SO ORDERED.

SIGNED this 8th day of February, 2019.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re	)	
	)	
Ralph M. Foster,	)	Case No. 18-80466
	)	
Debtor.	)	Chapter 13
	)	

ORDER ON DEBTOR'S RULE 59 AND 60 MOTION FOR RECONSIDERATION AND/OR TO VACATE/AMEND ORDER DISMISSING CASE FOR CAUSE AND MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL IN CASE OF DENIAL

This case comes before the court without a hearing upon the motion of Ralph M. Foster, pro se, (the "Debtor") to reconsider and/or vacate its Order Granting Motion to Dismiss entered November 20, 2018. In addition, the Debtor's motion incorporates a "Motion for Stay of Proceedings Pending Appeal in Case of Denial." The Debtor's omnibus motion, filed December 3, 2018 shall be referred to as the "Current Motion." After consideration of all matters of record in this case and the related adversary proceeding, and taking judicial notice of the record in the Debtor's prior bankruptcy case and related adversary proceeding, all relief requested in the Current Motion is denied for the reasons set forth below.

This order must be viewed in the greater context of over six years of litigation between the Debtor and his mortgage creditor. Therefore, before examining the issues raised in the Current Motion, the court will provide an overview of the Debtor's current bankruptcy case (the "Current Case"), the Debtor's prior bankruptcy case filed in the Middle District of North Carolina, 16-80601, (the "Prior Case"), the Debtor's adversary proceedings, and the state court and federal court litigation involving his residential mortgage.

Background.

The Debtor and his non-filing spouse, Ms. Steed-Foster, own and reside at 308 South Bend Drive, Durham, North Carolina (the "Real Property"). The Real Property is encumbered by a Deed of Trust dated February 26, 2010, executed by both the Debtor and Ms. Steed-Foster, and recorded with the Register of Deeds of Durham County (the "Deed of Trust"). The indebtedness secured by the Deed of Trust, in the original principal amount of $340,506.00, is evidenced by a

promissory note signed by the Debtor and Ms. Steed-Foster dated February 26, 2010 (the "Note"). The Deed of Trust states that Mortgage Electronic Registration Systems, Inc. ("MERS") is the beneficiary of the Deed of Trust as nominee for the lender, TBI Mortgage Company ("TBI"). A corporate assignment of the Deed of Trust from MERS as nominee for TBI to Wells Fargo Bank, NA ("Wells Fargo") is dated February 5, 2012. The Note, Deed of Trust, and corporate assignment are attached to claim number 7 filed by Wells Fargo in the Current Case on September 24, 2018 ("Wells Fargo Proof of Claim").

It is undisputed that the Debtor has not made a mortgage payment to Wells Fargo since 2012.

Foreclosure proceedings, 2012 -2015.

Wells Fargo first commenced foreclosure proceedings against the Debtor and Ms. Steed-Foster in the summer of 2012. Throughout both the Current Case and the Prior Case, the Debtor has relied heavily upon a copy of a transcript of the foreclosure hearing held on January 2, 2013 in this initial foreclosure proceeding.[1] According to this transcript, Wells Fargo presented various documentation at the foreclosure hearing including the Note and Deed of Trust. Wells Fargo also presented an affidavit that the borrowers defaulted under the Note, were offered a resolution plan or forbearance agreement (the "Forbearance Agreement"), but subsequently failed to timely make payments under the terms of the Forbearance Agreement.[2] The Debtor raised several points as to the validity of the endorsements on the Note, the issue of whether Wells Fargo or Fannie Mae was the owner of the Note, the assignment by MERS to Wells Fargo being void, and the loan modification process with Wells Fargo. The transcript reflects that the clerk found that Wells Fargo was the holder of the Note as of August 8, 2012, but that Wells Fargo did not produce documentation that it was the holder of the Note as of July 30, 2012, when the foreclosure proceeding was commenced. As a result, the clerk denied the foreclosure petition based on the lack of specific evidence that Wells Fargo was the holder of the Note on July 30, 2012 but stated that as to the "rest of this about MERS and things, I don't put much weight to that." The clerk dismissed the foreclosure petition in an order dated January 2, 2013. (Docket No. 67, Exhibit 1 at 6).

Wells Fargo appealed the clerk's order, but the Superior Court dismissed Wells Fargo's appeal without prejudice on February 1, 2013, stating that "Clerk's Order contained no findings of fact or conclusions of law." (Docket No. 67, Exhibit 1 at 75). Meanwhile, the Debtor and Ms. Steed-Foster had filed a "Mortgagors Motion for Sanctions and For Denial of Foreclosure with Prejudice and/or Permanent Injunctive Relief for Fraud upon the Court and Mortgagors by Wells Fargo Bank, NA" in that proceeding. In addition, the Debtor and Ms. Steed-Foster appealed the Superior Court's February 1, 2013 order dismissing Wells Fargo's appeal. (Docket No. 67,

[1] In the Current Case, the Debtor attached a copy of the transcript for the January 3, 2013 hearing to the Current Motion (Exhibit A), his Objection to the Amended Motion for Relief from Stay (Exhibit A-2), and the complaint in his adversary proceeding (Exhibit A). In the Prior Case, the Debtor incorporated portions of the transcript into his complaint, amended complaint, and second amended complaint in the related adversary proceeding, which he in turn incorporated into his response to the Trustee's objection to confirmation.

[2] This foreclosure hearing was held before the Honorable Archie L. Smith, III, Clerk of Court, Durham County, North Carolina, on January 2, 2013, Special Proceeding 12-SP-1061.

Exhibit 1 at 76). On April 25, 2013, Wells Fargo filed a motion to dismiss the appeal due to the Debtor and Ms. Steed-Foster not pursuing the appeal in accordance with the North Carolina Rules of Appellate Procedure. (Docket No. 67, Exhibit 1 at 82). Wells Fargo's motion to dismiss appeal was granted following a hearing on May 13, 2013 with an order entered May 31, 2013. (Docket No. 67, Exhibit 1 at 91).

The Debtor and Ms. Steed-Foster filed a "Motion to Vacate Order Dismissing Appeal and Motion to Vacate, Amend and/or for Reconsideration of the Denial of Respondents' Motion for Sanctions and Permanent Injunctive Relief" on May 23, 2013. (Docket No. 67, Exhibit 1 at 93). This motion to reconsider or vacate was denied in an order signed by the Honorable Carl R. Fox on August 2, 2013 and entered on August 8, 2013, following a hearing on July 29, 2013. (Docket No. 67, Exhibit 1 at 111).

The Debtor and Ms. Steed-Foster then filed a notice of appeal of Judge Fox's order on August 28, 2013. (Docket No. 67, Exhibit 1 at 113). The Debtor and Ms. Steed-Foster's appeal was heard by a three judge panel of the North Carolina Court of Appeals on May 7, 2014 and an opinion was entered on February 17, 2015 affirming Judge Fox's order. *In re Foreclosure of a Deed of Trust Executed by Foster*, 768 S.E.2d 870 (N.C. Ct. App. 2015). The appellate court determined that the February 1, 2013 order of Judge Collins "effectively ended the foreclosure proceeding." *Id*. at 873. It also found that Judge Fox properly denied the respondents' motion to vacate the order dismissing their appeal. *Id*. at 874.

State Court Litigation, 2012-2014.

While the foreclosure proceeding was ongoing, the Debtor and Ms. Steed-Foster filed a complaint in Durham County Superior Court against Wells Fargo and various other defendants on December 10, 2012 alleging fraud, unfair and deceptive trade practices, and civil conspiracy; the complaint requested damages and a permanent injunction preventing Wells Fargo from foreclosing on the Real Property. *Foster v. Wells Fargo, NA*, 758 S.E.2d 185 (N.C. Ct. App. 2014). The lower court dismissed the complaint with prejudice and the Debtor and Ms. Steed-Foster appealed. On March 4, 2014, the three judge panel affirmed the trial court's order dismissing the complaint with prejudice in its entirety, noting that the plaintiffs' allegations of fraud or unfair and deceptive trade practices were not sufficiently pled and the civil conspiracy claim was without merit. *Id*.

Prior Bankruptcy Case, 2016 – 2017.

Briefly, the Prior Case was filed on July 12, 2016 and dismissed on May 15, 2017; the Debtor filed a related adversary proceeding against Wells Fargo, Ginnie Mae, and Shapiro & Ingle, LLP on October 28, 2016 which was dismissed on May 17, 2017.
The Debtor proposed five different plans during the 10-month pendency of the Prior Case. On May 4, 2017, at a hearing on confirmation and the Trustee's motion to dismiss, counsel for the Chapter 13 Trustee noted that the Debtor only made $485.00 in payments to the Trustee over the ten months he had been in Chapter 13, despite having filed a proposed plan in February 2016 that required payments of $1,612.36 per month. None of the proposed plans provided for any payment to Wells Fargo for the secured debt encumbering his residence, though his Fourth Proposed Chapter 13 plan provided Wells Fargo with an unsecured claim, receiving a pro rata distribution of Debtor's projected disposable income paid into the plan.

The Prior Case was dismissed May 15, 2017 for cause including lack of feasibility of plan, plan not proposed in good faith, Debtor was seeking to hinder or delay creditors, and secured and priority creditors had been prejudiced by the Debtor's unreasonable delay in proposing a confirmable plan. The court's order denying confirmation and dismissing the case specifically explained that the proposed plan of the Debtor whereby the Wells Fargo mortgage would not be paid as a secured claim in the plan due to the speculative contention by the Debtor that litigation would result in a finding that the mortgage was invalid, was not a feasible plan. *In re Ralph Foster*, No. 18-80601, Doc. No. 122 (citing *In re Jensen*, 425 B.R. 105, 110 (Bankr. S.D.N.Y. 2010), *Ewald v. Nat'l City Mortgage Co. (In re Ewald)*, 298 B.R. 76, 81 (Bankr. E.D. Va. 2002), and *In re Reines*, 30 B.R. 555, 562 (Bankr. D.N.J. 1983)).

Adversary Proceeding, 2016-2017.

On October 28, 2016, the Debtor and Ms. Steed-Foster filed a complaint against Wells Fargo, Shapiro & Ingle, and Ginnie Mae asserting claims for a declaratory judgment/avoidance of lien, dischargeability of debt as unsecured, intentional negligence, civil conspiracy, violations of the North Carolina Debt Collection Act, unfair and deceptive trade practices, and breach of contract. (AP No. 16-9031, Doc. No. 1). Defendants filed motions to dismiss, but the Debtor filed an amended complaint two days before the hearing on the motions. Again, the defendants filed motions to dismiss, and the Debtor then filed a second amended complaint on March 3, 2017. Again, the defendants filed motions to dismiss. Also, in the alternative Shapiro & Ingle requested a stay of proceeding because the Debtor and Ms. Steed-Foster had filed an action against Wells Fargo and Shapiro & Ingle on March 28, 2016 in the United States District Court for the Middle District of North Carolina asserting claims for violations of the Fair Debt Collection Practices Act and various state law claims. (Ad. Proc. No. 16-9031, Doc. No. 71). Shapiro & Ingle asserted that in filing the adversary proceeding, the Debtor and Ms. Steed-Foster disregarded the first-filed rule, and that the adversary proceeding was duplicative and constituted harassment. The Debtor's adversary proceeding was dismissed following the dismissal of the Prior Case.

State Court Litigation, 2017-2018.

On July 28, 2017 the Debtor and Ms. Steed-Foster filed a "Complaint for Declaratory Relief, Specific Performance and/or Money Damages" in Superior Court in Durham County Case No. 17-CVS-3799, against Wells Fargo Bank, NA and Shapiro & Ingle, LLP asserting claims for declaratory judgment, breach of contract, specific performance, and unfair and deceptive trade practices. (Docket No. 67, Exhibit 6 at 2). Each defendant filed a motion to dismiss, and then the Debtor and Ms. Steed-Foster filed an Amended Complaint on October 17, 2017 adding claims for negligence, violations of the North Carolina Debt Collection Act, injunctive relief, and breach of implied covenant of good faith. (Docket No. 67, Exhibit 6 at 194). Once again, the defendants filed motions to dismiss, and in an order dated December 12, 2017, the court dismissed all claims asserted by the Debtor and Ms. Steed-Foster against the defendants, however denominated, with prejudice. (Docket No. 67, Exhibit 6 at 323).

In response, the Debtor and Ms. Steed-Foster filed an "Amended Plaintiffs' Motion Pursuant to Rule 60(b)(3) and (6) for Clarification of Judgment Dismissing Claims and to Vacate Void/Irregular Judgment and Request for Findings of Fact and Conclusions of Law." (Docket

No. 67, Exhibit 6 at 326). After a hearing was set on this motion, the Debtor and Ms. Steed-Foster filed a "Second Amended" motion. Another hearing was set for March 26, 2018, and on April 10, 2018, Superior Court Judge Orlando F. Hudson entered an order denying the second amended motion for reconsideration. (Docket No. 67, Exhibit 6 at 382). In the order Judge Hudson specifically stated, "To the extent that Plaintiffs believed this Court's Order to be in error, their remedy was to appeal, which they have not done. Plaintiffs' contentions that this Court erred when it entered the Order do not satisfy the standard required to obtain relief pursuant to Rule 60(b)."

The Debtor and Ms. Steed-Foster then filed a notice of appeal of both the underlying judgment of dismissal and the denial of the motion for reconsideration on April 24, 2018. (Docket No. 67, Exhibit 6 at 386). The Court of Appeals dismissed the Debtor's appeal from the trial court's Rule 12(b)(6) order and affirmed the trial court's order denying the Rule 60(b) motion. (Ad. Proc. No. 18-9032, Doc. No. 14).

Current Bankruptcy Case.

In the Current Case, the Debtor filed his Chapter 13 petition on June 27, 2018. The Debtor has filed four plans in this case. In his first plan, he proposed plan payments of $1,721.00 for 60 months, with that full amount to be paid to Wells Fargo each month. In his first amended plan, he again proposed a plan payment of $1,721.00 per month for 60 months, but with Wells Fargo receiving just $900.00 per month. The Debtor proposed to make payments on IRS and vehicle claims directly. He proposed no dividend to unsecured creditors. In a "Second Amended Plan" filed the day before the hearing on a motion for relief filed by Wells Fargo, the Debtor proposed to make payments of $4,309.67 per month for 60 months to the Trustee. This plan further provided for the payment of all vehicle and tax claims through the plan and the maintenance and cure of the Wells Fargo mortgage with payments of $900.00 a month. Finally, in a "Revised Second Amended Chapter 13 Plan" attached to his "Emergency Motion for Reconsideration and for Clarification and for Extension of Time to Comply with Deadline Announced at October 18th Hearing and Amended Plan Reflecting Adjustments due to Overpayment to Creditors," the Debtor decreased overall plan payments, proposing to pay $914.70 in October to bring his plan up to date retroactively, $3,487.23 in November and December, $3,827.28 in January, and then finally payments of $4,359.78 for the remainder of the plan.

The monthly payment stated in the Wells Fargo Proof of Claim is $1,827.91 for principal and interest only, $2,590.32 including escrow. The claim states a principal balance of $333,313.95, interest due of $115,155.22, fees and costs due of $2,596.64, and the escrow deficiency for funds advanced of $50,572.72. The claim total is $501,728.68, with an arrearage stated of $207,732.64. The largest payment the Debtor proposed to pay to Wells Fargo pursuant to any of the proposed plans was $1,721.00.

In addition to Wells Fargo, two secured creditors filed proofs of claims for vehicles, Ally Financial and CarMax Auto Finance. North Carolina Department of Revenue filed a claim in the amount of $3,727.02, of which $1,171.40 is a priority claim. The Internal Revenue Service filed a claim in the amount of $41,523.46, of which $40,231.98 is secured and $1,273.67 is priority. State Employees Credit Union filed a secured claim in the amount of $54,067.99; this debt is

secured by real property located at 615 Windsong Lane, Durham. One general unsecured claim in the amount of $3,548.69 was filed by State Employees Credit Union in the Current Case.[3]

The Current Case was dismissed in an order entered on November 20, 2018 (the "Dismissal Order") for cause based on lack of feasibility, unreasonable delay by the Debtor that is prejudicial to creditors, and lack of intent to propose a plan in good faith.

Current Adversary Proceeding.

The Debtor commenced an adversary proceeding against Wells Fargo on October 15, 2018 asserting the following claims: validity of lien-discharge of lien, violations of Truth in Lending Act, unfair business practices, unfair debt collection practices, breach of contract, fraud, breach of fiduciary duty, violations of Real Estate Settlement and Procedures Act, breach of duty of good faith, objection to claim, and accounting. Wells Fargo filed a motion to dismiss on December 17, 2018 asserting that the Court has already dismissed the Current Case and the adversary proceeding brings the same claims against Wells Fargo as the prior, pending state court litigation.

Current Motion.

Debtor requests the court to reconsider the Dismissal Order under Federal Rule of Civil Procedure 59, Federal Rule of Civil Procedure 60, and, in the event the order is not reconsidered, vacated or amended, then to "stay proceedings pending appeal and hold a hearing as to an amount (if any) necessary for a supersedeas bond" "pursuant to Fed. R. Bankr. P. 8005 [sic]." (Docket No. 88 at 25).

The grounds for the reconsideration of the Dismissal Order or to vacate or amend the Dismissal Order ("Debtor's Grounds") are as follows:

1. The record shows that Debtor's proposed Chapter 13 plan payments and terms were identical to those which the Trustee himself had proposed.
2. Bankruptcy law requirement that all creditors receive equal treatment.
3. The court gave Debtor confusing and contradictory instructions regarding his plan and cannot blame Debtor when Debtor sought clarification and none was given.
4. Wells Fargo's claim improperly taken as true over Debtor's objections and without a hearing.
5. This Court did not need to determine the adversary proceeding to deny dismissal or deny Wells Fargo's Proof of Claim because overwhelming undisputed facts already existed in the record to support denying dismissal and show Wells' proof of claim as false.
6. Neither the court nor the Debtor should have to engage in hypothetical musings regarding the terms of the resolution plan when production of same is demanded as part of the proof of claim.
7. The Court's findings are profoundly contrary to the record.

[3] Flagship Acceptance did not file a proof of claim setting forth its secured claim for a vehicle in the Current Case, but the Debtor's most recent proposed plans anticipate paying this claim through the plan.

8. Any delay in reaching a confirmable plan is traceable to Wells Fargo's incomplete proof of claim and the Court's failure to hold a hearing on Debtor's objection to the claim and to hold a hearing on Wells Fargo's motion for relief from stay.
9. The record reflects that Debtor's income is actually far higher than was determined by the Court resulting from clerical error.

Legal Standards to evaluate motions pursuant to Rules 59 and 60.

Federal Rule of Bankruptcy Procedure 9023 incorporates Federal Rule of Civil Procedure 59 regarding new trials and amendment of judgments. The Current Motion to alter or amend the judgment was timely filed under Rule 9023. The standard to grant such a motion under Fed. R. Bankr. P. 9023 encompasses the following grounds: (1) An intervening change in the law; (2) consideration of newly discovered evidence not available at the hearing; or (3) to correct clear error or prevent manifest injustice. *Louisiana Lottery Corp. v. CIT Group Bus. Credit, Inc. (In re E-Z Serve Convenience Stores, Inc.)* No. 02-83138, Adv. 03-9018, 2004 WL 3095842, at *4 (Bankr. M.D.N.C. Oct. 6, 2004) (citing *Pacific Life Ins. Co. v. American Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998)). The Debtor does not cite a specific basis for the relief requested pursuant to Rule 9023, but neither intervening change in the law nor consideration of newly discovered evidence were mentioned in his motion. As to the third ground, to correct clear error or prevent manifest injustice, this basis to alter or amend the Dismissal Order shall be discussed as applicable to each of the Debtor's Grounds below. However, as a general rule, it should be noted that reconsideration of a judgment, in this case the Dismissal Order, after its entry is an extraordinary remedy which should be used sparingly. *Id*. (quoting WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2810.1, at 127-28 (2d ed. 1995)).

Federal Rule of Bankruptcy Procedure 9024 incorporates Federal Rule of Civil Procedure 60 regarding relief from a judgment or order. Again, the Current Motion does not request reconsideration under any specific subsection enumerated in Rule 60(b), but appears to let the court intuit and apply his contentions to an appropriate subsection. The grounds for relief under to Rule 60(b) are as follows:

1. mistake, inadvertence, surprise, or excusable neglect;
2. newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
3. fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
4. the judgment is void;
5. the judgment has been satisfied, released, or discharge; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
6. any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

In order to obtain relief under Rule 60(b)(6) there must be a showing of extraordinary circumstances justifying relief and the movant must not have contributed to the situation from which relief is sought. *In re Clayton*, No. 02-82063C-13D, 2003 WL 22014579, at *3 (Bankr. M.D.N.C. Aug. 19, 2003) (citing *Dawson v. Compagnie des Bauxites de Guinee*, 112 F.R.D. 82, 85-86 (D. Del. 1986)). The court finds no possible grounds for reconsideration of the Dismissal Order in the Debtor's situation under this very high standard of extraordinary circumstances.

The Debtor relies on the legal standard stated in *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 402 F.Supp.2d 617, 619 (M.D.N.C. 2005), which is partially quoted in the Current Motion. The entire quote is as follows:

> A motion for reconsideration, however, is limited in its scope. 'A motion to reconsider is appropriate when the court has obviously misapprehended a party's position or the facts or applicable law, or when the party produces new evidence that could not have been obtained through the exercise of due diligence.' Thus, the reconsideration motion is not to present a better and more compelling argument that the party could have presented in the original briefs.

Id. (citation omitted). The Current Motion refers to the fact that the court "misapprehended" his position. The court will evaluate the reconsideration request with regard to this basis, noting that the Debtor testified at the November 15, 2018 hearing on the Trustee's motion to dismiss his case and was given every opportunity to present additional information at that hearing.

Analysis of Debtor's Grounds Pursuant to Bankruptcy Rules 9023 and 9024 (Civil Procedure Rules 59 and 60(b)).

1. **The record shows that Debtor's proposed Chapter 13 plan payments and terms were identical to those which the Trustee himself had proposed.**

The plan payments and terms of the plan proposed by the Debtor were not identical to the payments in the Trustee's analysis. The Debtor's Revised Second Amended Plan provided for plan payments in the amount of $914.79 prior to November 1, 2018, $3,487.23 for November and December 2018, $3,827.28 for January 2019, and $4,359.78 for February 2019 through the end of the plan. The Trustee recommended plan payments in the amount of $9,059.00. The record does not show that the payments and terms in question were identical. There is no clear error or manifest injustice to justify vacating the Dismissal Order pursuant to this situation under Rule 59 or any ground under Rule 60(b) that would justify reconsideration of the Dismissal Order.

2. **Bankruptcy law requirement that all creditors receive equal treatment.**

The Debtor contends that the court did not explain in the Dismissal Order that the reason the Debtor made a smaller payment to the Trustee on November 1, 2018 ($914.79) by virtue of his Revised Second Amended Plan was that the Debtor believed that creditors other than Wells Fargo had been overpaid by virtue of the payments he already made, both to creditors directly and to the Trustee. Prior to entering the Dismissal Order, the court entered an order on the Debtor's motion for reconsideration, clarification, and extension of time to comply with the deadline announced at the October 18, 2018 hearing. The order clarified that the Trustee would not disburse funds to any creditor unless otherwise ordered by the court, such that Debtor's concerns about possible overpayment to a creditor may be addressed at a later date. Therefore, the court finds this explanation by the Debtor to be completely without merit. To the extent that the Debtor had made any overpayments to secured and priority creditors either during one of his

Chapter 13 bankruptcy cases or during the period the Debtor was not in bankruptcy, the allowed claims in the Current Case are the controlling determinations for what the Trustee must pay over the course of the plan. The Trustee would determine, as the Debtor pays funds in during his five-year plan, whether some amounts to some creditors may need to be adjusted.

It should be noted that the Debtor did not file any objections to claims in the Current Case other than the objection to the Wells Fargo Proof of Claim contained in his complaint in the adversary proceeding. Moreover, before the Debtor filed his Revised Second Amended Plan under which he reduced the overall amount he would pay to the Trustee, the Trustee had advised the Debtor in open court that the plan payments would need to increase significantly for the plan to be successful. Therefore, Debtor's reasoning to try to justify a lower plan payment amount on November 1, 2018 is simply specious.

There is nothing in this subsection of Current Motion which would justify vacating the Dismissal Order under Rule 59 or reconsidering the Dismissal Order under Rule 60.

3. The Court gave Debtor confusing and contradictory instructions regarding his plan and cannot blame Debtor when Debtor sought clarification and none was given.

On October 18, 2018, the court held a hearing on Wells Fargo's amended motion for relief from stay and relief from co-debtor stay. The Debtor filed his Second Amended Plan on the day prior to the hearing. The court indicated that the Debtor could have until the court's next hearing date to comply with the terms of his newly proposed Second Amended Plan. Under this plan the Debtor proposed to make payments of $4,309.67 per month for 60 months to the Trustee. The Debtor's first plan payment was due in August 2018 in the Current Case. Therefore, by the end of October, by the terms of that Second Amended Plan, three plan payments of $4,309.67 should have paid to the Trustee. Despite objections by Wells Fargo and the Trustee, the court gave the Debtor time to comply with his latest plan and continued the hearing on Wells Fargo's amended motion for relief from stay.[4] Instead of complying with the terms of his own proposed plan, the Debtor filed his Revised Second Amended Plan with lower initial proposed payment terms: $914.79 prior to November 1, 2018; $3,487.23 for November and December 2018; $3,827.28 for January 2019; and $4,359.78 from February 2019 to the end of the plan. The Debtor specified in the Revised Second Amended Plan exactly how the Trustee should pay out his various secured and priority creditors each month, with a $1,721.00 payment to Wells Fargo as a constant amount.

[4] At the October 18, 2018 hearing, the court specifically instructed the Debtor to comply with his own proposed plan by making his October payment of $4,309.67 and bringing up to date all three payments "so that we have three good payments of $4,309.67." The court reiterated the amount to the Debtor at the end of the hearing and the Debtor clarified with the court that with the $4,309.67 per month plan payment for three months he could subtract the payments already made to the Trustee. The court asked the Debtor if he had any questions and if he understood what he needed to pay before the next hearing and he replied "yes I do." The court's objective in continuing the Amended Motion for Relief from Stay and giving the Debtor the opportunity to make his proposed plan payments was to direct the Debtor to a path that would lead to a successful Chapter 13 plan. The court is concerned about the apparent disconnect between the answers of the Debtor to the court at this hearing and his statements in his various motions in the Current Case.

Even if the Debtor was confused about paying in a plan the amount that he proposed, other considerations moot this point. At the October 18, 2018 hearing it was made clear to the Debtor that a good faith estimate of the arrearage of the Wells Fargo Proof of Claim would need to be paid into the plan over 60 months; it was a possibility that the Trustee could hold funds in dispute, but that the plan payments needed to cover the monthly payments due under the Wells Fargo Proof of Claim and also a reasonable amount toward the arrearage claim.[5] The Debtor represented that he would make his first four plan payments of $4,309.67 and that he had also paid some creditors directly as he had proposed in a prior plan. After consideration of those representations, the court advised the Debtor that it was likely that his plan payments starting in November would need to be far greater than $4,309.67. A week later, the Debtor proposed a plan with reduced payments.

There is nothing with regard to this contention of the Debtor which would justify either vacating the Dismissal Order under Rule 59 or reconsideration of the Dismissal Order under Rule 60(b).

4. Wells Fargo's claim improperly taken as true over Debtor's objections and without a hearing.

The Debtor uses a figure of $1,721.00 ($900.00 as the installment payment leaving $821.00 for an arrearage component) as a monthly payment to Wells Fargo in his latest proposed plan in the Current Case.[6] The Wells Fargo Proof of Claim sets forth a current monthly payment of $2,590.32. The plan confirmation process does not allow debtors "to change the amount or reclassify a debt in their chapter 13 plan which was set forth in a properly filed proof of claim." *De La Salle v. U.S. Bank, N.A. (In re de la Salle),* 461 B.R. 593, 602 (9th Cir. B.A.P. 2011). Section 1322(b)(2) specifically prohibits debtors from modifying claims which are secured by their principal residence.

The Debtor and Ms. Steed-Foster commenced this adversary proceeding against Wells Fargo on October 15, 2018, and the pre-trial was set for December 13, 2018. The complaint contained eleven counts,[7] including Count 9, Objection to Proof of Claim. The plan confirmation process and the objection to claim process are separate in bankruptcy court. As explained in the

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[5] For example, the court confirmed a Chapter 13 plan in In re Rutledge, where the Debtor disputed her mortgage claim with Wells Fargo and her plan provided for payments on the arrearage claim to be made to the Trustee but not disbursed to Wells Fargo until the dispute was resolved. Case No. 12-51625, Doc. No. 23. The Debtor then filed an adversary proceeding asserting an objection to claim, breach of contract, breach of the duty of good faith and fair dealing, breach of fiduciary duty, constructive fraud, violation of N.C. Gen. Stat. § 75-1.1, fraud, negligent misrepresentation, and violation of N.C. Gen. Stat. § 75-50. The court ultimately approved a settlement agreement between the parties over two years later.

[6] The Revised Second Amended Chapter 13 Plan attached to the Debtor's Emergency Motion for Reconsideration and for Clarification and For Extension of Time to Comply with Deadline announced at October 18th Hearing shows an installment payment to Wells Fargo of $900.00 without a specified monthly payment to go to arrearages, but in the motion the Debtor explains his payment to Wells Fargo as $1721.00, thereby leaving $821.00 to go to the arrearage portion of the Wells Fargo Proof of Claim.

[7] There were two Count 8's in the complaint.

Order Sustaining Objection to Confirmation and Granting Motion to Dismiss Case in the Debtor's Prior Case, speculative chapter 13 plans that rely on successful litigation to eliminate secured debt obligations, are not feasible and cannot be confirmed pursuant to 11 U.S.C. § 1325(a)(6). *See Ewald v. Nat'l City Mortgage Co. (In re Ewald)*, 298 B.R. 76, 81-82 (Bankr. E.D. Va. 2002). Whether there could be a reduction to the Wells Fargo Proof of Claim on some basis alleged in the complaint is purely speculative. Meanwhile, amounts must be paid into the plan with at least a good faith attempt to maintain ongoing payments and cure the portion of the arrearage consisting of interest and escrow deficiency. In the event the Debtor's adversary proceeding is unsuccessful, the Wells Fargo Proof of Claim must be satisfied during the 60 months of the Debtor's plan. If not, "strategic litigation" by debtors could result the avoidance of making payments in the chapter 13 plan while obtaining the benefits of the automatic stay. *De La Salle* at 602 n.11.

The Debtor has not made a mortgage payment on a $340,506.00 promissory note since 2012. The escrow deficiency alone for real property taxes and insurance for this time period is $50,572.72 per the Wells Fargo Proof of Claim. The largest arrearage figure the Debtor uses in his various proposed plans in the Current Case is $49,260.00, which apparently includes nothing for an escrow deficiency. The numbers that the Debtor uses in his proposed plans in his Current Case for amounts to be paid to Wells Fargo border on the absurd, with no foundation in reality. A pending objection to claim does not give the Debtor free license to simply make up a number that he feels he would like to pay to a secured creditor in his Chapter 13 plan.

There is nothing in this allegation in the Current Motion to justify either the vacating of the Dismissal Order under Rule 59 or reconsideration of the Dismissal Order under Rule 60.

5. The Court did not need to determine the adversary proceeding to deny dismissal or deny Wells Fargo's Proof of Claim because overwhelming undisputed facts already existed in the record to support denying dismissal and show Wells Fargo's Proof of Claim as false.

In this section of the Current Motion, the Debtor discusses the "false" claim filed by Wells Fargo in the Current Case. The Debtor appears to be referring to a "modification" of the mortgage held by Wells Fargo which reduced his mortgage payments and contends such "modification" should be included in the Wells Fargo Proof of Claim. This phantom modification (apparently also referred to in the Debtor's motions as a "resolution plan") would result in a monthly installment payment of $900.00 (if not lower), according to the Current Motion, as well as an arrearage of $49,260.00, as estimated in the Revised Second Amended Plan of the Current Case. This modification apparently predates the Forbearance Agreement, signed by the Debtor and Ms. Steed-Foster with Wells Fargo on August 8, 2011, whereby the payments to be made under the Forbearance Agreement were $1,075.91. A copy of the Forbearance Agreement and the Debtor's bank statements[8] are attached to the complaint in the related adversary proceeding. (Case No. 18-9032, Doc. No. 1, Ex.s B and C.

Specifically, the Current Motion notes eight $1,075.91 payments made to Wells Fargo by

[8] The Debtor attached six pages of SunTrust bank statements dated September 20, 2011, October 20, 2011, November 18, 2011, December 19, 2011, January 20, 2012, and February 16, 2012.

the Debtors from August 30, 2011 to April 9, 2012.[9] The Forbearance Agreement provided that the Debtor and Ms. Steed-Foster were to make six payments of $1,075.91, beginning September 1, 2011 and continuing on the first day of each month including February 1, 2012. (Adv. Proc. No. 18-09032, Docket No. 1, Exhibit B). The agreement states in paragraph 3, "If you are unable to make a payment on the plan by the date indicated above, further collection activity may result, including foreclosure." In addition, paragraph 4 of the Forbearance Agreement – Terms and Conditions (page 3) states, "Wells Fargo Home Mortgage is under no obligation to enter into any further agreement, and this forbearance shall not constitute a waiver of Wells Fargo Home Mortgage's right to insist upon strict performance in the future."

The bank statements upon which the Debtor relies confirm the dates the Debtor and Ms. Steed-Foster had the funds for the payments withdrawn from their bank account: August 31, 2011; October 6, 2011; November 7, 2011; November 30, 2011; December 28, 2011; and February 1, 2012. The payment history attachment to the Wells Fargo Proof of Claim shows these six payments and payment dates, as well as two additional payments of $1,075.91 made by the Debtor and Ms. Steed-Foster on March 5, 2012 and April 9, 2012.

The Current Motion appears to allege that, despite the language in the Forbearance Agreement to the contrary, and despite the failure to make the six forbearance payments on time (two of the six were past due), Wells Fargo owes the Debtor and Ms. Steed-Foster a modification to their mortgage. This contention clearly goes to the claims objection process of the Debtor's Chapter 13 plan, not to the plan confirmation process.

The Debtor also alleges in the Current Motion that Wells Fargo charged the Plaintiff's account "a number of bogus fees and charges and also charged to Debtor's account the costs for its failed foreclosure attempt in 2012 to the amount of approximately $4,000…" The Wells Fargo Proof of Claim set forth fees in the amount of $2,596.64. Again, any issues as to these fees should be resolved in the claims objection process, not confirmation.

In the Note attached to the Wells Fargo Proof of Claim the principal and interest portion of the indebtedness owed of $340,506.00, at a rate of 5% interest and a maturity of 30 years, is $1,827.91. In the attachment to the Wells Fargo Proof of Claim, the monthly mortgage payment is broken down into its components, $1,827.91 for principal and interest, $632.26 for the monthly escrow, and $130.15 for private mortgage insurance. The total of these amounts is $2,590.32 for a monthly payment to Wells Fargo, one that is dictated by the terms of the indebtedness and, unless the claim objection process results in a different monthly payment, one that is required to be made in the Debtor's Chapter 13 plan.

The Wells Fargo Proof of Claim shows that the county taxes and hazard insurance on the Real Property were paid every year by Wells Fargo since October, 2011 despite receiving no payments from the Debtor and Ms. Steed-Foster. Yet in this subsection of the Current Motion, the Debtor explains how a $1,721.00 payment to Wells Fargo is the correct one with $900.00 as the regular monthly payment and $821.00 towards arrears. An $821.00 payment for 60 months would not cover the escrow deficiency in the Wells Fargo Proof of Claim. A proposed $821.00 payment toward the arrearage of the Wells Fargo Proof of Claim is patently frivolous; there is nothing in this subsection of the Debtor's Current Motion to justify vacating the Dismissal Order under Rule 59 or reconsidering the Dismissal Order under Rule 60(b).

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[9] This was the last payment made to Wells Fargo according to the Wells Fargo Proof of Claim payment history attachment. At the hearing on the Trustee's motion to dismiss, the Debtor testified that the last time he made a direct payment to Wells Fargo was 2012.

6. Neither the Court or [sic] Debtor should have to engage in hypothetical musings regarding the terms of the resolution plan when production of same is demanded as part of the proof of claim.

The Debtor acknowledges that as part of his objection to the Wells Fargo Proof of Claim, he intends to uncover from Wells Fargo a "Resolution Plan" that should have been offered to the Debtor and Ms. Steed-Foster to reduce the monthly payments and "custom fit the needs of the homeowner." Again, this subsection in the Current Motion for reconsideration or vacating the Dismissal Order fails to distinguish between the plan confirmation process and the claim objection process.

The Debtor has cited no cases where a lender has been required by a court of law to enter into a mortgage modification agreement after the borrowers have failed to abide by the terms of their Forbearance Agreement. The court has been unable to discover such a case. The "resolution plan" terminology used by counsel for Wells Fargo at the foreclosure proceeding hearing on January 2, 2012 has been magnified by the Debtor to mean something additional or greater than the Forbearance Agreement. The Debtor's own exhibits, including the bank statements that he attached to the complaint in the related adversary proceeding, show he did not comply with the six timely payments requirement under the Forbearance Agreement for the period from September 1, 2011 to February 1, 2012. This subsection of the Current Motion offers no grounds for either vacating or reconsidering the Dismissal Order.

7. The Court's findings are profoundly contrary to the record.

The October 18, 2018 record reflects that the Debtor stated that he understood he needed to make the equivalent of three $4,309.67 payments less the amounts he already paid the Trustee by the next hearing. The Debtor affirmed that he understood that his next plan payments would need to be greater than the $4,309.67 amount in order to confirm a Chapter 13 plan and that this interim payment amount was in the nature of allowing the Debtor to show his good faith to continue in Chapter 13. Instead, the Debtor filed an emergency motion for clarification with a further amended plan attached and a proposed reduced plan payment of $914.73 due to "overpayments." There is nothing in this subsection of the Current Motion to justify either vacating or reconsidering the Dismissal Order.

8. Any delay in reaching a confirmable plan is traceable to Wells Fargo's incomplete proof of claim and the Court's failure to hold a hearing on Debtor's objection to the claim and to hold a hearing on Wells Fargo's motion for relief from stay.

The delay in reaching a confirmable plan was caused by the Debtor's failure to file a confirmable plan. In the Current Case, as well as the Prior Case, the Debtor has caused repeated delays by filing amended plans—none of which were remotely confirmable—just prior to scheduled hearings. The Debtor did not file his complaint with his objection to claim until October 15, 2018, three months into the case. The Bankruptcy Rules of Civil Procedure allow time for an answer, discovery, and dispositive motions, such that a trial on the merits would not have been scheduled until well into 2019. In contrast, 11 U.S.C. § 1324 provides that a confirmation hearing be held no later than 45 days after the § 341 meeting, which in this case

was held on September 28, 2018. Thus, as the court ruled in the Prior Case, and again cautioned the Debtor in the Current Case, a confirmable plan is one that is feasible without reliance on speculative litigation. None of the four proposed plans filed by the Debtor in the Current Case made any provision for Wells Fargo's claim in the event that the Debtor's litigation was unsuccessful.

Reviewing the contentions in this subsection in light of Rule 59 and Rule 60, the court does not find grounds for either vacating or reconsidering the Dismissal Order.

9. The record reflects that Debtor's income is actually far higher than was determined by the Court resulting from clerical error.

The Debtor had issues with his figures on his Schedules I and J and his Form 122C-1, Chapter 13 Statement of Current Monthly Income, filed during the Current Case; the Debtor filed amended Schedules I and J and an amended Form 122C-1 on the same day he filed the Current Motion. The income figure for the Debtor and Ms. Steed-Foster, shown in the latest amended Schedule I shows $10,075.00 as current monthly income available to make plan payments. The Debtor's expense figure in the latest amended Schedule J shows $6,912.00 in expenses, leaving $3,163.00 to make plan payments. On the face of his schedules and statements filed in the Current Case (including the statements and schedules filed after the Dismissal Order was entered), the Debtor does not show that he can make a confirmable plan payment.

While the amended schedules and statements are much more clearly filled out, they do not affect any conclusions of the court as to the Dismissal Order or the possibility of vacating the Dismissal Order pursuant to Rule 59 or reconsidering the Dismissal Order pursuant to Rule 60.

Stay of Proceedings.

The Debtor requests the court to stay proceedings pending appeal in the event the court denies the Debtor's motion to reconsider and/or vacate its Dismissal Order pursuant to "Fed. R. Bankr. P. 8005 [sic]." The existing rules in Part VIII of the Federal Bankruptcy Rules were amended in 2014; Rule 8007 of the Federal Rules of Bankruptcy Procedure is the current rule that governs stay pending appeal.

Courts in the Fourth Circuit apply the standard for granting a preliminary injunction when assessing the merits of a motion to stay pending appeal. *Bate Land Co., LP v. Bate Land & Timber, LLC*, No. 7:16-CV-23-BO, 2016 WL 3582038, at *1 (E.D.N.C. June 27, 2016). This stringent standard requires that the Debtor demonstrate each one of the following four factors: likelihood of success on the merits, irreparable harm in the absence of relief, the balance of equities tip in its favor, and a stay is in the public interest. *Id*. (citing *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds and remanded*, 559 U.S. 1089 (2010), *standard reaffirmed in* 607 F.3d 355 (4th Cir. 2010)).

The Debtor has not demonstrated a likelihood of success on any of the contentions raised in the Current Motion nor irreparable harm in the absence of relief. This motion is, after all, just one component of a continuing saga with Wells Fargo that has lasted for almost seven years, and the Current Case was dismissed without any bar to refiling. In addition, the balance of equities do not tip in the Debtor's favor. The Debtor, despite iterations to the court at the October 18, 2018 hearing as to understanding what he must do to show his good faith in participating in the Chapter 13 process, and despite providing testimony at the November 15, 2018 hearing, now

files his Current Motion asking for an order vacating the Dismissal Order, reconsidering the Dismissal Order, or for a stay pending appeal.

A stay pending appeal of the Dismissal Order does not serve the public interest. None of the four factors required for a stay are present in this case. The motion for stay pending appeal is denied.

Conclusion.

The court reviewed and considered all pleadings, exhibits, statements of record, and arguments advanced by the Debtor prior to the making the determination to dismiss the Current Case. The court has thoroughly reviewed and considered all documentation filed by the Debtor, the Trustee, and Wells Fargo on the record of the Current Case and Prior Case, as well as the related adversary proceedings.

The court is not interested in perpetuating the game the Debtor is playing to see how long he can delay the foreclosure process on his residence. A Chapter 13 case is a wonderful opportunity for a debtor to maintain regular monthly mortgage payments while curing any arrearages of the mortgage. It also provides an opportunity for a debtor to object to a mortgage claim and, if successful, that mortgage claim will be adjusted accordingly. However, a debtor must promptly propose and then actually make appropriate plan payments to show good faith and the financial ability to participate in the Chapter 13 process.

Despite professing to the court that he understands the reality of a Chapter 13 plan, two bankruptcy cases stretching over 15 months combined, and nine proposed plans, the Debtor has yet to propose a confirmable plan and his repeated excuses and delays are unreasonable and prejudicial to creditors.

For the reasons stated herein, the Debtor's motions as enumerated in the Debtor's Rule 59 and 60 Motion for Reconsideration and/or to Vacate/Amend Order Dismissing Case for Cause and Motion for Stay of Proceedings Pending Appeal in Case of Denial are denied in their entirety.

SO ORDERED.

[END OF DOCUMENT]

PARTIES TO BE SERVED

Ralph McDonald Foster
18-80466 C-13

Ralph McDonald Foster
308 South Bend Drive
Durham, NC 27713

Shyvonne L. Steed Foster
308 South Bend Drive
Durham, NC 27713

William P. Harris
Shapiro & Ingle
10130 Perimeter Parkway, Suite 400
Charlotte, NC 28216

Richard M. Hutson, II
Chapter 13 Office
P.O. Box 3613
Durham, NC 27702

William P. Miller
101 South Edgeworth St.
Greensboro, NC 27401