

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Theodore J. Mees
and Brooke A. Mees,

Debtor(s)

Case No. 04-34914

Chapter 7 Case

**MEMORANDUM OF FACT AND LAW OPPOSING
CREDITOR'S MOTION FOR RELIEF FROM THE STAY**

Debtors Theodore J. Mees and Brooke A. Mees submit this Memorandum of Law in response and in opposition to Creditor Home Town Federal Credit Union, f/k/a Owatonna Federal Credit Union's Motion for Relief from the Stay.

I. FACTS.

Debtors admit owing Movant a balance of \$747.34 on a Visa account. However, Debtors deny that the Movant is the holder of a secured claim. As such, Debtors deny that the Movant has an interest in property sufficient for a Motion for Relief from Stay pursuant to 11 U.S.C. § 362(d).

II. ANALYSIS.

A. Hometown Federal Credit Union has no Interest in the Property.

Pursuant to Movant's Motion for Relief from Stay and Exhibit A, no security interests in the Debtors' account exists pursuant to Exhibit A. In order for a security interest to exist securing the Visa Classic credit card, that security interest must be given to the Credit Union by "signing a separate pledge of shares ..." Motion for Relief from Stay and Exhibit A.

Furthermore, the Movant does not have a lien pursuant to Minn. Stat. § 52.12 as set forth at Exhibit C of the Motion for Relief from the Stay. In the context of Minnesota Statutes Chapter 52, Minn. Stat. § 52.12 applies to credit unions "formed and operating under this chapter [Minnesota Statutes Chapter 52]." Minn. Stat. § 52.001, subd. 4. This is in contrast to federal credit unions as the name of creditor here implies, which are defined as "a credit union organized and operating under the laws of the United States." Minn. Stat. § 52.001, subd. 7.

Minnesota Statutes explicitly differentiate between credit unions organized under state statutes and credit unions organized under federal statutes. The statute cited by Movant at Exhibit C specifically states that a "*credit union* shall have a lien on the shares and deposits of a member." Pursuant to Minn. Stat. § 52.001, the credit union is as defined and means only a credit union formed and operating under the state statutes.

Movant also sets forth a Membership and Account Agreement which Movant purports grants a security interest to funds on deposit against the Visa account. However, this Agreement fails to provide a security interest in those funds against the Visa account for failure of privities of time, lack of consideration, and specific modification in the Visa Account Agreement. The Visa Account Agreement provides that the account is secured only by signing a *separate pledge of shares*.

B. Alternatively, Home Town Federal Credit Union is Adequately Protected.

There is adequate protection for a security interest and can be no relief from the automatic stay where there is an equity cushion to protect the security interest. If, indeed, it is found that Home Town Federal Credit Union has a security interest in the Debtors' deposits, that security interest is properly only on the amount of debt owed to the Credit Union, that being a Visa card balance of \$747.34 as shown on Exhibit B of the Creditor's Motion. The Creditor

currently holds \$2,304.76, leaving an equity cushion of \$1,557.42 or approximately 208 percent. The United States Court of Appeals for the Ninth Circuit has held that a 20 percent equity cushion is adequate protection for the secured creditor. *In re Mellor*, 734 F.2d 1396, 1401 (9th Cir. 1984). Furthermore, the Bankruptcy Court for the Eastern District of Pennsylvania has held that a 10 percent equity cushion in property is sufficient to adequately protect the secured creditor. See, *In re McGowan*, 6 B.R. 241, 242-243 (Bankr. E.D.Pa. 1980). The *McGowan* holding is widely accepted, being cited favorably in the Ninth Circuit, the Eastern District of California, the Western District of Michigan, the District of Wyoming, the Northern District of Illinois and the District of Massachusetts.

The District of Rhode Island, in rejecting the equity cushion tests for adequate protection, held that a "secured creditor is entitled to protection against any depreciation or diminution in the value of the collateral as it existed and was available to satisfy the debt on the date of filing of the petition in bankruptcy." *In re Smithfield Estates*, 48 B.R. 910, 914 (Bankr. D.RI 1985). The Court went on to hold that where there was no decline in the value of the property, the value of the collateral securing the debt was substantially the same, and the secured creditor's position was maintained at the same level pre and post-bankruptcy petition. This constituted adequate protection for the secured creditor. Here, where the purported security interest is in cash, there can be no decline in the value of that property. A decline in the equity cushion on the property does not alter the fair market value of the property. Here, as in the *Smithfield Estates* case, the secured creditor is adequately protected under applicable Bankruptcy Code, and relief from the stay is not appropriate.

C. Amount of Creditor's Claim.

The amount of the Creditor's claim in this matter is artificially inflated due to actions of the Creditor. As previously argued, if the Creditor had a security interest in the Debtors' deposits, that security interest was only for the amount of debt owed to the Credit Union. Under that theory, the Creditor was only entitled to freeze the amount of the Debtors' deposits in which the Creditor had the lien. That lien amount would have been for \$747.34. Instead, the Creditor exceeded the scope of the lien and converted property of the Debtors in the amount of \$1,557.42 to their own use causing the Debtors to have insufficient funds for checks that had previously been written in the amount of \$758.48. This conversion artificially "bounced" these checks. The Creditor should not be allowed any claim for insufficient funds on checks that were artificially bounced by the Creditor's wrongdoing. Furthermore, the Creditor should not be allowed attorneys' fees and costs for these items.

III. CONCLUSION.

Based upon the document provided and the Debtors' understanding of Agreements with the Credit Union, the Credit Union does not have a secured interest in the Debtors' deposits. As such, the Debtor cannot have relief from the stay because they have no interest in the property. Furthermore, the Debtor will be entitled to have the property returned less the \$758.48 in withdrawals from the checking account pursuant to 11 U.S.C. § 522(h), and the credit card balance of \$747.34 should be determined a dischargeable unsecured debt.

In the event this Court finds that a security interest did exist in the Debtors' deposits, the interest should be limited to the amount of debt owed to the Creditor on the date of seizure, and an equity cushion exists adequately protecting the Creditor's interests. For these reasons, the

Creditor's Motion for Relief from the Stay should be denied, and no costs and fees should be awarded to the Creditor. Conversely, the Debtors should be awarded attorneys' fees incurred herein.

Respectfully submitted this 22nd day of September, 2004.

ADAMS, RIZZI & SWEEN, P.A.

/e/Dean K. Adams

Dean K. Adams

Attorney for Debtors

Attorney License No. 209508

300 First Street NW

Austin, Minnesota 55912

(507) 433-7394

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
)ss.
COUNTY OF MOWER)

Linda Enstad, of the City of Austin, County of Mower, State of Minnesota, being duly sworn, states that on the 22nd day of September, 2004, she served the annexed

MEMORANDUM OF FACT AND LAW OPPOSING CREDITOR'S MOTION FOR RELIEF FROM THE STAY on:

Home Town Federal Credit Union
2400 W Bridge St
Owatonna MN 55060

Linda Jeanne Jungers
Stewart Zlimen & Jungers Ltd
430 Oak Grove St Ste 200
Minneapolis MN 55403

Michael S Dietz
505 Marquette Bldg
PO Box 549
Rochester, MN 55903

U S Trustee
US Trustee Office
300 S 4th St Rm 1015
Minneapolis, MN 55415

the parties in this action, by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Austin, Minnesota, directed to said persons at the aforementioned last known addresses.

Linda Enstad

Linda Enstad

Subscribed and sworn to before me
this 22nd day of September, 2004.

Shelley A. Clark
Notary Public

