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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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In re,

BRUCE DOUGLAS,

Debtor,

2:11-cv-0348 FCD EFB

BANKR NO. 10-33792-C-7

Chapter 7

Adv. No. 10-02778

DC No. SW-2

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BRUCE DOUGLAS,

Plaintiff,

ORDER

vs.

WELLS FARGO BANK, N.A.,  
SUCCESSOR BY MERGER TO WELLS  
FARGO HOME MORTGAGE, INC.,

\_\_\_\_\_  
Defendant.

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This matter is before the court on defendant Wells Fargo Bank, N.A.'s ("defendant") motion to withdraw reference to the bankruptcy court pursuant to 28 U.S.C. § 157(d) and Bankruptcy

1 Rule 5011(a). Plaintiff Bruce Douglas ("plaintiff") opposes the  
2 motion. For the reasons set forth below,<sup>1</sup> defendant's motion is  
3 DENIED.

4 **BACKGROUND**

5 On December 2, 2010, plaintiff initiated an adversarial  
6 proceeding against defendant in the United States Bankruptcy  
7 Court. (See Compl., filed December 2, 2010.) As alleged in the  
8 complaint, plaintiff was laid off from his job in September 2008.  
9 (Id. ¶ 4.) In December 2008, plaintiff contracted with Pro City  
10 Mortgage ("Pro City") to assist him with obtaining a loan  
11 modification with defendant. (Id.) Pro City submitted documents  
12 to defendant on plaintiff's behalf but was told that plaintiff  
13 did not qualify for a permanent modification. (Id. ¶ 6.) In May  
14 2009, plaintiff ceased making his mortgage payments. (Id. ¶ 7.)  
15 On October 27, 2009, defendant filed its Notice of Default. (Id.  
16 ¶ 8.)

17 On November 20, 2009, plaintiff and defendant entered into a  
18 trial modification arrangement. (Id. ¶ 10.) Under this  
19 arrangement, plaintiff was to show that he "could make three  
20 reduced payments on time while [defendant] reviewed [p]laintiff's  
21 mortgage loan." (Id.) The first payment was due on January 1,  
22 2010 and plaintiff made this payment in person, on December 31,  
23 2009 at a Wells Fargo Bank Branch. (Id. ¶ 11.) A week later,  
24 defendant contacted plaintiff notifying him that defendant had  
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<sup>1</sup> Because oral argument will not be of material  
28 assistance, the court orders these matters submitted on the  
briefs. E.D. Cal. L.R. 230(g).

1 not received the payment. (Id.) Defendant removed plaintiff  
2 from the trial modification. (Id.)

3 On January 28, 2010, plaintiff was advised by a friend that  
4 defendant had recorded a Notice of Trustee's Sale and the  
5 foreclosure sale was set for February 17, 2010. (Id. ¶ 13.) On  
6 January 29, 2010, plaintiff made a second payment which was due  
7 February 1, 2010. (Id. ¶ 15.) From February 2010 through May  
8 2010, defendant continued to request additional documentation  
9 from plaintiff. (Id. ¶ 16.) "Plaintiff . . . provided documents  
10 but then never heard back from [defendant]." (Id.)

11 On May 25, 2010, defendant notified plaintiff that he would  
12 need to pay \$10,000 for 30-day postponement of the Trustee Sale  
13 with no assurance of a loan modification. (Id. ¶ 17.) On that  
14 same day, plaintiff filed a Chapter 7 bankruptcy petition in the  
15 United States Bankruptcy Court. (Id. ¶ 20). "Plaintiff's  
16 Chapter 7 bankruptcy case remains open and no property, including  
17 his residence, has been abandoned back to plaintiff by the  
18 Chapter 7 Trustee." (Def.'s Mot. to Withdraw Reference ["Def.'s  
19 Mot."], filed February 7, 2011 at 2.)

20 Based on these events, plaintiff alleges causes of action  
21 for breach of contract, fraud, breach of covenant of good faith  
22 and fair dealing, unfair business practices, and declaratory  
23 relief. (Id. ¶¶ 21-66.)

#### 24 STANDARD

25 District courts, rather than bankruptcy courts, have  
26 original jurisdiction over all bankruptcy matters. 28 U.S.C. §  
27 1334(b). However, district courts may refer all bankruptcy  
28 matters to a bankruptcy court. Id. § 157(a). 28 U.S.C. § 157(d)

1 provides that, in certain circumstances, a referred case may be  
2 transferred from the bankruptcy court back to the district court  
3 by withdrawing the reference. Withdrawal can be mandatory or  
4 permissive. Id. § 157(d). The burden of persuasion is on the  
5 party seeking withdrawal. In re U.S. Airways Group, Inc., 298  
6 B.R. 674, 667 (E.D. Va. 2003).

## 7 ANALYSIS

### 8 A. Mandatory Withdrawal

9 Withdrawal of the reference to the bankruptcy court is  
10 mandatory if "resolution of the proceeding requires consideration  
11 of both title 11 and other laws of the United States regulating  
12 organizations or activities affecting interstate commerce." 28  
13 U.S.C. § 157(d). Although the Ninth Circuit has not squarely  
14 addressed mandatory withdrawal, it has followed other circuits,  
15 stating, in dictum, that mandatory withdrawal hinges "on the  
16 presence of substantial and material questions of federal law."  
17 Sec. Farms v. Int'l Bhd. of Teamsters, Chauffers, Warehousemen &  
18 Helpers, 124 F.3d 999, 1008 n.4 (9th Cir. 1997); see also In re  
19 Vicars Ins. Agency, Inc., 96 F.3d 949, 954 (7th Cir. 1996)  
20 ("Mandatory withdrawal is required only when [non-title 11]  
21 issues require the interpretation, as opposed to the mere  
22 application, of the non-title 11 statute, or when the court must  
23 undertake analysis of significant and open unresolved issues  
24 regarding the non-title 11 law."); In re Ionosphere Clubs, Inc.,  
25 922 F.2d 984, 995 (2d Cir. 1990). Courts within the Ninth  
26 Circuit have adopted this approach. See, e.g., In re Upp, Nos. C  
27 10-01934 SI, 3:10-cv-00204-SI, 3:10-cv-01 149-SI, 3:10-cv-02449-  
28 SI, 2010 WL 5387609, at \*1 (N.D. Cal. Dec. 21, 2010); Siegel v.

1 Caldera, No. CV 10-00179-RGK, 2010 WL 1136220, at \*1 (C.D. Cal.  
2 Mar. 19, 2010); In re Creekside Vineyards, Inc., No. CIV. 2:09-  
3 2273 WBS EFB, 2009 WL 3378989, at \*4 (E.D. Cal. Oct. 19, 2009).  
4 Thus, “[u]nder the plain meaning of the statute, the substantial  
5 and material question of non-bankruptcy federal law must also be  
6 regarding a federal law “regulating organizations or activities  
7 affecting interstate commerce.” In re Creekside Vineyards,  
8 Inc., 2009 WL 3378989 at \*4 (citing 28 U.S.C. § 157(d)).

9 Defendant contends that the court must withdraw the  
10 reference under the mandatory language of 28 U.S.C. § 157(d)  
11 because plaintiff’s state law claims are intertwined with non-  
12 Code federal law. (Def.’s Mot. at 6.) However, none of these  
13 claims involve the application or interpretation of non-title 11  
14 federal law. Rather, plaintiff alleges only state law causes of  
15 action which do not necessarily require determination of a  
16 federal issue. See Rains v. Criterion Sys., Inc., California, 80  
17 F.3d 339, 345 (9th Cir. 1996) (holding that the plaintiff’s  
18 wrongful discharge claim did not give rise to federal question  
19 jurisdiction because it could be supported by violations of the  
20 state constitution, not only violations of a federal statute);  
21 Lippit v. Raymond James Fin. Servs., Inc., 240 F.3d 1033, 1043  
22 (9th Cir. 2003) (holding that California unfair competition  
23 claims did not give rise to federal question jurisdiction because  
24 such claims are based on unfair or fraudulent conduct generally,  
25 and not necessarily violations of federal rules and regulations);  
26 Mulcahey v. Columbia Organic Chems., 29 F.3d 148, 153 (4th Cir.  
27 1994) (holding that a negligence action alleging violations of  
28 local, state and federal environmental laws did not confer

1 federal question jurisdiction). As such, the court concludes  
2 that mandatory withdrawal is inappropriate in this case.

3 **B. Permissive Withdrawal**

4 Where withdrawal of the reference is not required, a  
5 "district court may withdraw . . . any case or proceeding  
6 referred [to the bankruptcy court] . . . for cause shown." 28  
7 U.S.C. § 157(d). "In determining whether cause exists, a  
8 district court should consider the efficient use of judicial  
9 resources, delay and costs to the parties, uniformity of  
10 bankruptcy administration, the prevention of forum shopping, and  
11 other related factors." Sec. Farms, 124 F.3d at 1008 (citing In  
12 re Orion Pictures Corp., 4 F.3d 1095, 1101 (2d Cir. 1993)).  
13 Before considering these factors, the court "should first  
14 evaluate whether claim is core or non-core, since it is upon that  
15 issue that questions of efficiency and uniformity will turn." In  
16 re Orion Pictures Corp., 4 F.3d at 1101.

17 Under 28 U.S.C. § 157(b)(3), "[t]he bankruptcy judge shall  
18 determine on the judge's own motion or on timely motion of a  
19 party, whether a proceeding is a core proceeding under this  
20 subsection or is a proceeding that is otherwise related to a case  
21 under title 11." The Ninth Circuit has interpreted § 157(b)(3)  
22 to express a preference for the bankruptcy judge to initially  
23 determine whether a claim is properly characterized as core or  
24 non-core. See, e.g., In re Coupon Clearing Serv., Inc., 113 F.3d  
25 1091, 1097 (9th Cir. 1997); In re Int'l Nutronics, Inc. 28 F.3d  
26 965, 969 (9th Cir. 1994). Several decisions from this district  
27 support this interpretation. See In re Creekside Vineyards, 2009  
28 WL 3378989 \*6-7; Willms v. Sanderson Cmtys. Inc., No. 07-2366,

1 2009 WL 728464, at \*1 (E.D. Cal. Mar. 19, 2009).<sup>2</sup> When the  
2 bankruptcy court has not made a determination on whether the  
3 proceeding is a core or non-core proceeding, remand to that court  
4 is appropriate. Willms, 2009 WL 7208464, at \*1.

5 At this time, the bankruptcy court has yet to determine  
6 whether this adversarial proceeding is core or non-core.  
7 Accordingly, the court declines to exercise its discretion to  
8 permissively withdraw the reference until the bankruptcy court  
9 has had an opportunity to make an initial determination of  
10 whether the action is core or non-core.

11 **CONCLUSION**

12 For the forgoing reasons, defendant's motion to withdraw  
13 reference is DENIED without prejudice, and this case is hereby  
14 remanded to the Bankruptcy Court.

15 IT IS SO ORDERED.

16 DATED: May 3, 2011



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FRANK C. DAMRELL, JR.  
UNITED STATES DISTRICT JUDGE

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24 <sup>2</sup> Although some courts in the Third Circuit have  
25 construed § 157(b)(3) to require the bankruptcy judge to make the  
26 initial determination of whether a proceeding is core or non-  
27 core, some district courts in the Ninth Circuit have explained  
28 that the language simply describes the scope of a bankruptcy  
court's authority under section 157. Compare Tomason Auto Group,  
LLC v. China Am. Co-op. Auto., Inc., No. 08-3365, 2009 WL 512195,  
at \*5 n.6 (D.N.J. Feb. 27, 2009), with In re Don's Making Money  
Llp, No. 07-319, 2007 WL 1302748, at \* 4 (D. Ariz. May 1, 2007).