IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

In re:	)	
	)	**Case No. 18-50029**
LARRY NOLAND and BONITA ANN WOODS NAPPER,	)	**Chapter 13**
	)	
	)	
Debtors.	)	
BONITA ANN WOODS NAPPER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Adversary Proceeding No. 24-06016**
SELECT PORTFOLIO SERVICING, INC.,	)	
	)	
Defendant.	)	
	)	
	)	

DEFENDANT SELECT PORTFOLIO SERVICING, INC.'S,
BRIEF IN SUPPORT OF DEFENSE OF FAILURE TO
STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Defendant Select Portfolio Servicing, Inc. ("Defendant"), by and through its undersigned counsel of record, files its *Brief In Support of Defense Of Failure To State A Claim Upon Which Relief May Be Granted*, as required by Paragraph 7 of the Court's January 31, 2025 *Scheduling Order* [Doc. 9] (the "Scheduling Order").

Procedural Background

1. Bonita Ann Woods Napper ("Plaintiff") filed her *Complaint* [Doc. 1] (the "Complaint") against Defendant on November 26, 2024.

2. Defendant filed its *Answer And Affirmative Defenses* [Doc. 7] (the "Answer") on January 10, 2025.

3. The Answer stated an affirmative defense for failure to state a claim upon which relief may be granted. (Answer, p. 25).

4. Paragraph 7 of the Scheduling Order states:

> The Defendant shall have 30 days from the date of this Order within which to file a brief or legal memorandum in support of any defenses asserting insufficiency of process, insufficiency of service of process, and failure to state claims for relief. If the Defendant files a brief or legal memorandum in support of such defenses, the Plaintiff may file and serve a brief or legal memorandum in opposition within 14 days after service of the Defendant's filing. If the Defendant does not file a supporting brief or legal memorandum on or before 30 days from the date of this Order, the Defendant shall be deemed to have abandoned the foregoing defenses and an order overruling and denying such defenses shall be entered.

(Scheduling Order, p. 2).

5. Federal Rule of Civil Procedure 12(b)(6), incorporated by Federal Rule of Bankruptcy Procedure 7012(b), provides that a party may assert by motion, as a defense to a claim for relief, "failure to state a claim upon which relief can be granted."

6. Civil Rule 12(h)(2) provides that a party may raise a defense of failure to state a claim upon which relief can be granted in a pleading, by motion under Rule 12(c), or at trial.

Argument

I. Plaintiff's "Motion" For Violation Of Federal Rule of Bankruptcy Procedure 3002.1(g) Fails To State A Claim Upon Which Relief Can Be Granted.

Upon information and belief, Defendant's filing of a *Response to Notice of Final Cure* [Doc. 70] (the "RNOFC") on June 21, 2023, a document required by subsection (g), is the sole act upon which this claim/motion is based. (Complaint, ¶ 83; Doc. 70). For three separate and

independent reasons, Plaintiff's claim for relief under Bankruptcy Rule 3002.1(g) does not state a claim upon which relief can be granted.

First, it is a well-established rule of law that Bankruptcy Rule 3002.1 does not provide a private right of action. *E.g.*, *In re Dewitt*, 651 B.R. 215, 222 (Bankr. S.D. Ohio 2023); *In re Harlow*, 2022 WL 17586716, at *5 (Bankr. W.D. Va. Dec. 12, 2022); *In re Tollstrup*, 2018 WL 1384378, at *5 (Bankr. D. Or. Mar. 16, 2018).

Second, Bankruptcy Rule 3002.1(i) – the remedy provision Plaintiff seeks to invoke – applies only if the creditor fails to make the filing. ("If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule . . . ."). *See*, *e.g.*, *In re Trevino*, 535 B.R. 110, 131 (Bankr. S.D. Tex. 2015) ("Because Rule 3002.1(i) provides relief in situations involving a *lack* of notice, rather than incorrect notice, this claim must be dismissed.") (emphasis in original). As noted in the Complaint, Defendant did file the document required by subsection (g) – the RNOFC filed on June 21, 2023. (Complaint, ¶ 83; Doc. 70). As such, the remedy provision in subsection (i) is not available.[1]

Third, the three-step process envisioned by Bankruptcy Rule 3002.1 subsection (f) (the trustee's notice of final cure); subsection (g) (the creditor's response to the trustee's notice of final cure); and subsection (h) (the trustee's or debtor's motion for determination of final cure or payment) has already been completed. The Chapter 13 Trustee filed a subsection (h) motion on July 7, 2023 – the *Motion for Determination of Final Cure and Payment Pursuant to Rule 3002.1(h) of the Federal Rules of Bankruptcy* Procedure [Doc. 71]. Plaintiff had an opportunity join the motion but did not do so. A hearing was held on the motion on August 2, 2023. The Court entered an *Order* on the motion on August 11, 2023 [Doc. 75] which resolved the issues between

[1] Defendant recognizes that there is a split of authority on this point. *E.g.*, *In re Tollstrup*, 2018 WL 1384378, at *3 (Bankr. D. Or. March 16, 2018).

the Chapter 13 Trustee and Defendant and also resolved the issues between Plaintiff and Defendant. This Order did not award any amounts under Bankruptcy Rule 3002.1(i). The Complaint asserts no grounds or theories pursuant to which Plaintiff would be entitled to relief from the Order or its modification. The Court should not allow Plaintiff's current attempt to file a second motion under Bankruptcy Rule 3002.1(g) over 16 months after resolution of the initial motion.

II. To The Extent The Plaintiff's Automatic Stay Violation Claim Is Based On Alleged Acts Of Misapplication Of Trustee Funds, It Fails To State A Claim Upon Which Relief May Be Granted.

Beginning at Paragraphs 60 and 61 of the Complaint, Plaintiff makes numerous allegations of Defendant's misapplication of payments received from the Trustee, specifically alleging that Defendant incorrectly applied certain payments not to the postpetition month for which the Trustee was making the payment but for prior postpetition months. For three separate and independent reasons, this fails to state a claim upon which relief may be granted.

First, the Complaint contains no allegation that Plaintiff knew of the alleged payment misapplications or that they were communicated to her. *E.g.*, *Mann v. Chase Manhattan Mortg. Corp.*, 316 F.3d 1, 3 (1st Cir. 2003) ("Viewed in this light, these postpetition bookkeeping entries by Chase did not implicate Bankruptcy Code § 362(a)(3), since such unilateral accruals of amounts assertedly due, but in no manner communicated to the debtor, the debtor's other creditors, the bankruptcy court, nor any third party, plainly are not the sort of 'act' Congress sought to proscribe.").

Second, the Complaint in no way connects the alleged misapplication of payments on a contractual basis to an alleged misapplication of payments on a Chapter 13 postpetition basis. Mortgage creditors are allowed to maintain dual payment records for Chapter 13 cases involving

treatment of their mortgage claim as a "cure and maintain" claim under 11 U.S.C. § 1322(b)(5) – a contractual one and a postpetition one. *See*, *e.g.*, *In re Nosek*, 544 F.3d 34, 39-40 and 47-48 (1st Cir. 2008); *In re Ogden*, 2016 WL 1077355, at *3 (Bankr. D. Colo. Mar. 18, 2016). The postpetition payment record is the one that matters as it tracks whether or not the debtor is current on monthly postpetition payments. So long as the postpetition payment application and status is correct, a contractual application cannot be said to be a "misapplication" in the first instance. To the extent a mortgage creditor applies payments on a contractual basis on its system of record which differs from its application of the payments on a postpetition basis, it is akin to a recordation on its internal records, which is not a violation of the automatic stay. *E.g.*, *In re Jacks*, 642 F.3d 1323, 1329 (11th Cir. 2011) ("The mere recordation of fees incurred by Wells Fargo on its internal records, without any attempt to collect these fees from the debtor or estate or to modify the mortgage, is not an 'act' in violation of § 362(a)(3).").

Third, Defendant notes that this Court in *In re Williams* followed the "majority rule" that "misapplication of Chapter 13 plan payments is a cause of action for violation of the automatic stay." 612 B.R. 682, 695 (Bankr. M.D.N.C. 2020). The Court distinguished the *In re Rodriguez* case, which plainly held that upon receipt by a creditor, funds which were previously property of the estate lose that status and the creditor's acts in applying those funds cannot be an attempt to exercise control over property of the estate. *Id.* at 695 (citing 421 B.R. 356, 367 (Bankr. S.D. Tex. 2009)). The distinction was in large part because the factual allegations in *Williams* asserted a post-Chapter 13 attempt to collect a sum much higher than the allowed claim and supported a stay violation claim based on section 362(a)(6) – an act to collect a prepetition debt. Here, there is no section 362(a)(6) claim but rather a section 362(a)(3) claim – an act to exercise control over

property of the estate. (Complaint, ¶ 183).[2] Plaintiff's allegation is not that Defendant applied postpetition payments to prepetition payments, but to earlier postpetition payments. In such cases, the rule of *Rodriguez* should apply and no cause of action for violation of the automatic stay should be allowed.

III. Plaintiff Has Not Alleged "Debt Collection" Within the Meaning of the North Carolina Debt Collection Act.

Plaintiff's claim under the North Carolina Debt Collection Act fails to state a claim because Plaintiff has not identified improper activities by Defendant that constitute "debt collection." Each section of the North Carolina Debt Collection Act invoked by the Complaint requires the Plaintiff to demonstrate that the complained-of conduct was done in the course of collection of a debt. *See* NCGS §§ 75-51 (". . . shall collect or attempt to collect any debt . . ."), 75-54 (". . . in connection with the attempt to collect any debt.") and 75-55(". . . shall collect or attempt to collect any debt by . . ."). But beyond conclusory labels, Plaintiff has not alleged any actual debt collection activity, and as a matter of law the bankruptcy filings that Plaintiff complains of do not constitute debt collection.

Interpreting analogous provisions of the federal Fair Debt Collection Practices Act, the Fourth Circuit has held that "determining whether a communication constitutes an attempt to collect a debt is a commonsense inquiry that evaluates the nature of the parties' relationship, the objective purpose and context of the communication, and whether the communication includes a demand for payment." *Lovegrove v. Ocwen Home Loans Servicing, L.L.C.*, 666 F. App'x 308, 311 (4th Cir. 2016) (internal quotations omitted).

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[2] This Court in *Williams* also distinguished the facts therein from the First Circuit's decision in *Mann v. Chase Manhattan Mortg. Corp.*, in that the allegedly incorrectly amounts owing on the loan were demanded by the creditor from the debtor in *Williams*. 612 B.R. at 695 (citing 316 F.3d at 3). As noted above, Plaintiff's Complaint does not make this allegation, and therefore the Court's distinction of the facts *Mann* from those *Williams* is not present here.

Consistent with the foregoing standard, courts in this Circuit and District have found that filing a proof of claim in a bankruptcy case does not constitute "debt collection." *See, e.g., In re Skerlak*, 2014 WL 1153972, at *3 (Bankr. M.D.N.C. Mar. 20, 2014). Any other holding would be inconsistent with 11 U.S.C. § 362(a)(6), which provides that the filing of the bankruptcy petition operates as a stay of "any act to *collect,* assess, or recover a claim against the debtor that arose before the commencement of the case under this title." *In re Jenkins*, 456 B.R. 236, 240 (Bankr. E.D.N.C. 2011) (finding that proof of claim filing was not "debt collection" for purposes of FDCPA and North Carolina Collection Agency Act"). In *Jenkins,* the court noted that bankruptcy debtors "do not need protection from abusive collection methods that are covered under the FDCPA because the claims process is highly regulated and court controlled." *Id.*

Like the proofs of claim at issue in *Skerlak* and *Jenkins*, Defendant's RNOFC and other filings in the bankruptcy proceeding are not "debt collection" and cannot give rise to claims under the North Carolina Debt Collection Act. Plaintiff's Complaint is vague as to what specific communications she contends give rise to this claim, if any, other than the RNOFC. Civil Rules 12(b)(6) and 8 require that Plaintiff identify specific communications—outside of the filings in the bankruptcy case—that she alleges violate the provisions of NCGS §§ 75-51, 75-54, and 75-55. The Complaint fails to do so.

Respectfully submitted this the 3rd day of March 2025.

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CERTIFICATE OF SERVICE

I certify that on March 3, 2025 a true and correct copy of the foregoing was served on all parties authorized to receive notice through the ECF notice system in this case.

/s/ G. Benjamin Milam
OF COUNSEL