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10 Counsel for Defendants

11 **IN THE UNITED STATES BANKRUPTCY COURT**
12 **FOR THE DISTRICT OF ARIZONA**

13 In re:

14 ANDREW C. BAILEY,
15
16 Debtor

Chapter 11 Proceedings

Case No. 2:09-bk-06979-PHX-RTBP

17 ANDREW C. BAILEY,
18 Plaintiff

Adv. Proceeding No. 2:09-ap- 01728-RTBP

19 vs.

20 THE BANK OF NEW YORK MELLON, as
21 trustee of the CWALT, INC.
22 ALTERNATIVE LOAN TRUST 2007-HY4
23 MORTGAGE PASS-THROUGH
24 CERTIFICATES, SERIES 2007-HY4; BAC
25 HOME LOANS SERVICING, LP F/K/A
26 COUNTRYWIDE HOME LOANS,
27 SERVICING, LP; COUNTRYWIDE BANK,
28 FSB; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS INC; JOHN
DOES 1-10 inclusive,
Defendants.

**DEFENDANTS' MOTION TO STRIKE
PLAINTIFF'S DECLARATION IN
SUPPORT OF FOURTH AMENDED
COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Hearing Date: November 9, 2010

Hearing Time: 10:00 a.m.

Defendants The Bank of New York Mellon ("BNY"), in its capacity as trustee of the
CWALT, Inc. Alternative Loan Trust 2007-HY4 Mortgage Pass-Through Certificates, Series

1 2007-HY4; BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loans
2 Servicing, LP (“BAC”); Bank of America, N.A., as successor-in-interest by merger to
3 Countrywide Bank, FSB (“CB”) and Mortgage Electronic Registration Systems Inc. (“MERS”)
4 (collectively, “Defendants”) submit this motion (“Motion”) to strike the *Plaintiff’s Declaration*
5 *In Support Of Fourth Amended Complaint For Declaration And Injunctive Relief*
6 (“Declaration”), filed on November 9, 2010 at Docket Entry #59. The Declaration is not timely
7 filed, is not relevant to the Defendants’ pending motion to dismiss, and is rife with inadmissible
8 hearsay. Accordingly the Court should strike the Declaration in its entirety and not consider the
9 contents therein for any purposes. This Motion is accompanied by the following Memorandum
10 of Points and Authorities and the entire record before the Court in this adversary proceeding.

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. RELEVANT FACTUAL BACKGROUND.**

13 1. The Plaintiff is the debtor in bankruptcy under proceedings that commenced on or
14 about April 8, 2009 as involuntary Chapter 7 proceedings converted by order dated May 28,
15 2009 to Chapter 11 proceedings.

16 2. The Plaintiff commenced the above-captioned adversary proceeding on December
17 23, 2009, by filing a complaint against Defendants, challenging the Defendants’ respective rights
18 in and to a loan made to the Plaintiff in March 2007 (“Loan”) and the validity of the foreclosure
19 and stay relief proceedings initiated against the real property securing the Plaintiff’s obligations
20 under the Loan.

21 3. The Court has dismissed several amended versions of the complaint filed by
22 Plaintiff, most recently evidenced by the Memorandum Decision on July 30, 2010, dismissing
23 the Plaintiff’s Third Amended Complaint. The Memorandum Decision contains findings of fact
24 and conclusions of law regarding the validity of Defendants’ respective rights in and to the Loan,
25 and certain of the Defendants’ standing regarding stay relief.

26 4. Notwithstanding the Court’s findings and conclusions set forth in the
27 Memorandum Decision, the Plaintiff filed a Fourth Amended Complaint challenging the validity
28

1 of the loan and foreclosure documents, Defendants' rights in and to the Loan, and Defendants'
2 standing to enforce the deed of trust securing repayment of the Loan.

3 5. Defendants filed a motion to dismiss the Fourth Amended Complaint with
4 prejudice on September 13, 2010 at Docket Entry #55 ("Dismissal Motion"), which Dismissal
5 Motion is set for hearing on Tuesday, November 9, 2010 at 10:00 a.m. ("Dismissal Hearing"). A
6 notice of the Dismissal Hearing was filed at Docket Entry #56 and served on the Plaintiff on
7 September 15, 2010.

8 6. Plaintiff filed his opposition to the Dismissal Motion on September 24, 2010, and
9 Defendants filed a reply in support of the Dismissal Motion on October 8, 2010. Accordingly,
10 this matter has been fully briefed for nearly a month.

11 **II. ARGUMENT.**

12 The Declaration consists of inadmissible evidence presented on an untimely basis in an
13 attempt to ambush Defendants and smear their reputation. Such Declaration must be stricken
14 and not considered by the Court for several reasons.

15 The Declaration is not based on Plaintiff's first hand knowledge, but rather relies, in part,
16 on unidentified news stories and sources. Such inadmissible hearsay evidence is entirely
17 irrelevant to the Dismissal Motion. The Declaration otherwise presents no new information that
18 was not known or available to Plaintiff at the time Plaintiff filed his response to the Dismissal
19 Motion. Furthermore, the Declaration was submitted to the Defendants' counsel and filed with
20 the Court just prior to the upcoming hearing (which hearing has been scheduled for several
21 weeks), clearly constituting an attempt to ambush the Defendants. Plaintiff should not be
22 rewarded with the practice of such unsavory tactics, and the Declaration filed under such
23 circumstances should be completely disregarded for all purposes by the Court.

24 **A. Declaration Is Not Based On Personal Knowledge.**

25 The Plaintiff's Declaration does not attest that the testimony therein is based on
26 Plaintiff's personal knowledge. "A witness may not testify to a matter unless evidence is
27 introduced sufficient to support a finding that the witness has personal knowledge of the matter."
28

1 Fed. R. Evid. 602. Accordingly, and on that basis alone, the Declaration must be stricken in its
2 entirety because insufficient foundation has been laid.

3 **B. Declaration Consists Of Statements And Arguments Known To Plaintiff**
4 **When Responding To The Motion To Dismiss.**

5 The applicable rules of procedure provide for a response to a motion and a reply in
6 support of the motion, each within certain time limits. *See* Local Rule of Bankruptcy Procedure
7 9013-1. The Dismissal Motion was fully briefed by October 8. The Declaration is a blatant
8 attempt by Plaintiff to impermissibly have the last word on the matter, contrary to the order of
9 arguments established by local rule.

10 Moreover, and more importantly, to the extent the Declaration contains evidence or
11 arguments that Plaintiff relies upon in opposing the Dismissal Motion, such evidence and
12 arguments could have been, and should have been, asserted in connection with the Plaintiff's
13 response in opposition to the Dismissal Motion, thereby affording Defendants an opportunity to
14 properly respond thereto (to the extent a response is necessary or advisable). Plaintiff instead
15 chose to ambush Defendants, filing the Declaration just prior to the Dismissal Hearing that has
16 been scheduled for nearly two months. No rule of procedure authorizes the untimely-filed
17 Declaration, and the Court should not be rely on any new arguments or evidence presented at this
18 late stage. The Declaration should therefore be stricken in its entirety.

19 **C. Declaration Contents Do Not Relate To The Loan, But Rather Purport To**
20 **Smear Defendants' Reputation With The Court.**

21 "Relevant" evidence has a tendency to make the existence of any fact that is of
22 consequence to the determination of the action more or less probable than without the evidence.
23 *See* Fed. R. Evid. 401. Evidence that is not relevant is inadmissible. *Id.* Additionally, evidence
24 of a party's character is not admissible for the purpose of proving conduct in conformity
25 therewith. *See* Fed. R. Evid. 404(a).

26 The Declaration was filed in support of the Fourth Amended Complaint, the sufficiency
27 of which is challenged by the Defendants by and through the Dismissal Motion. The
28 Declaration, however, focuses not on the sufficiency of the Fourth Amended Complaint, but on

1 the standard for summary judgment (*see* Paragraph 8, discussing “genuine issues of material
2 fact.”) Even the Plaintiff’s recitation of allegations and prayers for relief fail to assert valid
3 causes of action. Because the Declaration bears no relevance to whether the Fourth Amended
4 Complaint should be dismissed as sought by and through the Dismissal Motion, the entirety of
5 the Declaration is inadmissible as not relevant.

6 Paragraphs 1-3 and 10 of the Declaration consist of statements in which the Plaintiff
7 interprets unidentified news stories to malign Defendants’ character. The Plaintiff’s commentary
8 regarding legal proceedings in other states, learned through “the news,” has nothing to do with
9 the sufficiency of the Fourth Amended Complaint; rather, they are inflammatory statements
10 against Defendants. Paragraph 2 of the Declaration refers to Angelo Mozilo, who is not a party
11 to these proceedings. Paragraph 2 and Paragraph 3 allege conduct by Bank of America, MERS
12 and Bank of New York Mellon having nothing to do with the Loan or Plaintiff. Paragraph 10
13 relies on lawsuits and news reports. All of these paragraphs are intended to convince the Court
14 that Defendants have acted improperly in the past¹, so they must have acted improperly with
15 respect to the Loan. All such statements consist of inadmissible character evidence.

16 Accordingly, Paragraphs 1-3 and 10 of the Declaration should be stricken by the Court as
17 not relevant and consisting of improper character evidence.

18 **D. Declaration Is Based On Inadmissible Hearsay.**

19 Hearsay is an out of court statement offered for the truth of the matter asserted, and is
20 inadmissible unless a hearsay exception applies. Fed. R. Evid. 801, 802. Paragraphs 1 through 3
21 and 10 relate to unidentified news reports and lawsuits, which are classic examples of hearsay to
22 which no hearsay exception applies. The Court should therefore strike and completely ignore
23 such Paragraphs.

24 **III. RELIEF REQUESTED.**

25 WHEREFORE, Defendants request that the Court enter an order:
26

27 _____
28 ¹ Defendants vigorously oppose such characterization.

- 1 a. Striking the Declaration in its entirety, or in the alternative, striking those
2 portions of the Declaration as the Court deems appropriate;
3 b. Disregarding those portions of the Declaration that are stricken by the
4 Court; and
5 c. For such other and further relief as the Court deems just and proper under
6 the circumstances.

7 RESPECTFULLY SUBMITTED this 9th day of November, 2010.

8 **BRYAN CAVE LLP**

9
10 By: /s/ KSH, 024155
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12 Kyle S. Hirsch
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16 COPY of the foregoing served via **email**
17 this 9th day of November, 2010, upon:

18 Andrew C. Bailey
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20 Cornville, AZ 86325
21 Email: andrew@cameronbaxter.net
22 Debtor in Pro Per

23
24
25
26
27
28 /s/ Donna McGinnis