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 **COPY**

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 4  
OF 6 TO EXCLUDE DEFENDANT  
FROM ALLEGING DUE DILIGENCE  
REQUIREMENT FOR SERVICE OF  
NOTICE FOR POSSESSION**

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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20 Plaintiff, Federal Home Loan Mortgage Corporation, its assignees and/or successors  
21 ("Plaintiff" and/or "Federal Home Loan Mortgage Corporation"), submits the following Motion in  
22 Limine to exclude Defendants from alleging there is any due diligence requirement before serving  
23 a notice for possession following the foreclosure sale.

24 **SUMMARY OF FACTS**

25 Plaintiff seeks a Judgment for Possession and an issuance of a Writ of Possession for the  
26 real property commonly known as 39 Santa Ana Avenue Daly City, CA 94015 ("Property").  
27 Plaintiff purchased the Property at a properly conducted Trustee's Sale on 4/23/2012 and  
28 Defendants Alexander B. Paragas, who is the former borrower, and Arlene Hari, who is an

1 occupant residing with the former borrower ("Defendants") are holding over possession,  
2 preventing Plaintiff from possessing its property.

3 **SUMMARY OF ARGUMENT**

4 Plaintiff moves to exclude Defendant from alleging there is any due diligence requirement  
5 before serving a notice for possession following the foreclosure sale as no such requirement exists  
6 under Code of Civil Procedure §1162. Further, there is a presumption of service when the notice  
7 for possession was served by a registered process server under Evidence Code §647. Any  
8 allegations that there is a due diligence requirement or that the notice was not served properly  
9 should be excluded.

10 **POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S FOURTH MOTION IN**  
11 **LIMINE**

12 **a. NO REASONABLE DILIGENCE OR DUE DILIGENCE IS REQUIRED TO**  
13 **SERVE A NOTICE FOR POSSESSION**

14 Only one attempt to serve of a notice for possession following a foreclosure sale need be  
15 made. Due diligence in this context consists of knocking on the door in order to attempt to either  
16 personally serve the named defendant or defendants on the notice or to attempt substitute service  
17 on a person of suitable age and discretion. There is no requirement for multiple attempts at  
18 personal service or substitute service before posting and mailing. See Code of Civil Procedure  
19 §1162.

20 The Court in Nourafchan v. Miner, in dicta, states that Code of Civil Procedure §1162  
21 does not require a showing of "reasonable diligence" in attempting to personally serve an  
22 occupant. The Court even found that an attempt by the landlord to serve the tenant in that case at  
23 his property was sufficient and constituted a "reasonable attempt" to serve the occupants.  
24 Nourafchan v. Miner (1985) 169 Cal.App.3d, 746, 750. This dicta was followed in Hozz v Lewis  
25 (1989) 215 Cal.App.3d 314, and see also Highland Plastics Inc. v Enders (1980) 109 Cal.App.3d  
26 Supp 1.

27 There are no cases and no authority which require that the Plaintiff do more than what the  
28 registered process server did in this case, and the statutory requirements make no mention of

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1 reasonable or due diligence which is in direct contrast to the "due diligence" requirements to  
2 acquire an Order to Post the Summons which expressly state that the Plaintiff must show that  
3 service cannot be effectuated despite Plaintiff's "reasonable diligence." See Cal. Civ. Proc.  
4 §415.45

5 The three (3) methods for service of the notice for possession are clearly outlined in Cal.  
6 Civ. Proc. §1162 and the statute and case law show no element of reasonable or due diligence.

7 Again, this is in sharp contrast to the requirements for service of the summons and  
8 complaint in an eviction case as outlined in Cal. Civ. Proc. §415.45 which expressly requires  
9 proof of reasonable diligence before a plaintiff may serve the defendants and all others in  
10 possession with a summons and complaint pursuant to an order to post and mail. Simply put, there  
11 is no reasonable or due diligence requirements to serve the notice for possession, unlike the  
12 service of the summons and complaint.

13 If the legislature intended to require reasonable or due diligence in service of the notice for  
14 possession, then the legislature would have made the same requirements as for the service of the  
15 summons and complaint.

16 **b. CAL. EVID. CODE § 647 APPLIES TO PROOFS OF SERVICE EXECUTED**  
17 **BY REGISTERED PROCESS SERVERS**

18 As the Court of Appeal of California held in Palm Property Investments, LLC v. Yadegar,  
19 2011 Cal.App. LEXIS 522, where service is carried out by a registered process server, Cal. Evid.  
20 Code §647 applies to eliminate the necessity of calling the process server as a witness at trial. The  
21 Court concluded that this conclusion is consistent with the purpose of the unlawful detainer  
22 procedure to afford a relatively simple and speedy remedy for specific landlord-tenant disputes.  
23 See also Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 151.

24 Under Cal. Evid. Code §647, the proof of service "establishes a presumption, affecting the  
25 burden of producing evidence, of the facts stated in the return." As explained in Cal. Evid. Code  
26 §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

1 its nonexistence, in which case the trier of fact shall determine the  
2 existence or nonexistence of the presumed fact from the evidence and  
without regard to the presumption.

3 In this case, the Defendant is required to come forth with evidence - beyond just the denial  
4 in the answer - in order to overcome the presumption. (See, Palm Property at 17, and see also Farr  
5 v. County of Nevada (2010) 187 Cal.App.4th 669, 680-68, which states:

6 if a presumption affecting the burden of producing evidence applies to a  
7 proposition, the proponent of the proposition need not prove it unless the  
8 opposing party produces evidence undermining it, in which case the  
presumption is disregarded and the trier of fact must decide the question  
without regard to it.

9 See also People v. Chavez (1991) 231 Cal.App.3d 1471, 1483 which states: "If some fact be  
10 presumed, the opponent of that fact bears the burden of producing or going forward with evidence  
11 sufficient to overcome or rebut the presumed fact."

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1 **CONCLUSION**

2 Plaintiff caused to be served the notice for possession in accordance with Cal. Civ. Proc.  
3 §1162(3). Once an attempt to personal or substitute serve the notice has been accomplished, then  
4 proceeding with the alternative method of service under Cal. Civ. Proc. §1162(3) is proper. There  
5 is no additional requirement beyond what is listed under Cal. Civ. Proc. §1162 and no requirement  
6 for multiple attempts. There is simply no evidence that the Plaintiff did not comply with service  
7 pursuant to Cal. Civ. Proc. §1162.

8 Further, pursuant to Evidence code §647, the service of the notice is presumed pursuant to  
9 the proof of service signed by the registered process server. Therefore any allegations that the  
10 notice was not properly served should be excluded.

11 Alternatively, if the issue of whether the notice for possession was properly served is  
12 deemed to be a factual issue, then any allegation that there are any due diligence requirements  
13 must be excluded as there is no such requirement under Cal. Civ. Proc. §1162.

14 Dated: September 11, 2012

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

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16  
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