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7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10
11 ANN MARIE BORGES and CHRIS
12 GURR, individually and doing business
as GOOSE HEAD VALLEY FARMS,

13 Plaintiffs,

14 v.

15 COUNTY OF MENDOCINO, SUE
16 ANZILOTTI, and DOES 1-25,

17 Defendants,
_____/

3:20-cv-04537 SI

ERRATA BY DEFENDANT SUE
ANZILOTTI RE REPLY BRIEF ON
MOTION TO DISMISS COMPLAINT
PURSUANT TO F.R.C.P. 12(b)(6)

Date: September 25, 2020
Time: 10:00 a.m.
Ctmm: 1, 17th Floor, 450 Golden Gate Ave.,
San Francisco

1 Counsel for Sue Anzilotti has belatedly discovered that Anzilotti's Reply brief (Reply;
2 Dkt. #22), filed herein on September 3, 2020, does not include the bolding that was intended
3 and supplied, as indicated by the multiple statements therein re "bolding supplied".

4 This omission was inadvertent and may have deprived the court, counsel and parties of
5 components of Anzilotti's argument. This *errata* is therefore filed at this late date to provide
6 clarity to the extent possible.

7
8 Specifically, at 6:11 of the Reply, the "bolding supplied" statement was intended to
9 reference the following language on 6:10 that was supposed to have been bolded: "to deprive
10 one's constitutional rights."

11
12 At 6:13 of the Reply, the "bolding supplied" statement was intended to reference the
13 following language on 6:12-13 that was supposed to have been bolded: "an agreement or
14 'meeting of the minds' to violate constitution rights must be shown."

15
16 At 8:10 of the Reply, the "bolding supplied" statement was intended to reference the
17 following language on 8:6-7 that was supposed to have been bolded: "A relationship of cause
18 and effect between the complaint and the prosecution is not sufficient, or every citizen who
19 complained to a prosecutor would find himself in a conspiracy."

20
21 At 9:15 of the Reply, the "bolding supplied" statement was intended to reference the
22 following language on 8:28 that was supposed to have been bolded: "plaintiff must state
23 specific facts to support the existence of the claimed conspiracy", and also to the following
24 language on 9:2 that was supposed to have been bolded: "the mere furnishing of information
25 to police officers does not constitute a conspiracy or "joint action" under color of state law."

26
27 And at 9:26 of the Reply, the "bolding supplied" statement was intended to reference
28 the following language on 9:23 that was supposed to have been bolded: "fair prosecution

1 would not violate the boys' constitutional rights.”

2
3 Copies of corrected/intended pages 6, 8 and 9 are attached hereto.

4
5 Counsel for Anzilotti apologizes for the confusion caused by this error/oversight and
6 the late discovery thereof.

7
8 Dated: September 25, 2020

/s/ Brian C. Carter

CARTER RICH PC

By: Brian C. Carter, Esq.

10 Attorneys for Defendant SUE ANZILOTTI

1 F.3d 1193, 1194 (9th Cir. 1998) (*Barren*).

2
3 **3. PLAINTIFFS' COMPLAINT DOES NOT ADEQUATELY ALLEGE A**
4 **COMPLETED CONSPIRACY, IN WHICH ANZILOTTI PERSONALLY**
5 **PARTICIPATED, TO DEPRIVE PLAINTIFFS OF THEIR CONSTITUTIONAL**
6 **RIGHTS.**

7 Plaintiffs' claims against private actor Anzilotti are based upon her alleged conspiracy
8 with state actors McCowen and Kierkowski. "A private party may be considered to have
9 acted under color of state law when [he/she] engages in a conspiracy or acts in concert with
10 state agents **to deprive one's constitutional rights.**" *Fonda v. Gray*, 707 F.2d 435, 437 (9th
11 Cir. 1983) (*Fonda*) (bolding supplied). "To prove a conspiracy between private parties and
12 the government under § 1983, **an agreement or 'meeting of the minds' to violate**
13 **constitution rights must be shown.**" *Fonda*, 707 F.2d at 438 (bolding supplied; citing
14 *Adickes v. S.H. Kress & Co.*, 398 U.S. at 152, 158). See *United Steelworkers of America v.*
15 *Phelps Dodge Corp.* 865 F.2d 1539, 1540-1541 (*Phelps Dodge*) (quoting second above-
16 quoted passage from *Fonda*).

17 In their Opposition, plaintiffs do not include any reference to the above-bolded
18 language. This is a telling admission on plaintiffs' and their counsel's part. Anzilotti admits
19 (1) that she did not want County to grant plaintiffs a permit to cultivate cannabis next door to
20 her family's residence, and (2) Anzilotti spoke to Supervisor McCowen about her and her
21 family's opposition to such cultivation. What is missing from the Complaint, however, is any
22 allegation that Anzilotti knew or agreed that plaintiffs were entitled to a permit to cultivate
23 cannabis, that their permit or entitlement thereto was a constitutional right, or that Anzilotti
24 agreed with anyone to engage in conduct that would result in the wrongful denial of plaintiffs'
25 permit.

26 The Complaint, construed reasonably in plaintiffs' favor, simply fails to describe an
27 agreement by Anzilotti to do any such thing. Anzilotti's June 2017 contact with "Steve White
28 of the California Department of Fish and Wildlife (CDFW)" cannot reasonably be viewed as

1 “ . . . This unremarkable exchange between a complaining citizen and a
2 prosecutor does not amount to a conspiracy to deprive the plaintiffs of their
Fourth Amendment rights.

3 “The plaintiffs point to Massini’s subsequent zeal in prosecuting, and
4 her lack of research or discussion with her deputies who had dealt with the
earlier cases, as evidence of conspiracy. The plaintiffs also suggest that one
5 motive of Massini was to curry Richardson’s support for Massini’s upcoming
re-election bid. But zealous prosecution, even careless or improperly
6 motivated prosecution, is not sufficient to raise a triable issue of conspiracy
with the citizen complainant. **A relationship of cause and effect between the
7 complaint and the prosecution is not sufficient, or every citizen who
8 complained to a prosecutor would find himself in a conspiracy.** The
9 plaintiffs must provide evidence of ‘an agreement or meeting of the minds to
violate constitutional rights.’ [*Phelps Dodge*, 865 F.2d] at 1540-41. . . . Here,
there was insufficient evidence to raise a triable issue of such an agreement.”

10 *Radcliffe*, 254 F.3d at 783-784 (bolding supplied).

11 More recently, in *Manda v. Albin*, No. 5:19-cv-01947-EJD, 2019 U.S. Dist. LEXIS
12 204473 (N.D.Cal. Nov. 25, 2019) (*Manda*), Judge Edward Davila of this court addressed an
13 FRCP 12(b)(6) motion to dismiss Section 1983 conspiracy claims (among others). The case
14 arose from defendant medical and other providers’ allegedly wrongful removal of a child from
15 plaintiff parents’ custody, and the parents’ subsequent Section 1983 claims against relevant
16 state and private actors. Granting defendants’ 12(b)(6) motions to dismiss, the court stated:

17 “b. Conspiracy.

18 Finally, in an attempt to show joint action, Plaintiffs argue that
19 Defendants were working in conjunction and conspiring to violate Plaintiffs’
constitutional rights. Private parties have been held to act under color of law if
20 they willfully participate in joint action or a conspiracy with state officials to
deprive others of constitutional rights. *United Steelworkers of Am. v. Phelps*
21 *Dodge Corp.*, 865 F.2d 1539, 1540 (9th Cir. 1989) (collecting cases). To prove
a conspiracy between private parties and the government under [42 U.S.C. §]
22 1983, an agreement or “meeting of the minds” to violate constitutional rights
must be shown. *Fonda v. Gray* 707 F.2 435, 438 (9th Cir. 1983). For instance,
23 the “mere acquiescence of [private employees] to the investigation requests of
[state actors] is, without more, insufficient to prove a conspiracy.” *Id.* While
24 each participant in the conspiracy need not know the “exact parameters of the
plan,” they must at least “share the general conspiratorial objective.” *Id.*;
25 *Phelps Dodge Corp.*, 865 F.2d at 1541 (“To be liable, each participant in the
conspiracy need not know the exact details of the plan, but each participant
26 must at least share the common objective of the conspiracy.”). Thus, to
demonstrate the existence of a conspiracy, it must be shown that there was a
27 “single plan, the essential nature and general scope of which [was] known to
each person who is to be held responsible for its consequences.” *Hoffman-*
28 *LaRoche, Inc. v. Greenberg* 447 F.2d 872, 875 (7th Cir. 1971). The **plaintiff
must state specific facts to support the existence of the claimed conspiracy.**

1 *Olsen v. Idaho State Bd. Of Med.* 363 F.3d 916, 929 (9th Cir. 2004).

2 First, **the mere furnishing of information to police officers does not**
 3 **constitute a conspiracy or “joint action” under color of state law.** See
 4 *Lockhead v. Weinstein*, 24 F.App’x 805, 806 (9th Cir. 2001). Indeed, the mere
 5 fact that a private citizen was lying does not establish a conspiracy or joint
 6 action – the plaintiff must show that the private citizen conspired with state
 7 actors, i.e., that there was a “meeting of the minds to violate constitutional
 8 rights.” *Id.* Indeed, in a case involving an alleged conspiracy between a
 9 private citizen and a prosecutor, the Ninth Circuit concluded that merely telling
 10 a prosecutor about a complaint is insufficient to establish a conspiracy “or
 11 every citizen who complained to a prosecutor would find himself in a
 12 conspiracy.” *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 783 (9th Cir.
 13 2001).

14 Plaintiffs argue that defendant Albin was an “integral actor” in carrying
 15 out the fabricated investigation and deciding to remove A.Y. . . . This misses
 16 the point. *Lockhead* and *Radcliffe* stand for the proposition that merely
 17 providing information, even false information, to the police is insufficient to
 18 establish a conspiracy. Some “plus” factor is needed; in other words, the
 19 plaintiff must show the police *knew* the information was false and shared the
 20 general conspiratorial objective of violating someone’s constitutional rights.
 21 See *Crowe v. Cty. of San Diego*, 608 F.3d 406, 440-441 (9th Cir. 2010) (holding
 22 private actor not part of conspiracy because helping obtain a confession did not
 23 show he had the common objective of the larger conspiracy to wrongfully
 24 prosecute and convict the boys). Simply providing police information, without
 25 more is, as a matter of law, insufficient to establish a conspiracy.”

26 *Manda*, 2019 U.S. Dist. LEXIS 204473, at *32-35 (italics in original; bolding supplied).

27 In *Crowe v. Cty. of San Diego*, 608 F.3d 406 (9th Cir. 2010) (*Crowe*), cited in the
 28 above excerpt from *Manda*, the court explained the central point as follows:

18 “The district court concluded that although ‘a reasonable factfinder
 19 could find that there was a ‘meeting of the minds’ between defendant
 20 McDonough and the other defendants regarding the coercion of a confession
 21 from the boys,’ McDonough was not liable for the alleged Fourth Amendment
 22 violations because the plaintiffs did not ‘demonstrate that McDonough shared
 23 the common objective of the larger conspiracy alleged by plaintiffs: a
 24 conspiracy to wrongfully prosecute and convict the boys.’ . . . We agree. The
 25 key inquiry is whether McDonough shared a ‘common objective’ with the
 26 Escondido police officers to falsely prosecute the boys. A ‘common objective’
 27 to merely prosecute the boys is insufficient; **fair prosecution would not**
 28 **violate the boys’ constitutional rights.** It is too great a leap to conclude that
 help in obtaining a confession – even a coerced confession – suggests that
 McDonough shared the common objective of falsely prosecuting the boys. The
 district court’s grant of summary judgment in favor of McDonough is affirmed
 as to the Fourth Amendment conspiracy claims.”

26 *Crowe*, 608 F.3d at 440-441 (bolding supplied). See also *Fed. Agency of News LLC v.*
 27 *Facebook, Inc.*, 432 F.Supp.3d 1107, 1126, 2020 U.S. Dist. LEXIS 6159 (N.D.Cal., Jan. 13,
 28 2020) (granting with prejudice Facebook’s 12(b)(6) motion against Section 1983 claims;

PROOF OF SERVICE BY ELECTRONIC DELIVERY

(Borges v. County of Mendocino, Case No.: 3:10-cv-04537 SI)

I am employed in the County of Mendocino, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 305 N. Main Street, Ukiah, California, 95482.

On September 25, 2020, I served the attached document, entitled ***ERRATA BY DEFENDANT SUE ANZILOTTI RE REPLY BRIEF ON MOTION TO DISMISS COMPLAINT PURSUANT TO F.R.C.P. 12(b)(6)*** on the interested parties BY ELECTRONIC MAIL at the addressee(s) listed below, as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 25, 2020, at Ukiah, California.

/s/ Brian C. Carter

Brian C. Carter