repeatedly between July 1 and August 11, following the parties' meet and confer, requesting Plaintiffs dismiss the case: $1,185.50;

  * * *
- Preparing and filing Motion to Dismiss and Request for Sanctions: $39,337;
- Engaging Plaintiffs' counsel in settlement discussions: $3,731;
- Attending hearing on Request for Sanctions on September 17, 2015: $1,518;

  * * *
- General case management and work on the matter: $9,487.50; and
- Preparing for and attending November 10, 2015 status conference regarding sanctions, briefing the sanctions motion, including drafting this moving paper, reviewing Plaintiffs' opposition, and drafting the reply, and attending the hearing: $4,439 to date plus an estimated additional $20,000. [Sperling Decl. (adv. dkt. 50), pp. 3:11-4:7]

First, some of the time on these matters was spent on or before July 28, 2015, which the above discussion establishes as the cutoff. Second, the defendants have not shown how they arrived at their calculations, such as $39,337 for the motion to dismiss and request for sanctions. Among other things, the daily time entries include the hours per professional but not the resulting dollar amount for each entry so, unless this Court allows the subtotals in full, it would have to calculate the dollar amount for each entry and then add them up. Third, some of the time after July 28, 2015 involves the *lis pendens* matters (and possibly other matters that this Court has not determined are compensable). For all of these reasons, it appears appropriate to set a short deadline for the defendants to re-submit their time sheets marked up to show the dollar amounts for each compensable time entry, subtotals of those entries for each page, and a clear calculation of the total amounts.

As for the reasonableness of each entry, this Court has reviewed the entries in detail and to the extent that this Court can understand them they appear to reflect reasonable amounts of time for the filed documents that this Court has reviewed and the tasks that normally would be associated with matters of this sort, particularly after applying the voluntary discounts of the defendants' counsel. *See* Sperling Decl. (adv. dkt. 50), p. 4:8-16. But some of the redacted descriptions impair this Court's ability to assess whether the time relates to compensable matters and is reasonable. Therefore, the re-submitted time sheets should include generic descriptions next to each portion of redacted text.

H. Who Is Liable For Sanctions

Under the foregoing analysis the plaintiffs are each jointly and severally liable for their sanctionable conduct. As for any sanctions against their counsel, the parties primarily speak in terms of the Resnik firm as a whole rather than individual attorneys. Nevertheless, as discussed at the hearing on February 2, 2016 when addressing matters of intent, and particularly when any sanctions may have to be reported to the State Bar of California, sanctions issues ultimately must be addressed on an attorney-by-attorney basis. The plaintiffs' lead counsel, Mr. Resnik, offered to take responsibility, and there is no evidence to support a different allocation. Therefore, this Court will impose attorney sanctions solely against Mr. Resnik. He and the plaintiffs will be jointly and severally liable.

//

V. CONCLUSION

After the plaintiffs were provided with evidence that they had no factual basis for their claims against the defendants, they were asked repeatedly to dismiss their complaint. At the latest, any misunderstanding about a missing bank account was addressed by July 28, 2015. There is clear and convincing evidence that, by proceeding thereafter, they made a conscious decision to impose the subsequent costs of a motion to dismiss on the defendants, because they were unwilling to concede that they could not prosecute their complaint. In making that choice the plaintiffs and their principal attorney acted “in bad faith, vexatiously, wantonly, or for oppressive reasons.” Now they must reimburse the defendants for their reasonable attorney fees and costs in having to prepare and file the motion to dismiss, and everything flowing from that.

###

Date: October 13, 2016

Neil W. Bason
United States Bankruptcy Judge