

1 Ted A. Greene, Esq. (SBN: 220392)
2 **LAW OFFICES OF TED A. GREENE, INC.**
3 1912 F Street, Suite 110
4 Sacramento, California 95811
5 Telephone: (916) 442-6400
6 Facsimile: (916) 266-9395
7 Email: tgreene@tedgreenelaw.com

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

FILED
Superior Court Of California,
Sacramento
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amacias
By _____, Deputy
Case Number:
34-2014-00160873

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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.

CASE NO.:

COMPLAINT FOR:

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

DEMAND FOR JURY TRIAL

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.

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

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

19 **PARTIES**

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

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

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

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

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

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

18 JURISDICTION AND VENUE

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

24 The defendants engaged in business within the State of California, which business is
25 related to the events which give rise to the instant lawsuit. The subject events transpired within
26 the State of California. The defendants have "sufficient minimum contacts" with the State of
27

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1 California such that this Court's exercise of personal jurisdiction over the defendants herein
2 "[does] not offend traditional notions of fair play and substantial justice."¹

3 **FACTUAL BACKGROUND**

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

8 Plaintiffs fell several months behind on the subject mortgage. On February 4, 2010, a
9 Notice of Default ("NOD") was recorded against the primary mortgage secured by his home, the
10 subject property. The NOD was filed by FIRSTAMERICAN and is believed to be filed on behalf
11 of USBANK. However, the beneficiary under the Deed of Trust was Wells Fargo Bank, N.A.

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

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

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

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

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

1 As of the date of this Complaint, WELLSFARGO nor FIRSTAMERICAN are able to
2 provide Plaintiffs or their counsel, confirmation that the April 1, 2014 sale has been taken off
3 calendar. If Plaintiffs' home is sold at a foreclosure sale, they will be homeless.

4 **FIRST CAUSE OF ACTION**

5 **Negligence Per Se**

6 **(Against All Defendants)**

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

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

13 As set forth above, USBANK has no beneficial interest in the subject mortgage yet has
14 noticed that it will sell the property on April 1, 2014.

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

18 **SECOND CAUSE OF ACTION**

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

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

26 As set forth above, USBANK has no beneficial interest in the subject mortgage yet has
27 noticed that it will sell the property on April 1, 2014.

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

5 **THIRD CAUSE OF ACTION**

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

7 **(Against All Defendants)**

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

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

14 As set forth above, defendants USBANK, WELLSFARGO, and FIRSTMERICAN are
15 foreclosing under the subject Deed of Trust although they are not beneficiaries, trustees, or
16 otherwise authorized to initiate foreclosure proceedings.

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

20 **FOURTH CAUSE OF ACTION**

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

22 **(Against All Defendants)**

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

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

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

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

7 **FIFTH CAUSE OF ACTION**

8 **Declaratory Relief**

9 **(Against All Defendants)**

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

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

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

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

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

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

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

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

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

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

23 DATED: March 27, 2014

Respectfully submitted,

LAW OFFICES OF TED A. GREENE, INC.

26 By: 

Ted A. Greene, Esq.
Attorney for Plaintiffs