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named as Ewing Brothers Towing Company

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THOMAS BENSON, Plaintiff, vs. EWING BROTHER'S TOWING COMPANY, ET AL. Defendants.	CASE NO. 2:17-CV-447-RFB-NJK

JOINDER IN LAS VEGAS REVIEW JOURNAL AND ELI SEGALL'S MOTION TO STRIKE PLAINTIFF'S FUGITIVE "WRIT GRANTING TRIAL BY JURY" (ECF No. 113)

COMES NOW Defendant, EWING BROS., INC. (incorrectly named as Ewing Brother's Towing Company) by and through its attorney of record, PETER M. ANGULO, ESQ., of the law firm of OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, and file the instant Joinder in Las Vegas Review Journal and Eli Segall's Motion to Strike Plaintiff's Fugitive "Writ Granting Trial by Jury" (ECF No. 113) and adopts the arguments and grounds as stated in the Points and Authorities filed in support of said Motion.

In addition to the well-reasoned arguments set forth by Las Vegas Review Journal and Eli Segall in their pending Motion to Strike, these joining Defendants raise for the Court's consideration several additional arguments.

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POINTS AND AUTHORITIES

I. THE CASE IS NOT RIPE FOR A JURY TRIAL AT THIS POINT

Frankly, the underlying motion for which the fugitive Writ is purportedly granted is improperly brought before the Court since a discovery plan has not yet been formulated with the Court nor has any discovery taken place. Pursuant to LR 26-1(a), it is Plaintiff, operating in proper person, who bears the responsibility to initiate the scheduling of the conference required by FRCP 26(f) which is to be held within 30 days after the first defendant answers or otherwise appears. Until that conference takes place, discovery cannot occur. Pursuant to FRCP 26(d), no party may seek discovery from "any source" until the required Rule 26(f) conference has taken place. FRCP 26(d)(1). Here, there is no dispute that conference has never taken place and, therefore, attempts by Plaintiff to conduct a trial without ever allowing the parties to have a chance at discovery is unauthorized under the Rules and an act of futility.

II. ANY "GRANTING" OF THE WRIT IS DONE IN VIOLATION OF DUE PROCESS

On the same day, without service to any party in this action, Plaintiff filed his farcical motion and–at the same time–had it granted by his fancied court (which has already been declared to be non-existent). The delivery of this document to his "court" without prior service on any of the parties constitutes an *ex parte* communication–which is disallowed under the rules. This Court noted in Maxson v. Mosaic Sales Solutions U.S. Operating Company, LLC, 2015 WL 4661981 at *1-2 (D. Nev. July 19, 2015)(citations and footnotes omitted):

> Courts do not deviate from the adversarial system without very good reason for doing so. *Ex parte* requests for relief are disfavored. "Given the value of our system places on the adversarial process, it is not surprising that the opportunities for legitimate *ex parte* applications are extremely limited. The Local Rules for this District make clear that *ex parte* are only permitted when the movant establishes "compelling reasons" for not providing notice to the opposing party. This "compelling reasons" standard is a stringent one that is not easily met. Generally speaking, meeting the "compelling reasons" standard requires a showing that either (1) providing notice to the opposing party would enable it to frustrate the movant's ability to obtain relief or (2) the temporal urgency of the matter is such that immediate and irreparable harm would occur if there was any delay in obtaining relief. Such circumstances must be shown with particularized detail concurrently with the filing of the *ex parte* request, and a certification should generally be made through a declaration specifying the reasons why notice to the opposing party is not possible.
>
> In short, *ex parte* requests are inherently unfair and impose a threat to the administration of justice. The Court greets such requests with skepticism and requires a significant showing that relief should be granted without notice or an opportunity for the

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opposing party to be heard.

In the present matter, no compelling reasons are established for this Court as to why such a document should be considered *ex parte*. Accordingly, this request is manifestly improper.

Furthermore, the alleged granting of this improper demand by Plaintiff's kangaroo court violates the concepts of due process. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interest within the meaning of the due process of the Fifth or Fourteenth Amendment . . . . [the United States Supreme] Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. . . . A fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976)(citations omitted). In such a situation, it is not the deprivation of the interest which is unconstitutional, rather, what must be unconstitutional is the deprivation of such an interest without due process of law. Zinermon v. Burch, 494 U.S. 113, 125 (1990). "The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the state fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the state provided, and whether it was constitutionally adequate." Id.

The purpose of the clause is to protect individuals from a government's arbitrary exercise of its powers. Daniels v. Williams, 474 U.S. 327, 331 (1986). The procedural protections required by the due process clause must be determined with reference to the rights and interests at stake in a particular case. See Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The Court must consider the private interests at stake in the governmental decision, the governmental interests involved, and the value of the procedural requirement in determining what process is due under the Fourteenth Amendment. Mathews, 424 U.S. at 335.

The Ninth Circuit has held one's due process rights under the Fourteenth Amendment may be violated by demonstrating an act which constitutes more than mere negligence. See Daniels, 474 U.S. at 330-32 (1986). "Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property."

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Daniels, 474 U.S. at 331 (citations omitted).

Deliberate indifference is found when the wrongfulness of an action is so obvious it is held, to a high degree of likelihood, such conduct would be likely to result in the violation of constitutional rights. See City of Canton v. Harris, 489 U.S. 378, 390 (1989). Similarly, a person acts with reckless disregard when one "disregards a substantial risk that a wrongful act may occur of which he is aware, or which is so obvious that he must have been aware of it, and his disregard of that risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." Davis v. Mason County, 927 F.2d 1473, 1482 (9th Cir.) cert. denied, 502 U.S. 899 (1991).

In this case, no party had a chance to file an opposition or even to be heard telephonically on the matter. As a practical matter, the trial cannot go forward as unilaterally scheduled by Plaintiff since counsel for this joining Defendant has just completed a serious surgical procedure and is required to be in Baltimore on that day for a follow-up visit with his physician. Of course, Plaintiff's pretend "court" did not know that because it never made an inquiry. To allow this order to stand, therefore, would violate the concepts of procedural due process outlined above and constitute a reckless disregard of those rights to the disadvantage and prejudice of this Defendant among others. Accordingly, it cannot be allowed to stand and should be stricken for the offense that it is.

III. THE REQUEST FOR TRIAL SETTING AND A SUBSEQUENT GRANTING VIOLATE THIS COURT'S LOCAL RULES

Finally, pursuant to LR 16-3(b), Plaintiff is required to meet with the parties and "personally discuss settlement and prepare and file a proposed joint pretrial order" containing certain crucial information in advance of any trial. The falsified writ setting, theoretically, this matter for jury trial is further violative of LR 16-3(a) which anticipates the parties will have sufficient notice of an upcoming trial to file appropriate motions in limine in advance thereof. Furthermore, a trial by jury is not allowed unless a party demands a jury trial in a pleading under FRCP 38(b). Such a demand must be made by filing a pleading served upon the parties no later than 14 days after the last pleading directed to the issue is served. FRCP 38(b)(1). The demand must be filed in accordance with Rule 5(d). FRCP 38(b)(2). That has not been done in this case.

Moreover, the trial cannot be scheduled until a scheduling order has issued which cannot be done until the parties have filed a report under Rule 26(f) or the Court has consulted with the attorneys and any other unrepresented parties at a scheduling conference. FRCP 16(b)(1). It is that order which sets the dates for pretrial conferences and for trial. FRCP 16(b)(3)(B)(vi). This Court has not issued such a scheduling order; not even Plaintiff's chimerical court has issued such a document. Therefore, the instant "writ" is in violation of the Federal Rules of Civil Procedure and this Court's Local Rules. Accordingly, it is a legal nullity and must be stricken as a matter of law–along with the request upon which its is predicated.

CONCLUSION

For the foregoing reasons, these Defendants respectfully join in the request by the Las Vegas Review Journal and Eli Segall–and the other parties joining in that Motion–to explain to this Court that such a document should not be allowed to stand and that sanctions should be considered against Plaintiff for continuing to use a falsified court to create spurious legal documents to the detriment of this Court and the rules of justice.

RESPECTFULLY SUBMITTED this 3 day of October, 2017.

OLSON, CANNON, GORMLEY,
ANGULO & STOBERSKI

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4 day of October, 2017, I served the above **JOINDER IN LAS VEGAS REVIEW JOURNAL AND ELI SEGALL'S MOTION TO STRIKE PLAINTIFF'S FUGITIVE "WRIT GRANTING TRIAL BY JURY" (ECF No. 113)** through the CM/ECF system of the United States District Court for the District of Nevada (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

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