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ROBERT DE NIRO

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FIREMAN'S FUND INSURANCE
COMPANY, a corporation,

Plaintiffs,

v.

ROBERT DE NIRO, an individual, and
DOES 1 through 10, inclusive,

Defendants.

Case No. CV 073149 R (RZx)

**NOTICE OF MOTION AND
MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED
COMPLAINT PURSUANT TO FED.
R. CIV. P. 12(B)(6) AND 12(B)(5)
OR, IN THE ALTERNATIVE, TO
QUASH; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF;
DECLARATION OF ROBERT
DE NIRO; DECLARATION OF
ROBYN C. CROWTHER AND
EXHIBITS THERETO**

**Date: June 18, 2007
Time: 10:00 a.m.
Courtroom: 8**

1 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on June 18, 2007 at 10:00 a.m., or as soon
3 thereafter as the matter may be heard, in Courtroom 8 of the above-entitled Court,
4 located at 312 N. Spring Street, Los Angeles, California, Defendant
5 Robert De Niro will, and hereby does, move this Court for an order dismissing
6 each of the causes of action in the First Amended Complaint pursuant to Fed. R.
7 Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted and
8 12(b)(5) for insufficiency of process or, in the alternative, to quash service.

9 The grounds for this motion are as follows:

10 *First*, Plaintiff's claims against Defendant De Niro for Fraud/Deceit and
11 Negligent Misrepresentation fail to state facts sufficient to establish a claim for
12 relief because allegations of the Complaint do not demonstrate any false statement
13 or material omission of fact made by Defendant De Niro;

14 *Second*, Plaintiff's claims are equitably barred. The contracts referenced in
15 the Complaint arguably establish that, even if Plaintiff were able to obtain an
16 award of damages against Defendant DeNiro, that recovery may be borne by
17 DeNiro's indemnitor, Fox Entertainment Group, Inc. ("Fox"), and that Fox would
18 then have the right to recover any amount paid to De Niro from its insurer, who is
19 Plaintiff. Put simply, even if Fireman's Fund were able to establish liability here
20 (which it cannot), it would ultimately be responsible for any damages it can prove.
21 The Court is not required to adjudicate such a pointless dispute; and

22 *Third*, the placement of an envelope containing a copy of the summons and
23 complaint on the windshield of a car in which Defendant De Niro was a passenger
24 while the car was stopped in traffic without any effort by the process server to
25 notify Defendant De Niro that he was being served with process was not valid
26 service under Fed. R. Civ. P. 4(e).

27 This Motion is based on this Notice of Motion and Motion, the
28 Memorandum of Points and Authorities attached hereto, the Complaint, the

1 Declaration of Robert De Niro attached hereto, the Declaration of Robyn C.
2 Crowther and Exhibits thereto, the pleadings and papers on file herein, any
3 evidence of which the Court takes judicial notice prior to or at the hearing on this
4 matter, and any argument that may be had at the hearing on this Motion.

5
6 DATED: May 18, 2007

Respectfully submitted,

CALDWELL LESLIE & PROCTOR, PC
CHRISTOPHER G. CALDWELL
ROBYN C. CROWTHER
JEANNE A. FUGATE

10
11 By Robyn C. Crowther
ROBYN C. CROWTHER
Specially Appearing for Defendant
ROBERT DE NIRO

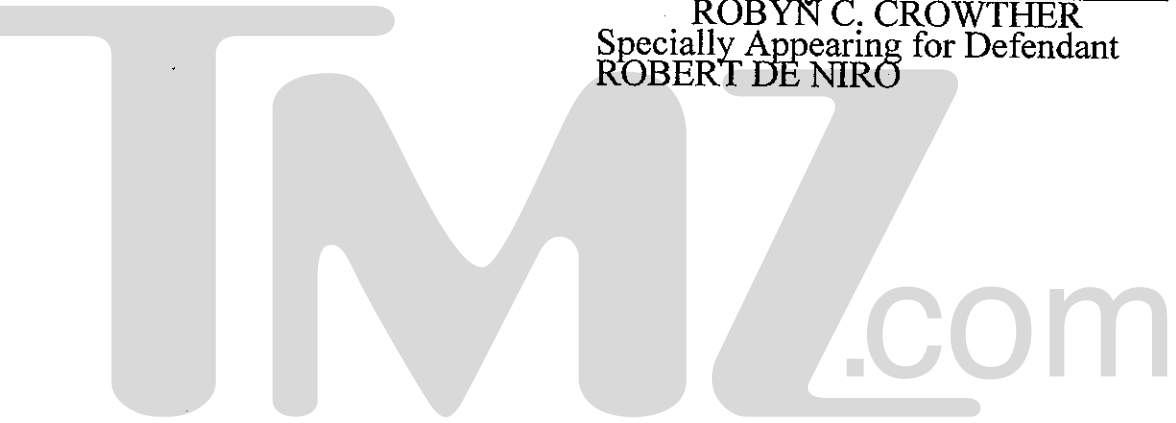


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1 glands. Complaint ¶ 6. The facts even as alleged in the Complaint, however,
2 demonstrate that there was no such misrepresentation. On October 13, 2003,
3 Mr. De Niro had not been “diagnosed with” nor “treated for” prostate cancer. All
4 that had occurred at that time was a test. Complaint ¶ 10. Indeed, Fireman’s
5 Fund’s Complaint admits that Mr. De Niro was not diagnosed with prostate cancer
6 until October 15, 2003. *Id.* Therefore, as discussed further in Section C below,
7 Fireman’s Fund’s Complaint fails to state a claim under Fed. R. Civ. P. 12(b)(6)
8 and warrants dismissal.

9 If Fireman’s Fund could establish liability against Mr. De Niro – and it
10 cannot - its claims would fail. As will be described in detail below, Fox (through
11 its subsidiary, Twentieth Century Fox Film Corporation) is contractually obligated
12 to defend and indemnify Mr. De Niro for claims made against him arising out of
13 the production of *Hide and Seek*. Because Mr. De Niro did not make any false
14 statements, that indemnity could cover any damages awarded against Mr. De Niro
15 in this action. Under the Policy, because any payment Fox would make to Mr. De
16 Niro would be an extra expense resulting from Mr. De Niro’s unavailability for
17 filming *Hide and Seek* for a period of time, Fox is entitled to claim any amount it
18 pays to Mr. De Niro arising out of this lawsuit from Fireman’s Fund. The law
19 does not require the Court to waste its time or resources to adjudicate this claim
20 that will result in no relief whatsoever to Fireman’s Fund even should it prevail in
21 the action.

22 In addition, Mr. De Niro is not even properly joined in this action because
23 Plaintiff has not effected proper service.² Mr. De Niro received the summons and
24 Complaint when an unidentified person approached a vehicle in which
25 Mr. De Niro was a passenger and, without speaking at all, placed an envelope
26

27 ² In an abundance of caution, Mr. De Niro removed to this Court despite invalid
28 service.

1 under the windshield wiper of the car while the car was stopped in traffic.
2 Approximately 20 minutes later, Mr. De Niro arrived at his destination, retrieved
3 and opened the envelope, and only then discovered that the envelope contained
4 legal documents. Under both federal and California law, this was not adequate
5 service. Under Fed. R. Civ. P. 12(b)(5), this Court has authority to dismiss a
6 complaint for insufficiency of process, and because the claims against Mr. De Niro
7 have no merit, the Court should exercise its discretion to end this baseless lawsuit
8 now. At a minimum, the Court should quash the service of the summons and
9 complaint on Mr. De Niro. This is an action that should never have been filed. It
10 should now be dismissed.

11 Mr. De Niro therefore respectfully requests that the Court grant his Motion
12 to Dismiss on all of the foregoing grounds, or, in the alternative, issue an Order
13 quashing service of process in this matter.

14 **I. FACTUAL BACKGROUND**

15 **A. *Fox Obtains Insurance Coverage for Mr. De Niro's Services in***
16 ***Hide and Seek***

17 On February 1, 2002, Fireman's Fund issued Motion Picture/Television
18 Producers Portfolio Policy No. MPT 07104173 (the "Policy") to Fox.³ The policy
19 provided coverage for "extra expenditures" Fox incurred "in completing principal
20 photography of an insured production" as a result of, among other things, the
21 injury or sickness of any person designated by Fox for insurance. Policy, pp. 16,
22

23 ³ Paragraph 9 of the Complaint references the Policy and certain of its terms.
24 Because Fireman's Fund relies upon the contents of the Policy, this Court may
25 consider it as a document "whose contents are alleged in a complaint and whose
26 authenticity no party questions, but which are not physically attached to the
27 [Plaintiff's] pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994),
28 *overruled on other grounds by Galbraith v. Santa Clara*, 307 F.3d 1119, 1127 (9th
Cir. 2002). The Policy is attached as Exhibit A to the Declaration of Robyn C.
Crowther (the "Crowther Declaration").

1 19 (Section I. I. and I. VI.A.). Fireman's Fund admits that the Policy "provided
2 coverage for the [Fox]'s feature film production 'Hide and Seek' and was made
3 effective as of October 13, 2003" and, necessarily, that Mr. De Niro was one of the
4 designated persons for insurance for the film *Hide and Seek*. Complaint, ¶ 9.

5 In August 2003, Mr. De Niro entered into an agreement (through his "loan
6 out" company, Canal Productions, Inc.) to provide services on the *Hide and Seek*
7 movie.⁴ Among other things, Fox agreed to indemnify Mr. De Niro from damages
8 and expenses arising out of any third party claim against Mr. De Niro "resulting
9 from Fox's development, production, distribution and/or exploitation" of the *Hide*
10 *and Seek* motion picture, and to defend Mr. De Niro in any such proceeding.

11 ¶8(b).

12 ***B. Mr. De Niro's "Statements" to Fireman's Fund Regarding his***
13 ***Medical Condition***

14 According to the Complaint, on October 10, 2003, Mr. De Niro underwent a
15 prostate biopsy procedure. Complaint, ¶ 10. The Complaint further alleges that
16 three days later, on October 13, Mr. De Niro was examined by a physician so that
17 Fox could purchase insurance coverage for *Hide and Seek*. *Id.*, ¶ 5. Fireman's
18 Fund asserts that at this examination, Mr. De Niro signed a Medical Certificate
19 including a representation that he had never been "*diagnosed with or treated for*
20 *anything related to 'disorders of the urinary tract, including but not limited to*
21 *sugar, albumin, blood or puss in the urine, kidney stones, or any other disorder of*
22 *the bladder, kidney or disorders of the genito-urinary system, including, but not*
23

24 ⁴ This agreement is referenced at Paragraph 4 of the Complaint, including that the
25 Fox signatory to that agreement is a wholly-owned subsidiary of its insured, Fox
26 Entertainment Group, Inc. Because Fireman's Fund references the agreement, the
27 Court may rely on this document for purposes of deciding the Rule 12(b)(6)
28 motion for the same reasons discussed *supra* note 1. *Branch*, 14 F.3d at 454. The
agreement is attached as Exhibit B to the Crowther Declaration.

1 limited to the reproductive organs or prostate glands.” Complaint, ¶ 6 (emphasis
2 added).

3 Fireman’s Fund concedes that Mr. De Niro was not “diagnosed” with
4 prostate cancer until October 15, 2003. Complaint, ¶ 10. Fireman’s Fund
5 contends, however, that Mr. De Niro intentionally misled Fireman’s Fund by
6 failing to volunteer that he had undergone a prostate biopsy three days before
7 signing the Medical Certificate. Complaint, ¶ 14. According to Fireman’s Fund,
8 either (1) the biopsy constituted treatment for prostate cancer (which is illogical
9 given that the Complaint alleges that Mr. De Niro had not been diagnosed with
10 that condition at the time of the biopsy); or (2) the knowledge that he had
11 undergone a prostate biopsy constituted “information known to [Mr. De Niro]
12 which might alter or otherwise conflict with statements made in the Medical
13 Certificate.” Complaint, ¶ 6. Fireman’s Fund’s fraud claim rests on the assertion
14 that Mr. De Niro “knew that [the results of his biopsy] might alter and/or conflict
15 with” his true statement that, as of October 13, 2003, he had never been diagnosed
16 with or treated for a prostate disorder. Complaint, ¶ 16. Alternatively, Fireman’s
17 Fund asserts that Mr. De Niro negligently misled it because he knew or should
18 have known that the results of the biopsy procedure might conceivably alter the
19 truth of his statement at some point in the future. Complaint, ¶ 20.

20 **C. The Delivery of the Summons and Complaint to Mr. De Niro**

21 According to the Complaint, Fireman’s Fund learned that Mr. De Niro had
22 been diagnosed with prostate cancer on October 20, 2003. Complaint, ¶ 10. Fox
23 made a claim to Fireman’s Fund on its insurance policy, which Fireman’s Fund
24 alleges it had completely paid by December 23, 2004. Complaint, ¶ 13. However,
25 Fireman’s Fund did not commence litigation against Mr. De Niro until October 12,
26 2006, when it filed its Complaint in the Los Angeles County Superior Court.

27 Fireman’s Fund apparently did not endeavor to serve Mr. De Niro until
28 months later, in April 2007. At the time, Mr. De Niro was a passenger in a rented

1 car that was traveling on Hollywood Boulevard in Los Angeles, California.
2 Declaration of Robert De Niro ("De Niro Decl."), ¶ 3. While the car was stopped
3 in traffic, and its windows were rolled up, a man approached the car and put an
4 envelope under one of the windshield wipers of the car. De Niro Decl., ¶ 4. The
5 man did not speak to Mr. De Niro; there was no attempt to confirm his identity,
6 nor did the man indicate what was in the envelope he placed on the windshield.
7 *Id.* Mr. De Niro was in the car because he was traveling to a restaurant, not
8 because he was making any effort to avoid service of process. *Id.* at ¶ 5. When he
9 reached the restaurant approximately 20 minutes later, Mr. De Niro opened the
10 envelope and discovered that it contained the summons and Complaint filed in this
11 lawsuit. *Id.*, ¶ 4. This event took place nearly six (6) months after Fireman's Fund
12 filed its Complaint in the Superior Court.

13 **II. FIREMAN'S FUND'S COMPLAINT AGAINST MR. DE NIRO FAILS**
14 **TO STATE A CLAIM**

15 For a variety of reasons, the lawsuit against Mr. De Niro should go no
16 further. The Complaint is irreparably defective, as it does not and cannot allege
17 that Mr. De Niro made any misrepresentation to Fireman's Fund and therefore
18 lacks the crucial element of both claims that Fireman's Fund has attempted to
19 plead.

20 Furthermore, as a matter of equity, the Court should not entertain Fireman's
21 Fund's lawsuit. According to the documents referenced in Fireman's Fund's
22 Complaint, because he made no false statement, Mr. De Niro is arguably entitled
23 to indemnification by Fox for any amount awarded against him in this lawsuit, and
24 Fox is then entitled to claim any amount paid to Mr. De Niro as a loss under the
25 Policy, which Fireman's Fund would then be obligated to pay. The various
26 indemnities therefore create a situation in which Fireman's Fund is, in essence,
27 chasing its own tail. Under California law, which controls the substantive matters
28 in this diversity action, the Court is not required to expend its time or resources to

1 adjudicate such a meaningless exercise in tail-chasing and may end the suit as a
2 matter of equity.

3 Finally, the placement of the envelope on Mr. De Niro's windshield did not
4 constitute valid service under either federal or state law. Under Fed. R. Civ. P.
5 12(b)(5), the Court may dismiss a complaint for insufficiency of service of
6 process. Mr. DeNiro respectfully submits that the appropriate result here is a grant
7 of his motion to dismiss on all grounds.

8 ***A. The Complaint Fails to State a Claim Because it Demonstrates***
9 ***that Mr. De Niro Truthfully Responded to Fireman's Fund's***
10 ***Medical Questions***

11 Rule 12(b)(6) permits the Court to dismiss a claim which is not legally
12 sufficient. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2002).⁵ When there is no
13 cognizable legal theory or an absence of facts sufficient to support a cognizable
14 legal theory, dismissal is proper. *Balistreri v. Pacifica Police Dep't.*, 901 F.2d
15 696, 699 (9th Cir. 1988). Here, there are at least two fatal defects in Fireman's
16 Fund's purported causes of action: (1) the Complaint establishes that Mr. De Niro
17 made no misrepresentations to Fireman's Fund; and (2) as a matter of equity,
18 Fireman's Fund's claims should be rejected because they will ultimately bear the
19 cost of any amount awarded to them against Mr. De Niro.

20 When considering a motion to dismiss under Rule 12(b)(6), the Court must
21 accept all material allegations of the complaint, and the reasonable inferences
22 supported by those facts, to be true. *Id.* (citations omitted). In this case, Fireman's
23 Fund's own allegations demonstrate the flaws in their causes of action. Under
24

25
26 ⁵ Although Mr. De Niro contends below that the Court does not have jurisdiction
27 over him due to invalid service, the law is clear that the Court may grant a motion
28 to dismiss under Rule 12(b)(6) "even before the defendant is properly served."
Wages v. Internal Revenue Service, 915 F.2d 1230, 1235 n.5 (9th Cir. 1989).

1 California law,⁶ both the causes of action for Fraud/Deceit and Negligent
2 Misrepresentation include as an element a false statement by the defendant. *Lazar*
3 *v. Superior Court*, 12 Cal.4th 631, 638 (1996) (fraud); *Bily v. Arthur Young & Co.*,
4 3 Cal.4th 370, 407-08 (1992) (negligent misrepresentation). Fireman's Fund does
5 not and cannot allege a false statement, and the causes of action therefore
6 necessarily fail.

7 Fireman's Fund's two claims rely on the premise that it was false when Mr.
8 DeNiro's responded on the Medical Certificate "that he had never been *diagnosed*
9 *with or treated for* anything related to 'disorders of the urinary tract . . . or
10 disorders of the genitor-urinary system, including, but not limited to the
11 reproductive organs or prostate glands. . . ." Complaint, ¶ 6 (emphasis added).

12 The Complaint itself, however, demonstrates that Mr. De Niro's statement was
13 true:

- 14 • **October 10, 2003:** Mr. De Niro "undergo[es] a prostate biopsy
15 procedure." Complaint, ¶ 10.
- 16 • **October 13, 2003:** Mr. De Niro affirms that he has not been "diagnosed
17 with or treated for" the excluded conditions. Complaint, ¶ 5, 6. He
18 further confirms that "he had withheld no information known to him
19 which might alter or otherwise conflict with statements made in the
20 Medical Certificate." Complaint ¶ 7.
- 21 • **October 15, 2003:** Mr. De Niro is diagnosed with prostate cancer.
22 Complaint, ¶ 10.

23
24
25
26 ⁶ Under California choice-of-law rules, California law should apply here. *See Van*
27 *Winkle v. Allstate Ins. Co.*, 290 F.Supp.2d 1158, 1161-62 (C.D. Cal. 2003)
28 (applying California's "governmental interest analysis" to determine choice of law
in a diversity action).

1 As is clear from the sequence of events alleged, Mr. De Niro was not
2 “diagnosed with” any excluded condition until after he signed the Medical
3 Certificate. And, of course, he had not been “treated for” any such condition until
4 after his diagnosis. Consequently, a court considering a similar issue found that
5 tests aimed at determining whether a disease was present could not be
6 characterized as treatment for that disease. *Martell v. Universal Underwriters Life*
7 *Ins. Co.*, 151 Vt. 547 (1989). Mr. De Niro therefore truthfully told Fireman’s
8 Fund on October 13, 2003, that he had never been “diagnosed with or treated for”
9 any of the disorders about which Fireman’s Fund inquired.

10 Perhaps recognizing these weaknesses, Fireman’s Fund notes that the
11 Medical Certificate Mr. De Niro signed included an affirmation that he had
12 “withheld no information known to him which might alter or otherwise conflict
13 with the statements made in the Medical Certificate.” Complaint, ¶ 7. Fireman’s
14 Fund contends that Mr. De Niro was obligated to disclose that he had undergone a
15 prostate biopsy on October 10, 2003. Complaint, ¶¶ 14-16; 20. Whatever the
16 biopsy revealed, it would not have changed Mr. De Niro’s statement that as of
17 October 13, 2003, he had not been diagnosed with or treated for any of the
18 disorders that are the subject of Fireman’s Fund’s Complaint. There was no
19 information known to Mr. De Niro that would change any of his statements,
20 because he did not then know the results of his biopsy. At the time, Mr. De Niro
21 had no reason to know one way or the other what his test results would be. It
22 certainly cannot be an actionable false statement that Mr. De Niro was incapable
23 of divining the results of medical tests that he did not receive until days later.
24 Mr. De Niro told the truth and the fact that he later was diagnosed with prostate
25 cancer provides no basis for recovery against Mr. De Niro. *See Brubaker v.*
26 *Beneficial Standard Life Ins. Co.*, 130 Cal.App.2d 340, 342 (1955) (insured had no
27 duty to reveal condition he did not believe to be cancerous at the time he executed
28 a health certificate declaring that he was in good health).

1 **B. *This Subrogation Action Is Equitably Barred***

2 This lawsuit is Fireman's Fund's effort to shift Fox's losses arising out of
3 Mr. De Niro's illness from Fox's insurance company to Mr. De Niro. The action
4 is therefore one for subrogation. As the California Court of Appeal has explained,
5 "[a] subrogation as applied to an insurer [(Fireman's Fund)] is its right to be put in
6 the position of its insured [(Fox)] against third parties legally responsible to its
7 insured [(Mr. De Niro)] for the loss which the insurer has both insured and paid."
8 *Liberty Mut. Fire Ins. Co. v. Auto Spring Supply Co.*, 59 Cal.App.3d 860, 864
9 (1976). As such, an insurer asserting subrogated rights of its insured against a
10 third party "*takes the rights subject to all the defenses which the third [party] has*
11 *against the [insured]."* *R.H.R. Rokeby-Johnson v. Aquatronics Int'l, Inc.*, 159
12 Cal.App.3d 1076, 1083 (1984) (emphasis in original; citations omitted). One such
13 defense is that the third party has a contractual right of indemnification from the
14 insured which would prevent the insured from recovering against the third party.

15 For example, in *Atlas Assur. Co. Ltd. v. Harper Robinson Shipping Co.*, the
16 Ninth Circuit considered whether an insurance company that had agreed to insure
17 for damage to goods shipped by the insured could recover the amount paid to its
18 insured from the shipping company that caused the loss. 508 F.2d 1381, 1383-84
19 (1975). The shipping company, however, had a contractual right to indemnity
20 against the insured party. *Id.* at 1384. Because, if the insurance company
21 prevailed, the loss would ultimately be borne by the insured party, the Ninth
22 Circuit explained that the Court cannot "blind" itself "to the fact that a suit against
23 [the shipping company] is effectively a suit against [the insured]." *Id.* at 1389.
24 Further noting that the insurance company was "clearly attempting to sue its
25 Assured, albeit in a circuitous manner," the Ninth Circuit denied the insurance
26 company the equity of subrogation under the "familiar doctrine that subrogation
27 does not invest the underwriter with a right to override its obligation to its
28 Assured." *Id.*

1 In a similar case, the California Court of Appeal noted that permitting the
2 insurance company to recover damages against a party who was entitled to
3 indemnification from the insured would provide “a windfall” to the insurance
4 company “who took the benefit of the premiums” and then later suggested that the
5 insured should or may be liable to stand in the loss against which the insurance
6 policy was purchased. *Rokeby-Johnson*, 159 Cal.App.3d at 1084.

7 Here, like the insurers in *Atlas* and *Rokeby-Johnson*, Fireman’s Fund has
8 never disputed that the expenses Fox incurred and claimed from Fireman’s Fund
9 were covered losses under the policy. Fireman’s Fund alleges in its Complaint a
10 contract that establishes Mr. De Niro’s right to indemnity from Fox, which may
11 include damages assessed against him in this action because he made no
12 misleading statements to Fireman’s Fund. It is precisely this “circuitous” effort to
13 require the insured to bear the cost of its covered loss that the Court rejected in
14 *Atlas*, and which the *Rokeby-Johnson* court rejected (in part in reliance on *Atlas*).
15 *Rokeby-Johnson*, 159 Cal.App.3d at 1085. As in *Atlas* and *Rokeby-Johnson*,
16 because Fox would be entitled to claim from Fireman’s Fund any amount Fox paid
17 to Mr. De Niro under its indemnity obligation, this case is an impermissible effort
18 by Fireman’s Fund to shift responsibility for an admittedly covered claim from it
19 to its insured. As a result Fireman’s Fund is equitably precluded from recovering
20 damages from Mr. De Niro, and its causes of action fail as a matter of law and
21 should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

22 **III. THE “SERVICE” OF THE SUMMONS AND COMPLAINT ON**
23 **MR. DE NIRO WAS INSUFFICIENT**

24 Service of process is the formal delivery of documents that is legally
25 sufficient to charge the defendant with notice of a pending action.
26 *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988). “[O]ne
27 becomes a party officially, and is required to take action in that capacity, only
28 upon service of a summons or other authority-asserting measure stating the time

1 within which the party served must appear and defend.” *Murphy Bros., Inc. v.*
2 *Michetti Pipe Strining, Inc.*, 526 U.S. 344, 350 (1999). The Court lacks
3 jurisdiction over a party who has not been properly served. *Dodco, Inc. v.*
4 *American Bonding Co.*, 7 F.3d 1387, 1388 (8th Cir. 1993). Actual notice of an
5 action is no substitute for valid service; rather, service of process in accord with
6 applicable states is required. *Mid-Continent Wood Prods., Inc. v. Harris*, 936 F.2d
7 297, 301 (7th Cir. 1991); *Sternbeck v. Buck*, 148 Cal.App.2d 829, 833-34 (1957).
8 “In short, the requirement of proper service of process is not some mindless
9 technicality.” *Friedman v. Estate of Presser*, 929 F.2d 1151, 1156 (6th Cir. 1991)
10 (citation omitted). Indeed, strict compliance with the rules governing the manner
11 of service is required. *Mid-Continent Wood Prods.*, 936 F.2d at 301. When the
12 validity of service is contested, the burden is on the plaintiff to prove proper
13 service. *Hayes v. J.S. Woodford*, 444 F.Supp.2d 1127, 1131 (S.D. Cal. 2006)
14 (citing *Grand Entm’t Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 488 (3d
15 Cir. 1993).

16 In this diversity action, service was purportedly made on Mr. De Niro
17 before the matter was removed to this Court. As a result, the sufficiency of service
18 is to be evaluated under California law. *Lee v. City of Beaumont*, 12 F.3d 933, 937
19 (9th Cir. 1993). Like Fed. R. Civ. P. 4(e)(2), California law permits service of
20 process by personal delivery of a copy of the summons and complaint to the
21 person to be served. Code Civ. Proc. § 415.10. The requirement, however, is that
22 the summons and complaint are to be delivered to the defendant *personally*, and
23 not even “substituted service” on a family member at the defendant’s residence
24 will suffice under California law. *Sternbeck*, 148 Cal.App.2d at 833. Personal
25 service is effected when the documents pass from the hand of the process server
26 into the hands of the defendant. *Hunstock v. Estate Development Corp.*, 22 Cal.2d
27 205, 209-210 (1943). The only conceivable exception to this rule arises when a
28 defendant refuses or attempts to avoid service. *Id.*; *In Re Ball*, 2 Cal.App.2d 578,

1 579 (1934) (service cannot be avoided by denying service and moving away
2 without consenting to take the document in hand).

3 Here, the process server did not place the documents in Mr. De Niro's hand.
4 Instead, he approached the car without speaking while the car was stopped in
5 traffic and left an envelope containing the documents on the windshield of the car.
6 De Niro Decl., ¶ 4.⁷ Pursuant to the foregoing authorities, the failure of the
7 process server to place the documents in Mr. De Niro's hand renders service *prima*
8 *facie* invalid.

9 Moreover, the manner in which the documents were delivered does not
10 satisfy the requirements for service. At a minimum, Fireman's Fund must show
11 "facts...that would convince a reasonable man that personal service of a legal
12 document [was] being attempted." *In Re Ball*, 2 Cal.App.2d at 579. In *In Re Ball*,
13 the California Court of Appeal found sufficient evidence that the process server
14 had apprised the defendant that he was attempting to serve the defendant with
15 legal process in the process server's statements, including that the process server
16 told the defendant "now you are served" when the documents fell to the ground
17 after the defendant refused to take them. *Id.* at 579. No decision, however, finds
18 valid service when the process server said nothing at all to the defendant.

19 A California decision with similar, but critically distinguishable, facts to
20 this case demonstrates that service on Mr. De Niro was insufficient. In *Trujillo v.*
21 *Trujillo*, 71 Cal.App.2d 257 (1945), the Court of Appeal considered whether the
22 placement of legal documents on the windshield of a car was valid service. The
23 Court of Appeal's findings included that (1) the defendant was not in his car at the
24 time the process server approached, but attempted to avoid service by getting into
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27 ⁷ Although this is a Motion to Dismiss, it is appropriate for the Court to consider
28 affidavits when a challenge is asserted to the propriety of service of process.
F.D.I.C. v. Oaklawn Apartments, 959 F.2d 170, 174 (1992) (citations omitted).

1 his car; (2) the window to the car was at first open, but that the defendant rolled
2 the window up and refused to accept service; and (3) the process server read to the
3 defendant the document to be served in a "loud and clear voice" and only then did
4 the process server place the documents under the windshield wiper of the car. *Id.*
5 at 259-260. The defendant in *Trujillo* admitted that the process server spoke to
6 him, but maintained that he did not hear what the process server said. *Id.* Because
7 the trial court credited the process server's statements that he had explained the
8 nature of the documents to the defendant, and believed that the defendant knew
9 the nature of the documents and the purpose of delivering them to him, but that the
10 defendant deliberately attempted to avoid service, the Court of Appeal found that
11 the trial court properly determined that service was valid. *Id.*

12 None of those critical facts is present here. Here, the evidence demonstrates
13 that the process server did not say anything at all, much less make statements
14 explaining the nature of the documents he delivered. There is no evidence that
15 Mr. De Niro understood the nature of the documents that were placed under the
16 windshield wiper of the car in which he was a passenger until long after delivery
17 was made when he opened the envelope. There is no evidence that Mr. De Niro
18 was using the car to try to avoid service. Instead, Mr. De Niro was traveling in the
19 car to go to dinner at a restaurant and the complaint and summons was left on the
20 windshield of his car while the car was stopped in traffic. De Niro Decl., ¶¶ 4, 5.
21 On this record, service is clearly invalid under California law. *See also Doe v. Qi*,
22 349 F. Supp.2d. 1258, 1274-76 (N.D. Cal. 2004) (service must be made in a way
23 reasonably calculated to apprise the defendant that service of process was being
24 attempted).

25 Upon a finding of the insufficiency of service of process, the District Court
26 has the discretion to dismiss an action. *S.J. v. Issaquah School Dist. No. 411*, 470
27 F.3d 1288, 1293 (9th Cir. 2006) (citations omitted); *Cleveland v. Williams*, 874
28 F.Supp. 270, 271 (E.D. Cal. 1994). Among other bases for exercising this

1 discretion in favor of dismissal, Mr. De Niro suggests that the Court consider
2 Fireman's Fund's delay in effecting service. Courts generally may dismiss a
3 matter where the plaintiff fails to establish good cause for the failure to serve the
4 complaint within the time permitted under Rule 4(m) (120 days after filing the
5 complaint). *Hayes*, 444 F. Supp.2d at 1135. Under state law, Cal. R. Ct. 3.110(b),
6 Fireman's Fund was required to serve Mr. De Niro within 60 days of filing the
7 Complaint. The six (6) month delay between filing and attempted service
8 therefore far exceeded the time limits imposed by either federal or state law.

9 At a minimum, if the Court declines to exercise its discretion to dismiss, it is
10 appropriate to quash the purported "service" of the summons and Complaint on
11 Mr. De Niro. *S.J.*, 470 F.3d at 1293; *Stevens v. Security Pac. Nat'l Bank*, 538 F.2d
12 1387, 1389 (9th Cir. 1976). Whether the Court opts to dismiss or quash service, it is
13 clear that the windshield delivery of the documents does not constitute proper
14 service of the summons and Complaint.

15 **IV. CONCLUSION**

16 For a variety of reasons, this is a case that never should have been filed.
17 Given the irreparable defects in the substance of Fireman's Fund's claims and the
18 ineffectiveness and delay in attempting service, Mr. De Niro respectfully requests
19 that the Court enter an order dismissing the case with prejudice on all of the
20 foregoing grounds. In the alternative, if the Court declines to dismiss this matter,
21 because service was ineffective, Mr. De Niro respectfully requests an order
22 dismissing the case without prejudice, or at a minimum quashing service and
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1 requiring Mr. De Niro to take no further action until such time, if ever, proper
2 service is achieved.

3
4 DATED: May 18, 2007

Respectfully submitted,

5 CALDWELL LESLIE & PROCTOR, PC
6 CHRISTOPHER G. CALDWELL
7 ROBYN C. CROWTHER
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9 By *Robyn C. Crowther*
10 ROBYN C. CROWTHER
11 Specially Appearing for Defendant
12 ROBERT DE NIRO



