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7 Plaintiff *In Propria Persona*  
and Attorney for Plaintiffs  
8 Amy Sherlock and Minors T.S.  
and S.S.  
9

10 **UNITED STATES DISTRICT COURT**  
11 **SOUTHERN DISTRICT OF CALIFORNIA**  
12

13 ANDREW FLORES, an individual,  
14 AMY SHERLOCK, on her own behalf  
and on behalf of her minor children,  
15 T.S. and S.S.

16 Plaintiffs,

17 vs.

18 GINA M. AUSTIN, an individual;  
19 AUSTIN LEGAL GROUP APC, a  
20 California Corporation; JOEL R.  
WOHLFEIL, an individual;  
21 LAWRENCE (AKA LARRY) GERACI,  
22 an individual; TAX & FINANCIAL  
CENTER, INC., a California  
23 Corporation; REBECCA BERRY, an  
24 individual; JESSICA MCELFRISH, an  
individual; SALAM RAZUKI, an  
25 individual; NINUS MALAN, an  
26 individual; MICHAEL ROBERT  
WEINSTEIN, an individual; SCOTT  
27 TOOTHACRE, an individual; ELYSSA  
28

Case No.: 3:20-cv-00656-BAS-DEB

**PLAINTIFFS' SURREPLY TO  
DEFENDANTS' REPLY TO  
PLAINTIFFS' OPPOSITION TO  
MOTION TO DISMISS THE FIRST  
AMENED COMPLAIN BY  
MICHAEL WEINSTEIN, SCOTT H.  
TOOTHACRE, ELYSSA KULAS,  
AND FERRIS & BRITTON APC**

Hearing Date: August 24, 2020  
Time: 10:00 A.M.

District Judge: Cynthia Ann Bashant  
Magistrate Judge: Daniel E. Butcher  
Courtroom: 4B (4<sup>th</sup> Floor)  
Complaint Filed: April 3, 2020  
Trial Date: None

1 KULAS, an individual;  
 2 FERRIS & BRITTON APC, a California  
 3 Corporation; DAVID DEMIAN, an  
 4 individual, ADAM C. WITT, an  
 5 individual, RISHI S. BHATT, an  
 6 individual, FINCH, THORTON, and  
 7 BAIRD, a Limited Liability Partnership,  
 8 JAMES D. CROSBY, an individual;  
 9 ABHAY SCHWEITZER, an individual  
 10 and dba TECHNE; JAMES (AKA JIM)  
 11 BARTELL, an individual; BARTELL &  
 12 ASSOCIATES, a California Corporation;  
 13 NATALIE TRANG-MY NGUYEN, an  
 14 individual, AARON MAGAGNA, an  
 15 individual; A-M INDUSTRIES, INC., a  
 16 California Corporation; BRADFORD  
 17 HARCOURT, an individual; ALAN  
 18 CLAYBON, an individual, MICHAEL  
 19 TRAVIS PHELPS, an individual; THE  
 20 CITY OF SAN DIEGO, a municipality;  
 21 2018FMO, LLC, a California Limited  
 22 Liability Company; FIROUZEH  
 23 TIRANDAZI, an individual; and  
 24 DOES 1 through 50, inclusive,

Defendants,

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19 JOHN EK, an individual;  
 20 THE EK FAMILY TRUST, 1994 Trust,

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Real Parties In Interest

Related Case: 18CV00325-BAS-DEB

23 Plaintiffs hereby file this surreply in opposition to defendants Michael Weinstein,  
 24 Scott Toothacre, Elyssa Kulas, and Ferris and Britton’s (the “Defendants”) Reply to  
 25 Plaintiffs’ Opposition to Motion to Dismiss Plaintiffs’ First Amended Complaint (the  
 26 “Reply”).

1 Defendants argue, for the first time, in their Reply that Plaintiffs are barred from  
2 bringing this action on the grounds that Plaintiffs were in privity with Darryl Cotton in  
3 *Cotton I*<sup>1</sup> and therefore the doctrine of res judicata and collateral estoppel applies.<sup>2</sup> In  
4 support of this argument, Defendants note that Flores’ made special appearances in *Cotton*  
5 *I*. However, those special appearances on behalf of Cotton, before Flores became the  
6 equitable owner of the Property, does not put Flores in a position of privity with Cotton,  
7 much less the Sherlock parties.

8 Defendants’ res judicata argument, predicated on Plaintiffs being in privity with  
9 Cotton, fails for at least four reasons:

10 First:

11 “Under the requirement of privity, only parties to the former judgment or their  
12 privies may take advantage of or be bound by it. [Citation.] A party in this  
13 connection is one who is [1] ‘directly interested in the subject matter, [2] *and had*  
14 *a right to make a defense, or to control the proceeding, and [3] to appeal from*  
15 *the judgment.*’ [Citations.]”

16 *Patel v. Crown Diamonds, Inc.*, 247 Cal.App.4th 29, 37-38 (Cal. Ct. App. 2016) (emphasis  
17 in original).

18 Defendants’ privity argument fails because Plaintiffs were neither parties to the  
19 *Cotton I* action nor were they in privity with Cotton. Although Flores had a direct interest  
20 in the Property (but not the Sherlock, T.S., or S.S.), none of Plaintiffs had a right to make a  
21 defense, control the proceeding, or appeal from the judgment. Defendants do not allege,  
22 much less prove, otherwise.

23 Second, Defendants are also barred by the doctrine of judicial estoppel from arguing  
24 that Flores was able to litigate his claims in the *Cotton I* action. Flores filed a motion to  
25 intervene in *Cotton I* arguing, *inter alia*, the existence of the Enterprise and the Antitrust  
26 Conspiracy (as alleged and defined in Plaintiffs’ First Amended Complaint). (*See Request*

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26 <sup>1</sup> “*Cotton I*” means *Larry Geraci vs Darryl Cotton*, San Diego County Superior Court,  
27 Case No. 37-2017-00010073-CU-BC-CTL.

28 <sup>2</sup> The word “privity” is not used even once in Defendants’ motion to dismiss.

1 for Judicial notice (“RJN”) No. 1.) Weinstein opposed Flores’ motion to intervene and the  
2 Court denied Flores’ motion. (See RJN No. 2.)

3 Federal law on judicial estoppel governs cases in federal courts regardless of whether  
4 they involve state law claims. *Johnson v. Oregon Dep’t of Human Res. Rehab. Div.*, 141  
5 F.3d 1361, 1364 (9th Cir. 1998); *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d  
6 597, 603 (9th Cir. 1996). Judicial estoppel is an equitable doctrine that prevents a party from  
7 benefitting by taking one position but then later seeking to benefit by taking a clearly  
8 inconsistent position. *Hamilton v. State Farm Fire & Cas. Ins. Co.*, 270 F.3d 778, 782 (9th  
9 Cir. 2001). It “applies to positions taken in the same action or in different actions,” *Samson*  
10 *v. NAMA Holdings, LLC*, 637 F.3d 915, 935 (9th Cir. 2010) (citing *Rissetto*, 94 F.3d at  
11 605)), and is intended to protect the integrity of the judicial process by preventing a litigant  
12 from “playing fast and loose with the courts,” *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th  
13 Cir. 1990). “It also ‘applies to a party’s stated position whether it is an expression of  
14 intention, a statement of fact, or a legal assertion.’” *Samson*, 637 F.3d at 935 (quoting  
15 *Wagner v. Prof’l Eng’rs in California Gov’t*, 354 F.3d 1036, 1044 (9th Cir. 2004)) (emphasis  
16 added).

17 Defendants, having opposed Flores’ motion to intervene and assert causes of action  
18 that were not litigated in *Cotton I*, is judicially estopped from arguing that Flores was in  
19 privity with Cotton. Defendants’ argument seeks to unconstitutionally deprive Plaintiffs of  
20 their “day in court” to litigate their claims. *Truax v. Corrigan*, 257 U.S. 312, 332 (1921)  
21 (“***The due process clause requires that every man shall have the protection of his day in***  
22 ***court***, and the benefit of the general law, a law which hears before it condemns, which  
23 proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after  
24 trial, so that every citizen shall hold his life, liberty, property and immunities under the  
25 protection of the general rules which govern society.”) (emphasis added).

26 Third, *arguendo*, assuming the *Cotton I* judgment is valid as Defendants state, Flores  
27 cannot be in privity with Cotton because then that means Cotton committed a fraud on  
28 Flores’ predecessor in interest, Richard Martin. Consequently, Flores has a cause of action

1 against Cotton for fraud. Such a position prevents a finding of privity because Cotton was  
2 not therefore a “virtual representative” for Martin/Flores. *See DKN Holdings LLC v.*  
3 *Faerber*, 61 Cal.4th 813, 826 (Cal. 2015) (“A nonparty alleged to be in privity must have  
4 an interest so similar to the party’s interest that the party acted as the nonparty’s ‘virtual  
5 representative’ in the first action.”) (citation and quotation omitted).

6 Fourth, for the reasons set forth above, a finding that Plaintiffs were in privity with  
7 Cotton would violate due process of law. *Cal Sierra Dev., Inc. v. George Reed, Inc.*, 14  
8 Cal.App.5th 663, 673 (Cal. Ct. App. 2017) (“This requirement of identity of parties or  
9 privity is a requirement of due process of law.”) (quotation and citation omitted).

10 **Conclusion**

11 For the reasons set forth above, Plaintiffs respectfully submit they were not in privity  
12 with Cotton.

14 Dated: August 18, 2020

Law Offices of Andrew Flores

15 By           /s/ Andrew Flores            
16 Plaintiff *In Propria Persona*, and  
17 Attorney for Plaintiffs AMY SHERLOCK  
18 and Minors T.S. and S.S.

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