



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

In re:

**RAYMOND VARGAS,**

Debtor.

Case No.: LA08-17036SB

Chapter 7

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

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

**I. Introduction**

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

law firm under Rule 9011<sup>1</sup> for bringing the motion with no evidentiary support.

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

**II. Relevant Facts**

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

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

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

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

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

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

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

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

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

Turner appeared and testified on  
September 30, 2008 on this motion. From his  
testimony the court finds that he is a low level  
clerk for Countrywide responsible for some  
500 loan defaults per week in Southern  
California. His principal responsibility is to  
review draft motions for relief from stay, to  
make sure that the numbers in paragraphs 6<sup>2</sup>  
and 8<sup>3</sup> of his declaration agree with the  
numbers that appear on the Countrywide  
computer screen at his desk. He testified that

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

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

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

### 6 III. Analysis

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

#### 11 A. Names of the Parties

12 MERS purports to join as moving  
13 parties "its assignees and/or successors in  
14 interest," which are otherwise unidentified.  
15 No such unidentified parties are permitted in a  
16 motion before the court.

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

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

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

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

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

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

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

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

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

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

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

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

#### B. Competence of Witness

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

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

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

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

#### 1. Payments and Amount Owng

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

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

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<sup>7</sup> See Local Rule 1002-1(d)(9).

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

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

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

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

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

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

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

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

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

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

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

## 12 2. Documents – Note and Deed of Trust

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

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

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

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

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

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

### a. Promissory Note

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

#### i. Authentication of Note

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

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

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

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

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

### 8 ii. Right to Enforce the Note

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

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

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

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

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

### b. Deed of Trust

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

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<sup>11</sup> Rule 901(b) provides in relevant part:

#### (b) Illustrations.

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

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

<sup>12</sup> Rule 902 provides in relevant part:

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

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

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

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

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

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

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

### C. Fraudulent Character of Note and Deed of Trust

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

### D. Other Defects in Motion

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

### IV. Conclusion

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

Dated: October 21, 2008

  
\_\_\_\_\_  
Hon. Samuel L. Bufford  
United States Bankruptcy Judge



**CERTIFICATE OF MAILING**

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