

JOHN PETER LEE, LTD.

ATTORNEYS AT LAW

830 Las Vegas Boulevard South
Las Vegas, Nevada 89101
Telephone (702) 382-4044
Fax (702) 383-9950
E-Mail: info@johnpeterlee.com

John Peter Lee, Esq.
Yvette R. Freedman, Esq.
John C. Courtney, Esq.
James J. Lee, Esq.
Carlene R. Star, Esq.
Jack Galardi, Law Clerk

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Assistant to John C. Courtney, Esq.

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JOHN PETER LEE, LTD.

Tiffany Duran
Assistant to John C. Courtney, Esq.

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1 **REPLY**
 2 JOHN PETER LEE, LTD.
 3 JOHN PETER LEE, ESQ.
 4 Nevada Bar No. 001768
 5 JOHN C. COURTNEY, ESQ.
 6 Nevada Bar No. 011092
 7 830 Las Vegas Boulevard South
 8 Las Vegas, Nevada 89101
 9 (702) 382-4044 Fax: (702) 383-9950
 10 e-mail: info@johnpeterlee.com
 11 Attorneys for Defendant Reza Zandian

12 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

13 **IN AND FOR CARSON CITY**

14 JED MARGOLIN, an individual;
 15
 16 Plaintiff,

Case No.: 090C00579
 Dept. No.: I

17 vs.

18 OPTIMA TECHNOLOGY CORPORATION,
 19 a California corporation, OPTIMA
 20 TECHNOLOGY CORPORATION, a Nevada
 21 coporation, REZA ZANDIAN aka
 22 GOLAMREZA ZANDIANJAZI aka
 23 GHOLAM REZA ZANDIAN aka REZA
 24 JAZI aka J. REZA JAZI AKA G. REZA JAZI
 25 aka GHONONREZA ZANDIAN JAZI, an
 26 individual, DOE Companies 1-10; DOE
 27 Corporations 11-20, and DOE Individuals 21-
 28 30,

Defendants.

1334.023382-td

19 **REPLY TO OPPOSITION TO MOTION TO DISMISS**

20 COMES NOW Defendant Reza Zandian by and through his counsel John Peter Lee, Ltd.,
 21 and hereby files his REPLY TO OPPOSITION TO MOTION TO DISMISS.

22 This Reply is made and based upon all of the pleadings and papers on file herein, exhibits
 23 attached hereto, the attached Memorandum of Points and Authorities, and oral argument, if required
 24 by the Court.

25 ...

26 ...

27 ...

28 ...

JOHN PETER LEE, LTD.
 ATTORNEYS AT LAW
 830 LAS VEGAS BLVD. SOUTH
 LAS VEGAS, NEVADA 89101
 Telephone (702) 382-4044
 Telecopier (702) 383-9950

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 JPL

JOHN PETER JEE, LTD.
ATTORNEYS AT LAW
830 LAS VEGAS BLVD. SOUTH
LAS VEGAS, NEVADA 89101
Telephone (702) 382-4044
Telecopier (702) 383-9950

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS.

1 In 2008, before the United States District Court District of Arizona, Plaintiff Jed Margolin
2 (hereinafter "Margolin"), by and through his company, Optima Technology, Inc. a/k/a Optima
3 Technology Group, Inc. (hereinafter "OTG"), litigated the same transactions and occurrences to a
4 final judgment that he now wishes to again litigate in this case. Compare Am. Compl. and
5 Opposition to Motion to Dismiss (hereinafter "Opposition"), Ex. 29 (hereinafter "Ex. 29").
6

7 In the Arizona action, Margolin, acting as agent for OTC, alleged that Optima Technology
8 Corporation (hereinafter "OTC") unlawfully converted OTG's patents to its own dominion and
9 control. Ex. 29, pp. 12-31. In this case, Margolin alleged that OTC has converted OTG's patents
10 to its own use. Am. Compl., pp. 3-6. In the Arizona action, Margolin characterized the same facts
11 as constituting wrongdoing under the following causes of action: (1) Patent Infringement; (2) Breach
12 of Contract; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; (4) Negligence;
13 (5) Declaratory Relief; (6) Injurious Falsehood/Slander of Title; (7) Trespass to Chattels; (8) Unfair
14 Competition; (9) Unfair and Deceptive Competition/Business Practices; (10) Unlawful Conspiracy
15 to Injure Trade or Business; (11) Unfair and Deceptive Competition/Business Practices; (12) UAS
16 Liability; and (13) Punitive Damages. Ex. 29., pp. 16-30. Using the same facts pertaining to the
17 same transactions and occurrences, in this case, Margolin again alleges wrongdoing on the part of
18 OTC pursuant to slightly modified causes of action including: (1) Conversion; (2) Tortious
19 Interference with Contract; (3) Intentional Interference with Prospective Economic Advantage; (4)
20 Unjust Enrichment; and (5) Unfair and Deceptive Trade Practices. Am. Compl., pp. 2-6.
21

22 In the Arizona action, Margolin alleged that "Zandian executed [documents purporting to
23 assign or transfer title and/or interest in the Patents to OTC with the PTO] by (*inter alia*) utilizing
24 his signature on behalf of OTC and mis-stating that Zandian/OTC was exercising the Power of
25 Attorney as the 'attorney in fact' of Margolin." Ex. 29, p. 22, ll. 21-23. In this case, Margolin
26 alleged that "Zandian filed with the [PTO] fraudulent assignment documents allegedly assigning all
27 four of the Patents to [OTC]." Am. Compl., p. 3, ll. 25-28. Margolin even admits to bringing the
28

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ATTORNE AT LAW
830 LAS VEGAS BLVD. SOUTH
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Telecopier (702) 383-9950

1 instant action pursuant to the same transactions and occurrences already litigated to final judgment.
2 *See* Am. Compl., p. 4, ll. 5-17. The similarity between the facts in the Arizona action and the instant
3 action is absolute and separated only by the verbiage utilized in describing the same transactions and
4 occurrences and the causes of action purported to have been committed. *Compare* Ex. 29 and Am.
5 Compl.

6 **II.**
7 **PROCEDURAL HISTORY.**

8 Margolin filed the instant action on December 11, 2009, more than two years ago. Without
9 effecting proper service upon Defendant Zandian (hereinafter "Zandian"), Margolin took a default
10 judgment, which was later set aside on the grounds of insufficient service. On June 9, 2011, Zandian
11 filed a motion to dismiss the instant action, which was denied without prejudice to allow Margolin
12 an additional ninety (90) days to properly effectuate service. Margolin then attempted service by
13 publication in the San Diego Union-Tribute, the Reno Gazette-Journal and the Las Vegas Review
14 Journal, even though there exist no evidence in the record that Zandian resides in any of the cites,
15 or even the same country, whereby publication was made.

16 Even though Margolin alleged that Zandian's last known address was "8401 Bonita Downs
17 Road, Fair Oaks, California," Margolin never attempted service by publication in Fair Oaks,
18 California. Publication Motion, Ex. "1". Also, Margolin alleged to this Court that Zandian resided
19 in Sacramento County, California; however, Margolin did not attempt service by publication there
20 either. *Id.* at Ex. "2" through "4".

21 **III.**
22 **LEGAL ANALYSIS.**

23 **A. The Instant Motion Need Not be Treated as a Motion for Summary Judgment**
24 **in Order to Grant the Relief Sought by Zandian.**

25 Margolin has suggested that since documents were referenced in the Motion to Dismiss, that
26 motion must be treated as one for summary judgment. The so-called matters outside of the pleadings
27 are references to the Arizona action. These matters, however, are not outside of the pleadings, but
28 instead specifically mentioned in the Complaint. *See* Am. Compl., ¶¶ 17-18. Thus, Zandian

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1 referenced matters complete inside, not outside, the pleadings. Moreover, Zandian referenced a
2 court-produced docket that is worthy of judicial notice in any jurisdiction.

3 Notwithstanding, “[w]hen the complaint shows on its face that the cause of action is barred,
4 the burden falls upon the plaintiff to satisfy the court that the bar does not exist.” Kellar v. Snowden,
5 87 Nev. 488, 491, 489 P.2d 90, 92 (1971) (although affidavit accompanied motion to dismiss,
6 motion to dismiss was properly granted because “the defense of the statute of limitations appears
7 from the complaint itself.”). Here, the Amended Complaint contains an admission that the instant
8 action has already been litigated, or should have been litigated, before a United States District Court
9 in Arizona. *See* Am. Compl., ¶¶ 17-18. Margolin has not met his burden to show this Court why
10 the same transactions and occurrences should now be re-litigated in Nevada. Thus, the Amended
11 Complaint must be dismissed. Moreover, dismissal is proper because the defense related to
12 issue/claim preclusion or res judicata can be ascertained from the Amended Complaint itself.

13 Apparently, Margolin seeks conversion of the instant motion to one for summary judgment
14 for the sole purpose of attempting to invoke Rule 56(f) as a means to continue this two-year old
15 litigation. This argument, however, must fail because one need not go any further than the Amended
16 Complaint to ascertain that the same transactions and occurrences have been litigated before in
17 another jurisdiction. *See* Am. Compl., ¶¶ 17-18.

18 **B. Plaintiff Has Not Met His Burden Regarding General Personal Jurisdiction.**

19 As stated in the initiating motion, “[t]he plaintiff bears the burden of producing *some*
20 evidence in support of all facts necessary to establish personal jurisdiction [emphasis added].”
21 Trump v. District Court, 109 Nev. 687, 692-93, 857 p.2d 740, 748 (1993). At first, Margolin alleged
22 that Zandian resided in either San Diego or Las Vegas, but Plaintiff did not even attempt to serve
23 Zandian in either of these alleged places of residence. *See* Compl.; *compare to* Publication Motion.
24 Now, Margolin alleges in one paragraph of his Amended Complaint that Zandian has “at all relevant
25 times resided in Las Vegas, Nevada.” Am. Compl., ¶ 4. Margolin makes this allegation so that the
26 Court will deem that it has personal jurisdiction over Zandian without further inquiry. Three
27 paragraphs later, Margolin has alleged that Zandian and his co-defendant “at all relevant times herein
28 mentioned has been and/or is residing or currently doing business in and/or are responsible for the

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Telecopier (702) 383-9950

1 actions complained of herein in Storey County.” Margolin makes this allegation so that the Court
2 will deem Storey County as the proper venue without further inquiry. So, Zandian has been alleged
3 to reside in Las Vegas, San Diego, and now Storey County; however, Margolin has never alleged
4 with any specificity whatsoever that any of the transactions and occurrences (on the part of Zandian,
5 as an individual) giving rise to this action took place within the State of Nevada.

6 Margolin alleged, not in the Amended Complaint, but instead in the Opposition, that because
7 business entities in which Zandian is a stockholder or member have had “substantial” or “continuous
8 and systematic” contacts with the state, then Zandian himself has had sufficient contacts with the
9 state to allow for personal jurisdiction over him in his individual capacity. See Opposition. This sort
10 of reasoning is repugnant to the principles regarding stockholder immunity. See citation and
11 additional argument, *infra*.

12 Margolin also alleged, not in the Amended Complaint, but instead in the Opposition, that
13 Zandian personally owns real property in Nevada, however, none of that property is alleged to be
14 within Carson City where the instant action is pending. Thus, this Court’s jurisdiction has no alleged
15 contacts with Zandian in his personal capacity whatsoever. Notwithstanding, Zandian’s alleged real
16 property ownership has no nexus whatsoever to the acts complained of in the Amended Complaint.
17 Moreover, Margolin does not reside in Carson City, but instead in Storey County, which has its own
18 jurisdiction.

19 In sum, two years into the action, there is nothing in the Amended Complaint that is
20 sufficient to allow the Court to exercise personal jurisdiction over Zandian in his individual capacity.

21 **C. Plaintiff Has Not Met His Burden Regarding Specific Personal Jurisdiction.**

22 Margolin has cited McCulloch Corp. V. O’Donnell, 83 Nev. 396, 433 P.2d 839 (1967), to
23 stand for the proposition that mere ownership in property within the forum state is adequate to allow
24 the forum state to exercise personal jurisdiction over a non-resident defendant. In McCullough, the
25 Court granted the non-resident defendant a writ of prohibition “to prevent the lower court from
26 exercising further jurisdiction” after the lower court denied the defendant’s motion to dismiss.

27 Margolin highlighted in bold on of the statements in McCulloch: “In this case it must amount
28 to owning property or doing business within this states.” In McCulloch, the ownership in a certain

1 real property and a certain business were relevant to the Court's inquiry because the case was
2 centered on an injury that occurred on certain real property owned by a certain business. The Court
3 did not end its inquiry with real property ownership in the forum state. In fact, the Court stated that
4 "[t]he mere fact of stock ownership by one corporation in another does not authorize jurisdiction
5 over the stockholder corporation." Id. at 399. The Court also held that "[f]ormer ownership is not
6 sufficient to impose continuing answerability to jurisdiction absent other circumstances." Id. at 398.

7 This case, unlike McCulloch, does not involve any real property. Period. Thus, Zandian's
8 alleged ownership in real property in the forum state is irrelevant. Also, this case does not involve
9 any business owned in sole proprietorship by Zandian. The mere fact that Zandian is a stockholder
10 or membership in certain limited liability entities or corporations does give the Court jurisdiction
11 over Zandian personally. In fact, such a notion regarding personal jurisdiction on this basis is
12 specifically prohibited under the doctrine of stockholder immunity. Id. at 399 (Court explained that
13 "[t]o hold other wise would be to disregard the principles of stockholder immunity and would further
14 lead to the impractical result of holding stockholders of any corporation responsible in the event of
15 an injury on corporate property").

16 **D. Margolin's Claims are Barred on the Grounds of Claim Preclusion.**

17 Margolin is correct in his assessment of the test regarding claim preclusion. *See* Am. Compl.,
18 p. 14, ll. 19-23. The three-part test involves: (1) whether the parties or their privies are the same;
19 (2) whether the final judgment is valid; and (3) whether subsequent action is based on the same
20 claims or any part of them that were or could have been brought in the first case. *See* Five Star
21 Capital Corp. v. Ruby, 124 Nev. 1028, 194 P.3d 709, 713 (2008).

22 The parties (or their privies) are the same. Margolin was involved in the Arizona action. Ex.
23 29. Margolin's privy, OTG brought a cross-claim against OTC, and alleged that Zandian was
24 involved with OTC. Id. Maroglin is the plaintiff in this action. Am. Compl. Margolin is bringing
25 claims against Zandian and OTC in this action. Id.

26 The judgment is final. Margolin attached as Exhibit "A" to the Amended Complaint a copy
27 of the final judgment attained in the Arizona action. Am. Compl.

28 The claims or any part of them were litigated or could have been litigated in the Arizona

1 action. Compare Ex. 29 and Am. Compl.

2 Thus, all three parts of the test are unequivocally satisfied, and the Court need not go any
3 further than the matters alleged in the Amended Complaint to find the same. Period.

4 Margolin's apparent counterargument is without merit. Margolin alleges that the parties and
5 privies are different because Margolin, agent of OTG was not the plaintiff in Arizona, but instead
6 was a cross claimant. This argument is sufficiently self-defeating on its face without more. Margolin
7 does not even argue whether the judgment was final in the Arizona action, and Margolin has argued
8 that the claims could not have been brought in Arizona because they are now brought under different
9 banners, although alleging the same transactions and occurrences. This argument too is sufficiently
10 self-defeating without more.

11 Margolin was not required to bring a cross-claim against OTC or Zandian in the Arizona
12 action, but he did. See Executive Management, Ltd. v. Ticor Title Ins. Co., 114 Nev. 823, 834-838,
13 963 P.2d 465, 473-475 (1998). That cross-claim has been litigated to a final judgment. Now,
14 Margolin brings it again. The only thing preventing Margolin from bringing the same action over
15 and over again before several different courts in several different states in which Zandian may own
16 real property is the fact that Margolin brought a cross-claim in the Arizona action against OTC,
17 alleging that Zandian was behind OTC, and that action is now closed by final judgment. Margolin,
18 therefore, is done, and it is up to this Court to tell him so.

19 The Court, accordingly, is left with no other option than to dismiss the instant action based
20 upon claim preclusion alone, notwithstanding the lack of personal jurisdiction and lack of sufficient
21 service.

22 **IV.**

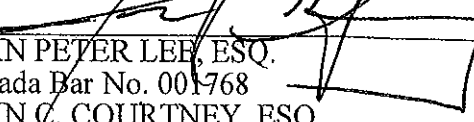
23 **CONCLUSION.**

24 Whether the Court feels that Zandian should be dismissed by the instant motion to dismiss,
25 or whether the Court deems that the instant motion has been converted to one for summary judgment
26 has no real effect: either way, Zandian must be dismissed out of the instant action as a matter of law.
27 Whether the Court deems that the dismissal should be on the grounds of insufficient service, lack
28 of personal jurisdiction or claim preclusion, Zandian must be dismissed out of the action as a matter

1 of law. Zandian hereby reserves his rights to attorney's fees and costs, as well as his right to bring
2 a subsequent motion to dismiss, or motion for summary judgment, upon other grounds.

3 DATED this 12th day of December, 2011.

4 JOHN PETER LEE, LTD

5
6 BY: 
7 JOHN PETER LEE, ESQ.
8 Nevada Bar No. 001768
9 JOHN C. COURTNEY, ESQ.
10 Nevada Bar No. 011092
11 830 Las Vegas Boulevard South
12 Las Vegas, Nevada 89101
13 Ph: (702) 382-4044/Fax: (702) 383-9950
14 Attorneys for Defendant Reza Zandian

15 **CERTIFICATE OF MAILING**

16 I HEREBY CERTIFY that on the 12th day of December, 2011, a copy of the foregoing
17 REPLY TO OPPOSITION TO MOTION TO DISMISS was served on the following parties by
18 mailing a copy thereof, first class mail, postage prepaid, addressed to:

19 Adam McMillen, Esq.
20 Watson Rounds
21 5371 Kietzke Lane
22 Reno, NV 89511

23 
24 An employee of
25 JOHN PETER LEE, LTD.

JOHN PETER LEE, LTD.
ATTORNEYS AT LAW
830 LAS VEGAS BLVD. SOUTH
LAS VEGAS, NEVADA 89101
Telephone (702) 382-4044
Telecopier (702) 383-9950