

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:)	
)	
JOHN WAYNE ATCHLEY and)	
ROBIN APRIL ATCHLEY,)	
)	CASE NO. 05-79232-MHM
Debtors)	
)	CHAPTER 13
)	
)	
)	

DONALD F. WALTON,)	
United States Trustee for Region 21,)	
)	
Plaintiff,)	ADVERSARY NO. 08-6092
)	
vs.)	
)	
COUNTRYWIDE HOME LOANS, INC.,)	
)	
Defendant.)	

**DEFENDANT COUNTRYWIDE HOME LOANS, INC.’S MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF’S COMPLAINT**

Defendant Countrywide Home Loans, Inc. (“Countrywide”), files this Memorandum of Law in support of its Motion to Dismiss Plaintiff’s Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and Federal Rule of Bankruptcy Procedure 7012(b).

I. INTRODUCTION

The Plaintiff, Donald F. Walton, United States Trustee for Region 21 (“Plaintiff”), filed this adversary proceeding claiming the power to sue Countrywide for injunctive relief and for sanctions under section 105 of the Bankruptcy Code and the Bankruptcy Court’s inherent powers

“for engaging in bad faith conduct which has abused the judicial process”.¹ The alleged violations which Plaintiff contends constitute abuse of the judicial process have been remedied, and the debtors in this case are not participating in the proceeding. Nonetheless, even if all of Plaintiff’s allegations are accepted as true, the Court should dismiss the case.

There are five distinct reasons to dismiss this case under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). First, Plaintiff lacks standing because his allegations fail to present a case or controversy. Second, Plaintiff lacks the statutory authority to assert these claims. Third, the Court lacks jurisdiction to hear these claims under 28 U.S.C. § 157 and § 1334. Fourth, the Court lacks jurisdiction to award the relief Plaintiff seeks. Fifth, Plaintiff fails to state any claim upon which relief may be granted. For all these reasons, the Complaint must be dismissed.

II. FACTUAL BACKGROUND

Plaintiff, a United States trustee, alleges that Countrywide filed two allegedly inaccurate motions for relief from stay on February 21, 2006, and May 24, 2006, assessed charges without disclosing how the fees arose in a May 11, 2007, payoff statement, received payments on these charges through the sale of the debtors’ residence, and that Countrywide continued to accept payments on June 1, 2007, and July 1, 2007, from the Chapter 13 trustee after the satisfaction of the mortgage. (Compl. at Sections B, C, D). Plaintiff acknowledges that Countrywide withdrew the first motion for relief from stay on February 28, 2006, and withdrew the second motion for relief from stay on June 20, 2006. (Compl. at ¶¶ 19, 26). Plaintiff also acknowledges that Countrywide issued refund checks for monies received after satisfaction of the loan on

¹ This lawsuit joins two almost identical lawsuits filed by the Plaintiff and another United States trustee, one in the United States Bankruptcy Court for Southern District of Florida and another filed by Habbo Fokkena, United States trustee for Region 9, in the United States Bankruptcy Court for the Northern District of Ohio. *See Walton v. Countrywide Home Loans, Inc. (In re Sanchez)*, Case No. 01-42230-BKC-AJC, Adv. No. 08-1176 (Bankr. S.D. Fla. 2008); *Fokkena v. Countrywide Home Loans, Inc. (In re O’Neal)*, Case No. 07-51027, Adv. No. 08-5031 (Bankr. N.D. Ohio 2008); (Compl. ¶ 50). While the underlying facts are slightly different in each case, in all cases the plaintiff improperly invokes bankruptcy jurisdiction to obtain sanctions and impermissible injunctive relief.

November 7, 2007, and withdrew its proof of claim on November 17, 2007. (Compl. at ¶¶ 39, 41). Plaintiff alleges that this “pattern of conduct” has resulted in “an abuse of the bankruptcy process” on a national level. (Compl. at Section E). Plaintiff does not allege any continuing violation of any orders or Bankruptcy Code provisions.

III. ARGUMENTS AND AUTHORITIES

Under Federal Rule of Civil Procedure 12(b), as incorporated by Federal Rule of Bankruptcy Procedure 7012(b), the Court can dismiss a complaint for lack of subject matter jurisdiction and for failure to state a claim. Fed. R. Civ. P. 12(b)(1), (6).

A. Plaintiff Fails To Allege A Live Case Or Controversy.

The jurisdiction of a federal court over an action depends on the existence of an actual “case and controversy” between the parties. U.S. Const. Art. III, § 2, cl. 1. The justiciability doctrines of standing and mootness play an important role in determining whether there is an actual case or controversy at issue. *See Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005) (“[S]tanding is a threshold jurisdictional question[] which must be addressed prior to and independent of the merits of a party's claims.”); *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1309 (11th Cir. 2000).

i. Plaintiff lacks standing.

To have standing, a plaintiff must allege “some threatened or actual injury resulting from the putatively illegal action” by a defendant to establish a case or controversy. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court articulated three factors that a plaintiff must show in order to satisfy the standing requirement: (1) that he has suffered an “injury in fact” that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the

complained of conduct of the defendant; and (3) that it is likely that the requested relief will redress or remedy the alleged injury. *Lujan*, 504 U.S. at 560-61; *see also Koziara v. City of Casselberry*, 392 F.3d 1302, 1304 (11th Cir. 2004).

Standing is determined on the basis of the plaintiff's complaint. *See Raines v. Byrd*, 521 U.S. 811, 818 (1997); *Lujan*, 504 U.S. at 561. The plaintiff bears the burden of establishing justiciability under this doctrine. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (noting it is the "burden of the 'party who seeks the exercise of jurisdiction in his favor...clearly to allege facts that he is a proper party to invoke judicial resolution of the dispute'" (internal citations omitted); *Koziara*, 392 F.3d at 1304. If a plaintiff fails to establish standing, a court should dismiss the complaint for lack of jurisdiction. FED. R.CIV. P. 12(b)(1).

Plaintiff lacks standing. Plaintiff does not allege that he suffered any actual injury. *See Lujan*, 504 U.S. 560-61. Additionally, Plaintiff has failed to demonstrate that this Court could redress any injury when each of Plaintiff's claims for relief is improper. *See* Section D, *infra*. Finally, no statute authorizes Plaintiff's actions in this case. *See* Section B, *infra*. This leaves the Court without jurisdiction to consider the Complaint, and the Complaint should be dismissed.

ii. Plaintiff's claims are moot.

Mootness, like standing, is a threshold jurisdictional question for a federal court. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998). "The doctrine of mootness derives directly from the case-or-controversy limitation because 'an action that is moot cannot be characterized as an active case or controversy.'" *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1335 (11th Cir. 2001) (quoting *Adler v. Duval County Sch. Bd.*, 112 F.3d 1475, 1477 (11th Cir. 1997)). A claim is moot if the issues are no longer live, or if the parties cease to have a legally cognizable interest in the outcome of the litigation because the court can no longer grant any

effective or meaningful relief to the prevailing party. *See id.* at 1335-36. *See also Powell*, 395 U.S. at 496 (finding that when “the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome[,]” the controversy vanishes and the case becomes moot); *Jews for Jesus v. Hillsborough County Aviation Auth.*, 162 F.3d 627, 629 (11th Cir. 1998) (“A case is moot when events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give the plaintiff meaningful relief.”).

A claim is moot when the claimant either receives the relief requested for that claim or the requested relief can no longer be granted. *See Harrison v. United Mine Workers of Am. 1974 Benefit Plan & Trust*, 941 F.2d 1190, 1193 (11th Cir. 1991). Additionally, “voluntary cessation of a challenged practice renders a case moot...if there is no ‘reasonable expectation’ that the challenged practice will resume after the lawsuit is dismissed.” *Jews for Jesus*, 162 F.3d at 629. Once a claim becomes moot, the court is divested of jurisdiction over that claim because the “case-or-controversy” required by Article III does not exist. *Morris v. Roche*, 182 F.Supp.2d 1260, 1279-80 (M.D. Ga. 2002) (citing *Al Najjar*, 273 F.3d at 1336). Accordingly, “the question of mootness is...one which a federal court must resolve before it assumes jurisdiction.” *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Bishop's Property & Investments*, 463 F.Supp.2d at 1377. If the case is moot, then a court should dismiss it for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

Any controversy that allegedly existed is now moot. Countrywide withdrew both of the offending motions for relief from stay, sent refund checks for monies received after satisfaction of the loan, and withdrew its proof of claim. (Compl. at ¶¶ 19, 26, 39, 41). Plaintiff fails to allege any outstanding orders that Countrywide is violating or any provisions of the Bankruptcy Code that Countrywide is currently violating. Plaintiff has failed to establish any “reasonable

expectation” that Countrywide will engage in any other allegedly improper conduct within the course of the underlying bankruptcy case or that Countrywide will even have a continuing role in the underlying case. *See Jews for Jesus*, 162 F.3d at 629. If the Plaintiff’s allegations are accepted as true, they illustrate how the adversary process effectively resolves disputes. The dispute over Countrywide’s practices has been resolved. Countrywide procedurally cannot repeat the allegedly harmful conduct, and any further examination of the issue is moot.

B. Plaintiff Lacks The Statutory Authority To Commence Adversary Proceedings Aimed At Policing Alleged Past Bankruptcy Code Violations.

Plaintiff also lacks statutory authorization to assert these claims. Plaintiff’s power, as a United States trustee (“UST”), is defined and limited by statute. The UST is a part of the United States Department of Justice, a federal agency. *In re Vance*, 120 B.R. 181, 185 (Bankr. N.D. Okla. 1990). As an agency, the UST has only the power specifically granted to it by Congress. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) (an agency may not exercise power “inconsistent with the administrative structure Congress enacted into law”); *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) (federal agency “has...only those authorities conferred on it by Congress”).

Lacking any statutory authority to prosecute this case, the UST will cite an isolated comment from the legislative history of the statute creating the UST program as justification for launching an extensive and costly national investigation of Countrywide’s business practices and policies.² *See In re A-1 Trash Pickup, Inc.*, 802 F.2d 774, 775 (4th Cir. 1986) (citing H.R. Rep. No. 95-595, at 88 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6049). The UST asserts that a

² So far this national effort has involved courts in six states and four circuits. *See, e.g., Walton v. Countrywide Home Loans, Inc. (In re Sanchez)*, Case No. 01-42230-BKC-AJC, Adv. No. 08-1176 (Bankr. S.D. Fla. 2008); *Fokkena v. Countrywide Home Loans, Inc. (In re O’Neal)*, Case No. 07-51027, Adv. No. 08-5031 (Bankr. N.D. Ohio 2008); *Countrywide Home Loans, Inc. v. Office Of the United States Trustee (In re Countrywide Home Loans, Inc.)*, No. 07-00204-TPA (Bankr. W.D. Pa. 2007); *Hill v. Countrywide Home Loans, Inc. (In re Hill)*, No. 01-22574 (Bankr. W.D. Pa. 2001); *In re Del Castillo*, No. 07-13601-BKC-AJC (Bankr. S.D. Fla. 2007); *In re Chadwick*, No. 05-37014-BKC-PGH (Bankr. S.D. Fla. 2005); *In re Parsley*, No. 05-90374 (Bankr. S.D. Tex. 2005).

statement in the legislative history describing his office as a “watchdog” exponentially expands his statutory duties. However, “courts have no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point.” *Shannon v. United States*, 512 U.S. 573, 584 (1994) (citing *International Brotherhood of Elec. Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987)).

Congress granted the UST standing to accomplish the specific goals of the UST program, but limited his ability to appear before the court by not making him a party in interest: “By not designating the U.S. Trustee as a party in interest, the legislation ensures that there is no confusion over the U.S. Trustee’s role in a case . . . the U.S. Trustee has no pecuniary stake in any case, and functions only as an impartial administrator.” H.R. Rep. No. 99-764, at 27 (1986), *reprinted in* 1986 U.S.C.A.A.N. 5227, 5240.

The UST’s powers and duties are primarily set forth in 28 U.S.C. § 586(a). Those duties are: (i) reviewing ... applications for compensation and reimbursement under section 330 of title 11; (ii) filing comments with the Court with respect to applications for compensation; (iii) monitoring plans and disclosure statements filed in Chapter 11 cases; (iv) monitoring plans filed under Chapters 12 and 13; (v) filing comments with respect to such plans; (vi) taking such action as it deems to be appropriate to ensure that all bankruptcy reports, schedules, and fees required to be filed by the debtor are properly and timely filed; (viii) monitoring creditors’ committees appointed under title 11; (ix) notifying the United States Attorney of matters which relate to the occurrence of any actions which may constitute a federal crime and, on the request of the United States Attorney, assisting the United States Attorney in carrying out prosecutions based on such actions; (x) monitoring the progress of cases under title 11 and taking such actions as it deems to be appropriate to prevent undue delay in such progress; (xi) performing additional duties in

relation to small business cases; (xii) monitoring applications filed under section 327 of title 11. 28 U.S.C. § 586(a).

The UST is also given specific powers and duties in title 11: section 110(j) – to bring a civil action against a bankruptcy petition preparer; section 111 – to review and approve non-profit budget and credit counseling agencies; section 303(g) – to appoint an interim trustee in an involuntary case; section 321 – to serve as trustee in a case “if necessary”; section 327(c) – to object to the employment by a trustee of a professional who represents a creditor; section 330(a) – to participate in hearings on compensation of officers in a case; section 332 – to appoint a consumer ombudsman; section 341 – to convene and preside at the first meeting of creditors; section 343 – to examine the debtor; section 345 – to approve certain corporate sureties; section 526 – to bring actions against a debt relief agency; sections 701(a) and 703(a) – to appoint interim Chapter 7 trustees or serve as interim trustee; section 704 – to file reports regarding whether an individual debtor filing is presumptively abusive; section 705(b) – to consult with creditors’ committees; section 707(a)(3) – to move for dismissal of a Chapter 7 case for failure to timely file information; section 707 (b) - to seek dismissal of an individual debtor case found to be abusive; section 727 – to object to or seek revocation of a discharge; section 1102 – to appoint committees in Chapter 11 cases; section 1104 – to request the appointment of a trustee or examiner; section 1105 – to request the removal of a Chapter 11 trustee; section 1112(e) – to seek conversion of Chapter 11 case where material grounds exist; section 1114 – to appoint a committee of retired employees; section 1163 – to appoint a person from a specified list in a railroad reorganization case; section 1202 – to appoint a Chapter 12 trustee and request that a Chapter 12 trustee perform certain duties; section 1224 – to object to confirmation of a Chapter

12 plan; section 1302 – to appoint the standing Chapter 13 trustee; and section 1307 – to request conversion or dismissal of a Chapter 13 case.

The UST, however, does not believe he is constrained by the statutory powers and duties granted by Congress, and instead believes section 307 of the Bankruptcy Code invests him with unlimited powers of investigation and enforcement by providing that the UST “may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan under section 1121(c) of this title.” 11 U.S.C. § 307.

A general rule of statutory construction is that the expression of one thing is the exclusion of others. See *In re Eaton*, 130 B.R. 74, 76 (Bankr. S.D. Iowa 1991) (citing *Marshall v. Gibson’s Prods.*, 584 F.2d 668, 675 (5th Cir. 1978)). The words “any issue” in section 307 contrast sharply with the specificity of the duties spelled out in § 586, and even more so with the enumerated powers set forth in title 11. *Id.* (citing 2 L. King, *Collier on Bankruptcy*, ¶ 307.01 at 307-1 (15th ed. 1990)). Quite clearly, if Bankruptcy Code section 307 gives the UST the broad powers he claims, the specific grants of power in both § 586 and the Bankruptcy Code are superfluous. Section 307, by itself, would be sufficient. The UST’s position flies in the face of the applicable statutes.

Section 307 gives the UST standing to perform the specific duties with which he had been tasked. *In re Clark*, 927 F.2d 793, 796 (4th Cir. 1986) (noting that the UST has “standing under 307 even though [it] had no pecuniary interest in any case”). It does not permit the UST to arrogate to himself those powers that he deems to be expedient.

The language of section 307 is virtually identical to the grant of standing to the Securities and Exchange Commission (the “SEC”) in Chapter 11 cases contained in section 1109(a) (“may raise and may appear and be heard on any issue in a case under this chapter...”). See *id.* (likening

sections 307 and 1109); *In re BAB Enters.*, 100 B.R. 982, 985 (Bankr. W.D. Tenn. 1989). Section 1109(a) has a clear single purpose – to give the SEC standing to participate in Chapter 11 cases. *Clark*, 927 F.2d at 796. The same standing is given to “parties in interest” under section 1109(b). Section 1109(b) permits such parties in interest—including any creditor—to “raise and ... appear and be heard on any issue in a case” under chapter 11. Like section 1109, section 307 simply does not contain any substantive power – it is a grant of standing to participate in cases and proceedings and perform statutorily defined and limited duties.

Absent from the list of duties that Congress gave to the UST is the suggestion of the power to initiate adversary proceedings seeking sanctions, injunctive relief or any other form of relief. The UST is wholly without authority to unilaterally challenge any secured creditor for its past conduct or initiate adversary proceedings seeking contempt sanctions.

Section 307 also specifies that the UST’s standing to “raise and appear and be heard” is limited to issues in an actual “case” or “proceeding.” *In re Attorneys At Law & Debt Relief Agencies*, 353 B.R. 318, 322-23 (S.D. Ga. 2006). As that court stated in denying the UST standing, “Congress has not imbued United States Trustees with the power to appear in court whenever bankruptcy law is discussed. Rather, it provided them with the authority to appear and act in *cases* and *proceedings*.” *Id.* at 322.

Here, there are no post-confirmation “proceedings” pending in which the UST may appear and be heard, and section 307 fails to give the UST authority to *initiate* his own proceeding. “Neither § 307 of the Bankruptcy Code nor 28 U.S.C. § 586(a) give the United States Trustee ‘an unconditional right to intervene.’” *In re Washington Mfg. Co.*, 123 B.R. 272, 276 (Bankr. M.D. Tenn. 1991). The Complaint exceeds the UST’s powers because it is

unrelated to any “case” or “proceeding” as those terms are used in the Bankruptcy Code and because the filing of the Complaint exceeded Plaintiff’s statutory authority. 11 U.S.C. § 307.

C. The Court Lacks Statutory Jurisdiction Over This Proceeding.

Bankruptcy court jurisdiction is “grounded in, and limited by statute.” *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995); see *Miller v. Kemira, Inc. (In re Lemco Gypsum)*, 910 F.2d 784, 786-87 (11th Cir. 1990) (discussing the limits on bankruptcy jurisdiction following *Marathon Pipeline*). An exercise of jurisdiction requires two steps: first, jurisdiction must be proper in the district court under 28 U.S.C. § 1334, and, second, the bankruptcy court’s exercise of power must be an appropriate exercise of core or non-core jurisdiction under 28 U.S.C. § 157. *Id.* at 787. The Court lacks subject matter jurisdiction under both § 1334 and § 157.

i. The Court Lacks Jurisdiction Under § 1334 Because This Proceeding Is Not “Related To” A Case Under Title 11.

District courts have the power to hear cases “under title 11,” “arising under title 11 or arising in or related to cases under title 11.” 28 U.S.C. § 1334(a), (b). Bankruptcy court jurisdiction is then dependent upon and derivative of district court jurisdiction. *Celotex*, 514 U.S. at 307. Cases “under,” “arising under,” “or arising in . . . cases under title 11” require either the invocation of substantive rights or the handling of administrative matters under the Bankruptcy Code. *In re Toledo*, 170 F.3d 1340, 1344-45 (11th Cir. 1999).

In determining whether a case is “related to” a case under title 11, the Eleventh Circuit has adopted the Third Circuit’s test in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984):

The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy. The proceeding need not necessarily be against the debtor or against the debtor’s property. An action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Lemco Gypsum, 910 F.2d at 788 (citing *Pacor*, 743 F.2d at 994). The Eleventh Circuit added a “general principle” to this test: “if the resolution of litigation cannot affect the administration of the estate, the bankruptcy court does not have jurisdiction to decide it.” *In re Gallucci*, 931 F.2d 738, 742 (11th Cir. 1991). Furthermore, “overlap between the bankrupt’s affairs and another dispute is insufficient unless its resolution also affects the bankrupt’s estate or the allocation of assets among creditors.” *Lemco Gypsum*, 910 F.2d at 789. The Supreme Court has noted that it is “clear bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor.” *Celotex*, 514 U.S. at 308 n. 6.

Furthermore, section 105 of the Bankruptcy Code cannot provide a basis for jurisdiction where jurisdiction is otherwise lacking. *Cunningham v. Pension Benefit Guaranty Corp.*, 235 B.R. 609, 618 (N.D. Ohio 1999). To the extent that a court attempts to retain jurisdiction under section 105 after confirmation of a plan, that jurisdiction is “limited to matters concerning the implementation or execution of a confirmed plan.” *Id.* at 617. Section 105 “does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law....” *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986) (citing *Southern Ry. Co. v. Johnson Bronze Co.*, 758 F.2d 137, 141 (3d Cir. 1985)). A court sitting in bankruptcy by section 105 is not a “roving commission to do equity.” *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 444-45 (1st Cir. 2000); *see also Guetling v. Household Fin. Servs., Inc.*, 312 B.R. 699, 704-05 (M.D. Fla. 2004). And section 105 cannot be used by a court to “legislate” by adding remedies. *Pertuso v. Fort Motor Credit Co.*, 233 F.3d 417, 423 (6th Cir. 2000). Additionally, authority under section 105 is limited by the language of the statute itself as only allowing orders “‘necessary and appropriate’ to carry out the provisions of the Bankruptcy Code.” *In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1996).

Plaintiff has failed to establish jurisdiction in this case and cannot use section 105 in an attempt to create bankruptcy jurisdiction. *See Cunningham*, 235 B.R. at 617-18. The Plaintiff fails to establish jurisdiction under either 28 U.S.C. § 1334(a) because Plaintiff does not invoke any substantive rights under the Bankruptcy Code or assert claims involving the handling of any administrative matters. *See Toledo*, 170 F.3d at 1344-45. Neither the money damages sought by Plaintiff nor the injunction involve rights given to the Plaintiff under title 11, so the claim for “arising under” or “arising in” jurisdiction fails.

Plaintiff cannot establish “related to” jurisdiction under § 1334(b) either. The cause of action would have to involve the administration of the estate or the allocation of assets among creditors, and the Complaint fails to seek any money damages for the benefit of the estate and certainly fails to adjust allocation of assets under the Plan. *See Lemco Gypsum*, 910 F.2d at 789; *Gallucci*, 931 F.2d at 742.

ii. Even if jurisdiction exists under § 1334, the Court lacks core jurisdiction and the Court cannot hear this matter as a non-core proceeding.

Bankruptcy courts have jurisdiction, by referral from district courts, to “hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11.” 28 U.S.C. § 157(a) and (b)(1). The statute presents a non-exclusive list of core proceedings, followed by a catch-all provision covering “other proceedings affecting the liquidation of assets of the estate.” 28 U.S.C. § 157(b)(2)(O). All core proceedings have “an overarching requirement that property of the estate under § 541 be involved.” *In re Toledo*, 170 F.3d 1340, 1348 (11th Cir. 1999).

Bankruptcy court jurisdiction over non-core proceedings is limited to proceedings that are “otherwise related to a case under title 11”; however, any final order or judgment in a non-core proceeding must be entered by a district court. 28 U.S.C. § 157(c)(1). Even the “related to”

requirement for non-core jurisdiction requires a connection to the estate, for “if the action does not involve property of the estate, then not only is it a noncore (*sic*) proceeding, *it is an unrelated matter completely beyond the bankruptcy court’s subject matter jurisdiction.*” *In re Gallucci*, 931 F.2d 738, 742 (11th Cir. 1991) (emphasis added).

Furthermore, section 105 of the Bankruptcy Code may not be used to convert a non-core proceeding into a core proceeding. *Cunningham*, 235 B.R. at 618. This comports with the more general rules that section 105 cannot be used to create substantive rights or to create bankruptcy court authority not otherwise present in the Bankruptcy Code. *See Hardy*, 97 F.3d at 1390 (11th Cir. 1996); *Sutton*, 786 F.2d at 1308 (5th Cir. 1986).

Plaintiff alleges that this is a core proceeding because it concerns the administration of the estate under § 157(b)(2)(A), because it involves the allowance or disallowance of claims under § 157(b)(2)(B), and because it either terminates, annuls, or modifies the automatic stay under § 157(b)(2)(G). (Compl. at ¶ 3). These arguments are meritless.

Even assuming that all of Plaintiff’s allegations are accepted as true and all claims for relief were proper and would be granted by the Court, there would be absolutely no effect on the administration of the debtors’ estate or any other estate in bankruptcy. Plaintiff does not seek money to administer within the estate or any modification to the debtors’ plan or any adjustment to the debtors’ right to discharge. Thus, this cannot be a core proceeding under § 157(b)(2)(A).

Additionally, Plaintiff is not attempting to adjudicate the allowance or disallowance of any claim under § 157(b)(2)(B). Countrywide’s claim has been withdrawn, and no relevant issue remains to be decided. (Compl. at ¶ 40). This argument also fails.

Finally, Plaintiff has not moved “to terminate, annul, or modify the automatic stay” as required by the provision. 28 U.S.C. § 157(b)(2)(G). Even if Plaintiff were seeking enforcement

of the automatic stay for a current stay violation, § 157(b)(2)(G) would not make that effort a core proceeding. The only allegation related to the stay is an allegation that Countrywide filed and withdrew two motions for relief from stay. (Compl. at B). While the filing of a motion for relief of stay itself would be a core proceeding under § 157(b)(2)(G), the Plaintiff's retroactive effort to challenge Countrywide's alleged conduct is not within this provision. This cannot be a core proceeding under § 157(b)(2)(G).

Moreover, as noted above, this proceeding is not even "related to" a core proceeding under § 157(c). Regardless of the outcome of this proceeding, there will be no effect on the bankruptcy estate whatsoever, and Plaintiff fails to allege any facts that would "involve" estate property or the administration of any estate. *See Gallucci*, 931 F.2d at 742. Thus, the Court lacks jurisdiction.

D. The Court Lacks Jurisdiction To Enter The Type Of Relief Plaintiff Seeks.

The relief Plaintiff seeks is inappropriate for the Court's consideration. First, the sanctions Plaintiff seeks could only be awarded in criminal contempt, and the Court lacks criminal contempt powers. Second, Plaintiff seeks an award of injunctive relief that would be improper if entered by any court.

i. Any monetary penalty awarded in this case would be in the nature of a criminal contempt penalty, and bankruptcy courts lack criminal contempt powers.

Contempt sanctions can either be classified as civil or criminal. Civil contempt sanctions coerce compliance with a court order, and, as a result, a party can avoid sanctions through obedience. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 812, 827 (1994). However, criminal contempt sanctions are punitive, aimed at vindicating the authority of the court. *Id.* at 828; *see also Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609, 612 (5th Cir. 1997). Because classification of a

contempt sanction requires an examination of the “character and purpose” of the sanction, a court must look to the “character of the relief” to decide whether a sanction is criminal or civil. *Bagwell*, 512 U.S. at 827. In the context of fines, a fine will be considered a civil sanction if a party can avoid the fine through compliance or if the fine is designed to compensate a party for the contemnor’s conduct. *Id.* at 829. However, a flat fine, “totaling even as little as \$50 is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance.” *Id.* at 829.

Bankruptcy courts lack the power to hold parties in criminal contempt. *In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1996) (noting that bankruptcy courts under section 105 “may only impose sanctions for contempt that are coercive and not punitive”); *see In re Hipp, Inc.*, 895 F.2d 1503 (5th Cir. 1990) (finding no constitutional, statutory, or inherent authority for a bankruptcy court to exercise criminal contempt powers). If a plaintiff seeks “money damages in the form of a fixed, non-compensatory fine, then the court may not order such monetary damages, as they are punitive and not coercive.” *Hardy*, 97 F.3d at 1390.

The United States District Court for the Western District of Texas addressed the civil and criminal contempt distinction in deciding an appeal of contempt sanctions from a bankruptcy court. *See In re Rodriguez*, 2007 WL 593582 (W.D. Tex. 2007). In *Rodriguez*, a debt counselor, Divins, had repeatedly violated bankruptcy court orders and injunctions over the course of several proceedings. *Id.* at 2-5. The United States trustee filed a motion seeking an order requiring Divins to show cause why she should not be held in contempt. *Id.* at 1. The bankruptcy judge characterized the proceeding as a civil contempt proceeding and imposed sanctions consisting of \$15,000 for three prior violations of court orders and \$6,000 to compensate the debtor. *Id.* at 4-5. On appeal, the district court noted that bankruptcy courts may

conduct civil contempt proceedings but lack the authority to hold criminal contempt proceedings. *Id.* at 7-8. Applying distinctions between civil and criminal contempt outlined by the United States Supreme Court, the district court determined that the \$15,000 sanction was an inappropriate criminal contempt sanction because no level of compliance by Divins would have avoided the penalty; rather, the penalty punished Divins for prior conduct. *Id.* at 11-14 (citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911) and *Bagwell*, 512 U.S. at 821). Conversely, the \$6,000 sanction fairly compensated the debtor for losses suffered due to Divins' conduct, and compensation is an appropriate goal of civil contempt. *Id.* at 15.

Plaintiff here is not pursuing civil contempt because any imposition of "monetary sanctions" would not compensate the debtors or coerce compliance with a court order. *See Bagwell*, 512 U.S. at 827; (Compl. at 16). The debtors, the only persons even arguably injured by Countrywide's alleged conduct, are not parties to this proceeding, and Plaintiff does not purport to seek monetary damages on the debtors' behalf. The alleged violations of court orders or the bankruptcy rules or statutes have passed, so the time to coerce compliance has also passed.

Thus, the sanctions sought by the Plaintiff are undoubtedly punitive in nature and aimed at vindicating the authority of the Court and addressing an alleged "pattern of conduct" by a "national lender and servicer of secured loans." *See Bagwell* at 829; (Compl. at 8). The Court should dismiss the Complaint because this relief could only be awarded, if at all, by a district court. *See Hipp*, 895 F.2d at 1505; *Rodriguez*, 2007 WL at 16.

ii. Plaintiff's claim for injunctive relief is improper and nonjusticiable, leaving the Court without authority to award any relief in this matter.

Plaintiff's claim for injunctive relief fails on a number of grounds. First, an injunction against future conduct requires proof of a "real and immediate threat" of future injury accompanied by "continuing, present adverse effects." *Elend v. Basham*, 471 F.3d 1199, 1207-

08 (11th Cir. 2006); *Koziara v. City of Casselberry*, 392 F.3d 1302, 1305 (11th Cir. 2004) (quoting *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1241 (11th Cir. 2003)). Without “continuing, present adverse effects,” the injury remains “wholly inchoate,” and the “injury” requirement of standing is not satisfied. *Elend*, 471 F.3d at 1207, 1209; *see, e.g., Bellefonte Reins. Co. v. Aetna Cas. and Sur. Co.*, 590 F. Supp. 187 (S.D.N.Y. 1984). No justiciable controversy exists when it is based upon the possibility of a factual situation that may never develop. *See, e.g., Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 28-29 (5th Cir. 1989); *Hunt v. Anderson*, 794 F. Supp. 1551 (M.D. Ala. 1991). Second, the requested injunctive relief is improper and unnecessary if it merely amounts to an injunction to obey the law. *Elend*, 471 F.3d at 1209; *Burton v. City of Belle Glade*, 178 F.3d 1175, 1200-01 (11th Cir. 1999) (finding that the district court correctly refused to issue requested injunction ordering defendant city not to discriminate as such injunction would amount to an order to “obey the law”). Finally, a request for an injunction requires specificity and clear guidance. *See, Burton*, 178 F.3d at 1200 (rejecting requested injunctive relief on basis that injunction must contain an operative command capable of enforcement); *Federal Elec. Comm’n. v. Furgatch*, 869 F.2d 1256, 1263-64 (9th Cir. 1989); *see Fed. R. Civ. P. 65(d)*.

Plaintiff’s claim for injunctive relief fails on all of these grounds. Plaintiff has failed to show an imminent threat of future injury or any continuing, current injury warranting any sort of injunction. *See Elend*, 471 F.3d at 1207-08. Rather, Plaintiff alleges that “Countrywide’s practices and conduct are likely to continue to prejudice parties in interest.” (Compl. at ¶ 49). The allegation fails to suggest an imminent threat of future harm but is merely a speculative, conclusory assertion. The allegedly offending conduct occurred in the past and was resolved, leaving no current conduct warranting restraint. Thus, the claim for relief resembles the claim in

Elend as Plaintiff alleges past harm to the debtors and then speculates that Countrywide will repeat this conduct in proceedings in the future. *See Elend*, 471 F.3d at 1207-08.

Plaintiff's failure to adequately demonstrate future injury spills into the next gap in Plaintiff's argument for injunctive relief, for Plaintiff requests an injunction that Countrywide obey the bankruptcy laws by not "engaging in bad faith and abusive practices"—practices already prohibited by, *inter alia*, Federal Rule of Bankruptcy Procedure 9011. *See Elend*, 471 F.3d at 1209 (calling injunctions to obey the law "impermissible" in the Eleventh Circuit). Any hypothetical future injury requiring injunctive restraint is already addressed by existing rules and procedures, and the injunction Plaintiff seeks would be an unnecessarily duplicative decree. Moreover, the claim for injunctive relief lacks any degree of specificity and fails to provide any real guidance for Countrywide's future conduct. *See Burton*, 178 F.3d at 1200.

The injunctive relief Plaintiff seeks cannot be awarded by the Court. The Court's inability to redress Plaintiff's perceived, but non-existent, "injuries" requires dismissal. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (listing redressability as a requirement of standing); Section A, *supra*.

E. Plaintiff Has Failed To State A Claim Upon Which Relief Can Be Granted.

Federal Rule of Civil Procedure 12(b)(6) allows a defendant to test the legal sufficiency of a complaint. *Bell Atlantic Corp. v. Twombly*, --- U.S. ---, 127 S. Ct. 1955, 1964-65 (2007) (noting that the federal pleadings standard requires more than legal conclusions unsupported by facts or a "formulaic recitation of the elements of a cause of action"). To avoid dismissal, a plaintiff must allege sufficient facts to support the allegations in the complaint and state a plausible claim. *Twombly*, 127 S.Ct. at 1965. Even under the liberal pleading standard in federal courts, conclusory statements standing alone will not withstand a motion to dismiss. *Oxford*

Asset Mgmt. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002) (“[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.”). Tested against this standard, none of Plaintiff’s causes of action survive.

i. Plaintiff fails to state a valid cause of action.

Plaintiff’s complaint contains four causes of action: Count I -- Materially Inaccurate And/Or Misleading Representations of Fact; Count II -- Improper Acceptance of Property of the Estate; Count III -- Failure to Reconcile the Proof of Claim with the Payoff Amount; and Count IV -- Repeated Failure to Ensure the Accuracy of Pleadings and Accounts. None of these separate counts is a valid cause of action.

In Counts I and IV, Plaintiff seeks sanctions based upon its allegation that the stay relief motions and proof of claim filed by Countrywide were inaccurate and/or misleading. (Compl. ¶¶ 53, 71). Even if these allegations were true, however, there is no federal cause of action for filing an inaccurate pleading. Instead, Federal Rule of Civil Procedure 11, as incorporated by Federal Bankruptcy Rule 9011, provides the mechanism by which parties may be sanctioned for filing unsupported papers in federal courts.

At no point has any party made any attempt to seek sanctions under Rule 11. Indeed, Plaintiff implicitly concedes that he cannot satisfy the requirements of Rule 11 in this case. *See* Compl. ¶ 54 (“By filing these motions for stay relief, Countrywide has acted in bad faith in the conduct of litigation before the Court in this case that the rules are not up to the task of adequately sanctioning.”). Recognizing that he is unable to satisfy the requirements of Rule 11, Plaintiff asks this Court to create a new cause of action out of whole cloth. There is no authority for this proposition, and §105(a) cannot be used to create a cause of action. *See Patrick v. Dell Fin’l Serv’s L.P.*, 344 B.R. 56, 58 (Bankr. M.D. Pa. 2005) (“There is no doubt that § 105(a) is a

powerful and versatile tool designed to empower bankruptcy courts to fashion orders in furtherance of the Bankruptcy Code. It cannot, however, create substantive rights. Nor can it authorize separate lawsuits as a remedy for bankruptcy violations.”) (citations omitted).

Counts III and IV are equally deficient. In Count III, Plaintiff seeks sanctions due to Countrywide’s alleged improper acceptance of property of the estate. Putting aside the fact that even Plaintiff concedes that Countrywide returned the payments erroneously made by the chapter 13 trustee, the remedy for receiving unauthorized post-petition payments would be an action to avoid and recover post-petition payments under sections 549 and 550 of the Bankruptcy Code. Of course, those statutes provide that the party with standing to pursue such an action would be the chapter 13 trustee and not the United States Trustee. *See* 11 U.S.C. §549 (a) (“the trustee may avoid a transfer of property of the estate”); 11 U.S.C. §550(a) (“to the extent a transfer is avoided . . . the trustee may recover”). There is no basis to create an additional cause of action to provide a remedy to the United States Trustee. *McDonald v. Southern Farm Bureau Life Insurance*, 291 F.3d 718, 725 (11th Cir. 2002) (“it is ... ‘an elemental canon’ of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.”) (citing *Karahalios v. Nat’l Fed’n of Fed. Employees*, 489 U.S. 527, 533, 109 S.Ct. 1282, 1286-87, 103 L.Ed.2d 539 (1989)).

Finally, in Count IV, Plaintiff seeks to recover based on the theory that “[i]f Countrywide assessed and collected fees and escrow charges that were improper under applicable law or the Bankruptcy Code, its failure to disclose all relevant facts relating to such charges is sanctionable under the Court’s inherent equitable powers.” (Compl. ¶ 63). However, there is no basis to grant equitable relief when there is an adequate remedy at law. *WESI, LLC v. Compass Environmental, Inc.*, 509 F.Supp.2d 1353, 1362 (N.D. Ga. 2007) (“It is axiomatic that equitable

relief is only available where there is no adequate remedy at law.”) (citing *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1518-19 (11th Cir.1994)).

Even if the allegations that Countrywide collected fees to which it is not entitled were correct, an adequate remedy at law exists which precludes Plaintiff from seeking equitable relief.

As stated by the court in *In re Smith*, 299 B.R. 687 (Bankr. S.D. Ga. 2003):

Debtor has alleged that Fairbanks' actions constitute an abuse of the bankruptcy process. Debtor has essentially asserted a claim for contempt under Section 105(a) based on Fairbanks' failure to comply with Section 506(b). However, it does not appear the alleged conduct of Fairbanks violates any provision of bankruptcy law. Section 506(b) provides for the accrual of attorney fees and interest for oversecured creditors and cannot be “violated.” *If a creditor were to collect fees to which it were not entitled under Section 506(b), the debtor's recourse would be to a nonbankruptcy claim such as breach of contract or conversion, not a claim under Section 506(b), which does not provide a cause of action.*

Id. at 693 (emphasis added). Thus, if Countrywide had collected fees to which it was not entitled, the debtors would have a state law breach of contract action they can pursue. Accordingly, an adequate remedy at law exists, and there is no basis for Plaintiff to obtain equitable relief.

In summary, there is neither a basis nor reason to accept Plaintiff's invitation to create new causes of action. Remedies already exist for any chapter 13 debtor who claims to have been damaged by Countrywide. Indeed, to create new causes of action in favor of the UST would expose Countrywide to the risk of multiple, inconsistent judgments arising from the same conduct. For instance, if Plaintiff's claims are allowed to proceed and Countrywide prevails, that result would not bind the debtors -- who are not parties to this proceeding. The debtors could still pursue their *own* remedies. Thus, not only is there no basis for the creation of new causes of action in favor of the UST, to do so would violate Countrywide's right to due process.

ii. Plaintiff has failed to state a claim for civil contempt.

As established in Section D, *supra*, civil contempt and criminal contempt accomplish distinct goals, with civil contempt aimed at compensating an aggrieved party or coercing compliance with an order while criminal contempt punishes violations or vindicates the authority of the court. *Bagwell*, 512 U.S. at 827. While the distinction remains significant in the context of the subject matter jurisdiction of bankruptcy courts, it also reveals that Plaintiff has failed to assert a cause of action for civil contempt. *See Hipp*, 895 F.2d at 1505.

Plaintiff's desired sanctions are not designed to compensate any party. The only parties with an alleged injury would be the debtors; but the debtors are not parties to this proceeding, and the Plaintiff did not purport to seek damages as compensation to the debtors or the debtors' estate. (Compl. at 16). Additionally, Plaintiff has not alleged that Countrywide is currently violating an order of the Court or any part of the Bankruptcy Code; thus, Plaintiff has not alleged civil contempt to coerce Countrywide's compliance with an order. Instead, any monetary sanction awarded under the Complaint would be purely punitive, which is outside the realm of civil contempt. *See Bagwell*, 512 U.S. at 827.

iii. Plaintiff has failed to state a claim for injunctive relief.

A claim for injunctive relief has several requirements. First, the claimant must allege a real threat of imminent injury. *Elend*, 471 F.3d at 1207. Second, the claimant must pursue more than a mere injunction to obey the law. *Elend*, 471 F.3d at 1207. Third, the claimant must allege with specificity the terms of the injunction. *Id.*

Plaintiff's allegations fall short. Plaintiff suggests that, absent an injunction, "Countrywide's practices and conduct are *likely* to continue to prejudice parties in interest." (Compl. at ¶ 49). Plaintiff fails to plead a "real and immediate threat" of future injury

accompanied by “continuing, present adverse effects” and instead offers only a conclusory assertion. *See Jaharis*, 297 F.3d at 1188; *Elend*, 471 F.3d at 1207. Additionally, Plaintiff’s requested injunction adds nothing to the existing body of law to prevent the alleged conduct and, as such, is unnecessary and impermissible. *See Elend*, 471 F.3d at 1207. Finally, the terms of the injunction are little more than vague assertions offering no specific guidance and thus fail to satisfy the specificity requirement. *See Burton*, 178 F.3d at 1200.

IV. CONCLUSION

For the forgoing reasons, Plaintiff’s Complaint should be dismissed.

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Respectfully submitted this 28th day of May, 2008.

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ATTORNEYS FOR COUNTRYWIDE HOME LOANS, INC.

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:)	
)	
JOHN WAYNE ATCHLEY and)	
ROBIN APRIL ATCHLEY,)	
)	CASE NO. 05-79232-MHM
Debtors)	
)	CHAPTER 13
)	
)	
)	

DONALD F. WALTON,)	
United States Trustee for Region 21,)	
)	
Plaintiff,)	ADVERSARY NO. 08-6092
)	
vs.)	
)	
COUNTRYWIDE HOME LOANS, INC.,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 2008, I electronically filed the foregoing Defendants' Memorandum of Law in Support of Its Motion to Dismiss Plaintiff's Complaint with the Clerk of Court using the CM/ECF system. I further certify that I served a copy of the foregoing by United States Mail postage prepaid and delivered to:

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United States Department of Justice
Office of the United States Trustee
362 Richard Russell Building
75 Spring Street, SW
Atlanta, Georgia 30303

/s/ Michelle L. Carter
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