

12 B. 4

**LEWIS BRISBOIS BISGAARD & SMITH LLP**

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Attorneys for FINCH THORNTON &  
BAIRD, DAVID DEMIAN AND ADAM  
WITT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual;  
JOE HURTADO, an individual;

Plaintiffs,

vs.

LARRY GERACI, an individual;  
REBECCA BERRY a/k/a REBECCA  
ANN BERRY RUNYAN, an  
individual; MICHAEL R.  
WEINSTEIN, an individual; SCOTT  
TOOTHACRE, an individual; FERRIS  
& BRITTON APC, a California  
corporation; GINA M. AUSTIN, an  
individual; AUSTIN LEGAL GROUP  
APC, a California corporation; SEAN  
MILLER, an individual; FINCH  
THORNTON & BAIRD, a limited  
liability partnership; DAVID DEMIAN,  
an individual; ADAM WITT, an  
individual; and DOES 1 through 50,  
inclusive,

Defendants.

CASE NO. 18CV2751 GPC MDD

**DEFENDANTS FINCH  
THORNTON & BAIRD LLP,  
DAVID DEMIAN AND ADAM  
WITT'S NOTICE OF MOTION  
AND MOTION TO DISMISS  
PURSUANT TO FRCP 4**

Date: May 24, 2019  
Time: 1:30 p.m.  
Courtroom: 2D  
Judge: Hon. Gonzalo P. Curiel

Complaint Filed: December 6, 2018  
Trial Date: None Set

[No Oral Argument Requested]

**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that on May 24, 2019, at 1:30 p.m., or as soon  
thereafter as the matter may be heard, in Courtroom 2D of the above entitled Court,  
located at United States Courthouse - Southern District, Edward J. Schwartz

4828-4966-6958.1

18CV2751W AGS

DEFENDANTS FINCH THORNTON & BAIRD, DAVID DEMIAN AND ADAM WITT'S NOTICE OF MOTION  
AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FRCP 4

1 Courthouse, 221 West Broadway, San Diego, CA 92101, defendants Finch Thornton  
2 & Baird, David Demian and Adam Witt ("FTB Defendants) will and hereby do move  
3 this Court for an Order, pursuant to Federal Rule of Civil Procedure 4, for an order  
4 dismissing them from this litigation without prejudice.

5 This motion is made on the grounds that plaintiff has failed to serve FTB  
6 Defendants in the manner prescribed by Federal Rule of Civil Procedure 4(e) and  
7 4(h) within the time constraints set by Federal Rule of Civil Procedure 4(m), and  
8 dismissal without prejudice is a remedy provided under Federal Rule of Civil  
9 Procedure 4.

10 This Motion is based upon this Notice of Motion, the accompanying  
11 Memorandum of Points and Authorities, the Request for Judicial Notice, the  
12 Declarations of David Demian, Adam Witt, Alexandria Choukair and Tim J. Vanden  
13 Heuvel, all pleadings, papers and records on file herein, any further matter of which  
14 the Court may take judicial notice, and such oral argument as may be presented at the  
15 hearing of this Motion.

16  
17 DATED: March 25, 2019

LEWIS BRISBOIS BISGAARD & SMITH LLP

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19  
20 By: /s/ Tim J. Vanden Heuvel  
21 Tim J. Vanden Heuvel  
22 Attorneys for Finch Thornton & Baird,  
23 LLP, David Demian and Adam Witt  
24  
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26  
27  
28

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WEINSTEIN, an individual; SCOTT  
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& BRITTON APC, a California  
corporation; GINA M. AUSTIN, an  
individual; AUSTIN LEGAL GROUP  
APC, a California corporation; SEAN  
MILLER, an individual; FINCH  
THORNTON & BAIRD, a limited  
liability partnership; DAVID DEMIAN,  
an individual; ADAM WITT, an  
individual; and DOES 1 through 50,  
inclusive,

Defendants.

CASE NO. 18CV2751 GPC MDD

**DEFENDANTS FINCH  
THORNTON & BAIRD, DAVID  
DEMIAN AND ADAM WITT'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
THEIR MOTION TO DISMISS  
PLAINTIFFS' COMPLAINT FOR  
DAMAGES PURSUANT TO FRCP 4**

Date: May 24, 2019

Time: 1:30 p.m.

Courtroom: 2D

Judge: Hon. Gonzalo P. Curiel

Complaint Filed: December 6, 2018

Trial Date: None Set

[No Oral Argument Requested]

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiffs in this action, Darryl Cotton and Joe Hurtado, have attempted to plead one claim for relief entitled “Legal Malpractice” against defendant Finch Thornton & Baird, LLP and its partners David Demian and Adam Witt (“FTB Defendants”). The case revolves around a pending Superior Court case (*Larry Geraci v Darryl Cotton*, Superior Court of California, County of San Diego 37-2017-00010073-CU-BC-CTL) in which FTB Defendants previously represented Darryl Cotton.

After the attorney-client relationship became strained over strategy decisions, a mutual decision was made for FTB Defendants to withdraw as counsel for Cotton. Cotton now sues FTB Defendants as after their withdrawal was approved on the grounds that he “was unable to convey the facts free of emotion resulting in his inability to persuade the trial court of the frivolous nature of the action against him...Summarily stated, Cotton’s submissions to the Court and oral arguments at hearings, alleging a conspiracy ... made him appear to be a ‘conspiracy nut’.” [Complaint ¶ 36; Docket #1]

Needless to say, FTB Defendants believe that there is no liability to Cotton or Hurtado (admittedly never a client of FTB) under a legal malpractice theory. Cotton is now represented by counsel in the underlying action, and even if he could not “convey the facts free of emotion” and “lost all credibility” while he was *pro se*, that inability was not the fault of FTB Defendants. Nor should it prejudice the outcome of the pending Superior Court litigation in that he is now represented by counsel.

All these factual observations aside, FTB Defendants bring the current motion on a purely legal ground. Plaintiffs have failed to timely serve FTB Defendants in a manner prescribed by Federal Rule of Civil Procedure 4(e) and 4(h). Given that FTB Defendants were not served within the time constraints set by Federal Rule of Civil Procedure 4(m), they hereby request that the Court dismiss them from this action

1 without prejudice at this juncture.

## 2 **II. FACTS**

3 On December 6, 2018, plaintiffs Darryl Cotton and Joe Hurtado filed the  
4 current action. [Docket #1<sup>1</sup>] Pursuant to Federal Rule of Civil Procedure 4(m),  
5 plaintiffs then had ninety days to effectuate service in compliance with Federal Rule  
6 of Civil Procedure 4(e) on individual defendants Demian and Witt, and Federal Rule  
7 of Civil Procedure 4(h) on Limited Liability Partnership Finch Thornton & Baird,  
8 LLP. Ninety days from the filing of the Complaint on December 6, 2018 was March  
9 6, 2019<sup>2</sup>.

10 On the eighty ninth day, March 5, 2019, an individual entered the offices of  
11 Finch Thornton & Baird, LLP at 4747 Executive Drive, San Diego, CA 92121,  
12 asking the receptionist if David Demian or Adam Witt was present. [Choukair  
13 Declaration ¶ 2] Neither was in the office the one time that the individual came in  
14 looking for them. The receptionist, Alexandra Choukair, is not authorized to accept  
15 service of process for Finch Thornton & Baird, LLP, David Demian or Adam Witt<sup>3</sup>.  
16 [Choukair Declaration ¶ 4] Told by the receptionist that neither David Demian or  
17 Adam Witt were present, the individual handed an envelope to the receptionist  
18 saying it contained “documents.” [Choukair Declaration ¶ 2]

19 The Proofs of Service filed in this matter demonstrate these facts are true. As  
20 to each FTB Defendant, the Proof states that each defendant was served at 4747  
21 Executive Drive, San Diego, CA 92121, the offices of Finch Thornton & Baird, LLP.  
22 As to each FTB Defendant, in the location where an address for personal service is  
23 \_\_\_\_\_

24 <sup>1</sup> As to each of the Docket entries cited, FTB Defendants request Judicial Notice of  
25 the docket contents pursuant to Federal Rule of Evidence 201.

26 <sup>2</sup> FTB Defendants request Judicial Notice of the ninetieth day following filing of the  
27 Complaint (March 6, 2019) pursuant to Federal Rule of Evidence 201.

28 <sup>3</sup> Neither David Demian nor Adam Witt resides at the offices of Finch Thornton &  
Baird, LLP at 4747 Executive Drive, San Diego, CA 92121. [Witt Decl. ¶ 3,  
Demian Decl. ¶ 3]

1 supposed to be inserted, the server instead wrote “on Alexandra Choukair, in  
2 charge.” [Docket #4, 6, 7]

3 As of the filing of this motion, the ninety day limitation for service pursuant to  
4 Federal Rule of Civil Procedure 4(m) has run. Having not accomplished proper  
5 service, each of the FTB Defendants move for dismissal without prejudice pursuant  
6 to Federal Rule of Civil Procedure 4(m).

7 **III. PLAINTIFFS FAILED TO TIMELY EFFECTUATE SERVICE,**  
8 **AND FTB DEFENDANTS REQUEST DISMISSAL WITHOUT**  
9 **PREJUDICE**

10 **A. Time for Service Expired on March 6, 2019**

11 Federal Rule of Civil Procedure 4(c) states in pertinent part that “the plaintiff  
12 is responsible for having the summons and complaint served within the time allowed  
13 by Rule 4(m).” Federal Rule of Civil Procedure 4(m) specifies the time limitation as  
14 90 days after the Complaint is filed. Ninety days from the filing of the Complaint on  
15 December 6, 2018 was March 6, 2019.

16 **B. Plaintiffs’ Purported Service on David Demian and Adam Witt is**  
17 **Defective**

18 Pursuant to Federal Rule of Civil Procedure 4(c), service of an individual  
19 within a judicial district of the United States must be accomplished either by  
20 “following state law for serving a summons in an action brought in courts of general  
21 jurisdiction in the state where the district court is located,” or by doing any of the  
22 following:

23 (A) delivering a copy of the summons and complaint to the individual  
24 personally;

25 (B) leaving a copy of each at the defendants dwelling or usual place of abode  
26 with someone of suitable age and discretion who resides there; or

27 (C) delivering a copy to an agent authorized by appointment or by law to  
28 receive service of process.

1 The California Code of Civil Procedure largely parallels those rules, requiring  
 2 personal service (C.C.P. § 415.10) or service at office or abode with subsequent  
 3 mailing by first class mail, postage prepaid, (C.C.P. § 415.20), or service by  
 4 publication on Court Order. (C.C.P. § 415.50)

5 As to the individual FTB Defendants, David Demian and Adam Witt, the  
 6 Proof of Service merely indicates that a copy of the summons and Complaint were  
 7 left at the offices of Finch Thornton & Baird, LLP with “Alexandra Choukair, in  
 8 charge.” [Docket #4, 6]

9 Neither Demian nor Witt was served personally. [Demian Decl. ¶ 3; Witt Decl.  
 10 ¶ 3] Neither Demian nor Witt was served by “leaving a copy of each at the  
 11 defendants dwelling or usual place of abode with someone of suitable age and  
 12 discretion who resides there.” [Demian Decl. ¶ 3; Witt Decl. ¶ 3] Neither Demian  
 13 nor Witt ever appointed receptionist Alexandria Choukair to receive service of  
 14 process on their behalf. [Demian Decl. ¶ 4; Witt Decl. ¶ 4] Neither Demian nor Witt  
 15 ever received a copy of the summons and complaint via mail, or signed a waiver of  
 16 service. [Demian Decl. ¶ 4; Witt Decl. ¶ 4] In short, no effective service of Demian  
 17 or Witt was accomplished before the ninety day cut-off.

18 **C. Plaintiffs’ Purported Service on Finch Thornton & Baird, LLP is**  
 19 **Defective**

20 As to service on a partnership or corporation, Federal Rule of Civil Procedure  
 21 4(h) provides that service can be made “following state law for serving a summons in  
 22 an action brought in courts of general jurisdiction in the state where the district court  
 23 is located,” or by “delivering a copy of the summons and of the complaint to an  
 24 officer, a managing or general agent, or any other agent authorized by appointment  
 25 or by law to receive service of process and – if the agent is one authorized by statute  
 26 and the statute so requires – by also mailing a copy to each defendant.”

27 The California Code of Civil Procedure largely parallels those rules, requiring  
 28 personal service to the person designated as agent for service of process as provided

1 in Section 24003 of the Corporations Code or to a general partner or general manager  
2 of the partnership. (C.C.P. § 416.40)

3 As to the partnership defendant Finch Thornton & Baird, LLP, the Proof of  
4 Service merely indicates that a copy of the summons and Complaint was left at the  
5 offices of Finch Thornton & Baird, LLP with “Alexandria Choukair, in charge.”  
6 [Docket # 7] Alexandria Choukair is not an officer, a managing or general agent of  
7 Finch Thornton & Baird, LLP. [Choukair Declaration ¶ 3] Alexandria Choukair was  
8 never authorized by appointment to accept service of process for Finch Thornton &  
9 Baird, LLP. [Choukair Declaration ¶ 4; Demian Decl. ¶ 4] Finch Thornton & Baird,  
10 LLP never received a copy of the summons and complaint via mail, or signed a  
11 waiver of service. [Demian Decl. ¶ 4] In short, no effective service of Finch  
12 Thornton & Baird, LLP was accomplished before the ninety day cut-off.

#### 13 **D. FTB Defendants Request Dismissal without Prejudice**

14 By the plain text of Rule 4, the plaintiffs have the burden to “demonstrate that  
15 the procedure employed to deliver the papers satisfies the requirements of the  
16 relevant portions of Rule 4.” 4A C. Wright and A. Miller, Federal Practice and  
17 Procedure § 1083 (3d ed. 2002 & Supp. 2012); see *Light v. Wolf*, 816 F. 2d 746,  
18 751(D.C.Cir. 1987); *Grand Entm’t Group, Ltd. v Star Media Sales, Inc.* 988 F. 2d  
19 434, 435 (3d Cir. 1993).

20 Federal Rule of Civil Procedure 4(m) provides that this Court may enter  
21 dismissal without prejudice of named defendants not served within the ninety day  
22 mandate, “but if the plaintiff shows good cause for the failure, the court must extend  
23 the time for service for an appropriate period.” (emphasis added) Good cause exists  
24 “when some outside factor, rather than inadvertence or negligence, prevented  
25 service.” *Lepone-Dempsey v Carroll Cnty. Com’rs*, 476 F.3d 1277, 1281 (11<sup>th</sup> Cir.  
26 2007) An example is defendants intentional evasion of service. *Lepone-Dempsey v*  
27 *Carroll Cnty. Com’rs, Id.*

28 ///

4828-1348-6990.1

1 Plaintiffs under these circumstances clearly cannot demonstrate “good cause  
 2 for the failure.” Plaintiffs waited until the last day to even attempt service, then  
 3 showed flagrant disregard for FRCP 4. FTB Defendants have not attempted to evade  
 4 service. [Demian Decl. ¶ 5; Witt Decl. ¶ 5] Finch, Thornton & Baird, LLP is an  
 5 operating law firm whose office is open from 8:00 a.m. to 6:00 p.m. every business  
 6 day, and Witt and Demian are regularly in the office during those times. [Demian  
 7 Decl. ¶ 5; Witt Decl. ¶ 5]

8 The failure to properly serve FTB Defendants in case at bar is clearly one of  
 9 attorney inadvertence or negligence, for which the remedy is a dismissal of the FTB  
 10 Defendants without prejudice. As no effective service was made on any of the FTB  
 11 Defendants within the statutory time frame, they request that the Court order their  
 12 dismissal without prejudice from this action forthwith.

13  
 14 DATED: March 25, 2019

LEWIS BRISBOIS BISGAARD & SMITH LLP

15  
 16  
 17 By: /s/ Tim J. Vanden Heuvel

18 Tim J. Vanden Heuvel

19 Attorneys for Finch Thornton & Baird,  
 20 LLP, David Demian and Adam Witt  
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WITT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual;  
JOE HURTADO, an individual;

Plaintiffs,

vs.

LARRY GERACI, an individual;  
REBECCA BERRY a/k/a REBECCA  
ANN BERRY RUNYAN, an  
individual; MICHAEL R.  
WEINSTEIN, an individual; SCOTT  
TOOTHACRE, an individual; FERRIS  
& BRITTON APC, a California  
corporation; GINA M. AUSTIN, an  
individual; AUSTIN LEGAL GROUP  
APC, a California corporation; SEAN  
MILLER, an individual; FINCH  
THORNTON & BAIRD, a limited  
liability partnership; DAVID DEMIAN,  
an individual; ADAM WITT, an  
individual; and DOES 1 through 50,  
inclusive,

Defendants.

CASE NO. 18CV2751 GPC MDD

**DECLARATION OF DAVID  
DEMIAN IN SUPPORT OF  
DEFENDANTS FINCH  
THORNTON & BAIRD, DAVID  
DEMIAN AND ADAM WITT'S  
MOTION TO DISMISS  
PLAINTIFFS' COMPLAINT FOR  
DAMAGES PURSUANT TO FRCP 4**

Date: May 24, 2019

Time: 1:30 p.m.

Courtroom: 2D

Judge: Hon. Gonzalo P. Curiel

Complaint Filed: December 6, 2018

Trial Date: None Set

[No Oral Argument Requested]

I, David Demian, do declare as follows:

1. I am an attorney at law, duly licensed to practice in all Courts in the  
State of California. I am a partner with the law offices of Finch Thornton & Baird,  
LLP, 4747 Executive Drive, San Diego, CA 92121 and competent to make this

4830-1625-5630.1

18CV2751W AGS

DECLARATION OF DAVID DEMIAN IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS'  
COMPLAINT

1 declaration. I have personal knowledge of the following facts, and if called as a  
2 witness to do so, could and would testify competently as follows.

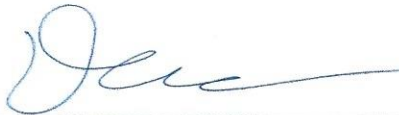
3       2. I have observed the purported Proof of Service in this matter regarding  
4 alleged service of the Summons and Complaint upon me. As to myself, the Proof of  
5 Service merely indicates that a copy of the summons and Complaint were left at the  
6 offices of Finch Thornton & Baird, LLP, 4747 Executive Drive, San Diego, CA  
7 92121, with "Alexandria Choukair, in charge" on March 5, 2019. [Docket # 6]  
8 Pursuant to the Finch Thornton & Baird, LLP delivery log, this occurred at  
9 approximately 1:17 p.m. I was not present at Finch Thornton & Baird, LLP at that  
10 time.

11       3. I was never served personally with the Summons and Complaint.  
12 I was not served by "leaving a copy of each at the defendants dwelling or usual place  
13 of abode with someone of suitable age and discretion who resides there." I do not  
14 reside at 4747 Executive Drive, San Diego, CA 92121, where the Proof of Service  
15 indicates service was attempted.

16       4. I never appointed Finch Thornton & Baird, LLP receptionist Alexandria  
17 Choukair to receive service of process on my behalf. I never received a copy of the  
18 summons and complaint via U.S. first class mail, or signed a waiver of service in this  
19 matter. I have also done a thorough investigation and determined that Finch  
20 Thornton & Baird, LLP never appointed Finch Thornton & Baird, LLP receptionist  
21 Alexandria Choukair to receive service of process on its behalf, never received a  
22 copy of the summons and complaint via U.S. mail, or signed a waiver of service in  
23 this matter.

24       5. I have never attempted to evade service of the Summons and Complaint  
25 in this matter. I have been regularly at Finch Thornton & Baird, LLP practicing law  
26 since the case was filed, and residing at my home in San Diego County. Finch,  
27 Thornton & Baird, LLP is an operating law firm whose office is open from 8:00 a.m.  
28 to 6:00 p.m. every business day, and I am generally in the office during these times.

1 I declare the following under penalty of perjury under the laws of the State of  
2 California and the United States of America. Given this 25<sup>th</sup> day of March in San  
3 Diego, California.

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5 By:   
6 David Demian, Esq.

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APC, a California corporation; SEAN  
MILLER, an individual; FINCH  
THORNTON & BAIRD, a limited  
liability partnership; DAVID DEMIAN,  
an individual; ADAM WITT, an  
individual; and DOES 1 through 50,  
inclusive,

Defendants.

CASE NO. 18CV2751 GPC MDD

**DECLARATION OF ADAM WITT  
IN SUPPORT OF DEFENDANTS  
FINCH THORNTON & BAIRD,  
DAVID DEMIAN AND ADAM  
WITT'S MOTION TO DISMISS  
PLAINTIFFS' COMPLAINT FOR  
DAMAGES PURSUANT TO FRCP 4**

Date: May 24, 2019

Time: 1:30 p.m.

Courtroom: 2D

Judge: Hon. Gonzalo P. Curiel

Complaint Filed: December 6, 2018

Trial Date: None Set

[No Oral Argument Requested]

I, Adam Witt, do declare as follows:

1. I am an attorney at law, duly licensed to practice in all Courts in the  
State of California. I am a partner with the law offices of Finch Thornton & Baird,  
LLP, 4747 Executive Drive, San Diego, CA 92121 and competent to make this

4831-7609-8702.1

18CV2751W AGS

DECLARATION OF ADAM WITT IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS'  
COMPLAINT

1 declaration. I have personal knowledge of the following facts, and if called as a  
2 witness to do so, could and would testify competently as follows.

3 2. I have observed the purported Proof of Service in this matter regarding  
4 alleged service of the Summons and Complaint upon me. As to myself, the Proof of  
5 Service merely indicates that a copy of the summons and Complaint were left at the  
6 offices of Finch Thornton & Baird, LLP, 4747 Executive Drive, San Diego, CA  
7 92121, with "Alexandria Choukair, in charge." [Docket # 4] Pursuant to the Finch  
8 Thornton & Baird, LLP delivery log, this occurred at approximately 1:17 p.m. I was  
9 not present at Finch Thornton & Baird, LLP at that time.

10 3. I was never served personally with the Summons and Complaint.  
11 I was not served by "leaving a copy of each at the defendants dwelling or usual  
12 place of abode with someone of suitable age and discretion who resides there." I do  
13 not reside at 4747 Executive Drive, San Diego, CA 92121, where the Proof of  
14 Service indicates service was attempted.

15 4. I never appointed Finch Thornton & Baird, LLP receptionist  
16 Alexandria Choukair to receive service of process on my behalf. I never received a  
17 copy of the summons and complaint via U.S. first class mail, or signed a waiver of  
18 service in this matter.

19 5. I have never attempted to evade service of the Summons and Complaint  
20 in this matter. I have been regularly at Finch Thornton & Baird, LLP practicing law  
21 since the case was filed, and residing at my home in San Diego County. Finch,  
22 Thornton & Baird, LLP is an operating law firm whose office is open from 8:00  
23 a.m. to 6:00 p.m. every business day, and I am generally in the office during these  
24 times.

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28 ///

1 I declare the following under penalty of perjury under the laws of the State of  
2 California and the United States of America. Given this 25<sup>th</sup> day of March in San  
3 Diego, California.

4  
5 By: 

6 Adam Witt, Esq.  
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JOE HURTADO, an individual;

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Defendants.

CASE NO. 18CV2751 GPC MDD

**DECLARATION OF ALEXANDRA  
CHOUKAIR IN SUPPORT OF  
DEFENDANTS FINCH  
THORNTON & BAIRD, DAVID  
DEMIAN AND ADAM WITT'S  
MOTION TO DISMISS  
PLAINTIFFS' COMPLAINT FOR  
DAMAGES PURSUANT TO FRCP 4**

Date: May 24, 2019  
Time: 1:30 p.m.  
Courtroom: 2D  
Judge: Hon. Gonzalo P. Curiel

Complaint Filed: December 6, 2018  
Trial Date: None Set

[No Oral Argument Requested]

I, Alexandra Choukair, do declare as follows:

1. I am an adult and competent to make this declaration. I have personal knowledge of the following facts, and if called as a witness to do so, could and would testify competently as follows.

4852-0044-4814.1

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DECLARATION OF ALEXANDRIA CHOUKAIR IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS  
PLAINTIFFS' COMPLAINT

2. On March 5, 2019 at approximately 1:17 p.m., I was at the front desk of Finch Thornton & Baird, LLP, 4747 Executive Drive, San Diego, CA 92121, acting as a receptionist. A person entered and asked if David Demian or Adam Witt were present. I thereupon informed the person that neither David Demian nor Adam Witt were present at the office. The person thereupon handed me an envelope bearing the sender name of Law Office of Jacob Austin, stating only that it contained "documents."

3. My job as receptionist at Finch Thornton & Baird, LLP generally entails greeting visitors, answering the front desk phone, and providing coffee and water to guests. I have no formal legal training. I am not an officer, director, managing or general agent of Finch Thornton & Baird, LLP. I am not an attorney or partner with Finch Thornton & Baird, LLP.

4. I have never been authorized to accept service of process on behalf of Finch Thornton & Baird, LLP, David Demian or Adam Witt, and have never held myself out as their agent for service of process. I am not an authorized agent for service of process for Finch Thornton & Baird, LLP under the Corporate Code. I never told the person who handed me the envelope that I was authorized to accept service of process on behalf of Finch Thornton & Baird, LLP, David Demian or Adam Witt, and had no idea what was even in the envelope, other than "documents."

I declare the following under penalty of perjury under the laws of the State of California and the United States of America. Given this 25<sup>th</sup> day of March in San Diego, California.

By: 

Alexandra Choukair

**LEWIS BRISBOIS BISGAARD & SMITH LLP**

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Attorneys for FINCH THORNTON &  
BAIRD, DAVID DEMIAN AND ADAM  
WITT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual;  
JOE HURTADO, an individual;

Plaintiffs,

vs.

LARRY GERACI, an individual;  
REBECCA BERRY a/k/a REBECCA  
ANN BERRY RUNYAN, an  
individual; MICHAEL R.  
WEINSTEIN, an individual; SCOTT  
TOOTHACRE, an individual; FERRIS  
& BRITTON APC, a California  
corporation; GINA M. AUSTIN, an  
individual; AUSTIN LEGAL GROUP  
APC, a California corporation; SEAN  
MILLER, an individual; FINCH  
THORNTON & BAIRD, a limited  
liability partnership; DAVID DEMIAN,  
an individual; ADAM WITT, an  
individual; and DOES 1 through 50,  
inclusive,

Defendants.

CASE NO. 18CV2751 GPC MDD

**DECLARATION OF TIM J.  
VANDEN HEUVEL IN SUPPORT  
OF DEFENDANTS FINCH  
THORNTON & BAIRD, DAVID  
DEMIAN AND ADAM WITT'S  
MOTION TO DISMISS  
PLAINTIFFS' COMPLAINT FOR  
DAMAGES PURSUANT TO FRCP 4**

Date: May 24, 2019

Time: 1:30 p.m.

Courtroom: 2D

Judge: Hon. Gonzalo P. Curiel

Complaint Filed: December 6, 2018

Trial Date: None Set

[No Oral Argument Requested]

I, Tim J. Vanden Heuvel, do declare as follows:

1. I am an attorney at law, duly licensed to practice in all Courts in the State of California. I am a partner with the law offices of Lewis Brisbois Bisgaard & Smith, LLP, and competent to make this declaration. I have personal knowledge of

4810-4104-8974.1

18CV2751W AGS

DECLARATION OF TIM J. VANDEN HEUVEL IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS  
PLAINTIFFS' COMPLAINT

1 the following facts, and if called as a witness to do so, could and would testify  
2 competently as follows.

3 2. Prior to bringing this motion, I made numerous attempts to meet and  
4 confer with plaintiffs counsel, Jacob Austin, Esq. In particular, I sent an email on  
5 March 19, 2019 at 1:16 p.m. to his listed e-mail, [JPA@jacobaustinesq.com](mailto:JPA@jacobaustinesq.com), which  
6 stated: "Pursuant to my earlier telephone calls, we are counsel for Finch, Thornton  
7 & Baird, David Demian and Adam Witt in the above referenced matter. We are  
8 formally requesting a meet and confer session regarding our clients Motion to  
9 Dismiss Pursuant to Rule 4 of the FRCP. Given the impending date for filing our  
10 responsive pleading, we request that you call me within 24 hours to meet and confer  
11 pursuant to the Local Rules. Thank you in advance for your cooperation." I also  
12 made two calls that day to the telephone number listed on the Complaint as his office  
13 number, and left messages.

14 3. On March 20, 2019, I again called to the telephone number listed on the  
15 Complaint as his office number, and left a message. On March 20, 2019 at 10:04  
16 a.m., I sent another email to his listed e-mail, [JPA@jacobaustinesq.com](mailto:JPA@jacobaustinesq.com), which  
17 stated: "I have made multiple calls over a number of days with no response. We are  
18 formally requesting a meet and confer session regarding our clients Motion to  
19 Dismiss Pursuant to Rule 4 of the FRCP. Given the impending date for filing our  
20 responsive pleading, we request that you call me today to meet and confer pursuant  
21 to the Local Rules. Thank you in advance for your cooperation."

22 4. On March 21, 2019, I again called to the telephone number listed on the  
23 Complaint as his office number, and left a message. On March 21, 2019 at 12:03  
24 p.m., I sent another email to his listed e-mail, [JPA@jacobaustinesq.com](mailto:JPA@jacobaustinesq.com), which  
25 stated: "Dear Mr. Austin: Still trying to reach you to meet and confer. If you cannot  
26 reach me at the office number, try my cell (619) XXX-XXXX." (numbers redacted)

27 5. On March 22, 2019 at 10:58 a.m., I sent another email to his listed e-  
28 mail, [JPA@jacobaustinesq.com](mailto:JPA@jacobaustinesq.com), which stated: "Dear Mr. Austin: Still awaiting a

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1 return call to meet and confer.”

2 6. As of the signing of this declaration, I have not had an opportunity to  
3 meet and confer with Mr. Austin. I have received no responses to my multiple e-  
4 mails.

5 I declare the following under penalty of perjury under the laws of the State of  
6 California and the United States of America. Given this 25<sup>th</sup> day of March in San  
7 Diego, California.

8  
9 By: \_\_\_\_\_  
10 Tim J. Vanden Heuvel, Esq.  
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**FEDERAL COURT PROOF OF SERVICE**

*Darryl Cotton, et al. v. Larry Geraci, et al.*

United States District Court – Southern District Case No. 18CV2751 GPC MDD

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

At the time of service, I was over 18 years of age and not a party to the action. My business address is 701 B Street, Suite 1900, San Diego, CA 92101. I am employed in the office of a member of the bar of this Court at whose direction the service was made.

On March 25, 2019, I served the following document(s): **DEFENDANTS FINCH THORNTON & BAIRD, DAVID DEMIAN, AND ADAM WITT'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DAMAGES PURSUANT TO FRCP 4**

**DEFENDANTS FINCH THORNTON & BAIRD, DAVID DEMIAN, AND ADAM WITT'S POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DAMAGES PURSUANT TO FRCP 4**

**DECLARATION OF ADAM WITT IN SUPPORT OF DEFENDANTS FINCH THORNTON & BAIRD, DAVID DEMIAN, AND ADAM WITT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DAMAGES PURSUANT TO FRCP 4**

**DECLARATION OF DAVID DEMIAN IN SUPPORT OF DEFENDANTS FINCH THORNTON & BAIRD, DAVID DEMIAN, AND ADAM WITT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DAMAGES PURSUANT TO FRCP 4**

**DECLARATION OF ALEXANDRA CHOUKAIR IN SUPPORT OF DEFENDANTS FINCH THORNTON & BAIRD, DAVID DEMIAN, AND ADAM WITT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DAMAGES PURSUANT TO FRCP 4**

**DECLARATION OF TIM J. VANDEN HEUVEL IN SUPPORT OF DEFENDANTS FINCH THORNTON & BAIRD, DAVID DEMIAN, AND ADAM WITT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DAMAGES PURSUANT TO FRCP 4**

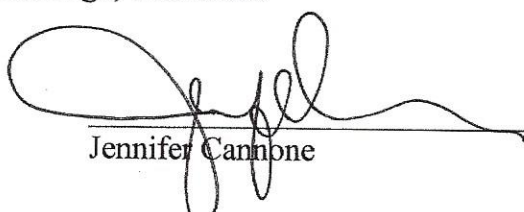
I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

The documents were served by the following means:

☒ (BY COURT'S CM/ECF SYSTEM) Pursuant to Local Rule, I electronically filed the documents with the Clerk of the Court using the CM/ECF system, which sent notification of that filing to the persons listed above.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on March 25, 2019, at San Diego, California.

  
Jennifer Cannone