EMERGENCY FORECLOSURE DEFENSE STRATEGIES IN THE CALIFORNIA UNLAWFUL DETAINER ACTION

(This is where you can make stuff happen)

By:

George Gingo

California and Florida Licensed Attorney

P.O. Box 838

Mims, Florida 32754

ggingo@yahoo.com

321-264-9624

You are in the final stages of losing your home if you are being sued for eviction. You need to buy some time so that you can mount a defense to the eviction and possibly counter-sue, and you need to do it quickly. Typically, you must respond within five days of receiving the lawsuit. There are some things you can do to buy you that time. If you had a competent lawyer, there may be many more things you could do. This book isn't intended to be legal advice. It is designed to enhance your understanding of what happens in an eviction based on a non-judicial foreclosure. Because this book can't cover everything that a lawyer would do, it's focus is on some of the more common issues that you can put into practical use now. There are real-world examples of documents that you can use to help you draft your own legal documents to fight your foreclosure.

If you are unaware of the real reason for the real estate melt-down and the bank and insurance company bailouts, then you have no idea of what rights and what money you are throwing away if you walk away from your home. It all begins and ends with the Mortgage Note.

In California, there are two primary instruments used to secure the financing of the purchase of property – the mortgage Instrument and the Deed of Trust. The Mortgage Note is your personal guarantee to pay back the loan. The Mortgage Instrument uses the property as security for the Mortgage Note. The Deed of Trust grants a power of sale to another person to sell your property for your failure to pay on the Mortgage Note. There used to be a huge difference between the Mortgage Instrument and the Deed of Trust. The Mortgage Instrument is just a lien on property and if you fail to pay the lender, the lender would have to sue you in court in order to foreclose – called "judicial foreclosure". The Deed of Trust used to be an actual transfer of title with a power of sale which made it much easier to foreclose as there was no need to go to court to foreclose. That is called "non-judicial" foreclosure. Now they are both treated very similar, except that the Deed of Trust still contains the power of sale which results in a non-judicial foreclosure.

A Deed of Trust has three parties to it – the trustor, or maker of it (you), a trustee who holds the power of sale and a beneficiary (the lender/payee). The mortgage loan itself consists of two documents – the Mortgage Instrument and the Note Instrument. Of these two documents, the Mortgage Instrument is inferior to the Note Instrument as it is a mere incident to the Note Instrument. The Mortgage Instrument is the security for the Note Instrument. The Note Instrument controls. If there is a dispute in the terms between the Mortgage Instrument and the Note Instrument, the Note Instrument controls. If the Note Instrument is paid off, the Mortgage Instrument is canceled. When you pay your mortgage, you want to be paying the owner of the Note Instrument. If you pay anyone other than the owner of the Note Instrument, you are throwing away your money.

The Mortgage Instrument and the Note Instrument need to stay together. The Deed of Trust is recorded, so it can't get lost. But, assume that the Mortgage Instrument and the Mortgage Note get separated and now Bank A says it owns the Mortgage Instrument and Bank B says it owns the Mortgage Note. If they both send you a bill for your mortgage loan, which one would you pay? If the trustee of the Deed of Trust (Bank C) sends you a bill, now who will you pay? You pay the owner of the Mortgage Note. However, because California has non-judicial foreclosure and because the government isn't protecting homeowners, you could still be foreclosed on if you paid the owner of the Mortgage Note.

Between 2001 and 2008, most of the new residential mortgage loans were securitized. That is to say that the Mortgage Note became security for an investment device on Wall Street. That alone

would not be a problem if the Mortgage Instrument and the Mortgage Note were kept together. However, they were separated on purpose and the banks had a hand in that, as did Wall Street and the insurance companies. Florida is a judicial foreclosure state – homeowner's get to have their day in court – they get the "due process" that is guaranteed to them by the Fifth Amendment to the U.S. Constitution and by the Florida Constitution. Florida homeowners fight back, and when they do, they may win their foreclosure. In some cases, they do walk away with the home without a mortgage loan. So in Florida, the courts are much more attuned to what happened with the securitized mortgage loan.

There are three main questions that need to be asked: 1) Why did the banks and Wall Street agree to separate the Mortgage Instrument from the Mortgage Note? 2) Why is it that only Mortgage Instruments are recorded in the government recording offices and why are Mortgage Notes never recorded? And, 3) Why is it that in virtually all of the Florida judicial foreclosure cases is the Mortgage Note lost? We will never know the absolute truth, but we can deduce why this happened and we can safely assume it happened in California as well.

The Mortgage Note controls over the Mortgage Instrument. If for instance the interest rate stated in the Mortgage Instrument is different than the interest rate stated in the Mortgage Note, the rate stated in the Mortgage Note controls. When the Mortgage Note became securitized, it landed on someone's desk with a large number - say 1,000 - of other Mortgage Notes. That person then added up the principal value of all the Mortgage Notes and created an investment bond based on the principal payments as an income stream which then were sold on Wall Street as mortgage-backed investment securities. He also added up all the interest rates and created an investment bond based on the interest payments as an income stream which likewise were sold on Wall Street as mortgage-backed investment securities. These investment devices were linked to many other similar mortgage investments in what are called "traunches". AIG insured these bonds, which raised the investment ratings (i.e., from "A" to "AAA") [1]

Now, if the person who was creating the investment bonds was a crook and wanted to manufacture wealth out of thin air, what he would do is lie about the interest rate and/or lie about the principal sums due on each Mortgage Note. The only evidence that would exist by which his fraud could be shown would be the Mortgage Note itself. And, that is, because if there is a difference between the terms in the Mortgage Instrument and the Mortgage Note, only the terms of the Mortgage Note controls. Now, how does such a criminal get rid of the evidence of his crime? He shreds it. Prior to 2001, the percentage of lost Mortgage Notes was less than 1%. Now, virtually every case of judicial foreclosure in Florida contains a lost note count. The reason we don't have a count for California is because California doesn't have judicial foreclosure and the Courts are very unfriendly to homeowners who have been foreclosed on by non-judicial means. The Courts do not willingly invite homeowners into their domain to challenge the foreclosure as Florida courts do.

The reason the Mortgage Note is so important is because it is a negotiable instrument. A dollar bill is a negotiable instrument – both are like money. Both can be used as money. Read the top of a dollar bill, it clearly states that it is a "NOTE", just as your Mortgage Note is a "NOTE".[2] A copy of the negotiable instrument just doesn't have any value – you can't make a copy of a dollar bill and then use it as money. And, just the same, you can't make a copy of a Mortgage Note and use it as a negotiable instrument. Just like a dollar is a bearer instrument, a Mortgage Note can also be a bearer instrument if it is endorsed as such. So, what happens if your Mortgage Note is lost or destroyed? Well, if it is lost, someone else may wind up with it and then come to you and sue you for payment on it. If you won the lottery and you wanted to pay off your Mortgage Note, you would be foolish to hand over the money to the bank if the bank could not hand you your original Mortgage Note, stamped "paid in full". What this means is that if your Mortgage Note is lost, you won't ever be able to convey clear title to your property without the risk of someone later suing you (or foreclosing on the property) because they have the original Mortgage Note.

In Florida, when a lost note count is made, the bank must show the court that it is able to indemnify you if someone later comes to you with the lost note and sues you for payment. Would you trust a bank to do that for you? Banks are dropping fast right and left. What about title insurance you ask? Sure, tell the truth to the title insurer that the original Mortgage Note is lost and see if they are willing to write a policy on that. If they do, they are either incredibly stupid or they are about to file bankruptcy and they just want your money.

So, in California, when you are foreclosed on non-judicially, do you ever get your original note back stamped "paid in full"? Never. I see a problem with that. Hopefully, you do too. California does not adore "due process" the way Florida does, and California does not wants its citizens to have uninhibited access to its Courts. California is about as far from that kind of due process as you can get. California Courts will kick you out on technicalities that no Florida Court would ever consider as a basis to deny you access to the Courts. All the state laws of Florida can fit in five books that from end to end are less than 1 ½ feet long. All the state laws of California could fill the walls on my office. The more laws there are, the more control over the person there is. Correspondingly, there is less freedom and the less access to government and the Courts. California is not friendly to homeowners in foreclosure, but there are things you can do to buy time and to challenge your note and your foreclosure.

The law relating to foreclosures is incredibly complex and broad. You can fight in four different courts - the limited jurisdiction of the Superior Court of California, the unlimited jurisdiction of the Superior Court of California, the federal district court and the federal bankruptcy court. This book assumes you are in an emergency situation because you are being sued for eviction in the limited jurisdiction of the Superior Court of California and you need to buy time to strategize.

You may have the right to file a counter-claim in the eviction court, but that is beyond the scope of this book. Therefore, this book focuses on only one aspect of the foreclosure process – the eviction which is in the limited jurisdiction of the Superior Court and your affirmative defenses to that eviction.

Law is complicated – most people get a bachelor's degree and then study in a law school for three years and obtain a juris doctorate degree before they are allowed by state law to take a bar exam. This book assumes that you are an aggressive reader and that your comprehension is on par with a lawyer's comprehension. In that regard, it does not repeat previous material and it presumes you will be able to connect the dots to the next logical position.

I can be hired to draft pleadings so you can be your own lawyer; I can be hired to be your lawyer; I can be hired to audit your county recorder documents and I can recommend Truth in Lending Auditors and Securitization Auditors.

PROCEDURAL FORECLOSURE DEFENSE

There are many issues that you can raise in order to try to keep your home. They can generally be categorized into procedural foreclosure defense and substantive foreclosure defense. Procedural foreclosure defense relates to the way in which your home was foreclosed. There are many laws that dictate how foreclosure is to be conducted – from the initial notices and compliance with federal pre-foreclosure default prevention procedures through the legitimacy of the sale. Substantive foreclosure defense relates to whether the foreclosing entity actually has a right to foreclose. If the Mortgage Note has been destroyed or lost, or if it was placed into a securitized trust and paid off, then the debt may have been extinguished and the entity collecting the debt may have no lawful right to collect it or to foreclose. This book focuses on the procedural aspects of foreclosure defense.

SECTION 1

CHALLENGE THE SUMMONS

In this section on challenging the summons, where you see the word “Defendant”, that means you if you are the one being sued for eviction. Where you see the word “Plaintiff”, that means the bank that is suing you. Where you see the name “John Doe”, that is where your name is to be placed in the documents. Where you see the address “1111 Hope Lane, Fresno, CA 93711”, that is where your address is to be placed in the documents. Where you see “Bailout Bank”, that’s where the name of the bank that is suing you is to be placed in the documents. Where you see the name “Judas Sharkley”, that is where the name of the Plaintiff’s lawyer is to be placed in the documents. Where you see “666 Wacker Drive, Chicago, Illinois 60616”, that is where the address of Plaintiff’s lawyer is to be placed in the documents. References herein to the County of Fresno are by default only. You must replace “Fresno” with the county that is relevant to your lawsuit. Where a date is referenced, put in the actual date.

The lawsuit for eviction will contain a “Summons” and a “Complaint” and it should have attached to it a “Notice to Vacate Property” along with a “Proof of Service of Notice to Vacate Property”. This section deals with your attack on the Summons.

Step 1 –A. Attacking the Summons:

Look at the Summons in Exhibit 1-A. At the bottom of the Summons, in sections “4” and “5”, you will see that none of the boxes are checked. If your Summons is missing a check in one of these boxes, then you can attack the Summons with a Motion to Quash Service of Summons.

At a minimum, box “4.a” should have been checked to advise you that you were being served as “an individual defendant.”, and box “5” should have been checked to advise you of the date that you were served. These alone are sufficient for the filing of a “Motion to Quash Service of Summons”. The motion alone should buy one to three months of time.

The Motion to Quash Service of Summons is composed of these documents:

1. Notice of Motion to Quash Service of Summons;

2. Proof of Service of Notice of Motion to Quash Service of Summons;

3. Memorandum of Points and Authorities of Defendant in Support of Motion to

Quash Service of Summons;

4. Declaration of Defendant; and,

5. Proof of Service of Memorandum of Points Authorities of Defendant in Support

of Motion to Quash Service of Summons.

Step 1-B.

Making a Notice of Motion to Quash Service of Summons

Look at Exhibit 1-B. It is a one-page document followed by a one-page Proof of Service. We will now fill out the caption of the document. In lines 1 – 4, put your own name, address, phone number and email address (if you don't have email, then don't put any email address there). Note that immediately to the right of your name there are the words "In Pro Per". These tell the court that you are not represented by a lawyer and that you are representing yourself. In line 8, where it states the name of the court, you are to write the name of the county where this lawsuit was filed. You can find the county name on the Summons, at section "1". On line 11, write the name of the Plaintiff suing you. You can find the name of the Plaintiff on the Summons at the top left, where it says "You are being sued by Plaintiff" and the name of the Plaintiff then follows that statement. On line 11, write the case number. You can find the case number on the Summons, across from section "1", in the box where it says "Case Number". On line 16, write your name if you are the defendant. You can find the name of the defendant on the Summons, at the top left, where it says "Notice to Defendant" and the name of the Defendant then follows that statement.

The caption is now completed.

On line 18, where it says "TO: Plaintiff", write the name of the Plaintiff right after the word "Plaintiff". On line 19, write your name if you are the defendant right after the word "Defendant". This document is almost complete, you now just need to get a hearing date, time and courtroom (also known as "Dept") from the clerk of the court. That information can be handwritten into the document later. But print it out as it is and set it aside. We will get that missing information when we are completely done with this motion.

Immediately behind the Notice of Motion to Quash Service of Summons is a document called a Proof of Service. This document says that the Notice of Motion to Quash Service of Summons has been mailed to the attorney for the bank. You will fill out some of the information in the document, but not all of it. Also, you will not sign it. Instead, you are to get someone else to help you who with completing the form and who will also mail it to the attorney for the bank. That person helping you must be over the age of 18, hasn't been convicted of any felonies or

misdemeanor theft offenses or crimes of moral turpitude, and is not involved in the lawsuit. Let's call that person "Friendly Fred" just for convenience.

You will fill out everything on this document except for the date that it was mailed (see section 3), the date that Mr. Fred signs it (see bottom left) and Mr. Fred's signature. Mr. Fred will fill those in when he serves it by mailing it. Specific instructions on filling out the Proof of Service follow the sample, as does a clean form for your use which is in **section 1-C**. But, starting at the top left, put in your name (remember to follow your name with "In Pro Per"), your address and phone number. Then in the next box down you will fill in the name and address of the court. Again, where it says "case number", put in the case number. In section 2 put the address for Mr. Fred. In section 3, the part about the date – leave that blank for Mr. Fred to fill out. Next to it, fill out the city and state in which Mr. Fred will mail it from. The name of the document follows and it is already in this form. Section 4, box "a" is to be checked, which means that Mr. Fred will put enough postage on it to get it to where it is intended to go and he will put it in the U.S. mail. In section 5a put the name of the lawyer for the Plaintiff. In section 5b put the address for the Plaintiff's lawyer. Then type Mr. Fred's first and last name on the bottom left. Now this document is ready for printing. Print and set aside.

Step 1-C

Making a Memorandum of Points and Authorities of

Defendant in Support of Motion to Quash Service of Summons;

Look at exhibit 1-D. This is a three-page document called a "Memorandum of Points and Authorities in Support of Motion to Quash Service of Summons". Repeat the sequence of steps in section 1-B, above, by filling out the caption, which will include your name, address and phone number, the name of the county for the court, the name of the Plaintiff, the name of the Defendant (your name) and the case number.

On line 20, right after the word "Defendant", write your name if you are the defendant in this action. On line 23, right after the word "Defendant" write your name if you are the defendant in this action. In every place in these documents where you see the word "Defendant", place your name right after it. Take out the summons you were served with and read it. Focus on sections 4a and 5. If there is no check mark in section 4a, you will then tell the court that in the document. If there is no check mark in section 5, you will tell the court that in the document. If there is a check in either box 4a or box 5, but not in both, you will tell the court that in the document. If there is a check in both sections 4a and 5, and you went through the trouble to prepare the

documents and forms described above, you have a problem with reading comprehension and you will need the assistance of a lawyer. Stop and go hire one now.

Look at the first page of the Memorandum of Points and Authorities in Support of Motion to Quash Service of Summons. At the bottom is where you say which box is blank. So correct the document to describe which box is blank. If box 4a is blank and box 5 is not, so state that, and vice versa. Don't mislead the court by stating something that isn't correct.

On the third page of the Memorandum of Points and Authorities in Support of Motion to Quash Service of Summons, you will type in the date you prepared the document along with your name. The next page following the Memorandum of Points and Authorities in Support of Motion to Quash Service of Summons is merely a place keeper page called "Exhibit A" and it needs to have your name on it.

The next document attached to the Memorandum of Points and Authorities in Support of Motion to Quash Service of Summons is your Declaration. Fill out the caption as you have done before. In line 17, put your name where it says "I, John Doe, hereby declare . . .". There are 7 paragraphs that follow. The first paragraph you will not change. Read each succeeding paragraph and if it is true, leave it. If it is not true, remove it and re-number the paragraphs. In the seventh paragraph (or whatever paragraph it now is if you re-numbered them) you will put the actual date, city and state where it was signed by you. Now, this is important, if you took out out paragraphs 2, 3, 4, 5 and 6, then you did something wrong. At the very least, the substance of paragraph 4 should be in the document because you must attach to this declaration the Summons that you were served, which goes behind the next place-keeper document entitled "Summons Attached Hereto".

The last page to this Memorandum of Points and Authorities in Support of Motion to Quash Service of Summons is the Proof of Service. The only thing different on this Proof of Service from the previous one is paragraph 3 where the name of this document is a Memorandum of Points and Authorities in Support of Motion to Quash Service of Summons. It is the same in all other respects. Now print this out and set it aside.

Step 1-D

Processing the Notice of Motion and Motion to Quash Service of Summons and the Memorandum of Points and Authorities of Defendant in Support of Motion to

Quash Service of Summons

You now have two nice piles of papers that are almost complete. The first one is the Notice of Motion and Motion to Quash Service of Summons and the second pile is the Memorandum of Points and Authorities in Support of Motion to Quash Service of Summons.

The next step is to call the Superior Court clerk in the county where the case is located. if you don't know the number, you can google it or dial 411 and ask information for the phone number of the court clerk. If anyone asks "which court" or something along those lines, tell them "limited jurisdiction". If that doesn't work, tell them "unlawful detainers". If that doesn't work, get in your car and drive to the clerk's office. Tell the clerk that you are the defendant in this case (meaning, in the case number of your lawsuit) and that you want a date, time and courtroom for a Notice of Motion and Motion to Quash Service of Summons. Sometimes, depending on the court, the clerk won't give you that date, time and courtroom unless and until you have cleared dates first with the attorney for the other side. You have to start somewhere, so I suggest you start with the clerk and see how it goes. Sometimes you have to make several calls back and forth as the courts never seem to be on the same page as lawyers, who are driven by efficiency.

Once you get your date, time and courtroom, enter it on the Notice of Motion and Motion to Quash Service of Summons. Read the document you wrote – that information goes on that first page *twice* – once in the caption where it plainly states "Date: Time: Dept:" and then again in the body of the document where the blank lines are. Don't forget to circle the correct time – a.m./p.m. Now sign date it just above your signature and sign it. Next go to the other pile of papers which is the Memorandum of Points and Authorities in Support of Motion to Quash Service of Summons and enter the date, time and courtroom on the first page. Then go to the third page and date and sign it. Next go to your declaration and date and sign it.

Now find Friendly Fred. Hand him the two piles of documents and get him to fill in the two dates in section 3 on the two Proofs of Service and the date on the bottom by his signature. He will now sign both documents.

Next, make three copies of these documents. Get a two-hole punch and punch the originals for the Court. The hole punch as marks on it that describe where to place the centerline

in order to have equally distant holes centered on the paper. Your paper is 8 ½ inches wide – so set the centerline at 8.5 (8 ½"). Staple the documents now. You now have six sets of documents. Three are in the pile consisting of the Notice of Motion and Motion to Quash Service of Summons and the other three are in the pile consisting of the Memorandum of Points and

Authorities in Support of Motion to Quash Service of Summons. Have Friendly Fred put one of each pile in an envelope that is addressed to the Plaintiff's lawyer and have him put sufficient stamps on it to get it there. Now have Mr. Fred mail it. You can take your originals and copies to the court clerk where you will file the originals and have the court clerk time-stamp your copies which will be given back to you. You are now set for a hearing and you're done. If you were lucky enough to get a court date two months away, well then you get to stay in your home for two months before you get to court. If you got a hearing three months away, better yet. If the clerk asked you when you wanted a hearing and you said "as fast as possible", then you are missing the boat on this whole book.

SECTION 2

CHALLENGE THE COMPLAINT BY MOTION TO STRIKE AND DEMURRER

Step 1 – Know the Basic Rules

A demurrer challenges the legal sufficiency of a Complaint. California Code of Civil Procedure section 430.30 states:

(a) When any ground for objection to a complaint, cross-complaint, or answer appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading.

(b) When any ground for objection to a complaint or cross-complaint does not appear on the face of the pleading, the objection may be taken by answer.

(c) A party objecting to a complaint or cross-complaint may demur and

answer at the same time.

If you demurr and answer at the same time, the action will proceed more quickly – which is of course contrary to buying time. So, a tactical advantage to buying time would be to first demurr and then after the hearing on the demurrer file an answer. Because the statute requires that a demurrer only go to the four corners of the Complaint (the obvious defects), that limits what you can actually challenge as you can't use a demurrer to challenge grounds that don't appear on the face of the Complaint. There is an exception of sorts to that rule in California Code of Civil Procedure section 430.70 which states:

When the ground of demurrer is based on a matter of which the court may take

judicial notice pursuant to Section 452 or 453 of the Evidence Code, such

matter shall be specified in the demurrer, or in the supporting points and

authorities for the purpose of invoking such notice, except as the court may

otherwise permit.

So if the face of the Complaint doesn't contain a basis for a demurrer, but you can point to something that the court may take judicial notice of, then the matter is still deemed to be on the face of the Complaint and you can then demurr to it. In particular, the official records in the County Recorder's office will contain much of the factual evidence you will need to challenge the procedures used to sell your home. (Note: Many of these documents may also be considered as party-opponent admissions.) The items that the Court may take judicial notice of are:

Evidence Code section 452**:**

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States

or of any state of the United States.

(e) Rules of court of (1) any court of this state or (2) any court of record of the United

States or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of

immediate and accurate determination by resort to sources of reasonably indisputable

accuracy.

Evidence Code section 452.5:

(a) The official acts and records specified in subdivisions (c) and (d) of Section 452 include any computer-generated official court records, as specified by the Judicial Council which relate to criminal convictions, when the record is certified by a clerk of

the superior court pursuant to Section 69844.5 of the Government Code at the time of

computer entry.

(b) An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or

solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.

Evidence Code section 453:

The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:

(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and

(b) Furnishes the court with sufficient information to enable it to take judicial notice of

the matter.

Step 2 - Examine an Actual Motion

Your particular facts may be different from those discussed herein and give rise to different procedural attacks. However, this lesson will give you the basis for formulating your demurrer. Go to Exhibit 2 where you will find two separate documents – a Notice of Motion and a Motion. Technically, their respective names are a Notice of Motion to Demur to Complaint and for More Definite Statement (pages 1 – 3); and, a Motion to Demur to Complaint and for More Definite Statement and Memorandum of Points and Authorities in Support of Motion to Demur to Complaint and for More Definite Statement (pages 4 – 18).

a. The Notice of Motion

The first document – the Notice of Motion – does just that, it gives the opposing party notice of who you are, what you are challenging, the documents you are relying on for the challenge, the court where you are making your challenge and the date, time and place of your challenge.

Notice that the caption of the documents reference attorneys George Gingo and Layne Hayden, their business address, phone numbers and email address, the name of the person they represent,

the name of the court the action is in, the name of the parties and the case number. You will change all of that to reflect your situation – and that you are acting as your own lawyer.

Next, there are blanks spaces for the hearing dates, time and place. That means that after your document is complete, you will have to clear dates with the opposing lawyer and the court and you will then write that information in the appropriate blanks. Next, the document is that it states the legal basis for the demurrer by stating the particular sections of the relevant California Code of Civil Procedure that is the basis for the challenge. On page 2, the notice states all the documents that it is based on. And, the last page of the notice is the proof of service. Every bit of that is critical. If you fail to leave any of it out, you will lose before you even start. That completes the Notice of Motion.

b. The Motion to Demurr

This is where the guts of your motion are found. This particular Demurrer makes two challenges to the Complaint. The first challenge is one you probably won't make, but we left it in this example so you can see that there may be a variety of challenges you can make. This first challenge arises from the fact that the opposing attorney had personally verified the Complaint. A "verification" is a declaration under oath, which if false, is perjury. Normally, only the client would do that. There's two primary reasons why a lawyer would not verify a Complaint – the first is that the lawyer is usually not around when the client takes action such that the lawyer would be a witness to the action; and, the second is that the California State Bar has a rule that says that lawyers aren't supposed to be their own witnesses in cases in which they represent someone else.[3]

But, this opposing lawyer made that claim when he "verified" the Complaint. What he claimed is stated on the top of page 6 in Exhibit 2. Of particular interest, he said that his client had no officers in the county who had any personal knowledge of the matter – which is why he "had to" verify the Complaint himself. So, we went on the internet and found that his client – Wells Fargo Bank – actually had officers in the county – to the tune of 90 banking stores, 1 private bank, 10 home mortgage offices and 12 Wells Fargo Financial Offices. And, within 4.86 miles of the opposing lawyer's office there were 25 banking offices. We also found that Wells Fargo Bank admitted in its website that they were decentralized and each office is a headquarters. It just didn't seem to us like he could verify the Complaint under law, so that was one basis for attack.

The second basis for attack is the procedure that was used in foreclosing on the home. Keep in mind that your particular facts are certain to be different than in this case. But, the principles are the same and that is the essence of this lesson. The first thing you should notice is that in the Motion, the first request is that the Court take Judicial Notice of certain things, primarily the Deed of Trust, the Notice of Default and Election to Sell Under Deed of Trust and the Trustee's Deed Upon Sale. (Exhibit 2, page 4) In the Complaint, the Plaintiff identified the Deed of Trust and it claimed that there was a valid foreclosure sale that title was perfected in the Trustee's Deed Upon Sale. So this challenge is to the validity of the foreclosure sale and the perfection of title in the buyer. The basis of our challenge will be to the procedures used to effectuate the sale. Our argument is that there was no effective "notice" to our client, the homeowner.

Recall that there are three parties to a Deed of Trust – the trustor, the trustee and the beneficiary. You created the trust so you are the "trustor", the "trustee" has the power of sale and the "beneficiary" is the lender/payee. If you don't pay, the trustee will sell the property and pay back the lender. The power of sale is what sets a Deed of Trust off as different from a Mortgage. The power of sale can be exercised by the trustee without having to go to Court to foreclose. That is known as a "non-judicial foreclosure".

In this case, the lender/payee/beneficiary was Home Loan Mortgage Specialists, COR (hereafter, "HLMS") and the trustee was Premier Trust Deed Services, Inc. (hereafter, "Premier"). (Exhibit 2, page 7, lines 1 – 15) Our client did not receive any notice from HLMS or Premier that they had sold the debt to another entity and our client was to begin making payments to that other entity. In fact, a complete stranger to the transaction - Option One Mortgage Corp. (hereafter, "Option One") – sent the client a bill and said that payments were now to be made to Option One. That would be like me sending you a notice that you had to now pay me for your mortgage. So, the client didn't pay Option One. Option One then filed a Notice of Default and Election to Sell Under Deed of Trust in the Official Records of the County of Fresno. This document says that Wells Fargo Bank is now the trustee. This document was not signed by the original lender/payee/beneficiary, nor was it signed by the trustee Premier. And again, logically, why would anyone ever pay their mortgage to a complete stranger? The California Civil Code provides for the right way to give notice of a change in the payee/beneficiary and of a change in the trustee, and that didn't happen in this case.

The next section of the Motion is titled "IV LAW", which is where we state the law that relates to our case. (Exhibit 2, page 8) You will note that we detail the law on the right to demurr (Exhibit 2, page 8, lines 9 – 22), the verification issue (Exhibit 2, page 9, lines 12 – page 10, line 10) and the law as it relates to proper procedure for a non-judicial foreclosure (Exhibit 2, page 10, lines 11 – page 11, line 3). One thing you will notice is that we state the codified law and we also cite to case law. Codified laws are those that the legislature makes, such as the Civil Code. Case law is that law that Courts make, such as the DeCamp opinion cited on page 10, line 7)

You can't just cite law because it sounds good. The law you cite must relate to the facts of your case. Whenever a case is begun, the first part of lawyering is to get the facts down. In this instance, we needed all the documents in the public record which related to the property being sold. There are usually many more documents in the record than we need and which relate to the wrong Deeds of Trust. What we want is every document in the public record that relate to the Deed of Trust that was the basis for the property being sold at a non-judicial foreclosure. That means that you start with the last relevant document – the Trustee's Deed Upon Sale. Trust us – if you don't do it this way, you are going to get very confused. In the Trustee's Deed Upon Sale it will state the Instrument Number of the Deed of Trust that contains the power of sale that caused the property to be sold. You next tell the clerk that you want certified copies of every document in the official records that reference that Instrument Number of that particular Deed of Trust. This will probably cost you between $30 and $80.

A critical note of how things work in government – the clerk may have forgotten that she is a public servant and she may not want to do this for you. Strike that – government has forgotten that it is a public servant and so the clerk probably will give you a very hard time. If the clerk gives you any grief whatsoever, you can expect that whatever documents you are given, they are not all of the necessary documents. So, instead of suing the clerk and the agency for a civil rights violation for depriving you of the benefits of citizenship, just go sit at a computer terminal in the clerk's office and figure out how to try to pull the documents up yourself. You will pay $1 per page and they won't be certified. If there are more documents that you found than the clerk found, go back to the clerk and show her what you found and ask her to generate the same documents for you and to certify them. Then, if you want to feel better, find her boss and tell the boss that you did a better job at finding the documents than the clerk did and that you would like a nice sit down job in an air conditioned office with excellent benefits and the title "clerk".

Once you have every document relating to that particular Deed of Trust, go to a quiet location and spread them out in the order of the time they were filed. Some documents may have been filed on the same day, but the earlier filed document has a lower Instrument Number. This is the hard part. You now have the facts in front of you, but what you don't know is which of these many facts support a legal challenge. California Civil Code sections 2920 through 2944.5 will contain the law that will support your procedural challenge. That section has been reproduced in full in Exhibit 6. What I do is I have that section of code lying open next to me when I begin reading the various Instruments. You must be completely familiar with those code sections or you will miss something. Let's call this part the Instrument Audit. There is an easier way to do this. You can hire me to do your instrument audit. You would send me copies of all of the instruments and $400. What you would receive back is a statement of the relevant facts and the violations of code. It would be up to you after that to incorporate that information into your legal documents. You can use this audit for more than just foreclosure defense – you can also use it if you sue to set aside the foreclosure, which is a matter discussed later.

Back to our case – you will notice that we argued that California Civil Code 2924(a) required that the Trustee must file a notice of default in the recorder's office that stated certain things. (Exhibit 2, page 10, lines 11 – page 12, line 3) That is the law part. It is obvious at this point that we are about to make an argument on the facts that this law was not complied with, and that is exactly what we did in the next section entitled "V ARGUMENT". We made some additional arguments that Wells Fargo had no standing (the right to stand in court) because there was nothing in the official record that said they were a party in any way. (Exhibit 2, page 13, section B) This section also touches on the securitized trust to which this note was supposedly assigned.

The next arguments are a short argument about joinder and uncertainty of the Complaint. These issues are tangentially related to your purposes and are not appropriate for this book but are relevant for a more advanced book. The end of the document contains the requested relief.

You will also see a declaration of Layne Hayden. The difference between the verification that the opposition lawyer made and this one of Layne Hayden is that the facts in Layne Hayden's declaration are of two kinds – admissions by the party opponent that are readily available on their website and official records. There can't be a whole lot of dispute over those facts. The verification of the opposition lawyer brought squarely into question whether there was an officer in his county – a matter of much dispute and to which the abundant proof contradicts. You too will make a declaration, but yours will only reference the official records. Follow our format for the introduction of those official records.

Next, clear a date, time and department with the Court and the opposition attorney. Execute (sign) and date the Notice of Motion and the Motion and supporting declaration, and attach the certified copies. Next, make three copies, hole-punch the original (two-hole at the top) and file the original and serve a copy on the opposition lawyer. You just bought some time.

Go to the hearing and argue to win. But, be prepared to lose. You should file a request for a Statement of Decision and at the hearing, remind the judge that you did file such a document and that you are reminding the Court that you want a Statement of Decision. This will make the Court put down the basis for it's decision in written form which you will find very valuable if you file an appeal. A copy of a request for a Statement of Decision is in Exhibit 3.

SECTION 3 – ANSWER THE COMPLAINT

We typically file our Answer along with our motion to strike and demurr. That always confuses the opposing attorney and sometimes the Court. They usually don't see people do that because if you Answer the Complaint, they think you are coming to the fight and are ready to do legal battle. But a motion to strike or demurr says that there should be no fight at all. These are not inconsistent, and once the opposing lawyer does his legal research, he will realize that this is a lawful practice.

Look at Exhibit 4. You will find a two-page form "Answer" followed by a nine-page Attachment to the Answer (3j). A proof of service is at the very end of the document. If you have been served a Verified Complaint, you must file and serve a Verified Answer. The bottom of the second page of the form Answer contains your "Verification". You will note that in paragraph 2.a of the form Answer, the box is checked as a general denial.

You will note also that in the attachment to the Answer, the facts in this particular case are laid out in a logical and sequential format. The Answer contains Affirmative Defenses to the eviction. In that regard, it is critically important to allege facts that support your contention that the foreclosure process was procedurally defective (think Instrument Audit) and that there are other reasons that the foreclosure was illegal, such as the Mortgage Note has been lost, destroyed or paid off and that the entity that is the alleged beneficiary of the Mortgage had no right to foreclose.

The primary goal of filing this Answer is to generate the right to discovery – the right to documents to prove whether the foreclosing entity actually had standing – the right to enforce the Note and foreclose. Once you file your Answer, you are entitled to serve the other side with a discovery request. Exhibit 5 is a sample interrogatory that you will send to the other side and which requests information about the Note.

The secondary goal is to be able to argue your affirmative defenses before the Court. This is a bigger issue because California Courts generally don't want you in their courts fighting against foreclosure. The legislature did not make a law that says you can't fight back with affirmative defenses, but the Courts for the most part are having a very narrow read of your rights which they are basing on rental evictions, which are completely different from a case where an owner of a property is foreclosed by an entity that has no legal standing to foreclose on you.

Here are the legal arguments and you must be familiar with these. Keep in mind that if you are in the First District in California, the Courts seem to be allowing you to file Affirmative Defenses.[4]

The Courts have been relying on the case of Superior Motels, Inc. v. Rinn Motor Hotels, Inc., 195 Cal.App.3d 1032, 241 Cal.Rptr. 487 (Cal.App. 1 Dist., 1987) to deny the right to file affirmative defenses and counter-claims in foreclosure/eviction cases.

The typical unlawful detainer action involves tenants wrongfully remaining in possession of the property after violating terms of their leases. (Superior Motels, pages 505-506) That is not the case in the unlawful detainer actions based on foreclosure. Foreclosure based cases involve owners of the property who have been wrongfully deprived of their real property after an entity violates the non-judicial foreclosure procedural provisions in Cal. Civil Code section 2924 and California Code of Civil Procedure section 1161a, in addition to federal pre-foreclosure default prevention procedures, such as those set forth in 12 USC 1710(a), 12 CFR 604, 12 CFR 605 and 7 CFR 1980. The non-judicial foreclosure procedure leading up to and including the trustee's sale is the key issue in our affirmative defenses and counter-claims. You must argue that it is not the court clerk's responsibility to prevent these kinds of defendant's claims in an unlawful detainer action, rather, that is the province of plaintiff's counsel and the court to challenge.

A good place to start is the case of Hutcherson v. Lehtin (N.D.Cal.1970) 313 F.Supp. 1324, 1327, vacated and remanded (1970), 399 U.S. 522, 91 S.Ct. 182, 287 L.Ed.2d 182 (also see Poulsen, California Unlawful Detainer Procedure--A Proposed Legislative Change, 21 Hastings L.J. 491, 501 (1970)). The federal court felt that affirmative defenses and counter-claims were appropriate in these kinds of actions. In 1100 Park Lane Associates v. Konrad Feldman, et al. (2008) 74 Cal.Rptr.3d 1, 160 Cal.App.4th 1467 the Defendants filed a cross-complaint to an unlawful detainer suit, alleging causes of action for retaliatory eviction, negligence, negligent misrepresentation, breach of the implied covenant of quiet enjoyment (in tort and in contract), wrongful eviction, breach of contract, and unfair business practices. The cross-complaint survived.

In J.P. Murdock v. Mrs. Lofton, (1973) 107 Cal.Rptr. 551, 553, 31 Cal.App.3d 981 the Court of Appeal for the First District stated that there were two exceptions to the general rule forbidding affirmative defenses and counter-claims. It discussed in detail its reason and determined that the statutes containing the procedures for summary possession of real property do not prohibit the assertion either of affirmative defenses or counterclaims in answers to unlawful detainer actions. When "unclean hands" is alleged, that allows the court to hear affirmative defenses. And, equity also allows the court to inquire into affirmative defenses and that the summary nature of these kinds of proceedings should not outweigh doing substantial justice. The court cited to Schubert v. Lowe, 193 Cal. 291, 295-296 [223 P. 550]; Johnson v. Chely, 43 Cal. 299, 305; Manning v. Franklin, 81 Cal. 205, 207-208 [22 P. 550]; Pico v. Cuyas, 48 Cal. 639, 642; Gray v. Maier &

Zobelein Brewery, 2 Cal.App. 653, 658 [84 P. 280]; Knight v. Black, 19 Cal.App. 518, 525-527 [126 P. 512]; Rishwain v. Smith, 77 Cal.App.2d 524, 531 [175 P.2d 555]; Strom v. Union Oil Co., 88 Cal.App.2d 78, 83 [198 P.2d 347]; Abstract Inv. Co. v. Hutchinson, 204 Cal.App.2d 242, 247-248.) (Also see Abstract Investment Co. v. Hutchinson (1962) 204 Cal.App.2d 242, 249, 22 Cal.Rptr. 309, 314, cited with approval in Schweiger v. Superior Court (1970) 3 Cal.3d 507, 514, 90 Cal.Rptr. 729, 476 P.2d 97.)

In Abstract Investment Co. v. Hutchinson, *supra*, the court recognized a constitutional defense to an unlawful detainer action, i.e. that an eviction was being sought solely because of race. The language "substantial justice" was used as something that basically compelled the court to hear the defense. Similarly in Schweiger v. Superior Court, supra, at page 515, 90 Cal.Rptr. at page 733, 476 P.2d at page 101, the court recognized a defense based upon the exercise of statutory rights (retaliatory eviction), reasoning as follows: 'The same interest in 'substantial justice' protected in Abstract Investment demands that a landlord be prevented from invoking judicial assistance to punish a tenant by eviction because the tenant sought to exercise rights expressly granted by statute.

In Vella v. Hudgens, 20 Cal. 3d 251 (Cal. 1977), the Court identified a qualified exception to the rule that title cannot be tried in unlawful detainer actions to include certain purchasers of property. The court stated that one who purchases property at a trustee's sale and seeks to evict the occupant in possession must show that he acquired the property at a regularly conducted sale and thereafter "duly perfected" his title. "The municipal court, in Hudgins' unlawful detainer action, was empowered to examine the conduct of the trustee's sale (if its validity had been challenged), and properly could consider whatever equitable defenses Vella might have raised insofar as they pertained directly to the right of possession." (At 418)

The Vella Court was concerned that a defendant may not be given a full and fair opportunity to litigate claims in the unlawful detainer action that reach to title, and that res judicata would bar those later claims. The court determined that defendant's failure to litigate fraud issues by way of a counter-claim in the unlawful detainer action would not be a bar to their subsequent prosecution in another action. There is nothing inconsistent with this concept and the right of a defendant to litigate those narrow non-judicial foreclosure procedural provisions in a counter-complaint in the unlawful detainer action. The litigation of those issues in the unlawful detainer action is defendant's voluntary submission to res judicata being a bar to a later prosecution.

Those statutory procedural requirements of non-judicial foreclosure have an immediate and often devastating effect on owners of property who's title is taken without benefit of a court

proceeding. The only thing between such owners and the street is compliance with those procedures. In the case where a stranger to the agreement signs his own name to a recorded document to change the trustee to another entity or to change the beneficiary of the Deed of Trust to another entity, and then they sell the property to themselves, the statute has been violated and the owner winds up on the street. A counter-claim in this case would be necessary to have the title revert back to the original owner.

The affirmative defenses and counter-claims need not be complex or take any extra time for the court to resolve. The minimal affirmative defense case can be based in whole strictly upon certified copies of the documents of record located in the office of the Fresno County Recorder. The court need merely look at the face of these documents to see the procedural errors and make a determination as to whether the procedures were or were not complied with. If the procedures were not complied with, the court can order the sale to be re-noticed and re-done, or in the factual scenario stated above, the court could set aside the transfer of the deed and the true and original beneficiary and trustee could then proceed as they see fit. None of this detracts from the summary nature of the unlawful detainer because it will all either be obvious to the court on the documents or not. This would still permit the parties to address fraud in another proceeding, but it would clearly and certainly resolve for all time the procedural defects claimed.

Currently, the form on a counter-complaint provides a box to remove the case from the limited jurisdiction for the unlawful detainer action to unlimited jurisdiction of the Superior Court. It appears that the legislature firmly believed that an unlawful detainer action is an appropriate forum to challenge the procedural provisions for non-judicial foreclosure as set forth in Cal. Civil Code section 2924 and California Code of Civil Procedure section 1161a.

If you are prevented from going forward on your affirmative defenses, you may want to be the one who files an appeal and try to change the law to help all those similarly situated to you.

1 Recently, President Obama was on the Jay Leno show. President Obama stated that for every 1 dollar in a mortgage asset, AIG issued 30 dollars of insurance on these bonds. That is the same as insuring “air”. Try insuring your home against risk of fire for 30 times its value. By the way, the U.S. (“you”) bailed out AIG – but, you didn’t get a bailout.

2 Article 3 of the Uniform Commercial Code specifies negotiable instruments.

3 California Rules of Professional Conduct. Rule 5-210 Member as Witness

A member shall not act as an advocate before a jury which will hear testimony from the member unless:

(A) The testimony relates to an uncontested matter; or

(B) The testimony relates to the nature and value of legal services rendered in the case; or

(C) The member has the informed, written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal.

4 (The second district in Karen A. Clark v. Mahvash Mazgani Cal.App 1/7/2009, Cal.App. 2009 heard an appeal from the Superior Courts in Los Angeles County involving a cross-complaint to an unlawful detainer and took no issue with whether it should have been filed in the first instance.)