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1 ERIC R. DEITZ (SBN: 222565)
edeitz@grsm.com

2 TATIANA DUPUY (SBN: 246705)
tdupuy@grsm.com

3 GORDON & REES SCULLY MANSUKHANI
4 101 West Broadway, Suite 2000
5 San Diego, California 92101
6 Tel: (619) 696-6700
7 Fax: (619) 696-7124

8 Attorneys for Defendants
9 MICHAEL R. WEINSTEIN, SCOTT TOOTHACRE, and FERRIS & BRITTON,
10 APC.

11
12 **UNITED STATES DISTRICT COURT**
13 **SOUTHERN DISTRICT OF CALIFORNIA**
14

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

17 Plaintiffs,

18 vs.

19 LARRY GERACI, an individual;
20 REBECCA BERRY a/k/a REBECCA
21 ANN BERRY RUNYAN, an
22 individual; MICHAEL R.
23 WEINSTEIN, an individual; SCOTT
24 TOOTHACRE, an individual; FERRIS
25 & BRITTON APC, a California
26 corporation; GINA M. AUSTIN, an
27 individual; AUSTIN LEGAL GROUP
28 APC, a California corporation, SEAN
MILLER, an individual FINACH
THORTON & BAIRD, a limited
liability partnership, DAVID DEMIAN,
an individual, ADAM WITT, an
individual; and DOES 1 through 50,
inclusive,

Defendants,

Case No. 3:18-cv-02751-GPC-MDD

**DEFENDANTS, MICHAEL R.
WEINSTEIN, SCOTT TOOTHACRE
AND FERRIS & BRITTON, APC,'S,
REPLY TO DARRYL COTTON'S
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS, OR IN THE
ALTERNATIVE, TO STAY THE
CASE; MOTION TO DISMISS
PLAINTIFF JOE HURTADO
PURSUANT TO FRCP 12(b)(6)**

Hearing Date: May 24, 2019
Hearing Time: 1:30 p.m.
Judge: Hon. Gonzalo P. Curiel
Courtroom: 2190

Complaint Filed: December 7, 2018
Trial Date: Not set.

REPLY TO DARRYL COTTON'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS,
OR IN THE ALTERNATIVE, TO STAY THE CASE; MOTION TO DISMISS PLAINTIFF JOE
HURTADO PURSUANT TO FRCP 12(B)(6)

Gordon Rees Scully Mansukhani, LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101

I. INTRODUCTION

Plaintiff Darryl Cotton's opposition to the Motion to Dismiss filed by Michael R. Weinstein, Scott Toothacre, and Ferris & Britton, APC. (collectively "Defendants"), is an attempt to save a sinking ship. Plaintiff Joe Hurtado has elected to distance himself from Cotton and is no longer represented by Cotton's attorney, effective April 18, 2019, due to an apparent disagreement in the State Action. Hurtado did not oppose Defendants' motion, and Defendants submit this Court should not consider arguments advanced on Hurtado's behalf by Cotton's counsel.

II. PLAINTIFF HURTADO FAILED TO OPPOSE THE MOTION TO DISMISS; THUS, HIS CLAIMS SHOULD BE DISMISSED

Hurtado failed to submit any written opposition to Defendants' Motion to Dismiss. Neither surprisingly nor appropriately, Cotton tries to argue the *Colorado River* doctrine does not apply because Hurtado is a new party in this case.

Nowhere in Cotton's opposition does he lay out how Hurtado has a colorable claim against these Defendants. Given the arguments and analysis set forth in the moving papers, and the lack of a written opposition to Defendants' motion from Hurtado, this Court may properly conclude that Hurtado fails to state a claim upon which relief may be granted for any of the five causes of action alleged.

Even if the Court elects to not dismiss this action in its entirety, a dismissal as to Hurtado is warranted pursuant to Federal Rule of Civil Procedure 12(b)(6) for a failure to oppose Defendants' motion. (*See, also*, CivLR 7.1(f)(3)(c) for the United States District Court for the Southern District of California.)

III. COTTON DOES NOT ESTABLISH HE PROPERLY SERVED OR CURED DEFECTIVE SERVICE UPON DEFENDANTS.

Cotton fails to address the issue of service of process upon Defendants. More precisely, Cotton largely ignores the failure to properly serve these Defendants.

At most, Cotton points to his separate opposition to the Motion to Dismiss filed by co-defendants Finch, Thornton & Baird, David Demian, and Adam Witt,

1 which does not address the failure to serve these Defendants. (*See*, Doc. 27.)
2 Nowhere in either of Cotton's oppositions does he state he or his process server
3 reasonably believed paralegal Rachel Prendergast had the authority to accept service
4 on behalf of Defendants.

5 Nor does Cotton argue in either set of opposition papers that these Defendants
6 have evaded service or could not be served. Cotton simply fails to make any
7 arguments regarding service of process upon these Defendants, nor did he attempt to
8 correct service of process upon receiving the present motion, or seek leave of this
9 Court to do so.

10 Cotton has been on notice of Defendants' challenge to service of process
11 since at least March 26, 2019. As Cotton has failed to cure, nor did he even attempt
12 to remedy the situation by seeking leave during the past six weeks, this Court should
13 dismiss the case against these Defendants based upon the failure to properly
14 effectuate service of process. The failure to correct the defective service confirms
15 there is no good cause for this Court to extend the time for service of process.

16 Leaving a copy of the Summons and Complaint with a paralegal at Ferris &
17 Britton, APC., does not constitute effective service upon a corporation under Fed. R.
18 Civ. P. 4(h)(1)(b) or Cal. Code Civ. P. § 416.10, nor did Cotton perfect service upon
19 the individual Defendants. To date, Cotton has still not properly served any of these
20 Defendants.

21 As Cotton has failed to timely or properly serve the Summons and Complaint
22 upon Defendants, their officers, or their registered agent in compliance with the
23 Federal Rules of Civil Procedure, the California Code of Civil Procedure, or
24 decisional authority interpreting the same, this Court should dismiss Cotton's action
25 against these Defendants. Should Cotton establish good cause for a failure to serve
26 Defendants, this Court should still quash service of the Summons and order Cotton
27 to comply with Rule 4 for effective service of process.

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III. THE COURT SHOULD DISMISS OR, IN THE ALTERNATIVE, STAY THIS MATTER PENDING THE OUTCOME OF THE CONCURRENT STATE COURT CASE

Cotton fails to state how this Court incorrectly relied upon the United States Supreme Court case *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) ("*Colorado River*") when it stayed the First District Court Action in February of 2018. Instead, Cotton claims the Superior Court does not have jurisdiction over the real property at issue.

Purportedly, Cotton planned to seek a dismissal of the Superior Court case via an ex parte application for a failure to join an indispensable party pursuant to California Code of Civil Procedure Section 389. (*See*, Doc. 28 at 6:16-20.) However, Cotton's April 25, 2019 ex parte never went forward, as Plaintiff never even filed an application.

It is Defendants' position, "[a]s this Court previously concluded, the first two [*Colorado River*] factors are essentially neutral in this case because the dispute does not attend the ownership of a specific piece of property but rather a breach of contract claim attendant to its sale, and both the federal and state forums are located in San Diego. (RJN, Ex. A., at 7:21-8:5.)" Although Cotton asserts Hurtado represented he intends to seek leave of court to file a separate or amended complaint, which will include a 42 USC § 1983 against the City of San Diego (*see*, Doc. 28 at 16:13-15), Hurtado has yet to do so.

Not only has Hurtado not filed an opposition to this motion, but to date, he has not sought leave to file a separate or amended Complaint against the City of San Diego. Whether Hurtado ultimately files a separate Complaint against the City of San Diego does not impact what the Court should do with this Complaint, as the issue is not ripe.

Cotton cites to *Tovar v. Billmeyer* (9th Cir. 1979) 609 F2d 1291, 1293, as authority for why this Court should not dismiss this matter given Hurtado's claimed intention to file a separate or amended Complaint against the City of San Diego,

1 which would include a 42 USC § 1983 claim. *Tovar* is distinguishable from these
 2 facts.

3 First, in *Tovar*, a claim had already been filed. Furthermore, *Tovar* has been
 4 distinguished several times on this issue since it was decided in 1979. *See, e.g.,*
 5 *Ohio Casualty Co. v. Jackson County Bank*, (1983) 562 F. Supp. 1165, 1983; *J.M. v.*
 6 *County of Orange*, 2014 U.S. Dist. LEXIS 196116. This issue is not ripe, as there
 7 has not been a filing or amendment by Hurtado, and Cotton's argument regarding
 8 the same is yet another example of Cotton grasping at straws in his attempt to forum
 9 shop.

10 As this Court previously observed, "Cotton is clearly forum shopping"
 11 (RJN, Ex. A., at 10:6.) Cotton has now redoubled his effort to forum shop by filing
 12 the present action, notwithstanding the "window dressing" that attends the addition
 13 of new parties and different labels to some of the claims asserted.

14 Hurtado has apparently grown frustrated or disenchanted with Cotton, his
 15 counsel, or both. His intentions, much like those of Cotton, are unclear given the
 16 proclaimed intent of action without follow through.

17 What is clear is that Hurtado did not oppose Defendants' Motion to Dismiss.
 18 It also clear Cotton continues to make arguments on behalf of Hurtado because that
 19 is all he has left to do in an attempt to maintain this case. As it did in the First
 20 District Court Action, which Cotton (and Hurtado) ignored when filing the present
 21 case, this Court may properly dismiss or stay this matter under the *Colorado River*
 22 doctrine.

23 **IV. THE COURT SHOULD STAY THE COMPLAINT IF IT DECLINES** 24 **TO DISMISS**

25 Cotton contends a stay is improper because: 1) the Superior Court lacks
 26 jurisdiction; 2) Hurtado will be prejudiced; and 3) considerations of judicial
 27 economy favor this Court addressing all of the facts and claims raised herein.

28 Regarding the first argument, Cotton never pursued the ex parte to dismiss the State

1 Action and the Superior Court still has jurisdiction.

2 On the second issue, Hurtado did not oppose this motion, so it is hard to argue
3 he will be unduly prejudiced by his own failure to file an opposition. Apparently
4 dissatisfied with the course of the State Action, but unwilling to dismiss that case,
5 Cotton has resorted to whatever means he believes he can to have this matter heard
6 in Federal Court, whether it is by adding irrelevant parties, making irrelevant claims,
7 or making arguments in pleadings that are not his to make.

8 As to number three above, the abstention factors weigh decidedly in favor of
9 staying this action pending the outcome of the State Court Case and the First District
10 Court Action. The outcome(s) of those earlier proceedings will dramatically
11 simplify the issues in this case, and possibly render this action moot.

12 This Court has already concluded that “given the pendency of the parallel
13 state proceeding and evaluating the factors in this case, the Court stays the case
14 pending [a] resolution of the state court action pursuant to the *Colorado River*
15 doctrine.” (RJN, Ex. A., at 10:24-26.) (Emphasis in original.) Therefore, in
16 balancing the factors discussed in *Colorado River*, if this Court declines to dismiss
17 the present action, then the same factors discussed warrant a stay for the pendency
18 of the State Court Case. *R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 978-79
19 (9th Cir. 2011).

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1 **V. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully requests this Court grant
3 its Motion to Dismiss or, in the Alternative, to Stay the Case. If the Court declines to
4 dismiss the action in its entirety, Defendants respectfully request the Court dismiss
5 Hurtado from the Complaint.

6 Dated: May 3, 2019

GORDON & REES SCULLY
MANSUKHANI

By: /s/ Eric R. Deitz

Eric R. Deitz

Tatiana Dupuy

Attorneys for Defendant

MICHAEL R. WEINSTEIN;

SCOTT TOOTHACRE and

FERRIS & BRITTON. APC.

Gordon Rees Scully Mansukhani, LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101

Gordon Rees Scully Mansukhani, LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101

ERIC R. DEITZ (SBN: 222565)
Edeitz@grsm.com

TATIANA DUPUY (SBN: 246705)
tdupuy@grsm.com

GORDON REES SCULLY MANSUKHANI
101 West Broadway, Suite 2000
San Diego, California 92101
Tel: (619) 696-6700
Fax: (619) 696-7124

Attorneys for Defendants
MICHAEL R. WEINSTEIN; SCOTT TOOTHACRE and FERRIS & BRITTON,
APC.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

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

Plaintiffs,

vs.

LARRY GERACI, an individual, et al.

Defendants.

Case No. 3:18-cv-02751-GPC-MDD

CERTIFICATE OF SERVICE

District Judge: Gonzalo P. Curiel
Courtroom: 2190

Magistrate Judge: Mitchell D. Dembin
Courtroom: 1180

Complaint Filed: December 7, 2018
Trial Date: Not set.

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon Rees Scully Mansukhani, 101 W. Broadway, Suite 2000, San Diego, CA 92101, my electronic mail address is mbrookman@grsm.com. On May 3, 2019, I served the foregoing document(s) entitled:

**DEFENDANTS, MICHAEL R. WEINSTEIN, SCOTT TOOTHACRE AND
FERRIS & BRITTON, APC,'S, REPLY TO DARRYL COTTON'S
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR IN THE
ALTERNATIVE, TO STAY THE CASE; MOTION TO DISMISS PLAINTIFF**

Gordon Rees Scully Mansukhani, LLP
 101 W. Broadway, Suite 2000
 San Diego, CA 92101

JOE HURTADO PURSUANT TO FRCP 12(b)(6)

- ☐ **BY U.S. MAIL** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in United States mail in the State of California addressed as set forth below pursuant to FRCP 5(b)(C).
- ☐ **BY PERSONAL SERVICE BY CAUSE.** I caused to be personally delivered the document(s) listed above to the person(s) set forth below pursuant to FRCP 5(b)(2)(B).
- ☐ **BY ELECTRONIC MAIL** by transmitting via electronic mail the document(s) listed above to the address(es) listed below on this date pursuant to FRCP 5(b)(2)(E).
- ☐ **BY OVERNIGHT DELIVERY:** by placing a true copy thereof enclosed in a sealed envelope, at a station designated for collection and processing of envelopes and packages for overnight delivery by **Federal Express** as part of the ordinary business practices of Gordon & Rees LLP, addressed as set forth below.
- ☒ **BY ELECTRONIC SERVICE THROUGH THE CM/ECF SYSTEM** which automatically generates a Notice of Electronic Filing at the time said document is filed to all CM/ECF Users who have appeared in this case. Service with this NEF constitutes service pursuant to FRCP 5(b)(E).

Counsel for Plaintiff Darryl Cotton

Jacob Austin
 THE LAW OFFICE OF JACOB
 AUSTIN
 1455 Frazee Road, #500
 San Diego, CA 92108
 619-357-6850
 Fax: 888-357-8501
 Email: JacobAustinEsq@gmail.com

Joe Hurtado, Plaintiff Pro Se

Joe Hurtado
 P.O. Box 2334
 La Mesa, CA 91943-2234
 Tel: 646-867-9542
j.hurtado1@gmail.com

**Counsel for Finch Thorton & Baird;
 David Demian; Adam Witt:**

Tim Jude Vanden Heuvel
 LEWIS BRISBOIS BISGAARD &
 SMITH, LLP
 701 B Street, Suite 1900
 San Diego, CA 92101
 (619)233-1006
 Fax: (619)233-8627
 Email:

**Counsel for Gina M. Austin; Austin
 Legal Group APC:**

Douglas A Pettit
 PETTIT KOHN INGRASSIA & LUTZ
 PC
 11622 El Camino Real, Suite 300
 San Diego, CA 92130
 (858)755-8500
 Fax: (858)755-8504
 Email: DPettit@PettitKohn.com

1 tim.vandenheuvel@lewisbrisbois.com

2 I declare under penalty of perjury under the laws of the United States of
3 America that the above is true and correct and that I am employed in the office of a
4 member of the bar of this court at whose direction this service was made.

5 Executed on May 3, 2019 at San Diego, California.

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Gordon Rees Scully Mansukhani, LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101