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

14 DARRYL COTTON, an individual,
15 Plaintiff,
16 v.

17 CYNTHIA BASHANT, an individual;
18 JOEL WOHLFEIL, an individual;
19 LARRY GERACI, an individual;
20 REBECCA BERRY, an individual;
21 MICHAEL WEINSTEIN, an individual;
22 JESSICA MCELFRISH, an individual;
23 and DAVID DEMIAN, an individual,
24 Defendants.

CASE NO. 3:18-cv-00325-TWR-DEB

**DEFENDANT JESSICA
MCELFRISH'S REPLY BRIEF IN
SUPPORT OF MOTION DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

District Judge:
Hon. Todd W. Robinson

Magistrate Judge:
Hon. Daniel E. Butcher

Date: April 21, 2021
Time: 1:30 p.m.
Courtroom: 3A

**[NO ORAL ARGUMENT
REQUESTED]**

25
26 TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF
27 RECORD HEREIN:

1 Defendant JESSICA McELFRESH (“Ms. McElfresh”) submits this reply to
 2 plaintiff DARRYL COTTON’s (“plaintiff”) Opposition to her Federal Rule of
 3 Civil Procedure 12(b)(6) motion to dismiss the First Amended Complaint:

4 **I.**

5 **INTRODUCTION**

6 Ms. McElfresh previously submitted a statement in support of her Rule
 7 12(b)(6) motion to dismiss requesting that the Court treat plaintiff’s failure to
 8 submit opposition papers as consent to granting the motion. After that statement
 9 was submitted, plaintiff served counsel for Ms. McElfresh with an untimely
 10 Opposition. It is not clear if the Opposition was actually filed with the Court. If
 11 so, the Court should not consider it, but in the event the Court is inclined to
 12 consider it, Ms. McElfresh submits that the new allegations in the Opposition are
 13 improper and, even with the new allegations, plaintiff’s proposed amendment
 14 would not state a valid cause of action.

15 **II.**

16 **THE COURT SHOULD NOT CONSIDER NEW ALLEGATIONS**

17 **NOT CONTAINED IN THE FIRST AMENDED COMPLAINT**

18 **IN RULING ON THE MOTION**

19 The First Amended Complaint is, by plaintiff’s own admission, an attempt
 20 to overturn the judgment against him in the *Cotton I* case brought by Larry Geraci.
 21 Ms. McElfresh brought the present motion to dismiss the First Amended
 22 Complaint because the cause of action for declaratory relief is just a request that
 23 this Court overturn the judgment in *Cotton I* and the cause of action labeled
 24 “punitive damages” is an improper request for a form of relief.

25 In his Opposition, plaintiff adds new allegations against Ms. McElfresh
 26 which were not contained in the First Amended Complaint. Specifically, he
 27 alleges that Ms. McElfresh furthered Mr. Geraci’s criminal conspiracy to defraud
 28 him of the property which was the subject of the *Cotton I* lawsuit. (Opposition, p.

1 5:18-20). He alleges that Ms. McElfresh appealed the City's granting of a
 2 cannabis dispensary conditional use permit to one of the neighbors, Aaron
 3 Magagna, in an attempt to support Mr. Geraci's own application for a cannabis
 4 conditional use permit. (Opposition, pp. 2:6-11, 5:12-15). Plaintiff further alleges
 5 that Ms. McElfresh breached a fiduciary duty she owed to him by representing
 6 both him and Mr. Geraci without his knowledge of her previous relationship with
 7 Mr. Geraci and without his consent. (Opposition, p. 12:21-27). In support of his
 8 allegations that Ms. McElfresh was working for Mr. Geraci, he attaches to his
 9 Request for Judicial Notice a bill dated December 6, 2018 from Ms. McElfresh to
 10 Mr. Geraci showing that she charged him \$1,245 for appealing the cannabis
 11 conditional use permit and Mr. Geraci's check paying the bill. (Request for
 12 Judicial Notice, Exhibit 2).

13 While the Court is required to assume factual allegations alleged in the
 14 pleading are true for the purposes of ruling on a Rule 12(b)(6) motion to dismiss,
 15 the Court should not consider the new allegations in plaintiff's opposition which
 16 were not contained in the First Amended Complaint. In ruling on a Rule 12(b)(6)
 17 motion, the district court cannot consider "new" facts alleged in plaintiff's
 18 opposition papers. See *Schneider v. California Dept. of Corrections*, 151 F.3d
 19 1194, 1197 (9th Cir. 1998); *E.I. du Pont de Nemours & Co. v. Kolon Industries,*
 20 *Inc.*, 637 F.3d 435, 449, 450 (4th Cir. 2011) [likewise for statements of counsel
 21 during argument]. When the legal sufficiency of a complaint's allegations is tested
 22 by a motion under Rule 12(b)(6), "[r]eview is limited to the complaint." *Lee v. City*
 23 *of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001), quoting *Cervantes v. City of San*
 24 *Diego*, 5 F.3d 1273, 1274 (9th Cir.1993). The new facts alleged in plaintiff's
 25 Opposition about Ms. McElfresh conspiring with Mr. Geraci by appealing a
 26 cannabis permit for him in the *Cotton I* litigation should therefore be disregarded.

27 Furthermore, a Court may only take judicial notice of "a fact that is not
 28 subject to reasonable dispute because it: (1) is generally known within the trial

1 court's territorial jurisdiction; or (2) can be accurately and readily determined from
 2 sources whose accuracy cannot reasonably be questioned." Fed. Rule Evid.
 3 201(b). The unauthenticated bill attached to plaintiff's Request for Judicial Notice
 4 as Exhibit 2 is not a document whose accuracy cannot reasonably be questioned
 5 and whether or not Ms. McElfresh represented Mr. Geraci in the *Cotton I* litigation
 6 is not the proper subject of a request for judicial notice.

7 III.

8 **EVEN WITH THE NEW ALLEGATIONS, PLAINTIFF'S**

9 **PROPOSED AMENDMENT WOULD NOT ALLEGE**

10 **A VALID CAUSE OF ACTION AGAINST MS. McELFRESH**

11 Realizing that he has not adequately pled a cause of action against Ms.
 12 McElfresh in the First Amended Complaint, plaintiff asks the Court for leave to
 13 amend to add a cause of action against Ms. McElfresh for violation of 42 U.S.C.
 14 §1983. (Opposition, pp. 12:16-17, 13:1-2).

15 Section 1983 provides:

16 Every person who, under color of any statute, ordinance,
 17 regulation, custom, or usage, of any State ... subjects, or
 18 causes to be subjected, any citizen of the United States or
 19 other person within the jurisdiction thereof to the
 20 deprivation of any rights, privileges, or immunities
 21 secured by the Constitution and laws, shall be liable to
 the party injured ...

22 42 U.S.C. §1983.

23 To establish a claim under §1983, a plaintiff must establish: (1) a violation
 24 of a right secured by the Constitution or laws of the United States; and (2) that the
 25 violation was committed by a person acting under color of state law. *See* 42 U.S.C.
 26 §1983; *West v. Atkin*, 487 U.S. 42, 48 (1988). A lawyer in private practice does
 27 not act under color of state law. *Simmons v. Sacramento County Superior Court*,
 28 318 F.3d 1156, 1161 (9th Cir. 2003).

1 Applying this legal authority to the present case, even with the new
 2 allegations plaintiff includes in his opposition, a §1983 cause of action would not
 3 be properly pled against Ms. McElfresh since there is no violation of plaintiff's
 4 Constitutional rights alleged and Ms. McElfresh is a private attorney not acting
 5 under color of state law. The amendment plaintiff is proposing should not be
 6 allowed because, like the First Amended Complaint, it would not state a valid
 7 claim.

8 **IV.**

9 **CONCLUSION**

10 Ms. McElfresh respectfully requests that the Court grant her motion to
 11 dismiss plaintiff's First Amended Complaint without leave to amend.

12
 13 DATED: April 14, 2021

WALSH MCKEAN FURCOLO LLP

14
 15 By: /s/ Laura Stewart
 16 REGAN FURCOLO
 17 LAURA STEWART
 18 Attorneys for Defendant
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DARRYL COTTON, an individual,
Plaintiff,
v.

CASE NO. 3:18-cv-00325-TWR-DEB

DECLARATION OF SERVICE

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

I, the undersigned, declare:

That I am over the age of eighteen years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California where the service occurred; and my business address is: 550 West C Street, Suite 950, San Diego, California.

On April 14, 2021, I served the following document(s):

- 1. DEFENDANT JESSICA MCELFFRESH'S REPLY BRIEF IN SUPPORT OF MOTION DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT.**


in the following manner:

- ☒ **By Electronic Transfer – as indicated on the attached service list.** I caused all of the above-entitled document(s) to be served through CM/ECF addressed to all parties named below. A copy of the Notice of Electronic Filing page will be maintained with the original document(s) in our office.

- ☒ **By First Class Mail – as indicated on the attached service list.** By causing a copy to be placed in a separate envelope, with postage fully prepaid, for each addressee named below and deposited each in the U.S. Mail at San Diego, California.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 14, 2021, at San Diego, California.



Michelle Davis

SERVICE LIST*Darryl Cotton v. Cynthia Bashant, et al.**USDC, Southern District of California Case No. 3:18-cv-00325-BAS-DEB*

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SERVICE LIST*Darryl Cotton v. Cynthia Bashant, et al.**USDC, Southern District of California Case No. 3:18-cv-00325-BAS-DEB*

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