

LEWIS BRISBOIS BISGAARD & SMITH LLP

CORINNE C. BERTSCHE, SB# 174939

E-Mail: Corinne.Bertsche@lewisbrisbois.com

DAVID M. FLORENCE, SB# 242857

E-Mail: David.Florence@lewisbrisbois.com

550 West C Street, Suite 1700

San Diego, California 92101

Telephone: 619.233.1006

Facsimile: 619.233.8627

Attorneys for Defendant DAVID
DEMIAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,

Plaintiff,

vs.

CYNTHIA BASHANT, an individual;
JOEL WOHLFEIL, an individual;
LARRY GERACI, an individual;
REBECCA BERRY, an individual;
GINA AUSTIN, an individual;
MICHAEL WEINSTEIN, an
individual; JESSICA MCELFFRESH, an
individual; and DAVID DEMIAN, an
individual,

Defendants.

CASE NO. 3:18-cv-00325-TWR-DEB

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT DAVID DEMIAN'S
MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT PURSUANT TO
FRCP 12 (b)(6) 12(b)(5), FRCP 4**

Judge: The Hon. Todd W. Robinson
Date: May 19, 2021
Time: 1:30 p.m.
Crtrm.: 3A (Schwartz)

**[NO ORAL ARGUMENT
REQUESTED]**

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant David Demian ("Demian") submits the following memorandum of points and authorities in support of his Motion to Dismiss Plaintiff's First Amended Complaint pursuant to FRCP 12(b)(6), 12(b)(5) and 4.

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1 **I. INTRODUCTION**

2 This action arises from plaintiff, Daryl Cotton’s (“Cotton”) breach of contract
3 lawsuit against defendant Larry Geraci (“Geraci”) in Superior Court (*Larry Geraci*
4 *v. Darryl Cotton*, Superior Court of California, County of San Diego 37-2017-
5 00010073-CU-BC-CTL (“*Cotton I*”).

6 On May 13, 2020, plaintiff filed a First Amended Complaint (“FAC”) adding
7 David Demian as a defendant in this action. Demian previously briefly represented
8 Cotton in *Cotton I* and withdrew as counsel early in the litigation. Subsequently,
9 Cotton proceeded with the litigation represented by other counsel. The action was
10 tried before a jury and resulted in a judgment in favor of Geraci in July 2019. [FAC
11 ¶ 104; Dkt No. 18.] Cotton now not only sues his prior counsel, but also his
12 adversary, Geraci, Geraci’s counsel, and the judges who previously presided over
13 the *Cotton I* litigation and this action, claiming the *Cotton I* judgment was erroneous
14 and procured by “fraud” and “judicial bias.” As in *Cotton I*, Cotton continues to
15 argue in this action that the contract at issue in the *Cotton I* litigation was “illegal”
16 and cannot be enforced. [FAC ¶ 1, 17; Dkt No. 18.]

17 Cotton asserts two claims entitled “Declaratory Relief” and “Punitive
18 Damages” against defendant Demian, neither of which state a valid claim. Instead,
19 this action is nothing more than a continuous collateral attack by Cotton to attempt
20 to overturn the judgment against him in the underlying *Cotton I* case. Instead of
21 proceeding with his appeal of the underlying judgment, which Cotton abandoned, he
22 seeks to relitigate the underlying action against anyone involved in the case.
23 Plaintiff’s FAC does not state a claim against Demian and should be dismissed.

24 Demian also brings the current motion on a purely legal ground, namely that
25 plaintiff has failed to timely serve him in a manner prescribed by Federal Rule of
26 Civil Procedure 4(e) and 4(h). Demian was not served within the time constraints set
27 by Federal Rule of Civil Procedure 4(m), and therefore requests that the Court
28

1 dismiss him from this action also on this basis.

2 **II. FACTS**

3 **A. Procedural History – Underlying State Court Action**

4 On March 21, 2017, Geraci filed a complaint in San Diego Superior Court
5 against Cotton (*Cotton I*) for breach of contract arising out of Geraci's alleged
6 purchase of Cotton's real property. Cotton filed a cross-complaint against Geraci
7 and Berry for fraud and breach of contract as to an alleged oral joint venture
8 agreement with Geraci to develop a cannabis dispensary on the property, among
9 other causes of action. [FAC at ¶¶ 4-6, 60-73, 75-77, 79.] Cotton claimed in the
10 underlying action that Geraci's purchase of the subject property was illegal and
11 fraudulent.

12 Unhappy with adverse rulings in the state court action, Cotton initially filed
13 the present lawsuit on February 9, 2018 while *Cotton I* was still pending. [Dkt. No.
14 1.¹] This court *sua sponte* stayed the present action, pending resolution of plaintiff's
15 state court action.

16 However, in July 2019, following a jury trial, judgment was entered in favor
17 of Geraci, and against Cotton finding that the parties entered into a fully integrated
18 purchase contract. [FAC at ¶ 104; RJN, Exhibit 1.] Cotton filed an appeal of the
19 judgment, which was subsequently dismissed and remittitur issued. [RJN, Ex. 2.]
20 Pursuant to Cotton's ex parte application on December 23 2019, this court then
21 lifted the stay of this action and ordered that defendants be with any summons or
22 pleadings. [Dkt. 8, 11.]

23 **B. First Amended Complaint in this Action**

24 On May 13, 2020, plaintiff filed his First Amended Complaint ("FAC") in
25 this action, adding Demian as a defendant. The FAC asserts the following causes of
26 _____

27 ¹ As to each of the Docket entries cited, Demian requests Judicial Notice of the
28 docket contents pursuant to Federal Rule of Evidence 201.

1 action: First and Second Causes of Action for Violation of Federal Civil Rights
 2 pursuant to 42 U.S.C §§ 1983 against Judge Bashant and Judge Wohlfeil; Third
 3 Cause of Action for Declaratory Relief against Geraci, Berry, Weinstein, Austin,
 4 McElfresh and Demian; and Fourth Cause of Action for “Punitive Damages” against
 5 all defendants. [Dkt. No. 18.]²

6 In the FAC, Cotton specifically pleads and admits that he has brought this
 7 action as a “collateral attack on a state court judgment issued by Judge Joel R.
 8 Wohlfeil in *Cotton I*.” [FAC at ¶ 1, Dkt. 18.] Cotton claims in this action that the
 9 “*Cotton I* judgment is void for being procured via a fraud on the court, the product
 10 of judicial bias, and because the alleged contract has an unlawful object and is
 11 therefore illegal and cannot be enforced.” [FAC at ¶ 17.]

12 Plaintiff did not personally serve Demian with the FAC within 90 days after
 13 filing the FAC as required by Federal Rule of Civil Procedure 4(m).³ In fact,
 14 plaintiff neither timely served Demian, nor served him at all with the FAC.

15 Instead, several months later on January 21, 2021, an individual entered the
 16 lobby of the building for offices of Finch Thornton & Baird, LLP at 4747 Executive
 17 Drive, San Diego, CA 92121 and asked for Demian. Security called FTB
 18 receptionist since the individual was downstairs asking for Demian. However, the
 19 receptionist called secretary Alexandria Quindt since Demian was unavailable, who
 20 went downstairs to meet the individual. [Quindt Decl. ¶ 2.] When Quindt arrived
 21 downstairs in the building lobby, the individual handed her an envelope with
 22

23
 24 ² The only factual allegations against Demian are that he was referred by McElfresh
 25 to “Cotton’s litigation investor” to represent Cotton in *Cotton I*, that neither
 26 McElfresh nor Demian “disclosed that FTB had shared clients with Geraci and his
 business,” and that “Demian, like Weinstein, Austin and McElfresh, is a criminal
 with a license to practice law...” [FAC ¶¶ 87, 88.]

27 ³ Demian requests Judicial Notice that August 11, 2020 is the ninetieth day
 following filing of the FAC pursuant to Federal Rule of Evidence 201.

28 (footnote continued)

documents. [Quindt Decl. ¶ 2.] The Proofs of Service filed in this matter states that David Demian at Finch Thornton & Baird, LLP, 4747 Executive Drive, San Diego, CA 92121, is to be served, but that “Alex Quindt legal secretary” was served instead. [Dkt No. 58.] However, Alexandra Quindt is not authorized to accept service of process for David Demian⁴. [Quindt Decl. ¶ 3.]

III. PLAINTIFF’S FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM AGAINST DEMIAN UPON WHICH RELIEF CAN BE GRANTED

A. Legal Standards for a 12(b)(6) Motion

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a plaintiff’s claims. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Dismissal pursuant to Rule 12(b)(6) is proper when the Complaint fails to allege sufficient facts to support a cognizable legal theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In order to plead a cause of action, a Complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), citing *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 570 (2007). The reviewing court must accept all well-pleaded facts as true, and in the light most favorable to the non-moving party. *Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002). However, pleadings that are mere conclusions “are not entitled to the assumption of truth.” *Iqbal*, 550 U.S. at 679, 686. As the Supreme Court explains, “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678

⁴ David Demian does not reside at the offices of Finch Thornton & Baird, LLP at 4747 Executive Drive, San Diego, CA 92121. [Demian Decl. ¶ 3.]

(citations omitted). A case will not be allowed to proceed absent “a Complaint with enough factual matter (taken as true) to suggest the required element.” *Bell Atlantic*, 550 U.S. at 556.

Fraud-based claims are subject to Rule 9(b)’s heightened pleading standards, which requires a plaintiff to plead “with particularity the circumstances constituting fraud or mistake,” including the “who, what, when, where, and how of the misconduct charged.” *Ebeid v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010); *see also, e.g., Krys v. Pigott*, 749 F.3d 117, 129 (2d Cir. 2014).

B. Plaintiff’s Third Cause of Action for Declaratory Relief Does Not Allege a Viable Claim Against Demian

A claim for federal declaratory relief must first present an actual case or controversy within the meaning of Article III, section 2 of the United States Constitution. 28 U.S.C. § 2201(a); *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 239-40, 57 S. Ct. 461, 463-64, 81 L. Ed. 617 (1937). Declaratory relief is only appropriate to adjudicate an “actual controversy that has not reached a stage at which either party may seek a coercive remedy and in cases where a party who could sue for coercive relief has not yet done so.” *Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401, 1405 (9th Cir. 1996). A declaratory relief cause of action is improper to remedy past wrongs. *Jackson v. Clear Recon Corp.*, 2016 U.S. Dist. LEXIS 17261, *14 (Cal, ED 2016) [“Plaintiff’s claim for declaratory relief fails because he is seeking relief for past wrongs.”]

Plaintiff’s third cause of action for Declaratory Relief, which is alleged against the parties and attorneys involved in the underlying *Cotton I* action, contains no facts. Instead, plaintiff “realleges and incorporates herein by reference the allegations in the preceding paragraphs” and seeks “to have the *Cotton I* judgment declared void and vacated for being procured by a fraud on the court, the product of judicial bias, and because it enforces an illegal contract.” [FAC ¶¶ 149-150; Dkt

1 No. 18.]

2 Not only was Demian not a party to the underlying state court action,
3 plaintiff's third cause of action seeking to reverse the state court judgment is not
4 cognizable as an independent cause of action under the Declaratory Relief Act.
5 Plaintiff's third cause of action does not present an actual case or present
6 controversy between plaintiff and Demian, and is instead an improper attempt to
7 circumvent the judgment entered in state court and should be dismissed.⁵

8 **C. Plaintiff's Fourth Cause of Action for "Punitive Damages" Fails**
9 **Since it is Not a Cause of Action**

10 Cotton also asserts a fourth cause of action entitled "Punitive Damages"
11 against all defendants, claiming that "it would be an egregious miscarriage of justice
12 to find that defendants can file and maintain a malicious prosecution action that at
13 no point stated a cause of action and rely on the judgments or orders by judges, that
14 were biased against Cotton." [FAC ¶ 153, 157; Dkt No 18.]

15 However, plaintiff's claim for Punitive Damages is not a recognized cause of
16 action, as punitive damages are a remedy, not an independent cause of action. *Ismail*
17 *v. County of Orange*, 917 F. Supp. 2d 1060, 1073 (C.D. Cal. 2012); *Kleinhammer v.*
18 *City of Paso Robles*, 2008 U.S. Dist. LEXIS 138381, fn. 5 (C.D. Cal. March 17,
19 2008). There are also no independent causes of action properly asserted against
20 _____

21 ⁵ Plaintiff's claim is barred by the *Rooker-Feldman* doctrine, since plaintiff's claim
22 in essence is an appeal from a state court judgment. See, *Ignacio v. Judges of the*
23 *United States Court of Appeals for the Ninth Circuit*, 453 F. 3d 1160, 1165 (9th Cir.
24 2006) (court dismissed plaintiff's action filed against judges, parties and counsel
25 involved in his domestic action since a "review of Ignacio's complaint reveals it as
26 yet another attempt to attack collaterally the California superior court
27 determination"; *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003) ["*Rooker-*
28 *Feldman* is a powerful doctrine that prevents federal courts from second-guessing
state court decisions by barring the lower federal courts from hearing de facto
appeals from state-court judgments: If claims raised in the federal court action are
"inextricably intertwined" with the state court's decision such that the adjudication
of the federal claims would undercut the state ruling or require the district court to
interpret the application of state laws or procedural rules, then the federal complaint
must be dismissed for lack of subject matter jurisdiction."]

Demian which would support a claim for punitive damages. As such, this cause of action should be dismissed with prejudice.

D. Plaintiff is Not Entitled to Leave to Amend

Leave to amend is not proper if any of the following four factors are present: bad faith, undue delay, prejudice to the opposing party, and/or futility. *Serra v. Lappin*, 600 F.3d 1191, 1200 (9th Cir. 2010); *Tracht Gut, LLC v. L.A. County Treasurer & Tax Collector*, 836 F.3d 1146, 1152 (9th Cir. 2016); *Stone v. Baum*, 409 F. Supp. 2d 1164, 1175 (Ariz. Dist. 2005). Here, plaintiff's action is clearly brought in bad faith, prejudicial to defendants, and is a futile and improper attempt to relitigate the underlying state court action by suing everyone involved in the underlying lawsuit. Plaintiff specifically alleges that this action is meant as "collateral attack on a state court judgment issued by Judge Joel R. Wohlfeil in *Cotton I.*" [FAC at ¶ 1] Moreover, not only does Cotton fail to assert any cognizable claim against the attorneys or judges involved in the underlying action, he admits in his complaint that he is using this action (as well as his other repeated lawsuits) for an improper purpose, as "he knows that if he keeps filing lawsuits ...he will eventually get the attention of the media." [FAC at ¶ 23]

Demian thus respectfully requests this Court dismiss plaintiff's claims against him with prejudice and without leave to amend.

IV. DEMIAN ALSO REQUESTS THIS COURT DISMISS HIM FROM THIS ACTION PURSUANT TO FRCP 12(b)(5) AND FRCP 4 DUE TO PLAINTIFF'S FAILURE TO PROPERLY AND TIMELY EFFECTUATE SERVICE

A motion to dismiss pursuant to FRCP 12(b)(6) may also be joined with any of the defenses set forth in FRCP 12(b), including for insufficient service of process under 12(b)(5). Fed. R. Civ. Proc. 12(g). Demian also moves for dismissal based on plaintiff's failure to timely and properly serve him with the FAC.

A. Plaintiff's Purported Service on Demian is Defective

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 following:

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

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

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

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

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

However, plaintiff cannot demonstrate proper service, as Demian was not served personally as required. [Demian Decl. ¶ 3.] The Proof of Service as to Demian merely indicates that a copy of the summons and Complaint was given to “Alex Quindt legal secretary,” at the Law Offices of Finch Thornton & Baird, 4747 Executive Dr. Ste 700, San Diego, CA 92121. [Dkt No. 58; Quindt Decl. ¶ 2.]

1 However, as the proof of service indicates, Demian was not personally served by
 2 “leaving a copy of each at the defendants dwelling or usual place of abode with
 3 someone of suitable age and discretion who resides there.” [Demian Decl. ¶ 3.]
 4 Moreover, Demian never appointed his legal secretary, Alexandra Quindt to receive
 5 service of process on his behalf. [Demian Decl. ¶ 4; Quindt Decl. ¶ 3.] Demian also
 6 never received a copy of the summons and complaint via mail, or signed a waiver of
 7 service. *Id.* As such, plaintiff has failed to effectively serve Demian in this action.

8 **B. Time for Service Expired on August 11, 2020**

9 Federal Rule of Civil Procedure 4(c) states in pertinent part that “the plaintiff
 10 is responsible for having the summons and complaint served within the time allowed
 11 by Rule 4(m).” Federal Rule of Civil Procedure 4(m) specifies the time limitation
 12 as 90 days after the Complaint is filed. Demian was added as a defendant in the
 13 FAC, which plaintiff filed on May 13, 2020. Ninety days from the filing of the FAC
 14 was August 11, 2020. As of the filing of this motion, the ninety day limitation for
 15 service pursuant to Federal Rule of Civil Procedure 4(m) has long run.

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

23 Plaintiff under these circumstances clearly cannot demonstrate “good cause
 24 for the failure.” Plaintiff waited several months after the 90 day period expired to
 25 even attempt service, then did not comply with FRCP 4 by serving Demian
 26 personally. Demian has not attempted to evade service. [Demian Decl. ¶ 5.]

27 ///

1 As no effective service was made on Demian within the statutory time frame,
2 he hereby requests that the Court order he be dismissed from this action forthwith
3 for plaintiff's failure to effectuate timely service as an additional basis.

4 **V. CONCLUSION**

5 For the foregoing reasons, defendant David Demian, respectfully requests this
6 Court grant his motion to dismiss for failure to state a claim, and motion to dismiss
7 for failure to effectuate proper and timely service.

8 DATED: February 11, 2021 LEWIS BRISBOIS BISGAARD & SMITH LLP

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10 By: s/ Corinne C. Bertsche
11 CORINNE C. BERTSCHE
12 Attorneys for Defendant DAVID DEMIAN
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LEWIS BRISBOIS BISGAARD & SMITH LLP

CORINNE C. BERTSCHE, SB# 174939

E-Mail: Corinne.Bertsche@lewisbrisbois.com

DAVID M. FLORENCE, SB# 242857

E-Mail: David.Florence@lewisbrisbois.com

550 West C Street, Suite 1700

San Diego, California 92101

Telephone: 619.233.1006

Facsimile: 619.233.8627

Attorneys for Defendant DAVID
DEMIAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,

Plaintiff,

vs.

CYNTHIA BASHANT, an individual;
JOEL WOHLFEIL, an individual;
LARRY GERACI, an individual;
REBECCA BERRY, an individual;
GINA AUSTIN, an individual;
MICHAEL WEINSTEIN, an
individual; JESSICA MCELFRISH, an
individual; and DAVID DEMIAN, an
individual,

Defendants.

CASE NO. 3:18-cv-00325-TWR-DEB

**NOTICE OF MOTION IN
SUPPORT OF DEFENDANT
DAVID DEMIAN'S MOTION TO
DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT
PURSUANT TO FRCP 12 (b)(6)
12(b)(5), FRCP 4**

Judge: The Hon. Todd W. Robinson
Date: May 19, 2021
Time: 1:30 p.m.
Crtrm.: 3A (Schwartz)

**[NO ORAL ARGUMENT
REQUESTED]**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 19, 2021, 2021, at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 3A of the above entitled Court, located at United States Courthouse - Southern District, Edward J. Schwartz Courthouse, 221 West Broadway, San Diego, CA 92101, defendant David Demian (Demian) will and hereby does move this Court for an Order dismiss Plaintiff's First

1 Amended Complaint filed on May 13, 2020 (“FAC”) and each claim for relief
 2 pursuant to Federal Rules of Civil Procedure (“FRCP”) Rule 12(b)(6), Rule 12(b)(5)
 3 and Rule, as to claims against him from this litigation on the following grounds:

4 This motion is made on the ground that the first amended complaint does not
 5 state a claim upon which relief may be granted against Demian and fails to plead
 6 any facts or allegations against Demian with the requisite particularity required by
 7 the Federal Rules of Civil Procedure, and should therefore be dismissed with
 8 prejudice pursuant to FRCP 12(b)(6).

9 This motion is further made on the ground that plaintiff has failed to serve
 10 Demian in the manner prescribed by Federal Rule of Civil Procedure 4(e) and 4(h)
 11 within the time constraints set by Federal Rule of Civil Procedure 4(m), and
 12 dismissal without prejudice is a remedy provided under Federal Rule of Civil
 13 Procedure 4.

14 This Motion is based upon this Notice of Motion, the accompanying
 15 Memorandum of Points and Authorities, the Request for Judicial Notice, the
 16 Declarations of David Demian, Alexandria Quindt, and Corinne Bertsche, all
 17 pleadings, papers and records on file herein, any further matter of which the Court
 18 may take judicial notice, and such oral argument as may be presented at the hearing
 19 of this Motion. Oral argument will not be heard unless requested by the Court.

20 DATED: February 11, 2021 LEWIS BRISBOIS BISGAARD & SMITH LLP

21
 22
 23 By: s/ Corinne C. Bertsche
 24 CORINNE C. BERTSCHE
 25 Attorneys for Defendant DAVID DEMIAN
 26
 27
 28

LEWIS BRISBOIS BISGAARD & SMITH LLP

CORINNE C. BERTSCHE, SB# 174939

E-Mail: Corinne.Bertsche@lewisbrisbois.com

DAVID M. FLORENCE, SB# 242857

E-Mail: David.Florence@lewisbrisbois.com

550 West C Street, Suite 1700

San Diego, California 92101

Telephone: 619.233.1006

Facsimile: 619.233.8627

Attorneys for Defendant DAVID
DEMIAN

UNITED STATES DISTRICT COURT
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DARRYL COTTON, an individual,

Plaintiff,

vs.

CYNTHIA BASHANT, an individual;
JOEL WOHLFEIL, an individual;
LARRY GERACI, an individual;
REBECCA BERRY, an individual;
GINA AUSTIN, an individual;
MICHAEL WEINSTEIN, an
individual; JESSICA MCELFRISH, an
individual; and DAVID DEMIAN, an
individual,

Defendants.

CASE NO. 3:18-cv-00325-TWR-DEB

**DECLARATION OF CORINNE C.
BERTSCHE IN SUPPORT OF
DEFENDANT DAVID DEMIAN'S
MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT PURSUANT TO
FRCP 12 (b)(6) 12(b)(5), FRCP 4**

Judge: The Hon. Todd W. Robinson
Date: May 19, 2021
Time: 1:30 p.m.
Crtrm.: 3A (Schwartz)

**[NO ORAL ARGUMENT
REQUESTED]**

I, Corinne C. Bertsche, 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 the following facts, and if called as a witness to do so, could and would testify competently as follows.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Judgment on Jury Verdict, filed on August 19, 2019 in *Cotton I*, San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL, *Geraci v. Cotton*.

3. Attached hereto as Exhibit 2 is a true and correct copy of the Remittitur filed in *Cotton I* on May 14, 2020, Fourth District Court of Appeal, Division One Case No. D077081, San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL, *Geraci v. Cotton*.

I declare the following under penalty of perjury under the laws of the State of California and the United States of America. Given this 11th day of February in San Diego, California.

DATED: February 11, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: s/ Corinne C. Bertsche
CORINNE C. BERTSCHE
Attorneys for Defendant DAVID DEMIAN

LEWIS BRISBOIS BISGAARD & SMITH LLP

CORINNE C. BERTSCHE, SB# 174939

E-Mail: Corinne.Bertsche@lewisbrisbois.com

DAVID M. FLORENCE, SB# 242857

E-Mail: David.Florence@lewisbrisbois.com

550 West C Street, Suite 1700

San Diego, California 92101

Telephone: 619.233.1006

Facsimile: 619.233.8627

Attorneys for Defendant DAVID
DEMIAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,

Plaintiff,

vs.

CYNTHIA BASHANT, an individual;
JOEL WOHLFEIL, an individual;
LARRY GERACI, an individual;
REBECCA BERRY, an individual;
GINA AUSTIN, an individual;
MICHAEL WEINSTEIN, an
individual; JESSICA MCELFRISH, an
individual; and DAVID DEMIAN, an
individual,

Defendants.

CASE NO. 3:18-cv-00325-TWR-DEB

**DECLARATION OF DAVID
DEMIAN IN SUPPORT OF DAVID
DEMIAN'S MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT PURSUANT TO
FRCP 12 (b)(6), 12(b)(5) AND 4**

Judge: The Hon. Todd W. Robinson

Date: May 19, 2021

Time: 1:30 p.m.

Crtrm.: 3A (Schwartz)

**[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 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.

2. I have observed the purported Proof of Service in this matter regarding alleged service of the Summons and Complaint upon me. The Proof of Service

4815-5721-5450.1

Case No. 3:18-cv-00325-TWR-DEB

DECLARATION OF DAVID DEMIAN IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FAC
PURSUANT TO FRCP 12 (b)(6), 12(b)(5) AND 4

1 merely indicates that a copy of the summons and Complaint was left with “Alex
2 Quindt legal secretary” on January 21, 2021 at 12:44 p.m. [Dkt No. 58.] Since I was
3 not available at the time the individual arrived at the lobby of our building, our
4 receptionist at Finch Thornton & Baird, LLP, called my secretary, Alexandria
5 Quindt, to go downstairs in the lobby to see what the individual wanted.

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

11 4. I never appointed Finch Thornton & Baird, LLP legal secretary
12 Alexandra Quindt to receive service of process on my behalf. I also never received a
13 copy of the summons and complaint via U.S. first class mail, or signed a waiver of
14 service in this matter.

15 5. I have never attempted to evade service of the Summons and Complaint
16 in this matter. I have been at Finch Thornton & Baird, LLP practicing law since the
17 FAC was filed, and residing at my home in San Diego County. Finch, Thornton &
18 Baird, LLP is an operating law firm whose office is open from 8:00 a.m. to 6:00
19 p.m. every business day, and I am generally in the office during these times. No
20 other attempt was made to serve me with the summons and FAC in this action.

21 I declare the following under penalty of perjury under the laws of the State of
22 California and the United States of America. Given this 10 day of February, 2021 in
23 San Diego, California.

24
25 By: 

26 David Demian, Esq.
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LEWIS BRISBOIS BISGAARD & SMITH LLP

CORINNE C. BERTSCHE, SB# 174939

E-Mail: Corinne.Bertsche@lewisbrisbois.com

DAVID M. FLORENCE, SB# 242857

E-Mail: David.Florence@lewisbrisbois.com

550 West C Street, Suite 1700

San Diego, California 92101

Telephone: 619.233.1006

Facsimile: 619.233.8627

Attorneys for Defendant DAVID
DEMIAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,

Plaintiff,

vs.

CYNTHIA BASHANT, an individual;
JOEL WOHLFEIL, an individual;
LARRY GERACI, an individual;
REBECCA BERRY, an individual;
GINA AUSTIN, an individual;
MICHAEL WEINSTEIN, an
individual; JESSICA MCELFRISH, an
individual; and DAVID DEMIAN, an
individual,

Defendants.

CASE NO. 3:18-cv-00325-TWR-DEB

**DECLARATION OF ALE ANDRA
QUINDT IN SUPPORT OF DAVID
DEMIAN'S MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT PURSUANT TO
FRCP 12 (b)(6), 12(b)(5) AND 4**

Judge: The Hon. Todd W. Robinson

Date: May 19, 2021

Time: 1:30 p.m.

Crtrm.: 3A (Schwartz)

**[NO ORAL ARGUMENT
REQUESTED]**

I, Alexandria Quindt, do declare as follows:

1. I am an individual over the age of 18, 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.

2. I am a legal secretary at the law offices of Finch Thornton & Baird,
LLP, 4747 Executive Drive, San Diego, CA 92121, Suite 700.

3. On January 21, 2021, I received a call from our receptionist stating that
our office building's security indicated that an individual was in the first floor lobby

4831-1130-4411.1

Case No. 3:18-cv-00325-TWR-DEB

DECLARATION OF ALE ANDRIA QUINDT IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FAC
PURSUANT TO FRCP 12 (b)(6), 12(b)(5) AND 4

1 of our building asking for David Demian. Since Mr. Demian was not available at the
2 time the individual arrived at the lobby, I went downstairs in the lobby to see what
3 the individual wanted. At that time, the male individual handed me an envelope of
4 documents.

5 3. I have never been authorized to accept service of process on behalf of
6 Finch Thornton & Baird, LLP, David Demian, or any other attorney at the firm, and
7 have never held myself out as their agent for service of process. I never told the
8 person who handed me the envelope that I was authorized to accept service of
9 process on behalf of David Demian, and did not know what was even in the
10 envelope.

11 I declare the following under penalty of perjury under the laws of the State of
12 California and the United States of America. Given this 10 day of February, 2021 in
13 San Diego, California.

14
15 By: 

16 Alexandria Quindt
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LEWIS BRISBOIS BISGAARD & SMITH LLP

CORINNE C. BERTSCHE, SB# 174939

E-Mail: Corinne.Bertsche@lewisbrisbois.com

DAVID M. FLORENCE, SB# 242857

E-Mail: David.Florence@lewisbrisbois.com

550 West C Street, Suite 1700

San Diego, California 92101

Telephone: 619.233.1006

Facsimile: 619.233.8627

Attorneys for Defendant DAVID
DEMIAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,

Plaintiff,

vs.

CYNTHIA BASHANT, an individual;
JOEL WOHLFEIL, an individual;
LARRY GERACI, an individual;
REBECCA BERRY, an individual;
GINA AUSTIN, an individual;
MICHAEL WEINSTEIN, an
individual; JESSICA MCELFRISH, an
individual; and DAVID DEMIAN, an
individual,

Defendants.

CASE NO. 3:18-cv-00325-TWR-DEB

**REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF DAVID
DEMIAN'S MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT PURSUANT TO
FRCP 12 (b)(6) 12(b)(5), FRCP 4**

Judge: The Hon. Todd W. Robinson

Date: May 19, 2021

Time: 1:30 p.m.

Crtrm.: 3A (Schwartz)

**[NO ORAL ARGUMENT
REQUESTED]**

Defendant, David Demian ("Demian") hereby requests that this court take
judicial notice pursuant to Federal Rule of Evidence 201, following documents filed
in the underlying action San Diego Superior Court Case No. 37-2017-00010073-
CU-BC-CTL, *Geraci v. Cotton*:

Exhibit 1: Judgment on Jury Verdict, filed on August 19, 2019 in *Cotton I*,
San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL, *Geraci v.*

///

1 *Cotton*, a copy of which is attached to the accompanying declaration of Corinne
2 Bertsche.

3 **Exhibit 2:** Remittitur filed in *Cotton I* on May 14, 2020, Fourth District
4 Court of Appeal, Division One Case No. D077081, San Diego Superior Court Case
5 No. 37-2017-00010073-CU-BC-CTL, *Geraci v. Cotton*, a copy of which is attached
6 to the accompanying declaration of Corinne Bertsche..

7
8 DATED: February 11, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

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11 By: s/ Corinne C. Bertsche
12 CORINNE C. BERTSCHE
13 Attorneys for Defendant DAVID DEMIAN
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LEWIS BRISBOIS BISGAARD & SMITH LLP

CORINNE C. BERTSCHE, SB# 174939

E-Mail: Corinne.Bertsche@lewisbrisbois.com

DAVID M. FLORENCE, SB# 242857

E-Mail: David.Florence@lewisbrisbois.com

550 West C Street, Suite 1700

San Diego, California 92101

Telephone: 619.233.1006

Facsimile: 619.233.8627

Attorneys for Defendant DAVID
DEMIAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,

Plaintiff,

vs.

CYNTHIA BASHANT, an individual;
JOEL WOHLFEIL, an individual;
LARRY GERACI, an individual;
REBECCA BERRY, an individual;
GINA AUSTIN, an individual;
MICHAEL WEINSTEIN, an
individual; JESSICA MCELFRISH, an
individual; and DAVID DEMIAN, an
individual,

Defendants.

CASE NO. 3:18-cv-00325-TWR-DEB

**PROOF OF SERVICE RE: DAVID
DEMIAN'S MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT PURSUANT TO
FRCP 12 (b)(6) 12(b)(5), FRCP 4**

Judge: The Hon. Todd W. Robinson

Date: May 19, 2021

Time: 1:30 p.m.

Crtrm.: 3A (Schwartz)

**[NO ORAL ARGUMENT
REQUESTED]**

At the time of service, I was over 18 years of age and not a party to the action. My business address is 550 West C Street, Suite 1700, 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 February 11, 2021, I served the following document(s):

1. NOTICE OF MOTION IN SUPPORT OF DEFENDANT DAVID

- 1 DEMIAN'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED
- 2 COMPLAINT PURSUANT TO FRCP 12 (b)(6) 12(b)(5), FRCP 4;
- 3 2. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
- 4 DEFENDANT DAVID DEMIAN'S MOTION TO DISMISS
- 5 PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO FRCP
- 6 12 (b)(6) 12(b)(5), FRCP 4;
- 7 3. DECLARATION OF CORINNE C. BERTSCHE IN SUPPORT OF
- 8 DEFENDANT DAVID DEMIAN'S MOTION TO DISMISS
- 9 PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO FRCP
- 10 12 (b)(6) 12(b)(5), FRCP 4;
- 11 4. DECLARATION OF DAVID DAMIEN IN SUPPORT OF DAVID
- 12 DEMIAN'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED
- 13 COMPLAINT PURSUANT TO FRCP 12 (b)(6) 12(b)(5), FRCP 4;
- 14 5. DECLARATION OF ALEXANDRA QUINDT IN SUPPORT OF
- 15 DAVID DEMIAN'S MOTION TO DISMISS PLAINTIFF'S FIRST
- 16 AMENDED COMPLAINT PURSUANT TO FRCP 12 (b)(6) 12(b)(5),
- 17 FRCP 4
- 18 6. REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DAVID
- 19 DEMIAN'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED
- 20 COMPLAINT PURSUANT TO FRCP 12 (b)(6) 12(b)(5), FRCP 4

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

23 Darryl Cotton (Plaintiff in Pro Per)
24 6176 Federal Blvd.
25 San Diego, CA 92114
(619) 954-4447

26 The documents were served by the following means:

27 ☒ (BY U.S. MAIL) I enclosed the documents in a sealed envelope or package
28 addressed to the persons at the addresses listed above and:

SERVICE LIST

Darryl Cotton v. Cynthia Bashant, et al.

Case No. 3:18-cv-00325-TWR-DEB

Julia Dalzell
11622 El Camino Real, Suite 300
San Diego, CA 92130
Tel: (858) 755-8500
jdalzell@pettitkohn.com

*Attorney for Defendants, Gina Austin
and Austin Legal Group*

Gregory Brian Emdee
Kjar McKenna & Stockalper
841 Apollo Street, Suite 100
El Segundo, CA 90245
Tel: (424) 217-3026
gemdee@kmslegal.com

*Attorney for Defendant, Michael
Weinstein*

Carmela E. Duke
Superior Court of California, City of San
Diego
1100 Union Street
San Diego, CA 92101
Tel: (619) 844-2382
carmela.duke@sdcourt.ca.gov

Attorney for Defendant, Joel Wohfeil