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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BANK OF AMERICA, N.A., as Successor
Trustee to LaSalle bank National
Association, as Trustee for the Registered
Holders of Morgan Stanley Capital I Inc.,
Commercial Mortgage Pass-Through
Certificates, Series 2004-HQ4, a national
banking company,

Plaintiff,

No. 2:09-cv-03557 JAM KJN

v.

ABOLGHASSEM ALIZADEH, and
individual, KOBRA ALIZADEH, an
individual,

Defendants.

ORDER

_____ /

Plaintiff's motion for default judgment (Dkt. No. 11) came before the court for
hearing on the undersigned's law and motion calendar on July 8, 2010.¹ (Dkt. No. 17.) Attorney
Steven G. Polard appeared via telephone on behalf of plaintiff. No appearance was made on
behalf of defendants.

¹ This action proceeds before the undersigned pursuant to Eastern District of California
Local Rule 302(c)(19) and 28 U.S.C. § 636(b)(1). This matter was referred to the undersigned by
an order entered February 8, 2010. (Dkt. No. 7.)

1 At the hearing, the undersigned expressed concerns regarding a number of issues
2 raised by the moving papers and record in this case, including whether defendants were served
3 with process in this case consistent with the Federal Rules of Civil Procedure. Plaintiff’s counsel
4 suggested that, if permitted, plaintiff would make efforts to alleviate the court’s concerns
5 regarding service of process and would prepare and submit supplemental briefing to address the
6 court’s other concerns.

7 Accordingly, and as stated during the hearing, plaintiff will be provided sixty (60)
8 days from the date of this order to accomplish the following:

9 1. Effectuate service of process on each defendant consistent with the Federal
10 Rules of Civil Procedure. Alternatively, defendant shall file supplemental briefing and, if
11 necessary, evidentiary support, explaining why plaintiff believes that it already effectuated proper
12 substituted service in accordance with the Federal Rule of Civil Procedure, including Rule 4(e),
13 as well as addressing what additional efforts have been made since the hearing to attempt to
14 effectuate personal service.

15 2. File with the court supplemental briefing and, if necessary, declarations or
16 other evidentiary support, that address the following issues:

17 a. For the purpose of evaluating the court’s subject matter jurisdiction
18 over plaintiff’s claims, and specifically whether complete diversity exists among the parties,
19 which state is designated as plaintiff’s “main office” in its articles of association? See, e.g.,
20 Wachovia Bank v. Schmidt, 546 U.S. 303, 318 (2006) (holding that a national banking
21 association is a citizen of “the State designated in its articles of association as its main office”).

22 b. Which specific provision or provisions in the guaranty agreement,
23 and what specific language therein, gives rise to defendants’ liability for the “full amount of the
24 Debt”? The undersigned notes that the term “Debt” does not appear to be defined in the guaranty
25 agreement.

26 c. What specific language from the document entitled “Assignment of

1 Deed of Trust and Security Agreement and Assignment of Assignment of Leases and Rents”
2 (Compl., Ex. E) effectuated an assignment of the guaranty agreement to plaintiff?

3 d. Aside from the October 15, 2008 notice of default (Compl., Ex. F)
4 and the November 4, 2008 loan acceleration letter (Compl., Ex. G), both of which were
5 apparently copied to defendants and therein “reference” the guaranty agreement, did plaintiff
6 actually make a proper demand for payment of the guaranteed obligations as required under
7 Sections 1.5 and 5.2 of the guaranty agreement and, if not, why was plaintiff excused from
8 making such a demand on defendants?

9 e. Although defendants have not formally appeared in this case, why
10 does defendant Abolghassem Alizadeh’s appearance in the Douglass Pointe LLC and/or Kobra
11 Properties bankruptcy cases not constitute an “appearance” under the Ninth Circuit Court of
12 Appeals’s decision in Ford v. Civic Ctr. Square, Inc. (In re Roxford Foods, Inc.), 12 F.3d 875
13 (9th Cir. 1993), such that plaintiff was obligated to provide notice of its motion for default
14 judgment to defendants pursuant to Federal Rule of Civil Procedure 55(b)(2)? If plaintiff
15 provides notice to defendants of its motion for default judgment subsequent to issuance of this
16 order, plaintiff need not address this question.

17 f. Which specific provisions of the “Loan Documents,” and what
18 specific language of those provisions, entitle plaintiff to the entire amount of the pre-judgment
19 interest sought, which appears to the undersigned to be \$2,273,602.20? The declarations filed in
20 support of plaintiff’s motion and the “payoff demand” do not provide a clear explanation
21 regarding the calculation of the “per diem” interest rate and why plaintiff is entitled to all of the
22 pre-judgment interest sought. Plaintiff’s supplemental explanation should also address why the
23 “per diem” rate arrived at by plaintiff is permissible under California statutory law and the
24 California Constitution.

25 g. Why is plaintiff entitled to recover, pursuant to Section 1.8 of the
26 guaranty agreement and in this guaranty action, all of the attorneys’ fees and costs incurred by

1 plaintiff in pursuing relief on the underlying debt outside of this guaranty action, as opposed to
2 those fees and costs incurred in the enforcement of the guaranty agreement or the preservation of
3 plaintiff's rights under the guaranty agreement? The court notes that plaintiff's explanation in its
4 moving papers regarding the fees sought was not of significant assistance to the court in
5 assessing plaintiff's entitlement to fees and costs under Section 1.8 of the guaranty agreement.

6 IV. CONCLUSION

7 For the reasons stated above, the court HEREBY ORDERS that:

8 1. Plaintiff shall have sixty (60) days from the date of this order to:


9 a. Effectuate service of process on each defendant consistent with the
10 Federal Rules of Civil Procedure or file with the court supplemental briefing explaining why
11 plaintiff believes that it effectuated proper substituted service in accordance with the Federal
12 Rule of Civil Procedure, including Rule 4(e); and

13 b. File with the court supplemental briefing and, if necessary,
14 declarations or other evidentiary support, which address the court's concerns identified above.

15 2. The court will set a hearing after receipt of plaintiff's supplemental
16 briefing if it determines that a hearing is necessary or appropriate.

17 IT IS SO ORDERED.

18 DATED: July 8, 2010

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22 KENDALL J. NEWMAN
23 UNITED STATES MAGISTRATE JUDGE
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