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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

**DEFENDANTS FINCH
THORNTON & BAIRD, DAVID
DEMIAN AND ADAM WITT'S
REPLY 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]

**I. PLAINTIFF HURTADO HAS CONCEDED THE MOTION BY
FAILURE TO OPPOSE**

Defendant Finch Thornton & Baird, LLP and its partners David Demian and Adam Witt (“FTB Defendants”) timely filed their Motion to Dismiss on March 25, 2019. [Docket # 18] At that time, plaintiff Joe Hurtado was represented by attorney Jacob P. Austin. [Complaint, Docket # 1] Subsequently, on April 18, 2019 and April 19, 2019, Mr. Hurtado caused to be filed two Consent Orders Granting Substitution of Attorney, placing himself in *pro se* status. [Docket #24 and 26]

After the filing, the two Consent Orders Granting Substitution of Attorney, plaintiff Cotton, through his counsel and for himself alone, filed an Opposition to FTB Defendants Motion to Dismiss. [Docket #27] The Opposition is specifically entitled “Darryl Cotton’s Opposition,” and the caption identifies only Darryl Cotton as being represented by attorney Jacob P. Austin. [Docket #27]

Plaintiff Hurtado has not opposed defendants Motion to Dismiss. U.S.D.C. Southern District of California Local Rule 7.1(f)(3) states:

“**Waiver.** If an opposing party fails to file the papers in the manner required by Civil Local Rule 7.1e2, that failure may constitute a consent to the granting of a motion or other request for ruling by the court.”

By failing to timely oppose defendants Motion to Dismiss, plaintiff Hurtado has consented to the motion being granted by the Court. Accordingly, the Court should dismiss without prejudice FTB Defendants from the Complaint as brought by plaintiff Hurtado at this time.

**II. NONE OF THE FTB DEFENDANTS WERE EVER PROPERLY
SERVED WITH PROCESS**

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

1 following:

2 (A) delivering a copy of the summons and complaint to the individual
3 personally;

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

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

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

12 As to service on a partnership or corporation, Federal Rule of Civil Procedure
13 4(h) provides that service can be made “following state law for serving a summons in
14 an action brought in courts of general jurisdiction in the state where the district court
15 is located,” or by “delivering a copy of the summons and of the complaint to an
16 officer, a managing or general agent, or any other agent authorized by appointment or
17 by law to receive service of process and – if the agent is one authorized by statute and
18 the statute so requires – by also mailing a copy to each defendant.”

19 The California Code of Civil Procedure largely parallels those rules, requiring
20 personal service to the person designated as agent for service of process as provided
21 in Section 24003 of the Corporations Code or to a general partner or general manager
22 of the partnership. (C.C.P. § 416.40)

23 As to each of the FTB Defendants, the Proof of Service merely indicates that a
24 copy of the summons and Complaint were left at the offices of Finch Thornton &
25 Baird, LLP with “Alexandra Choukair, in charge.” [Docket #4, 6, 7]

26 Neither Demian nor Witt was served personally. [Demian Decl. ¶ 3; Witt Decl.
27 ¶ 3] Neither Demian nor Witt was served by “leaving a copy of each at the
28 defendants dwelling or usual place of abode with someone of suitable age and

1 discretion who resides there.” [Demian Decl. ¶ 3; Witt Decl. ¶ 3] Neither Demian
 2 nor Witt ever appointed receptionist Alexandria Choukair to receive service of
 3 process on their behalf. [Demian Decl. ¶ 4; Witt Decl. ¶ 4] Neither Demian nor Witt
 4 ever received a copy of the summons and complaint via mail, or signed a waiver of
 5 service. [Demian Decl. ¶ 4; Witt Decl. ¶ 4]

6 Alexandra Choukair is also not an officer, a managing or general agent of Finch
 7 Thornton & Baird, LLP. [Choukair Declaration ¶ 3] Alexandra Choukair was never
 8 authorized by appointment to accept service of process for Finch Thornton & Baird,
 9 LLP. [Choukair Declaration ¶ 4; Demian Decl. ¶ 4] Finch Thornton & Baird, LLP
 10 never received a copy of the summons and complaint via mail, or signed a waiver of
 11 service. [Demian Decl. ¶ 4]

12 The only authority discussed by plaintiff for the proposition that personal
 13 service as attempted was effective is *Bein v. Brechtel-Jochim Group, Inc.* (1992) 6
 14 Cal. App. 4th 1387, 1392. The *Bein v. Brechtel-Jochim* opinion is actually adverse to
 15 plaintiff’s position, and addresses only the appropriateness of *substituted* service.

16 In *Bein v. Brechtel-Jochim*, plaintiffs attempted three times (“reasonable
 17 diligence”) to effect personal service through their process server on a defendant
 18 located in a home within a gated community, but were denied access by the gate
 19 guard. Having made three timely attempts at *personal service*, the process server
 20 attempted *substituted service*. The gate guard was provided the summons and
 21 complaint, and thereafter copies of the summons and complaint were mailed to the
 22 defendant’s residence via First Class Mail, postage prepaid.

23 The Court found this to be a case where *substituted* service was appropriate
 24 given the three timely attempts at personal service at a residence citing California
 25 Code of Civil Procedure § 415.20, and found service effective 10 days after the
 26 mailing of the summons and complaint to defendants residence. *Bein*, supra, at 1392

27 Plaintiff Cotton herein does not even make the argument that there was
 28 effective *substituted* service. There were no three timely attempts (“reasonable

diligence¹”) at personal service at a proper place allowing for substituted service. *Espindola v. Nunez* (1988) 199 Cal. App. 3d 1389, 1392 There was no subsequent mailing of the summons and complaint via first class mail, postage prepaid as required by California Code of Civil Procedure § 415.20. [Demian Decl. ¶ 4; Witt Decl. ¶ 4]

As to plaintiff’s argument (the “FTB Notice Email”) that a defendant’s knowledge of a lawsuit can substitute for service, case law is uniformly opposed. “A defendant’s actual notice is not sufficient to cure defectively executed service.” *Laurent v. Potter*, 405 F. App’x 453, 454 (11th Cir. 2010) quoting *Albra v Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007); see also *Manufacturers Hanover Trust Co. v Ponsoldt*, 51 F. 3d 938, 940 (11th Cir. 1995).

In short, there has been no effective personal or substituted service of process, and the *Bein v. Brechtel-Jochim* opinion cited by plaintiff Cotton supports the FTB Defendants position.

III. PLAINTIFF COTTON CANNOT DEMONSTRATE GOOD CAUSE FOR AN EXTENSION OF TIME

On December 6, 2018, plaintiffs Darryl Cotton and Joe Hurtado filed the current action. [Docket #1] Pursuant to Federal Rule of Civil Procedure 4(m), plaintiffs then had ninety days to effectuate service. Ninety days from the filing of the Complaint on December 6, 2018 was March 6, 2019.

On the eighty ninth day, March 5, 2019, plaintiff made his only failed attempt at personal service, as demonstrated above. There was no reasonable diligence/multiple attempts at personal service, no attempt to serve at the defendants residences, and no follow up mailing via U.S. Mail to create substitute service. As of today, *148 days after the filing* of the Complaint, there still has been no further service

¹ In fact, there was only one attempt, on the *eighty ninth* day, March 5, 2019.

1 of process.

2 Federal Rule of Civil Procedure 4(m) provides that this Court may enter
3 dismissal without prejudice of named defendants not served within the ninety day
4 mandate, absent a showing of *good cause for the failure*. Good cause exists “when
5 some outside factor, rather than inadvertence or negligence, prevented service.”
6 *Lepone-Dempsey v Carroll Cnty. Com’rs*, 476 F.3d 1277, 1281 (11th Cir. 2007) “At a
7 minimum, ‘good cause’ means excusable neglect. *Boudette v Barnette*, 923 F.2d 754,
8 756 (9th Cir. 1991)

9 In an attempt to show good cause, plaintiff makes the allegation that “the FTB
10 Defendant’s agent helped them evade personal service due to their ‘unavailability’.”
11 [Opposition, p. 6, l. 16-17] However, this allegation is completely unsubstantiated by
12 any facts. Both defendants Demian and Witt have declared that they were not present
13 at Finch Thornton & Baird on the date and time that personal service was attempted,
14 and also, they both have done nothing to evade service. [Demian Declaration ¶ 3, 5;
15 Witt Declaration ¶ 2, 5] There is absolutely *no evidence* submitted by plaintiff to the
16 contrary before this Court.

17 Additionally, plaintiff advances the argument counsel “was in the process of
18 amending the Complaint” as a basis for a showing of good cause. [Opposition, p. 3-
19 4] In the Ninth Circuit, it is well established law that plaintiffs desire to amend the
20 Complaint before service does not constitute good cause for delay in service. *Wei v.*
21 *State of Hawaii*, 763 F2d 370, 372 (9th Cir. 1985)

22 Plaintiffs under these circumstances clearly cannot demonstrate “good cause
23 for the failure.” Plaintiffs waited until the last day to even attempt service, then
24 showed flagrant disregard for FRCP 4. There was no reasonable diligence with
25 regards to personal service, and no attempt to perform substituted service. FTB
26 Defendants have not attempted to evade service. [Demian Decl. ¶ 5; Witt Decl. ¶ 5]
27 *148 days after the filing* of the Complaint, there still has been no service of process.
28 Plaintiff Cotton simply cannot demonstrate good cause based upon these facts.

**IV. THIS COURT SHOULD REJECT PLAINTIFFS CLAIMS THAT
ALLEGED PREJUDICE REQUIRES RELIEF**

Absent a showing of “good cause,” Courts within the Ninth Circuit have discretion to dismiss without prejudice or extend the time period in the interests of justice. *In re Sheehan*, 253 F. 3d 507, 512 (9th Cir. 2001). Plaintiff next asserts that this Court should offer extraordinary relief in the interest of justice, on the grounds that in its absence plaintiff could no longer assert his claims against FTB Defendants because of operation of the applicable statute of limitation.

As numerous Courts have recognized, the decision to grant discretionary relief is a factually driven inquiry. (*See: Cardenas v City of Chicago*, 646 F.3d 1001 (7th Cir. 2011) (single defective attempt at service with no further efforts after notice, case dismissed despite running of statute of limitations because fault for delay “rested squarely on Plaintiff’s counsel’s shoulders”); *Adams v Allied Signal Gen. Aviation Avionics*, 74 F. 3d 882 (8th Cir. 1996) (ample notice and no attempt at obvious correction justified dismissal despite running of statute of limitations.))

A very similar factual situation was discussed by the USDC for the Southern District of Florida in *Jean-Felix v. Chicken Kitchen USA, LLC*, 2013 U.S. Dist. LEXIS 71777, *7, 2013 WL 2243966. In the *Jean-Felix* case, plaintiffs performed defective service on an alleged “agent/employee” of the defendant corporation, and then took a default judgement. After service was challenged and the default judgment was vacated based upon the defective service, the statute of limitations had run. Plaintiff then moved for additional time to serve the complaint because justice so required given the running of the statute of limitations.

The *Jean-Felix* Court disagreed, stating “Even if Defendant may have strategically waited to raise its lack of jurisdiction defense until the Plaintiff could no longer assert the claims against it because of operation of the applicable statute of limitation, that fact alone does not per se warrant the Plaintiff to a second bite at the Defendant. *See Horenkamp v. Van Winkle And Co., Inc.*, 402 F.3d 1129, 1133 (11th

1 Cir. 2005) ("the running of the statute of limitations does not require that a district
 2 court extend the time for service of process"); *Panaras v. Liquid Carbonic Indus.*
 3 *Corp.*, 94 F.3d 338, 341 (7th Cir. 1996) ("absent a finding of good cause, a district
 4 court may in its discretion still dismiss a case even after considering that the statute of
 5 limitations has run"); *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1306 (3d
 6 Cir.1995) (same)). Plaintiffs' counsel is charged with having knowledge of the rules
 7 governing service in the jurisdiction in which he elects to bring suit on behalf of his
 8 client." *Jean-Felix v. Chicken Kitchen USA, LLC*, 2013 U.S. Dist. LEXIS 71777, *5-
 9 7, 2013 WL 2243966

10 Citing plaintiff's failure to perfect service on defendant months after being put
 11 on notice of the faulty service by defendants motions, the Court stated: "While
 12 Plaintiff now may be barred by the statute of limitations from bringing the claims
 13 against it, that result is in part due to his lack of diligence in ensuring that service was
 14 perfected." *Jean-Felix v Chicken Kitchen USA, LLC*, 2013 U.S. Dist LEXIS 71777
 15 *9, 2013 WL 2243966.

16 This is the exact situation presented in this matter. *148 days after the filing of*
 17 *the Complaint*, there still has been no service of process, despite the filing of a Motion
 18 to Dismiss based upon failure to timely serve. Neither "reliance upon a third party or
 19 a process server," "half-hearted attempts" by counsel to effectuate service, nor
 20 "inadvertence of counsel" constitutes good cause for relief. *Lal v Felker*, 2015 U.S.
 21 Dist. LEXIS 44306 (USDC Eastern Dist. CA), citing *Petrucelli v. Bohringer &*
 22 *Ratzinger*, 46 F.3d 1298, 1306 (3d Cir.1995) In the absence of any signs of diligence,
 23 this Court is well within its rights to dismiss FTB Defendants without prejudice at this
 24 time.

25 **V. CONCLUSION**

26 Plaintiff Hurtado has consented to entry of dismissal of FTB Defendants on his
 27 claims by failure to oppose the motion. [USDC Southern District of California Local
 28 Rule 7.1(f)(3)] Accordingly, FTB Defendants request that a dismissal of his claims

1 against FTB Defendants be entered without prejudice at this time.

2 With regard to plaintiff Cotton, the failure to properly serve FTB Defendants in
3 case at bar is clearly one of *attorney inadvertence or negligence*, for which the
4 remedy is a dismissal of the FTB Defendants without prejudice. As no effective
5 service was made on any of the FTB Defendants within the statutory time frame, and
6 plaintiff can show no good cause or reason for extraordinary relief, FTB Defendants
7 request that the Court order their dismissal without prejudice from this action without
8 prejudice forthwith as to plaintiff Cotton as well.

9 DATED: May 3, 2019

LEWIS BRISBOIS BISGAARD & SMITH LLP

10
11 By: /s/ Tim J. Vanden Heuvel

12 Tim J. Vanden Heuvel
13 Attorneys for Finch Thornton & Baird,
14 LLP, David Demian and Adam Witt
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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 May 3, 2019, I served the following document(s): **DEFENDANTS FINCH THORNTON & BAIRD, DAVID DEMIAN AND ADAM WITT'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DAMAGES PURSUANT TO FRCP 4**

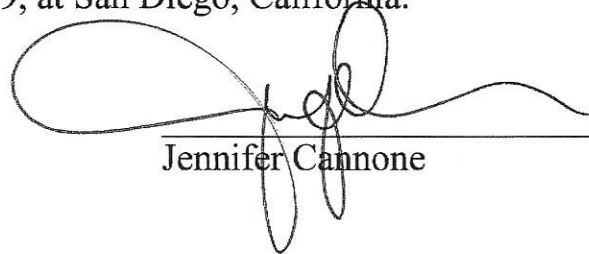
I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

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 May 3, 2019, at San Diego, California.



Jennifer Cannone

SERVICE LIST

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

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

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