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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF SAN MATEO**

14 **SAN MATEO SOUTHERN BRANCH JUDICIAL DISTRICT**

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

17 Plaintiff,

18 vs.

19 Alexander B. Paragas, Perla O. Paragas, Arlene
20 Hari
21 and DOES 1-10, inclusive,

22 Defendant(s).

Case No. CLJ205995

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION IN LIMINE
TO PRECLUDE ADMISSION OF THE
TRUSTEE'S DEED UPON SALE**

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

Defendant's Motion for Summary Judgment
9/21/2012
Time: 9:00 am
Dept.: Law and Motion

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

23 Plaintiff, Federal Home Loan Mortgage Corporation ("Plaintiff" and/or "Federal Home
24 Loan Mortgage Corporation"), submits the following Opposition to Defendant's Motion in
25 Limine to Exclude the Admission of the Plaintiff's Trustee's Deed Upon Sale.

26 **SUMMARY OF ARGUMENT**

27 The Defendant continues to raise a red herring claiming that Brian Burnett cannot hold
28 dual positions. The Defendant alleges that Brian Burnett has no authority to sign both the
assignment of the Deed of Trust. The Defendant is wrong as will be discussed below.

1 Next, the Defendant continues to erroneously assert that Cal. Civ. Code § 2932.5 requires
2 an assignment of the Deed of Trust be recorded before the power of sale can be exercised by an
3 assignee of the original lender and that without the assignment, the foreclosure was improper. It
4 is well-settled in California that an assignment of the Deed of Trust does not need to be recorded
5 to convey a beneficial interest.

6 Finally, as to the admission of the Trustee’s Deed Upon Sale, the only evidence the
7 Plaintiff need produce to prove it holds valid legal title is the certified Trustee’s Deed Upon Sale
8 and that is all the Plaintiff will produce at trial. The Defendant cannot overcome the rebuttable
9 presumption that the sale was conducted properly and he has no standing to challenge the
10 foreclosure because he has not tendered. Pursuant to the holding in Fontenot v. Wells Fargo
11 (2011) 198 Cal. App. 4th 256, it is appropriate for the Court to take judicial notice of the transfer
12 of beneficial interest to Plaintiff by virtue of the Trustee’s Deed Upon Sale.

13 **SUMMARY OF FACTS**

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

18 **POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT’S MOTION IN**
19 **LIMINE TO EXCLUDE THE ADMISSION OF THE TRUSTEE’S DEED UPON SALE**

20
21 **1. Defendant Speculation That One Person Cannot Hold Dual Positions**

22 The Defendant speculates that Brian Burnett cannot sign the Assignment the Deed of Trust
23 on behalf of MERS in his capacity as Assistant Secretary and also sign the Substitution of Trustee
24 in his capacity as Assistant Vice President for OneWest Bank. Further, Defendant “believes and
25 alleges” that Brian Burnett is not an Assistant Vice President of OneWest Bank. (Defendant’s
26 Motion in Limine to Preclude the Admission of the Trustee’s Deed upon Sale at page 3, lines 15-
27 27).

28 Two strikingly similar allegations are found in three recent cases. Chua v. IB Prop.

1 Holdings (C.D. Cal. Aug. 1, 2011) 2011 U.S. Dist. LEXIS 84683, *5-7, and Zinnel v.
2 CitiMortgage, Inc. (E.D. Cal. Sept. 15, 2010) 2010 U.S. Dist. LEXIS 102124, *10-12.

3 In Chua, Lisa Markham signed the Assignment of the Deed of Trust as Assistant Vice
4 President of MERS, and Lisa Markham executed the Substitution of Trustee. Plaintiff argued that
5 because she was not a valid signatory for both documents the related transfer and substitution
6 were invalid. Chua C.D. Cal. Aug. 1, 2011) 2011 U.S. Dist. LEXIS 84683, *5.

7 The Court held:

8 Plaintiff offers little more than a speculation that Lisa Markham is not an
9 authorized agent. . . . Additionally, to the extent that Plaintiffs take issue
10 with Lisa Markham's dual position, Plaintiffs have not identified a
relevant legal authority prohibiting one individual from working for both
CitiMortgage and MERS or from acting as an agent for both.

11 Id. at *6-7 citing Bogosian v. CR Title Services, Inc., (C.D. Cal. May 18, 2011) 2011 U.S. Dist.
12 LEXIS 67930 (denying a TRO where Plaintiffs argued that Lisa Markham's signature and
13 assignment was invalid because she signed on behalf of MERS and CitiMortgage).

14 Similarly in Zinnel, Plaintiff argued that the Assignment and Substitution of Trustee were
15 invalid because he “believes” Lisa Markham was not the Assistant Vice President of the
16 transferring bank and that the transferring bank never had a beneficial interest under the Bank
17 Deed of Trust.

18 The Court held:

19 Since Plaintiff offers nothing but his unsupported “belief” that Citi is not a
20 beneficiary of the Bank Deed of Trust, and conclusory assertions
21 unsupported by facts concerning the validity of the Assignment and
Substitution of Trustee, Plaintiff lacks sufficient evidentiary support for
his contentions.

22 Zinnel (E.D. Cal. Sept. 15, 2010) 2010 U.S. Dist. LEXIS 102124, *12.

23 Here, the Defendant makes the same unsubstantiated and speculative argument that the
24 person executing the Substitution of Trustee and Assignment of Deed of Trust cannot legally be
25 appointed as an officer for both MERS and for OneWest Bank. Defendant lack standing and
26 sufficient evidentiary facts and legal authority to support his position, which is based purely on his
27 speculation and conjecture. Statements such as Defendant “believes and alleges” that an
28

1 Assignment and Substitution of Trustee are not valid have no merit. Defendant’s arguments and
2 conclusions of law should not be well-taken by this Court.

3 **2. No Assignment is Required**

4 The Defendant continues to assert that Cal. Civ. Code § 2932.5 requires an assignment of
5 the Deed of Trust to be recorded before the power of sale can be exercised by an assignee of the
6 original lender and that without the properly executed and recorded assignment, the foreclosure
7 was improper. (Defendant’s Motion in Limine to Preclude the Admission of the Trustee’s Deed
8 Upon Sale, page 3 at lines 7-27) Defendant’s argument is misplaced because Cal. Civ. Code §
9 2932.5 is inapplicable to a deed of trust. The text of Cal. Civ. Code § 2932.5 provides in part:

10 Where a power to sell real property is given to a **mortgagee**, or other
11 encumbrancer, in an instrument intended to secure the payment of money,
12 the power is part of the security and vests in any person who by
13 assignment becomes entitled to payment of the money secured by the
14 instrument (**Emphasis added**).

15 By its terms, the statute applies only to situations in which “a power to sell real property is
16 given to a mortgagee, or other encumbrancer,” not when the power of sale is conveyed to a
17 Trustee, as in Defendant’s Deed of Trust. An assignment of a deed of trust *may* be recorded, but
18 there is no requirement for a recorded assignment in order for an assignee beneficiary to exercise
19 the power of sale contained in a deed of trust.

20 The Calvo court was quite clear on this issue: “It has been established since 1908 that this
21 statutory requirement that an assignment of the beneficial interest in a debt secured by real
22 property must be recorded in order for the assignee to exercise the power of sale *applies only to a*
23 *mortgage and not to a deed of trust.*” Calvo v. HSBC Bank USA, N.A. (2011) 199 Cal. App. 4th
24 118, 122 citing Stockwell v. Barnum (1908) 7 Cal. App. 413. A deed of trust is not a “mortgage”;
25 it is a separate and distinct security instrument. Calvo at 124.

26 There is no requirement under California law for an assignment to be recorded in order for
27 an assignee beneficiary to foreclose. Parcray v. Shea Mortgage Inc. (E.D. Cal. April 23, 2010)
28 2010 U.S. Dist. LEXIS 40377 at *31; Roque v. Suntrust Mortg., Inc. (N.D. Cal. Feb. 10, 2010)
2010 U.S. Dist. LEXIS 11546 at *13. Defendant acknowledges that his security instrument is a

1 Deed of Trust and not a mortgage, § 2932.5 is inapplicable and it is inconsequential as to whether
2 an assignment was recorded.

3 **3. Title Cannot Be Tried in an Unlawful Detainer**

4 There is one correct statement by the Defendant – title may not be tried in an unlawful
5 detainer case, see Vasey v. California Dance Co., Inc. (1977) 70 CA3d 742, 746–747 (holding the
6 only triable issue in an unlawful detainer is the right to possession and any incidental damages
7 that result from the unlawful detention). But then Defendant erroneously asserts the Greenhut v.
8 Wooden (1982) 129 Cal.App.3d 64, 69 provides authority for the exception to the general rule
9 that title may not be tried in an unlawful detainer case. Greenhut is a landlord/tenant case where
10 the landlord sought to quiet title.

11 The Greenhut case is a landlord/tenant case where the plaintiff/respondent (“lessor”)
12 owned and leased real property to the defendant/appellant (“lessee”). When the lessor wanted to
13 sell the property, the lessee exercised the option in the lease agreement that purported to give the
14 lessee the exclusive right to purchase the property. The lessor disaffirmed that alleged exclusive
15 option and litigation commenced. The trial court ruled in favor of the lessor and denied lessee’s
16 motion to consolidate the cases.

17 The Court of Appeal reversed the judgment finding the case should have been
18 consolidated and issues of title should have been resolved, but only because the landlord sought to
19 quiet title against the tenant. Id. at 69. The Greenhut Court held that “because respondent not
20 only brought first action to quiet title, but also sought declaratory relief, the case was an exception
21 to the general rule that title could not be tried in an unlawful detainer action.” Id. at 69.

22 This one exception has no bearing on this post-foreclosure eviction case with no alleged
23 landlord / tenant relationship. The Defendant has no authority for his position that he should be
24 allowed to collaterally attack title in this summary proceeding.

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. Defendant has no evidence to prove otherwise. The Plaintiff is
28 only required to produce the certified copy of the Trustee’s Deed Upon Sale to prove it holds

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valid legal title to the property and that is all the Plaintiff will provide at trial.

Any information Defendant may wish to present regarding non-compliance with § 2932.5 or § 2924 *et seq* must be excluded as this is an attempt to collaterally attack title in a summary proceeding. The Defendant is attempting to confuse the only allowable issue in an unlawful detainer – the right to possession – with a quiet title action. The Defendant is not permitted to do so.

Dated: September 18, 2012

Respectfully submitted,
McCARTHY & HOLTHUS, LLP

By: _____

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