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LEGAL PROCESS #6

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

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

14 Plaintiffs,

15 vs.

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

20 Defendants.

CASE NO.: 34-2014-00160873

21 **MEMORANDUM OF POINTS AND**
22 **AUTHORITIES IN SUPPORT OF EX**
23 **PARTE APPLICATION FOR A**
24 **TEMPORARY RESTRAINING ORDER**
25 **AND AN ORDER TO SHOW CAUSE**
26 **WHY A PRELIMINARY INJUNCTION**
27 **SHOULD NOT BE ISSUED**

28 [Filed concurrently with Plaintiffs' Notice of
Ex Parte Application; Declaration of Ted A.
Greene, Esq.; [Proposed] Temporary
Restraining Order and Order to Show
Cause]

Date: March 28, 2014
Time: 2:30 PM
Dept.: 53

1 Plaintiffs THADDEUS J. POTOCKI and KELLY R. DAVENPORT (“Plaintiffs” or “Mr.
2 Potocki and Mrs. Davenport”), by and through counsel, submit this Memorandum of Points and
3 Authorities in Support of the Ex Parte Application for a Temporary Restraining Order as follows:

4 **FACTUAL BACKGROUND**

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

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

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

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

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

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

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 **RELIEF REQUESTED**

5 Plaintiffs respectfully request this Court enter a Temporary Restraining Order and issue
6 an Order to Show Cause why a Preliminary Injunction should not be issued, enjoining
7 defendants and any and all of their employees, agents, servants, or anyone acting on their behalf,
8 from advertising holding, conducting or participating in any foreclosure sale or Trustee's Sale of
9 Plaintiff's real property commonly known as 3410 West Country Club Lane, Sacramento,
10 California 95821, currently scheduled to occur on April 1, 2014.

11 **ARGUMENT**

12 **A. Good Cause Exists For Granting This Application On An *Ex Parte* Basis.**

13 Good cause exists for granting this Application on an *ex parte* basis because the
14 defendants are clearly in violation of provisions set forth in the California Homeowners' Bill of
15 Rights ("HOBR") as Codified in the pertinent sections of the California Civil Code and more
16 sufficiently set forth in the Plaintiff's Complaint.¹ The HOBR prohibits mortgage servicers like
17 defendants from foreclosing using robo-signed and otherwise fraudulent documents.

18 The HOBR was enacted in 2013 and offers homeowners greater protection during the
19 foreclosure process. (*See generally* Cal. Civ. Code § 2923, *et seq.*)

20 As set forth in the Complaint herein, Plaintiffs can, and has, adequately shown a
21 likelihood of success on the merits in light the HOBR.

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

26
27 ¹ For the Court's ease of reference, a true and correct copy of Plaintiffs' Complaint against the
28 defendants is attached to the Declaration of Ted A. Greene filed concurrently herewith as Exhibit A.

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

4 Plaintiffs will suffer irreparable harm if the home is lost to foreclosure as they will be
5 homeless. Injury to real property is irreparable as every piece of real property is unique in nature
6 and no amount of monetary damage will remedy Plaintiffs' potential loss.

7 A restraining order granted by this Court will preserve the status quo during the pendency
8 of the instant litigation. Further, the balance of equities is in Plaintiffs' favor as a temporary
9 restraining order merely delays the defendants' right to foreclose and is not dispositive of it.

10 Finally, an injunction is in the public's interest as it enforces a recently enacted law
11 designed to specifically to protect the public from this type of conduct.

12 The Plaintiffs reside in the Subject Property as their primary residence.

13 While it is noticed, a sale has yet to occur and no trustee's deed has been recorded against
14 the Plaintiffs' interest regarding the subject property. As a result of the violation of the
15 aforementioned provisions of the HOBR, Plaintiff has brought this action for injunctive relief to
16 enjoin a material violation of §2924(a)(6) and 2924.17.

17 The requested relief should remain in place and any trustee's sale, including the one
18 scheduled concerning the Subject Property "shall be enjoined" until the violations are remedied
19 by the defendants.

20 **B. This Court Has The Authority To Issue This Temporary Restraining Order.**

21 California Civil Code section 2924.12(a)(1) and (2) state that:

22 If a trustee's deed upon sale has not been recorded, a borrower may bring an
23 action for injunctive relief to enjoin a material violation of Section...2924.17.

24 ***

25 (2) Any injunction shall remain in place and any trustee's sale shall be
26 enjoined until the court determines that the mortgage servicer, mortgagee,
trustee, beneficiary, or authorized agent has corrected and remedied the
violation or violations giving rise to the action for injunctive relief.

27 (*Ibid.*)

1 California Code of Civil Procedure section 527 states, in pertinent part:

2 "(a) An injunction may be granted at any time before judgment upon verified
3 complaint, or upon affidavits if the complaint in the one case, or the affidavits
4 in the other, show satisfactorily that sufficient grounds exist therefore."

5 California Code of Civil Procedure section 745 states in pertinent part that:

6 "The court may, by injunction, on good cause shown, restrain the party
7 possession from doing any act to the injury of real property:

8 (a) During the foreclosure of a mortgage on the property.

9 (*Ibid.*)

10 California Code of Civil Procedure Section 526 states in pertinent part that:

11 (a) An injunction may be granted in the following cases:

12 (2) When it appears by the complaint or affidavits that the commission or
13 continuance of some act during the litigation would produce waste, or
14 great or irreparable injury, to a party to the action.

15 (3) When it appears, during the litigation, that a party to the action is
16 doing, or threatens, or is about to do, or is procuring or suffering to be
17 done, some act in violation of the rights of another party to the action
18 respecting the subject of the action, and tending to render the judgment
19 ineffectual."

20 (*See also Dingley v. Buckner* (1909) 11 Cal. App. 181, 183-84)

21 **C. Plaintiff Will Suffer Irreparable Harm If A Restraining Order Is Not Issued.**

22 In *Jessen v. Keystone* (1983) 142 Cal.App.3d 454, 457, the Court stated that "irreparable
23 injury is one for which ... the item is so unique its loss deprives the possessor of intrinsic values
24 not replaceable by money or in kind ... " It is well settled California law that real property is
25 unique and not replaceable by money or other real property. (*See C. Robert Nattress &*
26 *Associates v. CIDCO* (1986) 184 Cal.App.3d 55, 63.)

27 In this instance, the defendants are scheduled to conduct a Trustee's Sale of Plaintiffs'
28 home on April 1, 2014. If the Court does not intervene and issue a temporary restraining order,
Plaintiffs' property will be auctioned off and sold prior to resolution of this lawsuit, leaving
Plaintiffs homeless.

1 Plaintiffs would not be afforded any meaningful opportunity to examine the accuracy of
2 the foreclosure, address the HOBR claims in this case and protect the interests in the property.
3 (*See Wind v. Herbert* (1960) 186 Cal.App.2d 276, 285.)

4 As set forth above, each piece of real property is unique in nature and not replaceable by
5 money or other real property. As such, Plaintiffs will be irreparably harmed and any monetary
6 damages would be insufficient to compensate them for the losses.

7 Therefore, this Court must issue an order enjoining Defendants from advertising, holding,
8 conducting or participating in any foreclosure sale or Trustee's Sale of Plaintiffs' property
9 pending the resolution of this litigation.

10 **D. Status Quo Must Be Preserved.**

11 A temporary restraining order may be granted to preserve the status quo until a final
12 determination on the merits of the action can be had by the parties. (*See Butt v. Stat* (1992) 4
13 Cal.4th 668; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d.512, 528; *Cohen v. Board of*
14 *Supervisors* (1985) 40 Cal.3d 277.)

15 The public policy to preserve the status quo holds especially strong until such time as the
16 court can determine ownership or right to possession of real property. (*See Robbins v. Sup. Ct.*
17 *(Co. of Sacramento)* (1985) 38 Cal.3d 199,205.)

18 This public policy set forth in *Robbins* applies to Plaintiffs' case. Plaintiff has filed a
19 Complaint underlying this Application and seeks damages based on various causes of action
20 against the defendants arising out of their failure to follow the HOBR.

21 Without the Court's issuance of a restraining order to halt the imminent foreclosure sale
22 and to maintain the status quo pending the outcome of the Plaintiffs' Complaint, substantial harm
23 and irreparable injury to Plaintiffs is inevitable. Plaintiffs' application is justified and supported
24 by the facts and authorities set forth herein.

25 If the April 1, 2014 sale is not enjoined, the Court's judgment or damage award would not
26 adequately remedy Plaintiffs' loss as set forth above.

1 Plaintiffs request this Court issue the requested restraining order to maintain the status
2 quo and enjoin the defendants from carrying out the sale of the subject property.

3 **E. Ex Parte Notice Requirements Were Attempted And Required Showings Are Met.**

4 California Rules of Court, Rule 379 states, in pertinent part:

5 (a) An ex parte application for an order must be accompanied by an affidavit or a
6 declaration showing:

7 (1) that, within the applicable time period under (b) the applicant informed the
8 opposing party when and where the application would be made;

9 (b) A party seeking an ex parte order must notify all parties no later than 10:00 a.m.
10 the court day before the ex parte appearance, absent a showing of exceptional
11 circumstances.

12 Counsel for Plaintiffs has submitted a declaration filed concurrently herewith, and
13 another declaration showing good cause demonstrating a good faith attempt at compliance with
14 this rule governing applications for *ex parte* relief. The supporting Declaration of attorney Ted
15 A. Greene, Esq. states that the defendants, or their agents or employees, were informed of the
16 time, date and location of the *ex parte* hearing to be held on March 28, 2014.

17 **CONCLUSION**

18 Based on the foregoing, Plaintiffs respectfully request this Court to issue a temporary
19 restraining order enjoining defendants, and any and all of their employees, agents, servants, or
20 anyone acting on their behalf, from advertising, holding, conducting or participating in any
21 foreclosure sale or Trustee's Sale of Plaintiffs' real property commonly known as 3410 West
22 Country Club Lane, Sacramento, California 95821, pending the resolution of this litigation or
23 until further Order of this Court.

24 DATED: March 27, 2014

Respectfully submitted,

25 **LAW OFFICES OF TED A. GREENE, INC.**

26 By: 

27 Ted A. Greene, Esq.
Attorney for Plaintiff