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

13 In re:

14 ANDREW C. BAILEY,

15 Debtor.

16 ANDREW C. BAILEY,

17 Plaintiff,

18 vs.

19 THE BANK OF NEW YORK MELLON,
20 f/k/a THE BANK OF NEW YORK; CWALT
21 INC. ALTERNATIVE LOAN TRUST; BAC
22 HOME LOANS SERVICING LP, f/k/a
23 COUNTRYWIDE HOMES LOANS;
24 COUNTRYWIDE HOME LOANS; THE
25 MORTGAGE ELECTRONIC
26 REGISTRATION SERVICE,

27 Defendants.

Chapter 11 Proceedings

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

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

**RESPONSE TO ANDREW C. BAILEY'S
OBJECTION TO DEFENDANTS'
RESPONSE TO PLAINTIFF'S FIRST SET
OF INTERROGATORIES AND FIRST
REQUEST TO PRODUCE DOCUMENTS**

Hearing Date: Not yet set.

Hearing Time: Not yet set.

28 The Bank of New York Mellon, in its capacity as trustee of the CWALT, Inc. Alternative
Loan Trust 2007-HY4 Mortgage Pass-Through Certificates, Series 2007-HY4 ("BNY Mellon");
BAC Home Loans Servicing, LP ("BAC"); and Mortgage Electronic Registration Service

1 (“MERS”) (collectively, “Defendants/Respondents”) hereby collectively file this response to the
2 Objection to Defendants’ Response to Plaintiff’s First Set of Interrogatories and First Request to
3 Produce Documents [Adversary Proceeding DE #32, Administrative Case DE #173]
4 (“Objection”)¹ filed by Andrew C. Bailey, the debtor and debtor-in-possession in the above-
5 captioned bankruptcy case and the plaintiff in the above-captioned adversary proceeding
6 (“Bailey”).

7 The Objection, which relates to Defendant Bank of New York Mellon’s Response to
8 Debtor’s/Plaintiff’s First Set of Interrogatories and First Request for Production of Documents
9 (“Discovery Response”), is procedurally improper and substantially fails to warrant any relief
10 whatsoever in favor of Bailey. Accordingly, the Objection must be overruled. Additionally,
11 because the Objection so profoundly fails to follow the procedural requirements set forth in
12 applicable rules and lacks the substantive integrity to justify relief in favor of Bailey, the
13 Defendants/Respondents are entitled to an award of reasonable attorneys’ fees incurred in
14 connection herewith.

15 In support of this response, Defendants/Respondents state as follows:

16 1. Pursuant to Rule 37(a)(1) of the Federal Rules of Civil Procedure, as incorporated
17 by Rule 7037 of the Federal Rules of Bankruptcy Procedure, Bailey must certify that he has, in
18 good faith, conferred or attempted to confer with the Defendants/Respondents in an effort to
19 resolve any discovery disputes without court action, and such certification must accompany
20 Bailey’s motion to compel discovery. Fed. R. Civ. P. 37(a)(1). Bailey has made no such attempt
21 to confer with the Defendants/Respondents regarding the issues raised in the Objection, and no

22 ¹ As set forth at footnote 1 of the Discovery Response, Bailey served virtually identical
23 discovery requests on BNY Mellon in both the adversary proceeding and the administrative
24 bankruptcy case, with the sole difference being Bailey’s self reference as “Plaintiff” and
25 “Debtor,” respectively. Bailey has now filed his Objection in both the adversary proceeding and
26 in the administrative bankruptcy case; the only differences between the two versions consist of
27 (i) the elimination of the adversary proceeding number and (ii) the addition of several service
28 parties in the version of the Objection filed in the administrative bankruptcy case. To avoid any
doubt, and despite the redundancy, Defendants/Respondents file their collective response in the
adversary proceeding and in the administrative bankruptcy case, modifying only the caption and
the service list as appropriate in each.

1 certification that Bailey has in good faith conferred or attempted to confer with the
2 Defendants/Respondents accompanies the Objection. Therefore, Bailey's Objection is premature
3 and the relief requested therein must be denied.

4 2. The Objection is an improper avenue for Bailey to raise his dissatisfaction with
5 the responses he received to his discovery requests inasmuch as Bailey seeks to object to the
6 Discovery Response. The Federal Rules of Bankruptcy Procedure provide no mechanism for
7 Bailey to file with the Court an objection to the Discovery Response. Rather, Rule 37 of the
8 Federal Rules of Civil Procedure, as incorporated by Rule 7037 of the Federal Rules of
9 Bankruptcy Procedure, allow Bailey to file a motion with the Court seeking an order compelling
10 disclosure or discovery. Fed. R. Civ. P. 37. The Objection merely complains about the
11 Discovery Response, but does not constitute a motion to compel discovery and is procedurally
12 improper. Therefore, the relief requested in the Objection must be denied.

13 3. To the extent that the Objection raises substantive issues to which a response is
14 required, the Defendants/Respondents assert the following:

15 a. Bailey's objection that the Discovery Response is somehow flawed
16 because it was prepared by Defendants/Respondents' attorney is without merit. It is common
17 practice for an attorney to prepare discovery responses, and to work with the client(s) to ensure
18 the responses are factually accurate. That is precisely what occurred with respect to BNY
19 Mellon's Discovery Response – counsel prepared an initial draft, and BNY Mellon's
20 representative reviewed, modified as necessary to accurately reflect the facts stated therein, and
21 authorized the Discovery Responses. Furthermore, the Defendants/Respondents have submitted
22 various declarations in support of seeking stay relief in the administrative bankruptcy case that
23 contain facts entirely consistent with the Discovery Response. Therefore, all responses
24 contained in the Discovery Response are valid and admissible, and any objection on the basis
25 that they were prepared by an attorney is meritless.

26 b. Bailey's objection that the Discovery Response is incomplete or otherwise
27 improper because only BNY Mellon responded to Bailey's discovery request is absurd. Bailey
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1 propounded its discovery requests upon BNY Mellon only. To date, Bailey has not propounded
2 discovery upon the remaining Defendants/Respondents, and such Defendants/Respondents are
3 under no obligation to respond to discovery propounded solely upon BNY Mellon.² Therefore,
4 only BNY Mellon was obligated to respond to Bailey’s discovery requests.

5 c. Bailey’s objection that the Discovery Response is insufficient, incomplete,
6 or non-compliant also fails. As set forth in the Discovery Response, each of the interrogatories
7 and production requests are objectionable on several grounds, including, without limitation,
8 vagueness. To the extent BNY Mellon could, in good faith, provide a response or produce
9 responsive documents, BNY Mellon did so. Accordingly, and subject to the stated objections,
10 the Discovery Response and the documents produced therewith are appropriate and fully
11 responsive to the interrogatories and requests for production of documents propounded upon
12 BNY Mellon by Bailey. Furthermore, Bailey’s Objection fails to reveal with any particularity
13 any defects in the Discovery Response. To the extent BNY Mellon obtains further information
14 or documentation responsive to Bailey’s discovery request, and to the extent obligated to do so,
15 BNY Mellon will adhere to its duty to supplement its Discovery Response.

16 d. Bailey’s objection that the Discovery Response was not filed with the
17 Court and is improperly absent from the record is without merit. Bailey has not identified any
18 rule or requirement that discovery responses be filed with the Court. Such silence is revealing—
19 no such rule or requirement exists. In fact, Local Rule of Bankruptcy Procedure 5005-1(a)
20 expressly provides that answers to interrogatories and responses to requests for production “shall
21 not be filed with the court except that a ‘Notice of Service’ of the foregoing papers shall be
22 filed.” BNY Mellon properly filed a “Notice of Service” [Adversary Proceeding DE # 23,
23 Administrative Case DE #162], which Bailey acknowledges in the Objection.

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26 ² Defendants/Respondents note that the discovery requests served by Bailey on BNY Mellon
27 were almost exclusively overbroad, vague, or otherwise objectionable. Thus, to the extent
28 Bailey does serve discovery requests on the other Defendants/Respondents that are identical to
those served on BNY Mellon, there is a high likelihood that the responses will be substantially
similar as those contained in the Discovery Response, and for similar reasons.

1 4. Rule 37(a)(5)(B) of the Federal Rules of Civil Procedure, as incorporated by Rule
2 7037 of the Federal Rules of Bankruptcy Procedure, provides for the payment of reasonable fees
3 incurred, including attorney’s fees, in favor of a party that successfully opposes a discovery
4 motion. Fed. R. Civ. P. 37(a)(5)(B). Bailey has failed to properly present his dispute to the
5 Court, has failed to confer with the Defendants/Respondents as required, and has raised meritless
6 arguments (including raising issues that are easily defeated by referring to the applicable rules of
7 procedure). Bailey clearly does not like the discovery responses he received, but wasting the
8 Court’s and the Defendants/Respondents’ time and resources with the meritless and procedurally
9 improper Objection is inexcusable under the circumstances. The Defendants/Respondents
10 should be awarded their reasonable attorneys’ fees to compensate for such abuses and as a
11 sanction to deter similar conduct by Bailey in the future.

12 WHEREFORE, the Defendants/Respondents respectfully request the Court enter an
13 Order:

- 14 A. Overruling the Objection in its entirety;
- 15 B. Denying the relief requested in the Objection;
- 16 C. Requiring Bailey to comply with the procedural rules regarding discovery;
- 17 D. Awarding the Defendants/Respondents reasonable fees incurred in connection
18 with this response, including attorneys’ fees, pursuant to Rule 37(a)(5)(B) of the Federal Rules of
19 Civil Procedure, as incorporated by Rule 7037 of the Federal Rules of Bankruptcy Procedure, as
20 an administrative expense priority claim; and

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1 E. Granting to the Defendants/Respondents such other and further relief as the Court
2 deems just and proper under the circumstances.

3 RESPECTFULLY SUBMITTED this 14th day of May, 2010.
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5 **BRYAN CAVE LLP**

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7 By: /s/ KSH, 024155
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10 Two North Central Avenue, Suite 2200
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12 Counsel for Defendants/Respondents

13 COPY of the foregoing served via **email**
14 this 14th day of May, 2010, upon:

15 Andrew C. Bailey
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19 Appearing in Pro Per

20 /s/ Donna McGinnis
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