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8 Attorneys for Movant,
9 First Horizon Home Loans a division of First Tennessee Bank National Association, its
10 assignees and/or successors

11 UNITED STATES BANKRUPTCY COURT
12 FOR THE DISTRICT OF ARIZONA
13 TUCSON DIVISION

14 In re:) In Proceedings Under
15)
16 Barry Weisband,) Chapter 13
17)
18 Debtor.) Case No. 4:09-bk-05175-EWH
19)
20) **MOTION FOR RELIEF FROM**
21) **AUTOMATIC STAY; SUPPORTING**
22) **MEMORANDUM OF POINTS AND**
23) **AUTHORITIES**
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101 First Horizon Home Loans a division of First Tennessee Bank National Association
102 (“Movant”), by and through its undersigned attorney, moves for termination of all stays and
103 injunctions, pursuant to 11 U.S.C. § 362(d), 11 U.S.C. § 105, Bankruptcy Rules 4001 and 9014

1 and Local Rule 4001, regarding the real property generally described as 2764 North Fair Oaks
2 Avenue, Tucson, AZ 85712.

3 The relief requested in this Motion is proper for all of the reasons set forth in the
4 Memorandum of Points and Authorities attached hereto and incorporated herein by this
5 reference.

6 DATED: March 16, 2010

7
8 **McCarthy ♦ Holthus ♦ Levine**

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10 By: /s/ Jessica R. Kenney
11 Jessica R. Kenney, Esq.
12 3636 North Central Avenue
13 Suite 1050
14 Phoenix, AZ 85012
15 Attorneys for Movant
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1 MEMORANDUM OF POINTS AND AUTHORITIES

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3 1. On or about 03/19/2009, Debtor filed a Voluntary Petition under Chapter 13 of the
4 Bankruptcy Code. Pursuant to 11 U.S.C. § 362, the Petition stays the commencement or
5 continuation of any proceedings against the Debtor or any act to obtain possession of any
6 property of the Debtor or to enforce any lien against any property of the Debtor.

7 2. This Court has jurisdiction pursuant to 28 U.S.C. § 1334. The filing of this Motion
8 commences a contested matter within the meaning of Bankruptcy Rule 9014. Pursuant to Local
9 Bankruptcy Code 4001(b), Movant sent notice to the Debtors' counsel.

10 3. On or about 10/28/2005, Movant entered into a contract with Barry Weisband
11 wherein Debtor agreed to pay the amount of \$990.00, or more, on or before the first day of
12 every month, beginning on or about 12/01/2005. The obligation is evidenced by a Note and
13 secured by a Deed of Trust. **See Exhibit "1"**.

14 4. The Deed of Trust was timely and duly recorded and perfected in accordance with
15 Arizona law as Recorders No. 20052151083 in the office of the Pima County Recorder.

16 5. First Horizon Home Loans a division of First Tennessee Bank National Association
17 is the holder of the Note that is Secured by the Deed of Trust and is the real party in interest.

18 6. The original principal amount of the Note was \$176,000.00, plus interest, costs and
19 attorneys' fees for collection. Currently, but for the defaults in acceleration, the monthly
20 payment pursuant to the Note would be \$1,204.96.

21 7. The Debtor has failed to make monthly payments, beginning with the month of
22 11/01/2008, and all subsequent payments, costs, attorneys' fees, interest and accruing late
23 charges. Debtor has been in default for 12 months.

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1 8. As of 03/15/2010, the amount required to fully reinstate the Debtors' loan post-
2 petition is approximately \$17,476.18 , itemized as follows:

3				
4	Unpaid Principal Balance:		\$	175,950.50
5	PRE-PETITION DELINQUENCIES:			
6	Monthly Payments: 2 at \$1,187.64		\$	2,375.28
7	(11/08 through 12/08)			
8	Monthly Payments: 3 at \$1,203.63		\$	3,610.89
9	(01/09 through 03/09)			
10	Late Charges:		\$	148.47
11	Property Inspections:		\$	45.00
12	Post Petition Fees and Costs included in POC:		\$	300.00
13	Total Pre-Petition Delinquencies:		\$	6,479.64
14	POST-PETITION DELINQUENCIES:			
15	Monthly Payments: 7 at \$1,204.96		\$	8,434.72
16	(09/09 through 03/10)			
17	Corporate Advances:		\$	2,910.96
18	Bankruptcy Attorney Fee:		\$	650.00
19	Bankruptcy Filing Fee:		\$	150.00
20	Suspense:		\$	(1,149.14)
21	Total Post-Petition Delinquencies:		\$	10,996.54
22	Total Delinquencies:		\$	17,476.18
23	Total Amount Due to Secured Creditor:		\$	193,426.68

24 9. Pursuant to the Note, Movant has declared the entire unpaid balance of principal and
25 accrued interest, plus all other amounts owed, to be immediately due and payable. As of
26 03/15/2010, the principal amount owing on the Note secured by the Trust Deed is \$193,426.68.

27 10. Movant has performed all of its obligations required under the Note and Deed of
28 Trust, and all conditions precedent to the Debtors' performance there under have occurred.

29 **MOVANT IS NOT RECEIVING ADEQUATE PROTECTION**

11. Pursuant to 11 U.S.C. § 362 subd. (d)(1), Movant is entitled to relief from the
automatic stay to enforce its lien for cause, including lack of adequate protection of any interest

1 in the property. Movant is entitled to adequate protection for the present value of the collateral
2 in the form of monthly payments.

3 12. The Moving Party further seeks relief in order to, at its option, offer, provide and
4 enter into any potential forbearance agreement, loan modification, refinance agreement or other
5 loan workout/loss mitigation agreement. The Movant may contact the Debtor via telephone or
6 written correspondence to offer such an agreement. Any such agreement shall be non-recourse
7 unless included in a reaffirmation agreement.

8 13. Failure to make post-petition mortgage payments can constitute cause for lifting the
9 stay. The debtor has the burden of showing there is no cause to terminate the stay. In re Ellis,
10 60 B.R. 432 (9th Cir. BAP 1985). Where cause is shown, courts have no discretion, but must
11 grant relief. In re Ford, 36 B.R. 501 (Dt 1983). Movant has not been provided adequate
12 protection, inasmuch as monthly payments have been in default since 11/01/2008, as more fully
13 set forth in paragraph 8.

14 14. Movant is not adequately protected. Movant is not receiving regular monthly
15 payments, and is unfairly delayed from proceeding with the foreclosure of the subject Property.
16 Accordingly, relief from the automatic stay should be granted to Movant pursuant to 11 U.S.C.
17 § 362(d)(1).

18 15. Due to Debtors' default, Movant commenced foreclosure proceedings by recording
19 a Notice of Trustee's Sale on 02/17/2009, and the foreclosure sale was scheduled for
20 05/18/2009. Due to the filing of the instant bankruptcy petition, Movant is stayed from
21 proceeding with the foreclosure.

22 16. Movant sent notice as required by Local Rule 4001-1(b).

23 CONCLUSION

- 24 1. Movant's claim is in default and unpaid by the Debtor.
- 25 2. Movant's only form of redress is to look to the secured property.
- 26 3. Costs, attorneys' fees and interest continue to mount on Movant's claim,
27 thus completely eroding any and all equity that may be claimed by
28 Respondent.
- 29 4. This property is not required for any reorganization.

1 On 3/16/2010, I served the foregoing documents described as **MOTION FOR RELIEF**
2 **FROM AUTOMATIC STAY; SUPPORTING MEMORANDUM OF POINTS AND**
3 **AUTHORITIES** on the following individuals by electronic means through the Court's ECF
4 program:

5 COUNSEL FOR DEBTOR
6 Ronald Ryan
7 ronryanlaw@cox.net

8 I declare under penalty of perjury under the laws of the United States of America that the foregoing
9 is true and correct.

10 /s/ Ana Martins
11 Ana Martins

12 On 3/16/2010, I served the foregoing documents described as **MOTION FOR RELIEF**
13 **FROM AUTOMATIC STAY; SUPPORTING MEMORANDUM OF POINTS AND**
14 **AUTHORITIES**, on the following individuals by depositing true copies thereof in the United
15 States mail at San Diego, California, enclosed in a sealed envelope, with postage paid,
16 addressed as follows:

17 COUNSEL FOR DEBTOR
18 Ronald Ryan
19 Ronald Ryan, P.C.
20 1413 East Hedrick Drive
21 Tucson, AZ 85719

22 DEBTOR
23 Barry Weisband
24 5424 East Placita Apan
25 Tucson, AZ 85718

26 TRUSTEE
27 Dianne C. Kerns
28 7320 North La Cholla # 154
29 PMB 413
Tucson, AZ 85741

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1 UNITED STATES TRUSTEE
2 Office of the U.S. Trustee
3 230 North First Avenue, Suite 204
4 Phoenix, AZ 85003-1706

5 SPECIAL NOTICE
6 Deutsche Bank National Trust Company
7 Rosicki, Rosicki & Associates, P.C.
8 51 East Bethpage Road
9 Plainview, NY 11803

10 Pima County
11 Pima County Attorney's Office, Civil Division
12 32 North Stone Avenue Suite 2100
13 Tucson, AZ 85701

14 GE Money Bank
15 Recovery Management Systems Corporation
16 25 SE 2nd Avenue, Suite 1120
17 Miami, FL 33131-1605

18 GMAC Mortgage LLC
19 Pite Duncan, LLP
20 4375 Jutland Drive, Suite 200
21 P.O. Box 17933
22 San Diego, CA 92177-0933

23 **I declare under penalty of perjury under the laws of the United States of America that the foregoing**
24 **is true and correct.**

25 /s/ David Fry
26 _____
27 David Fry