

1 *{YOUR INFO HERE}*

2  
3 *{YOUR NAME HERE}*, In Pro Per  
4  
5  
6

7 **SUPERIOR COURT OF CALIFORNIA**  
8 **COUNTY OF *{YOUR COURT}***

9  
10 *{JDB HERE}*,

11 Plaintiff,

12 vs.

13 *{YOUR NAME HERE}*,

14 Defendant

Case No.: *{YOUR CASE NUMBER}*

**Defendants Motion in Limine**

**Date:** October 17<sup>th</sup>, 2012

**Time:** 09:00AM

**Department:** 2

15  
16 **MOTION**

17 Defendant hereby moves this Court in limine for an Order precluding Plaintiff from entering  
18 into evidence at Trial the document titled Affidavit in Lieu of Testimony and exhibits attached  
19 thereto. The grounds for this motion is that Plaintiff has willfully failed to comply with the rules of  
20 civil procedure that govern Limited Civil Cases in the State of California specifically, Code of Civil  
21 Procedure § 98.  
22

23 **VIEMORANDUM OF POINTS AND AUTHORITIES INTROIDUCTION**

24 Plaintiff properly filed this action as a Limited Civil case. As such, Plaintiff is bound by the  
25 rules of civil procedure for such cases which are found in the Code of Civil Procedure § 90, et seq.  
26 Plaintiff has failed to comply with the requirements of these rules of civil procedure. Said failure  
27 prejudices Defendant in this case and provides Plaintiff with an unfair litigation advantage.  
28

1 **ISSUE PRESENTED**

2 **1. Whether Plaintiff’s Affidavit in Lieu of Testimony should be excluded from evidence at**  
3 **Trial**

4 Plaintiff has served Defendant a document titled Affidavit in Lieu of Testimony which fails to  
5 comply with Code of Civil Procedure § 98. A copy of the Declaration in question, without exhibits, is  
6 attached to the Declaration of {YOUR NAME HERE} in Support of Defendant’s Motion in Limine  
7 filed herewith, and identified as Exhibit "A." Exhibit "A" fails to comply with Code of Civil  
8 Procedure § 98. The declarant was not “available for service of process at that place for a reasonable  
9 period of time, during the 20 days immediately prior to trial." This lack of compliance was willful  
10 and in blatant disregard of the laws which govern this action.  
11

12  
13 For this reasons, Plaintiff should be barred from introducing the proffered Affidavit in Lieu of  
14 Testimony at time of Trial instead of live testimony of their witness.

15 **ARGUMENTS AND AUTHORITIES**

16 **1. The Court Should Bar Plaintiff from Introducing the Affidavit in Lieu of Testimony**

17 Code of Civil Procedure § 98 provides as follows:  
18

19 A party may, in lieu of presenting direct testimony, offer the  
20 prepared testimony of relevant witnesses in the form of affidavits or  
21 declarations under penalty of perjury. The prepared testimony may  
22 include, but need not be limited to, the opinions of expert witnesses,  
23 and testimony which authenticates documentary evidence. To the  
24 extent the contents of the prepared testimony would have been  
admissible were the witness to testify orally thereto, the prepared  
testimony shall be received as evidence in the case, provided that  
either of the following applies:

- 25 a) *A copy has been served on the parry against*  
26 *whom it is offered at least 30 days prior to the trial,*  
27 *together with a current address of the affiant that is*  
28 *within 150 miles of the place of trial, and the affiant*  
*is available for service of process at that place for a*

1                    *reasonable period of time, during the 20 days*  
2                    *immediately prior to trial.*

3                    b) The statement is in the form of all or part of a  
4                    deposition in the case, and the party against whom it  
5                    is offered had an opportunity to participate in the  
6                    deposition.

7                    The court shall determine whether the affidavit or declaration shall  
8                    be read into the record in lieu of oral testimony or admitted as a  
9                    documentary exhibit.

10                   This statute provides three distinct prerequisites which are required for affidavits or  
11                   declarations presented in lieu of direct testimony, if the testimony being offered is not in the form of a  
12                   deposition in the case. First, the declaration must be served on the party against whom it is offered at  
13                   least 30 days prior to Trial. Second, the party who is offering the declaration must provide a “current  
14                   address” of the declarant “that is within 150 of the place of trial.” Third, the declarant must be  
15                   available for service of process “at that place” during the 20 days immediately prior to Trial.

16                   **Current Address**

17                   Plaintiffs Declarant, Ashley Lashinski, has not provided a current address that is within 150  
18                   miles of the place of Trial. In her Affidavit in Lieu of Testimony, dated September 11<sup>th</sup>, 2012,  
19                   Declarant, Ashley Lashinski, has stated under penalty of perjury that her declaration was executed in  
20                   St. Cloud, Minnesota. Notably, no address in St. Cloud, Minnesota is within 150 miles of the place of  
21                   Trial. Additionally, the Affidavit in Lieu of Testimony states that “For 20 days immediately prior to  
22                   any trial in this matter, I agree to accept service at any of the following locations:” Among the five  
23                   different locations Ms. Lashinski will be able to be served 20 days before any trial in California is  
24                   2730 Gateway Oaks, Suite 100, Sacramento, California, 95833. Four other locations in San Diego,  
25                   Westlake Village, San Jose and Upland, California are also listed and all are over 150 miles from the  
26                   court and do not conform to Code of Civil Procedure § 98.  
27  
28

1 Plaintiff's declarant cannot just simply provide any "address for service of process," and  
2 doing so utterly fails to comply with the statute. The addresses provided must be "a current address"  
3 of the declarant and the address must be within 150 miles of the place of trial. The plain meaning of  
4 the statute is clear: declarant whose current address is greater than 150 miles from the place of trial  
5 cannot submit declarations in lieu of direct testimony at trial. Instead, such witnesses must appear at  
6 trial in person. Plaintiff has attempted to circumvent this statutory provision. Because Plaintiff has  
7 failed to meet this basic requirement of Code of Civil Procedure § 98, the Affidavit in Lieu of  
8 Testimony must be excluded from evidence at trial in this matter.

9  
10 **Availability for Service of Process**

11  
12 Declarant, Ashley Lashinski was not available for service of process at the address provided  
13 in her Declaration. On October 27<sup>th</sup>, 2012, the Defendant issued a Civil Subpoena for Appearance at  
14 Trial or Hearing which ordered the Declarant, Ashley Lashinski, to appear in person, at trial on  
15 October 17, 2012. On October 1st, 2012, Sacramento County Sheriff's office made an attempt to  
16 personally serve this Civil Subpoena for Personal Appearance at Trial or Hearing on Ashley  
17 Lashinski at: 2730 Gateway Oaks, Suite 100, Sacramento, California, 95833. Ashley Lashinski was  
18 not available for service at this address she provided in her Affidavit in Lieu of Testimony due to the  
19 fact that there is no business currently in operation at the address listed. Therefore Ashley Lashinski  
20 was not served a copy of the Civil Subpoena for Personal Appearance at Trial or Hearing. Because  
21 declarant, Ashley Lashinski, was not available for service of process, at the address she provided  
22 under penalty of perjury within the 20 days immediately prior to trial, Plaintiff has failed to provide a  
23 declaration which complies with Code of Civil Procedure § 98. Therefore, the Affidavit in Lieu of  
24 Testimony must be excluded from evidence at trial in this matter.

25  
26  
27 **Service in Care Of is not Service**

1           It is bad faith for Plaintiff to attempt to skirt the rules designed for economic litigation by  
2 stating I that its out of state declarant would be available to personally "accept service" "c/o" or "in  
3 care of" by another entity in a limited jurisdiction case. With the five addresses listed as locations the  
4 declarant could be served it shows that the plaintiff intended to have service accepted in care of for  
5 the declarant. In a blatant attempt to avoid the obvious problems of using an out of state declarant  
6 with a CCP §98 declaration, Plaintiff has endeavored an end run around the rules of civil procedure  
7 which require the local presence of the declarant, CCP §98. Declarant, Ashley Lashinski, signed her  
8 Affidavit in Lieu of Testimony in St. Cloud, Minnesota. This would naturally disqualify her from  
9 being a CCP §98 declarant, yet her declaration craftily states she will be available for service at the  
10 office "c/o" *Hunt & Henriques, 2730 Gateway Oaks, Suite 100, Sacramento, California, 95833*.  
11 However, the attempt was made to serve Ms. Lashinski at the address she stated she would be  
12 available at revealed that Ms. Lashinski was not present. Not only was Ms. Lashinski not present to  
13 be served personally but no business was in operation at this location at all. Attempting this  
14 arrangement for service in care of is false since subpoenas must be served personally:"the service of a  
15 subpoena is made by delivering a copy, or a ticket containing its substance, to the witness  
16 personally." *Cal. Code Civ. Proc. 1987(a). In the case of In re Abrams 1980), 108 Cal. App. 3D 685,*  
17 *166 Cal. Rptr. 749*, the court points out the difference between service of a subpoena and service of a  
18 summons:

19  
20  
21  
22           In addition to the lack of express statutory authorization for serving  
23 witness subpoenas on agents, service of a subpoena differs from service of  
24 summons because the penalty for disobeying a subpoena may be much more  
25 serious than that for not responding to a summons, hence it is much more  
26 important to maximize the probability of notice to the contemptner than to the  
27 usual defendant. Not answering a summons normally will produce a default  
28 judgment for the payment of money, which may sometimes be later set aside  
under Code of Civil Procedure section 473 or an analogous procedure. Non  
response to a subpoena may result in money damages plus five days'  
imprisonment. The difference in possible consequences may help explain why

1 the Legislature has provided many different modes of serving summons, **but**  
2 **one, personal delivery for serving a subpoena."** *Id. At 690(Emphasis added)*

3 Arranging to have one of their local debt collection colleagues agree to "accept service" for an  
4 out of state declarant is simply not permissible under the foregoing law governing personal service of  
5 subpoenas to appear at trial. Plaintiff's invalid and specious arrangement balks at the laws which  
6 govern this court and those who practice before it. Those submitting evidence to California courts  
7 against California resident must be subject to the jurisdiction of California courts if justice is to be  
8 served. Surely, the California legislature did not intend CCP § 98 to create a means for out of state  
9 witness declarations to be used carte blanche and without being subject to cross-examination in  
10 California courts.  
11

### 12 CONCLUSION

13  
14 The Affidavit in Lieu of Testimony proffered by Plaintiff fails to meet two (2) out of the three  
15 (3) requirements for admissibility under Code of Civil Procedure § 98. By falsely asserting that its  
16 declarant, Ms. Lashinski, would be available for personal service of process in California. Plaintiff,  
17 MIDLAND FUNDING, LLC, deliberately sought to violate the intent of the rules designed for  
18 limited economic litigation and attempted to perpetrate a fraud on the court. If such behavior would  
19 be indulged, there would be no point in establishing such rules. Further, without an opportunity to  
20 subpoena and cross-examine this key witness, admission of the affidavit would violate Defendant's  
21 due process rights. Finally, it would not be economic litigation if a defendant were forced to waste  
22 money and resources on false representation of witness location, or to go nearly 3000 miles to depose  
23 a witness.  
24

25  
26 The rules of Civil Procedure for economic litigation are meant to simplify limited cases and  
27 make the process affordable to the litigants, not to add unnecessary complexity and difficulty for a  
28

1 defendant who wishes to exercise his right to cross examine witnesses against him. As the foregoing  
2 demonstrates, Plaintiff's willful misrepresentations caused defendant to waste time and money in trial  
3 planning, attempting to have a Trial Subpoena served on the Plaintiff's declarant at the address  
4 indicated. Not only that, but it founds an illegal trap for the unwary litigant and constitutes a fraud on  
5 this court. If defendant had not attempted to serve the declarant as the designated location, then this  
6 court may have likely accepted the truth of the assertions contained in the affidavit as being proper  
7 and in compliance with CCP § 98. Therefore, because Plaintiff has failed to comply with Code of  
8 Civil Procedure § 98, this Court must exclude the Affidavit in Lieu of Testimony and all exhibits  
9 which it purports to support as it contains pure hearsay and receive only live testimony at the trial in  
10 this matter.  
11  
12

13  
14 Respectfully Submitted on this the day of *{DATE}*.

15  
16  
17  
18  
19 \_\_\_\_\_  
*{YOUR NAME HERE}*  
In Pro Per