

**UNDERSTAND CLAIMS FOR RELIEF AND BURDENS  
PURSUANT TO 11 U.S.C. 362(d) (1) or (d) (2) -  
DRAFTING RESPONSIVE PLEADINGS TO LIFT STAY**

**GARY W. CRUICKSHANK**

I. Pursuant to 11 U.S.C. 362(g) (1)

1. Moving Party has the burden of proof on the issue of debtor's equity (or lack thereof) in a property;
2. Moving Party has burden of going forward with evidence;
3. Moving Party must make a prima facie case;
4. 11 U.S.C. 362(d) (2) (A) provides a basis for terminating the automatic stay where the Debtor does not have equity in the property and if the property is not necessary to an effective reorganization;
5. Equity over and above the position of the moving party if there are junior liens who are not seeking relief - has moving part met its burden in that case?<sup>1</sup>
6. Fair market value or liquidation value - which is the starting point for equity analysis?
7. Should balance of secured claim include penalties, default interest, legal fees not yet incurred.

II. Pursuant to 11 U.S.C. 362(g) (2), the party opposing the relief (Chapter 11 or Chapter 13 Debtor or Chapter 7 or 11 Trustee) has the burden of proof on all other issues.

1. Is property necessary to an effective reorganization (11 U.S.C. 362(d) (2) (B)
  - A. Impossible in Chapter 7 cases since there is no reorganization involved.

Practice Tip: Do not respond to a Motion for Relief in a Chapter 7 case by requesting that the lender negotiate a loan modification with the Chapter 7 debtor, no harm in trying - but make the attempt

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<sup>1</sup> Majority view - all liens counted in determining lack of equity In Re Indian Palms Assoc. Ltd., 61 F.3d 197, (1995). Minority view - count only the lien of the party seeking relief from stay and senior lienholders Cote v. United Finance Co. (In Re Cote) 27 B.R. 510, 513 (Bankr.D.Or. 1983).

directly with the lender and not in a response to a Motion for Relief from Stay;

B. Plead that cause has not been shown pursuant to 11 U.S.C. 362(d) (1);

a) Examples of cause include

- i) bad faith filing<sup>2</sup>
- ii) complete litigation in another forum where case is ready for trial<sup>3</sup>

C. Assert that the moving party is adequately protected - 11 U.S.C. 362(d) (1); 11 U.S.C. 361

- a) monthly debt service payment;<sup>4</sup>
- b) assets insured;
- c) additional collateral from non-debtor guarantors;
- d) equity;
- e) indubitable equivalent - administrative expenses claim under 11 U.S.C. 503(b) (1)

### III. Serial Filings - 11 U.S.C. 362(c) (3)<sup>5</sup>

1. Second case within one year of first case being dismissed except under 11 U.S.C. 707(b) - stay continued for 30 days. 11 U.S.C. 362(c) (3) (A);
2. The Automatic Stay as to the Bankruptcy Estate remains in place.
3. Pursuant to 11 U.S.C. 362(C) (3) (B), debtor must file a motion for continuation of stay;
4. Moving party (usually the debtor) must demonstrate that filing of later case is in good faith as to creditors to be stayed. See M.L.B.R. 4001(d) (1) for contents of the Motion for Continuance of Stay;

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<sup>2</sup> In Re Dixie Broadcasting, Inc., 871 F.2d 1023 (11th Cir. 1989); In Re Bryan, 104 B.R. 554, 557 (Bankr.D.Mass. 1989); In Re Harvey Road Assoc., VIII, 140 B.R. 302, 305 (Bankr.D.Mass. 1992).

<sup>3</sup> In Re Pro Football Weekly, 60 B.R. 824 (N.D.Ill. 1986)

<sup>4</sup> Interest only to over-secured creditors - United Savings Association of Texas v Timbers of Inwood Forest Associates Ltd., 484 U.S. 365 (1988)

<sup>5</sup> In Re Jummp, BAP No. MW 06-031, Bankruptcy Case No. 06-40677-JBR for discussion regarding 362(c) (3) (A).

5. Motion must be filed within 15 days of new petition M.L.B.R. 4001-1(d)(2). If not timely filed, motion may be denied;
6. M.L.B.R. 4001(d)(3) requires opposing party to specifically state why Motion should not be granted or state any conditions on allowance a Motion. The response is due within 10 days of filing of the Motion;
7. Suggested contents of Motion for Continuance of Stay;
  - a) Affidavit of Debtor as to Plan and ability to fund plan;
  - b) Affidavit of reason for prior dismissal (for example pro se debtor who misunderstood filing requirement and then consulted with counsel, that situation should result in allowance of a Motion for continuation of stay;
8. 11 U.S.C. 109(g)(1) issue if second case is within 180 days of prior dismissal;
9. Rebuttable presumption of lack of good faith - see 11 U.S.C. 362(C)(3)(C);
10. Major point in support of Motion for Continuance of Stay is a substantial change<sup>6</sup> in financial or personal affairs of the Debtor since prior dismissal
  - a) employment change;
  - b) salary change - commission to salary by job change;
  - c) family financial assistance.

IV. 11 U.S.C. 362(c)(4)(A)(i) - Two or more cases within one year

1. Good luck - there is no stay;
2. Rebuttable presumption by clear and convincing evidence 11 U.S.C. 362(C)(4)(D);
3. Move quickly since pending creditor action is not stayed. THERE IS NO STAY;
4. Motion must be filed within fifteen (15) days of the petition M.L.B.R. 4001-1(d)(2).

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<sup>6</sup> In Re Sarafoglou, 345 B.R. 19 (Bankr.D.Mass. 2006).

- V. Counterclaim - There is no such procedure under 11 U.S.C. 362.
1. M.L.B.R. 4001-1(c) requires the admission, denial or claim of insufficient knowledge of each allegation in a Motion for Relief and said response must further state why the Motion for Relief should not be granted;
  2. If Moving Party has filed a proof of claim, file an objection to the claim and a counterclaim pursuant to Rule 3007(a) and (b), which will implement the adversary proceeding Rules 7001, et seq.

**DRAFTING RESPONSIVE PLEADINGS TO LIFT STAY  
MOTIONS UNDER 11 U.S.C. 362(d)(1) or (d)(2)**

**By: Amy Lipman-White, Esq.  
Stanton & Davis, Marshfield, MA**

## **I. RESPONDING TO MOTIONS FOR RELIEF RELATING TO PROPERTY**

1. If a timely response is not filed, Local Rules allow Relief to be granted automatically without hearing.
2. A party opposing a motion for relief from the automatic stay must file an opposition to the motion within ten (10) days, inclusive of the three (3) day mailing period provided in Fed. R. Bankr. P. 9006(f), after service of the motion. Note: The Court provides the objection deadline in the ECF email sent with the filing of the Motion for Relief so calendar the deadline upon receipt of the Motion.
3. The importance of following the Rules and Procedures can make or break a case, if not properly plead or responded to at the outset. The majority of relief motions remain non-evidentiary, however, those that become contested may have avoided litigation if plead or responded to properly in the first instance.
4. In preparing a response, the Debtor's first procedural inquiry should be whether the moving party has standing to file the motion for relief. If the moving party is not the record title holder of the mortgage and note then the moving party does not have standing to file the Motion.

5. Avoid blanket responses or general denials of all claims in the motion for relief. It is questionable whether such a response technically complies with MLBR 4001-1 (c), and it is not helpful to either party in getting the matter resolved prior to or at hearing.
6. Debtor counsel's ideal response to a motion for relief is when the Debtor has evidence of payments having been made and there are copies to attach as an exhibit in the response. The Debtor counsel's second best scenario is when the Debtor has the ability to become current in a short period of time. In this case, be sure to include in the response the reasons for the default; state the debtor's intention to cure and the time needed to cure the default.
7. Providing & Requesting Evidence:
  - a. The exchange of information between the parties is critical in responding to a motion for relief.
  - b. Provide all relevant facts and/or proof of payments (i.e. cancelled checks, bank statements) as soon as possible.
  - c. If there is a question or a discrepancy as to sums that are pre-petition request a payment history. If there are questions as to post-petition payments request a post petition payment history.
  - d. Promptly, identify and request any and all documents deemed necessary to assist in the Debtor's response to a motion for relief. If you are questioning a value or an

amount in the motion for relief, make the request for the information within your response. Prompt requests for documents and breakdowns allow Bank counsel time to obtain the information and Debtor counsel time to review the information with the Debtor prior to hearing.

- e. Attaching a RESPA letter or an Adversary Complaint as a response to a motion for relief is not considered a response to the motion. Although, the court may decide to merge the relief motion with the Adversary Proceeding or halt the motion until the Adversary Proceeding is resolved.

8. Value

- a. Under the Local Rules, the creditor must set forth a value for the property, which will include the liquidation value.
- b. Banks generally value property in two ways: either adopting the debtor's fair market value as stated in the schedules or by obtaining its own valuation through a recent broker's price opinion or appraisal.
- c. In today's market, many debtors have little or no equity in their property so the valuation of the collateral becomes critical in assessing equity and potential "cram downs" of secured claims.

- d. Debtor counsel should look to file a motion to avoid a lien(s); this may affect the equity cushion and creditor's assertion that the property lacks equity.
- e. If there is equity in the property when using the fair market value and no equity in the property when applying the liquidation value, then debtor counsel should argue that the court should adopt the fair market value as the proper value, since it is the debtor's intent is to continue to maintain the premises, make repairs and make regular monthly payment, thereby making it necessary for reorganization.
- f. If debtor disputes the Bank's value, then debtor can set forth the Debtor's own opinion as to the value. The burden of proof then shifts to the debtor. Note that a Debtor may testify as to value and the necessity of the asset for reorganization, but, debtor should be prepared to be thoroughly cross examined as to the debtor's knowledge and basis for their opinion.
- g. A Debtor may prevail against the Bank obtaining relief, if the Debtor can demonstrate the Bank is adequately protected. Although, the bankruptcy code does not specifically define "adequate protection" it has been found that if there is equity in the property to protect the Banks

interest in the property then the Bank may be considered adequately protected. The ability of the debtor to make regular monthly payments is also considered adequate protection.

- h. Finally, even if the debtor is upside down on the mortgage to equity ratio do not forget the debtor's newest options: Loan Modifications and Hope Loans. The foundation for the loan modification is that the economy will eventually improve. If the debtor can hold onto the property and make the modified payments, eventually the market will improve and the debtor will be able to refinance and pay back the modified loans in full, which is currently a better option than foreclosing on a property with no equity.

9. Service of Response

- a. Serve all parties with the response to the motion for relief that have filed a notice of appearance and/or have an interest in the subject property.

**Local Rule 4001-1 (c) Sets forth the Debtor's Procedure in filing a response to a Motion for Relief Procedural Requirements to Responding**

- (c) A party opposing a motion for relief from the automatic stay must file an opposition to the motion within ten (10) days, inclusive of the three (3) day mailing period provided in Fed. R. Bankr. P. 9006(f), after service of the motion.**

**The opponent shall either admit, deny or state that the opponent has insufficient knowledge to admit or deny each and every allegation of the motion, shall state specifically why the motion should not be granted, and shall state the terms of any offer of adequate protection made by the debtor or trustee.**

**If the value alleged by the movant is disputed, any appraisal available to the opponent shall be attached to the opposition.**

**If the motion is scheduled for an expedited hearing before the expiration of the ten (10) day period, then the opposition shall be filed before the expedited hearing.**

10. Resolving a Motion for Relief

- a. In a chapter 13 filing, after agreeing on the post-petition arrears, the parties may be able to resolve the case prior to the motion for relief hearing.

- b. A stipulation allows the debtor to pay the total post-petition arrearage over a reasonable period time (generally a six-month period) in addition to keeping current with post-petition payments.
- c. Be sure to assess the feasibility of a stipulation, by reviewing the debtor's current disposable income and if there is a possibility of an income change in the near future.
- d. The average stipulation period is six-months however, if the debtor can make a good argument as to why an extended period is necessary the Bank may agree.
- e. Be careful to look for a stipulation containing a "drop dead" clause if the debtor fails to comply with the terms, a ten-day notice of default is sent to the debtor and debtor's counsel.
- f. If the debtor fails to make payments pursuant to a stipulation the creditor will file a certificate of non-compliance and seek relief from the automatic stay based on its original motion.
- g. The creditor will continue to accept payments from the debtor after a certificate of non-compliance is filed and the debtor will have the opportunity to cure the default up until the time of the hearing on the certificate of non-compliance.

**Appendix 1 Chapter 13 Rule 13-16 (b). Sets forth the specific information or Stipulation relating to a Motion for Relief.**

**(b) Stipulations Relating to Motions for Relief from Stay.**

**A motion for approval of a stipulation relating to a motion for relief from stay between the debtor and a party that has a lien on property of the estate shall be filed with the stipulation and served on the chapter 13 trustee, debtor's attorney, any other entity with an interest in the property, and any party requesting service of pleadings in the case. Unless otherwise ordered by the Court, the moving party shall serve the stipulation together with a notice that objections to the approval of the stipulation must be filed within fifteen (15) days of the mailing of the notice, unless the Court fixes a different time. If no objection is filed, the Court may approve the stipulation without a hearing. The Court, in its discretion, may approve a stipulation that is not accompanied by a motion for its approval.**

- (c) A stipulation resolving a motion for relief from stay shall be served on the chapter 13 trustee, any other entity with an interest in the property, including any lien holder or co-owner, and any attorney who has filed an appearance requesting service of pleadings in the case. The debtor's attorney (or the debtor, if appearing pro se) shall file a certificate of service reflecting compliance with this rule. Unless otherwise ordered by the Court, an objection to a stipulation resolving a motion for relief from stay shall be filed within fifteen (15) days from the date of service of the stipulation. Notwithstanding this**

requirement, the Court, in its discretion, may cancel a hearing scheduled on a motion for relief from stay which is the subject of a stipulation and may approve a stipulation resolving a motion for relief from stay without a hearing.

## **II. REQUIRED INFORMATION IN A MOTION FOR RELIEF PURSUANT TO LOCAL RULES**

**Local Rule 4001-1 (b)(1)&(2)(A –G): Sets forth the Secured Creditor’s burdens in their Motion for Relief for Authority to Foreclose under section 362 (d):**

**(b) If the motion contains a request for authority to foreclose pursuant to a mortgage or security interest, the movant shall provide the following information.**

- (1) If the movant seeks relief for cause pursuant to 11 U.S.C. § 362(d)(1), then the cause shall be specifically stated in the motion.**
- (2) If the movant seeks relief with respect to a stay of an act against property pursuant to 11 U.S.C. § 362(d)(1) or (d)(2), then the motion shall state:**

- (A) the amounts and priority of the debt alleged to be owed to the movant;
- (B) the identification, amount, and priority of each other encumbrance affecting the property, including real estate taxes and other municipal charges;
- (C) the total of the amounts set forth in subsections (a) and (b);
- (D) the fair market value and liquidation value of the collateral, with any available appraisal(s) attached;
- (E) either that (i) there is no other collateral securing the obligation, or (ii) there is other collateral securing the obligation, indicating the identity, value and valuation method and attaching any available appraisal(s);
- (F) the original holder of the obligations secured by the security interest and/or mortgage and every subsequent transferee, if known to the movant, and whether the movant is the holder of that obligation or an agent of the holder; and
- (G) if known to the movant, whether and where any declaration of homestead has been recorded against the property;

**Local Rules Appendix 1 Chapter 13 Rule 13-16. Sets forth the specific information required in a Motion for Relief.**

- (a) In addition to the requirements of MLBR 4001-1, a motion for relief from the automatic stay shall provide the following information:

- (1) the date of filing of the chapter 13 petition;**
- (2) the total amount owed to the moving party;**
- (3) the date of confirmation of the plan (if the plan has been confirmed);**
- (4) the amount of the monthly payment at issue;**
- (5) the total amount of the post-petition or post-confirmation payments (principal and interest) in default as of the date of the filing of the motion and due as of the anticipated date of hearing, and the total amount of any other post-petition charge due or anticipated as of each of these dates;**
- (6) the total amount of the pre petition arrearage;**
- (7) the identity and an estimation of the amounts due all lien holders, in order of their priority;**
- (8) an opinion of the value of the property (by declaration), if such value is an issue to be determined; and**
- (9) if the motion for relief from stay is based on defaults in payments to or through the chapter 13 trustee, the motion must show that the debtor has not made the payments to the chapter 13 trustee.**

**The Court, in its discretion, may deny a motion for relief from stay in the absence of an objection, if the above information is not set forth in the motion.**

III. **Pursuant to Local Rule 4001-1 (d)(1)(2)(3) Sets forth the Procedure relating to Serial Filings under 11 U.S.C. 362(c)(3) and 11 U.S.C. 362(c)(4)(A)(i) – Two or more cases within one year**

(d) Any party in interest seeking the continuation of the automatic stay pursuant to 11 U.S.C. § 362 (c)(3)(B) or seeking the imposition of the automatic stay pursuant to 11 U.S.C. § 362 (c)(4)(B) shall file a motion and a proposed order.

(1) The motion should:

- (A) identify the prior case(s) filed by the debtor, individually or jointly, within the preceding year and its/their disposition;
- (B) state whether any motion for relief was pending in the prior case(s) at the time of dismissal;
- (C) if any motion for relief had been filed in the prior case(s), state whether such motion(s) was/were resolved by terminating, conditioning, or limiting the stay;
- (D) explain the extent to which the party in interest wishes the automatic stay to be continued or imposed, including the length of the proposed continuation or imposition and the parties affected (i.e. all creditors or only particular creditors); and

- (E) set forth facts demonstrating that the filing of the later case is in good faith as to the creditors to be stayed.
- (2) The motion shall be filed within 15 days from the filing of the new petition. If the motion is not timely filed, the Court may deny the motion.
- (3) For a motion to continue the automatic stay, the court shall set a hearing not later than 30 days after the filing of the petition. For a motion to impose the automatic stay, the court shall set a hearing not later than 15 days after the date of the service of the motion. A party opposing a motion filed under this section may file an opposition to the motion within 10 days after service of the motion. The opposing party shall state specifically why the motion should not be granted or state any conditions or limitations that should be imposed upon granting the continuance or imposition of the automatic stay. In the absence of an opposition, the Court in its discretion may allow the motion without a hearing.

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**Appendix A – Sample Response to Motion for Relief based upon Fact Pattern**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS

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IN RE:  
DeeDee Debtor,

IN PROCEEDINGS UNDER CHAPTER 13

Case No. 08-66666-JNF

Debtor(s)

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**DEEDEE DEBTOR’S OPPOSITION TO MOTION FOR RELIEF**

NOW COMES, the debtor, **DeeDee Debtor** (“Debtor(s)”), and hereby opposes to the **Bailout Bank, as Trustee for the Obama Trust 2006-12 for a securitized pool of mortgage loans** its successors and/or assigns (“Secured Creditor”) Motion for Relief from the Automatic stay pursuant to 11 U.S.C. Section 362 (a) & (d) and Bankruptcy Rules 4001 (a) and Local Rule 4001-1 and Local Rule Chapter 13 Rules 13-16. In support of this Motion the Debtor states as follows:

1. **Admit.** On **September 30, 2008** the Debtor filed a Chapter 13 Bankruptcy Petition, case number **08-66666-JNF**.
2. **Admit and further states the document speaks for itself.** On **August 31, 2007** the Debtor granted a mortgage to **Mortgage Electronic Registration Systems, Inc. ("MERS") acting solely for nominee for Lender (Big Bay Lender) and Lender successor and assigns\*** against the Property, which mortgage is recorded in the **Barnstable County** Registry of Deeds in Book , Page . (the “Mortgage”) (Exhibit 1). *MERS is an electronic database set up simplify tracking the chain of ownership title. It only works so long as the mortgage remains registered under MERS. It is set up so assignments do not have to be recorded at the registries throughout the country and assignments are electronically executed between members of MERS. However, when in Bankruptcy the chain must be shown at the Registry of Deeds and only the record title holder can bring the Motion. With*

*the one exception, if the Servicer of the Loan has the servicing contract to show that the Record title holder has granted the servicer authority to bring a Motion in the Mortgage holders name then it may be brought. See In re Huggins 37 B.R. 180 (Bankr. D. Mass 2006) for an in depth discussion re: MERS and when it can be the proper party to bring a Motion for Relief.*

3. **Admit, and further states the document speaks for itself.** The Mortgage secures a promissory note in the original principal sum of \$300,000.00 dated **August 31, 2007** (the “Note”) (Exhibit 2).
4. **Denied.** The Debtor states that she makes her payments to Not Mine Loan Servicing and is unaware of the Secured Creditor named herein. See copy of attached letter of payment letter from Not Mine Loan Servicing. The Mortgage and the Note were further assigned to the Secured Creditor (the “Assignment”) (Exhibit 3) *Here is where issues relating to whether the party bringing the Motion for Relief is the proper party with standing and/or the actual holder of the Mortgage. See In re: Maisel 07-43324-JBR, within referencing cases such as In re: Schwartz, 06-42476-JBR, 366 BR 265 Bank. D. Mass 2007 emphasizing proof of each element is required under Motion for Relief. Also there may be Issues surrounding securitization see In re: Hayes 393 NT 259 (Bankr. D. Mass 2008) 07-13967-JNF.*
5. **Admit.** No other collateral secures the Note and Mortgage.
6. **Admit.** On **October 15, 2008** the Debtor filed a Chapter 13 Plan and awaits confirmation.
7. **Denied, and calls upon the Secured Creditor to prove the same.** The pre-petition arrearage owed the Secured Creditor is **\$12,000.00 (February 2008 to September 2008)**.
8. **Denied.** Further, the Debtor states that she received a payment letter advising her that her payment was \$1,700.00 see copy of letter attached hereto and further, the

Debtor sent 2 payments which were returned by the Bank. *Some Banks send out payment change letters that often confusing the Debtor. The payment of \$1700, is likely only the Debtor's principal and interest however, there may be escrow for taxes that is often listed in a negative number but, should be added to the amount. Forward the letter to Bank's counsel or attach as an exhibit.* The Debtor's current monthly payment is **\$2,000.00** due on the 1st day of each month and if not received by the 15<sup>th</sup> of the month, a late charge of **\$60.00** is incurred.

9. **Denied. The Debtor has made payments.** The Debtor is 4 post-petition payments in arrears from **October 2008 to January 2009** to present, the Debtor's post-petition arrearage is **\$9,040.00**: (4) monthly payments totaling \$8,000.00; (4) late charges totaling \$240.00; and post-petition bankruptcy fees \$800.00 (\$650.00 + \$150.00 filing fee). Further, it is anticipated that as of a hearing on this motion, an additional monthly payment and late charge will be due and owed with in a total of **\$11,040.00**.
10. **Admit.** As a matter of record there is a homestead in the Debtor's name dated September 29, 2008. It is upon information and belief that there are no other liens against the property.
11. **The Debtor has insufficient information to admit or deny the allegation contained there and calls upon the Secured Creditor Bank to prove as such.** As of **January 19, 2009** the total amount owed the Secured Creditor is as follows:

Principal	\$	300,000.00
Interest	\$	22,000.00
Recording Fee	\$	76.00
Foreclosure Attorney Fees	\$	1,325.00*
Foreclosure Costs	\$	860.60**
Title Fees	\$	425.00
Property Inspection Fees	\$	112.50
Bankruptcy Fees and Costs	\$	1,025.00
Escrow Shortage	\$	3,744.06***
Less Partial Balance	<u>(\$</u>	<u>1,409.71)****</u>
<b>TOTAL BALANCE OWED:</b>	<b>\$</b>	<b>329,173.45</b>

*\*Foreclosure Fees: Question if appear they unreasonable however, a general rule of thumb is that attorney foreclosure fees average approximately \$1,500.00.*

*\*\*Foreclosure Costs: Question if they appear high. However, keep in mind the location of your clients' property. Sale publication for a Boston property run high \$2500 - \$3,500.00 because the foreclosure attorney is dictated by the Land Court where to publish and the Boston Herald and Boston Globe are likely to run much higher in average cost for the publication than a property located in small western MA property. Property Inspections and Title Fees and Recording Fees may be included in Foreclosure Costs. In re: Lynn-Weaver 06-11544-WCH, 06-1364-AP, presents an issue how many postponements of sales are too many.*

*\*\*\*Escrow Shortage: Question Debtor. Did you pay your insurance? If yes, did you forward a copy to the Bank. Forced Placed Hazard Insurance costs much more than if you're Debtor gets their own. Who is supposed to pay the taxes?*

*\*\*\*\*Partial Balance/Suspense: In re: Nosek, 08-46025-JBR, AP 04-4517 and 07-4109, Appeal 1<sup>st</sup> Circuit 07-2173 & 07-2174. If your client is sending in partial payments can the Bank hold partial payments in suspense? Nosek appears to say yes, if it's less than a full payment or unless your plan says otherwise.*

12. **Admit, the Bank pays the tax escrow.** It is upon information and belief there are no outstanding real estate taxes &/or municipal charges.
13. **The Debtor has insufficient information to admit or deny the allegation contained there and calls upon the Secured Creditor Bank to prove as such.** As of **January 19, 2009** the total owed against the Property is **\$329,173.45**.
14. Debtor admits that the Debtor's schedules provide for a property value of \$328,000 but, deny the remainder of the allegation contained therein. According to the Debtor's schedules, the fair market value of the Property is \$328,000.00, using this value for purposes of this Motion only, the Secured Creditor asserts that the liquidation value of the Property at **\$306,274.32**, calculated at the Debtor's estimated fair market value less a reasonable realtor's fee of 6% (\$19,680.00); deed stamps (\$1,495.68) and costs incurred in a real estate closing (\$550.00). Further, the Secured Creditor has obtained a separate brokers price opinion, dated ?, in the sum of \$250,000.00. (Exhibit 4).

15. **The allegation calls for a conclusion of law to which no response is required.** Section 362(d)(1) of the United States Bankruptcy Code provides that the Court may grant relief for cause. The term "cause" is not defined in the statute, but includes, among other things, the failure to make post-petition payments during a pending Chapter 13 bankruptcy. The Secured Creditor is owed post-petition payments from **October 2008** continuing to present. Apparently, the Debtor is unable to make current payments as required in the context of Chapter 13 reorganization.
16. **The allegation calls for a conclusion of law to which no response is required.** Based upon the above, the Secured Creditor, lacks adequate protection pursuant to 11 U.S.C. Section 362(d) (1) of the Bankruptcy Code as to the Property. *See In re Ledis 259 BR 472 (Bkrcty.D.Mass. 2001), citing In re Jug End in the Berkshires, 46 BR 892 (Bkrcty.D.Mass. 1985) (“the classic protection for a secured debt justifying continuation of the stay is the existence of an ‘equity cushion’.”)*
17. **The allegation calls for a conclusion of law to which no response is required.** The Property is not necessary for an effective reorganization pursuant to 11 U.S.C. Section 326(d)(2) (B) of the Bankruptcy Code.
18. **The allegation calls for a conclusion of law to which no response is required.** The Property is a burden to the Debtor’s estate after taking into consideration the maintenance, costs of insurance, utilities, real estate taxes and the Secured Creditor’s security is diminishing due to the Debtor’s failure to make payments.

WHEREFORE, the Debtor hereby prays that this Honorable Court deny the Secured Creditor’s Motion; and such further and other deems relief as this Honorable Court deems just and proper.

Respectfully Submitted  
For the Debtor,  
By its Attorneys

Dated: January 19, 2009

BY: /s/ Debtor Counsel  
Debtor Counsel  
BBO # 666999  
Law Firm Law Firm Address  
Law Firm Tel #  
Debtor Counsel email Address @.com

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS

\_\_\_\_\_  
IN RE:  
DeeDee Debtor,  
Debtor(s)  
\_\_\_\_\_

IN PROCEEDINGS UNDER CHAPTER 13  
Case No. 08-66666-JNF

CERTIFICATE OF SERVICE

I, Debtor's Counsel, Esq., hereby certify that I served the foregoing Opposition Motion for Relief from Automatic Stay, Exhibits, Proposed Order and Certificate of Service on January 19, 2009 by causing copies of the same to be sent accordingly via electronic mail or regular mail, first class postage prepaid, to the following:

**Electronic Mail Notice List**

- Carolyn Bankowski-13 13trustee@ch13boston.com
- John Fitzgerald USTPRegion01.BO.ECF@USDOJ.GOV
- Debtor counsel
- Creditor counsel

**Manual Notice List**

**Dee Dee Debtor, Debtor**  
12 Kennedy Street  
Hyannis, MA

**Tax Collector Office**  
Town of Hyannis  
Hyannis, MA 01830

Not Mine Loan Servicing  
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