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9 **UNITED STATES BANKRUPTCY COURT**
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

11 IN RE ORLANDA CUNNINGHAM,,) Case No: 09-36912 BR
12) CHAPTER 11
13 DEBTOR,)
14) **DEBTOR IN POSSESSION**
15) **ORLANDA CUNNINGHAM'S**
16) **OPPOSITION TO WELLS FARGO**
17) **BANK, N.A. AS TRUSTEE FOR**
18) **OPTION ONE MORTGAGE LOAN**
19) **TRUST 2007-5 ASSET-BACKED**
20) **CERTIFICATES, SERIES 2007-5'S**
21) **MOTION FOR RELIEF FROM**
22) **THE AUTOMATIC STAY**
23)
24)
25)

26 TO THE HONORABLE BARRY RUSSELL, UNITED STATES
27 BANKRUPTCY JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE,
28 THE MOVING PARTY AND OTHER PARTIES IN INTEREST:

1 Debtor in Possession Orlanda Cunningham (“Debtor”) hereby opposes and
2 objects to the motion for relief from stay filed by Wells Fargo, N.A. AS
3 TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2007-5 ASSET-
4 BACKED CERTIFICATES, SERIES 2007-5 (“Wells Fargo”) as follows:
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6 **I.**

7 **INTRODUCTION**

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9 Wells Fargo’s motion for relief from stay (the “Motion”) is based on an
10 alleged default in mortgage payments on a note secured by a first Deed of Trust on
11 the residential real estate of Debtor. Wells Fargo alleges in its motion that it is the
12 “owner and holder” of the Deed of Trust and Note. To the contrary, the Debtor
13 alleges that Wells Fargo is not the actual holder or current assignee of the Note, is
14 not the real party in interest in this matter, and has no legal standing to bring this
15 Motion. Moreover, Wells Fargo’s exhibits are not properly authenticated and its
16 declarations lack foundation.
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19 **II.**

20 **WELLS FARGO IS NOT THE REAL PARTY IN INTEREST AND,**
21 **THEREFORE, LACKS STANDING TO BRING THIS MOTION**
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23 Rule 17(a) of the Federal Rules of Civil Procedure provides that every
24 action “shall be prosecuted in the name of the real party in interest.” Rule 17(b) of
25 the Federal Rules of Civil Procedure provides that the party filing the action must
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1 have the “capacity to sue or be sued.” Here, Wells Fargo is not the real party in
2 interest and therefore has no standing to bring this Motion against Debtor.

3 In order to determine whether Wells Fargo has standing and is entitled to
4 relief under Section 362, it is necessary to consider who is entitled to enforce the
5 Note under the substantive law that governs those rights, i.e., California law. In re
6 Hwang, 396 B.R. 757, 762 (Bankr.C.D.Cal. 2008). Specifically, under California
7 law, an “instrument” such as a secured note, may only be enforced by the
8 “holder” of the note. Cal. Comm. Code ' 3301(a). To qualify as a holder of a
9 note, the person must be in possession of the note and the note must be payable to
10 that person. Cal. Comm. Code ' 1201(20). The payee of a note may negotiate it
11 by indorsing and delivering it to another person who then becomes its holder and
12 is entitled to enforce it. Cal. Comm. Code ' 3201, 3203.

13 Here, the Note and Deed of Trust at issue in this case are both dated
14 February 27, 2007, and the Note is made payable to Option One Mortgage
15 Company (“Option One”). An Assignment of the Deed of Trust which was
16 allegedly made on February 27, 2007, but was not recorded until on or about
17 October 29, 2009, allegedly transferred the Deed of Trust from Option One to
18 Wells Fargo. Although Wells Fargo also testifies (through Shinita Jackson) that
19 the Note was assigned to it as well, there is no evidence of any such assignment.
20 That is, the Note attached to the Motion does not give any indication that it has
21 been transferred. It shows Option One as the payee with no indorsement to Wells
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1 Fargo. Consequently, Option One remains the holder of the note and is the only
2 entity entitled to enforce it. Cal. Comm. Code ' 3301(a); see In re Hayes, 393 B.R.
3 259 (Bankr.D.Mass.2008) (holding that where the movant seeking relief from stay
4 failed to show that the note was ever transferred to it, the movant lacked standing
5 to bring the motion and had no rights of its own to assert).

7 **III.**

8 **WELLS FARGO'S MOTION LACKS FOUNDATION AND IS NOT**
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10 **PROPERLY AUTHENTICATED**

11 In support of Wells Fargo's Motion, it attaches a declaration executed by
12 Shinita Jackson, who is not an employee of Wells Fargo, but rather is employed as
13 a "Bankruptcy Specialist with American Home Mortgage Servicing, Inc.
14 ("AHMS")," which is allegedly an authorized loan servicing agent for Wells
15 Fargo. Declaration of Shinita Jackson attached to the Motion as Attachment 1
16 ("Jackson Decl."), at Paragraphs 1 and 2. In that regard, Ms. Jackson testifies that
17 she is
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20 "familiar with the manner and procedures by which [AHMS] business
21 records are obtained, prepared and maintained. Those records are
22 obtained, prepared and maintained by [AHMS's] employees or agents
23 in the performance of their regular business duties at or near the time,
24 and conditions and/or events recorded therein."
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1 However, Ms. Jackson's declaration lacks foundation as there is no admissible
2 evidence that the servicing of the loan was assigned to her or that the Movant has
3 authorized AHMS to act as its agent. Thus, Ms. Jackson's familiarity with
4 AHMS's procedures is irrelevant without some admissible evidence of a legal
5 relationship between Wells Fargo and AHMS
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7 **IV.**

8 **CONCLUSION**

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10 For all of the foregoing reasons, Debtor respectfully requests that this Court
11 deny Wells Fargo's Motion in its entirety.
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14 DATED: December 28, 2009 LAW OFFICES OF CAMERON H. TOTTEN
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17 By: /s/ Cameron H. Totten
18 Cameron H. Totten
19 Proposed Attorney for Debtor in Possession
20 Orlanda Cunningham
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