

1 Christopher J. Fry, Esq. (SBN: 298874)  
Email: cfry@greenefry.com  
2 Ted A. Greene, Esq. (SBN: 220392)  
Email: tgreene@greenefry.com  
3 **GREENE | FRY, APLC**  
1912 F Street, Suite 110  
4 Sacramento, California 95811  
Telephone: (916) 442-6400  
5 Facsimile: (916) 266-9395

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

**FILED**  
**Superior Court Of California,**  
**Sacramento**  
**02/13/2015**  
cleurgans  
By \_\_\_\_\_, Deputy  
Case Number:  
**34-2014-00160873**

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

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

13 Plaintiffs,

14 vs.

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

18 Defendants.

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

**SECOND AMENDED COMPLAINT**  
**FOR:**

1. **Breach of Contract;**
2. **Violation of California Business and Professions Code Section 17200, et seq.;**
3. **Negligence.**

**DEMAND FOR JURY TRIAL**

GREENE | FRY  
1912 F Street, Suite 110, Sacramento, California 95811  
Telephone: (916) 442-6400



GREENE; FRY  
1912 F Street, Suite 110, Sacramento, California 95811  
Telephone: (916) 442-6400

1 business in California. Defendant WELLSFARGO is the current servicer of the subject mortgage  
2 loan.

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

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

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

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

19 **JURISDICTION AND VENUE**

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

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

2 **FACTUAL BACKGROUND**

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

6 Plaintiffs fell several months behind on the subject mortgage in early 2009. Upon  
7 contacting defendant WELLSFARGO, they were offered a modification in exchange for their  
8 agreement to make three (3) trial payments in the amount of \$1,633.53 beginning in September of  
9 2009. Plaintiffs were promised a loan modification holding a payment of \$1,633.53 per month  
10 upon completion of the trial payments.

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

15 Plaintiffs were never provided the modification paperwork as promised. Instead, on  
16 February 4, 2010, a Notice of Default (“NOD”) was recorded against the primary mortgage secured  
17 by his home, the subject property. The NOD was filed by FIRSTAMERICAN and is believed to  
18 be filed on behalf of USBANK.

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

22 On March 11, 2014, FIRSTAMERICAN recorded a Notice of Trustee’s Sale (“NTS”)  
23 (referencing T.S. No. CA1000192071) noting that the home was up for sale on April 1, 2014.

24 From the date of the Notice of Default to the date of this Complaint, WELLSFARGO  
25 continued to make promises of the previously offered loan modification and in fact, is currently  
26 reviewing Plaintiffs for same. Based on these representations, Plaintiffs forewent breach of  
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28 <sup>1</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

GREENE, FRY  
1912 F Street, Suite 110, Sacramento, California 95811  
Telephone: (916) 442-6400

1 contract allegations until now. Plaintiffs allege that the contract to modify according to the trial  
2 payment plan was effectively repudiated by WELLSFARGO by way of its March 11, 2014 NTS.

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

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

9 **FIRST CAUSE OF ACTION**

10 **Breach of Contract**

11 **(Against Defendant USBANK, WELLSFARGO and Does 1-100)**

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

14 In connection with the subject mortgage loan, Plaintiffs and defendant USBANK and  
15 WELLSFARGO entered into a written contract whereby defendants agreed to modify the subject  
16 mortgage loan in exchange for Plaintiffs' three trial payments. A copy of which is attached as  
17 **Exhibit A** and incorporated herein by reference. Plaintiffs fully performed their promise and made  
18 the trial payments.

19 Without excuse, defendants effectively breached the contract in April of 2014 by the acts  
20 and omissions set forth above.

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

24 **SECOND CAUSE OF ACTION**

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

26 **(Against All Defendants)**

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

GREENE, FRY  
1912 F Street, Suite 110, Sacramento, California 95811  
Telephone: (916) 442-6400

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

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

8 **THIRD CAUSE OF ACTION**

9 **Negligence**

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

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

13 Defendants owed Plaintiffs a general duty of care. Plaintiffs and defendants entered into a  
14 contract that was not honored. Additionally, Plaintiffs have subsequently submitted completed  
15 loan modifications to defendants which were never reviewed and the defendants continue to  
16 foreclose resulting in the damages below.

17 Further, the defendants negligently made false representations when they promised a  
18 permanent loan modification in exchange for three trial payments. Plaintiffs relied on the promise  
19 and made several trial payments. The representations were ultimately proven to be untrue when  
20 the defendants noticed the sale as set forth above and made it clear they had no intent of honoring  
21 the contract.

22 At the time the defendants made the representations to Plaintiffs as above alleged, they  
23 knew, or should have known, that said representations were in fact false, and nevertheless made  
24 them, with the intent to induce Plaintiffs to enter into the contract and make the trial payments.

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

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GREENE FRY  
1912 F Street, Suite 110, Sacramento, California 95811  
Telephone: (916) 442-6600

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

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

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

1. That Judgment is entered for Plaintiffs and against defendants, and each of them;
2. For an Order requiring defendants to show cause, if they have any, why they should not be enjoined as set forth below, during the pendency of the action;
3. For compensatory damages, according to proof at trial;
4. For consequential damages, according to proof at trial;
5. For general and statutory damages for all injuries resulting from the causes of action set forth herein according to proof at trial;
6. For disgorgement and restitution of all earnings, profits, compensation and benefits received by defendants as a result of their unlawful acts and practices;
7. For punitive and/or exemplary damages in an amount sufficient to punish defendants' wrongful conduct and deter future misconduct;
8. For an accounting from defendants of all monies received by them on Plaintiffs' subject mortgage loan;
9. Prejudgment interest;
10. Costs and disbursements of the action;
11. Attorney's fees;
12. For specific performance of defendant's promises;
12. For declaratory relief concerning the relative rights, responsibilities, obligations and interest as to each of the parties hereto with respect to the subject real estate; and,
13. For an injunction barring the defendants from selling Plaintiffs' home at auction or otherwise foreclosing on the mortgage;

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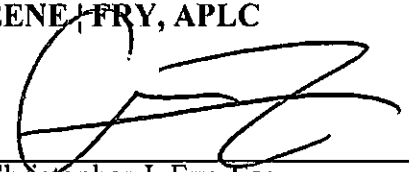
14. For such other and further relief as the Court may deem just and proper.

DATED: February 13, 2015

Respectfully submitted,

**GREENE & FRY, APLC**

By:



\_\_\_\_\_  
Christopher J. Fry, Esq.  
*Attorney for Plaintiffs*

GREENE & FRY  
1912 F Street, Suite 110, Sacramento, California 95811  
Telephone: (916) 442-6400



# **Exhibit A**



Wells Fargo Home Mortgage  
MAC X9400-02A  
11200 West Parkland Avenue  
Milwaukee, WI 53224

August 12, 2009

Loan Number 708-0048244214  
Due Date: 05-01-09

Thaddeus J Potocki  
Kelly R Davenport  
3410 West Country Club Lane  
Sacramento CA 95821

Thank you for contacting us regarding your financial hardship on the loan mentioned above. Our goal is simple. We want to ensure that you have every opportunity to retain your home. Based on our telephone conversation and the financial information you provided, we would like to offer you a Special Forbearance Plan.

Currently, your loan is due for 4 installments, from May 01, 2009 through August 01, 2009. As agreed, you have promised to pay the amounts stated within the Special Forbearance Agreement. The terms and conditions of this Special Forbearance Agreement are outlined on page two. The Special Forbearance Agreement must be signed and returned with the first installment. This is not a waiver of the accrued or future payments that become due, but a period for you to determine how you will be able to resolve your financial hardship.

Upon successful completion of the Special Forbearance Plan, your loan will not be contractually current. Since the agreed upon payment plan may be less than the total amount due you may still have outstanding payments and fees. Any outstanding payments and fees will be reviewed for a loan modification. An additional contribution may be needed if you are approved for a loan modification.

Any payments received will be applied to the delinquent payments on the loan. During this Special Forbearance Agreement, payments are to be mailed to:

Wells Fargo Home Mortgage  
Attn: MAC X9400-02M  
11200 W. Parkland Ave.  
Milwaukee WI 53224

NOTE: If your loan is in foreclosure, we will instruct our foreclosure counsel to suspend foreclosure proceedings once the initial payment has been received, and to continue to suspend the action as long as you keep to the terms of the Special Forbearance Agreement. Upon full reinstatement, we will instruct our foreclosure counsel to dismiss foreclosure proceedings and report to credit bureaus accordingly.

Wells Fargo Home Mortgage  
Is a division of Wells Fargo Bank N.A.



Wells Fargo Home Mortgage  
 MAC X9400-02A  
 11200 West Parkland Avenue  
 Milwaukee, WI 53224

During this period, we are requesting that you maintain contact with our office in order to establish acceptable arrangements for bringing your loan current. If you need additional assistance, please call us at (866) 204-3574, Monday through Friday, 9 AM to 9 PM, Eastern Time.

Sincerely,  
 Borrower Counseling Services

LJ004 005 FTD

Wells Fargo Bank, N A is required by the Fair Debt Collection Practices Act to inform you that if your loan is currently delinquent or in default, as your loan servicer, we will be attempting to collect a debt, and any information obtained will be used for that purpose. However, if you have received a discharge, and the loan was not reaffirmed in the bankruptcy case, Wells Fargo Bank, N A will only exercise its right as against the property and is not attempting any act to collect the discharge debt from you personally.

**SPECIAL FORBEARANCE AGREEMENT - TERMS AND CONDITIONS**

1. Currently, your loan is due for 4 installments, from May 01, 2009 through August 01, 2009. The indebtedness of the referenced loan is in default and in consideration of extending forbearance for a period of time, it is necessary that you indicate your understanding and acceptance of the terms of the forbearance agreement by immediately signing and returning this agreement.
2. Payments must be made strictly in accordance with the enclosed payment schedule and forbearance agreement conditions. This plan is an agreement to temporarily accept reduced payments or maintain regular monthly payments during the plan specified below. Upon successful completion of the three regular payments as outlined in this plan, your loan will be reviewed for a Loan Modification, based on investor approval, which will satisfy the remaining past due amount on your loan.
3. The lender is under no obligation to enter into any further agreement, and this forbearance shall not constitute a waiver of the lender's right to insist upon strict performance in the future.
4. All of the provisions of the note and security instrument, except as herein provided, shall remain in full force and effect. Any breach of any provision of this agreement or non-compliance with this agreement, shall render the forbearance null and void, and at the option of the lender without further notice to you may terminate this agreement. The lender, at its option, may institute foreclosure proceedings according to the terms of the note and security instrument without regard to this agreement. In the event of foreclosure, you may incur additional expenses of attorney's fees and foreclosure costs.
5. Each payment must be remitted according to the schedule below.
 

PLAN	DATE	AMT	PLAN	DATE	AMT
01	09/01/09	1,633.53	02	10/01/09	1,633.53
03	11/01/09	1,633.53			
6. There is no "grace period" allowance in this agreement. All payments must be received on or before the agreed due date. If any payment is not received on or before the due date, the agreement will be void and the total delinquency, including fees, will be due immediately.
7. The total amount indicated on each payment of the Wells Fargo Home Mortgage  
is a service of Wells Fargo Bank, N.A. payment schedule

**WELLS FARGO HOME MORTGAGE**

Wells Fargo Home Mortgage  
MAC X9400-02A  
11200 West Parkland Avenue  
Milwaukee, WI 53224

must be remitted. In the event the total amount due of each payment is not received, the Special Forbearance agreement will be rendered null and void.

By signing this agreement I hereby consent to being contacted concerning this loan at any cellular or mobile telephone number I may have. This includes text messages, at no cost to me, and telephone calls including the use of automated dialing systems to contact my cellular or mobile telephone.

[Signature] 8-25-09  
Mortgagor Date

[Signature] 8-25-09  
Co-mortgagor Date

Wells Fargo Bank, N.A.

Officer

Date

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**PROOF OF SERVICE  
CALIFORNIA SUPERIOR COURT**

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

On February 13, 2015, I served the foregoing document(s) described as:

**SECOND AMENDED COMPLAINT**

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

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

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

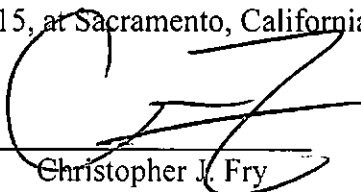
**Attorney for First American Servicing Solutions, LLC:**

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

[X] BY MAIL and EMAIL: I caused such envelope to be deposited in the mail at Sacramento, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" 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. An email with the above document was sent to the email on file for each party above.

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

Executed on February 13, 2015, at Sacramento, California.

  
Christopher J. Fry

RECEIVED  
CIVIL DROP BOX

2015 FEB 13 PM 2:30

GDSSC COURTHOUSE  
SUPERIOR COURT  
OF CALIFORNIA  
SACRAMENTO COUNTY