

1 **McCARTHY & HOLTHUS, LLP**  
2 Gayle E. Jameson, Esq. (SBN: 207050)  
3 Rebecca L. Lang, Esq. (SBN: 249234)  
4 Anne Ogle-Knee, Esq. (SBN: 253824)  
5 Mishaela Graves, Esq. (SBN 259765)  
6 1770 Fourth Avenue  
7 San Diego, CA 92101  
8 Telephone: (619) 243-3960  
9 Facsimile: (619) 243-1979



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,  
12 its assignees and/or successors,

13 Plaintiff,

14 vs.

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

18 Defendant(s).

Case No. CLJ205995

**PLAINTIFF'S MOTION IN LIMINE 1  
OF 6 TO EXCLUDE CASE FROM  
BEING HEARD BY A JURY**

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

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

19 Plaintiff, Federal Home Loan Mortgage Corporation, its assignees and/or successors  
20 ("Plaintiff" and/or "Federal Home Loan Mortgage Corporation"), submits the following Motion in  
21 Limine to exclude this case from being heard by a jury.

22 **SUMMARY OF ARGUMENT**

23 Plaintiff, Federal Home Loan Mortgage Corporation, by and through its attorneys of  
24 record, McCarthy & Holthus, LLP, submits the following motion in limine in support of its  
25 position to try the equitable issues and matters of law involved in this case as a bench trial. If  
26 factual issues remain after a bench trial of the equitable issues, then only that portion of the case  
27 should be sent to a jury. Only triable issues of material fact should be sent to the jury. Matters of  
28 law are to be determined by the Judge.

1 **SUMMARY OF FACTS**

2 Plaintiff seeks a Judgment for Possession and an issuance of a Writ of Possession for the  
3 real property commonly known as 39 Santa Ana Avenue Daly City, CA 94015 ("Subject  
4 Property"). Plaintiff purchased the Subject Property at a properly held Trustee's Sale on  
5 04/23/2012, and Defendant is holding over possession, preventing Plaintiff from possessing its  
6 property.

7 **POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S FIRST MOTION IN**  
8 **LIMINE**

9 Defendants Alexander B. Paragas, who is the former borrower, and Arlene Hari, who is an  
10 occupant residing with the former borrower ("Defendants") have requested that this Unlawful  
11 Detainer be decided by a jury, rather than being heard by the Court. However, actions in equity  
12 are not entitled to be heard by a jury, as will be described below.

13 The general rule is that a defendant in an unlawful detainer action is entitled to a trial by  
14 jury pursuant to California Code of Civil Procedure §§592 and 1171; both of which state that in  
15 actions where a Plaintiff seeks to recover possession of real property from a Defendant, the  
16 Defendant is permitted to request a jury trial on the legal issues as they relate to the facts of the  
17 case. However as addressed below, some care should be taken to parse the legal issues from the  
18 equitable issues, as equitable issues are not triable before a jury, and any questions of law must be  
19 settled by the Bench Officer before submitting them to a jury. This ultimately leaves the jury to  
20 decide the facts as they relate to the law. It is doubtful in this case whether any legal issues will  
21 still remain after the equitable issues and questions of law have already been dispensed with by  
22 the Court.

23 Plaintiff contends that the only outstanding issues of fact which will remain after the  
24 equitable issues and questions of law have been settled are the amount of daily damages  
25 Defendants owe to Plaintiff. Plaintiff is willing to waive the daily damages as they are only  
26 incidental to the equitable issues supporting Plaintiff's right to possession. For these reasons and  
27 those to follow, Plaintiff submits the following brief in support of its position that a jury trial is  
28 not necessary to try this case.

1 a. **NO RIGHT TO JURY TRIAL UNDER CIRCUMSTANCES OF THIS**  
2 **CASE**

3 A jury trial is a matter of right in a civil action at law, but not in equity. Southern Pac.  
4 Transp. Co. v. Superior Court (1976) 58 Cal.App.3d 433, 436. In determining whether an action  
5 was triable by jury at common law, the court will inquire into the "gist" of the action. Bank of  
6 America v. Greenbach (1950) 98 Cal.App.2d 220. The type of relief sought usually determines  
7 whether the action is legal or equitable. Raedeke v. Gibraltar Sav. & Loan Ass'n (1974) 10  
8 Cal.3d 665, 672. There is no right to a jury trial if the gist of the action is for the enforcement of a  
9 right that is only recognized in equity. Ford v. Palisades Corp. (1950), 101 Cal.App.2d 491, 499;  
10 C&K Eng'g Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 8.

11 The right to a jury trial is determined from the pleadings in the case. A party has a right to  
12 seek a particular remedy, even though other remedies may be available, and the jury trial right  
13 will flow from the claims asserted and the remedies sought. When a claim for damages is  
14 combined with an equitable claim, the parties have a right to a jury trial on the damages claim.  
15 See 8-38 Moore's Federal Practice - Civil §38.42. The court must look to all the pleadings in  
16 determining the jury trial right, including claims, defenses, counterclaims and third-party  
17 pleadings. Beacon Theatres v. Westover, (1959) 359 U.S. 500, 508.

18 When legal and equitable issues are joined in the same action, the parties are usually  
19 entitled to a jury trial on separable legal issues. Frahm v. Briggs (1970) 12 Cal. App. 3d 441, 445.  
20 When equitable and legal remedies are sought in the same action, the parties are entitled to have a  
21 jury decide the legal issues unless the trial court's initial decision on the equitable issues is also  
22 dispositive of the legal issues, leaving nothing to be tried by a jury. American Motorists Ins. Co. v  
23 Superior Court (1998) 68 Cal. App. 4th 864, 871. If both legal and equitable issues are involved  
24 in an unlawful detainer action, the court will try the equitable issues first, because this may  
25 obviate the need for a jury trial on the legal issues.

26 b. **DEFENDANTS CANNOT OVERCOME THE REBUTTABLE**  
27 **PRESUMPTION THAT THE SALE WAS CONDUCTED PROPERLY,**  
28 **AND HAS NO STANDING TO CHALLENGE THE FORECLOSURE**

The Defendants cannot overcome the rebuttable presumption that the sale was conducted properly, and have no standing to challenge the foreclosure.

McCARTHY & HOLTHUS, LLP  
ATTORNEYS AT LAW  
1774 FOURTH AVENUE  
SAN DIEGO, CALIFORNIA 92101  
TELEPHONE (619) 243-3860 FACSIMILE (619) 243-1979

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Civil Code §2924 states:

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

Recitals in the Trustee's Deed Upon Sale creates a rebuttable presumption that the Trustee complied with all the notification to conduct a lawful foreclosure sale, therefore the burden shifts to the Defendant to prove that the notice requirements of Cal. Civ. Code §2924 *et seq* were not lawfully complied with and the Defendants cannot provide any proof to rebut the presumption.

Defendants will not be able to rebut the presumptions contained in the Trustee's Deed Upon Sale. Further, Defendants have not tendered the amount due and owing on the Deed of Trust. Without first tendering the amount delinquent, Defendants have no standing to challenge the foreclosure process.

Further, recitals in a Trustee's Deed Upon Sale also provide proof of the regularity of the sale, and no further evidence is necessary to establish the title and right to possession of the purchaser. See Sorenson v. Hall (1934) 219 Cal. 680; Beck v. Reinholtz (1956) 138 Cal.App.2d 719, 723 (held recitals in a trust deed furnish prima facie evidence of the facts as set forth therein and are sufficient to sustain Plaintiff's burden of proof). This presumption applies between the trustor and a purchaser who is not a bona fide purchaser for value. See Wolfe v. Lipsy (1985) 163 Cal.App.3d at 640.

**c. DEFENDANTS HAVE NOT OFFERED TO DO EQUITY**

In order for Defendants to prevail in an Unlawful Detainer action alleging that a foreclosure sale was invalid, he 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 find in the record any offer on the part of appellant to pay the full amount of the debt for which the property was given as security. Some disposition on the part of the appellant to do equity by tendering the amount of the debt due is a prerequisite to her demand for a judgment cancelling the

McCARTHY & HOLTHUS, LLP  
ATTORNEYS AT LAW  
1770 FOURTH AVENUE  
SAN DIEGO, CALIFORNIA 92101  
TELEPHONE (619) 243-3960 FACSIMILE (619) 243-1978

1 trustee's sale. Crummer v. Whitehead, (Cal. App. 1st Dist. 1964) 230  
Cal.App.2d 264, 268-269.

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

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

18 The tender rule is strictly applied (Nguyen v. Calhoun, (2003) 105 Cal.App.4th 428, 439),  
19 and absent an alleged and actual tender, the defenses raised by Defendant fail in their entirety.  
20 Karlsen v. Am. Sav. & Loan Ass'n, (1971) 15 Cal. App.3d 112; Abdallah, 43 Cal.App.4th at  
21 1109; Miller & Star, Cal. Real Estate (3d ed.), Deeds of Trust, §10:212, pp. 653-54.

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

25 **CONCLUSION**

26 Plaintiff is entitled to a determination that it has made a prima facie showing of the  
27 propriety of the foreclosure sale. Defendants have no evidence to prove otherwise, and any  
28 information Defendants may wish to put in front of a jury is for the effect of confusing the issues.

**McCARTHY & HOLTHUS, LLP**  
ATTORNEYS AT LAW  
1776 FOURTH AVENUE  
SAN DIEGO, CALIFORNIA 92101  
TELEPHONE (619) 243-9980 FACSIMILE (619) 243-1979

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Plaintiff only seeks equitable relief and for a judgment for possession only.

Plaintiff respectfully requests that the Court make a ruling that a jury trial should be excluded. In the alternative, Plaintiff request that only triable issues of material fact be sent to the jury.

Dated: September 11, 2012

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

By: \_\_\_\_\_  
Gayle E. Jameson, Esq.  
Attorney for Plaintiff,  
Federal Home Loan Mortgage Corporation