



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 J. Graves, Esq. (SBN 259765)
 6 1770 Fourth Avenue
 7 San Diego, CA 92101
 8 Telephone: (619) 243-3960
 9 Facsimile: (619) 243-1979
 10 Attorney for: Plaintiff,
 11 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**
 12 **CORPORATION, its assignees and/or**
 13 **successors,**

Plaintiff,

14 v.

15 **ALEXANDER B. PARAGAS,**
 16 **PERLA O. PARAGAS,**
 17 **ARLENE HARI,**
 18 **and DOES 1-10, inclusive,**

Defendants.

Case No. CLJ205995

PLAINTIFF'S JURY TRIAL BRIEF

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

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McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
 1770 FOURTH AVENUE
 SAN DIEGO, CALIFORNIA 92101
 TELEPHONE (619) 685-4800 FACSIMILE (619) 685-4810

McCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW
1770 FOURTH AVENUE
SAN DIEGO, CALIFORNIA 92101
TELEPHONE (619) 885-4800 FACSIMILE (619) 885-4810

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1 **I. INTRODUCTION**

2 Plaintiff, Federal Home Loan Mortgage Corporation (“Federal Home Loan Mortgage
3 Corporation”) submits the following points and authorities in support of Plaintiff’s jury trial brief.
4 Defendant Alexander B. Paragas, the former borrower, and Defendant Arlene Hari, occupant
5 residing with the former borrower (“Defendant” or “Defendants”), have been living in the subject
6 property expense free for more than twenty three (23) months. Additionally, an occupant residing
7 with the former borrower is not entitled to any more notice than the former borrower pursuant to
8 Cal. Code Civ. P. section 1161b(b).

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

14 The facts establish the elements of an unlawful detainer action and there are no triable
15 issues of material fact. Accordingly, Federal Home Loan Mortgage Corporation is entitled to
16 judgment for possession.

17 Further, it must be noted that there was no automatic stay as alleged in Defendant’s
18 affirmative defense as Defendant Alexander B. Paragas has filed five (5) bankruptcies since
19 4/7/2010, four of which were pending and dismissed within the last 12 months. The multiple
20 bankruptcies will be discussed in more detail below.

21 **II. STATEMENT OF FACTS**

22 Defendant Alexander B. Paragas borrowed \$417,000 from Indymac F.S.B. (original
23 lender) in relation to the real property commonly known as 39 Santa Ana Avenue, Daly City, CA
24 94015 (“Subject Property”). Defendant Alexander B. Paragas defaulted on the underlying loan
25 obligation which was secured by the Deed of Trust as of 10/1/2010, meaning the Defendant(s)
26 have been living expense free for more than twenty three (23) months now.

27 Defendant Alexander B. Paragas stopped making payments on the loan on or about 10/1/2012,
28 almost two (2) years ago. As such, foreclosure proceedings were commenced against the

1 Property pursuant to the Deed of Trust.

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

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

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

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

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

25 **III. POINTS AND AUTHORITIES**

26 **a. Federal Home Loan Mortgage Corporation Has Established the Essential**
27 **Elements of an Unlawful Detainer Action Following a Nonjudicial Trustee's**
28 **Sale**

The purchaser at a trustee's sale is entitled to immediate possession of the subject

1 property. Farris v. Pacific States Auxiliary Corp. (1935) 4 Ca1.2d 103. The purchaser may bring
2 an unlawful detainer action against the trustor, or anyone holding under the trustor, who refuses to
3 relinquish possession. Cal. Civ. Proc. § 1161a; MCA, Inc. v. Universal Diversified Enters. Corp.
4 (1972) 27 Cal. App. 3d 170. The elements of an unlawful detainer action based upon the sale of
5 real property at a trustee's sale are set forth in California Code of Civil Procedure section
6 1161a(b)(3), which states:

7 (b) In any of the following cases, a person who holds over and continues
8 in possession of a manufactured home, mobile home, floating home or real
9 property after a three-day Notice for Possession the property has been
10 served upon the person, or if there is a subtenant in actual occupation of
11 the premises, also upon such subtenant, as described in Section 1162, may
12 be removed therefrom as prescribed in this chapter:

13 (3) Where the property has been sold in accordance with Section 2924 of
14 the Civil Code, under a power of sale contained in a deed of trust executed
15 by such person, or a person under whom such person claims, and the title
16 under the sale has been duly perfected.

17 A Plaintiff is entitled to judgment in an unlawful detainer action upon establishing the
18 following: (1) the property was sold in accordance with California Civil Code section 2924 and
19 title was duly perfected; (2) the requisite notice to vacate to defendant was served as described in
20 California Civil Code of Procedure section 1162; and (3) defendant remains in possession of the
21 property. See Stephens, Partain & Cunningham v. Hollis (1987) 196 Cal. App. 3d 948, 952; See
22 also Evans v. Superior Court (1977) 67 Cal. App. 3d 162.

23 **b. Federal Home Loan Mortgage Corporation Acquired Title to the Property at
24 a Nonjudicial Foreclosure Sale and Has Recorded its Trustee's Deed Upon
25 Sale**

26 On 4/23/2012, Federal Home Loan Mortgage Corporation acquired title to the Subject
27 Property through a nonjudicial foreclosure at a public trustee's sale. The Trustee's Deed Upon
28 Sale constitutes prima facie evidence of the facts set forth therein that Federal Home Loan
Mortgage Corporation acquired title to the Subject Property at a trustee's sale in compliance with
California Civil Code section 2924, *et seq.* and that title has been duly perfected in Federal Home
Loan Mortgage Corporation. Beck v. Reinholtz (1956) 138 Cal.App.2d 719, 722.

There is a statutory presumption that if a trustee's deed recites that the trustee has

1 complied with all requirements concerning the mailing, posting, publication, or personal delivery
2 of the notice of default and the notice of sale, the recitals are conclusive in favor of a bona fide
3 purchaser and encumbrancer for value and without notice. Cal. Civ. Code § 2924(c); see also
4 Garfinkle v. Superior Court (1978) 21 Cal.3d 268, 279, fn. 16. In the absence of a bona fide
5 purchaser, the recitals are prima facie evidence of the facts that they allege to be true. Cal. Civ.
6 Code § 2924(c); Wolfe v. Lippy (1985) 163 Cal. App. 3d 633; Seidell v. Tuxedo Land Co. (1934)
7 1 Cal. App. 2d 406, 408. As a result, the recitals of statutory compliance in the Trustee's Deed
8 establish a presumption that all notice requirements for the foreclosure were met and that the
9 foreclosure sale was valid.

10 California Civil Code section 2924(c) states in relevant part the following:

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

17 Further, by express provision in a Deed of Trust, recitals in a trustee's deed may be
18 furnished as proof of the regularity of the sale, and no further evidence is necessary to establish
19 the title and the right to possession of the purchaser. Sorensen v. Hall (1934) 219 Cal. 680;
20 Pacific States Savings & Loan Co. v. O'Neill (1936) 7 Cal.2d 596; Cobb v. California Bank
21 (1936) 6 Cal.2d 389.

22 Here, Defendant Alexander B. Paragas signed the Deed of Trust. The Deed of Trust
23 specifically states: "The recitals in the Trustee's Deed shall be prima facie evidence of the truth
24 of the statements made therein." [See Request for Judicial Notice, Deed of Trust, Exhibit "1,"
25 page 12, heading 22 "Acceleration; Remedies"].

26 As previously stated, on 4/23/2012, Federal Home Loan Mortgage Corporation acquired
27 the Subject Property at a Trustee's Sale. On 5/4/2012, the Trustee's Deed Upon Sale was
28 recorded in the SAN MATEO County Recorder's Office, thereby perfecting Federal Home Loan

1 Mortgage Corporation's interest in the Subject Property. [Request for Judicial Notice Exhibit
2 "7"]. By furnishing this Court with certified, admissible copies of the recorded Deed of Trust
3 and the Trustee's Deed Upon Sale, Federal Home Loan Mortgage Corporation has met its burden
4 of proving that it acquired title to the Subject Property at a trustee's sale.

5 Further, the Trustee's Deed Upon Sale includes the proper recitals demonstrating prima
6 facie proof that the sale was conducted in accordance with California Civil Code section 2924, *et*
7 *seq.* Therefore, a presumption that all notice requirements were met and that the sale was
8 regularly and fairly conducted is met.

9 Accordingly, Federal Home Loan Mortgage Corporation is the owner of the Subject
10 Property with standing to sue as the real party in interest. See Gantman v. United Pac. Ins. Co.
11 (1991) 232 Cal. App. 3d 1560, 1566. Finally, Defendant's remaining challenge to the validity of
12 Federal Home Loan Mortgage Corporation's title is California Civil Code section 2932.5. As is
13 thoroughly discussed in Plaintiff's Motion in Limine 2 of 6, there is no post-foreclosure remedy
14 for failure to comply with Civil Code 2923.5.

15 **c. The Fact of Plaintiff's Ownership is Judicially Noticeable**

16 Pursuant to the recent holding in Fontenot v. Wells Fargo, judicial notice of the Trustee's
17 Deed Upon Sale pursuant to Evidence § 452, including certain facts contained within it, is
18 appropriate. (2011) 198 Cal. App. 4th 256, 264. As the Court notes,

19 ///

20 "Judicial notice is the recognition and acceptance by the court, for use by
21 the trier of fact or by the court, of the existence of a matter of law or fact
22 that is relevant to an issue in the action without requiring formal proof of
23 the matter. (Poseidon Development, Inc. v. Woodland Lane Estates, LLC
24 (2007) 152 Cal.App.4th 1106, 1117 (Poseidon.) When ruling on a
25 demurrer, —[a] court may take judicial notice of something that cannot
26 reasonably be controverted, even if it negates an express allegation of the
27 pleading. (Ibid.) Accordingly, Evidence Code section 452, subdivisions (c)
28 and (h), respectively, permit a court, in its discretion, to take judicial
notice of —[o]fficial acts . . . of any state of the United States and
—[f]acts and propositions that are not reasonably subject to dispute and
are capable of immediate and accurate determination by resort to sources
of reasonably indisputable accuracy." Id at 265.

The Court goes on to state,

1 Strictly speaking, a court takes judicial notice of facts, not documents.
2 (Evid. Code, § 452, subds. (g), (h).) When a court is asked to take judicial
3 notice of a document, the propriety of the court's action depends upon the
4 nature of the facts of which the court takes notice from the document. As
5 noted in Poseidon, for example, **it was proper for the trial court to take**
6 **judicial notice of the dates, parties, and legally operative language of a**
7 **series of recorded documents, but it would have been improper to**
8 **take judicial notice of the truth of various factual representations**
9 **made in the documents.** (Poseidon, supra, 152 Cal.App.4th at pp. 1117-
10 1118; see similarly Herrera v. Deutsche Bank National Trust Co. (2011)
11 196 Cal.App.4th 1366, 1375 (Herrera.) Taken together, the decisions
12 discussed above establish that **a court may take judicial notice of the**
13 **fact of a document's recordation, the date the document was recorded**
14 **and executed, the parties to the transaction reflected in a recorded**
15 **document, and the document's legally operative language,** assuming
16 there is no genuine dispute regarding the document's authenticity. From
17 this, the court may deduce and rely upon the legal effect of the recorded
18 document, when that effect is clear from its face." (**Emphasis Added**) Id
19 at 265.

20 In this case, the Defendants do not dispute the Trustee's Deed Upon Sale's authenticity or
21 allege that it was forged.

22 Therefore, based on the holding in Fontenot, it is appropriate for this Court to take judicial
23 notice of conveyance of title to the Plaintiff based on the Trustee's Deed Upon Sale. There is
24 simply no further evidence required under law to prove that the Plaintiff owns the property.

25 **d. Defendant Was Served With A Three-Day Notice For Possession.**

26 California Code of Civil Procedure section 1162 states:

27 The notices required by Sections 1161 and 1161a may be served, either:

- 28 1. By delivering a copy to the tenant personally; or,
- 29 2. If he be absent from his place of residence, and from his usual place of
30 business, by leaving a copy with some person of suitable age and discretion at
31 either place, and sending a copy through the mail addressed to the tenant at his
32 place of residence; or,
- 33 3. If such place of residence and business cannot be ascertained, or a person of
34 suitable age or discretion there cannot be found, then by affixing a copy in a
35 conspicuous place on the property, and also delivering a copy to a person
36 there residing, if such person can be found; and also sending a copy through
37 the mail addressed to the tenant at the place where the property is situated.
38 Service upon a subtenant may be made in the same manner.

39 The return of a registered process server creates a presumption of proper service. Bus. &
40 Prof. Code § 22350 *et seq*; Evid. Code § 647 ("The return of a process server registered pursuant
41 to Chapter 16 (commencing with Section 22350) of Division 8 of the Business and Professions

1 Code upon process or notice established a presumption, affecting the burden of producing
2 evidence, of the facts stated in the return.”).

3 Further, the provisions of Evidence Code section 647 applies in an unlawful detainer
4 action:

5 Normally, the landlord will have to produce the person who served the
6 notice to testify to the facts of service. When the issue is controverted,
7 proof by affidavit alone will not suffice. [Citations.] [¶] ... However, if the
8 notice was served by a registered process server [citation], plaintiff may
9 take advantage of a statutory presumption: The registered process server's
10 proof of service can be introduced as a business record [citation], thereby
11 creating a presumption affecting defendant's burden of producing
12 evidence. [Citations.] [¶] If defendant does not introduce rebuttal
13 evidence, the trier of fact must find for plaintiff in accordance with the
14 presumption. Conversely, the presumption is dispelled by defendant's
15 introduction of rebuttal evidence, and the burden shifts back to plaintiff to
16 put the person who served the notice on the stand to testify to proper
17 service.

18 Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2010) ¶¶ 9:204.1-9:204.2, p. 9-54 (rev. #
19 1, 2009).)

20 As the Court of Appeal of California held in Palm Property Investments, LLC v. Yadegar
21 (2011) 194 Cal. App. 4th 1419, 1427-1428 where service is carried out by a registered process
22 server, Evidence Code section 647 applies to eliminate the necessity of calling the process server
23 as a witness at trial. The Court concluded that that this conclusion is consistent with the purpose
24 of the unlawful detainer procedure to afford a relatively simple and speedy remedy for specific
25 landlord-tenant disputes. See also Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 151.

26 Under Evidence Code section 647, the proof of service “establishes a presumption,
27 affecting the burden of producing evidence, of the facts stated in the return.” As explained in
28 Evidence Code section 604 “[t]he effect of a presumption affecting the burden of producing
evidence is to require the trier of fact to assume the existence of the presumed fact unless and
until evidence is introduced which would support a finding of its nonexistence, in which case the
trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence
and without regard to the presumption.” In this case, the Defendant is required to come forth with
evidence – beyond a simple denial in the Defendant’s answer – to overcome the presumption.

1 (Palm Property, 194 Cal. App. 4th 1428; see also Farr v. County of Nevada (2010) 187 Cal. App.
2 4th 669, 680-68, which states “if a presumption affecting the burden of producing evidence
3 applies to a proposition, the proponent of the proposition need not prove it unless the opposing
4 party produces evidence undermining it, in which case the presumption is disregarded and the
5 trier of fact must decide the question without regard to it.” See People v. Chavez (1991) 231 Cal.
6 App. 3d 1471, 1483, “If some fact be presumed, the opponent of that fact bears the burden of
7 producing or going forward with evidence sufficient to overcome or rebut the presumed fact.” Id.

8 On 5/7/2012, Defendants were lawfully served with a three-day written Notice for
9 Possession. However, Defendants remain in unlawful possession.

10 **e. Defendants Remains in Unlawful Possession of the Property**

11 Defendants remain in possession of the Subject Property. For these reasons, there are no
12 triable issues of material fact because Federal Home Loan Mortgage Corporation is the owner of
13 the Subject Property and Defendants remain in unlawful possession. As such, Federal Home
14 Loan Mortgage Corporation is entitled to judgment for possession.

15 **f. Defendants Fail To Establish A Defense To The Unlawful Detainer Action**

16 The defenses available to a defendant in an unlawful detainer action based upon a
17 trustee’s sale are extremely limited. The extent to which a plaintiff’s title may be a triable issue
18 in an unlawful detainer action was addressed by the Supreme Court in Cheney v. Trauzettal
19 (1937) 9 Cal.2d 158, 160:

20 ///

21 The trial court properly held that in the summary proceeding in unlawful detainer
22 the right to possession alone was involved, and the broad question of title could
23 not be raised and litigated by cross-complaint or affirmative defense... It is true
24 that where the purchaser at a trustee’s sale proceeds under §1161a of the Code of
25 Civil Procedure he must prove his acquisition of title by purchase at the sale; but
26 it is only to this limited extent, as provided by statute, that the title may be
27 litigated in such a proceeding... Matters affecting the validity of the trust deed or
28 primary obligation itself, or other basic defects in the plaintiffs title, are neither
properly raised in this summary proceeding for possession nor are they concluded
by the judgment.

Therefore, the only defense in a summary proceeding under California Code of Civil

1 Procedure section 1161a(b)(3) is to dispute the validity of the trustee's sale. As discussed above,
2 the recitals in the Trustee's Deed Upon Sale create the presumption that the foreclosure sale was
3 conducted properly. Cal. Civ. Code § 2924(c). It is well settled law that nonjudicial foreclosures
4 in California are strictly controlled by statute. "The statutory provisions regulating the
5 nonjudicial foreclosure of deeds of trust are contained in sections 2924-2924k. These provisions
6 cover every aspect of exercise of the power of sale contained in a deed of trust." I.E. Associates
7 v. Safeco Title Insurance Company (1985) 39 Cal.3d 281, 285. Further, "a nonjudicial
8 foreclosure is accompanied by a common law presumption that it 'was conducted regularly and
9 fairly.'" Melendrez v. D & I Investment, Inc. (2005) 127 Cal. App. 4th 1238, 1258.

10 This presumption may only be rebutted by *substantial evidence* of prejudicial procedural
11 irregularity. Id. It is the burden of the party challenging the trustee's sale to prove such
12 irregularity and thereby overcome the presumption of the sale's regularity. Id. As a general rule,
13 there is common law rebuttable presumption that a foreclosure sale has been conducted regularly
14 and fairly. Cal. Civ. Code §§ 2924-2924k; Royal Thrift and Loan Co. v. County Escrow, Inc.
15 (2004) 123 Cal. App. 4th 24, 32.

16 Furthermore, a defendant's answer must adequately plead his defense. Cruey v. Gannett
17 Co., Inc. (1998) 64 Cal. App. 4th 356, 367. Evidence that gives rise to nothing more than mere
18 *speculation* is insufficient to establish a triable issue of material fact. Sangster v. Paetkau (1998)
19 68 Cal. App. 4th 151, 163 (bare assertion that a moving party "fabricated" evidence is insufficient
20 to avoid summary judgment.); Joseph E. Di Loreto, Inc. v. O'Neill (1991) 1 Cal. App. 4th 149,
21 161; Annod Corp. v. Hamilton & Samuels (2002) 100 Cal. App. 4th 1286, 1298-1299. If the
22 opposing party's evidence would show some defense not yet pleaded, he should seek leave to
23 amend the pleading before the hearing on the summary judgment. Leibert v. Transworld
24 Systems, Inc. (1995) 32 Cal. App. 4th 1693, 1699; Distefano v. Forester (2001) 85 Cal. App. 4th
25 1249, 1265.

26 Aside from Defendants' apparent misunderstanding of California Civil Code section
27 2932.5, Defendants offer no substantive evidence in the Defendants' respective Answers as to
28 why Plaintiff should not be entitled to possession of the Property, and instead offer only

1 boilerplate affirmative defenses based upon "information and belief."

2 More importantly, Defendants fail to present evidentiary facts to controvert the recitals in
3 the Trustee's Deed Upon Sale to the effect that the sale was legally held. If the Defendants
4 attempt to raise issues relating to Plaintiff's title, it would be improper as such issues are not
5 properly raised in this summary proceeding for possession or concluded by the judgment.
6 Likewise, such issues of title are improperly raised as Defendants are unable to demonstrate a
7 substantial prejudicial procedural irregularity.

8 **g. Defendants' Affirmative Defenses Are Without Merit**

9 As noted above, the Plaintiff does not have to provide to this Court evidence or argument
10 which would negate or refute each of the Affirmative Defenses asserted by Defendant. Montrose
11 Chemical Corp., 6 Cal.App.4th at 301, fn 4; Santa Ana Unified School District, (2001) 90
12 Cal.App. 4th at 411. However, it is clear that Defendants' seventeen (17) collective affirmative
13 defenses have no merit. Using what can be characterized as boilerplate affirmative defenses,
14 Defendants' respective Answers jointly assert failure to state a claim, waiver, estoppel, failure to
15 mitigate damages, statute of frauds, statute of limitations, unclean hands, Plaintiff's lack of
16 standing, Plaintiff's lack of title, an invalid notice to vacate, holder in due course, lack of subject
17 matter jurisdiction, non-compliance with civil code sections 2924 *et. seq.*, 2923.5, 2923.6 and
18 Business and Professions Code section 17200, violation of Senate Bill 1137, and the failure to
19 allege that a landlord-tenant relationship exists. Defendant Alexander Paragas also incorrectly
20 claims that Plaintiff has filed this unlawful detainer action in violation of an automatic stay
21 initiated by a Chapter 13 bankruptcy proceeding filed by Paragas.

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

27 **h. There is No Landlord-Tenant Relationship and Plaintiff has not Acted in**
28 **Violation of Senate Bill 1137**

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

12 The bill analysis offered by the Senate Judiciary Committee is probative on this point.
13 Under the section entitled "Changes to Existing Law" subheading 7, "Tenants to receive
14 additional time to relocate, and would receive notice when their rental property may be subject
15 to foreclosure" pages 17-18, states,

16 "This bill would, instead, require a tenant or subtenant to receive a 60-day notice to
17 quit prior to eviction, providing an additional 30 days for a tenant to relocate from the
18 property. **To ensure that the extended time period cannot be exploited by a**
19 **former owner who rents the property to another person but remains in the**
20 **foreclosed home, the amendments state that the extended time period shall not apply**
21 **if any party to the mortgage note remains in the property as a tenant, subtenant, or**
22 **occupant.**" (**Emphasis Added**).

23 See the full bill analysis here: http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_1101-1150/sb_1137_cfa_20080326_113641_sen_comm.html

24 Further, in the Comments Section of the bill analysis, the first comment is entitled "Authors'
25 amendments to address the concerns of financial institutions," subsection 6 states that the
26 rationale for the deliberate wording of Cal. Code Civ. P. 1161b(b) was to, "Narrow the
27 requirement for a 60-day notice to quit to exclude instances where any party to the note remains
28 in the property as a tenant, subtenant or occupant, **thus addressing concerns of potential abuse**
of the new provision." (**Emphasis Added**).

In the instant case, Defendant Arlene Hari admits to being in possession with the former

1 borrower, Defendant Alexander Paragas. As a tenant living with the former borrower it is not a
 2 bona fide situation and she is only entitled to those protections allotted to her by state law. And
 3 state law expressly precludes the possibility that any additional time be given to a tenant when the
 4 former borrower remains in possession of the Property. This circumstance is precisely the type
 5 anticipated by the drafters of both the State and the Federal laws, and why the laws were written
 6 not to protect non-bona fide tenants living with former borrowers.

7 **i. There Was No Automatic Stay in Place When Plaintiff's Unlawful Detainer**
 8 **Action was Filed and No Action Has Been Taken in Violation of Any**
 9 **Automatic Stay**

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

14 First and foremost, it must be said that there was no automatic stay when the Plaintiff filed
 15 the complaint on 5/16/2012 because contrary to the claims made in Defendant Alexander Paragas'
 16 erroneously titled Motion to Extend the Automatic Stay Pursuant to 11 USC section 362(c)(3)(B),
 17 Defendant Alexander Paragas had already had three (3) bankruptcies pending and dismissed
 18 within the 12 month period prior to the date of filing. Pursuant to Bankruptcy Code 11 U.S.C.
 19 362(4)(A)(i), which states in part: "if a single or joint case is filed by or against a debtor who is an
 20 individual under this title, and if 2 or more single or joint cases of the debtor were pending within
 21 the previous year but were dismissed...the stay under subsection (a) shall not go into effect upon
 22 the filing of the later case."

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

28 On 7/22/2011, Defendant Alexander Paragas filed a second Chapter 13 Bankruptcy
 Petition in the United States Bankruptcy Court, Eastern District of California, Case No. 2:11-bk-

1 37976. [Request for Judicial Notice Exhibit "10"]. This case was dismissed on 8/9/2011 for
2 failure to file information and terminated on 10/18/2011. [Request for Judicial Notice Exhibit
3 "11"]. It should be noted that Mr. McCandless also represented Defendant Alexander Paragas in
4 this second bankruptcy case.

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

11 Despite the fact that Mr. McCandless represented Defendant Alexander Paragas in all 3
12 prior bankruptcy filings, the Motion to Extend the Automatic Stay Pursuant to 11 USC section
13 362(c)(3)(B) filed in Case No. 3:12-bk-31228 only lists the last 2 bankruptcy petitions filed.
14 [Request for Judicial Notice Exhibit "14"]. Incidentally, because there was no automatic stay due
15 to multiple bankruptcy filings within the last 12 months, Debtor erroneously filed a Motion to
16 Extend Automatic Stay when the correct filing would have been a Motion to Impose Automatic
17 Stay Pursuant to 11 USC section 362(c)(4)(B).

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

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

1 7/10/2012, when the case was dismissed, Plaintiff did not take any action in violation of the stay
2 that did not go into effect until 6/11/2012. [Request for Judicial Notice Exhibit "17"].

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

5 Finally, as a condition precedent to challenge the validity of a trustee's sale, the former
6 trustor must pay or tender the payment of all amounts owed on the debt that was secured by the
7 Deed of Trust. As a prerequisite to challenging a foreclosure sale, a borrower must, in good faith
8 and with the ability to pay, make an unconditional tender of the secured debt. Napue v. Gor-Mey
9 West, Inc. (1985) 175 Cal. App. 3d 608, 620-621; Arnolds Management Corp. v. Eischen (1984)
10 158 Cal. App. 3d 575, 578-580; Karlsen v. American Sav. & Loan Assoc. (1971) 15 Cal. App. 3d
11 112, 117. A complaint that attacks the validity of a foreclosure sale but does not allege a proper
12 tender fails to state a cause of action. Karlsen, 15 Cal. App. 3d at 117 [judgment on the
13 pleadings]; MCA, Inc., 27 Cal. App. 3d at 179 [summary judgment].

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

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

28 [D]efendant's assertions of plaintiffs non-compliance with CC §2924; did not

1 raise a triable issue 'because we do not find in the record any offer on the part of
2 [defendant] to pay the full amount of the debt for which the property was given as
3 security. Some disposition on the part of [defendant] to do equity by tendering the
4 amount of the debt due is a prerequisite to a demand for judgment canceling the
5 trustee's sale....Plietner, 70 Cal.App.2d 576, 582, and cases cited. See also
6 Shimpones v. Strickney, 219 Cal. 637, 649, Crummer v. Whitehead, 230
7 Cal.App.2d at 268-269; Humbolt Savings & Loan Soc. V. March, 136 Cal. 321.

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

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

20 IV. CONCLUSION

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

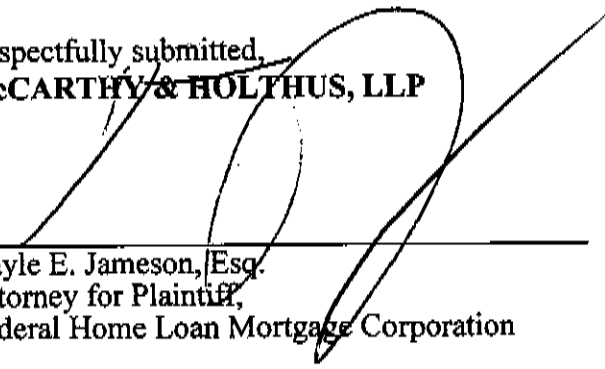
26 The facts establish the elements of an unlawful detainer action and there are no triable
27 issues of material fact. As discussed, Defendants' affirmative defenses fail as a matter of law.
28 Accordingly, Federal Home Loan Mortgage Corporation is entitled to judgment for possession.

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

1 section 415.46, as prayed for in the Complaint.

2 Dated: September 11, 2012

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

5 By: 
6 Gayle E. Jameson, Esq.
7 Attorney for Plaintiff,
8 Federal Home Loan Mortgage Corporation

9
10
11 **McCARTHY & HOLTHUS, LLP**

12 **ATTORNEYS AT LAW**

13 1770 FOURTH AVENUE

14 SAN DIEGO, CALIFORNIA 92161

15 TELEPHONE (619) 685-4800 FACSIMILE (619) 685-4810

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