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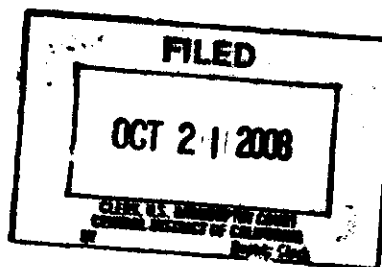
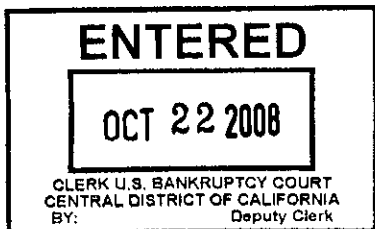
9-30-2008

MERS Relief From Stay Motion Regarding the Debtor Raymond Vargas

Samuel L. Bufford

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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re:

RAYMOND VARGAS,

Debtor.

Case No.: LA08-17036SB

Chapter 7

**MERS RELIEF FROM STAY MOTION:
FINDINGS OF FACT AND CONCLUSION OF
LAW**

Date: September 30, 2008
Time: 9:30 a.m.
Ctrm: 1575
Floor: 15th

I. Introduction

Movant Mortgage Electronic Registration Systems, Inc. ("MERS") supports this relief from stay motion solely with evidence from a low level clerk whose only function is to compare the financial numbers on his evidentiary declaration with those on a computer screen. After trial, the court finds that the clerk is not competent to testify as to anything relevant to the motion, under the applicable evidentiary rules, and that MERS has presented no admissible evidence in support of its motion. In consequence, the court denies the motion. In addition, the court finds that sanctions should be imposed on the

law firm under Rule 9011¹ for bringing the motion with no evidentiary support.

In addition, MERS purports to join as moving parties "its assignees and/or successors in interest." The court finds that this is an improper effort to obtain relief from stay for undisclosed parties, and that the motion must be denied also on these grounds.

II. Relevant Facts

¹ Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C.A. §§ 101-1532 (West 2008) and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 Debtor Raymond Vargas is an 83-year
2 old retired World War II veteran, whose
3 monthly income consists of approximately
4 \$1,004 in social security payments and a
5 union pension of \$308. Debtor purchased a
6 new home in 1971, and fully paid the
mortgage thereon in approximately 1993.
His wife became ill in approximately 2000, and
suffered multiple ailments that led to her death
in December 2004.

7 Debtor obtained a reverse mortgage
8 from Wells Fargo Bank in December 2003 for
9 approximately \$320,000 to pay for his wife's
10 medical care and expenses. In opposition to
11 the motion, debtor also submitted loan
12 documents for two other loans, in 2004 and in
2005, which appeared to bear his signature
but which he did not recall making. He was
physically debilitated and wheel-chair bound at
the time these loans were purportedly made.
None of these loans is at issue in this case.

13 There purport to be two loans in 2006.
14 One was made on May 12 for \$650,000 with
15 Countrywide Bank. The other, which underlies
16 this motion for relief from the automatic stay,
17 was purportedly made with Freedom Home
18 Mortgage ("FHM") on October 3 for \$630,000.
19 In addition, there is another October 3 loan for
20 \$150,500, also with FHM. Debtor asserts that
21 none of these documents bears his signature
22 and that each signature is invalid and forged.

23 The documents submitted with this
24 motion include an adjustable rate promissory
25 note, in which FHM is the promisee, in the
26 amount of \$630,000 with an initial interest rate
27 of 1.75% per annum. The note is supported
28 by a deed of trust, showing FHM as the
lender. The deed of trust shows that MERS is
the beneficiary under the deed of trust "acting
solely as a nominee for lender and lender's
successors and assigns."

No evidence is provided as to any
adjustments in the interest rate, whether
proper or improper, pursuant to the adjustment
clause. Debtor denies having signed either
the promissory note or the deed of trust and
asserts that the signatures are forged.

The debtor filed this case originally
under chapter 13 on May 21, 2008. On July 7,
2008, the case was converted to a case under

chapter 7. MERS filed its motion for relief
from the automatic stay on July 30, 2008.
The movant, as stated in the motion, is
"Mortgage Electronic Registrations System,
Inc. (MERS), its assignees and/or successors
in interest."

The motion includes a declaration by
Robert Turner, an employee of Countrywide
Home Loans, Inc. ("Countrywide"), "which is
a duly authorized servicing agent of the
Movant." The declaration states that Turner is
a custodian of the books, records and files of
"Movant," that he knows that these documents
were prepared in the ordinary course of
business of "Movant" and that he has a
business duty to record accurately the events
documented in those records. However,
neither the declaration nor the testimony at
trial gives any hint as to how Turner has
custody of any books, records or files of
MERS, or as to any connection between him
and MERS.

Turner appeared and testified on
September 30, 2008 on this motion. From his
testimony the court finds that he is a low level
clerk for Countrywide responsible for some
500 loan defaults per week in Southern
California. His principal responsibility is to
review draft motions for relief from stay, to
make sure that the numbers in paragraphs 6²
and 8³ of his declaration agree with the
numbers that appear on the Countrywide
computer screen at his desk. He testified that

² Paragraph 6 of the form declaration requires
that the movant state the following information
about the loan at issue: the amount of
principal, accrued interest, late charges, costs,
advances, and the total claim.

³ Paragraph 8 requires that the movant state
the current interest rate, the contractual
maturity date, the amount of the current
monthly payments, the number of unpaid
prepetition and postpetition payments, the
date of postpetition default, the date of the last
payment received, the date of recording of a
notice of default and a notice of sale, the date
of the scheduled foreclosure, and the amounts
of future payments coming due (including the
late charge, if the payment is not timely).

1 he spends about five minutes on this task for
2 each relief from stay motion. He further
3 testified that, apart from checking these
4 numbers, he gives no consideration to
5 anything else contained in such a declaration,
6 and that he gave no consideration to anything
7 else but the numbers in paragraphs 6 and 8 of
8 the declaration before the court.

9 III. Analysis

10 The motion for relief from stay must
11 be denied on two separate grounds. First,
12 it purports to include unidentified moving
13 parties, who are intended to benefit from the
14 relief from stay order. Second, Turner is
15 altogether incompetent to give any testimony
16 relevant to this motion.

17 A. Names of the Parties

18 MERS purports to join as moving
19 parties "its assignees and/or successors in
20 interest," which are otherwise unidentified.
21 No such unidentified parties are permitted in a
22 motion before the court.

23 Rule 10(a) of the Federal Rules of
24 Civil Procedure provides in relevant part:
25 "Caption; Names of Parties. Every pleading
26 must have a caption The title of the
27 complaint must name all of the parties."⁴
28 While there is no comparable rule in the
Federal Rules of Bankruptcy Procedure,
Local Rule 1002-1(a)(8) fills in this gap by
specifying what must be stated on the title
(or first) page of all papers filed in this court.
Rule 1002-1(a)(8)(D) states: "The names of
the parties shall be placed below the title of
the court and to the left of center"

For a relief from stay motion, the
movant must use local form 4001-1M.RP.
See Local Rule 1002-1(d)(9) ("Motions for
relief from stay shall be made using those
forms designated for mandatory use in the F
4001-1 series of the court-approved forms").

⁴ This provision also prohibits the addition of
a "John Doe" defendant (i.e., an unidentified
defendant whose name may be provided at a
later date).

Like Rule 1002-1(d)(8), the form requires that
the name of the movant be stated on the
second line below the line stating, "Notice of
Motion and Motion for Relief from the
Automatic Stay." Thus, each movant in a
motion for relief from stay must be named on
the first page of the motion.

The identification of the movant
serves several important functions. First,
it links the motion to the Schedule A list of real
property owned by the debtor. Second, this
identification links the motion to the Schedule
D list of creditors holding secured claims.
Third, this identification permits the judge to
determine whether the judge must recuse
based on the Code of Conduct for United
States Judges (requiring recusal in a variety of
circumstances based on the judge's
relationship, if any, to the moving party).⁵

The exclusion of these unidentified
parties is particularly important in this
proceeding. It is highly unlikely that FHM has
kept the promissory note: most likely, it sold
the note into the market for mortgage
securitization.⁶ In consequence, it is quite
unlikely that MERS is an authorized agent of
the holder of the note here at issue.
By adding these unidentified movants, MERS
is trying to obtain relief from the automatic stay
for the current note holders without disclosing
to the court their existence, identities or the
source of MERS's authority to act on their
behalf. This is improper.

A secured promissory note traded on
the secondary mortgage market remains
secured because the mortgage follows the
note. CAL. CIV. CODE § 2936
("The assignment of a debt secured by

⁵ As of this date, I still do not know whether
my recusal may be required in this case.

⁶ See, e.g., James R. Barth et al., *A Short
History of the Subprime Mortgage Market
Meltdown* 5 fig.2 (Milken Institute 2008),
available at [http://www.milkeninstitute.org/
publications/publications.taf?function=detail&
ID=38801038&cat=Papers](http://www.milkeninstitute.org/publications/publications.taf?function=detail&ID=38801038&cat=Papers) (showing that
approximately 85% of all home mortgages
originated in 2006 and 2007 were securitized).

1 mortgage carries with it the security.”).
2 California codified this principle in 1872.
3 Similarly, this has long been the law
4 throughout the United States: when a note
5 secured by a mortgage is transferred, “transfer
6 of the note carries with it the security, without
7 any formal assignment or delivery, or even
8 mention of the latter.” *Carpenter v. Longan*,
9 83 U.S. 271, 275 (1872). Clearly, the
10 objective of this principle is “to keep the
11 obligation and the mortgage in the same
12 hands unless the parties wish to separate
13 them.” RESTATEMENT (THIRD) OF PROPERTY
14 (MORTGAGES) § 5.4 (1997). The principle is
15 justified, in turn, by reasoning that the
16 “the debt is the principal thing and the
17 mortgage an accessory.” *Id.* Consequently,
18 “[e]quity puts the principal and accessory upon
19 a footing of equality, and gives to the assignee
20 of the evidence of the debt the same rights in
21 regard to both.” *Id.* Given that “the debt is the
22 principal thing and the mortgage an
23 accessory,” the Supreme Court reasoned that,
24 as a corollary, “[t]he mortgage can have
25 no separate existence.” *Carpenter*, 83 U.S.
26 at 274. For this reason, “an assignment of the
27 note carries the mortgage with it, while an
28 assignment of the latter alone is a nullity.”
Id. at 274. While the note is “essential,” the
mortgage is only “an incident” to the note. *Id.*

Thus, if FHM has transferred the note,
MERS is no longer an authorized agent of the
holder unless it has a separate agency
contract with the new undisclosed principal.
MERS presents no evidence as to who owns
the note, or of any authorization to act on
behalf of the present owner.

In consequence, because these
purported movants are not identified, the
motion must be denied on these grounds
alone.

B. Competence of Witness

The purpose of the declaration
submitted with the motion, which is
a mandatory form in the Central District

of California,⁷ is to provide competent
evidence supporting the motion for relief from
the automatic stay. Competent evidence is
required so that “the truth may be ascertained
and proceedings justly determined.” FED R.
EVID. 102. Questions concerning the
admissibility of evidence are determined by
the court. See *id.* 104(a).

While the form of the declaration is
mandatory, a moving party is required to
modify and supplement it (and show the
modifications) to present admissible evidence
on every item covered by the declaration. It is
manifest that, except for the numbers in
paragraphs 6 and 8, Turner made no attempt
whatever to assure the accuracy of the
declaration.

The general rule is that a witness may
only testify as to matters within the personal
knowledge of the witness: “A witness may not
testify to a matter unless evidence is
introduced sufficient to support a finding that
the witness has personal knowledge of the
matter.” *Id.* 602. MERS has failed to
introduce evidence of any kind sufficient to
show that Turner has personal knowledge or
is otherwise competent to testify as to any
matter relevant to the motion before the court.

1. Payments and Amount Owng

Hearsay evidence is not admissible
unless an exception to the hearsay rule
applies: “Hearsay is not admissible except as
provided by these rules” *Id.* 802.
Hearsay is “a statement, other than one made
by the declarant while testifying at the trial
or hearing, offered in evidence to prove
the truth of the matter asserted.” *Id.* 801(c).
In his declaration, Turner presented the
numbers in paragraphs 6 and 8 for their truth.
This evidence was hearsay, and is not
admissible unless an exception to the hearsay
rule is applicable.

The declaration in a real property
relief from stay motion is required to state in
paragraph 6 the amount of movant’s claim
with respect to the property, including the

⁷ See Local Rule 1002-1(d)(9).

1 principal owing on the loan, the amount of
2 accrued interest, the amount of late charges,
3 any advances such as for property taxes or
4 insurance, and the total amount of the claim.
5 The declarant must further attach a true and
6 correct copy of the promissory note and the
7 deed of trust, and the declarant must be
8 competent to testify as to the authenticity of
9 these documents. The form further requires
10 that the declarant state in paragraph 8 the
11 current rate of interest, the number and
12 amount of unpaid prepetition payments, the
13 number and amount of postpetition payments,
14 the date of the recording of any notice of
15 default or notice of sale, and further
16 information on the foreclosure process.
17 The declaration must also state the fair market
18 value of the property and the basis for this
19 determination. A number of other items
20 relating to the promissory note, the lien and
21 the status of debtor's payments are also
22 required.

23 FHM apparently relies on Rule 803(6)
24 for the admissibility of this hearsay evidence.⁸

25 ⁸ Rule 803(6), providing for the admission of
26 records of regularly conducted activity
27 (formerly known as the "business records
28 rule"), states:

Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph

"The basic elements for the introduction of business records under the hearsay exception for records of regularly conducted activity all apply to records maintained electronically." *In re Vinhnee*, 336 B.R. 437, 444 (B.A.P. 9th Cir. 2005). *Vinhnee* also states the requirements for qualification as business records: "Such records must be: (1) made at or near the time by, or from information transmitted by, a person with knowledge; (2) made pursuant to a regular practice of the business activity; (3) kept in the course of regularly conducted business activity; and (4) the source, method, or circumstances of preparation must not indicate lack of trustworthiness." *Id.* (citing FED. R. EVID. 803(6); *United States v. Catabran*, 836 F.2d 453, 457 (9th Cir. 1988)).

The admission of computer records requires that movant provides an 11-step foundation:

1. The business uses a computer.
2. The computer is reliable.
3. The business has developed a procedure for inserting data into the computer.
4. The procedure has built-in safeguards to ensure accuracy and identify errors.
5. The business keeps the computer in a good state of repair.
6. The witness had the computer readout certain data.
7. The witness used the proper procedures to obtain the readout.
8. The computer was in working order at the time the witness obtained the readout.
9. The witness recognizes the exhibit as the readout.
10. The witness explains how he or she recognizes the readout.
11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

1 *Vinhnee*, 336 B.R. at 446 (citing EDWARD J.
2 IMWINKELRIED, EVIDENTIARY FOUNDATIONS
§ 4.03[2] (5th ed. 2002)).

3 Under Ninth Circuit law, the fourth
4 requirement subsumes details regarding the
5 computer policy consisting of (a) control
6 procedures including control of access to the
7 database, (b) control of access to the
8 program, (c) recording and logging of
9 changes, (d) back-up practices, and (e) audit
10 procedures to assure the continuing integrity
11 of the records. See *id.* at 446-47.

12 Turner did present competent
13 evidence as to items 1 and 6 through 8. The
14 remaining seven requirements, however, were
15 totally unmet, including *Vinhnee's* five-part
16 gloss on the fourth element. The court finds
17 that Turner was unable and failed to present
18 any competent testimony as to these items.

12 2. Documents – Note and Deed of Trust

13 In addition to the data concerning
14 payment on the loan, movant must provide
15 evidence that the underlying debt is owing to
16 it, and evidence of the security interest (if the
17 obligation is secured).

18 A party offering an item of
19 non-testimonial evidence, such as a document
20 (not offered to prove the truth of its contents),
21 must prove that the item is what the party
22 claims it is. See, e.g., 31 WRIGHT & GOULD,
23 FEDERAL PRACTICE & PROCEDURE: EVIDENCE ¶
24 7101 (2000). Accordingly, authentication is a
25 condition to the admissibility of such evidence.
26 See *id.*

27 Thus, a person testifying in support of
28 a motion for relief from stay (including a
29 declarant making a declaration under penalty
30 of perjury) must have personal knowledge of
31 the authenticity of the promissory note and
32 deed of trust, or the documents must be
33 admissible under another evidentiary rule.

34 MERS attached to Turner's
35 declaration a copy of the relevant promissory
36 note and deed of trust. However, MERS
37 declined to move the admission of any of
38 these documents or any other documents
39 attached to the moving papers. Thus, there is

no evidence properly before the court as to the
promissory note or the deed of trust.

Similarly, MERS declined to move the
admission of the declaration itself. Indeed, the
court finds that Turner is not competent to
testify as to any relevant information
underlying the relief from stay motion.

a. Promissory Note

There are two issues that MERS must
address with respect to the promissory note.
First, it must authenticate the note. Second,
it must show that it is entitled to enforce
the note.

i. Authentication of Note

For admission as evidence,
a promissory note does not need to qualify
as a record of regularly conducted activity
(or for some other exception to the hearsay
rule). The note itself is not hearsay, and thus
is not subject to the hearsay rule. See, e.g.,
Remington Invs., Inc. v. Hamedani, 55 Cal.
App. 4th 1033, 1042 (App. 1997)
("A promissory note document itself is not a
business record as that term is used in the law
of hearsay, but rather is an operative
contractual document admissible merely upon
adequate evidence of authenticity.").

A promissory note cannot be admitted
into evidence unless it is authenticated.⁹
Federal Rule of Evidence 901(a) provides:
"The requirement of authentication . . . as a
condition precedent to admissibility is satisfied
by evidence sufficient to support a finding that
the matter in question is what its proponent
claims." Rule 901(b) illustrates how a
document such as a promissory note may be
authenticated. Turner gave no testimony as to
the authenticity of the note here at issue, and

⁹ In fact, there is no rule of evidence that
explicitly requires that a document be
authenticated. However, this unstated
requirement underlies the rules on
authentication of documents. See 31 WRIGHT
& GOLD, *supra*, ¶ 7012 (2000).

1 MERS has not presented any evidence on this
2 subject.

3 Indeed, the debtor vigorously contests
4 the authenticity of the note in this case. Given
5 the lack of evidence on the part of MERS,
6 authentication of the note is altogether missing
7 from its evidence in this case.

8 ii. Right to Enforce the Note

9 In addition to authenticating the note,
10 MERS must show that it is entitled to enforce
11 the note. Only the holder of a negotiable
12 promissory note (with minor exceptions not
13 relevant in this case) is entitled to enforce the
14 note. See CAL. COM. CODE § 3301.
15 The holder enforces the note by making a
16 demand for payment. See *id.* § 3501(a).
17 The person making a demand shows its right
18 to enforcement by showing the original of the
19 promissory note. See *id.* § 3501(b)(2).

20 MERS has not brought to court the
21 note here at issue, and makes no pretense
22 that it holds the note. Indeed, MERS is not in
23 the business of holding promissory notes.¹⁰
24 Its business is only to hold deeds of trust as
25 an agent for the holder of the note.
26 This status for MERS is disclosed in the deed
27 of trust here at issue, which states that MERS
28 is "acting solely as a nominee [a type of agent]
for lender and lender's successors and
assigns."

In addition, there is no evidence
before the court as to who is the holder of the
promissory note and is entitled to enforce it.
MERS contends that Countrywide acts as
agent for MERS. However, MERS does not
purport to be the holder of the promissory
note. Under California law, only the holder of
a note is entitled to enforce it (with minor
exceptions not relevant herein). See CAL.
COM. CODE § 3301.

¹⁰ MERS, Inc. is an entity whose sole purpose
is to act as mortgagee of record for mortgage
loans that are registered on the MERS
System. This system is a national electronic
registry of mortgage loans, itself owned and
operated by MERS, Inc.'s parent company,
MERSCORP, Inc.

The court finds that MERS has
altogether failed to show that it is entitled to
enforce the note here at issue in this case.

b. Deed of Trust

A deed of trust is normally
authenticated by showing that it is a public
record under Rule 901(b)(7).¹¹ Extrinsic
evidence of authenticity is not required as a
condition precedent to admissibility with
respect to a certified copy of a public record
such as a deed of trust.¹²

¹¹ Rule 901(b) provides in relevant part:

(b) Illustrations.

By way of illustration only, and not by
way of limitation, the following are
examples of authentication or
identification conforming with the
requirements of this rule:

...
(7) *Public records or reports.* Evidence
that a writing authorized by law to be
recorded or filed and in fact recorded or
filed in a public office, or a purported
public record, report, statement, or data
compilation, in any form, is from the
public office where items of this nature
are kept.

¹² Rule 902 provides in relevant part:

Extrinsic evidence of authenticity as a
condition precedent to admissibility is
not required with respect to the
following:

...
(4) **Certified copies of public records.**
A copy of an official record or report
or entry therein, or of a document
authorized by law to be recorded or
filed and actually recorded or filed in
a public office, including data
compilations in any form, certified as
correct by the custodian or other
person authorized to make the
certification, by certificate complying
with paragraph (1), (2), or (3) of this
rule or complying with any Act of

1 The deed of trust in this case gives
2 the appearance of being a certified copy of the
3 original recorded deed. However, the
4 purported certification is defective. It states
5 only: "I HEREBY CERTIFY THAT THIS IS A
6 TRUE AND EXACT COPY OF THE
7 ORIGINAL", followed by the signature of
8 Martha J. Urquijo.

9 A certified copy of a public record
10 must be made "by the custodian or other
11 person authorized to make the certification . . .
12 ." FED. R. EVID. 902(4). In addition, the
13 certification of a domestic document must
14 comply with paragraph (1) (for documents
15 under seal) or (2) (for documents not under
16 seal) of Rule 902. If the document is not
17 under seal (as appears in this case), the
18 signature must be "in the official capacity of an
19 officer or employee" of a governmental entity
20 qualifying under paragraph (1). Finally, the
21 certification must include a certification under
22 seal, made by "a public officer having a seal
23 and having official duties in the district or
24 political subdivision of the [certifying] officer or
25 employee" that the signer "has the official
26 capacity and that the signature is genuine."
27 All of this is missing from the purported
28 certification. Thus, the court must assume
that Ms. Urquijo has no authority whatever to
certify the deed of trust.

Here, the authenticity of the deed of
trust is disputed by the debtor. Presumably in
consequence thereof, MERS has declined to
move its admission into evidence.¹³

Congress or rule prescribed by the
Supreme Court pursuant to statutory
authority.

¹³ The declarant's total lack of competence to
testify on this motion raises a serious question
as to the good faith of counsel for MERS under
Rule 9011. Counsel should have known that
Turner was incompetent to testify as to anything
relevant to this motion. Thus, counsel should
not have filed with the court the declaration in
which he stated falsely, under penalty of perjury:
"I have personal knowledge of the matters set
forth in this declaration and, if called upon to
testify [as he was], I could and would
competently testify thereto."

C. Fraudulent Character of Note and Deed of Trust

The debtor contends that the note and
deed of trust involved in this motion are
fraudulent. The court makes no findings on
this issue. Such a determination requires an
adversary proceeding which is not before the
court. However, the court can deny a motion
for relief from stay pending the determination
of such an adversary proceeding where the
debtor presents serious evidence that the note
and deed of trust are fraudulent. On these
grounds, also, the court denies the motion.

D. Other Defects in Motion

There appear to be other defects in
the motion, that the court does not address
because of lack of appropriate admissible
evidence. For example, Freedom Home
Mortgage is the payee on the note. There is
no evidence before the court as to who is the
present holder is entitled to enforce the note.
The holder must join in the motion for relief
from stay. See *In re Hwang*, __ B.R. __
(Bankr. C.D. Cal. 2008).

IV. Conclusion

The court concludes that this motion
for relief from stay must be denied on two
separate grounds. First, the motion
improperly attempts to obtain relief for
unidentified parties, in violation of the rule
requiring the disclosure of parties appearing
before the court. Second, the only evidence
supporting the motion is provided by a witness
who is incompetent to provide any relevant
evidence.

Dated: October 21, 2008



Hon. Samuel L. Bufford
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I certify that a true copy of this **MERS RELIEF FROM STAY MOTION: FINDINGS OF FACT
AND CONCLUSION OF LAW** was mailed on **OCT 22 2008** to the parties listed
below:

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Dated: **OCT 22 2008**



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