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7
 8 **IN THE UNITED STATES DISTRICT COURT**
 9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 10 **SAN FRANCISCO DIVISION**

11
 12 EDELSON PC, an Illinois professional
 13 corporation,

14 Plaintiff,

15 vs.

16 DAVID LIRA, an individual, KEITH
 17 GRIFFIN, an individual, ERIKA
 18 GIRARDI a/k/a ERIKA JAYNE, an
 individual, EJ GLOBAL, LLC, a
 19 California limited liability company,
 CHRISTOPHER KAMON, an individual,
 20 GEORGE HATCHER, an individual,
 21 WRONGFUL DEATH CONSULTANTS,
 a California corporation, JOSEPH
 22 DINARDO, an individual, CALIFORNIA
 23 ATTORNEY LENDING II, INC., a New
 York corporation

24
 25 Defendants

Case No, 3:22-cv-03977-SK
Honorable Sallie Kim

**DEFENDANT KEITH GRIFFIN'S
 MOTION TO DISMISS PURSUANT
 TO FED. R. CIV. PROC. 12(b)(7);
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

Complaint Filed: July 6, 2022
 Motion Date: November 7, 2022
 Motion Time: 9:30 a.m.
 Courtroom: C

1 **TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF**
2 **RECORD:**

3 PLEASE TAKE NOTICE that on November 7, 2022, at 9:30 a.m., in
4 Courtroom C of the United States District Court, located at 450 Golden Gate
5 Avenue, San Francisco, CA 94102, Defendant Keith Griffin will appear and move
6 the Court to dismiss Plaintiff’s Complaint pursuant to Fed. R. Civ. Proc. 12(b)(7) for
7 failure to join indispensable parties, and on other grounds as set forth below.
8 Defendant Keith Griffin respectfully requests that this Court dismiss this case, or in
9 the alternative, stay this action until the resolution of the bankruptcy proceedings
10 regarding Thomas Girardi and Girardi Keese law firm.

11 This Motion is based upon this Notice, the Memorandum of Points and
12 Authorities below, the pleadings, and such other matters as the Court may deem
13 appropriate in deciding this Motion.

14
15 DATED: September 21, 2022

ROSEN ♦ SABA, LLP

By: s/ Ryan D. Saba

RYAN D. SABA
Attorneys for Defendant,
KEITH GRIFFIN

ROSEN ♦ SABA, LLP
2301 Rosecrans Avenue, Suite 3180, El Segundo, CA 90245

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant Keith Griffin respectfully submits this memorandum of points and
3 authorities in support of this motion to dismiss the above-captioned pursuant to
4 FRCP Rule 12(b)(7) for failure to include indispensable parties, whose inclusion
5 destroys jurisdiction.

6
7 **I. INTRODUCTION**

8 A cursory reading of Plaintiff’s complaint makes it obvious that this lawsuit
9 centers around the conduct of the law firm GIRARDI KEESE (“GK”) and its sole
10 proprietor Thomas Girardi. [See Complaint, paras. 1-23 and 40-65.] Plaintiff
11 attempts to weave in contrived references to the remaining named defendants as
12 participants in the “the Girardi Family Enterprise”, but this utter conjecture belies
13 reality. Both Mr. Girardi and GK are in bankruptcy. [See Central District of
14 California Bankruptcy cases 2:20-bk-21022 and 2:20-bk-21020.]

15 Edelson could have named Mr. Girardi and the law firm in this action if they
16 sought and obtained permission from the bankruptcy court. Moreover, Edelson could
17 have brought this action as an adversary proceeding in the bankruptcy actions.
18 However, Edelson did not do so. In lieu of taking any steps to seek leave from the
19 bankruptcy court to include and pursue the only legitimate defendants in this case,
20 GK and Thomas Girardi, Plaintiff simply omits them, pretending they are not
21 necessary or indispensable parties. However, the contrary is self-evident. Not only
22 are Mr. Girardi and his law firm indispensable parties, but they are also the only two
23 responsible parties that should answer these claims.

24 For the reasons stated more fully below, Defendant Keith Griffin respectfully
25 requests that this Court dismiss this case, or in the alternative, stay this action until
26 the resolution of the bankruptcy proceedings.

27
28

1 **II. STATEMENT OF FACTS**

2 Edelson PC filed this lawsuit on July 6, 2022 alleging a vast conspiracy of
3 malfeasance surrounding the fall of GK and its proprietor Thomas Girardi, who is
4 noticeable absent from the list of Defendants in this case. This is not the first
5 complaint that Edelson PC has filed against Girardi and its employees, relating to
6 the same transactions and occurrences. [See United States District Court, Northern
7 District of Illinois, *Edelson v. Girardi*, case number 20-cv-7115.] Edelson did sue
8 Thomas Girardi and Girardi Keese in the Northern District of Illinois case. Edelson
9 also sued Mr. Griffin and Mr. Lira in that matter.

10 The instant complaint fails to name the two center pieces of Plaintiff's story,
11 namely Thomas Girardi and his law firm GK. Mr. Girardi and the law firm entered
12 bankruptcy on December 18, 2020. [See Central District of California Bankruptcy
13 actions 2:20-bk-21020 and 2:20-bk-21022.] The hundreds of allegations in the
14 Complaint focus almost entirely on the alleged "Girardi Family Enterprise". It is
15 impossible to read the instant complaint without questioning how justice could be
16 served without the participation of Girardi and his law firm. More importantly, Mr.
17 Griffin's due process rights are denied if Mr. Girardi is not part of this litigation
18 since he is the culpable party.

19 Mr. Girardi and the law firm are indispensable parties, and the instant
20 complaint should be dismissed for failure to include them.

21
22 **III. LEGAL STANDARD**

23 Pursuant to Fed. R. Civ. P. 12(b)(7) and 19(a)-(b), a complaint should be
24 dismissed if it fails to join a necessary and indispensable party and joinder of that
25 party would destroy jurisdiction. See *Camacho v. Major League Baseball*, 297
26 F.R.D. 457, 460 (S.D.Cal.2013). Determining whether a case should be dismissed
27 pursuant to Fed. R. Civ. P. 12(b)(7) and 19(a)-(b) imposes a three-step inquiry. See
28 *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1179

1 (9th Cir.2012) (citing *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779-80 (9th
 2 Cir.2005)). First, the court must determine if the party is necessary under Rule 19(a).
 3 *Id.* Second, if the party is necessary the court must determine whether joinder of that
 4 party is feasible. *Id.* Finally, if the party is necessary and their joinder is not feasible,
 5 the court must determine if the matter can proceed without the absent party. *Id.*

6 A motion to dismiss for failure to join a necessary and indispensable party
 7 requires a practical and fact specific inquiry. *See Makah Indian Tribe v. Verity*, 910
 8 F.2d 555, 558 (9th Cir. 1990) (citing *Provident Tradesmens Bank & Trust Co. v.*
 9 *Patterson*, 390 U.S. 102, 118- 19, 88 S.Ct. 733, 742-43, 19 L.Ed.2d 936 (1968). “To
 10 determine whether Rule 19 requires the joinder of additional parties, the court may
 11 consider evidence outside the pleadings.” *McShan v. Sherrill*, 283 F.2d 462, 464 (9th
 12 Cir. 1960).

14 **IV. ARGUMENT**

15 **A. *Mr. Girardi and GK Are Indispensable Parties.***

16 A party may be necessary under Rule 19(a) in three different ways. *See Salt*
 17 *River Project*, 672 F.3d at 1179 (9th Cir.2012). First, a person is necessary if, in his
 18 absence, the court cannot accord complete relief among existing parties. *Id.* (citing
 19 FRCP Rule 19(a)(1)(A)). Second, a person is necessary if he has an interest in the
 20 action and resolving the action in his absence may as a practical matter impair or
 21 impede his ability to protect that interest. *Id.* (citing FRCP Rule 19(a)(1)(B)(i)).
 22 Third, a person is necessary if he has an interest in the action and resolving the
 23 action in his absence may leave an existing party subject to inconsistent obligations
 24 because of that interest. *Id.* (citing FRCP Rule 19(a)(1)(B)(ii)).

25 It is inconceivable that this action could proceed without the inclusion of
 26 Thomas Girardi and his former law firm GK. Under Rule 19(a), Defendant Griffin
 27 can not obtain the appropriate relief, as he is unable to seek indemnity from his
 28 employer GK. At all times mentioned in the complaint, Mr. Griffin was an employee

1 of GK and is entitled to indemnification from his employer. *See* Complaint, para.
2 28; see also Cal. *Labor Code* sec. 2802(a).

3 Under Rule 19(b), indispensable parties are “persons who not only have an
4 interest in the controversy, but an interest of such a nature that a final decree cannot
5 be made without either affecting that interest or leaving the controversy in such a
6 condition that its final termination may be wholly inconsistent with equity and good
7 conscience.” *Camacho*, 297 F.R.D. at 463 (quoting *Shields v. Barrow*, 58 U.S. 130,
8 139, 17 How. 130, 15 L.Ed. 158 (1854)). There is simply no way that Mr. Griffin
9 can obtain appropriate relief without the inclusion of Mr. Girardi and GK and the
10 opportunity to seek indemnification.

11 Rule 19(a) sets forth three circumstances in which joinder is not feasible: (1)
12 when venue is improper; (2) when the absentee is not subject to personal
13 jurisdiction; and (3) when joinder would destroy subject matter jurisdiction. See
14 *Camacho*, 297 F.R.D. 457, 462-463 (S.D.Cal.2013) (citing *Equal Emp. Opportunity*
15 *Comm'n v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir.2005)).

16 As it is evident that Mr. Girardi and GK are necessary and indispensable
17 parties, Edelson must show that adding them to this action is feasible. When seeking
18 relief under Rule 12(b)(7) “[t]he movant bears the initial burden of demonstrating
19 that an absent person or entity is a required party, but if an initial appraisal of the
20 facts demonstrates the absent person or entity is required, the burden is shifted to the
21 opponent of joinder.” *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 273
22 F.R.D. at 385 (citing *Hood v. City of Memphis*, 570 F.3d 625, 628 (5th Cir. 2009)
23 (quoting *13 Pulitzer- Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir. 1986));
24 *Ranger Ins. Co. v. United Hous. of New Mexico, Inc.*, 488 F.2d 682, 683 (5th Cir.
25 1974)).

26 However, as discussed, Edelson has failed to seek leave from the bankruptcy
27 court to pursue Girardi and GK in this lawsuit. Therefore, the automatic stay remains
28 in place and the debtors cannot be added to this lawsuit. As a result, Edelson cannot

1 establish that joinder of Girardi and GK is feasible and Edelson’s claims must be
2 dismissed.

3 ***B. In the Alternative, This Case Should Be Stayed Until Completion of***
4 ***the Bankruptcy Proceedings.***

5 Pursuant to 11 U.S.C.A. §362(a)(1) the filing of an involuntary bankruptcy
6 petition under 11 U.S.C.A. §303 operates as a stay of the continuation of judicial or
7 other actions against the debtor that were commenced before the commencement of
8 the bankruptcy or to recover a claim against the debtor that arose before the
9 commencement of the bankruptcy. Similarly, pursuant to 11 U.S.C.A. §362(a)(3)
10 any act to obtain possession of property of the bankruptcy estate or to exercise
11 control over property of the estate is stayed.

12 The stay protects creditors from acting unilaterally in self-interest to obtain
13 payment from a debtor to the detriment of other creditors. *See, Assoc. of St. Croix*
14 *Condominium Owners v. St. Croix Hotel Corp.*, 682 F. 2d 446, 448 (3d Cir. 1982).
15 The stay “protect[s] the bankrupt’s estate from being eaten away by creditors’
16 lawsuits and seizures of property before the trustee has had a chance to marshal the
17 estate’s assets and distribute them equitably among the creditors.” *See, Martin-*
18 *Trigona v. Champion Fed. Sav. & Loan Assoc.*, 892 F.2d 575, 577 (7th Cir. 1989).

19 The scope of the protection is determined not just by who is named in a
20 proceeding but by who the party is with the real interest in the litigation. Pursuant to
21 Section 362(c)(2) the stay continues until the earliest of (A) the time the case is
22 closed; (B) the time the case is dismissed; or (C) the time a discharge is granted or
23 denied. Absent relief from the stay, judicial actions and proceedings against the
24 debtor or which affect the debtor’s estate are void ab initio.

25 The Ninth Circuit has recognized that the stay may extend to codebtors or
26 codefendants where “there is such identity between the debtor and the third-party
27 defendant that the debtor may be said to be the real party defendant and that a
28 judgment against the third-party defendant will in effect be a judgment or finding

1 against the debtor.” *United States v. Dos Cabezas*, 995 F.2d 1486, 1491, n. 3 (9th
2 Cir.1993) (citing *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir.1986); *In*
3 *re Circle K Corp.*, 121 Bankr.257, 259 (Bankr.D.Ariz.1990); *In re Family Health*
4 *Service*, 105 Bankr.937, 943 (Bankr.C.D.Cal.1989)).

5 In *Boucher v. Shaw*, 572 F.3d 1087, 1093 (9th Cir. 2009), the Ninth Circuit
6 reaffirmed this analysis by holding: “[I]f the liability of the non-debtor party were to
7 affect the property of the bankruptcy estate, such as by a requirement that the debtor
8 indemnify the non-debtor ... it may be necessary for the plaintiff in such a case to
9 proceed against the non-debtor party through bankruptcy proceedings.” (Citations
10 omitted.)

11 An example of “such a situation would be a suit against a third-party who is
12 entitled to absolute indemnity by the debtor on account of any judgment that might
13 result against them in the case. To refuse application of the statutory stay in that case
14 would defeat the very purpose and intent of the statute.” *A.H. Robins Co., Inc. v.*
15 *Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986).¹ Here, Mr. Griffin has a right of
16 indemnification against GK and/or Mr. Girardi under equitable principles of law,
17 and has a statutory right to indemnification under California’s Labor Code.
18 Additionally, Section 362(a)(3) directs stays of any action, whether against the
19 debtor or third parties, to obtain possession or to exercise control over property of
20 the debtor. Here, as plead, the funds are or were in the possession of debtor GK.
21 Moreover, there is no question that GK funds in the possession of GK are now
22 property of its bankruptcy estate.

23 Allowing Edelson to proceed against Mr. Griffin in this matter would violate
24 the spirit of Section 362 and allow it to circumvent the purpose of the automatic

25 _____
26 ¹ Since *Robins*, courts have clarified that absolute indemnity is not required and that
27 the possibility of a right to indemnification is sufficient. See, *In re Sudbury, Inc.*, 140
28 B.R.461, 464 (Bankr. N.D. Ohio 1992) and *In re American Film Technologies, Inc.*, 175
B.R. 847, 851-855 (Bankr. D. Del. 1994) (applying the “unusual circumstances” exception
even though there were questions as to the enforceability of the indemnity obligation
because of alleged fraud on the part of individual officers and directors.)

1 stay. Edelson’s purported purchased fraud claims in this action are rooted in the
2 conduct of Mr. Girardi, not the employee defendants. No derivative finding could be
3 established against the employee defendants without an initial finding against Mr.
4 Girardi and GK. In truth and in fact, GK is the party with the real interest in this
5 litigation.

6 As such, the claims against the employees and GK are inextricably
7 interwoven. Litigation of their liability requires litigation of Mr. Girardi and GK’s
8 liability. Under the rule in *Robins* and the cases which followed it, where the
9 debtor’s interests are impossible to separate from the claims against the non-debtor,
10 a stay of proceedings is an appropriate remedy.

11 Finally, proceeding in the instant action could result in conflicting judgments.
12 There is no question that the automatic stay precludes Edelson from proceeding
13 further against GK or Mr. Girardi without leave of the bankruptcy court. Thus, in
14 order to adjudicate GK’s and Girardi’s liability, Edelson will need to file a creditor’s
15 claim in the main bankruptcy case, obtain relief from the stay, and/or institute an
16 adversary proceeding in the GK/Girardi bankruptcies. The claims which need to be
17 adjudicated in the bankruptcy court would necessarily be identical to the claim filed
18 in this action. Resolution of identical claims in two different forums risks
19 inconsistent judgments and would be a waste of judicial resources. A stay is
20 appropriate in this case until the claims resolution process in the bankruptcy
21 proceeding has been completed or at minimum until Edelson obtains relief from the
22 stay.

23 Where a debtor and non-debtor are bound by statute or contract such that the
24 liability of the non-debtor is imputed or shifted to the debtor by operation of law, the
25 intent to provide relief to debtors with a stay would be frustrated by permitting
26 indirectly what is expressly prohibited in the code. “Clearly the debtor’s protection
27 must be extended to enjoin litigation against others if the result would be binding
28 upon the debtors estate.” *A. H. Robins, supra*, 788 F. 2d 994 (4th Cir1986) at 999,

1 citing *In re Metal Center, Inc.* 31 B.R. 458, 462 (Bankr. D. Conn. 1983.)

2 Pursuant to California *Labor Code* §2802(a) “[a]n employer shall indemnify
3 his or her employee for all necessary expenditures or losses incurred by the
4 employee in direct consequence of the discharge of his or her duties...” California
5 *Labor Code* §2802 requires an employer to indemnify an employee who is sued by
6 third persons for conduct in the course and scope of his or her employment,
7 including paying any judgment entered and attorneys’ fees and costs incurred in
8 defending the action. *Cassady v. Morgan, Lewis & Bockius, LLP*, 145 Cal.App.4th
9 220, 230 (2006).

10 Here a judgment in favor of Edelson would affect the Girardi bankruptcy
11 estate, since under California law, a verdict in favor of Edelson against Mr. Griffin
12 would automatically trigger indemnification liability against Girardi Keese.
13 Therefore, the action is in effect one against the debtor and as such would qualify
14 for relief under §362(a)(1).

15 Mr. Griffin’s claim for indemnity against GK would ordinarily take the form
16 of a compulsory cross-claim against GK. However, the automatic stay precludes Mr.
17 Griffin from pursuing that claim here. Thus, allowing the case against Mr. Griffin to
18 proceed here would severely prejudice Mr. Griffin, and would require him to
19 proceed in two different forums. Exposing Mr. Griffin to liability here and denying
20 him indemnification relief at the same time would impermissibly interfere with his
21 indemnity rights and his due process rights.

22 “[I]f the indemnitee, who has suffered a judgment for which he is entitled to
23 be absolutely indemnified by the debtor, cannot file and have allowed as an
24 adjudicated claim the actual amount of the judgment he has secured but must submit
25 his claim for allowance in the bankruptcy proceeding with the prospect that his
26 claim may not be allowed in the full amount of the judgment awarded in favor of
27 him, the indemnitee will be unfairly mulcted by inconsistent judgments and his
28 contract of indemnity in effect nullified.” *A.H Robins, supra*, 788 F. 2d 994,1000

1 (4th Cir. 1986).

2
3 **V. CONCLUSION**

4 It would be unfair and prejudicial to the Girardi Keese employee defendants
5 to defend this case in the absence of their former employer, who has an obligation to
6 provide them with complete indemnity. Plaintiff has taken no steps to seek leave
7 from the bankruptcy court to pursue this action or file an adversary proceeding
8 against Mr. Girardi or the law firm. Without their participation, Mr. Griffin cannot
9 obtain complete relief without the participation of Mr. Girardi and his former
10 employer. For these and the reasons discussed herein, Defendant Griffin respectfully
11 requests that this Court dismiss this case for failing to join indispensable parties, or
12 in the alternative, stay this case until the resolution of the Girardi bankruptcy.

13
14 DATED: September 21, 2022

ROSEN ♦ SABA, LLP

15 By: s/ Ryan D. Saba

16 RYAN D. SABA
17 Attorneys for Defendant,
18 KEITH GRIFFIN