

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, DENYING PLAINTIFF’S
RICHARD N. GOLDMAN, ET AL.,	)	MOTION FOR PRELIMINARY
	)	INJUNCTION, AND DENYING
Defendants.	)	PLAINTIFF’S MOTION TO COMPEL
	)	RESPONSE
	)	

Plaintiff Richard T. McRee (“McRee”) brings this action against Defendants Douglas E. Goldman (“D. Goldman”), Richard N. Goldman (“R. Goldman”), Willie L. Brown, Jr. (“Brown”), Gavin Newsom (“Newsom”), and Bevan Dufty (“Dufty”) pursuant to 15 U.S.C. § 4, 28 U.S.C. §§ 1331, 1337, 1338(a) & (b), and 1367, alleging patent infringement and a variety of constitutional and common law claims. Before the Court are three motions: Defendant Douglas E. Goldman’s motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted; Plaintiff’s motion to compel response from the other Defendants; and Plaintiff’s motion for a preliminary injunction enjoining the alleged infringement. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument and hereby VACATES the hearing and case management conference scheduled for October 13, 2011. Having considered the submissions of the parties, and for good cause shown,

1 the Court hereby DENIES Plaintiff’s motion to compel response from Defendants R. Goldman,  
2 Brown, Newsom, and Dufty, GRANTS Defendant Douglas E. Goldman’s motion to dismiss in part  
3 with prejudice and in part with leave to amend, and DENIES Plaintiff’s motion for preliminary  
4 injunction.

5 **I. BACKGROUND**

6 For purposes of ruling on the motion to dismiss, the Court may generally “consider only  
7 allegations contained in the pleadings, exhibits attached to the complaint, and matters properly  
8 subject to judicial notice.” *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 899-900  
9 (9<sup>th</sup> Cir. 2007) (internal quotation marks and citations omitted). “Pro se pleadings are liberally  
10 construed.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). The Court  
11 accepts the following allegations from Plaintiff’s complaint as true and construes the pleadings in  
12 the light most favorable to the nonmoving party. *Colony Cove Props., LLC v. City of Carson*, 640  
13 F.3d 948, 955 (9th Cir. 2011).

14 McRee is a registered architect and sole inventor of U.S. Patent No. 6,003,269 (’269  
15 Patent), which claims a “Retractable Covering for Spaces” (RCS). Compl. ¶ 1; *see* Ex. A to  
16 Compl. McRee uses his trademark “SkyCover” to identify embodiments of the ’269 Patent.  
17 Compl. ¶ 1.

18 The site of the alleged infringement is Stern Grove, a public park owned and maintained by  
19 the City and County of San Francisco (“CCSF”) featuring an outdoor performance venue. Since  
20 1938, the Stern Grove Festival Association (“SGFA”) has been responsible for organizing and  
21 presenting, through charitable donations, a series of admission-free summer concerts open to the  
22 public and staged in Stern Grove’s natural amphitheater. In 2004 and 2005, SGFA and CCSF  
23 jointly oversaw a \$15 million renovation of Stern Grove, which included construction of a new  
24 stage. Compl. ¶ 54. The new stage included a series of three retractable canvas panels that could  
25 be deployed above the stage to protect the performers from the sun and rain. McRee alleges that  
26 these retractable panels (“Stern Grove retractable canopy”) infringe his ’269 Patent and that such  
27 infringement on the part of Defendants was willful.

1 Plaintiff alleges that Defendants knew of his patent prior to construction; indeed, that “the  
2 entire vision faithfully reflected both the very same idea and same location Plaintiff had  
3 incidentally and confidentially mentioned to a Brown Agent inside the Mayor[‘s] Office six years  
4 before.” *Id.* ¶¶ 15, 17. Plaintiff disclosed his invention to the City of San Francisco in 1998 when  
5 he was called into then-Mayor Brown’s office for a confidential meeting concerning the possible  
6 redevelopment of Candlestick Park. *Id.* ¶ 22. In the end, Candlestick Park was not redeveloped,  
7 but the Stern Grove redevelopment proceeded. In June 2004, various SGFA staff received  
8 brochures for the SkyCover without Plaintiff’s authorization at a public meeting, and shortly  
9 thereafter, plans for the Stern Grove renovations were released to the public. *Id.* ¶ 59. No  
10 infringing SkyCover was apparent, but Plaintiff contacted SGFA to confirm this fact and was  
11 assured that some form of “shroud” would be used rather than a SkyCover. *Id.* ¶ 61.

12 Plaintiff alleges that he first learned of the suspected infringement from a photograph of the  
13 stage in a June 20, 2005 newspaper article on the Stern Grove renovations. He, his wife, and a  
14 colleague immediately drove to Stern Grove, where he witnessed the purported infringing structure  
15 firsthand. *Id.* ¶¶ 16, 17. After learning of the infringement, Plaintiff contacted various Defendants  
16 and their associates to notify them of the infringement and to attempt license discussions. *Id.* ¶ 70;  
17 Ex. B to Compl. From 2005 through the filing of this suit, Plaintiff continued to reach out to the  
18 named Defendants and their agents in hopes of gaining recognition for his invention and resolution  
19 of his grievances, but Defendants were unresponsive. Compl. ¶¶ 18, 70-73. Instead, CCSF and  
20 SGFA continued to use the Stern Grove retractable canopy, which was exposed to and enjoyed by  
21 nearly one million people over the past six years. *Id.* ¶ 18. Plaintiff alleges that the infringement  
22 has caused him and his family considerable harm, including economic harm, health problems, and  
23 reputational/dignitary injury. *Id.* ¶ 70. Plaintiff attempted to retain an attorney to represent him in  
24 the instant action but was unable to afford one and therefore filed this complaint pro se.<sup>1</sup> *Id.* ¶ 70.

## 25 II. LEGAL STANDARDS AND ANALYSIS

26  
27 <sup>1</sup> The Court advises Plaintiff to sign up for an appointment with the Federal Legal Assistance Self-Help Center  
28 (“FLASH”) at the San Jose Courthouse. The telephone number for FLASH is (408) 297-1480.



1 copy of the summons and complaint “together with two copies of the notice and acknowledgment  
2 provided for in subdivision (b) and a return envelope, postage prepaid, addressed to the sender.”  
3 Cal. Code Civ. P. § 415.30.

4 Plaintiff did not comply with the California rules for service of individuals, nor did he  
5 comply with the federal rules by serving Defendants Brown, Newsom, or Dufty individually,  
6 leaving a copy at each of their dwellings or places of abode, or delivering a copy to their authorized  
7 agents.<sup>2</sup> Because Plaintiff has not properly served Defendants Brown, Newsom, or Dufty, his  
8 motion to compel them to file an answer to his complaint is hereby DENIED.

9 Nevertheless, although the Complaint does not identify the City and County of San  
10 Francisco as a defendant, Plaintiff’s subsequent filings suggest that CCSF is the real party in  
11 interest. For example, Plaintiff’s motion for administrative relief asks the Court to determine “that  
12 service to CCSF was indeed sufficient” and to “compel[] [CCSF] to respond to the complaint in  
13 recognition of its legal responsibility for the actions of Defendants Brown, Newsom, and Dufty,  
14 performed solely in their official capacities.” Mot. Admin. Relief, ECF No. 41 at 3. In that same  
15 motion, Plaintiff explains that Defendants Brown, Newsom, and Dufty “were named solely  
16 because their infringement-inducing actions were performed while serving in their ‘official’  
17 capacities as elected representatives of [the City and County of San Francisco (“CCSF”).” *Id.*

18 Accordingly, the Court grants Plaintiff leave to amend his Complaint and to re-attempt  
19 proper service of any amended complaint on defendants as shall be named therein. Should Plaintiff  
20 again name defendants in their individual capacity, service shall comply with Rule 4(e) of the  
21 Federal Rules of Civil Procedure to be valid. Should Plaintiff choose to file suit against defendants  
22 in their official capacity or against the City and County of San Francisco, service shall comply with  
23 Rule 4(j)(2) of the Federal Rules of Civil Procedure to be valid. Rule 4(j)(2) provides that service  
24

25 <sup>2</sup> On June 21, 2011, Plaintiff received a letter from City Attorney Dennis J. Herrera informing him  
26 as follows: “I write to advise you that delivery to the Mayor’s office is not effective service for  
27 former City officials Gavin Newsom, Willie Brown or Bevan Dufty. San Francisco has not been  
28 authorized to accept service on behalf of any of these former City officials. Because they have not  
been properly served, these former City officials will not file a response to your complaint.” ECF  
No. 24 at 2.

1 of state or local government is accomplished by “(A) delivering a copy of the summons and of the  
2 complaint to its chief executive officer; or (B) serving a copy of each in the manner prescribed by  
3 that state’s law for serving a summons or like process on such a defendant.” Fed. R. Civ. P.  
4 4(j)(2). The California rules provide that “[a] summons may be served on a public entity by  
5 delivering a copy of the summons and of the complaint to the clerk, secretary, president, presiding  
6 officer, or other head of its governing body.” Cal. Code Civ. P. § 416.50.

## 7 **2. Defendant R. Goldman**

8 The Complaint also names as a defendant R. Goldman, who died in November 2010, a few  
9 months before this action was filed. The Complaint moves to hold his son, D. Goldman, along  
10 with the Richard and Rhoda Goldman Fund, liable for R. Goldman’s actions. Compl. ¶ 3. In his  
11 motion to compel response, Plaintiff again moves for substitution of the Richard and Rhoda  
12 Goldman Fund. Mot. to Compel at 10, ECF No. 36. Because R. Goldman was already deceased at  
13 the time Plaintiff filed this action, Plaintiff should have followed procedures for suing R.  
14 Goldman’s estate rather than attempting to hold R. Goldman’s son or fund liable for his actions.  
15 The Court therefore denies Plaintiff’s motion to compel response or to substitute parties but grants  
16 Plaintiff leave to amend his complaint to name the proper defendants and accordingly re-attempt  
17 proper service as required.

## 18 **B. MOTION TO DISMISS**

19 This motion to dismiss is brought solely by Defendant D. Goldman, son of R. Goldman and  
20 Chairman of the Board for the Stern Grove Festival Association non-profit organization throughout  
21 the course of the alleged conduct that forms the basis of Plaintiff’s complaint. Compl. ¶ 4.

### 22 **1. Patent Infringement**

23 Plaintiff alleges that “Defendants directly, indirectly, contributorily and by inducement,  
24 have willfully infringed the ’269 patent by making and using the patented inventions for the stage  
25 proscenium at Stern Grove, and have willfully prolonged the infringement of the ’269 patent by  
26 continuing their use of the patented inventions despite Plaintiff’s diligence and repeated efforts to  
27 assert his Rights.” Compl. ¶ 93.

1 The relevant provisions of federal patent law provide:

2 (a) . . . whoever without authority makes, uses, offers to sell, or sells any patented  
3 invention, within the United States . . . infringes the patent. (b) Whoever actively  
4 induces infringement of a patent shall be liable as an infringer. (c) Whoever offers  
5 to sell or sells within the United States or imports into the United States a  
6 component of a patented machine, manufacture, combination, or composition, or a  
7 material or apparatus for use in practicing a patented process, constituting a material  
8 part of the invention, knowing the same to be especially made or especially adapted  
9 for use in an infringement of such patent, and not a staple article or commodity of  
10 commerce suitable for substantial noninfringing use, shall be liable as a contributory  
11 infringer.”

12 35 U.S.C. § 271.

13 Direct infringement requires no more than the unauthorized use of a patented invention.

14 *See Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 484 (1964). Defendant does  
15 not argue that the Stern Grove retractable canopy is non-infringing. Instead, Defendant argues that  
16 he cannot be held personally liable under 35 U.S.C. § 271(a) for direct infringement because he  
17 was not directly involved in the design or construction of the Stern Grove RCS canopy, and  
18 because there is no evidence that SGFA is merely his “alter ego” as would justify “piercing the  
19 corporate veil.” *See Wordtech Sys., Inc. v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308,  
20 1313 (Fed. Cir. 2010) (“To determine whether corporate officers are personally liable under §  
21 271(a) requires invocation of those general principles relating to piercing the corporate veil.”  
22 (quoting *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1579 (Fed. Cir. 1986)).  
23 “[T]he ‘corporate veil’ shields a company’s officers from personal liability for direct infringement  
24 that the officers commit in the name of the corporation, unless the corporation is the officers’ ‘alter  
25 ego.’” *Id.* at 1313 (quoting *Wechsler v. Macke Int’l Trade, Inc.*, 486 F.3d 1286, 1295 (Fed. Cir.  
26 2007)). Plaintiff’s allegations of infringement appear to be directed at SGFA, of which D. Goldman  
27 is the chairman of the board. The Court agrees that Plaintiff has not alleged that D. Goldman  
28 personally designed, constructed, used, or sold the alleged infringing item, nor that SGFA is D.  
Goldman’s alter ego. Plaintiff has therefore failed to plead sufficient facts to state a claim against  
D. Goldman personally for direct infringement.



1 that the canopy infringed, and Plaintiff has not alleged any acts of Defendant intended to induce  
2 infringement after June 2005, the first cause of action for patent infringement is DISMISSED.

3 Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend “shall be freely  
4 given when justice so requires bearing in mind “the underlying purpose of Rule 15 to facilitate  
5 decision on the merits, rather than on the pleadings or technicalities.” *Lopez v. Smith*, 203 F.3d  
6 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks and alterations omitted). The Ninth  
7 Circuit instructs that “[i]n dismissing for failure to state a claim, ‘a district court should grant leave  
8 to amend even if no request to amend the pleading was made, unless it determines that the pleading  
9 could not possibly be cured by the allegation of other facts.’” *Doe v. United States*, 58 F.3d 494,  
10 497 (9th Cir. 1995) (quoting *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242, 247  
11 (9th Cir. 1990)). Furthermore, the Court “has a duty to ensure that pro se litigants do not lose their  
12 right to a hearing on the merits of their claim due to ignorance of technical procedural  
13 requirements.” *Balistreri*, 901 F.2d at 699. Leave to amend is generally only denied if allowing  
14 amendment would unduly prejudice the opposing party, cause delay, or be futile, or if the moving  
15 party has acted in bad faith. *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047,  
16 1058 (9th Cir. 2011) (citing *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir.  
17 1989)).

18 Defendant has not shown that leave to amend the first cause of action would be futile,  
19 unduly prejudicial, cause delay, or that the Plaintiff has acted in bad faith. Accordingly, the Court  
20 grants LEAVE TO AMEND this cause of action.

## 21 2. Unconstitutionality

22 Plaintiff next challenges the constitutionality of § 1.27 of the Manual of Patent Examining  
23 Procedure (“MPEP”) (Appendix R), concerning “[d]efinition of small entities.” Plaintiff alleges  
24 that by equating individual with “small entities” of up to 500 persons, MPEP Appendix R § 1.27  
25 puts individual patent holders on an un-level playing field against “much larger non-profits and  
26 universities with access to superior legal resources for defending intellectual property,” rendering it  
27 effectively impossible for individual patentees like himself to secure legal representation in patent

1 infringement disputes. *See* Compl. ¶¶ 100-103. Plaintiff alleges that this lack of protection for  
2 individual inventors contravenes Article I, § 8 of the federal Constitution, which empowers  
3 Congress “[t]o promote the Progress of Science and Useful Arts, by securing for limited Times to  
4 Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S.  
5 Const. art. I, § 8, cl. 8.

6 D. Goldman moves to dismiss on grounds that a claim of unconstitutionality cannot be  
7 asserted against him, a private individual, and that Plaintiff’s claim is barred by the statute of  
8 limitations. Mot. to Dismiss at 5-6. The Court agrees on both counts. Plaintiff has not alleged that  
9 Defendant is a state actor or that he acted under color of state law. Indeed, Plaintiff has in no way  
10 alleged that Defendant has any affiliation with the United States Patent Office or any other  
11 governmental entity responsible for authoring or implementing the MPEP. Defendant therefore  
12 cannot be sued for the alleged unconstitutionality of the MPEP, Appendix R, § 1.27. Moreover,  
13 even if D. Goldman were a proper defendant, Plaintiff’s claim of unconstitutionality is barred by  
14 the statute of limitations, which is four years after the cause of action accrues. *See* 28 U.S.C. §  
15 1658(a) (statute of limitations for civil actions arising under an Act of Congress). Plaintiff applied  
16 for his patent and submitted a “Small Entity Declaration – Independent Inventor(s)” form to the  
17 U.S. Patent and Trademark Office on April 7, 1997, Lippetz Decl., Ex. A, and he first learned of  
18 the suspected infringement in June 2005. Yet Plaintiff delayed commencement of this suit until  
19 2011, nearly six years after discovering all the elements of his cause of action.

20 Plaintiff argues that Defendants should be estopped from asserting that his claims are  
21 barred by the statute of limitations because they dragged out protracted pre-litigation settlement  
22 discussions in bad faith. A party asserting equitable tolling must demonstrate that (1) he has been  
23 diligent in pursuing his rights, and (2) extraordinary circumstances prevented him from filing on  
24 time. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Plaintiff alleges primarily his financial  
25 inability to obtain counsel, his own lack of legal expertise, and his reliance on putative Defendants’  
26 representations that the matter could be resolved amicably without resort to the courts. Although  
27 his allegations may be construed as diligence in seeking resolution of his claims without resort to

1 litigation, he has not alleged facts demonstrating that “extraordinary circumstances beyond [his]  
2 control made it impossible to file the claims on time.” *Huynh v. Chase Manhattan Bank*, 465 F.3d  
3 992, 1004 (9th Cir. 2006) (internal quotation marks and citations omitted). While the Court is  
4 certainly sympathetic to the challenges facing pro se plaintiffs, the factors Plaintiff proffers as  
5 justification for his delayed filing do not support the equitable tolling doctrine, which is to be  
6 applied sparingly and reserved only for “extreme cases,” such as when the claimant has been  
7 tricked by an adversary into letting a deadline expire, an administrative agency’s notice of the  
8 statutory period is clearly inadequate, or when the statute of limitations is not complied with solely  
9 due to defective pleadings. *See Scholar v. Pac. Bell*, 963 F.2d 264, 267-68 (9th Cir. 1992)  
10 (citations omitted).

11 Although Plaintiff has not shown that he is entitled to equitable tolling under California  
12 law, he may attempt to do so in an amended complaint. Accordingly, Plaintiff’s second cause of  
13 action is DISMISSED with leave to amend.

### 14 3. Fraud

15 Plaintiff’s third claim for relief alleges fraud based on Defendants having held themselves  
16 out to be “honest men” when in fact they “learned confidentially” of Plaintiff’s invention and  
17 then exploited their power to infringe his patent. Compl. ¶¶ 105-113. D. Goldman moves to  
18 dismiss, asserting that Plaintiff’s fraud claim is barred by the statute of limitations and that Plaintiff  
19 cannot allege criminal conduct as the basis for a civil suit.

20 The Court agrees with Defendant. Under California law, an action for relief on the ground  
21 of fraud or mistake must be filed within three years of discovery by the aggrieved party of the facts  
22 constituting the fraud or mistake. Cal. Code Civ. P. § 338(d). Plaintiff admits in his Complaint  
23 that he knew of the alleged infringement as early as June 2005, yet he did not file this action until  
24 March 2011. *See* Compl. ¶¶ 16-17. Plaintiff’s delay of more than three years from the time of his  
25 discovery of the alleged fraud bars his claim for relief, and no amendment to his pleadings can  
26 remedy this deficiency. As discussed above, Plaintiff has not shown that he is entitled to equitable  
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1 tolling under California law, but he may attempt to do so in an amended complaint. Accordingly,  
2 Plaintiff's third cause of action is DISMISSED with leave to amend.

#### 3 **4. Unfair Competition**

4 Plaintiff alleges that Defendants "have presented the [Stern Grove] Proscenium as their  
5 exclusive creation which is likely to cause confusion as to source, sponsorship, or association; thus  
6 making it likely that Plaintiff's professional colleagues, contacts, and associates in Industry  
7 (including the Marine, Fabric, Awnings, and Tensile Structure Industries) may assume that the  
8 Grove's RCS possesses no other significance and is therefore free to be copied without further  
9 attribution, thereby undermining Plaintiff's credibility and prospects when attempting to  
10 professionally advance the '269 Patent with collaborators, clients, prospects, and suppliers."  
11 Compl. ¶ 117. D. Goldman moves to dismiss, asserting that Plaintiff's unfair competition claim is  
12 barred by the statute of limitations, that Plaintiff cannot allege criminal conduct as the basis for a  
13 civil suit, and that Plaintiff has failed to allege sufficient facts to maintain a claim against D.  
14 Goldman for unfair competition.

15 Plaintiff cites sections of the Lanham Act, 15 U.S.C. § 1051 *et seq.*, as well as sections of  
16 the criminal code, as the basis for his unfair competition claim. However, Plaintiff does not allege  
17 trademark infringement under the Lanham Act, and he cannot cite the criminal code as the basis of  
18 his civil suit. To the extent Plaintiff sought to state a claim for unfair competition under the  
19 California Business & Professions Code, which defines unfair competition as "any unlawful, unfair  
20 or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising," Cal.  
21 Bus. & Prof. § 17200, his claim is barred by the four-year statute of limitations.

22 For the reasons discussed above, Plaintiff has not demonstrated that he is entitled to  
23 equitable tolling but may attempt to do so in an amended complaint. Accordingly, Plaintiff's  
24 fourth cause of action is DISMISSED with leave to amend.

#### 25 **5. Negligence**

26 Finally, Plaintiff alleges that "[t]he Philanthropist-Defendants have fiduciary duties to the  
27 Public Trust to act in ways that are true and consistent with their own statements and their public

1 image and roles as leaders striving for virtue and altruism,” and that they breached this duty to  
2 Plaintiff by disrespecting him and his patent. Compl. ¶¶ 119-122. As Defendant observes,  
3 Plaintiff appears to be attempting to state a claim under California Corporations Code § 5231,  
4 which provides that “[a] director shall perform the duties of a director, including duties as a  
5 member of any committee of the board upon which the director may serve, in good faith . . . .” The  
6 statute of limitations for a negligence claim based on California Corporations Code § 5231 is four  
7 years from the time the cause of action accrued. Plaintiff discovered the alleged infringement that  
8 forms the basis for his negligence claim in June 2005 yet waited nearly six years before bringing  
9 suit. His claim is therefore barred by the statute of limitations. Plaintiff has not demonstrated that  
10 he is entitled to equitable tolling but may attempt to do so in an amended complaint. Accordingly,  
11 Plaintiff’s fifth cause of action is DISMISSED with leave to amend.

### 12 C. MOTION TO STRIKE

13 The Court’s dismissal renders moot D. Goldman’s motion to strike certain portions of the  
14 complaint. *See* Mot. to Dismiss at 13-15 & Ex. B. Nonetheless, because the Court grants Plaintiff  
15 leave to amend, the Court hereby advises Plaintiff that any amended Complaint must comply with  
16 the Federal Rules of Civil Procedure, including Rule 8(a)(2) (requiring a “short and plain statement  
17 of the claim showing that the pleader is entitled to relief”) and Rule 12(f) (allowing court to “strike  
18 from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous  
19 matter”).

### 20 D. MOTION FOR PRELIMINARY INJUNCTION

21 A plaintiff seeking a preliminary injunction must show that (1) he is likely to succeed on  
22 the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the  
23 balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter v.*  
24 *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Under the Ninth Circuit’s “sliding scale”  
25 approach, which survived *Winter*, “the elements of the preliminary injunction test are balanced, so  
26 that a stronger showing of one element may offset a weaker showing of another.” *Alliance for*  
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1 *Wild Rockies v. Cottrell*, 622 F.3d 1045, 1049 (9th Cir. 2010); *accord Vanguard Outdoor, LLC v.*  
2 *City of Los Angeles*, 648 F.3d 737, 739-40 (9th Cir. 2011).

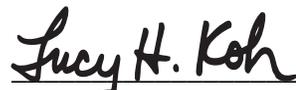
3 As discussed above, McRee has not pleaded sufficient facts to withstand a motion to  
4 dismiss, much less demonstrate a likelihood of success on the merits. In light of his failure to  
5 satisfy the first prong of the preliminary injunction test, it is unnecessary at this time to consider  
6 whether the other elements are satisfied. Because the action is dismissed as to Defendant Goldman  
7 and no other putative defendant has properly been made party to the instant suit, the motion for  
8 preliminary injunction is denied as moot.

9 **III. CONCLUSION**

10 For the foregoing reasons, Defendant Douglas E. Goldman's motion to dismiss the first  
11 cause of action for failure to state a claim is GRANTED with leave to amend. All other claims are  
12 dismissed with prejudice. Accordingly, Plaintiff's motion for preliminary injunction is DENIED.  
13 Plaintiff's motion to compel response is DENIED with leave to re-attempt proper service of an  
14 amended complaint. Any amended complaint must remedy the deficiencies identified above and  
15 must be filed and served within 21 days of this Order.

16 **IT IS SO ORDERED.**

17  
18 Dated: October 12, 2011



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