

Bankruptcy Litigation Model

VOLUME 2

MOTIONS & PLEADINGS

For Ipad

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VOLUME 2 – MOTIONS AND PLEADINGS

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A. No Protest Abandon Property

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR.

**DEBTOR'S MOTION TO ABANDON REAL PROPERTY
(with In Rem Remedy as to taxes and HO fees)**

COMES NOW, the debtor, by and through undersigned counsel, and moves the Court, pursuant to 11 U.S.C. § 554 and Bankruptcy Rule 6007(b), for an Order deeming the debtor's real property abandoned, and in support thereof states:

1. The matters set forth herein are core proceedings pursuant to 28 U.S.C. § 157 (b) (2) and *In re Thompson*, 193 B.R. 83, 84 (D.D.C. 1994).
2. The debtors filed his Voluntary Chapter 13 on _____ seeking the fundamental protections afforded by the bankruptcy laws and rules.
3. The Meeting of Creditors was held on _____.
4. The debtor's plan was confirmed by order of this court on _____.
5. On Schedule A, the debtor listed real property located at: 9160 River Circle, Shelby, Cleveland County, North Carolina 28152. The legal description is: Being all of Lot 45 of River Acres, more fully shown on plat recorded in Book 15 at Page 3, Cleveland County Registry.
6. Debtor estimated the fair market value of the property to be \$380,000.00.
7. On Schedule D, the debtor listed the current mortgage servicer Homebanc Mortgage as the secured creditor on the First and Second Mortgages.
8. There is no equity in the property and abandonment is the appropriate remedy.
9. Debtor desires to have the property declared abandoned and an order entered thereon to prevent the potential problems with homeownership after surrendering the real property in their Chapter 13 plan. To wit: tax assessments, judgments for not maintaining the home, etc.
10. Debtor requests this Court issue an Order directing that Homebanc Mortgage will assume any and all risk of loss associated with, related to, or arising out of the said property, including, without limitation, liability for real and/or personal property taxes, hazard insurance, homeowner's dues, and maintenance of said property, pursuant to Section 544 of Title 11 of the Bankruptcy Code.

WHEREFORE, the Debtor respectfully requests the Court to issue an order finding abandoning the property and for such other and further relief as this Court deems necessary and just.

This the _____ day of _____, 2009.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

**MOTION TO MODIFY CHAPTER 13 PLAN
TO SURRENDER REAL PROPERTY AND TO QUIT-CLAIM PROPERTY TO
THE MORTGAGE SERVICER**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order modifying the plan and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this Court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. The plan presently provides for a monthly payment of \$1146.00.

5. The Debtors' plan as filed includes a first deed of trust in favor of CitiFinancial Mortgage Company and a second deed of trust in favor of CitiFinancial (currently serviced by Resurgent Capital) on their residential real estate located at _____.

6. The debtors have determined that due to substantial and material changes in circumstances since the confirmation of the plan in this case, they are no longer in a financial position to retain this collateral and therefore desire to surrender the same to the secured creditor listed herein and to grant said creditor relief from the automatic stay to foreclose on the property.

7. In support hereof, the debtors have attached hereto and incorporate herein by this reference Amended Schedules I and J.

8. The debtors are therefore moving the Court to modify their plan by directing the Trustee to strike the secured claim [plus any unsecured split-claim related thereto] of the creditor identified herein and by allowing the said creditor 120 days from the date of the entry of the order granting this motion to file any deficiency claims with the Chapter 13 Trustee.

9. The debtors are also moving the court pursuant to Section 544 of Title 11 of the Bankruptcy Code to abandon any interest they may have in the property to the secured creditor named herein and to have such creditor assume any and all risk of loss associated with, related to, or arising out of the said property. The debtors are simply no longer in a financial position to maintain or insure the property and such obligations would be extremely burdensome to the debtors and the estate.

10. The debtors are also moving the Court to reduce the percentage payout to unsecured creditors with filed and allowed claims from 95% to 10% and to reduce the plan payments from \$1146.00 per month to \$410.00 per month.

11. The debtors are informed and believe and therefore allege that they will be able to make the plan payments at the stated monthly rate after this modification has been approved by the court.

12. The debtors are also moving the Court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion to modify plan be granted as provided for in the body of this motion;

B. That the monthly plan payments be changed, modified or maintained as requested herein;

C. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$108.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtors into the Plan.

D. That the debtor be permitted to execute a quit-claim deed to the mortgage servicer for the subject property;

E. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

**MOTION TO MODIFY CHAPTER 13 PLAN
TO SURRENDER MOTOR VEHICLE AND REDUCE PLAN PAYMENTS**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order modifying the plan and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this Court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. The plan presently provides for a monthly payment of \$600.00.

5. The plan includes a debt to Capital One Auto Finance (Capital One) for first lien on a 2001 Dodge Neon. The claim in favor of Capital is identified as bifurcated claim number 0003 (secured) and number 2003 (unsecured) on the records of the Trustee.

6. The debtors have determined that due to substantial and material changes in circumstances since the confirmation of the plan in this case, they are no longer in a financial position to retain this collateral and therefore desire to abandon the same to the secured creditor listed herein and to grant said creditor relief from the automatic stay to repossess and dispose of the said collateral. The debtors have in fact, delivered the vehicle to the office of their attorney, where it is currently being stored.

7. In support hereof, the debtors are submitting Amended Schedules I and J attached hereto and incorporated herein.

8. The debtors are therefore moving the Court to modify their plan by directing the Trustee to strike the secured claim [plus any unsecured split-claim related thereto] of the creditor identified herein, identified on the records of the Trustee as claim number 0003 and 2003, and by allowing the said creditor 90 days from the date of the entry of the order granting this motion to file any deficiency claim with the Chapter 13 Trustee.

9. The debtors are also moving the Court to reduce the plan payments from \$600.00 to \$310.00 in light of the removal of the claims in favor of Capital One.

10. The debtors are informed and believe and therefore allege that they will be able to make their plan payments at the stated monthly rate after this modification has been approved by the court.

11. The debtors are also moving the Court for an Order ordering Capital One to take recovery of the subject vehicle within ten days of the order granting this motion.

12. The debtors are also moving the Court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion to modify plan be granted as provided for in the body of this motion;

B. That the monthly plan payments be changed, modified or maintained as requested herein;

C. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$60.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtors into the Plan.

D. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

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A. No Protest
Approve Settlements

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

**MOTION FOR APPROVAL OF
WORKER'S COMPENSATION SETTLEMENT
AND
MOTION TO MODIFY SCHEDULES**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order approving a worker's compensation settlement and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. The plan presently provides for a monthly payment of \$675.00.

5. The male debtor died in a work-related accident on _____.

6. The female debtor has entered into an Agreement for Compensation for Death from the male debtor's employer, The City of Shelby. The Agreement provides for the female debtor to receive the sum of \$346.65 for 400 weeks.

7. The debtors are informed and believe and therefore allege that the said offer is fair and reasonable.

8. The debtors are therefore moving this Court to approve the settlement with the disbursement to be made to the female debtor as set forth in the settlement.

9. The debtors are hereby moving this court to amend their schedules to reflect the net amount of the settlement as property of the estate and to exempt the property pursuant to North Carolina General Statutes Section 97-21.

10. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion for approval of a worker's compensation settlement be granted as provided for in the body of this motion;

B. That the debtors' motion to modify schedules be granted as provided for in the body of this motion;

C. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$106.00, said fee and expenses to be paid by the Trustee from funds paid by the debtors into the plan;

D. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: Chapter 13 No.
Our File No.

ADDRESS:

SSN:
Debtors.

**MOTION FOR APPROVAL OF
SOCIAL SECURITY DISABILITY SETTLEMENT
AND
MOTION TO MODIFY SCHEDULES**

COMES NOW the above-named debtor, by and through her attorney of record, and respectfully moves the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order approving a Social Security Disability settlement and in support hereof alleges and says that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. The plan presently provides for monthly payments of \$140.00 per month.

5. The debtor filed for Social Security Disability Benefits which was denied. The debtor appealed and has been awarded a "back award" of \$24,859.80 and \$945.00 per month.

6. The debtor is therefore moving this Court to approve the settlement with the proceeds to be disbursed to the debtor as exempt property pursuant to 42 U.S.C. 407.

7. The debtor is also moving this Court for approval of \$5,300.00 in legal fees and \$788.00 in expenses to be paid from the settlement to _____, the attorney who represented the debtor in her appeal.

8. The debtor is hereby moving this court to amend her schedules to reflect the net amount of the Social Security Disability settlement as property of the estate and to exempt the property under 42 U.S.C. 407.

9. The debtor is also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtor respectfully prays of the Court as follows:

A. That the debtor's motion for approval of a Social Security Disability settlement be granted as provided for in the body of this motion;

B. That the attorney for the debtor be granted an additional non-base legal fee of \$350.00 and expenses of \$42.00, said fee and expenses to be paid by the debtor from the proceeds paid to the debtor;

C. That the debtor's motion to modify schedules be granted as provided for in the body of this motion;

D. That the debtor have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

DEBTORS

**MOTION FOR APPROVAL OF
PERSONAL INJURY INSURANCE SETTLEMENT
AND MOTION TO MODIFY SCHEDULES**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order approving a personal injury insurance settlement and modifying the schedules and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.
2. The 341(a) meeting of creditors is scheduled to be held in Shelby, North Carolina on _____.
3. The Chapter 13 plan was subsequently confirmed by order of this Court.
4. The plan presently provides for a monthly payment of \$295.00.
5. The debtors aver that the female debtor was involved in an accident in which she sustained personal injuries.
6. The debtors aver that as a result of the said injuries the female debtor pursued a personal injury claim against the other party involved in the aforesaid accident. The debtors aver that the matter has been settled.
7. The female debtor has received and accepted an offer to settle the personal injury claim for the sum of \$25,000.00 from the at-fault party, \$1,000.00 from the debtors' medical payments coverage on their own insurance policy, and the sum of \$16,487.00 which is being held in the trust account of the female debtor's personal injury attorney from Liability for a worker's compensation lien.
8. The debtors are informed and believe and therefore allege that the said offer is fair and reasonable.
9. The debtors are therefore moving this Court to approve the settlement with the following disbursements to be made from the said insurance proceeds:

- A. To the Law Offices of _____ (legal fees) \$8,403.00;
- B. To the Law Offices of _____ (expenses) \$65.00;
- C. To _____ Insurance Company \$8,333.00;
- D. To the debtors the sum of \$25,686.00, the balance of the net proceeds, to be paid to the debtors (specifically the female debtor) as exempt property pursuant to North Carolina General Statutes Section 1C-1601(a)(8).

10. The debtors are hereby moving this court to amend their schedules to reflect the net amount of the personal injury settlement as property of the estate and to exempt the property under Chapter 1C of the North Carolina General Statutes.

11. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

- A. That the debtors' motion for approval of a personal injury insurance settlement be granted as provided for in the body of this motion;
- B. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$162.00, said fee and expenses to be paid by the debtors from the net proceeds paid to the debtors;
- C. That the debtors' motion to modify schedules be granted as provided for in the body of this motion;
- D. That the insurance settlement be approved as set forth herein with the net proceeds to be paid as provided for herein; and
- E. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER No.
OUR FILE No.**

ADDRESS:

SSN:

Debtors.

**MOTION FOR APPROVAL OF
PHYSICAL DAMAGE INSURANCE SETTLEMENT REGARDING RESIDENCE**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order approving a physical damage insurance settlement, and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this Court on _____.
2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.
3. The Chapter 13 plan was subsequently confirmed by order of this Court.
4. The plan presently provides for a monthly payment of \$1146.00.
5. The plan included a debt to CitiFinancial Mortgage (hereinafter "CitiFinancial") secured by a first lien on the debtors' residence. The debtors have surrendered this property to the secured creditor and upon information and belief, Resurgent Capital Services, LP is the current servicer.
6. Prior to the surrender of the debtors' home, the debtors aver that their air conditioning unit sustained damage when it was struck by lightening.
7. The debtors obtained repairs to the air conditioning unit from Rutherford Heating & Air, Inc. in the amount of \$1431.00 including labor and materials.
8. NC Grange Mutual Insurance has offered to settle the insurance damage claim for the sum of \$1231.00 and in fact has issued a check made payable to the debtors and to CitiFinancial in this amount. This check is being held at the office of the attorney for the debtors pending this Court's approval of this motion.

9. The debtors are therefore moving this Court to approve the settlement with the entire amount of the settlement to be paid to Rutherford Heating & Air, Inc.

10. The debtors are further moving this Court for an Order requiring CitiFinancial to endorse the settlement check and return it to the office of the attorney for the debtors or to accept the insurance settlement check and issue a check directly to Rutherford Heating & Air, Inc.

11. The debtors are also moving this Court to adopt the settlement as an order subject to the contempt powers of this Court.

12. The debtors are also moving the Court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion for approval of a physical damage insurance settlement be granted as provided for in the body of this motion;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$108.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtors into the Plan;

C. That the insurance settlement be approved as set forth herein with the proceeds to be used to pay for repairs;

D. That CitiFinancial be ordered to endorse the settlement check and return it to the office of the attorney for the debtors or to accept the insurance settlement check and issue a check directly for the repairs;

E. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

**MOTION FOR APPROVAL OF
PHYSICAL DAMAGE INSURANCE SETTLEMENT
REGARDING MOTOR VEHICLE WITH NET PROCEEDS PAYABLE TO DEBTORS**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order approving a physical damage insurance settlement and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. The plan presently provides for a monthly payment of \$690.00.

5. The plan included a debt to Americredit Financial Services (hereinafter "Americredit") secured by a first lien on the debtors' 1999 Plymouth Neon. The debtors aver that the secured portion of the debt to Americredit is identified on the records of the Trustee as claim number 0003 in the remaining amount of \$266.06. Americredit's unsecured claim is identified on the records of the Trustee as claim number 2003 in the remaining amount of \$2551.35 to be paid at 21%. The debtors aver that the amount necessary to pay Americredit in full for this claim is approximately \$830.00.

6. The debtors aver that this vehicle was damaged in an automobile accident and that Nationwide Mutual Insurance Company ("Nationwide") has offered to settle the property damage claim for the sum of \$2941.19.

7. The debtors are informed and believe and therefore allege that the offer of Nationwide is fair and reasonable.

8. The debtors are therefore moving this Court to approve the settlement to be used to pay the claim of Americredit and for the remaining amount of approximately \$2111.18 to be paid to the debtors to pay for bills and medical expenses.

9. The debtors are further moving this Court to require Americredit to release the lien on the title to the 1999 Plymouth Neon and deliver the title to the attorney for the debtors within ten (10) days of the receipt of the order granting this motion.

10. The debtors are further moving the Court to order Nationwide to deliver the settlement check made payable to O. Max Gardner III, P.C., Trust Account, within ten (10) days of the receipt of the order granting this motion.

11. The debtors are further moving the Court to order that the obligations of Americredit and Nationwide are independent and that the debtors may move to enforce any order entered in this case by motion and that in the event of any such enforcement proceeding that the debtors be entitled to recover actual damages, punitive damages and legal fees and expenses.

12. The debtors are therefore moving this Court to approve the settlement as set forth herein.

13. The debtors are also moving this Court to adopt the settlement as an order subject to the contempt powers of this Court.

14. The debtors are also moving the Court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion for approval of a physical damage insurance settlement be granted as provided for in the body of this motion;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$450.00 and expenses of \$92.00, said fee and expenses to be paid through the plan;

C. That the insurance settlement be approved as set forth herein with the proceeds to be used to pay the claim of Americredit and for the remainder to be paid to the debtors to pay bills and medical expenses;

D. That Americredit be ordered to release the lien on the title to the 1999 Plymouth Neon and deliver the title to the attorney for the debtors within ten (10) days of the receipt of the order granting this motion;

E. That Nationwide be ordered to deliver the settlement check made payable to O. Max Gardner III, P.C., Trust Account, within ten (10) days of the receipt of the order granting this motion;

F. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616/FAX (704) 487-0619

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

Chapter 13 No.

Our File No.

ADDRESS:

SSN:

Debtors.

**MOTION FOR APPROVAL OF
PHYSICAL DAMAGE INSURANCE SETTLEMENT
REGARDING MOTOR VEHICLE AND
MOTION FOR SUBSTITUTION OF COLLATERAL**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order approving a physical damage insurance settlement and substitution of collateral and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. The debtors aver that in the petition and schedules in this case, they duly listed a secured debt in favor of Heritage Finance ("Heritage") secured by a 1996 Honda Accord.

5. The debtors aver that this vehicle was totally destroyed in an automobile accident and that Progressive Insurance ("Progressive") has offered to settle the claim for the sum of \$5,477.79.

6. The debtors are informed and believe and therefore allege that the offer of Progressive is fair and reasonable.

7. The debtors are therefore moving this Court to approve the settlement to be paid to the debtors to use the full settlement to purchase a replacement vehicle of comparable price with Heritage to retain the first lien on the title to the replacement vehicle.

8. The debtors are further moving this Court to require Heritage to release the lien on the title to the 1996 Honda Accord and deliver the title to the attorney for the debtors within ten (10) days of the receipt of the order granting this motion.

9. The debtors are further moving the Court to order Progressive to deliver the settlement check made payable to O. Max Gardner III, P.C., Trust Account, within ten (10) days of the receipt of the order granting this motion.

10. The debtors are further moving the Court to order that the obligations of Heritage and Progressive are independent and that the debtors may move to enforce any order entered in this case by motion and that in the event of any such enforcement proceeding that the debtors be entitled to recover actual damages, punitive damages and legal fees and expenses.

11. The debtors are therefore moving this Court to approve the settlement as set forth herein.

12. The debtors are also moving this Court to adopt the settlement as an order subject to the contempt powers of this Court.

13. The debtors are also moving the Court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion for approval of a physical damage insurance settlement be granted as provided for in the body of this motion;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$450.00 and expenses of \$170.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtors into the Plan;

C. That the insurance settlement be approved as set forth herein with the net proceeds to be paid to the debtors to purchase a replacement vehicle with Heritage to retain the first lien on the title to the replacement vehicle;

D. That Heritage be ordered to release its lien on the title of the 1996 Honda Accord and deliver said title to the office of the attorney for the debtors within ten (10) days of the receipt of the order granting this motion;

E. That Progressive be ordered to issue the settlement check made payable to the O. Max Gardner, III, PC Trust Account and deliver it to the office of O. Max Gardner, III, PC within ten (10) days of the order granting this motion;

F. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

**MOTION FOR APPROVAL OF
PHYSICAL DAMAGE INSURANCE SETTLEMENT
REGARDING MOTOR VEHICLE TO USE TO REPAIR VEHICLE**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order approving a physical damage insurance settlement to be used to repair the vehicle and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.
2. The 341(a) meeting of creditors was held on in Shelby, North Carolina, on _____.
3. The Chapter 13 plan was subsequently confirmed by order of this Court.
4. The plan presently provides for a monthly payment of \$595.00.
5. In the petition and schedules in this case, the debtors duly listed a secured debt in favor of Union Acceptance Corporation (hereinafter "Union Acceptance") secured by a 2001 PT Cruiser, said claim being identified on the records of the Trustee as claim number 0013.
6. The debtor's 2001 PT Cruiser was damaged in an automobile accident and Auto Owners Insurance (hereinafter "Auto Owners"), has offered to settle the claim for the sum of \$1,066.48. Auto Owners has in fact already issued a check to Union Acceptance, the debtors and the debtors' son in the amount of \$1,066.48, which is being held in at the office of the attorney for the debtors, pending this court's approval of this settlement.
7. The debtors are informed and believe and therefore allege that the offer of Auto Owners is fair and reasonable.
8. The debtors are therefore moving this Court to approve the settlement to be paid to the debtors to use the net settlement proceeds to pay for repairs to the vehicle.
9. The debtors are also moving this Court for an order requiring Union Acceptance to endorse the settlement check and return it to the office of the attorney for the debtors within ten days of the order granting this motion.

10. The debtors are further moving the Court to order that the obligations of Union Acceptance and Auto Owners are independent and that the debtors may move to enforce any order entered in this case by motion and that in the event of any such enforcement proceeding that the debtors be entitled to recover actual damages, punitive damages and legal fees and expenses.

11. The debtors are therefore moving this Court to approve the settlement as set forth herein.

12. The debtors are also moving this Court to adopt the settlement as an order subject to the contempt powers of this Court.

13. The debtors are also moving the Court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion for approval of a physical damage insurance settlement be granted as provided for in the body of this motion;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$70.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtors into the Plan;

C. That the insurance settlement be approved as set forth herein with the net proceeds to be paid to the debtors to use to pay for repairs to the vehicle;

D. That Union Acceptance be ordered to endorse the settlement check and return it to the office of the attorney for the debtors within ten days of the order granting this motion;

E. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
Email: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: Chapter 13 No.
Our File No.

ADDRESS:

SSN:
Debtors.

MOTION FOR APPROVAL OF PREFERENCE RECOVERY SETTLEMENT

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order approving a preference recovery settlement and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this Court on _____.
2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.
3. The Chapter 13 plan was subsequently confirmed by order of this Court.
4. The plan presently provides for a monthly payment of \$1,390.00.
5. The debtors aver that their attorney obtained a preference recovery settlement in the amount of \$440.70 from MBNA.
6. The debtors are therefore requesting the Court approve this settlement with the proceeds to be disbursed as follows: for one-half of the recovery (\$220.35) to be paid to the attorney for the debtors as and for legal expenses incurred in obtaining the recovery settlement, and the remaining one-half (\$220.35) to be paid to the Trustee to be applied to the Chapter 13 plan of the debtors.
7. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

- A. That the debtors' motion for approval of the preference recovery settlement, with the proceeds to be disbursed as set forth above, be granted and approved;
- B. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NCSB #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME(S):

CHAPTER 13 NO.

OUR FILE NO.

ADDRESS:

SSN:

DEBTOR(S)

Adv. Proc. No.

Plaintiffs,
versus

Defendants.

MOTION FOR APPROVAL OF SETTLEMENT OF ADVERSARY PROCEEDING

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9019 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order approving the settlement agreement in this contested matter and in support hereof allege and say that:

1. The Plaintiffs filed this adversary proceeding on _____ for various alleged acts of improper mortgage servicing, improper fees and stay violations.
2. The defendants were served with the Summons and Complaint.
3. Defendant filed an answer to the complaint on _____.
4. The parties have reached an agreement to resolve the issues between them and to settle the pending complaint.
5. The obligations of the parties as set forth in the settlement are as follows:

Obligations of Defendants:

Plaintiffs' Attorney's Fees and Expenses. The Defendants shall pay O. Max Gardner, III, the Plaintiffs' attorney, reasonable legal fees based on 27.75 hours at \$325.00 per hour for a total of nine thousand eighteen and 75/100's (\$9,018.75) in satisfaction of his attorney's fees and one hundred eighty seven and 50/100's in satisfaction of all expenses incurred in connection with the Adversary Proceeding. The Defendants agree to pay these amounts within ten days following receipt of an executed Settlement Agreement, Release of All Claims in favor of Defendants, and completed W-9 form from O. Max Gardner, III.

Payment to Plaintiffs. The Defendants shall pay to the Plaintiffs the sum of three thousand five hundred and no/100's (\$3,500.00) Dollars as damages within ten days following receipt of an executed Settlement Agreement and Release of All Claims in favor of Defendants.

Cure of Default. The Defendant agrees that it will apply all necessary credits in order to declare the mortgage loan current through _____ and permanently waive any alleged default through that date.

Removal of Improper Fees. The Defendant agrees to permanently remove and waive any and all fees and charges assessed to the subject loan, not previously approved by the Bankruptcy Court.

Prior Consent Order, Notices of Default and Reinstatement Letters. The Defendant agrees that the _____ Consent Order has expired. Defendant further agrees that it will vacate all prior notices of default, including all reinstatement letters, and reinstate the mortgage subject to the automatic stay and pursuant to the terms of the chapter 13 plan.

Obligations of Plaintiffs.

Future payments: The Plaintiffs agree to accept responsibility for any amounts accruing on the subject Loan after _____.

Dismissal of Adversary Proceeding. The Plaintiffs shall file the within motion with the Court seeking the Court's approval to enter into this Agreement. The Plaintiffs shall file a Stipulation of Voluntary Dismissal With Prejudice signed by all the parties subsequent to this Court's approval of the settlement.

Stipulation. Plaintiffs hereby stipulate and agree that they shall take no action to further modify or discharge their obligation to the Defendant in respect of the subject loan. Defendant hereby stipulates that the Mortgage Loan is or will be **post-petition current** through _____.

6. The debtors are therefore requesting the Court approve this settlement as set forth herein, and to allow the parties to enter into and execute the same in full settlement of this contested matter.

7. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion for approval of the Settlement Agreement, be granted and approved, for the parties to enter into and execute the same in full settlement of this contested matter;

B. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NCSB #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
WILKESBORO DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

DEBTOR AND WIFE,

Adv. Proc. No.

Plaintiffs,

versus

**SELECT PORTFOLIO SERVICING, INC.
F/K/A FAIRBANKS CAPITAL CORPORATION,
THE BANK OF NEW YORK AS TRUSTEE
UNDER EQCC TRUST 2001-2 and
EQCC TRUST 2001-2,**

Defendants.

MOTION FOR APPROVAL OF SETTLEMENT

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9019 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order approving the settlement agreement in this contested matter and in support hereof allege and say that:

A. The Plaintiffs ("Claimants") filed this adversary proceeding against the Defendants on _____ for various alleged acts of improper mortgage servicing, improper fees and stay violations.

B. The Defendants were served with the Summons and Complaint.

C. Defendants have not yet filed an answer in this proceeding but _____ and _____ have appeared as counsel of record for the Defendants.

D. The parties have reached an agreement to resolve the issues between them and to settle the pending complaint.

E. The obligations of the parties as set forth in the settlement are as follows:

1) The Mortgage Servicer will agree to enter into a loan modification with the Plaintiffs for the entire mortgage, to reduce the payoff to \$____,000.00, including all pre- and

post-petition arrears, fees and charges, with sum repayable at 0% interest, with a monthly payment of \$_____ each month for _____ months and with a balloon payment due on the 37th month. The Plaintiffs will refinance the balloon portion of the loan on or before the 37th month. The loan modification as contemplated herein must be signed by both the Plaintiffs. The Deed of Trust securing this obligation will remain in full force and effect until the obligation is paid in full as provided for in this agreement and the Williams hereby waive any and all defenses to the validity of the said Deed of Trust subsequent to the execution of this agreement. To that extent, the claim of the Mortgage Servicer shall be at all times deemed a secured claim until and unless this agreement is fully performed by the Debtors.

2) All monthly payments are due on the 25th day of the month. Plaintiffs will make all payments directly to SPS and not through their Chapter 13 plan. If payments are not received on the 25th day of the month, then a default will occur. SPS will send written notice of the default to the Plaintiffs with a copy to O. Max Gardner III. SPS will request a delivery receipt from the post office or other delivery service. The notice will be deemed received when mailed. The Plaintiffs will have 18 days from the mailing date to tender the past due payment to SPS. If the Plaintiffs fail to do so, then the automatic stay will lift and SPS will be released from the Chapter 13 Bankruptcy Case to proceed with a foreclosure of the Property without further order of the court. The initial payment date will be due during the first month that falls 45 days from the date of the execution of this Agreement. By way of example, if this Agreement is signed by all of the parties on October 10 of 2008 then the first monthly payment provided for herein shall be due during the month of November of 2008 and no later than the 25th day of that month. On the other hand, if this Agreement is not signed by all of the parties until October 25, 2008, then the first monthly payment provided for herein shall be due during the month of December of 2008 and no later than the 25th day of that month. The parties agree that this Agreement shall be fully executed by all parties no later than the 31st day of October of 2008.

3) The Plaintiffs will be required to keep real estate taxes current and insurance in force at all times during the pendency of this Agreement. If taxes and/or insurance lapse, Plaintiffs understand and agree that this lapse will trigger the default remedies as set forth in paragraph 2. In conjunction herewith, Plaintiffs must provide in their new Chapter 13 plan (see paragraph number 14) for the repayment of all real estate taxes on the Property and furthermore must provide The Mortgage Servicer with proof of insurance on or before execution of the loan modification agreement.

4) No additional fees or charges will be assessed for any matter related to the execution, closing and recording of the loan modification. No additional fees or expenses will be added to the loan for any other matter or thing related to or arising out of this case or the present Chapter 13 case. No additional fees or charges of any type will be assessed to or charged against this loan in the future without strict compliance with Rule 2016(a) of the Federal Rules of Bankruptcy Procedure either during the pendency of the present and future Chapter 13 case or at any time after discharge to the extent the services were performed during the case. The Mortgage Servicer reserves the right upon notice to the Plaintiffs and the right to object to seek any fees authorized by the loan instruments for any services that are rendered after the execution of this Agreement and that are not discharged by the terms herein.

5) The Plaintiffs and the Mortgage Servicer agree that the arrearage claims identified on the online records of the Trustee as claims numbered 22 and 26 in favor of Nationscredit Financial Corporation will not be reasserted in the new Chapter 13 case as said claims are deemed to be included in the agreed amount owed.

6) The Plaintiffs and the Mortgage Servicer agree that the balance of the debt over and above the \$_____,000.00 loan balance stated herein will be discharged in the new Chapter 13 Case, provided that the Plaintiffs make all of the required payments to the Mortgage Servicer included herein. The Mortgage Servicer will not file any objection to the Chapter 13 Plan in the new case to be filed by the Debtors unless it is not consistent with this agreement. However, the terms of this agreement are contingent on the Debtors filing a new Chapter 13 case no later than December 1, 2008 and obtaining an Order of Confirmation in that case.

7) Upon payment of the \$_____,000.00 loan balance in full, SPS will report the loan as "paid in full" to all three of the national credit reporting agencies. SPS agrees that subsequent to the execution of this Agreement SPS will report to the three national credit reporting agencies that the total amount of the indebtedness is \$_____,000.00 and furthermore will report the status of the monthly payments as provided for in this Agreement and as actually made by the Plaintiffs. By way of example, if the first monthly payment is due in December of 2008 and is received prior to the 25th day of that month then and in that event the Mortgage Servicer shall report the monthly payments as current to the three national consumer reporting agencies (Equifax, Experian and Trans Union). Contemporaneously with the execution of this Agreement the Mortgage Servicer shall submit a Uniform Data Report (a UDR) to the said creditor reporting agencies that will provide for the removal of any negative trade-line information inconsistent with the terms of this Agreement.

8) SPS will pay \$5,000.00 to Plaintiffs' counsel as legal fees and will return to the Plaintiffs the \$6,821.00 currently being held in an escrow account. Both of these checks shall be made payable to O. Max Gardner III, Trust Account. The funds in the amount of \$6,821.00 are unapplied funds received from the Chapter 13 Case Trustee in the form of claim disbursements. SPS has been holding these funds in a Suspense Account. Plaintiffs' Counsel will make arrangements to obtain these funds on behalf of the Plaintiffs to apply to his outstanding legal fees and expense and to the legal fees and expenses incurred by co-counsel, P. Wayne Sigmon of the Sigmon Law Firm in Gastonia, North Carolina. SPS shall release these funds to O. Max Gardner III within 5 days of the date of the execution of this Agreement.

9) The funds identified in Section 8 above will be deemed the property of the Plaintiffs and the Servicer will release all claims thereto. The parties also agree that any funds held in the Trust Account of O. Max Gardner III for the benefit of the Plaintiffs shall be deemed the sole and separate property of the Plaintiffs and SPS hereby releases any claims to any of the said Trust funds.

10) The Plaintiffs will prepare and file a Motion for Approval of this settlement with notice of opportunity for hearing to be served case-wide in the Chapter 13 Case on all parties in interest.

11) The Adversary Proceeding will be dismissed with prejudice within 10 days after the Settlement Agreement is executed by all parties and the loan modification instruments are fully executed.

12) SPS will dismiss the state foreclosure action, pending as case number _____ in _____ County, and the motion for relief from stay filed in the Chapter 13 Case within the same time period as set forth in paragraph 11. Both actions will be dismissed without prejudice.

13) The Relief from Stay Agreed Order filed in the pending Chapter 13 Case on _____ will be vacated and set aside. The Plaintiffs will file a motion to vacate the said order promptly after the execution of this Agreement.

14) Within 30 days of full compliance with the matters set forth herein, the Plaintiffs shall file a voluntary dismissal without prejudice of their pending Chapter 13 case and simultaneously therewith shall file a new Chapter 13 case for a term of at least 36 months. The claim of SPS shall be scheduled as secured claim in that case in the sum of \$_____,000.00 repayable without interest as provided for herein.

15) The loan modification shall not be conditioned on the entry of a discharge order in the new Chapter 13 case. If the contractual amount is paid before the Chapter 13 case is discharged, then all of the obligations shall be extinguished.

16) The Plaintiffs agree to keep the terms and provisions of this Agreement confidential and shall not divulge the contents to third-parties outside of their immediate family members, tax preparers, accountants, and attorneys, except as necessary in seeking approval from the Bankruptcy Court, to enforce this Agreement or to comply with any laws or regulations of the United States or any state thereof, other than to disclose that the Adversary Proceeding has been resolved.

17) The parties will agree to waive arbitration as to any future disputes related in any way to this loan and the servicing thereof or to any matter or thing arising out of the relationship of the parties.

18) Williams, on behalf of themselves, their heirs, successors and assigns, hereby remise, release, acquit, and forever discharge the Defendants, as well as their officers, directors, employees, agents, assigns, affiliates, predecessors in interest, and successors in interest, and any holder of the Note and Deed of Trust for which The Servicer provides servicing, including without limitation the Trustee, the Trust, and Nationscredit Financial Services Corporation of and from any and all liability, obligation, claims, actions, causes of action, demands, damages, punitive damages, treble damages, statutory penalties, stay violations, costs, attorney's fees, and/or expenses whatsoever arising out of or relating to the Note or the Deed of Trust, whether such claims or causes of action are known or unknown, including but not limited to all claims alleged in the Adversary Proceeding.

19) Except as provided herein, the Servicer, on behalf itself and its successors and assigns, hereby remises, releases, acquits, and forever discharges Williams and their heirs and successors, of and from any and all liability, obligation, claims, actions, causes of action, demands, damages, punitive damages, treble damages, statutory penalties, costs, attorney's fees, and/or expenses whatsoever arising out of or relating to the Note or the Deed of Trust, whether such claims or causes of action are known or unknown; provided, however, nothing in this Agreement shall release or impair the right of the Servicer or its successors or assigns to pursue foreclosure, acquire title to the Property through foreclosure, or receive foreclosure or insurance proceeds in connection with the Property as provided for herein and in the Loan Modification Agreement.

20) The parties agree that this Agreement constitutes settlement of doubtful and disputed claims, and that nothing stated herein shall constitute an admission of liability on the part of either party, such liability being expressly denied by the same.

21) This Agreement constitutes the entire agreement between the parties hereto, and shall inure to the benefit of the predecessors, successors and assigns of each. The parties hereto further state that they have carefully read the foregoing, understand the contents thereof, and each have been independently represented by counsel in entering this Agreement.

22) This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which shall constitute one and the same instrument.

F. The debtors are therefore requesting the Court approve this settlement as set forth herein, and to allow the parties to enter into and execute the same in full settlement of this contested matter.

G. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion for approval of the Settlement Agreement, be granted and approved, for the parties to enter into and execute the same in full settlement of this contested matter;

B. That the attorney fees and expenses as set forth herein be approved; and

C. That the debtors have such other and further relief as to the Court may seem just and proper.

Dated this the _____ day of _____, 2009.



O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
maxgardner@maxgardner.com

Wayne Sigmon
The Sigmon Law Firm

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

IN THE MATTER OF:

NAME: Chapter 13 No.
Our File No.

ADDRESS:

SSN:
Debtors.

**MOTION FOR APPROVAL OF
LIFE INSURANCE SETTLEMENT
AND
PAYOFF OF BANKRUPTCY PLAN**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order approving a life insurance settlement and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on September 27, 2006.

2. The 341(a) meeting of creditors was held in Charlotte, North Carolina on November 9, 2006.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. The plan presently provides for a monthly payment of \$790.00.

5. The debtor's father has passed away and the debtor is to receive an approximate amount of \$17,500.00 in life insurance proceeds. The debtor wishes to utilize the life insurance proceeds to payoff her bankruptcy plan. The debtor is therefore moving this Court to approve the settlement with the disbursement to be made to the Gardner Law Offices, Trust Account to be held until an order is entered directing the attorney for the debtor to forward the insurance proceeds in the approximate amount of \$17,500.00 to the Trustee to payoff the remainder of the bankruptcy plan.

6. The debtors assert that the Debtor's plan should not be modified based on this amount of life insurance and the fact that this does not represent a substantial change in circumstances. (see In Re Griffith 04-32325). To date the debtor has paid in almost \$34,000 to her plan and has paid about \$5,076.95 to her unsecured creditors. She has already paid a 5% dividend to her unsecured creditors and the confirmed plan requires a 10% payment. The early repayment of the plan will yield a higher dividend to the filed unsecured creditors than originally proposed in the debtor's plan and will allow them to be paid earlier than under the terms of the plan.

7. The payoff of the plan with the Life Insurance is also done in good faith. The debtor's case appears to be a "no asset" chapter 7 case. If she were to convert the case the unsecured creditors could potentially only get the amount they have been paid in the chapter 13.

Furthermore, it appears from Schedule C that the debtor could amend her exemptions to claim some of the Life Insurance proceeds for herself. Instead of converting or amending the exemptions, she has elected to payoff her plan in order to get a chapter 13 discharge.

9. The debtor is therefore moving this Court to approve the settlement as set forth herein and allow or the payoff of the chapter 13 plan.

10. The debtor is also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtor's motion for approval of a life insurance settlement and payoff of bankruptcy plan be granted as provided for in the body of this motion;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$74.00, said fee and expenses to be paid by the Trustee from funds paid by the debtors into the plan;

C. That the debtor has such other and further relief as to the Court may seem just and proper.

Dated this the 10th day of March 2010



William S. Gardner
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Attorney for the Debtor
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Brief in Support of Motion To Approve Settlement

FRBP 9019 gives the court the authority to approve compromise settlements. To be approved, a settlement must be reasonable in view of the circumstances of the case, as well as fair and equitable. The party proposing a compromise has the burden of showing that it is fair and equitable and should be approved, subject to the sound discretion of the court that should not be overturned except in cases of abuse leading to a result that the compromise is neither in the best interests of the estate nor fair and equitable for the creditors. *In re Schmitt*, 215 B.R. 417, 420 (9th Cir. BAP 1997); *In re Debbie Reynolds Hotel & Casino, Inc.*, 255 F.3d 1061, 1065 (9th Cir. 2001).

This Court addressed the tests for compromise and settlement under F.R.B.P. Rule 9019(a) in *In re Schrock*, 9 Mont. B.R. 414, 416-417 (Bankr. D. Mont. 1991) and *In re Pierce Packing Company*, 13 Mont. B.R. 255, 256 (Bankr. Mont. 1994). In *Pierce*, this court adopted the four factor test of the 9th Circuit to determine if the settlement is reasonable, fair and equitable. Those factors, fairly well defined and uniform in all circuits, are:

- a) the probability of success on the merits in the litigation;
- b) the difficulties, if any, encountered in the collection of any judgment that might be obtained;
- c) the complexity of the litigation, the expense, inconvenience and delay necessarily attending to it;
- d) the paramount interest of the creditors with proper deference to their reasonable views.

Martin v. Kane (In re A & C Properties), 784 F.2d 1377, 1380-1381 (CA 9 1986), cert. denied sub nom *Martin v. Robinson*, 479 U.S. 854 (1986); *In re Blair*, 538 F.2d 849, 851 (9th cir. 1976); *In re MGS Marketing*, 111 B.R. 264, 267 (9th Cir. B.A.P. 1990). See also *In re General Store of Beverly Hills*, 11 B.R. 539, 541 (9th Cir. B.A.P. 1981)

(in ruling on a request to compromise a dispute, a court should consider the expense, benefits, hazards, complexity, the time requires to litigate, and whether disallowance of the settlement would result in waste of the estate's assets).

In addition to the four prong test set forth in *A & C Properties*, it is also well established that the law favors compromise. In *re Blair*, 538 F.2d 849, 851 (9th Cir. 1976). In accordance with that principle, Bankruptcy Rule 9019(a) gives this Court broad authority to approve a compromise or settlement. In *re General Store of Beverly Hills*, 11 B.R. 539, 542 (9th Cir. BAP 1981). The determination of whether to approve a compromise or settlement is a matter within the sound discretion of this Court. *Providers Benefit Life Insurance Co. v. Tidewater Group, Inc.*, 13 B.R. 764, 765 (Bankr. N.D. Ga. 1981). See also, *In re Lions Capital Group*, 49 B.R. 163, 175-76 (Bankr. S.D. N.Y. 1985).

Generally speaking, "The law favors compromise and not litigation for its own sake...." In *re A & C Properties*, 784 F.2d at 1381. A leading treatise, the *Collier Handbook for Trustees and Debtors in Possession*, echoes this sentiment:

The trustee should make every effort, alone or with the trustee's attorney, to secure a prompt and equitable settlement for the benefit of the estate. The old saw that a bad settlement is better than a good lawsuit has no truer application than in a bankruptcy case. Bankruptcy courts have historically encouraged trustees to settle lawsuits to the end that the administration of the estate may be wound up promptly. . . . In the vast majority of cases, whether or not creditors appear and object, courts will follow the business judgment and recommendations of the trustee and counsel.

1999 *Collier Handbook for Trustees and Debtors in Possession*, § 110.3[2], *Liquidation of Choses in Action, Settlement*, pp.11-6 to 11-7.

In determining whether to approve a proposed settlement, the scope of a bankruptcy court's inquiry is:

The bankruptcy court need not conduct an exhaustive investigation into the validity of the asserted claim [;]. . . [i]t is sufficient that, after apprising itself of all facts necessary for an intelligent and objective opinion concerning the claim's validity, the court determines that either (1) the claim has a 'substantial foundation' and is not 'clearly

invalid as a matter of law,' or (2) the outcome of the claim's litigation is 'doubtful'. *United States v. Alaska National Bank of the North (In re Walsh Construction, Inc.)*, 669 F.2d 1325, 1328 (9th Cir. 1982).

The Court need not, however, "conclusively determine claims subject to compromise, nor find that the settlement constitutes the best result obtainable." *In re Apex Oil Co.*, 92 B.R. 847, 867 (Bankr. E.D. Mo. 1988) (citing *In re W.T. Grant Co.*, 699 F.2d 599, 613 (2d Cir.) cert. denied, 464 U.S. 822 (1983)). Similarly, "a precise determination of likely outcomes is not required, since 'an exact judicial determination of the values in issue would defeat the purpose of compromising the claim.'" *In re Telesphere Communications*, 179 B.R. 544, 553 (Bankr. N.D. Ill. 1994) (quoting *In re Energy Co-Op., Inc.*, 886 F.2d 921, 929 (7th Cir. 1989)).

In determining whether to approve a proposed settlement, the bankruptcy court does not substitute its judgment for that of the settlement's proponents. *Id.* at 574. The responsibility of the bankruptcy judge is not to decide the numerous questions of law and fact that may be raised regarding the settlement, but rather to canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness. *In re Energy Coop.*, 886 F.2d 921 (7th Cir. 1989); *In re Teltronics Services, Inc.*, 762 F.2d 185, 189 (2d Cir. 1985); *In re International Distribution Centers, Inc.*, 103 B.R. 420, 423 (S.D.N.Y. 1989); *In re Bell & Beckwith*, 93 B.R. 569, 574-575 (Bankr. N.D. Ohio 1988); *In re Marshall*, 33 B.R. 42, 43 (Bankr. D. Conn. 1983). Thus, mini-trial on the merits of the claims or a bankruptcy judge's independent investigation into the underlying dispute sought to be compromised is not required. *In re Walsh Constr. Inc.*, 669 F.2d 1325, 1328 (9th Cir. 1982); *Blair*, 538 F.2d at 851; *International Distribution Centers*, 103 B.R. at 423; *In re Carson*, 82 B.R. 847, 853 (Bankr. S.D. Ohio 1987).

In addition, in determining the reasonableness of the settlement, the bankruptcy judge may weigh the opinions of the trustee, the parties, and their attorneys, and may consider the principals' belief that all of the factors bearing upon the appropriateness of the settlement have been explored and that the compromise is fair, equitable, and the wisest course *Blair* 538 F.2d at 851. Moreover, the court may consider the competency and experience of counsel who support the compromise. *International Distribution Centers*, 103 B.R. at 423; *In re Texaco Inc.*, 84 B.R. 893, 902 (Bankr. S.D.N.Y. 1988). See also, *Walsh*, 669 F.2d at 1328.

Finally, in reviewing a proposed settlement, the court must be mindful of the fact that the law favors compromise (A & C Properties, 784 F.2d at 1381; Blair 538 F.2d at 851) and that the bankruptcy court is uniquely situated to evaluate whether a compromise is in the best interest of the bankruptcy estate. Walsh, 669 F.2d at 1328. Compromise settlements should be rejected only if they fall “below the lowest point in the range of reasonableness.” Cosoff v. Rodman (In re W.T. Grant Co.), 699 F.2d 599, 608 (CA 2 1983)(citing Newman v. Stine, 464 F.2d 689, 693 (CA 2 1972)).

A. No Protest Avoid Lien

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**MOTION TO AVOID JUDICIAL LIEN
OF RUTHERFORD HOSPITAL, INC.**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move this Court pursuant to 11 U.S.C. § 522(f) for the entry of an order avoiding the judicial lien of the above referenced creditor and in support hereof allege and say that:

1. This case was commenced by the filing on _____, of a voluntary petition under Chapter 13 of Title 11 of the United States Code.

2. This Court has jurisdiction over this contested matter pursuant to 11 U.S.C. § 522(f) in that this action is filed by the debtors to avoid a judicial lien on real property used as the debtors' residence. This is a core proceeding within the provision of 28 U.S.C. § 157.

3. The movants are indebted to Rutherford Hospital, Inc. of 288 S. Ridgecrest Ave., Rutherfordton, NC 28139 (hereinafter "respondent") for money owed. After the debtors failed to satisfy the debt owed to respondent, respondent obtained a judicial lien in the approximate sum of \$427.00 as recorded with the Rutherford County Public Registry in file _____ in and on the real property used as debtor's residence at _____.

The movants aver that the judgment is voidable in the absence of an underlying attachable "res" per *In re Thomas*, 102 B.R. 199 (Bankr.E.D.Cal. 1989). The movants are informed and believe and hence allege that the judicial lien has been duly recorded in the Public Registry of the debtors' home county evidencing said creditor's security interest and lien.

4. In the schedules filed in this case the debtors' residential real estate had a fair market value of \$12,080.00 with outstanding first mortgage debt to Green Tree Servicing, LLC in the sum of \$15,892.81.

5. The existence of respondent's lien on movants' real property impairs the exemption to which movants would be entitled under 11 U.S.C. § 522(b).

WHEREFORE, movants pray judgment against respondent for the cancellation and avoidance of the judicial lien on their residential real estate, and for such other and further

relief as to this Court seems just and proper.

Dated this the _____ day of _____, 2009.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a stylized flourish at the end.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME(S):

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN: --- -- ----

DEBTOR(S)

**MOTION TO AVOID LIEN
OF CITIFINANCIAL
(HOUSEHOLD GOODS)**

COMES NOW the above-named debtor(s), by and through his attorney of record, and respectfully moves this Court pursuant to 11 U.S.C. § 522(f) for the entry of an order avoiding the non-possessory, non-purchase money security interest in household and personal goods of CitiFinancial and in support hereof alleges and says that:

1. This case was commenced by the filing of a joint voluntary petition under Chapter 13 of Title 11 of the United States Code on _____.
2. The Court has jurisdiction over this contested matter pursuant to 11 U.S.C. Section 522(f) in that this action is filed by the debtor(s) to avoid a lien on household and personal goods. This is a core proceeding within the provision of 28 U.S.C. Section 157.
3. The movant(s) is/are indebted to CitiFinancial (hereinafter "respondent") for money loaned. As security for the debt, the respondent insisted upon and the movant(s) executed a waiver of exemption of certain property and a security agreement granting to respondent a non-possessory, non-purchase money security interest in household goods which is property delineated by 11 U.S.C. Section 522(f)(2) and which is held primarily for the personal, family, or household use of the movant(s) or dependents of the movant(s). The movant(s) is/are informed and believe(s) and hence allege(s) that a financing statement has been duly recorded in the Public Registry of the debtor(s)' home county evidencing said creditor's security interest and lien.
4. The movant(s)' interest in any item of property referred to in the preceding paragraph does not exceed the value claimed exempt for that item in movant(s)' voluntary petition.
5. The money so borrowed from the respondent does not represent any part of the purchase money of any of the articles covered in the security agreement which movant(s) executed, and all of the articles so covered remain in the possession of the movant(s) and movant(s)' family.

6. The existence of respondent's lien on movant(s)' household goods and personal items impair the exemption to which movant(s) would be entitled under 11 U.S.C. Section 522(b).

7. The debtor(s) Affidavit is attached hereto as an Exhibit and incorporated herein by this reference.

WHEREFORE, movant(s) pray(s) judgment against respondent for the cancellation and avoidance of the security interest in the personal and household goods to be effective upon the entry of a Discharge Order in this case and for such other and further relief as is just and proper.

Dated this the _____ day of _____, 2009.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR.

**AFFIDAVIT OF MOVANT IN SUPPORT OF MOTION TO AVOID
LIEN OF CITIFINANCIAL (HOUSEHOLD GOODS)**

The undersigned Debtor, _____, being duly sworn, states:

1. I am proceeding under 11 USC §522(f)(1)(B) to avoid a security interest held by CitiFinancial in certain of my household goods and furnishings.

2. The property in which the creditor has a security interest is: Nintendo Wii and Gameboy, 10 video games (Wii and Gameboy), keyboard musical instrument, exercise equipment-3 weights, and a CD player. These personal property items are household goods and furnishings, musical instruments and appliances that I and my children use for personal, family and household use.

3. The property listed in paragraph 2 is of the type contemplated by 11 USC §522(f)(1)(B).

4. I have exempted the property listed in paragraph 2 by listing the same property on my amended Schedule C.

5. The amount that I claimed as exempt for this property is \$530.00.

6. I believe the fair market value of the property involved in this matter to be a total of \$530.00.

7. I owe CitiFinancial a debt in the amount of \$1,331.36, which is secured by the property listed in paragraph 2.

8. The money so borrowed from CitiFinancial does not represent any part of the purchase money of any of the property listed in paragraph 2.

Further, affiant saith naught.

Debtor

STATE OF NORTH CAROLINA

COUNTY OF CLEVELAND

Sworn to and subscribed before me, this the ____ day of _____, 2009.

[Notary Seal]

_____, Notary Public

My Commission Expires: _____

A. No Protest
Continue Auto Stay

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: **CHAPTER 13 NO.**
OUR FILE NO.

ADDRESS:

SSN: **Debtor(s).**

**Male Debtor. and
Female Debtor**

Movants,

vs.

**AMITY FINANCE OF KINGS MOUNTAIN, INC..
BELLSOUTH TELEPHONE CO., CAROLINAS MEDICAL
CENTER, CENTURY EMPLOYEES CREDIT UNION,
CITIFINANCIAL, CLEVELAND REGIONAL MEDICAL
CENTER, CROSS COUNTRY BANK, DIRECTV, INC.,
DREXEL MEDICAL PRACTICE, FIRST NATIONAL
BANK, FIRST PREMIER BANK, FRYE REGIONAL
MEDICAL CENTER, GRACE HOSPITAL, INC.,
HOUSEHOLD AUTOMOTIVE FINANCE, HSBC,
SELECT PORTFOLIO SERVICING, INC.,
SHELBY BONE AND JOINT CLINIC, PA,
THE SANGER CLINIC, W.S. BADCOCK CORP.,
WASHINGTON MUTUAL FINANCE, WELCOME
FINANCE, and WELLS FARGO FINANCIAL**

Respondents.

MOTION FOR CONTINUATION OF AUTOMATIC STAY

NOW COME the above-named debtors, by and through O. Max Gardner III, their attorney of record in this case, and respectfully move this Court pursuant to § 362(c)(3)(B) of the Bankruptcy Act of 2005 for an order continuing the automatic stay as to the debtors as provided under § 362(a). This request is being made as to all creditors in this case. In support of this motion, the Debtors state as follows:

1. This case was commenced by the filing of a voluntary petition under Chapter 13 of the Bankruptcy Code with the Clerk of this Court on _____.
2. The Debtors had previously filed a Chapter 13 case which was dismissed on _____. Between the date of the commencement of their previous case on _____, and the date of the case dismissal, the debtors paid a total of \$30,704.00 and the debtors did in fact try to cure all missed payments by paying the sum of \$1,309.00 per month for most months in the year _____.

3. This case was dismissed because the female debtor, through no fault of her own, had been laid off from her job and was therefore unable to maintain payments under their Chapter 13 plan. Further, the male debtor was unable to perform his new job duties, which involved hard physical labor, due to ongoing and persistent medical problems.

4. The female debtor is now receiving Unemployment Compensation benefits and the male debtor's employment situation has stabilized.

5. The petition in this case has been filed in good faith. The debtors believe that the Chapter 13 plan they have submitted will be confirmed and that they will be able to fully perform under the terms of the plan.

6. The Debtors' prior Chapter 13 case dismissed on _____ was the only previous case by the debtors that was pending during the preceding year.

7. The Debtors' prior Chapter 13 case was not dismissed because the debtors failed to file or amend their petition or any required documents, or to provide adequate protection ordered by the court.

8. The Debtors' prior Chapter 13 case was not dismissed at a time when there had been a motion for relief that was pending before the court or resolved with an order terminating, conditioning or limiting the stay. Furthermore, no affirmative action was taken against the Debtors from the date of the dismissal of the first case until the date of the filing of this case.

WHEREFORE, the Debtors pray:

- A. That this Court continue as to the Debtors the automatic stay under § 362(a) as to all creditors for the duration of this Chapter 13 proceeding, or until such time as the stay is terminated under § 362(c)(1) or (c)(2), or a motion for relief is granted under § 362(d);
- B. That the stay in any event be deemed continued as to "all property of this estate" in bankruptcy;
- C. That the Debtors have such other and further relief as to the Court may be just and proper; and
- D. The attorney for the Debtors is also moving the Court for a non-base fee of \$350 plus expenses of \$2.00 per each creditor on the matrix.

Dated this the _____ day of _____, 2009.



O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: **CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN: --- -- 9820 & --- -- 2764

Debtor(s).

**Male Debtor. and
Female Debtor**

Movants,

vs.

**AMITY FINANCE OF KINGS MOUNTAIN, INC..
BELLSOUTH TELEPHONE CO., CAROLINAS MEDICAL
CENTER, CENTURY EMPLOYEES CREDIT UNION,
CITIFINANCIAL, CLEVELAND REGIONAL MEDICAL
CENTER, CROSS COUNTRY BANK, DIRECTV, INC.,
DREXEL MEDICAL PRACTICE, FIRST NATIONAL
BANK, FIRST PREMIER BANK, FRYE REGIONAL
MEDICAL CENTER, GRACE HOSPITAL, INC.,
HOUSEHOLD AUTOMOTIVE FINANCE, HSBC,
SELECT PORTFOLIO SERVICING, INC.,
SHELBY BONE AND JOINT CLINIC, PA,
THE SANGER CLINIC, W.S. BADCOCK CORP.,
WASHINGTON MUTUAL FINANCE, WELCOME
FINANCE, and WELLS FARGO FINANCIAL**

Respondents.

DECLARATION OF DEBTORS

We, _____, the Debtors in the above-captioned Chapter 13 case, declare under penalty of perjury as follows:

1. We have had one Chapter 13 bankruptcy case dismissed over the course of the previous year, No. _____. Our understanding of the reason for this dismissal was that we failed to make full and timely plan payments during the pendency of the case.
2. This case was dismissed because the female debtor, through no fault of her own, had been laid off from her job and was therefore unable to maintain

payments under our Chapter 13 plan. Further, the male debtor was unable to perform his new job duties, which involved hard physical labor, due to ongoing and persistent medical problems.

3. As of the date of the filing of this Petition under the law of BAPCPA, the female debtor is now receiving Unemployment Compensation benefits and the male debtor's employment situation has stabilized.

4. Our petition in this case has been filed in good faith. We believe that the Chapter 13 plan we have submitted will be confirmed and that we will be able to fully perform under the terms of the plan.

5. Our prior Chapter 13 case which was dismissed on _____, was our only previous case pending during the preceding year.

6. Our prior Chapter 13 case was not dismissed because we failed to file or amend our petition or any required documents, or to provide adequate protection ordered by the court.

7. Our prior Chapter 13 case was not dismissed at a time when there had been a motion for relief that was pending before the court or resolved with an order terminating, conditioning or limiting the stay.

WE, THE DEBTORS, SIGN UNDER PENALTY OF PERJURY, AFFIRMING THAT THE ABOVE IS TRUE AND CORRECT:

Date: _____

Debtor Signature

Date: _____

Debtor Signature

A. No Protest Employ Professionals

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR(S).

MOTION TO APPROVE EMPLOYMENT OF SPECIAL COUNSEL

COMES NOW through undersigned counsel, _____, debtor herein, who respectfully represents:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.
2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.
3. The Chapter 13 plan was subsequently confirmed by order of this Court.
4. Debtor has a claim involving an automobile accident that occurred on _____ in Shelby, North Carolina. The said claim is pending in Cleveland County Civil District Court as a case entitled _____.
5. The debtor wishes to employ John R. Smith, an attorney duly admitted to practice law in the State of North Carolina, as special counsel.
6. The debtor has selected John R. Smith for the reason that he has had considerable experience in matters of this character and believes that John R. Smith is well qualified to represent her in this proceeding.
7. The professional services that John R. Smith is to render are:
 - a.) To give debtor legal advise with respect to the personal injury lawsuit;
 - b.) To represent debtor in connection with the above suit;
 - c.) To prepare on behalf of the debtor necessary applications, answers, orders, reports and other legal papers;
 - d.) To perform all other legal services for the debtor which may be necessary in the above named suit; and
 - e.) To seek Court approval of any settlement negotiated.
8. It is necessary for debtor to employ an attorney for such professional services.
9. To the best of debtor's knowledge, John R. Smith has no connection with the

creditors, or any other parties in interest, or their respective attorneys.

10. Because of the extensive legal services required, debtor desires to employ John R. Smith under the contingency contract attached hereto and made a part thereof, not to exceed 33 1/3% of any settlement or judgment plus costs approved by the Court.

WHEREFORE debtor prays that her employment of John R. Smith under a contingency agreement to represent her in the above mentioned suit be approved by the Court, and that she have such other and further relief as is just and equitable.

Dated this the _____ day of _____, 2009.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", written over a horizontal line.

O. Max Gardner III
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Attorney for the Debtor(s)
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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR.

**APPLICATION FOR EMPLOYMENT OF PROFESSIONAL PERSON FOR A
SPECIFIC PURPOSE**

COMES NOW the undersigned counsel, O. Max Gardner III, and respectfully submits the instant application for employment of professional persons pursuant to 11 U.S.C. §327 and Rule 2014 of the Bankruptcy Rules of Procedure and in support of said application states as follows:

1. The debtor(s) desires to retain O. Max Gardner III of the Law Offices of O. Max Gardner III in Shelby, Cleveland County, North Carolina, for the specific purpose of recovering damages arising out of a cause of action filed by the debtor(s) against _____. The nature of the cause of action is _____. This attorney was previously retained by the Debtor.

2. I am duly licensed to practice law in the State of North Carolina.

3. I was initially employed by the debtor to represent him/her and am familiar with the facts and legal issues involved in the case.

4. I do not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

5. Attached and submitted hereto is an affidavit executed by _____ in support of this application pursuant to 11 U.S.C. §327 and Rule 2014 of The Bankruptcy Rules of Procedure.

6. I have no connections with the debtor, creditors, any parties in interest, the Bankruptcy Administrator, or the Trustee, other than with the representation of the debtor and upon granting of this application, the estate, in the representation of the estate in this action.

7. The debtor has signed a contract with O. Max Gardner III for representation regarding the cause of action. The terms of the contract include _____, plus reimbursement of out-of-pocket expenses. No money has been paid to the attorney prior to the filing of this Application. I understand that I cannot share any compensation with attorneys other than members of my firm unless said professionals are also approved by this Court. I do not have any agreement to share compensation with other attorneys in this matter except: _____ *[name of referring or associated attorney]*. I understand that I must make application to the Court for approval of my fees and expenses. However, if there is no recovery, O. Max Gardner III

acknowledges that the bankruptcy estate of _____ *[debtor]* shall not be responsible for reimbursement of attorney's fees or for any out-of-pocket expenses.

WHEREFORE, the above premises considered, I move this Honorable Court to authorize the employment of O. Max Gardner III to represent the estate in the cause of action filed by the Debtor. Upon settlement or completion of the cause of action, O. Max Gardner III will apply to the Court for approval of fees and expenses pursuant to 11 U.S.C. §326, 327, 328 and Rules 2014 and 2016 of The Bankruptcy Rules of Procedure.

This the _____ day of _____, 2008.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR.

APPLICATION TO EMPLOY REAL ESTATE BROKER

Joan Adams, Debtor-in-Possession, by her undersigned attorney, applies pursuant to 11 U.S.C. §327(a) to employ Coldwell Banker Realty, Inc. as broker for the sale of her property located at 541 DeKalb Street, Shelby, Cleveland County, North Carolina (the "Property"), stating as follows:

1. Ms. Adams wishes to employ Broker as a real estate broker to sell the Estate's interest in the Property. Broker is well qualified to broker the Property. Broker has represented in its Declaration filed pursuant to Bankruptcy Rules 2014 and 2016 (the "Broker Disclosure") that to Broker's knowledge it does not have any interests that are materially adverse to the Estate.

2. The professional services Broker will render are the listing and marketing of the Property. A copy of Broker's listing agreement is attached to the Broker Declaration as Exhibit A and incorporated herein by reference.

3. Employment of Broker would be in the best interest of the estate, and Broker has no interest that is adverse to the Estate, its creditors, or any other party in interest or their respective attorneys.

4. The commission and other charges, if any, that Broker will charge the Estate are set forth in the listing agreement. The agreed commission is six percent (6.0%) of the sales price. Ms. Adams requests that the Court determine that the commission and terms of payment of the commission set forth in the listing agreement are reasonable and appropriate and meet with this Court's approval.

5. The term of the proposed listing agreement expires on November 30, 2008. Ms. Adams requests that she be authorized to extend the listing one or more times for a cumulative extension not beyond May 30, 2009.

6. Broker requests that the Trustee be authorized to pay Broker its commission in full upon the closing of the sale of the Property.

WHEREFORE, the debtor respectfully prays of the Court as follows:

A. That the debtors' application for approval to employ Broker as its broker for the Property pursuant to 11 U.S.C. § 327(a) under the terms of the listing agreement and this Application, effective as of the date hereof;

B. That the attorney for the debtors be granted an additional non-base legal fee of

\$250.00 and expenses of \$82.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtor into the Plan; and

C. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor
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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: **CHAPTER 13 CASE NO.**
OUR FILE NO.

ADDRESS:

SSN:

DEBTOR.

APPLICATION TO EMPLOY INDEPENDENT EXPERT

Joan Adams, Debtor-in-Possession, by her undersigned attorney, applies pursuant to 11 U.S.C. §327(a) to employ John David Smith, a forensic accountant, for the purpose of the examination of the receipt and application of mortgage payments in her case by BAC Home Loans Servicing and all prior services, the advancement of charges and fees and the repayment thereof, the compliance with the 524(i) provision of the Debtor's Plan, and any other relevant matters, and in support hereof alleges and says that:

1. Ms. Adams wishes to employ Expert to the services noted herein. Expert is well qualified to perform the services requested herein as evidenced by the Expert's CV, a copy of which is attached hereto. Expert has represented in his Declaration filed pursuant to Bankruptcy Rules 2014 and 2016 (the "Broker Disclosure") that to Expert's knowledge he does not have any interests that are materially adverse to the Estate.

2. The professional services of the Expert are required in order to determine the current status of the accounting of payments, receipts, disbursements, advances, application of payments, compliance with the Plan and the Orders of this Court, and other related matters.

3. Employment of Expert would be in the best interest of the estate, and Expert has no interest that is adverse to the Estate, its creditors, or any other party in interest or their respective attorneys.

4. The Expert has agreed to perform the services described herein at the hourly rate of \$125.00 plus all necessary and reasonable expense as set forth in the proposed Expert agreement attached hereto.

WHEREFORE, the debtor respectfully prays of the Court as follows:

A. That the debtors' application for approval to employ the Expert pursuant to 11 U.S.C. § 327(a) under the terms of the agreement and this Application, effective as of the date hereof;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$250.00 and expenses of \$82.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtor into the Plan; and

C. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

O. Max Gardner III
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A. No Protest Fee Applications

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR.

**FIRST APPLICATION BY COUNSEL FOR DEBTOR
FOR INTERIM COMPENSATION**

Gardner & Gardner PLLC, attorneys for the Debtor herein, apply to the Court for an Order for a first interim allowance of attorneys' fees for professional services rendered to the Debtor and for reimbursement for actual and necessary costs incurred through _____, 2009, pursuant to §§ 327, 330 and 331 of the Bankruptcy Code and Bankruptcy Rule 2016, seeking interim compensation in the amount of _____ Dollars and _____ Cents (\$_____), and reimbursement for out-of-pocket expenses in the amount of _____ Dollars and _____ Cents (\$_____), and in support thereof, state as follows:

1. This Court has jurisdiction over this application pursuant to 28 U.S.C. §§ 1334 and 157 and Local District Court Rule 402. Venue in this Court is proper pursuant to 28 U.S.C. § 1409. This application is a core proceeding within the meaning of 28 U.S.C. § 157.

2. On _____ (the "Petition Date"), the Debtor filed a voluntary petition commencing this case under Chapter 13 of the Bankruptcy Code. Counsel gave notice in the 2016(b) statement and the Plan that fees were to be by fee application, rather than the Appendix F options.

3. The undersigned law firm, Gardner & Gardner PLLC, was retained on an hourly basis at \$375.00 per hour for attorney time and \$150.00 per hour for paralegal time, plus actual costs, to be paid through the Plan upon court approval. The Debtor paid Gardner & Gardner, PLLC \$15,000.00 for pre-petition work related to this case, and advanced the filing fee and credit counseling fee (paid to _____) of \$_____ and \$_____, respectively, which were paid pre-petition. To date, this law firm has received no other compensation for this matter.

4. The lawyers who billed time on this matter, as shown on the attached statement, are: O. Max Gardner III (OMG) at \$375 per hour. The paralegals who billed time on this matter, as shown on the attached statement, are: _____ (*initials*); and _____ (*initials*) at \$150.00 per hour. The rates charged are at or below those charged by comparably skilled practitioners in cases other than cases under Title 11.

5. This is an application for compensation for the period from filing through _____, 2009. No previous fee application has been filed, and no previous order for compensation has been entered.

6. All administrative expenses, mortgage and car payments, and plan payments are

current, and the Trustee has indicated that he will recommend confirmation on _____, 2009. The Plan includes sufficient funding to pay the requested fees in full. The Plan includes \$_____ in funding payable to unsecured creditors (including the trustee fees and other administrative claims), so the requested compensation is approximately _____% of the pot.

7. A detailed statement of the actual, necessary services rendered, time expended, and expenses incurred is attached hereto. The total time as billed on the attached statements is _____ hours, of which _____ hours are post-petition and are included in this application. At the aforementioned hourly rates, less adjustments, the post-petition fees come to \$_____.

8. The attached statements also include \$_____ in disbursements for actual and necessary expenses made by this law firm (postage and copies). Disbursements are all billed at actual cost. Copies are billed at \$0.____ per page, which are at or below the standard rates charged by other area law firms and within the allowance of Local Rules Appendix D.

9. No payments for post-petition services have heretofore been made or promised. No compensation has been or will be shared, and no agreement for sharing of compensation with regard to this case exists.

10. For the period covered by this application, Gardner & Gardner PLLC performed services in three general categories:

(A) Administration: Gardner & Gardner PLLC advised the Debtor on issues related to case administration, including, but not limited to, generally advising and counseling the Debtor, correcting the schedules, and representing the Debtor at the Section 341 meeting;

The total time spent on this category is broken down as follows:

O. Max Gardner III _____ hours @ \$375/hr = \$ _____,
less _____ uncharged time = \$_____.

TOTAL _____ hours \$_____

(B) Claims objections: Gardner & Gardner PLLC reviewed and analyzed various proofs of claim filed, advised the Debtor on the same, and where appropriate prepared and filed objections.

The total time spent on this category is broken down as follows:

O. Max Gardner III _____ hours @ \$375/hr = \$ _____,
less _____ uncharged time = \$_____.

TOTAL _____ hours \$_____

(C) Plan: Gardner & Gardner PLLC advised the Debtor on issues related to their Plan; prepared and revised the plan as appropriate, including verification of unsecured status of certain claims; and prepared the pre-confirmation certification.

The total time spent on this category is broken down as follows:

O. Max Gardner III _____ hours @ \$375/hr = \$ _____,

less ____ uncharged time = \$_____.

TOTAL _____ hours \$_____

11. Consideration of the factors set forth in Section 330(a)(3)(A) of the Code shows that the requested fee is appropriate. The services provided were necessary to the successful administration of the case to date, which achieved a Trustee's recommendation for confirmation, and no objection, on the first filed plan. There was no duplication of services. A review of the statements shows that the amount of time spent was reasonable, commensurate with the complexity, importance, and nature of the problems, tasks and issues addressed. The rates charged (\$375 per hour for attorney and \$150 per hour for paralegal) are lower than those charged by most attorneys of comparable skill and experience both in bankruptcy and non-bankruptcy matters, and are equal to or lower than the rates charged to other clients of the undersigned law firm.

12. Courts frequently look to the "lodestar" formula in assessing attorneys' fees. Under this approach, courts consider the number of hours of service reasonably devoted to the case, multiplied by the attorneys' reasonable rates. This sum may be adjusted to reflect the characteristics of the particular case, and the reputation of the attorney. See e.g., *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 361 (D. D.C. 1983), *aff'd. in part rev'd in part*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021, 105 S. Ct. 3488 (1985). Many courts frequently consider the specific lodestar factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) and applied in bankruptcy cases in *In re First Colonial Corporation of America*, 544 F.2d 1291, 1298-99 (5th Cir.), *cert. denied*, 431 U.S. 904 (1977). The Fourth Circuit Court of Appeals adopted these tests in *Barber v. Kimbrells, Inc.*, 577 F.2d 216, 226 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978). In *Anderson v. Morris*, 658 F.2d 246, 249 (4th Cir. 1981), the Fourth Circuit held that the District Court should consider the lodestar approach, which encompasses the *Johnson* factors (a) and (e) as set forth below, and then adjust the fee on the basis of the remaining *Johnson* factors. The following are the *Johnson* factors:

- (a) the time and labor required;
- (b) the novelty and difficulty of the questions;
- (c) the skill requisite to perform the legal service properly;
- (d) the preclusion of other employment by the attorney due to acceptance of the case;
- (e) the customary fee;
- (f) whether the fee is fixed or contingent;
- (g) time limitations imposed by the client or the circumstances;
- (h) the amount involved and the results obtained;
- (i) the experience, reputation, and ability of the attorneys;
- (j) the "undesirability" of the case;
- (k) the nature and length of the professional relationship with the client; and
- (l) awards in similar cases.

Johnson, 488 F.2d at 717-719; *Barber* 577 F.2d at 226 n.28; *Anderson*, 658 F.2d at 248 n.2.

13. In *In re Bernard Hill*, 133 B.R. 61 (Bankr. D. Md. 1991), the United States Bankruptcy Court for the District of Maryland supplemented the general lodestar principals by establishing ten "cardinal rules" with which fee applications should comply:

- (a) Fee applications must make sense;
- (b) Fee applications must indicate what work was performed, when it was performed and how much money is being charged for performing it;

- (c) Services rendered should be reported in several broad, general categories;
- (d) Fee applications must contain a "lodestar" analysis;
- (e) Fee applications must indicate how much in time and money was "written off" in the exercise of billing judgment;
- (f) Numbers must add up;
- (g) The names of the individuals who rendered services, together with their hourly rates and years of experience, must be disclosed;
- (h) Time records must be submitted with the fee application;
- (i) Out-of-pocket expenses for which reimbursement is sought must be set forth in the application; and
- (j) When more than one professional or firm of professionals is appointed to represent or furnish similar services to a debtor, the fee application(s) must indicate a clear division of labor and non-duplicative effort.

14. Gardner & Gardner PLLC submits the following lodestar analysis in support of its request for allowance of fees and disbursements:

- (a) The time and labor required. The amount of time required to represent the Debtor in this case was not extensive, as reflected in the modest fee through confirmation, but was commensurate with the necessities of the case. Much of the work was done pre-petition, and the fee would have been lower had creditors not filed improper claims.
- (b) Novelty and difficulty of the questions. This Chapter 13 case has not presented any particularly novel or difficult issues, as reflected in the modest fee, but did require that claims objections be filed.
- (c) The skill requisite to perform the legal service properly. Because of the experience of Debtor's counsel in handling matters of this nature, counsel has efficiently and adeptly exercised the skill requisite to perform these services properly.
- (d) The preclusion of other employment by the firm due to acceptance of this case. This case has not conflicted Debtor's counsel out of other matters, but any case takes up a portion of the limited time available to counsel, diverting counsel's attention from other matters in which they otherwise might have been involved to devote themselves to the competent representation of the Debtor.
- (e) The customary fee for similar work. Gardner & Gardner PLLC submits that the fees sought herein are warranted, and are generally less than or equal to competitor fees in the local legal market for attorneys with comparable skill and experience with comparable practices.
- (f) Whether the fee is fixed or contingent. The fees are sought based on a fixed hourly rate, but pursuant to the Code, all fees sought by professionals retained by the Debtor are subject to approval of this Court, and thus are, to an extent, contingent.
- (g) Time limitations imposed by the client or circumstances. Because of the nature of this Bankruptcy proceeding, in order to get the Plan confirmed at the first opportunity, Gardner & Gardner PLLC has been compelled to render legal services, in some instances, under time constraints.
- (h) The amounts involved and the results obtained. This case involves substantial claims, including claims that were improper and objectionable. Thus far, counsel has successfully had confirmation recommended at the first scheduled hearing. Accordingly, Gardner & Gardner PLLC has taken steps to move this case along for the benefit of all legitimate creditors and parties in interest, with positive results.
- (i) Experience, reputation and ability of the attorney. O. Max Gardner III, who has previously represented debtors, secured and unsecured creditors, bidders, trustees, and other interested parties in all aspects of bankruptcy and commercial litigation proceedings. Mr. Gardner has practiced bankruptcy law for approximately 35 years. He is an experienced bankruptcy practitioner, presenting a prestigious resumé. Mr.

Gardner's experience, reputation and ability have been recognized by *ABC Nightline News*, *CNN*, *BusinessWeek*, *The New York Times*, *The Washington Post*, and many other news outlets across the country. Mr. Gardner has conducted Bankruptcy Bootcamps for the past three years and has spoken at numerous continuing legal education programs on bankruptcy topics for various legal professional organizations throughout the United States. Mr. Gardner is a member of the North Carolina State Bar, North Carolina Bar Association, North Carolina Academy of Trial Lawyers, American Bar Association, American Trial Lawyers Association, Southern Trial Lawyers Association, National Association of Consumer Bankruptcy Attorneys, Civil Justice Foundation, National Consumer Law Center, Cleveland County Bar Association, Mecklenburg County Bar Association, 27-B Judicial District Bar Association, Committee on Consumer Bankruptcies (National Consumer Law Center), Southeastern Bankruptcy Law Institute, Fourth Circuit Committee on Banking and Bankruptcy (ABA), U.S. Bankruptcy Court (WDNC) Local Rules Committee, NC Academy of Trial Lawyers Chairperson – Bankruptcy Section, American Bankruptcy Institute (Consumer Rights Section), and numerous other associations and memberships.

- (j) The "undesirability" of the case. This case cannot be said to be undesirable.
- (k) The nature and length of the firm's professional relationship with the client. Gardner & Gardner PLLC was retained by the Debtor shortly before filing this case in _____.
- (l) Awards made in similar cases. Gardner & Gardner PLLC submits that its request for compensation, while the total is above the Appendix F amounts, is well within the range of the usual and customary awards granted in similar cases.

15. In addition to the *Johnson* factors discussed above, Gardner & Gardner PLLC submits that this application satisfies the ten cardinal rules required by *Bernard Hill*:

- (a) The application makes sense as it is structured to convey the information contained herein in an understandable and consistent manner.
- (b) The application contains a statement showing the dates and categories of work that reflect what work was performed and when it was performed, and exactly how much money is being charged for performing it.
- (c) The application contains several broad and general categories of work performed and substantiation for the work.
- (d) The application contains a lodestar analysis.
- (e) Including pre-petition time, Gardner & Gardner has voluntarily written off approximately \$_____ internally in duplicative or unproductive time in the exercise of its billing judgment, which is approximately _____% of the total.
- (f) The breakdown of services and disbursements adds up.
- (g) The names of the individuals who rendered services, together with their hourly rates, have been disclosed. The experience of the attorneys has been set out.
- (h) A complete printout of detailed time records has been submitted with the application.
- (i) Disbursements for out-of-pocket expenses have been set forth in the application.
- (j) The application does not contain any bill for any other firm or professionals other than Gardner & Gardner PLLC.

16. Detailed daily time records setting forth the tasks performed and the time spent thereon are attached hereto.

17. The affidavit of O. Max Gardner III in support of this application is attached hereto.

18. The expenses for which reimbursement is sought are set forth in the attached invoice

and were actual and necessary. Gardner & Gardner PLLC submits that the expenses are reasonable and economical and are customarily charged to non-bankruptcy clients of the applicant.

WHEREFORE, Gardner & Gardner PLLC prays for the entry of an Order approving payment of interim compensation as an administrative expense in the amount of _____ Dollars and _____ Cents (\$_____), and reimbursement for out-of pocket expenses in the amount of _____ Dollars and _____ Cents (\$_____), for actual, necessary services rendered and actual, necessary expenses incurred.

This the _____ day of _____, 2009.

O. Max Gardner III
Gardner & Gardner, PLLC
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NC State Bar #6164
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PH (704) 487-0616/FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

A. No Protest Filing Requirements

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR(S).

**MOTION FOR WAIVER OF
CREDIT COUNSELING AND
OTHER REQUIREMENTS OF DEBTOR**

Debtor, _____, by counsel, hereby move the Court as follows:

1. For a determination that the requirement that the debtor receive a credit counseling briefing pursuant to 11 U.S.C. §109(h)(1) does not apply to this debtor;
2. For a waiver of the requirement that the debtor file a certificate from a credit counseling agency as required by 11 U.S.C. §521(b);
3. For a determination that 11 U.S.C. §727(a)(11) requiring the debtor to complete an instructional course concerning personal financial management do not apply to this debtor;
4. For a waiver of the requirement that the debtor personally attend a meeting of creditors required by 11 U.S.C. §341(a)(11) and permitting the debtor to provide information to the case trustee in alternate manner;
5. All for the reasons set forth in the Memorandum below.

MEMORANDUM IN SUPPORT

Debtors submit the following Certification in support of this Motion:

1. The male/female debtor is unable to complete the requirements of 11 U.S.C. §109(h)(1) because of both incapacity and disability;
2. Debtor, _____ is _____ years old. He/She has suffered from Lewy body dementia for over 18 years. This disease is rare and has been described as a combination of Alzheimer's and Parkinson diseases. Confirmation of his/her diagnosis from his doctor is attached. The debtor's spouse has a Power of Attorney that was obtained in _____ (year) while he/she was still competent;

3. Debtor requires constant care and personal attention 24 hours a day. He/She is incontinent. He/She is cared for by his/her spouse with very little assistance from paid caretakers. He/She cannot be left alone even for a few minutes. He/She is unable to communicate in coherent sentences and is completely unable to understand the condition of his/her finances or the implications of failure to pay his/her debts;

4. The debtor is impaired by reason of mental illness or mental deficiency so that he/she is incapable of realizing and making rational decisions with respect to his/her financial responsibilities;

5. The debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in-person, telephone, or Internet briefing required by 11 U.S.C. §109(h)(1);

6. The debtor is a person described in 11 U.S.C. §109(h)(4) and therefore the debtor is not required to complete the instructional course required by 11 U.S.C. §109(h)(1).

7. For reasons beyond the Debtor's control, the Debtor is, and will continue to be, unable to complete an instructional course concerning personal financial management as required by 11 U.S.C. §727(a)(11).

8. For reasons beyond the Debtor's control, the Debtor is, and will continue to be, unable to personally attend the meeting of creditors required by 11 U.S.C. §341(a).

WHEREFORE, Debtor prays for an Order determining the above facts and waiving the above requirements in accordance with this Motion.

Dated this the _____ day of _____, 2009.

O. Max Gardner III
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Attorney for the Debtor(s)
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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 7 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR.

**MOTION FOR PERMANENT WAIVER OF REQUIREMENT TO COMPLETE CREDIT
COUNSELING AND FINANCIAL MANAGEMENT COURSES**

COME NOW the Debtors, by and through the undersigned attorney, and hereby move this Court as follows:

1. The Debtor, John Doe, is presently incarcerated by the North Carolina Department of Corrections in its Taylorsville Facility.
2. The Debtor has been incarcerated since October 10, 2007.
3. The Debtor's release date is set for July 17, 2014.
4. As an inmate, no credit counseling or financial management courses are available to the Debtor. He does not have access to the internet, he has limited access to a telephone, and he is unable to leave the prison to complete an in-person counseling session.
5. The Debtor, as authority for his position, relies on a Virginia case, In re Vollmer 361 B.R. 811 wherein the Court states that "even though imprisonment alone is not a 'disability' sufficient to merit a waiver under §109(h)(4), the Debtor is truly unable to participate in either the required credit counseling or financial management courses and that a permanent waiver of both of those requirements is justified."
6. The Court in In re Vollmer 361 B.R. 811 further states, "Under such circumstances, the Court must have the authority not only to defer the credit counseling requirement but also to waive the requirement completely."
7. The Debtors request this Court to consider the ruling in In re Vollmer when making a determination on the Debtors' motion.

WHEREFORE, the Debtors respectfully request this Honorable Court to grant this Motion for Permanent Waiver of Requirement to Complete Credit Counseling and Financial Management Courses and grant such other and further relief as is proper and just.

This the _____ day of _____, 2009.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: **CHAPTER 13 NO.**
OUR FILE NO.

ADDRESS:

SSN: **DEBTOR(S).**

**EX-PARTE MOTION FOR ORDER EXTENDING TIME WITHIN WHICH TO FILE
SCHEDULES, STATEMENTS AND CHAPTER 13 PLAN**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move this Court pursuant to Rules 1007(c) and 9013 of the Bankruptcy Rules for an extension of time within which to file schedules, statements and their Chapter 13 Plan and in support hereof respectfully show unto the Court the following:

1. This proceeding was commenced by the filing of a voluntary petition on _____. The Bankruptcy Rules require that Schedules, Statements and the Plan be filed by no later than _____.
2. The 341(a) meeting of creditors has been scheduled for _____.
3. Counsel is in need of additional time to prepare the schedules and statements in this case, through and including _____, due to scheduling conflicts.
4. The Debtors, therefore, seek additional time to file Schedules, Statements and Chapter 13 Plan and Related Documents in order to properly present Debtors' position in this case.
5. The granting of this additional time will not significantly delay the progress of this matter, and the documents will be filed before the Meeting of Creditors pursuant to 11 U.S.C. Section 341(a) in this case, so as to allow the creditors to examine and review the documents prior to said Meeting.
6. This request for an extension of time is not sought for the purpose of delaying this case before this Court, and the granting of this Motion will not prejudice any creditor or grant any unfair advantage to the Debtors.
7. The Debtors request that this Court grant them additional time to file their Schedules, Statements, Chapter 13 Plan and related documents.

WHEREFORE, the debtors respectfully pray that this Court enter an Ex-Parte Order Extending Time Within Which to File Schedules, Statements and Chapter 13 Plan through and including _____.

Dated this the _____ day of _____ 2009.



William S. Gardner
Gardner Law Offices
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**Motion to Excuse Compliance
With DSO Requirement of §543**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to **Section 543** of Title 11 of the United States Code, **Rule 5005** of the Rules of Bankruptcy Procedure, and **Rule 9009** of the Local Bankruptcy Rules for the entry of an order excusing the debtors ex-wife from compliance and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.
2. The 341(a) meeting of creditors is scheduled to be held in Charlotte, North Carolina on _____.
3. The Chapter 13 plan has not yet been confirmed by order of this Court.
4. The debtor was not able to include in the filed petition the telephone number of his ex-wife in relation to his Domestic Support Obligation (DSO) due to the fact that she is unwilling to provide this information.
5. The debtor is therefore moving the court to excuse the necessity of the inclusion of this telephone number in the petition and to excuse compliance in this matter in regards to the DSO.
6. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

- A. That the debtors' motion to excuse compliance be granted as provided for in the body of this motion;
- B. That the attorney for the debtors be granted an additional **non-base legal fee of \$350.00** and expenses of \$104.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtors into the Plan.
- C. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR(S).

**MOTION TO EXCUSE DEBTORS FROM REQUIREMENT TO FILE
SCHEDULE I,
AND FOR ORDER SETTING ALTERNATIVE DATE FOR
DETERMINING THE DEBTORS' CURRENT MONTHLY INCOME**

NOW COME the above-named debtors, by and through their attorney of record respectfully move the Court to enter an Order excusing them from the requirement that they file a schedule of current income required by 11 U.S.C. § 521(a)(1)(B)(ii) (Schedule I), and setting a date (other than the last day of the calendar month immediately preceding the date of the commencement of their case) for determining their "current monthly income" in this case. In support of such motion, the debtors show unto the Court the following:

1. The above-referenced debtors filed a Voluntary Petition under chapter 13 of the United States Bankruptcy Code on _____, and _____. is the duly appointed and acting chapter 13 Trustee.

2. Along with their Petition, the debtors filed various schedules and other documents which are required to be filed in connection with their chapter 13 case, but did not file a Schedule I - Current Income of Individual Debtor(s) (hereinafter "Schedule I").

3. Pursuant to 11 U.S.C. § 521(a)(1)(B)(ii), a consumer debtor who files a Petition under chapter 13 is ordinarily required to file a Schedule I. However, § 521(a)(1)(B) provides that such Schedule I is required "unless the court orders otherwise." Accordingly, under appropriate circumstances, the Court is specifically authorized to excuse a debtor from such requirement.

4. The Form B22C filed by the debtors herein indicates that, as of the date of the filing of the debtors' Petition, the male debtor had "current monthly income" of \$4,044.76. This amount was calculated by averaging the income received by the male debtor in the six month period preceding the filing of the Petition, ending on August 31, 2006, as is typically required in accordance with 11 U.S.C. § 101(10A)(A)(i).

5. Between _____ and _____, the male debtor was employed by a number of entities, but his primary source of income was from work done with the National Guard, from which he earned nearly \$30,000 between _____ through and including _____. However, _____ was the last day on which the male debtor was employed by the National Guard, and as of the date the filing of the Petition he was not employed anywhere. As a result, his "current monthly income," if calculated in accordance with 11 U.S.C. § 101(10A)(A)(i), is significantly

higher than his actual income, and erroneously reflects greater "disposable income," and as a consequence a greater present ability to repay unsecured debts.

6. 11 U.S.C. § 101(10A)(A)(ii) provides that a debtor's "current monthly income" may be determined as a six-month average of income ending on a date other than the last day of the calendar month immediately preceding the date of the commencement of the case "if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii)." Such alternative date, apparently, may be any date which the court deems to be appropriate.

7. Because the debtors' financial circumstances deteriorated so significantly in the six month period preceding the filing of their Petition, and in particular from August 9, 2006 through the date of the filing of their case, just cause exists to allow the debtors' "current monthly income" to be determined in accordance with 11 U.S.C. § 101(10A)(A)(ii). Specifically, the debtors submit that their "current monthly income" should be determined as a six-month average of income earned during the period ending on _____.

8. If requested, the debtors will provide the information otherwise contained on Schedule I to the Trustee, and shall file such alternative documentation regarding such information as may be required by the court, if they are excused from the filing of the official Schedule I. Furthermore, all of the information provided by Schedule I may be easily and accurately provided by alternative means.

WHEREFORE, the debtors pray the Court as follows:

- A. to enter an Order excusing them from the requirement that they file a Schedule I;
- B. to set a future date on which their "current monthly income" may be determined in accordance with 11 U.S.C. § 101(10A)(A)(ii);
- C. In the alternative, the debtors request a hearing;
- D. and for such other and further relief as this Court deems just and proper.

Dated this the _____ day of _____, 2009.



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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 7 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR.

EMERGENCY MOTION TO STRIKE PETITION

NOW COME the Debtors, by and through counsel, O. Max Gardner III, and move this Court to strike the Petition partially filed on February 19, 2008, and state:

1. Debtors contacted counsel to file for relief under Chapter 7 of the Bankruptcy Code. Counsel prepared the documents necessary to commence such a filing.
2. On Sunday, February 19, 2008, Counsel began the automatic case upload of Debtor's case in error. Upon realizing that the Debtors had not yet completed the required pre-filing Debtor counseling required by 11 U.S.C. § 109(h)(1), Counsel canceled the upload before receiving any notification of filing or case number, and therefore believed that the upload had been canceled in time.
3. Counsel subsequently received an ECF notice that the above case number had been assigned, and was informed by the case administrator that a portion of the petition had, in fact, been uploaded.
4. Due to questions about the status of the case, as of this date, Counsel has not yet paid the filing fee associated with this case (but will do so immediately upon resolution of these issues).
5. Debtors have taken no improper or inappropriate actions in this case. Debtors have taken no actions in reliance on any automatic stay imposed by the "filing," nor has any creditor been affected by any such stay.
6. Debtors received their credit counseling certificate on February 23, 2008,¹ their combined household income qualifies them under the Means Test to file for relief under Chapter 7, and they are ready, willing and able to file for relief under Chapter 7.
7. Should the case that was "filed" on February 19, 2008 be dismissed and Debtors "refile," they will show two bankruptcies on their credit report, as well as being

¹ Counsel deferred the filing of this Motion until after he had received a copy of the Counseling Certificates for Debtors.

- subject to the repeat filing provisions of 11 U.S.C. § 362(c)(3).²
8. The Debtors were not eligible to be debtors under § 109(h) on February 19, 2008, as they had not completed their credit counseling. Accordingly, under § 301, no case was "commenced." See *In re Hubbard*, 2005 WL 3117215 (Bankr.S.D.Tex. Nov. 16, 2005); *In re: Rios*, 2005 WL 3462728 (Bankr.S.D.N.Y. Dec. 19, 2005).
 9. Debtors request that, under the circumstances of the initial "filing" and given that no case was commenced yet a case number was assigned, the existing case be deemed filed as of the date of completion of their credit counseling—the first date they were eligible to commence a case under BAPCPA.
 10. In the alternative, Debtors pray that in lieu of dismissal, the Court follow the procedure discussed in *Hubbard* and *Rios* and deem the improperly-filed case as "stricken".

Wherefore, Debtors pray that this Court:

- A. Deem their case filed as of February 24, 2008 (upon entry of such an Order, Counsel will immediately upload the complete Petition, Means Test, Statement of Financial Affairs, Schedules, Statement of Intention and Credit Counseling Certificates); or in the alternative
- B. Deem the above-captioned case not properly filed, strike the pleadings, and not consider it a dismissal for the purposes of § 11 U.S.C. § 362(c)(3); and
- C. Order such other and further relief such as to the Court may seem appropriate.

Respectfully submitted this the _____ day of _____, 2008.

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² If the Court rules that a subsequent case must be filed, Counsel will, of course, pay any additional filing fees associated with such new case.

A. No Protest
Modify Plan

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

**MOTION TO MODIFY CHAPTER 13 PLAN
TO ADD MORTGAGE PAYMENTS**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order modifying the plan and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.
2. The 341(a) meeting of creditors was held on in Shelby, North Carolina, on _____.
3. The Chapter 13 plan was subsequently confirmed by order of this Court.
4. The plan presently provides for a monthly payment of \$490.00.
5. Carolina Model Homes Corporation ("Carolina Model Homes") is the holder of a deed of trust on the debtors' residence.
6. The debtors have not been able to make their post-petition mortgage payments to Carolina Model Homes for the months of _____, due to the fact that the debtors' son was recently sick and consequently admitted to the Emergency Room. The debtors incurred unexpected medical bills and lost two days of work each. The debtors believe they owe Carolina Model Homes the total sum of \$2293.60 through _____.
7. The debtors desire to make every effort to retain their home and believe that they will be able to cure this post-petition default during the remainder of their plan and that they will be able to resume making their monthly payment to Carolina Model Homes in _____.
8. The debtors are therefore moving the court to modify their plan by directing the Trustee to add to the plan the sum of \$2293.60 in post-petition mortgage payments to Carolina Model Homes, with said claim to be paid in full with interest at the contract rate.
9. The debtors are also moving the court to increase their plan payments as the Trustee deems necessary to allow for the payment of the additional claim in favor of Carolina Model Homes.

10. The debtors are informed and believe and therefore allege that they will be able to make the plan payments for the increased amount after this modification has been approved by the court.

11. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion to modify plan be granted as provided for in the body of this motion;

B. That the monthly plan payments be changed, modified or maintained as requested herein;

C. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$82.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtors into the Plan; and

D. That the debtors have such other and further relief as to the Court may seem just and proper.

Dated this the _____ day of _____, 2008.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

**MOTION TO MODIFY CHAPTER 13 PLAN
TO ADD TAX DEBT**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order modifying the plan and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. The plan presently provides for a monthly payment of \$690.00.

5. The debtors aver that they incurred an income tax liability for the year 2006 in the amount of \$1050.00 to the Internal Revenue Service and for 2006 real property taxes to the Cleveland County Tax Office in the amount of \$459.09.

6. The debtors do not have the ability to make the direct post-petition payment to the IRS and to the Cleveland County Tax Office.

7. The debtors are therefore moving the court to modify their plan by directing the Trustee to add to the plan the tax liabilities as set forth in paragraph five above.

8. The debtors are also moving the court to direct the Trustee to increase their monthly plan payments as he deems necessary to allow payment of the tax liabilities.

9. The debtors are informed and believe and therefore allege that they will be able to make the plan payments as increased after this modification has been approved by the court.

10. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion to modify plan be granted as provided for in the body of this motion;

B. That the monthly plan payments be changed, modified or maintained as requested herein;

C. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$102.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtors into the Plan; and

D. That the debtors have such other and further relief as to the Court may seem just and proper.

Dated this the _____ day of _____, 2008.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

**MOTION TO MODIFY CHAPTER 13 PLAN
TO REMOVE DEBTS BASED ON DOMESTIC SEPARATION OF DEBTORS**

COMES NOW the above-named male debtor, by and through his attorney of record, and respectfully moves the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order modifying the plan and in support hereof alleges and says that:

1. This case was commenced by the filing of a petition with the Clerk of this Court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was confirmed by this Court on _____.

4. The plan presently provides for a monthly payment of \$645.00.

5. The male debtor and his wife are separated.

6. The male debtor is moving the court for an order removing the debts of the female debtor and directing the Trustee to remove all unsecured debts held solely by the female debtor, as itemized below.

7. The unsecured debts held solely by the female debtor are identified on the records of the Trustee as follows:

<u>Creditor</u>	<u>Claim Number</u>	<u>Claim Amount</u>
Capital One Bank	0007	\$1407.07

8. The male debtor is also moving the court for an order directing the Trustee to strike the secured and unsecured claims of Capital One Auto Finance for the debt on the 1998 Oldsmobile Silhouette, identified on the records of the Trustee as claim number 0003 in the remaining amount of \$3266.72 and claim number 2003 in the amount of \$5859.87.

The male debtor abandons all interest in this vehicle and consents to granting a release from this case to Capital One Auto Finance to repossess the vehicle.

9. The male debtor is also moving the Court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the male debtor respectfully prays of the Court as follows:

A. That the male debtor's motion to modify plan be granted as provided for in the body of this motion;

B. That all unsecured debts held solely by the female debtor be removed from the plan;

C. That the male debtor's motion that the secured and unsecured claims in favor of Capital One Auto Finance on the 1998 Oldsmobile Silhouette be removed from the plan and that the said creditor be granted a release from this case to Capital One Auto Finance to repossess the vehicle be granted as provided for in the body of the motion;

D. That the attorney for the debtor be granted an additional non-base legal fee of \$350.00 and expenses of \$32.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtor into the Plan.

E. That the debtor have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2008.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

**MOTION TO MODIFY CHAPTER 13 PLAN
TO REDUCE PLAN PAYMENT**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order modifying the plan and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.
2. The 341(a) meeting of creditors was held on in Shelby, North Carolina, on _____.
3. The Chapter 13 plan was subsequently confirmed by order of this Court dated _____.
4. The plan presently provides for a monthly payment of \$329.00.
5. The debtors have determined that due to substantial and material changes in circumstances since the confirmation of the plan in this case, including the loss of income by the male debtor, the debtors are no longer in a financial position to maintain the monthly plan payment as confirmed.
6. In support hereof, the debtors have attached hereto and incorporate herein by this reference Amended Schedules I and J.
7. The debtors are therefore moving the Court to direct the Trustee to reduce the percentage payout to unsecured creditors with filed and allowed claims from 20% to 10% and to reduce their plan payments from \$375.00 to \$195.00.
8. The debtors are also moving the Court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion to modify plan be granted as provided for in the body of this motion;

B. That the monthly plan payments be changed, modified or maintained as requested herein;

C. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$52.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtors into the Plan.

D. That the debtors have such other and further relief as to the Court may seem just and proper.

Dated this the _____ day of _____, 2008.

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a. The Debtors are allowed to substitute collateral, as a result of which AmeriCredit will release its lien on the 2002 Mazda and obtain a first lien upon the substitute vehicle; and

b. The substitute vehicle chosen by the Debtors must be mutually acceptable to the Debtors and AmeriCredit and must be comparable in value to the 2002 Mazda. Prompt consent shall not be unreasonably withheld or delayed by AmeriCredit; and

c. The insurance proceeds from the 2002 Mazda shall be paid by the insurance company forthwith to the trust account of the Debtors' attorney, to be held by the attorney and released to the seller of the substitute vehicle only under such circumstances that AmeriCredit is entered as the first lien holder on the title to the substitute vehicle; and

d. Any insurance proceeds not used for the purchase of the substitute vehicle shall be delivered by the Debtors' attorney to the Trustee for disbursement on AmeriCredit's claim; and

e. Upon entry of this order, AmeriCredit is required to release its lien on the 2002 Mazda and surrender the certificate of title to GMAC; and

f. The Debtors shall obtain and maintain physical damage (comprehensive and collision) insurance protection on the vehicle, in strict compliance with the terms of the contract between AmeriCredit and the Debtors, including but not limited to listing AmeriCredit as a loss payee and shall provide AmeriCredit with proof of insurance for the substituted vehicle prior to AmeriCredit delivering title to the 2002 Mazda; and

g. The Debtors' attorney is allowed an additional non-base fee of \$450.00 to be paid through the Chapter 13 Plan.

9. The debtor and the debtor's attorney then located numerous vehicles similar to the 2002 Mazda Tribute and each one was turned down by AmeriCredit Financial Services. The debtor needed a reliable automobile to travel to and from work. He began having problems making it to work and was jeopardizing his job.

10. He was then forced to seek to obtain new credit to purchase a vehicle on his own. He obtained the new credit on October 17, 2007 to purchase a vehicle through U.S. Finance Limited in the maximum amount of \$9,004.95 and a maximum monthly payment of \$318.93. He purchased a 2002 Ford Explorer in the amount of \$9,004.85 from Village Auto Sales in Gastonia, North Carolina in October of 2007 that is being paid outside of the plan.

11. On November 28, 2007 an Order Terminating the Automatic Stay to allow AmeriCredit Financial to collect and apply the above insurance proceeds for its vehicle that the debtor totaled, more fully described as a 2002 Mazda Tribute – V6 Utility 4D LX 2WD (VIN #4F2YU09162KM55378), was entered.

12. Therefore, the debtor is moving the court for an order directing the Trustee to strike the secured claim of AmeriCredit Financial for the debt on the 2002 Mazda Tribute, identified on the records of the Trustee as claim number 4. The debtor abandons all interest in this vehicle and consents to granting a release from this case to AmeriCredit Financial to repossess the vehicle.

13. In addition, on approximately December 19, 2007, the automatic stay on the debtor's home was terminated by Chase Home Finance, LLC (aka – Wells Fargo Bank) due to the debtor defaulting on a consent order dated September 19, 2007. Therefore, the debtor is moving the court for an order directing the Trustee to strike the secured claims of Chase Home Finance, LLC (aka – Wells Fargo Bank), identified on the records of the Trustee

as claim numbers 5, 6, 7, and 8. The debtor abandons all interest in the home located at 401 W. Indiana Avenue, Bessemer City, NC 28016 and consents to granting a release from this case to Chase Home Finance, LLC (aka – Wells Fargo Bank) to proceed with foreclosing on the property.

14. The debtor is also moving the court to reduce his monthly plan payment to \$125.00 due to the removal of the above mentioned claims numbered 4, 5, 6, 7, and 8 in relation to Americredit Financial and Chase Home Finance, LLC (aka – Wells Fargo Bank). Amended Schedules I and J and a statistical summary are being filed along with this motion in support of this reduction in the plan payment.

15. The male debtor is in need of a reduction in his plan payment due to a number of unforeseen changes in his circumstances. In addition to losing his automobile and his house he also has a torn rotator cuff, and is not able to work as much due to this injury, the surgery to repair it, and the time off that will be required due to the injury.

16. The male debtor is also moving the Court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtor respectfully prays of the Court as follows:

A. That the male debtor's motion to modify plan be granted as provided for in the body of this motion;

B. That the debtor's motion that the secured claim in favor of AmeriCredit Financial on the 2002 Mazda Tribute be removed from the plan;

C. That the secured claims in favor of Chase Home Finance, LLC (aka – Wells Fargo Bank) be removed from the plan as outlined in this motion;

D. That the debtor's monthly plan payment be reduced to \$125.00 due to the removal of Americredit's and Chase Home Finance, LLC's (aka – Wells Fargo Bank) secured claims;

E. That the attorney for the debtor be granted an additional non-base legal fee of \$350.00 and expenses of \$106.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtor into the Plan;

F. That the debtor have such other and further relief as to the Court may seem just and proper.

Dated this the 14th Day of January 2008.



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IN THE MATTER OF:

Debtors.

c. The insurance proceeds from the 2002 Mazda shall be paid by the insurance company forthwith to the trust account of the Debtor's attorney, to be held by the attorney and released to the seller of the substitute vehicle only under such circumstances that AmeriCredit is entered as the first lien holder on the title to the substitute vehicle; and

d. Any insurance proceeds not used for the purchase of the substitute vehicle shall be delivered by the Debtor's attorney to the Trustee for disbursement on AmeriCredit's claim; and

The debtor and the debtor's attorney then located numerous vehicles similar to the 2002 Mazda Tribute and each one was turned down by AmeriCredit Financial Services. The debtor needed a reliable automobile to travel to and from work. He began having problems making it to work and this lack of consistency was jeopardizing his job. The Debtor was then forced to obtain new credit to purchase a vehicle on his own. He obtained the new credit on October 17, 2007 to purchase a vehicle through U.S. Finance Limited in the maximum amount of \$9,004.95 and a maximum monthly payment of \$318.93. The debtor used this authority to purchase a 2002 Ford Explorer in the amount of \$9,004.85 from Village Auto Sales in Gastonia, North Carolina. This transaction was closed in October of 2007, and the debt is being paid outside of the plan.

On November 28, 2007 this Court entered an Order Terminating the Automatic Stay to allow AmeriCredit Financial to collect and apply the above insurance proceeds for its vehicle that the debtor totaled, more fully described as a 2002 Mazda Tribute – V6 Utility 4D LX 2WD (VIN #4F2YU09162KM55378). This Order served to remove the secured claim of AmeriCredit from the plan.

In addition, on approximately December 19, 2007, the automatic stay on the debtor's home located at 401 W. Indiana Avenue, Bessemer City, NC 28016 was terminated by Chase Home Finance, LLC (aka – Wells Fargo Bank) due to the debtor's default of a consent order dated September 19, 2007.

In addition, the debtor suffered a torn rotator cuff, which required surgery to repair it, and resulted in lost and continued loss of significant time from work. The debtor's ability to work every day at his place of employment has been seriously impaired by this injury and an extended period of recovery.

The debtor therefore filed a Motion to Modify the Chapter 13 Plan to remove the secured claims of Chase Home Finance, LLC (aka – Wells Fargo Bank), identified on the records of the Trustee as claim numbers 5, 6, 7, and 8 and to remove the secured claim of AmeriCredit Financial for the debt on the 2002 Mazda Tribute, identified on the records of the Trustee as claim number 4. In his motion the debtor seeks to reduce his monthly plan payment to \$150.00 due to the removal of the above mentioned claims. Amended Schedules I and J and a statistical summary were filed by the debtor along with this motion in support of this reduction in the plan payment. The Amended Schedules I & J reflect current average monthly income of \$3,046.92; average monthly expenses of \$2,892.00, and monthly net income of approximately \$153.92.

The Amended Summary of Schedules filed with the Motion to Modify also indicates a dramatic reduction of approximately \$127,000.00 in the debtor's personal assets, while the debtor's liabilities were not significantly reduced due to the surrenders of the properties. The debtor admits that his income is still above the median family income for a family of

one in the Western District of North Carolina, and has not been permanently changed as a result of the events set forth above.

The Trustee filed a Response to the debtor's Motion to Modify on January 23, 2008 wherein he stated, "The proposed modification may not comply with the requirements of 11 U.S.C. Section 1325(b)(1)(B). The debtor has only made 33 payments to the trustee and the proposed modification to \$150.00 for ten percent dividend would only require eight more payments. The debtor's form B22C indicates he is an above median income debtor and would be subject to an applicable commitment period of 60 months."

ARGUMENT

This case presents two questions of first impression for determination by this Court:

First: Can the term of the debtor's plan be modified under § 1329(a) to be shorter term than pursuant to the debtor's applicable commitment period as calculated pursuant to § 1325(b) without having to pay all unsecured claims a dividend of 100%?

Second: Is the debtor bound by the results of the calculation on Form B22C as a minimum payment to unsecured creditors regardless of any change in actual income or expenses after the confirmation of the original plan?

DISCUSSION

During the past 27 months, the Bankruptcy Courts have been bombarded with questions about whether or not "projected disposable income" is an historic fact or a future prediction. Many Judges have been puzzled and perplexed by Form B22C and Disposable Income. Judges have wondered "out loud" in written opinions what Congress really intended when it adopted the IRS expense standards, which the IRS created solely for determining how much a taxpayer could pay in working out offers of compromise for tax debts. Compare *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006) (*applies both PDI and DI*) and *In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006) (ignored B22C for substantial drop in income by AMI debtors) with *In re Alexander*, 344 B.R. 742 (Bank. E.D.N.C. 2006) (*the concept of DI as we knew it has changed*) and *In re Barr*, 341 B.R. 181 (Bankr. M. D. N. C. 2006) (*in the case of an AMI debtor who had a substantial I & J surplus but negative DI on Form B22C could file a good faith plan with less than I & J*). Bankruptcy Judges have been struggling with questions about "current monthly income" to the extent that it is not current, not monthly and in some cases not even income. Courts have wondered whether the "applicable commitment period" is a device for measuring the duration of a plan or a mathematical number to determine the total amount a debtor must repay under the plan.

The Debtor contends that while all of these issues are still open to debate, throughout the United States one issue was resolved by Congress in connection with the enactment of BAPCPA and that issue relates to the modification of Chapter 13 confirmed plans. The fact of the matter is that nothing in BAPCPA made any substantive changes in §§ 1329(a)(1), (a)(2) and (a)(3). It is extremely important to note that *not one of these sections was even modified or amended by BAPCPA* with the sole exception of deleting the "or" at the end of the former (a)(2). Since these sections were not amended by one single provision of BAPCPA, the new § 1325(b) is not incorporated in either the old or the new versions of § 1329. In fact, the only reference to § 1325(b) is in the last section of § 1329(c). This section simply provides that if a plan is modified under section (a) and (b) then the modified plan may not make payments beyond "the applicable commitment period under section 1325(b)(1)(B)" unless the court, for cause, approves a longer period; provided that the

court may not approve a period that expires more than five years after the time the first payment is due.

The new statutory language that has created all of the current disequilibrium and all of these status quo "disturbances" is found in § 1325(b)(4). This section provides that in order to determine how a debtor's projected disposable income is to be disbursed to the unsecured creditors the court must make three determinations. First, the court must determine the "applicable commitment period." Second, if the debtor's CMI is less than the median income then the commitment period is not less than three years. Third, if the debtor's CMI is more than the median family income then the applicable commitment period is not less than five years. This section then provides that the applicable commitment period may only be less than three or five years if the plan provides for payment in full of all allowed unsecured claims. In short, if you want to payoff a three year plan in two years then this section appears to provide that you have to pay 100% of all allowed and filed unsecured claims.

Consequently, does this mean that a chapter 13 debtor must either pay a 100% dividend or stay in a plan for not less than 36 or not less than 60 months? The Debtor in this case contends that whatever the answers are for an initial plan confirmation then the answer is definitely NO for a post-confirmation plan modification.

In the pre-BAPCPA Code, § 1325(b)(1)(B) provided that the debtor must commit the debtor's projected "disposable income" to be received for a period of three years to the plan. Specifically, this section provided that the chapter 13 commitment related to income "to be received in the three-year period beginning on the date that the first payment is due under the plan." However, under the old Code there was no specific prohibition against modifying the plan to shorten the three-year period by way of an early pay-off without having to pay 100% to the unsecured creditors. See *In re Anderson*, 21 F.3d 355 (9th Cir. 1994).

These issues of how long a debtor must stay committed to a Chapter 13 plan are not new issues. These issues have been extensively litigated in numerous pre-BAPCPA cases. One of the first significant cases was *In re McKinney*, 191 B.R. 866 (Bankr. D. Or. 1996). The debtor's confirmed plan in *McKinney* provided for a 0% dividend to the unsecured creditors and the payment of scheduled priority debt of approximately \$10,000 to be paid over 36 months. *Id.* 17 867. The actual priority claims filed and allowed totaled substantially less than \$10,000 and as a result the debtor was able to complete all plan payments in 12 months. The Trustee responded by filing a § 1329 motion to modify the plan to increase the percentage to the unsecured creditors and to require the debtor to continue paying all projected disposable income to the Trustee for at least 36 months as provided by § 1325(b)(1). The Bankruptcy Judge granted the Trustee's motion and held that the modification of a confirmed plan had occurred because of the understatement of priority claims and that upon the objection of the Trustee by way of the motion to modify the court had to look at § 1325(b). More importantly, the court reasoned that while § 1325(b) was not directly incorporated into § 1329(b), it was "indirectly incorporated therein via its reference in § 1325(a)."

The first signs of serious doubts about this so-called "incorporation" theory arose in *Max Recovery, Inc. v. Than*, 215 B.R. 430 (9th Cir. BAP 1997). The plan in *Than* was confirmed, without objection, with terms providing monthly payments of \$300.00 for 38 months or until the plan achieved an 11% dividend on those claims. The plan therefore appears to have been a hybrid pot plan. When the filed claims came in lower than scheduled, it was determined that the plan would pay the 11% dividend in 32 months instead of 38. Max

Recovery, an unsecured debt buyer, moved to increase the term of the plan to not less than 36 months. The motion was made pursuant to § 1325(b). The bankruptcy court held § 1325(b) was inapplicable and denied the motion. *Id.* at 436. In affirming, the BAP stated that “the Code does not prohibit a plan that is less than 36 months in duration in the absence of any objection by the Trustee or a creditor to ‘the confirmation of the plan.’” *Id.* at 437 *citing* § 1325(b)(1). The BAP also noted in passing that § 1329(b) does not expressly incorporate § 1325(b). *Id.* at 434.

The next case important modification was *In re Sounakhene*, 249 B.R. 801 (Bankr. S.D. Cal. 2000). In *Sounakhene*, the debtors, prior to the expiration of a 37 month plan, refinanced their home mortgage and made a single lump-sum payment to the Trustee equal to the aggregate amount of their disposable income over the remaining life of the plan. The Trustee moved to modify the plan to require that payments nonetheless be made for at least 36 months. The court denied the motion on the ground that the plan was complete when the Trustee received the amount required under the plan. *Id.* at 804. However, the court specifically held that § 1325(b) was not incorporated into § 1329 based upon a “plain interpretation of the statute.” *Id.* at 803. Rather than applying the so-called disposable income test, the court determined that the better approach would be to utilize the analysis underlying the disposable income test in exercising the court’s judgment and discretion. *Id.* at 805. Citing *Than*, the court stated that “the only limits on modification are those set forth in the language of the Code itself, coupled with the bankruptcy judge’s discretion and good judgment in reviewing the motion to modify.” *Id.* And, even if 1325(b)(1)(B) did apply, the court noted that nothing in § 1325(b) prohibited a lump sum payment where no pre-payment discount was requested.

The next significant case was *In re Casper*, 154 B.R. 243 (N.D. Ill. 1993). In *Casper*, as a result of priority claims being allowed in amounts significantly less than scheduled, the debtors were able to complete their 60 month plan in 24 months. The plan paid a 10% dividend. The Trustee filed a motion to modify the plan to a 60 month term and to increase the dividend from 10% to 80%. The bankruptcy court granted the Trustee’s motion. On appeal, the district court reversed, holding that 1325(b)(1)(B) only required the debtors to commit the amount representing their projected disposable income over three years to the plan. The district court also clearly stated that 1325(b) does not prohibit the payment of such an amount in less than the prescribed term of the plan. *Id.* at 245-46.

Casper was quickly followed by *In re Phelps*, 149 B.R. 534 (Bankr. N.D. Ill. 1993). The confirmed plan in *Phelps* provided for a payment of secured claims in full with a 10% dividend to unsecured creditors and monthly payments of \$282.00 for a projected term of 43 months. Because of un-filed unsecured claims, the plan paid out in 37 months. The Trustee filed a motion to modify the plan to require a full 43 months of payment. The court rejected this motion finding that plan completion occurs when the debtor has paid the percentage owed to each class of creditors as provided for in the plan. *Id.* at 537. While *Phelps* did not address the particular issue of § 1325(b)’s disposable income test and the mandatory minimum term of 36 months, its reasoning is instructive in that it interprets “completion of payments” as it is used in § 1329(a), i.e., focusing on payment of the required percentage owed rather than on the duration of the plan.

Sections 1329 and 1325 were indirectly addressed by the court in *In re Easley*, 334 (Bankr. M.D. Fla. 1996). In *Easley*, several months after confirmation of a 60 month plan the debtor filed a § 1329 motion to modify the plan by paying the entire amount due from a loan received from his parents. The Trustee objected and argued that any loan proceeds should be used to increase the plan payments and not to modify the plan. The court agreed with the debtor and granted the motion to modify. The court held that nothing in § 1329

prohibited the debtor from borrowing money to pay his existing creditors early. The court reasoned that the debtor was merely "substituting one set of creditors, his parents, for his former set of creditors addressed in the plan." *Id.* at 335.

The court in *Forbes*, 215 B.R. 183 (8th Cir. BAP 1997) directly addressed the §§ 1325 and 1329 issue. After 36 months of a 60 month plan the debtor in *Forbes* received settlement proceeds which would enable him to reduce the plan term from 60 to 40 months. The debtor filed a § 1329 motion to so modify the plan. The Trustee and an unsecured creditor objected to the proposed modification on the ground that settlement constituted a windfall, enabling the debtor to pay all of his creditors in full. The bankruptcy court overruled both of the objections and approved the plan as modified by the debtor. The Trustee and the creditor appealed. The issue before the BAP was whether or not the bankruptcy court erred by failing to consider the settlement funds as disposable income under § 1325(b). In affirming the bankruptcy court, the BAP held that Congress clearly did not include § 1325(b) in the requirements for post-confirmation plans under § 1329 and the court would not read the statute to hold otherwise. *Id.* at 191. The panel also noted that its conclusion was supported by the absurd result which would have been obtained had the disposable income test applied: "Mathematically, no proposed modified plan can satisfy both the disposable income test in § 1325(b) and the five year limitation in § 1329(c) if the proposed modification is filed after two years after the commencement of payments under the original plan." *Id.* at 192.

In the case of *In re Smith*, 237 B.R. 621 (Bankr. E.D. Tex. 1999), *aff'd* 252 B.R. 107 (E.D. Tex. 2000), the debtor had proposed a 56 month plan, which was confirmed over objections. After making payment number 26, the debtor paid the Trustee the total amount due under the remainder of the plan. The Trustee then distributed the funds with a notice of plan completion. An unsecured creditor objected and argued that the debtor had failed to submit her income to the plan for the full 36 month period as required by § 1325(b)(1). The court overruled the objection and held that the creditor's reliance on § 1325(b)(1) was misplaced because that section only applied to plan confirmations. *Id.* at 625 n.5.

The next significant holding was *In re Golek*, 308 B.R. 332 (Bankr. N.D. Ill. 2004). In this case, the debtor filed a motion in month 20 of his plan to sell real property. The court granted the motion and directed the debtor to pay the proceeds of the sale to the Trustee in an amount sufficient to pay-off the plan. The debtor then filed a motion to modify the plan to the payments made. The Trustee objected on the ground that the debtor was proposing to terminate his plan before its 36 month term had expired. *Id.* at 334. The court rejected the Trustee's position and argument that § 1325(b) was incorporated into § 1329. The court stated that when "Congress wants to say something, it knows how to say it, and in this instance, Congress did not say it. Indeed, § 1329(b)(1) goes out of its way to include both §§ 1322(a) and 1322(b) in its list of restrictions. While § 1325(a) is expressly listed, however, § 1325(b) is not." *Id.* at 337.

This issue was also recently addressed in two significant pre-BAPCPA cases, both of which were decided in 2005. In the first case, *In re Sunahara*, 326 B.R. 697 (9th Cir. BAP 2005), the court held that the debtor could seek to modify a plan under § 1329 without having to pay a 100% dividend to the unsecured creditors. The debtor's plan in this case provided for a total payment of \$41,000 over a term of 60 months, with an estimated dividend of 50% to the unsecured creditors. One day prior to the hearing on confirmation of the debtor's third amended plan, the debtor filed a motion to refinance real estate, to pay-off the plan, and to terminate the case. The plan was confirmed without objection prior to the hearing on the motion. The bankruptcy court sustained the objection to the debtor's motion and on appeal the BAP reversed. The BAP pointed to *Lamie v United States Trustee*, 540 U.S. 526

(2004) in holding that the “plain language of § 1329(b) does not mandate satisfaction of the disposable income test of § 1325(b)(1)(B) with respect to modified plans.” The court went on to emphasize that had “Congress intended to impose such a requirement, it could have easily done so by making the appropriate incorporating reference. If the absence of the reference to § 1325(b) was indeed an oversight, it is the province of the legislature, and not the judiciary, to make the correction.”

The *Sunahara* court also specifically held that the so-called “best efforts” test of § 1325(b) did not apply to a § 1329 motion. This holding was based on an unambiguous finding that the confirmation standards of § 1325(b) were “not explicitly incorporated into § 1329.” Specifically, the *Sunahara* court held: “Section 1329(b) expressly applies certain specific Code sections to plan modifications but does not apply § 1325(b). Period. The incorporation of § 1325(a) is not, as has been posed by some courts, the functional equivalent of an indirect incorporation of § 1325(b).” On remand, the BAP ordered the trial court to consider the current I & J schedules, the likelihood of any future increases in net monthly income, the time period between confirmation and modification, and the risk of a plan failure over the remaining term versus the certainty of immediate payments to creditors.

The second important 2005 case was *In re Keller*, 329 B.R. 697 (Bankr. E.D. Ca. 2005). In *Keller*, the debtor filed a motion to modify a 36 month plan by reducing the term, by paying the base amount with a mortgage refinance, but without paying a 100% dividend. The court held that the debtor could payoff the plan early without a full dividend, but that the process to follow would be a § 1329 motion to modify and not a motion to approve a new mortgage loan. However, the *Keller* court then found in *dicta* that § 1325(b)(1) was incorporated into § 1325(a) and since § 1325(a) was in fact referenced in § 1329 all of the pre-confirmation rules applied to a § 1329 modification.

It is not clear how the *Keller* court would deal with the issue of “projected disposable income” under BAPCPA and § 1329. However, the *Keller* reasoning is suspect because it is based on the general requirement of § 1325(a)(1) that the court shall confirm a plan if “the plan complies with the provisions of this chapter and with the other applicable provisions of this title.” Given the very strict constructionalist approach to BAPCPA, it seems safe to assume that the vast majority of courts will follow *Sunahara* and reject *Keller*. And, unless it wants to reverse precedent in *Lamie*, the Supreme Court is bound to follow *Sunahara*.

The Debtor in this case contends that the best predictor of what the courts will finally do on the issue of post-confirmation plan modifications can be found in a 1989 decision by the Fourth Circuit. The case is *In re Arnold*, 869 F.2d 240 (4th Cir. 1989). In *Arnold*, the court was called on to interpret § 1329 in a matter where the debtor’s post-confirmation income increased from \$80,000 a year to more than \$200,000 per year. The court held that in this case where there had been an unanticipated and substantial change for the better in the debtor’s financial circumstances then either the Trustee or an unsecured creditor could file a § 1329 motion to modify the plan to increase the dividend to the general body of unsecured creditors. In a very detailed analysis of § 1329, the *Arnold* court never once mentioned § 1325(b) and certainly found no “direct” or “indirect” incorporation of Section 1325(b) into § 1329.

The *Arnold* holding was strongly reaffirmed on January 18, 2006 when the Fourth Circuit filed its opinion in *In re Murphy*, Lawyers Weekly No. 07-01-0168 (4th Cir. 2007). *Murphy* involved two cases where the Trustees sought to modify confirmed chapter 13 plans to increase the amount to be paid to the unsecured creditors. The court combined both cases

for decision in order to “set forth a thorough analysis on how a bankruptcy court should analyze a motion for modification pursuant to §§ 1329(a)(1) or (a)(2).” *Slip* at 8.

The *Murphy* court noted that under “§ 1329 of the Bankruptcy Code, a confirmed plan can be modified at ‘any time after confirmation of the plan but before the completion of payments’ at the request of the debtor, the Chapter 13 Trustee, or an allowed unsecured creditor in order to, among other things, ‘increase or reduce the amount of payments on claims of a particular class provided for by the plan; [or to] extend or reduce the time for such payments.’” *Id.* at 7. The court made it crystal clear that any modification under §§ 1329(a), (a)(1) and (a)(2) had to comply with § 1329(b)(1). Specifically, the court stated that “[u]nder § 1329(b)(1), any post-confirmation modification must comply with §§ 1322(a) and (b), and § 1323(c), and § 1325(a) of the Bankruptcy Code.” *Id.* at 7-8. The court made absolutely no reference to § 1325(b).

The *Murphy* court then went on to explain that the doctrine of *res judicata* prevented the modification of a confirmed plan pursuant to §§ 1329(a)(1) or (a)(2) “unless the party seeking modification demonstrates that the debtor experienced ‘substantial’ and ‘unanticipated’ post-confirmation changes in his financial condition.” *Id.* at 8 citing *Arnold*. The court then took pains to note that “this doctrine” of finality is designed to ensure that “confirmation orders will be accorded the necessary degree of finality, preventing parties from seeking to modify plans when minor and anticipated changes in the debtor’s financial condition take place.” *Id.* To further emphasize this point, the court, *quoting* from *In re Butler*, 174 B.R. 44, 47 (Bankr. M.D.N.C. 1994) stated that “[a]s a matter of sound policy as well as appropriate judicial economy, there is no reason why either a creditor or a debtor should be permitted to re-litigate issues which were decided in the confirmation order or which were available at the time of the confirmation but not raised by the parties. Absent this salutary policy, there is no readily available brake on the filing of motions under § 1329 by creditors and debtors simply hoping to produce a more favorable plan based on the same facts presented at the original confirmation hearing.”

The truly amazing thing about the *Murphy* decision is that the court never makes any reference whatsoever to § 1325(b). Simply stated, it seemed so clear to the court that since § 1325(b) was not incorporated directly into any of the relevant § 1329 provisions that any reference to the section was not even worth a footnote. The court went to some lengths on this point by including the full text of all “relevant” statutes in the footnotes.

As noted, *Murphy* involved two cases. In the first case, the Chapter 13 Trustee sought to modify a confirmed plan after the bankruptcy court granted the debtors permission to refinance the mortgage on their residence. In fact, the refinance produced an excess of “cash out” equity for the debtors and it was this extra money that the Trustee sought to recapture for the unsecured creditors. In the second case, the Chapter 13 Trustees sought to modify the plan after the debtor had secured authority to sell his condominium. Because the condo had appreciated more than 50% in about a year, the debtor was in position to pocket about \$80,000 of the appreciation after paying off the original confirmed plan amount.

As to case number one, the court held that the “cash-out refinancing” did not rise to the level of a § 1329 modification and denied the Trustee’s motion to modify. The court held that all these debtors did “was eliminate a portion of their equity in the property for cash in exchange for a corresponding amount of debt. Thus, even when one considers that the [debtors’] residence appreciated in value post-confirmation, at most, they simply received a large loan in place of a small one. By any stretch, a loan, regardless of the size, is not income. [emphasis added].” The court even characterized the refinancing as evidence that

the debtors “unquestionably took the more noble course of seeking to fulfill their obligations under the confirmed plan. . .” *Slip* at 12. Specifically, the court held: “A debtor’s proposal of any early payoff through the refinancing of a mortgage simply does not alter the financial condition of the debtor and, therefore, cannot provide a basis for the modification of a confirmed plan pursuant to §§ 1329(a)(1) or (a)(2).” *Slip* at 11.

As to the second case, the court found that the debtor did experience a substantial and unanticipated change of circumstances when his condominium was scheduled for \$121,000 in value as of December 15, 2003, the date of the confirmation, and was sold for \$235,000 in November of 2004. The court noted that a 51.6 percent appreciation in value in less than a year constituted both a “substantial change in circumstances” and “an unanticipated change given the current market trends.” The holding in this case is also of some interest because the debtor argued that since his plan had been confirmed under § 1327(b), the condominium had reverted in him at the time of confirmation and therefore the appreciation was beyond the reach of the Trustee and the bankruptcy estate. The court noted this vesting rule and stated that under § 1327(c) such vesting “is free and clear of any claim or interest of any creditor provided for by the plan.” The court addressed the differences between § 1306 and § 1327 by noting the “varying interpretations” but simply held neither statute could be used by a debtor “to shield himself from the reach of his creditors when he experiences a substantial and unanticipated change in his income.” *Slip* at 16. Since the primary purpose for filing a § 1327 plan is to avoid this result, it would make no sense for any attorney in the Fourth Circuit to file anything other than a full § 1306 plan.

Section 1329(c) as amended also raises additional issues that seem consistent with the pre-BAPCPA law on plan modifications. This section was amended to include a reference to the “applicable commitment period under § 1325(b)(1)(B).” The wording of the new section is tortuous. However, the meaning is clear—if a plan is modified under § 1329 the extended time period to pay cannot exceed five years even if the court finds good cause to so extend the plan. This limited reference to § 1325(b) in § 1329(c) certainly provides clear and convincing evidence and perhaps irrefutable evidence that Congress was fully aware of this section when it enacted BAPCPA. The fact that Congress incorporated § 1325(b) in one provision of § 1329 but not in the truly substantive sections is certainly a highly relevant fact.

This Congressional omission from § 1329 [not incorporating § 1325(b)] effectively writes the projected disposable income rules and the B22C analysis right out of the plan modification process. This also means that there is no “best efforts” test under a § 1329 motion. And, if a majority of courts follow the Fourth Circuit’s *res judicata* reason in *Murphy* then a plan modification should not be granted absent a substantial and unanticipated change of the debtor’s financial circumstances.

These exact issues were presented to the Western District of Arkansas Bankruptcy Court the Chapter 13 case of *Ernest and Robert Ireland*, 6:06-bk-70571M. The *Irelands* filed a Chapter 13 case in the Western District of Arkansas on April 4, 2006. The debtors’ third amended plan was finally confirmed by the Court on September 13, 2006. The Debtors listed on Form B22C combined annual gross income of \$66,499.04, which was above the then existing median income from Arkansas of \$38,438.00. The original Schedule I reflected combined net monthly income of \$4,559.88 after deduction for taxes, insurance and social security. Schedule I reflected that the Mr. Ireland was employed as a truck driver by Pat Salmon & Sons and that Mrs. Ireland worked as a cashier for McClard’s Restaurant in Hot Springs. Form B22C revealed that the debtors had “disposable monthly income “ of \$1,014.96 and Schedule J indicated net monthly income of approximately

\$1,650.00. The amended plan was confirmed with a payment of \$1,640.00 per month for a term of 60 months, a sum that would pay the claims of the unsecured creditors in full.

On September 20, 2006 the debtors filed amended Schedules I & J that evidenced a net monthly income reduction of \$848.00. This reduction arose out of the fact that Mrs. Ireland had lost her prior employment at no fault of her own and had secured new employment at a substantial reduction in hourly benefits. The proposed amended plan would only pay a dividend of \$6,087.41 on general unsecured claims of \$32,039.00. The debtors computed their new plan payment of \$1,000.00 based solely on the Amended Schedules I & J. The debtors' combined gross monthly income, however, still put them above the median family income for a family of two in Arkansas.

The Trustee objected to the proposed modification of the confirmed plan since the dividend to the unsecured creditors would be decreased from 100% to 19%. The Trustee argued that the debtors should be bound by the calculations on Form B22C as a minimum payment to the unsecured creditors regardless of unanticipated changes in the actual income of the debtors. The debtors, on the other hand, argued that 1325(b) had no application to an amendment under § 1329 and in this situation the court need only look at calculated projected disposable income with reference to Amended Schedules I & J.

In reviewing these arguments, the Court noted that "Section 1329 of the Bankruptcy Code governs modification of any Chapter 13 plan after confirmation and is instructive on the issue before the Court." Slip at 6. After reviewing the language of the Section, the Court stated that "clearly, the statute allows a debtor to modify a confirmed plan to increase or reduce payments on claims of a particular class provided for by the plan. Further, the statute expressly designates those specific Code sections to be complied with in a modified plan. These include Sections 1322(a), 1322(b), 1323(c) and 1325(a) as well as the requirement of Section 1325(b)(1)(B) regarding the appropriate commitment period." The Court then observed that "except for the reference to health insurance and the applicable commitment period, Section 1329 does not expressly designate compliance with any part of 1325(b) in a post-confirmation modification." Slip at 7.

The *Ireland* Court then noted that "Subsection 1325(b)(2) and (b)(3), which provide for how a debtor's plan payments must be computed pursuant to Form B22C and the means test, have not been expressly made applicable to plan modifications under Section 1329." Slip at 8.

The Court then quoted the following from *8 Collier on Bankruptcy Section 1329.03* (Alan N. Resnick & Henry J. Sommer, eds, 15th ed. Rev. 2006):

"[B]ecause 1325(b) is not mentioned in section 1329 except for other discrete purposes, it does not appear that section 1325(b) is directly applicable to modification under section 1329. The inapplicability of section 1325(b) to modification was clarified by several changes made in the 2005 legislation [BAPCPA]. First, section 1325(b) was amended to provide that the debtor's ability to pay is determined under that section based upon the debtor's "current monthly income." "Current monthly income" is a term added by the 2005 legislation to the definitions in section 101 and, except in certain limited circumstances, it is based on a calculation involving the debtor's income over the six months preceding the bankruptcy petition. Thus, the debtor's "current monthly income" is normally fixed at the time of the petition and does not change over the course of the case, regardless of any fluctuation of the debtor's actual income during that time. *It would be nonsensical to apply*

section 1325(b) to modifications and thereby require the use of [an] income figure that may differ greatly from the debtor's income at the time of the modification.

Second, the 2005 amendments added two new references to section 1325(b) to section 1329, and both were added for very limited purposes. As discussed below, the only references to section 1325(b) that were added to section 1329, in a bill that substantially amended section 1325(b), concern the purchase of health insurance by the debtor and the maximum time period over which a modified plan can extend. Thus, having had the opportunity to provide that section 1325(b) applies in all respects to modifications, Congress chose not to do so."

In *Ireland*, since the Trustee did not challenge the genuineness of the Debtors' alleged change in circumstances, the Court held that it "was not inclined to adopt a tortured view of this statute in order to reach an absurd result." The Court went on to state that "there is no indication that with the enactment of BAPCPA, Congress intended to repeal, by implication, the provisions of 11 USC 1329 that give the Bankruptcy Court flexibility to deal with changed circumstances after a plan has been confirmed. Therefore, the only method left to determine disposable income/projected disposable income in a modified plan filed pursuant to 11 USC 1329 is to compare Schedules I and J." Slip at 11-12 (Full copy attached).

In the District of Nevada Chapter 13 Bankruptcy case of Donald and Susan Ewers, BK-S-06-10179-LBR, at issue was the question of whether debtors who have a 5-year applicable commitment period can modify their plan to 3 years without paying unsecured creditors in full. The Court held that "they can, so long as the requirements of 11 USC § 1329(b) are satisfied, which includes the requirement of good faith." A copy of the Court's Order on Trustee's Motion to Deny Confirmation is attached hereto and fully incorporated herein by this reference.

In re Ireland is fully consistent with the well established law in the Fourth Circuit as established by *Murphy* and *Arnold*. And, as the United States Supreme Court stated in *Hartford Underwriters Ins. Co. v Union Planters Bank*, 530 U.S. 1, 6 (2000), "bankruptcy courts must enforce statutes when the language is plain and the disposition is not absurd." The United States Supreme Court has therefore made it clear that a disposition under a particular statute should not lead to an absurd result. If this Court held that 1325(b) applied to a 1329 modification, then a debtor would never be able to amend the monthly payments in a plan since the 1325(b) test is based on the average income for the 6 month period before the filing of the case, not including the month of filing. Such a result is not and cannot be the law. The debtor in this case respectfully moves this court to adopt the same reasoning and logic and enter an order consistent with well-settled law in the Fourth Circuit and with *Ireland* and *Ewers*.

Dated this the 11th Day of February, 2008.



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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**MOTION FOR APPROVAL OF
DISBURSEMENT FROM 401(K) PLAN**

COMES NOW the above-named debtors, by and through their attorney of record, and respectfully moves the Court pursuant to Section 363 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order approving disbursement from the debtor's 401(k) Plans for the funds to be paid to the debtors, and in support hereof alleges and says that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.
2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.
3. The Chapter 13 plan was confirmed by order of this Court on _____.
4. The plan presently provides for a monthly payment of \$350.00.
5. The debtors listed in Schedule B of their petition, their ESOP 401(k) Plan, which has a balance of approximately \$9,682.00 for him and \$18,247.00 for her, totaling approximately \$27,929.00.
6. The debtors want to withdraw \$7,000.00 from their 401(k)'s. They want to use this money to pay for repairs to their roof, which are not covered by insurance.
7. The debtors aver that they are unable to pay for the damages to their roof, and must apply for the necessary funds to be withdrawn from the 401(k) Plans, which will cause them to incur penalties and tax liabilities on the funds withdrawn.
8. The debtors are therefore moving the court for approval of a hardship withdrawal from the 401(k) Plans in an amount sufficient to pay for the repairs to their roof, with the tax liability to be paid through their Chapter 13 plan, and for the funds to be disbursed to the debtors to use the funds to pay for the roof repairs

9. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion for approval of a hardship disbursement from their 401(k) plans in an amount necessary to pay for the roof repairs be granted as provided for in the body of this motion;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$82.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtors into the Plan; and

C. That the debtors have such other and further relief as to the Court may seem just and proper.

Dated this the _____ day of _____, 2008.



O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

MOTION TO MODIFY CHAPTER 13 PLAN TO PAYMENTS MADE

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order modifying the plan and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. The plan presently provides for a monthly payment of \$510.00.

5. As of the filing of this motion, the records of the Trustee in this case reveal that the debtors have paid in \$23,715.00 toward a base amount of \$29,070.00, which constitutes 82% of their plan payments. To date, the debtors have paid 100% of all secured claims, 100% of all administrative claims and 100% of all claims for legal fees and related expenses. There were no priority claims. The plan provided for 19% payback to unsecured creditors with filed an allowed claims totaling \$75,063.14. To date the Trustee has disbursed approximately 17.9% to unsecured creditors.

6. The debtors in this case have exercised their best efforts to make their plan payments to the Trustee but are not in a financial position to pay the balance needed to complete this plan before the end of the plan term (i.e., the 60th month). The debtors aver that their plan has otherwise complied by the applicable provisions of Chapter 13 of Title 11 of the United States Code since the same has been pending before this court for approximately 59 months and the estimated amount to complete the plan is approximately \$5,355.00. The debtors simply do not have the financial means to make this payment within the next month.

7. The debtors are informed and believe and therefore allege that the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than, but in fact is more than, the amount that

would have been paid on such claim if the estate of the debtors had been liquidated under Chapter 7 of the Bankruptcy Code on such date.

8. Although the debtors have not yet completed their specified plan payments, they are nonetheless entitled to a discharge under the provisions of Section 1328(b) of the Code in that the failure to complete such payments is due to circumstances for which the debtors should not justly be held accountable.

9. The debtors are informed and believe and therefore allege that modification of this plan under Section 1329 of the Code by reducing the plan payments is not practicable.

10. The debtors are therefore moving the court to modify their plan to the payments that will have been made as of the end of the 60 month term of this plan and to proceed with the entry of a final discharge order at that time.

11. The debtors are also moving the Court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion to modify plan be granted as provided for in the body of this motion;

B. That the plan be terminated as to the payments made as of the 60th month and to proceed with the entry of a final discharge order at that time;

C. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$148.00, for filing this motion, said fee and expenses to be paid directly by the debtors; and

D. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2008.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

MOTION FOR HARDSHIP DISCHARGE

COMES NOW the debtor, by and through her counsel, hereby applies for a hardship discharge pursuant to 11 U.S.C. § 1328(b). In support of this application she avers that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court entered on _____.

4. Since that date the debtor has made regular monthly payments to the Chapter 13 Trustee in the full amounts provided for by the plan and all secured claims have been paid in full by disbursements made by the Chapter 13 Trustee under the plan.

5. The value, as of the effective date of the plan, of the amounts distributed to the unsecured creditors under the plan has not been less than the amounts which those creditors would have been paid on their claims had the estate of the debtor been liquidated under Chapter 7 on that date. In fact the timely filed and allowed unsecured creditors have received the sum of \$338.55 from disbursements made by the Chapter 13 Trustee under the confirmed plan.

5. The debtor has become permanently disabled and her only source of income now is the sum of \$902.00 per month in Social Security Disability benefits. A copy of the amended Schedules I and J reflecting the debtor's current income and expenditures is being filed contemporaneously herewith.

6. No modification of the plan is practicable because the debtor's present income is barely sufficient to pay daily living expenses and is not sufficient to continue to make payments under the plan.

7. The debtor is therefore moving this Court for approval of a hardship discharge pursuant to 11 U.S.C. § 1328(B).

8. The debtor is also moving the Court for such other and additional relief as to the Court may seem just and proper.

WHEREFORE, the debtor respectfully prays of the Court as follows:

A. That the debtor's motion for approval of a hardship discharge pursuant to 11 U.S.C. § 1328(b) be granted as provided for in the body of this motion;

B. That the attorney for the debtor be granted an additional non-base legal fee of \$475.00, said fee to be paid directly by the debtor; and

C. That the debtor have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2009.

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A. No Protest
New Credit

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: Chapter 13 No.
Our File No.

ADDRESS:

SSN:

Debtors.

**MOTION FOR APPROVAL OF NEW MORTGAGE LOAN
AND CREDIT AUTHORIZATION FOR THE PURCHASE OF A RESIDENCE**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 363 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order allowing the debtors to secure a new mortgage loan and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.
2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.
3. The Chapter 13 plan was subsequently confirmed by order of this Court.
4. The plan presently provides for a monthly payment of \$726.00, however the debtors made a lump sum payment to the Trustee on or about February 23, 2004 to complete their plan. The debtors aver that the Trustee's records indicate the debtors are "about to complete" their plan and that the Trustee's Motion for Discharge and Final Audit is pending.
5. The debtors have entered into a proposed loan contract for the purchase of a single family residence. The proposed loan commitment is from Myers Park Mortgage in the principal amount of \$234,037.00. The said loan commitment will be for a term of 360 months, with a fixed interest rate of 6.5% and a total monthly payment including principal and interest and escrow of approximately \$1,673.27.
6. The debtors aver that they have reasonable need for this purchase and that they can afford to make the required monthly payments to fund this new loan.
7. In the alternative, in the event the debtors are not able to secure refinancing from the specific lender identified herein then the debtors are requesting the court to approve this motion for new mortgage loan by any party on the same general terms and conditions as provided for herein.

8. The debtors are therefore moving the court for approval of this credit transaction.

9. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion for credit authorization be granted and approved;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$110.00, said fee and expenses to be paid directly by the debtors from the loan proceeds at the closing.

C. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2008.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

**MOTION FOR APPROVAL OF NEW MORTGAGE LOAN
AND CREDIT AUTHORIZATION FOR A REFINANCE OF DEBTORS' MORTGAGE LOAN**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 363 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order allowing the debtors to secure a new mortgage loan and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. The plan presently provides for a monthly payment of \$490.00.

5. The debtors have secured a new mortgage loan commitment from Sound Mortgage Group in the sum of \$76,000.00 to refinance their residential real property. The said loan will be for a term of 360 months with a fixed interest rate of approximately 7.8% and a total monthly payment of approximately \$547.10.

6. The debtors aver that the mortgage loan proceeds shall be used for closing costs, to payoff their mortgage loan to Countrywide Home Loans ("Countrywide"). This loan will not payoff the pending Chapter 13 Case.

7. The debtors aver that they have reasonable need for this refinance and that they can afford to make the required monthly payments to fund this new loan, as they are currently paying approximately \$593.87 per month to Countrywide and the new loan will decrease their monthly financial obligations.

8. The debtors are therefore moving the court for approval of this credit transaction.

9. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion for credit authorization as set forth herein be granted and approved;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$122.00, said fee and expenses to be paid by the Trustee from funds paid by the debtors into the plan; and

C. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2008.

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**CHAPTER 13 – WESTERN DISTRICT OF NORTH CAROLINA
REFINANCING INFORMATION**

DEBTOR NAME(S): _____ BK. NO.: _____

MORTGAGE BROKER Name, Address & Telephone: _____

<u>Current Mortgagee(s)</u>	<u>Current Monthly Payment w/T&I</u>	<u>Fixed/ ARM</u>	<u>Current Interest Rate</u>
_____	\$ _____	_____	_____ %
_____	\$ _____	_____	_____ %
_____	\$ _____	_____	_____ %

<u>Proposed New Lender</u>	<u>Approximate Proposed Total New Loan Amount</u>	<u>Fixed</u>	<u>Interest Rate</u>
_____	\$ _____	_____	_____ %

State the proposed new monthly payment: \$ _____

Does it include taxes [YES/NO] and insurance [YES/NO]

Per Federal Truth In Lending Disclosure Statement, what is the total cost of the new loan \$ _____

State the approximate dollar amounts from the proceeds of the new loan that will be paid to the following:

Existing mortgages	\$ _____	All other fees and costs	\$ _____
Real estate taxes	\$ _____	Estimated payoff of Chapter 13	\$ _____
Other debts	\$ _____	Cash to debtor(s)	\$ _____
Legal fees	\$ _____	Mortgage broker	\$ _____
Points	\$ _____		

TOTAL NEW LOAN AMOUNT \$ _____

SIGNED:

DEBTOR

DEBTOR

Date: _____

Date: _____

Please sign and return to Chapter 13 Trustee, P.O. Box 1778, Statesville, NC 28678-1778. On an additional page, or on the back of this form, explain how refinancing is a benefit to you (without this information, the Trustee will not process this request). You must also attach a copy of the Good Faith Estimate.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

Debtors.

**MOTION FOR APPROVAL OF NEW MORTGAGE LOAN
AND CREDIT AUTHORIZATION FOR REFINANCE AND TO PAYOFF THE PLAN**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 363 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order allowing the debtors to secure a new mortgage loan and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held on in Shelby, North Carolina, on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court dated _____.

4. The plan presently provides for a monthly payment of \$900.00.

5. The debtors have secured a new mortgage loan commitment from Hillbrook Mortgage, Inc. in the sum of \$105,200.00 to refinance their residential real property. The said loan will be for a term of 360 months with a fixed interest rate of approximately 7.75% and a total monthly payment of approximately \$682.02.

6. The debtors aver that the mortgage loan proceeds shall be used for closing costs, to payoff their mortgage loan to First Charter Bank, and to payoff the balance owed on their Chapter 13 plan.

7. The debtors aver that they have reasonable need for this refinance and that they can afford to make the required monthly payments to fund this new loan, as they are currently paying approximately \$637.00 to First Charter Bank and \$900.00 to the bankruptcy court and the new loan will decrease their monthly financial obligations by approximately \$854.98.

8. The debtors are therefore moving the court for approval of this credit transaction.

9. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion for credit authorization as set forth herein be granted and approved;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$120.00, said fee and expenses to be paid from the loan proceeds at the closing; and

C. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2008.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME(S):

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

Debtors.

**MOTION FOR APPROVAL OF CREDIT AUTHORIZATION
FOR THE PURCHASE OF A MOTOR VEHICLE**

COMES NOW the above-named debtors, by and through their attorney of record, and respectfully moves the Court pursuant to Section 363 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules to approve a new credit authorization and in support hereof alleges and says that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan has not yet been confirmed.

4. The debtors have negotiated a lease from DeVoe Cadillac for a 2006 Cadillac CTS. The debtors will pay a down-payment of \$1250.00, and they will pay 48 monthly payments of \$531.49.

5. The debtors believe that they can afford to pay their car payments without modifying their Chapter 13 plan as the old lease that has now ended was consistent with the new payment and the debtors were able to make all prior payments and fund the plan.

6. The debtors are therefore moving the court for approval of the credit authorization identified in paragraph four.

7. In the alternative, in the event the debtors are not able to secure financing on the specific vehicle identified in this motion or financing from the specific lender identified herein then the debtors are requesting the court to approve this motion for new credit for any vehicle financed by any party on the same general terms and conditions as provided for herein.

8. The debtors are informed and believe and therefore allege that they will be able to continue to make their plan payments after this motion has been approved by the court.

9. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion for approval of the new credit authorization be granted as provided for in the body of this motion;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$350.00 and expenses of \$88.00, said fee and expenses to be paid by the Trustee out of the funds paid by the debtors into the Plan; and

C. That the debtors have such other and further relief as to the Court may seem just and proper.

Dated this the _____ day of _____, 2008.

O. Max Gardner III
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A. No Protest Sale of Ppty

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

MOTION FOR APPROVAL OF SALE OF PERSONAL PROPERTY

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 363 and 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order allowing the debtors to sell personal property and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held on in Shelby, North Carolina, on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court dated _____.

4. The plan presently provides for a monthly payment of \$1,210.00.

5. In the petition and schedules filed in this case, the debtors listed a 1998 Coachmen 1260 Pop Up Camper secured by a lien in favor of Equity One, Inc. The claim of Equity One, Inc. is identified on the records of the Trustee as claim number 0022 in the remaining principal balance of \$3160.82 and claim number 0124 for arrears in the amount of \$400.05.

6. The debtors have received an offer to purchase their 1998 Coachmen 1260 Pop Up Camper for the sum of \$3000.00.

7. The debtors hereby move this Court for approval of the sale with the proceeds to be used to pay Equity One, Inc. and for the Court to allow the debtors to pay the remaining balance of approximately \$560.87 themselves in order to receive a clear title to the camper.

8. The debtors have reasonable need for this sale.

9. The debtors are therefore moving the court for approval of this sale with the proceeds from the buyer and the additional necessary funds in the approximate amount of

\$560.87 from the debtors to be paid to the secured creditor identified herein to satisfy the subject debt in full and to receive a clear title.

10. The debtors are also moving the Court for such other and additional relief as to the Court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the motion for approval of the sale of the personal property of the debtors as set forth herein be granted and approved;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$450.00 and expenses of \$242.00, said fees and expenses to be paid by the Trustee from funds paid by the debtors into the plan.

C. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2008.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

MOTION FOR AUTHORITY TO SELL REAL PROPERTY

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Sections 363 and 1329 of Title 11 of the United States Code, Rules 4001(c) and 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order allowing the debtors to sell real property and in support hereof allege and say that:

1. This case was commenced by the filing of a voluntary petition with the Clerk of this Court on _____.

2. The 341(a) meeting of creditors will be held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. The debtors have received an offer to purchase their residential real estate located at _____, as recorded at Book _____, Page _____ of the Cleveland County Registry. The debtors aver that HomEq Servicing Corporation is the servicer of the Deed of Trust on this property. The said offer was made by _____ for the said real estate and is for the sum of \$123,500.00.

5. The debtors hereby move this Court for approval of the sale with all remaining net sales proceeds after allowable closing costs, and payment in full to HomEq Servicing Corporation, subject to the debtors' reservation of rights, to be paid to the Chapter 13 Trustee to fund the plan of the debtors.

6. The debtors have reasonable need for this sale.

7. The debtors are therefore moving the court for approval of this purchase offer and contract.

8. The debtors aver that the Offer to Purchase contract is subject to the approval of the United States Bankruptcy Court for the Western District of North Carolina upon proper notice to all parties and a court hearing. If this contract is approved by the court, then any breach of contract by the buyers will subject them to recovery of actual damages, punitive damages, costs and legal fees to be determined by the United States Bankruptcy Court,

which the parties consent will have exclusive jurisdiction to resolve any matter or thing related to this contract.

9. The debtors are also moving the court to recognize that the debtors are paying the amount allegedly owed to the mortgage servicer under protest and with a full reservation of rights.

10. The debtors are also moving the Court for such other and additional relief as to the Court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the motion for approval of the sale of the real property of the debtors as set forth herein be granted and approved;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$450.00 and expenses of \$212.00, said fees and expenses to be paid from the sales proceeds at the time of the closing.

C. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2008.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

MOTION FOR AUTHORITY TO SELL COMMERCIAL PROPERTY

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Sections 363 and 1329 of Title 11 of the United States Code, Rules 4001(c) and 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order allowing the debtors to sell commercial property and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held on in Shelby, North Carolina, on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. On _____, the Court approved in open court the sale of the debtors' commercial property located at _____, Cleveland County, NC to _____ for the sum of \$210,000.00. The lien holder FH Partners, LP agreed to the sale, even though the purchase price was less than the balance due pursuant to the Note and Deed of Trust.

5. _____ failed to close the sale with the debtors.

6. The debtors, however, have received a second offer to purchase from _____ for the sum of \$210,000.00. The Offer to Purchase Contract provides for a closing date of _____.

7. The debtors hereby move this Court for approval of the sale with all remaining net sales proceeds after applicable closing costs, payment of all outstanding ad valorem taxes, and real estate commissions to be paid to FH Partners, LP in satisfaction of the debt, so long as the net amount paid to FH Partners, LP is no less than \$185,000.00.

8. The debtors aver that they have reasonable need for this sale.

9. The debtors are therefore moving the court for approval of this purchase offer

and contract.

10. The debtors aver that the Offer to Purchase contract is subject to the approval of the United States Bankruptcy Court for the Western District of North Carolina upon proper notice to all parties and a court hearing. If this contract is approved by the court, then any breach of contract by the buyers will subject them to recovery of actual damages, punitive damages, costs and legal fees to be determined by the United States Bankruptcy Court, which the parties consent will have exclusive jurisdiction to resolve any matter or thing related to this contract.

11. The debtors are also moving the Court for such other and additional relief as to the Court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the motion for approval of the sale of the real property of the debtors as set forth herein be granted and approved;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$450.00 and expenses of \$216.00, said fees and expenses to be paid from the sales proceeds at the time of the closing.

C. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2008.

O. Max Gardner III
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Attorney for the Debtors
N.C. State Bar #6164
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(704) 487-0616
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maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

MOTION TO APPROVE THE SALE OF DEBTOR'S VEHICLE NUNC PRO TUNC

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 105 of Title 11 of the United States Code, Rules for the entry of an order approving the sale of the Debtor's vehicle *Nunc Pro Tunc* and in support hereof allege and say that:

1. At the time of filing the within case, the Debtor was the owner of a 2003 Honda Accord (the "Car"). The Car was listed on Debtor's Schedule B, and the lien on the vehicle was listed on Schedule D.

2. On _____, Debtor entered into a Vehicle Purchase Agreement with Carmax for to sell the Car for a gross purchase price of \$15,000.00, of which \$11,357.75 was estimated as the total payoff to Honda Finance Exchange. Debtor received a bank draft from Carmax in the amount of \$3,642.25. This sum was deposited by Debtor into his bank account, and a treasurer's check in this amount is on its way to Counsel to be deposited into his attorney escrow account.

3. Debtor's intention was to use this sum to purchase a replacement vehicle.¹

4. At the time of this transaction, Debtor did not recall his lawyer's advice to him that he must get approval from the United States Bankruptcy Court before he can sell or buy property. He subsequently became concerned that he did something improper, and immediately contacted his attorney.

5. Although the approval of the sale is requested *nunc pro tunc*, no prejudice has occurred, since the full net proceeds were retained and will shortly be held in Counsel's attorney escrow account. This also has a benefit in ensuring that the proceeds are properly utilized for the purchase of a replacement vehicle, since Counsel will require documentation of the new purchase before releasing the funds.

6. Debtor is current in his Chapter 13 Plan payments.

¹ The net funds should be sufficient to allow Debtor to purchase such a vehicle without requiring financing. Of course, should the Debtor wish to finance the purchase of a replacement vehicle, appropriate Court approval will be sought before purchase.

Wherefore, Debtor prays that this Court:

- A. Approve the sale of the Debtor's 2003 Honda Accord to Carmax, *nunc pro tunc* to _____ (date); and
- B. Authorize Debtor to expend the net proceeds of the sale, \$4,642.25, towards the purchase of a replacement vehicle; and
- C. To award the attorney for the Debtor a non base fee of \$350.00 and expenses of \$180.00 to be paid through the Chapter 13 Plan.
- D. Order such other and further relief as the Court may deem appropriate.

This the _____ day of _____, 2008.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 No.
OUR FILE No.**

ADDRESS:

SSN:

Debtors.

MOTION FOR APPROVAL OF SHORT SALE OF REAL PROPERTY

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 363 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order allowing the debtors to sell real property and in support hereof alleges and says that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.
2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.
3. The Chapter 13 plan was subsequently confirmed by order of this Court on _____.
4. The plan presently provides for a monthly payment of \$955.00.
5. The debtors have received an offer to purchase their residential real estate located at _____ in Mooresboro, North Carolina, as more particularly described in that instrument recorded at plat _____ map _____ in Book _____ Page _____ of the Cleveland County Registry. The said offer was made by _____ for the said real estate and is for the sum of \$60,000.00.
6. The debtors aver that their residential real estate is encumbered by a first mortgage to HomeEq Servicing Corporation in the amount of \$106,240.00.
7. The plan filed by the debtors states that they will be surrendering their residential real estate and moving into rental property.
8. The debtors hereby move this Court for approval of the short sale.
9. The debtors aver that they have reasonable need for this sale.
10. The debtors are therefore moving the Court for approval of this purchase offer and contract.

11. The debtors aver that the Offer to Purchase contract is subject to the approval of the United States Bankruptcy Court for the Western District of North Carolina upon proper notice to all parties and a court hearing. If this contract is approved by the court, then any breach of contract by the buyer will subject them to recovery of actual damages, punitive damages, costs and legal fees to be determined by the United States Bankruptcy Court, which the parties consent will have exclusive jurisdiction to resolve any matter or thing related to this contract.

12. The debtors are also moving the Court for such other and additional relief as to the Court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the motion for approval of the short sale of the real property of the debtors as set forth herein be granted and approved;

B. That the attorney for the debtors be granted an additional non-base legal fee of \$450.00 and expenses of \$140.00, said fees and expenses to be paid by the Trustee from funds paid by the debtors into the plan.

C. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____.

O. Max Gardner, III
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A. No Protest Servicemembers Act

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: **CHAPTER 13 CASE NO.**
OUR FILE NO.

ADDRESS:

SSN:

DEBTORS.

MOTION TO APPLY SERVICEMEMBERS CIVIL RELIEF ACT

NOW COME the above-name Debtors, by and through counsel, and respectfully represent:

1. The Debtors filed a voluntary petition under Chapter 13 on July 22, 2008 and their plan is awaiting confirmation.
2. On the 22nd day of March, 2008, the male debtor, a member of the National Guard, was called to active military duty in an active war zone by Order of the Secretary of Defense of the United States. A copy of the military order calling him to service is attached hereto. Specifically, the male debtor is scheduled to be deployed to Iraq on or about August 28, 2008.
3. The Debtors are entitled to the protections of the Servicemembers Civil Relief Act (SCRA) 50 U.S.C.app. §§ 501-596.
4. The SCRA applies to all members of the uniform service. To be entitled to Act's protections, the servicemember must be in "military service" defined as active duty. 50 U.S.C. § 511(2)(i), cross-referencing 10 U.S.C. 101(d)(1). National Guard members called to active service by the President or Secretary of Defense for more than thirty consecutive days and supported by federal funds are considered to be on active duty and entitled to the Act's protections. 50 U.S.C. § 511(2)(A)(ii), See Pub. L. 107-330 & 305, 116 Stat. 2821 (Dec. 6, 2002). Thus, the male debtor and his spouse are entitled to the Act's protections.
5. Not only persons in military service, but also their dependents and co-obligors are entitled to many of the protections of the SCRA. When the servicemember and his or her spouse are jointly liable on an obligation, the Act explicitly requires the interest rate be reduced for both of them. 50 U.S.C.app. § 527(a)(I). Thus, the female debtor is also entitled to the Act's protections requested herein.
6. The Act requires that creditors reduce the interest rate to 6% on any obligation incurred by the servicemember before active duty. 50 U.S.C.app § 527. All of the obligations dealt with herein were incurred by the debtors before the male debtor's active duty. The interest rate reduction lasts as long as the servicemember is on active duty. 50 U.S.C.app. §§ (a)(1), 511. The interest rate reduction applies to any "obligation or liability" so it applies to all types of debt including car loans, mortgages, and business debts. See Moll v. Ford Consumer Finance Co. 1998 U.S.

Distr. LEXIS 3638 (ND Ill. Mar. 23, 1998). The rate reduction applies to interest paid on obligations under a confirmed Chapter 13 plan. In re Watson, 292 B.R.441 (Bankr.S.D. Ga. 2003).

With amendments in 2003, Congress codified case law that the interest must be forgiven, not just deferred. 50 U.S.C.app. § 527(a)(2). Congress also added an explicit requirement that the periodic payment due from the servicemember be reduced by the amount of the forgiven interest, thus foreclosing creditors from requiring the same payment amount but just applying a greater portion of the payment to principal. 50 U.S.C.app. § 527(a)(3). The intent of the Act is to require lenders to re-amortize the loan using a 6% interest rate, so that the monthly payment is consistent from month to month. The interest rate reduction is self-executing and is effective, retroactive to the date the servicemember was called to military service. 50 U.S.C.app. § 527(b)(2).

7. The Debtors' first mortgage upon their residence is held by Citifinancial which has filed a Proof of Claim alleging a principal balance due of \$135,218.81 and an arrearage of \$14,789.03. Concurrently herewith, the Debtors have objected to the principal balance and arrearage claim of Citifinancial. In their petition, the Debtors stated the amount due to Citifinancial to be a principal balance of \$132,802.53 and an arrears of \$5,800.00. Once the amounts due to Citifinancial are determined, the interest rate to be applied to the debtors' direct payments outside the plan upon the principal balance and to the payments upon the arrearage claim through the plan should be 6%. The Debtors' monthly direct payments upon the principal balance should be reduced to reflect the reduction from the contract rate of 11.5% to 6%.
8. Citifinancial also holds a second mortgage lien upon the Debtors' residence in the sum of \$9,858.85. Concurrently herewith the Debtors are filing an adversary proceeding attempting to lien strip this second mortgage.
9. Condor Capital Corporation has a secured claim in the sum of \$14,940.00 secured by a vehicle. Pursuant to the SCRA that claim should be paid through the plan at the 6% rate.
10. The Cleveland County Tax Collector has filed a secured claim of \$1,245.27 which, pursuant to the SCRA should be paid through the plan at the 6% rate.

WHEREFORE the Debtors respectfully pray that the claims set forth above be adjusted pursuant to the SCRA retroactive to the date the male debtor commenced active duty; and for such other relief as the Court determines just and proper, including attorneys' fees of \$_____ and expenses of \$_____ for the filing of this motion.

This the _____ day of _____, 2008.

O. Max Gardner III
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A. No Protest
Social Security Nos.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

Debtor(s)

**MOTION FOR EX PARTE RELIEF UNDER BANKRUPTCY RULE 9037
TO RESTRICT PUBLIC ACCESS**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move this Court for an Order for relief under Bankruptcy Rule 9037(a) and in support hereof respectfully show unto the Court the following:

1. This case was commenced by the filing of a voluntary Chapter 13 petition with the Clerk of this Court on _____.
2. The venue of this case was and is in the Shelby Division.
3. In the schedules filed in this case _____ is listed as a creditor holding an unsecured claim.
4. _____ filed a Proof of Claim in this bankruptcy case on _____. This claim is identified by the records of the Trustee as claim number _____ (hereinafter "Proof of Claim"). The aforesaid Proof of Claim included the full Social Security number(s) and/or loan account number for the debtor(s).
5. The inclusion of the full said number(s) is in violation of Federal and State Identity Protection laws and of the common law privacy protection laws and furthermore is a direct violation of Rule 9037 of the Bankruptcy Rules and of the Local Rule 9037-1 of this Court.

WHEREFORE, the debtors respectfully pray of this Court that:

- A. The Clerk of Court immediately disable public access to this record and
- b. That the debtors have such other and further relief as to the Court may seem just and proper.

Dated this the _____ day of _____, 2009.



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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

Debtor(s)

**APPLICATION FOR AN ORDER DIRECTING CORRECTION
OF SOCIAL SECURITY NUMBER(S)**
(or other Individual Taxpayer Identification Number(s) (ITIN(s)))

To the Hon. _____, Bankruptcy Judge:

O. Max Gardner III, attorney for the above-named Debtor(s), applies to the Court for an order directing that the official record in this case be modified to reflect the correct Social Security Number or other ITIN of the Debtor (*and/or* Joint Debtor, if applicable). The attorney states the following in support of its application:

1. This case was commenced by the filing of a petition under Chapter 13 of the Code on _____.

2. Due to the below-noted filing omission or clerical error, the correct Social Security Number or other ITIN of the Debtor (*and/or* Joint Debtor, if applicable) was not provided to the Court:

☐

Official Form 21, Statement of Social Security Number or other ITIN, was not submitted at the time of filing of the petition.

☐

The Social Security Number or other ITIN of the Debtor (*and/or* Joint Debtor, if applicable) was incorrectly stated on the Official Form 21, Statement of Social Security Number or other ITIN, which accompanied the petition.

☐

The Social Security Number or other ITIN of the Debtor (*and/or* Joint Debtor, if applicable) was incorrectly entered into the Court record by the Attorney for the Debtor(s) at the time of filing of the petition over the Internet.

3. A Statement of Social Security Number or other ITIN (*or* an Amended Statement of Social Security Number or other ITIN) is being filed herewith, correctly stating the Social Security Number(s) or other ITIN(s) of the Debtor(s).

WHEREFORE, attorney for the Debtor(s) prays for an order directing correction of the Social Security Number(s) or other ITIN(s) of the Debtor(s), and for such further relief as the Court deems just.

Dated this the _____ day of _____, 2009.

O. Max Gardner III
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B. Motions

Amend Complaint

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

IN THE MATTER OF:

NAME(S):

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR(S)

**Male Debtor, and wife,
Female Debtor**

Adv. Proc. No.

Plaintiffs,

versus

CENTEX HOME EQUITY COMPANY, LLC

Defendant.

Motion to Amend Complaint

Come Now the Plaintiffs, by and through their attorney of record, and respectfully move this Court pursuant to Rule 7015 of the Rules of Bankruptcy Procedure and Federal Rule of Civil Procedure 15(a) to amend their Complaint filed in this Case. In support of the requested relief, the Plaintiffs submit the following.

1. This case was commenced by the filing of a Complaint on _____.
2. Since the filing of this Complaint new allegations have arisen between the two parties that are related to and substantially similar to those stated in the original Complaint.
3. Instead of filing a separate Complaint stating these new allegations, the Plaintiffs seek to amend the Complaint in this case in the interests of judicial economy.
4. Federal Rule of Civil Procedure 15(a) allows a party to amend their Complaint after seeking leave from Court. This Rule further states "...leave shall be freely given when justice so requires".
5. The Amended Complaint is attached to this motion.

WHEREAS, the Plaintiffs respectfully request the Court to:

- A. Grant the Plaintiffs' request to Amend the Complaint;
- B. Grant any other relief the Court deems just and proper;

Dated this the 1st day of _____, 2008.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a stylized flourish at the end.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Plaintiffs
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B. Motions To Consolidate

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR.

**DEBTOR'S MOTION TO CONSOLIDATE
AND FOR JOINT ADMINISTRATION
OF CASES PURSUANT TO RULE 1015**

COMES NOW the above-named debtor, by and through his attorney of record, O. Max Gardner, III, and respectfully prays of this Court that his case be consolidated and jointly administered with the pending Chapter 13 bankruptcy case of his wife, _____, and in support hereof respectfully shows unto the Court the following:

1. This case was commenced by the filing of a petition with the Clerk of this Court on _____.
2. The 341(a) meeting of creditors was held in Shelby, North Carolina, on _____.
3. The plan was subsequently confirmed by this Court and the venue of this case was and is in the Shelby Division.
4. The debtor's spouse, _____, filed a Chapter 13 bankruptcy case bearing the case number _____ on _____. The case was subsequently confirmed by this Court on _____.
5. The debtor and his wife jointly owe the majority of the debts listed in each of their respective bankruptcies and have found it unduly burdensome to maintain their separate Chapter 13 plan payments. Further the debtors believe that it is in the best interests of all parties for the two pending cases to be consolidated and jointly administered pursuant to Federal Bankruptcy Rule 1015 in order to afford the debtors the best opportunity for a successful reorganization, to best protect the rights of all parties and to avoid unnecessary costs and delays in the administration of the two bankruptcy proceedings.
6. The debtor is also moving the Court for such other and additional relief as to the Court may seem just and proper.

WHEREFORE, the debtor prays of the Court as follows:

- A. That the Chapter 13 bankruptcy cases of _____ and _____ be consolidated and jointly administered pursuant to Federal Rule

1015;

B. That the attorney for the debtor be granted a non-base fee of \$400.00 to be paid directly by the debtor; and

C. That the debtor have such other and further relief as this Court may deem just and proper.

Dated this the _____ day of _____ 2010.

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B. Motions

Convert Obj POC to AP

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

Debtors.

**MOTION TO CONVERT
OBJECTION TO PROOF OF CLAIM OF CITIBANK USA, N.A.
TO AN ADVERSARY PROCEEDING**

COME NOW the above-named debtors, by and through their attorney of record, O. Max Gardner, III, pursuant to Rules 3007 and Rule 7001 of the Federal Rules of Bankruptcy Procedure and hereby move this Court to convert their Objection to Proof of Claim of Citibank USA, N.A. ("Citibank") to an adversary proceeding and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was confirmed by order of this Court on _____ and the venue of this case was and is in the Shelby Division.

4. The schedules in this case included a debt to Sears, Roebuck and Co. and/or Sears National Bank ("Sears") in the sum of \$1016.00. This debt related to credit card purchases in the name of the male debtor on account number _____.

5. Citibank, as the alleged issuer, service provider or purchaser of the account from Sears filed a purported proof of claim against _____ with the Trustee in the amount of \$1,123.65 for "money loaned" (designated as neither secured nor unsecured) bearing account number _____.

6. The debtor filed an objection to the said claim on or about _____.

7. On or about _____ the Law Offices of the debtor's counsel received a telephone call from an individual "Sarah" who identified herself as a Bankruptcy Credit Associate employed by the Citibank Bankruptcy Unit. Her telephone number was 800-669-4459 at Bankruptcy Department extension 7 at desk extension 10255. She left a voice mail message that she was calling about the objections that this office had filed to a number of Citibank/Sears proofs of claim.

8. During a subsequent telephone conversation, Sarah advised the Law Offices of O. Max Gardner, III, PC of the following:

- a. Some of the accounts involving various Objections to Proofs of Claim filed by the Law Offices of O. Max Gardner III may have been sold to MaxFlow/MaxTrust and to Sherman Acquisitions, LLC., d/b/a Resurgent Capital, Inc., and this is why the proofs of claim are filed by Citibank USA, N.A. as "Issuer, Service Provider or Purchaser of the account from Sears, Roebuck & Co., and/or Sears National Bank." She did not have the immediate ability to identify those accounts since Citibank had made the decisions on which accounts to sell and which accounts to retain. She stated that this information "is above [her] pay grade."
- b. All of the employees in her department are former employees of the Sears Bankruptcy Unit and this is why the automated answering service still says, "Sears Bankruptcy Unit." They have just now had a chance to change this part of automated message or greeting. Her office is located in Des Moines, Iowa in the old Sears Bankruptcy Collection Center. They still have access to and use the Sears computer and data retrieval systems at the Des Moines location. In fact, all of the relevant account data is still stored and maintained in the old Sears collection system.
- c. In April of this year all of the accounts will be transferred to the Citibank centralized collection center in Kansas City, Missouri. Although some of the former Sears employees may be offered employment by Citibank in Kansas City, no offers have been made and many of the current employees cannot afford to move even if such offers are extended.
- d. The employees in her department have access to the Sears data base but were instructed just to print out the one page Citibank statement of account, which was attached to some or all of the proofs of claim at issue, rather than a six month Sears transaction history and copy of the credit application and agreement. Citibank has not yet changed the data base and the employees were still "working off of" the Sears system and software. She had no idea why some of the claims this office received had not been signed but if this was the case it was a mistake.

9. Citibank filed a response and request for hearing on _____ by and through David Yarbrough of the law firm of Nexsen Pruet Adams Kleemeier, PLLC. In its response, Citibank alleged the following:

- a. Citibank is the issuer of the debtor's credit card as assignee and successor-in-interest;
- b. Citibank purchased debtor's account and is therefore the assignee and successor-in-interest to Sears Roebuck & Co. Therefore, Citibank is the appropriate creditor to file a proof of claim;
- c. The statement attached to Citibank's proof of claim setting forth the debtor's account balance, account number, and the date the debtor's account was opened was legally sufficient to support its claim; and
- d. Citibank is the only party entitled to file a proof of claim on this debt.

10. An Affidavit of Jamie Viers, dated _____, was attached to Citibank's response as Exhibit A. In this sworn statement, Mr. Viers made the following factual statements:

- a. That Jamie Viers is a Bankruptcy Team Manager for Citibank and that he has personal knowledge of the matters and business records set forth in the Affidavit;
- b. That the following accounts, among others are **owned by Citibank** (emphasis added) (emphasis supplied):
- (redacted)
- c. That the Proofs of Claim filed by Citibank were "executed by Citibank, and **filed solely on Citibank's behalf**. The Proofs of Claim filed by Citibank . . . **were not filed on behalf of any other creditor, as servicer of any other creditor, or as an agent of any other creditor.**" (emphasis supplied).
10. This matter is presently set for hearing on Friday, _____.
11. Since the filing of the Objection, the debtors have discovered new and additional evidence with respect to the acts and practices of Citibank and other parties related to or otherwise affiliated with Citibank that give rise to numerous claims for relief that were not included in or made a part of the said Objection.
12. On or about _____, the attorney for the debtors received a telephone call from Anna Gorman of the law firm of Poyner & Spruill, LLP. Ms. Gorman stated that she had been retained by Sherman Acquisitions, LLC d/b/a Resurgent Capital, Inc. ("Resurgent") to represent their interests in the case of the debtors. She stated that Resurgent had purchased these claims from Citibank which in turn had acquired the claims from Sears.
13. These statements made by Ms. Gorman were and are totally inconsistent with the statements made in Citibank's Response and the sworn Affidavit by the Citibank employee attached to Citibank's Response as Exhibit A.
14. Ms. Gorman requested a continuation of the hearings scheduled for Friday, _____ on the grounds that it would take her client approximately 45 days for her client to secure copies of the underlying documentation required to support each proof of claim.
15. On or about _____, when the attorney for the debtors contacted Ms. Gorman about these accounts and her request for a continuance, Ms. Gorman advised that her representation of Resurgent had been canceled due to the fact that Resurgent had re-sold all of the accounts and claims back to Citibank.
16. On or about _____, the attorney for the debtors received a telephone call from the attorney for Citibank, David Yarbrough. Mr. Yarbrough stated that after the proofs of claim were filed by Citibank, in all of the cases, but before they received the debtors' Objections (filed on or about _____), Citibank sold the claims to Resurgent. After Citibank's responses were filed on February 16, 2004, Citibank then repurchased all of the accounts from Resurgent. Mr. Yarbrough also stated that Resurgent had purchased all of the Chapter 13 bankruptcy accounts from Citibank, not just the ones identified herein and on the Affidavit of Jamie Viers. Mr. Yarbrough did not have the exact dates of any of these transactions, did not know if Resurgent was under contract to purchase bankruptcy accounts from Citibank, did not know if Citibank was required to file a proof of claim for Resurgent under the contract, and could not explain why the Citibank employee who signed the Affidavit was not aware of the sale of these accounts to Resurgent. Mr. Yarbrough further would not agree to provide the debtors' attorney with a copy of the contract of sale and assignment, which would be important in determining who owned the claim at the time the sworn proof of claim was filed.

17. On or about _____, the attorney for the debtors received a Notice of the cancellation of the transfer of the proof of claim from Citibank to Resurgent, in the case of _____. The said notice was addressed to the Court and referenced the cancellation of the transfer of claim number 0033 and states that this action was taken on _____ (the date Citibank responded to all of the debtors' Objections). The document also purports to withdraw the said proof of claim. The trustee's records identify this claim as a claim in favor of Citi Cards. The debtors allege that this claim is the Citibank credit card account it purchased from Sears, which is one of the subject debts identified herein. This document, filed by Resurgent, conclusively establishes that Resurgent believed it owned the subject debt as late as _____.

18. The debtors allege that the sworn affidavit signed by the Citibank employee, Jamie Viers, on _____ is obviously false, as Resurgent owned all of the subject accounts on _____. The debtors further allege that the Citibank employee was aware of this fact when he signed his sworn affidavit since this transaction involved the sale of thousands of Chapter 13 bankruptcy accounts from Citibank to Resurgent. The debtors also allege upon information and belief that before the acquisition of these accounts by Citibank Sears had entered into an agreement with Resurgent to immediately purchase any Sears account that was involved in a Chapter 13 bankruptcy case; that Sears was obligated to file a proof of claim for Resurgent in those cases in order to protect the transferred claims; that Sears thereafter initiated a procedure whereby it only filed unsecured claims in Chapter 13 cases (even if the claims were secured) so as to expedite the transfer process to Resurgent; and that Citibank assumed and became a party to this same contract when it acquired the credit accounts from Sears. The debtors also believe and therefore allege that under the terms of this contract Citibank only acquired a contingent interest in these claims and that such property rights were canceled as soon as it received notice of a Chapter 13 bankruptcy case.

19. The debtors therefore allege that this contested case should be converted to an adversary proceeding because, among other things, the debtors in this case will be seeking:

a. The recovery of money damages or property from Citibank and the from the creditor that originated the debt as well as from other parties and entities;

b. The entry of an order to determine the validity, priority or extent of the claim of Citibank and of the creditor that originated the debt giving rise to the claim;

c. The entry of an injunction or some other form of equitable relief with respect to Citibank and with respect to the creditor that originated the debt as well as other parties;

d. The entry of a declaratory judgment with respect to the acts and practices of Citibank and the creditor that originated the debt and the subsequent creditor that purchased the debt with respect to the transfer, assignment and filing of proofs of claim in this case and in other Chapter 13 bankruptcy cases;

e. The determination of other claims and causes of action that the debtor may have against Citibank, the creditor that originated the debt, and other parties and entities;

f. The entry of an order to subordinate the claim or claims of Citibank and of the creditor that originated the debt or to seek other relief pursuant to the powers available to the court under Section 105 of the Bankruptcy Code including but not limited to the certification of such an adversary proceeding as a class action under Rule 7023;

g. The possible certification of the adversary proceeding under a class action in the Western District of North Carolina for all pending Chapter 13 bankruptcy cases involving the same parties and practices as identified herein; and

h. The entry of an order that will preclude the filing of any amended claims, supplemental claims or original claims by Citibank or by the creditor that originated the debt and for other legal and equitable relief and for the recovery of all costs and reasonable legal fees.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That this contested case be converted to an adversary proceeding;

B. That the debtors have 30 days from the date of the entry of any order granting this motion to file an adversary complaint with this court and to cause proper process to be issued; and

C. That the debtors have such other and further relief as the Court may deem just and proper.

Dated this the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor(s)
P.O. Box 1000
Shelby, NC 28151-1000
N.C. State Bar No. 6164
(704) 487-0616 / FAX (704) 487-0619
maxgardner@maxgardner.com

B. Motions
Deem Mortgage
Current

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO:
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**MOTION FOR RECONSIDERATION OF
CLAIM OF MORTGAGE SERVICER AND DECLARE MORTGAGE CURRENT
(POST BAPCPA)**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Sections 502(j) and 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order in this case to reconsider for cause the secured claim filed by the mortgage servicer named herein and to declare the mortgage loan current as of the date of entry of the Discharge Order in this case and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.
2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.
3. The Chapter 13 plan was subsequently confirmed by order of this Court.
4. The Trustee filed a Motion for Entry of Discharge and Final Report in this case on _____.
5. All pre-petition arrears owed by the debtors to mortgage servicer named herein have been paid, according to the Final Report of the Trustee.
6. The debtors allege that they have made all of their post-petition direct monthly mortgage payments up to and including the date of the filing of this motion.
7. The plan filed in this case provides as follows:

Confirmation of the plan shall impose an affirmative duty and legal obligation on the holders and/or the servicers of any claims secured by liens, mortgages and/or deeds of trust on the residential real property of the debtors to do all of the following:

(a) To apply the payments received from the trustee on the pre-petition arrearages, if any, and only to such arrearages. For purposes of this plan, the "pre-petition" arrears shall include all sums included in the "allowed" proof of claim and shall be included in a "corporate advance" equal to the

total of all sums included in the said claim. During the term of the plan, payments from the trustee shall be credited against the "corporate advance" account. The "corporate advance arrearage account" shall have a "0" balance upon entry of the Discharge Order in this case.

(b) To deem the pre-petition arrearages as contractually cured upon confirmation of the plan, thereby precluding the imposition of late payment charges or other defaulted-related fees and services based solely on the pre-petition default or defaults. Such action shall be taken by making the "corporate advance" in a sufficient amount to "cure" the pre-petition arrears as established by the "allowed" proof of claim.

(c) To apply the direct post-petition monthly mortgage payments paid by the trustee or by the debtor(s) to the month in which they were designated to be made under the plan or directly by the debtor(s), whether or not such payments are immediately applied to the outstanding loan balance or are placed into some type of suspense, forbearance or similar account. All such post-petition payments must be first applied to the outstanding post-petition interest and then to the principal balance and may not be used for any other purpose without the approval of the Bankruptcy Court after proper notice and a hearing.

(d) To notify the trustee, the debtor(s) and the attorney for the debtor(s) in writing of any changes in the interest rate for any non-fixed rate or any adjustable rate mortgages and the effective date of any such adjustment or adjustments. The failure to comply with such notice requirements shall constitute a waiver of any increase in the rate until such notice is provided. In the event the rate should be reset to a rate lower than the rate as of the petition date, then any failure to provide notice as herein provided shall constitute a violation of 524(i) to the extent that the debtor suffers aggregate damages of more than \$50.00.

(e) To Notify the trustee, the debtor(s) and attorney for the debtor(s) in writing of any change in the property taxes and/or the property insurance premiums that would either increase or reduce the escrow portion, if any, of the monthly mortgage payments and the effective date of any such adjustment or adjustments. The failure to comply with such notice requirements shall constitute a waiver of any right to recover any enhanced escrow payments and to recover any such increases until such notice is provided, on the condition that it is provided within sufficient time to maintain the feasibility of the plan as confirmed.

(f) To refrain from directly paying or attempting to pay any pre-petition tax obligation that the debtor(s) have included in their plan to be paid under their plan unless a motion is filed to modify the plan with adequate notice and hearing or unless a notice of assignment of the tax claim is filed from the taxing authority to the servicer and/or holder of the mortgage loan or loans.

(g) To refrain from ever assessing, charging, imposing, advancing or billing any type of fees or charges (such as legal fees, broker price opinion fees, property inspection fees, property preservation fees, proof of claim fees, notice of appearance fees, plan review fees, or any type of legal fees, or any other type of fee or charge) to the mortgage loan of the debtor(s) either

post-petition and pre-confirmation, either post-confirmation and pre-discharge, or post-discharge unless such fees or charges have been approved by the Bankruptcy Court upon filing of a proper application for the approval of such fees and charges under Rule 2016(a) of the Rules of Bankruptcy Procedure and after adequate notice of hearing. To the extent such fees are not approved, but are provided in any type of notice to the debtor(s), such action shall be deemed to constitute a material violation of this provision and a violation of either the automatic stay or the discharge injunction, whichever provision may be applicable.

Violations of this Section.

Any violation of this provision shall be deemed a willful violation of 11 U.S.C. Section 524(i) in the event that the mortgage loan or loans is not serviced in a manner strictly in compliance with this provision of the plan and to the extent the improper servicing results in improper fees and charges of more than \$50.00.

Application of Section 524(i) of the Bankruptcy Code.

The debtor(s) further specifically invoke and intend for this plan provision to invoke and to reserve the debtor(s) the provisions of 11 U.S.C. Section 524(i).

8. The mortgage servicer named herein as evidenced by the record in this case has failed to apply for and secure an order of approval for any additional fees, charges or expenses other than those that have been duly scheduled and paid in full by the Chapter 13 Trustee.

9. The debtors have reason to believe and therefore allege that the mortgage servicer named herein has already charged or will impose and charge improper fees to their mortgage loan post-discharge that purportedly arose during this case but which have never been submitted to and approved by this Court. Furthermore, any such "secret fees" or charges would be in clear violation and constitute a breach of the specific language of the confirmed plan in this case.

10. The debtors are therefore requesting this court to reconsider the claim of the mortgage servicer named herein under Section 502(j) and to permanently enjoin the mortgage servicer or the holder of the note or any officer, agent, employee, attorney, assignee, or subsequent holder from seeking to collect from these debtors, either directly or indirectly, all corporate advances or expenses, corporate suspense accounts, statutory fees, legal fees, or any other fees, charges or expenses that the holder of the mortgage loan or the master servicer, the servicer, the sub-servicer, the default servicer or any other entity has added to the account of the debtors, but which have not been applied for or approved by this Court, after proper notice and hearing, and to be forever canceled and discharged as of the date of the Order discharging the debtors.

11. The debtors are further requesting that in the event the holder of this mortgage, the current servicer or any subsequent servicer or assignee or holder of the mortgage debt attempts to collect any of these discharged fees or expenses, such action shall be deemed to be a willful violation of the discharge injunction and contempt of the orders of this Court; and that such action shall give the right to the debtors to pursue a proceeding before this court for contempt and appropriate sanctions and for such other state and federal statutory remedies as may be available to the debtors and that this Court specifically retain jurisdiction over such claim or claims.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion be granted as provided for in the body of this motion;

B. That the debtors have such other and further relief as to the Court may seem just and proper.

Dated this the _____ day of _____, 2008.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616/FAX (704) 487-0619
maxgardner@maxgardner.com

B. Motions

Discovery Motions

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

Adversary Proc. No. _____

Plaintiffs,

versus

CITIFINANCIAL MORTGAGE COMPANY

Defendants.

**MOTION TO COMPEL DISCOVERY
AND
MOTION FOR SANCTIONS FOR FAILURE
TO RESPOND TO DISCOVERY**

COME NOW the above-named Plaintiffs, by and through their attorney of record, and respectfully move the Court pursuant to Rule 9013 of the Local Bankruptcy Rules, Rules 7037, 9011 and 9014 of the Federal Bankruptcy Rules, and Rules 11 and 37 of the Federal Rules of Civil Procedure and allege and say that:

1. On or about _____ the Plaintiffs prepared and served upon the Defendants their First Interrogatories and Request for Production of Documents in this case. The Plaintiff's First Interrogatories and Request for Production of Documents was filed electronically with the Court on or about _____ and is identified as Document Number _____.

2. The Defendants have failed and refused to provide the Plaintiffs with any responses whatsoever to the above-identified requests.

3. The Defendants have made no request for an extension of time, either formally or informally, nor have they filed or served any such request with the court.

4. The Plaintiffs believe that the Defendants' failure to provide their responses to the discovery requests has been willful and intentional.

5. The Plaintiffs are informed and believe and therefore allege that this Court should enter an order compelling the Defendants to file and serve full and complete answers to all interrogatories and requests for production before trial and to award to the Plaintiffs legal fees and expenses in the amount of \$750.00 incurred in connection with their efforts to secure such answers.

WHEREFORE, the Plaintiffs respectfully pray to the Court as follows:

A. That the court conduct an evidentiary hearing on this motion and thereafter that the Court order the Defendants to fully and completely answer all of the designated interrogatories and requests for production of documents;

B. That the Defendants be ordered to pay legal fees and expenses of \$750.00 involved in bringing this matter on for hearing before the court;

C. That the Plaintiffs have such other and further relief as to the court may seem just and proper.

Dated this the _____ day of _____, 2008.

O. MAX GARDNER III
ATTORNEY FOR THE PLAINTIFFS
State Bar #6164
POST OFFICE BOX 1000
SHELBY, NORTH CAROLINA 28151-1000
TELEPHONE: (704) 487-0616
TELEFAX: (704) 487-0619
maxgardner@maxgardner.com

AFFIDAVIT OF ATTORNEY

I, O. Max Gardner, III hereby made solemn oath:

1. I am an attorney and counselor at law, duly admitted to practice in the State of North Carolina and this Court and represent the debtors in this proceeding.
2. I made numerous attempts to contact the adverse attorney via telephone, written letters, and emails to obtain the requested discovery.
3. I called the adverse attorney on July 7, 2008; July 8, 2008 and July 9, 2008 and left voice mail messages requesting a return phone call regarding the discovery.
4. I sent the adverse attorney a written request regarding the outstanding discovery on July 10, 2008, and July 15, 2008.
5. I emailed the adverse attorney on July 12, 2008, July 14, 2008 and July 17, 2008.
6. The adverse attorney has failed and refused to respond to any of my phone calls, letters or emails.

Dated this the _____ day of _____, 2008.

O. MAX GARDNER III
ATTORNEY FOR THE DEBTORS
State Bar #6164
POST OFFICE BOX 1000
SHELBY, NORTH CAROLINA 28151-1000
TELEPHONE: (704) 487-0616
TELEFAX: (704) 487-0619
maxgardner@maxgardner.com

NATIONAL CONSUMER BANKRUPTCY
LITIGATION CENTERPO Box 1000
403 South Washington Street
Shelby, North Carolina 28151Phone: (704) 418-2628
Fax: (888) 870-1647**GOOD FAITH LETTER – RESPONSE TO RTP**

[Date]

Mr. Opposing Counsel, Esquire
Opposing Counsel, P.A.
Nowhere Street
Anywhere, USA 00000*Via Facsimile (704) 888-1111
and Regular Mail***RE: *My Client vs. Your Client*
 *Chapter 13 Case No.:***

Dear Mr. Counsel:

I am in receipt and review of what appears to be your client's response to Plaintiff's First Request for Production. The purpose of this correspondence is to advise you that the manner in which the documents have been produced is in violation of the requirements of Rule 34 of the Federal Rules of Civil Procedure and Rule 7034 of the Rules of Bankruptcy Procedure. Specifically, your client has failed to identify the documents to correspond with the definitions and instructions in the request. Accordingly, be advised that unless my office receives a proper response identifying the documents to correspond with the categories in the request by _____, _____, 2010, I will have no choice but to move the Court for an order compelling Defendant's compliance and seek sanctions.

This correspondence is being written in a good faith effort to resolve an issue of discovery in the above referenced matter without seeking intervention of the Court. Your cooperation is appreciated.

Very truly yours,

O. Max Gardner, III
OMGIII/lbp
cc: Client**O. Max Gardner III**Chief Executive Officer
Vice President-Litigation
Management
maxgardner@maxgardner.com
Admitted in NC**William S. Gardner**Vice President-Legal Affairs
Secretary & Treasurer
wgardner@maxgardner.com
Admitted in NC**John Mull Gardner**Of Counsel
jgardner@maxgardner.com
Admitted in NC*All Principals are proud
members and supporters of:*



NATIONAL CONSUMER BANKRUPTCY
LITIGATION CENTER

PO Box 1000
403 South Washington Street
Shelby, North Carolina 28151

Phone: (704) 418-2628
Fax: (888) 870-1647

GOOD FAITH LETTER – COMPEL PROPER RESPONSES

[Date]

Mr. Opposing Counsel, Esquire
Opposing Counsel, P.A.
Nowhere Street
Anywhere, USA 00000

*Via Facsimile (704) 888-1111
and Regular Mail*

RE: *My Client vs. Your Client*
Chapter 13 Case No.:

Dear Mr. Counsel:

I am in receipt of what appears to be your client's response to Plaintiff's First Set of Interrogatories. The purpose of this correspondence is to advise you that your Client has not properly responded to said Interrogatories in accordance with Rule 7033 of the Rules of Bankruptcy Procedure and Rule 33 of the Federal Rules of Civil Procedure. Your Client's deficiencies are as follows:

- **Interrogatory number 2** your Client has not stated any facts or identified any documents for each denial in your answer.
- **Interrogatory number 8** your Client has not: stated when the work to be performed by Magical Media was to start and be completed.
- **Interrogatory number 9** your Client has not stated any facts or identified any documents or any facts to evidence the alleged damages incurred or which will be incurred by you as a result of Magical Media.
- **Interrogatory number 10b** your Client has not stated what was ordered and the date the items were delivered.
- **Interrogatory number 11a** your Client has not identified and described when and where the communications and negotiations between Plaintiff and Defendant regarding the contract or formation of the contract occurred.
- **Interrogatory number 11c** your Client has not identified and described the persons involved in the communications and negotiations between Plaintiff and Defendant regarding the contract or formation of the contract.

Accordingly, be advised that unless your Client rectifies the above stated deficiencies and said response to be received in my office by _____, _____, 20____, I will have no choice but to attend the hearing scheduled for _____, _____, 20____, requesting from the Court an order compelling Defendant's compliance and sanctions including the payment of any reasonable attorney's fees incurred as a result of the non-compliance.

Gardner & Gardner PLLC, PO Box 1000, Shelby, NC 28151
<http://www.maxgardnerlaw.com>

O. Max Gardner III
Chief Executive Officer
Vice President-Litigation
Management
maxgardner@maxgardner.com
Admitted in NC

William S. Gardner
Vice President-Legal Affairs
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wgardner@maxgardner.com
Admitted in NC

John Mull Gardner
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jgardner@maxgardner.com
Admitted in NC

*All Principals are proud
members and supporters of:*





NATIONAL CONSUMER BANKRUPTCY
LITIGATION CENTER

PO Box 1000
403 South Washington Street
Shelby, North Carolina 28151

Phone: (704)418-2628

Fax: (888) 870-1647

This correspondence is being written in a good faith effort to resolve an issue of discovery in the above referenced matter without seeking intervention of the Court. Your cooperation is appreciated.

Very truly yours,

O. Max Gardner, III
OMGIII/lbp
cc: Client

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

Debtors.

vs.

Plaintiff,

Defendants.

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADV. PROC. NO.

**MOTION FOR LEAVE TO PROPOUND SUPPLEMENTAL
INTERROGATORIES TO DEFENDANT**

NOW COMES Plaintiff, by and through her attorney, O. Max Gardner, III, and moves the Court for permission to propound supplemental interrogatories to Defendant. In support hereof, Plaintiff states and alleges as follows:

1. This adversary action was filed on _____.
2. A Pre-Trial Scheduling Order was entered on _____.
3. Plaintiff served Interrogatories upon Defendant on _____.
4. Said Interrogatories, including subparts, numbered 25 as limited by F.R.C.P. 33.
5. Defendant provided its Rule 26(a) disclosures on _____.
6. The Rule 26 Disclosures of Defendant disclosed the actions of another party (_____) in the course of the main bankruptcy case.
7. The First Set of Interrogatories propounded to Defendant did not take into account the actions of _____.
8. The North Carolina Secretary of State's corporate business records demonstrate that there is some relationship between the principal of Defendant and _____.

9. The street addresses of Defendant and _____ differ only by suite number.
10. The supplemental set of interrogatories is designed to inquire as to that previously undisclosed relationship.
11. The proposed supplemental interrogatories are attached hereto as "Plaintiff's Second Set of Interrogatories to defendant" and as required by North Carolina General Statute § 1A-1, Rule 33 and LBR 7026.1.
12. There is good cause to permit supplemental interrogatories.

WHEREFORE Plaintiff moves the Court for an Order permitting the use and propounding of the attached Second Set of Interrogatories to Defendant and for such other relief the Court deems just and equitable.

Dated this _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor/Plaintiff
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

**NAME: LANE, PHILLIP L.
 LANE, TAMMY J.**

**Chapter 13 No. 04-40625
Our File No. 11244**

**ADDRESS: 118 OAK POINTE DRIVE
 CHERRYVILLE, NC 28021**

SSN: --- --0731 & --- --4739

Debtors.

**PHILLIP L. LANE, and wife,
TAMMY J. LANE,**

Adversary Proc. No.: 06-4059

Plaintiffs,

versus

**LITTON LOAN SERVICING, LP,
MORRIS, SCHNEIDER & PRIOR, LLC AND
ANGEL GORDON**

Defendants

**MOTION TO QUASH
SUBPOENA TO PRODUCE DOCUMENTS**

COME NOW the above named plaintiffs, by and through their attorney of record, and respectfully move this court pursuant to Rule 45(c)(3)(A)(i) of the Federal Rules of Civil Procedure and Rule 7045 of the Bankruptcy Rules for an Order to Quash the Subpoena issued by Defendants and in support show the Court the following:

1. Plaintiffs filed a Complaint Seeking Damages in a Core Adversary Proceeding with this Court on or about November 16, 2006.
2. Defendant Litton Loan filed an Answer with this Court on or about December 18, 2006.
3. Defendant Litton Loan issued, and filed with this court on April 4, 2007, a Subpoena to the purported closing agent, Kemp Michael, Esq., involved in this matter commanding him to produce "All contracts, HUD-1 forms, documents to be signed at closing, correspondence, electronic mail, memos, notes and all other documents of whatever kind of nature that relate to, refer to, evidence or discuss the proposed sale of property at 118 Oak Pointe Drive, Cherryville, North Carolina 28021."

4. The Subpoena commands the said party to produce these documents at the Office of Kemp Michael, Esq., 124 Catawba Ave., Mt. Holly, NC 28120 on Friday, April 13, 2007 at 10:00 am.

5. The Plaintiffs state that the Defendants are attempting to engage in unilateral discovery before the pre-trial conference and failed to contact the attorney for the Plaintiffs regarding a date and time for any deposition or subpoena to produce documents.

6. The Plaintiffs also state that the attorney for the Defendants signed the Subpoena on March 23, 2007, filed it with the Court on April 4, 2007 and mailed it to counsel for the Plaintiffs on April 4, 2007.

7. Counsel for the Plaintiffs received the subpoena in the mail on April 9, 2007.

8. Counsel for the Plaintiffs called the attorney for the Defendants on April 10, 2007 at 9:10 am and, not being able to speak with him at that time, left a detailed message for David O'Quinn to return the phone call about the subpoena as soon as possible.

9. David O'Quinn returned the call to Plaintiffs' attorney at approximately 10:00 am on April 10, 2007 and admitted that the subpoena was late in service. He further stated that he would not proceed with the document review on Friday, April 13, 2007.

10. The Plaintiffs are therefore moving the Court for an Order to Quash the subpoena.

WHEREAS, the Debtors respectfully move this Court to:

- A. Issue an Order to Quash the Subpoena;
- B. Hold a hearing on this matter;
- C. Award legal fees and expense to the Plaintiffs; and
- C. Grant the Plaintiffs any further relief as the Court may deem just and proper.

Date this the 11th day of April, 2007.



O. Max Gardner III
Law Offices of O. Max Gardner III
Attorney for the Plaintiffs
N.C. State Bar No. 6164
P.O. Box 1000
Shelby, NC 28151-1000
Phone (704) 487-0616
Fax (704) 487-0619
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: Chapter 7 No.
Our File No.

ADDRESS:

SSN:
Debtor.

MOTION TO QUASH SUBPOENA DIRECTED TO DEBTOR'S COUNSEL

To the Honorable Craig Whitley, U.S. Bankruptcy Judge:

Debtors move to quash the April 16, 2010 subpoena by Verizon directing debtor's counsel to attend a deposition on June 5, 2010. In support thereof, debtors state:

1. Debtors' Chapter 7 petition was filed on June 30, 2009. The Meeting of Creditors was held on July 29, 2009.
2. Debtors filed their Amended Motion for Stay Violation Sanctions on October 8, 2009, alleging multiple postpetition demands and other actions to collect prepetition obligations, after (1) there was no response to their original motion, and (2) Verizon shut off Internet services after the original motion was filed but before the hearing thereon.
3. Verizon filed a Response to debtors' Amended Motion for Stay Violation Sanctions on January 3, 2010, following agreed extensions.
4. On January 5, 2010, the Court established June 5, 2010 as the deadline for completion of discovery.
5. On April 16, 2010, Verizon caused a subpoena to be served upon debtor's counsel, attached hereto along with the Notice of Deposition to debtors' counsel.
6. There are no restrictions on the scope of the examination, leaving open the possibility of inquiry into privileged work-product and client communications.
7. Debtors cannot oppose the subpoena in detail without knowledge of the intended scope of inquiry. However, case law provides burdens for Verizon to overcome before the subpoena is honored.
8. The 6th and 8th Circuits follow the three part test of *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. Ark. 1986), which was cited with approval but not expressly followed by the 1st Circuit in *Saldana-Sanchez v. Lopez-Gerena*, 256 F.3d 1, 5 (1st Cir. P.R. 2001):

- (1) no other means exist to obtain the information sought through the deposition than to depose opposing counsel;
- (2) the information sought is relevant and not privileged; and
- (3) the information is crucial to the preparation of the case.

9. The 2nd Circuit has taken what it calls a more flexible approach, incorporating all the factors of Fed.R.Civ.P. 26 such as the need to depose the lawyer, the lawyer's role in the matter upon which discovery is sought, the risk of privilege and/or work-product issues arising, and the extent of existing discovery. *Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del., Inc. v. Friedman (In re Friedman)*, 350 F.3d 65, 72 (2d Cir. N.Y. 2003).

10. Respondent Verizon presents no fact or argument in either its Subpoena or Notice for any intelligent review. The Subpoena should be quashed.

Dated this _____ day of _____, 2010_.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR.

**DEBTOR'S MOTION FOR EXAMINATION OF
AMC MORTGAGE SERVICERS, INC. PURSUANT TO RULE 2004**

Hardworking American, Debtor, moves pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure for entry of an order requiring AMC Mortgage Services, Inc. ("AMC") to appear for examination, and for grounds states:

1. AMC Mortgage Services, Inc. has filed a proof of claim reflecting a mortgage on Mr. American's home held by Ameriquest Mortgage Corp.
2. Claimant is not the owner of the claim, nor is any transfer or authorization contained in the claim. The claim contains a document authorizing Claimant to file certain documents on behalf of Ameriquest, the claim's putative owner, which authorization does not extend to proofs of claim in bankruptcy.
3. Claimant's proof of claim asserts claims for "escrow account," "pre-petition attorney fees and costs," and "other amounts," without itemizing these amounts sufficiently to permit a determination whether they were properly assessed. The claim owner's mortgage document does not provide for the establishment of an escrow account, and the claim owner did not give proper notice to Mr. American of any escrowed charges.
4. The proof of claim asserts a claim for late charges not accounted for and charges for property inspection and other charges not provided for in the loan documents.
5. It is necessary to conduct the examination of AMC to determine the claimant's authority to file the proof of claim and the accounting for charges and payments claimed to be due.

WHEREFORE the Debtor respectfully prays of the Court that;

- A. A hearing be held on this matter;
- B. This Court order the Rule 2004 Examination of AMC Mortgage ;
- C. For such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2008.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
)	
	)	CHAPTER 7 CASE NO.
	)	OUR FILE NO.
)	
Debtor.)	
_____)	

**MOTION FOR A 2004 EXAMINATION UNDER OATH
AND FOR ISSUANCE OF A SUBPOENA DUCES TECUM
IN CONNECTION THEREWITH**

TO: THE HONORABLE _____
UNITED STATES BANKRUPTCY JUDGE

Debtor, by his attorney of record, O. Max Gardner III, moves the Court pursuant to Rules 2004 and 9016 of the Federal Rules of Bankruptcy Procedures for an order:

- (a) Authorizing the issuance of a subpoena duces tecum, compelling JP Morgan Chase Bank, National Association ("Chase") to produce the documents as set forth in Exhibit "A" to this Motion at the date and time set forth below;
- (b) Compelling Chase to appear, via a duly authorized representative most familiar with the documents identified in Exhibit "A", for an examination and to answer any and all questions regarding the documents and the topics identified in Exhibit "B" attached to the Motion, as the documents relate to the administration of the Debtor's estate; and
- (c) Granting such other relief as this court deems just and proper.

Required Date & Location for Production of Documents identified in Exhibit "A":

**Law Offices of O. Max Gardner III
403 South Washington Street
Shelby, North Carolina 28150
(704) 487-0616 Tel. No.
(704) 487-0619 Fax No.**

Requested Date and Location for Examination: _____

**Law Offices of O. Max Gardner III
403 South Washington Street
Shelby, North Carolina 28150
(704) 487-0616 Tel. No.
(704) 487-0619 Fax No.**

BACKGROUND

1. The Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on October 10, 2008. Prior to the filing of the petition, the Debtor was sole owner, of a real estate condominium unit, located at The Columns, East Marion Street, Shelby, North Carolina.

2. The property was purchased by way of two mortgages, both of which were originated by ABC Mortgage Company. The original mortgage notes executed by the Debtor also named ABC Mortgage Company as the designated mortgagee—payee, owner and holder of the notes.

3. The property became property of the Chapter 7 Bankruptcy estate on October 10, 2008 pursuant to §541 of the Code. The property remains property of the Chapter 7 Bankruptcy estate as of the filing of this Motion.

4. On November 14, 2008, Chase filed a Motion for Termination of the Automatic Stay ("MFR") as to the real property. In the motion, Chase identified itself as the servicer for Deutsche Bank National Trust Company.

5. The Debtor is informed and believes and therefore alleges that Chase is not the owner and holder of the mortgage note in this case and is not the assignee of record of the mortgage. The Debtor also alleges that Chase is not the "Real Party in Interest" in this case and has no constitutional standing to proceed with the MFR in this Court or in any Federal Court.

AUTHORITY FOR THE RELIEF REQUESTED

6. Bankruptcy Rule 2004(a) provides that upon the motion of a party in interest, the court may order the examination of an entity regarding any matter that may affect the administration of the estate of the debtor. Courts that have analyzed Bankruptcy Rule 2004 have recognized the right of a party in interest to conduct a 2004 examination, and the permitted scope of that examination is extremely broad. See, e.g., In re Texaco, Inc., 79 B.R. 551, 553 (Bankr. S.D.N.Y. 1987) (citing In re Johns-Manville Corp., 42 B.R. 362 (S.D.N.Y.1984)).

7. "Good cause is the standard employed to determine if cause exists to support an examination under Bankruptcy Rule 2004. To obtain authority to conduct an examination, the movant must show some reasonable basis to examine the material...[and] that the requested documents are necessary to establish the movant's claim or that denial of production would cause undue hardship or injustice." In re Grabill Corp., 109 B.R. 329, 334 (N.D. 111.1989).

8. "Generally, good cause is shown if the Rule 2004 examination is necessary to establish the claim of the party seeking the examination, or denial of such request would cause the examiner undue hardship or injustice." See In re Meticom, Inc., 318 B.R. 263, 268 (S.D.N.Y. 2004); see also In re Express One Intl., 217 B.R. 215, 217 (Bankr. E.D.Tex.1998); In re Hammond, 140 B.R.197,201 (S.D. Ohio1992). "Good cause is established if the one seeking the Rule 2004 examination has shown that such an examination is reasonably necessary for the protection of its legitimate interest." Hammond, 140 B.R. at 201.

9. Debtor has raised serious questions concerning Chase standing to bring its Motion for Termination of the Automatic Stay and requires discovery as annexed hereto.

10. An Evidentiary Hearing has been set for June 11, 2009 and such discovery is needed to prepare for the hearing.

11. Consequently, "cause" exists authorizing the issuance of a subpoena to compel document production under Bankruptcy Rules 2004(c) and 9016, and moreover, for the issuance of an order directing Chase to appear for an examination under Bankruptcy Rule 2004.

12. A proposed subpoena is annexed hereto as Exhibit "C".

WHEREFORE, Debtor respectfully requests the entry of an order substantially similar to the proposed order attached as Exhibit "D".

- (a) Authorizing the issuance of a subpoena duces tecum compelling Chase to produce the documents identified in Exhibit "A" attached to this Motion;
- (b) Compelling Chase to appear, via a duly authorized representative most familiar with the documents identified in Exhibit "A", for an examination and to answer any and all questions regarding the documents and the topics identified in Exhibit "B" attached to the Motion, as the documents relate to the administration of the Debtor's estate; and
- (c) Granting such other relief as this courts deems just and proper.

Dated this the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619e-mail maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
	)	CHAPTER 7 CASE NO.
	)	OUR FILE NO.
)	
Debtor.)	
<hr style="width: 100%;"/>)	

EXHIBIT "A" DOCUMENT REQUEST

1. Any and all documents, computer records, reports, or other information in the possession, custody or control of Chase regarding and/or related to Chase having standing to file Motion For Termination Of The Automatic stay in the Western District of North Carolina in the matter of Debtor, Case Number 08-14106 (REG).
2. All contents of the Mortgage File, including all documents listed in Section 2.01 of the Pooling and Servicing Agreement dated March 1, 2006 and included in the ABC Mortgage Loan Trust 2006-2, Asset-Backed Certificates, Series 2006-2, pertaining to the Mortgage Loan or loans referred to in the Motion for Termination of The Automatic Stay.
3. Any and all documents, computer records, reports, or other information in the possession, custody or control of Chase regarding transfers/assignments or sales of mortgage notes, mortgages or any other documentation relied upon by Chase and evidencing a complete chain of beneficiary interest / title to mortgage loans incurred by Debtor with ABC Mortgage Company, as mortgagee to any other entity, including, but not limited to Deutsche Bank National Trust Company, ABC Securities Corp. and JP Morgan Chase National Association.
4. All documents in the custody of the Master Document Custodian for ABC Mortgage Company Trust 2006-2, Asset Bank Certificates, Series 2006-2 for the mortgage notes in this case.
5. All transfer and delivery receipts for the mortgage notes in this case from ABC Mortgage Company to ABC Securities Corp. and from ABC Securities Corp. to the Trustee for ABC Mortgage Trust 2006-2 and from ABC Mortgage Trust 2006-2 to the Master Document Custodian.
6. All of the mortgage sales agreements with all exhibits between ABC Mortgage Company to ABC Securities Corp. and from ABC Securities to the Trustee for ABC Mortgage Loan Trust 2006-2 and from ABC Mortgage Trust Loan 2006-2 to the Master Document Custodian.

7. All proof of payments and receipts for payments from ABC Mortgage Company, ABC Securities Corp. and ABC Mortgage Trust 2006-2 for the purchase and sale of the mortgage notes in this case.
8. The Pooling and Servicing Agreement for ABC Mortgage Loan Trust 2006-2.
9. The Master Document Custodial Agreement for ABC Mortgage Trust 2006-2.
10. The Master Document Custodial Handbook for ABC Mortgage Trust 2006-2.
11. The initial securities rating reports prepared by Fitch, Standard & Poor's or Moody's for the bonds issued by ABC Mortgage Trust 2006-2.
12. All delivery and transfer receipts for the mortgage notes in this case from the Master Document Custodian for ABC Mortgage Trust 2006-2 to the current servicer.
13. Any servicing or subservicing agreements between the Master Servicer or ABC Mortgage Trust 2006-2 and the current servicer.
14. A copy of the original note with all endorsements and allonges, if any.
15. A copy of the original mortgage and all assignments, if any.
16. All collection notes, emails, and any other form or recording of all communications between the current servicer and any third-party provider of mortgage related services with respect to the mortgage notes in this case.
17. Any standard forms used by the current servicer for the mortgage notes in this case that relate to lost notes, lost assignments, or other similar documents.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
)	
)	CHAPTER 7 CASE NO.
)	OUR FILE NO.
)	
Debtor.)	
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**EXHIBIT "B" OF SUBPOENA DUCES TECUM
TOPICS FOR EXAMINATION OF
JP MORGAN CHASE BANK, NATIONAL ASSOCIATION**

1. Information regarding all documents requested in Exhibit "A" appended to the subpoena.

UNITED STATES BANKRUPTCY COURT

District of _____

In re SYLVIA NEUR

Debtor

SUBPOENA IN A CASE UNDER
THE BANKRUPTCY CODE

Case No. * 08-14106 REG

To: JP MORGAN CHASE BANK, NATIONAL ASSOCIATION
c/o TEITELBAUM & BASKIN LLP
3 BARKER AVENUE
WHITE PLAINS, NY 10610

Chapter 7

☐ YOU ARE COMMANDED to appear in the United States Bankruptcy Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.PLACE OF DEPOSITION LAW OFFICE OF DAVID B. SHAEV
350 FIFTH AVENUE, SUITE 7210
NEW YORK, NEW YORK 10118DATE AND TIME
, 2009 at 10:00 a.m.☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):PLACE LAW OFFICE OF DAVID B. SHAEV
350 FIFTH AVENUE, SUITE 7210
NEW YORK, NEW YORK 10118DATE AND TIME
, 2009 at 4 p.m.☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

Any organization not a party to this proceeding that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Rule 30(b)(6), Federal Rules of Civil Procedure, made applicable in bankruptcy cases and proceedings by Rules 1018, 7030, and 9014, Federal Rules of Bankruptcy Procedure.

ISSUING OFFICER SIGNATURE AND TITLE

DATE

ISSUING OFFICER'S NAME, ADDRESS, AND PHONE NUMBER

DAVID B. SHAEV, ESQ. 350 FIFTH AVENUE, SUITE 7210, NEW YORK, NY 10118 (212) 239-3800

* If the bankruptcy case is pending in a district other than the district in which the subpoena is issued, state the district under the case number.

PROOF OF SERVICE

SERVED	DATE	PLACE
	SERVED ON (PRINT NAME)	
SERVED BY (PRINT NAME)		MANNER OF SERVICE
		TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on	DATE	SIGNATURE OF SERVER
		ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), as amended on December 1, 2007, made applicable in cases under the Bankruptcy Code by Rule 9016, Federal Rules of Bankruptcy Procedure:

(c) Protecting a Person Subject to a Subpoena.

(1) **Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) **Command to Produce Materials or Permit Inspection.**

(A) **Appropriate Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) **Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) **Quashing or Modifying a Subpoena.**

(A) **When Required.** On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iv), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) **When Permitted.** To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unreviewed expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) **Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) **Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

(A) **Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) **Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) **Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

(D) **Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nevertheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) **Claiming Privilege or Protection.**

(A) **Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself

privileged or protected, will enable the parties to assess the claim.

(B) **Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has, must not use or disclose the information until the claim is resolved, must take reasonable steps to retrieve the information if the party disclosed it before being notified, and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) **Contempt.**

The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be evaluated if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(i).

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: **CHAPTER 7 CASE NO.**
OUR FILE NO.

ADDRESS:

SSN:

DEBTOR.

EXHIBIT "A"
TO SUBPOENA FOR RULE 2004 EXAMINATION

1. Any and all documents, computer records, reports, or other information in the possession, custody or control of Chase regarding and/or related to Chase having standing to file Motion for Termination of the Automatic Stay in the Western District of North Carolina in the matter of Jane Doe, Case Number 08-14000.
2. All contents of the Mortgage File, including all documents listed in Section 2.01 of the Pooling and Servicing Agreement dated March 1, 2006 and included in the Long Beach Mortgage Loan Trust 2006-2, Asset-Backed Certificates, Series 2006-2, pertaining to the Mortgage Loan or loans referred to in the Motion for Termination of Automatic Stay.
3. Any and all documents, computer records, reports, or other information in the possession, custody or control of Chase regarding transfers/assignments or sales of mortgage notes, mortgages or any other documentation relied upon by Chase and evidencing a complete chain of beneficiary interest / title to mortgage loans incurred by Jane Doe with Long Beach Mortgage Company, as mortgagee to any other entity, including, but not limited to Deutsche Bank National Trust Company, Long Beach Securities Corp. and JP Morgan Chase National Association.
4. All documents in the custody of the Master Document Custodian for Long Beach Mortgage Company Trust 2006-2, Asset Bank Certificates, Series 2006-2 for the mortgage notes in this case.
5. All transfer and delivery receipts for the mortgage notes in this case from Long Beach Mortgage Company to Long Beach Securities Corp. and from Long Beach Securities Corp. to the Trustee for Long Beach Mortgage Trust 2006-2 and from Long Beach Mortgage Trust 2006-2 to the Master Document Custodian.

6. All of the mortgage sales agreements with all exhibits between Long Beach Mortgage Company to Long Beach Securities Corp. and from Long Beach Securities to the Trustee for Long Beach Mortgage Loan Trust 2006-2 and from Long Beach Mortgage Trust Loan 2006-2 to the Master Document Custodian.
7. All proof of payments and receipts for payments from Long Beach Mortgage Company, Long Beach Securities Corp. and Long Beach Mortgage Trust 2006-2 for the purchase and sale of the mortgage notes in this case.
8. The Pooling and Servicing Agreement for Long Beach Mortgage Loan Trust 2006-2.
9. The Master Document Custodial Agreement for Long Beach Mortgage Trust 2006-2.
10. The Master Document Custodial Handbook for Long Beach Mortgage Trust 2006-2.
11. The initial securities rating reports prepared by Fitch, Standard & Poor's or Moody's for the bonds issued by Long Beach Mortgage Trust 2006-2.
12. All delivery and transfer receipts for the mortgage notes in this case from the Master Document Custodian for Long Beach Mortgage Trust 2006-2 to the current servicer.
13. Any servicing or subservicing agreements between the Master Servicer or Long Beach Mortgage Trust 2006-2 and the current servicer.
14. A copy of the original note with all endorsements and allonges, if any.
15. A copy of the original mortgage and all assignments, if any.
16. All collection notes, emails, and any other form or recording of all communications between the current servicer and any third-party provider of mortgage related services with respect to the mortgage notes in this case.
17. Any standard forms used by the current servicer for the mortgage notes in this case that relate to lost notes, lost assignments, or other similar documents.

IN THE MATTER OF:)	
)	
)	CASE NO.
)	OUR FILE NO.
)	
Debtor.)	
_____)	
)	
)	ADV. PROC. NO.
)	
Plaintiff,)	
)	
vs.)	
)	
)	
Defendants.)	

COMES NOW the Plaintiff in the above captioned matter and moves the Court, pursuant to Local Bankruptcy Rule 9013-1 and Fed.R.Civ.P. 37(c)(2), for an order allowing Plaintiff the reasonable expenses, including attorney fees, incurred in proving true Requests for Admissions propounded under Fed.R.Civ.P. 36, which were denied by Defendants, in the total amount of \$_____.

This motion is made on the grounds that the costs claimed by Plaintiff are reasonable and necessary costs of and attorney fees incurred in proving true Requests for Admissions, which were of substantial importance and were denied by Defendants without having a reasonable ground to believe that they might prevail on the matter or other good reason for the failure to admit. Plaintiff is therefore entitled to recover attorney fees and costs pursuant to Fed.R.Civ.P. 37(c)(2).

This motion is based on the Declaration of Plaintiff's attorney, and the Memorandum of Points and Authorities served and filed herewith, and the pleadings, records, and files herein, and on such other and further evidence as may be presented at the hearing on this motion.

WHEREFORE, Plaintiffs pray of the Court that

- A. A hearing be held on this motion; and
- B. That the relief requested by the Plaintiff be granted; and
- C. For such other relief as to the court may seem reasonable.

Dated this the _____ day of _____, 2009.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a stylized flourish at the end.

O. Max Gardner III
Gardner & Gardner, PLLC
Attorney for the Plaintiff
P.O. Box 1000
Shelby, NC 28151-1000
N.C. State Bar No. 6164
(704) 487-0616 / FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

MEMORANDUM OF POINTS AND AUTHORITIES

On February 21, 2007, Plaintiff served Requests for Admissions on each Defendant. Defendants were required to serve responses to the Requests for Admissions no later than March 26, 2007. No extension of time to respond was requested by Defendants nor granted by Plaintiff.

From early April, 2007, into the following month, Plaintiff sent several letters to Defendants' prior counsel, stating that because no responses had been provided, the requests were deemed admitted as provided by Fed. R. Bankr. P. 36(b).

Nevertheless, Defendant served responses to the Requests for Admissions on May 29, 2007, and Defendant John Doe served responses to the Requests for Admissions on May 29, 2007, and Defendant Jane Doe served responses to the Requests for Admissions the following day, May 30, 2007. The Responses served by Defendant Jane Doe admitted only 4 of the 25 Requests for Admissions, denying the remaining 21 Requests, either outright or with explanatory comments.

The Requests for Admissions and Defendants' Responses were admitted as trial exhibits, and true and correct copies are attached to this motion:

1. Requests for Admissions to John Doe (Trial Exhibit ____);
2. John Doe's responses to Request for Admissions dated May 29, 2007 (Trial Exhibit ____);
3. Jane Doe's responses to Request for Admissions dated May 30, 2007 (Trial Exhibit ____);
4. Requests for Admissions to Jane Doe (Trial Exhibit ____).

Copies are attached to the Declaration of Plaintiff's Attorney, attached hereto. The original Exhibits are still in the possession of the Court Clerk.

_____ was substituted as attorney for Defendants in place of _____ on June 11, 2007. On September 7, 2007, Defendants filed a motion to have the Deemed Admissions withdrawn pursuant to Fed.R.Civ.P. 36(b). In bringing this motion, Defendants conceded that unless the admissions were allowed to be withdrawn, the case would not be decided "on the merits" but rather upon admissions of the parties. (Defendants' Motion to Vacate Admissions, heard October 4, 2007, page 6, lines 14-16.)

Plaintiff vigorously opposed the motion, but it was nevertheless granted by the Court. The deemed admissions were vacated, and Defendants were allowed to deny the Requests for Admissions.

Plaintiff was then forced to retain an expert witness and proceed to trial, where Plaintiff prevailed on his claim under § 523(a)(2) against Defendant Jane Doe. In doing so,

Plaintiff was required to prove the truth of the Requests for Admission that Defendant Jane Doe had previously denied. Had these requests been admitted, or had the Court not been forced to rule on the motion to vacate the deemed admissions, the case would have effectively been over at that point. Due to Defendants' denials, Plaintiff was forced to expend attorney's fees and expert witness fees that would otherwise not have been incurred. Pursuant to Fed.R.Civ.P. 37(c)(2), Plaintiff is entitled to recover attorney's fees, expenses and costs.

ARGUMENT

Fed.R.Civ.P. 37(c)(2) provides:

(2) Failure to Admit.

If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

- (A) the request was held objectionable under Rule 36(a);
- (B) the admission sought was of no substantial importance;
- (C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
- (D) there was other good reason for the failure to admit.

With the exception of Requests, numbered 1, 2 (which both ask defendant to admit borrowing the money), 5 and 10, the balance of the requests are effectively denied. The Request for Admissions and Defendant's Responses to those requests are set forth here:

Request for Admission No. 3: Admit that YOU told the plaintiff that YOU would "cut up your credit cards" if he loaned you money.

Response: Deny, I did not tell Plaintiff I would cut up any credit cards.

Request for Admission No. 4: Admit that after initially borrowing money from the plaintiff, YOU told him that you would file bankruptcy unless he loaned you additional funds.

Response: Deny – I did not tell Plaintiff that I would file bankruptcy unless he loaned me the additional funds.

Request for Admission No. 5: Admit that YOU are a convicted felon.

Response: Admit – I was convicted for embezzlement.

Request for Admission No. 6: Admit that YOU did not tell the plaintiff that you had a felony conviction before borrowing money from him.

Response: I admit only to the extent that I did not tell Plaintiff personally; however, Plaintiff knew I had a felony conviction from my sister Nipa Wick who was Plaintiff's then girlfriend.

Request for Admission No. 7: Admit that YOU told plaintiff that YOU had been offered new employment that would pay you \$2,500 (approximately) per month.

Response: Deny – I never told Plaintiff that I had any job offer for any amount of money.

Request for Admission No. 8: Admit that YOU never had an offer of employment that would pay you \$2,500 (approximately) per month.

Response: Deny – I have not had an offer of employment for any amount of money.

Request for Admission No. 9: Admit that YOU told the plaintiff that you needed an additional car in order to commute to your new employment.

Response: Deny – I did not tell Plaintiff that I needed a car as I did not have any job. In fact, Plaintiff knew that I could not get a job because of my criminal background and that is why in 2002 he helped me to get a job with his then employer, Neighbour's Cadillac.

Request for Admission No. 10: Admit that YOU have a gambling addiction.

Response: Admit.

Request for Admission No. 11: Admit that YOU did not tell the plaintiff that you had a gambling addiction before you borrowed money from him.

Response: Deny, I told him several times regarding my gambling problem and that is why I requested he write checks directly you [sic] my creditor rather than taking money from him.

Request for Admission No. 12: Admit that YOU did not pay off your credit cards with the money you borrowed from the plaintiff.

Response: Deny.

Request for Admission No. 16: Admit that YOU did not tell the plaintiff that YOU had filed a Chapter 7 bankruptcy before borrowing money from him.

Response: Deny – I told Plaintiff about my bad debt because of my gambling issue that I had to file bankruptcy in 1995 and I even told Plaintiff that my credit was getting better and that the interest was lower than his so I could borrow and pay his first loan off which I did. Plaintiff was adamant about not wanting his money back so soon to the point that he counter offered for me to keep the loan with a lower rate of interest.

Request for Admission No. 17: Admit that YOU told the plaintiff if he did not loan an additional \$70,000, you and your spouse would file bankruptcy.

Response: Deny – I only told Plaintiff that I messed up again and that I needed the additional funds so that I could pay off the credit cards so I could afford to pay Plaintiff.

Request for Admission No. 18: Admit that YOU told the plaintiff that YOU would be returning to work with a salary of \$2,500 per month, which was more than the loan payment amount to the plaintiff.

Response: Deny.

Request for Admission No. 19: Admit that YOU told the plaintiff he could be assured of repayment because you were "cutting up" all of your credit cards and would use the loan proceeds to pay off your credit card and other obligations.

Response: Deny – I never told Plaintiff I would cut up the credit cards.

Request for Admission No. 20: Admit that YOU told the Plaintiff that your spouse would assume sole control of your finances, and only he would have access to your checking account.

Response: Agree – my husband opened an account in his name only with Washington Mutual as agreed with Plaintiff.

Request for Admission No. 21: Admit that YOU obtained a car from the plaintiff based on your telling him you needed a car to commute to your new job.

Response: Deny – I never told Plaintiff that I needed a car.

Request for Admission No. 22: Admit that YOU offered to increase the loan interest rate to 8.5% in order to induce plaintiff to loan you the additional \$70,000 in or around February, 2006.

Response: Deny – I offered Plaintiff 8%.

Request for Admission No. 23: Admit that YOU planned to file bankruptcy irrespective of whether or not plaintiff loaned you any additional funds.

Response: I was trying to consolidate my bills to where I was able to afford it because my credit was finally better.

Request for Admission No. 24: Admit that YOU intended to use the new loan to continue gambling.

Response: Deny – the loan was intended to consolidate the credit cards.

Request for Admission No. 25: Admit that YOU did not experience any extraordinary financial emergency event after February 2006 which forced you to file bankruptcy.

Response: Deny – I was not able to pay my bills including my rent payment in January and February. That is why I have to pay my rent in money order now and that

the creditors were calling daily at every hour before 9:00 p.m. Plaintiff came to knock at our apartment after 11:00 p.m. and we were so embarrassed and afraid that we did not open the door. I was having a lot of marital problems concerning this and I was very depressed. My husband and I continue to have marital problems due to these situations to this day.

Plaintiff brought a motion in limine to use Defendant's prior felony conviction for embezzlement, the stolen proceeds of which were used to feed her gambling habit, to impeach Defendant's testimony. The motion was granted. During cross-examination, Defendant freely admitted that she regularly lied in connection with obtaining the loan, in her pre-trial discovery, in her deposition, and in her testimony before the Court given under the penalty of perjury. She admitted that she could not be believed in connection with any of her testimony.

Plaintiff introduced testimony and evidence that contradicts all of the denials made by Defendant Jane Doe. Defendant Jane Doe was wholly impeached on all of her testimony, and particularly her testimony in regard to the material issues in this case. Because the Court found that Plaintiff sustained his burden of proof, it must have accepted the testimony of Plaintiff as credible and truthful, and found that the testimony of Jane Doe was not to be believed.

Request Numbers 3 and 19 ask Defendant to admit that she promised to cut up her credit cards, which she denied she promised to do. John Doe, in the response to requests for admissions propounded on him, denies that this was a promise made to Plaintiff as an inducement to obtain the loan, but claims to have cut them up "at the time" because he was tired of his wife using the credit cards to gamble. (See Exhibits 12 and 13, Request Number 19 and Response thereto.) If this is true, it is unclear how Jane Doe continued to obtain cash advances on those same credit cards until she used all the money obtained in the February 2006 loan. Request Numbers 4 and 17 ask Defendant to admit that she told Plaintiff she would file bankruptcy unless he made a second loan to her, which she denied.

Request Numbers 5 and 6 ask Defendant to admit that she was convicted of felony embezzlement, and while she admits the felony and that she did not tell Plaintiff directly, she states that this was because Plaintiff already knew because her sister told Plaintiff.

Request Numbers 7, 8, 9, 18 and 21 all ask Defendant to admit that she told Plaintiff she would have the ability to repay the loan to him because she had a job offer to pay her \$2,500 per month and that she wanted to purchase a car from Plaintiff as part of the loan

because she needed a car to commute to work. Defendant denied having a job offer and denied ever claiming to Plaintiff that she did have a job offer and that she needed a car to commute to and from work.

Requests 10, 11 and 16 ask Defendant to admit that she had a gambling addiction and that she failed to inform Plaintiff that she was a gambling addict or had filed Chapter 7 bankruptcy in 1995 because of her gambling addiction and embezzlement conviction. She admitted the gambling addiction, but denied that she failed to inform Plaintiff of the gambling addiction or the 1995 bankruptcy prior to borrowing money from him.

Finally, Request Number 12 asks Defendant to admit that she did not pay off her credit cards with the money borrowed from Plaintiff, and Request Number 24 asks Defendant to admit that she intended to use the February 2006 loan to continue gambling. Both of these were clearly proven. Defendant did not pay off her credit cards with the money she borrowed, she gambled it all away and admitted that fact at trial and at her deposition. Further it was shown that with the exception of the day she obtained the proceeds of the February 2006 loan, 2/13/06, Defendant gambled nearly every day up to and including February 13, 2006, then every day after that through February 21, 2006, and then nearly every day after that until the money was gone.

At trial, Plaintiff proved that Defendant had no intention to repay the loans to Plaintiff at the time they were made. Plaintiff proved this element by circumstantial evidence, specifically by introducing evidence that Defendant promised to stop gambling, cut up their credit cards, close the credit cards accounts, open an account to which only Defendant John Doe had access, but then failed to do as they promised. Plaintiff further showed this by proving that Defendant failed to disclose to Plaintiff her prior felony embezzlement conviction, her prior bankruptcy, or her gambling addiction. The only evidence offered in support of Defendant's contentions was her testimony, which she herself admitted could not be believed. Plaintiff specifically offered direct evidence of what he was told and not told. Although the court was not specific about which elements it relied on in forming its decision, all or some combination of these elements was accepted as sufficient evidence necessary for Plaintiff to sustain his burden of proof. Defendant was aware that she would be wholly impeached, yet chose to offer no other evidence in support of her claims besides her own testimony. She should have known, therefore, that she had no reasonable basis upon which to believe that she would be able to prove her denials at trial.

The essence of this motion and the federal discovery rules upon which it is based is to encourage parties to tell the truth and not to make denials merely for the purpose of delaying the outcome and to cause parties to incur unnecessary time and expenses in trial.

In this case, Defendant's denials were nothing more than an extension of her gambling problem. She was gambling on the outcome of the case and did not want to admit the truth, but instead chose to gamble that Plaintiff would not be able to prove it or some other intervening factor would exonerate her. Because Defendant knew she was lying when she denied the requests, yet pleaded with the Court to relieve her from her deemed admissions, admissions that ended up being proven true at trial, and because Defendant had no reasonable belief that she could prove her denials were made truthfully, the Court is required to award Plaintiff his reasonable expenses and attorney fees pursuant to Fed.R.Civ.P. 35(c)(2) in the total amount of \$_____, as more fully set forth in the accompanying Declaration of O. Max Gardner III, Plaintiff's attorney.

Dated this the _____ day of _____, 2009.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a stylized flourish at the end.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

Debtor.

Plaintiff,

vs.

Defendants.

**CASE NO.
OUR FILE NO.**

ADV. PROC. NO.

DECLARATION OF O. MAX GARDNER, III, ATTORNEY FOR PLAINTIFF

I, O. Max Gardner, III hereby make solemn oath:

1. I am an attorney and counselor at law, duly admitted to practice in the State of North Carolina and this Court and represent the Plaintiffs in this proceeding.
2. I have spent _____ hours and _____ minutes in this case specifically for the purpose of proving true Requests for Admissions.
3. My Timeslips for this case is attached hereto, reflecting the total time spend in this matter.

Dated this the _____ day of _____, 2009.



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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
John Q. Public,	)	CASE NO.
	)	OUR FILE NO.
)	
Debtor.)	
<hr style="width:35%; margin-left:0"/>)	
JOHN Q. PUBLIC,)	
)	
Plaintiff,)	
)	
STEVEN G. TATE, ESQ.	)	ADV. PROC. NO.
Chapter 13 Trustee, Interested Party)	
)	
vs.)	
)	
DEUTSCHE BANK NATIONAL TRUST COMPANY,)	
)	
Defendant.)	

MOTION UNDER RULE 7056(f)

I. INTRODUCTION

Plaintiff John Q. Public hereby moves this Honorable Court to deny Summary Judgment or, in the alternative, continue this action pursuant to rule 56(f) of the Federal Rules of Civil Procedure and Rule 7056(f) of the Federal Rules of Bankruptcy Procedure. This motion is supported by the declaration of plaintiff attached as Exhibit "A" and incorporated by this reference.

This motion is made on the grounds that, as set forth in detail in the Public declaration, plaintiff does not have the benefit of necessary fact discovery from Defendant to determine whether disbursements associated with the loan were properly excluded from points and fees calculation under HOEPA and has not had sufficient opportunity to conduct such discovery or otherwise obtain and present facts essential to justify his opposition to summary judgment.

Therefore, plaintiff debtor respectfully requests that the Court deny or, in the alternative, continue hearing motion for summary judgment to a date no earlier than insert date. Such a continuance would likely provide sufficient time for plaintiff to complete discovery and otherwise obtain facts essential to justify his opposition to Defendant's motion. Such discovery includes the attached written discovery attached hereto as Exhibit "B".

II. STANDARD OF REVIEW

Rule 56 (f) permits the court to order a continuance of a motion for summary judgment "should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." To succeed, a Rule 56(f) motion "must identify with specificity what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained." Lunderstadt v. Colafella, 885 F.2d 66, 71 (3d Cir. 1989). Summary judgment is proper when there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R.C.P. 56(c). Rule 56(f) confers on the court wide discretion to allow additional discovery to be completed before summary judgment, or to "make such order as is just" to "protect parties from a premature grant of summary judgment." Weinberg v. Whatcom County, 241 F.3d at 750 (9th Cir. 2001).

III. ARGUMENT

Debtor alleges violation of HOEPA based on facially apparent defects in disclosure of the finance charge based on the TILA and HUD-1 disclosures. To wit, unspecified and unexplained attorney fees listed under the services portion of the HUD-1 and a service charge listed under the disbursement section of the HUD-1 are excluded from the HOEPA points and fees calculation. A violation is apparent on the face of the disclosure statement if "the disclosure can be determined to be incomplete or inaccurate by a comparison among the disclosure statement, any itemization of the amount financed, the note, or *any other disclosure of disbursement*." 15 U.S.C. §1641(e)(1).¹

As set forth in debtor's Affidavit, debtor is unaware of the basis for these charges. Defendant is in sole possession of the full set of loan documents for this loan which would reveal any factual basis for these fees being assessed in connection with the loan. To determine whether the attorney fees are duplicative and/or baseless and the service fee represents loan services or a payoff requires defendant answering the discovery attached to this motion as Exhibit "B". Debtor has been unable to serve discovery due to the objections that would be met from defendant as to inefficient use of judicial resources, etc., due to the previously pending Rule 12b6 motions to dismiss.

At a minimum, examination of the origination file's loan documents for invoices or other explanation of or support for what these fees and charges represent is required to determine whether such fees and charges were "bona fide and reasonable" charges properly excludable from the points and fees calculation as permitted by Reg. Z 226.4(c)(7). Plaintiff is entitled at least to discovery from defendant's file as to the foregoing issue.

WHEREFORE, debtor having raised issues of material fact to be determined as to his adversary claims sounding violation of HOEPA, debtor requests discovery and denial or continuance of the Court's hearing on summary judgment as to debtor's claims.

¹ Hays v. Bankers Trust, 46 F.Supp. 2nd 490 (SD WV 1999) (assignee liable where Amount Financed listed on TILA disclosure form was overstated due to improper exclusion of broker fee disclosed on HUD1 and fee disclosure).

Dated this _____ day of _____, 20____.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
John Q. Public,	)	CASE NO.
	)	OUR FILE NO.
Debtor.)	
<hr style="width: 35%; margin-left: 0;"/>)	
JOHN Q. PUBLIC,)	
)	
Plaintiff,)	
)	
STEVEN G. TATE, ESQ.	)	ADV. PROC. NO.
Chapter 13 Trustee, Interested Party)	
)	
vs.)	
)	
DEUTSCHE BANK NATIONAL TRUST COMPANY,)	
)	
Defendant.)	

AFFIDAVIT OF DEBTOR

I, John Q. Public, a competent adult and plaintiff debtor in this matter, being duly sworn according to law, depose and state that, for the following reasons, I am unable to present facts essential to justify opposition to a summary judgment without discovery of facts within the sole possession of defendant:

1. The only loan document in my possession from my loan is one page from a HUD-1 settlement statement (attached to this affidavit as Ex. "A").
2. Neither name of closing attorney nor any other person orally explained to me or provided me with an invoice, letter, or other written document which explained what services, if any, were performed for the attorney fees of \$500 and \$1,500 listed on the HUD1 settlement for my loan.
3. Prior to receiving the loan, I did not owe a debt to either name of closing attorney or name of any other person involved in the loan closing now claiming a debt owed.
4. Neither name of any other person involved in the loan closing now claiming a debt owed nor any other person provided me with an invoice, letter, or other written document which explained to me what services, if any, were performed for the fee of \$2,000 listed on the HUD 1 settlement for my loan (attached to this affidavit as Ex. "A").
5. Neither name of pest inspector and/or company identified on HUD1 nor any other person conducted a pest inspection of my home.

John Q. Public

Sworn to and subscribed before me this
_____ day of _____, 20__.

Notary Public

My Commission Expires:

B. Motions

Motions to Dismiss

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

IN THE MATTER OF:

NAME(S):

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR(S)

Creditor

Adv. Proc. No.

Plaintiff,

versus

Debtors,

Defendants.

**Motion to Dismiss the Complaint
For Failure to State a Claim**

Come Now the above-named Debtors and Defendants, by and through their attorney of record, and respectfully move this Court pursuant to Rule 7012 of the Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rule of Civil Procedure to dismiss the complaint for failure to state a claim upon which relief can be granted and in support hereof allege and stay that:

1. The base case was commenced by the filing of a petition with the Clerk of this Court on _____.
2. The 341(a) meeting of creditors was held in Charlotte, North Carolina, on _____.
3. In the complaint, the Plaintiff is seeking an order of non-dischargeability as to a debt allegedly covered by Section 523(c) of the Bankruptcy Code.
4. Rule 4007(c) of the Bankruptcy Rules provides that a complaint to determine the dischargeability of a debt under Section 523(c) shall be filed no later than 60 days after the first date set for the 341(a) Meeting of Creditors.
5. The records of this court in this proceeding reveal that the complaint was filed and the summons was issued 77 days after _____, the date of the 341(a) Meeting of Creditors.

6. As a result of the foregoing, the Plaintiff is barred by statute and rule from asserting any claim for the relief stated against these Debtors and Defendants.

WHEREAS, the Defendants respectfully request the Court to:

A. Grant the motion of the Defendants to dismiss this complaint with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and rule 7012 of the Bankruptcy Rules;

B. Order the Plaintiff to pay the reasonable legal fees and expenses incurred by the Defendants in this case; and

B. Grant any other relief the Court deems just and proper.

Dated this the _____ day of _____, 2008.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a stylized flourish at the end.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Defendants
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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
	)	CHAPTER 13 CASE NO.
	)	OUR FILE NO.
)	
Debtors.)	
<hr/>)	
)	
	)	ADV. PROC. NO.
WASHINGTON MUTUAL BANK, FA)	
SUCCESSOR BY MERGER TO)	
BANKUNITED, FSB Plaintiff,)	
)	
vs.)	
)	
Jane Smith,)	
)	
Defendant.)	

**DEFENDANT’S MOTION TO DISMISS/ABATE ACTION
FOR FAILURE TO SUBSTITUTE PLAINTIFF**

COMES NOW, the Defendant and moves the court to dismiss/abate this action on account of the plaintiff’s failure to substitute the United States Office of Thrift Supervision (OTS) and/or the Federal Deposit Insurance Corporation (FDIC) and/or JPMorgan Chase as the real party in interest and in support, states:

1. On September 25, 2008, the OTS closed the plaintiff, Washington Mutual Bank, and appointed the FDIC as receiver.
2. Subsequent to the closure of the plaintiff, JPMorgan Chase acquired the assets of the plaintiff from the FDIC as the receiver for the plaintiff.
3. This defendant has until December 30, 2008 to file her proof of claim to the FDIC as receiver to present and preserve her claims against the plaintiff that arise out of the mortgage transaction and the foreclosure that are the subject of this litigation.
4. A copy of the Bank Acquisition Information sheet and the notice to creditor from the FDIC to file proof of claim downloaded from www.fdic.gov concerning the plaintiff and documenting the above information is attached and incorporated herein.
5. The plaintiff, Washington Mutual, no longer has any interest in the subject matter or outcome of this litigation.
6. The plaintiff, Washington Mutual, is not the real party in interest and has no standing to pursue this action.
7. Despite notice to counsel for plaintiff and despite the fact that the FDIC was appointed receiver almost 3 months ago and the plaintiff then was sold to JPMorgan Chase,

the plaintiff has failed to substitute the real party in interest as the plaintiff in this proceeding.

8. The present owner of the subject mortgage and holder of the subject promissory note is the entity with standing and the real party in interest and is an indispensable party to this action and must be substituted in order for relief to be accorded in this action pursuant to North Carolina General Statute § 1-57, Rule 17 of the Federal Rules of Civil Procedure, and Federal Rule of Bankruptcy Procedure 7017.

Wherefore, pursuant to North Carolina General Statute § 1-57, Rule 17 of the Federal Rules of Civil Procedure, and Federal Rule of Bankruptcy Procedure 7017, the defendant requests the court grant this motion and dismiss or abate this action for failure to substitute plaintiff and for all other relief to which defendant proves herself entitled.

Dated this _____ day of _____, 2009.

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e-mail maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME(S):

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR

Creditor,

Adv. Proc. No.

Plaintiff,

versus

Debtor,

Defendant.

**MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION**

COMES NOW the above-named debtor, by and through her attorney of record, and respectfully moves to dismiss this case for lack of subject matter jurisdiction and in support thereof, alleges and says that:

1. Article III, Section 2 of the United States Constitution provides that the judicial power of the United States shall extend to, among other things, "all cases in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority;" This doctrine of "standing" is a foundational component for which courts can identify those "cases" that are appropriately resolved in the Federal court system. See, e.g., *W.R. Huff Asset Management Co. LLC v. Deloitte & Touche, LLP*, 549 F.3d 100 (2d Cir. 2008).

2. The United States Supreme Court has made it clear that a litigant must have standing to satisfy the "cases" or "controversies" requirement of Article III to qualify to bring a claim in Federal Court.

3. To this end, the Court has established that irreducible constitutional minimum of standing contains four elements:

(a) An injury in fact which is concrete and peculiarized and actual or imminent, not conjectural or hypothetical;

- (b) A causal connection between the injury and the alleged injury-causing action that is fairly traceable to the challenged action of the party seeking federal jurisdiction and not the result of the independent action of some third party not before the court;
- (c) The injury will likely be redressed by a favorable decision; and
- (d) The party invoking federal jurisdiction has the burden to establish these elements.

See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 2136 (1992).

4. In the present cases, there is no evidence that the movant has been lawfully given the ownership of, or the right to retain any recovery with respect to, the claims asserted. The purported assignments and negotiations attached to the motion are totally inconsistent with the Conveyancing Rules of Section 2.01 of the Pooling and Servicing Agreement and therefore, are ineffective, as a matter of federal law, to transfer any ownership rights to the movant.

5. Furthermore, the federal courts have held that the granting of a "power of attorney" is insufficient standing alone as a "provision by which one person grants another the power to sue on and collect on a claim." The grant of a power of attorney, however, is not the equivalent of an assignment of ownership; and, standing alone, a power of attorney does not enable the grantee to bring suit in his name." See, e.g., *Titus v. Wallick*, 206 U.S. at 289, 59 S.Ct. at 561; *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11 (2nd Cir. 1997).

6. The movant in this case has provided no proof that it owns the mortgage note or that it has a beneficial interest in the note.

WHEREFORE, the debtor/defendant respectfully requests the Court to:

- A. Grant her motion to dismiss this case with prejudice for lack of subject matter jurisdiction;
- B. Order the plaintiff to pay the reasonable legal fees and expenses incurred by the debtor/defendant in this case; and
- C. Grant any other relief the Court deems just and proper.

This the _____ day of _____, 2009.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
John Q. Public,	)	CASE NO.
	)	OUR FILE NO.
Debtor.)	
<hr style="width: 35%; margin-left: 0;"/>)	
FIA CARD SERVICES, N.A. (fka MBNA America Bank, N.A.)	)	ADV. PROC. NO.
)	
Plaintiff,)	
)	
vs.)	
)	
John Q. Public,)	
)	
Defendant.)	

MOTION FOR JUDGMENT ON THE PLEADINGS

Debtor/Defendant John Q. Public hereby moves the Court for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), as incorporated by U.S. Bankruptcy Rule 7012(b), and in support of this Motion offers the attached Memorandum of Points and Authorities, we well as the pleadings and papers on file herewith, and upon such other oral and documentary evidence as may be presented at the hearing on this matter.

Defendant requests that he be granted judgment on the pleadings dismissing the adversary proceeding.

Dated this _____ day of _____, 2009.

O. Max Gardner III
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Attorney for the Debtor/Defendant
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e-mail maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
John Q. Public,)	CASE NO.
)	OUR FILE NO.
Debtor.)	
)	
FIA CARD SERVICES, N.A. (fka MBNA America Bank, N.A.))	ADV. PROC. NO.
)	
Plaintiff,)	
)	
vs.)	
)	
John Q. Public,)	
)	
Defendant.)	

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant John Q. Public ("Defendant") submits this Memorandum of Points and Authorities in support of his Motion for Judgment on the Pleadings in favor of Defendant and against Plaintiff FIA Card Services, N.A. (fka MBNA America Bank, N.A.) ("Plaintiff").

I. STATEMENT OF THE CASE

The action arises out of a claim that Defendant made certain credit card purchases and/or cash advances without the intention to pay for said purchases and/or cash advances. Plaintiff is a creditor in Defendant's Chapter 7 bankruptcy case.¹ Plaintiff's Complaint pleads a single cause of action seeking to have Defendant's debt to Plaintiff declared nondischargeable under 11 U.S.C. § 523(a)(2)(A). Plaintiff also seeks compensatory damages, interest, attorney's fees and costs.

As more fully discussed hereafter, the Complaint fails to state a claim upon which relief may be granted and should be dismissed.

**II. A MOTION FOR JUDGMENT ON THE PLEADINGS IS JUSTIFIED WHERE A
COMPLAINT FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM**

A Rule 12(c) motion for judgment on the pleadings and a Rule 12(b)(6) motion to dismiss are virtually interchangeable. *See* William W. Schwarzer, et al., *Federal Civil Procedure Before Trial* § 9:319 (2003). In fact, the same standard applies to both. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989)

¹ In Re: John Q. Public, Chapter 7 Case No. 09-00000

(stating standard for motion for judgment on the pleadings); Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988) (stating standard for motion to dismiss). The only differences between the two motions are (1) the timing (a motion for judgment on the pleadings is usually brought after an answer has been filed, whereas a motion to dismiss is typically brought before an answer is filed), Jones v. Greninger, 188 F.3d 322, 324 (5th Cir. 1999), and (2) the party bringing the motion (a motion to dismiss may be brought only by the party against whom the claim for relief is made, usually the defendant, whereas a motion for judgment on the pleadings may be brought by any party). In re Villegas, 132 B.R. 742, 744-45 (9th Cir. BAP 1991).

Because the two motions are analyzed under the same standard, a court considering a motion for judgment on the pleadings may give leave to amend and "may dismiss causes of action rather than grant judgment." See Federal Civil Procedure Before Trial, *supra* at § 9:341; Moran v. Peralta Cmty College Dist., 825 F.Supp. 891, 893 (N.D.Cal. 1993). The mere fact that a motion is couched in terms of Rule 12(c) does not prevent the district court from disposing of the motion by dismissal rather than judgment. See Amersbach v. City of Cleveland, 598 F.2d 1033, 1038 (6th Cir. 1979). Therefore, the court considers defendant's motion as it would a motion to dismiss, and declines to grant judgment at this point.

The Federal Rules of Civil Procedure, Rule 12(b)(6) and Rule 12(c), allow a court to dismiss a complaint for failure to state a claim upon which relief can be granted. Such a dismissal can be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. See Balistreri, 901 F.2d at 699; Hal Roach Studios, 896 F.2d at 1550. In applying this standard, the court's review is limited to the contents of the complaint. See Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996); Hal Roach Studios, 896 F.2d at 1550. The court must accept all factual allegations pleaded in the complaint as true, construing and drawing all reasonable inferences from the allegations in favor of the nonmoving party. See Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996); Wager v. Pro, 575 F.2d 882, 884 (D.C. Cir. 1976).

However, the court need not accept as true unreasonable inferences or conclusory legal allegations case in the form of factual allegations. See Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). *cert. denied*, 454 U.S. 1031, 102 S.Ct. 567, 70 L.Ed.2d 474 (1981). Moreover, the court does not have to accept as true conclusory allegations that contradict facts that may be judicially noticed or that are contradicted by documents referred to in the complaint. See, e.g. Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295-96 (9th Cir. 1998).

With these principles in mind, the Defendant invites the Court's attention to the following arguments:

III. THE COMPLAINT FAILS TO STATE A CLAIM BECAUSE IT FAILS TO SUFFICIENTLY ALLEGE THE ELEMENTS FOR A CLAIM THAT THE DEBT IS NOT DISCHARGEABLE

In very broad and overly generalized terms, the Complaint alleges that Defendant obtained money from the Plaintiff through false pretenses, false representations and actual fraud. To comply with pleading requirements of Fed. R. Civ. P. 8, as incorporated by U.S. Bankruptcy Rule 7008, and "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, No. 07-1015, Slip. Op. at 14 (U.S. May 18, 2009) (internal citations and quotations omitted).

"[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Legal conclusions couched as a factual allegation are likewise not entitled to be accepted as true for purposes of a Motion to Dismiss. *Id.*

The Complaint filed herein contains 27 paragraphs of allegations to support its cause of action (paragraphs 6 through 27). The Defendant contends that 12 of these paragraphs (paragraphs 15 through 26) are mere legal conclusions or recitals of the elements of the cause of action. As such, they are not entitled to the assumption of truth. *Id.* at 15.

Paragraphs 7 through 14 all contain factual actual allegations which are entitled to the presumption of truth. However, none of those allegations, or the reasonable inferences that can be drawn from them, provides the factual support for the claim asserted by the Plaintiff. In particular, the Complaint fails to contain any factual allegations to support the elements of 11 § 523(a)(2) that the Defendant made a representation to repay the debt incurred, that the Plaintiff relied upon this alleged representation, that the alleged representation was false, or that the Plaintiff was injured by the alleged false representation.

Given the lack of factual allegations to support the Complaint, the Plaintiff has failed to plead sufficient allegations to support its Complaint under 11 U.S.C. § 523(a)(2) and the Complaint should be dismissed for failing to state a claim upon which relief can be granted.

IV. CONCLUSION

Based on the foregoing, Defendant respectfully requests that the Court grant this Motion for Judgment on the Pleadings and enter judgment against Plaintiff.

Dated this _____ day of _____, 2009.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for the Debtor/Defendant
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
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B. Motions

Motions to Strike

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

Debtors ,

Adversary Proceeding No.: _____

Plaintiffs,

versus

**CITIGROUP, INC., AND
CITIFINANCIAL MORTGAGE
COMPANY, INC.,**

DEFENDANTS.

**MOTION TO STRIKE ANSWER
And
For Judgment on the Pleadings**

COME NOW the above-named Plaintiffs, by and through their attorney of record, and hereby move the Court pursuant to Rule 7012(b) of the Bankruptcy Rules and Rules 12(f) and 12(c) of the Federal Rules of Civil Procedure to strike Defendants' Answer to the Complaint and for judgment in favor of the Plaintiffs based on the allegations of the Complaint, and in support thereof allege and say that:

1. This case was commenced by the filing of a Complaint Seeking Damages in Non-Core Adversary Proceeding on _____.

2. The Consent Motion for Extension of Time for Citigroup, Inc. and CitiFinancial Mortgage Company, Inc. to Respond to Debtors' Complaint Seeking Damages in Non-Core Adversary Proceeding was granted. Citigroup, Inc. and CitiFinancial Mortgage Company, Inc. had until _____, to serve their answer or otherwise plead in response to the Complaint Seeking Damages in Non-Core Adversary Proceeding.

3. The Defendant filed an Answer to the Complaint on _____.

4. Rule 7007.1(a) of the Bankruptcy Rules provides for the following required

disclosure:

Any corporation that is a party to an adversary proceeding, other than the debtor or a governmental unit, shall file two copies of a statement that identifies any corporation, other than a governmental unit, that directly or indirectly owns 10% or more of any class of the corporation's equity interests, or states that there are no entities to report under this subdivision.

5. Rule 7007.1(b) provides the following:

A party shall file the statement required under Rule 7007.1(a) with its first pleading in an adversary proceeding. A party shall file a supplemental statement promptly upon any change in circumstances that this rule requires the party to identify or disclose.

6. The Defendants' pleadings failed to include a Rule 7007.1(a) Statement of Corporate Ownership in violation of Rule 7007.1(b).

7. The Plaintiffs are therefore moving the Court to strike Defendant's Answer and for Judgment on the allegations of the Complaint for failure of the Defendant to comply with the mandatory disclosure requirements of the Federal Rules of Bankruptcy Procedure.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That this court strike the Defendants' Answer for failure to comply with the mandatory rule for including the Statement of Corporate Ownership;

B. For Judgment on the allegations of the complaint;

C. That the debtors have such other and further relief as the Court may deem just and proper.

Dated this the _____ day of _____, 2008.



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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
	)	CHAPTER 13 CASE NO.
	)	OUR FILE NO.
)	
Debtor.)	
<hr style="border: 0.5px solid black;"/>)	
	)	ADV. PROC. NO.
)	
Plaintiff,)	
)	
vs.)	
)	
)	
Defendants.)	

PLAINTIFF'S MOTION TO STRIKE AFFIDAVIT

COMES NOW the Plaintiff, pursuant to Bankruptcy Rule 7056 and moves the Court to strike certain statements averred to be fact by the affiant in the Affidavit of John Affiant, including every statement referring to an extrinsic document not attached and properly authenticated; every statement not shown to be made upon personal knowledge, and other certain statements contained therein which are inadmissible for the grounds stated. As grounds therefore, plaintiff shows unto the court the following:

Bankruptcy Rule 7056 incorporating FED. R. CIV. P. 56(e) sets the standards for admissible evidence in affidavits submitted by a party on a motion for summary judgment:

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

1. Plaintiff objects and moves the court to strike all statements which refer to documents neither attached nor properly authenticated in violation of Rule 56(e); said statements as are contained in unnumbered paragraphs 1 and 2 on Page 1, and Paragraphs 2 and 3 of Page 2.
2. Plaintiff objects to the hearsay statements in Paragraph 3 on Page 2, First and Second sentences, each of which begin with "I am advised that...". Said statements are obviously and patently based upon out of court statements by another to prove the truth of the matter asserted. Said statements also clearly contradict the record contained in the Debtor's chapter 13 case (Doc #1).
3. Plaintiff objects to the opinion evidence offered by affiant in the last Paragraph on Page 2 continuing to Page 3, as without adequate foundation, obviously self serving, irrelevant to the ultimate issue of notice, and are conclusions not based upon admissible evidence.

WHEREFORE, premises considered, Plaintiff moves the court to grant the relief requested.

Dated this _____ day of _____, 2009.

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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
	)	CHAPTER 13 CASE NO.
	)	OUR FILE NO.
)	
Debtors.)	
)	
)	
	)	ADV. PROC. NO.
Plaintiff,)	
)	
vs.)	
)	
)	
Defendant.)	

MOTION TO STRIKE AFFIRMATIVE DEFENSES

This is a motion filed pursuant to Rule 12(f) of the Federal Rules of Civil Procedure and your 7012 of the Bankruptcy Rules to strike certain affirmative defenses pled by Defendant in their answer to the Plaintiff's complaint. Plaintiff brings this motion to strike redundant, irrelevant, frivolous and immaterial matter from the answer and to test the legal sufficiency of a defense. Plaintiff moves this Court to strike the Defendant's Affirmative Defenses numbered 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 25, and show the Court the following:

1. In an uncomplicated complaint for a single cause of action claim violation of the Discharge Injunction, Defendant has alleged twenty-five separate affirmative defenses.

2. This method of pleading displays a lack of care and deliberation and causes the parties to waste unnecessary time and money litigating the invalid and insufficient defenses.

3. For example, one of the alleged affirmative defenses (Twenty-Second Defense) purports to incorporate by reference *"any and all standards or limitations regarding the determination and enforceability of punitive damage awards articulated in BMW of North America v. Gore, 116 S.Ct. 1589 (1996) and its progeny."* [Emphasis added] No attorney could possibly believe that all the standards or limitations set out in that forty page opinion would be even remotely applicable in a case of this simplicity.

4. Second Affirmative Defense. Defendant asserts that the complaint is barred by "all applicable statutes of limitations." Defendant's conclusory allegation deprives the Plaintiff of fair notice of the grounds upon which the defense rests. The Plaintiff's complaint alleges in paragraphs 7 & 8:

On June 11, 2008, the plaintiff was granted a discharge of all dischargeable debts pursuant to 11 U.S.C. § 524. Plaintiff alleges that this discharge included the debt to Defendant pursuant to 11 U.S.C. 727.

On or before August 7, 2008, Defendant filed a lawsuit against the debtor Angela Weaver, in the Court of Justice of Cleveland County, North Carolina, designated as File Number 2008 CVD 2670 for the sum of \$3,078.48 plus court costs.

Therefore, there is no legal or factual basis upon which Defendant could allege that any statute of limitation, Federal or State, would apply during this period to bar the single cause of action alleged in the complaint. Defendant has engaged in "boilerplate" pleading, asserting defenses with no conceivable basis in law or fact and no relationship to the case at hand.

5. Third Affirmative Defense. Defendant asserts that the complaint is barred by "the doctrines of waiver and estoppels." Defendant's conclusory allegation deprives the Plaintiff of fair notice of the grounds upon which the defense rests. There is no legal or factual basis upon which Defendant could allege that the doctrines of waiver and estoppels would bar the discharge violation cause of action alleged in the complaint. Defendant has engaged in asserting defenses with no conceivable basis in law or fact and no relationship to the case at hand.

6. Fourth Affirmative Defense. In this alleged affirmative defense Defendant asserts that the Plaintiff's damages were caused by the acts or omissions of others. This is not a defense. Defendant is only responsible for its own acts or omissions. It is not necessary for the Defendant to assert fault of the Plaintiff or other parties, an allegation that may be appropriate in a state tort case but has no bearing or relevance in this action.

7. Fifth, Sixth and Seventh Affirmative Defenses. In these alleged affirmative defenses Defendant states it (5) owed no duty, (6) breached no duty, and (7) caused no harm, to the Plaintiff. These are not affirmative defenses. Plaintiff has the burden of demonstrating a duty, breach of that duty and any harm suffered, so these purported affirmative defenses are merely borrowed allegations of some other complaint with no bearing or relevance in this action.

8. Eighth Affirmative Defense. In this asserted affirmative defense Defendant states its actions "were conducted in good faith and were in accordance with the terms and conditions of its agreements with Weaver."

What? In good faith and in accordance with the terms and conditions of its agreements with Weaver? What nonsense. Defendant sued the Plaintiff on a discharged debt! Good faith is not an affirmative defense in this instance; it is insufficient on its face and constitutes no more than a bare bones conclusory allegation. Yet another instance of a boilerplate allegation lifted from some other pleading without regard to whether it applies in this case or has a legal or factual basis to support it.

9. Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-First, and Twenty-Second Affirmative Defenses.

These thirteen alleged affirmative defenses all make the same repetitive statements regarding punitive damages and are a waste of paper and ink. They are attempts by Defendant to disguise self serving statements and conclusions of law as affirmative defenses.

Affirmative defenses numbered Ten, Eleven, Twelve, Thirteen, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, and Twenty also reference punitive damages under North Carolina law and are inapplicable to the case at hand.

10. Twenty-third Affirmative Defense. This supposed affirmative defense is a Motion to Bifurcate that is clearly language taken from other pleadings without regard to whether it applies in this case or not. The motion oddly references the North Carolina Rules of Civil Procedure and preservation of trial by jury. A motion to bifurcate is a pretrial motion normally reserved until after discovery when a party could conceivably has a factual basis for its assertion, it is certainly not an affirmative defense. Plus, there is no right to a trial by jury for an alleged violation of the Discharge Injunction in a bankruptcy case.

11. Twenty-Fifth Affirmative Defense. Defendant's twenty-fifth affirmative defense is not a defense at all but a sentence separating the Affirmative Defenses from the Defendant's Answers to the specific paragraphs of the Plaintiff's complaint.

12. The portion of Defendant's pleading that actually answers the Plaintiff's complaint consists of twelve numbered statements that take up one-half page. The other seven and one-half pages of Defendant's pleading are taken up with the assertion of every conceivable affirmative defense representing the method of "pleading everything including the kitchen sink."

WHEREFORE, the Plaintiff prays the Court as follows:

- A. For an Order striking the enumerated affirmative defenses as set out in this motion; and
- B. That the Plaintiff recover against the Defendant an award of excess costs, expenses, and reasonable attorney's fees incurred because of the Defendant's conduct in multiplying these proceedings; and
- C. That the Plaintiff be awarded such other and further relief as the Court deems just and proper.

Dated this _____ day of _____, 2009.

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B. Motions Sanctions

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

MOTION FOR SANCTIONS PURSUANT TO BANKRUPTCY RULE 9011

COME NOW the above-named Debtors, by and through their attorney of record, and respectfully move this Court pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure for the entry of an order of sanctions against the attorney for Chase Home Finance, LLC, servicing agent for LaSalle Bank National Association, Trustee and in support hereof allege and say that:

1. This case was commenced by the filing on _____, of a voluntary petition under Chapter 13 of Title 11 of the United States Code.

2. The Debtors fell behind on their post petition mortgage payments and LaSalle Bank National Association, Trustee by and through its servicing agent Chase Home Finance, LLC (hereinafter "Chase") filed a motion seeking relief from the automatic stay on or about _____. The motion was resolved by a consent order that allowed the Debtor to add one missed payment to their Chapter 13 plan and resume making regular direct mortgage payments on a timely basis beginning in _____. If those payments were not made, Chase was required to send a notice giving the debtor fifteen additional days to make the payment. If the payment was not made within that time period, Chase would be released from the automatic stay. The consent order was good for 12 months following entry of the order. The order was entered on _____.

3. The Debtors failed to timely make the _____ payment and Chase sent notice giving the Debtors 15 days to cure the default. The Debtors sent a payment on _____. The payment was wired via western union quick collect. The payment amount was \$845.00. Also Chase contacted the female debtor at work to demand payment. The caller even offered a second mortgage to pay off the arrears.

4. Despite the fact the Debtors fully complied with the Consent Order and submitted their _____ payment within the 15 day notice period, Chase caused a Notice of Default and Termination of the Automatic Stay to be entered in the case on _____. Furthermore, this was done even though the 12 month future default was not even in effect based on the date of entry of the Consent Order. By the express terms of that order, the 12 month future default terminated on _____.

5. Chase's attorney has violated Bankruptcy Rule 9011 by filing a false document with the Court. A reasonable inquiry into the terms of the Consent Order would have revealed that the 12 month future default expired on _____. Furthermore, even if the Consent Order was still in effect, which it was not, the Debtors complied with the terms by submitting a payment within the 15 day notice period.

6. A copy of this motion was served on the attorney for Chase, giving 21 days' notice to withdraw the offending document before filing this motion and he failed and refused to withdraw the Notice of Default and Termination of the Automatic Stay.

7. The Debtors in this case respectfully request that Chase's attorney be sanctioned pursuant to Rule 9011 and also to pay the attorney fees incurred by the attorney for the Debtors.

WHEREFORE, the movants pray for Sanctions to be entered against Chase's attorney pursuant to Bankruptcy Rule 9011, and for such other and further relief as to this Court seems just and proper.

Dated this the _____ day of _____, 2008.



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Date

Attorney
Brock & Scott, PLLC
5121 Parkway Plaza Dr.
Suite 300
Charlotte, NC 28217

In the Matter of:

Debtors
Address
Chapter 13 No: SSN:
File Date:
Our No:

Dear _____:

The attached motion will be filed with the Court if you do not withdraw the notice of termination of the automatic stay that was entered in this case. Such motion will be filed after the expiration of the 21 day period specified in Bankruptcy Rule 9011. Such withdrawal should also direct the Chapter 13 trustee to resume making payments on Chase's claim.

Also, the Debtors informed me that Chase contacted the female debtor at work regarding the alleged past due amounts. If these improper contacts continue, we will file a motion for violation of the automatic stay against your client seeking damages and attorney fees.

Very truly yours,



O. Max Gardner III

OMGIII/wsg
ENCLOSURE: MOTION FOR SANCTIONS

cc: debtors

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: Chapter 7 No.
Our File No.

ADDRESS:

SSN:
Debtor.

Rule 9011 Motion for Sanctions with a Request to waive the 21 day prior notice period and in fact to treat the objection as a prior notice of problems pursuant to the Rule.

DEBTOR'S MOTION FOR BR 9011 SANCTIONS:
PHH MORTGAGE CORPORATION

To the Honorable Craig Whitley, U.S. Bankruptcy Judge:

Debtor, by and through counsel, moves for sanctions against PHH Mortgage Corporation. In support thereof, debtor states:

1. Debtor filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code on August 31, 2009. The Meeting of Creditors was held on September 29, 2009.

2. Jurisdiction of the Court in this matter is provided by 28 U.S.C. §§ 1334 and 157 and the Order Of Reference of the United States District Court for this district, incorporated into the local rules of the district court as LR 201.

3. Movant asserts that this is a core proceeding, and specifically assents to issuance of final findings of fact and conclusions of law by this Court for any non-core issues.

4. PHH Mortgage Corporation knew or should have known that it was not entitled to stay relief when it filed its Motion for Relief from Stay for the many reasons stated in debtor's Opposition.

- a. PHH has still not demonstrated the required possession of the Mortgage Note, despite debtor's Opposition having raised this issue.
- b. PHH has still not demonstrated the required endorsements of the Mortgage Note, despite debtor's Opposition having raised this issue.
- c. PHH has still not demonstrated an assignment of the Mortgage Note to itself, should the Court rule that an assignment is effective to give rights to a note holder instead of an endorsement, despite debtor's Opposition having raised this issue.
- d. PHH still dishonors its own forbearance agreement, despite debtor's

Opposition having raised this issue.
(The debtor will withdraw the Fourth and Fifth Defenses raised in her Opposition to the motion for relief from stay, which related to statutorily required signatures for the mortgage assignments.)

5. Additionally, PHH Mortgage Corporation knew or should have known that the stay is dissolved upon closing of the case when all property not otherwise administered is abandoned, 11 USC 554, that this is a “no asset” case with no expectation of delay for any administration, and that the case would have closed shortly after 60 days from the Meeting Of Creditors, or shortly after November 28, 2009.

6. The only reason that the stay has not been dissolved heretofore by the closing of the case is PHH Mortgage Corporation’s own motion for relief from stay.

7. PHH Mortgage Corporation’s continuance of its motion, effectively denying its own requested relief as well as denying debtor the closing of the case and abandonment of the debtor’s property, is being done in violation of Bankruptcy Rule 9011(b)(1) in that it causes unnecessary delay, and it needlessly increases the cost of litigation.

8. PHH Mortgage Corporation’s motion seeks attorney fees in violation of Rule 9011(b)(2) in that it is not warranted by existing law and is not a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

9. In addition to PHH Mortgage Corporation’s unfounded request for attorney fees, the many issues raised in debtor’s Opposition show that PHH Mortgage Corporation’s motion for relief from stay overall was a violation of Rule 9011(b)(2) in that its legal contentions are not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

10. The debtor requests that the Court exercise its discretion under BR 9011(c)(1)(A) (“or such other period as the court may prescribe”) and waive the 21 day advance notice provision for this Motion. PHH Mortgage Corporation had more than sufficient notice from the debtor that any motion for stay relief would be unfounded. In these circumstances, the debtor’s Opposition effectively served as the required advance service of a motion for sanctions. Any separate advance service of a motion for BR 9011 sanctions would be meaningless in light of the sufficient notice already given to PHH Mortgage Corporation.

11. In further support of the debtor’s request that the Court exercise its discretion under BR 9011(c)(1)(A), the debtor anticipates that PHH Mortgage Corporation will not withdraw its motion promptly upon service of this Motion.

12. In any event, any withdrawal by PHH Mortgage Corporation of its motion belies the fact that it was not entitled to stay relief when it first filed its motion. Sanctions are appropriate.

13. The debtor is entitled to sanctions from PHH Mortgage Corporation for its violation of BR 9011.

14. The debtor separately requests sanctions pursuant to 28 USC §1927, asserting that PHH Mortgage Corporation multiplied the proceedings in this case unreasonably and vexatiously.

15. Finally, the debtor requests sanctions pursuant to 11 U.S.C. §105. This Section gives this Court additional "statutory contempt powers" which "inherently include the ability to sanction a party." *Bessette v. Avco Fin.Svcs., Inc.*, 230 F.3d 439, 445. The Section "has been referred to as a 'catch-all' provision, effectively filling gaps in the bankruptcy code in order to 'preserv[e] (sic) the integrity of the bankruptcy system.'" *Ameriquist Morg. Co. v. Nosek (In re Nosek)*, 544 F.3d 34, 44 (1st Cir. 2008), quoting from *Cuevas-Segarra v. Contreras*, 134 F.3d 458, 459 (1st Cir. 1998).

Dated this _____ day of _____, 20__.

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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

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)
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)
)
)
)

**CASE NO.
OUR FILE NO.**

Debtor.

**MOTION FOR SANCTIONS AND FOR ATTORNEY FEES
PURSUANT TO FEDERAL COMMON LAW**

COME NOW the Debtors in the above captioned matter and move the Court, pursuant to Federal Common Law for an order of sanctions and for attorneys fees against the Respondent Creditor and the attorney for the said Creditor, in the total amount of \$_____ and state as follows:

1. This motion is made on the grounds that the costs claimed by the Debtors are reasonable and necessary costs of and attorney fees incurred in objecting to Creditor's Proof of Claim.

2. Creditor filed a Proof of Claim on or about _____ in the within case alleging that the debtors owed the unsecured sum of _____ as and for a medical expense incurred ten years ago, well beyond the applicable Statute of Limitations.

3. The Debtors objected to the Proof of Claim on or about _____ and the matter is currently scheduled for hearing on _____.

4. Creditor continued to assert its claim through written communications with the attorney for the Debtors and in its response to the Debtors' Objection.

5. The parties have conducted discovery wherein it was revealed, after considerable delay on the part of Creditor that Creditor's claim was well outside the three year Statute of Limitations for medical related debts.

6. Creditor has moved the court to continue the hearing on this matter five times, needlessly increasing the cost of this litigation.

7. Creditor continues to assert its claim notwithstanding the evidence obtained in discovery and continues to litigate this matter in bad faith, vexatiously, wantonly and for oppressive reasons.

8. Creditor's bad faith furthermore extends to and includes its activities leading up to the filing of Debtors' Objection to the subject proof of claim in that it knew the claim was barred by the Statute of Limitations and filed the claim anyway.

9. The Debtors are therefore moving this court for sanctions against Creditor and for the award of reasonable legal fees and expenses based on Federal Common Law regarding fees if a party litigates a matter in bad faith.

WHEREFORE, Debtors pray of the Court that

- A. A hearing be held on this motion; and
- B. That the relief requested by the Debtors be granted; and
- C. For such other relief as to the court may seem reasonable.

Dated this the _____ day of _____, 2009.



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B. Motions

Motion for Turnover

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR.

**Debtor, and
STEVEN G. TATE, Standing Chapter 13 Trustee**

Movants,

versus

BRANCH BANKING & TRUST COMPANY

Respondent.

**Motion for Sanctions Arising out of Violations of the Automatic Stay and
of the Turnover Provisions of the Bankruptcy Code**

COMES NOW the above-named debtor, by and through her attorney of record, and respectfully moves the Court pursuant to Sections 105, 362, 522 and 542 of Title 11 of the United States Code, Rules 9013 and 9020 of the Rules of Bankruptcy Procedure and Rules 9013-1 of the Local Rules of Practice for the United States Bankruptcy Court for the Western District of North Carolina, for the entry of an order for economic and monetary sanctions against the respondent named herein and in support hereof respectfully show unto the Court the following:

Jurisdiction

1. This contested case is a core proceeding as that term is defined by Section 157(b)(2) of Title 28 of the United States Code in that it concerns claims and matters arising out of the administration of this bankruptcy case and rights duly established under Title 11 of the United States Code and other applicable federal law.

2. This Court has both personal and subject matter jurisdiction to hear this contested case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy

Amendments and Federal Judgeship Act of 1984.

3. Section 362(h) of title 11 of the United States Code provides individual debtors with a powerful tool to safeguard the benefits of the automatic stay and to discourage violations of the stay. Putnam v Rhymes Heating Oils, Inc., 167 B.R. 737, 741 (Bankr. D.N.H. 1994). The debtor further alleges that this provision provides that "an individual injured by any willful violation of a stay . . . shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. Section 362(h).

The Base Case

4. The underlying Chapter 13 bankruptcy case was commenced by the filing of a voluntary petition with the Clerk of this Court on _____.

5. An Order for Relief under the provisions of Chapter 13 of Title 11 of the United States Code was duly entered by this Court upon the filing of the petition. The movant further avers that this order served to invoke the provisions of Sections 362(a) and of Title 11 of the United States Code.

6. The 341(a) meeting of creditors is scheduled to be held in Shelby, North Carolina on _____.

7. The Chapter 13 plan has not yet been confirmed by order of this Court.

8. In the schedules filed with the petition in this case and on the master mailing matrix filed with the Clerk of this Court, a debt was listed in favor Branch Banking & Trust Company (hereinafter "BB&T"), in the sum of \$14,540.00 for a 2005 Ford Escape. The debtor indicated the vehicle had a fair market value of \$16,300.00. The debtor's plan proposes to pay the claim in full since it is a "910 Claim."

9. The subject vehicle was repossessed on _____ by BB&T and BB&T has failed and refused to return the subject vehicle since that date.

10. Prior to the filing of the debtor's Chapter 13 case, the office of the attorney for the debtor received two phone calls from agents of BB&T on _____ and _____ inquiring as to the status of the debtor's bankruptcy case (i.e. whether or not she had a case number). BB&T therefore knew the debtor was being represented by counsel and that she intended to file a bankruptcy case.

The Allegations in Support of the Willful Violation of the Automatic Stay And the Willful Violation of the Turnover Provisions of the Bankruptcy Code

11. _____ is the movant and debtor in the above referenced Chapter 13 bankruptcy case.

12. The movant, Steven G. Tate is the Standing Chapter 13 Trustee for the United States Bankruptcy Court for the Western District of North Carolina, Shelby Division.

13. The respondent BB&T is a banking corporation organized and existing under the laws of the State of North Carolina, with a principal office address of 200 W. Second Street, Winston-Salem, NC 27101.

14. The movant alleges that this Court has jurisdiction over this proceeding pursuant to Sections 151, 157, and 1334 of Title 28 of the United States Code.

15. The movant alleges that this is a core proceeding and the movant further consents to a dispositive order in this proceeding by the Bankruptcy Court.

16. The movant avers that certain of the her property, which is the subject of this motion, is property of the estate as defined by Section 541 of Title 11 of the United States Code to wit: 2005 Ford Escape.

17. BB&T received actual written notice of the bankruptcy filing and of the automatic stay from the Trustee, the Clerk of this Court, and from the attorney for the debtors. The movants further aver that these notices were mailed and received by BB&T at or about the time of the filing of this case.

18. The debtor alleges upon information and belief that the notice mailed by the Trustee included the following warning to all creditors: "**CREDITORS MAY NOT TAKE CERTAIN ACTIONS:** The filing of the bankruptcy case automatically **stays** certain collection and other actions against the debtor, debtor's property, and certain co-debtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be **penalized.**"

19. The debtor avers that BB&T has improperly retained possession of the debtor's vehicle.

20. Under Section 1306 of Title 11 of the United States Code, the debtor is entitled to possession of all property of the estate.

21. The respondent has willfully and intentionally refused and failed to turn over the property to the movant as required by Sections 362(a)(3) and 542 of Title 11 of the United States Code.

22. As of the filing of this motion the respondent has willfully and intentionally failed and refused to turn over the personal property identified above.

23. The actions of the respondent as described herein have been in contempt and in willful violation of Section 362(a)(3) of Title 11 of the United States Code which prohibits any "act to exercise control over the property of the estate." The movant believes that such action or inaction by the respondent also constitutes civil contempt under the Order for relief duly entered upon the filing of this case.

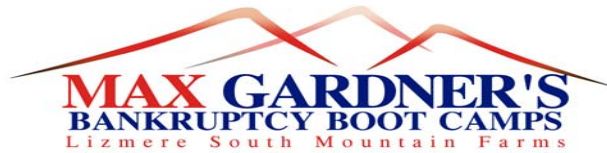
24. The actions of the respondent as alleged herein constitute willful, intentional and fraudulent conduct in violation of the provisions of Sections 542 and 543 of Title 11 of the United States Code.

WHEREFORE, the movant respectfully prays of the Court as follows:

A. That this Court impose sanctions against respondent for violating Section 542 and 543 of Title 11 of the United States Code in a sum to be determined by the Court as a damage award payable to the debtor;

B. That this Court order the respondents to pay reasonable legal fees and

C. Relief from Stay Obj to MFR Real Property



DEFENDING A MOTION FOR RELIEF

It is generally the court's practice to sign a default order granting an unopposed motion for relief from stay or to sign an agreed order if (1) the motion has been properly served on all appropriate parties; and (2) the motion sets out the factual and legal basis for the relief requested – the motion states a *prima facie* case for relief from stay. However, the courts will not sign an order lifting a stay on a motion for relief that does NOT state a *prima facie* case for relief – whether the debtor is in default or otherwise.

A *prima facie* case requires that:

1. The movant show that it is entitled to enforce the note because:
 - a. it is the original payee ***in possession*** of the original note; or
 - b. it is the payee because it is ***in possession*** of the original note and the note is endorsed to it; or
 - c. the note is endorsed in blank and the movant ***has possession*** of the original note; or
 - d. the movant ***has physical possession*** of the note, without an endorsement, but the movant ***has the rights of a holder***; or
 - e. the note is lost but the applicable State statute regarding "enforcement of lost, destroyed, or stolen instrument" is satisfied.
2. The movant show that its lien is properly perfected (establishing its position as a secured creditor) and that it is entitled to proceed against the collateral.
3. The movant show that the debtor owes money under the note or has otherwise defaulted under the terms of the note or security instrument.

Motions do NOT state a *prima facie* case for relief from stay if:

1. The motion filed, according to the supporting documents, has not established standing to file the motion.
2. The motion adds attorney fees to the amount due from the debtor when those fees are not recoverable under applicable State law.¹
3. The motion lumps together hundreds to thousands of dollars in “costs,” “other charges” or “advances.” As facts are disclosed, it may turn out that these amounts do not fall within the language of the subject note and mortgage and/or that are not provided for by applicable State statute. (Examples may include charges incurred for the benefit of third-party investors, such as recording fees for the assignment of the mortgage to a trust; charges for broker’s price opinions; charges for a servicer’s activities that are not allowed under State law.)
4. The supporting affidavits attached to the motion contain conflicting statements, without explanation, as to the entity in possession of the note.
5. The supporting affidavits are deficient because:
 - a. they appear to be signed by the affiant in one state and notarized in a different state;
 - b. they do not state the date and the amount of each unpaid payment;
 - c. they identify unpaid payments that were not provided for in the agreed order; or
 - d. the affiant has not demonstrated connection to the parties who entered into the agreed order.
6. The motion alleges that the underlying note is “lost,” but the “lost note affidavit” does not comply with applicable State statute.
7. Local counsel appearing on behalf of the movant at the hearing on the motion for relief from stay has not been in direct contact with his/her client and does not have access to the information needed to move the motion forward.
8. The motion alleges that the movant is entitled to enforce a note secured by a mortgage, but there is no evidence that the mortgages and/or assignments attached to the motion were recorded with the

¹ The movant’s counsel may “acknowledge” at the hearing that the fees are not recoverable under the applicable State law, but states that his/her client has not authorized that he/she delete the fees from the amount due.

office of the county recorder/registry where the real property is located.

9. The motion fails to meet requirements of the local rules.
10. The motion alleges that the movant is entitled to enforce a note where the note is purportedly "transferred" by assignment rather than by applicable State statute.
11. The motion seeks relief where (1) the debtor has no interest in the property; or (2) the debtor is not obligated on the note; and (3) no other legal basis is stated for seeking relief from stay.
12. With respect to a motor vehicle, the motion seeking relief from stay has no attached certificate of title showing that the movant either owns the vehicle or has a lien on it (or the attached certificate of title is illegible). Movants frequently attach documents that are apparently obtained from a web site, but that are not titles (electronic or otherwise).
13. The motion is filed without notice being given to other parties with an interest in the property, such as other lienholders.

Finally, don't overlook the obvious:

1. The motion is not in the form approved by the court.
2. The name of the creditor in the caption differs from the name of the creditor in the first paragraph.
3. The motion has blanks where the attorney has set up a boilerplate document for convenience, but has not inserted the information.
4. The motion states that the movant made the loan, but the documents show that another entity made the loan.
5. The attached payment history resembles hieroglyphics.
6. With reference to "extra charges" on the worksheet:
 - a. the worksheet states there are none, but then states that "certain expenses" are continuously accruing;
 - b. the worksheet deletes the languages requiring the attorney to attach a payment and loan transfer history; and
 - c. the worksheet does not itemize the "extra charges."

7. The worksheet does not list the date of the last payment. Logically, the creditor must know the date it last received payment from the debtor.
8. Either there is no separate transfer history attached to the worksheet, OR it lists only the last transfer. The transfer history should start with the entity that originated the loan and follow through to the present with supporting documentation of ALL transfers.
9. The caption of the motion states that it is directed to the debtor, but the motion later requests relief against a co-debtor as well. This does not give the co-debtor adequate notice that his/her rights may be affected.
10. The motion requests relief against a co-debtor without stating the co-debtor's name. Since most people do not think of themselves as "co-debtors," they will not realize that relief is being requested against them unless their name is stated.
11. The supporting documents do not show that the movant is in the chain of title.

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At Historic Webbley House

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Telephone: (704) 487-0616
Facsimile: (888) 870-1644

DATE

John Q. Public
Mary E. Public
100 Main Street
Anywhere, NC 28999

In the Matter of:

Your Chapter 13 Case
Court No: 05-49999
SSN: --- -- 1234 & --- -- 5678
File Date: 02 January 2005
Our File No: 11999

Contested Case: Saxon Mortgage Servicing, Inc. v Public

Court Date: Friday, _____ at 9:30 a.m.

Location: Courtroom #5, Cleveland County Courthouse, Shelby

Dear John and Mary:

The above-named creditor has filed a Motion with the Court for relief from your case to foreclose on your collateral. The motion has been noticed for hearing before the United States Bankruptcy Court on the date and at the time noted above. You must attend this hearing in person with me if you want to try to save your property.

This of course is a serious matter and deserves your immediate attention. At this point, the most helpful thing you can do is to provide my office with proof of every mortgage payment that you have made. You also need to advise us of any mortgage payments that you have actually failed to make. You should bring this proof to the office along with copies of any documents you have received from the mortgage company (i.e., bills, statements, notices, letters). We are in the process of reviewing this entire matter and a member of our Staff will contact you as soon as this review has been completed.

With best regards, I remain

Very truly yours,



O. Max Gardner III
OMGIII/cjh

GARDNER LAW OFFICES

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Managing Attorney
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Of Counsel
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Facsimile: (888) 870-1647
maxgardner@maxgardner.com

Motion for Relief from Stay Hearing Questionnaire

Name: _____

Date: _____

1. How many mortgage payments have you missed? (identify by month and amount): _____

2. If you are in default, can you cure the default and how? _____

3. Do you have proof of all payments made since the filing of your case? If so, please attach copies (front and back of checks, bank statements, etc).

4. Do you have your own insurance on the home? If so, what is the name and address and telephone number of your agent? _____

5. Do you owe any real property taxes? If so, state the amount, tax years, and tax office.

6. Has your monthly payment changed since the filing of your case? If Yes, when, why & how much? _____

7. What type of notice of the change in your monthly payment did you receive (attach a copy)?

8. Have you received monthly billing statements from your mortgage company (attach copies)?

9. If your mortgage company has force placed insurance, can you afford to buy insurance on your own? _____

10. Do you understand that forced placed insurance does not insure your household goods and provides no coverage to you in the event of loss, and that it just pays off the amount of the debt, and provides no third-party liability coverage if someone is hurt on your property? _____

11. Has anyone been to your home for the purpose of appraising or inspecting the property? If so, then state when, who, and what you observed them do with respect to the inspection.

12. Have you received any telephone calls or letters from your mortgage company or any law firm? If so, please attach copies of any letters and/or describe the telephone calls.

13. Do you have a fixed rate or an adjustable rate mortgage?

14. If you have an adjustable rate mortgage, have you received any notices of any increases in the rate (if so state when and attach copies)?

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William S. Gardner
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Facsimile: (888) 870-1644

DATE

Creditor atty

In the Matter of:

John Q. Public
Mary E. Public
100 Main Street
Anywhere, NC 28999
Chapter 13 Case No. 05-49999
SSN: --- -- 1234 & --- -- 5678
File Date: 02 January 2005
Our File No: 11999

Contested Case: Saxon Mortgage Servicing, Inc. v Public

Court Date: Friday, _____ at 9:30 a.m.

Location: Courtroom #5, Cleveland County Courthouse, Shelby

Dear atty:

Local Rule 4001-1(a)(6) provides that when a creditor whose claim is secured by residential real or personal property files a motion for relief from stay on the grounds of a post-petition default by the debtors, the creditor must include with the motion for relief from stay "a **statement of all post-petition account activity** that is readable, reasonably understandable, and stated in plain English." [Emphasis supplied]. Please provide me with a complete post-petition transaction history with a definition of the transaction codes as soon as possible, pursuant to this mandatory rule.

With best regards, I remain

Very truly yours,



O. Max Gardner III

OMGIII/cjh

Cc: John and Mary Public

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Facsimile: (888) 870-1644

DATE

Creditor atty

In the Matter of:

John Q. Public
Mary E. Public
100 Main Street
Anywhere, NC 28999
Chapter 13 Case
Court No: 05-49999
SSN: --- -- 1234 & --- -- 5678
File Date: 02 January 2005
Our File No: 11999

Contested Case: Saxon Mortgage Servicing, Inc. v Public

Court Date: Friday, _____ at 9:30 a.m.

Location: Courtroom #5, Cleveland County Courthouse, Shelby

Dear atty:

Pursuant to 15 U.S.C. Section 1641(f)(2) of the Truth In Lending Act I am hereby requesting you to provide me with the name and address of the owner of the above captioned mortgage. This is a "Qualified Written Request" pursuant to 24 C.F.R. § 3500.21 and requires your timely written response.

With best regards, I remain

Very truly yours,



O. Max Gardner III

OMGIII/cjh

Cc: John and Mary Public

NATIONAL CONSUMER BANKRUPTCY
LITIGATION CENTERPO Box 1000
403 South Washington Street
Shelby, North Carolina 28151**Phone:** (704) 418-2628
Fax: (888) 870-1647

DATE

Agent
Creditor
Address
City, State Zip**In the Matter of:**John Q. Public
Mary E. Public
100 Main Street
Anywhere, NC 28999
Chapter 13 Case
Court No:
File Date:
Our File No:**SHORT QWR**

Dear Sir or Madam:

Please treat this letter as a "qualified written request" under Section 6(e) of the Real Estate Settlement Procedures Act, 12 U.S.C. 2605(e). This request is made on behalf of my Clients, the above-named debtors, based on the pending dispute in their Chapter 13 case about the proper application of payments from the Chapter 13 Trustee and from the debtors to interest, principal, escrow advances and expenses (in that order of priority as provided for in the loan instruments); about your use of suspense accounts in connection with your receipt of Trustee's and debtors' payments; about your use of legacy late charges with respect to post-petition mortgage payments; about your use of automatically triggered property inspections and broker price opinion charges and fees based on pre-petition legacy accounting for pre-petition arrears; and about legal fees and expenses that have been attached to or otherwise assessed to this account in the form of corporate advances that have neither been applied for nor approved by the United States Bankruptcy Court. Specifically, I am requesting the following information:

1. The amount of any **legal fees** added to the principal debt in this case or charged against the account or tracked for any purpose in any account for any post-filing legal services, paralegal services, accounting services, claim preparation services, case review services, plan review services, or for any other similar service, professional or otherwise.
2. The **amount of any property inspection fees, property preservation fees, broker price opinion fees, bankruptcy monitoring fees**, or other similar fees or expenses added to the principal debt or charged against the account or tracked for any purpose post-petition or associated with any account related to this loan.
3. The total amount of any **post-petition arrears** including a complete explanation of the months in which payments were allegedly missed, the aggregate late charges imposed for all such payments, the date and amount of all account payment postings post-petition, and the basis for the imposition of each late charge fee.
4. The current amount needed to **pay-off the loan** in full in the form of an itemized printed payoff report.

O. Max Gardner IIIChief Executive Officer
Vice President-Litigation
Managementmaxgardner@maxgardner.com

Admitted in NC

William S. GardnerVice President-Legal Affairs
Secretary & Treasurerwgardner@maxgardner.com

Admitted in NC

John Mull Gardner

Of Counsel

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Admitted in NC

*All Principals are proud
members and supporters of:*

NATIONAL CONSUMER BANKRUPTCY
LITIGATION CENTERPO Box 1000
403 South Washington Street
Shelby, North Carolina 28151Phone: (704)418-2628
Fax: (888) 870-1647

5. A complete life of loan payment and **transaction history** for this loan to the date of your response to this letter, including all entries of any nature in the form of a debit, a credit, a transfer or otherwise. A complete copy of all transaction codes associated with this loan and the plain English definitions for each such code. Also, please identify the mortgage servicing software you use in connection with this loan (MSP, LSAMS, etc).

6. The amount of any funds deposited in any post-petition **suspense accounts or corporate advance accounts or any other similar accounts** (including the amount and date of each transaction, the source of funds, and a description of the deposit account) and a description of all payments from any such accounts including the date of the payment, the purpose or nature of the payment, and the amount of each such payment.

7. A copy of any **pooling and servicing agreement**, servicing agreement, default servicing agreement, or sub-servicing agreement that the creditor or Servicer has with any party.

8. A copy of all of your **loss mitigation rules**, regulations, and protocols (**including any non-HAMP modification policies**) as the same apply to this loan, a description of your efforts to implement the same in connection with the servicing of this loan, and copies of all communications, records and servicing notes relating to evaluating or processing this loan for a HAMP or non-HAMP modification.

9. A copy of **statements or bills for services** submitted and paid by you to any attorney, law firm or third-party for any form of legal services rendered post-petition with respect to this mortgage loan.

10. A copy of the **most recent review of and report** on the Servicer, including its bankruptcy and default servicing departments by any rating agency such as Fitch, Moody's, Standard & Poor's, as well as by any internal audit unit.

11. A copy of your **Key Loan Transaction history, bankruptcy work form, XLS spreadsheet**, or any other manually-prepared spreadsheet or record of all accounts associated with this mortgage loan.

If this is a MERS or MOM loan, please provide the documents listed in items 12-15; otherwise, please skip to Item 16.

12. A copy of **the MERS Milestone Report**.

13. A copy of the **MERS MIN Summary**.

14. A copy of the **MERS Member Agreement**.

15. A copy of all corporate resolutions that appoint any employee of the Servicer to an officer position with MERS or grant authority to sign documents on behalf of MERS.

16. Copies of all **collection notes**, collection records, communication files or any other form of recorded data with respect to any communications between you and the debtor.

17. An itemized statement of the full amount needed to **reinstate the mortgage** as of

NATIONAL CONSUMER BANKRUPTCY
LITIGATION CENTERPO Box 1000
403 South Washington Street
Shelby, North Carolina 28151**Phone:** (704)418-2628
Fax: (888) 870-1647

the date of your response.

18. Copies of all written or recorded communications between you and any non-lawyer third parties regarding this mortgage.

19. All P-309 screen shots of the history all of the accounts (principal, interest, escrow, late charges, legal fees, property inspection fees, broker price opinion fees, statutory expense fees, miscellaneous fees, corporate advance fees, etc.) associated with this loan.

20. In accordance with Section 131(f)(2) of the Truth-in-Lending Act, 15 U.S.C. Section 1641(f), please provide me with the name, address, and telephone number of the owner of the promissory Note signed by my clients and secured by the deed of trust with respect to my clients' mortgage loan referenced above.

To the extent that the servicer of this mortgage loan has charged the debtor's mortgage loan account, subsequent to the filing of their bankruptcy case, any appraisal fees, broker price opinion fees, property inspection/preservation fees, legal fees, bankruptcy/Proof of Claim fees, recoverable corporate advances and other fees or costs that were not disclosed to the debtor(s) and approved by the bankruptcy court, the debtor(s) dispute(s) any such fees and costs and specifically requests that the mortgage loan account be corrected to remove any such fees that have not been approved by the Bankruptcy Court after the filing of a proper application for the same with notice and hearing and an order of approval.

You should be advised that you must acknowledge receipt of this qualified written request within five (5) business days, pursuant to 12 U.S.C. Section 2605(e)(1)(A) as amended effective July 16, 2010 by the Dodd-Frank Financial Reform Act and Reg. X Section 3500.21(e)(1).

You should also be advised that the debtor(s) herein will seek the recovery of damages, costs, and reasonable legal fees for each failure to comply with the questions and requests herein. The debtor(s) also reserve the right to seek statutory damages for each violation of any part of Section 2605 of Title 12 of the United States Code in the amount of \$2,000.00 for each violation.

With best regards, I remain

Very truly yours,

O. Max Gardner III
OMGIII/cjh

Cc: Steven G. Tate, Trustee
John and Mary Public

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

John Q. Public

Mary E. Public

100 Main Street

Anywhere, NC 28999

Chapter 13 Case

Court No:

SSN:

File Date:

Our No:

Contested Case: Saxon Mortgage Servicing, Inc. v Public

Court Date: Friday, _____ at 9:30 a.m.

Location: Courtroom #5, Cleveland County Courthouse, Shelby

**OBJECTION TO MOTION FOR RELIEF FROM STAY
OBJECTION TO MOTION FOR ADEQUATE PROTECTION (IF APPLICABLE)
OBJECTION TO MOTION FOR RELIEF FROM THE CO-DEBTOR STAY
(IF SECTION 1301 RELIEF IS REQUESTED)
AND
CONDITIONAL COUNTER-MOTION FOR LEGAL FEES AND EXPENSES
AND
REQUEST FOR A PRELIMINARY HEARING**

COME NOW THE ABOVE-NAMED DEBTOR(S), by and through their attorney of record, pursuant to Section 362 of Title 11 of the United States Code, Section 1301 of Title 11 of the United States Code (if applicable), and Rule 9013-1 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Western District of North Carolina, and hereby file this objection to the motion for relief from stay filed in this case and move the court for a preliminary hearing on all issues raised by the allegations in this case and for a subsequent final hearing on all of the said issues and allegations. The debtor(s) also deny for the purposes of this response that the movant has established sufficient legal grounds to justify the entry of an order granting it relief from the automatic stay.

Allegations in the Motion for Relief from Stay

1. As to the allegations in paragraph 1 of the motion, it is denied that the movant is the current holder of the mortgage note.
2. The allegations in paragraph 2 are denied for lack of knowledge as to the corporate structure or organizational status of the movant.
3. It is admitted that the respondents are currently debtors under Chapter 13 of Title 11 of the United States Code.

4. It is admitted that the respondents filed a petition for relief under Chapter 13 on October 1, 2007, and that their plan was confirmed by the Court.
5. It is admitted that the plan included pre-petition arrears to the movant for the months of June, July, August and September of 2007 in the total amount of \$7,775.00 plus aggregate late fees of \$212.00. The loan did not include any escrow feature as of the petition date so no provision was made for taxes and/or insurance in connection with the pre-petition arrears.
6. It is admitted that the Chapter 13 plan was confirmed on November 20, 2007.
7. It is admitted that the movant filed a sworn proof of claim in this case in an amount equal to the arrears duly noted in Schedule D and in the plan.
8. As to the allegations in paragraph 8 of the motion, it is denied that the debtors are currently in arrears in their post-petition mortgage obligations for the months of September and October of 2007.
9. As to the allegations in paragraph 9 of the motion, it is denied that the movant lacks adequate protection in the subject property.
10. All and singular the allegations in paragraph 10 are denied since the respondents contend that movant is not entitled to any relief.
11. As to the allegations in paragraph 11 of the motion, the current alleged balance owed is denied for lack of knowledge or information.

ALTERNATIVE AFFIRMATIVE DEFENSES

1. **Failure to Comply with Section 6 of the Plan.** The respondents are informed and believe and therefore allege that the movant has willfully failed to apply the mortgage payments received from the Trustee and the Debtors to the loan in a manner consistent with special provisions of Section 6 of the Plan that has been duly Confirmed by an Order of this Court. The respondents allege that such compliance is mandatory under Section 524(i) of the Code and pursuant to the Order of Confirmation. As a result of such lack of compliance, the respondents allege that the motion for relief is not based on the actual status of the post-petition mortgage account but rather is the result of the misapplication of payments. The respondents also allege upon information and belief that unapproved legal fees and charges may have been added to this loan and that payments received from the Trustee and the Debtors may have been used to pay all or part of these charges thereby resulting in all or part of the alleged default.
2. **Failure to Apply Payments Pursuant to the Deed of Trust.** The respondents are informed and believe and therefore allege that the movant has willfully failed to apply the mortgage payments made pursuant to the plan (both the arrearage payments and the direct payments) in this case in a method consistent with the mandatory "priority of payments" provision provided for the Uniform *Covenant Number Two* of the Deed of Trust. The respondents therefore assert such breach of contract as an affirmative defense to the motion for relief from stay.

3. Failure to Comply with Uniform Covenant Fourteen of the Deed of Trust. The respondents are informed and believe and therefore allege that the movant has charged to or added against the loan obligations of the respondents certain legal fees, bankruptcy fees, property inspection fees, broker price opinion fees, statutory expenses fees, and other corporate advance fees without securing the approval of this Court pursuant to *Covenant Fourteen* of the Deed of Trust. The respondents therefore assert such breach of contract as an affirmative defense to the motion for relief from stay. In addition, the respondents respectfully move the Court pursuant to Covenant Number Fourteen for the recoupment or the credit against their loan obligations for the full amount of all such improper fees and charges.

4. Failure to Attach a Post-Petition Transaction History. The respondents are informed and believe and therefore allege that the movant has failed to attach to the motion for relief from stay a true, complete, accurate and valid transactional history of all debits and credits to the subject mortgage loan, which transactional history was actually prepared as a normal business record by the movant. The respondents also allege that the movant has access to a "bankruptcy worksheet" for this loan that is prepared in the normal course of business in an XLS spreadsheet format. To the extent that the motion for relief fails to include such documents, or is based on records that would not qualify as business records under Rule 803(6) of the Federal Rules of Evidence, then the respondents move to dismiss the motion.

5. Failure to Prosecute the Case in the Name of the Real Party in Interest. The respondents are informed and believe that the movant is not the actual holder of the mortgage note and loan instruments in this case. Rather, the respondents are informed and believe and therefore allege that the said note may actually owned by the Trustee of a residential mortgage-backed securitized trust. As a result, the motion should be dismissed under Rules 7017 and 9014 of the Bankruptcy Rules and Rule 17 of the Federal Rules of Civil Procedure for failure to prosecute the case in the name of the real party in interest.

6. False and Fraudulent Affidavits and Records. The respondents are informed and believe and therefore allege that the Affidavit and/or Records, if any, attached to the motion for relief from stay were not prepared by actual officers, agents and employees of the movant but rather were produced and executed by a third-party out-source providers such as Fidelity National Information Services, First American National Default Services, MR Default Services, or Promiss Default Services. As a result, the respondents allege that such motion should be dismissed due to the movant's use of such false and fraudulent document and/or records.

7. ILLEGAL CHARGES ADDED TO BALANCE. The Movant upon information and belief has charged and/or collected and/or assessed charges and fees to the mortgage loan involved in this case for such things as property inspections, broker price opinions, property preservation expenses, corporate advances, attorney fees, recording fees, legal fees, foreclosure costs, statutory expenses, assessments, advances, late fees and other charges, optional products and other predatory servicing fees and charges that are not authorized by or in conformity with the terms of the subject note and mortgage and that have never been approved by this Court after proper notice and a hearing. The Movant upon information and belief has wrongfully added and continues to unilaterally add these illegal charges and fees to the balance movant claims is due and owing under the subject note and mortgage. In addition, the Movant upon information and belief has failed to immediately apply all payments received from the Debtors and the Chapter 13 Trustee to the loan balance but rather has placed such payments in one or more corporate suspense, debtor suspense, trustee suspense or corporate forbearance accounts. The Debtors allege that such actions by the Movant have resulted in the addition of unlawful interest to the loan balance on a daily basis and for the monthly assessment of unlawful late charges and other related

ancillary fees. The respondents allege such misconduct, unclean hands and lack of good faith as grounds to dismiss the motion for relief from stay.

8. FAILURE OF CONTRACTUAL CONDITION PRECEDENT: INVALID, INEFFECTIVE NOTICE OF DEFAULT.

Movant failed to provide the attorney for the Debtors with a Notice of Default and Intent to Accelerate that complies with the subject mortgage. As a result, the Debtors have been denied a good faith opportunity pursuant to the mortgage and the servicing obligations of the movant to avoid the filing of a motion for relief from stay through loss mitigation, forbearance and workout programs. The Debtors also allege that such a pre-litigation notice is required by the loan instruments in this matter, the applicable Pooling and Servicing Agreement, and the applicable Single-Family Loan Servicing Guidelines.

9. MOVANT FAILED TO COMPLY WITH APPLICABLE FANNIE MAE/ FREDDIE MAC/GINNIE MAE SINGLE FAMILY LOAN SERVICING LAWS, REGULATIONS AND ORDERS:

A. Movant failed to provide the attorney for the Debtors with legitimate and non predatory access to the debt management and relief that must be made available to borrowers, facing temporary financial problems. Such relief must include, among other things, temporary indulgence, a liquidating plan, and special forbearance designed to avoid residential foreclosure of single family loans secured by and/or underwritten by Fannie Mae, Freddie Mac, and/or Ginnie Mae.

B. Movant failed its obligation to the Debtors to pursue effective foreclosure prevention strategies and did not evaluate the particular circumstances surrounding the claimed default; failed to evaluate the Debtors or the subject property; failed to determine the Debtors' capacity to pay the monthly payment amount or a modified payment amount; failed to ascertain the reason for the Debtors' claimed default, or the extent of the Debtors' interest in keeping the subject property.

C. Movant failed to comply with the Fannie Mae, Freddie Mac and/or Ginnie Mae loss mitigation and foreclosure prevention servicing guidelines by failing to contact the attorney for the Debtors regarding the claimed mortgage delinquency to determine whether the debtors were facing a financial crisis or hardship. As a result, the Movant failed to give the Debtors the opportunity to cooperate in resolving the claimed default.

D. The Movant failed to avoid filing this motion for relief from the automatic stay by not contacting the attorney for the Debtors by the 30th day of the claimed delinquency. The Movant never asked the attorney for the Debtors to provide it with any information to determine the reason for the claimed non-payment. Movant failed to inform the Debtors through counsel of the existence of the Fannie Mae, Freddie Mac and/or Ginnie Mae alternatives to foreclosure. As a result, Movant has denied the Debtors the required opportunity to avoid foreclosure through early intervention upon delinquency pursuant to the Fannie Mae, Freddie Mac and/or Ginnie Mae servicing requirements and standards.

E. Movant failed to comply with the controlling Fannie Mae, Freddie Mac and/or Ginnie Mae Single Family servicing guidelines before the filing of the motion for relief from stay by failing to inform the attorney for the Debtors in writing about the applicable foreclosure alternatives in a timely fashion, or at all.

F. Movant breached its duty to the Debtors to manage the subject mortgage as required by the special foreclosure prevention workout programs which can include and allow for a restructuring of the loan allowing the borrower to pay out delinquent installments or advances to bring the mortgage current. Instead the Movant did the exact opposite of what the special foreclosure prevention workout programs are designed and intended to do.

The Movant further denied the Debtors access to special forbearance in the form of a written agreement that reduces or suspends the Debtors' monthly mortgage payments for a specific period to allow the debtors time to recover from a financial hardship. Such a plan can involve changing one or more terms of the subject mortgage in order to help the debtors bring the claimed default current thereby preventing foreclosure. Movant's failure to comply with the Fannie Mae, Freddie Mac and or Ginnie Mae repayment plan or special forbearance workout programs and rules has denied the Debtors the required access to explore alternatives to avoid foreclosure.

G. Movant has failed to comply with the Guidelines developed by the Secretary of the Treasury of the United States for the implementation of loss mitigation strategies and has breached written agreements and promises made to the United States Congress to comply with all such voluntary programs, plans and strategies.

10. FAILURE OF GOOD FAITH AND FAIR DEALING: UNFAIR AND UNACCEPTABLE LOAN SERVICING. Movant failed to act in good faith or to deal fairly with the Debtors by failing to follow the applicable standards of residential single family mortgage lending and servicing as described in these Affirmative Defenses thereby denying the Debtors access to the residential mortgage servicing protocols applicable to the subject note and mortgage. Movant has also failed to service the mortgage loan in a manner consistent with the Confirmed Plan and with the Uniform Covenants in the Deed of Trust and Mortgage Note.

11. UNCLEAN HANDS. The Movant comes to court with unclean hands and is prohibited by reason thereof from obtaining relief from stay from this Court. The Movant's unclean hands result from the Movant's failure to comply with material terms of the mortgage and note; the willful failure of the Movant to comply with the requirements of Federal Law as described herein including but limited to Sections 362(a) and 506(b) of Title 11 of the United States Code and Rule 2016(a) of the Federal Rules of Bankruptcy Procedure; and the willful failure of the Movant to comply with the Federal Fair Debt Collections Practices Act, the North Carolina Unfair Debt Collection Statute, and the North Carolina Mortgage Servicing Act. As a matter of equity, this Court should refuse to grant relief from stay to the Movant to foreclose on this mortgage because acceleration of the note would be inequitable, unjust, and the circumstances of this case render acceleration unconscionable. This court should refuse to grant relief from stay and refuse the acceleration and deny foreclosure because Movant has waived the right to acceleration or is estopped from doing so because of misleading conduct and unfulfilled conditions.

12. NO HUD COUNSELING NOTICE. Movant failed to comply with the forbearance, mortgage modification and other foreclosure prevention loan servicing requirements imposed on Movant pursuant to the National Housing Act, 12 U.S.C. 1701x(c)(5) which requires the Movant to advise the Debtors of any home ownership counseling Movant may offer together with information about counseling offered by the United States Department of Housing and Urban Development. The Debtors allege that the United States Department of Housing and Urban Development has determined that 12 U.S.C. 1701x(c)(5) creates an affirmative legal duty on the part of the Movant and Movant's non-compliance is an actionable event that affects the Movant's ability to carry out foreclosure. Movant cannot legally pursue foreclosure unless and until Movant demonstrates compliance with 12 U.S.C. 1701x(c)(5).

13. DEFECTIVE ASSIGNMENT. The purported assignment of the deed of trust that is attached to the motion for relief from stay conflicts with the alleged copy of the deed of trust that is attached to the Proof of Claim filed in this case. In addition, there is no proof of a continuous chain of assignments from the originator of the deed of trust to the current alleged beneficiary thereof, whoever that may be.

14. HOLDER OF THE NOTE. The Movant does not lawfully own and/or hold the subject mortgage note by endorsement, delivery and acceptance or otherwise and was not the owner and lawful holder of the subject note on the date this motion for relief from stay was filed with this Court. Additionally, the alleged endorsement, delivery and acceptance of delivery of the mortgage note suffers from other deficiencies including the fact that one or more of the endorsements purports to be from a representative of an institution that is in a state other than _____ whereas the notary recites that the endorsement was executed in the State of _____. In addition, the purported endorsement of the note from the originator to the current movant is fatally defective in that it omits at least two intermediary parties from the purported transaction. Movant has therefore failed to establish that it is the real party in interest or that it has legal standing to pursue this motion for relief from stay.

15. DEFECTIVE MERS ENDORSEMENT. The endorsement or allonge attached to the motion for relief from stay that purportedly transfers and delivers the promissory note from MERS in its corporate capacity as owner and not "as nominee" is legally defective to transfer ownership or possession of the subject note or mortgage to the Movant. Besides the fact that the endorsement is not from "MERS as nominee" which is how MERS is named in the original mortgage note, the purported endorsement suffers from other deficiencies including the fact that the said endorsement purports to be from a MERS representative located in a state other than the state of Virginia, whereas the only business office of MERS in the United States is located in the Commonwealth of Virginia.

16. FURTHER DEFECTS IN THE ENDORSEMENT. The purported endorsement of the mortgage note attached to the motion for relief from stay is from one mortgage originator, but the mortgage attached to the Proof of Claim identifies a totally different entity. There are no documents attached to the motion for relief from stay that identify any intermediary endorsements or transfers and deliveries of the mortgage from the party identified in the note attached to the Proof of Claim to any other entity and no sufficient links in the chain of endorsements, transfers and deliveries that would arise out of the securitization of a mortgage note.

17. COMPLETE LACK OF STANDING. There is no valid endorsement of the mortgage note (corrective or otherwise) that is attached to the motion for relief from stay or that has been filed by the Movant as a supplement thereto that establishes that the Movant owned the mortgage or owned or held the subject promissory note either prior to or at the time it filed the motion for relief.

18. FAILURE TO PROVIDE STATUTORY NOTICE OF FEES. Before attorney's fees can be collected on a debt, North Carolina law requires the creditor to notify the debtor in writing that "the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance' shall be enforced and that [the debtor] has five days from the mailing of such notice to pay the 'outstanding balance' without the attorneys' fees." N.C. Gen. Stat. § 6-21.2(5) (1999). Thus, the mere delinquency of a debt is not sufficient to trigger the award of attorney's fees under this statute. The Debtors must have been given written notice plus a five-day grace period to pay their outstanding balance or the amount necessary to cure the alleged default. The Motion for Relief from Stay includes no allegation that would tend to establish that this requirement was satisfied. Absent evidence showing movant complied with this notice requirement, any award of attorney's fees is unauthorized. See, e.g., *McGinnis Point Owners Ass'n v. Joyner*, 522 S.E.2d 317, 320 (1999).

19. FAILURE TO COMPLY WITH THE NC UNIFORM TRUST CODE. The NC Uniform Trust Code § 36C-10-1013 entitled, Certification of Trust provides as follows:

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

- (1) The existence of the trust and the date the trust instrument was executed;
- (2) The identity of the settlor, unless withheld under a provision in the trust instrument;
- (3) The identity and address of the currently acting trustee;
- (4) The powers of the trustee;
- (5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (6) The authority of cotrustees, agents or servicers to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
- (7) The trust's taxpayer identification number; and
- (8) The manner of taking title to trust property.

(b) The Debtors are informed and believe that their mortgage note is in fact owned by a common law trust organized under the laws of either the State of Delaware or the State of New York. The Movant has failed to provide any of the information required by the North Carolina Uniform Trust Code. As a result, the Debtors respectfully request that the motion for relief be dismissed without further notice.

20. UNJUST ENRICHMENT/DOUBLE DIPPING/FAILURE TO COMPLY WITH HAMP.

Movant has received \$3,552,000,000 (three billion, five-hundred, fifty-two million dollars) in TARP funds, under the Economic Stabilization Act of 2008, which were meant to relieve banks of their "troubled assets" including Notes and Mortgages which are in foreclosure. It has also been reported that banks such as the Movant have been paid billions for losses or "troubled assets" which include mortgages that have gone into foreclosure by insurers like AIG and United Guarantee who insured the Movants against this very type of loss through credit default swaps. To allow Movant to come now and take the Respondent's home through relief from stay and subsequent foreclosure, sell it at auction and pocket the proceeds amounts to unjust enrichment and is what is known as 'double dipping'.

Further, Movant is also a Residential Mortgage Servicer committed to the Home Affordable Modification program through a formal Participation Agreement with the United States of America. As a recipient of TARP funds, and pursuant to the Participation Agreement signed and agreed to by Movant the Movant is subject to the U.S. Treasury's modification program guidelines for the Making Home Affordable program. The full description of the Home Affordable Modification program is available at:

http://www.treas.gov/press/releases/reports/modification_program_guidelines.pdf

The Home Affordable Modification program clearly requires "[A]ny foreclosure action...be temporarily suspended during the trial period, or while borrowers are considered for alternative foreclosure prevention options. In the event that the Home Affordable Modification or alternative foreclosure options fail, the foreclosure action may be resumed." Movant in this action has received \$3,552,000,000 dollars in taxpayer funds. Pursuant to the U.S. Treasury Movant must suspend all foreclosure operations against the Respondent herein until such time as the services, tests, and potential modification opportunities promulgated by the U.S. Treasury are provided to the Respondent. Movant has never offered the Respondent a modification in accordance with the Home Affordable Modification plan even though the Movant has taken \$3,552,000,000.00 dollars from the US taxpayers. As a matter of equity, this Court should refuse to grant relief from stay to Movant because acceleration of the due date would be inequitable, unjust, and the circumstances of this case render acceleration unconscionable. Further, based upon the foregoing, this Court should deny relief from stay because Movant comes to court with unclean hands for failing to abide by its obligations under federal law and by taking billions in tax dollars, signing a contract agreeing to modify its customers mortgages and then not doing so. Further this court should deny relief from stay because Movant has waived the right to acceleration or is estopped from doing so because of misleading conduct, unfulfilled contractual conditions precedent and double dipping.

21. MOVANT FAILED TO FOLLOW THE STANDARDS OF LOAN SERVICING PURSUANT TO THE GUARANTEE AND INSURANCE COVERAGE PROVIDED BY THE VETERAN'S ADMINISTRATION. Movant failed to follow the standards of loan servicing applicable to the subject residential mortgage pursuant to the guarantee and insurance coverage provided to Movant by the Veterans Administration (VA) pursuant to Title 38 of the U.S. Code. Movant failed to extend to Respondent all reasonable forbearance, including the opportunity to apply for a mortgage foreclosure avoidance workout and failed to give the required consideration to Respondent for temporary suspension of payments and extension of the loan, including:

- (a) the subject residential mortgage loan is a purchase money mortgage made to a veteran, the payment of which is guaranteed and insured by the United States pursuant to 38 U.S.C. § 3703(a)(1) and 38 U.S.C. § 3710(a)(1);
- (b) the subject loan was made on the terms and pursuant to the conditions, regulations, and restrictions prescribed by the Secretary of Veterans Affairs found at 38 U.S.C. § 3703(a)(2)(B) and 38 U.S.C. § 3703(c)(1);
- (c) 38 U.S.C. 36.4300 to 36.4393 set out the federal regulations prescribed by the Secretary of Veterans Affairs applicable to the subject mortgage that describe the Movant's obligations to service this mortgage so as to avoid foreclosure;
- (d) the purpose of the VA Housing Loan Program, pursuant to which the subject mortgage is guaranteed and insured by the United States is to enable veterans to obtain home loans and to minimize the risk of foreclosure and the loss of home ownership. U.S. v. Shimer, 367 U.S. 374, 383 (1961);
- (e) 38 U.S.C. 36.4346(a) and the VA Handbook H26-94-1 require the Movant as the lender and/or loan servicing agent of the subject mortgage to establish a delinquent loan servicing program which, among other things, requires the Movant to:
 - (1) arrange for an individual loan consultation with the Respondent;
 - (2) have a collection staff trained in techniques of loan servicing and counseling delinquent borrowers, including the pursuit of alternatives to

foreclosure available to counsel Debtors in their status as delinquent borrowers.

(3) have guidelines for individual analysis of the delinquency in Respondent's mortgage;

(4) evaluate repayment proposals with the Respondent;

(5) employ collection techniques flexible to adapt to Respondent's circumstances;

(6) establish timely, helpful and responsive telephone contact with Respondent to determine why payment was not made on the mortgage; alternatively, arrange a face-to-face interview with Respondent to solicit information to evaluate the prospects for curing the mortgage default including determining whether the granting of forbearance or other such relief assistance would be appropriate to assist Respondent in avoiding foreclosure and the loss of home ownership by a veteran and that veteran's family;

(7) make a reasonable effort to determine the reason for the Respondent's default and whether such reason is temporary or permanent, the income of Respondent and their monthly household and debt expenses and obligations leading to a realistic and mutually satisfactory arrangement for curing the default;

Movant has no valid cause of action due to the Movant's failure to service this delinquent VA insured loan as required by the federal law and regulations set forth herein above and, by reason thereof, Movant comes to the court with unclean hands and is not entitled to the equitable remedy of foreclosure. Norwest Mortgage v. Rhodes, 5 Fla. Law Weekly 361 (Fla 12th Judicial Circuit Court 1998); See also Simpson v. Cleland, 640 F.2d 1354 (D.C. Cir. 1981); Cross v. FNMA, 359 So. 2d 464, 465 (Fla. 4th D.C.A. 1978) (finding that a mortgage foreclosure is an equitable action and equitable defenses are appropriate); Brown v. Lynn, 392 F. Supp. 559 (N.D. Ill. 1975) (finding that foreclosure courts can direct the parties to pursue and exhaust the alternatives to foreclosure enumerated in the handbook); FNMA v. Ricks, 372 N.Y.S. 2d 485 (1975).

22. MOVANT FAILED TO PROVIDE DEBT MANAGEMENT AND RELIEF IMPOSED BY FEDERAL REGULATIONS PROMULGATED BY THE VETERANS ADMINISTRATION, PURSUANT TO 38 USC 36.4346.

Movant failed to provide the Respondent with debt management and relief which must be made available to borrowers facing temporary financial problems imposed upon Movant and the subject VA mortgage by federal regulations promulgated by the VA, pursuant to 38 U.S.C. 36.4346. Such relief options must include temporary forgiveness of monthly payments, mortgage modification and other foreclosure prevention loan servicing requirements. As a result of Movant's failure to engage in any foreclosure loss mitigation, as required, Movant has failed to establish compliance with a statutory and contractual condition precedent to the Motion for Relief. Movant failed its obligation to the Respondent to pursue effective foreclosure prevention strategies and did not evaluate the particular circumstances surrounding his claimed default; failed to determine the Respondent's capacity to pay the monthly payment amount or a modified payment amount; failed to ascertain the reason for the Respondent's claimed default, or the extent of his interest in keeping the subject property. Movant failed to comply with the VA loss mitigation and foreclosure prevention servicing guidelines by failing to contact the Respondent regarding the claimed mortgage delinquency to determine whether he was facing a financial crisis or hardship. The Movant failed to give the Respondent the opportunity to cooperate in resolving the debt. Movant failed to attempt to avoid filing this Motion for Relief action by not contacting the Respondent by the 30th day of

the claimed delinquency. Movant did not timely ask Respondent to provide information to determine the reason for the claimed non-payment. Movant failed to inform the Respondent of the existence of the VA alternatives to foreclosure prior to filing the Motion for Relief from Stay. As a result, Movant has denied the Respondent the required opportunity to avoid foreclosure through early intervention upon delinquency pursuant to the VA servicing requirements and standards. Movant failed its duty to the Respondent to manage the subject mortgage as required by the VA's special foreclosure prevention workout programs which can include and allow for the restructuring of the loan which allows the borrower to pay out delinquent installments or advances to bring the mortgage current. Movant further denied the Respondent access to special forbearance in the form of a written agreement that reduces or suspends the monthly mortgage payments for a specific period to allow time to recover from a financial hardship. Such a plan can involve changing one or more terms of the subject mortgage in order to help the Respondent bring the claimed default current thereby preventing foreclosure. The Movant's failure to comply with the VA repayment plan or special forbearance workout programs denied the Respondent the required access to explore alternatives to avoid foreclosure.

23. THE VA INSURED NOTE IS NOT A NEGOTIABLE INSTRUMENT/LACK OF STANDING. The exhibits attached to Movant's Motion for Relief are inconsistent with Movant's allegations as to ownership of the subject promissory note and mortgage. Movant has failed to establish that Movant is the real party in interest and Movant has failed to state a cause of action. The VA insured promissory note that is the subject of the Motion for Relief is not a negotiable instrument and therefore is not subject to transfer by endorsement because the note directly and specifically incorporates and directly references and applies federal regulations issued by the VA that limit the Lender's rights of acceleration, collection and foreclosure in the case of a borrower's default. The VA insured promissory note states, in pertinent part, under the section on borrower's failure to pay section 10:

Some of those conditions are described as follows: Regulations (38 C.F.R. part 36) issued under the Department of Veterans Affairs Guaranteed Loan Authority (38 U.S.C. Chapter 37) and in effect on the date of loan closing shall govern the rights, duties and liabilities of the parties to this loan and any provisions of this Note which are inconsistent with such regulations are hereby amended and supplemented to conform thereto.

The VA insured promissory note is conditional because it is subject to and governed by the VA default loan servicing and loss mitigation regulations. The court cannot determine the obligations required of the person promising to pay or the person requiring payment without reference to the VA regulations. As a result, the note is not an unconditional promise, is not a negotiable instrument and is not subject to transfer by endorsement.

Under Section 3-106(a) of the Uniform Commercial Code "a promise or order is [conditional if it] is subject to or governed by another record, or [the] rights or obligations with respect to the promise or order are stated in another record."

"To determine whether an instrument meets negotiable instrument definition of Uniform Commercial Code, only [the] instrument itself may be looked to, not other documents, even when other documents are referred to in instrument." First State Bank at Gallup v. Clark, 570 P.2d 1144 (N.M. 1977); Amberboy v. Societe de Banque Privee, 831 S.W.2d 793, 794 (Tex. 1992); Walls v. Morris Chevrolet, Inc., 515 P.2d 1405, 1407 (Okla. App. 1973).

"No instrument can be negotiable which (1) is subject to another agreement, (2) refers to another agreement for the rights of the parties, or (3) incorporates another agreement."

Hawkland, Uniform Commercial Code Services § 3-105:2. See also, Holly Hill Acres, Ltd. v. Charter Bank of Gainesville, 314 So. 2d 209, 210-11 (Fla.2nd DCA 1975) (holding that the incorporation of the terms of a separate writing makes the promissory note a non-negotiable, conditional promise to pay); Hawkland, Uniform Commercial Code Services § 3-105:2; Dzikowski v. Moreno (In re V.O.C. Analytical Labs., Inc.) 263 B.R. 156, 160-61 (S.D. Fla. 2001); (The phrase "subject to" or words to that effect are fatal to negotiability, regardless of the actual provisions of the other document.) Hawkland, Uniform Commercial Code Services § 3-105:2; 28; ("An order or promise is conditional if either the instrument states that the rights or obligations of the parties are defined or stated in another writing or that the rights or obligations of the parties are subject to the terms of another writing.") Anderson, Uniform Commercial Code § 3-106:8 [Rev].

It appears on the face of the Motion for Relief that a person other than the Movant was the true owner of the claim at the time the Motion for Relief was filed and that the Movant is not the real party in interest and is not shown to be authorized to bring this Motion for Relief.

The prosecution of a residential mortgage foreclosure action must be by the owner and holder of the mortgage and the note. Movant is not entitled to maintain an action if it does not own and hold the note which is purportedly secured by the subject mortgage. Your Construction Center, Inc. v. Gross, 316 So. 2d 596 (Fl. 4th DCA 1975); Greenwald v. Triple D Properties, Inc., 424 So. 2d 185, 187 (Fla. 4th DCA 1983).

In this case, Movant has failed to provide proof that it is the owner of the subject mortgage.

Legal possession alone is not sufficient to transfer ownership of a non negotiable instrument. Gibson v. Boling. 622 S.W. 2d 180, 185 (Ark., 1981). There must be some evidence of the transfer.

An item which is non-negotiable in its inception remains so. Mere endorsement of such a draft does not convert the document into a negotiable, bearer instrument, since the receipt was nonnegotiable. Universal Premium Acceptance Corp. v. York Bank & Trust Co., 69 F.3d 695, 700 (C.A.3 (Pa.), 1995).

The original lender named on both the Mortgage and the Note is _____.

Alternative Affirmative Defense and Conditional
Counter-Motion
Requesting the Recovery of Legal Fees and Expenses
Under 28 USC 1927

In the event the motion for relief from the automatic stay is withdrawn by the movant at any time prior to the conclusion of the final hearing on the merits or in the event this Court denies the motion for relief from stay based on one or more of the **Affirmative Defenses** pleaded herein or in the further event that the Court denies the motion upon a finding of one or more of the following facts:

1. This Court finds that the factual contentions in the motion were not based on a reasonable review of the account records of the debtors as maintained by the Master Servicer, the Primary Servicer, the Subservicer, the Default Servicer, the Movant, or any third-party vendor; or
2. This Court finds that the alleged default in payments by the debtors was based in whole or in part on any misapplication of payments from debtors by the Movant or any other party; or

3. This Court finds that the alleged default in payments by the debtors was based in whole or in part upon the use of payments made by the debtors for the payment of or the credit against any fees or expenses of any nature whatsoever related to or arising out of the debtors' mortgage loan that have not heretofore been approved by this Court after proper notice and hearing; or

4. This Court finds that the factual contentions in the motion were not supported by the evidence in the account records of the debtors or, in the alternative, were inconsistent with the proofs of payment tendered as evidence by the debtors and duly admitted as evidence by this Court; or

5. This Court determines that the motion was filed for some improper purpose such as to harass the debtors or to cause unnecessary delay or needlessly increase the cost of this Chapter 13 bankruptcy case.

Then and in the event any one or more of such findings are made by this Court then the debtors respectfully move this Court pursuant to the provisions of Section 1927 of Title 28 of the United States Code for the recovery of their legal fees and expenses in a sum equal to twice the presumed fee (or \$900.00), or the hourly billing rate of the attorney for the debtors (\$375.00), whichever amount is greater, and for the recovery of the debtors' expenses such as lost time from work, travel costs, telephone calls, postage, paying for bank records, securing and paying for money order or checking tracing and confirmation services, expenses incurred for the electronic tracing of payments and the like, from the Movant and/or the attorneys for the Movant.

In support of this conditional motion, the debtors show unto the Court that Section 1927 of Title 28 of the United States Code, regarding Counsel's liability for excessive costs, provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

A district court has the inherent power to assess attorney's fees against a party who has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975) (internal quotations omitted). In this regard, if a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled," it may assess attorney's fees against the responsible party. *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946). In such instances, the imposition of sanctions "transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of 'vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy.'" *Chambers v. Nasco*, 501 U.S. 32, 46 (1991) (quoting *Universal Oil*, 328 U.S. at 580).

WHEREFORE, the debtor(s) having responded to the motion for relief filed herein for the purpose of reserving their right to hearing before the court respectfully pray of the court as follows:

A. That the debtor(s) be granted a **preliminary hearing** on all issues raised by the pleadings in this case;

B. That if applicable the movant be ordered pursuant to **Rule 7034** of the Federal Rules of Bankruptcy Procedure to **produce all current appraisal reports on the subject property, valuations, delinquency contact reports, mortgage inspection reports, property inspection reports, and all documents** prepared in connection with this loan before any court hearing;

C. That the court require the movant pursuant to **Rule 7034** of the Federal Rules of Bankruptcy Procedure to **produce a complete life of loan history of all receipts of payments since the filing of this case (from the Trustee and the Debtors) and a detailed summary of the application and disbursement of all such payments**;

D. That if applicable the movant be ordered to provide the debtor(s) with **the name, address and telephone number of the current holder of the mortgage or note as provided for by Section 1641(f)(2) of Title 15 of the United States Code**;

E. That if applicable the movant provide the debtor(s) with a list of each entity having any interest in the mortgage note that is the subject of this motion including, but not limited to, any broker, table-funder, correspondent lender, originator, lender, warehouse lender, trustee, investor, trustee under a pooling and servicing agreement, servicer, sub-servicer, master-servicer, or similar party, and to identify each such party by full name, address, and a telephone number;

F. That if applicable the movant be required to provide the debtor(s) for each party listed pursuant to Section E herein the consideration each entity received or disbursed for any interest it obtained or relinquished in the loan as well as the party it paid consideration to or received it from;

G. That this response be treated as a written **Request for Production of the Documents** described herein, including the production of the lists and records as identified herein, said request being made pursuant to Rule 7034 of the Federal Rules of Civil Procedure and Rule 34 of the Federal Rules of Civil Procedure, and that **the court enter an order requiring such documents to be produced a least ten (10) days prior to any final hearing on this motion**;

H. That this response be treated as a **Motion pursuant to Rule 9006(c)(1)** of the Federal Rules of Civil Procedure for this court in its discretion without notice and a hearing to reduce the time period to respond to the request for production of documents as provided for herein to a period of no less than ten (10) days prior to the designated hearing date and that the movant be ordered to fax legible copies of said documents to the attorney for the debtor(s) or to transmit the same by an expedited or express mail service;

I. That the court require the movant to establish all facts in this case by way of sworn testimony by qualified and competent agents and employees of the movant and to that extent the debtor(s) object to the use of any affidavits at this hearing and will only consent to the testimony of witnesses with actual and personal knowledge of the facts so that they can authenticate that any matter is what it is claimed to be;

J. That if applicable the motion be dismissed if the movant fails to produce all of the requested documents at least five (5) days before the hearing date as requested herein and that sanctions be awarded against the movant in the event thereof;

K. That if applicable this motion be dismissed pursuant to Rules 7017, 7019, and 7020 of the Federal Rules of Bankruptcy Procedure for failure to prosecute the same in the name of the real party in interest, to join necessary and mandatory parties, or to include the Trustee

under the Deed of Trust, or the Trustee under the Pooling and Servicing Agreement, as a necessary party;

L. That if applicable this motion be dismissed for failure of the movant to comply with the mandatory claim transfer and assignment Rules as provided for by **Rule 3001(e)** of the Federal Rules of Bankruptcy Procedure;

M. That the debtor(s) be granted a **final hearing** on all issues raised by the pleadings in this case;

N. That the attorney for the debtor(s) be awarded a non-base legal fee of \$450.00 to be paid under the plan; and

O. That the debtor(s) have such other and further relief as to the court may seem just and proper.

This document may contain nonpublic personal information about the consumer-debtor(s) subject to the restrictions of the Federal Gramm-Leach-Bliley Act. Such information, if any, is only included in this document for matters and things related to the bankruptcy case of these consumer-debtor(s). You may therefore only use this information in connection with proceedings in this bankruptcy case and for no other purpose. You may not directly or indirectly redisclose or reuse any of the consumer-debtor(s)' nonpublic personal information contained in this document for any other purpose.

DATED THIS THE _____ DAY OF _____, 2008.

O. MAX GARDNER III
ATTORNEY FOR THE DEBTOR(S)
NC STATE BAR NUMBER: 6164
HISTORIC WEBBLEY
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PO BOX 1000
SHELBY NC 28151-1000
704.487.0616
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

John Q. Public
Mary E. Public
100 Main Street
Anywhere, NC 28999
Chapter 13 Case
Court No:
SSN:
File Date:
Our File No:

**Contested Case: America's Servicing Company;
Wells Fargo Bank, N.A., Master Document Custodian
for the Trust _____**

Court Date: Friday, _____ at 9:30 a.m.

Location: Courtroom #5, Cleveland County Courthouse, Shelby

**DEBTORS' OBJECTION TO AND
MOTION TO STRIKE AFFIDAVIT**

COME NOW the Debtors, pursuant to Rules 803(6) and 902(11) of the Federal Rules of Evidence and object to the Affidavit of John Cody, including every statement referring to an extrinsic document not attached and properly authenticated; every statement not shown to be made upon personal knowledge, and other certain statements contained therein which are inadmissible for the grounds stated. As grounds therefore, debtors show unto the court the following:

Rule 902(11) of the Federal Rules of Evidence provides that:

The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:

- (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
- (B) was kept in the course of the regularly conducted activity; and
- (C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

1. The Debtors object and move the court to strike the affidavit for failure of the Movant to provide the Debtors with sufficient prior notice of its intent to use the Affidavit at the hearing on the Motion for Relief from Stay in lieu of the live testimony of Mr. John Cody.
2. The Debtors move, in the alternative, to strike all statements which refer to documents neither attached nor properly authenticated in violation of Rules 803(6) and 902(11): said statements as are contained in unnumbered paragraphs 1 and 2 on Page 1, and paragraphs 2 and 3 of Page 2.
3. The Debtors, in the alternative, object to the hearsay statements in Paragraph 3 on Page 2, First and Second sentences, each of which begin with "I am advised that...". Said statements are obviously and patently based upon out of court statements by another to prove the truth of the matter asserted. Said statements also clearly contradict the record contained in the Debtors' chapter 13 case (Doc #1).
4. The Debtors, in the alternative, object to the opinion evidence offered by affiant in the last Paragraph on Page 2 continuing to Page 3, as without adequate foundation, obviously self serving, irrelevant to the ultimate issue of default, and are conclusions not based upon admissible evidence.
5. The Debtors, in the alternative, object to the statement in Paragraph 7 of the Affidavit stating that "all documents attached to the Motion are genuine, authentic and true copies of the originals" when the only Note produced by Movant at Debtors' request is unendorsed and provides no evidence of due and proper negotiation in an unbroken chain from the originator to the Trust that currently and allegedly owns and holds the note.
6. The Debtors also, and in the alternative, object to Paragraph 7 and to Paragraph 8 (involving the amount of the alleged default) on the grounds that Jody Cody is not a Vice President of America's Servicing Company but rather an employee of LPS LLC, formerly known as Fidelity National Foreclosure Solutions. A copy of a recent publication of Fidelity, attached hereto, clearly identifies Mr. Cody as such an employee. As an employee of LPS, Mr. Cody is not in a position to authenticate by affidavit or otherwise the business records of America's Servicing Company or of the Master Document Custodian (Wells Fargo Bank, N.A.) for the Trust that allegedly owns the note.
7. The Debtors have not been afforded the opportunity to inspect the documents referred to in the Movant's Affidavit, in violation of Rule 902(11) of the Federal Rules of Evidence, and therefore the said affidavit should be excluded.

WHEREFORE, premises considered, the Debtors move the court to grant the relief requested.

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME(S):

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR

**MOTION TO DISMISS THE MOTION FOR RELIEF
FROM AUTOMATIC STAY FILED BY
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.
(With Brief)**

COME NOW the above-named debtors, by and through their attorney of record, and move to dismiss the motion for relief from stay filed by Mortgage Electronic Registration Systems, Inc. ("MERS") on the following grounds:

FAILURE TO PROSECUTE IN THE NAME OF THE REAL PARTY IN INTEREST

MERS has offered no evidence that they are a party in interest in this case. They are neither the lender nor the trustee, nor do they even profess to be the **holders and/or owner** of the Promissory Note. There is no competent evidence submitted by the movant that MERS has an enforceable right arising from any default in the Promissory Note attached to their motion as Exhibit A. In fact the declaration supporting the motion contains a blatant misstatement. The declaration says that the Note was made in favor of MERS as a "nominee." The Note itself makes no such references to MERS. MERS' only appearance in the documents attached to their motion is that they are the beneficiary of the "security instrument." MERS must have actual evidence to support every element of their prima facie case. Under North Carolina law, only the Note Holder or its legitimate transferee may foreclose. MERS has no possession of any enforceable instrument.

A. A Deed of Trust without a corresponding Note is not enforceable.

North Carolina law is well established that a deed of trust by itself is ineffective to allow foreclosure. A "mortgage note is a promissory note that evidences the indebtedness secured by a mortgage" and "contains the following essential terms: a promise to pay a fixed sum, the terms of payment, and the signature of the borrower." Webster's *Real Estate Law in North Carolina*, § 13-4.

North Carolina is a "'common law' or 'title theory' state with respect to mortgagesand normally take the form of deeds of trust." "A mortgage which purports to secure payment of a debt has no validity if the debt has no existence." Webster's *Real Estate Law in North Carolina*, § 13-1, et seq.

Section 13-22 of Webster, *supra*, states that:

"The mortgagee's interest in mortgaged land is transferable. The mortgagee's interest is composed of two things: (1) the debt or obligation usually evidenced by a negotiable promissory note, and (2) the mortgagee's interest in the real property which secures the obligation. It is often said that the debt or obligation is the principal thing and the security for the debt is the 'incident' or 'accessory' of the obligation. This idea is of fundamental significance in considering the law relating to the transferability of the mortgagee's interest in the mortgage. This concept means that the security is inseparable from the obligation and that the person who holds the note or obligation is also entitled to the mortgage. Since the mortgagee owns a duality of interests, difficulties may arise when the mortgagee purports to transfer those interests to different persons."

Section 13-23 of Webster, *supra*, states that:

"Since a mortgage is a mere security for the debt, the negotiation of the debt, which is the principal, carries with it the mortgage security, which is only the accessory. As long as the debt exists, the security will follow it. Thus where the mortgagee negotiates a note secured by a mortgage to another, the mortgage is also automatically assigned, even though the assignee does not know that there is a mortgage when he takes the note. The assignment of the mortgage, therefore, can be without a writing, and while the legal title to the real property does not pass, the transferee can nevertheless bring a suit to have the mortgage foreclosed to satisfy the debt."¹

Section 13-24 of Webster, *supra*, states that:

"Since the mortgage is only the incident of the mortgage debt, and since the person who holds the note or obligation is also entitled to the mortgage security, it has been held that a transfer of the mortgage without transfer of the indebtedness is a nullity, and that the transferee who takes an assignment of the mortgage without the note or obligation takes nothing."²

By analogy to our situation, unless there is absolute certainty that MERS is standing in the shoes of the note holder, we can have no assurance that the debtor will not be required to pay twice. To protect against that possibility a mortgage holder must produce

¹ "If the assignment of the mortgage results from an assignment of the debt only, without a writing also assigning the mortgage instrument, signed, sealed and delivered, the mortgagee's assignee can only foreclose by judicial action. In order for the assignee of a mortgage to foreclose by exercising a power of sale in the mortgage, it must appear that there has been a valid written assignment of the mortgage by the mortgagor to the assignee. *Well v. Davis*, 168 N.C. 298, 84 S.E. 395 (1915)."

² **"If the transferee of the mortgagee takes only the mortgage, without taking the note or other obligation, and the mortgagee subsequently negotiates the note to another transferee, the transferee of the mortgage only would have nothing while the transferee of the note only would have the benefit of the note *and* security."** (Emphasis added.)

the promissory note. MERS has failed to do so. Unless MERS can produce a Note or a recorded assignment they should not be entitled to relief.

Other jurisdictions have established case law that a deed of trust without a corresponding note is not enforceable. California law is well established that a deed of trust by itself is ineffective to allow foreclosure. In *In Re Leisure Time*, 194 B.B.859 (9th Cir. BAP 1996) the court acknowledged that a "Security Instrument cannot exist, much less transfer independent from the obligation which it secures." 194 B.R. at 861, *citing DiSanto & Moore Associates*, 41 B.R. 935 (Bank. C.D. Cal. 1984).

In *Leisure Time, Supra*, the California Supreme Court is cited as follows: "There can be no assignment of a security interest independent of the assignment of the obligation. *Kelly v. Upshaw*, 39 Cal2d 179, 192, 246 P.2d 23, 30 (1952) (a purported assignment of the debt which it secured was a legal nullity), the Court continued by quoting from *In Re Belize Airways Ltd.*, 7 B.R. 604, 607 (Bank. S.D.Fla. 1980) as follows: "This is not a mere technical legal requirement; to allow the assignee of a security interest to enforce a security agreement would expose the obligor to double liability since the holder in due course of the promissory note is clearly entitled to recover from the obligor...."

By analogy to our situation, unless there is absolute certainty that MERS is standing in the shoes of the note holder, we can have no assurance that the debtor will not be required to pay twice. To protect against that possibility a mortgage holder must produce the promissory note. MERS has failed to do so. Unless MERS can produce a Note or a recorded assignment they should not be entitled to relief.

B. MERS has no enforceable right under the Deed of Trust.

MERS is nowhere mentioned or even referenced in the underlying note in this case. Clearly, if the original note was never executed, MERS would have no rights whatsoever arising solely from the deed of trust. Accordingly, the genesis of enforceable rights can only be created by the underlying note. Under North Carolina law, the enforceability of an instrument only arises from various attributes of possession of the underlying instrument. Where an instrument has been transferred, enforceability is still determined based upon possession.

Pursuant to North Carolina General Statute § 25-3-301, a "[P]erson entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to *G.S. 25-3-309* or *G.S. 25-3-418(d)*. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Under North Carolina *G.S. § 25-3-309*, Enforcement of lost, destroyed, or stolen instrument,

"(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its

whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) of this section must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, G.S. 25-3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means."

MERS is nowhere mentioned or even referenced in the underlying note in this case. Clearly, if the original note was never executed, MERS would have no rights whatsoever arising solely from the deed of trust. Accordingly, the genesis of enforceable rights can only be created by the underlying note. Where the instrument has been transferred, enforceability is still determined based upon possession. As stated above, there are only three instances, all arising from possession, which allow a person to enforce an instrument.

In the instant case, MERS has not produced any evidence of current possession of the instrument or an exception to the same under the lost note provisions of N.C.G.S. § 25-3-309. Likewise, MERS has not submitted any evidence of possession of a transferred or assigned Note. MERS has not submitted any evidence it either possesses the underlying note or that the note was negotiated payable to bearer or person in possession and MERS not the holder of the instrument. Accordingly, MERS has no enforceable rights under North Carolina law. MERS has not submitted any evidence that it possesses the underlying note as a nonholder, but with the rights of a holder. MERS has submitted no evidence that the note was assigned to it to provide its holder rights. Accordingly, MERS has no enforceable rights under North Carolina law. MERS has not submitted any evidence that it was in possession of the note and entitled to enforce it when loss occurred. MERS has not produced evidence that the loss of note was not the result of any transfer to any person or a lawful seizure. MERS has submitted no evidence that it cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process. Accordingly, MERS is not entitled to enforce the instrument claiming the lost note provisions of G.S. 25-3-309. In sum, MERS has not met its burden of proof and has failed to set forth a prima facie case that qualifies it to enforce the note under North Carolina law.

C. MERS has failed to provide evidence that they are entitled to the relief requested as they have no power of sale.

1. Under North Carolina law, Power of Sale is determined by Chapter 45, Article 2A of the North Carolina General Statutes.

The designation of MERS in the deed of trust as the beneficiary acting solely in nominee capacity for the lender and its successors and assigns, has nothing to do with who may enforce the terms of the note under North Carolina law. If MERS is not a party that can competently enforce the deed of trust, how could it obtain relief from stay? North

Carolina law defines who may pursue a foreclosure under Chapter 45. "Holder," as defined in N.C.G.S. § 25-1-201(21), also applies to Chapter 45:

- "a. The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;
- b. The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or
- c. The person in control of a negotiable electronic document of title."

MERS has provided no evidence that they have either possession of the Note or any evidence of an assignment.

In its papers MERS claims that "On or about October 13, 2005 Debtors, for valuable consideration, made, executed and delivered to Mortgage Electronic Registration System Inc., Solely as Nominee for Encore Credit Corp ("Lender") a Note in the principal sum of \$684,000.00." (See Declaration in Support of Motion for Relief from Stay, Paragraph 2, page 2, lines 3-5.) This allegation is patently untrue. A review of the Note attached as Exhibit A to that declaration shows no mention of MERS in any capacity whatever, nor is any assignment of the Note attached as an exhibit to MERS' declaration.

The same declaration (paragraph 4) indicates that the deed of trust was executed on October 13, 2005 granting the Lender (Encore) a security interest. There is nothing in MERS' moving papers to explain why their position as nominee for Encore entitles them to the relief requested; namely, that Movant be given leave to foreclose.

"As evidence that a plaintiff is holder of a note is an essential element of a cause of action upon such note, the defendant was entitled to demand strict proof of this element. The incorporation by reference into the complaint of a copy of the note was not in itself sufficient evidence to establish for purposes of summary judgment that the plaintiff was the holder of the note." *Liles v. Myers*, 38 N.C. App. 525, 248 S.E.2d 385 (1978).

"It is the fact of possession which is significant in determining whether a person is a holder, and the absence of possession defeats that status." *Connolly v. Potts*, 63 N.C. App. 547, 306 S.E.2d 123 (1983).

Accordingly, MERS has no power of sale unless it strictly complies with North Carolina law. As previously discussed, MERS has proffered no evidence whatsoever that it is entitled to enforce the note or is entitled to payment of the money pursuant to the note/instrument. Since MERS is not entitled to payment of money as holder of the note, MERS is not vested with the power to sell. Likewise, MERS has provided no evidence to this Court that it can exercise any power of sale since MERS has provided no evidence of a duly acknowledged and recorded assignment. So while MERS might have once been an artificial "nominee" for the original lender and "beneficiary" of the deed of trust, MERS has failed to establish any connection with the proper party entitled to enforce the note.

2. Other jurisdictions have followed the requirement that MERS be entitled to foreclose.

MERS is no stranger to litigation about its right to enforce similar documents.³ The following case is illustrative: "Presumably MERS serves in a "nominee" capacity for the originating lender, but, "simply stated, MERS has no independent right to collect on any debt because MERS itself has not extended credit, and none of the mortgage debtors owe MERS any money." *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dep't of Banking and Finance*, 270 Neb. 529, 535, 704 NW2d 784 (2005). The Seventh Circuit concurs, stating, "MERS is not the lender. It is a membership organization that records, trades and forecloses loans on behalf of many lenders, acting for their accounts rather than its own....[i]t is a nominee only, holding title to the mortgage but not the note. Each lender appears to be entitled not only to payment as the note's equitable (and legal) owner but also to control any litigation and settlement." *Mortgage Electronic Systems, Inc. v. Estrella*, 390 F3d 522, 523 (7th Cir. 2004).

Similarly under North Carolina law, MERS should not be exempt from proving to the court's satisfaction that it is a party in interest.

CONCLUSION

MERS has not produced any evidence that they are a party in interest and therefore, they should not be able to obtain relief from stay.

Respectfully submitted, this the _____ day of _____, 2009.

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³ Counsel for the debtor wished to acknowledge Jacksonville Area Legal Aid Inc. whose Amicus Brief filed in the Eiranova – Montoya case (Case 07-06952 PB7 Bank.S.D.CA) served as a basis for portions of this brief.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

John Q. Public

Mary E. Public

100 Main Street

Anywhere, NC 28999

Chapter 13 Case

Court No:

SSN:

File Date:

Our File No:

Contested Case: Saxon Mortgage Servicing, Inc. v Public

Court Date: Friday, _____ at 9:30 a.m.

Location: Courtroom #5, Cleveland County Courthouse, Shelby

**MOTION TO DISMISS THE MOTION FOR RELIEF
FROM AUTOMATIC STAY FILED BY
SAXON MORTGAGE SERVICING, INC.**

(Not the Holder of the Original Note)

COME NOW the above-named debtors, by and through their attorney of record, and move to dismiss the motion for relief from stay filed by Saxon Mortgage Servicing ("Saxon") on the following grounds:

1. Saxon filed a motion with this court for Relief from the Automatic Stay. The motion was based on an alleged default in mortgage payments on a note secured by a first Deed of Trust on the residential real estate of the debtor(s). Saxon alleged in its motion that it was the "owner and holder" of the Deed of Trust Note.
2. The debtor(s) allege that Saxon is not the actual holder of the original Deed of Trust Note, is not the real party in interest in this matter, and has no legal standing to bring this motion. The debtor(s) believe and therefore allege that the actual "holder" of the Deed of Trust Note is the trustee under a mortgage-backed securitized trust that includes thousands of "notes" and similar evidence of indebtedness.
3. The debtor(s) allege that as opposed to being the current "owner and holder" of the Deed of Trust Note, Saxon is only a servicer, a sub-servicer or a default-servicer of the debt pursuant to a pooling and servicing agreement with the actual holder, who the debtor(s) believe is a mortgage-backed securitized trust.
4. Rule 17(a) of the Federal Rules of Civil Procedure provides that every action "shall be prosecuted in the name of the real party in interest." Rule 17(b) of the Federal Rules of Civil Procedure provides that the party filing the action must have the "capacity to sue or be sued" (*Miguel v Country Funding Corp.* HI D.C. No. CV-97-01593 DAE). In this case, the movant is not the holder of the original Note and therefore has no standing to bring the Motion for Relief against the debtor(s).

5. The debtor(s) are further moving this Court for the award of reasonable legal fees and expenses of no less than \$450.00 for filing an improper motion in this case and for damages payable to the debtor(s) in the sum of at least \$250.00. The debtor(s) are also moving this Court to dismiss the motion for relief from stay with prejudice.

WHEREFORE the debtor(s) respectfully pray of the Court as follows:

A. That the motion for relief from the automatic stay of Saxon be dismissed with prejudice;

B. That Saxon be precluded from filing any future motions for a period of 12 months;

C. That the attorney for the debtor(s) be awarded the sum of \$450.00 as reasonable legal fees and expenses and the debtors be awarded damages of \$250.00 for the filing of an improper motion in this case by Saxon;

D. That this matter be set for hearing;

E. That the debtor(s) have such other and further relief as to the Court may seem just and proper.

Dated this the _____ day of _____, 2008.

O. Max Gardner, III
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**In THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

John Q. Public
Mary E. Public
100 Main Street
Anywhere, NC 28999
Chapter 13 Case
Court No:
SSN:
File Date:
Our File No:

Contested Case: Chase Home Finance, LLC v Public

Court Date: Friday, _____ at 9:30 a.m.

Location: Courtroom #5, Cleveland County Courthouse, Shelby

**MOTION TO DISMISS THE MOTION FOR RELIEF
FROM AUTOMATIC STAY**

(Not the Real Party in Interest & Absence of Cause Pursuant to § 362(d)(1))

COME NOW the above-named debtors, by and through their attorney of record, and move to dismiss the motion for relief from stay filed by Chase Home Finance, LLC ("Chase") on the following grounds:

FAILURE TO PROSECUTE IN THE NAME OF THE REAL PARTY IN INTEREST

1. Chase filed a motion with this court for Relief from the Automatic Stay. The motion was based on an alleged default in mortgage payments on a note secured by a first Deed of Trust on the residential real estate of the debtor(s). Chase alleged in its motion that it was the "owner and holder" of the Deed of Trust Note.
2. The debtor(s) allege that Chase is not the actual holder or current assignee of the Deed of Trust Note, is not the real party in interest in this matter, and has no legal standing under applicable Federal Law to bring this motion and invoke the jurisdiction of this Court. The debtor(s) believe and therefore allege that the actual "holder" of the Deed of Trust Note is the originator of the debt obligation, a document repository company, a special purposes vehicle, a mortgage sponsoring entity, or the trustee under a mortgage-backed securitized trust that includes thousands of "notes" and similar evidence of indebtedness.
3. The debtor(s) allege that as opposed to being the current "owner and holder" of the Deed of Trust Note, Chase is only a servicer, a sub-servicer or a default-servicer of the debt pursuant to a pooling and servicing agreement with the actual holder, who the debtor(s) allege may or may not be a mortgage-backed securitized trust.
4. Rule 17(a) of the Federal Rules of Civil Procedure provides that every action "shall be prosecuted in the name of the real party in interest." Rule 17(b) of the Federal Rules of

Civil Procedure provides that the party filing the action must have the "capacity to sue or be sued" (*Miguel v Country Funding Corp.* HI D.C. No. CV-97-01593 DAE). In this case, the movant is not the real party in interest and therefore has no standing to bring the Motion for Relief against the debtor(s).

ABSENCE OF CAUSE OF ACTION PURSUANT TO SECTION 362(d)(1)

5. The debtors' mortgage loan with Chase was deemed current upon confirmation of their Chapter 13 plan.
6. The Plan specifically provided that the debtors intended to retain their residential real estate, cure the arrears through the plan and make all future payments directly to Chase.
7. The debtors claimed all equity in the property, if any, was exempt.
8. Since the debtors' payments are not considered late until after the 15th day of the month in which the payment is due, the debtors were literally only one (1) payment in arrears under the loan instruments when the motion for relief from stay was filed.
9. The debtors allege that the movant made no effort to resolve this matter informally prior to the filing of a motion for relief from stay.
10. The underlying loan instruments provide that the debtors must be provided with prior notice of any default and the right to cure the same before the movant is entitled to any legal fees or expenses.
11. The movant failed to provide the debtors with any prior notice of default or right to cure.
12. The movant has also failed to comply with the mandatory notice provisions of N.C.G.S. § 6.21.2(5). This statute provides that a creditor has to give a debtor five days' notice after default of the intent to assert attorney's fees. If the debtor then pays the defaulted amount within the five day period, attorney's fees cannot be collected against the debtor even if the agreement between the creditor and the debtor provides for the payment of such fees. The secured creditor in this case did not give any such notice but filed an application for legal fees before the bankruptcy court.
13. The debtor(s) are therefore moving this Court to dismiss the motion for relief from stay with prejudice.
14. The debtor(s) are further moving this Court for the award of reasonable legal fees and expenses of no less than \$450.00 for filing an improper motion in this case and for damages payable to the debtor(s) in the sum of at least \$250.00.

WHEREFORE the debtor(s) respectfully pray of the Court as follows:

- A. That the motion for relief from the automatic stay of Chase be dismissed with prejudice;
- B. That Chase be precluded from filing any future motions for a period of 12 months;

C. That the attorney for the debtor(s) be awarded the sum of \$450.00 as reasonable legal fees and expenses and the debtors be awarded damages of \$250.00 for the filing of an improper motion in this case by Chase;

D. That this matter be set for hearing;

E. That the debtor(s) have such other and further relief as to the Court may seem just and proper.

Dated this the _____ day of _____ 2009.

O. Max Gardner, III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

John Q. Public
Mary E. Public
100 Main Street
Anywhere, NC 28999
Chapter 13 Case
Court No:
SSN:
File Date:
Our File No:

Contested Case: HSBC Mortgage Corporation v Greene

Court Date: Friday, _____ at 9:30 a.m.

Location: Courtroom Number 5, Cleveland County Courthouse, Shelby

**MOTION TO DISMISS THE AMENDED MOTION FOR RELIEF
FROM AUTOMATIC STAY FILED BY
HSBC MORTGAGE CORPORATION**

COMES NOW the above-named debtor, by and through his attorney of record, and moves to dismiss the Amended Motion for Relief from the Automatic Stay filed by HSBC Mortgage Corporation (hereinafter "HSBC") and in support hereof shows unto the Court the following:

1. HSBC filed a motion with this Court for Relief from the Automatic Stay on or about _____. The debtor filed and served an Objection to the said motion on or about _____. HSBC thereafter unilaterally amended the motion for relief. Such action was taken on or about _____.
2. Rule 7015 of the Bankruptcy Rules of Procedure, which incorporates Rule 15 of the Federal Rules of Civil Procedure, provides for amended and supplemental pleadings, but does not apply in contested matters under Rule 9014 of the Bankruptcy Rules. As a result, a party cannot amend a motion or any other pleading in a contested case. And, even if Rule 7015 applied, the right to amend a pleading as a matter of right only applies if no responsive pleading has been filed. Since the debtor filed a responsive pleading before _____, the movant could only have amended the motion with the approval of this Court after notice and a hearing.
3. The debtor is therefore moving this Court to strike the purported amended motion as a nullity and to dismiss this contested case with prejudice.
4. The debtor is also moving this Court for the award of reasonable legal fees and expenses of no less than \$450 for the filing of an improper amended motion in this case and for damages payable to the debtor in the sum of at least \$250.

WHEREFORE the debtor respectfully prays of the Court as follows:

- A. That the amended motion for relief from the automatic stay of HSBC be dismissed with prejudice;
- B. That the attorney for the debtor be awarded the sum of \$450 as reasonable legal fee and expenses and the debtor be awarded damages of \$250 for the filing of an improper amended motion in this case by HSBC;
- C. That this matter be set for hearing;
- D. That the debtor have such other and further relief as to the Court may seem just and proper.

Dated this the _____ day of _____, 2008.



O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
	)	CHAPTER 13 CASE NO.
	)	OUR FILE NO:_____
)	
Debtor.)	
_____)	
WELLS FARGO BANK N.A.,)	
)	
Movant,)	
)	
vs.)	
)	
)	
Debtor.)	

**MOTION TO DISMISS PLAINTIFF'S MOTION FOR RELIEF FROM STAY
(Failure to Comply with HAMP/HARP)**

COMES NOW the Debtor, by and through his undersigned counsel, and moves to dismiss the motion for relief from stay filed by WELLS FARGO BANK N.A. on the following grounds:

1. On May 18, 2009 the Movant, WELLS FARGO BANK N.A., filed a Motion for Relief from Stay for the purpose of commencing foreclosure proceedings against the residential real estate of the debtor before the Clerk of Superior Court, Cleveland County, North Carolina. The Debtor submits that such Motion should be dismissed and or enjoined for the failure of Movant to comply with the applicable pre-filing mitigation rules arising out of applicable Federal law and contractual obligations of the Movant to the Secretary of the United States Treasury.

2. The Emergency Economic Stabilization Act of 2008 (EESA) was signed into law on October 3, 2008.¹ In implementing the Act, the United States Treasury has instituted a number of programs, including the "Making Homes Affordable" Act, Capital Purchase Program, and Capital Assistance Program, among others. See <http://www.financialstability.gov/roadtostability/programs.htm>.

3. Pursuant to the plans, and the authority provided by H.R. 1424 Title I Sec. 109-110, the United States Treasury has ordered as follows:

Mortgage Foreclosure Mitigation: All recipients of capital investments under the Financial Stability Plan will be required to commit to participate in mortgage modification program.
<http://www.financialstability.gov/about/transparencyaccountability.html>
(April 16, 2009).

¹ The full text may be found at <http://www.govtrack.us/congress/billtext.xpd?bill=h110-1424>.

4. The Movant in this case is Wells Fargo Bank N.A. Pursuant to the United States Department of the Treasury Section 105(a) Troubled Asset Relief Program (TARP) Report to Congress for the Period April 1, 2009 to April 30, 2009² the Movant in fact is a recipient of Federal TARP funds.

5. The Movant, Wells Fargo, is also one of fourteen Residential Mortgage Servicers committed to the Home Affordable Modification program through a formal Participation Agreement with the United States of America.³ As a recipient of TARP funds, and pursuant to the Participation Agreement, Movant is subject to the U.S. Treasury's modification program guidelines for the Making Home Affordable Program.

6. Said guidelines, promulgated on March 4, 2009 and a copy of which is attached hereto, clearly require "[A]ny foreclosure action...be temporarily suspended during the trial period, or while borrowers are considered for alternative foreclosure prevention options. In the event that the Home Affordable Modification or alternative foreclosure options fail, the foreclosure action may be resumed."

7. The guidelines further require, in summary:

- A) A screening for borrowers who write to their lender for assistance even if not in default;
- B) A Net Present Value (NPV) analysis, which, if positive, requires the offering of the Making Homes Affordable (HMA) Modification;
- C) If the NPV analysis does not qualify for the MHA program, the lender must seek alternative foreclosure prevention including alternative modification programs, deed-in-lieu, and short sales; and
- D) Borrowers in litigation can qualify for a modification without waiving legal rights in such litigation.

8. The Movant in this action in fact has received at least millions and millions of dollars in taxpayer funds and pursuant to the U.S. Treasury, their acceptance of same requires that Wells Fargo suspend all foreclosure operations against the Defendants herein until such time as the services, tests, and potential modification opportunities promulgated by the U.S. Treasury are provided to the Defendants.

9. The Movant is also contractually bound to stay this action. The Movant should not be permitted to foreclose in violation of the stated obligations to the U.S. Treasury. The Debtor herein has been provided rights by the U.S. Government which this Court should honor and which apply to all proceedings under Title 11 of the United States Code.

WHEREFORE, the Debtor hereby requests this Honorable Court GRANT this motion and order as follows:

A. That Movant's Motion for Relief from Stay be dismissed, or in the alternative, be stayed until such time as the loss mitigation and modification opportunities have been afforded to the Defendant herein;

² See http://www.financialstability.gov/docs/105CongressionalReports/105aReport_042009.pdf.

³ See Residential Mortgage Servicers listed on [Hope Now Alliance website](#) (CTRL + Click to follow link).

B. In the event that the Movant disputes its obligation to provide such servicing, and/or disputes its involvement with the Financial Stability Plan, the Court should order that an evidentiary hearing be held on the matter and that no dispositive motions be heard until such time as a hearing can be held.

Dated this _____ day of _____, 2009.

O. Max Gardner III
Gardner & Gardner, PLLC
Attorney for the Debtor
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com
web: <http://www.maxgardnerlaw.com>

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME(S):

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR

**OBJECTION TO NOTICE OF WITHDRAWAL OF
MOTION FOR RELIEF FROM STAY**

NOW COMES the debtor herein, by and through counsel, pursuant to Rules 7041 and 9014(c) of the Federal Rules of Bankruptcy Procedure and Rule 41 of the Federal Rule of Civil Procedure, and respectfully objects to the Notice of Withdrawal of Motion for Relief from Stay filed by the creditor, CITI RESIDENTIAL LENDING, and dated January 28, 2009, for the following reasons:

1. The debtor filed for bankruptcy protection under Chapter 13 on or about _____.
2. On or about _____, Citi Residential Lending ("Citi") filed a motion for relief from stay.
3. On or about _____, debtor filed a response opposing the relief sought in Citi's Motion.
4. On or about _____, Citi filed a Notice of Withdrawal of the motion for relief from stay.
5. Rule 9014(c) of the FRBP makes Rule 7041 of the FRBP applicable to the instant proceedings, and Rule 7041 incorporates and makes applicable to the instant proceedings Rule 41 of the FRCP.
6. Rule 41 of the FRCP prohibits withdrawal of a pleading after the filing of a responsive pleading or a motion for summary judgment.
7. In the case at bar, debtor has filed a response opposing the relief sought in the motion for relief from stay filed by Citi.
8. In connection with the response, debtor seeks relief from the Court pursuant to 28 U.S.C. § 1927 for the movant's vexatious multiplication of litigation.

9. Specifically, the response to the motion asserts that the motion constitutes vexatious multiplication of litigation in that it is based on documents that clearly establish that the movant is not entitled to the relief requested, and that it is, in fact, the second motion filed by the same attorney, based on the same loan, and the same documents.
10. Accordingly, debtor opposes the "Notice of Withdrawal" filed by movant, and seeks appropriate relief from the Court pursuant to 28 U.S.C. § 1927, including but not limited to attorney's fees and other appropriate sanctions.

WHEREFORE, debtor prays this Court for the following relief:

1. That the attempted Notice of Withdrawal filed by Citi Residential Lending be stricken under Rules 9014(c) and 7041 of the Federal Rules of Bankruptcy Procedure; and
2. That Citi Residential Lending be ordered to pay to counsel for debtor a reasonable attorney's fee, costs and expenses, pursuant to 28 U.S.C. § 1927; and
3. For a hearing to be held on this matter; and
4. For such other and further relief as this Court deems just and proper.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

In the Matter of:

John Q. Public
Mary E. Public
100 Main Street
Anywhere, NC 28999

Chapter 13 Case

Court No:

SSN:

File Date:

Our File No:

Contested Case: Mortgage Electronic Registration Systems, Inc. v Public

Court Date: Friday, _____ at 9:30 a.m.

Location: Courtroom number 5, Cleveland County Courthouse, Shelby, NC

**REQUEST FOR PRODUCTION
OF DOCUMENTS FROM THE DEBTORS TO THE MOVANT**

COME NOW the above-named debtors a, by and through their attorney of record, and herewith serve upon the MOVANT(S) in this case the following request for the production and inspection of documents pursuant to Rules 9014 and 7034 of the Rules of Bankruptcy Procedure and Rule 34 of the Federal Rules of Civil Procedure as provided for and set forth in the foregoing rules.

DEFINITIONS AND INSTRUCTIONS

A. The term "Document" means all writings of any kind, including the originals and all other non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including but not limited to correspondence, memoranda, notes, diaries, desk or other calendars, statistics, letters, telegrams, minutes, business records, personal records, accountants' statements, account statements, contracts, reports, credit reports, studies, checks, statements, receipts, invoices, bills, return checks, summaries, pamphlets, books, inter-office and intra-office communications, notations of any sort of conversations or meetings, telephone call meetings or other communications, written agreements, bulletins, printed matter, computer printouts, teletypes, telefaxes, invoices, worksheets, all drafts, alterations, modifications, changes and amendments of any kind with respect to any of the foregoing, graphic or oral records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings, electronic mail records, computer memory records such as hard disk drives and master back-up tapes, diskettes, or other devices such as zip drive records).

B. The term "act" as used herein includes acts of every kind and description.

C. The term "identify" or "describe" when used in reference to a "document" means to state:

- a. The type of document (e.g., letter, memorandum, report, electronic mail records, notes, etc.);

- b. The date of the document;
- c. The name of the parties or parties who originated the document, their past or present position with the respondents, their general duties and responsibilities, their current physical location with the company, and their e-mail, telephone number and telephone extension;
- d. The name and address of the current custodian of the document;
- e. The name and current address of each signatory thereon;
- f. The reason, in detail, for the preparation of the document;
- g. The subject or subjects covered by the document;
- h. The names, business addresses and titles of the persons to whom the document writing was directed; and
- i. The name and address and title of each person who originated, read or received the document.

D. The term "identify" as used herein in connection with a "person" or "persons" means to state the names, titles, the present employer of such "person" or "persons," the relationship of such person or persons to any of the respondents, and such person's current business address and business telephone number.

E. The term "identify" as used herein with respect to or in connection with an "act" means to:

- a. Furnish the date and place of the act;
- b. Identify the person acting, the person for whom the act was performed, and the person against whom the act was directed; and
- c. Describe in detail the act.

F. The terms "describe" or "state" as used herein mean:

- a. Describe or state fully by reference to underlying facts rather than by ultimate facts or conclusions of law;
- b. Particularize as to the:
 - i. Time;
 - ii. Date;
 - iii. Manner; and
 - iv. Place.

G. The term "oral communication" as used herein means and includes any face-to-face conversation, meeting, conference, telephone conversation, cell-phone conversation, computer conversation with voice mail, or any one for more of these or related devices.

H. The term "person" or "persons" as used herein means and includes all natural persons, public and private corporations, associates, wholly owned affiliates or subsidiary corporations or any other form of a business association, and any other type of entity and the agents, employees, officers, deputies and representatives thereof.

I. The terms "you" or "your" as used herein shall refer to any one or all of the named Movants and any related or affiliated companies associated in any way therewith.

J. All request shall be deemed to include any documents made by, held by, or maintained in the files of any predecessor, successor, employee, agent or assignee of either one or all of the respondents.

K. The term "the transaction" or "the transactions" or "account" or "accounts" when used herein without qualification means the transactions and accounts between or among the debtors and the named Movants and all related activities and agents or assigns of either party.

L. Each of the following requests for production of documents is intended to be a continuing request to produce and answer. As a result, the debtors hereby demand that, in the event that at any later date you obtain any additional facts, or form any conclusions, opinions or contentions different from those set forth in your responses herein, then you shall amend your answers to such responses and document production promptly and sufficiently in advance of any trial date, to fully set forth such differences and to produce any documents in connection therewith.

REQUEST FOR PRODUCTION OF DOCUMENTS

1. Provide copies of all property preservation or inspection reports prepared since the filing of the Chapter 13 case and within 12 months before the filing date.

RESPONSE:

2. Provide a statement of the name and address of all companies or individuals providing such property preservation or inspection services.

RESPONSE:

3. Please state the amount of the fees charged and the fees paid for such property preservation or inspection services.

RESPONSE:

4. Provide copies of all checks and payment receipts in payment of all such property inspections.

RESPONSE:

5. Provide copies of all Broker Price Opinions for the subject property since the petition date.

RESPONSE:

6. Provide copies of all Broker Price Opinions for 12 months before the petition date.

RESPONSE:

7. Provide copies of all statements and/or invoices for all such Broker Price Opinions and copies of all checks in payment thereof.

RESPONSE:

8. Provide a statement of all fees and expenses paid or advanced to the mortgage loan for such Broker Price Opinions since the petition and for 12 months before the petition date.

RESPONSE:

9. Provide copies of all digital photos on file with respect to the subject property.

RESPONSE:

10. Provide copies of all digital photos on file for comparable properties.

RESPONSE:

11. Provide a printout of all data entries for tracking property preservations, property inspections, and Broker Price Opinions for timeliness and for consistency of data.

RESPONSE:

12. Provide copies of all operational guidelines for your mortgage software programs.

RESPONSE:

13. Provide copies of all rules and procedures for the electronic ordering of property preservations, property inspections, and Broker Price Opinions.

RESPONSE:

14. Provide copies of all documents and data related to the electronic payment of invoices for property preservations, property inspections and Broker Price opinions.

RESPONSE:

15. Provide copies of any documents related to any type of Bankruptcy Inspection and all charges and fees related thereto.

RESPONSE:

16. Provide copies of all collection notes and other entries in any files related to this mortgage. Also, provide copies of all images related to this file entered in the NewImage Express system or any other similar system or data storage or imaging transfer system.

RESPONSE:

17. Provide copies of all data entries in any restricted corporate advance accounts or files related to this mortgage.

RESPONSE:

18. Provide copies of all applications for employment submitted by any Vendor who has performed any services related to this mortgage.

RESPONSE:

19. Provide copies of all documents related to any legal services provided or rendered with respect to this mortgage since the petition date, including bills, statements and payment invoices, and time and expense records.

RESPONSE:

20. Provide copies of any statement, invoice, or bill containing the name and address of each and every attorney and/or law firm providing such services.

RESPONSE:

21. Provide copies of any data regarding the amount of money paid for legal fees and expenses to any attorney and/or law firm, or any other entity, since the petition date including the amount and date of each payment. This question includes any type of document release or document acquisition or document preparation fee. In addition, if any legal fees have been shared between or among lawyers or lawyers and third-party vendors then attach copies of all agreements or written understandings with respect thereto.

RESPONSE:

22. Provide copies of any transactional history (i.e., showing the date and amount of payment) related to the source of funds used to pay for property preservation services, property inspection services, Broker Price Opinions, and legal services and any other expenses.

RESPONSE:

23. Provide copies of any transactional history indicating how the payments identified in the documents produced in number 21 above relate to the subject mortgage loan.

RESPONSE:

24. Provide copies of any guidelines related to any type of bankruptcy tracking system used with respect to the subject mortgage.

RESPONSE:

25. Provide copies of all payment records related to the receipt of post-petition mortgage payments from the Chapter 13 Trustee. Also, if such payments are placed in any suspense or unapplied funds account then identify the amount and date of each such transaction and identify by date and amount of all funds removed from such account or accounts and state exactly how the removed funds were applied.

RESPONSE:

26. Provide copies of the Key Loan Transaction history for the subject mortgage loan. Also, if you have an XLS spreadsheet for the subject loan please produce the same.

RESPONSE:

27. Provide a copy of the Pooling and Servicing Agreement for the subject mortgage.

RESPONSE:

28. Provide a complete life of loan transactional history for the subject mortgage beginning with the origination date and ending with the date of production. This document must include all debits, including any restricted corporate advances, and credits of any nature made at any time with respect to the subject mortgage loan, whether or not such transactions resulted in additions to the outstanding principal balance.

RESPONSE:

29. Provide copies of all documents included in the initial bankruptcy referral package to the attorney in this case and state whether or not a fee had to be paid to any party for this package. If such a fee had to be paid, then state the amount of the fee, the name of the payee, and the date of the payment.

RESPONSE:

30. Provide copies of any documents related to any type of review of Schedules A and B in this case.

RESPONSE:

31. Provide copies of any documents related to any type of review of Schedules D, E and F in this case.

RESPONSE:

32. Provide copies of any documents related to any type of review of Schedules 22C and I & J in this case.

RESPONSE:

33. Provide copies of any documents related to any fees or charges related to the preparation and filing of the proof of claim in this case.

RESPONSE:

34. Provide copies of any documents related to any fees or charges related to the review of the bankruptcy plan in this case.

RESPONSE:

35. Provide copies of any documents related to any fees or charged related to attending the 341 meeting in this case.

RESPONSE:

36. Provide copies of any documents related to any loss mitigation activities in this case from the petition date up to and including the date of the response to this request to produce.

RESPONSE:

37. Provide copies of all monthly reports received from your bankruptcy lawyer or lawyers regarding the loss management efforts pursued during the pendency of this Chapter 13 case.

RESPONSE:

38. Provide copies of all rules or guidelines related to the amount of the post-petition contractual default that must occur before referring the file to the bankruptcy attorney for filing a motion for relief from stay.

RESPONSE:

39. Provide copies of any documents related to post-petition remittances to the investor that owns this mortgage that were related to the subject mortgage.

RESPONSE:

40. Provide copies of any documents related to post-petition advances related to the subject mortgage loan.

RESPONSE:

41. Provide copies of any documents related to any pool buy-out requirements related to the subject mortgage loan or to any limitations on loan modification options imposed by any of the securitization instruments.

RESPONSE:

42. Provide copies of any and all servicing guides related to the amount of approved legal fees for any post-petition legal service.

RESPONSE:

43. Provide copies of any and all servicing guides related to the source of funding for the payment of post-petition legal fees.

RESPONSE:

44. Provide copies of all cash disbursement request forms in this case related to the payment of post-petition legal fees.

RESPONSE:

45. Provide copies of any and all documents related to any standard rule or procedure that provides for the payment of a legal fee to a lawyer or lawyers for post-petition services in a Chapter 13 bankruptcy case.

RESPONSE:

46. Provide copies of any and all documents that describe the legal services that are to be provided for the legal fee.

RESPONSE:

47. Provide copies of any and all documents related to any additional legal fees that may be paid post-petition for a lawyer sending a default letter to the debtor's bankruptcy counsel that results in a cure of a post-plan confirmation delinquency.

RESPONSE:

48. Provide copies of any and all documents related to how legal fees are charged to, advanced against, or assessed to the subject mortgage.

RESPONSE:

49. Provide copies of any and all documents related to the procedures to be used in Chapter 13 bankruptcy cases for court approval of the legal fees.

RESPONSE:

50. Provide copies of any and all documents related to written notices to be provided to the debtor or debtor's counsel in a Chapter 13 bankruptcy case with respect to legal fees.

RESPONSE:

51. Provide copies of any and all guidelines or policies related to the application of court approved legal fees in Chapter 13 bankruptcy cases that are less than \$1,000.00.

RESPONSE:

52. Provide copies of any and all accounting rules and procedures related to the receipt of post-petition legal fees included in a Chapter 13 plan (either pre or post-confirmation) and the relation of such fees to the legal fee or any other type of fixed fee paid to a bankruptcy lawyer.

RESPONSE:

53. Provide copies of any and all guidelines related to the retention of a local bankruptcy attorney by your general bankruptcy attorney, including the amount and procedures for the payment of and accounting for fees and expenses paid to the said local bankruptcy counsel.

RESPONSE:

54. Please produce a copy of the Master Document Custodial Agreement for the Trust that owns the mortgage loan in this case.

RESPONSE:

55. Please produce a copy of the Master Document Custodian Guidebook for the Trust that owns the mortgage loan in this case.

RESPONSE:

56. Please produce copies of all records maintained by the document custodian identified herein that confirm the proper unbroken chain of assignments of the mortgage or deed of trust from the originator to the Trustee for the Trust that owns the mortgage loan in this case.

RESPONSE:

57. Please produce copies of all records maintained by the document custodian identified herein that confirm the proper unbroken chain of negotiations and transfers of the mortgage note from the originator to the Trustee for the Trust that owns the mortgage loan in this case.

RESPONSE:

58. Please produce the original mortgage note.

RESPONSE:

59. Please produce all endorsements to the original mortgage note.

RESPONSE:

60. Please produce all allonges executed with respect to the original mortgage note.

RESPONSE:

61. Please produce all transfer and delivery receipts for the transfer of ownership of the original mortgage note in this case from the originator to the Trustee for the Trust that owns the note.

RESPONSE:

62. State whether or not the originator of this mortgage loan claims any ownership rights in the original mortgage note.

RESPONSE:

63. State whether or not the Trustee for the Trust that claims to own the original mortgage note in this case denies that it actually owns the same.

RESPONSE:

64. Please produce the original deed of trust or mortgage in this case.

RESPONSE:

65. Please produce a filed and recorded copy of the original deed of trust or mortgage in this case.

RESPONSE:

66. Please produce the originals of all assignments of the original deed of trust or mortgage in this case from the originator to any intermediary party and then from any such parties to the Trustee for the Trust that owns the mortgage note in this case.

RESPONSE:

67. Please produce copies of any assignments of the mortgage or deed of trust in this case that have been assigned in blank (i.e., no identified or named assignee) and explain the basis for the execution of such a document and cite the state statute that permits or allows for the execution of such assignments.

RESPONSE:

68. Please produce all reports prepared by the Master Document Custodian in this case at any time related to the mortgage loan in this case.

RESPONSE:

69. State when the Master Document Custodian confirmed receipt of the original mortgage note in this case and produce all documents associated with such confirmation.

RESPONSE:

70. State whether or not the originator the mortgage note in this case still reflects this loan as either an asset or a liability on any financial statements or documents.

RESPONSE:

71. Please identify by full name and address all parties who claim to have an ownership interest in the original mortgage note in this case.

RESPONSE:

72. Please produce copies of any ratings for the Trust in this case prepared by Moody's, Standard & Poor's or Fitch.

RESPONSE:

73. Please provide copies of any exception reports or notices prepared by the master document custodian in this case with respect to the subject mortgage note.

RESPONSE:

74. Identify the state under which the Trust that owns the original mortgage note was formed and identify any and all state statutes related to the formation, organization and powers of the said Trust.

RESPONSE:

Dated this the _____ day of _____, 2008.

O. Max Gardner III
Law Offices of O. Max Gardner III, PC
Attorney for Debtors
403 South Washington Street
PO Box 1000
Shelby NC 28151-1000
704.487.0616
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR(S).

**REQUEST FOR PRODUCTION OF DOCUMENTS
AND WRITTEN INTERROGATORIES**

To:
Attorneys for CitiMortgage

The debtors named above allege and believe that the amount of delinquency claimed by CitiMortgage as set forth in the Proof of Claim and/or alleged in the motion for relief from stay is inaccurate and that certain payments may not have been properly credited or otherwise applied to the Debtors' mortgage loan.

Pursuant to Federal Rules of Bankruptcy Procedure 9014 and Rules 33 and 34 and 26(b) F.R.Civ.P., the debtors are requesting you to respond within 15 days to the following requests by producing the documents described herein for inspection and copying by the debtors' attorney at his law offices located at 403 South Washington Street, Shelby, NC 28150. The debtors are also requesting you to provide written answers to the interrogatories within 15 days.

**Instructions for Request for Production of Documents
And Written Interrogatories**

You may produce a true, complete, and accurate photocopy in lieu of the original of any document or thing requested. You may also produce in on a CD or a DVD any and all evidence that is stored in any type of digital form.

This is an ongoing Request for Production of all documents of things now in existence or hereafter obtained at any time prior to final entry of judgment in this case. Federal Rule of Bankruptcy Procedure 7034 and Rule 34 F.R.Civ.P. provide, among other things, that Documents falling within this request which must be produced are those which are in possession, custody, or control of you, your attorneys, third-party vendors or your agents. You or your agents need not presently have physical custody, as the right to ask for and receive the documents or things is sufficient for them to fall within the group of documents or things to be produced in response to this request.

You must either produce the documents as they are kept in your usual course of business, such as in their file jacket or you must compile, organize and label them to correspond to the categories in this request. If you object to a request, you must state the reason for objection in writing. If you object to part of a request, you must specify the part. If you object on the ground that the information sought is beyond the scope of discovery, you must nevertheless answer the request to the extent that it is not objectionable. If you respond to a request for

discovery with a response that is complete when made, you are nevertheless under a duty to supplement the responses to include information thereafter acquired. For instance, without limitation, you must supplement or amend your response, if you obtain information which shows your earlier response was incorrect when made, or your earlier response although correct when made is no longer true (and any failure to amend your response in light of such information is, in substance, a knowing concealment).

Definitions for Request for Production of Documents

"Document," "writing," and "report" mean any written or graphic matter or other means of preserving thought or expression and all tangible things in which information can be processed or transcribed including, but not limited to, correspondence, messages, telegrams, contracts, memoranda, studies, surveys, charts, drafts, books, financial statements, ledgers, transcripts, affidavits, tapes, tape recordings, video tapes or recordings, emails, voicemails, electronic or data messages, compact disks, optical disks, material read by laser scanning, computer disks, computer tapes, computer print-outs, and information stored in data processing or retrieval systems, electronic, digital or otherwise, whether originals, copies or drafts, however produced or reproduced. The term also includes all information whether maintained in hard copy form or stored electronically either in temporary, suspense or permanent files. The definition also includes data compilations from which information can be obtained only with the use of detection devices and similar programs. This obviously means that the key computer and data control personnel with your company must be told in no uncertain terms to be sure that no information is destroyed or otherwise altered under any routine document retention policies during the pendency of this litigation.

"You" means you and any predecessor-in-interest to the debt now owed to you by the Debtors.

"Accounting," except as used in "accounting for" means record.

"Record," except as used in "for record," "of record," "record or legal title" and "record owner" means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

REQUEST FOR PRODUCTION OF DOCUMENTS AND INTERROGATORIES

Please produce an accounting which sets forth a detailed **payment history** concerning the debt owed to you by the debtors, for the period from the date the loan was originated to the date of this request. Please make sure the payment history includes all of the following information:

1. An itemization regarding all of the following types of transactions:
 - a. Each and every monetary amount by which you charged to or debited against or attached or tracked against the debtors' account with you, whether concerning principal, interest, late charges, appraisal fees, broker price opinions, insurance, taxes, foreclosure fees, repossession fees, attorney fees, legal costs, property inspections, property preservations, NSF check charges, escrow advances, appraisals, third-party servicing charges, statutory charges, advances or any other form of expense or charge;
 - b. Each and every payment made by or on behalf of the debtors to you;
 - c. Each and every payment made by or on behalf of the Chapter 13 Trustee to you;
 - d. Each and every amount, other than payments, by which you credited to the debtors' account.

2. For each and every such transaction identified in Request Number 1, please provide the date it was posted to or associated with the debtors' account, the amount thereof, the type of charge or debit, the resulting balance due and owing on the account or any attached accounts, suspense accounts, or any other related account after the transaction, and any and all information sufficient to identify the purpose for each such transaction.
3. For each and every such payment transaction, provide the date it was posted to the debtors' account, the amount thereof, and the resulting balance due and owing on the account.
4. For each and every such credit transaction (other than from payments), provide the date it was posted to the debtors' account or any sub-account, suspense account or associated account, the amount thereof, and the resulting balance due and owing on the account.
5. For each and every payment, provide:
 - a. The manner of the payment, whether by personal check, money order, cashier's check, bank check or otherwise; and
 - b. Any number or other information in your control that would further identify the payment, as for instance, and without limitation to the type of payment or type of information, check numbers, money order numbers, etc.
6. A legend and/or detailed explanation sufficient to allow for a layman's full understanding of all the data provided including but not limited to the accounting transaction codes used with your mortgage servicing software and the appropriate English definition of each such code.
7. A copy of the written notice, required by N.C.G.S. § 58-35-85 (10), sent by the insurer that previously provided insurance coverage to the debtors, to you, indicating that the debtors' insurance has lapsed and/or been cancelled.
8. All contracts or agreements with third-party vendors providing foreclosure and/or bankruptcy processing or administrative services in effect at any time from January of 2000 to the present.
9. All documents regarding Compensation paid to such third-party vendors in connection with the subject bankruptcy case and/or and contested case or adversary proceedings filed herein, and copies of checks, wire transfers or debit/credit memos evidencing all such payments.
10. Copies of all contract documents and/or agreements with all attorneys involved at any time in the subject bankruptcy case.
11. Copies of all time and billing records prepared by any attorney involved at any time in the subject bankruptcy case.
12. Copies of all attorney performance reports for the attorneys involved in the subject bankruptcy case.
13. Documentation of any internal benchmarks used for grading the performance of outside counsel in the processing of the subject bankruptcy case.
14. All documents relating to your internal processes for preparing proofs of claim and Motions for Relief from Stay in the consumer bankruptcy cases. Please state the full name and address of the party or entity that actually drafted the proof of claim and motion for relief from

stay filed in this case.

15. All Guidelines, manuals, bulletins and/or policies governing the servicing procedures for the mortgage loan involved in the subject bankruptcy case.

16. All Guidelines, manuals, bulletins and/or policies governing the servicing procedures for defaulted loans serviced by you in effect from January of 200 to the present.

17. Documentation of any and all guidelines you have prepared governing allowable legal fees and timelines for foreclosure and bankruptcy processing that apply to the subject mortgage loan or to any consumer bankruptcy case.

18. Documentation of all Management Assertions, Management Representation Letters, and Independent Accountant's Reports concerning your compliance with the minimum servicing standards identified in the Mortgage Bankers Association of America's Uniform Single Attestation Program for Mortgage Bankers, plus all documents you provided to the accountants documenting these conclusions.

19. Copies of any internal audit, review or special investigation of yours default management and escrow procedures from January of 2000 to the present.

20. Copies of performance reviews of your escrow management department and escrow procedures from January of 2000 to the present.

21. A current itemized payoff statement for the mortgage loan involved in this case.

22. The operations guidelines or manuals used in your payoff department for generating the statement referred to in Request Number 21.

23. The written protocols for the treatment of a corporate advance account, restricted corporate advance account, suspense account, or any other similar account for purposes of generating the payoff statement referred to in Request Number 21.

24. Any documentation regarding the type of accounts used in connection with any consumer bankruptcy loan, the use of those accounts, and the implementation of any procedures regarding those accounts.

25. All documents regarding the referral of the mortgage loan in this case to any party for the filing of a motion for relief from stay.

26. All operational manuals available to your attorneys that allow them to access any of the account data regarding the mortgage loan in this case or in any other consumer bankruptcy case.

27. All documents used, relied upon or available to your attorney in connection with the preparation of the motion for relief from stay in this case.

28. All documents used, relied upon or available to the person who signed the affidavit attached to the motion for relief from stay filed in this case. Please also state the full name of such party, the address of such party, and the full name and address of the employer of such party.

29. The job descriptions and names of all of your employees who were involved in the servicing of the mortgage loan in this case subsequent to the filing of the bankruptcy petition.

30. Any documents or notices received from the provider of the mortgage servicing software

used in connection with your loans involved in consumer bankruptcy cases related to any problems or common errors regarding the proper application and accounting for payments received from debtors, bankruptcy trustees or other parties.

31. Any and all electronic records in the NewImage system regarding this loan.
32. Any and all electronic records in the NewTrack system regarding this loan.
33. Any and all electronic records in the NewInvoice system regarding this loan.
34. Any and all electronic mail messages regarding this mortgage loan.
35. Please state the name of the entity that paid the law firm that filed the motion for relief from stay in this case.
36. State the amount of any fees or charges that the law firm that filed the motion for relief from stay had to pay to any third-party for any documents in this case and identify any and all such documents.
37. Please itemize and identify by date and amount any reimbursement payments you received from any party other than the debtors for expenses advanced in connection with this loan.
38. Please identify all national law firms you use in connection with consumer bankruptcy cases and identify the firm used in this case.
39. State the amount and date of all fees paid by you to the national law firm in this case.
40. Please produce copies of any all documents you have provided to any third-party that purports to give such party any authority to sign documents on your behalf (such as, for example, a power of attorney form).
41. Please provide an itemized payoff statement for this mortgage pursuant to North Carolina General Statute § 45-36.7. Pursuant to N.C.G.S. § 45-36.7(e), the payoff statement must contain the following information:
 - (a) The date on which it was prepared and the payoff amount as of that date, including the amount by type of each fee, charge, or other sum included within the payoff amount;
 - (b) The information reasonably necessary to calculate the payoff amount as of the requested payoff date, including the per diem interest amount; and
 - (c) The payment cutoff time, if any, the address or place where payment must be made, and any limitation as to the authorized method of payment.
42. Provide an itemized statement of the amount needed to fully reinstate this mortgage loan.
43. Provide a detailed itemization of all fees incurred, including the date each fee was incurred, the nature of the fee, a copy of the bill or invoice for such fee, and a copy of each check or wire transfer in payment thereof.

44. Copies of all statements or notices you have mailed to the consumers named herein pursuant to N.C.G.S. § 45-91(1)b.
45. Copies of all statements or notices you have mailed to the consumers named herein pursuant to N.C.G.S. § 45-91(2).
46. A full and complete explanation of any default in the mortgage payments and the date the account went into default as required by N.C.G.S. § 45-93(1)a.
47. The current balance due on the mortgage loan pursuant to N.C.G.S. § 45-93(a)b.
48. The current amount of any funds held in any suspense account and the source of such funds held in suspense as provided for in N.C.G.S. § 45-93(1)b.
49. The name and address of the current holder of the mortgage note as required by N.C.G.S. § 45-91(1)c.
50. The name and address of the current owner of the mortgage note as required by N.C.G.S. § 45-91(1)c.
51. The name and address of the current assignee of the mortgage note or deed of trust as required by N.C.G.S. § 45-91(a)c.
52. The telephone number and mailing address of a representative of your business with authority to answer questions about this mortgage loan and the authority to resolve disputes.

This the _____ day of _____, 2008.



O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor(s)
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR(S).

DEBTORS' FIRST REQUEST FOR ADMISSIONS OF FACT TO MOVANT

To:
Attorney for Movant

The debtors named above allege and believe that the amount of delinquency claimed by the Movant as set forth in the Motion for Relief from Stay filed in this case is inaccurate and that certain payments may not have been properly credited to the Debtors.

Pursuant to the provisions of Rules 7001 and 7036 of the Rules of Bankruptcy Procedure, Rule 36 of the Federal Rules of Civil Procedure, and Rules 7016-1, 7026-1 and 7030-1 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Western District of North Carolina, and the Bankruptcy Practice Guide for the United States Bankruptcy Court for the Western District of North Carolina, the Movant is requested by way of a proper officer to admit for the purpose of this action only the following facts. Please note that under the provisions of the applicable court rules each and every matter set forth below will be deemed admitted unless, within thirty (30) days after service of this request, the defendant serves upon the plaintiffs a written answer or objection addressed to the matter, signed by the defendant or their attorney.

1. No documents in connection with this loan have been altered.

RESPONSE:

2. No documents in connection with this loan have been modified.

RESPONSE:

3. No documents in connection with this loan have been executed so that any act purports to be the act of another.

RESPONSE:

4. No documents in connection with this loan have been executed so that any act purports to be the act of another who did not authorize that act.

RESPONSE:

5. No documents in connection with this loan have been altered so that they purport to have been executed at a time other than was in fact the case.

RESPONSE:

6. No documents in connection with this loan have been altered so that they purport to have been executed at a place or location other than was in fact the case.

RESPONSE:

7. No documents in connection with this loan have been altered so that they purport to have been executed in a numbered sequence other than was in fact the case.

RESPONSE:

8. No documents in connection with this loan have been altered so that they purport to have been executed at a time other than was in fact the case.

RESPONSE:

9. No documents in connection with this loan purport to be copies of originals when in fact no such originals are known to exist.

RESPONSE:

10. No documents in connection with this loan have been issued or transferred or published other than original documents or true, accurate and complete copies of original documents.

RESPONSE:

11. No documents in connection with this loan have been completed so that they purport to be the acts of another.

RESPONSE:

12. No documents in connection with this loan have been completed so that they purport to be the acts of another who did not authorize the completion.

RESPONSE:

13. No documents in connection with this loan have been authenticated so that they purport to be the act of another who did not authorize the authentication.

RESPONSE:

14. No documents in connection with this loan have been authenticated as an original when no such original ever existed.

RESPONSE:

15. No affidavits or statements under penalty of perjury have been made and completed which purport to be the act of another who did not authorize that act.

RESPONSE:

16. No affidavits or statements under penalty of perjury have been made or completed except by a person who was a full time employee of the entity designated by such party in the said affidavit or statement.

RESPONSE:

17. No document in connection with this loan has been presented to the Trustee, the Court or the Debtor that is inconsistent with any of the Requests For Admissions in numbers 1 through 16 herein.

RESPONSE:

18. No pleading filed in this case has been prepared by any entity other than the attorney of record or a direct employee of the attorney of record.

RESPONSE:

19. No part of the fees or charges for filing the pleading in this case have been paid to any party or entity other than the attorney of record or the said attorney's law firm.

RESPONSE:

20. No payments to any third-parties have been made in connection with this case which have not been fully and completely disclosed to the court.

RESPONSE:

21. No instrument in connection with the loan in this case was endorsed in any manner other than what it purports to be on the face of the document.

RESPONSE:

22. No document in connection with the loan in this case has been made or published or endorsed by any fictitious person.

RESPONSE:

23. No document in connection with the loan in this case has been made or published or endorsed by any real person other than the person represented on the face of any such document.

RESPONSE:

24. No document in connection with the loan in this case has been altered in such a manner that it purports to have been made at another time or with different data and information.

RESPONSE:

25. No document in connection with the loan in this case has been issued or delivered to any party with knowledge that the said document has been altered, modified, or changed.

RESPONSE:

26. The party who claims to have possession of the mortgage note in this case had actual physical possession and exclusive control over said document before this current contested case or adversary proceeding was filed.

RESPONSE:

27. No representation of privilege or confidentiality has been asserted with respect to any document in connection with this loan that is also a public record.

RESPONSE:

28. No representations made in connection with this proceeding are inconsistent with any documents on file with the Securities and Exchange Commission of the United States of America.

RESPONSE:

29. No document in connection with the loan in this case has been presented or published with knowledge that the document was not what it was presented and published to be.

RESPONSE:

30. No document in connection with the loan in this case has ever been altered, amended, changed, or modified in any way since the date it was created.

RESPONSE:

31. The Originator of the loan in this case endorsed the Note to the Depositor.

RESPONSE:

32. The Originator of the loan in this case endorsed the Note in blank.

RESPONSE:

33. The Originator of the loan in this case then physically transferred and delivered the Note to the Depositor in the form of a true sale.

RESPONSE:

34. The Depositor then transferred and physically delivered the Note to the Trustee for the Residential Mortgage Backed Trust that currently owns the Note.

RESPONSE:

35. The transaction described in number 34 was a true and bona fide sale of the Note.

Response:

36. If the Note was endorsed by the Originator to the Depositor, then the Depositor endorsed the Note to the Trustee for the Residential Mortgage Backed Trust that currently owns the Note.

RESPONSE:

37. The transaction described in number 36 was a true and bona fide sale of the Note.

Response:

38. The Originator of the loan in this case assigned the Deed of Trust to the Depositor.

RESPONSE:

39. The Depositor then assigned the Deed of Trust to the Trustee for the Residential Mortgage Backed Securitized Trust.

RESPONSE:

This the _____ day of _____ 2008.



O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: PUBLIC, JOHN Q.
PUBLIC, MARY

CHAPTER 13 CASE NO. 00-00000
OUR FILE NO. 11000

ADDRESS: ANYWHERE STREET
SHELBY, NC 28150

SSN: --- -- 0000 --- -- 0000

DEBTORS

**FIRST INTERROGATORIES AND REQUEST FOR PRODUCTION
OF DOCUMENTS FROM THE DEBTORS TO THE MOVANTS
(Electronic Discovery)**

COME NOW the above-named debtors, by and through their attorney of record, and herewith serve upon the MOVANTS in this case the following written interrogatories pursuant to the provisions of Rule 7033 of the Rules of Bankruptcy Procedure and Rule 33 of the Federal Rules of Civil Procedure and the following request for the production and inspection of documents pursuant to Rule 7034 of the Rules of Bankruptcy Procedure and Rule 34 of the Federal Rules of Civil Procedure as provided for and set forth in the foregoing rules. Answers to these Interrogatories and Request for Production of Documents must be furnished within thirty (30) days of the service of these Interrogatories.

DEFINITIONS AND INSTRUCTIONS

A. If there is insufficient space after each interrogatory for you to provide a full and complete answer, then you should state your full and complete answer on a separate page, identify the page, and attach the page to your response as a properly identified and marked exhibit thereto.

B. The term "**backed-up data**" refers to the Movant's backup procedures and schedules with respect to backup media, retired hardware and disaster recovery systems. IT personnel should be able to provide information on how backups are performed, the backup schedule and where backup records are kept. The Movant must also create a schedule of which servers are actually backed up; whether incremental backups or full-system copies are performed; and whether there have been any system changes during the relevant time period (e.g., changes in hardware or software or the adoption/removal of a third-party service). It must also be noted whether individual hard drives are backed up. It should also be noted if the Movant uses any off-site or third-party systems for storage or backup.

C. The term "**computer forensics**" refers to the application of computer investigation and analysis techniques in the interests of determining potential legal evidence. Forensic data capture may be deemed necessary during discovery if potentially relevant files have been deleted, written over or damaged or if there is reason to believe there is hidden or encrypted data on a system.

D. The term "**document**" means any media form, including paper matter, e-mail, electronic files, including reproductions, microfilm, flash drives, BlackBerry devices, Palm Pilots, laptops, compact disks, machine-readable computer records and voicemail.

E. The term "**document-retention policy**" means any system used to address the systematic creation, retention and disposition of corporate records. Records -- defined by ISO 15489 as information created, received and maintained as evidence by an organization or person in the transaction of business, or in the pursuance of legal obligations -- can be in any media form, including paper matter, e-mail, electronic files, including reproductions, microfilm, flash drives, BlackBerry devices, Palm Pilots, laptops, compact disks, machine-readable computer records and voicemail.

F. The term "**electronic device**" includes computers, laptops, legacy hardware, servicers, personal data assistants (PDAs), hand-held devices, CDs, CVDs, telephone equipment, cell phones, fax phones and fax machines, microdrives, thumb-drives, digital cameras, CompactFlash, SmartMedia, SecureDigital, Memory Stick, and Multi-Media cards, optical devices, floppy disks, USB devices, MP3 Players, iPods, FireWire devices, PCMCIA removable drive zip disks, Jazz Disks, internal and external hard drives, tapes, GPS, Back-Up Media, audio and voice recording devices, Anti-Theft systems, and any other similar products designed to produce, store or maintain any form of electronically stored information.

G. The term "**electronically stored information (ESI)**" refers to and includes any electronic data stored, saved, transmitted, produced or archived in computers, laptops, legacy hardware, servicers, personal data assistants (PDAs), hand-held devices, CDs, CVDs, telephone equipment, cell phones, fax phones and fax machines, microdrives, thumb-drives, digital cameras, CompactFlash, SmartMedia, SecureDigital, Memory Stick, and Multi-Media cards, optical devices, floppy disks, USB devices, MP3 Players, iPods, FireWire devices, PCMCIA removable drive zip disks, Jazz Disks, internal and external hard drives, tapes, GPS, Back-Up Media, audio and voice recording devices, Anti-Theft systems, and any other similar products designed to produce, store or maintain any form of ESI.

H. The term "**forensic data capture**" means the discovery of potentially relevant files that have been deleted, written over or damaged or if there is a reason to believe there is hidden or encrypted data on a system or in any process. The Movant(s) shall reveal and indicate if any such data or documents are subject to forensic capture.

I. When you are requested to "**identify**" a document herein, you are also obligated to reveal the following with respect to the Metadata in such a document:

- a. document creation date;
- b. date document was last modified;
- c. document author;
- d. document title;
- e. history of changes to the document;
- f. e-mail sender;
- g. e-mail recipients;

- h. date and time e-mail was sent;
- i. date and time e-mail was received;
- j. subject line of e-mail;
- k. files and documents attached to e-mail;
- l. attachment relationship(s) to original e-mail, as well as metadata fields listed for electronic documents;
- m. forwarded e-mails.

J. The term "**litigation hold**" means that all parties involved in a pending or prospective legal proceeding will go through an identification process, which allows company principals and counsel to ascertain the custodians and locations of all data potentially relevant to the matter that may be disclosed during litigation. During identification, key company personnel are identified; relevant documents and data are cataloged; the sources and locations of this data are established; and a litigation hold is drafted and distributed. A litigation hold is designed to preserve all documents and data that may be relevant to litigation and requires a company to immediately freeze its usual document management and disposal efforts. It is important to regularly monitor, update and reissue the litigation hold letter throughout the process to ensure it includes all personnel and information uncovered during identification, as well as to accommodate any changes in litigation such as the addition of claims or defenses. In addition, all involved personnel should be made aware of the importance of the litigation hold, how to adhere to it and consequences for not following its guidelines.

K. The term "**metadata**" included embedded data in almost every electronic record. Metadata associated with e-mail may include headers, attachments, date and time, domain names and recipient lists; metadata in file systems can provide information about revision lists, modification dates, file sizes and authors; and documents created by office programs such as Microsoft Word and Microsoft Excel can include embedded document information such as changes made, deletions and reviewer names. To the extent Metadata relates to directly or indirectly to relevant information in the subject litigation or to the authenticity of electronic documents it must be preserved. Metadata is discoverable when required in the matter at hand; however, there is no official requirement to produce metadata during discovery unless there is an affirmative showing of need. In addition, privacy and privilege concerns offer additional arguments against the default, mandated retention of metadata. Since the Debtors will be requesting Metadata in this case, please note that the Movant is now under a litigation hold or discovery request or preserve or such data, or the Debtors may move for sanctions and charges of spoliation if it continues to scrub metadata without the approval of the requesting party.

L. The term "**native format**" means that all electronic information must be produced as it is maintained and used.

M. The term "**person**" or "**persons**" as used herein means and includes all natural persons, public and private corporations, associates, wholly owned affiliates or subsidiary corporations or any other form of a business association, and any other type of entity and the agents, employees, officers, deputies and representatives thereof.

N. The term "**preservation notices**" means a notice herein to all witnesses or non-parties to litigation may be in possession of relevant materials and, as such, may be subject to preservation notices or legal holds. This is a communication that suspends the normal disposition or processing of records and may alternatively be called a "preservation notice," "preservation order" or "hold notice."

O. The term "**preservation standards**" imposed a duty on the Movant, to prove and confirm that it has a clearly established duty to preserve evidence (which includes any and all documents and formats, including all manner of electronic evidence and media) regardless of whether it is supportive or detrimental to the company's legal position.

P. The term "**Record**" means any information created, received and maintained as evidenced by an organization or person in the transaction of business, or in the pursuance of legal obligations and can be in any media form, including paper matter, stored, produced or maintained in any electronic device.

Q. The terms "**you**" or "**your**" as used herein shall refer to any one or all of the named Movants and any related or affiliated companies associated in any way therewith.

R. All requests shall be deemed to include any documents made by, held by, or maintained in the files of any predecessor, successor, employee, agent or assignee of either one or all of the Movants.

S. If the space provided below each interrogatory is not sufficient for your answer, then use additional sheets, numbered consecutively after each such interrogatory, and inserted in the proper order of all copies filed and served. For example, in the case of Interrogatory number 1, any additional sheets for your answers would be numbered as 1-A, 1-B, 1-C, etc.

T. Each of the following requests for production of documents and interrogatories is intended to be a continuing request to produce and answer. As a result, the Debtors hereby demand that, in the event that at any later date you obtain any additional facts, or form any conclusions, opinions or contentions different from those set forth in your responses herein, then you shall amend your answers to such responses and document production promptly and sufficiently in advance of any trial date, to fully set forth such differences and to produce and documents in connection therewith.

INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

1. Please describe your computer system including the name of the computer(s) used; configuration of your network; operating system used; the number of work stations, laptops and servers; their physical location; a diagram of how are devices are interconnected; how long you have used the computer system and how widely used your computer system is in the mortgage servicing industry.

ANSWER:

2. Please describe all software applications that are used, both off the shelf and custom, how long the software has been used and how widely used the software is in the mortgage servicing industry.

ANSWER:

3. Please describe how employees are trained in the software applications used by you, including how long they are trained and by whom.

ANSWER:

4. Please describe all databases used internally by your company and their functions.

ANSWER:

5. Please describe how your computer backup systems function including the type of software used (including version), the hardware used (including manufacturer name and models) and how it works, including the tape rotation schedule, what happens when tapes are overwritten, and what data is backed up and from which device.

ANSWER:

6. Please identify the location of offsite backup storage and the name of a contact person at all locations.

ANSWER:

7. Please describe all security measures that may prevent unauthorized access to the backup media.

ANSWER:

8. Please identify all portable media that may contain data relevant to this matter, such as disks, zip disks, CD-ROMs, DVDs, tapes, thumb drives, etc.

ANSWER:

9. Please identify the system administrator or administrators and their contact information, as well as the supervisor and contact information for such person or persons.

ANSWER:

10. Please identify all information technology (IT) personnel who may have worked on or have knowledge of or data relevant to this matter.

ANSWER:

11. Please describe all of your network authentication procedures.

ANSWER:

12. Please describe in detail all related intranets or extranets, their functions, and their security mechanisms.

ANSWER:

13. State the number of PDAs in use (if applicable) by manufacturer and model and identify each individual who uses them.

ANSWER:

14. Please state the number and location of all company workstations and laptops including manufacturer, model, and class; operating systems; and user names.

ANSWER:

15. Please identify all networked digital copiers by manufacturer, model and location.

ANSWER:

16. Please state whether any of your employees work from home computers and if so whether a VPN or other form of remote access to the network exists and if so then please describe all authentication and security methods.

ANSWER:

17. Please describe the E-mail package used, including the version.

ANSWER:

18. Please describe your E-mail server, with manufacturer and model, operating system and mail server software used, and location.

ANSWER:

19. Please identify the location of all E-mail storage.

ANSWER:

20. Please describe all network activities and events that are routinely logged (e.g., SNMP traps, router logs).

ANSWER:

21. Please identify all active intrusion detection systems and configurations.

ANSWER:

22. Please identify your internet service provider.

ANSWER:

23. Please identify the host of your company's website.

ANSWER:

24. Please identify all persons by name and location who hold administrative rights to the mail server.

ANSWER:

25. Please describe your company's internet and E-mail use policies.

ANSWER:

26. Please describe your monitoring policy regarding employees' computer activity, including what is monitored and by whom and retention period for logs.

ANSWER:

27. Please describe all security policies and procedures employed with respect to such monitoring.

ANSWER:

28. Please identify your firewall manufacturer, the model you use and its configuration.

ANSWER:

29. Please identify your application service provider and the nature of the data held.

ANSWER:

30. Please describe your outsourcing policy for IT services, including the name and address of all providers, a description of the services of each provider, and the contact person for each provider.

ANSWER:

31. Please explain your security structure including who has access to which applications, drives, etc., and note the distinction, if applicable, between read-only access and read-write access.

ANSWER:

32. Please identify the names, log-on IDs, passwords, and E-mail addresses of any individual who may have any knowledge of or relation to this matter.

ANSWER:

33. Please describe your encryption programs, including the level of encryption and where and how they are used and identify all decryption keys and pertinent instructions for all decryption procedures.

ANSWER:

34. Please identify your PBX manufacturer, the model, and whether it interfaces with your telephone system and carries voice mail.

ANSWER:

35. Please describe your retention policy for any voice messaging records.

ANSWER:

36. Please describe your retention policy for phone usage records and categories of records retained.

ANSWER:

37. Please describe your retention and disposal policies for such records.

ANSWER:

38. Please attach a schema of your network or telephone system.

ANSWER:

39. Please identify all company-issued cell phones and pagers and identify each of the units by manufacturer, model, and the name, title and location of the primary user.

ANSWER:

40. Please describe any instructions given to any or all employees regarding the need to preserve possible evidence, the date or dates such instructions were given, and copies of all such printed, printable or written instructions.

ANSWER:

41. Please list all specific data that has been deleted, and when it was deleted, with respect to any matter or thing relevant to this case.

ANSWER:

42. Please describe your disposal policy for data and hardware.

ANSWER:

43. Please describe company behavior regarding over-writing of backup tapes and selling, donating, or otherwise disposing of equipment since the filing of his case, and how such behavior might differ from company policy previously in force.

ANSWER:

44. Please provide a list of all equipment disposed of since the filing of this case.

ANSWER:

45. Please describe all software and/or hardware modifications to any company computers since the filing of this case.

ANSWER:

46. Please identify individuals by job title, name, business address, and phone number with respect to responsibilities for enforcing Internet or E-mail usage policies, document retention policies, and employee monitoring.

ANSWER:

47. Please identify by dates and details of any computer or computer-related crimes of which the company has been charged.

ANSWER:

48. Please identify by the case number, the court, and the date of production, and media in which the evidence was produced for any matters since 1999 in which the company produced electronic evidence.

ANSWER:

Dated this the ____ day of January 2009.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a horizontal line extending from the end of the signature.

O. Max Gardner III
Law Offices of O. Max Gardner III
Attorney for the Debtor(s)
NC State Bar #6164
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Shelby, NC 28151-1000
(704) 487-0616
FAX (888) 870-1647
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

**John Q. Public and
Mary Public,**

Debtors.

)
)
)
)
)
)
)

**CASE NO.
OUR FILE NO.

CHAPTER 13**

MOTION TO SET ASIDE WITHDRAWAL AND/OR MOTION TO RECONSIDER

COME NOW the above-named debtors, by and through their attorneys of record, and move this honorable court to set aside the withdrawal and/or reconsider the previously filed Motion for Relief. In support thereof, the debtors would show unto the court as follows:

1. On _____, 2010, creditor BAC Home Loans Servicing L.P. (hereinafter "BAC") filed a Motion for Relief from Stay regarding certain real property of the debtors with no supporting documents.
2. On _____, 2010, debtors filed a response to the Motion for Relief.
3. On _____, 2010, because BAC had filed the motion on the Court's chapter 7 docket rather than the chapter 13 docket, the Court rejected the Order of BAC and required to file an amended motion within seven days.
4. BAC failed to amend its motion and subsequently on _____, 2010, the court denied the Motion for Relief.
5. At some point following, BAC filed an "agreed order" signed only by BAC attempting to reinstate the motion and have it set for hearing.
6. The court denied this "agreed order" on _____, 2010.
7. On _____, 2010, BAC refilled the Motion for Relief from Stay.
8. On _____, 2010, debtors filed a response to the new Motion for Relief.
9. On _____, 2010, a hearing was held on the matter and was continued until _____, 2010 to allow BAC to produce certain documents to debtors' counsel evidencing a proper security interest in the real property and showing it had standing to bring the Motion for Relief.
10. On _____, 2010, BAC provided to debtors' counsel an assignment of the deed of trust. This assignment raised questions and concerns on the part of debtors' counsel and a further response was filed on _____, 2010.
11. On _____, 2010, BAC, without consent of debtors' counsel, withdrew the Motion for Relief.

12. At the hearing scheduled for _____, 2010, the court would not hear arguments on the motion, as it had been withdrawn by BAC.

13. The filing of a Motion for Relief creates a contested matter as set forth in F.R.B.P. 9014.

14. Pursuant to F.R.B.P. 9014(c), F.R.B.P. 7041 applies to contested matters. F.R.B.P. 7041 incorporates F.R.Civ.P. 41.

15. F.R.Civ.P. 41(a)(1)(A)(i) states that:

“...the plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment.”

16. BAC should not have been permitted to withdraw the contested matter without consent from the debtors.

17. Counsel for the debtors has expended significant time and energy over the last several months in researching, investigating and responding to BAC's motions.

18. The debtors have also been highly inconvenienced and burdened by attending a hearing on this matter, travel to and from counsels' offices, and numerous telephone conversations. Additionally, the debtors have suffered anxiety and fear in dealing with this motion.

WHEREFORE, the debtors respectfully pray of the Court as follows:

1. That the Court disallow the withdrawal of BAC's Motion for Relief and set this matter for hearing and consider the previously filed responses by the debtor.

2. That the Court award fees to debtors' counsel pursuant to F.R.B.P. 9011 and/or 28 U.S.C. 1927.

3. That the Court award actual and punitive damages to the debtors in an amount to be determined.

4. That the debtors have such other and further relief as the Court may find just and proper.

Dated this _____ day of _____, 20__.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for the Debtor/Plaintiffs
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

D. Notices

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

NOTICE OF PHONE NUMBER FOR DSO RECIPIENT

NOW COME the debtors, by and through O. Max Gardner III, and pursuant to the provisions of Rule 1009(a) of the Federal Rules of Bankruptcy Procedure and respectfully amend their plan and petition to reflect the phone number for child support recipient of the Domestic Support Obligations as follows:

(DSO Recipient)

Telephone Number: 828._____

This the _____ day of _____, 2009.



O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
Primary e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: Chapter 13 No.
Our File No. 10407

ADDRESS:

SSN:
Debtors.

NOTICE OF OPPORTUNITY FOR HEARING

**(No-Protest Notice: No Hearing Will Be Held
Unless Request For Hearing Is Filed)**

PLEASE BE ADVISED that the above-named debtors have filed papers with the United States Bankruptcy Court for the Western District of North Carolina for
_____.

YOUR RIGHTS MAY BE AFFECTED. YOU SHOULD READ THESE PAPERS CAREFULLY AND DISCUSS THEM WITH YOUR ATTORNEY, IF YOU HAVE ONE IN THIS BANKRUPTCY CASE. IF YOU DO NOT HAVE AN ATTORNEY, YOU MAY WISH TO CONSULT ONE.

TAKE FURTHER NOTICE that if you do not want the Court to grant the relief requested by the debtor(s) in their motion, or if you want the Court to consider your views on the motion, then on or before _____, you or your attorney must do three (3) things:

1. **File with the court a written response requesting that the Court hold a hearing and explaining your position. File the response at:**

United States Bankruptcy Court
Western District of North Carolina
P.O. Box 34189
Charlotte, NC 28234-4189

If you mail your response to the court for filing, you must mail it early enough so the court will **receive** it on or before the date stated above.

2. **On or before the date stated above for written responses, you must also mail or fax a copy of your written request to:**

O. Max Gardner III
Attorney for the Debtor(s)
P.O. Box 1000

Shelby, NC 28151-1000

and to:

Steven G. Tate
Chapter 13 Trustee
P.O. Box 1778
Statesville, NC 28687-1778

3. **Attend the hearing scheduled for Friday, _____ at 9:30 a.m.** in Courtroom Number 5 at the Cleveland County Courthouse and Law Enforcement Center, 100 Justice Place, Shelby, North Carolina.

If you or your attorney do not take these steps, **A HEARING WILL NOT BE HELD**, and the Court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
N.C. State Bar 6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

NOTICE OF HEARING

PLEASE BE ADVISED that the above-named debtors have filed papers with the United States Bankruptcy Court for the Western District of North Carolina for _____.

YOUR RIGHTS MAY BE AFFECTED. YOU SHOULD READ THESE PAPERS CAREFULLY AND DISCUSS THEM WITH YOUR ATTORNEY, IF YOU HAVE ONE IN THIS BANKRUPTCY CASE. (IF YOU DO NOT HAVE AN ATTORNEY, YOU MAY WISH TO CONSULT ONE).

If you do not want the court to grant the relief requested by the debtors in their motion, or if you want the court to consider your views on the motion, then on or before _____, you or your attorney must:

1. File with the court a written request for a hearing and a written response if you desire to file one at:

United States Bankruptcy Court
Western District of North Carolina
P O Box 34189
Charlotte, NC 28234-4189

2. If you mail your response to the court for filing, you must mail it early enough so the court will **receive** it on or before the date stated above.

You must also mail a copy to:

O. Max Gardner III
Attorney for the Debtors
P.O. Box 1000
Shelby, NC 28151-1000

Steven G. Tate
Chapter 13 Trustee
P.O. Box 1778
Statesville, NC 28687-1778

3. You must also **attend the hearing** scheduled to be held on **Friday,**
_____ **at 9:30 o'clock a.m.** in courtroom Number 5 at the Cleveland County
Courthouse, 100 Justice Place, Shelby, North Carolina.

No further notice of this hearing will be given.

This the _____ day of _____, 2009.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a stylized flourish at the end.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the debtors
State Bar No. 6164
P.O. Box 1000, Shelby, NC 28151-1000
Voice: (704) 487-0616 / FAX: (704) 487-0619
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN: --- -- 5707

DEBTOR(S).

**NOTICE OF AMENDMENT TO SCHEDULE
AND MASTER MAILING MATRIX**

COMES NOW the above-named debtors, by and through their attorney of record, and respectfully amends their Schedule F and the master mailing matrix in this case as a matter of right before this case is closed pursuant to the provisions of Rule 1009(a) of the Federal Rules of Bankruptcy Procedure as follows:

1. To amend Schedule F and the debtors' master mailing matrix to add the following:

NAME OF PARTY-IN-INTEREST and ADDRESS	AMOUNT/DEBT	STATUS
Rutherford Radiological Assoc., PA P.O. Box 886 Rutherfordton, NC 28139	\$73.80	Unsecured
Carolina Credit Exchange P.O. Box 1764 Spartanburg, SC 29304-1764	Additional notice address	
Timken-Latrobe Savings & Investment Plan American Express Financial Advisors, Inc. 200 AXP Financial Center Minneapolis, MN 55474	\$5,368.82	Unsecured
Rutherford Emergency Medicine, PA P.O. Box 75358 Charlotte, NC 28275-0358	\$188.30	Unsecured

The debtors inadvertently failed to list any pre-petition debt or debts in error in the original petition and schedules. Copies of the amended schedule and master mailing matrix are being filed contemporaneously herewith.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor(s)
N.C. State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
Primary e-mail: maxgardner@maxgardener.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

**NAME: SMITH, JOHN WILLIAM
SMITH, ELIZABETH**

**CHAPTER 13 NO. 06-0000
OUR FILE NO. 00000**

**ADDRESS: 000 WASHINGTON STREET
SHELBY, NC 28000**

SSN: --- -- 0000 & --- -- 0000

DEBTORS

NOTICE OF CHANGE OF ADDRESS

PLEASE TAKE NOTICE that the above-named Debtor or Debtors have a new address as indicated below:

John William Smith
Elizabeth Smith
000 Washington Street
Shelby, NC 28000

All future notices shall be sent to the above address.

This the _____ day of _____, 2009.



O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (888) 870-1647
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: SMITH, JOHN WILLIAM
SMITH, ELIZABETH

**CHAPTER 13 NO. 06-0000
OUR FILE NO. 00000**

ADDRESS: 000 WASHINGTON STREET
SHELBY, NC 28000

SSN: --- -- 0000 & --- -- 0000

DEBTORS

NOTICE OF CHANGE OF EMPLOYMENT

PLEASE TAKE NOTICE that the above-named male (female) Debtor has gained employment with:

William & Smith Enterprise Co., Inc
000 Washington Street
Shelby, NC 28000

Please take future notice that if this paragraph is checked the debtors are also requesting the Trustee to issue a Wage Deduction Order to the employer for the Chapter 13 plan payment: Yes _____ No _____.

This the _____ day of _____, 2009.



O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (888) 870-1647
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: SMITH, BILL JOHN
SMITH, ANN

**CHAPTER 13 NO. 00-00000
OUR FILE NO. 01010**

ADDRESS: 0000 WEST ROAD
SHELBY, NC 28000

SSN: --- -- 5584 & --- -- 3849

DEBTORS

Name of State Court Action: _____

State Court County _____ District or Superior Court

State Court Case Number: _____

State Court Attorney: _____

NOTICE OF CONTINUATION OF AUTOMATIC STAY IN BANKRUPTCY

PLEASE TAKE NOTICE THAT on January 4, 2009, the United States Bankruptcy Court for the Western District of North Carolina entered an order (which is attached as Exhibit "A"), continuing the automatic stay in the case of Debbie Debtor, Case No. _____. This order was entered pursuant to 11 U.S.C. §363(c)(3)(B) (Supp. 2005).

The order extends the automatic stay provided for by 11 U.S.C. §362(a) as to:

_____ specific creditors named in said order, including the parties in this case:

XXX all creditors and lessors.

That stay includes, but is not limited to, prohibitions against "the commencement or continuation ... of a judicial, administrative or other action or proceeding against the debtor", 11 U.S.C. §362(a)(1), enforcement of certain judgments, 11 U.S.C. §362(a)(2), and a prohibition against "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3).

This the _____ day of _____, 2009.

O. Max Gardner, III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor(s)
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

**NOTICE OF DEATH OF DEBTOR IN PENDING
CHAPTER 13 BANKRUPTCY PROCEEDING**

PLEASE BE ADVISED THAT the above-named male debtor, _____, died on _____.

PLEASE BE FURTHER ADVISED that all creditors who may have **credit life insurance or any other form of death benefits** are required to immediately notify the Trustee of the same and to file an amended proof of claim with the said Trustee. The Trustee in this case is Steven G. Tate and his mailing address is PO Box 1778, Statesville NC 28687-1778. You are also requested to notify the attorney for the debtors of any and all such death benefits.

PLEASE BE FURTHER ADVISED that this case shall continue as to the female debtor.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
PH (704) 487-0616/FAX (704) 487-0619
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

WITHDRAWAL OF OBJECTION TO PROOF OF CLAIM

COME NOW the above named debtors by and through counsel, and hereby withdraw their Objection to the Proof of Claim of _____ (Document _____) which was filed with this court on or about _____ with prejudice. This action is being taken based on an amended proof of claim filed by _____ on or about _____.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar No. 6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

WITHDRAWAL OF MOTION TO WITHDRAW AS ATTORNEY OF RECORD

COMES NOW the attorney for the above named debtors, and hereby withdraws his Motion to Withdraw as Attorney of Record (Document _____) which was filed with this court on or about _____.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar No. 6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

WITHDRAWAL OF OBJECTION/RESPONSE TO MOTION FOR RELIEF FROM STAY

COME NOW the above named debtors, and hereby withdraw the Objection/Response to the Motion for Relief from Stay filed by _____ (Document _____) which was filed with this court on or about _____. This action is being taken based on the agreement between the parties that _____ will have 90 days to file any deficiency claim. The attorney for the debtors is moving the Court for the award of a non base legal fee and expenses of \$450.00 relating to the filing of this Objection, said fee and expenses to be paid by the Trustee from funds paid by the debtors into the plan.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor
NC State Bar No. 6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: **DAVIS, TROY GLENN** **Chapter 13 No. 08-40174**
 DAVIS, ROBIN FULLOVE **Our File No. 12497-WG**

ADDRESS: **1905 Rucker Road**
 Shelby, NC 28152

SSN: **--- -- 6607 & --- -- 3345**

Debtors.

WITHDRAWAL OF MOTION TO MODIFY

COMES NOW the above named debtors, and hereby withdraw the Motion to Modify filed with this court on March 1, 2010 (Document #49). This action is being taken at the request of the debtors. The attorney for the debtors is further withdrawing his application for compensation.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar No. 6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

DEBTORS' NOTICE OF VOLUNTARY DISMISSAL OF CHAPTER 13 CASE

COME NOW the above-named debtors, by and through their attorney of record, and hereby voluntarily dismiss the above-captioned Chapter 13 proceeding without prejudice pursuant to 11 U.S.C. Section 1307(b). In support of this election, the debtors show unto the Court the following:

1. This case was commenced by the filing of a voluntary Chapter 13 petition on _____.

2. This case has not been previously converted under Sections 706, 1112 or 1208 of the Bankruptcy Code.

3. **This case is being voluntarily dismissed pursuant to the creation of a debt repayment plan under 362(i).**

This the _____ day of _____, 20_____.

O. Max Gardner III
Gardner & Gardner, PLLC
Attorney for the Debtors
NC State Bar No. 6164
P.O. Box 1000
Shelby, NC 28151-1000
PH(704) 487-0616/FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

After being fully informed and advised of the consequences of a dismissal of my Chapter 13 case, I have requested my attorney to file the necessary documents with the Bankruptcy Court so as to cause my case to be dismissed.

Date: _____

Debtor

Date: _____

Debtor

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**Debtor, and wife,
Debtor**

Adversary Proc. No. _____

Plaintiffs,

versus

GENERAL MOTORS ACCEPTANCE CORPORATION

Defendant.

**NOTICE OF VOLUNTARY DISMISSAL WITH PREJUDICE OF
ADVERSARY PROCEEDING**

COME NOW the plaintiffs to this Adversary Complaint, by and through counsel, pursuant to Rule 41 of the Federal Rules of Civil Procedure and Rules 7041 and 9014 of the Federal Rules of Bankruptcy Procedure, and hereby voluntarily dismiss the said adversary complaint filed by the Plaintiffs with prejudice. This action is being taken based on the settlement of this matter.

This the _____ day of _____, 2009.



O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor(s)
NC State Bar No. 6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS

**DEBTOR AND WIFE,
DEBTOR**

ADVERSARY PROC. NO. _____

PLAINTIFFS,

versus

**CITIFINANCIAL, INC., AND
CITIGROUP, INC.**

DEFENDANTS

**STIPULATION OF DISMISSAL WITH PREJUDICE
OF ADVERSARY PROCEEDING**

COME NOW the parties to this Adversary Proceeding filed by the Debtors, by and through counsel, pursuant to Rule 41 of the Federal Rules of Civil Procedure and Rules 7041 and 9014 of the Federal Rules of Bankruptcy Procedure, and stipulate to the dismissal of the said complaint filed by the Debtors against the Defendant with prejudice. This action is being taken based on the settlement of this matter.

Date: _____

/S/ O. Max Gardner, III
O. Max Gardner III
Attorney for Plaintiffs

Date: _____

Attorney for Defendant

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

Debtor,

Adversary Proc. No.: _____

Plaintiff,

versus

SELECT PORTFOLIO SERVICING, INC.

Defendant.

NOTICE OF SETTLEMENT

PLEASE BE ADVISED that the above-named Plaintiff and Defendant have settled the adversary proceeding on all issues. The Plaintiff will file a Stipulation of Dismissal as soon as the settlement documents have been executed, which the Plaintiff anticipate will take approximately one week to ten days.

This the _____ day of _____, 2009.



O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Plaintiffs
State Bar No. 6164
P.O. Box 1000, Shelby, NC 28151-1000
Voice: (704) 487-0616 / FAX: (704) 487-0619
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME(S):

**CHAPTER 7 NO.
OUR FILE NO**

ADDRESS:

SSN:

DEBTOR(S)

**NOTICE OF CONVERSION TO CHAPTER 7
OF THE BANKRUPTCY CODE**

COME NOW the above-named debtors, by and through their attorney of record, pursuant to Section 1307 of Title 11 of the United States Bankruptcy Code and hereby give written notice to all parties in interest of the conversion of this case to a case under Chapter 7 of the Bankruptcy Code.

The debtors also show unto the Court that they will be filing a Final Report and Schedule of Post-Petition debts and a Statement of Intention herewith.

This the ____ day of January 2009.



O. Max Gardner III
Gardner Law Offices
Attorney for the Debtor
P.O. Box 1000
Shelby, NC 28151-1000
N.C. State Bar No. 6164
(704) 487-0616/Fax (888) 870-1647
e-mail: maxgardner@maxgardner.com



William S. Gardner
Gardner Law Offices
Attorney for the Debtor
P.O. Box 1000
Shelby, NC 28151-1000
N.C. State Bar No. 32684
(704) 487-0616/Fax (888) 870-1644
e-mail: bgardner@maxgardner.com

I hereby authorize my attorney to convert my pending Chapter 13 Case to a Chapter 7 bankruptcy case and I acknowledge that I have been fully advised of the consequences thereof.

Date: January 22, 2009

(Debtor)

Date: January 22, 2009

(Debtor)

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME(S):

**CHAPTER 7 NO.
OUR FILE NO**

ADDRESS:

SSN:

DEBTOR(S)

**NOTICE OF CONVERSION TO CHAPTER 13
OF THE BANKRUPTCY CODE**

COME NOW the above-named debtors, by and through their attorney of record, pursuant to Section 706 of Title 11 of the United States Bankruptcy Code and hereby give written notice to all parties in interest of the conversion of this case to a case under Chapter 13 of the Bankruptcy Code.

The debtors also show unto the Court that they will be filing required amendments as well as additional required statements and the Chapter 13 plan in this case within 15 days of the date of this notice.

This the _____ day of February 2009.



William S. Gardner
Gardner Law Offices
Attorney for the Debtors
NC State Bar No. 32684
P.O. Box 1000
Shelby, NC 28151-1000
Phone (704) 487-0616
FAX (888) 870-1644
e-mail: bgardner@maxgardner.com

Date: February 11, 2009

(Debtor)

Date: February 11, 2009

(Debtor)

Rule 1019 Information Necessary for Conversion

Below is information that is necessary in order to properly prepare your case for conversion from Chapter 13 to Chapter 7. This information is required under Rule 1019 of the Federal Rules of Bankruptcy Procedure and you are supplying the information under penalty of perjury. THIS INFORMATION IS CRITICAL FOR PREPARATION OF YOUR CONVERSION.

- 1) Please list or schedule all unpaid debts that you have incurred after you first filed for bankruptcy protection but before you converted this case to a chapter 7 (if your case has already been converted). We will need the name and address of each creditor along with a brief description of what the claim was for and what remains owing and if there is any collateral associated with this debt.

- 2) Please list or schedule all property that you have acquired after you initially filed for bankruptcy protection but before conversion of your case (if your case has already been converted). Describe the type of property acquired, how much you paid for it, and if any debt is associated with this collateral.

- 3) List any contracts or unexpired leases that you may have entered into but not yet fully performed.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME(S):

**CHAPTER 13 NO.
OUR FILE NO**

ADDRESS:

SSN:

DEBTOR(S)

**STATEMENT OF SCHEDULES FOR CONVERSION
PURSUANT TO RULE 1019**

NOW COME debtors herein, by and through counsel, and pursuant to Rule 1019(5) of the Federal Rules of Bankruptcy Procedure, and files the following:

- A) Statement of After Acquired Property.
None.
- B) Unpaid debts incurred after initial Chapter 13 filing.
None.
- C) Executory contracts or unexpired leases entered into after Chapter 13 filing:
None.

I, _____, do hereby certify under penalties of perjury and the foregoing is true and correct to the best of my knowledge and belief.

Debtor

This the ____ day of _____, 2009.



O. Max Gardner III
Gardner & Gardner, PLLC
Attorney for the debtors
State Bar No. 6164
P.O. Box 1000, Shelby, NC 28151-1000
Voice: (704) 487-0616 / FAX: (704) 487-0619
maxgardner@maxgardner.com

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME(S):

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR(S).

ADVERSARY PROC: 08- _____

versus

Plaintiffs,

Defendant.

**DEFENDANT'S
NOTICE OF REMOVAL**

Comes now Defendant by and through counsel and pursuant to 28 U.S.C § 1452 and FRBP 9027(a)(2) and hereby gives Notice of Removal and states the following grounds for removal:

1. On or about _____ the Plaintiff commenced a civil action against the above-named defendant and debtor herein before the General Court of Justice, Superior Court Division, Cleveland County, North Carolina. The Case is identified on the records of that Court as case under 08 CVS 12431.

2. A voluntary petition under Chapter 13 of the United States Bankruptcy Code was filed by the said Defendant as the debtor and on _____ and an Order for relief was issued by the United States Bankruptcy Court for the Western District of North Carolina on that same date.

3. The complaint filed in the State court and identified in paragraph 1 above seeks to recover damages for a breach of contract claim, which claim is disputed by the Defendant and Debtor herein.

4. Pursuant to FRBP 9027(a)(1), the Defendant states:

a. he is entitled to remove this matter for the reasons stated above;

- b. this proceeding is a core proceeding; and
- c. Defendant consents to be bound by a final order or judgment of the Bankruptcy Court;
- d. the Defendant will file a copy of all process and pleadings in the near future¹; and
- e. A copy of this Notice will be filed immediately with the Clerk of Superior Court, Cleveland County, North Carolina, 100 Justice Place, Shelby, NC 28150.

5. Pursuant to FRBP 9027(a)(2) this Notice is filed within ninety (90) days following the order for relief.

6. Pursuant to FRBP 9027(b) the Defendant hereby gives notice to all adverse parties and will file a copy of this notice with the clerk of the state court.

7. Pursuant to FRBP 9027(c) a copy of this notice is being filed on all parties in the pending state court case.

8. A copy of the pending state court file in pdf format will be filed with the Bankruptcy Court as soon as possible after the filing of this notice, the file not being currently available as it is in paper form. Defendant will be filing a motion to have the file released for copying.

Wherefore Defendant hereby gives notice of removal of this action.

Dated this the _____ day of _____ 2008.



O. Max Gardner III
Gardner Law Offices
Attorney for the Defendant
P.O. Box 1000
Shelby, NC 28151-1000
N.C. State Bar No. 6164
(704) 487-0616/Fax (888) 870-1647
e-mail: maxgardner@maxgardner.com

¹ Defendant is in the process of checking out the court file, will copy it and then scan the entire file to be filed with this court.

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR.

**NOTICE OF DEBTORS' RESCISSION OF REAFFIRMATION AGREEMENT
WITH CITIMORTGAGE, INC.**

COME NOW the Debtors, by and through counsel, and for their Notice of Rescission of Reaffirmation Agreement, state as follows:

1. Debtors herein executed a reaffirmation agreement with Citimortgage, Inc., for Account Number xxxxxxxxxxxxxx3998, which was filed with the Court on August 22, 2008.
2. Debtors, pursuant to 11 U.S.C. §524(c)(4), hereby give Notice of their absolute right to rescind such reaffirmation agreement referred to in paragraph 1 hereinabove.
3. This Notice has been sent to Citimortgage, Inc., by mailing the same to the address found within the Reaffirmation Agreement, P.O. Box 790130, MS #730, St. Louis, MO 63179-0130.

This the _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor
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FAX (704) 487-0619
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**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE**

IN RE: BELINDA HEDGE	)	Case No.: 05-38203
	)	Chapter 7
Debtor.)	

BELINDA HEDGE,)	
)	
Plaintiff,	)	Adversary Proceeding
	)	No. 08-3043
vs.)	
)	
CAPITAL ONE SERVICES, INC.,)	
a corporation, CAPITAL ONE BANK,)	
a corporation, ALLIED INTERSTATE,)	
INC., a corporation and PHILLIPS &)	
COHEN ASSOCIATES, LTD.)	
)	
Defendants.)	

RULE 30(b)(6) NOTICE OF DEPOSITION

**TO: CAPITAL ONE SERVICES, INC. A Corporation and
CAPITAL ONE BANK, A Corporation,**

**Bryan A. Fratkin, Esq.
McGuire Woods, LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030**

**Sarah Beckett Boehm
McGuire Woods, LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030**

PLEASE TAKE NOTICE that, pursuant to Fed.R.Civ.P. 30(b)(6), commencing on _____ at _____ a.m., and thereafter by adjournment until the same shall be completed, at the offices of _____ or at such other time and place as counsel for the parties shall agree, Plaintiff, through her counsel, will take the deposition(s) under oath of the designated representatives of Capital One Services, Inc. and Capital One Bank (hereinafter referred to as "Capital One") by oral examination, said depositions to be

taken before an officer duly authorized by law to administer oaths under Fed.R.Civ.P. 28 stenographically and/or by videotape.

PLEASE TAKE FURTHER NOTICE that, the designated representative(s) of Capital One must be prepared to testify regarding “matters known or reasonably available to” Capital One, including but not limited to:

1. The settlement between the United States Trustee Program and Capital One Bank (USA), NA of the Complaint filed in the United States Bankruptcy Court for the District of Massachusetts, Eastern Division, entitled Phoebe Morse, United States Trustee vs. Capital One Bank (USA), NA, filed in the Chapter 13 Bankruptcy Case of William L. Galley and Laurie A. Galley, 06-12142, which alleged that Capital One had sought to collect debts that had been discharged in prior bankruptcy cases.
2. Problems related to the failure of Capital One to identify previous accounts discharged in bankruptcy in 2005 and the source and nature of the problem and how and when it was discovered.
3. The exact errors that were discovered by Capital One in their bankruptcy system.
4. The relationship between Capital One and TSYS.
5. The function, role and scope of the new Quality Control Verification process and how it actually works.
6. The function and role of the auditor in the case filed by the US Trustee identified in #1.
7. The identification of all of the codes, symbols, entries, and notes on the documents produced for identification as Hedge/COB 0001 through 0063; Hedge/COB Ai 0001-0002; and Hedge/COB PC 0001-0021.
8. The identification of the names of all of the collectors who have made any entries on the documents produced for identification as Hedge/COB 0001 through 0063; Hedge/COB Ai 0001-0002; and Hedge/COB PC 0001-0021.
9. The identification of the type of disqualification system or systems used to determine if an account has been discharged in bankruptcy, settled, resolved, or is barred by the statute

of limitations and how that system or system was used in this case.

10. How collectors are compensated for funds actually collected including all bonus, incentive and other plans.

11. How accounts are transferred from Capital One to collectors such as Allied Interstate and Phillips & Cohen, including the delivery medium and the documentation used.

12. Whether accounts such as Capital One accounts are purchased by Allied Interstate or Phillips & Cohen by way of a Forward Flow Contract or are just assigned for collection.

13. Any and all indemnity agreements between Capital One and any other party regarding claims that may arise out of the collection of accounts.

14. The location of any electronic data or paper files related in any way to the Belinda Hedge accounts with Capital One.

15. The process for the recording of collection calls, how the recorded calls are stored, where and by whom and for how long.

16. The back-up systems and mass destruction locations used by Capital One for the storage of files and what in fact is stored at such locations.

17. The telephone systems used and how all calls are recorded and saved including the numbers called, the time of the call, duration, etc.

18. The processes employed by Capital One whenever a consumer states that the subject debt was included in either a Chapter 7 or 13 case.

19. How long Capital One will work a file before referring it to another party.

20. Who makes the decision on referral, the type of agreements used, how the file data is transmitted, what data is transmitted, etc.

21. All written guides or best practice rules for the collection of consumer debts.

22. The procedures required by Capital One for compliance with the Fair Debt Collection Practices Act.

23. Any training, instructional or educational programs to comply with the Fair Debt Collection Practices Act provided to any Capital One employees, agents, independent

contractors or any other outside account handlers.

DEFINITIONS

The term "document" or "documents" means every writing or recorded material of every type and description, of any kind, that is in the possession, control or custody of Capital One, or of which Capital One has knowledge, whether originals, copies or facsimiles. Such writings or recordings include, but are not limited to, collection notes, electronic computer collection records, printouts of collection records, sample collection letters, Metro-data tapes, diskettes, computer hard drives, tape backups, Zip-type disks, magnetic media of any kind, CD-ROM, DVD, correspondence, memoranda, stenographic notes, handwritten notes, contracts, documents, rough drafts, inter-office memoranda, memoranda for the files, letters, research materials, logs, diaries, forms, bank statements, tax returns, card files, books of account, journals, ledgers, invoices, diagrams, minutes, manuals, studies, publications, pamphlets, pictures, films, voice recordings, reports, surveys, minutes, statistical compilations, data processing cards, computer records, tapes, print-outs, agreements, communications, state and federal governmental hearings, reports, correspondence, telegrams, memoranda, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, diaries, graphs, notebooks, note charts, charts, plans, drawings, sketches, maps, summaries or records of meetings or conferences, summaries or reports of investigations or negotiations, opinions or reports of consultants, photographs, video tape, motion picture film, digital photographs, brochures, advertisements, circular, press releases, drafts, any marginal comments appearing on any document, all other writings, books of all nature and kind whether handwritten, typed, printed, mimeographed, photocopied or otherwise reproduced, all tape recordings (whether for computer, audio, or visual replay) and all other written, printed, and recorded matter or tangible things upon which words, phrases, symbols or information of any kind are recorded, encrypted or otherwise stored.

Dated this the _____ day of October, 2008.



O. Max Gardner III
Gardner & Botes, PLLC
P.O. Box 1000
Shelby, NC 28151-1000

John P. Newton
Law Offices of Mayer & Newton
Attorneys for Plaintiff
1111 Northshore Drive, Suite S-570
Knoxville, Tennessee 37919

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
)	CASE NO.
John Q. Public and)	OUR FILE NO.
Mary Public,)	
)	CHAPTER 13
Debtors.)	
_____)	

John and Mary Public
Plaintiffs

Vs. **Adversary Proceeding No.:** _____

GMAC Mortgage, LLC
Defendant

NOTICE OF DEPOSITION BY WRITTEN QUESTIONS

TO: GMAC Mortgage, L.L.C., Defendant,

Please take notice that, under Federal Rule of Civil Procedure 31, Plaintiffs will take the deposition of the custodian of records for The Bank of New York Mellon, N.A. by written questions, on _____ at __:00am, at _____.

1. The Bank of New York Mellon, N.A. ("BNYM") is directed to designate a person or persons to testify on its behalf in the following matters: Plaintiff's mortgage loan; BNYM's status as "creditor" of Plaintiff's mortgage loan; BNYM's relationship with GMAC Mortgage, LLC as it pertains to Plaintiff's mortgage loan; when, from whom, and by virtue of what transaction BNYM acquired Plaintiff's mortgage loan; the authenticity, meaning, and purpose of the Mortgage Loan Transfer Notice dated October 13, 2009 that Plaintiff received by mail; BNYM's relationship to Mortgage Electronic Registration Systems, Inc. a/k/a "MERS" as it pertains to Plaintiff's mortgage loan.

2. A copy of the questions to be asked at the deposition is attached.

3. Under Federal Rules of Civil Procedure 31(a)(1) and 45(a)(1)(A)(iii), BNYM is requested to produce the following discoverable information (including responsive documents, electronically stored information, or tangible things) at the deposition:

- a. All documents evidencing the transaction whereby BNYM acquired Plaintiff's mortgage note;

- b. All transfer and/or delivery receipts evidencing the physical transfer of Plaintiff's mortgage note from loan inception to its transfer and/or delivery to BNYM;
- c. All custodial agreements applicable to Plaintiff's mortgage loan file;
- d. Any servicing, or pooling and servicing agreement, applicable to Plaintiff's mortgage loan;
- e. Plaintiff's mortgage loan file;
- f. All documents in your possession, custody, or control relating to Plaintiff's mortgage loan.

Dated this _____ day of _____, 20__.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for the Debtor/Plaintiffs
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

5. Have you been served with a subpoena for the production of documents in connection with this lawsuit and this deposition?

ANSWER:

6. Do you understand that the subpoena requests all records in your possession, custody, or control relating to Plaintiff's mortgage loan and is not limited to records relating only to the claims that form the basis for this lawsuit?

ANSWER:

7. Please identify which of the records you produced today were made by Bank of New York Mellon, N.A., and/or its employee(s), agent(s), or representative(s).

ANSWER:

8. Concerning the documents you identified in response to the previous question, was each made at or near the time of the act, event, or matter identified in the records?

ANSWER:

9. Please identify which of the records you produced today were NOT made by Bank of New York Mellon, N.A., and/or its employee(s), agent(s), or representative(s).

ANSWER:

10. When did Bank of New York Mellon, N.A. obtain the documents you identified in response to the previous question?

ANSWER:

11. From whom, i.e., what person or entity, did Bank of New York Mellon, N.A. obtain each of the documents identified in response to the previous two questions?

ANSWER:

12. Is Bank of New York Mellon, N.A. the owner of Plaintiff's mortgage note? (if answer is yes, skip to question no. 14)

ANSWER:

13. If the answer to the foregoing question was negative, please state whether Bank of New York Mellon, N.A. knows who owns Plaintiff's mortgage note, and if so, identify the owner of Plaintiff's mortgage note.

ANSWER:

14. Was Plaintiff's mortgage loan sold or transferred to Bank of New York Mellon, N.A. on October 12, 2009?

ANSWER:

15. If your answer to the previous question was negative, please state the date when Plaintiff's mortgage loan was sold or transferred to Bank of New York Mellon, N.A..

ANSWER:

16. Was Plaintiff's mortgage note in default when Bank of New York Mellon, N.A. acquired it?

ANSWER:

17. How does Bank of New York Mellon, N.A. know whether Plaintiff's note was in default when Bank of New York Mellon, N.A. acquired it?

ANSWER:

18. Who was the creditor of Plaintiff's mortgage loan prior to October 12, 2009?

ANSWER:

19. Is the person or entity you identified in your response to the previous question the person or entity from whom Bank of New York Mellon, N.A. acquired Plaintiff's mortgage loan?

ANSWER:

20. Please take a look at the copy of the document I have marked as "Exhibit A" and attached hereto. Generally speaking, have you ever seen that type of document before?

ANSWER:

21. (referring to Exhibit A) What is it?

ANSWER:

22. (referring to Exhibit A) Who prepares these?

ANSWER:

23. (referring to Exhibit A) What is the purpose of this notice? Why are these sent out?

ANSWER:

24. Still looking at Exhibit A, before today, have you ever seen that document?

ANSWER:

25. When did you first see the document I've marked as Exhibit A?

ANSWER:

26. Aside from any hand-written markings on Exhibit A, is Exhibit A a true and correct copy of the Mortgage Loan Transfer Notice that the Bank of New York Mellon, N.A. sent to Plaintiff?

ANSWER:

27. Turning to page 2 of Exhibit A, beneath and to the right of the Plaintiff's address block is a notation that reads, "20091013-86" and then beneath that is "TILA". Do you see that?

ANSWER:

28. Please explain what the "20091013-86" and "TILA" notations on page 2 of Exhibit A mean.

ANSWER:

29. Did Bank of New York Mellon, N.A. acquire this mortgage loan from Mortgage Electronic Registration Systems, Inc.?

ANSWER:

30. Is Bank of New York Mellon, N.A. aware of whether Mortgage Electronic Registration Systems, Inc. ever owned Plaintiff's mortgage loan?

ANSWER:

THE LAW OFFICES OF
O. MAX GARDNER III, P.C.*

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William S. Gardner
bgardner@maxgardner.com
Telephone: (704) 487-0616
Facsimile: (888) 870-1644

(Date)

Certified Mail – Return Receipt Requested

Alice Brown, Vice President
Oakdale Mortgage Servicers, Inc.
PO Box 1492
Oakdale, NC 28000

RE: Jim and Tammy Baker
Loan No: 000-123-456

**NOTICE TO PRESERVE
ELECTRONIC EVIDENCE**

Dear Ms. Brown:

I write as counsel for Jim and Tammy Baker (hereinafter "Plaintiffs") to advise you of a claim for damages and other relief against you as a result of your mortgage servicing methods and tactics.

I have enclosed a summons and complaint as service of process.

Plaintiffs demand that you preserve documents, tangible things and electronically stored information that are potentially relevant to the issues in this case. As used in this letter, the terms you and your refer to OMS, and its predecessors, successors, parents, subsidiaries, divisions and affiliates and its respective officers, directors, agents, attorneys, accounts, employees, partners, and other persons occupying similar positions of performing any functions on behalf of OMS.

Much of the information that is subject to disclosure or responsive to discovery in this case will be stored on your current and former computer systems and other media and devices, including personal digital assistants, voice messaging systems, online repositories and cell phones. The term Electronically Stored Information (hereinafter "ESI") should be afforded the broadest possible meaning and includes (by way of example and not as an exclusive list) potentially relevant information electronically, magnetically, optically or otherwise stored as:

- digital communications (for example email, voicemail, and instant messaging)
- email service stores (for example lotus domino.nsf or Microsoft exchange.edb)
- word processed documents (for example Word or WordPerfect files and all drafts thereof)
- spreadsheets and table
- accounting application data
- imaging and facsimile files
- scan recording of any conversations with the plaintiffs
- databases (for example Access, Oracle, SQL Server data)

- Contact and relationship data management (for example Outlook, Ask or Interaction)
- Calendar and diary application data
- online access data (for example temporary internet files, history files and cookies)
- presentations (for example PowerPoint and Corel presentations)
- network access and server activity logs relating to information exchanged between defendants and by defendants with third parties
- project management application data
- backup and archival files

Plaintiffs hereby demand that you preserve both accessible and inaccessible ESI. This demand is reasonable and necessary. Pursuant to the North Carolina Rules of Civil Procedure you must identify all sources of ESI you decline to produce and demonstrate why such sources are not reasonably accessible. For good cause shown, the court may order production of ESI even if it is not reasonably accessible. Accordingly you must preserve ESI that you deem inaccessible so as not to preempt the court's authority.

Preservation requires immediate intervention

You must act immediately to preserve potentially relevant ESI, including, without limitation, information and the earlier of a created or last modified date for ESI concerning any foreclosure conducted by you in the State of North Carolina from or after February 1, 2004, through the date of this demand. Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. You must immediately intervene to prevent loss due to routine operations or malfeasance and employ proper techniques and protocols to preserve ESI. Booting a drive, examining its contents or running any application may irretrievably alter the evidence contained therein and constitute spoliation of evidence.

Preservation requires action

You are directed to immediately initiate a litigation hold for potentially relevant ESI, documents and tangible things and to act diligently and in good faith to secure and audit compliance with that litigation hold. You are further directed to immediately identify and modify or suspend features of your information systems and devices, which, in routine operation, operate to cause the loss of potentially relevant ESI. Examples of such features and operations that could result in spoliation include:

- purging the contents of email repositories by age, capacity or any other criteria
- using data or media wiping, disposal, erasure or encryption utilities or devices
- overriding erasing, destroying or discarding backup media
- reassigning, re-imaging or deposing of systems, servers, devices or media
- running antivirus or other programs affecting wholesale metadata alteration
- releasing or purging online storage repositories
- using metadata stripper utilities
- disabling server, packet or local instant messaging login
- executing drive or file defragmentation or compression programs

Guard against deletion

You should anticipate that your officers, employees, or others may seek to hide, destroy or alter ESI. This is not a concern that is unique to you or your companies. Rather it is simply conduct that occurs with such regularity that any custodian of ESI and their counsel must anticipate and guard against its occurrence. You are directed to preserve complete backup tape sets (including differentials and incrementals) containing emails and ESI for any person involved in the foreclosure of any mortgage loan in North Carolina from

February 1, 2004 through the present. You should also take affirmative steps to prevent anyone with access to your data, systems or archives from seeking to modify destroy or hide ESI.

System sequestration or forensic sound imaging

As an appropriate and cost effective means of preservation you should remove from service and securely sequester the systems, media and devices housing potentially relevant ESI of any lawyer that has appeared in any bankruptcy case in the State of North Carolina for any individual for whom OMS services a mortgage loan from February 1, 2004 through the present. In the event that you deem it impractical to sequester those systems, we believe that the breadth of preservation required, coupled with the modest number of systems implicated, dictates that forensically sound imaging of the systems identified above is expedient and cost effective. As we anticipate the need for forensic examination of one or more of the systems and the presence of relevant evidence in forensically accessible areas of the drives, we demand that you employ forensically sound ESI preservation methods. Failure to use such methods imposes a significant threat of spoliation and data loss. Be advised that a conventional copy, backup or ghosting of a hard drive does not produce a forensically sound image because it only captures active, unlocked data files and fails to preserve forensically significant data existing in for example unallocated clusters and slack space.

You anticipate that certain ESI, including but not limited to spreadsheets and databases will be sought in the forms or form in which it was ordinarily maintained, that is in native form. Accordingly, you should preserve ESI in such native forms and should not employ methods to preserve ESI that remove or degrade the ability to search ESI by electronic means or that make it difficult or burdensome to use that information.

You should further anticipate the need to disclose and produce system and application metadata and act to preserve it. System metadata is information describing the history and characteristics of other ESI. This information is typically associated with tracking or managing an electronic file and often includes data reflecting a file's name, size, custodian, location and dates of creation and last modification or access. Metadata may be overwritten or corrupted by careless handling or improper preservation, including by moving, copying or examining the contents of files.

As hard copies do not preserve electronic search ability or metadata, they are not an adequate substitute for, or cumulative of, electronically stored versions. If information exists in both electronic and paper forms, you should preserve both the forms.

We desire to work with you to agree upon an acceptable protocol for forensically sound preservation and can supply a suitable protocol if you will furnish an inventory and description of the systems and media to be preserved. Alternatively if you promptly disclose the preservation protocol you intend to employ, perhaps we can now identify any points of disagreement and resolve them.

A successful and compliant ESI preservation effort requires expertise. If you do not currently have such expertise, we urge you to engage the services of an expert in electronic evidence and computer forensics. Perhaps our respective experts can work cooperatively to secure a balance between evidence preservation and burden that's fair to both sides and acceptable to the court.

I am available to discuss reasonable preservation steps; however, you should not defer preservation steps pending such discussions if ESI may be lost or corrupted as a consequence of delay. Should your failure to preserve potentially relevant evidence result

in the corruption, loss or delay of production of evidence to which we are entitled, that failure would constitute spoliation of evidence.

Please confirm no later than ten days from the date of this letter, that you have taken the steps outlined in this letter to preserve ESI and tangible documents potentially relevant to this action. If you have not undertaken the steps outlined above, or have taken other actions, please describe what you have done to preserve potentially relevant evidence.

Sincerely yours,

O. Max Gardner III
State Bar No: 6164
Law Offices of O. Max Gardner III, P.C.
PO Box 1000
403 South Washington Street
Shelby NC 28150
704.487.0616 (v)
888-870-1647 (f)

E. Objections to POC

Attorneys Who Mishandle Their Clients' Proofs of Claim Leave Themselves Open to Significant Blame

BY HON. JEFF BOHM, BRENETTA ANTHONY SCOTT, AND SUHANI DESAI

Creditors' attorneys, faced with a multitude of proof of claim (POC) filings, sometimes dispense with the requirements of properly filing a POC. As a matter of routine, attorneys often sign their clients' POCs and submit them to the bankruptcy court without attaching supporting documentation. In light of the recent credit crisis and increase in bankruptcy filings nationwide, this article aims to equip attorneys with information that will assist them in filing POCs and help them avoid the pitfalls associated with deficient POCs. This article focuses on recent rulings that are leading the charge against lax practices by attorneys who sign a POC without adequately investigating its validity or attaching documents in support of the claim.

Adopting an assembly-line approach to signing and filing POCs without due regard to the provisions of the Federal Rules of Bankruptcy Procedure may subject attorneys to dire quality control measures taken by courts. The inefficient process may strip the claim of prima facie validity¹ at best or subject the claim to disallowance at worst.² A lack of attention to detail may also result in sanctions against the offending attorney.

Proceed with Caution with Signatures

An attorney may sign a POC on behalf of a client without attaching evidence of authority to act for the client.³ Pursuant to Rule 3001(b) of the Federal Rules of Bankruptcy Procedure, an attorney is entitled to sign a POC on behalf of a client, but by doing so, the attorney may put himself or herself in harm's way. The attorney must be prepared to prove the claim by a preponderance of evidence.⁴ Advocacy of a document that is

not sufficiently investigated may violate Rule 9011. Therefore, attorneys must fully understand the consequences of signing a POC on behalf of a client.

By signing a POC, attorneys hold themselves accountable for the following:⁵

- *Investigation of the claim:* The attorney's signature on the POC indicates that the attorney has conducted a thorough investigation of the facts underlying the claim.
- *Compliance with the law:* The signature attests that the claim is warranted by existing law, has evidentiary support, and is not being presented for improper purposes.
- *Validity of the claim:* The signature indicates that the signing attorney attests to the validity and accuracy of the claim.
- *Burden of proof:* The burden is on the filing party, namely the signing attorney, to submit evidentiary support for all the allegations and factual contentions in a POC.⁶

Given the consequences of signing a POC on a client's behalf, the best practice is to advise the client, who has firsthand knowledge of the claim, to sign the POC. The attorney should also advise the client to conduct a thorough review of the claim. In addition, the attorney should apprise the client of the consequences of filing an invalid or an inaccurate POC.

FORM LETTER

This form letter is suggested as a template that attorneys could adopt as standard practice.

Name of Creditor/Client:
Address of Creditor/Client:
Re: In re **[Name of Debtor]**; Case Number **[Insert]**;
Account Number **[Insert]**.

Dear [Ms./Mr. Client]:

Pursuant to your request, I have completed the proof of claim that is to be filed on your behalf in the above-referenced bankruptcy case, based upon my knowledge of the file. I enclose this proof of claim for your review and signature. If it is incorrect on any point, you should tell me so that we can address the issue *before* filing the claim.

As you can see by reviewing the very bottom of the document, the penalty for submitting a fraudulent claim is a fine of up to \$500,000.00 or imprisonment for up to five years. **Because you are signing this proof of claim, please review it carefully to ensure that it is accurate in every respect.** It is my recommendation that you, not I, should sign this proof of claim because if the debtor, or any other creditor or party in interest, ever files an objection to your claim, you will want me to represent you at the hearing on this objection. If I sign the proof of claim, the court could require me to testify as a fact witness at this hearing, and when that happens, court rules prevent attorneys from continuing to represent their client in the case. You would then have to engage a different attorney, which would impose additional expenses on you. Because I have no doubt that you want to avoid incurring such an additional expense, it is my strong recommendation that you sign the proof of claim, but only after you have reviewed it and have assured yourself that it is accurate.

Please also be aware that *all* documents on which the claim is based must be attached to the proof of claim when it is filed with the bankruptcy court (as required by Paragraph 7 of the Official Proof of Claim Form). If you cannot find such documents, you must attach a written statement explaining why the documents are not attached. When you send the signed and dated proof of claim back to me to file with the court, please make sure that you have attached all the documents supporting this claim. It is important that the original proof of claim be accurate and complete. In this manner, we will minimize the risk that the debtor will file an objection to the claim and force us to prepare for and attend a hearing, or hearings, on the objection.

The deadline for filing the proof of claim with the court is **[Insert Date]**. If the signed form and supporting documents are not filed by this date, the court may deny you any distributions in the bankruptcy.

Please do not hesitate to call or email me if you have any questions.

Thank you.

Don't File Without Supporting Documentation

Rule 3001 specifies that supporting materials substantiating a claim should be filed with a POC, and a POC filed in accordance with this rule's provisions "shall constitute *prima facie* evidence of the validity and amount of the claim."⁷ Creditors who fail to attach supporting documents to their POCs risk having their claim disallowed for evidentiary reasons.⁸

Although it is true that a POC may not be disallowed for a failure to provide supporting documentation, the lack of evidence to substantiate the claim may deprive it of *prima facie* validity.⁹ The *prima facie* validity afforded to the POC is based on the presumption that the POC complies with the promulgated rules and forms. If compliance with the rules is questionable, the courts strip the POC of *prima facie* validity and shift the burden of proof to the filing party to prove the claim by a preponderance of evidence.¹⁰

In a legal system based on evidence, the initial burden of proving and providing documents supporting a claim is on the party filing a POC. The rules promulgated by the Supreme Court under congressional authority require that documents be attached to a POC, or that an explanation be provided for the absence of documents. Among the supporting documents that may be attached are the contract, assignments, pay history, and invoices for incurred expenses or fees. However, recent rulings highlight the lax treatment POCs receive from attorneys who wait until objections have been lodged by the debtor before they consider amending the POC to attach supporting documents.

One co-author of this article, a bankruptcy judge for the Southern District of Texas, has issued a notice and order that for every chapter 7 and chapter 13 case assigned to his court, Federal Rule of Bankruptcy Procedure 15 automatically applies once an objection to a POC is filed.¹¹ The claimant will not be permitted to amend the claim after the objection is filed unless the claimant first obtains leave of court or, alternatively, obtains the objecting party's written consent. Sanctions may be imposed against any claimant who amends the POC after an objection is filed without first obtaining leave of court or the objecting party's written consent. Imposing automatic application of Rule 15 gives greater incentive to creditors and their counsel to file the initial POC with all the appropriate documentation attached thereto. Such circumstances reduce the number of objections lodged by debtors, who most certainly do not need to incur any more fees than they already have.

A POC unsupported by documentation not only is subject to disallowance but also may result in sanctions against the attorney who ignored due diligence

procedures to verify the claim. "Advocacy of a document that counsel has not sufficiently investigated can be a Rule 9011 violation."¹²

The Consequences for Attorneys

Attorneys who attest to the validity of a POC by signing and filing it without supporting documents subject themselves to the following risks and impediments:

- *Doubts about credibility*: Signing a POC without client approval or without attaching supporting documents calls into question the credibility of the attorney who is unable to satisfy his or her burden of proof with evidentiary support.
- *Hearsay objections*: Any testimony proffered by the attorney based upon out-of-court statements of the client may draw hearsay objections.
- *Objections regarding lack of foundation*: Any testimony regarding the validity of the POC may draw objections for lack of foundation.
- *Motions to disqualify*: By signing a POC and thereby attesting to its validity, an attorney may risk a motion to disqualify for becoming a fact witness.
- *Loss of presumption of prima facie validity*: If a party in interest contests the claim, the POC loses its prima facie validity. The signing attorney then bears the burden of proof by a preponderance of the evidence to bring forth documentation in support of the contested POC.

Assignments Gone Awry

A frequent scenario encountered by the courts adjudicating disputes over POCs is the assignment of secured or unsecured debt from the original creditor to assignee creditors. Too often, the supporting documentation submitted to the courts fails to substantiate the assignment of the debt to the assignee creditors. Recent rulings indicate that creditors holding a transferred claim will not be relieved of their evidentiary burden to produce a proof of assignment.¹³ Attorneys representing assignee creditors should secure proof of assignment and attach such documentation to the POC before filing it.

Sanctions and Penalties

Section 157 of title 18 of the United States Code makes a false or fraudulent representation or claim in relation to a bankruptcy case a federal crime.¹⁴ Section 152 of title 18 provides for the imposition of a fine, a prison sentence not to exceed five years, or both, on any person who commits such conduct—such as filing a false or fraudulent POC. In addition, Rule 9011(c) permits a court to sanction attorneys who make false representations on a POC. Section 105 of the Bankruptcy Code also gives the courts the power to issue orders to prevent abuse of the bankruptcy process.¹⁵ Additional sanctions and penalties may exist under individual state laws.

A BESTPRACTICES APPROACH TO FILING POCs

When signing or filing a POC, attorneys can avoid running afoul of the Bankruptcy Code and the Bankruptcy Rules by taking the following steps:

- Always conduct due diligence of the documents presented in support of a POC.
- Always attach an itemized breakdown of the claim and supporting documents.
- Always inform the client in writing of the requirement of verification and authenticity of the documents supporting the POC.
- Always have the client sign the POC.
- Always adhere to POC deadlines stringently.

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Endnotes

1. Rule 3001(f) provides evidentiary benefit to a POC that complies substantially with the rule. It provides that a POC "executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim."
2. A POC is disallowed only when the claimant is unable to establish his or her burden of proof by a preponderance of the evidence.
3. *Wilson v. Valley Elec. Membership Corp.*, 141 B.R. 309, 312-13 (Bankr. E.D. La. 1992). *See also* FED. R. BANKR. P. 9010(c).
4. *In re Armstrong*, 320 B.R. 97, 103-4 (Bankr. N.D. Tex. 2005).
5. *See* FED. R. BANKR. P. 9011(b).
6. *Heath v. Am. Express Travel Related Servs. Co.* (In *re Heath*), 331 B.R. 424, 435 (B.A.P. 9th Cir. 2005); *Dove-Nation v. eCast Settlement Corp.* (In *re Dove-Nation*), 318 B.R. 147, 151 (B.A.P. 8th Cir. 2004). *See also* *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 21 (2000).
7. FED. R. BANKR. P. 3001(f).
8. *Samson v. B-Real, LLC* (In *re Samson*), 392 B.R. 724, 728 (Bankr. N.D. Ohio 2008).
9. *Heath*, 331 B.R. at 433; *Dove-Nation*, 318 B.R. at 152.
10. *In re Kendall*, 380 B.R. 37, 47 (Bankr. N.D. Okla. 2007).
11. *In re DePugh*, 2009 Bankr. LEXIS 1796, at *35, (Bankr. S.D. Tex. June 26, 2009). *See also In re Gilbreath*, 395 B.R. 356, 366 (Bankr. S.D. Tex. 2008).
12. *In re Padilla*, 2006 WL 2090210, at *1 (Bankr. S.D. Tex. June 26, 2006).
13. *In re Parrish*, 326 B.R. 708, 719 (Bankr. N.D. Ohio 2005). *See also In re Hughes*, 313 B.R. 205, 210 (Bankr. E.D. Mich. 2004).
14. A person making a false oath on a POC is subject to a penalty of up to five years in prison. 18 U.S.C. § 157.
15. 1 U.S.C. § 105. *See also In re Thomas*, 337 B.R. 879, 888 (Bankr. S.D. Tex. 2006), *aff'd*, 223 F. App'x 310, 315-16 (5th Cir. 2007).

Deciphering Mortgage Proofs of Claim

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Most chapter 13 bankruptcy debtors are homeowners, and many of these homeowners are in default on their mortgage obligations when they seek bankruptcy relief. Sections 1322(b)(5) and 1322(c)(1) provide these debtors with the opportunity to cure defaults on long-term mortgage loans secured by their principal residence by paying, in full, any pre-petition arrearage amounts. Arrearage amounts consist of any missed regular payments, escrow account payments, late fees and other charges permitted under the mortgage note.

Mortgage creditors who wish to receive distributions from the chapter 13 trustee must file a proof of claim. Chapter 13 trustees pay the mortgage creditors any arrearage amounts that are established in a proof of claim.¹ A properly executed and timely proof of claim constitutes *prima facie* evidence of the validity and the amount of the claim. Creditors who file claims are required to use Official Form 10 or a substantially similar document. Form 10 directs creditors to attach an itemized statement if their claim “includes interest or other charges” in addition to the principal amount. This requirement will apply to nearly all residential mortgage claims. Federal Rule of Bankruptcy Procedure 3001 imposes two additional evidentiary requirements for proofs of claim: a copy of the writing, if one evidences the claim, and evidence of perfection if the creditor asserts a security interest in the property of the debtor.

Applied to residential mortgage transactions, Rule 3001 requires the creditor to attach the promissory note and mortgage or deed of trust. This trio of documentation permits all parties in a bankruptcy case—debtor, trustee, other creditors, and courts—to ensure the accuracy and legality of the claim.²

Without this documentation, it is nearly impossible to verify that the claim is correctly calculated and that it only reflects amounts due under the terms of the note and

¹ In addition, over half of chapter 13 trustees also pay the ongoing mortgage payments (often called “conduit” districts).

[†] Since the publication of this piece, the Rules Committee has proposed amendments to Rule 3001 and a new Rule 3002.1. The new rules alter the supporting documentation required for claims filed in a bankruptcy case of an individual debtor and would require additional notices for claims secured by a security interest in the debtor's principal residence.

² In a recent national study of mortgage claims in bankruptcy more than 50% of all claims filed by mortgagees were missing one or more of these documents. See Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 2008. deciphering mortgage claims can still be challenging. The information below is intended to help unravel the mysteries of mortgage proofs of claim.

mortgage and permitted by applicable law. Even when these documents are attached,

Mystery #1: Who Is the Creditor?

In today's mortgage market, the identity of the mortgage creditor is not always apparent.³ Most mortgages are sold or otherwise transferred to another entity shortly after origination. As a result, the mortgage holder frequently will not be the bank or mortgage company that is listed on the note or mortgage. Instead, a majority of loans are securitized. The securitization process involves pooling mortgage loans, transferring those obligations to a trust, and then selling fractional interests in the trust's pool of mortgages to investors. The relationship of the parties to the securitization is typically governed by a pooling and servicing agreement (PSA). Securitized loans account for roughly 70 to 75 percent of all outstanding residential mortgages.⁴

The right to service mortgage loans may be sold or transferred independently of the loans themselves. Commonly, the originating lender retains the servicing rights when it sells a mortgage loan. Such a lender would be considered both the originator and servicer, but not the current creditor, or holder, of the loan. In these cases, however, borrowers may never know that the ownership of their mortgage loans has changed.⁵ The following section describes key players involved in most residential mortgages transactions. Understanding the role of each player will assist counsel in distinguishing the actual mortgage creditor from its agents.

Mortgage Loan Originator: The mortgage loan originator is the entity whose name appears as the lender on the loan note and mortgage.⁶

Mortgage Loan Holder: The mortgage holder is the entity that currently holds the borrower's note. This is the party that has the present right to receive payments on the note and to foreclose and should be listed as the "Creditor" on the proof of claim. If the loan has been securitized, the holder will be the trustee of the trust of the pooled loans

Mortgage Servicer: In general, the servicer collects the monthly payments from

³ See *In re Hayes*, 2008 WL 3870820 (Bankr. D. Mass. 2008) ("The mortgage lender, its affiliates, assignees, and agents involved in this case, through the convoluted process of securitization, the submission of a 191-page, incomplete PSA, and reliance upon backdated, unrecorded assignments, have confounded the identity of the current holder of the mortgage"); see also *In re Nosek*, 386 B.R. 374 (Bankr. D. Mass. 2008).

⁴ "Mortgage Liquidity du Jour: Underestimated No More," Credit Suisse, p. 28 (Mar. 13, 2007).

⁵ While the Real Estate Settlement Procedures Act requires that borrowers be notified when their loan servicer changes, there are no laws or regulations requiring disclosure to the borrower when a mortgage loan has been sold to another entity. However, the Truth In Lending Act contains a provision that requires the loan servicer to tell the borrower who the holder of the mortgage is. 15 U.S.C. § 1641(f).

⁶ For some loans, the Mortgage Electronic Registration System (MERS) appears as the mortgagee of record or beneficiary of the deed of trust as "nominee" for the loan originator. (e.g., Deutsche Bank National Trust Company as Trustee for the MLMI Trust Series 2005-SL1 or JPMorgan Chase Bank, N.A. as trustee, C-Bass Mortgage Loan Asset Backed Certificates, Series 2004-CB).

homeowners and interacts with homeowners on the holder's behalf. It also holds funds in escrow to pay the property taxes and homeowner's insurance and remits these payments to the appropriate entities.

Securitized loan pools may have several layers of servicers. For example, the primary servicer will collect monthly payments and interact with the homeowner; the special servicer is often responsible for nonperforming loans and real estate owned assets; and, the master servicer oversees both the primary and special servicer, ensures a smooth transition between the two servicer when a transfer is necessary and is charged overall with protecting the interest of the investors.

In consumer bankruptcies, servicers are often responsible for filing a proof of claim on behalf of the holder.⁷ However, when the servicer files the proof of claim the holder of the mortgage loan should be listed as the creditor and the servicer should indicate that it is acting as agent for the creditor.⁸

Mortgage Electronic Registration System (MERS): MERS is an electronic registry and clearinghouse established to track ownership and servicing rights in mortgages. MERS was developed by the lending industry to reduce the costs associated with the recordation of assignments in connection with the bulk transfer of mortgage loans on the secondary market. Sometimes MERS is designated the original mortgagee of record as the "nominee" for the originator. Other times the mortgage is assigned to MERS after the loan has closed.

Once MERS is the mortgagee of record, all subsequent assignments will not be recorded in the public records. Instead MERS will internally track all the changes in ownership and servicing rights. Borrowers can receive information about the servicer of their loan from MERS, but MERS generally will not disclose the name of the holder to the borrower. Because MERS generally has no legal or beneficial interest in the promissory note, courts have differed on whether MERS may prosecute a foreclosure or pursue a motion for relief from stay solely as "nominee" for the holders.

Mystery #2: How much is owed?

Although the purpose of a proof of claim is to establish the amount of the debt, many mortgagees' claims are hard to decipher. Accurate and complete proofs of claim filed by mortgagees will provide a breakdown of both the total debt and the pre-petition arrearages. Many of the line items in the total debt and arrearage itemizations will be the same. The pre-petition arrearage amount is what must be paid, in full, through the chapter 13 plan to cure the default. The following is a glossary of terms commonly found on proofs of claim filed by mortgagees.

⁷ A creditor is the person, corporation, or other entity owed a debt by the debtor. *See* 11 U.S.C. § 101(10). Rule 3001(b) permits an authorized agent of the creditor to execute a proof of claim.

⁸ *Compare In re Huggins*, 357 B.R. 180 (Bankr. D. Mass 2006) *with* *LaSalle Bank Nat. Ass'n v. Lamy*, 824 N.Y.S.2d 769 (N.Y. Sup. Ct. 2006)(unreported table decision).

Total Debt: The total debt represents the entire amount of the creditor's claim at the time of the petition. The amount includes the outstanding principal, accrued interest, escrow deficiencies, late fees and any other charges to the account. This amount should be listed as the "Amount of Claim on Date Case Filed" (Box 1) on Official Form 10. This amount should correspond with the "Amount of Claim without deducting the Value of Collateral" on the debtor's Schedule D.

Arrearage: The arrearage amount includes all past due payments of principal and interest, all past due escrow account payments, and any reasonable costs and fees incurred by the holder and recoverable against the debtor. For secured mortgage loans, the arrearage amount is indicated as the "Amount of arrearage and other charges as of time case filed included in secured claim, if any \$" (Box 4) on Official Form 10.

Principal: The sum of money outstanding on the mortgage loan and upon which interest is payable. In many cases the principal amount of the loan will be less than the original amount of the note because some portion of the borrower's monthly payments have been applied to the principal. There are, however, some types of loans, such as interest-only loans and option adjustable rate mortgages, for which the principal balance will be the same or greater than the original note amount.

Accrued Interest: Interest earned for the period of time that has elapsed since interest was last paid.

Escrow Payments: The creditor's claim should include any missed pre-petition escrow payments for loans with established escrow accounts.⁹ Often the number of missed escrow payments is equal to the number of missed principal and interest payments. Servicers will frequently use the terms "escrow deficiency" or "escrow shortage" on proofs of claim. The two terms have distinct meaning under the Real Estate Settlement Procedures Act and neither is equivalent to the missed pre-petition escrow payments.¹⁰ A deficiency may appear in the total indebtedness section but not in the arrearage amounts because escrow amounts are already accounted for in the missed monthly payments. It is also possible, though less common, for the debtor to have an escrow surplus, which may be indicated as a negative number on the proof of claim.

Escrow Advances: For mortgage loans without escrow accounts, the escrow advances or escrow deficiency is typically the amount of negative balance resulting from actual

⁹ Campbell v. Countrywide Home Loans, Inc., 2008 WL 3906382 (5th Cir. Tex.2008)(debtor's escrow payments that were due pre-petition were part of the creditor's claim).

¹⁰ Regulation X defines a deficiency as the "amount of a negative balance in an escrow account." 24 C.F.R. § 3500.17(b). A "shortage" is defined as an "amount by which a current escrow account balance fall short of the target balance at the time of the escrow analysis." 24 C.F.R. § 3500.17(b). A debtor with an escrow shortage will still have a positive balance in their escrow account.

disbursements made on the debtor's behalf for taxes, insurance, etc.

Suspense Balance (Unapplied Funds): A suspense account is a catch-all account used to temporarily put funds that are in "suspense" until the servicer makes decision on how to permanently allocate or apply them. The suspense account is often used to hold any payments received from debtors that are for less than the full amount due or to hold payments received while account is in default. Suspense accounts must be authorized by the underlying mortgage documents. The suspense balance should appear as a negative number on the proof of claim. In bankruptcy cases, servicers may also create a trustee suspense account where payments from the trustee are held prior to being applied to the borrower's account.

Late Charge: Fee charged to borrower's account when the monthly payment is made after due date (usually ten to fifteen days after due date). The amount of the late charge is specified in the promissory note.¹¹ In some cases the late charge will be a percentage of the principal and interest payment (e.g., 5-10%), and in other cases the late charge may be a flat fee (e.g., \$35).

Appraisal: An estimate of the value of property made by a qualified professional called an "appraiser." Appraisals can vary in price depending upon whether it contains a full report with a market analysis involving comparable sales and a walk-through of the property or whether it is a simple "drive-by." Full appraisals for residential property generally range from \$350-\$550.

Broker's Price Opinion (BPO): Evaluation of property value typically based on drive-by exterior examination, public data sources, and recent comparable sales, obtained by a servicer after loan is placed in default status or upon loan modification, as an alternative to full appraisal. BPOs typically range in price from \$50 to \$100. While the standard mortgage loan documents generally permit lenders to recover costs of BPOs, courts have questioned the reasonableness and necessity of multiple BPOs where there is no evidence of any change in circumstances between them.¹²

Property Inspection Fee: Fee charged to the borrower for inspections (usually drive-by) to determine the physical condition or occupancy status of mortgage property. Borrowers are typically charged \$8 to \$15 per inspection. Often these fees are imposed repeatedly once account is placed in default status because they are automatically ordered by a servicer's software system. Some courts have found that such inspections are neither reasonable nor necessary or that such inspections without advance notice to the borrower do not comply with the underlying mortgage loan contract.¹³ Property inspection fees are

¹¹ If a copy of the promissory note is not attached to the Proof of Claim as required by Rule 3001, it will be difficult, if not impossible, to determine whether the amount of late fees are correct.

¹² See *In re Stewart*, 391 B.R. 327 (Bankr. E.D. La. 2008)(disallowing fees for BPOs that were duplicative, that were allegedly conducted while the parish in which the property was located was under an evacuation order, or that were allegedly conducted after property was sold at foreclosure).

distinguishable from property protection costs incurred to preserve the value of the property (*e.g.*, winterizing, replacing or repairing locks, boarding or replacing windows).

Foreclosure Costs/Fees: Disbursement for attorney fees and other costs (*e.g.*, publication, sheriff's costs, filing fees, service of process, etc.) associated with collection or foreclosure. A reasonable amount for foreclosure costs and fees will vary dramatically depending on the stage of foreclosure the property was in at the time the homeowner filed for bankruptcy. Foreclosure costs and fees also vary depending on whether a state is a judicial or non-judicial foreclosure state and on state law itself. Generally, foreclosure fees and costs must be reasonable and actually incurred before they are recoverable against the borrower.¹⁴

Bankruptcy Fee: A post-petition, pre-confirmation fee charged to the borrower by the servicer as a result of the bankruptcy filing by the borrower. This is often a flat fee included in the claim amount listed on proof of claim filed by servicer in chapter 13 or added to account as recoverable expense or corporate advance. These fees may also be called POC Fees, Bankruptcy Monitoring Fees, or Plan Review Fees. The range for these fees is \$150-\$550. Courts have differed on whether such fees are recoverable by the servicer.¹⁵ Where such fees are recoverable, some courts require servicers to file Rule 2016 disclosures.¹⁶

Force Placed Insurance: Hazard insurance purchased by servicer on borrower's home (typically covering only lender's interest) when policy purchased directly by borrower on non-escrow mortgage account has lapsed or when servicer contends that borrower has failed to provide proof of insurance coverage.

Corporate Advance: Disbursement for servicing-related expenses (not escrow expenses) paid with servicer funds rather than escrow funds, to be recovered from borrower. Corporate advances may include foreclosure expenses, attorney fees, bankruptcy fees, force placed insurance, and so forth. It is preferable for corporate advance amounts to be itemized so that the debtor, trustee and court can determine whether such fees are appropriate.

Statutory Expense: Any tax, special assessment, or other charge imposed by federal, state, or local taxing authority or other governmental entity. Generally does not refer to

¹³ See *In re Stewart*, 391 B.R. 327 (Bankr. E.D. La. 2008)(finding that automatically generated property inspections conducted on wrong property, and even when conducted on correct property, were never reviewed by servicer).

¹⁴ See *Korea First Bank v. Lee*, 14 F. Supp. 2d 530 (S.D.N.Y. 1998)(lender not entitled to recover more than it paid its attorney or more than what was reasonable); *In re Riser*.

¹⁵ Compare *In re Marks*, 2005 WL 4799326 (Bankr. W.D. La. Nov. 30, 2005)(disallowing proof of claim fee because it was an administrative function not requiring an attorney) with *In re Moye*, 385 B.R. 885 (Bankr. S.D. Tex. 2008)(allowing \$200 fee for preparation of proof of claim) with *In re Conde-Dedonato*, 391 B.R. 247 (Bankr. E.D.N.Y. 2008)(permitting creditor to recover \$200 plan review fee and \$150 proof of claim fee).

¹⁶ See, *e.g.*, *In re Sanchez*, 372 B.R. 289 (Bankr. S.D. Tex. 2007)(post-petition, preconfirmation fees disallowed where creditor failed to disclose fees and file Rule 2016 applications).

taxes paid through escrow account but rather corporate advances to cover such charges when account is in default or property facing tax sale, or following a foreclosure.

Payoff Fee: Fee charged to borrower for providing statement of amount required to pay off loan.

Fax fee: Fee charged to borrower for faxing payoff statement or other information to the borrower. Other similar fees may include email fees and overnight delivery fees. As with other fees charged to the debtor's account these fees must be reasonable under the circumstances.



MORTGAGE PROOF OF CLAIM CHECKLIST

Client's Name: _____ Case Number: _____

Date Case Filed: _____

Was there a previous case? ☐ Yes ☐ No ☐ If yes, case number: _____

MORTGAGE SERVICER: _____

Date Proof of Claim filed: _____ ☐ Note attached (Rule 3001) ☐ Mortgage attached (Rule 3001)
☐ Itemization of fees attached (Form 10) ☐ Itemization of fees includes "Other" or "Misc." (request explanation)
☐ Itemization of fees includes interest on pre-petition arrears ☐ Is Note a Scheduled Payment Mortgage Note?

Amount of pre-petition interest: _____

☐ 1st Amended Proof of Claim filed: _____ ☐ 2nd Amended Proof of Claim filed: _____
☐ 3rd Amended Proof of Claim filed: _____ ☐ 4th Amended Proof of Claim filed: _____

<input type="checkbox"/> First Lien	<input type="checkbox"/> Refinanced	<input type="checkbox"/> Fixed Rate
<input type="checkbox"/> Second Lien	<input type="checkbox"/> FHA	<input type="checkbox"/> Escrow Loan
<input type="checkbox"/> Third Lien	<input type="checkbox"/> VA	<input type="checkbox"/> Interest Only
<input type="checkbox"/> Fourth Lien	<input type="checkbox"/> Conventional	<input type="checkbox"/> Pick-a-Pay
<input type="checkbox"/> Home Equity Loan	<input type="checkbox"/> ARM	
<input type="checkbox"/> Home Improvement Loan	<input type="checkbox"/> Balloon Note	
<input type="checkbox"/> HELOC loan	<input type="checkbox"/> Loan matured or loan will mature during Chapter 13	

NOTE INFORMATION:

Date of Note: _____ (Post 1994 - no interest on arrears)

Scheduled Payment Mortgage? _____

Date 1st payment due under the note: _____

Who is the payee in the note? _____

Does it differ from party filing POC? ☐ Yes ☐ No
If yes, request copies of the Assignment(s).

Are there any loan modifications? ☐ Yes ☐ No If yes, request copies of the loan modification.

Fixed Interest Rate: _____% (ARM Loans go to next line) Loan Amount: \$ _____

ARM Loans: Initial Interest Rate: _____% Margin _____ Index _____
(Add index + margin to get the fully indexed interest rate)

How often can loan reset? _____ ARM Interest Rate Cap: _____%

Initial Payment Amount: _____ 1st change date: _____

1 st Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____
2 nd Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____
3 rd Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____
4 th Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____
5 th Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____
6 th Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____
7 th Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____
8 th Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____
9 th Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____
10 th Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____
11 th Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____
12 th Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____
13 th Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____
14 th Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____
15 th Reset Date: _____	Int. Rate: _____	% P&I \$ _____	Escrow \$ _____	Total \$ _____

(If there are additional reset dates, use separate page.)

Request rate adjustment letters.

Are any delinquent payments time barred? ☐ Yes ☐ No If yes, which ones: _____

Payment Analysis:

Number of payments _____	X monthly mortgage payment \$ _____	= Total of Payments Due \$ _____
Number of payments _____	X monthly mortgage payment \$ _____	= Total of Payments Due \$ _____
Number of payments _____	X monthly mortgage payment \$ _____	= Total of Payments Due \$ _____
Number of payments _____	X monthly mortgage payment \$ _____	= Total of Payments Due \$ _____
Number of payments _____	X monthly mortgage payment \$ _____	= Total of Payments Due \$ _____
Number of payments _____	X monthly mortgage payment \$ _____	= Total of Payments Due \$ _____

Does this agree with amount in Proof of Claim? ☐ Yes ☐ No

Does monthly payment in Proof of Claim include escrow? ☐ Yes ☐ No

Is there a separate escrow shortage amount included in Proof of Claim? ☐ Yes ☐ No

Is there a separate escrow advance amount included in Proof of Claim? ☐ Yes ☐ No

Is Proof of Claim collecting escrow twice (separate line item and in mortgage payments)? ☐ Yes ☐ No

LATE FEES:

_____ % allowed to charge = \$ _____ per month

Number of months late: _____ X \$ _____ late fee = Total Late fees allowed. (Note: If ARM - will need to calculate for each adjustment period.)

Amount in Proof of Claim \$ _____ ☐ Late fee amount in Proof of Claim is incorrect

ESCROW:

☐ Taxes ☐ Insurance ☐ Homeowners Association

When did escrow payments begin? _____

Insurance paid by:

☐ Servicer ☐ Homeowner

Forced place insurance ☐ Yes ☐ No

If yes, did client have insurance while forced place insurance in effect? ☐ Yes ☐ No

If yes, request proof of insurance and proof of payment of premiums from client.

Taxes paid by: ☐ Servicer ☐ Homeowner

If paid by Servicer, were they paid timely? ☐ Yes ☐ No
(If no, may have claim against Servicer for any penalties and interest charged)

- ☐ Request Tax Statements from Taxing Authority
☐ Request Tax Statements and canceled checks from servicer.

Was loan transferred? ☐ Yes ☐ No If so, when? _____

Need RESPA request ☐ Yes ☐ No If yes, date sent: _____ 60 Business Day Date _____

LEGAL FEES AND COSTS:

Pre Bankruptcy \$ _____
Post Bankruptcy \$ _____
Prior Bankruptcy \$ _____

If there is a prior case - pull Trustee ledger and compare to payment to payment history.
Were Trustee payments applied to loan or put in suspense? _____
If placed in suspense, were they used to pay other fees? ☐ Yes ☐ No
Were Trustee *interest* payments posted in payment history? ☐ Yes ☐ No
If no, how much was paid in interest by the Trustee? (Request copies of canceled checks from Trustee.)

Were the prior fees approved by the Court? ☐ Yes ☐ No (Check agreed orders and other documents in prior cases). (Verify the dollar amount requested in this case is the same agreed to in prior case, i.e., Agreed Order in previous case allowed \$600.00 for fees and costs but now they are claiming \$750.00 for the same Agreed Order).

- ☐ Request copies of invoices to support legal fees and costs.
Do they match the amount in the proof of claim? ☐ Yes ☐ No
Do they match the amounts on the payment/transaction history? ☐ Yes ☐ No

Miscellaneous Matters:

Property Inspections \$ _____ Request copies of invoices and reports to support charges
BPO fees \$ _____ Request copies of invoices and reports to support charges.

Can loan be crammed-down? ☐ Yes ☐ No

Is loan pooled? If so, name of trust _____
Check for Pooling and Servicing Agreement on EDGAR
Did Servicer offer all the options allowed by agreement to assist debtor with delinquency? ☐ Yes ☐ No
MERS Loan Number _____

Are attorneys that filed Proof of Claim licensed in North Carolina? ☐ Yes ☐ No

Double check and triple check math in Proof of Claim for errors. For example, number of months for late fees vs. number of months charged. (Mtg.co. lists 4 late payments but only lists April, May & June for late payments due)
Does the P&I payment match the amount in the note and/or adjustment rate letters?

Law firm filing Proof of Claim _____ Is it different from firm filing Notice of Appearance? ☐ Yes ☐ No

Any forbearance agreements? If so, need copies.

Any fees for pay off statements? ☐ Yes ☐ No If yes, does it violate Texas Administrative Code? ☐ Yes ☐ No

Is any language in Proof of Claim objectionable? Need to object? ☐ Yes ☐ No

Object to Proof of Claim ☐ Yes ☐ No

Request following documents:

Life of Loan Transaction History

Manual XLS Life of Loan History

Transaction Codes

Code Definitions in Plain English

Itemized Payoff Statement

Note

Mortgage/Deed of Trust

HUD-1 Settlement Statement

Truth-in-Lending Disclosure

Good Faith Estimate of Settlement Costs

Notices of Right to Rescind

Copies of Assignments

Forebearance Agreements/Loan Modifications

ARM Rider

*Home Equity Line of Credit Agreement

*Notice of Right to Cancel

*HOEPA Disclosures

* If Applicable.

Did mortgagee calculate the arrears of principal/interest correctly?

Did mortgagee calculate escrow account shortage, if any, correctly?

Did the mortgagee include impermissible escrow account fees?

Did mortgagee charge impermissible fees? Attorney fees, property preservation/inspection fees, foreclosure fees, other fees

403 S Washington Street
PO Box 1000
Shelby, NC 28151-1000



704.487.0616 (voice)
704.487.0619 (fax)
maxgardner@maxgardner.com

Date

Creditor
Address

RE: **Proof of Claim**
Debtor(s):
Bankruptcy Case No. :
Amount of Claim: \$_____

Dear Creditor:

We are in receipt of your Proof of Claim filed on _____. The Debtor(s) in this case:

- ☐ Does not recognize or acknowledge the debt;
- ☐ Disputes the amount alleged to be due and owing;
- ☐ Reserves the right to object to the claim based on applicable statute of limitations on collections;
- ☐ Other: _____

At this time we are requesting verification of the debt as follows:

- ☐ FULL ACCOUNTING ON THE DEBT (including all accrued interest, late fees, over the limit fees, attorney or collection fees and costs);
- ☐ DATE OF LAST ACTIVITY, CHARGE OFF DATE AND DATE OF ASSIGNMENT (IF APPLICABLE);
- ☐ COPIES OF THE CREDIT APPLICATION AND/OR AGREEMENT;
- ☐ COPIES OF ALL BILLING STATEMENTS;
- ☐ COPIES OF DOCUMENTS IN SUPPORT OF PROOF OF OWNERSHIP, ASSIGNMENT;
- ☐ COPIES OF ALL INVOICES FOR LEGAL FEES/COLLECTION COSTS ADDED TO THIS ACCOUNT;
- ☐ OTHER: _____

If we do not receive a response within **15 days** from the date of this letter, we will file an objection with the Court and set the matter for hearing. Should you have any questions concerning this matter, please feel free to contact me at the above listed number.

Sincerely,

O. Max Gardner III
Attorney for Debtor

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**OBJECTION TO PROOF OF CLAIM
PURSUANT TO RULE 3001(C)**

COME NOW the above-named debtors, by and through their attorney of record, O. Max Gardner, III, pursuant to Rule 3007 of the Rules of Bankruptcy Procedure and respectfully object to the Proof of Claim filed in this case by the above named creditor and in support hereof respectfully show unto the Court the following:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. Citibank USA, N.A. as issuer, service provider or purchaser of the account from Sears, Roebuck and Co. and/or Sears National Bank (hereinafter "Citibank") filed a purported proof of claim in the amount of \$1,123.65 for "money loaned" (designated as neither secured nor unsecured.)

3. The debtors object to the filing of the said Proof of Claim on the basis that the Proof of Claim was not supported by any written documents, notes, credit applications, account statements, or any other type of written or printed document.

4. Rule 3001(c) of the Bankruptcy Rules provides that when "a claim is based on a writing" the "original or a **duplicate shall be filed with the proof of claim.**" The claim filed by Citibank in this case is fatally defective for failure to comply with this mandatory Rule.

5. The debtors further object to the filing of the said proof of claim on the basis that no Notice of Assignment, Transfer or Sale of the said claim has been filed.

WHEREFORE, the debtors pray of the Court as follows:

- A. That the Court direct the Chapter 13 Trustee to strike the claim of Citibank;
- B. That Citibank be precluded from filing any amended, modified or substitute claim in this case;

C. That the underlying debt be canceled and forever discharged whether or not the debtors receive their Discharge Order in this case;

D. That Citibank be required to pay the sum of \$500.00 in legal fees and expenses to O. Max Gardner III, the attorney for the debtors*; and

E. That the debtors have such other and further relief as the Court may deem just and proper.

This the _____ day of _____, 2008.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

* If the debtor is seeking legal fees or damages, you must file an Adversary Proceeding pursuant to Rule 3007(b)

RULE 3001. Proof of Claim

Effective December 1, 2011

* * * * *

(c) SUPPORTING INFORMATION.

(1) Claim Based on a Writing. When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) Additional Statements Required.

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses or other charges incurred prior to the date of the petition, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in property of the debtor, the proof of claim shall include a statement of the amount necessary to cure any default as of the date of the petition.

(C) If a security interest is claimed in property that is the debtor's principal residence and an escrow account has been established in connection with the claim, the proof of claim shall be accompanied by an escrow account statement prepared as of the date of the filing of the petition, in a form consistent with applicable nonbankruptcy law.

(3) *Failure to Provide Supporting Information.* If the holder of a claim fails to provide the information required in subdivision (c) of this rule, the holder may not present that information, in any form, as evidence in any hearing or submission in any contested matter or adversary proceeding in the case, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, after notice and hearing, may award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

* * * * *

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR(S).

**OBJECTION TO PROOF OF CLAIM
FILED BY CITIFINANCIAL MORTGAGE COMPANY
AS A DUPLICATE CLAIM FILED BY RESURGENT CAPITAL SERVICES**

COME NOW the above-named debtor, by and through his attorney of record, O. Max Gardner III, pursuant to Rule 3007 of the Rules of Bankruptcy Procedure and respectfully objects to the Proof of Claim filed in this case by the above named creditor and in support hereof respectfully shows unto the Court the following:

1. This case was commenced by the filing of a petition with the Clerk of this Court on _____.

2. On or about _____, CitiFinancial Mortgage Company (hereinafter "CitiFinancial") filed a purported amended proof of claim in the amount of \$3,057.74 for "money loaned." The said claim purports to amend a previously filed claim dated _____ in the amount of \$2,519.39. This prior claim is identified on the Trustee's Claims Register as claim number 0010 and represents pre-petition mortgage arrears on the residential real estate of the debtor.

3. On or about _____, CitiFinancial filed with the Court a Notice of Transfer of Claim, or Change of Claimant Name and/or Address. As per the notice, the secured claim of CitiFinancial for the pre-petition mortgage arrears identified on the Trustee's Claims Register as claim number 0010 in the amount of \$2,519.39 was transferred to Resurgent Capital Services (hereinafter "Resurgent"). The debtor has serious reservations as to whether or not a creditor can bifurcate a single secured mortgage claim and sell and transfer the pre-filing arrears. Nonetheless, this is exactly what CitiFinancial has purported to do in this case.

4. The debtor objects to the filing of the said Proof of Claim on the basis that Proof of Claim filed by CitiFinancial is a duplicate of the claim allegedly transferred to Resurgent and therefore unenforceable pursuant to 11 U.S.C §502(b)(1). Furthermore, since CitiFinancial has transferred the claim to Resurgent it has on legal standing to amend the claim following the transfer.

5. The debtor further objects to the filing of the said Proof of Claim on the basis that the Proof of Claim is not prima facie valid because it is not supported by an appropriate

underlying writing. The Proof of Claim of CitiFinancial reflects that the basis for its claim is a security agreement, but no copy of the deed of trust and deed of trust note are attached. Instead, CitiFinancial Proof of Claim had only a summarized statement.

6. Rule 3001(c) of the Bankruptcy Rules provides that when "a claim is based on a writing" the "original or a duplicate shall be filed with the proof of claim." The claim filed by CitiFinancial in this case is fatally defective for failure to comply with this mandatory Rule.

WHEREFORE, the debtor prays of the Court as follows:

A. That the Court direct the Chapter 13 Trustee to strike the claim of CitiFinancial;

B. That CitiFinancial be precluded from filing any amended, modified or substitute claim in this case;

C. That the underlying debt be canceled and forever discharged whether or not the debtor receives his Discharge Order in this case;

D. That CitiFinancial be required to pay the sum of \$750 in legal fees and expenses to O. Max Gardner III, the attorney for the debtor*; and

E. That the debtor have such other and further relief as the Court may deem just and proper.

This the _____ day of _____, 2008.



O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (888) 870-1647
e-mail: maxgardner@maxgardner.com

*** If the debtor is seeking legal fees or damages, you must file an Adversary Proceeding pursuant to Rule 3007(b)**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**OBJECTION TO PROOF OF CLAIM
AS NOT TIMELY FILED**

COME NOW the above-named debtors, by and through their attorney of record, O. Max Gardner, III, pursuant to Rule 3007 of the Rules of Bankruptcy Procedure and respectfully object to the Proof of Claim filed in this case by the above named creditor and in support hereof respectfully show unto the Court the following:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. World Omni Financial Corp. ("World Omni") was granted relief from stay to repossess the debtors' 1997 Dodge Ram 1500 Truck, by an Order that was entered by this Court on _____. The Order provided for 30 days for World Omni to file a deficiency claim.

5. World Omni filed a Proof of Claim for its deficiency claim in the amount of \$5,879.27 on or about _____, nearly two years following the entry of the order.

6. The debtors object to the filing of the said Proof of Claim on the basis that the deficiency claim was not timely filed and is barred by the 30 day time period established in the Order.

WHEREFORE, the debtors pray of the Court as follows:

A. That the Court direct the Chapter 13 Trustee to strike the claim of World Omni;

B. That World Omni be precluded from filing an amended, modified or substitute claim in this case;

C. That the attorney for the debtors be allowed his attorney fees and expenses in the amount of \$350.00 to be paid by World Omni or through the plan of the debtors at the discretion of the Court*; and

D. That the debtors have such other and further relief as the Court may deem just and proper.

This the _____ day of _____, 2008.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
maxgardner@maxgardner.com

*** If the debtor is seeking legal fees or damages, you must file an Adversary Proceeding pursuant to Rule 3007(b)**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**OBJECTION TO PROOF OF CLAIM
DUE TO IMPROPER UNAUTHORIZED FEES AND CHARGES**

COME NOW the above-named debtors, by and through their attorney of record in this case, O. Max Gardner, III, pursuant to Rule 3007 of the Rules of Bankruptcy Procedure and respectfully object to the Proof of Claim filed in this case by Chase Manhattan Mortgage Corporation ("Chase") and in support hereof respectfully show unto the Court the following:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.
2. The 341(a) meeting of creditors was held on in Shelby, North Carolina, on _____.
3. The Chapter 13 plan was subsequently confirmed by order of this Court.
4. Chase filed a proof of claim in this case for a secured claim for the mortgage and the mortgage arrears in the amount of \$71,821.16 and \$14,027.59 respectively. The proof of claim includes arrears for 23 months, "Prior BK fees and costs" in the amount of \$822.47, "Prior Foreclosure Fees" of \$330.00 and "Prior Foreclosure Costs" in the amount of \$200.74, and \$500.00 in legal fees and expenses for the preparation of the proof of claim. In addition, Chase purports to "reserve the right to charge additional fees to the mortgage loan during the course of this case."
5. The debtors' petition in this case provided for the payment of \$4081.86 in arrears and the debtors allege that the proof of claim grossly overstates the debtors' default.
6. The debtors allege that Chase's proof of claim is padded with illegal charges, designed to extract additional and substantial profits from the servicing of the debtors' mortgage loan and from the property of this bankruptcy estate to the detriment of the debtors and unsecured creditors with filed and allowed claims.
7. Furthermore, Chase failed to attach any supporting written or printed documentation to support its claim for this substantial default, in violation of Rule 3001(c), and the claim is therefore improper.

8. The debtors are also informed and believe and therefore allege that the alleged "bankruptcy legal" fees included in the proof of claim are not reasonable or necessary, are not supported by time and expenses records, and have been claimed in violation of Section 506(b) of the Code and Rule 2016(a) of the Bankruptcy Rules.

9. The debtors are therefore objecting to the proof of claim filed by Chase.

WHEREFORE, the debtors pray of the Court as follows:

A. That the Court direct the Chapter 13 Trustee to strike the arrearage claim of Chase;

B. That Chase be precluded from filing any amended, modified or substitute claims in this case;

C. That Chase be required to pay reasonable legal fees and expenses to O. Max Gardner III, the attorney for the debtors, for the filing of an improper pleading in this case, in the amount of \$500.00*; and

D. That the debtors have such other and further relief as the Court may deem just and proper.

This the _____ day of _____, 2008.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
maxgardner@maxgardner.com

*** If the debtor is seeking legal fees or damages, you must file an Adversary Proceeding pursuant to Rule 3007(b)**

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**OBJECTION TO PROOF OF CLAIM
(Statute of Limitations)**

NOW COME the above-named Debtors, by and through their attorney of record, pursuant to 11 U.S.C. Section 502(b) and Bankruptcy Rule 3007, and respectfully object to the proof of claim filed by the entity identified as WEST HEALTHCARE RECEIVABLE MANAGEMENT, LLC, and dated March 26, 2008, for the following reasons:

1. The purported entity, West Healthcare Receivable Management, LLC., allegedly acting in some unknown capacity for Tenet Patient Financial Services, Inc., West Asset Management, Inc. and MEDCLR Hospital Portfolio, LLC., filed an unsecured proof of claim in the amount of \$4,353.59 in the above case.
2. According to the Declaration of Mary Beth Corcoran, explaining missing documentation and attached to the filed proof of claim, West Healthcare Receivable Management, LLC., and MEDCLR Hospital Portfolio LLC., purchased this "credit card" debt from Tenet Patient Financial Services, Inc., on or about "00/00/0000," which is the same date listed as the date the debt was incurred. Obviously the date of "00/00/0000" is insufficient for the Debtors to ascertain their rights and defenses under 11 USC § 502(b)(1), and North Carolina General Statute § 1-52. Since no other date is provided on the face of the proof of claim or in any other attached documentation, the Debtors are unable to adequately proceed without further information being provided by the Claimant.
3. The Debtors also deny having any debt due to Tenet Patient Financial Services, Inc. for any debt incurred on any credit card, and allege that stating that a purported medical debt is a credit card debt is not harmless error, as under North Carolina law, the distinction between credit card debt and medical debt is significant, as it may change the applicable statute of limitations from when the statute begins to run pursuant to North Carolina General Statute § 1-52.
4. North Carolina General Statute § 1-52(1) provides in pertinent part that "absent a contract stipulating the date when payment is due, a cause of action for collection of payment for continuing medical treatment arises at the time the last treatment is provided" and any action to collect medical debt must be brought within three years of the last date of treatment, or within three years of the date of the last payment.
5. From the Declaration, and the documents attached to the proof of claim herein, not only is it impossible for the Debtors to ascertain when this purported "credit card" debt was incurred, as the attached Declaration states it was purchased from the

alleged provider on 00/00/0000, but it is impossible for the Debtor to ascertain the basis of the debt; where the debt was incurred; how the debt was incurred; if the debt includes any interest; if any payments have been made on this debt; the date of default, if any; if there are any co-debtors; or if a written contract exists, etc. These are all important considerations that the Debtors need to understand to adequately participate in the claim process.

6. While the Bill of Sale attached to the proof of claim purports to be between the Tenet Patient Financial Services, Inc., West Healthcare Receivable Management, LLC., and MEDCLR Hospital Portfolio, LLC. (which entity is not listed on the face of the proof of claim) and is dated November 13, 2007, said date does not purport to be the date that this specific debt was purchased, and there appears to be no other date or information in the Bill of Sale from which the Debtors can determine their rights under 11 USC 502(b)(1). The Bill of Sale also fails to identify the subject claim as one that was transferred thereby. The Claimant therefore has failed to establish a complete and unbroken chain of assignments and transfers from the originator of the alleged debt to the Claimant.
7. The relevant date of the debt is significant since jurisdictions vary as to the impact of the statute of limitation and as to whether it is an absolute bar to claims as it removes jurisdiction from the Court to hear the matter, and/or thus renders any order entered void *ab initio*, or whether it is an affirmative defense that must be raised or waived. North Carolina appears to be a jurisdiction that treats the statute of limitation as an affirmative defense that must be raised or waived, and not as a jurisdictional bar preventing the Court from entertaining the matter, thus the Debtors, to preserve their rights under North Carolina General Statute § 1-52, are required in all actions to raise the statute of limitation as an affirmative defense, or that defense will be waived, and the Debtors via *res judicata*, judicial estoppel, and/or claim preemption may be forever barred from raising this defense to this claim. While some may say that is not an important enough consideration at this stage in this case, as North Carolina does allow 0% plans, it is also a fact that the Chapter 13 completion rate in North Carolina is less than 100%, and under the Bankruptcy Abuse Prevention and Consumer Protection Act, effective October 17, 2005, if the Debtors are dismissed from this case, they may not be able to refile for relief under Title 11 for several years. Thus, if the Debtors fail to raise their North Carolina statutory required affirmative defenses in Bankruptcy Court, they may also be preempted from raising them in any state court action occurring after the Chapter 13 case is dismissed, thus permitting this claim to become an allowed claim pursuant to Title 11, could essentially be construed to be an act or revivor to the detriment of the Debtors who would otherwise be entitled to this defense.
8. The United States Supreme Court in Traveler Cas. and Sur. Co. V. Pacific Gas and Elec. Co. 127 S.Ct 1199, 167 L.Ed. 2d 178, 75 USLW 4131 (2007), held that applicable non-bankruptcy law does apply in bankruptcy cases, and 11 USC 502(b)(1) also states that claims may be disallowed if they cannot be enforced against a Debtor under applicable law. Also, In Re Michael Angelo Corry Inn, Inc., 297 B.R. 435 (W.D. PA 2003), the Bankruptcy Court held that applicable state statutes of limitations constituted applicable state law as it pertained to 11 USC 502(b)(1), and allowable claims in bankruptcy.
9. The Debtors hereby invoke their rights to the affirmative defense of the statute of limitations to the claim of West Healthcare Receivable Management LLC., in their unknown capacity for Tenet Patient Financial Services, Inc., MEDCLR Hospital Portfolio LLC., and West Asset Management, Inc., on the ground that the above creditors would not have a claim if the date associated with this proof of claim is more than three years past the date of last medical services provided, if this is a

medical debt or a credit card debt.

WHEREFORE, the Debtors respectfully request the Court to issue an order finding as follows:

1. That the Creditor be compelled to provide to the Debtors and the Court
 - a. sufficient information to determine the date the debt was incurred, as required on official form B10;
 - b. the basis for the debt;
 - c. the debt classification;
2. That the Court issue a written opinion to serve as future instruction for the above creditors to prepare any future proofs of claims; and
3. Any other such relief as the Court determines just and proper, including attorneys' fees for bringing this objection.

This the _____ day of _____, 2008.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

B10 (Official Form 10) (12/08)

UNITED STATES BANKRUPTCY COURT DISTRICT OF SOUTH CAROLINA		PROOF OF CLAIM
Name of Debtor Nathalie Grant		Case Number 10-00657-JEW-13
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property) Midland Credit Management, Inc.		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim. Court Claim Number: (If known) Filed on: _____
Name and address where notices should be sent: Midland Credit Management, Inc. 8875 Aero Drive, Suite 200 San Diego, CA 92123 Telephone number: 800-825-8131 Ext. 32986		
Name and address where payment should be sent (if different from above): Midland Credit Management, Inc. 8875 Aero Drive, Suite 200 San Diego, CA 92123 Telephone number: 800-825-8131 Ext. 32986		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check this box if you are the debtor or trustee in this case.
1. Amount of Claim as of Date Case Filed: \$ 2,669.91 If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4. If all or part of your claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest charges.		5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount. Specify the priority of the claim. <input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950),* earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(4). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(5). <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8). <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____). Amount entitled to priority: \$ _____ <i>* Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to case commenced on or after the date of adjustment.</i>
2. Basis for Claim: <u>Credit Card</u> (See instruction #2 on reverse side.)		
3. Last four digits of any number by which creditor identifies debtor: 5062/501841 3a. Debtor may have scheduled account as: Columbus Bank And Trust (See instruction #3a on reverse side.)		
4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information. Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: Value of Property: \$ Annual Interest Rate: % Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$ Basis for perfection: Amount of Secured Claim: \$ Amount Unsecured: \$ Creditor reserves the right to amend its claim to seek an unsecured deficiency balance, if any, and will amend its claim after such liquidation.		
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.		
7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See instruction 7 and definition of "redacted" on reverse side.) DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING. If the documents are not available, explain:		
Date: 02/09/2010	Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any. <div style="display: flex; justify-content: space-between;"> /s/ S. Blair Korschun ecfnotices@ascensioncapitalgroup.com </div>	

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**OBJECTION TO PROOF OF CLAIM
FILED BY THE INTERNAL REVENUE SERVICE AND
THE NORTH CAROLINA DEPARTMENT OF REVENUE**

COME NOW the above-named debtors, by and through their attorney of record, O. Max Gardner, III, pursuant to Rule 3007 of the Rules of Bankruptcy Procedure and respectfully object to the Proofs of Claim filed in this case by the above named creditors and in support hereof respectfully show unto the Court the following:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. The IRS filed a priority proof of claim in the amount of \$79,176.31 and an unsecured claim in the amount of \$3949.13. The North Carolina Department of Revenue filed a priority proof of claim in the amount of \$20,578.28 and an unsecured proof of claim in the amount of \$5179.44.

5. The debtors allege that these tax claims are based on estimated claims for quarterly taxes and that they filed returns for the subject periods. The debtors believed and therefore alleged in their petition that they owed \$30,569.93 to the IRS as a priority claim and \$7624.00 to the NCDOR as a priority claim.

6. The debtors therefore object to the Proofs of Claim of the IRS and the North Carolina Department of Revenue.

WHEREFORE, the debtors pray of the Court as follows:

A. That the Court direct the Chapter 13 Trustee to strike the Proofs of Claim of the IRS in the amount of \$79,176.31 (priority) and \$3949.13 (unsecured) and the North Carolina Department of Revenue in the amounts of \$20,578.28 (priority) and \$5179.44 (unsecured);

B. That the IRS and the North Carolina Department of Revenue be directed to file amended proofs of claim.

C. That the debtors have such other and further relief as the Court may deem just and proper.

This the _____ day of _____, 2008.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtors
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
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maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

Debtor.

)
)
) **CHAPTER 13 CASE NO.**
) **OUR FILE NO.**
)
)
)

**OBJECTION TO CLAIM
(re Lost Note Affidavit)**

NOW COMES the Debtor pursuant to 11 U.S.C. Section 502 and Bankruptcy Rule 3007(a) and respectfully objects to the proof of claim filed by WELLS FARGO BANK, NA ("Wells Fargo") and dated January 29, 2009, for the following reasons:

1. On or about December 26, 2008, Wells Fargo sent a Monthly Mortgage Statement (A copy of which is attached hereto and incorporated by reference as Exhibit A) to the Debtor showing a balance of \$92,032.61 payable at an interest rate of 6.875%.
2. Based on this Monthly Mortgage Statement, the principal balance as of January 26, 2009 should have been \$92,597.40, consisting of:
 - a. One month of accrued interest at 6.875% in the amount of \$527.27; and
 - b. A late fee of 4%, the maximum allowed by both the Deed of Trust and North Carolina law, of \$37.52.
3. On or about January 29, 2009, Wells Fargo, by and through its attorney, filed a sworn Proof of Claim asserting an outstanding principal balance of \$94,199.63, with no accounting or any other explanation for the \$1,602.23 in additional amounts assessed. (A copy of which is attached hereto and incorporated by reference as Exhibit B.)
4. The principal balance asserted in the Proof of Claim, in fact, may include at least one late fee for this period and other collateral charges and expenses.
5. Additionally, the Proof of Claim includes a document that is designated as a "Lost Instrument Affidavit," and was allegedly signed by Teresa J. Williams, who identifies herself as an employee of Wells Fargo.
6. The purported "Lost Note" Affidavit states that Ms. Williams: "Has caused to be made a diligent search of the records of Wells Fargo in an attempt to locate the original Promissory Note as described herein; however this document cannot be located."

7. Contrary to the requirements of Bankruptcy Rule 3001(c), however, this Affidavit does not include a “statement of the circumstances of the loss or destruction” of the original Promissory Note. The document is also not consistent with the mandatory provisions of Rules 1002 and 1004(1) of the Federal Rules of Evidence. In short, the affidavit is insufficient as a matter of Federal law to establish a legal foundation for the failure of Wells Fargo to produce the original of the note.
8. Further, while the attached Monthly Mortgage Statement from Wells Fargo indicates that the interest rate for this mortgage is 6.875%, the Deed of Trust attached to the Proof of Claim contains an Adjustable Rate Rider indicating that the interest rate for this note, varying between 10.5% interest and 20.5%.
9. Based in part on the discrepancy between the Monthly Mortgage Statement and the Proof of Claim, both prepared by Wells Fargo, there is sufficient cause to rebut the presumption of adequacy of the Proof of Claim filed by Wells Fargo.
10. Because the Debtor contests the amount claimed by said creditor in its Proof of Claim filed in this case, pursuant to Rule 34 of the Federal Rules of Civil Procedure and Rule 9014 of the Federal Rules of Bankruptcy Procedure, the Debtor is, by separate document attached herewith, requesting production from said creditor of a payment history and related documents and other relevant evidence. .

WHEREFORE, the Debtor prays that the Court enter an Order disallowing the Proof of Claim filed by Wells Fargo. Furthermore, the Debtor requests that, until such time as the aforementioned payment history is provided, the Court treat any hearing upon this Objection as preliminary, in accordance with the power vested in this Court pursuant to 11 U.S.C. 105(a).

Dated: _____

Gardner & Gardner PLLC

O. Max Gardner III
State Bar No: 6164
PO Box 1000
Shelby NC 28151-1000
704.487.0616
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

Debtor.

)
)
) **CHAPTER 13 CASE NO.**
) **OUR FILE NO.**
)
)
)

**REQUEST FOR PRODUCTION OF DOCUMENTS,
QUALIFIED WRITTEN REQUEST,
and
NOTIFICATION REQUESTING PAY-OFF**

To:
Wells Fargo
Mac X2501-01D
One Home Campus
Des Moines, NC 50328
(Certified Mail Return Receipt)

Wells Fargo
Post Office Box 660278
Dallas, TX 75266-0278
(Certified Mail Return Receipt)

Sean Corcoran
Attorney for Wells Fargo
Brock & Scott
5121 Parkway Plaza Drive, Suite 300
Charlotte, NC 28217-

ACCOUNT NUMBER: 80047*****

The Debtor above-named disputes the amount claimed by Wells Fargo as set forth in the Proof of Claim filed in this case, the Motion for Relief, and/or other subsequent communications with the Debtor, Debtor's attorney, or Chapter 13 Trustee. The Debtor believes that her account may not have been properly credited for certain payments and/or that fees, costs and charges have been assessed improperly and/or without authorization.

Pursuant to Federal Rules of Bankruptcy Procedure 9014 and Rules 34 and 26 (b) F.R.Civ.P., the Debtor requests you to respond within 30 days to the following requests by producing for inspection and copying by Debtor's Attorney at his offices located at 430 South Washington Street, Shelby,

NC 28150 (the Webbley House).

In addition, this request shall also be considered a qualified written request under the Real Estate Settlement Procedures Act, codified as 12 U.S.C. § Section 2605(e) and Reg. X Section 3500.21(e)(1). You should be advised that you must acknowledge receipt of this qualified written request within 20 business days, pursuant to 12 U.S.C. Section 2605(e)(1)(A) and Reg. X Section 3500.21(e)(1). You must then verify the accuracy of this account and provide the requested information within 60 business days.

Furthermore, this request shall also be considered a Notification Requesting Payoff Statement under N.C.G.S. § 45-36.7(a). You should be advised that you must provide this payoff within 10 days after the effective date of notification.

This request shall also be considered a Request for Verification of a Debt pursuant to 15 U.S.C. § 1692 g (b). You should be advised that you must provide this verification prior to the continuation of any collection activities, including, without limitation, a Motion for Relief from Stay or other litigation.

Lastly, this pleading is a request to identify the name, address and telephone number of the current holder and lawful owner of the Note as required by the Truth in Lending Act found at 15 U.S.C. § 1641(f)(2).

Instructions For Request For Production Of Documents

You may produce a photocopy in lieu of the original of any document or thing requested.

This is an ongoing Request For Production of all documents of things now in existence or hereafter obtained at any time prior to final entry of judgment in this case. Federal Rule of Bankruptcy Procedure 7034 and Rule 34 F.R.Civ.P. provide, among other things that: Documents falling within this Request which must be produced are those which are in possession, custody, or control of you or your agents. You or your agents need not presently have physical custody, as the right to ask for and receive the documents or things is sufficient for them to fall within the group of documents or things to be produced in response to this Request.

You must either produce the documents as they are kept in your usual course of business, such as in their file jacket, or you must compile, organize and label them to correspond to the categories in this Request. If you object to a Request, you must state the reason for objection in writing. If you object to part of a Request, you must specify the part. If you object on the ground that the information sought is beyond the scope of discovery, you must nevertheless answer the Request to the extent that it is not objectionable. If you respond to a request for discovery with a response that is complete when made, you are nevertheless under a duty to supplement the response to include information thereafter acquired. For instance, without limitation, you must supplement or amend your response, if you obtain information which shows (and failure to amend your response in light of such information is in substance a knowing concealment) your earlier response was incorrect when made, or your earlier response, although correct when made, is no longer true.

Definitions For Request For Production Of Documents

"Document", "writing" and "report" means any written or graphic matter or other means of preserving thought or expression and all tangible things in which information can be processed or transcribed including, but not limited to, correspondence, messages, telegrams, contracts, memoranda, studies, surveys, charts, drafts, books, financial statements, ledgers, transcripts, affidavits, tapes, tape recordings, video tapes or recordings, compact disk, optical disk, material read by laser scanning, computer disks, computer tapes, computer printouts, and information stored in data processing or retrieval systems, whether originals, copies of drafts, however produced or reproduced.

"You" means you and any predecessor-in-interest to the debt now owed to you by the Debtor.

REQUESTS FOR PRODUCTION OF DOCUMENTS

Please produce a document which sets forth a detailed **payment history** concerning the debt owed to you by the Debtor, for the period from the date of the origination of the loan to the date of this request. Please make sure the payment history includes all of the following information:

1. **Payoff Statement**, as of the date 30 days from the date of this request, including:
 - a. The date on which the payoff statement was prepared;
 - b. The current amount need to pay-off the loan in full, including the amount by type of each fee, charge or other sum included within the payoff statement;
 - c. The information reasonably necessary to calculate the payoff amount as of the requested payoff date, including the per diem interest amount;
 - d. The payment cutoff time, if any;
 - e. The address or place where payment must be made;
 - f. Any limitations as to the authorized method of payment;
 - g. The amount of fees, if any, authorized under N.C.G.S. § 45-36.7 not otherwise included in this payoff statement; and
 - h. The total amount you contend is necessary to fully reinstate this loan as of the date of your response to this discovery pleading.

The information requested under #1 is pursuant to N.C.G.S. § 45-36.7 and must be provided within 10 days of the effective date of this notification.

2. **Verification of Debt**, as of the date of this request, including, without limitation:
 - a. An itemization of the amount of the debt;
 - b. The name of the consumer;
 - c. A statement that the debt has not been paid; and
 - d. A statement that the creditor, to whom the debt was originally owed, in consideration

of the consumer's debt, had either delivered a merchantable product or properly rendered a service.

The information requested under #2 is pursuant to 15 U.S.C. § 1692 g (b) and all collection activities, including litigation, must cease until it mails the verification to the Debtor's attorney.

3. **Payment History:** A complete and itemized statement of the loan history from the date of the origination of the loan to the date of this request (commonly referred to as the P309 Report), including, but not limited to:

- a. **Charges and Debits:** Each and every monetary amount by which you charged to or debited to any and all of Debtor's accounts with you, whether concerning principal, interest, late charges, appraisal fees, insurance, taxes, foreclosure fees, attorney fees, legal costs, property inspections, property preservation, NSF check charges, escrow, appraisal or otherwise, including:

- i. Requested Information for all charges and debits:

- (1) The date of each and every charge or debit;
- (2) The amount of each and every charge or debit;
- (3) The resulting principal balance due and owing on the account;
- (4) The nature and purpose of each such charge or debit;
- (5) Identification of the provision under the Deed of Trust and/or note that authorizes charging each and every such fee against the loan of the Debtor.
- (6) The name, address and telephone number of the payee of any type of disbursement related to this account; and
- (7) The actual amount paid to such payee.

- ii. Requested information for specific charges and debits:

- (1) **Attorneys Fees:** A summary of all fixed or standard legal fees approved for any form of legal services rendered in connection with this account.
- (2) **Escrow Accounts:** A complete and itemized statement from the date of the origination of the loan to the date of this request of any escrow accounts and expenses related thereto, related in any way to this loan, including:
 - (a) Copies of any and all communications with the Debtor regarding such accounts;
 - (b) The dates of any escrow analysis performed; and
 - (c) The results of any such escrow analysis.

- (3) Forced-Placed Insurance: A complete and itemized statement from the date of the origination of the loan to the date of this request of any forced-placed insurance and expenses related thereto, related in any way to this loan.
- (4) Loan Modification/Forbearance/Satisfaction Fees: A complete and itemized statement from the date of the origination of the loan to the date of this request of any fees incurred to modify, extend, or amend the loan or to defer any payment due under the terms of the loan or satisfaction fees., including copies of all communications with the Debtor.
- (5) Proof of Claim Fees: A complete and itemized statement of the amount, payment date, purpose and recipient of all fees, whether actually charged or merely assessed, for the preparation and filing of the original proof of claim, any amended proofs of claim, or any supplemental proofs of claim in this case.
- (6) Property Inspections: Please attach copies of all property inspection reports and appraisals and all digital photographs.
- (7) Real Property Taxes: A complete and itemized statement from the date of the origination of the loan to the date of this request of any real property taxes paid by you and the expenses related thereto, related in any way to this loan.
- (8) Suspense Accounts: A complete and itemized statement from the date of the origination of the loan to the date of this request of any suspense account entries and/or any corporate advance entries related in any way to this loan, including, but not limited to, the balance in any such account or accounts and the nature, source and date of any and all funds deposited in such account or accounts.
- (9) Broker Price Opinions: Please attach copies of all Broker Price Opinions and digital photographs of the subject property and of the comparable properties used by the appraiser.

b. Payments and Credits:

- i. Each and every payment made by or on behalf of the Debtor to you from the date of the origination of the loan to the date of this request, including:
 - (1) The date of each and every payment;
 - (2) The amount of each and every payment; and
 - (3) The resulting principal balance due and owing on the account;
 - (4) The manner of payment, whether by personal check, money order,

- cashier's check, bank check or otherwise; and
 - (5) Any number or other information in your control that would further identify the payment, as for instance, and without limitation to the type of payment or type of information, check numbers, money order numbers, etc.
 - ii. Each and every amount, other than payments made by or on behalf of the Debtor, by which you credited the Debtor's account, from the date of the origination of the loan to the date of this request, including:
 - (1) The date of each and every payment;
 - (2) The amount of each and every payment; and
 - (3) The resulting principal balance due and owing on the account;
 - (4) The nature and purpose of each such payment;
- 4. **The Bankruptcy Worksheet:** The bankruptcy worksheet in an XLS Format prepared by any of your employees, agents, or third-party providers of bankruptcy services such as but not limited to Fidelity National Information Services, Lender Processing Services, LLC, First American National Default Services, Promiss Solutions LLC, and other similar entities.
- 5. **Lost Instrument Affidavit:** Regarding the Lost Instrument Affidavit filed with the Proof of Claim, please provide the following:
 - a. A complete description of Teresa J. Williams' employment with Wells Fargo Bank, NA, including:
 - i. A description of her duties for Wells Fargo;
 - ii. An employment history for Ms. Williams with Wells Fargo Bank, NA, showing her date of her original employment and the date of her employment as an "Assistant Secretary";
 - iii. The address of her actual physical place of employment.
 - iv. A list of all other employers that Ms. Williams has or has had during the past 10 years;
 - v. A list of all positions that Ms. Williams has held with Wells Fargo during the past 10 years with the names of her immediate supervisors in each such position; and
 - vi. A document with her current title.
 - b. The name and physical address where Penny S. McCraven is employed.
 - c. A complete description of the methods under which Ms. Williams made a "diligent search of the records of Wells Fargo Bank, NA in an attempt to locate the original "Promissory Note"; including:
 - i. Copies of all files and documents which Ms. Williams searched;

- ii. The names, physical addresses, and names of employers of any persons that assisted in this search;
 - iii. Any records made contemporaneously with this search that would indicate that such a search was conducted prior to the filing of the Proof of Claim;
 - iv. The name and address of the master document custodian;
 - v. All documents, records and reports of the master document custodian for the subject loan;
 - vi. All reports filed by the master document custodian with respect to the subject loan;
 - vii. All New Image records related to the subject loan;
 - viii. All documents in the possession of Lender Processing Services, LLC, with respect to the subject loan; and
 - ix. All tracking documents from the origination of the loan to the date the original loan documents were delivered to Wells Fargo.
4. **Key or Dictionary:** A legend and/or detailed explanation of all transaction codes and other similar terms used in the statements requested above sufficient to allow for a layman's full understanding of all the data provided.

The information requested under #3, #4 & #5 is pursuant to the Federal Rules of Bankruptcy Procedure 9014 and Rules 34 and 26 (b) F.R.Civ.P. and must be provided within 30 days.

This information is also requested pursuant to the Real Estate Settlement Procedures Act, codified as 12 U.S.C. § Section 2605(e) and Reg. X Section 3500.21(e)(1). You must acknowledge receipt of this request within 20 business days and provide the requested information within 60 business days.

Date: _____

Gardner & Gardner, PLLC

O. Max Gardner, III
Attorney for Debtor
North Carolina State Bar No.: 6164
P O Box 1000
Shelby, N.C. 28151-1000
(704) 487-0616
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR.

**MOTION TO CONVERT
OBJECTION TO PROOF OF CLAIM OF INDYMAC BANK, FSB
TO AN ADVERSARY PROCEEDING**

NOW COMES the above-named debtor, by and through her attorney of record, O. Max Gardner III, pursuant to Rules 3007(b) and Rule 7001 of the Federal Rules of Bankruptcy Procedure and hereby moves this Court to convert the Objection to Proof of Claim of IndyMac Bank, FSB ("**IndyMac**") to an adversary proceeding and in support hereof alleges and says that:

1. The Chapter 13 case of the movant was commenced by the filing of a petition with the Clerk of this court on April 4, 2007.
2. The 341(a) meeting of creditors was held in Shelby, North Carolina on May 14, 2007.
3. The Chapter 13 plan was confirmed by order of this Court on July 20, 2007.
4. The Objection to Proof of Claim of IndyMac Bank, FSB was filed on August 10, 2007, and is identified as Docket Number 24.
5. The Debtor has engaged in discovery in this contested case which has revealed that the Debtor will be seeking the type of relief as described in Rule 3007(b) and 7001 of the Bankruptcy Rules. As a result, pursuant to the December 1 of 2007 Amendments to Rule 3007 this matter must be litigated as an Adversary Proceeding.
6. This contested case is presently set for hearing on March 5, 2008.
7. The Debtor therefore alleges that this contested case should be converted to an adversary proceeding because, among other things, the Debtor in this case will be seeking:
 - a. The recovery of money damages or property from Indymac and from the creditor that originated the debt as well as from other parties and entities;
 - b. The entry of an order to determine the validity, priority or extent of the claim of Indymac and of the creditor that originated the debt giving rise to the claim;
 - c. The determination of other claims and causes of action that the Debtor may

have against Indymac, the creditor that originated the debt, and other parties and entities who are not parties to this contested case; and

- d. The entry of an order that will preclude the filing of any amended claims, supplemental claims or original claims by Indymac or by the creditor that originated the debt;
- e. For other legal and equitable relief, and for the recovery of all costs and reasonable attorney's fees.

WHEREFORE the Debtor respectfully prays of the Court as follows:

- 1. That this contested case be converted to an adversary proceeding;
- 2. That the debtor have 45 days from the date of the entry of any order granting this motion to file an adversary complaint with this court and to cause proper process to be issued and served; and
- 3. Any other such relief as the Court determines just and proper, including attorney's fees for bringing this objection.

This the ____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR.

**MOTION TO STRIKE WITHDRAWAL OF CLAIM
FILED BY ASSET ACCEPTANCE, LLC**

NOW COMES debtor herein, by and through counsel, and moves this Court pursuant to Rule 9014(a) of the Bankruptcy Rules and moves to strike the Withdrawal of Proof of Claim filed by Asset Acceptance, LLC, in the above-captioned matter. In support of such motion, debtor shows as follows:

1. The debtor filed for bankruptcy protection under Chapter 13 on or about October 1, 2007.
2. On or about October 16, 2007, Asset Acceptance, LLC filed a proof of claim alleging that debtor owed it \$1,919.33 stemming from an alleged credit card account to Lowes.
3. The debtor filed an objection to the proof of claim on or about November 5, 2007, alleging that a) Asset Acceptance, LLC was not an assignee of record from the originator of the debt or was not otherwise entitled to file a proof of claim; b) that such claim was barred by the applicable statute of limitations; and c) that debtor had not scheduled any such claim in favor of Asset Acceptance LLC nor was any claim owed and that this Court should issue a "show cause" order to ascertain whether Asset Acceptance, LLC's procedures comply with Rule 3001 of the Federal Rules of Bankruptcy Procedure.
4. On November 28, 2007, Asset Acceptance, LLC filed a letter purporting to withdraw the proof of claim previously filed in this matter.
5. Under Rule 3006 of the Federal Rules of Bankruptcy Procedure, once an objection to a proof of claim has been filed, a creditor may not withdraw such proof of claim except on order of the court after a hearing and notice. In such situations, the order of the court allowing such withdrawal shall contain such terms and conditions as the court deems just and proper.

6. The successful withdrawal of the proof of claim renders the withdrawn claim a legal nullity and leaves the parties as if the claim had never been brought. In re: Frank, 322 B.R. 745, 753 (Bankr. M.D.N.C. 2005) *aff'd by United States v. Frank*, (2006 U.S. Dist. LEXIS 16417).
7. Unless this Court enters an order conclusively determining that such claim asserted by Asset Acceptance, LLC is a) not owed by the debtor; or b) barred by the statute of limitations; or c) not legitimately owed to Asset Acceptance, LLC as it is not an assignee of any creditor of debtor; or d) any other reason for which debtor does not owe the claimed obligation, it is quite likely that Asset Acceptance, LLC will continue to pursue debtor herein notwithstanding that debtor herein may not owe the debt. Thus, it is vitally important to debtor that this Court enter an order that such claim is no longer a claim against this debtor. *See Weston, Liz Pulliam, "Zombie Debt is Hard to Kill," MSN Money, attached hereto.*
8. Asset Acceptance, LLC's procedures in filing proofs of claim without proper documentation and in which the debtor has not scheduled such claim in her bankruptcy case, or including any other evidence that such claim is valid gives rise to serious concerns that Asset Acceptance, LLC's procedures do not comport with Rule 3001 of the Federal Rules of Bankruptcy Procedure. As such, this Court should issue a "show cause" order to determine whether such procedures do conform with the creditor's obligations to investigate the claims under Rules 3001 and 9011 of the Federal Rules of Bankruptcy Procedure. *See In re: Wingerter*, 376 B.R. 221, (N.D. Ohio 2007) *and cases cited therein.*
9. This Court should consider under what terms and conditions would be just and proper to allow the withdrawal of such proof of claim filed by Asset Acceptance, LLC and to include, at a minimum, the requirement that Asset Acceptance, LLC pay a reasonable attorney's fee to counsel for debtor under 11 U.S.C. § 105(a) and to establish what documentation must be included, at a minimum, to a proof of claim so that its validity can be assessed by debtor and/or the trustee in bankruptcy cases.

WHEREFORE, debtor prays this Court for the following relief:

1. That the attempted Withdrawal of Proof of Claim filed by Asset Acceptance, LLC be stricken under Rule 3006 of the Federal Rules of Bankruptcy Procedure; and
2. That a "show cause" order be issued to inquire as to whether the procedures by which Asset Acceptance, LLC files its proofs of claims complies with Rules 3001 and 9011 of the Federal Rules of Bankruptcy Procedure;
3. That a hearing be held to determine the merits of debtor's objections or, should a withdrawal of claim be allowed, on what terms and conditions may the proof of claim filed by Asset Acceptance, LLC may be withdrawn;
4. That Asset Acceptance, LLC be ordered to pay to counsel for debtor a reasonable attorney's fee as authorized under the general power of the court as set forth in 11 U.S.C. § 105(a);
5. That this Court retain jurisdiction over this matter and all parties thereto;
6. For such other and further relief as this Court deems just and proper.

This the _____ day of _____, 2008.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

F. Objections and Responses

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR(S).

DEBTOR'S OBJECTION TO THE MOTION OF TRUSTEE TO MODIFY PLAN

COMES NOW the above-named debtor, by and through her attorney of record, O. Max Gardner, III, and respectfully objects to the Motion of Trustee to Modify Plan and in support hereof respectfully shows unto the Court the following:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.
2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.
3. The Chapter 13 plan was subsequently confirmed by order of this Court.
4. The Chapter 13 Trustee has filed a motion to modify plan which proposes to increase the plan payment from \$529.00 to \$685.00 to pay 10% to unsecured creditors.
5. The debtor objects to the modification as proposed by the Trustee and is therefore moving the court for a hearing on this matter.
6. The debtor is also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtor prays of the Court as follows:

- A. That this matter be set for hearing on _____ at 9:30 a.m. in Shelby, North Carolina;
- B. That the attorney for the debtor be granted an additional non-base legal fee of \$350.00, said fee to be paid by the Trustee out of the funds paid by the debtor into the Plan; and
- C. That the debtor have such other and further relief as this Court may deem just and proper.

This the _____ day of _____, 2009.



O. Max Gardner III
Attorney for the Debtor
P.O. Box 1000, Shelby, NC 28151-1000
N.C. State Bar No. 6164
(704) 487-0616/FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**DEBTORS' OBJECTION TO THE MOTION OF TRUSTEE
FOR ALLOWANCE OF CLAIMS DETERMINATION AND
DESIGNATION OF UNSECURED PERCENTAGE DIVIDEND**

COME NOW the above-named debtors, by and through their attorney of record, O. Max Gardner, III, and respectfully object to the Motion of Trustee for Allowance of Claims Determination and Designation of Unsecured Percentage Dividend and in support hereof respectfully shows unto the Court the following:

1. This case was commenced by the filing of a petition with the Clerk of this Court on _____.
2. The 341(a) meeting of creditors was held in Shelby, North Carolina, on _____.
3. The plan was subsequently confirmed by this Court and the venue of this case was and is in the Shelby Division.
4. The Chapter 13 Trustee has filed a motion to allow claims which provides for payment of second mortgage arrears to Wilshire Credit Corporation ("Wilshire") in the amount of \$6,819.48.
5. The debtors aver that on _____ an Order was entered in this case granting relief from stay to the first mortgage holder, Wells Fargo Home Mortgage on the subject property.
6. The debtors therefore hereby object to the Trustee's motion to allow claims and request this matter be set for hearing.
7. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors pray of the Court as follows:

- A. That the Chapter 13 Trustee's Motion to Allow Claims be denied as to the claims of Wilshire;

B. That the claims of Wilshire be stricken and removed from the plan pursuant to the Order granting relief from stay to Wells Fargo Home Mortgage on _____.

C. That this matter be set for hearing;

D. That the debtors have such other and further relief as this Court may deem just and proper.

This the _____ day of _____, 2009.

O. Max Gardner III
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(704) 487-0616
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR

**DEBTOR'S OBJECTION TO NOTICE OF TERMINATION
OF AUTOMATIC STAY PURSUANT TO ALLEGED DEFAULT OF
CONSENT ORDER
FILED BY GMAC MORTGAGE CORPORATION**

COMES NOW the above-named debtor, by and through her attorney of record, O. Max Gardner III, and respectfully objects to the Notice of Termination of Automatic Stay filed by GMAC Mortgage Corporation and in support hereof respectfully shows unto the Court the following:

1. This case was commenced by the filing of a petition with the Clerk of this Court on _____.
2. The §341(a) meeting of creditors was held in Shelby, North Carolina on _____.
3. The Chapter 13 plan was subsequently confirmed by order of this Court.
4. GMAC Mortgage Corporation (hereinafter "GMAC") filed a motion for relief from the automatic stay on or about _____. The said motion was subsequently resolved by the Consent Order entered on _____.
5. On or about _____, GMAC filed a Notice of Termination of the Automatic stay alleging that the debtor failed to comply with the terms of the Consent Order.
6. The debtor objects to the purported default and is therefore moving the Court for a hearing on this matter.
7. The debtor is also moving the Court for such other and additional relief as to the Court may seem just and proper.

WHEREFORE, the debtor prays of the Court as follows:

- A. That this matter be set for hearing;
- B. That the attorney for the debtor be awarded the sum of \$450 as reasonable legal fees and expenses and the debtor be awarded damages of \$250 for the filing of an improper Notice of Default in this case by GMAC;

C. That the debtor have such other and further relief as this Court may deem just and proper.

This the _____ day of _____, 2008.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a stylized flourish at the end.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**MALE DEBTOR and wife,
FEMALE DEBTOR**

Adv. Proc. No. _____

Plaintiffs,

versus

**HOUSEHOLD REALTY CORPORATION, AND
BENEFICIAL MORTGAGE CO. OF NORTH CAROLINA**

Defendants.

OBJECTION TO COURT'S NOTICE OF INTENT TO DISMISS PROCEEDING

COME NOW the above-named debtors, by and through their attorney of record, O. Max Gardner, III, and respectfully object to the Court's Notice of Intent to Dismiss Proceeding filed in this case and in support hereof respectfully show unto the Court the following:

1. The parties have agreed to try to settle all issues arising out of the Adversary Proceeding filed in this case against the Defendants.
2. The parties would like additional time to prepare a settlement package for execution by all the parties and the debtors will thereafter be filing a Motion for Approval of the Settlement.
3. The debtors therefore respectfully object to the filing of the said Notice and request an additional 90 days to consummate the settlement in the form of a written agreement.

WHEREFORE, the debtors pray of the Court as follows:

- A. That the Court rescind its Notice of Intent to Dismiss Proceeding;

B. That the Court allow the parties an additional 90 days to consummate the settlement in the form of a written agreement;

C. That the debtors have such other and further relief as the Court may deem just and proper.

Dated this the _____ day of _____, 2008.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a stylized flourish at the end.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: **CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**DEBTORS' RESPONSE TO OBJECTION TO CONFIRMATION
FILED BY WELLS FARGO FINANCIAL ACCEPTANCE, INC.**

COME NOW THE ABOVE-NAMED DEBTORS, by and through their attorney of record, and hereby respond to the Objection to Confirmation filed in this case by Wells Fargo Financial Acceptance, Inc. (hereinafter "Wells Fargo") and in support thereof shows unto the Court the following:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.
2. The 341(a) meeting of creditors is scheduled to be held in Shelby, North Carolina on _____.
3. The Chapter 13 plan has not yet been confirmed by order of this Court.
4. The plan presently provides for a secured claim in favor of Wells Fargo in the amount of \$9290.00 for a 2001 Dodge Caravan.
5. On or about _____, Wells Fargo filed an Objection to the Confirmation of the Plan of the debtors, by and through attorney Pamela Keenan, alleging that the property has a value in excess of the amount proposed by the debtors.
6. The debtors are therefore requesting this Court schedule a hearing on all matters relating to the Objection to Confirmation in this case, with the allowance of reasonable discovery for both the creditor and the debtors.

WHEREFORE, the debtors respectfully pray of the Court as follows:

- A. That a hearing be held on the Objection to Confirmation filed by Wells Fargo;
- B. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2008.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**DEBTOR'S RESPONSE TO OBJECTION TO CONFIRMATION
AND
MOTION TO DISMISS**

COMES NOW THE ABOVE-NAMED DEBTOR, by and through his attorney of record, and hereby responds to the Objection to Confirmation filed in this case by Fidelity Bank (hereinafter "Fidelity") and moves to dismiss the said Objection and in support thereof shows unto the Court the following:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan has not yet been confirmed by order of this Court.

4. The plan presently provides for a monthly payment of \$125.00 and includes a second mortgage debt to Fidelity as well as a claim for arrears on the second mortgage debt.

5. On or about _____, Fidelity filed an Objection to the Confirmation of the Plan of the debtor, by and through Richard D. Sparkman, alleging that the debtor's plan provides for the debt to Fidelity to be treated as unsecured, and that the claim will be "stripped." The objection implies that the debtor intends to file an adversary proceeding to have the second mortgage lien of Fidelity declared unsecured.

6. The debtor alleges that the Objection filed by Fidelity is inappropriate and was not timely filed. The plan provides that any objection to confirmation be filed no later than five days following the 341(a) meeting of creditors. The objection was filed 15 days after the meeting.

7. Furthermore, the debtor alleges that the Objection is inappropriate based on the fact that the plan provides that the debtor will resume making direct mortgage payments to Fidelity in _____ and that arrears will be paid through the plan. The plan does not provide for the claim of Fidelity to be "stripped" by way of an adversary proceeding. Nor does the plan provide for Fidelity's claim to be treated as unsecured.

8. The debtor is therefore moving the Court to dismiss Fidelity's objection in this case on the grounds that it is without merit and is improperly filed.

9. The debtor is also requesting this Court schedule a hearing on the Objection to Confirmation in this case and the within Motion to Dismiss.

WHEREFORE, the debtor respectfully prays of the Court as follows:

A. That a hearing be held on the Objection to Confirmation filed by Fidelity and the Debtor's Motion to Dismiss;

B. That the attorney for the debtor be awarded a fee in the amount of \$450.00 to be paid by Fidelity for the filing of an improper pleading in this case; or in the alternative by the Trustee from the funds paid by the debtor into the plan;

C. That the debtor have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2008.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**DEBTOR'S RESPONSE TO
OBJECTION TO VALUATION**

COME NOW THE ABOVE-NAMED DEBTORS, by and through their attorney of record, and hereby respond to the Objection to Valuation filed in this case by DaimlerChrysler Services North America, LLC ("DaimlerChrysler") and in support thereof shows unto the Court the following:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.
2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.
3. The Chapter 13 plan was confirmed by order of this Court dated _____.
4. The plan presently provides for DaimlerChrysler's claim to be paid in the secured amount of \$9,000.00 at 7.25% interest.
5. On or about _____, DaimlerChrysler filed an Objection to Valuation, by and through R. Keith Johnson, alleging that the property has a value of \$10,282.50.
6. The debtors aver that DaimlerChrysler is precluded from objecting to the value of the property by res judicata after confirmation of the plan.
7. The debtors further aver that DaimlerChrysler has no standing to object pursuant to 11 U.S.C. § 1329, which provides that only a debtor, trustee or unsecured creditor can modify a plan after confirmation.
8. The debtors are therefore requesting this Court schedule a hearing on all matters relating to the Objection to Valuation in this case, with the allowance of reasonable discovery for both the creditor and the debtors.

WHEREFORE, the debtors respectfully pray of the Court as follows:

- A. That a hearing be held on the Objection to Valuation filed by DaimlerChrysler;
- B. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2008.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

**RESPONSE TO TRUSTEE'S OBJECTION TO CLAIM OF CITIFINANCIAL AND
MOTION TO ALLOW SECURED TREATMENT OF CLAIM**

COME NOW the above-named debtors, by and through their attorney of record, and hereby respond to the Trustee's Objection to the proof of claim of CitiFinancial and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9013 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order allowing the secured treatment of CitiFinancial's claim and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan was subsequently confirmed by order of this Court.

4. The Standing Chapter 13 Trustee filed an objection to the claim of CitiFinancial on or about _____.

5. In his Objection, the Trustee stated that CitiFinancial has consistently filed proofs of claim with this Court ignoring the requirements of the Bankruptcy Code as to the documentation of secured status and has filed in this case a proof of claim without any documentation as to the proof of its valid lien on the debtor's property.

6. In the schedules filed with the petition in this case and on the master mailing matrix filed with the Clerk of this Court, the debtors listed a secured debt to CitiFinancial for a first lien on the debtors' 1997 Ford Expedition having a value of \$7515.00. The debtors believed and therefore alleged in their schedules that they owed CitiFinancial the total sum of \$10721.07 for this debt, with the remaining \$3206.07 to be paid as an unsecured claim.

7. The debtors are therefore moving the Court on behalf of CitiFinancial to allow the debtors to have this claim treated as a secured debt, to the extent of the value provided in the plan and the schedules, of \$7515.00. A successful Objection to CitiFinancial's claim by the Trustee would subject this claim to an unsecured treatment in this case, and would leave a problem of a lien cancellation after the debtors' discharge.

8. The debtors are also moving the Court for the award of their non base legal fees and expenses of \$500.00 to be paid by CitiFinancial due to the necessity of filing this motion on behalf of CitiFinancial, because of CitiFinancial's negligence in providing documentation of its secured status, and for the payment of sanctions and legal fees to be paid to the Trustee pursuant to the relief requested in his Objection.

9. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion be granted as provided for in the body of this motion;

B. That the attorney for the debtors be granted an additional non-base legal fee and expenses of \$500.00, and for the payment of sanctions and legal fees to be paid to the Trustee pursuant to the relief requested in his Objection, with said fees and expenses to be paid by CitiFinancial either directly or from the first disbursements on it's secured claim under the plan; and

C. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2008.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR(S).

**RESPONSE TO TRUSTEE'S OBJECTION TO CLAIM OF
ECAST SETTLEMENT CORPORATION AND
MOTION FOR SANCTIONS AGAINST ECAST SETTLEMENT CORPORATION**

COME NOW the above-named debtors, by and through their attorney of record, and hereby respond to the Trustee's Objection to the proof of claim of eCAST and respectfully move the Court for sanctions against eCAST and in support hereof allege and say that:

1. This case was commenced by the filing of a petition with the Clerk of this court on _____.

2. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

3. The Chapter 13 plan has not yet been confirmed by order of this Court.

4. The Standing Chapter 13 Trustee filed an objection to the claim of eCAST Settlement Corporation ("eCAST"), assignee for Household Bank (SB), N.A. ("Household") on or about _____.

5. In his Objection, the Trustee stated that eCAST has filed a proof of claim with this Court without any documentation as to the proof of its valid lien on the debtors' property.

6. In the schedules filed with the petition in this case and on the master mailing matrix filed with the Clerk of this Court, the debtors listed a secured debt to Household for a first lien on the debtors' 2000 Sea Doo RX Jetski, having a value of \$2800.00. The debtors believed and therefore alleged in their schedules that they owed eCAST the total sum of \$4704.61 for this debt, with the remaining portion of \$1904.61 to be paid as an unsecured claim.

7. The debtors are therefore moving the Court to allow them to join in the Trustee's objection, and for sanctions against eCAST declaring that any security interest be declared invalid, that eCAST release and cancel all UCC-1 Financing Statements, and that the claim be considered unsecured for all purposes.

8. The debtors are also moving the Court for the award of their non base legal fees and expenses of \$350.00 to be paid by eCAST as additional sanctions against eCAST, because of eCAST's negligence in providing documentation of its secured status.

9. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion be granted as provided for in the body of this motion;

B. That the attorney for the debtors be granted an additional non-base legal fee and expenses of \$350.00 to be paid by eCAST either directly or from the first disbursements on it's secured claim under the plan; and

C. That the debtors have such other and further relief as to the Court may seem just and proper.

This the _____ day of _____, 2008.



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