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U.S. BANKRUPTCY COURT
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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Jennifer L. Wilson, Plaintiff, v. Residential Capital, LLC, et al., Defendants.	ADV. CASE: 12-01936 CASE NO: 12-12020
In re RESIDENTIAL CAPITAL, LLC et al., Debtors.	Chapter 11 Jointly Administered

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OBJECTION TO DECLARATION OF JENNIFER SCOLIARD, IN-HOUSE SENIOR BANKRUPTCY COUNSEL AT RESIDENTIAL CAPITAL, LLC, IN SUPPORT OF DEBTORS' MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING PURSUANT TO BANKRUPTCY RULE 7012(B) AND FRCP 12(B)(1) AND 12(B)(6) OR, IN THE ALTERNATIVE, PERMISSIVE ABSTENTION PURSUANT TO 28 U.S.C. §1334(C)(1)ARY PROCEEDING PURSUANT TO BANKRUPTCY RULE 7012(B) AND FRCP 12(B)(1) AND 12(B)(6) OR, IN THE

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ALTERNATIVE, PERMISSIVE ABSTENTION PURSUANT TO 28 U.S.C. §1334(C)(1)

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POINTS AND AUTHORITIES

BACKGROUND.

01. On November 9, 2012 plaintiff, Jennifer L. Wilson (hereinafter "Wilson") filed a Complaint naming Residential Capital, LLC; Residential Funding Company, LLC; and DOES 1 – 10 inclusively (hereinafter collectively and severally "Defendants" or "Defendants'").

02. On a condition of Defendants' waiver of process of service Wilson stipulated to two separate extensions for response to the complaint.

03. On January 7, 2013 Defendants' moved for dismissal pursuant to Bankruptcy Rule 7012(b); FRCP 12(b)(1) and 12(b)(6) or, in the alternative, permissive abstention pursuant to 28 U.S.C. § 1334(c)(1) (hereinafter "Motion to Dismiss").

04. Defendants' submitted the "DECLARATION OF JENNIFER SCOLIARD, IN-HOUSE SENIOR BANKRUPTCY COUNSEL AT RESIDENTIAL CAPITAL, LLC IN SUPPORT OF DEBTOR'S MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING PURSUANT TO BANKRUPTCY RULE 7012(b) AND FRCP 12(b)(1) AND 12(b)(6) OR, IN THE ALTERNATIVE PERMISSIVE ABSTENTION PURSUANT TO 28 U.S.C. § 1334(c)(1)" in support of Defendants' Motion to Dismiss.

STANDARD OF REVIEW.

05. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. F.R.E. Rule 401.

06. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. F.R.E. Rule 403.

07. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion. See F.R.E. Rule 801. A "declarant" is a person who makes a statement. (*Id.*). "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.*).

08. Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress. F.R.E. Rule 802.

09. 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.

10. The term ''business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. F.R.E. Rule 803(6).

11. The standard governing admissibility is as follows: "The requirement of authentication or identification 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." F.R.E. Rule 901(a).

12. Certified domestic records of regularly conducted activity.—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.

13. The "DECLARATION OF JENNIFER SCOLIARD, IN-HOUSE SENIOR BANKRUPTCY COUNSEL AT RESIDENTIAL CAPITAL , LLC IN SUPPORT OF DEBTOR'S MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING PURSUANT TO BANKRUPTCY RULE 7012(b) AND FRCP 12(b)(1) AND 12(b)(6) OR, IN THE ALTERNATIVE PERMISSIVE ABSTENTION PURSUANT TO 28 U.S.C. § 1334(c)(1)" (hereinafter "Scoliard

Declaration") fails to certify the NOTE to be a true and correct copy of the original.

14. Further, the Scoliard Declaration is not based upon firsthand knowledge stating "I am responsible for the management of all non-routine bankruptcy litigation nationwide, including contested bankruptcy matters." None of the litigation referred to in the Scoliard Declaration involved "non-routine bankruptcy litigation."

15. Additionally, the Scoliard Declaration is contradictory in relevant part stating, "Wilson did not ... file any judicial action to enjoin the Foreclosure." See Scoliard Declaration ¶ 8; and subsequently stating, "On November 12, 2010, Plaintiff filed a complaint in the District Court for the Western District of North Carolina (the "WDNC Court"), Case No. 10-CV-573 (the "WDNC Action"), against SunTrust Bank and Does 1-10 inclusively, along with a motion for a temporary restraining order seeking a stay of the Foreclosure sale (the "Request for TRO"). See Scoliard Declaration ¶ 10.

ARGUMENT

SCOLIARD DECLARATION.

16. Scoliard Declartion lacks personal knowledge of the facts and therefore the Scoliard Declaration can only be considered hearsay.

17. First, the Scoliard Declaration is unclear if the declaration is made upon firsthand (personal) knowledge; general familiarity; information supplied or verified by personnel in departments; discussions with other members of the Legal Department, etc. (see Scoliard Declaration ¶ 4).

18. Second, the Scoliard Declaration fails to identify; 1) the personnel making verifications, if any; 2) what, documents records/materials were verified, if any; 3) the verifier's level of qualifications, if any; 4) which members of the Legal Department did discussions take place, if any.

19. Three, the Scoliard Declaration fails to identify the "Custodian" of the records relied upon in making the declaration.

20. Fourth, the Scoliard Declaration fails to authenticate the "NOTE" attached as Exhibit "A". Documents, such as that identified as Exhibit "A" in the Scoliard Declaration are hearsay pursuant to F.R.E. Rules 802 and 803(6), unless supported or certificated by a competent declarant pursuant to F.R.E. Rule 902(11).

21. Fifth, the Scoliard Declaration fails to meet the required essentials for admissibility; (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.[1]

22. Six, by admission the Scoliard Declaration falls outside the Custodianship of the "NOTE", an unauthenticated copy proffered as evidence, more particularly identified as Exhibit "A". See Scoliard Declaration ¶ 4.

23. Seven, the Scoliard Declaration completely lacks the "trustworthiness" component and fails to state the source, method, or circumstances of preparation.

24. Eight, a Declarant's statement, like that of the Scoliard Declaration, is hearsay unless made while testifying at trial. See F.R.E. 801.

CONCLUSION

Exhibit, "A", attached to and incorporated in the "DECLARATION OF JENNIFER SCOLIARD, IN-HOUSE SENIOR BANKRUPTCY COUNSEL AT RESIDENTIAL CAPITAL , LLC IN SUPPORT OF DEBTOR'S MOTION FOR

[1] In re: Vee Vinhnee, BAP No. CC-04-1284, Bk. No. LA 03-29549-SB, Adv. No. LA 03-02660-SB, pg. 9 (Dec. 16, 2005).

DISMISSAL OF ADVERSARY PROCEEDING PURSUANT TO BANKRUPTCY RULE 7012(b) AND FRCP 12(b)(1) AND 12(b)(6) OR, IN THE ALTERNATIVE PERMISSIVE ABSTENTION PURSUANT TO 28 U.S.C. § 1334(c)(1)" fails to comport to the Federal Rules of Evidence and therefore is inadmissible.

The "DECLARATION OF JENNIFER SCOLIARD, IN-HOUSE SENIOR BANKRUPTCY COUNSEL AT RESIDENTIAL CAPITAL , LLC IN SUPPORT OF DEBTOR'S MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING PURSUANT TO BANKRUPTCY RULE 7012(b) AND FRCP 12(b)(1) AND 12(b)(6) OR, IN THE ALTERNATIVE PERMISSIVE ABSTENTION PURSUANT TO 28 U.S.C. § 1334(c)(1)" is strictly hearsay and lacks the requisite trustworthiness element and on that basis is inadmissible.

Date: March 13, 2013

Respectfully,

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