

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): [REDACTED] Brett G. Evans (Bar No. 244213)	FOR COURT USE ONLY
TELEPHONE NO. : [REDACTED] FAX NO. (Optional): (888) 956-7890 E-MAIL ADDRESS (Optional) : [REDACTED], brett@eklawpc.com ATTORNEY FOR (Name) : Specially-Appearing Defendant [REDACTED]	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Los Angeles STREET ADDRESS : 6230 Sylmar Ave., Room 107 MAILING ADDRESS : 6230 Sylmar Ave., Room 107 CITY AND ZIP CODE : Van Nuys, CA 91401 BRANCH NAME : Northwest District - Van Nuys East	
PLAINTIFF/PETITIONER: COOPER TRUST DTD 10/05/2000 et al. DEFENDANT/RESPONDENT: JOHN L. PARMIGIANI	
<b>FACSIMILE TRANSMISSION COVER SHEET</b>	CASE NUMBER: <div style="text-align: center; font-size: 1.2em;">LC105051</div>

**TO THE COURT:**

1. **Please file** the following transmitted documents in the order listed below:

<u>Document name</u>	<u>No. of pages</u>
NOTICE OF MOTION AND MOTION TO QUASH SERVICE	24
DECLARATION OF BRETT G. EVANS IN SUPPORT OF MOTION	58

2.  **Processing instructions** consisting of: \_\_\_\_\_ pages are also transmitted.

3.  **Fee required**     Filing fee     Fax fee (Cal. Rules of Court, rule 10.815)

a.  **Credit card payment** I authorize the above fees and any amount imposed by the card issuer or draft purchaser to be charged to the following account:

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Brett Evans  
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b.  **Attorney account** (Cal. Rules of Court, rule 2.304). Please charge my account no.:

1 [REDACTED]  
2 Brett G. Evans (Bar No. 244213)  
3 brett@eklawpc.com  
4 Evans & Kob, PC

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6 Facsimile: (888) 956-7890

7 Attorneys for Specially-Appearing Defendant [REDACTED]

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF LOS ANGELES, NORTHWEST DISTRICT

10 COOPER TRUST DTD 10/05/2000 by its  
11 Trustee LETITIA MCKEE COOPER, an  
12 individual,

13 Plaintiff,

14 vs.

15 JOHN L. PARMIGIANI, an individual;  
16 DOES 1 through 20, Inclusive,

17 Defendants.

Case No. LC105051

Assigned for All Purposes to:  
the Honorable Huey P. Cotton, Dept. A

**SPECIALY APPEARING DEFENDANT  
[REDACTED] NOTICE OF  
MOTION AND MOTION TO QUASH  
SERVICE OF PLAINTIFF'S  
COMPLAINT OR, IN THE  
ALTERNATIVE, TO STAY OR DISMISS  
FOR FORUM NON CONVENIENS; OR  
IN THE ALTERNATIVE, TO STAY  
UNDER THE COURT'S DISCRETION  
DURING PENDENCY OF FEDERAL  
APPEAL; MEMORANDUM OF POINTS  
AND AUTHORITIES**

*[Declaration of Brett G. Evans filed  
concurrently herewith]*

Hearing Date: August 11, 2017  
Time: 8:30 a.m.  
Department: A  
Reservation ID: 170718235503

Complaint Filed: January 9, 2017  
Trial Date: None Set

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**


2 **PLEASE TAKE NOTICE** that, on August 11, 2017 at 8:30 a.m., or as soon thereafter as the  
3 matter may be heard, in Department A of the Superior Court for the County of Los Angeles,  
4 Northwest Division, of the Van Nuys Courthouse East, located at 6230 Sylmar Ave., Van Nuys, CA  
5 91401, Defendant [REDACTED] ([REDACTED]”) will and hereby does move for an order  
6 pursuant to Code Civ. Proc. § 418.10(a)(1) quashing service of summons for lack of personal  
7 jurisdiction because Plaintiff still has not properly served [REDACTED] despite repeatedly filing false  
8 and defective proofs of service while nonetheless aware of such defects before each such filing.  
9 In the alternative, or in conjunction therewith, [REDACTED] moves the Court stay this action or dismiss  
10 the action on the ground of inconvenient forum pursuant to Code Civ. Proc., § 418.10(a)(2) during  
11 the pendency of the federal appeal of the remand. In the alternative, [REDACTED] requests that this  
12 Court should exercise its sound discretion to stay this action during the pendency of the federal  
13 appeal covering the same subject matter and parties as the instant action.

14 This motion is further based upon this Notice of Motion and Motion, attached Memorandum  
15 of Points and Authorities, the accompanying Declaration of Brett G. Evans and the exhibits attached  
16 thereto, all pleadings and papers on file in this action, and such additional facts, other evidence and  
17 arguments as may be presented at or before the time of the hearing on this matter.

18  
19 Dated: July 18, 2017

Respectfully submitted,

20 **EVANS & KOB, PC**

21  
22 By:   
23 Brett G. Evans (Bar No. 244213)  
brett@eklawpc.com

24 [REDACTED]  
25 [REDACTED]  
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27 Facsimile: (888) 956-7890

28 *Attorneys for Specially-Appearing Defendant* [REDACTED]  
[REDACTED]

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1 **I. INTRODUCTION**

2 After filing two prior false and facially defective proofs of service, one filed in this Court and  
3 another filed in the United States District Court for the Central District of California, Western  
4 Division that unjustifiably deprived Defendant [REDACTED] of his statutory  
5 privilege of removal, Plaintiff demonstrates that history can and will repeat itself sooner than one  
6 would hope, by filing a third false and facially defective proof of service on June 30, 2017 in this  
7 Court, despite prior notice of the defects demonstrating bad faith.

8 At 7:15 a.m. on May 25, 2017, Plaintiff’s process server allegedly approached a house at  
9 [REDACTED] New York and allegedly, “by substitute service,” left a summons,  
10 complaint and notice of the case management conference with Alexandra Melendez, a fictitious “Co-  
11 Tenant” that was “a competent member of the household” on behalf of the “occupant” pursuant to  
12 Code Civ. Proc., § 415.46, which is applicable only to a “prejudgment claim of right to possession.”  
13 While Plaintiff’s efforts may be commended this time for properly identifying the actual defendant  
14 (not [REDACTED]) and the proper state (not New Jersey), in addition to obvious  
15 procedural defects, Defendant notified Plaintiff three days prior to filing this purported “proof of  
16 service” with the Court that: (1) [REDACTED] does not know an “Alexandra Melendez;” (2) No  
17 persons other family reside at the [REDACTED] household – there are no “co-tenants;” and (3) no  
18 members of the family were even at home at 7:15 a.m. on May 25, 2017. Defense counsel informed  
19 Plaintiff of the defects in service, but they have failed to correct them. Nevertheless, based on these  
20 false allegations, Plaintiff filed another purported “proof of service” with this Court.

21 By this Motion,<sup>1</sup> [REDACTED] respectfully requests this Court:

22 **1.** Issue an order quashing service of summons on pursuant to Code Civ. Proc., §  
23 418.10(a)(1) because Plaintiff has yet to properly serve [REDACTED] despite repeatedly filing false and  
24 defective proofs of service in direct conflict with prior notice of such defects. Substitute service must  
25 be strictly complied prior to this Court exercising personal jurisdiction over [REDACTED].

26 **2.** Stay this action on the ground of inconvenient forum pursuant to Code Civ. Proc., §  
27

28 <sup>1</sup> This motion does not constitute a “general appearance” in the case. *See* Code Civ. Proc., § 418.10(d) (“no motion under this section...shall be deemed a general appearance by the defendant.”).

1 418.10(a)(2), until completion of the appeal of the remand order, which through Plaintiff's false and  
2 defective proof of service filed in the District Court, deprived [REDACTED] of his removal privilege  
3 and leaving him without remedy until conclusion of the appeal. Absent a stay, [REDACTED] will be  
4 forced into the inequitable and unjustifiable position of not only expending significant time and costs  
5 in the appeal to protect his statutory removal privilege due to Plaintiff's bad faith acts, but  
6 nonetheless, simultaneously engage in duplicate efforts, time and costs in defending this parallel  
7 action in this Court.

8 **3.** Alternatively, stay this action pursuant to the Court's exercise of sound discretion  
9 during the pendency of the federal appeal covering the same subject matter as the instant action.

10 [REDACTED] respectfully requests that this Court not reward Plaintiff's shenanigans that have:  
11 twice caused the filing of false and defective proofs of service with this Court; twice resulted in the  
12 dismissal of claims filed in arbitration; and most importantly, inequitably and unjustifiably deprived  
13 [REDACTED] of his statutory right to removal and forced him unnecessarily to incur unnecessary costs  
14 in appealing the remand order.

## 15 **II. RELEVANT FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### 16 **A. False and Defective Proof of Service Filed Twice in this Court**

17 **First POS.** On March 20, 2017, Plaintiff filed with this Court, the first false and defective  
18 proof of service. *See* Declaration of Brett G. Evans, filed concurrently herewith ("Evans Decl."),  
19 Exhibit A ("First POS"). The First POS was false, defective and filed in bad faith as clearly  
20 demonstrated by the following:

- 21 1. Allegedly served "[REDACTED]" not "[REDACTED]" (as provided in the title of  
22 the Complaint and the title to the same page of the affidavit)
- 23 2. Allegedly served at "14 Lohli Drive, Hamilton, NJ 08690" that was [REDACTED]  
24 abode within the State of New York[.]"
- 25 3. Affidavit and service allegedly executed in Bergen County, State of New Jersey, despite  
26 that allegedly attempting to serve [REDACTED] at his "abode within the State of New York[.]"

27 Importantly, on March 16, 2017, **four days prior to filing this false and defective proof of**  
28 **service**, Plaintiff's counsel hung up on Mr. [REDACTED] when he called "when trying to  
explain to [Plaintiff's counsel] that this person listed in the letter received was not me... This packet  
was addressed to an individual named [REDACTED]" and not to me "[REDACTED]" as



1 you can see the middle initial is not the same as mine which stands for Joseph. I have lived in NJ all  
2 of my life.” See Evans Decl., Exhibit B (emphasis in original). Nonetheless, Plaintiff filed the First  
3 POS in clear bad faith, without merit, or otherwise intended to cause unnecessary delay and  
4 necessitated a completely innocent, unrelated individual to waste time (and potentially money) filing  
5 a declaration with this Court.

6 **District Court POS.** On June 21, 2017, Plaintiff filed in the United States District Court for  
7 the Central District of California, Western Division (the “District Court”) a Proof of Service on  
8 Defendant ██████████ that, in addition to attaching the Second POS (as defined herein), improperly  
9 argued (without any evidence, declaration or otherwise in support) that:

- 10 1. “Defendant ██████████ was sent the Summons and Complaint, to his work address, with a  
11 Notice and Acknowledgment of Receipt on May 3, 2017. Defendant ██████████ did not  
12 respond.”
- 13 2. “Defendant ██████████ was represented by different counsel previously. A copy of the  
14 Summons and Complaint was sent to that counsel, who later stated he was not authorized by  
15 Mr. ██████████ to accept service and would not represent him in this case.”

16 See Evans Decl., Exhibit C (“District Court POS”).

17 However, to the contrary, on June 27, 2017 (**three days prior to filing the false and**  
18 **defective second proof of service** with this Court), ██████████ filed an objection to Plaintiff’s  
19 District Court POS, along with a declaration in support, that the District Court POS alleging  
20 substitute service “by leaving the documents with a co-tenant named Alexandra Melendez on May  
21 25, 2017” **was false** as:

- 22 1. “No Co-tenants Reside at ██████████ Home (other than family)” – “No person named  
23 Alexandra ██████████ lives with them or has lived with them.” No adults were even “at home  
24 at the time of the alleged service.”
- 25 2. “Defendant does not know a Alexandra ██████████” – Defendant neither “employ[s] anyone  
26 named Alexandra Melendez” nor is anyone named “Alexandra...associated with the family  
27 in any way at the time of the alleged substitute service.”

28 See Evans Decl., Exhibit D (“Objection to District Court POS”). Importantly, each of the statements  
was supported by ██████████’s declaration. See Evans Decl., Exhibit E (“█████████ Declaration”).

**Second POS.** Despite the Objection to the District Court POS, supported by the ██████████  
Declaration, that put Plaintiff on notice that the proof of service was false and defective, three days  
later on June 30, 2017, Plaintiff filed in this Court the same proof of service in this Court that was

1 **false, defective and filed in bad faith** as clearly demonstrated by the following:

- 2 1. Allegedly serving on fictitious (or otherwise unknown) “Alexandra [REDACTED]”
- 3 2. Allegedly serving fictitious “Co-Tenant” not “a competent member of the household”
- 4 3. Alleging serving such fictitious person on behalf of the “occupant” **pursuant to Code Civ. Proc., § 415.46**, which is **only applicable to a “prejudgment claim of right to possession”**
- 5 4. No “declaration of diligence stating actions taken first to attempt personal service.”
- 6 5. No subsequent mailing copies of the documents to [REDACTED] at the place where copies left.

7 *See* Evans Decl., Exhibit F (“Second POS”); *see also* [REDACTED] Declaration.

8 **B. Procedural History: Plaintiff’s False, Defective and Bad Faith Filings Deprive**  
9 **[REDACTED] of Statutory Right to Removal Causing Significant Appellate Expenses**

10 On June 13, 2017, prior to any effective service, [REDACTED] filed a notice of removal based  
11 on diversity of citizenship pursuant to 28 U.S.C.A. § 1441. *See* Evans Decl., Exhibit G. As  
12 [REDACTED] was not served, he filed only the courtesy copy of the Complaint (not any proof of  
13 service/process).

14 On June 16, 2017, the District Court *sua sponte* ordered that Plaintiff file “a notice informing  
15 the Court of when defendant [REDACTED] was served with the Complaint.” *See* Evans Decl.,  
16 Exhibit H.

17 On June 21, 2017, Plaintiff filed the District Court POS. *See* Evans Decl., Exhibit C.

18 On June 21, 2017, the District Court *sua sponte* ordered that the action remanded back to this  
19 Court, based on the District Court POS, because the District Court found that [REDACTED] did not file  
20 “a copy of all process, pleadings, and orders served upon such defendant or defendants in such  
21 action” by apparently not including the District Court POS in his initial filings (even though he never  
22 was so served). *See* Evans Decl., Exhibit I (“Remand Order”).

23 On June 28, 2017, prior to remand, [REDACTED] filed the Objection to District Court POS. *See*  
24 Evans Decl., Exhibit D.

25 On June 30, 2017 (amended on July 3, 2017, to include the subsequent order after  
26 termination of the stay), [REDACTED] filed a Notice of Appeal of the Remand Order.

27 On July 5, 2017, the United States Court of Appeals for the Ninth Circuit issued a Time  
28 Schedule Order, which provides that **briefing shall not be complete until after January 8, 2018.**

1 See Evans Decl., Exhibit J (“Time Schedule Order”).

2 **C. History of Delay in Twice Dismissed Claims in Arbitration**

3 **First Arbitration Filing.** On June 28, 2010, Plaintiff filed a Statement of Claim against  
4 [REDACTED] and others for arbitration before a panel of arbitrators with FINRA Dispute Resolution.  
5 See Evans Decl., Exhibit K (the “First Arbitration”). After nearly five years, which required five pre-  
6 hearing conferences (Dec.16, 2010, May 17, 2011, Oct. 25, 2012, Jan. 2, 2014, Oct. 30, 2014 and  
7 April 21, 2015), two motions to amend by Plaintiff to name additional parties (Feb. 26, 2013 and  
8 Aug. 27, 2013), a change in counsel causing further delays, Plaintiff’s failures to agree to hearing  
9 dates, and finally, Plaintiff’s failure to attend hearings on motions to dismiss filed by the very same  
10 parties that Plaintiff previously demanded to add and multiple respondents (including [REDACTED])  
11 raising the issue of a possible motion to dismiss for failure to prosecute, on April 21, 2015 the Panel  
12 ordered that it would dismiss Plaintiff’s case unless an arbitration date was set by May 8, 2015  
13 (within the next six months with no further continuances to be granted). After the Plaintiff failed to  
14 respond, on June 9, 2015, the Panel dismissed Plaintiff’s case in its entirety without prejudice. *Id.*

15 **Second Arbitration Filing.** On November 23, 2015, after failing to prosecute the First  
16 Arbitration over approximately five years, Plaintiff filed another Statement of Claim against  
17 [REDACTED] before a panel of arbitrators with FINRA Dispute Resolution. See Evans Decl., Exhibit L  
18 (the “Second Arbitration”). On October 15, 2016, the Panel unanimously granted [REDACTED]’s  
19 motion to dismiss Plaintiff’s claim in its entirety, without prejudice to any right the Claimants have  
20 to file in court, pursuant to Rule 12206 of the Code (six year time limitation of submission of claims)  
21 based on the following facts and matters: (i) the “Account was opened and all disputed transactions  
22 took place between January and June 2009; (ii) the “Account was moved to another brokerage not  
23 later than the end of June 2009; (iii) the “instant Claim was filed with FINRA on November 23,  
24 2015;” and (iv) “[t]here are no colorable claims by Claimants against Respondent that occurred  
25 after the end of June 2009.” *Id.*

26 **III. SERVICE OF SUMMONS MUST BE QUASHED WHERE SERVICE IS DEFECTIVE**

27 **A. Standards Governing the Motion to Quash**

28 “A defendant, on or before the last day of his or her time to plead or within any further time

1 that the court may for good cause allow, may serve and file a notice of motion...(1) To quash service  
2 of summons on the ground of lack of jurisdiction of the court over him or her.” Code Civ. Proc., §  
3 418.10(a)(1). Pursuant to Code of Civil Procedure Section 418(a)(1), a defendant may move to  
4 quash defective service of a summons because “compliance with the **statutory procedures for**  
5 **service of process is essential to establish personal jurisdiction.**” *Dill v. Berquist Construction*  
6 *Co.* (1994) 24 Cal.App.4th 1426, 1444, *as modified on denial of reh'g* (May 26, 1994) (emphasis  
7 added).

8 When a motion to quash is brought, “the burden of proof is placed upon the plaintiff to  
9 establish the facts of jurisdiction by a preponderance of the evidence.” *Aquila, Inc. v. Superior Court*  
10 (2007) 148 Cal.App.4th 556, 568; *see also Summers v. McClanahan* (2006) 140 Cal.App.4th 403,  
11 413 (“When a defendant challenges the court's personal jurisdiction on the ground of improper  
12 service of process ‘the burden is on the plaintiff to prove the existence of jurisdiction by proving,  
13 inter alia, the facts requisite to an effective service.’”).

14 **B. [REDACTED] Has Not Been Properly Served by “Substituted Service”**

15 Plaintiff sued [REDACTED], as a natural person residing in New York, whom was allegedly  
16 served by “substituted service” on May 25, 2017. *See* Second POS. Substitute service is governed by  
17 Code of Civil Procedure Section 415.20, subdivision (b), which provides that: (1) “**If a copy of the**  
18 **summons and complaint cannot with reasonable diligence** be personally delivered to the person  
19 to be served,” then (2) “a summons may be served by leaving a copy of the summons and complaint  
20 at the person's dwelling house, usual place of abode,” (3) “in the presence of **a competent member**  
21 **of the household**... at least 18 years of age, who shall be **informed of the contents thereof**,” and  
22 (4) “by **thereafter mailing a copy** of the summons and of the complaint by first-class mail, postage  
23 prepaid to the person to be served at the place where a copy of the summons and complaint were  
24 left.” Code Civ. Proc., § 415.20(b) (emphasis added). These “statutory requirements **must be**  
25 **strictly complied with** in order for jurisdiction over the person to be established by substitute  
26 means.” *Evartt v. Superior Court* (1979) 89 Cal.App.3d 795, 797-799, 152 Cal. Rptr. 836 (5th Dist.  
27 1979) (emphasis added);<sup>2</sup> *see also Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 41 (“When  
28 \_\_\_\_\_

<sup>2</sup> Compared to the “preferred way to serve a defendant, of course, is by personal delivery, as

1 substituted or constructive service is attempted, strict compliance with the letter and spirit of the  
2 statutes is required.”).

3 Plaintiff failed to effect service on [REDACTED] in accordance with these requirements. See  
4 Relevant Factual Background, subsection A. First, Plaintiff’s Second POS fails to demonstrate even  
5 a minimum of “reasonable diligence” attempts at personal service on [REDACTED], let alone the two or  
6 three attempts to personally serve the defendant at a “proper place” that ordinarily qualifies as  
7 “reasonable diligence.” See *Espindola v. Nunez* (1988) 199 Cal.App.3d 1389, 1392 (citations  
8 omitted). Substituted service is ineffective where process server fails to exercise “reasonable  
9 diligence” to effect personal service prior to substituted service. See *Evaritt*, 89 Cal. App. 3d at 797-  
10 798; see *Board of Trustees of the Leland Stanford Junior University v. Ham* (2013) 216 Cal.App.4th  
11 330, 337 (substituted service is permissible only after a good faith effort at personal service has first  
12 been made; the burden is on the plaintiff to show that the summons and complaint cannot with  
13 reasonable diligence be personally delivered to the individual defendant). Second, Plaintiff (and its  
14 process server) served “Alexandra [REDACTED],” an alleged “Co-Tenant” of the dwelling – besides that  
15 [REDACTED] doesn’t even know this person (see [REDACTED] Declaration), this is clearly not “a  
16 competent member of the household” and the process server makes no attempt to provide any  
17 evidence in contravention thereof or demonstrate how such person is “at least 18 years of age.” See  
18 Comments to Code Civ. Proc., § 415.20 (“The process server, or other persons with personal  
19 knowledge of the facts, must set forth in the proof of service facts showing that the various  
20 requirements were complied with. (Sections 417.10(a), 417.20(a).) Service upon such person is  
21 complete on the tenth day after a copy of the summons and of the complaint are mailed to the person  
22 to be served.); see also Code Civ. Proc., § 417.10(a). This fails the minimum constitutional standards  
23 for notice – “To be constitutionally sound the form of substituted service must be ‘reasonably  
24 calculated to give an interested party actual notice of the proceedings and an opportunity to be heard  
25 ... [in order that] the traditional notions of fair play and substantial justice implicit in due process are

26  
27  
28 prescribed in section 415.10, as this is the most likely to ensure actual notice to the defendant.”  
*Board of Trustees of the Leland Stanford Junior University v. Ham* (2013) 216 Cal.App.4th 330,  
336.

1 satisfied.” *Zirbes v. Stratton* (1986) 187 Cal.App.3d 1407, 1417 (citations omitted). Finally, the  
2 Second POS fails to demonstrate that it was thereafter mailed to [REDACTED].

3 Accordingly, Plaintiff has failed to properly serve [REDACTED] by substitutive service, despite  
4 notice of defects, and failed to remedy the defective service. Therefore, this Court lacks personal  
5 jurisdiction over [REDACTED].

6 **C. [REDACTED] Has Not Been Properly Served Under New York Law**

7 Alternatively, assuming arguendo, Plaintiff failed to effect service on [REDACTED] in  
8 accordance with the laws of the State of New York. *See* Code Civ. Proc., § 413.10(b) (“Outside this  
9 state but within the United States, as provided in this chapter or as prescribed by the law of the place  
10 where the person is served.”). Under Rule 308 of New York’s Civil Practice Law and Rules, service  
11 may made by: (1) delivering the process within New York State to a person of suitable age and  
12 discretion, who is willing to accept the papers, at the actual place of business, dwelling place or  
13 usual place of abode of the defendant or respondent; and (2) mailing the papers by first class mail to  
14 the person to be served at his or her last known residence or mailing them to his or her actual place  
15 of business. *See* N.Y. C.P.L.R., rule 308(2), 28 U.S.C.A. (McKinney). In addition, proof of service  
16 requirements provide that: (3) Plaintiff “specify the papers served, the person who was served and  
17 the date, time, address, or, in the event there is no address, place and manner of service, and set forth  
18 facts showing that the service was made by an authorized person and in an authorized manner[;]” (4)  
19 “[w]henver service is made pursuant to this article by delivery of the summons to an individual,  
20 proof of service shall also include, in addition to any other requirement, a description of the person  
21 to whom it was so delivered, including, but not limited to, sex, color of skin, hair color, approximate  
22 age, approximate weight and height, and other identifying features;]” and (5) Proof of service shall  
23 be...in the form of an affidavit if made by any other person [other than sheriff or other authorized  
24 public officer][.]” *See* N.Y. C.P.L.R., rule 306, 28 U.S.C.A. (McKinney).<sup>3</sup>

25 Here, Plaintiff not only failed to effect service on [REDACTED] in accordance with these  
26 requirements (demonstrating mailing, authority to accept service, description of the individual  
27

28 <sup>3</sup> Similar to California, “it is the plaintiff’s burden to prove the sufficiency of service[.]” *Room Additions, Inc. v. Howard* (N.Y. Civ. Ct. 1984) 124 Misc.2d 19, 20.

1 served, including but not limited to, sex color of skin, hair color, age, etc.), but the **Second POS**  
2 **demonstrates bad faith in contravention of New York’s explicit requirements** by allegedly  
3 serving “Alexandra [REDACTED],” an alleged “Co-Tenant” of the dwelling. Importantly, “[g]ood faith  
4 is implicit in the spirit of the statutory scheme. **If a plaintiff knows, or should know, that service**  
5 **according to the letter of the statute will not afford notice, then, by definition, it is not**  
6 **reasonably calculated to afford notice, and is constitutionally infirm.”** *City of New York v.*  
7 *Chemical Bank* (N.Y. Sup. Ct. 1983) 122 Misc.2d 104, 107 (emphasis added).

8 Plaintiff has failed to properly serve [REDACTED] by under New York law. *Id.* at 108 (“Where,  
9 however, service is not made in compliance with statute,...the **service is fatally defective; even if**  
10 **the defendant does receive notice**, the requirement of a formal, jurisdiction-acquiring sovereign act  
11 is not met.”) (emphasis added). This Court therefore lacks personal jurisdiction over [REDACTED].

#### 12 **D. Plaintiffs Filed Defective Proofs of Service in this Court**

13 After failing to serve process in accordance with the applicable law, Plaintiff compounded  
14 her errors by **twice filing false and defective proofs of service in this Court** that also fail to meet  
15 statutory requirements. Once service is made, a party is required to file a proof of service in the form  
16 of an affidavit swearing to certain facts, including the time, place and manner of service and “facts  
17 showing that the service was made in accordance with this chapter.” Code Civ. Proc., § 417.10(a).<sup>4</sup>  
18 A compliant proof of service must also state, in addition to the person served, “if appropriate, his or  
19 her title or the capacity in which he or she is served[.]” *Id.* Here, Plaintiff twice filed false and  
20 defective proofs of service in this Court, which provide **conclusory, self-serving statements that**  
21 **fail to satisfy the simple, codified procedure** in accordance with the Code of Civil Procedure.

### 22 **IV. IN THE ALTERNATIVE, THIS ACTION SHOULD BE STAYED (OR DISMISSED) ON**

#### 23 **THE GROUND OF INCONVENIENT FORUM**

24 If the court denies [REDACTED]’s Motion to Quash, this case should be stayed on the grounds  
25

26 <sup>4</sup> *See also* Code Civ. Proc., § 417.20(a). However, “[i]f served pursuant to another law of this state,  
27 in the manner prescribed by that law or, if no manner is prescribed, in the manner prescribed by this  
28 section for proof of a similar manner of service.” Code Civ. Proc., § 417.10(c). The comments to  
Code Civ. Proc., § 417.20 provide that, in addition to providing proof of service in such state, this  
Court would usually include a requirement that such proof of service “include a statement or  
showing of the foreign law that governs service of process and proof thereof.”

1 of *forum non conveniens* because this action is more appropriately tried in the United States District  
2 Court for the Central District of California, Western Division (the “District Court”), or alternatively,  
3 dismissed, forcing Plaintiff to refile in the District Court, based on the substantial injustice resulting  
4 from Plaintiff’s false and defective proof of service, filed in bad faith, that deprived ██████ of  
5 his right of removal. “A defendant, on or before the last day of his or her time to plead or within any  
6 further time that the court may for good cause allow, may serve and file a notice of motion for one or  
7 more of the following purposes: ... (2) To stay or dismiss the action on the ground of inconvenient  
8 forum.” Code Civ. Proc., § 418.10(a)(2); *see also* Code Civ. Proc., § 410.30(a) (“When a court upon  
9 motion of a party or its own motion finds that in the interest of substantial justice an action should be  
10 heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on  
11 any conditions that may be just.”). *Forum non conveniens* is employed when justice and propriety  
12 dictate that an action be tried within an alternative forum. *Stangvik v. Shiley Inc.* (1991) 54 Cal.3d  
13 744, 751. The granting or denial of a motion to stay on the ground of inconvenient forum lies within  
14 the trial court’s sound discretion. *Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 Cal.App.4th  
15 753, 758. “An action will be dismissed or stayed if a suitable alternative forum exists and the  
16 balance of private and public interests weigh in favor of allowing the litigation to proceed in the  
17 alternative forum.” *Id.* (citing *Stangvik*, 54 Cal.3d at 751).

18 **A. The District Court Provides a Suitable Place for Trial**

19 The first step in the analysis of whether a stay is appropriate is whether the alternative forum  
20 is a suitable place for trial. A forum is “suitable” if there is jurisdiction (“where an action ‘can be  
21 brought’”) and no statute of limitations bar to hearing the case on the merits in the alternative forum,  
22 but “not necessarily [where an action can be] won.” *Roulier v. Cannondale* (2002) 101 Cal.App.4th  
23 1180, 1186 (citations omitted). Determining whether the alternative forum is suitable depends not on  
24 the factors relevant to the convenience of the parties and the interests of the public, but on whether  
25 an action may be commenced in the alternative jurisdiction and a valid judgment obtained there  
26 against the defendants. *Id.* at 1187.

27 Here, litigating this action in the District Court will neither raise jurisdiction nor statute of  
28 limitations issues. First, both this Court and the District Court will be subject to the same



1 constitutional “minimum contacts” constitutional limitations on the exercise of personal jurisdiction  
2 over non-resident ██████████ (and which he already availed himself of the District Court through his  
3 attempt at removal). *See Sanders v. CEG Corp.* (1979) 95 Cal.App.3d 779, 783 (Code Civ. Proc., §  
4 410.10 “incorporates, reaffirms the due process clause of the 14th Amendment to the federal  
5 Constitution as a limitation on any attempt of exercise of jurisdiction by a California court to enter a  
6 judgment affecting rights or interests of non-resident defendants.”).<sup>5</sup> Second, “[f]ederal courts sitting  
7 in diversity apply the substantive law of the state and...[s]tate law includes the applicable state  
8 statute of limitations.” *Quality Cleaning Products R.C., Inc. v. SCA Tissue North America, LLC* (1st  
9 Cir. 2015) 794 F.3d 200, 204 (internal citations omitted); see *Guaranty Trust Co. of N.Y. v. York*  
10 (1945) 326 U.S. 99, 109–12 (“in all cases where a federal court is exercising jurisdiction solely  
11 because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court  
12 should be substantially the same, so far as legal rules determine the outcome of a litigation, as it  
13 would be if tried in a State court.”).<sup>6</sup>

14 **B. The Balance of Private and Public Interests Weighs in Favor of This Action Being**  
15 **Tried in the District Court**

16 If the alternate forum is suitable, “the court where the motion is pending must then balance  
17 the private interests of the litigants and the interests of the public in retaining the action in  
18 California.” *Chong v. Superior Court* (1997) 58 Cal.App.4th 1032, 1037.<sup>7</sup> Private interest factors are  
19 those that make trial and the enforceability of the ensuing judgment expeditious and relatively  
20 inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of  
21 witnesses, and the availability of compulsory process for attendance of unwilling witnesses. *Roulier*,  
22 101 Cal.App.4th at 1188. Public interest factors include the avoidance of overburdening local courts

23 \_\_\_\_\_  
24 <sup>5</sup> Due process permits state courts to exercise personal jurisdiction over nonresidents who have  
25 “minimum contacts” with the forum state. “Minimum contacts” means the relationship between the  
26 nonresident and the forum state is such that the exercise of jurisdiction does not offend “traditional  
27 notions of fair play and substantial justice” under the U.S. Constitution’s Fourteenth Amendment  
28 Due Process Clause. *See generally Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 474-76.

<sup>6</sup> “Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court  
bears on a Statecreated right vitally and not merely formally or negligibly. As to consequences that  
so intimately affect recovery or non-recovery a federal court in a diversity case should follow State  
law.” *Id.* at 110.

<sup>7</sup> ██████████’s “residence is also a factor to be considered in the balance of convenience.” *Stangvik v.*  
*Shiley Inc.* (1991) 54 Cal.3d 744, 755.

1 with congested calendars, protecting the interests of potential jurors so that they are not called upon  
2 to decide cases in which the local community has little concern, and weighing the competing interest  
3 of California and the alternate jurisdiction in the litigation. *Id.*

4 First, the private interests clearly weigh in favor of District Court. Despite any contentions  
5 otherwise (*cf.* Complaint, ¶ 21), “Prestige Financial Center and its [sic] principles[,]” Friedman,  
6 Schnaier & Associates and Kirtenbaum (*see* Complaint ¶¶ 1-3, 6, 10, 12-13, 15, 17) are all residents  
7 and/or domiciled in the State of New York, and Benjamin Chizzick is a resident of the State of  
8 Colorado, with all their relevant tangible evidence maintained in New York and Colorado, a  
9 thousand or more miles from the present forum. Further, the Federal Rules of Civil Procedure are  
10 generally considered more favorable for dealing with out of state non-party discovery. Rule 45 of the  
11 Federal Rules of Civil Procedure permits nationwide service of a subpoena issued from the district  
12 court where the action is pending, *see* Fed. Rules Civ.Proc., rule 45(b)(2), 28 U.S.C.A., while any  
13 discovery issued by this Court will require the party seeking discovery to present the clerk of the  
14 court where the discovery is sought (New York and/or Colorado) with a subpoena issued under the  
15 authority of this trial court, and then the clerk (New York and/or Colorado) is to issue a subpoena  
16 under the authority of the discovery for service on the witness. *See, e.g.*, N.Y. C.P.L.R., rule 3119,  
17 28 U.S.C.A. (McKinney). Second, public interest are likely a “wash” as both the District Court and  
18 this Court have similar interests in the litigation; however, the District Court may be favored  
19 considering Plaintiff’s sixth cause of action for breach of contract (Complaint, ¶¶ 52-55), which  
20 alleges a breach of the new account agreement that “shall be governed by the laws of the State of  
21 New York, without reference to its choice of law doctrine.” *See* Evans Decl., Exhibit M.

### 22 C. Equity and Justice Favor Litigating the Case in the District Court

23 This Court should invoke its “discretionary power...to decline to exercise the jurisdiction it  
24 has over a transitory cause of action when it believes that the action may be more appropriately and  
25 justly tried elsewhere” under the “equitable doctrine” of *forum non conveniens* as ██████████ was  
26 deprived of his removal privilege as a result of Plaintiff’s fraudulent attempt to subvert the removal  
27 statute leaving ██████████ without remedy until conclusion of the appeal. *Stangvik v. Shiley Inc.*  
28 (1991) 54 Cal.3d 744, 751.

1 In the instant case, the combination of Plaintiff's bad faith acts (by filing false and defective  
2 proof of service in the District Court) and the District Court's *sua sponte* Remand Order in excess of  
3 its authority based thereon,<sup>8</sup> ██████████ has been deprived of his removal "privilege...granted by the  
4 federal statute." *See generally Chicago, R.I. & P.R. Co. v. Stude* (1954) 346 U.S. 574, 580.  
5 Based on binding federal authority, the Appeal will result in the Remand Order being vacated with  
6 the case remanded to the District Court. *See Kelton Arms Condominium Owners Ass'n*, 346 F.3d  
7 1190 at 1193; *Corona-Contreras*, 857 F.3d at 1030. However, in the interim, this Court is put in the  
8 precarious position of reacquiring jurisdiction over the case for a limited period until the Remand  
9 Order is vacated in the Appeal. *See Spanair S.A. v. McDonnell Douglas Corp.* (2009) 172  
10 Cal.App.4th 348, 356 (federal court is divested of jurisdiction, and ██████████'s ability to request a  
11 stay from the federal court, when the district court clerk gives notice to the state court a certified  
12 copy of the remand order).

13 Importantly, absent a stay by this Court, ██████████ will be forced into the inequitable and  
14 unjustifiable position of not only expending significant time and costs in the appeal of the Remand  
15 Order to protect his statutory removal privilege due to Plaintiff's bad faith acts, but nonetheless,  
16 simultaneously engage in duplicate efforts, time and costs in defending this parallel action in this  
17 Court. Plaintiff's bad faith filing of false and defective proof of service was an attempt to subvert the  
18 removal statute, which ██████████ will be left without redress absent a stay of this Court. If Plaintiff  
19 had similarly subverted the removal statute by filing a parallel, separate action,<sup>9</sup> ██████████ would be  
20 entitled to seek redress through the Anti-Injunction Act.<sup>10</sup> "Courts considering the question have  
21 \_\_\_\_\_

22 <sup>8</sup> Since 2003, the law has been clear, when the Ninth Circuit joined "every other circuit has  
23 concluded that the district court has no such authority, and that there are good and sufficient reasons  
24 to reach this conclusion, we hold that the district court cannot remand *sua sponte* for defects in  
25 removal procedure." *Kelton Arms Condominium Owners Ass'n, Inc. v. Homestead Ins. Co.* (9th Cir.  
26 2003) 346 F.3d 1190, 1193; *see also Corona-Contreras v. Gruel* (9th Cir. 2017) 857 F.3d 1025,  
27 1029–30 ("Because the district court remanded for a procedural defect, and because procedural  
28 defects are waivable, the district court lacked authority to remand in the absence of a timely motion  
by Contreras....Contreras did not file a motion to remand, timely or otherwise. Therefore, the district  
court exceeded its authority under § 1447(c) by remanding *sua sponte* based on a non-jurisdictional  
defect.").

<sup>9</sup> *See generally Ackerman v. ExxonMobil Corp.* (4th Cir. 2013) 734 F.3d 237, 249 ("State and federal  
actions are parallel 'if substantially the same parties litigate substantially the same issues in different  
forums.'").

<sup>10</sup> *See* 28 U.S.C.A. § 2283 ("A court of the United States may not grant an injunction to stay  
proceedings in a State court except as expressly authorized by Act of Congress, or where necessary

1 unanimously held that a plaintiff's fraudulent attempt to subvert the removal statute implicates the  
2 "expressly authorized" exception to the Anti-Injunction Act and may warrant the granting of an anti-  
3 suit injunction." *Davis Intern., LLC v. New Start Group Corp.* (3d Cir. 2007) 488 F.3d 597, 605.  
4 Finally, any claim of prejudice by Plaintiff is illusory as Plaintiff not only had the opportunity to  
5 expedite this action by waiving any such procedural defects. *See* Remand Order ("If Plaintiff wishes  
6 to remain in federal court and thereby waive the procedural defect discussed above, Plaintiff shall  
7 notify the Court in writing on or before June 28, 2017).

8 **D. The Court May Retain Jurisdiction of a Stayed Action to Protect Plaintiff's Interests**  
9 **Should Plaintiff Be Unable to Receive a Fair Trial in The Alternate Forum**

10 With a stay of the action, this court retains jurisdiction so that plaintiff's due process rights  
11 are protected. In *Chong v. Superior Court*, the trial court was concerned that plaintiff would not be  
12 provided adequate due process in the alternate forum (Hong Kong) and therefor denied defendant's  
13 motion to dismiss on the ground of inconvenient forum. The Court of Appeal held that instead of  
14 denying defendant's motion, the trial court should have stayed the action pursuant to Code Civ.  
15 Proc., § 410.30. In that way, if plaintiff was unable to receive a fair trial in alternate forum, plaintiff  
16 could apply to lift the stay. *See Chong v. Superior Court* (1997) 58 Cal.App.4th 1032, 1040. In the  
17 instant proceeding, although there is no contention that plaintiff cannot receive a fair trial in the  
18 District Court as the alternate forum, the Court, rather than dismiss the action entirely, may order a  
19 stay and thereby retain jurisdiction so as to protect plaintiff from any due process concerns with  
20 respect to the alternate forum.

21 Thus, [REDACTED] submits that either this action should be dismissed so that Plaintiff can  
22 rectify the injustice caused by their false proof of service depriving [REDACTED] of his right to remove  
23 this case to the District Court, or in the alternative, submits that this action should be stayed, with  
24 orders that plaintiff file the action in the District Court.

25 **V. IN THE ALTERNATIVE, THIS ACTION SHOULD BE STAYED UNTIL THE**  
26 **FEDERAL APPEAL OF THE REMAND ORDER**

27 If the court denies [REDACTED]'s Motion to Quash and Motion to Stay (or Dismiss) the Action  
28 in aid of its jurisdiction, or to protect or effectuate its judgments.").

1 for *Forum Non Conveniens*, the Court should exercise its sound discretion to stay this action during  
2 the pendency of the appeal to the Ninth Circuit of the improper Remand Order. “It is black letter law  
3 that, when a Federal action has been filed covering the same subject matter as is involved in a  
4 California action, the California court has the discretion but not the obligation to stay the state court  
5 action.” *Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.* (1993) 15 Cal.App.4th 800, 804  
6 (citations omitted). This Court, in exercising its discretion, should consider:

- 7 1. “the importance of discouraging multiple litigation designed solely to harass an adverse  
8 party,”
- 9 2. “avoiding unseemly conflicts with the courts of other jurisdictions”
- 10 3. “whether the rights of the parties can best be determined by the court of the other jurisdiction  
11 because of the nature of the subject matter,”
- 12 4. “the availability of witnesses,”
- 13 5. “the stage to which the proceedings in the other court have already advanced” and
- 14 6. “the Federal action is pending in California not some other state.”

15 *Id.* at 804 (citations omitted); *see also Mave Enterprises, Inc. v. Travelers Indemnity Company of*  
16 *Connecticut* (2013) 219 Cal.App.4th 1408, 1423–24, as modified (Oct. 23, 2013). All these factors  
17 weigh in favor of staying the instant action (*see* Section IV *supra*), with a “critical factor favoring a  
18 stay of the state court action in favor of the Federal action, a factor which happens to be present in  
19 this case—the Federal action is pending in California not some other state.” *Caiafa Prof. Law Corp.*,  
20 15 Cal.App.4th at 804. Further, principles of equity and justice further weigh in favor of a stay (*see*  
21 *supra* Section IV, subsection C), as the Court “should consider the importance of discouraging  
22 multiple litigation designed solely to harass an adverse party, and of avoiding unseemly conflicts  
23 with the courts of other jurisdictions.” *Id.*

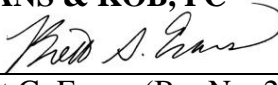
## 24 VI. CONCLUSION

25 For all of the foregoing reasons and supporting facts and authorities, and the attached  
26 Declaration of Brett G. Evans, Defendant [REDACTED] respectfully requests that the Court  
27 grant the relief requested in this Motion (*see supra* Introduction) pursuant to Code Civ. Proc. §  
28 418.10, or pursuant to this Court’s exercise of its sound discretionary authority to stay this action  
during the pendency of the federal court appeal, where on completion of the appeal, the case may be  
tried in the District Court.










1 Dated: July 18, 2017

Respectfully submitted,

2 **EVANS & KOB, PC**

3 By: 

4 Brett G. Evans (Bar No. 244213)  
brett@eklawpc.com

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11 Facsimile: (888) 956-7890  
12 *Attorneys for Specially-Appearing Defendant*   
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1 **CALIFORNIA STATE COURT PROOF OF SERVICE**

2 COOPER TRUST DTD 10/05/2000 by its Trustee LETITIA MCKEE COOPER, an  
3 individual, v. JOHN L. PARMIGIANI et al. (Case No. LC105051)

4 SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
5 COUNTY OF LOS ANGELES, NORTHWEST DISTRICT

6 At the time of service, I was over 18 years of age and not a party to the action. My business  
7 address is 1851 E. First St., Suite 900, Santa Ana, CA 92705.

8 On July 18, 2017, I served the following document:

9 **SPECIALY APPEARING DEFENDANT [REDACTED] NOTICE  
10 OF MOTION AND MOTION TO QUASH SERVICE OF PLAINTIFF'S  
11 COMPLAINT OR, IN THE ALTERNATIVE, TO STAY OR DISMISS FOR  
12 FORUM NON CONVENIENS; OR IN THE ALTERNATIVE, TO STAY  
13 UNDER THE COURT'S DISCRETION DURING PENDENCY OF FEDERAL  
14 APPEAL; MEMORANDUM OF POINTS AND AUTHORITIES**

15 **DECLARATION OF BRETT G. EVANS IN SUPPORT OF SPECIALY  
16 APPEARING DEFENDANT [REDACTED] NOTICE OF  
17 MOTION AND MOTION TO QUASH SERVICE OF PLAINTIFF'S  
18 COMPLAINT OR, IN THE ALTERNATIVE, TO STAY OR DISMISS FOR  
19 FORUM NON CONVENIENS; OR IN THE ALTERNATIVE, TO STAY  
20 UNDER THE COURT'S DISCRETION DURING PENDENCY OF FEDERAL  
21 APPEAL**

22 On the interested parties in this action as follows:

23 **Plaintiff Letitia McKee Cooper**

24 In her capacity as the trustee of the Cooper Trust dated October 5, 2010  
25 Joseph S. Fogel (SBN 156746)  
26 joefogel@lawfogel.com  
27 FOGEL & ASSOCIATES  
28 16133 Ventura Boulevard, Penthouse Suite  
Encino, California 91436-2447  
Telephone: (818) 986-7100  
Facsimile: (818) 986-7106

29 The document was served by the following means:

30  **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the  
31 document to be sent from e-mail address brett@eklawpc.com to the persons at the e-mail addresses  
32 listed above. The document was transmitted at 3:25 p.m. I did not receive, within a reasonable time  
33 after the transmission, any electronic message or other indication that the transmission was  
34 unsuccessful.

35  **BY MAIL:** I enclosed the document in a sealed envelope or package addressed to the  
36 persons at the addresses listed in the Service List and placed the envelope for collection and mailing,  
37 following our ordinary business practices. I am readily familiar with the firm's practice for  
38 collecting and processing correspondence for mailing. On the same day that the correspondence is  
placed for collection and mailing, it is deposited in the ordinary course of business with the United  
States Postal Service, in a sealed envelope with postage fully prepaid.

1 I certify under penalty of perjury under the laws of the State of California that the foregoing  
2 is true and correct. Executed on July 18, 2017, at Santa Ana, California.

3  
4 /s/ Brett G. Evans  
Brett G. Evans

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