

1 **McCARTHY & HOLTHUS, LLP**  
2 Gayle E Jameson, Esq. (SBN: 207050)  
3 Jessica L. Partridge, Esq. (SBN: 260045)  
4 Rebecca L. Carle, Esq. (SBN: 249234)  
5 1770 Fourth Avenue  
6 San Diego, CA 92101  
7 Telephone: (619) 243-3960  
8 Facsimile: (619) 243-1979



**COPY**

9 Attorneys for Plaintiff,  
10 Federal Home Loan Mortgage Corporation, its assignees and/or successors

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **COUNTY OF SAN MATEO**

13 **SAN MATEO SOUTHERN BRANCH JUDICIAL DISTRICT**

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

16 Plaintiff,

17 vs.

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

21 Defendant(s).

Case No. CLJ205995

**PLAINTIFF'S SETTLEMENT  
STATEMENT**

Complaint Filed: 5/16/2012

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 by and through its attorneys of  
23 record, McCarthy & Holthus, LLP, submit the following Settlement Statement.

24 **I. STATEMENT OF FACTS**

25 Defendant Alexander B. Paragas borrowed \$417,000 from Indymac F.S.B.  
26 (original lender) in relation to the real property commonly known as 39 Santa Ana Avenue, Daly  
27 City, CA 94015 ("Subject Property"). Defendant Alexander B. Paragas defaulted on the  
28 underlying loan obligation which was secured by the Deed of Trust as of 10/1/2010, meaning the  
Defendant(s) have been living expense free for more than twenty three (23) months now.

1 Defendant Alexander B. Paragas stopped making payments on the loan on or about  
2 10/1/2012, almost two (2) years ago. As such, foreclosure proceedings were commenced against  
3 the Property pursuant to the Deed of Trust.

4 Defendant Alexander B. Paragas failed to cure the deficiency and a Notice of Default was  
5 recorded in the Contra Costa County Recorder's Office on 1/29/2012. At that time, Defendant  
6 Alexander B. Paragas owed nine thousand eight hundred forty seven dollars (\$9,847). [See  
7 Notice of Default as attached to the Request for Judicial Notice Exhibit "4"]. Subsequently a  
8 Notice of Sale was recorded [See Notice of Sale as attached to the Request for Judicial Notice as  
9 Exhibit "5"] and the public auction culminated in the Trustee's Sale on 4/23/2012. [See Trustee  
10 Deed Upon Sale as attached to the Request for Judicial Notice Exhibit "7"].

11 After Plaintiff acquired the Property at a Trustee's Sale on 4/23/2012, on 5/4/2012, the  
12 Trustee's Deed Upon Sale was recorded in the SAN MATEO County Recorder's Office thereby  
13 perfecting Plaintiff Federal Home Loan Mortgage Corporation's interest in the Property. [Request  
14 for Judicial Notice Exhibit "7"].

15 On 5/7/2012, Defendants were served with a 3-Day Written Notice for Possession. The  
16 Defendants have continued in unlawful possession of the Property after expiration of the written  
17 3-Day Notice for Possession and Federal Home Loan Mortgage Corporation is entitled to a  
18 judgment for possession.

19 The Notice was served according to Code of Civil Procedure section 1162; the Notice was  
20 posted in a conspicuous place at the Property and mailed to Defendants and all others in  
21 possession. The Notice was attached to the Complaint as Exhibit "B" and the Proof of Service  
22 was attached to the Complaint as Exhibit "C."

23 After expiration of the Notice, Plaintiff filed its Complaint against Defendants on  
24 5/16/2012. In response to the Complaint, Defendant filed a motion to consolidate which was later  
25 withdrawn, the Defendants have filed a motion for summary judgment to be heard on 9/20/2012  
26 and a demand for a jury trial, to be heard on 9/24/2012 after the settlement conference on  
27 9/20/2012.

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**II. DAMAGES CLAIMED BY PLAINTIFF**

In the instant Unlawful Detainer case, the Plaintiff is entitled to costs and the reasonable rental value of the premises for each day the Defendants have remained in possession from the date of expiration of the Notice for possession to their vacating the Property. Code Civ.Proc. §1174(b).

Plaintiff filed this unlawful detainer action to obtain possession of the Property which was foreclosed on as a result of Defendant's failure to cure the default of over \$9,847 as of 10/1/2010.

The Plaintiff is only seeking a judgment for possession only and will waive all money damages if the Defendants vacate the Property. Plaintiff has also incurred at least six hundred and seventy dollars (\$670.00) in costs specifically related to the filing of this unlawful detainer action but will also waive costs if the Defendants vacate the Property.

**III. AREAS OF CONTENTION BETWEEN THE PARTIES**

Defendants' seventeen (17) collective affirmative defenses have no merit. Using what can be characterized as boilerplate affirmative defenses, Defendants' respective Answers jointly assert failure to state a claim, waiver, estoppel, failure to mitigate damages, statute of frauds, statute of limitations, unclean hands, Plaintiff's lack of standing, Plaintiff's lack of title, an invalid notice to vacate, holder in due course, lack of subject matter jurisdiction, non-compliance with civil code sections 2924 *et. seq.*, 2923.5, 2923.6 and Business and Professions Code section 17200, violation of Senate Bill 1137, and the failure to allege that a landlord-tenant relationship exists. Defendant Alexander Paragas also incorrectly claims that Plaintiff has filed this unlawful detainer action in violation of an automatic stay initiated by a Chapter 13 bankruptcy proceeding filed by Paragas.

The majority of these affirmative defenses are without merit and are not brought in good faith; therefore, Plaintiff will not waste this Court's time addressing them. Others will be discussed below. However, as the Court will see, there are no triable issues of material fact raised by the Defendants. As no viable affirmative defenses have been raised, Federal Home Loan Mortgage Corporation should be granted judgment for possession.

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**1. Plaintiff Complied with Civil Code Section 2924**

California 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.

The Trustee's Deed Upon Sale contained such a recital. Thus, there is Prima Facie evidence that the Trustee's Sale was validly conducted. DEFENDANT has not introduced any evidence to show that the Foreclosure Sale was improper. A mere contention, with no facts, is not sufficient to prove this affirmative defense. The Trustee's Deed Upon Sale contained such a recital. 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. Defendant cannot show provide any proof to the contrary. Thus the presumption has not been rebutted.

Recitals in a Trustee's Deed Upon Sale 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. 389; 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.

The only issues of title that this Court may consider are those pertaining to whether the foreclosing trustee complied with Civil Code section 2924 *et seq*. Because the recitals in the Trustee's Deed Upon Sale creates a presumption that the statutory requirements for a non-judicial foreclosure have been satisfied and such resumption has not been rebutted, possession of the Property should be restored to the Plaintiff. Therefore the Court should find that the recitals

1 in the Trustee's Deed Upon Sale are Prima Facie evidence that the Trustee's Sale was validly  
2 conducted.

3 **2. There is No Landlord-Tenant Relationship and Plaintiff has not Acted in**  
4 **Violation of Senate Bill 1137**

5 Defendant Arlene Hari's eighth and ninth Affirmative Defenses to the Complaint appear to  
6 be premised on the notion that a landlord-tenant relationship exists and accordingly, Section 6 of  
7 SB 1137, or the Perata Mortgage Relief Bill, affords her 60-days' notice to vacate the Subject  
8 Property in order to protect her as an "innocent tenant". However, SB 1137, codified in Cal. Code  
9 Civ. P. section 1161b(b), was written with an express eye on the potential for abuse by former  
10 borrowers who intended to stay in the property post-foreclosure with their tenants. This is why the  
11 language of the statute is so broadly worded, that "this section **shall not apply** if any party to the  
12 note remains in the property as a tenant, subtenant, **or occupant.**" (**Emphasis Added**). Whatever  
13 language the former borrower used to describe himself, the California Legislature saw fit to curb  
14 the potential abuses by denying tenants extra time to vacate if the former borrower remained a  
15 fixture at the Property.

16 Defendant Arlene Hari admits to being in possession with the former borrower, Defendant  
17 Alexander Paragas. As a tenant living with the former borrower it is not a bona fide situation and  
18 she is only entitled to those protections allotted to her by state law. And state law expressly  
19 precludes the possibility that any additional time be given to a tenant when the former borrower  
20 remains in possession of the Property. This circumstance is precisely the type anticipated by the  
21 drafters of both the State and the Federal laws, and why the laws were written not to protect non-  
22 bona fide tenants living with former borrowers.

23 **3. There Was No Automatic Stay in Place When Plaintiff's Unlawful Detainer**  
24 **Action was Filed and No Action Has Been Taken in Violation of Any**  
25 **Automatic Stay**

26 Defendant Alexander Paragas' fifteenth (15) Affirmative Defense alleges that based on the  
27 filing of Chapter 13 bankruptcy petition in the United States Bankruptcy Court, Northern District  
28 of California, Case No. 3:12-bk-31228 on 4/23/2012, there was an automatic stay and that  
Plaintiff knowingly filed the unlawful detainer action in violation of said automatic stay.

1 First and foremost, it must be said that there was no automatic stay when the Plaintiff filed  
2 the complaint on 5/16/2012 because contrary to the claims made in Defendant Alexander Paragas'  
3 erroneously titled Motion to Extend the Automatic Stay Pursuant to 11 USC section 362(c)(3)(B),  
4 Defendant Alexander Paragas had already had three (3) bankruptcies pending and dismissed  
5 within the 12 month period prior to the date of filing. Pursuant to Bankruptcy Code 11 U.S.C.  
6 362(4)(A)(i), which states in part: "if a single or joint case is filed by or against a debtor who is an  
7 individual under this title, and if 2 or more single or joint cases of the debtor were pending within  
8 the previous year but were dismissed....the stay under subsection (a) shall not go into effect upon  
9 the filing of the later case."

10 On 5/20/2011, Defendant Alexander Paragas filed a Chapter 13 Bankruptcy Petition in the  
11 United States Bankruptcy Court, Eastern District of California, Case No. 2:11-bk-35261. [Request  
12 for Judicial Notice Exhibit "8"]. The case was dismissed on 6/24/2011 for failure to file  
13 information and terminated on 9/13/2011. [Request for Judicial Notice Exhibit "9"]. It should be  
14 noted that Mr. McCandless represented Defendant Alexander Paragas in this bankruptcy case.

15 On 7/22/2011, Defendant Alexander Paragas filed a second Chapter 13 Bankruptcy  
16 Petition in the United States Bankruptcy Court, Eastern District of California, Case No. 2:11-bk-  
17 37976. [Request for Judicial Notice Exhibit "10"]. This case was dismissed on 8/9/2011 for  
18 failure to file information and terminated on 10/18/2011. [Request for Judicial Notice Exhibit  
19 "11"]. It should be noted that Mr. McCandless also represented Defendant Alexander Paragas in  
20 this second bankruptcy case.

21 On 10/13/2011, Defendant Alexander Paragas filed a third Chapter 13 Bankruptcy Petition  
22 in the United States Bankruptcy Court, Northern District of California, Case No. 3:11-bk-33721.  
23 [Request for Judicial Notice Exhibit "12"]. The case was dismissed on 2/7/2012 for failure to  
24 make plan payments and terminated on 4/24/2012. [Request for Judicial Notice Exhibit "13"]. It  
25 should be noted that Mr. McCandless also represented Defendant Alexander Paragas in this third  
26 bankruptcy case.

27 Despite the fact that Mr. McCandless represented Defendant Alexander Paragas in all 3  
28 prior bankruptcy filings, the Motion to Extend the Automatic Stay Pursuant to 11 USC section

1 362(c)(3)(B) filed in Case No. 3:12-bk-31228 only lists the last 2 bankruptcy petitions filed.  
2 [Request for Judicial Notice Exhibit "14"]. Incidentally, because there was no automatic stay due  
3 to multiple bankruptcy filings within the last 12 months, Debtor erroneously filed a Motion to  
4 Extend Automatic Stay when the correct filing would have been a Motion to Impose Automatic  
5 Stay Pursuant to 11 USC section 362(c)(4)(B).

6 Had Plaintiff actually been given notice of the pending bankruptcy proceeding or  
7 Defendant's motion, Plaintiff would have filed an opposition. However, as per the Creditor  
8 Matrix filed with Defendant Alexander Paragas' bankruptcy petition on 4/23/2012, Plaintiff  
9 Federal Home Loan Mortgage Corporation was not listed and therefore was not served notice of  
10 the pending bankruptcy proceeding. [Request for Judicial Notice Exhibit "15"].

11 Furthermore, even if Plaintiff had been notified of the bankruptcy filing on 4/23/2012, the  
12 order granting Defendant Alexander Paragas' erroneously titled Motion to Extend the Automatic  
13 Stay Pursuant to 11 USC section 362(c)(3)(B) was entered on 6/11/2012. [Request for Judicial  
14 Notice Exhibit "16"]. Pursuant to 11 USC section 362(4)(C), a stay imposed under subparagraph  
15 (B) shall be effective on the date of the entry of the order allowing the stay to go into effect.  
16 Since Plaintiff did not take any action in the unlawful detainer case between 6/11/2012 and  
17 7/10/2012, when the case was dismissed, Plaintiff did not take any action in violation of the stay  
18 that did not go into effect until 6/11/2012. [Request for Judicial Notice Exhibit "17"].

19 **4. Defendant Must Allege Tender and Have the Present Ability to Tender the**  
20 **Entire Indebtedness to Challenge the Foreclosure Process**

21 Finally, as a condition precedent to challenge the validity of a trustee's sale, the former  
22 trustor must pay or tender the payment of all amounts owed on the debt that was secured by the  
23 Deed of Trust. As a prerequisite to challenging a foreclosure sale, a borrower must, in good faith  
24 and with the ability to pay, make an unconditional tender of the secured debt. Napue v. Gor-Mey  
25 West, Inc. (1985) 175 Cal. App. 3d 608, 620-621; Arnolds Management Corp. v. Eischen (1984)  
26 158 Cal. App. 3d 575, 578-580; Karlsen v. American Sav. & Loan Assoc. (1971) 15 Cal. App. 3d  
27 112, 117. A complaint that attacks the validity of a foreclosure sale but does not allege a proper  
28 tender fails to state a cause of action. Karlsen, 15 Cal. App. 3d at 117 [judgment on the

1 pleadings]; MCA, Inc., 27 Cal. App. 3d at 179 [summary judgment].

2 In the unlawful detainer case, MCA, Inc. v. Universal Diversified Ent. Corp., the plaintiff  
3 purchased real property at a trustee's sale which was held pursuant to the power of sale in a deed  
4 of trust. The defendant refused to vacate the premises, and plaintiff filed an unlawful detainer  
5 action to recover possession and monetary damages. (1972) 27 Cal. App. 3d 170 at 173-174. The  
6 Court of Appeals affirmed a summary judgment for unlawful detainer granted to the purchaser of  
7 real property at a trustee's sale against the former trustor. It held that the defendant's attack on  
8 plaintiff's title failed to raise a triable issue of fact "because we do not find in the record any offer  
9 on the part of [defendant] to pay the full amount of the debt for which the property was given as  
10 security." Id. at 176. As a result, the defendant was precluded from raising issues as to the  
11 validity of the trustee's sale or other objections to the plaintiff's title. Id. at 177.

12 The Court held that the defendant trustor's assertion of noncompliance with the procedure  
13 for the trustee's sale, as set forth in California Civil Code section 2924; *et seq* did not raise triable  
14 issues of fact because the defendant had not tendered the full amount of the debt for which the  
15 property was given as security. Id. Specifically, the court held:

16 [D]efendant's assertions of plaintiffs non-compliance with CC §2924; did  
17 not raise a triable issue 'because we do not find in the record any offer on  
18 the part of [defendant] to pay the full amount of the debt for which the  
19 property was given as security. Some disposition on the part of  
20 [defendant] to do equity by tendering the amount of the debt due is a  
21 prerequisite to a demand for judgment canceling the trustee's  
22 sale....Plietner, 70 Cal.App.2d 576, 582, and cases cited. See also  
23 Shimpones v. Strickney, 219 Cal. 637, 649, Crummer v. Whitehead, 230  
24 Cal.App.2d at 268-269; Humbolt Savings & Loan Soc. V. March, 136 Cal.  
25 321.

26 Further, in Crummer v. Whitehead (1964) 230 Cal. App. 2d 264, the Court of Appeal  
27 made it clear that in an unlawful detainer action brought pursuant to California Code of Civil  
28 Procedure section 1161a, where a defendant is entitled to dispute the validity of the trustee's sale,  
it is a prerequisite to a trustor's demand for relief and attack on the title that he must have  
tendered the full amount of the debt due. See also Abdallah 43 Cal. App. 4th at 1109 (debtor must  
allege tender of the full amount of beneficiary's secured indebtedness in order to maintain any



McCARTHY & HOLTHUS, LLP  
ATTORNEYS AT LAW  
1770 FOURTH AVENUE  
SAN DIEGO, CALIFORNIA 92101  
TELEPHONE (619) 243-3960 FACSIMILE (619) 243-1979

1 cause of action for irregularity in the sale procedure).

2 Here, Defendants have not alleged readiness, willingness, or the present ability to pay the  
3 full debt owing to Federal Home Loan Mortgage Corporation to redeem the Property. Because  
4 Defendants have failed to allege the present ability to tender, Defendants failed to raise a triable  
5 issue of fact as to Federal Home Loan Mortgage Corporation's title. For these reasons, Federal  
6 Home Loan Mortgage Corporation should be granted judgment for possession.

7 **IV. CONCLUSION**

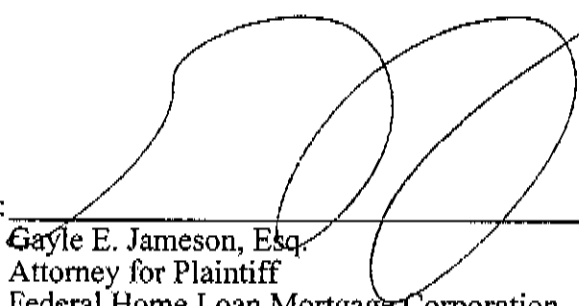
8 The Plaintiff is entitled to a judgment for possession as the three (3) elements of an  
9 unlawful detainer action after a nonjudicial foreclosure have been met: (1) the property was sold  
10 in accordance with California Civil Code section 2924 and title was duly perfected; (2) the  
11 requisite notice to vacate to defendant was served as described in California Civil Code of  
12 Procedure section 1162; and (3) defendant remains in possession of the property.

13 The facts establish the elements of an unlawful detainer action and there are no triable  
14 issues of material fact. As discussed, Defendants' affirmative defenses fail as a matter of law.  
15 Accordingly, Federal Home Loan Mortgage Corporation is entitled to judgment for possession.

16 Federal Home Loan Mortgage Corporation respectfully requests this Court award  
17 judgment for possession in favor of the Plaintiff and against the Defendants, Alexander B. Paragas  
18 and Arlene Hari, and all other occupants pursuant to California Code of Civil Procedure section  
19 415.46, as prayed for in the Complaint.

20  
21 Dated: September 11, 2012

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

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26 By:   
27 Gayle E. Jameson, Esq.  
28 Attorney for Plaintiff  
Federal Home Loan Mortgage Corporation,  
Its Assignees and/or Successors