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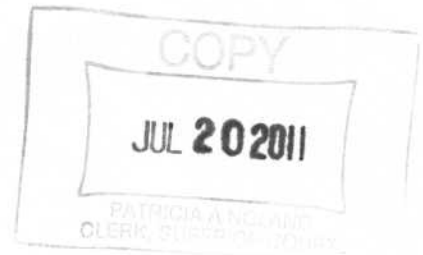
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8 *Attorney for Plaintiff Lonon F. Smith*



9 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**  
10 **IN AND FOR THE COUNTY OF PIMA**

11 LONON F. SMITH,

12 Plaintiff,

13 vs.

14 BANK OF AMERICA, a foreign  
15 corporation; BAC HOME LOANS  
16 SERVICING, LP FKA COUNTRYWIDE  
17 HOME LOANS SERVICING LP, a foreign  
18 limited partnership; JOHN DOES 1-10;  
19 JANE ROES, 1-10; ABC CORPORATIONS  
20 1-10; XYZ LIMITED LIABILITY  
21 COMPANIES 1-10; AND 123  
22 PARTNERSHIPS 1-10,

23 Defendants.

Case No. **C20115279**

**APPLICATION FOR TEMPORARY  
RESTRAINING ORDER,  
PRELIMINARY INJUNCTION, AND  
ORDER TO SHOW CAUSE  
(without notice)**

Assigned to Judge **KYLE A. BRYSON**

24 Plaintiff Lonon F. Smith, pursuant to Rules 6(d) and 65(d), Arizona Rules of Civil Procedure and  
25 A.R.S. § 12-1801, *et seq.*, requests that this Court issue a Temporary Restraining Order (“TRO”)  
26 preventing Defendants and their appointed Successor Trustee Michael A. Bosco from holding the  
27 Trustee’s Sale currently scheduled for July 21, 2011, at 11:30 a.m. at the East entrance of Pima County  
28 Superior Court to sell the real property located at 1138 N. Jones, Tucson, AZ 85716. Plaintiff further  
requests that this Court issue an Order to Show Cause commanding Defendants and/or Trustee to appear

1 at a time and place certain to show cause why the TRO enjoining Defendants from selling Plaintiff's  
2 Property, pending the outcome of a preliminary injunction hearing, should not be issued by the Court.

3 Plaintiff request the issuance of a TRO until a preliminary injunction hearing can be set because,  
4 based on the specific facts detailed in the Verified Complaint, immediate and irreparable injury will  
5 result if the TRO is not issued. Namely, if not enjoined, Defendants will sell Mr. Smith's Property on  
6 **Thursday, July 21, 2011 at 11:30 a.m. at the east entrance to Pima County Superior Court.** Mr.  
7 Smith requests that this Court issue an Order to Show Cause to Defendants and set a hearing to consider  
8 the Application for Temporary Restraining Order. This Application is supported by the accompanying  
9 Memorandum of Points and Authorities and the Verified Complaint (and attached Declaration) filed  
10 simultaneously with this Application.  
11

## 12 **MEMORANDUM OF POINTS AND AUTHORITIES**

### 13 **I. Factual Background**

14 Mr. Smith owns a real property interest in the Property referenced in the Verified Complaint.  
15 The Property is the subject matter of this claim. Mr. Smith incorporates by reference the factual  
16 allegations set forth in his Verified Complaint as though set forth herein.  
17

### 18 **II. Legal Standard**

19 A plaintiff seeking a preliminary injunction must establish that: (1) she is likely to succeed on the  
20 merits; (2) she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of  
21 equities tips in his favor; and (4) an injunction is in the public interest. *Mobilisa, Inc. v. Doe*, 217 Ariz.  
22 103, 111-12, n. 9; 170 P.3d 712, 720-21 (App. 2007). The critical element in the court's analysis is the  
23 relative hardship to the parties. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990). To  
24 meet this burden, the moving party may establish either (1) probable success on the merits and the  
25  
26  
27  
28

possibility of irreparable injury or (2) the presence of serious questions and “the balance of hardships tip sharply” in its favor. *Id.*

### III. Legal Argument

In short, the scheduled Trustee sale is illegal and invalid because it was noticed and recorded by a party which had absolutely no legal authority to commence a foreclosure on the Property at that time. In addition to the specific requirements of the Deed of Trust – which have not been met here – under Arizona's real property statutes, a property interest sought to be foreclosed via sale under a Deed of Trust must follow Arizona's non-judicial trustee sale laws and strict compliance is required. See generally, among other statutes, A.R.S. 33-801(9) (“Trust property” means any legal, equitable, leasehold or other interest in real property which is capable of being transferred.”; emphasis added.); A.R.S. 33-807 (sale of trust property); A.R.S. 33-808 (notice of trustee sale requirements etc.).

In addition to fatal defects with the various notices resulting in the trustee sale currently scheduled for July 21, 2011, Defendants promised that they would inquire into his questions and would respond completely back in March 2011, but have not yet done so and collateral estoppel should prevent them under such circumstances from going forward with a Trustee Sale. Finally, Defendants materially breached the modified loan agreement entered into on 12/28/2009, after Mr. Smith's wife died.

Finally, it appears that the party seeking foreclosure may not have a legally enforceable interest as it appears that the note has been transferred to a different creditor, which would mean that the Deed of Trust was transferred along with the Note, and Defendants do not have any beneficial interest at the present time.

1                   A.     Plaintiff has a Reasonable Probability of Success on the Merits.

2             Mr. Smith has a reasonable probability of proving that the Deed of Trust requires that Defendant  
3 properly record a Notice of Sale and hold a sale pursuant to applicable Arizona law, which requires that  
4 a Deed of Trust be foreclosed pursuant to Arizona's real property laws. Plaintiff has alleged seven  
5 causes of action in the Verified Complaint: (1) Violations of Arizona law and Deed of Trust Statutes (2)  
6 Breach of Contract; (3) Breach of Implied Covenant of Good Faith and Fair Dealing (4) Promissory  
7 Estoppel; (5) Consumer Fraud; and (6) Negligent Misrepresentation; and (7) Breach of Fiduciary Duty.  
8 The factual allegations substantially support these causes of action. Mr. Smith stands a reasonable  
9 chance of prevailing on each of these counts. The factual allegations set forth in the Verified Complaint  
10 are sufficient to support each of the alleged causes of action, and meet the reasonable probability  
11 standard for issuance of injunctive relief.  
12

13                   B.     Plaintiff Will Suffer Irreparable Harm if Injunctive Relief is not Granted.

14             If Defendants are not enjoined from holding the Trustee's Sale on Thursday, July 21, 2011, Mr.  
15 Smith will lose all defenses to the Trustee's Sale and will lose the Property without a chance to litigate  
16 the issues set forth in the Verified Complaint. Mr. Smith's Property is unique and the harm of losing the  
17 Property is not speculative; rather, the harm is unquestionably imminent. *See generally JSG Trading*  
18 *Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d. Cir 1990); *see also Simula, Inc. v. Autoliv, Inc.*, 175 F.3d  
19 716, 725 (9<sup>th</sup> Cir. 1999) (petitioner must show significant threat of irreparable harm). Because this case  
20 involves real property, which is by its nature unique, Mr. Smith cannot possibly be compensated by  
21 mere money damages. Moreover, the relief he seeks is mandated by statute to prevent a trustee's sale.  
22

23                   C.     The Balance of Equities Tips Strongly in Plaintiff's Favor.

24             The balancing of hardships or equities in this case heavily favors Mr. Smith. Given the very  
25 harsh consequences of not obtaining a TRO and stopping the scheduled Trustee's Sale, Mr. Smith will  
26  
27  
28

1 lose the Property without the opportunity to litigate the issues raised in his Verified Complaint. If he  
2 does not obtain injunctive relief before the scheduled Trustee's Sale, the Property will be sold, and he  
3 will lose all defenses to the Trustee's Sale, according to A.R.S. 33-811(c), if an injunction is not timely  
4 obtained by 5 p.m. on the business day before the scheduled sale. Not only do the equities tip in the  
5 balance of plaintiff, the law requires that he seek this extraordinary remedy.

7 D. The Public Interest Will Not Be Served if a TRO is not Issued.

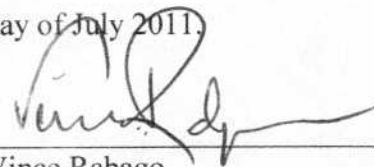
8 The public interest will not be served in this case if Defendants are permitted to push forward  
9 with the scheduled Trustee's Sale. Indeed, if the TRO does not issue, again, Mr. Smith will be left with  
10 no legal remedies to preserve the Property. How can the public interest be served if Defendants are  
11 entitled to move forward with the Trustee's Sale? Indeed, the public interest will be harmed by allowing  
12 Defendants to push forward with yet another foreclosure without having to account for its breaches of  
13 the Deed of Trust and of Arizona law.

15 IV. CONCLUSION

16 A TRO is justified in this case. It merely keeps the *status quo* providing the parties ample time  
17 to sort out what happened regarding the Agreement. Mr. Smith will invariably suffer immediate and  
18 irreparable harm if she loses his Property. Mr. Smith has a probable likelihood of success on the merits  
19 of his claims, the most formative factor that this Court must consider. Additionally, the balancing of  
20 hardships clearly favors Mr. Smith in this case, as Arizona law mandates the requested remedy here.  
21 Simply postponing the scheduled Trustee's Sale for a few months to allow the parties to litigate the  
22 issues alleged in the Verified Complaint is in the best interest of all parties, including Defendants.  
23 Finally, the public's interest will be well served by the issuance of the TRO, as it will ensure that people  
24 like plaintiff do not unwittingly lose their property rights.

1 For the foregoing reasons, Mr. Smith requests that this Court issue a TRO enjoining Defendants  
2 from holding the Trustee's Sale currently scheduled for **Thursday, July 21, 2011 at 11:30 a.m** until  
3 such time as a preliminary injunction hearing can be set.  
4

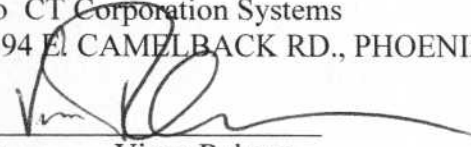
5 **RESPECTFULLY SUBMITTED** this 20<sup>th</sup> day of July 2011.

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8 Vince Rabago  
9 VINCE RABAGO LAW OFFICE  
10 Attorney for Lonon F. Smith  
11  
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13  
14  
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16  
17

18 Copies of the foregoing were delivered via  
19 hand-delivery and/or delivered electronically  
20 and/or delivered via U.S. Mail to the  
21 following parties on July 20, 2011:

22 BAC HOME LOANS SERVICING LP FKA COUNTRYWIDE HOME LOANS SERVICING LP  
23 c/o CT Corporation Systems  
24 2394 E. CAMELBACK RD., PHOENIX AZ 85016

25 Bank of America NA  
26 c/o CT Corporation Systems  
27 2394 E. CAMELBACK RD., PHOENIX AZ 85016

28 By  Vince Rabago