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UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA, TUCSON DIVISION

In re: **BARRY WEISBAND, DEBTOR** **FIRST HORIZON HOME LOANS A DIVISION OF FIRST TENNESSEE BANK NATIONAL ASSOCIATION, MOVANT** **VS.** **BARRY WEISBAND, DEBTOR RESPONDENT** **DIANNE C. KERNS, TRUSTEE**	Case # 09-05175-TUC-EWH **DEBTOR'S RESPONSE TO MOTION FOR RELIEF** Chapter 13

COMES NOW, BARRY WEISBAND, Debtor and Respondent, and files this Debtor's Response to Motion for Relief from Stay, and Brief of Authorities upon Vanderbilt Mortgage and Finance, Inc., Movant and Claimant. A more complete legal memorandum may be filed separately, particularly if additional issues arise. There is an index of abbreviations and acronyms attached.

1. This chapter 13 case was commenced by the filing of a petition on 3/19/2009.

Debtor's Plan has not been confirmed. Debtor denies that Movant is entitled to Motion to Lift Stay ("MLS") relief against Debtor's Residence (the "Property"), the address of which is **2764 North Fair Oaks Avenue, Tucson, AZ 85712.** There is an adversary pertaining to this property numbered, 09-ap-00918-EWH. Debtor intends to file a Motion for Summary Judgment that will dispose of all issues. Alternatively, if eventually unsuccessful in this, Debtor will file a Motion to Amend the Complaint to pay the balance off in a single payment.

2. Movant does not have Constitutional Standing ("C.S.") and is not the Real Party in Interest ("RPI") with the right to enforce the Promissory Note, (the "Note"), and Deed of Trust ("DOT") in question. The DOT has a MERS MIN Number on the DOT, which almost guarantees the loan was securitized. For this reason, Movant is not entitled to stay relief. Moreover, Debtor has good reason for believing that there is no longer any individual nor business entity of any type that can come forward and prove itself to have CS be the RPI with the right to enforce the Note. The reason for this is that there is no longer any individual nor business entity of any type that: a) owns the Note; b) holds the Note or has a right to possession; c) and has the right to enforce it.[1] All three are required. Movant contends that it is the holder of the Note, and contends that the same is secured by the Deed of Trust in question.[2] Movant does not claim to be owner of the Note, but does clam to be the RPI. However, upon information and belief, the Note was sold within days after execution of the loan documents, and it passed through a number of Participants eventually being transferred to a Mortgage Backed Security Trust ("MBS") for Pooling for the benefit

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[1] Hereinafter sometimes these three requirements are together called "ownership,' 'holdership' and the 'right to enforce.'"

[2] ¶ 3 of MLS, Doc 124 Filed 03/16/10.

of the Investors, whose investment dollars funded the loan and/or purchased the Note.[3] Debtor challenges the validity of the sales, endorsements and transfers of the Note and Deed of Trust and of the veracity of other documentary evidence presented to the Court, and has good reason for doing so. Debtor demands that the original Note be produced in Court, and the cases that mortgage claimants have recently cited, that seem to state that Debtor is not entitled to have the original produced, are distinguishable. Because the security interest in the DOT follows the ownership of the Note, or the underlying obligation, absent an intentional separation of ownership of the Note from the Deed of Trust, since neither Movant nor any other party owns the Note and has the right to enforce it, Debtor therefore denies the validity of the Primary Mortgage lien. Additionally and in the alternative, Movant has failed to provide Debtor and the Court with "3rd Party Source Accounting."[4] Movant has accordingly incorrectly stated the amount still owed on the Note. Therefore, Movant has not proven the amount of Debtor's equity in the Property. Debtor contends that 3rd Party Sources have paid enough to completely discharge Debtor's Obligation.[5] Each of Debtor's contentions is based on the fact that Debtor's Note was

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[3] "Participants" as used herein is defined as those that have acted in concert, and continue to do so, in the creation, role playing, and administration of the Bonds and of the Pool, which include parties commonly known as: the Mortgage Broker, the Lender or Originator, the Depositor, the Company, the Transferor, the Sponsor, Underwriter, any other involved underwriters, Master Servicers, other Servicers, and the last but not least, the so-called "Trustee," that is really a Bond Administrator.

[4] "3rd Party Source Accounting" is an itemized accounting that, among other things, credits Debtor for payments made by 3rd Party Sources obligated to pay on the Note to the Note's owner, or a party entitled to receive payments for the Note's owner, or payments made from 3rd Party Sources that are obligated to be credited to Debtor's Obligation.

[5] Whenever the phrase "3rd Party Sources" is used herein, the same refers to payments made on behalf of the Note or the Pool of Notes in a MBS Trust, or credited thereto, other than from mortgage payments made pursuant to the Note or from foreclosure proceeds. These 3rd

Pooled into a Mortgage Backed Security Trust ("MBS"),[6] a short time after it was executed by Debtor. Debtor alleges that while Movant may be a Master Servicer, Servicer or Subservicer (sometimes simply called, "Servicer" regardless of the level of servicer that an entity happens to be in reference to Debtor's Obligation), **it has not been the Owner/Holder** of the Note **for approximately three years**.[7]

3. Movant's Motion fails if it does not disclose who it is, its relation to other parties and the identity of all RPI. Movant has wrongfully failed to identify for Debtor all parties that own the beneficial interest in the note. Local Bankruptcy Rule ("LBR") 4001-1(b) requires that an MLS ". . . must be accompanied by a certification . . . that after sincere effort the parties have been unable to resolve the matter. . ." Debtor contends that the true owners of the Note have not been informed this motion has been filed. They do not know Debtor, who in turn does not know them. Accordingly, Debtor has not been given an opportunity to discuss the matter with the only party that would have the ability to truly negotiate and thus avoid the MLS.[8] "The parties cannot come to a resolution if those with

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Party Sources include Credit Default Swaps, other insurance, other guarantees, special pooling and service agreement terms, cross collateralization provisions, bond indenture terms, over-collateralization provisions, description of tranches, buy-back provisions, call provisions and reserves, or funding security sources not planned in advance, such government funds, including but not limited to TARP funds, Federal Reserve loans or gifts, or U.S. Department of Treasury loans or gifts.

[6] "Trust" is actually a misnomer, because the administration of the MBS is unlike a trust, and there are serious conflicts of interest between the "Trustee" of the MBS and the Investors, or Bondholders, whose funds were used to purchase mortgage notes for the MBS Pool.

[7] A Note that is no longer a negotiable instrument, may still qualify as a written contract evidencing a debt. "Debtor's Obligation" refers to the Note's underlying obligation amount, even if zero, without regard to whether the Note remains a negotiable instrument or not.

[8] See also See Bankruptcy Rule ("BR") 7007.1 Corporate Disclosure Statement, though specifically applicable to adversary proceedings is pertinent to these

a beneficial interest in the note have not been identified and engaged in the communication." *MERS vs Chong, Schwartzer, Bankruptcy Trustee, Mitchell*, et al, Case 2:09-cv-00661-KJD-LRL Doc 52 entered 12/04/09, at 4-5 (US D NV 2009) (cited herein "*MERS Consolidated*"). In nearly every bankrupty case involving a MLS, Proof of Claim ("POC"), or plan objection, of a mortage entered into between 2001-2008 (the "dreadful years") borrowers were never provided the identity of those that they owed, and those that owed never knew who owed them. Thousands of such cases have had the stay lifted and the homes have gone into foreclosure. The information was intentionally kept hidden, even though such information is not privileged under the law. The RPI is synonymous with Debtor's Mortgage Creditors.[9] These Creditors are the only parties that ever had any financial interest of their own at stake. They obtained their interests when they purchased Mortgage Bonds, which entitled them to a share in the funds attributable to the Pool of mortgage notes administered by the MBS "Trustee," who is not really a trustee, but is an administrator, because of the serious conflicts of interest it has with the Investors. Such persons are also collectively referred to sometimes as Bond Holders ("BH"). The MBS Trustee does not qualify as one that can "stand in the shoes" of the BH, because of these conflicts of interest, and because the authorities and and duties granted the Trustee in the Securitization Documents ("SD") are not sufficient to qualify as a RPI, and because the BH were not signatories to any of the SD.

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proceedings.

[9] "Debtor's Mortgage Creditor" or "Mortgage Creditor," though referred to in the singular are the large number of persons and entities. These are the "real party in interest," that is defined by Courts as the party whose own financial interest is at stake in the outcome of litigation, and has been committed to Rule in FRCP 17(a) and BR 7017.

ISSUES THAT ARE PROPER FOR MOTION FOR RELIEF PROCEEDINGS

4. The traditional rule that Motion for Relief from Stay litigation includes only certain specific matters remains true in today's environment.[10] But because of problems intentionally created by the Wall Street Investment Banking Comglomerates (WSIBC) that aggregated, created, planned and designed MBS Trusts, including that in this case, and which continue to make all the big decisions as to the MBS to this very day, Movants for stay relief that are challenged cannot succeed. It is true that stay action procedure was intended to provide a mechanism for summary relief. But in the prevailing circumstances and conditions pertaining to notes that were pooled into an MBS Trust, there is no summary procedure possible. A "colorable claim" has become a meaningless cliche in today's environment. It does not mean intentional use of documentary evidence that only makes it APPEAR that a colorable claim has been made, when that claimant knows or should know it is not the creditor.[11] To have Constitutional Standing and to be the Real Party in Interest, the named party must appear for itself, absent proof of an exceptionally extraordinary grant of express authority, and it must the the Holder of the Note, the Owner of the Note, and must have the right to enforce the Note. A Colorable Claim also does not

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[10] Stay litigation is focused to issues of lack of adequate protection, the debtor's equity in the property, and the necessity of the property to an effective reorganization, and [under normal circumstances] is handled in a summary fashion. *In re Johnson*, 756 F.2d 738, 740 (C.A.9 (Cal.), 1985). But these times are universes away from "normal times." In any event, the preexisting principles still apply.

[11] The "colorable claim" argument has become a meaningless cliche in today's environment. does not really mean anything in today's context. It has been bastardized due to evidentiary fraud. It was never meant to include within its definition situation where an entity intentionally makes it look like they have RPI standing, when they either know they do not own the note, or do not own the note regardless of knowledge when they are not an HDC or where the endorsements or transfers are reasonably challenged.

consist of the presentation of documents with misleading endorsements showing the claimant to the Holder of the Note, when the Note was sold and transferred along a chain of ownership and transfer that is completely different from the chain they are alleging a right to enforce the Note. These are examples of evidentiary fraud or fraud upon the Court. A speedily increasingly number of Courts and districts have made critical commentary and taken actions combat this decay in professionalism and are discussed herein and in the separate legal memorandum. For some reason others do not even seem to see the evidentiary fraud.

5. A brief summary of the issues that are appropriate for MLS litigation and within which Movant cannot prevail include:

a) whether the MLS Movant can satisfy its burden to prove that has Constitutional Staning and that it is a "Real Party in Interest" under 11 U.S.C. § 362(d)(4); FRBR 7017 and FRCP 17(a)(1);

b) whether the MLS Movant can satisfy its burden to prove that is a "creditor," or a party with an interest in the property upon which the MLS is sought;

c) Issues of evidentiary insufficiency or impropriety that show that Movant lacks any credibility;

d) whether Movant will legitimately meet its burden of proof under § 362(g) to prove the amount of equity that Debtor has in the property;

e) to establish its right to adequate protection, which includes proving that it is a party in interest with an interest in the property upon which adequate protection is sought, in which case Debtor has a right to advance notice of a hearing or to respond to a request and an evidentiary hearing;.

6. To comport with Debtor's fundamental property rights, the automatic stay cannot be lifted as to no party in particular. It must be done if at all, on behalf of a Real Party in Interest that is a named party in the motion requesting such relief. This applies even to a Debtor that is far in arrears in payments pursuant to the original terms of the Note. See *In re Hayes*, 393 B.R. 259, 262 (Bankr.Mass., 2008)(twenty-one delinquent

monthly mortgage payments).

7. Because discharge pursuant to ARS § 47-3602(A), or accord and satisfaction, of Debtor's underlying indebtedness is at the heart of the value of Debtor's equity in the Property, it is squarely before the Court at the MLS stage of proceedings. If the debt to the creditor has been completely discharged, the Debtor's equity equals the current market value of the property.

THE BIG PICTURE AND WHAT HAS CAUSED THE MESS OF 2001-2008

8. Debtors allege that Servicing Companies and Trustees of MBS Pools,[12] for themselves and for the benefit of the particular WSIBC that Aggregated, created, planned, designed the particular MBS, and which continues thereafter to be the real major decision maker and order-giver, have been converting MBS income, including foreclosure proceeds and 3rd Party Source funds, and have been doing so for years. Besides having the effect of converting Debtors' homes, when the unforeseen and unexpected benefit of extremely large 3rd Party Source Payment totals, should have been credited to discharge, accord and satisfy Debtor's obligation. As alluded to above, the existence of the excessive 3rd Party Source Payment totals is the result of a situation intentionally created by the WSIBC that aggregated, created, planned, designed and which continue to make all the big decisions as to the MBS to this very day for the MBS Trust in this case. To accomplish this, the

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[12] Or entities acting in concert with them, at the direction of the WSIBC, such as subsidiaries, shell companies, Special Purpose Vehicles, and other collaborators. The MBS Pools are not real "Trusts" through that is what they are called by the creators thereof. They are "bond administrations" that have been handled far different from the way they led the Investors to believe they would be during marketing. The only thing that can be" trusted" is that those that acted in concert to create and administer the Pools will continue to try to get away with everything they can. The BH purchased "mortgage bonds" and by definition, bonds establish a debt relationship, not a trust relationship.

following are types of wrong performed upon borrowers, at least some of which occurred with the Debtor in this case, by Loan Brokers and Originators ("Lenders" in the original deeds of trust), which were acts in furtherance of an overall fraud and conversion scheme that was necessary to its success, because without a large number of loans doomed to fail from the start, the WSIBC and major Participants could not be certain that the Mortgage Pools as a whole would fail.

a) The fact that Borrowers paid as much as double what the homes were actually worth, due to a real estate market that was artificially inflated because of the wealth of investment dollars looking for a home following the bursting of the dot.com bubble, followed by what amounts to an economic depression for the working poor. Borrowers can't afford the payments and they are losing their homes, and the unbelievable abundance of foreclosures shows the extent to which any defect in character they may have is common to large numbers of persons. Appraisal values were often over-inflated even above the artificially high values provided by the market and appraisers were advised they would not receive further business unless they cooperated.

b) Borrowers were mislead as to what the monthly payments would be a few years into the loans.

c) In more extreme cases, Borrowers were often offered teaser rates that they qualified for, but which greatly increased within a very short period of time.

d) There was so much investment money looking for someone to borrow it that could sign a note during this time, that loans were pushed at people with persuasive and high pressure tactics;

e) Borrowers were advised that they could afford a much nicer home then they really could. It appears hard to resist a home that is much nicer than thought affordable, when someone that appears to be a reputable professional assures them they can afford it. Optimism and wishful thinking overpower reason.

f) Loan brokers were pushed to offer loans that were on worse terms than the borrower could qualify for. Sometimes they received higher commissions, often in secret, for getting people to take out loans on terms that were less beneficial then a loan that Borrowers would have qualified for. And sometimes the only loan products that loan brokers had available to them

were those containing unfavorable terms.

g) Borrowers were advised that they did not have to worry about the payments being unaffordable in the future, because they would be definitely be able to refinance again at that point, because the market was so solid.

h) Underwriters were pushed by supervisors to pass through bad loans, many of which were obviously doomed to fail from the start.

ADEQUATE PROTECTION

9. The top legal precedent for adequate protection on the issue of adequate protection of real estate is *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). In *Timbers*, the Supreme Court specifically held that a finding that a secured creditor is undersecured, absolutely precludes the secured creditor from recovering interest on its claimed indebtedness. 484 U.S. at 372, 373, 108 S.Ct. at 630, 631. The Supreme Court also specifically held that an undersecured creditor was not entitled to receive interest payments on the value of its real estate collateral, which was found to be less than the amount of its total claim. 484 U.S. at 373, 108 S.Ct. at 631. Finally, the Supreme Court specifically held that an undersecured creditor may not receive any "lost opportunity" payments resulting from any delay in exercising its rights to its alleged real estate collateral. 484 U.S. at 371, 108 S.Ct. at 630. Under *Timbers*, the only adequate protection to which an undersecured creditor of real estate would be entitled is the diminution in value of its real estate collateral. 484 U.S. at 370, 108 S.Ct. at 629, 11 U.S.C. § 361(1). The Hollowell Court previously stated the determining factor in deciding the amount of adequate protection to be paid is based on the depreciation of the value of the property during the pendency of litigation. *In re Weisband*, 4:09-bk-05175-EWH, Order, Doc 115, P 2, Entered 01/25/10, which accords

with *United Savings*. *Id*. This is a fact issue and there must be an evidentiary hearing to establish the amount of adequate protection, in order to fairly determine the diminution in value. In cases where the property is not declining in value, the claimant is not entitled to any adequate protection. The fact that the debtor has no equity in the estate is not sufficient, standing alone, to grant relief from the automatic stay under section 362(d)(1). *In re Suter*, 10 B.R. 471, 472 (B.Ct.E.D.Penn.1981); *In re Mellor*, 734 F.2d 1396, 1400 (C.A.9, 1984). In *Mellor*, the Court reversed the lifting of the stay solely on the basis that the sellers interest in and to the subject real estate lacked adequate protection, while failing to explain the legal or factual basis for this conclusion, other than to find that the debtor had no equity. The *In re Forest Ridge, II, Ltd. Partnership*, 116 B.R. 937 (Bankr.W.D.N.C., 1990), case held that the only basis on which the Boston Company could be entitled to adequate protection payments under the facts of that case would be if Boston Company had been able to show the real estate collateral was decreasing in value, as required by *Timbers*.

Dated, April 8, 2010

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Respectfully submitted,
/S/ Ronald Ryan
Ronald Ryan, Debtor's Counsel

CERTIFICATE OF SERVICE

I certify that on April 8, 2010, a true copy of the forgoing was emailed to: Attorneys for Jessica R. Kenney, Esq. 3636 North Central Avenue Suite 1050 Phoenix, AZ 85012 Attorneys for Movant, McCarthy Holthus Levine; Chapter 13 Trustee; and Debtor.

/s/ Ronald Ryan
Ronald Ryan