

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

RICHARD T. MCREE,	)	Case No.: 11-CV-00991-LHK
	)	
Plaintiff,	)	ORDER GRANTING DEFENDANT
v.	)	DOUGLAS E. GOLDMAN’S MOTION
	)	TO DISMISS; GRANTING IN PART
RICHARD N. GOLDMAN, ET AL.,	)	AND DENYING IN PART CITY AND
	)	COUNTY OF SAN FRANCISCO’S
Defendants.	)	JOINDER IN MOTION TO DISMISS;
	)	GRANTING UNITED STATES’
	)	MOTION TO DISMISS; AND DENYING
	)	PLAINTIFF’S MOTION TO COMPEL
	)	

Plaintiff Richard T. McRee (“Plaintiff”) brings this action against Defendants Douglas E. Goldman (“D. Goldman”), the City and County of San Francisco (“CCSF”), the United States of America, Richard N. Goldman’s Estate (“R. Goldman”), Willie L. Brown, Jr. (“Brown”), Gavin Newsom (“Newsom”), and Bevan Dufty (“Dufty”) (collectively “Defendants”), alleging patent infringement and a variety of constitutional and common law claims. See ECF No. 61. Before the Court are four motions: (1) D. Goldman’s Motion to Dismiss Plaintiff’s First Amended Complaint, ECF No. 76 (“Goldman Mot.”); (2) CCSF’s Joinder in D. Goldman’s Motion to Dismiss, ECF No. 86 (“CCSF Mot.”); (3) the United States’ Motion to Dismiss Plaintiff’s First Amended Complaint, ECF No. 89 (“U.S. Mot.”); and (4) Plaintiff’s Ex Parte Motion to Compel Response from the Richard N. Goldman Estate, ECF No. 88 (“Mot. to Compel”). The Court held a hearing on D.

1 Goldman's and CCSF's motions to dismiss on March 8, 2012. Pursuant to Civil Local Rule 7-1(b),  
2 the Court finds the United States' motion to dismiss suitable for determination without oral  
3 argument and hereby VACATES the May 3, 2012 hearing. Having considered the submissions  
4 and arguments of the parties, and the relevant law, the Court hereby GRANTS D. Goldman's  
5 motion to dismiss all claims against him, but grants leave to amend as to Plaintiff's claim for  
6 inducement of infringement; GRANTS IN PART and DENIES IN PART CCSF's Joinder in D.  
7 Goldman's Motion to Dismiss; and GRANTS the United States' motion to dismiss all claims  
8 against it. Moreover, for the reasons stated in Section IV, *infra*, the Court DENIES Plaintiff's  
9 Motion to Compel a Response from the Richard N. Goldman Estate.<sup>1</sup>

## 10 I. BACKGROUND

### 11 A. Factual Background

12 For purposes of ruling on the motion to dismiss, the Court takes the facts as alleged in  
13 Plaintiff's First Amended Complaint ("FAC") to be true and construes them in the light most  
14 favorable to Plaintiff, the nonmoving party. *See Colony Cove Props., LLC v. City of Carson*, 640  
15 F.3d 948, 955 (9th Cir. 2011).<sup>2</sup> Plaintiff is a registered architect, inventor, and sole owner of U.S.  
16 Patent No. 6,003,269 (the "'269 Patent"), entitled "Retractable Covering for Spaces" ("RCS"),  
17 which issued on December 21, 1999. FAC ¶ 1; *see* ECF No. 62 (FAC Ex. A). Plaintiff uses the  
18 registered trademark "SkyCover" to identify embodiments of the '269 Patent. FAC ¶ 1.

19  
20  
21 <sup>1</sup> It appears that Plaintiff has still not served Defendants Brown, Newsom, and Dufty in their  
22 individual capacity, notwithstanding the Court's October 12, 2011 Order advising Plaintiff to do so  
23 if he wishes to pursue this action against them. *See* ECF No. 60 at 4-5. Pursuant to Federal Rule  
24 of Civil Procedure 4(m), Plaintiff is required to serve all Defendants within 120 days of filing a  
25 complaint in federal court. More than 120 days have elapsed since this action was initiated.  
26 Plaintiff's failure to serve any Defendants within 30 days of filing his Second Amended Complaint  
27 pursuant to this Order will result in dismissal of such Defendants without prejudice. *See* Fed. R.  
28 Civ. P. 4(m).

<sup>2</sup> The Court assumes that the parties and readers of this Order have read the Court's October 12,  
2011 Order Granting Defendant Douglas E. Goldman's Motion to Dismiss, Denying Plaintiff's  
Motion for Preliminary Injunction, and Denying Plaintiff's Motion to Compel Response, *see* ECF  
No. 60 ("Order"), and therefore will not repeat at length here the factual allegations summarized  
therein, to the extent the FAC repeats facts alleged in the original Complaint.

1 The site of the alleged infringement is Stern Grove, a public park owned and maintained by  
2 CCSF, which features an outdoor performance venue. Since 1938, the Stern Grove Festival  
3 Association (“SGFA”) has organized and presented, through charitable donations, a series of  
4 admission-free summer concerts open to the public and staged in Stern Grove’s natural  
5 amphitheater. D. Goldman became the Director of SGFA in 1996. *Id.* ¶ 46.

6 Plaintiff discovered Defendants’ alleged infringement of the ’269 Patent on June 20, 2005,  
7 when he saw in the newspaper that the newly renovated Stern Grove – a public park owned and  
8 maintained by CCSF – featured an embodiment of the ’269 Patent covering the new performance  
9 stage (“Stern Grove Canopy”). FAC ¶¶ 116, 120-21. The \$15 million Stern Grove park renovation  
10 project was funded in large part by D. Goldman and R. Goldman and was jointly overseen by  
11 CCSF and the Stern Grove Festival Association (“SGFA”), of which D. Goldman is the Director.  
12 *Id.* ¶¶ 60, 63, 78, 98, 127. Plaintiff alleges that he had previously shared his invention with CCSF  
13 in 1998 during a meeting with the Mayor’s Office, under the auspices of a signed Confidential  
14 Disclosure Agreement, and that Defendants’ infringement was therefore willful. *Id.* ¶ 55. Plaintiff  
15 further alleges that, upon discovery of the alleged infringement, he immediately notified  
16 Defendants, and for nearly six years thereafter diligently pursued non-litigation strategies for  
17 resolving this dispute without resort to the courts. *Id.* ¶¶ 67, 120, 122, 126.

### 18 **B. Procedural History**

19 Plaintiff filed his original Complaint on March 3, 2011, alleging five causes of action: (1)  
20 patent infringement; (2) unconstitutionality; (3) fraud; (4) unfair competition; and (5) negligence.  
21 ECF No. 1. On October 12, 2011, the Court granted Defendant D. Goldman’s motion to dismiss  
22 all claims, with leave to amend. ECF No. 60 (“Order”). On November 8, 2011, Plaintiff filed his  
23 FAC, which asserts the same five causes of action, and which repeats many of the same factual  
24 allegations as in the original Complaint. However, in response to the October 12, 2011 Order,  
25 Plaintiff adds CCSF and the United States as Defendants, and elaborates on why he believes he is  
26 entitled to equitable tolling. *See generally* FAC. D. Goldman filed a Motion to Dismiss Plaintiff’s  
27 FAC on November 28, 2011, *see* ECF No. 76; and CCSF filed a Joinder in that Motion on

1 December 22, 2011, *see* ECF No. 86. The United States filed a separate Motion to Dismiss on  
2 January 20, 2012. *See* ECF No. 89. Plaintiff filed Oppositions to all three motions. *See* ECF No.  
3 80 (“Opp’n to Goldman”); ECF No. 92 (“Opp’n to CCSF”); ECF No. 104 (“Opp’n to U.S.”).

## 4 II. LEGAL STANDARD

5 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if  
6 it fails to state a claim upon which relief can be granted. To survive a motion to dismiss, the  
7 plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*  
8 *Corp. v. Twombly*, 550 U.S. 544, 547 (2007). This “facial plausibility” standard requires the  
9 plaintiff to allege facts that add up to “more than a sheer possibility that a defendant has acted  
10 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009). In deciding whether  
11 the plaintiff has stated a claim, the court must assume the plaintiff’s allegations are true and draw  
12 all reasonable inferences in the plaintiff’s favor. *Usher v. City of L.A.*, 828 F.2d 556, 561 (9th Cir.  
13 1987). Pro se pleadings are to be construed liberally. *Boag v. MacDougall*, 454 U.S. 364, 365  
14 (1982) (per curiam); *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). However, the court is not required to  
15 accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or  
16 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

17 A Rule 12(b)(6) motion to dismiss on statute of limitations grounds may be granted “only if  
18 the assertions of the complaint, read with the required liberality, would not permit the plaintiff to  
19 prove that the statute was tolled.” *Morales v. City of L.A.*, 214 F.3d 1151, 1153 (9th Cir. 2000)  
20 (citations omitted); *see also Cervantes v. City of San Diego*, 5 F.3d 1273, 1277 (9th Cir. 1993)  
21 (holding that a motion to dismiss on statute of limitations grounds should not be granted if “the  
22 complaint, liberally construed in light of our ‘notice pleading’ system, adequately alleges facts  
23 showing the potential applicability of the equitable tolling doctrine.”). “A complaint cannot be  
24 dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would  
25 establish the timeliness of the claim.” *Von Saher v. Norton Simon Museum of Art at Pasadena*,  
26 592 F.3d 954, 969 (9th Cir. 2010) (quoting *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204,  
27 1206 (9th Cir. 1995)).

1 Generally, when a complaint is dismissed, “leave to amend shall be freely given when  
2 justice so requires.” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010); *see*  
3 Fed. R. Civ. P. 15(a). This is particularly true where the plaintiff is proceeding pro se. *See Lopez*  
4 *v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000). Nonetheless, leave to amend may be denied if  
5 allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile.  
6 *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008). In addition, a motion to  
7 dismiss based on time bars may be granted without leave to amend where the face of the complaint  
8 establishes “facts that foreclose[] any showing of reasonable diligence.” *Von Saher*, 592 F.3d at  
9 969 (discussing *Orkin v. Taylor*, 487 F.3d 734, 742 (9th Cir. 2007)). Finally, the Court’s  
10 “discretion to deny leave to amend is particularly broad where plaintiff has previously amended  
11 the complaint.” *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th  
12 Cir. 2011) (quoting *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989)).

### 13 **III. DISCUSSION OF MOTIONS TO DISMISS**

#### 14 **A. Patent Infringement**

##### 15 **1. D. Goldman**

16 Plaintiff’s FAC alleges that D. Goldman “willfully, directly and indirectly induced and  
17 infringed the ’269 [P]atent by earmarking and donating major charitable [f]unds from [his] non-  
18 profit family charity Funds.” FAC ¶ 165. Defendant D. Goldman moves to dismiss Plaintiff’s  
19 patent infringement claim against him.

20 The relevant provisions of federal patent law provide:

21 (a) . . . whoever without authority makes, uses, offers to sell, or sells any patented  
22 invention, within the United States . . . infringes the patent. (b) Whoever actively induces  
23 infringement of a patent shall be liable as an infringer. (c) Whoever offers to sell or sells  
24 within the United States or imports into the United States a component of a patented  
25 machine, manufacture, combination, or composition, or a material or apparatus for use in  
26 practicing a patented process, constituting a material part of the invention, knowing the  
27 same to be especially made or especially adapted for use in an infringement of such patent,  
28 and not a staple article or commodity of commerce suitable for substantial noninfringing  
use, shall be liable as a contributory infringer.

35 U.S.C. § 271.

1           The October 12, 2011 Order ruled that the original Complaint did not “plead sufficient facts  
2 to state a claim against D. Goldman personally for direct infringement” under 35 U.S.C. § 271(a);  
3 rather, “allegations of infringement appear[ed] to be directed at SGFA, of which D. Goldman is the  
4 chairman of the Board.” Order at 7. The Court therefore dismissed Plaintiff’s direct infringement  
5 claims against D. Goldman with leave to amend, allowing Plaintiff the opportunity to allege  
6 grounds for piercing the corporate veil so as to hold D. Goldman personally liable for SGFA’s  
7 direct infringement. *See id.* at 8-9.

8           Despite Plaintiff’s bare and conclusory allegations that SGFA and CCSF are “Goldman  
9 alter ego organization[s],” FAC ¶¶ 127, 162, Plaintiff does not allege facts adequate to state a claim  
10 against D. Goldman. Under patent law, “the ‘corporate veil’ shields a company’s officers from  
11 personal liability for direct infringement that the officers commit in the name of the corporation,  
12 unless the corporation is the officers’ ‘alter ego.’” *Wordtech Sys., Inc. v. Integrated Networks*  
13 *Solutions, Inc.*, 609 F.3d 1308, 1313 (Fed. Cir. 2010) (quoting *Wechsler v. Macke Int’l Trade, Inc.*,  
14 486 F.3d 1286, 1295 (Fed. Cir. 2007)). To determine whether alter ego liability applies under §  
15 271(a), courts must apply the law of the regional circuit. *Wechsler*, 486 F.3d at 1295; *see also*  
16 *Wordtech*, 609 F.3d at 1313; *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1579  
17 (Fed. Cir. 1986). The Ninth Circuit applies the law of the forum state, which in this case is  
18 California. *Wechsler*, 486 F.3d at 1295 (citing *Towe Antique Ford Found. v. IRS*, 999 F.2d 1387,  
19 1391 (9th Cir. 1993)).

20           “California courts generally treat the alter ego doctrine as a drastic remedy and disregard  
21 the corporate form only reluctantly and cautiously.” *Id.* In general, California courts allow the  
22 corporate veil to be pierced “[o]nly when (1) ‘there is such a unity of interest and ownership that  
23 the individuality, or separateness, of the said person and the corporation has ceased,’ and (2) ‘an  
24 adherence to the fiction of the separate existence of the corporation would . . . sanction a fraud or  
25 promote injustice.’” *Id.* (quoting *Firstmark Capital Corp. v. Hempel Fin. Corp.*, 859 F.2d 92, 94  
26 (9th Cir. 1988)). Here, Plaintiff’s FAC alleges only that the “long-standing and influential  
27 personal, economic, and political ties” create an alter ego relationship between D. Goldman and

1 SGFA and CCSF. FAC ¶ 162. Even taken in the light most favorable to Plaintiff, these allegations  
2 are insufficient to show an obvious “unity of interest and ownership” between D. Goldman and  
3 either of the two entities allegedly responsible for the direct infringement. Moreover, the FAC falls  
4 far short of showing that fraud or injustice would result from allowing Plaintiff’s direct  
5 infringement claim to proceed against CCSF but not against D. Goldman in his individual capacity.  
6 As Plaintiff has already been given an opportunity to cure the deficiency in his pleadings and has  
7 failed to do so, the Court DISMISSES with prejudice the claim that D. Goldman directly infringes  
8 the ’269 Patent.

9 Plaintiff also fails to allege sufficient facts that D. Goldman induced infringement in  
10 violation of 35 U.S.C. § 271(b). “To prevail on inducement, the patentee must show, first that  
11 there has been direct infringement, and second that the alleged infringer knowingly induced  
12 infringement and possessed specific intent to encourage another’s infringement.” *Kyocera*  
13 *Wireless Corp. v. ITC*, 545 F.3d 1340, 1353-54 (Fed. Cir. 2008) (internal quotation marks omitted);  
14 *accord DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (en banc). As the Court  
15 explained in its prior Order, “[i]nduced infringement requires more than mere knowledge of the  
16 induced acts; rather, the accused must have ‘knowledge that the induced acts constitute patent  
17 infringement.’” Order at 8 (quoting *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060,  
18 2068 (2011)). In *Global-Tech Appliances*, the Supreme Court held that the doctrine of willful  
19 blindness applies to inducement of infringement claims such that a defendant may not avoid  
20 inducement liability by deliberately avoiding actual knowledge that the acts it induces constitute  
21 patent infringement. *Global-Tech Appliances*, 131 S. Ct. at 2069. Thus, a plaintiff may establish  
22 inducement liability under a theory of willful blindness by showing that: (1) the defendant  
23 subjectively believes that there is a high probability that a fact exists, and (2) the defendant took  
24 deliberate actions to avoid learning of that fact. *Id.* at 2070. “[P]utting *Global-Tech* together with  
25 *Iqbal*, the question before the Court on [D. Goldman’s] motion[] to dismiss is whether [Plaintiff]  
26 has plead sufficient facts . . . for the Court to *infer* that [D. Goldman] had knowledge of  
27 [Plaintiff’s] patent[] and that the [Stern Grove Canopy] infringed on [that] patent[]” at the time of

1 his alleged acts of inducement. *See Trading Techs. Int'l, Inc. v. BCG Partners, Inc.*, No. 10c715,  
2 2011 WL 3946581, at \*3 (N.D. Ill. Sept. 2, 2011) (Kendall, J.) (emphasis in original); *accord*  
3 *Weiland Sliding Doors and Windows, Inc. v. Panda Window and Doors, LLC*, No. 10CV677, 2012  
4 WL 202664, at \*4 (S.D. Cal. Jan. 23, 2012) (Sammartino, J.).

5 Plaintiff fails to show the concurrence of knowledge and action necessary to establish D.  
6 Goldman's liability under § 271(b) for induced infringement. All of D. Goldman's alleged acts of  
7 inducement occurred prior to August 9, 2005, when Plaintiff first sent a letter to D. Goldman  
8 notifying him of the alleged infringement. FAC ¶ 137. Plaintiff alleges that, in 1999, D. Goldman  
9 conferred with the hired designer of the Stern Grove Renewal Project and witnessed "first sketches  
10 of the work," FAC ¶¶ 56, 72, 78, and that in 2000 or 2001, he donated \$2 million to SGFA for the  
11 Renewal Project, which included construction of the accused product, FAC ¶ 127. However,  
12 Plaintiff does not allege that D. Goldman had any knowledge of the '269 Patent prior to August 9,  
13 2005. Although Plaintiff alleges that as early as 1998, under the terms of a Confidential Disclosure  
14 Agreement, he disclosed to someone in the Mayor's Office the designs for his invention and the  
15 fact that he had a patent application pending for the RCS, *see* FAC ¶ 55, he fails to allege how or  
16 when this information was conveyed to D. Goldman in advance of his charitable donation to the  
17 Stern Grove Renewal Project, stating only that the Goldmans and the City "share long-standing  
18 ties," FAC ¶ 70. Furthermore, Plaintiff says that he himself did not initially suspect infringement  
19 based on the designer's publicly disclosed drawings, which were "'sketchy' and with no suggestion  
20 of a SkyCover." FAC ¶ 105. In short, Plaintiff has not adequately alleged facts from which the  
21 Court can draw a plausible inference that D. Goldman knew of or was willfully blind to the  
22 existence of the '269 Patent at the time of his charitable donation, nor that he knew his funds would  
23 be used to infringe the '269 Patent. Plaintiff furthermore fails to allege that D. Goldman engaged  
24 in any acts that induced infringement after he learned of the '269 Patent in 2005. Thus, Plaintiff  
25 has failed to plead that D. Goldman knowingly induced any acts of infringement and that he had  
26 the requisite specific intent to induce such infringement. Accordingly, the Court DISMISSES  
27 Plaintiff's claim of active inducement against D. Goldman. In light of Plaintiff's pro se status and



1 the possibility that he can cure his pleading deficiency with the assistance of pro bono counsel,  
2 however, the Court dismisses this claim without prejudice.

3 **2. CCSF**

4 Plaintiff's FAC seems to allege that Defendant CCSF directly infringed, and continues to  
5 infringe, the '269 Patent through the acts of its public officials. FAC ¶¶ 163-64. CCSF does not  
6 move to dismiss the patent infringement claim against CCSF, but instead moves only to strike the  
7 patent infringement claim pursuant to Rule 12(f) for failure to comply with Rule 8(a)(2) of the  
8 Federal Rules of Civil Procedure. *See Joinder* at 5-6; *Goldman Mot.* at 18-20 (moving to strike  
9 under Rules 8(a)(2), 9(b), and 12(f)).

10 Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is  
11 entitled to relief," while Rule 12(f) allows the Court to "strike from a pleading . . . any redundant,  
12 immaterial, impertinent, or scandalous matter." A matter is immaterial if it "has no essential or  
13 important relationship to the claim for relief" pleaded. *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524,  
14 1527 (9th Cir. 1993) (internal quotation marks and citation omitted), *rev'd on other grounds*, 510  
15 U.S. 517 (1994). A matter is impertinent if it does "not pertain, and [is] not necessary, to the issues  
16 in question." *Id.* "The function of a 12(f) motion to strike is to avoid the expenditure of time and  
17 money that must arise from litigating spurious issues by dispensing with those issues prior to  
18 trial." *Id.* (quoting *Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983)); *accord*  
19 *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010). While a Rule 12(f)  
20 motion provides the means to excise improper materials from pleadings, such motions are  
21 generally disfavored because the motions may be used as delaying tactics and because of the strong  
22 policy favoring resolution on the merits. To that end, courts have held that a motion to strike  
23 matter from a complaint simply for being redundant, immaterial, impertinent, or scandalous  
24 "should only be granted if 'the matter has no logical connection to the controversy at issue *and*  
25 may prejudice one or more of the parties to the suit.'" *N.Y. City Emps.' Ret. Sys. v. Berry*, 667 F.  
26 Supp. 2d 1121, 1128 (N.D. Cal. 2009) (Ware, J.) (quoting *Rivers v. Cnty. of Marin*, No. C 05-4251,  
27 2006 WL 581096, at \*2 (N.D. Cal. 2007) (Illston, J.)). "Where the moving party cannot

1 adequately demonstrate such prejudice, courts frequently deny motions to strike ‘even though the  
2 offending matter literally [was] within one or more of the categories set forth in Rule 12(f).’” *Id.*  
3 (quoting *Rivers*, 2006 WL 581096, at \*2); *see also* Charles A. Wright & Arthur R. Miller, *Federal*  
4 *Practice and Procedure* § 1382 (1990). Furthermore, as already noted above, the Court construes  
5 pro se pleadings liberally. *Boag*, 454 U.S. at 365.

6 Although the Court’s October 12, 2011 Order advised Plaintiff that he must comply with  
7 Rules 8(a)(2) and 12(f), the Court did not consider the merits of D. Goldman’s first motion to strike  
8 portions of the original Complaint, as the motion was mooted by the Court’s dismissal without  
9 prejudice of the original Complaint. *See* Order at 13. D. Goldman’s new Motion to Dismiss does  
10 not identify what portions of the FAC are subject to be stricken under Rule 12(f), instead merely  
11 asserting as a general matter that portions of the FAC are prolix or repetitive. *See* Mot. at 18-21.  
12 In its Joinder, CCSF adds no analysis or argument, simply asserting that “the First Cause of  
13 Action” should be stricken “for failure to comply with Rules 8(a)(2) and 12(f).” Joinder at 6.  
14 Where a Rule 12(f) motion is really an attempt to dismiss certain claims, the Ninth Circuit has held  
15 that a Rule 12(b)(6) motion or a Rule 56 motion is the more proper vehicle. *See Whittlestone*, 618  
16 F.3d at 974; *see also Yamamoto v. Omiya*, 564 F.2d 1319, 1327 (9th Cir. 1977) (“Rule 12(f) is  
17 ‘neither an authorized nor a proper way to procure the dismissal of all or a part of a complaint.’”  
18 (citing 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1380, at 782  
19 (1969)). CCSF in its Joinder has not identified how Plaintiff’s patent infringement claim against  
20 CCSF is redundant, immaterial, impertinent, or scandalous, nor has it shown how CCSF is  
21 prejudiced by any of the matter asserted in the FAC. Accordingly, the Court DENIES CCSF’s  
22 Rule 12(f) motion to strike the First Cause of Action for patent infringement.

### 23 B. State Law Claims

24 In its October 12, 2011 Order, the Court dismissed Plaintiff’s state claims of fraud, unfair  
25 competition, and negligence as barred by their respective statutes of limitation,<sup>3</sup> but granted leave  
26

27 <sup>3</sup> As explained in the Court’s October 12, 2011 Order, Plaintiff’s state law claims are subject to the  
28 following statutes of limitation: (1) three years for fraud, *see* Cal. Code Civ. P. § 338(d); (2) four

1 to amend to allow Plaintiff an opportunity to plead facts that would entitle him to equitable tolling.  
2 Plaintiff has failed to do so in his FAC, and thus the state claims are dismissed with prejudice.

3 As explained in the previous Order, a party asserting equitable tolling must demonstrate  
4 that: (1) he has been diligent in pursuing his rights, and (2) “‘extraordinary circumstances beyond  
5 [his] control made it impossible to file the claims on time.’” *Huynh v. Chase Manhattan Bank*, 465  
6 F.3d 992, 1004 (9th Cir. 2006) (quoting *Seattle Audubon Soc’y v. Robertson*, 931 F.2d 590, 595  
7 (9th Cir. 1991)); *see Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). The doctrine is to be applied  
8 sparingly and is reserved only for “extreme cases,” such as when the claimant has been tricked by  
9 an adversary into letting a deadline expire, an administrative agency’s notice of the statutory period  
10 is clearly inadequate, or when the statute of limitations is not complied with solely due to defective  
11 pleadings. *Scholar v. Pac. Bell*, 963 F.2d 264, 267-68 (9th Cir. 1992); *see Irwin v. Dep’t of*  
12 *Veterans Affairs*, 498 U.S. 89, 96 (1990). Courts are “generally unforgiving, however, when a late  
13 filing is due to [a litigant’s] failure ‘to exercise due diligence in preserving his legal rights.’”  
14 *Scholar*, 963 F.2d at 268 (quoting *Irwin*, 498 U.S. at 96).

15 In Plaintiff’s original complaint, he alleged that his untimely filing of his state law claims  
16 was due primarily to (1) his financial inability to obtain and retain counsel; (2) his own lack of  
17 legal expertise; and (3) his good faith reliance on Defendants’ representations that the matter could  
18 be resolved amicably without resort to the courts. *See* Order at 10. Although Plaintiff adds a  
19 section to his FAC dedicated to equitable tolling and further elaborates on the reasons why he  
20 delayed bringing these causes of action, he still fails to demonstrate entitlement to equitable tolling  
21 of his time-barred claims.

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24 years for unfair competition, *see* Cal. Bus. & Prof. Code § 17200 *et seq.*; and (3) four years for a  
25 negligence claim based on California Corporations Code § 5231, *see* Cal. Corp. Code § 5231. *See*  
26 Order at 11-13. Under California law, “[a] cause of action accrues when the claim is complete  
27 with all of its elements.” *Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1054 (9th  
28 Cir. 2008). Here, Plaintiff’s fraud, unfair competition, and negligence claims all stem from the  
alleged patent infringement, which Plaintiff discovered in June 2005. Thus, all of his state law  
claims accrued as of June 2005. Plaintiff did not file his action until March 2011, and therefore all  
of his state law claims are time barred.

1 First, as before, Plaintiff cannot rely on his financial inability to obtain and retain counsel or  
2 his own lack of legal expertise as bases for equitable tolling of his claims. *See* FAC ¶ 29. If a  
3 plaintiff’s financial inability to retain counsel or personal lack of legal expertise alone were  
4 sufficient to invoke the principles of equitable tolling, all pro se plaintiffs would be able to  
5 circumvent the applicable statutes of limitations and delay prosecution of their claims, to the  
6 detriment of defendants. These generic grounds do not exemplify the “extraordinary  
7 circumstances” required to justify equitable tolling of the statutes of limitations for Plaintiff’s state  
8 law claims here.

9 Likewise, while Plaintiff’s good faith efforts to resolve this dispute with Defendants  
10 without litigation are admirable, they are not sufficient grounds for equitable tolling,  
11 notwithstanding Plaintiff’s appeal to the “vast difference in [m]arket [p]ower between Plaintiff and  
12 Defendants” and the “complex interweaving and historical interaction of Defendants.” FAC ¶ 15.  
13 Plaintiff alleges that Defendants ignored him and “misrepresent[ed] . . . legal case findings,” FAC ¶  
14 133, but he does not allege that they tricked him into letting a deadline expire or took any other  
15 actions that “made it impossible [for him] to file the claims on time,” *Huynh*, 465 F.3d at 1004  
16 (internal quotation marks and citation omitted). While the Court appreciates Plaintiff’s feelings of  
17 frustration at being allegedly ignored by Defendants, it was Plaintiff’s own responsibility “to  
18 exercise due diligence in preserving his legal rights” and to bring suit in a timely manner.  
19 *Scholar*, 963 F.2d at 268 (quoting *Irwin*, 498 U.S. at 96).

20 Plaintiff also alleges that 2008 “was a year of frustration, anxiety, cancer and recuperation,”  
21 involving “radiation treatment / 6 months convalescence.” FAC ¶¶ 130, 137. Again, while the  
22 Court is sympathetic to Plaintiff’s medical issues, his allegations fall short of establishing that this  
23 is the extreme and rare case where equitable tolling is warranted. Plaintiff does not allege that his  
24 medical condition in 2008 rendered him unable to pursue his legal rights during the relevant time  
25 period, or that the time period of his incapacitation was long enough to justify the delay of several  
26 years in filing his claims. *See Gaston v. Palmer*, 417 F.3d 1030, 1034-35 (9th Cir. 2005), *reh’g*  
27 *granted, op. modified*, 477 F.3d 1165 (9th Cir. 2006); *Bryant v. Ariz. Att’y Gen.*, 499 F.3d 1056,

1 1060-61 (9th Cir. 2007). Accordingly, Plaintiff’s alleged medical issues and treatment are  
2 insufficient to toll the applicable statutes of limitations.

3 Finally, Plaintiff cannot rely on the six-year statute of limitations for his patent  
4 infringement claim under 35 U.S.C. § 286 to equitably toll his state law claims. *See* FAC ¶ 29.  
5 Plaintiff alleges, without basis, that “[b]ecause the infringement has . . . been the true basis of this  
6 action, ‘elements’ [for the other claims] truly didn’t in any way ‘accrue’ for Plaintiff until 2010,  
7 after RN Goldman refused a final time to respond or intercede.” *Id.* Title 35 applies only to patent  
8 law and is not applicable to claims relating to fraud, unfair competition, or negligence. Thus, this  
9 last argument is also insufficient to support equitable tolling.

10 In conclusion, Plaintiff’s state law claims of fraud, unfair competition, and negligence, are  
11 all time barred, and despite being given leave once before to plead facts supporting application of  
12 the equitable tolling doctrine, Plaintiff fails to do so. Because the running of the applicable statutes  
13 is apparent on the face of the FAC, and because this ground for dismissal applies equally to all  
14 Defendants, the Court DISMISSES with prejudice Plaintiff’s fraud, unfair competition, and  
15 negligence claims as to all Defendants.

### 16 C. Unconstitutionality

#### 17 1. D. Goldman and CCSF

18 Finally, the FAC alleges “Unconstitutionality” as a Cause of Action. FAC ¶¶ 170-71.  
19 Plaintiff argues that patent law in its current form does not provide adequate legal remedies for  
20 individual patentees like himself. *Id.*; *see* Order at 9-10. He appears to take issue specifically with  
21 the Manual of Patent Examining Procedure (“MPEP”) Appendix R Section 1.27, which Plaintiff  
22 claims disadvantages individual inventors. The Court previously dismissed Plaintiff’s  
23 unconstitutionality claim against D. Goldman because: (1) Plaintiff failed to allege “that Defendant  
24 has any affiliation with the United States Patent Office or any other governmental entity  
25 responsible for authoring or implementing the [Manual of Patent Examining Procedure],” and (2)  
26 Plaintiff failed to bring his unconstitutionality claim within the four year statute of limitations for  
27

1 civil actions arising under an Act of Congress, and failed to establish entitlement to equitable  
2 tolling. *See* Order at 10-11 (citing 28 U.S.C. § 1658(a)).

3 On this count, Plaintiff’s FAC fares no better than his original complaint. Neither D.  
4 Goldman nor CCSF is alleged to have any role in enacting, enforcing, or implementing the federal  
5 Patent Law or the Manual of Patent Examining Procedure. Furthermore, Plaintiff’s  
6 unconstitutionality claim is time barred, and as previously discussed, he fails to allege facts  
7 sufficient to establish equitable tolling. Plaintiff’s claim of unconstitutionality against D. Goldman  
8 and CCSF is therefore DISMISSED with prejudice.

9 **2. United States**

10 As an additional ground for dismissal, the United States argues that Plaintiff lacks standing  
11 to bring his unconstitutionality claim because he has not shown and cannot show that any injury  
12 suffered is traceable to the challenged regulation or that any injury is redressable by this Court.  
13 The Court agrees. The “irreducible constitutional minimum of standing” under Article III contains  
14 three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff must show:  
15 “[ (1) an injury in fact which is ‘actual, concrete, and particularized’; [ (2) a causal connection  
16 between that injury and the defendant’s conduct; and [ (3) a likelihood that the injury can be  
17 redressed by a favorable decision of the court.” *Get Outdoors II, LLC v. City of San Diego, Cal.*,  
18 506 F.3d 886, 891 (9th Cir. 2007) (quoting *Lujan*, 504 U.S. at 560-61); *accord Oliver v. Ralphs*  
19 *Grocery Co.*, 654 F.3d 903, 907 (9th Cir. 2011). Plaintiff makes clear in his opposition that  
20 “Plaintiff is not asking to ‘invalidate’ any patent regulations. Rather, he is arguing that [the]  
21 United States has failed altogether to establish regulations that would ‘secure’ his constitutional  
22 rights.” Opp’n to U.S. at 18. Plaintiff argues that his injury arises from the absence of adequate  
23 protections for individual inventors under the existing patent laws, and the relief he appears to be  
24 seeking is an injunction compelling the United States or the Department of Justice “to compel the  
25 creation of patent regulations . . . to provide [i]nventors the protection they need.” Opp’n to U.S. at  
26 22. This Court is without power to order the United States Congress to enact new patent  
27 legislation, as all legislative powers are vested exclusively in the Legislative Branch. *See* U.S.

1 Const. art. I, § 1; *see also Buckley v. Valeo*, 424 U.S. 1, 119 (1976) (“[T]he doctrine of separation  
2 of powers . . . is at the heart of our Constitution.”). Plaintiff has not identified any existing statute  
3 or regulation that has caused his alleged injury of patent infringement, nor has he requested a form  
4 of relief that this Court can award. Accordingly, the United States’ motion to dismiss Plaintiff’s  
5 claim of unconstitutionality is DISMISSED with prejudice.

#### 6 IV. DISCUSSION OF MOTION TO COMPEL RESPONSE

7 Finally, the Court considers Plaintiff’s motion to compel response from the Estate of R.  
8 Goldman, filed on January 1, 2012, in which Plaintiff requests “that the Court employ whatever  
9 methods may be at its disposal for compelling a response from the Estate of RN Goldman . . . to  
10 assure equitable treatment of all parties.” Mot. to Compel at 2. Plaintiff contends he has received  
11 “no response to [his] summons from the Estate or survivors of deceased defendant Richard N  
12 Goldman.”<sup>4</sup> Mot. to Compel at 2.

13 As the Court noted in its October 12, 2011 Order, “[a] federal court does not have  
14 jurisdiction over a defendant unless the defendant has been served properly under [Federal Rule of  
15 Civil Procedure] 4.” Order at 4 (citing *Direct Mail Specialists v. Eclat Computerized Techs., Inc.*,  
16 840 F.2d 685, 688 (9th Cir. 1988)). The Certificate of Service of Summons and First Amended  
17 Complaint shows that Plaintiff attempted to serve the Richard N. Goldman Estate via the Richard  
18 and Rhoda Goldman Fund. *See* ECF Nos. 71 (Summons), 84 (Certificate of Service). Plaintiff  
19 previously attempted to serve Richard N. Goldman in his official capacity as Chairman of the  
20 Richard and Rhoda Goldman Fund (“Goldman Fund”) by mailing a copy of the original Complaint  
21 to Gregory L. Lippetz, Esq. *See* ECF No. 20. Plaintiff appears to believe that Attorney Lippetz is  
22 the proper agent to accept service on behalf of R. Goldman’s Estate for two reasons: (1) Attorney  
23 Lippetz represents D. Goldman, son of R. Goldman and putative principal heir to the R. Goldman  
24 Estate, *see* Mot. to Compel at 5; and (2) in 2007, when Plaintiff first tried to contact R. Goldman  
25 regarding the alleged patent infringement by writing to the Goldman Fund, the Goldman Fund’s  
26 Executive Director Amy Lyons directed Plaintiff to speak with Attorney Lippetz, *see id.* at 3.

27 <sup>4</sup> R. Goldman died in November 2010, a few months before this action was filed. *See* Order at 6.

1 In response to the instant Motion to Compel, Attorney Lippetz filed a declaration stating,  
2 “Neither I nor my firm are or ever have been counsel for Richard N. Goldman, his Estate[,] or the  
3 Richard and Rhoda Goldman [F]und.” ECF No. 90 ¶ 3. Attorney Lippetz clarified at the March 8,  
4 2012 hearing that he represents SGFA and its officers and directors, and therefore represents D.  
5 Goldman solely in his capacity as a director of SGFA, not in his personal capacity. Based on  
6 Attorney Lippetz’s representations, it appears that Plaintiff has not properly served R. Goldman’s  
7 Estate.

8 If R. Goldman left an Estate, then any claims filed against the Estate must be served on the  
9 Estate’s personal representative. *See* Cal. Prob. Code § 9820 (“The personal representative may . .  
10 . [d]efend actions and proceedings against the decedent, the personal representative, or the  
11 estate.”); *id.* § 9150(b). Plaintiff therefore must ascertain the identity of the personal representative  
12 of the Estate and serve his Complaint upon that person or entity. “The ‘personal representative’ is  
13 the person or firm appointed by the probate court to administer the probate of a decedent’s estate.”  
14 *Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore*, 162 Cal. App. 4th 1331,  
15 1340 (2008). Plaintiff should be able to identify the personal representative of R. Goldman’s  
16 Estate by inquiring at the Probate Court in the County where R. Goldman was domiciled. *See* Cal.  
17 Prob. Code § 7051.

18 While the Court is sympathetic to the difficulties Plaintiff has faced as a pro se litigant, the  
19 Court is without authority to compel the participation of a non-party who has not been properly  
20 served. To the extent Plaintiff may wish to compel another party to disclose information that  
21 would facilitate service on R. Goldman’s Estate and personal representative, Plaintiff may attempt  
22 to do so through a discovery request. However, because Plaintiff does not yet appear to have  
23 properly served R. Goldman’s Estate, Plaintiff’s motion to compel a response from the Estate at the  
24 present time is DENIED without prejudice.<sup>5</sup>

25 \_\_\_\_\_  
26 <sup>5</sup> As a final note, the Court advises Plaintiff that much of the analysis discussed in this Order would  
27 appear to apply equally to R. Goldman’s Estate. Thus, of the claims pleaded in the FAC, it appears  
28 likely that only Plaintiff’s patent infringement claim could conceivably survive a motion to dismiss  
brought by R. Goldman’s Estate, should the Estate properly become a party to this suit.




1           **V. CONCLUSION**

2           For the foregoing reasons, the Court orders as follows: (1) D. Goldman's motion to dismiss  
3 is GRANTED with prejudice as to Plaintiff's claims of direct infringement, fraud, unfair  
4 competition, negligence, and unconstitutionality; and GRANTED without prejudice as to  
5 Plaintiff's inducement of infringement claim; (2) CCSF's motion to dismiss Plaintiff's claims of  
6 fraud, unfair competition, negligence, and unconstitutionality is GRANTED with prejudice; (3)  
7 CCSF's motion to strike Plaintiff's patent infringement claim is DENIED; (4) the United States'  
8 motion to dismiss all claims against it is GRANTED with prejudice; and (5) Plaintiff's motion to  
9 compel response from R. Goldman's Estate is DENIED without prejudice. Any amended  
10 complaint must remedy the deficiencies identified above and must be filed and served within 21  
11 days of the date of this Order or will be dismissed with prejudice as to D. Goldman. Plaintiff may  
12 not add new causes of action or parties without leave of the Court or stipulation of the parties  
13 pursuant to Federal Rule of Civil Procedure 15(a)(2).

14 **IT IS SO ORDERED.**

15  
16 Dated: March 19, 2012

  
\_\_\_\_\_  
LUCY H. KOH  
United States District Judge