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5 Attorney for Debtor  
6 GORDY A SPIRES  
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10 UNITED STATES BANKRUPTCY COURT  
11 SOUTHERN DISTRICT OF CALIFORNIA

12 GORDY A SPIRES )

CHAPTER 13  
CASE NO: 08-13091-LT13

13 )  
14 Debtor/Plaintiff, )

ADVERSARIAL CASE NO:  
09-90133-LT  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR TEMPORARY  
RESTRAINING ORDER  
AND OSC RE PRELIMINARY  
INJUNCTION  
AND IN SUPPORT OF REQUEST FOR  
EMERGENCY HEARING

15 v. )

16 G8 CAPITAL FUND VII, LLC.; )  
17 MORTGAGE ELECTRONIC )  
REGISTRATION SYSTEMS, INC. )  
18 "MERS" and DOES 1-50, inclusive. )

19 )  
20 )  
21 Defendant )  
22 )  
23 )  
24 )

25  
26 **I. INTRODUCTION**

27 Plaintiff GORDY A SPIRES (hereinafter "Plaintiff") applies for a temporary  
28 restraining order maintaining the status quo and preventing Defendants G8

1 CAPITAL FUND VII, LLC.; MORTGAGE ELECTRONIC REGISTRATION  
2 SYSTEMS, INC. "MERS" and DOES 1-50, inclusive.(hereinafter "Defendants", and  
3 their agents, servants, trustees, and employees from going forward with foreclosure  
4 proceedings and conducting a Trustee sale on real property located at 4743 CRATER  
5 RIM ROAD, CARLSBAD, CA 92010 , and requests that Defendants and their agents be  
6 enjoined from these acts during the pendency of this action.

7 This motion is made on the ground that plaintiff will suffer great and irreparable  
8 injury before the matter can be heard on its merits if the injunction is not granted.  
9 Plaintiffs has no way to stop the foreclosure proceedings and sale because Defendants  
10 have failed to cooperate and breached their agreement with Plaintiff. Furthermore, the  
11 Notice of Default and Notice of Trustee's sale are void and of no effect because  
12 Defendants have no power of sale because Plaintiff has never received notice of any  
13 purported assignment. Defendant further lack standing because Defendant G8  
14 CAPITAL FUND VII, LLC.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,  
15 INC. "MERS" and DOES 1-50, inclusive. Is part of a Pooling and Servicing agreement,  
16 and Plaintiff's Deed of Trust is one of the securities in the pool but, by terms of the trust,  
17 it cannot modify Plaintiff's Deed of Trust or legally buy or sell or make profits from the  
18 trust.

19 **II STATEMENT OF FACTS**

20 This is a case regarding defendant's attempts to foreclose on Plaintiff's property  
21 and hold a Trustee sale, when they have no authority or power of sale. Defendant also  
22 had no right to modify Plaintiff's loan which ultimately resulted I the current foreclosure  
23 proceedings. Defendants have also made misrepresentations to Plaintiff and breached  
24 their agreement with them that they would stay the foreclosure and the sale pending her  
25 compliance with the terms and conditions of the agreement, but they have refused to do  
26 so.

27 Plaintiff is the true equitable owner and sole title holder of the real property located  
28 at 4743 CRATER RIM ROAD, CARLSBAD, CA (hereinafter referred to as the

1 “property”. Plaintiff is also the Trustor of the deed of trust which was recorded on  
2 January 11, 2007.

3 **III LEGAL ARGUMENT**

4 Plaintiff requests that this Court issue a temporary restraining order to restrain  
5 Defendants from going forward with the foreclosure proceedings and selling the  
6 property at the Trustee’s sale until a hearing on the preliminary injunction and order to  
7 show cause why Defendants should go forward with the foreclosure proceedings and  
8 sell the property.

9 **A. AN INJUNCTION IS APPROPRIATE IN THIS CASE**

10 California Code of Civil Procedure section 526(2) authorizes an injunction “when it  
11 appears by the complaint of affidavits that the commission or continuance of some act  
12 during the litigation would produce waste, or irreparable injury to a party in the action”  
13 California Code of Civil Procedure section 527 (a) provides that a preliminary injunction  
14 “may be granted at any time before judgment upon a verified complaint or upon  
15 affidavits if the complaint in one case, or the affidavit in the other, show satisfactorily  
16 that sufficient grounds exist therfor...”

17 The test most commonly applied by courts in determining whether to issue a  
18 preliminary injunction is as follows”

19 (a) The likelihood that the plaintiff will succeed on the merits of trial; and

20 (b) The interim harm that the plaintiff will suffer if the injunction is not issued  
21 compared to the interim harm that the defendant will suffer if it is (*Cohen v Board of*  
22 *Supervisors* (1985) 40 Cal. 3d 277, 286.) The analysis of this situation, which is set  
23 forth below, makes it clear that an injunction and TRO should be granted in this case.

24  
25 **B. PLAINTIFF IS LIKELY TO PREVAIL ON THIS MATTER**

26 **1. The pooling and servicing agreement prohibits modification of Plaintiff’s**  
27 **loan.**

28 Plaintiff is informed and believes that their Deed of Trust is part of a pooling and

1 Servicing agreement with Defendant is a trustee. The specific terms of the pooling and  
2 servicing agreement provides that Plaintiff's loan, cannot be modified. Defendants  
3 attempt to increase Plaintiff's interest rate on his loan is contrary to the express  
4 provisions of the Pooling and servicing agreement in which their Deed of Trust is held,  
5 which renders the increased interest rate illegal and the resulting foreclosure  
6 proceedings null and void.

7 **2 The underlying note contract has been rescinded therefore there is**  
8 **no note to foreclose on and accordingly the proposed foreclosure sale should be**  
9 **vacated or enjoined under Federal and state laws pertaining to rescission.**

10 Plaintiff because of the alleged violations of the Truth in Lending Act (TILA) (15  
11 U.S.C. 1601. Et seq.) And disclosure laws under which defendants were required to  
12 and failed to provide certain notices and disclosures, gave notice of rescission to  
13 defendants as allowed under 15 U.S.C. 1635. Rescission under this section provides  
14 where improper or failure to provide proper notice of right to rescind at the contract  
15 entry stage is found the borrower can rescind the contract. Plaintiff's allegations of  
16 none disclosure by defendants include the lack of providing proper notice to rescind  
17 and other disclosure violations.

18 Pursuant to subsection (b) of 15 U.S.C. 1635, when an obligor exercises his right  
19 to rescind under subsection (a) of 15 U.S.C. 1635 the underlying contract immediately  
20 becomes void upon such rescission by operation of law. Defendants have 20 days to  
21 comply with the requirements to return all the monies due and owing to Plaintiff before  
22 plaintiff has to do anything. Accordingly there is no longer any contract under which  
23 defendants or anyone can foreclose on the property. This alone is sufficient to warrant  
24 the court's entry of a vacating order to stop the sale of the property.

25 The California law of rescission is essentially the same as that provided for under  
26 the federal statute. Rescission is the extinguishment of a contract. (Calif. Civ. Code  
27 section 1688). Rescission relates back to the formation of a contract or agreement, and  
28 negates its existence as though it has never been made. *Long v. Newline* (1956) 144

1 CA2d 509,301 P2d 271. The rescinded agreement becomes a nullity; its terms cease  
2 to exist and are not enforceable against the other party. *Holmes v. Steele* (1969) 269  
3 CA2d 675, 75 CR 216. Rescission terminates further liability and restores the parties to  
4 their former positions by requiring each to return whatever consideration was received.  
5 *Tippett v. Terich* (1995) 37 CA4th 1517,44 CR2d 862, overruled on other grounds in  
6 *Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 C4th 163, 171, 96 CR2d 518  
7 Civil Code 1688-1693 provides the methods of effectuating a rescission. Under  
8 Civ. Code 1691 a party to a contract may rescind unilaterally by giving notice of  
9 rescission and offering to restore the consideration received. *Runyan v. Pacific Air*  
10 *Indus, Inc.* (1970) 2 C3d 304, 85 CR 185. In an action for relief based on rescission ,  
11 the parties are restored generally to the position they occupied before formation of the  
12 contract by (1) restitution of all benefits conferred as a result of the transaction, and (2)  
13 an award of any consequential damages.

14 One of the basis upon which a rescission can be supported is fraud. Plaintiff's  
15 have alleged fraud in their Complaint with respect to the underlying note contract  
16 securing the loan on the subject property. Fraud, either actual or constructive,  
17 constitutes a ground for rescinding an agreement. California Civil Code 1689 (b)(1).

18 Since Plaintiffs have rescinded the underlying contract there is no note upon which  
19 the foreclosure can proceed. The court should therefore vacate or enjoin the proposed  
20 sale and enjoin further foreclosure proceedings until the claims within the complaint are  
21 adjudicated by the court.

22 **3. Plaintiff's contend that defendants are not the real party in interest.**

23 Only the real party in interest has the right to maintain an action or proceedings or  
24 to defend in a lawsuit. It is the person or entity who owns or holds the title to the claim  
25 or property or involved that can maintain a proceeding or action. *Gantman v. United*  
26 *Pacific Ins. Co.* (1991) 232 ca3d 1560, 1566, 284 cr 188, 192. Prior to foreclosing on  
27 the property they must show it is the real party in interest in maintaining the proposed  
28 foreclosure.

1 In California only the holder of the Note can foreclose. The deed of trust "being a  
2 mere incident to the debt...belongs to the holder of the note and could only be  
3 foreclosed by the latter"; *Adler v. Sargent*, 109 Cal. 42, 49 (1895). In fact , a  
4 mortgagee's purported assignment of the debt which is secured is a legal nullity". *Kelly*  
5 *v. Upshaw* (1952) 39 Cal. 2d 179. There has been no showing by any of the  
6 defendants that they hold the note.

7 **C. Until Defendants show they are the real party in interest they should not be**  
8 **allowed to proceed with any foreclosure proceedings.**

9 Plaintiffs have requested, as allowed under law, that the note holder be identified  
10 and that the amount of any alleged debt owed on the loan be validated. Defendants  
11 have not done so. Plaintiffs are informed and believe and thereon allege that the  
12 Defendant had no authority to proceed with any foreclosure sale, as the Deed was  
13 improperly recorded before foreclosure action on 10-27-08, as the lender granted title to  
14 itself before it had any interest to record.

15 **D. PLAINTIFF WILL BE IRREPARABLY HARMED IF A TEMPORARY**  
16 **RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION IS NOT ISSUED AND**  
17 **THERE WILL BE NO HARM TO DEFENDANTS.**

18 The purpose of a temporary restraining order is to preserve the status quo pending  
19 a trial on the merits. *Continental Baking Co. V Katz* (1968) 68 C.2d 512,528. In  
20 the present case, Plaintiff seeks a temporary restraining order and an order to show  
21 cause why a preliminary injunction should not be issued which would maintain the  
22 status quo until Plaintiff's action is heard on its merits.

23 In balancing the respective burdens of Plaintiff and Defendants, it is clear that  
24 Plaintiff would suffer more. If a temporary restraining order/preliminary injunction is not  
25 issued, defendants would go forward with the foreclosure proceedings and sell  
26 Plaintiff's property, which will cause them irreparable injury because the property is  
27 unique.

28 There is no prejudice to Defendants if the foreclosure is enjoined because the

1 property has significant value, Defendants have an enforceable security interest in the  
2 Property contrary to the Plaintiff's interest, and they will have the opportunity to  
3 foreclose after trial.

4 Plaintiff remains ready, able and willing on a reasonable agreement to modify their  
5 loan.

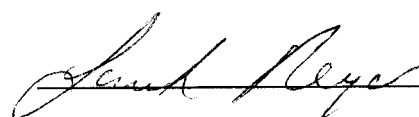
6 **IV**  
7 **CONCLUSION**

8 Based upon the above facts, circumstances and the applicable laws, as applied to  
9 the facts of this case, Plaintiffs seek and respectfully submit to the court that they are  
10 entitled to an order vacating the pending sale of the property or alternatively a  
11 temporary restraining order staying the foreclosure proceeding on the subject property  
12 of this action and an order staying the proposed Trustee sale .

13 Unless defendants is enjoined from conducting a Trustee Sale the property to  
14 which plaintiffs lay claim of possession to and the right to return to defendants under  
15 plaintiffs rescission rights will be lost and plaintiffs will be irreparably harmed.

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Dated: 4-27-09

  
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JOSEPH REGO ATTORNEY FOR  
DEBTOR GORDY SPIRES