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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN MATEO**

**SAN MATEO SOUTHERN BRANCH JUDICIAL DISTRICT**

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

12 Plaintiff,

13 vs.

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

16 Defendant(s).

Case No. CLJ205995

**PLAINTIFF'S MOTION IN LIMINE 2  
 of 6 TO EXCLUDE DEFENDANT  
 FROM ALLEGING PLAINTIFF HAS  
 AN OBLIGATION OR DUTY TO  
 MODIFY THE DEFENDANT'S LOAN  
 AND THERE IS NO POST-  
 FORECLOSURE REMEDY FOR NON-  
 COMPLIANCE WITH CIVL CODE  
 2923.5**

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

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

22 Plaintiff, Federal Home Loan Mortgage Corporation, its assignees and/or successors  
 23 ("Plaintiff" and/or "Federal Home Loan Mortgage Corporation"), submits the following Motion in  
 24 Limine to exclude Defendant from alleging that Plaintiff had any obligation or duty to modify  
 25 Defendant's loan. Further, Plaintiff requests this Court exclude any allegations that Plaintiff  
 26 failed to comply with Civil Code 2923.5 as there is no post-foreclosure remedy.

**SUMMARY OF ARGUMENT**

28 Plaintiff moves to exclude Defendants Alexander B. Paragas, who is the former borrower,

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1 and Arlene Hari, who is an occupant residing with the former borrower (“Defendants”) from  
2 asserting the Plaintiff had any obligation or duty to modify Defendant’s loan, including  
3 Defendant’s affirmative defenses. A challenge to a foreclosure on this basis cannot be raised in  
4 an unlawful detainer action. The only remedy for a violation of California Civil Code section  
5 2923.5 is postponement of the foreclosure sale. Post-foreclosure, this issue is moot as a sale  
6 cannot be postponed once it has already occurred. Defendant argues the foreclosure sale is invalid  
7 due to allegations that there was no contact to the borrower prior to the foreclosure sale as  
8 required under Civil Code 2923.5. Pursuant to the California Supreme Court case Mabry v.  
9 Superior Court (2010) 185 Cal. App. 4th 208, there is no post-foreclosure remedy for failure to  
10 comply with Civil Code 2923.5. Any allegation regarding non-compliance with Civil Code  
11 2923.5 must be excluded from the summary proceeding of the unlawful detainer case.

12 **SUMMARY OF FACTS**

13 Plaintiff seeks a Judgment for Possession and an issuance of a Writ of Possession for the  
14 real property commonly known as 39 Santa Ana Avenue Daly City, CA 94015 (“Subject  
15 Property”). Plaintiff purchased the Subject Property at a properly held Trustee’s Sale on  
16 4/23/2012, and Defendant is holding over possession, preventing Plaintiff from possessing its  
17 property.

18 **POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF’S SECOND MOTION IN**

19 **LIMINE**

20 Senate Bill 1137, commonly known as the “Perata Mortgage Relief Act,” was codified via  
21 California Civil Code Section 2923.5, and became effective in September of 2008. Section 2923.5  
22 provides that certain enumerated contacts must be made, or attempted to be made, by the  
23 mortgagee, beneficiary, or its authorized agent in order to explore alternatives to foreclosure with  
24 the borrower prior to filing the Notice of Default. This section ultimately muddied the waters in  
25 Unlawful Detainer actions, as there had been no subsequent rulings from any Courts which  
26 definitively stated whether an alleged failure to comply with section 2923.5 could be raised as an  
27 affirmative defense in an Unlawful Detainer action. An Unlawful Detainer action brought  
28 pursuant to California Code of Civil Procedure section 1161a need only prove that the sale was

1 held in compliance with California Civil Code section 2924.

2 On June 2, 2010, the Court of Appeals of California issued a ruling on Mabry v. Superior  
3 Court of Orange County, which clarified whether a challenge to Cal. Civ. Code section 2923.5  
4 may be raised in an Unlawful Detainer action. Mabry v. Superior Court (2010) 185 Cal. App. 4th  
5 208. The answer is a resounding “No.”

6 Throughout the opinion, the Court of Appeals repeatedly noted that while there is a private  
7 right of action for a failure to comply with California Civil Code section 2923.5, this right expires  
8 after the foreclosure sale. The only remedy for a violation of section 2923.5 is postponement of  
9 the foreclosure sale so that the beneficiary may comply. Post-foreclosure, this issue is moot as a  
10 sale cannot be postponed once it has already occurred. Further, the Court held that a post-  
11 foreclosure inquiry into section 2923.5 would be inappropriate because of the Legislature’s intent  
12 to preserve foreclosure sales as final.

13 The Court states,

14 “(G) If a lender did not comply with section 2923.5 and a foreclosure sale has  
15 already been held, does that noncompliance affect the title to the foreclosed  
16 property obtained by the families or investors who may have bought the property  
at the foreclosure sale? No. The Legislature did nothing to affect the rule regarding  
foreclosure sales as final.” [Emphasis in Original].

17 The Court goes on to reinforce this point, stating,

18 “A primary reason for California’s comprehensive regulation of foreclosure  
19 in the Civil Code is to ensure stability of title after a trustee’s sale.  
20 (Melendrez v. D & I Investment, Inc. (2005) 127 Cal.App.4th 1238, 1249–  
21 1250 [26 Cal. Rptr. 3d 413] [“comprehensive statutory scheme” governing  
22 foreclosure has three purposes, one of which is “to ensure that a properly  
conducted sale is final between the parties and conclusive as to a bona fide  
purchaser” (internal quotations omitted)].)

23 There is nothing in section 2923.5 that even hints that noncompliance with  
24 the statute would cause any cloud on title after an otherwise properly  
25 conducted foreclosure sale. We would merely note that under the plain  
26 language of section 2923.5, read in conjunction with section 2924g, the  
27 only remedy provided is a postponement of the sale before it happens.”  
28 [Emphasis in Original].

It is clear that the Court of Appeals intended to preclude the introduction of any evidence  
about California Civil Code section 2923.5 in Unlawful Detainers, as there is no remedy post-

1 foreclosure. Further, the Court's justification for its ruling is that a nonjudicial foreclosure sale  
2 held pursuant to California Civil Code section 2924 is kept intentionally sacrosanct, and cannot be  
3 challenged without adequate evidence and a valid tender. To allow an inquiry into California  
4 section 2923.5 in Unlawful Detainers would be to muddle the nature of the issues which can be  
5 raised in this summary proceeding. The rights and remedies for a violation of section 2923.5 pre-  
6 foreclosure are entirely different than the rights and remedies for a violation of California Civil  
7 Code section 2924.

8 There have been no other decisions, either before or since the decision in Mabry which  
9 require Plaintiff to prove compliance with California Civil Code section 2923.5 in order to obtain  
10 possession of Property purchased at foreclosure. As such, Defendants' arguments that Plaintiff  
11 must prove compliance with section 2923.5 in an Unlawful Detainer action should not be well-  
12 taken by this Court.

13 **CONCLUSION**

14 Plaintiff is entitled to a determination that it has made a prima facie showing of the  
15 propriety of the foreclosure sale. Defendants have no evidence to prove otherwise, and any  
16 information Defendants may wish to put in front of a jury regarding a loan modification is for the  
17 effect of confusing the issues. Any testimony or insinuation by Defendants that the foreclosure  
18 was not valid based on non-compliance with Civil Code 2923.5 must be excluded from evidence  
19 pursuant to the holding in Mabry.

20 Dated: September 11, 2012

Respectfully submitted,  
**McCARTHY & HOLTHUS, LLP**

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22  
23 By: \_\_\_\_\_

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