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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
09/07/2022 at 05:37:00 PM
Clerk of the Superior Court
By Regina Chanez, Deputy Clerk

10 Attorneys for Defendant JESSICA MCELFRISH, an individual

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF SAN DIEGO - CENTRAL DIVISION, HALL OF JUSTICE**

13 AMY SHERLOCK, an individual and on
14 behalf of her minor children, T.S. and S.S.,
15 ANDREW FLORES, an individual

16 Plaintiffs,

17 vs.

18 GINA M. AUSTIN, an individual;
19 AUSTIN LEGAL GROUP, a professional
20 corporation, LARRY GERACI, an
21 individual, REBECCA BERRY, an
22 individual; JESSICA MCELFRISH, an
23 individual; SALAM RAZUKI, an
24 individual; NINUS MALAN, an
25 individual; FINCH, THORTON, AND
26 BARID, a limited liability partnership;
27 ABHAY SCHWEITZER, an individual
and dba TECHNE; JAMES (AKA JIM)
BARTELL, an individual; NATALIE
TRANG-MY NGUYEN, an individual,
AARON MAGAGNA, an individual;
BRADFORD HARCOURT, an
individual; SHAWN MILLER, an
individual; LOGAN STELLMACHER, an
individual; EULENTIAS DUANE
ALEXANDER, an individual; STEPHEN
LAKE, an individual, ALLIED
SPECTRUM, INC., a California
corporation, PRODIGIOUS
COLLECTIVES, LLC, a limited liability
company, and DOES 1 through 50,
inclusive,

28 Defendants.

CASE NO. 37-2021-00050889-CU-AT-CTL

**NOTICE OF MOTION AND MOTION TO
STRIKE PORTIONS OF FIRST AMENDED
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES; AND
DECLARATION OF LAURA STEWART IN
SUPPORT THEREOF**

[IMAGED FILE]

JUDGE: Hon. James A. Mangione
DEPT.: C-75

DATE: October 21, 2022
TIME: 9:00 a.m.
DEPT.: C-75

COMPLAINT FILED: December 3, 2021
TRIAL DATE: Not Set

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:**

2 **PLEASE TAKE NOTICE** that on October 21, 2022 at 9:00 a.m., or as soon thereafter
3 as the matter may be heard in Department C-75 of the above-entitled court, located at 330 West
4 Broadway, San Diego, California, the Honorable James A. Mangione presiding, defendant
5 JESSICA McELFRESH (“Ms. McElfresh”) will appear before this Court to move and hereby
6 does move to strike the following portions of the First Amended Complaint filed by plaintiffs
7 AMY SHERLOCK, an individual and on behalf of her minor children, T.S. and S.S., and
8 ANDREW FLORES (“plaintiffs”):

9 1. All references to “exemplary” and/or “punitive” damages against Ms. McElfresh
10 in the First Amended Complaint, specifically:

11 Paragraph 337, page 40, lines 1-3: “In doing the things herein alleged, defendants have
12 acted with malice, oppression, and fraud in conscious disregard of Plaintiffs’ rights, thereby
13 warranting an assessment of punitive damages in an amount appropriate to punish Defendants
14 and deter others from engaging in similar misconduct.”

15 Prayer for Relief, Paragraph 4, Page 40, line 10 (“An award of punitive and exemplary
16 damages, as permitted by law”).

17 Ms. McElfresh’s motion to strike is made pursuant to Sections 435, 436(a), 436(b),
18 431.10(b), and 437 of the California *Code of Civil Procedure* on the grounds that the above
19 portions of the First Amended Complaint are legally irrelevant, improper and not drawn or filed
20 in conformity with the laws of California.

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This motion to strike is based upon this notice of motion and motion, the memorandum of points and authorities in support thereof, the declaration of Laura E. Stewart, and the complete pleadings and records on file herein, and upon such additional evidence and argument as may hereafter be presented.

DATED: September 7, 2022

WALSH MCKEAN FURCOLO LLP

By: 

Laura Stewart, Esq.
Attorneys for Defendant JESSICA
MCELFRESH, an individual

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs’ request for “exemplary” and “punitive” damages against Ms. McElfresh
4 should be stricken as irrelevant, improper and not drawn or filed in conformity with the laws of
5 California, since insufficient facts are pled warranting any award of exemplary or punitive
6 damages.

7 **II. STATEMENT OF FACTS**

8 The First Amended Complaint (“FAC”) contains seven causes of action. Only the causes
9 of action for (1) conspiracy to monopolize in violation of the Cartwright Act (*Business &*
10 *Professions Code* §16700 et seq.), (5) unfair competition and unlawful business practices
11 (*Business & Professions Code* §17200 et seq.), and (7) civil conspiracy are alleged against Ms.
12 McElfresh.

13 It is alleged that the defendants are part of a conspiracy to create an unlawful monopoly
14 in the cannabis market in San Diego by ensuring that the limited number of conditional use
15 permits (“CUPs”) go to principals of the enterprise. (FAC, ¶¶ 1-2). It is alleged that the
16 Sherlock plaintiffs were deprived of CUPs for properties located at 1210 Olive Street in Ramona
17 (“the Ramona CUP”) and 8863 Balboa Avenue in San Diego (“the Balboa CUP”). (FAC, ¶¶ 64-
18 99 and 285-301). But the majority of the FAC is devoted to discussing how Darryl Cotton was
19 deprived of a CUP for a property located at 6620 Federal Blvd. in San Diego (“the Federal
20 CUP”) and the litigation between Mr. Cotton and Mr. Geraci which resulted in a judgment
21 against Mr. Cotton. (FAC, ¶¶ 116-209). In fact, the sixth cause of action is brought by Mr.
22 Flores against Mr. Geraci seeking a judicial declaration that the judgment Mr. Geraci obtained
23 against Mr. Cotton is void. (FAC, ¶¶ 324-332). It is alleged that Mr. Cotton brought two other
24 lawsuits in federal court seeking to have the judgment against him in the *Geraci* lawsuit declared
25 void, but the Court would not do that for him, so the State court must address it here. (FAC, ¶¶
26 276-279).

27 With respect to Ms. McElfresh, it is alleged that she was charged in May 2017 with
28 conspiracy to manufacture a controlled substance and obstruction of justice for her efforts to

1 conceal a client’s alleged illegal marijuana manufacturing operations from government
2 inspectors. (FAC, ¶¶ 54). In July 2018, she entered into a Deferred Prosecution Agreement
3 (“DPA”) that would allow her to plead guilty in 12 months. (FAC, ¶ 55). The DPA prohibited
4 her from violating any other laws (except for minor infractions) or face resumption of all charges
5 filed against her. (FAC, ¶ 56).

6 It is further alleged that during the *Geraci* litigation, Cotton acquired a litigation investor,
7 Mr. Hurtado. (FAC, ¶ 153). In April 2017, Mr. Hurtado consulted with Ms. McElfresh to
8 represent Mr. Cotton and she agreed to do so, but on April 13, 2017, she e-mailed Mr. Hurtado
9 that “upon further reflection” she did “not have the bandwidth” to represent Mr. Cotton and
10 referred Mr. Hurtado to defendant David Demian at Finch, Thornton & Baird. (FAC, ¶¶ 154-
11 156). It is further alleged that at that time, Mr. Cotton did not know that Ms. McElfresh had
12 shared clients with defendant Gina Austin or that she also worked for Mr. Geraci and did not
13 understand “the gravity of an attorney who fails to disclose conflicts of interests between
14 clients.” (FAC, ¶ 182). It is further alleged that the \$260,109.28 judgment against Mr. Cotton in
15 the *Geraci* lawsuit included legal fees for Ms. McElfresh’s representation of Mr. Geraci in
16 advancing the interests of the Federal CUP application and Ms. McElfresh’s representation of
17 Mr. Geraci violated her fiduciary duties to Mr. Cotton as her former client, the terms of her DPA
18 as she knew Geraci could not lawfully own a CUP, and *Penal Code* §115. (FAC, ¶¶ 208, 318).

19 It is further alleged that Ms. Austin discouraged someone named Williams from
20 purchasing a property in Lemon Grove because it did not qualify for a CUP. (FAC, ¶¶ 267-269).
21 Subsequently, a CUP was issued for the Lemon Grove property and the parties who acquired the
22 CUP were represented by Ms. McElfresh. (FAC, ¶¶ 270-271).

23 As part of the cause of action for civil conspiracy, plaintiffs seek punitive damages: “In
24 doing the things herein alleged, defendants have acted with malice, oppression, and fraud in
25 conscious disregard of Plaintiffs’ rights, thereby warranting an assessment of punitive damages
26 in an amount appropriate to punish Defendants and deter others from engaging in similar
27 misconduct.” (FAC, ¶ 337).

1 **III. LEGAL AUTHORITY FOR MOTION TO STRIKE PUNITIVE DAMAGES**

2 The Court may strike from any pleading “irrelevant, false or improper matter inserted in
3 any pleading” as long as appropriate notice requirements have been met. (*Code Civ. Proc.* §
4 436(a).) “Irrelevant matter,” as the term is used in Section 436(a), means “immaterial
5 allegation.” (*Code Civ. Proc.* § 431.10(c).) *Code of Civil Procedure* section 431.10, subdivision
6 (b), defines “immaterial allegation” as:

- 7 (1) An allegation that is not essential to the statement of a claim
8 or defense.
- 9 (2) An allegation that is neither pertinent to nor supported by an
10 otherwise sufficient claim or defense.
- 11 (3) A demand for judgment requesting relief not supported by
12 the allegations of the complaint or cross-complaint.

13 Also, a court may “[s]trike out all or any part of any pleading not drawn or filed in
14 conformity with the laws of this state . . .” (*Code Civ. Proc.* § 436(b).)

15 In order to state a valid claim for punitive damages, the facts alleged in the complaint
16 must provide clear and convincing evidence that the defendant acted out of “malice, oppression
17 or fraud” in committing the tort. *Cal. Civ. Code*, section 3294, subd. (a). “Malice” is defined as
18 conduct “intended by the defendant to cause injury to plaintiff, or despicable conduct that is
19 carried on by the defendant with a willful and conscious disregard for the rights or safety of
20 others.” *Cal. Civ. Code* section 3294, subd. (c)(1). “Despicable” conduct is defined as “conduct
21 that is so vile, base, or contemptible that it would be looked down upon and despised by
22 reasonable people.” CACI 3940; *College Hospital, Inc. v. Superior Court (Cromwell)* (1994) 8
23 Cal.4th 704, 725. Despicable conduct has been described as “[h]aving the character of outrage
24 frequently associated with crime.” *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894.
25 “Oppression” means “despicable conduct that subjects a person to cruel and unjust hardship in
26 conscious disregard for the rights or safety of others.” *Cal. Civ. Code* section 3294, subd. (c)(2).
27 “Fraud” is “an intentional misrepresentation, deceit, or concealment of a material fact known to

1 the defendant with the intention on the part of the defendant of thereby depriving a person of
2 property or legal rights or otherwise causing injury.” *Cal. Civ. Code* section 3294, subd. (c)(3).

3 California law requires specific factual allegations, not just conclusory characterizations
4 of the defendant’s conduct, to support claims for punitive damages. *Smith v. Superior Court*
5 (*Bucher*) (1992) 10 Cal.App.4th 1033, 1042 [punitive damage claim is insufficient in that it is
6 “devoid of any factual assertions supporting a conclusion petitioners acted with oppression,
7 fraud, or malice”]; *Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872 [“conclusory
8 characterization of defendant’s conduct as intentional, willful and fraudulent is a patently
9 insufficient statement of ‘oppression, fraud or malice, express or implied,’ within the meaning of
10 section 3294”]; *Blake v. Aetna Life Ins. Co.* (1979) 99 Cal. App.3d 901 [an insured must allege
11 sufficient facts to show that an insurance company’s actions were of such egregious conduct to
12 warrant a claim for punitive damages].

13 **IV. ARGUMENT**

14 Applying these legal authorities to the present case, the claim for punitive damages
15 against Ms. McElfresh should be stricken from the FAC because it is unsupported by California
16 law.

17 While plaintiffs allege in the seventh cause of action for conspiracy that “...defendants
18 have acted with malice, oppression, and fraud in conscious disregard on Plaintiffs’ rights,
19 thereby warranting an assessment of punitive damages in an amount appropriate to punish
20 Defendants and deter others from engaging in similar misconduct,” plaintiffs fail to allege any
21 specific facts supporting that conclusion, at least with respect to Ms. McElfresh. The factual
22 allegations in the FAC regarding Ms. McElfresh are that she considered representing Mr. Cotton
23 but decided she could not, so she referred him to another attorney at Finch Thornton & Baird.
24 (FAC, ¶¶ 156-157). Mr. Cotton believes Ms. McElfresh had a conflict of interest because she
25 shared clients with two other defendants and had worked on the application for the Federal CUP.
26 (FAC, ¶¶ 182, 208). Mr. Cotton is not even a plaintiff in this case. It is further alleged that Ms.
27 Austin discouraged someone named Williams from purchasing a property in Lemon Grove
28 because it did not qualify for a CUP. (FAC, ¶¶ 267-269). Subsequently, a CUP was issued for

1 the Lemon Grove property and the parties who acquired the CUP were represented by Ms.
2 McElfresh. (FAC, ¶¶ 270-271).


3 Even assuming these allegations are true, they certainly do not rise to the level of malice,
4 oppression or fraud required to state a claim for punitive damages.

5 **V. CONCLUSION**

6 Since plaintiffs have not stated any facts alleging the requisite malice, oppression or
7 fraud, the request for punitive damages is improper and the Court may properly strike such
8 request as failing to conform to applicable law.

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10 DATED: September 7, 2022

WALSH MCKEAN FURCOLO LLP

11
12
13 By: 
14 Laura Stewart, Esq.
15 Attorneys for Defendant JESSICA
16 MCELFRESH, an individual

DECLARATION OF LAURA E. STEWART

I, Laura Stewart, declare:

1. I am an associate at the law firm of Walsh McKean Furcolo, LLP, counsel of record for defendants JESSICA McELFRESH. I am an attorney in good standing and licensed to practice in the State of California. I have personal knowledge of the matters stated herein and, if called as a witness, I could and would testify competently thereto.

2. On August 2, 2022, I called attorney Andrew Flores, counsel for plaintiffs, to meet and confer before filing Ms. McElfresh's Motion to Strike Portions of the First Amended Complaint as required by *Code of Civil Procedure* section 435.5. I indicated the issues with the request for punitive damages and further indicated my intent to move to strike the punitive damages claim from the First Amended Complaint.

3. Mr. Flores e-mailed me back that evening saying he was not available to meet and confer until after the deadline, so I filed a declaration stating we were not able to meet and confer and the deadline for Ms. McElfresh to respond to the First Amended Complaint was extended for thirty (30) days, to September 7, 2022. A true and correct copy of my e-mail correspondence with Mr. Flores is attached hereto as Exhibit A.

4. On August 31, 2022, I called Mr. Flores again to meet and confer before filing Ms. McElfresh's Motion to Strike Portions of the First Amended Complaint. This time, I sent Mr. Flores an e-mail discussing in detail the basis for the Motion to Strike, including all of the legal arguments for why the punitive damages claim against Ms. McElfresh should be stricken along with references to specific allegations in the First Amended Complaint and citations to legal authorities. A true and correct copy of my e-mail correspondence to Mr. Flores is attached hereto as Exhibit B.

5. Mr. Flores never responded to my August 31, 2022 e-mail.

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6. My attempts to meet and confer with Mr. Flores regarding the demurrer satisfy my obligations under *Code of Civil Procedure* section 435.5.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed this 7th day of September, 2022, at San Diego, California.



Laura Stewart, Esq.

EXHIBIT “A”

From: ["Andrew flores" <andrew@floreslegal.pro>](mailto:andrew@floreslegal.pro)
To: ["Laura Stewart" <lstewart@wmflp.com>](mailto:lstewart@wmflp.com)
CC: ["Michelle Davis" <mdavis@wmflp.com>](mailto:mdavis@wmflp.com)
Date: 8/2/2022 8:55:33 PM
Subject: Re: Sherlock v. Austin, et al. // SDCS Court Case No. 37-2021-00050889-CU-AT-CTL

Hello Ms. Stewart,

I am in receipt of your email regarding a meet and confer and approaching deadlines. Looking at my schedule I am in hearings tomorrow and Thursday, but I will have time on Friday between 1-3 pm for a telephone call. Please let me know if that time works for you. Also, with respect to the filing deadline I have no problem with stipulating to an extension so we may properly meet and confer.

Sincerely,

Andrew Flores

From: Laura Stewart <lstewart@wmflp.com>
Sent: Tuesday, August 2, 2022 2:40:22PM
To: Andrew flores <andrew@floreslegal.pro>
Cc: Michelle Davis <mdavis@wmflp.com>
Subject: Sherlock v. Austin, et al. // SDCS Court Case No. 37-2021-00050889-CU-AT-CTL

Dear Mr. Flores,

My office is counsel for defendant Jessica McElfresh with respect to the Sherlock case (Case No. 37-2021-00050889-CU-AT-CTL) pending in the San Diego County Superior Court. I left a voice message for you today because I would like to meet and confer before filing Ms. McElfresh's demurrer and motion to strike punitive damages from the First Amended Complaint as required under the Code. Would you please advise of a good time for us to meet and confer by phone?

With respect to the demurrer, the argument is that the First Amended Complaint does not state a claim upon which relief may be granted against Ms. McElfresh. The Sherlock plaintiffs only complain of an alleged loss of the Ramona and Balboa CUPs, but it is not alleged that Ms. McElfresh had anything to do with the Ramona or Balboa CUPs. With respect to the Federal CUP, it is alleged that Ms. McElfresh represented Mr. Geraci in connection with the Federal CUP application, which allegedly violated her fiduciary duties to Mr. Cotton. Ms. McElfresh disputes that she ever represented Mr. Cotton or ever owed any duty or any sort to Mr. Cotton. But, in any event, Mr. Cotton is not a plaintiff in the Sherlock case, you are. We understand that you represented Mr. Cotton in the Geraci case. In short, none of the plaintiffs in this case claim to have been damaged by anything Ms. McElfresh did or did not do.

With respect to the motion to strike, the argument is that there are insufficient facts pled to show the malice, oppression or fraud required to state a claim for punitive damages.

Based on our current August 8 response date, we understand tomorrow is the 5-day deadline to meet and confer before our demurrer and motion to strike are filed. If you are not available today or tomorrow, we can file a declaration under Code of Civil Procedure sections 430.41 (a)(2) and 435.5(a)(2) to give us some additional time to meet and confer.

Thank you in advance for your courtesy and cooperation.

Laura Stewart, Esq.
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EXHIBIT “B”

From: ["Laura Stewart" <lstewart@wmfillp.com>](mailto:lstewart@wmfillp.com)
To: Andrew@FloresLegal.Pro
CC: ["Michelle Davis" <mdavis@wmfillp.com>](mailto:mdavis@wmfillp.com)
Date: 8/31/2022 3:01:56 PM
Subject: Sherlock v. Austin, et al. // SDCS Court Case No. 37-2021-00050889-CU-AT-CTL

Dear Mr. Flores,

As you know from our prior correspondence, my office is counsel for defendant Jessica McElfresh with respect to the Sherlock case (Case No. 37-2021-00050889-CU-AT-CTL) pending in the San Diego County Superior Court. I called you today and left a message to meet and confer before filing Ms. McElfresh's demurrer and motion to strike punitive damages from the First Amended Complaint ("FAC") as required by Code of Civil Procedure §§430.41 and 435.5. I will set forth the basis for the demurrer and motion to strike in this correspondence.

I. DEMURRER

With respect to the demurrer, the argument is that the FAC does not state a claim upon which relief may be granted against Ms. McElfresh. Discussion of why each of the three causes of action alleged against Ms. McElfresh in the FAC should be dismissed is included here.

First Cause of Action for Violation of the Cartwright Act

Recovery is provided under the Cartwright Act where the activities of a combination of capital, skill or acts by two or more persons result in a restraint of trade. *G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 265, citing *Weissensee v. Chronicle Publishing Co.* (1976) 59 Cal.App.3d 728, 729. In order to maintain a cause of action for such combination in restraint of trade, the complaint must allege: The formation and operation of the conspiracy; the illegal acts done pursuant thereto; a purpose to restrain trade; and the damage caused by such acts. *G.H.I.I., supra*, 147 Cal.App. 256, 265, citing *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 119.

The Supreme Court demands a "high degree of particularity in the pleading of Cartwright Act violations." *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 326-328; *Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 742. Generalized allegations of civil antitrust violations are usually insufficient and the unlawful combination or conspiracy must be alleged with specificity. Thus, general allegations of a conspiracy unaccompanied by a statement of facts constituting the conspiracy and explaining its objectives and impact in restraint of trade will not suffice. Put slightly differently, the lack of factual allegations of specific conduct directed toward furtherance of the conspiracy to eliminate or reduce competition renders the complaint legally insufficient. *G.H.I.I., supra*, 147 Cal.App.256, 265, citing *Jones v. H.F. Ahmanson & Co., supra*, 1 Cal.3d 93, 119.

Applying these legal authorities to the present case, plaintiffs have failed to allege Ms. McElfresh's participation in a conspiracy to restrain trade as required by the Cartwright Act. In the FAC, it is alleged that "Defendants committed overt acts and engaged in concerted action in furtherance of their combination and conspiracy to restrain and monopolize, as described above, including but not limited to unlawfully applying for or acquiring CUPs through the use of proxies and/or forged documents, sham litigation, and acts and threats of violence against competitors and/or parties who could threaten or expose their illegal actions in furtherance of the conspiracy. (FAC, ¶283.) None of these allegations have anything to do with Ms. McElfresh. The allegation that the defendants applied for or acquired CUPs through the use of proxies and/or forged documents is directed towards Mr. Geraci and Mr. Geraci's assistant, Ms. Berry, who Mr. Cotton claims helped Mr. Geraci submit the Federal CUP in her name. (FAC ¶119). The allegation that the defendants acquired CUPs through the use of forged documents is directed towards the individuals who plaintiffs claim assisted Mr. Lake and Mr. Harcourt in defrauding the Sherlock plaintiffs out of the Ramona and Balboa CUPs by forging Mr. Sherlock's signature on the dissolution form for Leading Edge Real Estate, the owner of the Ramona and Balboa properties. (FAC ¶¶ 64-99 and ¶¶ 285-301). The allegation that the defendants engaged in sham litigation is directed towards Mr. Geraci for bringing the *Geraci* lawsuit. The allegation that the defendants engaged in acts and threats of violence against competitors and/or parties who could threaten or expose their illegal actions is directed towards Mr. Alexander and Mr. Stellmacher, who allegedly threatened Mr. Cotton, and Mr. Magagna who threatened Ms. Young. (FAC, ¶¶215-224 and ¶¶ 225-238). As plaintiffs do not allege that Ms. McElfresh had anything to do with any of these incidents, a Cartwright Act violation is not sufficiently pled against Ms. McElfresh.

Fifth Cause of Action for Unfair Competition/Unlawful Business Practices

California *Business & Professions Code* § 17200 (also known as the Unfair Competition Law) defines “unfair competition” as “any unlawful, unfair or fraudulent business act or practice...” The Unfair Competition Law permits a cause of action to be brought if a practice violates some other law. In effect, the “unlawful” prong of § 17200 makes a violation of the underlying or “borrowed” law a violation of § 17200. *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180; *Farmers Ins. Exch. v. Sup.Ct.* (1992) 2 Cal.4th 377, 383. A defense to the “borrowed” law extinguishes the Unfair Competition Law claim. *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1060 [“If the underlying claim is dismissed, then there is no unlawful act upon which to base the derivative Unfair Competition claim”]; *Scripps Clinic v. Sup.Ct.* (2003) 108 Cal.App.4th 917, 938-939; *Krantz v. BT Visual Images, L.L.C.* (2001) 89 Cal.App.4th 164, 178 [the viability of an “unlawful” UCL claim “stands or falls” with the underlying claim].

In the present case, the allegation in the cause of action for unlawful business practices directed towards Ms. McElfresh is the allegation in ¶ 318 of the FAC that her representation of Mr. Geraci in furtherance of the Federal CUP application violated her fiduciary duties to Mr. Cotton as her former client, the terms of her DPA and *Penal Code* § 115.

Ms. McElfresh disputes that she ever represented Mr. Cotton or that she ever owed any duty to Mr. Cotton. But, assuming these allegations are true, as the Court must do for the purposes of a demurrer, Mr. Cotton is not a plaintiff in this case; Mr. Flores is. Representing Mr. Cotton is not the same thing as representing Mr. Flores and a breach of a fiduciary duty to Mr. Cotton is not a breach of a fiduciary duty to Mr. Flores. There is no conceivable theory upon which Ms. McElfresh owed a fiduciary duty to Mr. Flores and, in fact, it is not alleged anywhere in the FAC that Ms. McElfresh did owe a duty of any kind to Mr. Flores. As such, a breach of fiduciary duty to Mr. Flores cannot be the “borrowed” law which serves as the predicate for the “unlawful business act or practice” under § 17200. In fact, Mr. Cotton and Mr. Flores have already filed two other lawsuits against Ms. McElfresh besides this one in federal court. All three of the lawsuits are attempts by Mr. Cotton to overturn the judgment against him in the *Geraci* lawsuit. The only legally valid way for Mr. Cotton to overturn the *Geraci* judgment is by way of an appeal to the Court of Appeal, which he already tried and lost. Another lawsuit in the same Court is simply not the appropriate avenue and the Court should dismiss the *Sherlock* FAC for that reason.

Mr. Flores also lacks standing to sue Ms. McElfresh for a violation of the Deferred Prosecution Agreement (“DPA”) between Ms. McElfresh and the government, since Mr. Flores was not a party to the agreement. The violation of the DPA therefore cannot be the “borrowed law,” either.

Penal Code § 115 makes it a felony to knowingly procure or offer any false or forged instrument to be filed, registered or recorded in any public office of the state. Plaintiffs allege that Ms. McElfresh represented Mr. Geraci in connection with the Federal CUP before the City of San Diego and that violated *Penal Code* § 115. But, violation of a criminal statute only gives the government a right to prosecute the offender, it does not create a private right of action for individuals to sue anybody, and even if it did, the individual who would hold that right is Mr. Cotton, who is not a plaintiff in this case. It is inconceivable how Mr. Flores would have standing to maintain an action for violation of *Penal Code* § 115 against McElfresh.

Since there is no underlying “borrowed” law plaintiffs can sue Ms. McElfresh for, plaintiffs have not stated a cause of action for violation of the Unfair Competition Law against her.

Seventh Cause of Action for Civil Conspiracy

To allege a conspiracy, a plaintiff must plead: (1) formation and operation of the conspiracy. (2) damage resulting to plaintiff and (3) from a wrongful act done in furtherance of the common design. *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150. It is often said that civil conspiracy is not an independent tort, meaning a plaintiff only pleads a cause of action for civil conspiracy if s/he pleads a cause of action for the underlying wrong. *Hege v. Worthington, Park & Worthington* (1962) 209 Cal.App.2d 670, 678 [the pleaded facts must show that, even without the conspiracy, they give rise to a cause of action]; *Prakashpalan v. Engstrom, Lipscomb and Lack* (2014) 223 Cal.App.4th 1105, 1135 [there is no separate tort of civil conspiracy and no action for conspiracy to commit a tort unless the underlying tort is committed and damage results therefrom].

Applying these legal authorities to the present case, plaintiff has not adequately pled a cause of action for civil conspiracy to violate the Cartwright Act against Ms. McElfresh because plaintiffs have not alleged a cause of action for a

violation of the Cartwright Act against her.

II. MOTION TO STRIKE PUNITIVE DAMAGES

With respect to the motion to strike, the argument is that there are insufficient facts pled to state a claim for punitive damages. In order to state a valid claim for punitive damages, the facts alleged in the complaint must provide clear and convincing evidence that the defendant acted out of "malice, oppression or fraud" in committing the tort. Cal. Civil Code §3294(a). "Malice" is defined as conduct "intended by the defendant to cause injury to plaintiff, or despicable conduct that is carried on by the defendant with a willful and conscious disregard for the rights or safety of others." Cal. Civ. Code §3294(c)(1). "Despicable conduct" is defined as "conduct that is so vile, base, or contemptible that it would be looked down upon and despised by reasonable people." CACI 3940; *College Hospital, Inc. v. Superior Court (Cromwell)*(1994) 8 Cal.4th 704, 725. Despicable conduct has been described as "[h]aving the character of outrage frequently associated with crime." *Taylor v. Superior Court*(1979) 24 Cal.3d 890, 894. "Oppression" means "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard for the rights or safety of others." Cal. Civ. Code section 3294, subd. (c)(2). "Fraud" is "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." Cal. Civ. Code section 3294, subd. (c)(3).

California law requires specific factual allegations, not just conclusory characterizations of the defendant's conduct, to support claims for punitive damages. *Smith v. Superior Court (Bucher)*(1992) 10 Cal.App.4th 1033, 1042 [punitive damage claim is insufficient in that it is "devoid of any factual assertions supporting a conclusion petitioners acted with oppression, fraud, or malice"]; *Brousseau v. Jarrett*(1977) 73 Cal.App.3d 864, 872 ["conclusory characterization of defendant's conduct as intentional, willful and fraudulent is a patently insufficient statement of 'oppression, fraud or malice, express or implied,' within the meaning of section 3294"]; *Blake v. Aetna Life Ins. Co.* (1979) 99 Cal. App.3d 901 [an insured must allege sufficient facts to show that an insurance company's actions were of such egregious conduct to warrant a claim for punitive damages].

While plaintiffs allege in the seventh cause of action for conspiracy that "...defendants have acted with malice, oppression, and fraud in conscious disregard on Plaintiffs' rights, thereby warranting an assessment of punitive damages in an amount appropriate to punish Defendants and deter others from engaging in similar misconduct," plaintiffs fail to allege any specific facts supporting that conclusion, at least with respect to Ms. McElfresh. The factual allegations in the First Amended Complaint regarding Ms. McElfresh are that she considered representing Mr. Cotton but decided she could not, so she referred him to another attorney at Finch Thornton & Baird. (FAC, ¶¶156-157). Mr. Cotton believes Ms. McElfresh had a conflict of interest because she shared clients with two other defendants and had worked on Mr. Geraci's CUP application with the City of San Diego. (FAC, ¶¶182, 208). It is further alleged that Ms. Austin discouraged someone named Williams from purchasing a property in Lemon Grove because it did not qualify for a CUP. (FAC, ¶¶267-269). Subsequently, a CUP was issued for the Lemon Grove property and the parties who acquired the CUP were represented by Ms. McElfresh. (FAC, ¶¶270-271). Even assuming these allegations are true, they certainly do not rise to the level of malice, oppression or fraud required to plead a claim for punitive damages.

Based on our current September 7 response date, Friday September 2 is the deadline to meet and confer before our demurrer and motion to strike are filed. If I don't hear from you before Friday, I will go ahead file the demurrer and motion to strike on the 7th with a declaration explaining that I satisfied my obligations to meet and confer as required by the Code by setting forth the arguments for the demurrer and motion to strike in this e-mail.

Thank you in advance for your courtesy and cooperation.

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