

Standing  
Summary Judgment  
Violation of Automatic Stay  
Wrongful Foreclosure

Blocker v. Nomura Home Equity Home Loan, Inc., et al, Adversary  
No. 09-03361-rld  
Tyrone Blocker, Case No. 09-31131-rld7

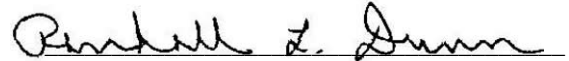
9/27/2010 RLD

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By Quitclaim Deed signed two days before filing for bankruptcy protection, chapter 7 debtor transferred his asserted interest in real property ("Property") to his sister. Despite this transfer, debtor claimed in his bankruptcy schedules both an ownership interest and an exemption in the Property. After the bankruptcy court denied debtor's motion for reconsideration of the order granting relief from stay with respect to the Property, (1) debtor filed an appeal, (2) debtor's sister recorded the Quitclaim Deed, (3) debtor's sister filed her own chapter 7 bankruptcy case, and (4) debtor filed an adversary proceeding against the holder of the beneficial interests under the note and trust deed on the Property, as well as its servicing agent, the successor trustee, and his law firm, asserting claims for violation of the automatic stay and seeking damages for a wrongful and fraudulent conspiracy to foreclose on the Property.

The court granted defendants' motion for summary judgment on all claims in the adversary complaint. The court determined that for summary judgment purposes debtor had sufficient standing to bring the complaint based on his claim of an ownership interest in the Property in his bankruptcy schedules and on the chapter 7 trustee's abandonment to the debtor of any interest of the bankruptcy estate in the Property and in debtor's claims in the adversary proceeding. Nevertheless, the court determined that there was nothing in the summary judgment record that (1) supported debtor's claim for relief that defendants had violated the automatic stay, or (2) supported debtor's other claims.

Below is an Opinion of the Court.



RANDALL L. DUNN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

11	In Re:	)	Bankruptcy Case
12	TYRONE BLOCKER,	)	No. 09-31131-rld7
13		)	
13	Debtor.	)	
14	_____		)
14	TYRONE BLOCKER,	)	Adv. Proc. 09-03361-rld
15		)	
16	Plaintiff,	)	
17	v.	)	MEMORANDUM OPINION
17		)	
18	NOMURA HOME EQUITY HOME LOAN,	)	
18	INC., et al.,	)	
19		)	
19	Defendants.	)	

20 I heard the defendants' Motion for Summary Judgment in this  
 21 adversary proceeding ("Adversary Proceeding") on August 12, 2010 (the  
 22 "Hearing") and took the matter under advisement. In his First Amended  
 23 Complaint ("Amended Complaint") in this Adversary Proceeding, the  
 24 plaintiff Tyrone Blocker ("Mr. Blocker") purports to assert federal civil  
 25 RICO claims and related Oregon state tort law claims against the  
 26 defendants Nomura Home Equity Home Loan, Inc. ("Nomura"), HSBC Bank USA,

1 National Association ("HSBC"), Ocwen Loan Servicing ("Ocwen"), Shapiro &  
2 Sutherland LLC ("Shapiro & Sutherland"), and Kelly D. Sutherland ("Mr.  
3 Sutherland"). Defendants are referred to collectively herein as the  
4 "Defendants." In its essence, Mr. Blocker is asserting that Defendants  
5 conspired wrongfully and fraudulently to foreclose his interest in a  
6 residence located at 12620 S.E. Cora Street, Portland, Oregon 97236 (the  
7 "Property"). He also asserts in the Amended Complaint that the  
8 Defendants violated the automatic stay under § 362(a)<sup>1</sup> in his individual  
9 chapter 7 bankruptcy case. Defendants deny Mr. Blocker's allegations and  
10 assert that they are entitled to summary judgment because Mr. Blocker has  
11 no standing to assert the claims set forth in the Amended Complaint, and  
12 in any event, "there is no factual nexus between any events complained of  
13 and any damage to Mr. Blocker." Defendants' Memorandum of Law in Support  
14 of Motion for Summary Judgment, Docket No. 52, at p. 3.

15 I have jurisdiction to decide the Defendants' Motion for  
16 Summary Judgment under 28 U.S.C. §§ 1334 and 157(a) and (b).

17 Following the Hearing, I have reviewed the Adversary Proceeding  
18 pleadings and the parties' evidentiary submissions, as well as applicable  
19 legal authorities. I also have taken judicial notice of the dockets and  
20 documents filed in Mr. Blocker's chapter 7 case, case number 09-31131-  
21 rld7 ("Blocker Main Case"), and in the chapter 7 case of Mr. Blocker's  
22 sister, Cynthia Thompson ("Ms. Thompson"), case no. 09-38579-elp7  
23 ("Thompson Main Case") for purposes of confirming and ascertaining facts

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24  
25 <sup>1</sup> Unless otherwise indicated, all chapter, section and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the  
Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal  
Rules of Civil Procedure are referred to as Civil Rules.

1 not reasonably in dispute. Federal Rule of Evidence 201; In re Butts,  
2 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa. 2006).

3 This Memorandum Opinion sets forth my conclusions of law in  
4 light of the evidentiary record before me pursuant to Civil Rule 52(a),  
5 applicable in the Adversary Proceeding pursuant to Rule 7052.

6 Factual Background

7 A. Fact Sources

8 The following facts have been gleaned from the dockets in the  
9 Adversary Proceeding, the Blocker Main Case and the Thompson Main Case,  
10 and from Defendants' Concise Statement of Facts (Docket No. 51). In his  
11 Response to Defendants' Motion for Summary Judgment (Docket No. 65)  
12 ("Response"), Mr. Blocker does not contest the factual statements in  
13 Defendants' Concise Statement of Facts. However, in his Response, Mr.  
14 Blocker does contest the qualifications of Nichelle Jones to authenticate  
15 various documents submitted as exhibits to her Declaration, included in  
16 Docket No. 50, and supporting statements included in Defendants' Concise  
17 Statement of Facts. I treat his objection as raising authentication and  
18 hearsay issues with respect to said documents.

19 Federal Rule of Evidence 901(a) requires that documentary  
20 evidence be properly authenticated or identified prior to its admission.  
21 As a general matter, documents offered as evidence to prove the truth of  
22 what they contain are "hearsay." Federal Rule of Evidence 801. However,  
23 there is an exception to the inadmissibility of documents as hearsay for  
24 documents kept in the course of regularly conducted business activity.  
25 Federal Rule of Evidence 803(6).

26 In her Declaration, Ms. Jones declared under penalty of perjury

1 and based on her personal knowledge, that she was employed by Ocwen and  
2 was duly authorized to make the statements included in her Declaration.  
3 She further declared that she was familiar with the manner and procedures  
4 by which Ocwen obtained, prepared and maintained its business records.  
5 She declared that such records are prepared and maintained by Ocwen's  
6 employees or agents "in the performance of their regular business duties  
7 at or near the time, and conditions, and/or event recorded therein." She  
8 also stated that she had knowledge of and/or access to Ocwen's business  
9 records, and specifically, the Note and Deed of Trust that are subjects  
10 of the Adversary Proceeding, and she personally had reviewed the Note and  
11 Deed of Trust prior to signing her Declaration. She went on to identify  
12 the Note, Deed of Trust and Assignment of the Deed of Trust attached as  
13 Exhibits 1, 2 and 3 to her Declaration. Her Declaration was adequate to  
14 authenticate those exhibits as business records of Ocwen, kept in the  
15 regular course of its business. Accordingly, I overrule Mr. Blocker's  
16 objection to consideration of the documents attached as exhibits to Ms.  
17 Jones' Declaration, finding them properly authenticated and admissible  
18 under the "business records" exception to the hearsay rule. See United  
19 States v. Smith, 609 F.2d 1294, 1301-02 (9<sup>th</sup> Cir. 1979); Sicherman v.  
20 Diamondcut, Inc. (In re Sol Bergman Estate Jewelers, Inc.), 225 B.R. 896,  
21 901 (BAP 6<sup>th</sup> Cir. 1998), aff'd, 208 F.3d 215 (6<sup>th</sup> Cir. 2000); and In re  
22 Exide Technologies, 340 B.R. 222, 244 (Bankr. D. Del. 2006).

23 B. Facts in the Record

24 On or about July 28, 2006, Michael D. Feil and Heather A. Feil  
25 (the "Feils"), as tenants by the entirety, signed and delivered to  
26 American Mortgage Express Financial dba Millennium Funding Group, an

1 adjustable-rate promissory note in the principal amount of \$237,500,  
2 bearing interest at 8.625% per annum (the "Note"). The Note was secured  
3 by a deed of trust ("Deed of Trust") on the Property, recorded August 7,  
4 2006. The beneficial interests under the Note and Deed of Trust were  
5 assigned to HSBC, as trustee for the registered holders of Nomura asset-  
6 backed certificates, Series 2007-2, by an assignment ("Assignment")  
7 recorded on March 25, 2010.

8 Ocwen is the authorized servicing agent for HSBC. Mr.  
9 Sutherland of Shapiro & Sutherland was appointed as successor trustee  
10 under the Deed of Trust. The Substitution of Trustee form appointing Mr.  
11 Sutherland as successor trustee under the Deed of Trust was recorded on  
12 April 14, 2008.

13 The Note and Deed of Trust are in default, and monthly  
14 installment payments are owing from September 1, 2007 forward. Mr.  
15 Sutherland has been instructed to begin foreclosure proceedings with  
16 respect to the Property pursuant to ORS 86.700 et seq. Mr. Sutherland  
17 currently has possession of the original Note.

18 A quitclaim deed ("Blocker Quitclaim Deed") from the Feils to  
19 Mr. Blocker was signed on November 7, 2007 and recorded on December 4,  
20 2007. The stated consideration for the transfer of the Property on the  
21 Blocker Quitclaim Deed is \$1.00.

22 A quitclaim deed ("Thompson Quitclaim Deed") from Mr. Blocker  
23 to Ms. Thompson was signed on February 23, 2009 and recorded on  
24 October 16, 2009. The stated consideration for the transfer of the  
25 Property on the Thompson Quitclaim Deed is \$25,000, with a \$5,000  
26 downpayment.

1 Mr. Blocker filed his chapter 7 petition on February 25, 2009.  
2 In spite of Mr. Blocker having transferred all of his "right, title and  
3 interest" in and to the property to Ms. Thompson by the Thompson  
4 Quitclaim Deed two days earlier, on February 23, 2009, Mr. Blocker  
5 asserted under penalty of perjury in his schedules that he was the  
6 "owner" of the Property and claimed a homestead exemption in the  
7 Property. Blocker Main Case Docket No. 12, Schedules A and C.

8 On April 20, 2009, Mr. Sutherland filed a motion for relief  
9 from stay ("Stay Relief Motion") in behalf of HSBC and Ocwen to obtain  
10 relief from the automatic stay of § 362(a) in the Blocker Main Case to  
11 proceed with foreclosure against the Property. Blocker Main Case Docket  
12 No. 25. Mr. Blocker opposed the Stay Relief Motion. Blocker Main Case  
13 Docket Nos. 27 and 31. Following a hearing, the Stay Relief Motion was  
14 granted by order ("Blocker Stay Relief Order") entered on May 27, 2009.  
15 Blocker Main Case Docket No. 46. On August 28, 2009, Mr. Blocker filed a  
16 motion to vacate the Blocker Stay Relief Order. Blocker Main Case Docket  
17 No. 83. On September 17, 2009, Mr. Blocker filed a motion to reconsider  
18 the Blocker Stay Relief Order, essentially reiterating and expanding on  
19 his arguments made in the motion to vacate the Blocker Stay Relief Order.  
20 Blocker Main Case Docket No. 91. Following review of the documents and  
21 pleadings filed, the bankruptcy court denied Mr. Blocker's motion to  
22 vacate the Blocker Stay Relief Order, by order entered on September 18,  
23 2009. Blocker Main Case Docket No. 93. Further, following review of the  
24 documents and pleadings filed, the bankruptcy court denied Mr. Blocker's  
25 motion to reconsider the Blocker Stay Relief Order, by order entered on  
26 September 21, 2009. Blocker Main Case Docket No. 95. Mr. Blocker filed

1 a timely notice of appeal of the bankruptcy court's order denying his  
2 motion to vacate the Blocker Stay Relief Order on September 30, 2009.  
3 Mr. Blocker filed a motion for a stay pending appeal on October 9, 2009.  
4 Blocker Main Case Docket No. 106. Following review of the documents and  
5 pleadings filed, the bankruptcy court denied Mr. Blocker's motion for  
6 stay pending appeal by order entered on October 14, 2009. Blocker Main  
7 Case Docket No. 110. Mr. Blocker filed a notice of appeal of the  
8 bankruptcy court's denial of his motion for stay pending appeal on  
9 October 22, 2009. Blocker Main Case Docket No. 118. Mr. Blocker's two  
10 appeals have been consolidated and are pending before the district court.  
11 See United States District Court for the District of Oregon Appeal Nos.  
12 10-CV-127-KI and 10-CV-623-KI.

13 Ms. Thompson filed her chapter 7 petition on October 19, 2009.  
14 In her schedules, Ms. Thompson claimed a "rent to own" ownership interest  
15 in the Property but did not claim a homestead exemption in the Property.  
16 Thompson Main Case Docket No. 18, Schedules A and C. Mr. Sutherland  
17 filed a motion for relief from stay ("Thompson Stay Relief Motion") in  
18 behalf of HSBC and Ocwen to obtain relief from the automatic stay of  
19 § 362(a) in the Thompson Main Case to proceed with foreclosure against  
20 the Property. Thompson Main Case Docket No. 10. Ms. Thompson opposed  
21 the Thompson Stay Relief Motion. Thompson Main Case Docket No. 17.  
22 Following a series of hearings, including a final evidentiary hearing on  
23 March 16, 2010, the bankruptcy court granted the Thompson Stay Relief  
24 Motion by order ("Thompson Stay Relief Order") entered on March 23, 2010.  
25 Thompson Main Case Docket No. 52. Ms. Thompson filed a notice of appeal  
26 of the Thompson Stay Relief Order on April 7, 2010. Thompson Main Case



1 Docket No. 54. Ms. Thompson's appeal is pending before the district  
2 court. See United States District Court for the District of Oregon  
3 Appeal No. 10-CV-1018-KI.

4 Legal Discussion

5 A. Summary Judgment Standards

6 Granting a motion for summary judgment is appropriate only if  
7 there is no genuine dispute as to any material fact, and the moving party  
8 is entitled to judgment as a matter of law. Civil Rule 56(c); Rule 7056;  
9 State Farm Mutual Auto Ins. Co. v. Davis, 7 F.3d 180, 182 (9<sup>th</sup> Cir.  
10 1993). "Material facts" are such facts as may affect the outcome of a  
11 case under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
12 248 (1986). A dispute concerning a material fact is "genuine" only if  
13 there is sufficient evidence to justify a finding in favor of the non-  
14 moving party. Id. However, all justifiable inferences from the evidence  
15 presented are to be considered in favor of the non-moving party. Id. at  
16 255.

17 The moving party bears the initial burden of demonstrating that  
18 there are no genuine issues of material fact. T.W. Elec. Serv., Inc. v.  
19 Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9<sup>th</sup> Cir. 1987).  
20 However, once the moving party has met that burden, the burden shifts to  
21 the non-moving party to "set forth, by affidavit or as otherwise provided  
22 in Rule 56, 'specific facts showing that there is a genuine issue for  
23 trial.'" Horphag Research Ltd. v. Garcia, 475 F.3d 1029, 1035 (9<sup>th</sup> Cir.  
24 2006) (quoting T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,  
25 809 F.2d at 630). The non-moving party cannot rely on the allegations in  
26 its pleadings to meet that burden. Nelson v. Pima Community College, 83

1 F.3d 1075, 1081-82 (9<sup>th</sup> Cir. 1996) (“[M]ere allegations and speculation  
2 do not create a factual dispute for purposes of summary judgment”).

3 B. Standing

4 Defendants argue that to the extent Mr. Blocker’s claims for  
5 relief arose prior to the filing of his chapter 7 petition, those claims  
6 belong to his bankruptcy estate, rather than to him individually, and the  
7 real party in interest to assert such claims is the chapter 7 trustee.  
8 In addition, the defendants also argue that Mr. Blocker lacks standing  
9 because he conveyed all of his right, title and interest in and to the  
10 Property to Ms. Thompson by the Thompson Quitclaim Deed two days prior to  
11 his bankruptcy filing.

12 The question of standing involves both “constitutional  
13 limitations on federal court jurisdiction and prudential limitations on  
14 its exercise.” Warth v. Seldin, 422 U.S. 490, 498 (1975). Standing as a  
15 constitutional matter concerns whether the plaintiff’s personal stake in  
16 the subject litigation is sufficient to constitute a “case or  
17 controversy” to which the federal judicial power may extend under Article  
18 III of the Constitution. Lujan v. Defenders of Wildlife, 504 U.S. 555,  
19 559-60 (1992). Prudential standing “is comprised of both judicially-  
20 created limitations, such as the prohibition on third-party standing ...  
21 and statutorily-imposed limitations, such as the [Civil] Rule 17(a)  
22 requirement” that claims be maintained by the real party in interest.  
23 Gilmartin v. City of Tucson, 2006 WL 5917165 \*4 (D. Ariz. 2006) (citing  
24 Lee v. Deloitte & Touche LLP, 428 F. Supp. 2d 825, 831 (N.D. Ill. 2006).

25 With regard to the argument that the estate rather than Mr.  
26 Blocker owns any prepetition claims asserted by Mr. Blocker in the

1 Adversary Proceeding, I note that from the outset of his chapter 7 case,  
2 Mr. Blocker claimed a homestead exemption with respect to the Property  
3 that in effect would be eliminated by a foreclosure sale. However, in  
4 any event, Mr. Blocker entered into a settlement ("Settlement") with his  
5 chapter 7 trustee pursuant to which, in consideration of Mr. Blocker  
6 withdrawing his objection to settlement of an estate claim against State  
7 Farm and waiver of any claim of exemption with respect to the State Farm  
8 settlement proceeds, the trustee abandoned any estate claims to the  
9 Property and to the claims asserted by Mr. Blocker in the Adversary  
10 Proceeding. See Blocker Main Case Docket No. 184. The Settlement notice  
11 provided that it would be effective if no objection was filed within 23  
12 days after the Settlement notice date of February 18, 2010. No such  
13 objection was filed; so, the Settlement became effective. Any  
14 prepetition claims asserted in the Adversary Proceeding accordingly were  
15 abandoned to Mr. Blocker.

16 Mr. Blocker is on considerably thinner ice for standing  
17 purposes in light of his conveyance of all right, title and interest in  
18 and to the Property to his sister, Ms. Thompson, by means of the Thompson  
19 Quitclaim Deed two days prior to his bankruptcy filing. The Thompson  
20 Quitclaim Deed subsequently was recorded. However, the relationship  
21 between Mr. Blocker and Ms. Thompson with respect to the Property is  
22 confused in light of the schedules they have filed in their separate  
23 bankruptcy cases.

24 Mr. Blocker claims under penalty of perjury that he owns the  
25 Property and further claims a homestead exemption in the Property, in  
26 spite of the evidence of the Thompson Quitclaim Deed. Ms. Thompson

1 claimed only a "rent to own" interest in the Property under penalty of  
2 perjury and did not claim a homestead exemption in the Property. In  
3 these circumstances, Mr. Blocker might not be able to withstand a  
4 standing challenge at trial, but I conclude, based on the contradictory  
5 evidentiary record before me, that a genuine issue of material fact  
6 exists as to whether Mr. Blocker in fact maintains an ownership interest  
7 in the Property, precluding summary judgment against him on the standing  
8 issue.

9 C. Lack of Evidence to Support the Claims for Relief

10 Despite my conclusion that granting summary judgment on the  
11 standing issues raised by Defendants is inappropriate, my ultimate  
12 conclusion is that summary judgment must be entered in favor of the  
13 Defendants against Mr. Blocker on all of his asserted claims for relief  
14 in the Amended Complaint for the following reasons.

15 1. Claims for Violation of the Automatic Stay

16 Mr. Blocker has provided no evidence that any of the Defendants  
17 has violated the automatic stay of § 362(a) in his bankruptcy case. Mr.  
18 Blocker has not provided an affidavit to support his stay violation  
19 allegations. Further, my review of the records in both the Adversary  
20 Proceeding and the Blocker Main Case indicates nothing more than that the  
21 Defendants pursued the Stay Relief Motion to its conclusion with the  
22 entry of the Blocker Stay Relief Order. Once the Stay Relief Motion was  
23 granted, and no stay pending appeal was imposed, the Defendants  
24 apparently rescheduled a foreclosure sale of the Property. However,  
25 foreclosure was again stayed by Ms. Thompson's bankruptcy filing. While  
26 relief from stay was granted by the Thompson Stay Relief Order in the

1 Thompson Main Case, there is no evidence in the record before me that a  
2 foreclosure sale of the Property has in fact taken place. As a bottom  
3 line matter, there is nothing in the record that supports Mr. Blocker's  
4 claim for relief based on Defendants' alleged violation of the automatic  
5 stay of § 362(a) in Mr. Blocker's bankruptcy case. In addition, I  
6 conclude that Mr. Blocker has no standing to pursue any alleged violation  
7 of the automatic stay in Ms. Thompson's bankruptcy case. Accordingly,  
8 summary judgment in Defendants' favor is appropriate on Mr. Blocker's  
9 claim for relief based on alleged violations of the automatic stay, as  
10 there is no genuine issue of material fact as to any such violation of  
11 the stay claim.

12 2. Wrongful and Fraudulent Conspiracy to Foreclose

13 While Mr. Blocker's allegations of civil RICO and state law  
14 tort claims go on at great length in his Amended Complaint, in their  
15 essence, he is alleging that Defendants have no right to foreclose his  
16 interest in the Property, and they have wrongfully, fraudulently and  
17 illegally conspired to complete such a foreclosure.

18 At the outset, as noted above, there is no evidence in the  
19 record that a foreclosure of Mr. Blocker's interest, if any, in the  
20 Property has been completed. To the extent that Mr. Blocker is asserting  
21 a claim for damages based on such a wrongful foreclosure, the event  
22 leading to such potential damages has not occurred, and his claim is not  
23 ripe for determination.

24 However, the uncontradicted evidence in the record before me is  
25 that the Defendants in their respective roles have every right to pursue  
26 a foreclosure sale of the Property, and they have done nothing wrongful,

1 fraudulent or illegal. If Mr. Blocker has any evidence of such  
2 wrongdoing on the part of any of the Defendants, he has not presented it,  
3 and he has presented no evidence in opposition to the Defendants'  
4 appropriately supported Motion for Summary Judgment to establish that  
5 there is any genuine issue of material fact on the issue of damages  
6 resulting to him from the alleged wrongful, fraudulent or illegal conduct  
7 of any of the Defendants. In short, Mr. Blocker has emphatically stated  
8 his claims against the Defendants in the Amended Complaint, but when he  
9 was required to present some evidence tending to establish the existence  
10 of a genuine issue of material fact in opposition to Defendants' Motion  
11 for Summary Judgment, he defaulted. His citations to ORS § 73.0104(5)  
12 and UCC § 3-409(1) [ORS § 73.0409(1)] are unavailing because he does not  
13 provide any explanation as to why they should be treated as talismans  
14 that shield him from the requirement to produce evidence in support of  
15 his claims. I conclude that the Defendants have established that they  
16 are entitled to summary judgment on all of Mr. Blocker's claims asserted  
17 against them in the Amended Complaint.

#### 18 Conclusion

19 Defendants' Motion for Summary Judgment is supported by the law  
20 and the evidentiary submissions included in their supporting  
21 declarations. My review of the documents filed and dockets in the  
22 Adversary Proceeding, the Blocker Main Case and the Thompson Main Case  
23 provides nothing that would contradict Defendants' entitlement to summary  
24 judgment. Mr. Blocker has not submitted any evidence tending to  
25 establish the existence of a genuine issue of material fact with respect  
26 to any of the claims for relief asserted in his Amended Complaint.

1 Accordingly, I conclude that Defendants are entitled to summary judgment  
2 in their favor on all claims asserted against them in the Amended  
3 Complaint. Mr. Esterkin should submit an order and judgment consistent  
4 with the conclusions set forth in this Memorandum Opinion within the next  
5 ten days.

6  
7 cc: Tyrone Blocker  
8 James N. Esterkin  
9 David B. Mills  
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