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Attorneys for Defendant  
**GINA M. AUSTIN**

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

DARRYL COTTON, an individual,  
Plaintiff,

v.

CYNTHIA BASHANT, an individual; JOEL WOHLFEIL, an individual; LARRY GERACI, an individual; REBECCA BERRY, an individual; GINA AUSTIN, an individual; MICHAEL WEINSTEIN, an individual; JESSICA MCELFFRESH, an individual; and DAVID DEMIAN, an individual,  
Defendants.

CASE NO.: 18-cv-0325-BAS-DEB

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT GINA M. AUSTIN'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

**Date:** July 13, 2020  
**Time:** N/A

**NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT**

Courtroom: 4B (4<sup>th</sup> Floor)  
District Judge: Cynthia A. Bashant  
Magistrate Judge: Daniel E. Butcher  
Complaint Filed: February 9, 2018  
Trial Date: None

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I.

**INTRODUCTION**

Plaintiff Darryl Cotton’s (“Plaintiff”) First Amended Complaint (“FAC”), is now the fourth attempt to plead causes of action against Defendant, Ms. Gina Austin (“Defendant” or “Austin”), for her actions in representing a client, and complying with her civic duties in testifying in a state civil jury trial. Plaintiff, knowing his repetitive claims are baseless, has not been deterred—also suing the Honorable Joel Wohlfeil, the state court judge who presided over Plaintiff’s jury trial, the Honorable Cynthia Bashant, the federal magistrate who denied Plaintiff’s request for preliminary injunction, and now in Opposition threatening to sue Defendant’s current counsel, this firm, for adequately representing its client and filing this Motion to Dismiss.

Plaintiff’s Opposition does not refute Defendant’s Motion to Dismiss and makes no showing of how Plaintiff’s First Amended Complaint (“FAC”) alleges any facts to support a claim against Defendant. Plaintiff accuses Defendant of perjury—an allegation that does not support and is not an element to any cause of action in the FAC. Yet, instead of proving he has additional facts to permit amendment, Plaintiff’s Opposition regurgitates his vague and inadequate contentions of the FAC and fails to do more than simply reference Defendant’s protected litigation speech and activity.

Further, after admitting he is attempting to relitigate his state court proceeding because he “cannot afford an appeal,” Plaintiff’s Opposition then continues on a rampage requesting leave to amend to now add Defendant’s current counsel in retaliation for their filing of this Motion. Plaintiff’s Opposition is a clear reflection of Plaintiff’s relentless approach of filing baseless suits, bar complaints, and judicial complaints—adding any individual who testifies, adjudicates, or advocates against his claims.

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1 Finally, Plaintiff's Opposition has not been properly served. Plaintiff  
 2 apparently timely filed his Opposition with the Court on June 29, 2020; however,  
 3 there is no certificate of service attached and Defendant's counsel was not  
 4 personally served. Under Federal Rules of Civil Procedure, Rule 5, because  
 5 Plaintiff did not electronically file, any CM/ECF notice Defendant's counsel  
 6 received days later does not effectuate proper service.

7 Therefore, for the reasons stated herein and the subject Motion to Dismiss,  
 8 Plaintiff's FAC should be dismissed with prejudice.

## 9 II.

### 10 ARGUMENT

#### 11 **A. PLAINTIFF HAS FAILED TO PROVE THAT HIS FAC STATES ANY** 12 **FACTS TO MEET THE REQUISITE PLEADING STANDARDS**

13 Plaintiff's FAC fails to allege any facts sufficient to state a claim for relief  
 14 against Defendant. The FAC contains no factual allegations to support its alleged  
 15 causes of action against Defendant, neglects to state an actionable and independent  
 16 cause of action against Defendant, and contains no other facts describing or  
 17 specifying any conduct of Defendant to support any remote allegations of some  
 18 alleged wrongdoing.

19 Plaintiff's Opposition simply reiterates his repetitive and unintelligible  
 20 pleading and asserts that his grievance with Defendant stems solely from his belief  
 21 that Defendant perjured herself in Plaintiff's underlying state court action.  
 22 Plaintiff's Opposition has hardly expounded upon this perjury or further explained  
 23 how Plaintiff was harmed or injured and how this allegation supports any of his  
 24 causes of action against Defendant. The only causes of action asserted against  
 25 Defendant are Plaintiff's Third Cause of Action for Declaratory Relief and Fourth  
 26 Cause of Action for Punitive Damages. Both of these "causes of action" are  
 27 duplicative of Plaintiff's other legal claims and not tethered to any substantive

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1 action against Defendant. Further, a fact of alleged perjury, even if properly pled,  
2 would support neither of these causes of action.

3 Plaintiff's Opposition fails to address these points raised in Defendant's  
4 Motion, and does nothing to clarify the vague and speculative wrongs alleged in the  
5 FAC. Thus, Plaintiff has failed to give "fair notice" of the claims asserted against  
6 Defendant and the "grounds upon which they rest." Bell Atlantic Corp. v.  
7 Twombly, 550 U.S. 544, 555 (2007). Defendant cannot possibly begin to prepare a  
8 defense based on the singular and conclusory speculation of perjury alleged in the  
9 FAC.

10 **B. PLAINTIFF HAS FAILED TO PROVE HE CAN AMEND HIS**  
11 **PLEADING TO STATE SUFFICIENT FACTS**

12 Attempting to support his pleading, Plaintiff's Opposition includes additional  
13 "facts" he believes substantiate his allegations against Defendant. Plaintiff's  
14 Opposition cites sentences of Defendant's testimony in Plaintiff's underlying state  
15 court trial. (Plaintiff's Opposition ["Oppo"], at 7:21-28.) Plaintiff then states  
16 Defendant committed perjury and "is a liar." (Oppo. at 13:17-23.) Plaintiff's  
17 inclusion of these citations does not prove he has any additional facts to support a  
18 claim.

19 Not only does an allegation of perjury support no actionable claim against  
20 Defendant, Plaintiff cannot amend his pleading to meet any standards because  
21 Defendant's actions as an attorney in representing her client and her litigation-  
22 related speech and activity would be subject to the California anti-SLAPP statute,  
23 adopted and as applied by this Court. Plaintiff's Opposition provides no additional  
24 substantive allegations or facts that would warrant leave to amend, and instead  
25 clarifies that Plaintiff is simply seeking to punish Defendant solely for her  
26 representation of Plaintiff's adversary in his underlying state court proceeding and  
27 for Defendant's compliance with her obligations to testify.

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1 Attempting to attack the validity of his underlying state court judgment,  
 2 Plaintiff claims Defendant lied in her witness testimony and thus the judgment was  
 3 decided on inaccuracies. However, notwithstanding that Defendant was truthful,  
 4 this Court is not the avenue for Plaintiff to seek to set aside a judgment, and further,  
 5 Plaintiff cannot set aside a judgment based only on claims regarding the  
 6 truthfulness of a witness's testimony.

7 Even assuming, arguendo, that Plaintiff's allegations ring true, a witness who  
 8 perjures herself on the stand does not mandate a court to set aside or modify a  
 9 judgment. Once the time for appealing an order or judgment has passed, a court  
 10 may only set aside or modify an order or judgment if the judgment is void on its  
 11 face of the record on the basis of fraud and mistake. Estate of Beard (1999) 71  
 12 Cal.App.4th 753, 774. Additionally, it is the trial court that retains jurisdiction to  
 13 set aside a void judgment. An appellate court can then review that decision. Talley  
 14 v. Valuation Counselors Group, Inc. (2010) 191 Cal. App. 4th 132, 146. Plaintiff  
 15 cannot seek to circumvent this process by instead filing an action in this Court.

16 Plaintiff's Opposition provides no additional facts or claims to establish he is  
 17 able to amend his FAC to meet pleading standards. Consistent with Plaintiff's  
 18 history in disregarding court and judicial processes, Plaintiff's Opposition now  
 19 argues that Defendant's Motion fails to address the "merits" of Plaintiff's FAC.  
 20 (Oppo. at ¶¶ 28, 30, 31.) Plaintiff is mistaken that Defendant is required to  
 21 somehow guess and hypothesize the claims against her and then defend the merits  
 22 of those claims in the pleading stage. A motion to dismiss dismisses conclusions,  
 23 unwarranted inferences, and inadequately-pled complaints when amendment would  
 24 be futile. The Court does not weigh credibility and does not make any legal or  
 25 factual ruling on the merits of any facts or claims; instead, the Court addresses  
 26 whether there are "enough facts to state a claim to relief that is plausible on its  
 27 face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Defendant has proven there is  
 28 no plausible claim for relief and Plaintiff's Opposition neglects to argue otherwise.

**C. PLAINTIFF HAS CONCEDED THAT HIS PLEADING WAS FILED  
IN A HARASSING NATURE**

Plaintiff's Opposition does not refute Defendant's Motion with any persuasive explanation for his pleading inadequacies. Instead, Plaintiff continues on to what seems to be, frankly, a concerning litany of threatening comments about Defendant's counsel before ultimately requesting leave to amend to include Defendant's counsel as additional defendants to this action. (Oppo. at 13:24-28; 14:4-28.) This is yet just another example of Plaintiff's relentless filing of baseless complaints against everyone and anyone he believes has somehow wronged him or impacted whatever result he seeks.

Almost the entirety of Plaintiff's Opposition, like his meritless FAC, focuses on the distaste he has for the attorneys and judges he has encountered, and how any action taken to defend themselves is therefore a "sham." Plaintiff admits he is abusing the judicial process, but claims his filing is justified because he could not afford an appeal. (Oppo. at 14:4-10.) Plaintiff's financial affairs are of no concern and cannot be used as a factor to somehow transform this Court into a pseudo-appellate court and relitigate Plaintiff's state court action.

Plaintiff has repeatedly conceded that his actions are baseless and he is seeking media attention and harassing Defendant in ruthless retribution. This Court however is not an appropriate outlet to assuage Plaintiff's anger, and Defendant can no longer be subjected to this continual harassment by Plaintiff's tirade of frivolous filings. Therefore, Defendant respectfully requests that Plaintiff's First Amended Complaint be dismissed *without leave to amend.*

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III.

**CONCLUSION**

Plaintiff's FAC fails to state a claim for relief against Defendant. Plaintiff's Opposition fails to prove that the FAC is adequately pled and fails to prove that Plaintiff has sufficient facts to amend his claims. Accordingly, Defendant respectfully requests that this Court dismiss Plaintiff's FAC against Defendant **with prejudice**.

**PETTIT KOHN INGRASSIA LUTZ & DOLIN PC**

Dated: July 6, 2020

By: /s/ Julia Dalzell  
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Julia Dalzell, Esq.  
Attorneys for Defendant  
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**GINA M. AUSTIN**

**UNITED STATES DISTRICT COURT**  
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CASE NO.: 3:18-cv-0325-BAS-DEB

**CERTIFICATE OF SERVICE RE:**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT GINA M. AUSTIN'S REPLY TO PLAINTIFF DARRYL COTTON'S OPPOSITION TO MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

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District Judge: Cynthia A. Bashant  
Magistrate Judge: Daniel E. Butcher  
Complaint Filed: February 9, 2018  
1<sup>st</sup> Amd Complaint: May 13, 2020  
Trial Date: None

I hereby certify that a copy of the foregoing document(s):

- 1. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT GINA M. AUSTIN'S REPLY TO PLAINTIFF DARRYL COTTON'S OPPOSITION TO MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

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Was served on this date to counsel of record:

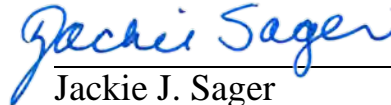
**[X] BY OVERNIGHT-DELIVERY MAIL:** By placing a copy thereof for delivery in a separate envelope addressed to the following addressee, respectively, as follows:

Darryl Cotton  
6176 Federal Blvd.  
San Diego, CA 92114  
Ph: (619) 954-4447  
Fax: (619) 229-9387  
**Plaintiff PRO SE**

**[X] BY ELECTRONIC TRANSMISSION:** I electronically filed the above document(s) with the Clerk of the Court using the CM/ECF system. The CM/ECF system will send notification of this filing to the person(s) listed below.

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**Attorneys for Defendants**  
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Executed on **July 6, 2020**, at San Diego, California.

  
\_\_\_\_\_  
Jackie J. Sager