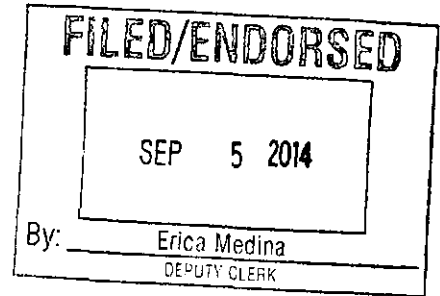


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8 Attorneys for Plaintiffs,
9 **THADDEUS J. POTOCKI and KELLY R. DAVENPORT**



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11
12 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF SACRAMENTO**

14 THADDEUS J. POTOCKI and KELLY R.
15 DAVENPORT,

16 Plaintiffs,

17 vs.

18 WELLS FARGO BANK, N.A.; FIRST
19 AMERICAN SERVICING SOLUTIONS, LLC;
20 U.S. BANK, N.A.; and DOES 1 through 100,
21 inclusive,

22 Defendants.

23 **CASE NO.: 34-2014-00160873**

24 **FIRST AMENDED COMPLAINT FOR:**

- 25 1. Negligence Per Se;
- 26 2. Violation of California Business and Professions Code Section 17200, *et seq.*;
- 27 3. Violation of California Civil Code Section 2924(a)(6);
- 28 4. Violation of California Civil Code Section 2924.17;
5. Breach of Contract;
6. Declaratory Relief.

DEMAND FOR JURY TRIAL

LAW OFFICES OF TED A. GREENE, INC.
1912 F Street, Suite 110, Sacramento, California 95811
Telephone: (916) 442-6400

1 Plaintiffs THADDEUS J. POTOCKI and KELLY R. DAVENPORT (“Plaintiffs” or “Mr.
2 Potocki and Mrs. Davenport”), by and through counsel, for their Complaint against the
3 defendants, upon information and belief allege as follows:

4 INTRODUCTION

5 Sadly, not even California’s Attorney General Kamala D. Harris can put a leash on the
6 Nation’s otherwise out-of-control mortgage industry. The legislation touted as the
7 “Homeowner’s Bill of Rights” (“HOBR”) was enacted in 2013 to afford homeowners protections
8 during this record setting foreclosure crisis.

9 Until the HOBR was enacted, the non-judicial foreclosure process in this State was
10 comparable to the “Wild West.” Mortgage servicers seemed to do as they pleased with
11 absolutely no regard to the welfare of the foundation of the economy, homeowners. Mortgage
12 servicers would even offer “trial payment plans” with a promise to modify only to completely
13 disregard the borrower once the payments were made. Millions have lost their home after the
14 banks defrauded them to pay trial payments with no modification ever being offered.

15 While the HOBR provided a false sense of security to homeowners, the truth is that the
16 mortgage industry seems to think that it is immune from having to follow California law.
17 Homeowners are being foreclosed upon by complete strangers to the mortgage transaction using
18 fraudulent and “robo-signed” documentation.

19 As a result of the complete disregard of California law, homeowners, such as Plaintiffs,
20 are forced to incur the substantial cost of seeking the assistance of the Courts to preserve their
21 rights.

22 PARTIES

23 Plaintiffs are residents of Sacramento, California. Plaintiffs bring this action against the
24 defendants for damages and harm resulting from the defendants’ willful and reckless violation of
25 California law relating to the servicing and foreclosure of their residential mortgage. The
26 residential mortgage concerns the property located at 3410 West Country Club Lane,
27 Sacramento, California 95821.

1 Defendant, WELLS FARGO BANK, N.A. (“WELLSFARGO”), is a national banking
2 association with its principal place of business in Minneapolis, Minnesota and regularly does
3 business in California. Defendant WELLSFARGO is the current servicer of the subject mortgage
4 loan.

5 Defendant, U.S. BANK, N.A. (“USBANK”), is a national banking association with its
6 principal place of business located in Minneapolis, Minnesota and regularly does business in
7 California. Defendant USBANK is the trustee of the WFASC 2005-AR1 securitized trust and
8 purports to be the current owner of the subject mortgage loan.

9 Defendant, FIRST AMERICAN SERVICING SOLUTIONS, LLC
10 (“FIRSTAMERICAN”), is a Texas corporation with its principal place of business in Santa Ana,
11 California and regularly does business in California. Defendant FIRSTAMERICAN is currently
12 foreclosing on the subject mortgage loan under Trustee Sale Number CA1000192071. Defendant
13 FIRSTAMERICAN is allegedly acting on behalf of Defendants USBANK and WELLSFARGO.

14 Plaintiffs are ignorant of the true names and capacities of the defendants sued herein
15 under the fictitious names Does 1 through 100, inclusive, and Plaintiffs will amend this
16 Complaint to allege such names and capacities as soon as they are ascertained. Each of said
17 fictitiously named defendants is responsible in some manner for the wrongful acts complained of
18 herein.

19 Each defendant was the agent and employee of each and every other defendant and in
20 doing, saying, or omitting to say the things herein alleged, was acting within the course and
21 scope of such agency and with the permission and consent of each of the other defendants.

22 JURISDICTION AND VENUE

23 Pursuant to Code of Civil Procedure section 392(a), venue is proper in this Court because
24 the transactions occurred within this County, the events transpired within this County, the parties
25 and witnesses reside within this County, the evidence, including the defendants’ business
26 records, is located within this County, and the defendants regularly conduct business within this
27 County.

28

1 The defendants engaged in business within the State of California, which business is
2 related to the events which give rise to the instant lawsuit. The subject events transpired within
3 the State of California. The defendants have "sufficient minimum contacts" with the State of
4 California such that this Court's exercise of personal jurisdiction over the defendants herein
5 "[does] not offend traditional notions of fair play and substantial justice."¹

6 FACTUAL BACKGROUND

7 Mr. Potocki and Mrs. Davenport purchased the subject property located at 3410 West
8 Country Club Lane, Sacramento, California 95821, in 2004. The Trustee and only party
9 authorized to foreclose under the subject Deed of Trust is Fidelity National Title. Plaintiffs have
10 lived in and owned the home for nearly ten (10) years. It is their primary residence.

11 Plaintiffs fell several months behind on the subject mortgage in early 2009. Upon
12 contacting defendant WELLSFARGO, they were offered a modification in exchange for their
13 agreement to make three (3) trial payments in the amount of \$1,633.53 beginning in September
14 of 2009. Plaintiffs were promised a loan modification holding a payment of \$1,633.53 per month
15 upon completion of the trial payments.

16 On September 11, 2009, Plaintiffs made their first installment in the trial payment plan.
17 The next two installments were made on September 30, 2009 and November 3, 2009
18 respectively. Plaintiffs made payments totaling approximately \$4,900.59.

19 Plaintiffs were never provided the modification paperwork as promised. Instead, on
20 February 4, 2010, a Notice of Default ("NOD") was recorded against the primary mortgage
21 secured by his home, the subject property. The NOD was filed by FIRSTAMERICAN and is
22 believed to be filed on behalf of USBANK. However, the beneficiary under the Deed of Trust
23 was Wells Fargo Bank, N.A.

24 Shortly thereafter, on April 9, 2010, a Substitution of Trustee was recorded by
25 WELLSFARGO contending to substitute Plaintiffs' trustee with FIRSTAMERICAN.

26
27
28 ¹ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

1 On April 29, 2010, Robert Bourne signed an Assignment of Deed of Trust purporting to
2 transfer all beneficial interest in Plaintiffs' Deed of Trust from WELLSFARGO to USBANK on
3 behalf of WELLSFARGO.

4 On September 13, 2010, Plaintiffs filed suit against WELLSFARGO alleging a variety of
5 causes of action relating to the wrongful foreclosure. The case was pending for nearly four years
6 and was ultimately dismissed by Plaintiffs without prejudice on February 7, 2014.

7 On March 11, 2014, FIRSTAMERICAN recorded a Notice of Trustee's Sale ("NTS")
8 (referencing T.S. No. CA1000192071) noting that the home was up for sale on April 1, 2014. In
9 the NTS, FIRSTAMERICAN purports to be the Trustee under the Deed of Trust. However, the
10 NTS is at odds with the Deed of Trust as the Deed of Trust explicitly names Fidelity National
11 Title as Trustee and not FIRSTAMERICAN.

12 Plaintiffs allege that USBANK is acting on behalf of a trust that closed in 2005.
13 Securitize trusts require the mortgage be pooled in prior to the closing date. As such, the 2010
14 purported transfer was executed five (5) years late is void as a matter of law. Therefore,
15 USBANK is not the beneficiary and cannot authorize FIRSTAMERICAN and WELLSFARGO
16 to foreclose on the subject mortgage.

17 From the date of the Notice of Default to the date of this Complaint, WELLSFARGO
18 continued to make promises of the previously offered loan modification and in fact, is currently
19 reviewing Plaintiffs for same. Based on these representations, Plaintiffs forewent breach of
20 contract allegations until now. Plaintiffs allege that the contract to modify according to the trial
21 payment plan was effectively repudiated by WELLSFARGO by way of its March 11, 2014 NTS.
22 The recording of the NTS put Plaintiffs on notice for the first time that WELLSFARGO truly
23 had no intentions of making good on its promise to modify the mortgage.

24 However, while WELLSFARGO is currently reviewing Plaintiffs for a loan modification,
25 as of the date of this Complaint, WELLSFARGO nor FIRSTAMERICAN are able to provide
26 Plaintiffs or their counsel, confirmation that the trustee sale has been taken off calendar. If
27 Plaintiffs' home is sold at a foreclosure sale, they will be homeless.

28 ///

1 **FIRST CAUSE OF ACTION**

2 **Negligence Per Se**

3 **(Against All Defendants)**

4 Plaintiffs incorporate herein by this reference each and every allegation set forth above,
5 as though fully set forth herein.

6 California Civil Code sections 2924(a)(6), below, mandate a duty upon the defendants to
7 ensure that appropriate safeguards are put into place prior to any foreclosure sale. These sections
8 were designed specifically to protect homeowners, such as Plaintiffs, from robo-signing based
9 foreclosures.

10 As set forth above, USBANK has no beneficial interest in the subject mortgage yet has
11 noticed that it will sell the property at a trustee's sale.

12 As a direct and proximate result, Plaintiffs have sustained damages, including, but not
13 limited to, excessive interest accumulation, negative amortization, loss of equity, destruction of
14 credit standing, pain, suffering, and emotional distress, in an amount to be shown at trial.

15 **SECOND CAUSE OF ACTION**

16 **Violation of California Business and Professions Code Section 17200, et seq.**

17 **(Against All Defendants)**

18 Plaintiffs incorporate herein by this reference each and every allegation set forth above,
19 as though fully set forth herein.

20 As alleged herein above, Plaintiffs have standing to pursue this claim as they have
21 suffered injury in fact and have lost money or property as a result of the named defendants'
22 actions as set forth herein.

23 As set forth above, USBANK has no beneficial interest in the subject mortgage yet has
24 noticed that it will sell the property at a trustee's sale.

25 As a result of the defendants' unfair business practices, Plaintiffs have sustained
26 damages, including, but not limited to, excessive interest accumulation, negative amortization,
27 loss of equity, destruction of credit standing, pain, suffering, and emotional distress, in an
28 amount to be shown at trial.

1 **THIRD CAUSE OF ACTION**

2 **Violation of California Civil Code Section 2924(a)(6)**

3 **(Against All Defendants)**

4 Plaintiffs incorporate herein by this reference each and every allegation set forth above,
5 as though fully set forth herein.

6 Civil Code section 2924(a)(6) bars all defendants from initiating foreclosure unless they
7 are the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or
8 the substituted trustee under the deed of trust, or the designated agent of the holder of the
9 beneficial interest.

10 As set forth above, defendants USBANK, WELLSFARGO, and FIRSTAMERICAN are
11 foreclosing under the subject Deed of Trust although they are not beneficiaries, trustees, or
12 otherwise authorized to initiate foreclosure proceedings.

13 As a result, Plaintiffs have sustained damages, including, but not limited to, excessive
14 interest accumulation, negative amortization, loss of equity, destruction of credit standing, pain,
15 suffering, and emotional distress, in an amount to be shown at trial.

16 **FOURTH CAUSE OF ACTION**

17 **Violation of California Civil Code Section 2924.17**

18 **(Against All Defendants)**

19 Plaintiffs incorporate herein by this reference each and every allegation set forth above,
20 as though fully set forth herein.

21 Civil Code section 2924.17 bars all defendants from initiating foreclosure unless they
22 submit accurate declarations stating that they are the holder of the beneficial interest under the
23 mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or
24 the designated agent of the holder of the beneficial interest.

25 As set forth above, defendants USBANK, WELLSFARGO, and FIRSTAMERICAN
26 have declared and are foreclosing under the subject Deed of Trust although they are not
27 beneficiaries, trustees, or otherwise authorized to initiate foreclosure proceedings.

28

1 As a result, Plaintiffs have sustained damages, including, but not limited to, excessive
2 interest accumulation, negative amortization, loss of equity, destruction of credit standing, pain,
3 suffering, and emotional distress, in an amount to be shown at trial.

4 **FIFTH CAUSE OF ACTION**

5 **Breach of Contract**

6 **(Against Defendant WELLSFARGO and Does 1-100)**

7 Plaintiffs incorporate herein by this reference each and every allegation set forth above,
8 as though fully set forth herein.

9 In connection with the subject mortgage loan, Plaintiffs and defendant WELLSFARGO
10 entered into a written contract whereby defendant WELLSFARGO agreed to modify the subject
11 mortgage loan in exchange for Plaintiffs' three trial payments. Plaintiffs fully performed their
12 promise and made the trial payments.

13 Without excuse, defendant WELLSFARGO effectively breached the contract in April of
14 2014 by the acts and omissions set forth above.

15 As a proximate result of defendant WELLSFARGO's said breach of contract, Plaintiffs
16 have sustained damages, including, but not limited to, excessive interest accumulation, negative
17 amortization, loss of equity, and destruction of credit standing, in an amount to be shown at trial.

18 **SIXTH CAUSE OF ACTION**

19 **Declaratory Relief**

20 **(Against All Defendants)**

21 Plaintiffs incorporate herein by this reference each and every allegation set forth above,
22 as though fully set forth herein.

23 An actual controversy exists. Civil Code section 2924(a)(6) bars all defendants from
24 initiating foreclosure unless they are the holder of the beneficial interest under the mortgage or
25 deed of trust, the original trustee or the substituted trustee under the deed of trust, or the
26 designated agent of the holder of the beneficial interest.

1 As set forth above, defendants USBANK, WELLSFARGO, and FIRSTAMERICAN are
2 foreclosing under the subject Deed of Trust although they are not beneficiaries, trustees, or
3 otherwise authorized to initiate foreclosure proceedings.

4 As further set forth above, Plaintiffs and WELLSFARGO entered into a written contract
5 wherein WELLSFARGO promised to modify the subject mortgage in exchange for Plaintiffs
6 making three trial payments. WELLSFARGO repudiated the contract in March of 2014.

7 A judicial determination concerning the relative rights, responsibilities, obligations and
8 interest as to each of the parties hereto with respect to the subject real estate is needed.

9 As a result, Plaintiffs have sustained damages, including, but not limited to, excessive
10 interest accumulation, negative amortization, loss of equity, destruction of credit standing, pain,
11 suffering, and emotional distress, in an amount to be shown at trial.

12 **DEMAND FOR JURY TRIAL AND PRAYER FOR DAMAGES**

13 Plaintiffs, THADDEUS J. POTOCKI and KELLY R. DAVENPORT, hereby demand a
14 trial by jury.

15 WHEREFORE, Plaintiffs, THADDEUS J. POTOCKI and KELLY R. DAVENPORT,
16 pray for Judgment and Order against the defendants, as follows:

- 17 1. That Judgment is entered for Plaintiffs and against defendants, and each of them;
- 18 2. For an Order requiring defendants to show cause, if they have any, why they
19 should not be enjoined as set forth below, during the pendency of the action;
- 20 3. For compensatory damages, according to proof at trial;
- 21 4. For consequential damages, according to proof at trial;
- 22 5. For general and statutory damages for all injuries resulting from the causes of
23 action set forth herein according to proof at trial;
- 24 6. For disgorgement and restitution of all earnings, profits, compensation and
25 benefits received by defendants as a result of their unlawful acts and practices;
- 26 7. For punitive and/or exemplary damages in an amount sufficient to punish
27 defendants' wrongful conduct and deter future misconduct;

28

1 **PROOF OF SERVICE**
2 **CALIFORNIA SUPERIOR COURT**

3 I am employed in the County of Sacramento, State of California. I am over the age of 18
4 and not a party to the within action; my business address is: 1912 F Street, Suite 110,
Sacramento, California 95811.

5 On September 5, 2014, I served the foregoing document(s) described as:

6 **FIRST AMENDED COMPLAINT**

7 On all interested parties in this action by placing [x] the original [] a true copy thereof
8 enclosed in sealed envelopes addressed as follows:

9 **Attorneys for Wells Fargo Bank, N.A.:**

10 Daska P. Babcock, Esq.
11 Mark D. Lonergan, Esq.
12 Edward R. Buell, Esq.
13 Severson & Werson
One Embarcadero Center, Suite 2600
San Francisco, California 94111

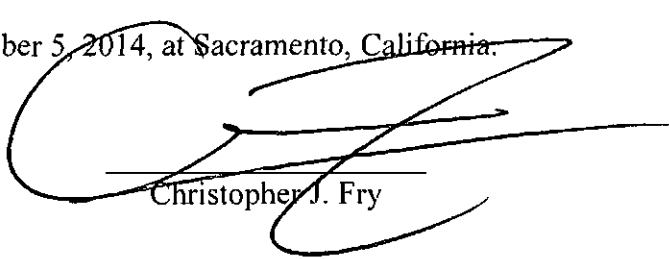
14 **Attorney for First American Servicing Solutions, LLC:**

15 Patrick Reider, Esq.
16 First American Law Group
5 First American Way
17 Santa Ana, California 92707

18 [X] BY MAIL: I caused such envelope to be deposited in the mail at Sacramento,
19 California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar"
20 with this firm's practice of collection and processing correspondence for mailing. It is deposited
with U.S. postal service on that same day in the ordinary course of business.

21 I declare that I am employed in the office of a member of the bar of this court at whose
22 direction the service was made. I declare under penalty of perjury under the laws of California
that the above is true and correct.

23 Executed on September 5, 2014, at Sacramento, California.

24 
25 Christopher J. Fry
26
27
28

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2014 SEP -5 PM 3: 50

GDSSC COURTHOUSE
SUPERIOR COURT
OF CALIFORNIA
SACRAMENTO COUNTY