SO ORDERED.

SIGNED this 4th day of November, 2013.

Catharine R Aron

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

In re:	)	
	)	
Vincent Winbush and	)	
Erin M. Winbush,	)	**Case No. 12-51485**
	)	
Debtors.	)	
	)	
	)	
	)	
Vincent Winbush and	)	
Erin M. Winbush,	)	
	)	
Plaintiffs,	)	**Adv. Proc. No. 13-06031**
	)	
v.	)	
	)	
Wells Fargo Bank, N.A. and	)	
Massachusetts Mutual Life Insurance	)	
Company,	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS THE ADVERSARY PROCEEDING

THIS MATTER came before the Court on August 13, 2013 in Winston-Salem, North Carolina, after due and proper notice to all parties in interest, upon Defendants' Motions to

Dismiss. Kenneth Love appeared on behalf of Vincent Winbush and Erin M. Winbush, and John Benjamin, Jr. appeared on behalf of Wells Fargo Bank, N.A. and Massachusetts Mutual Life Insurance Company. After considering arguments of counsel, pleadings and papers, and evidence on the record, this Court makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

JURISDICTION

This Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157, and 1334 and Local Rule 83.11 entered by the United States District Court for the Middle District of North Carolina. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2) which this Court has the jurisdiction to hear and determine. Pursuant to the analysis in *Stern v. Marshall*, ___ U.S. ____, 131 S. Ct. 2594 (2011), this Court may enter a final order in this matter.

FINDINGS OF FACTS

Vincent Winbush executed a note in the original principal amount of $143,727.00 on or about May 18, 2004 (the "Note") with Washington Mutual Bank, FA. The Note was secured by a deed of trust executed on or about May 18, 2004 ("Deed") for residential real property located at 153 Scotland Ridge Drive, Winston-Salem, North Carolina. Washington Mutual Bank, FA recorded the Deed on or about May 27, 2004 in the Office of the Register of Deeds for Forsyth County. Thereafter, Washington Mutual Bank, FA endorsed and transferred the Note to Wells Fargo Bank, N.A. ("Wells Fargo"). Wells Fargo endorsed the Note "in blank." On or about March 30, 2007, Vincent Winbush and Wells Fargo entered into an agreement to modify the Note and Deed ("Modification Agreement"). The Debtors fell behind on their payments to

Wells Fargo, and in 2011, Wells Fargo instituted a foreclosure special proceeding in Forsyth County, North Carolina ("Foreclosure Action").

In response to the Foreclosure Action, on October 17, 2012, Vincent Winbush and Erin M. Winbush (the "Debtors") filed a voluntary petition under Chapter 13 of the United States Bankruptcy Code ("Petition"). In the Debtors' sworn Petition, the Debtors' disclosed that they owned a single family home located at 153 Scotland Ridge Road ("Property") with a fair market value of $160,200.00 and that the Property was encumbered by a mortgage in the amount of $131,000.00 in favor of Wells Fargo. Both Debtors exempted the Property noting that Wells Fargo held a lien on the Property in the amount of $131,000.00. The Debtors did not schedule or exempt any cause of action against Wells Fargo or any resulting proceeds from such legal action. In the Debtors' sworn Schedule D, the Debtors listed Wells Fargo as a secured creditor having a valid lien on the Property. The Debtors did not schedule Wells Fargo as a creditor having a contingent, unliquidated or disputed claim. The Debtors filed their initial notice to creditors and proposed plan on October 17, 2012 (the "Notice"). In the Notice, the Debtors proposed to treat Wells Fargo as a secured creditor and make payments to Wells Fargo in the amount of $1,113.71 per month and the Debtors stated in the Notice that Wells Fargo had an arrearage claim of $28,101.62. Although the Debtors filed amended schedules on February 6, 2013 to add creditors with unsecured debt, no amendments were made to Wells Fargo's status as an undisputed secured creditor.

On February 25, 2013, the Notice and Proposed Order of Confirmation was served on all creditors giving all parties, including the Debtors, an opportunity to object to any plan provision ("Proposed Plan"). The Proposed Plan treated Wells Fargo as a secured creditor with a long-term debt and stated that the Trustee would make payments to Wells Fargo in the amount of

$1,132.77 per month (with escrow) and listed Wells Fargo with an arrearage claim in the approximate amount of $29,300.00, which also would be paid monthly by the Chapter 13 Trustee with all remaining available funds. The Proposed Plan reflected that Wells Fargo had not yet filed a proof of claim. However, on February 28, 2013, immediately after the Proposed Plan was filed and prior to confirmation, Wells Fargo filed its proof of claim ("POC") and attached the Note, Deed, and Modification Agreement.

No party objected to the Proposed Plan, and the Court confirmed the Proposed Plan on April 1, 2013 ("Confirmation Order"). Paragraph H of the Confirmation Order incorporates the terms and provisions of a standing order of this Court dated February 24, 2012 (the "Standing Order"). The Standing Order states that "providing for a claim under the plan does not bar objections to the claim," and further provides that "notwithstanding the allowance of a claim as secured, all rights under Title 11 to avoid liens are reserved and confirmation of the plan is without res judicata effect as to any action to avoid a lien."

On May 3, 2013, the Debtors filed this adversary proceeding ("AP") against Wells Fargo and Massachusetts Mutual Life Insurance Company ("Mass Mutual") seeking relief pursuant to the following causes of action:

Count I: Declaratory Judgment that the Defendants are not the holders of Mortgage Obligation
Count II: Breach of Contract by Wells Fargo
Count III: Breach of Duty of Good Faith and Fair Dealing by Wells Fargo
Count IV: Breach of Fiduciary Duty by Wells Fargo
Count V: Unfair and Deceptive Trade Practices by Wells Fargo
Count VI: Disallowance of Fees listed in Wells Fargo's Proof of Claim

Subsequently, on June 28, 2013, Wells Fargo and Mass Mutual (collectively the "Defendants") filed Motions to Dismiss (the "Motion"). At the hearing on the Motion, it was disclosed, through Defendants' counsel, that the Debtors had instituted a civil action against Wells Fargo in Forsyth

County in or around August 2012 ("Civil Suit") regarding the same factual circumstances at issue in this AP, prior to the filing of the Petition. The Civil Suit was pending at the time the Debtors filed the Petition and remained pending both after entry of the Confirmation Order, and at the time the Debtors filed this AP. The Civil Suit was not disclosed in the Debtors' Petition, including the Statement of Financial Affairs. Also, at no time, did the Debtors file an objection to Wells Fargo's claim and the Debtors, to date, have not amended their schedules, statement of financial affairs or exemptions. The Debtors took a voluntary dismissal of the Civil Suit on or about May 24, 2013, approximately two months prior to the hearing on this Motion.

STANDARD OF REVIEW

The standard of review on a motion to dismiss for failure to state a claim under Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the action.[1] *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 813 (M.D.N.C. 1995). All well-pleaded allegations made by the Plaintiff are taken as true and all inferences are liberally construed in the plaintiff's favor. *MacNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325, 327 (4th Cir. 1996). The duty of fair notice under Federal Rule of Civil Procedure 8(a)[2] requires the plaintiff to allege, at a minimum, the necessary facts and grounds that will support his right to relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007). "A complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009).

ANALYSIS

[1] Federal Rule of Civil Procedure 12(b)(6) is made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7012(b).
[2] Federal Rule of Civil Procedure 8(a) is made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7008.

I. Massachusetts Mutual Life Insurance Company

The Debtors' claims as alleged against Mass Mutual must fail. The Debtors have not alleged any facts to support any of their claims against Mass Mutual. Having not met their burden under *Twombly* and *Iqbal*, the Debtors have failed to state any claims against Mass Mutual upon which relief may be granted. As such, Defendants' Motion is granted as to all counts against Mass Mutual.

II. Wells Fargo

A. Count I against Wells Fargo is Barred by Res Judicata

Defendants' Motion is granted as to Count I against Wells Fargo. This Court's Standing Order states that providing for a claim under the plan does not bar objections to the claim. That provision was put in place to allow confirmation to go forward even before all creditors had filed a proof of claim. A secured creditor is not required to file a proof of claim in a chapter 13 case. However, the secured creditor will not receive payments from the chapter 13 trustee until a claim has been filed. After the proof of claim is filed, the debtor and the chapter 13 trustee will be given the opportunity to review the claim to determine if the claim has been properly perfected or if there are fees that were improperly added to the claim. Similarly, the right to avoid a lien is reserved. This provision in the Standing Order is typically used in the situation where there is a defect in the security documents of which no party was aware or in instances in which there are two mortgages on the real property and the value of the property does not exceed the value of the first mortgage such that the second lien can be avoided.

The Standing Order does not protect the Debtors in this instance. The Debtors are bound by the terms of the Confirmation Order. *Valley Historic Ltd. v. Bank of New York*, 486 F.3d 831, 838 (4th Cir. 2007) (stating that "'A bankruptcy court's order of confirmation is treated as a final

judgment with res judicata effect,' binding the parties by its terms and precluding them 'from raising claims or issues that they could have or should have raised before confirmation,'"); *In re Varant Enters., Inc.*, 81 F.3d 1310, 1315 (4th Cir. 1996); *In re Weidel*, 208 B.R. 848, 850 (Bankr. M.D.N.C. 1997). Previously, this Court has held that "the confirmed plan is res judicata and its terms are not subject to collateral attack … in order to provide finality in the Chapter 13 confirmation order, a court cannot subsequently address arguments that were or could have been made at the time of confirmation." *In re Phillips*, 2001 WL 1699680, at * 2 (Bankr. M.D.N.C. Feb. 12, 2001). As such, the debtor is prohibited from modifying the confirmation order absent a substantial and unanticipated change of circumstances. *In re Arnold*, 869 F.2d 240, 243 (4th Cir. 1989).

Here, the Debtors clearly believed they had a dispute with Wells Fargo – as they had gone so far as to file the Civil Suit. However, the Debtors did not indicate in their Petition schedules any dispute with Wells Fargo regarding Wells Fargo's claim. In fact, prior to entry of the Confirmation Order, Wells Fargo filed the POC and Debtors were provided with an opportunity to object and to determine whether to raise certain arguments attacking Wells Fargo's claim. The Debtors not only failed to object to the Proposed Plan, but also dismissed their Civil Suit. The Debtors did not disclose their potential claims – nor did they exempt the potential claims. To date, no amendments have been made to the Debtors' schedules, statement of affairs, or exemptions. The Debtors cannot modify the treatment of the claim of Wells Fargo as there is no substantial and unanticipated change in circumstances. Further, only one of the Debtors' claims seeks to avoid the lien. All other claims are for money damages. In the Fourth Circuit, the effect of confirmation is "res judicata of all issues that were or could have litigated at or before a hearing on confirmation. *In re Linkous*, 990 F.2d 160, 162 (4th Cir. 1993). This

Court will not allow the Debtors to proceed with raising claims or issues that should have been raised prior to entry of the Confirmation Order. As such, Count I against Wells Fargo is barred by the doctrine of res judicata and dismissed.

B. Counts I, II, III, IV, and V against Wells Fargo are Barred by Judicial Estoppel

Counts I, II, III, IV, and V against Wells Fargo are barred by judicial estoppel.[3] The doctrine of judicial estoppel "is an equitable doctrine that precludes a party from gaining an advantage by taking a clearly inconsistent position." *In re Hamlett*, 304 B.R. 737, 741 (Bankr. M.D.N.C. 2003). Judicial estoppel "seeks to protect courts, not litigants, from individuals who would play 'fast and loose' with the judicial system." *In re Tanglewood Farms, Inc. of Elizabeth City*, slip op., 2013 WL 1829910 at *8n.10 (Bankr. E.D.N.C. May 1, 2013) Under North Carolina law, in determining whether a party's claim is barred by judicial estoppel, courts look to the following factors: (1) the party to be estopped must be advancing an assertion that is inconsistent with a position taken during previous litigation; (2) the position must be one of fact instead of law; (3) the prior position must have been accepted by the court in the first proceeding; and (4) the party to be estopped must have acted intentionally, not inadvertently. *Folio v. City of Clarksburg, W.Va.*, 134 F.3d 1211, 1217-18 (4th Cir. 1998). "To satisfy the final prong, the party 'must have intentionally misled the court' for purposes of 'gain[ing] unfair advantage.'" *Vanderheyden v. Peninsula Airport Com'n*, slip op., 2013 WL 30065 at *11 (E.D. Va. Jan. 2, 2013) (citing *Whitten v. Fred's Inc.*, 601 F.3d 231, 241 (4th Cir. 2010) (abrogated on other grounds by *Vance v. Ball State Univ.*, 133 S.Ct. 2434 (2013)). Furthermore, federal bankruptcy law provides that the debtor has a statutory duty to disclose a legal or equitable interest, including potential causes of action. *Vanderheyden v. Peninsula Airport Com'n*, slip op., 2012 WL 6760107, at *3 (E.D. Va. Sept. 27, 2012). *See* 11 U.S.C. 521(a)(1), 541(a). "This

[3] Count I is barred by the doctrine of res judicata and the doctrine of judicial estoppel.

duty to disclose does not end once the debtor submits the required forms to the bankruptcy court, but rather, continues for the entirety of the bankruptcy proceeding." *Id*. A plaintiff has knowledge of undisclosed claims when the plaintiff is aware of the factual basis of such claims, and in absence of direct evidence to conceal, the court will infer "deliberate or intentional manipulation … from the record where the debtor has knowledge of undisclosed claims and motive for concealment." *Vanderheyden*, 2013 WL 30065, at *12.

In this case, prior to filing the Petition, the Debtors had already filed the Civil Suit against Wells Fargo regarding the same factual issues raised in this AP. The Debtors failed to disclose the Civil Suit and did not exempt the Civil Suit. The Debtors did not list Wells Fargo as a disputed creditor. The Debtors did not object to the Proposed Plan and proceeded through plan confirmation, even though the Debtors were aware prior to the bankruptcy case the facts supporting the AP. *In re Hovis*, 396 B.R. 895, 904 (Bankr. D.S.C. 2007) (upholding the bankruptcy court's finding that the plaintiff was judicially estopped from bringing a contract claim because the claim was not disclosed until after the plan of reorganization had been confirmed). The Debtors dismissed the Civil Suit while this AP was pending before the Bankruptcy Court without so much as filing an amendment to the Petition schedules. Furthermore, the Debtors were not candid with the Court, as the Court learned of the Civil Suit through Defendants' counsel, not Debtors' counsel. *See Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005) (finding that the debtor is judicially estopped from pursing an EEOC claim filed while the bankruptcy petition was pending and debtor failed to fulfill duty to amend the petition to include the EEOC claim). The Debtors should not be able to assert inconsistent positions based on the same facts throughout the court system. As such, the Debtors

are judicially estopped from asserting these claims against Wells Fargo and Counts I, II, III, IV, and V against Wells Fargo are dismissed.

C. Defendants' Motion to Dismiss Count VI against Wells Fargo is Denied

The Debtors allege that Wells Fargo did not properly follow guidelines in assessing certain fees and filed a cause of action pursuant to N.C. Gen. Stat. § 45-91 to disallow those fees. The Standing Order does not prevent an objection to the claim after plan confirmation. The Debtors have plead sufficient factual matter to state a claim for relief pursuant to N.C. Gen. Stat. § 45-91. As such, the Defendants' Motion as to Count VI against Wells Fargo is denied.

CONCLUSION

For the reasons set forth above, it is ORDERED and ADJUDGED that the Defendants' Motions to Dismiss Counts I, II, III, IV, V, and VI against Mass Mutual are GRANTED. It is ORDERED and ADJUDGED that the Defendants' Motions to Dismiss Counts I, II, III, IV, and V against Wells Fargo are GRANTED, and the Defendants' Motion to Dismiss Count VI against Wells Fargo is DENIED.

END OF DOCUMENT

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