

CAUSE NO. \_\_\_\_\_

<b>JOHN P. KLANDER</b>	§	<b>IN THE DISTRICT COURT OF</b>
<b>AND BRIAN A. BREWER - TRUSTEE</b>	§	
	§	
<b>v.</b>	§	<b>HARRIS COUNTY, TEXAS</b>
	§	
<b>NEW PENN FINANCIAL, LLC</b>	§	<b>_____ JUDICIAL DISTRICT</b>

**PLAINTIFFS' ORIGINAL PETITION, APPLICATION FOR INJUNCTIVE RELIEF,  
AND REQUEST FOR DISCLOSURES**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW John P. Klander and Brian A. Brewer - Trustee, Plaintiffs herein, filing this their Original Petition, Application for Injunctive Relief, and Request for Disclosures complaining of New Penn Financial, LLC, Defendant herein, and for causes of action would respectfully show the Court as follows:

**DISCOVERY**

1. Plaintiffs intend to conduct discovery under Texas Rules of Civil Procedure 190.3 (Level 2).

**PARTIES**

2. John P. Klander as well as Brian A. Brewer - Trustee are individuals who reside in and/or conduct business in Harris County, Texas and may be served with process on the undersigned legal counsel.

3. New Penn Financial, LLC is an entity formed under the laws of the State of Delaware which conducts business in Harris County, Texas and may be served with process as follows:

New Penn Financial, LLC  
C/O Corporation Services Company  
211 E. 7<sup>th</sup> Street, Suite 620  
Austin, TX 78701

### **JURISDICTION AND VENUE**

5. The Court has jurisdiction over New Penn Financial, LLC because this Defendant is an entity formed under the laws of the State of Delaware which conducts business in Harris County, Texas.

6. The Court has jurisdiction over the controversy because the damages are within the jurisdictional limits of the Court. Venue is mandatory in Harris County, Texas because the subject matter of the lawsuit involves real property which is located in Harris County, Texas. Further, all or a substantial part of the events or omissions giving rise to Plaintiffs' causes of action occurred in Harris County, Texas thus venue is proper under §15.002(a)(1) of the Texas Civil Practice and Remedies Code.

### **RELEVANT FACTS**

7. The subject matter of the lawsuit is the real property and the improvements thereon located at 8511 Majesticbrook Drive, Houston, TX 77095 (the "Property").

8. John P. Klander ("Klander") and his wife Martha purchased the Property on or about March 7, 2012. During the Process of purchasing the Property, Klander executed a Note in the amount of \$118,960 and a Deed of Trust for which JPMorgan Chase Bank, N.A. is listed as the Lender. A true and correct copy of Deed of Trust is attached hereto as Exhibit "1" and incorporated herein for all purposes.

9. Upon information and belief, the Note and Deed of Trust were subsequently transferred to New Penn Financial, LLC ("New Penn") who also acts as the loan servicer.

10. Klander began to have financial difficulties in the summer of 2016 due to hospitalization and treatment for health problems. As such, Klander struggled occasionally to pay his mortgage payment in a timely manner. Klander has never received any correspondence from New Penn informing him that he was behind on or in default of his mortgage.

11. As such, Klander believed did not think he was in danger of losing his home until he was contacted by Brian A. Brewer - Trustee of the Elm Pointe Trust ("Brewer") on March 15, 2018 who informed Klander that New Penn posted his Property for foreclosure sale on April 3, 2018 - this surprised Klander because he had not received any correspondence from New Penn informing him of such, including a notice of default, the opportunity to cure the default, notice of intent to accelerate the debt, notice of acceleration of debt, and notice of substitute trustee's sale. A true and correct copy of the Notice of Substitute Trustee's Sale, which was provided to Plaintiffs by the undersigned legal counsel, is attached hereto as Exhibit "2" and incorporated herein for all purposes. Apparently, New Penn posted Klander's Property for foreclosure sale on April 3, 2018 without sending him proper and timely notice of default, an opportunity to cure the default, notice of intent to accelerate the debt, notice of acceleration of debt, and notice of substitute trustee's sale prior to the foreclosure sale as required by the Texas Property Code – New Penn violated Klander's due process rights as well as the terms and conditions of the Deed of Trust.

12. Brewer offered to help Klander with his mortgage issues by paying off his mortgage loan, purchasing the Property from him, and renting the property back to him. To facilitate the process, Klander executed a Special Warranty Deed whereby Klander transferred his



ownership interest in the Property to Brewer subject to the existing loan with New Penn. A true and correct copy of the related Special Warranty Deed is attached hereto as Exhibit "3" and incorporated herein for all purposes.

13. Accordingly, Plaintiffs allege that New Penn is about to wrongfully sell their Property at a foreclosure sale on April 3, 2018 in violation of the Texas Property Code, Deed of Trust, and Plaintiffs' due process rights.

**FIRST CAUSE OF ACTION:  
VIOLATION OF TEXAS PROPERTY CODE §5.065**

14. To the extent not inconsistent herewith, John P. Klander ("Klander") incorporates by reference the allegations made in paragraphs 1 through 13 as if set forth fully herein.

15. Pursuant to the provisions of the Texas Property Code, the holder of a note must ordinarily give notice to the maker of the holder's intent to accelerate the time for payment as well as notice of acceleration. If the mortgagee intends to accelerate the maturity of the debt, the notice must unequivocally inform the mortgagor of the mortgagee's intention. A proper notice of default must give the borrower notice that the alleged delinquency must be cured; otherwise, the loan will be accelerated and the property will go to foreclosure. Prior to a foreclosure action, the noteholder is also required to give the home owners clear and unequivocal acceleration notice. Effective acceleration requires two acts: notice of intent to accelerate and notice of acceleration.

16. The actions committed by New Penn Financial, LLC ("New Penn") constitute violations of the Texas Property Code §5.065 because New Penn never sent proper and timely notice of default, the opportunity to cure the default, notice of intent to accelerate the debt, notice of acceleration, and notice of substitute trustee's sale which are required in order for New Penn to foreclose on its lien rights to the Property.

**SECOND CAUSE OF ACTION:  
BREACH OF CONTRACT**

17. To the extent not inconsistent herewith, John P. Klander ("Klander") incorporates by reference the allegations made in paragraphs 1 through 13 as if set forth fully herein.

18. The actions committed by New Penn Financial, LLC ("New Penn") constitute breach of contract because:

- A. There exists a valid, enforceable contract between Klander and New Penn;
- B. Klander has standing to sue for breach of contract;
- C. Klander performed, tendered performance, or was excused from performing his contractual obligations;
- D. New Penn breached the contract; and
- E. The breach of contract by New Penn caused Klander's injury.

**THIRD CAUSE OF ACTION:  
VIOLATION OF TEXAS PROPERTY CODE §51.002**

19. To the extent not inconsistent herewith, John P. Klander ("Klander") incorporates by reference the allegations made in paragraphs 1 through 13 as if set forth fully herein.

20. Texas Property Code §51.002(d) clearly dictates that "[n]otwithstanding any agreement to the contrary, the mortgage servicer of the debt shall serve a debtor in default under a deed of trust or other contract lien on real property used as the debtor's residence with written notice by certified mail stating that the debtor is in default under the deed of trust or other contract lien and giving the debtor at least 20 days to cure the default before notice of sale can be given . . ." "[A] notice-of-foreclosure on real property used as the debtor's residence is useless to the creditor unless a proper notice-to-cure has been sent pursuant to §51.002(d)." *Mills v. Haggard*, 58 S.W.3d 164, 167 (Tex.App. - Waco 2001, no pet.).

21. As such, the actions committed by New Penn Financial, LLC ("New Penn") constitute violations of Texas Property Code §51.002 because New Penn never sent proper and timely notice of default or provided the 20-day opportunity to cure the default prior to sending Plaintiff Notice of Trustee's Sale.

**FOURTH CAUSE OF ACTION:  
BREACH OF DUTY OF COOPERATION**

22. To the extent not inconsistent herewith, John P. Klander ("Klander") incorporates by reference the allegations made in paragraphs 1 through 13 as if set forth fully herein.

23. Texas law recognizes a duty to cooperate that "is implied in every contract in which cooperation is necessary for performance of the contract." This duty "requires that a party to a contract may not hinder, prevent, or interfere with another party's ability to perform its duties under the contract." *Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 770 (Tex. App.—Dallas 2005, pet. denied).

24. As described above, New Penn Financial, LLC ("New Penn") has failed to cooperate in a manner that would put Klander on notice that he was in default of his mortgage and give him the opportunity to cure that default. New Penn did not provide Klander with the proper information he needed to meet his obligations; therefore, Klander's ability to meet his obligations by paying any alleged default was thwarted by New Penn, who, instead, improperly posted his Property for foreclosure sale on April 3, 2018. New Penn has therefore breached the implied duty of cooperation.

**DAMAGES:  
ACTUAL DAMAGES**

25. Plaintiffs are entitled to recover their actual damages from Defendant for which Plaintiffs plead in an amount which does not exceed the jurisdictional limits of this Court.



### **EXEMPLARY DAMAGES**

26. Plaintiffs are entitled to recover their exemplary damages from Defendant for which Plaintiffs plead in an amount which does not exceed the jurisdictional limits of this Court.

### **ATTORNEYS' FEES**

27. Plaintiffs were forced to employ the undersigned attorneys to represent them and have agreed to pay them reasonable attorneys' fees for their services. Plaintiffs are entitled to recover their reasonable attorneys' fees pursuant to Chapter 38 of the Texas Civil Practices & Remedies Code for which Plaintiffs plead in an amount which does not exceed the jurisdictional limits of this Court.

### **CONDITIONS PRECEDENT**

28. All conditions precedent to the Plaintiffs' right to bring these causes of action have been performed, have occurred, or have been waived.

### **REQUEST FOR DISCLOSURES**

29. New Penn Financial, LLC is hereby requested to disclose to John P. Klander as well as Brian A. Brewer - Trustee, within 50 days of service of this request, the information and material described in Rule 194 of the Texas Rules of Civil Procedure.

### **APPLICATION FOR TEMPORARY RESTRAINING ORDER**

30. To the extent not inconsistent herewith, Plaintiffs incorporate by reference the allegations made in paragraph 1 through paragraph 28 as if set forth fully herein.

31. Unless Defendant is enjoined, Plaintiffs will suffer probable harm which is imminent and irreparable. More specifically, if not enjoined, Defendant may sell the Property at any time during the pendency of this matter thus depriving Plaintiffs of ownership of the Property

and potentially causing Plaintiffs to be dispossessed of the Property. Further, Defendant may take legal action to evict or otherwise cause Plaintiffs to be dispossessed of the Property. Plaintiffs have no adequate remedy at law because the subject matter is real property, and any legal remedy of which Plaintiffs may avail themselves will not give them as complete, equal, adequate, and final a remedy as the injunctive relief sought in this Application.

32. Therefore, Plaintiffs request that this Court issue a Temporary Restraining Order and, thereafter, a Temporary Injunction, to restrain Defendant from selling the real property which is the subject matter of this lawsuit and is commonly known as 8511 Majesticbrook Drive, Houston, TX 77095 as well as from taking any legal action to evict Plaintiffs and any other occupants from, or enforcing a writ of possession regarding, the aforementioned property.

33. Plaintiffs further request that, upon trial on the merits, Defendant be permanently enjoined from the same acts listed in Paragraph 32 above.

34. Plaintiffs are likely to prevail on the merits of the lawsuit as described above.

35. The granting of the relief requested is not inconsistent with public policy considerations.

#### **BOND**

36. Plaintiffs are willing to post a reasonable temporary restraining order bond and requests that the Court set such bond.



## PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that:

- A. Defendant be cited to appear and answer herein;
- B. The Court conduct a hearing on Plaintiffs' Application for Injunctive Relief;
- C. A temporary restraining order be issued restraining Defendant, its agents, employees, and legal counsel, and those acting in concert or participation with Defendant who receive actual notice of the Order, by personal service or otherwise, from selling the real property which is the subject matter of this lawsuit and is commonly known as 8511 Majesticbrook Drive, Houston, TX 77095 as well as from taking any legal action to evict Plaintiffs and any other occupants from, or enforcing a writ of possession, regarding the aforementioned property;
- D. A Permanent Injunction be entered enjoining Defendant from the same acts listed in Paragraph C above; and
- E. Upon final hearing or trial hereof, the Court order a judgment in favor of John P. Klander and Brian A. Brewer – Trustee against New Penn Financial, LLC for their actual damages, exemplary damages, reasonable attorneys' fees, all costs of court, and such other and further relief, both general and special, at law or in equity, to which Plaintiffs may be entitled.

Respectfully submitted,

VILT AND ASSOCIATES, P.C.

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