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 **COPY**

6 Attorneys for Plaintiff,
7 Federal Home Loan Mortgage Corporation, its assignees and/or successors

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF SAN MATEO**

10 **SAN MATEO SOUTHERN BRANCH JUDICIAL DISTRICT**

11 Federal Home Loan Mortgage Corporation,
its assignees and/or successors,

Case No. CLJ205995

12 Plaintiff,

**PLAINTIFF'S MOTION IN LIMINE 3
of 6 TO EXCLUDE DEFENDANT
FROM ALLEGING THAT THE
FORECLOSURE DID NOT COMPLY
WITH CALIFORNIA LAW**

13 vs.

14 Alexander B. Paragas, Perla O. Paragas, Arlene
15 Hari
and DOES 1-10, inclusive,

Settlement Conference: 9/20/2012
Time: 1:30 pm
Dept.: presiding

16 Defendant(s).

Jury Trial: 9/24/2012
Time: 9:00 am
Dept.: presiding

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20 Plaintiff, Federal Home Loan Mortgage Corporation, its assignees and/or successors
21 ("Plaintiff" and/or "Federal Home Loan Mortgage Corporation"), submits the following Motion in
22 Limine to exclude Defendant from alleging that the foreclosure sale did not comply with the laws
23 regulating California nonjudicial foreclosures under Civil Code 2924 *et seq.*

24 **SUMMARY OF ARGUMENT**

25 Plaintiff moves to exclude Defendants Alexander B. Paragas, who is the former borrower,
26 and Arlene Hari, who is an occupant residing with the former borrower ("Defendants") from
27 asserting the foreclosure sale did not comply with the laws regulating California nonjudicial
28 foreclosures, including Defendants' affirmative defenses. There is a common law rebuttable

1 presumption that a foreclosure sale has been conducted regularly and fairly. The presumption
2 must prevail when the record lacks substantial evidence of a prejudicial procedural irregularity.

3 **SUMMARY OF FACTS**

4 Plaintiff seeks a Judgment for Possession and an issuance of a Writ of Possession for the
5 real property commonly known as 39 Santa Ana Avenue Daly City, CA 94015 (“Subject
6 Property”). Plaintiff purchased the Subject Property at a properly held Trustee’s Sale on
7 4/23/2012, and Defendants are holding over possession, preventing Plaintiff from possessing its
8 property.

9 **POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF’S THIRD MOTION IN**

10 **LIMINE**

11 Defendants cannot overcome the rebuttable presumption that the sale was conducted
12 properly, and has no standing to challenge the foreclosure. Civil Code § 2924 still states:

13 (c) A recital in the deed executed pursuant to the power of sale of compliance
14 with all requirements of law regarding the mailing of copies of notices or the
15 publication of a copy of the notice of default or the personal delivery of the
16 copy of the notice of default or the posting of copies of the notice of sale or the
17 publication of a copy thereof shall constitute prima facie evidence of
18 compliance with these requirements and conclusive evidence thereof in favor
19 of bona fide purchasers and encumbrancers for value and without notice.

20 The Trustee’s Deed Upon Sale, which was recorded on 4/23/2012, contained such a
21 recital. See the Trustee’s Deed Upon Sale attached to the Request for Judicial Notice as Exhibit
22 “7.” Thus, there is prima facie evidence that the Trustee’s Sale was validly conducted. Defendant
23 will not be able to rebut the presumptions contained in the Trustee’s Deed Upon Sale. Further,
24 Defendant has not tendered the amount due and owing on the Deed of Trust and Promissory Note.
25 Without first tendering the amount delinquent, Defendant has no standing to challenge the
26 foreclosure process.

27 In order for Defendants to prevail in an Unlawful Detainer action alleging that a
28 foreclosure sale was invalid, the Defendants must offer to tender the full amount of the past due
debt. As stated by the Court of Appeal in Crummer v. Whitehead,

“We cannot say that here, in refusing to set aside the trustee's sale, the trial
court has in any way abused the discretion committed to it. On the
contrary, the trial court's ruling appears fair and just because we do not

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1 find in the record any offer on the part of appellant to pay the full amount
2 of the debt for which the property was given as security. Some disposition
3 on the part of the appellant to do equity by tendering the amount of the
4 debt due is a prerequisite to her demand for a judgment cancelling the
5 trustee's sale. Crummer v. Whitehead, (Cal. App. 1st Dist. 1964) 230
6 Cal.App.2d 264, 268-269.

7 Nowhere in the Answers do Defendants allege they attempted or completed a tender of the
8 full amount owed on the Note. There is a maxim in the context of foreclosures known as the
9 "tender rule." If a borrower who has defaulted on the payments requests the Court to exercise its
10 equitable powers to stop or set aside foreclosure proceedings, the borrower must first do equity
11 itself. Arnolds Mgmt. Corp. v. Eishen, 158 Cal.App.3d 575, 577 (1984); Meetz v. Mohr (1904)
12 141 Cal. 667, 673 ("One who seeks equity must do equity").

13 Without having "done equity" by tendering the obligation in full, Defendants lack standing
14 to unwind the foreclosure sale. California courts have expanded the application of the tender rule
15 to "any cause of action" that is based upon allegations of wrongful foreclosure or that seeks
16 redress from foreclosure. Abdallah v. United Sav. Bank, (1996) 43 Cal.App.4th 1101, 1109 (in
17 affirming sustaining of demurrer without leave to amend court explained that the tender rule
18 applies to "any cause of action for irregularity in the sale procedure"); United States Cold Storage
19 v. Great W. Sav. & Loan Ass'n, (1985) 165 Cal.App.3d 1214, 1225 (affirming judgment of
20 nonsuit); Arnold Mgmt. Corp., 158 Cal. App. 3d at 579 (affirming sustaining of demurrer without
21 leave to amend on claims of wrongful foreclosure, fraud, and negligence relating to defective
22 notice not foreclosure sale).

23 The tender rule is strictly applied (Nguyen v. Calhoun, (2003) 105 Cal.App.4th 428, 439),
24 and absent an alleged and actual tender, the defenses raised by Defendant fail in their entirety.
25 Karlsen v. Am. Sav. & Loan Ass'n, (1971) 15 Cal. App.3d 112; Abdallah, 43 Cal.App.4th at
26 1109; Miller & Star, Cal. Real Estate (3d ed.), Deeds of Trust, §10:212, pp. 653-54.

27 Defendants have not tendered, nor have Defendants offered to tender, the delinquent
28 amount on the loan. Without such a payment, the Defendants have no standing to challenge the
foreclosure sale, and therefore no questions of fact exist for a jury to decide.

CONCLUSION

Plaintiff is entitled to a determination that it has made a prima facie showing of the

1 propriety of the foreclosure sale. Defendants have no evidence to prove otherwise, and any
2 information the Defendants may wish to put in front of a jury is for the effect of confusing the
3 issues. Any testimony or insinuation by Defendants that the foreclosure was not valid - without
4 first overcoming the presumption the sale was in compliance with Cal. Code Civ. Proc. 2924 *et*
5 *seq* with actual evidence and without tender - must be excluded from evidence.

6 Dated: September 11, 2012

Respectfully submitted,
McCARTHY & HOLTHUS, LLP

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9 By: _____

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Federal Home Loan Mortgage Corporation