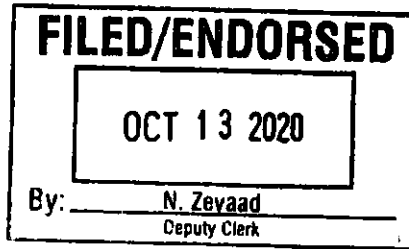


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THADDEUS J. POTOCKI and KELLY R. DAVENPORT

7
8 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SACRAMENTO**

10
11
12 **THADDEUS J. POTOCKI and KELLY R. DAVENPORT,**

13 **Plaintiffs,**

14 **vs.**

15 **WELLS FARGO BANK, N.A.; FIRST**
16 **AMERICAN SERVICING SOLUTIONS,**
17 **LLC; U.S. BANK, N.A.; and DOES 1**
through 100, inclusive,

18 **Defendants.**

CASE NO.: 34-2014-00160873

FIFTH AMENDED COMPLAINT FOR:

1. Violation of Civ. Code § 2923.6;
2. Violation of California Civil Code Section 2924(a)(6); and,
3. Wrongful Foreclosure.

DEMAND FOR JURY TRIAL

CIVIL UNLIMITED DIVISION

DAMAGES SOUGHT EXCEED
\$25,000.00

Fry Law Corporation
Trial Attorneys



1 regularly conduct business within this County.

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

8 **BRIEF FACTUAL BACKGROUND**

9 13. Mr. Potocki and Mrs. Davenport purchased the subject property located at
10 3410 West Country Club Lane, Sacramento, California 95821, in 2004. Plaintiffs have
11 lived in and owned the home for nearly ten (10) years. It is their primary residence.

12 14. Plaintiffs fell several months behind on the subject mortgage in early 2009.
13 Upon contacting defendant WELLSFARGO, they were offered a modification in exchange
14 for their agreement to make three (3) trial payments in the amount of \$1,633.53 beginning
15 in September of 2009. Plaintiffs were promised a loan modification holding a payment of
16 \$1,633.53 per month upon completion of the trial payments.

17 15. On September 11, 2009, Plaintiffs made their first installment in the trial
18 payment plan. The next two installments were made on September 30, 2009 and
19 November 3, 2009 respectively. Plaintiffs made payments totaling approximately
20 \$4,900.59. All three (3) payments were accepted by WELLSFARGO.

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

26 17. Shortly thereafter, on April 9, 2010, a Substitution of Trustee was recorded
27

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

1 by WELLSFARGO contending to substitute Plaintiffs' trustee with FIRSTAMERICAN.

2 18. On April 29, 2010, Robert Bourne signed an Assignment of Deed of Trust
3 purporting to transfer all beneficial interest in Plaintiffs' Deed of Trust from WELLSFARGO
4 to USBANK on behalf of WELLSFARGO. The trust in which the mortgage was purportedly
5 assigned contained a 2005 cut-off. Plaintiffs believe that the subject mortgage trust is a
6 REMIC trust which enjoys tax-free status if properly formed. However, if property is
7 transferred into the trust after the cut-off or closing date, it can jeopardize the tax-exempt
8 status. According to State and Federal law, mortgages not assigned to said trust before
9 the cut-off were not included in the trust.

10 19. Based on the foregoing, defendant USBANK was either barred from
11 accepting the untimely assignment or refused it. Either of which concludes that defendant
12 USBANK did not receive a beneficial interest and therefore, could not authorize a valid
13 foreclosure sale

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

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

23 22. Plaintiffs allege that USBANK is acting on behalf of a trust that closed in
24 2005. Securitize trusts require the mortgage be pooled in prior to the closing date. As
25 such, the 2010 purported transfer was executed five (5) years late is void as a matter of
26 law. Therefore, USBANK is not the beneficiary and cannot authorize FIRSTAMERICAN
27 and WELLSFARGO to foreclose on the subject mortgage.

28 23. On or about December 8, 2014, Plaintiffs submitted a completed loan



1 modification application along with the plethora of supporting documents WELLSFARGO
2 requested. After several months of review, Plaintiffs were reviewed for two (2) separate
3 modifications. The first, a modification under the Making Home Affordable Program
4 (“HAMP”) and the second, another Trial Payment Plan (“TPP”).

5 24. On February 3, 2015, Plaintiffs received a denial on their HAMP
6 modification review. The vague denial alleges that WELLSFARGO could not modify the
7 mortgage under HAMP because they “do not have the contractual authority to modify
8 your loan because of limitations in our servicing agreement.” Plaintiffs have never
9 reviewed or agreed to any terms contained in said servicing agreement and as such
10 should not be bound by them. Further, WELLSFARGO is the original lender of the loan,
11 owns the trust in which the mortgage is pooled and owns servicing rights to the loan.
12 WELLSFARGO is a signatory to the government sponsored HAMP program and has
13 received funds from the United States Government specifically to modify loans. Moreover,
14 the denial contained no detailed information pertaining to exactly why the investor came
15 to this conclusion and did not allow the modification.

16 25. On the same day, Plaintiffs also received what they initially saw as a ray of
17 light. They received a separate letter from WELLSFARGO regarding the TPP review. The
18 letter started with “We have good news about the above referenced loan. Our goal is
19 simple. We want to ensure that you have every opportunity to retain your home.” Plaintiffs
20 were thrilled that WELLSFARGO had finally decided to make progress towards resolving
21 this issue and had their checkbook open. However, a few pages into the letter they
22 discovered something ghastly.

23 26. WELLSFARGO requested three (3) trial payments with the first in the
24 amount of \$171,745.78, which is nearly 2100% of Plaintiffs’ income. The purported
25 workout option was essentially an initial payment of the past due total arrearages on the
26 account and resulted in a complete waste of time and effort to get help. Plaintiffs would
27 have been better off simply paying the arrearages and resuming payment (which of
28 course, cannot be done). This was a constructive denial and crystal clear message from



1 WELLSFARGO and USBANK that they simply refuse to offer Plaintiffs help.

2 27. Plaintiffs appealed both denials and the denials were promptly affirmed
3 putting Plaintiffs back to square one.

4 28. From the date of the initial Notice of Default to the date of this Complaint,
5 WELLSFARGO continued to make promises of the previously offered loan modification
6 and in fact, reviewed and denied Plaintiffs for same. Based on these representations,
7 Plaintiffs forewent breach of contract allegations until now. Plaintiffs allege that the
8 contract to modify according to the trial payment plan was effectively repudiated by
9 WELLSFARGO by way of its March 11, 2014 NTS.

10 29. The recording of the NTS put Plaintiffs on notice for the first time that
11 WELLSFARGO truly had no intentions of making good on its promise to modify the
12 mortgage.

13 30. Plaintiffs sued Defendants for said conduct. After Defendants successfully
14 demurred to the operative pleading, Plaintiffs appealed to the Third District Court of
15 Appeal. During the appeal, on or about May 16, 2016, defendants USBANK and
16 WELLSFARGO sold the home at auction for \$387,000.00, well under the appraised value.

17 31. Despite lacking a beneficial interest in the mortgage, USBANK nevertheless
18 directed WELLSFARGO and FIRSTAMERICAN to conduct the foreclosure sale of the
19 Subject Property on May 16, 2016 and record the Trustee's Deed Upon Sale shortly
20 thereafter.

21 32. Plaintiffs ultimately succeeded on the appeal and the case was remanded.

22 33. As a result of the illegal conduct, Mr. and Mrs. Potocki have suffered severe
23 stress and were subjected to multiple trespassers on the property, constant harassment
24 and visitation by realtors and others as the property was improperly publicly listed for
25 foreclosure sale.

26 34. The Potocki family home was foreclosed in direct violation of California law.
27 They incurred thousands in late fees, delinquency charges and foreclosure fees charged
28 by WELLSFARGO, USBANK and FIRSTAMERICAN. Further, USBANK and



1 WELLSFARGO never provided a fair loan modification review. Their home was sold while
2 simultaneously reviewing Plaintiffs for a loan modification.

3 35. The Potockis were fully capable of paying the mortgage if the payment could
4 have been modified and the arrearages worked out. The ended up homeless, a fact the
5 defendants are fully aware of.

6 36. The defendants' conduct deprived Plaintiffs of the possibility of reaching a
7 resolution to the default prior to sustaining damages. Had WELLSFARGO and USBANK
8 fairly and carefully reviewed them for the modification, they would have been approved
9 and would not have suffered the damages alleged herein. At a minimum, they would have
10 been able to pursue other viable foreclosure alternatives (short sale, equity sale,
11 bankruptcy, etc.).

12 **FIRST CAUSE OF ACTION**

13 **Violation of California Civil Code Section 2923.6**

14 **(Against Defendants USBANK, WELLSFARGO and Does 1-100)**

15 37. Plaintiffs incorporate herein by this reference each and every allegation set
16 forth above and below, as though fully set forth herein.

17 38. Former, and active at the time, Civil Code section 2923.6, subdivision (c)
18 bars foreclosing parties from recording a Notice of Default, Notice of Trustee's Sale, or
19 otherwise proceeding with a foreclosure while a completed loan modification application
20 has been submitted by a borrower. Subdivision (e) and (f) also require servicers to provide
21 detailed written denials in the event the loan modification application is denied.

22 39. Subdivision (e) states, in sum: "If the borrower's application for a first lien
23 loan modification is denied, the mortgage servicer, mortgagee, trustee, beneficiary, or
24 authorized agent shall not record a notice of default or, if a notice of default has already
25 been recorded, record a notice of sale or conduct a trustee's sale until the later of: (1)
26 Thirty-one days after the borrower is notified in writing of the denial."

27 40. Subdivision (f) also states, in sum: "Following the denial of a first lien loan
28 modification application, the mortgage servicer shall send a written notice to the borrower



1 identifying the reasons for denial.”

2 41. As set forth above, Plaintiffs submitted to defendants a complete loan
3 modification application. Plaintiffs received two written denials, both of which were
4 insufficiently detailed to comply with the statute.

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

8 **SECOND CAUSE OF ACTION**

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

10 **(Against Defendants USBANK, WELLSFARGO and Does 1-100)**

11 43. Plaintiffs incorporate herein by this reference each and every allegation set
12 forth above and below, as though fully set forth herein.

13 44. Former Civil Code section 2924(a)(6) bars all defendants from initiating
14 foreclosure unless they are the holder of the beneficial interest under the mortgage or
15 deed of trust, the original trustee or the substituted trustee under the deed of trust, or the
16 designated agent of the holder of the beneficial interest.

17 45. As set forth above, defendants USBANK and WELLSFARGO foreclosed
18 under the subject Deed of Trust although they are not beneficiaries, trustees, or otherwise
19 authorized to initiate foreclosure proceedings.

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

23 **THIRD CAUSE OF ACTION**

24 **Wrongful Foreclosure**

25 **(Against All Defendants)**

26 47. Plaintiff incorporates herein by this reference each and every allegation set
27 forth above, as though fully set forth herein.

28 48. Civil Code section 2923.6 bars all defendants from foreclosing on a



1 mortgage while a loss mitigation option is being reviewed. The former code sections also
2 barred the foreclosure of properties by anyone other than the beneficial owner. California
3 law also imposes a duty of care to review loss mitigation options diligently before
4 foreclosing.

5 49. As set forth above, defendants foreclosed under the subject Deed of Trust
6 although a loss mitigation application was under review and/or while lacking the beneficial
7 interest to do so.

8 50. As a result, Plaintiff has sustained damages, including, but not limited to,
9 excessive interest accumulation, negative amortization, loss of equity, destruction of
10 credit standing, and late fees and other charges, in an amount to be shown at trial.

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

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

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

- 16 1. That Judgment is entered for Plaintiffs and against defendants, and each of
17 them;
- 18 2. For an Order requiring defendants to show cause, if they have any, why
19 they 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
23 of action set forth herein according to proof at trial;
- 24 6. For punitive damages as a result of the malicious, oppressive and
25 fraudulent conduct;
- 26 7. For disgorgement and restitution of all earnings, profits, compensation and
27 benefits received by defendants as a result of their unlawful acts and practices;
- 28 8. For punitive and/or exemplary damages in an amount sufficient to punish

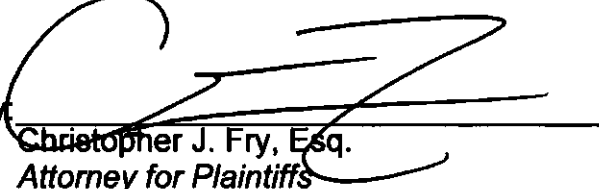


- 1 defendants' wrongful conduct and deter future misconduct;
- 2 9. For an accounting from defendants of all monies received by them on
- 3 Plaintiffs' subject mortgage loan;
- 4 10. Prejudgment interest;
- 5 11. Costs and disbursements of the action;
- 6 12. Attorney's fees;
- 7 13. For specific performance of defendant's promises;
- 8 14. For declaratory relief concerning the relative rights, responsibilities,
- 9 obligations and interest as to each of the parties hereto with respect to the subject real
- 10 estate; and,
- 11 15. For an injunction barring the defendants from selling Plaintiffs' home at
- 12 auction or otherwise foreclosing on the mortgage;
- 13 16. For such other and further relief as the Court may deem just and proper.
- 14

15 DATED: October 13, 2020

Respectfully submitted,

FRY LAW CORPORATION

By 
Christopher J. Fry, Esq.
Attorney for Plaintiffs

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SUPERIOR COURT
OF CALIFORNIA
SACRAMENTO COUNTY