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Attorney for Debtor  
GORDY A SPIRES

Case # : 09-90133-LTAD  
Debtor.: SPIRES VS. G8 CAPITAL  
Judge.: LAURA TAYLOR  
Chapter: AD

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Filed : March 26, 2009 11:31:28  
Deputy : ACROSBY  
Receipt: 203013  
Amount : \$250.00  
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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

GORDY A SPIRES  
  
Debtor/Plaintiff,  
  
v.  
  
G8 CAPITAL FUND VII, LLC.;  
MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.  
"MERS" and DOES 1-50, inclusive.  
  
Defendant

CHAPTER 7 NO. 08-13091-LT7  
  
ADVERSARIAL CASE NO  
  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
ADVERSARIAL COMPLAINT:  
1. FOR DECLARATORY RELIEF;  
2. INJUNCTIVE RELIEF;  
3. DEMAND FOR ACCOUNTING;  
4. RESCISSION;  
5. FRAUD;  
6. NEGLIGENT INFLICTION OF  
EMOTIONAL DISTRESS;  
7. BREACH OF FIDUCIARY DUTY;  
8. BREACH OF COVENANT OF GOOD  
AND FAIR DEALING;  
9. UNLAWFUL, UNFAIR AND  
FRAUDULENT BUSINESS PRACTICE  
(BUS. PROFESSION CODE 17200):  
PUNITIVE DAMAGES

**SUMMARY OF ARGUMENT**

On 1/11/2007 PLAINTIFF borrowed money from DEFENDANTS to purchase real property. The loan was for the sum of \$640,115.00 and was secured by a note

1 and deed of trust.

2 DEFENDANTS were required under the Truth and Lending Act (TILA) 15 U.S.C.  
3 1638: Regulation Z section 226.7 and 226.18 and the Real estate Settlement and  
4 Procedures Act (RESPA) 12 U.S.C. sections 2601-2617 to comply among other things,  
5 but not limited to: (a) providing disclosures of fees and costs associated with the loan  
6 processing and ultimate financing and under the statute required to refrain from  
7 asserting unfair and unlawful fees and costs such as settlement fees, administrative  
8 fees and loan processing fees., costs for tax services rendered when in fact no tax  
9 service was rendered by a licensed tax professional, yield spread points paid to resale  
10 state brokers when the broker did not in fact provide the service or the services  
11 provided was of less value than the costs and fees paid by the borrowers. (b)  
12 DEFENDANTS were also required to provide plaintiffs with Truth in Lending Act  
13 disclosures outlining finance charges, the amount financed and the rights of rescission  
14 under such act. PLAINTIFFS contend they were not provided with such disclosures in  
15 the manner prescribed by law.

16 DEFENDANTS also fraudulently placed PLAINTIFF in a predatory loan charging  
17 them a teaser interest rate that included unlawful and oppressive interest rates,  
18 prepayment penalties and in fact was a loan that was far less favorable than what  
19 plaintiff's qualified for at the time of the loan. This type of tactic and unlawful and  
20 underhanded acts by DEFENDANTS is the same which has become known throughout  
21 the mortgage industry as "predatory lending".

22 PLAINTIFFS are informed and believe and thereon allege that the note securing  
23 the loan originally held by BENEFICIAL CALIFORNIA INC. was sold to another, as yet,  
24 unknown buyer or series of buyers in a series of securitized real estate pool  
25 agreements and that DEFENDANTS and all named defendants herein was paid off on  
26 the note. PLAINTIFF have requested the identity of the true note holder to determine  
27 what, if anything, is owed on the note. PLAINTIFF allege that nothing is due and owing  
28 to the DEFENDANT who are attempting to foreclose on the subject property.

1 A dispute has arisen between the PLAINTIFF and DEFENDANTS with regard to  
2 the payments due, the alleged amount owed to the note holder and alleged fraudulent  
3 acts committed by the defendants and each of them.

4 On 7/10/2008 DEFENDANT, through its alleged trustee, filed a Notice of Default  
5 and Election to sell under Deed of Trust. . That sale date was postponed to due to a  
6 Chapter 7 bankruptcy.

7 Despite PLAINTIFFS attempts to work with DEFENDANTS to resolve the issues  
8 regarding the dispute with the loan and the pending foreclosure defendants have not  
9 been willing meet or provide an opportunity for resolution of the matter with plaintiffs.

10 PLAINTIFFS have timely rescinded the promissory note between them and  
11 DEFENDANT and contend that there is no longer a note upon which any of the  
12 defendants can foreclose due to the automatic recession by operation of law.

13 PLAINTIFFS now seek to restrain DEFENDANTS from selling the subject property  
14 and for return of all monies paid to DEFENDANTS in connection with the loan, monies  
15 paid in improving the property, taxes paid and for statutory damages and claims as set  
16 forth in the Complaint.

17 II

18 ARGUMENT

19 **A. The underlying note contract has been rescinded therefore there is no note to**  
20 **foreclose on and accordingly the proposed foreclosure sale should be vacated or**  
21 **enjoined under Federal and State Laws pertaining to rescission**

22 PLAINTIFFS, because of the alleged violations of the Truth in Lending Act (TILA)  
23 (15 U.S.C. 1601, et seq.) And disclosure laws under which DEFENDANTS were  
24 required to failed to provide certain notices and disclosures, gave notice of rescission to  
25 defendants allowed under 15 U.S.C. 1635. Rescission under this section provides  
26 where improper or failure to provide proper notice of right to rescind at the contract  
27 entry stage is found the borrower can rescind the contract. PLAINTIFFS" allegations of  
28 none disclosure by defendants include the lack of providing proper notice to rescind

1 and other disclosure violations.

2 Pursuant to subsection (b) of 15 U.S.C. 1635, when an obligator exercises his right  
3 to rescind under subsection (a) of 15 U.S.C. 1635 the underlying contract immediately  
4 becomes void upon such rescission by operation of law. DEFENDANTS have 20 days  
5 to comply with requirements to return all monies due and owing to PLAINTIFF before  
6 PLAINTIFFS have to do anything. Accordingly, there is no longer any contract under  
7 which DEFENDANTS or anyone can foreclose on the property. This alone is sufficient  
8 to warrant the court's entry of a vacating order to stop the sale of property.

9 The California law of rescission is essentially the same as that provided for under  
10 the federal statute, Rescission is the extinguishment of a contract (Ca;if Civ. Code  
11 section 1688). Rescission relates back to the formation of a contract or agreement, and  
12 negates its existence as though it had never been made. *Long v. Newlin* (1956) 144  
13 CA2d 509, 301 P2d 271. The rescinded agreement becomes a nullity; its terms cease  
14 to exist and are not enforceable against the other party. *Holmes v. Steele* (1969) 269  
15 CA2d 675, 75 CR 216. Rescission terminates further liability and restores the parties to  
16 their former positions by requiring each to return whatever consideration was received.  
17 *Tippett V. Terich* (1995) 37 CA4th 1517, 44 CR2d 862, overruled on other grounds in  
18 *cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 C4th 163, 171, 96 CR2d 518.

19 Civil Code 1688-1693 provides the methods of effectuating a rescission. Under  
20 the Civ. Code 1691 a party to a contract may rescind unilaterally by giving notice of  
21 rescission and offering to restore the consideration received. *Runyan v. Pacific Air*  
22 *Indus., inc.* (1970) 2 C3d 304, 85 CR 138. In an action for relief based on rescission,  
23 the parties are restored generally to the position they occupied before formation of the  
24 contract by (1) restitution of all benefits conferred as result of the transaction, and (2) an  
25 award of any consequential damages.

26 One of the basis upon which a rescission can be supported is fraud. PLAINTIFFS  
27 have alleged fraud in their Complaint with respect to the underlying note contract  
28 securing the loan on the subject property. Fraud, either actual or constructive,

1 constitutes a ground for rescinding an agreement. Calif. Civ. Code 1689 (b) (1).

2 Since PLAINTIFF have rescinded the underlying contract there is no note upon  
3 which the foreclosure can proceed. The court should therefore vacate or enjoin the  
4 proposed sale and enjoin further foreclosure proceedings until the claims within the  
5 complaint are adjudicated by the court or a jury.

6 **B. Plaintiffs contend Defendants nor other defendants are the real party in**  
7 **interest.**

8 Only the real party in interest has the right to maintain an action or proceeding or to  
9 defend in a lawsuit. It is the person or entity who owns or holds the title to the claim or  
10 property involved that can maintain a proceeding or action. *Gantman v. United Pacific*  
11 *Ins. Co.* (1991) 232 CA3d 1560, 1566, 284 CR 188, 192. Prior to DEFENDANTS  
12 foreclosing on the property on the property they must show it is the real party in interest  
13 in maintaining the proposed foreclosure.

14 In California only the holder of the Note can foreclose. The deed of trust "being a  
15 mere incident to the debt...belongs to the holder of the note and could only be  
16 foreclosed by the latter". *Adler v. Sargent*, 109 Cal. 42, 49 (1895). In fact, a  
17 "mortgagee's purported assignment of the mortgage without an assignment of the debt  
18 which is secured is a legal nullity". *Kelly v. Upshaw* (1952) 39 Cal. 2d 179. There has  
19 been no showing by any of the defendants that they hold the note.

20 **C. Until the defendants show they are the real party in interest they should not be**  
21 **allowed proceed with any foreclosure proceeding.**

22 PLAINTIFFS have requested, as allowed under law, that the note holder be  
23 identified and that the amount of any alleged debt owed on the loan be validated.  
24 DEFENDANTS have not done so. PLAINTIFFS are informed and believe and thereon  
25 allege that DEFENDANTS are merely the servicers on the loan allegedly owed by  
26 PLAINTIFF and not the holder(s) of the note to whom payment should be made to. In  
27 fact it is believed that the note has been sold numerous times and has been securitized  
28 in such a manner that the real note holder cannot be determined as there is likely

1 several note holders holding portions of the note as security. These parties would all  
2 have to be brought before the court as indispensable parties in order to properly  
3 adjudicate the claims made by plaintiffs in the Complaint.

4 **III**

5 **CONCLUSION**

6 Based upon the above facts, circumstances and the applicable laws, as applied to  
7 the facts of this case, PLAINTIFF seek and respectfully submit to the court that they  
8 are entitled to an order vacating the pending sale of the property or alternatively a  
9 temporary restraining order staying the foreclosure proceeding on the subject property  
10 of this action and an order staying the hearing for the Motion for Relief from stay set for  
11 3/19/2009

12 Unless DEFENDANTS are enjoined from conducting a Sale the property by which  
13 the PLAINTIFF lay claim of possession to and the right to return to DEFENDANT under  
14 PLAINTIFF'S rescission rights will be lost and PLAINTIFF will be irreparably harmed.

15 A Court may issue provisional injunctive relief when plaintiffs, as in this case,  
16 allege acts that violate a trust obligation. (Calif. Code of Civil Proc. 526 (a) (7); violate  
17 another parties' rights in the subject of the action and tend to render final judgment  
18 ineffectual (CCP 526(a)(3) or produces injury for which money damages are inadequate  
19 or extremely difficult to ascertain (CCP526(a)(4)(5)).

20 As the subject of the action is real property it should be deemed unique. In an  
21 action to enjoin a pending trustee sale, both irreparable injury and the inadequacy of  
22 money damages are usually supported by an allegation that the property is unique.  
23 See Calif. Civ. Code section 3387; *Wheat v. Thomas* (1930) 209 C 306, 287 P 102;  
24 *United Sav & Loan Ass'n v Reeder Dev. Corp.* (1976) 57 CA3d 282, 129 CR 113.

25 PLAINTIFF respectfully requests the court to issue the prayed for vacation of the  
26 sale in its entirety or alternatively for a temporary restraining order and set the matter  
27 for an OSC hearing for issuance of a preliminary injunction in due course.

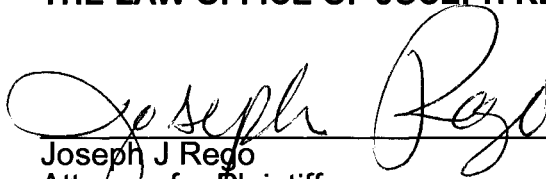
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Respectfully submitted,

**THE LAW OFFICE OF JOSEPH REGO**

Dated: 3/24/09

  
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Joseph J Rego  
Attorney for Plaintiffs