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3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5 SACRAMENTO DIVISION
6
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8)
9 In re) Case No. 05-29803-A-7
10 KAUSHA REED,) Docket Control No. PDM-1
11 Debtor.) Date: December 5, 2005
12) Time: 9:00 a.m.
_____)

13 *On December 5, 2005 at 9:00 a.m. the court considered the*
14 *motion of Mortgage Electronic Registrations Systems, Inc., for*
15 *relief from the automatic stay in the above-captioned case. The*
16 *text of the final ruling appended to the minutes of the hearing*
17 *follows. This final ruling constitutes a "reasoned explanation"*
18 *for the court's decision and accordingly is posted to the court's*
19 *Internet site, www.caeb.uscourts.gov, in a text-searchable format*
20 *as required by the E-Government Act of 2002. The official record*
21 *of this ruling remains the ruling appended to the minutes of the*
22 *hearing.*

23 **FINAL RULING**

24 The motion will be denied.

25 Mortgage Electronic Registration Systems, Inc, ("MERS") as
26 nominee for GMAC Mortgage Corporation ("GMACM"), filed a motion
27 for relief from the automatic stay on October 19, 2005. Pite
28 Duncan & Melmet, LLP ("counsel") is counsel for MERS.

That motion was supported by the declaration of John P.
McDermott, a "Bankruptcy Team Leader" employed by GMACM. His
declaration (hereafter "the McDermott declaration") is four pages
in length and is on pleading paper with 28 numbered lines.

1 The text of the McDermott declaration ends on its third page
2 at line 11. Lines 12 through 27 are blank except for “/././”
3 which appears on each line on the left margin. These symbols,
4 meant to connote that text was intentionally omitted from Lines
5 12 through 27, also appear on the left margin of Line 28.
6 Opposite the symbols, on the right margin of Line 28, there
7 appears a footer, “623947.wpd.” This footer does not appear on
8 any other page.

9 The “.wpd” suffix of the footer means that the document was
10 prepared using WordPerfect, a popular word processing program.
11 The number prefix of the footer is the name given the document
12 when saving it on the computer system used to prepare the
13 McDermott declaration.

14 One would expect the footer to appear at the end of the last
15 page of the document. That is, it should be at the bottom of the
16 last page, the fourth page, following the signature. This
17 expectation is borne out by the Motion and Notice of Hearing.
18 Each of these documents bears a similar footer that appears on
19 the last page immediately after the signature of the person
20 preparing each document, albeit on the left rather than the right
21 margin.

22 Aside from the numbering of Lines 1 through 28 on the left
23 margin, the only text appearing on the fourth page is the unsworn
24 declaration of the witness. It reads:

25 “I declare under penalty of perjury under the laws of
26 the United States of America that the foregoing is true
and correct. Executed this 10th day of October 2005,
at Horsham, Pennsylvania.”

27 ///

28 ///

1 The italicized words are handwritten while the remainder of
2 the quoted language is typed text. The quoted language is
3 followed by the signature of Mr. McDermott and, beneath his
4 signature, appear the typed words, "John P. McDermott."

5 At the bottom center of the first three pages of the
6 McDermott declaration, there appears a page number. Below each
7 page number is a line that stretches from the right and left
8 margins. Below the line, on the left margin, appears the word
9 "DECLARATION."

10 There is no page number on the fourth page. There is no
11 line at the bottom of the fourth page stretching from the right
12 and left margins. Nor does the word "DECLARATION" appear at the
13 bottom of the fourth page.

14 The McDermott declaration was not filed electronically. The
15 original paper document was filed. The court has examined it.
16 The first three pages are on different paper stock than the
17 fourth page. The fourth page is both thinner and not bleached as
18 white as the first three pages of the McDermott declaration.

19 There is another anomaly. On the fourth page, the signature
20 and the date are both handwritten in blue ink. However, the ink
21 used for the date is a different shade of blue than the ink used
22 for the signature. The pen used for the signature also appears
23 to have been a medium point while the date was written with a
24 finer ballpoint pen.

25 Further, when the handwritten date on the fourth page of the
26 McDermott declaration, October 10, 2005, is compared to the
27 handwritten date on the Proof of Service By Mail, October 19,
28 2005, it appears that the two dates were written in the same

1 handwriting. While the word "October" is printed in the former
2 and written in cursive in the latter, the "O" in each "October"
3 is very similar. Also, each "2005" is nearly identical.

4 The proof of service was executed by Heather McCauley. Her
5 declaration of service indicates that she is employed in San
6 Diego, County and that she signed the document in the City of El
7 Cajon. The law offices of counsel for the secured creditor are
8 in El Cajon, which is in San Diego County, California. Mr.
9 McDermott's office, however, is in Pennsylvania.

10 It appears, then, that the fourth page was prepared separate
11 and apart from the first three pages of the McDermott
12 declaration. Had they been prepared contemporaneously, the
13 signature would appear on the third page (which had ample space
14 to accommodate the text of the unsworn declaration and
15 signature), the footer would appear after the signature, and all
16 pages of the McDermott declaration would be printed on the same
17 paper stock.

18 These facts, particularly when combined with the fact that
19 Ms. McCauley dated Mr. McDermott's declaration for him, suggest
20 the possibility that Mr. McDermott did not sign the fourth page
21 after the first three pages of the McDermott declaration were
22 prepared. Rather, the fourth page was pre-signed, later added as
23 the fourth page of the McDermott declaration, then dated by
24 someone other than the declarant. Even more troubling is the
25 possibility that Mr. McDermott's signature and attestation under
26 penalty of perjury were affixed to a declaration that does not
27 represent his testimony and/or that he never reviewed prior to
28 its filing with the court.

1 The court continued this motion from November 4, 2005 to
2 learn more about the McDermott declaration. It issued an order
3 to show cause requiring to file declarations of: (a) Mr.
4 McDermott and the persons who typed, composed the text of,
5 received the signature page of, attached the fourth page to, and
6 served the Declaration; and (b) the persons who transmitted the
7 McDermott declaration to, and received it from, Mr. McDermott, as
8 well as the persons who transmitted it to the court for filing.
9 The OSC required the declarations to address: (1) when the
10 McDermott declaration was prepared; (2) when Mr. McDermott's
11 attestation on the fourth page was prepared; (3) the identity of
12 the person who composed the text of the McDermott declaration;
13 (4) the identity of the person who composed the attestation on
14 the fourth page; (5) when counsel's office received the signed
15 fourth page; (6) the actual date Mr. McDermott's signature was
16 affixed to the fourth page; (7) the means by which the McDermott
17 declaration was sent to Mr. McDermott for his review; (8) whether
18 Mr. McDermott reviewed his declaration before it was signed or
19 filed; (9) whether the McDermott declaration's fourth page was
20 received by movant's counsel, or the person composing the
21 Declaration, before or after the first three pages were composed;
22 (10) when the McDermott declaration's fourth page was received
23 from Mr. McDermott; (11) the identity of the person who dated the
24 McDermott declaration; and (12) the identity of the person who
25 signed the McDermott declaration if not Mr. McDermott.

26 The OSC also required that these declarations identify all
27 documents in existence that memorialize the transmittal of the
28 McDermott declaration, and/or its fourth page, by and between Mr.

1 McDermott and counsel, including anyone working for, at the
2 direction of, or in connection with, Mr. McDermott or counsel.
3 The exhibits were to include the computer directory or file log
4 showing when the McDermott declaration was prepared.

5 On November 14, 2005, a response to the OSC, along with the
6 declarations of John P. McDermott, Joan S. Huh, Karelyn Kimokeo,
7 Amber McQuaid, and Heather McCauley were filed. Movant also
8 filed a separate set of exhibits.

9 These declaration and exhibits confirm that GMACM has given
10 counsel pre-signed attestations by Mr. McDermott for use in cases
11 where his declaration will support a motion. These attestations
12 are in the following form:

13 "I declare under penalty of perjury under the laws of
14 the United States of America that the foregoing is true
15 and correct. Executed this _____ day of _____ ,
16 at Horsham, Pennsylvania."

/s/

John P. McDermott

17 On the originals, Mr. McDermott's signature appears.
18 However, the space for the day, month, and year of the
19 declaration's execution is blank.

20 When GMACM requests that a motion for relief from the
21 automatic stay be filed, counsel prepares the motion and a
22 declaration to support the factual assertions in the motion. The
23 content of the declaration is prepared based on what is in the
24 file rather than on an interview of the declarant. The
25 declaration is then sent electronically to GMACM for review. By
26 electronic mail, GMACM then advises counsel that the declaration
27 is approved. Counsel then assembles all documents for the
28 motion. After inserting the date, the declarant approved the

1 declaration, a pre-signed attestation is appended to the
2 declaration. Then, all documents are filed and served by mail.

3 In this case, the declarations and exhibits filed in
4 response to the OSC reveal the following chronology:

5 09/14/05 Counsel is engaged to file a motion for
6 relief from the automatic stay on behalf of
7 GMACM. Exhibit E, a log of all email between
8 counsel and GMACM concerning this matter,
9 indicates that the matter was referred by
10 John Timson, a "bankruptcy specialist"
11 employed by GMACM.

12 10/06/05 Karelyn Kimeko, a "Word Processing
13 Specialist" from counsel's "Word Processing
14 Department," prepares the initial draft of
15 the motion for relief from the automatic
16 stay, including the McDermott declaration.
17 That is, the documentation for the motion was
18 not first prepared by an attorney. Nor was
19 Mr. McDermott interviewed prior to the
20 preparation of his declaration. Instead, a
21 draft of the moving papers, including the
22 McDermott declaration, was prepared by a
23 paraprofessional or clerical staff member in
24 counsel's employ from the information in the
25 file forwarded by GMACM. That draft was then
26 sent to attorney Joan S. Huh for review.
27 Based on Ms. Huh's conclusion that the motion
28 was well-taken, she directed that the
McDermott declaration be sent to Mr.
McDermott for approval.

19 10/10/05 At 1:23 p.m. (E.S.T.) Amber McQuaid, a
20 "bankruptcy paralegal" employed by counsel,
21 sends an electronic copy of the draft
22 declaration, minus the attestation on the
23 fourth page, to John Timson at GMACM. Her
24 email message states: "Attached please find
25 the original Declaration in Support of Motion
26 for Relief from Automatic Stay in the above-
27 referenced matter. Upon your review and
28 approval of the declaration please return the
written approval via electronic mail. **As
always, our office will use a pre-signed
declaration page to expedite the filing of
the motion.**" [Emphasis added.]

10/10/05 At 3:30 p.m. (E.S.T.) John Timson meets with
John McDermott and they review the McDermott
declaration. McDermott instructs Timson to
advise counsel that he "approved" his
declaration.

1 10/10/05 At 4:07 p.m. (E.S.T.) John Timson sends an
2 email to Heather McCauley, a "bankruptcy
3 paralegal" employed by counsel, advising her
4 that "the declaration is approved."

5 10/18/05 On counsel's computer system, Heather
6 McCauley assembles and prints all documents
7 that are part of the motion, including the
8 McDermott declaration. She then appends a
9 pre-signed attestation as the fourth page of
10 that declaration and inserts the date October
11 10, 2005 as the date John McDermott
12 "executed" his declaration. The assembled
13 documents are given to attorney Judith Huh
14 for a final review. She approves them and
15 the documents are sent to court and served,
16 all by mail.

17 10/19/05 The motion and all supporting documents are
18 received by the court and are filed.

19 28 U.S.C. § 1746 provides in relevant part:

20 "Wherever, under any law of the United States or under
21 any . . . requirement made pursuant to law, any matter
22 is required or permitted to be supported, evidenced,
23 established, or proved by the sworn declaration,
24 verification, certificate, statement, oath, or
25 affidavit, in writing of the person making the same . . .
26 . such matter may, with like force and effect, be
27 supported, evidenced, established, or proved by the
28 unsworn declaration, certificate, verification, or
statement, in writing of such person which is
subscribed by him, as true under penalty of perjury,
and dated, in substantially the following form: (1) If
executed without the United States: 'I declare (or
certify, verify, or state) under penalty of perjury
under the laws of the United States of America that the
foregoing is true and correct. Executed on (date).
(Signature).'

29 May a pre-signed but undated attestation be appended to, and
30 dated when, a declaration is later prepared? Given the
31 requirement of section 1746 that a declaration be dated as of the
32 date it is executed, it may not. In this case, the date on the
33 declaration does not reflect the date it was executed by the
34 declarant. The court reads section 1746 to require the
35 contemporaneous execution and dating of a declaration.

1 While it seems that Mr. McDermott was shown and he approved
2 his declaration before his signature was affixed to it, this
3 process of "assembling" a declaration is easily subject to abuse.
4 One need only consider Bankruptcy Judge Morris Sterns' Order to
5 Show Cause dated October 24, 2005 and issued in connection with
6 the chapter 13 petition of Jenny Rivera, District of New Jersey,
7 Case No. 01-42625, to see how such a process might be abused.

8 Because the McDermott declaration does not meet the
9 requirements of section 1746, it is stricken.

10 MERS, nominee for GMACM, seeks relief from stay with respect
11 to the real property located at 3046 Sherborne Court in
12 Mufreesboro, Tennessee. MERS alleges lack of equity on the basis
13 that the value of the property is \$110,000, whereas the
14 encumbrances total \$96,506.05. MERS also alleges that debtor has
15 failed to make three post-petition monthly payments on account of
16 the debt secured by the property.

17 However, given that the McDermott declaration has been
18 stricken, none of these factual allegations are supported by the
19 record. Therefore, the motion will be denied. Furthermore, all
20 fees and costs associated with this motion and the response to
21 the OSC are disallowed for all purposes in all contexts.