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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,

Plaintiff,

vs.

GINA M. AUSTIN, an individual;
JESSICA MCELFFRESH, an individual;
DAVID S. DEMIAN, an individual;
and DOES 1-50, inclusive,

Defendants.

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

**DAVID S. DEMIAN'S REPLY TO
PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED
COMPLAINT**

Date: April 13, 2022

Time: 9:00 a.m.

Judge: The Hon. Jinsook Ohta

Crtrm.: 3A

**[NO ORAL ARGUMENT
REOUESTED]**

Defendant DAVID S. DEMIAN (hereinafter "Demian") submits the
following reply to plaintiff DARRYL COTTON's (herein "Cotton") opposition to
his Motion to Dismiss Plaintiff's Second Amended Complaint Pursuant to FRCP 12
(b)(6) 12(b)(5), FRCP 4.

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1 **I. INTRODUCTION**

2 Plaintiff's opposition inappropriately combines arguments against all
 3 defendants, including those who have been previously dismissed from this action.
 4 The vast majority of plaintiff's opposition has nothing to do with, nor mentions
 5 defendant Demian. Instead, plaintiff spends most of his opposition arguing that the
 6 judgment rendered against him in *Cotton I*¹ is void since it allegedly enforced an
 7 "illegal contract," claiming that Geraci's purchase of Cotton's property was for an
 8 unlawful purpose. Plaintiff repeatedly argues that Judge Wohlfeil erred in entering
 9 the judgment and in failing to determine that the contract was illegal since Geraci
 10 allegedly could not lawfully own a cannabis CUP himself. However, instead of
 11 exercising his right to appeal that decision, plaintiff continues to forum shop by
 12 pursuing other actions to seek a judicial determination that his contract with Geraci
 13 was illegal, including this case, this time by way of purported civil rights claims
 14 against his and Geraci's attorneys.

15 However, plaintiff's civil rights claims against Demian fail as a matter of law.
 16 Plaintiff fails to explain how Demain, a private attorney, was acting under color of
 17 state law or violated plaintiff's civil rights under 42 U.S.C. § 1983 in briefly
 18 representing him in *Cotton I*. Plaintiff's allegations that Demain's firm "FTB" failed
 19 to disclose a potential conflict, or improperly amended Cotton's pleadings fails to
 20 support any claim under section 1983. Demain, who stopped representing Cotton
 21 over a year before trial and judgment was rendered following a jury verdict in favor
 22 of Geraci, clearly was not acting in an official government capacity under color of
 23 law nor did he violate plaintiff's constitutional rights.

24 Moreover, plaintiff's argument that defendants are "coconspirators" with
 25 Geraci since "attorney Nguyen," who he states is an associate of Gina Austin,
 26 _____

27 ¹ Plaintiff refers to the State Court case, *Lawrence Geraci v. Darryl Cotton*, San
 28 Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL as "*Cotton I*."

1 prevented “Young’s testimony” in the *Cotton I* action also fails to support a claim
 2 against Demian under 42 U.S.C. § 1985. (Dkt. 112, pp. 12 and 15.) Demian did not
 3 represent Cotton or any other party at trial, nor is Cotton claiming that Demian had
 4 anything to do with preventing witness testimony, let alone in this federal action.

5 Neither of plaintiff’s causes of action for violations of 42 U.S.C. § 1983 and
 6 42 U.S.C. § 1985, allege viable claims against Demian, and should be dismissed
 7 with prejudice.

8 **II. PLAINTIFF’S SECOND AMENDED COMPLAINT FAILS TO** 9 **ALLEGE ANY CLAIM AGAINST DEMIAN**

10 **A. Plaintiff’s First Cause of Action for Violation of 42 U.S.C. § 1983** 11 **Fails to Assert a Viable Claim Against Demian.**

12 Plaintiff acknowledges that in order to allege a claim for violation of 42
 13 U.S.C. § 1983, plaintiff must allege facts supporting that defendant was acting under
 14 color of state law and violated plaintiff’s Constitutional rights. Plaintiff fails to do
 15 either.

16 Plaintiff not only fails to identify any of plaintiff’s Constitutional rights that
 17 Demian supposedly violated, he fails to explain how Demian was acting under color
 18 of state law in briefly representing him as his attorney in a civil action. Plaintiff
 19 ignores that Demian, as Cotton’s prior counsel, was not acting in any state or official
 20 government capacity, or as an agent of the state. *See Briley v. State of Cal.*, 564 F.2d
 21 849, 855 (9th Cir. 1977) (“We have repeatedly held that a privately-retained
 22 attorney does not act under color of state law for purposes of actions brought under
 23 the Civil Rights Act.”); *Polk County v. Dodson*, 454 U.S. 312, 318 (“A lawyer
 24 representing a client is not, by virtue of being an officer of the court, a state actor
 25 ‘under color of state law’ within the meaning of § 1983.”)

26 Plaintiff fails to allege or offer any specific facts which would support that
 27 Demian acted under color of state law or participated in a conspiracy to deprive
 28 plaintiff of his constitutional rights. Plaintiff’s conclusory allegations fail to state

1 any such claim. Instead, plaintiff provides nonsensical arguments in support of his
 2 civil rights claims. First, plaintiff argues that other persons who were engaged with
 3 state officials were acting under color of law by conspiring with Geraci to allow him
 4 to acquire a CUP on Cotton's property. Specifically, plaintiff argues that
 5 "Tirandazi," a city agent, allowed Geraci to process a CUP application in the name
 6 of a proxy, then lied at trial in *Cotton I*. (Dkt. 112, p. 14.) Next, plaintiff argues that
 7 because of the City's processing of Geraci's CUP application, he was deprived of
 8 his property. (*Id.*) Lastly, plaintiff argues that attorney Nguyen's prevention of
 9 Young's testimony in *Cotton I* constituted an obstruction of justice and prevented
 10 him from having a fair trial. (Dkt. 112, pp. 14-15.)

11 However, Demian was not involved in presenting Geraci's CUP application
 12 to the City or in preventing "Young" or anyone else from testifying at trial, nor does
 13 Cotton allege he was. Instead, plaintiff argues that "FTB" failed to disclose prior
 14 relationships with Geraci's tax business, amended plaintiff's pleadings to remove
 15 allegations of Geraci's illegal ownership, and attempted to have Cotton make
 16 judicial and evidentiary admissions that would mean that Cotton was seeking to
 17 unlawfully acquire the CUP. [Dkt. 112, p. 17; SAC ¶¶ 166-170.]

18 In support of his claims against Demian, plaintiff cites *Sheppard, Mullin,*
 19 *Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, 80.
 20 However, plaintiff's reliance on *Sheppard* is misplaced and does not support his
 21 claims. *Sheppard* does not involve, and did not find, that an attorney's failure to
 22 provide written disclosure of potential conflicts of interest to a client supports a
 23 claim under either 42 U.S.C., § 1983 or 42 U.S.C. § 1985. Instead, the court in
 24 *Sheppard* found that since plaintiff attorney services contract was unenforceable for
 25 failing to disclose a known conflict, the attorney could not enforce an arbitration
 26 clause in the agreement or award by the arbitrator in his favor. However, the
 27 Supreme Court found that the attorney firm could still seek compensation against
 28 the client under a quantum meruit theory.

1 As discussed in the moving papers, the actions of private individuals not
 2 affiliated with state or municipal governments generally do not involve action under
 3 color of state law. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156, 98 S. Ct.
 4 1729, 56 L. Ed. 2d 185 (1978). For conduct by private parties to be under color of
 5 state law, it must be "fairly attributable to the State." *Lugar v. Edmonson Oil Co.*,
 6 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982); *Rivera v. Green*, 775
 7 F.2d 1381, 1382-84 (9th Cir. 1985), cert. denied, 475 U.S. 1128, 90 L. Ed. 2d 198,
 8 106 S. Ct. 1656 (1986); *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir.
 9 2000).

10 Although a liberal standard is used to evaluate a motion to dismiss, "a liberal
 11 interpretation of a civil rights complaint may not supply essential elements of the
 12 claim that were not initially pled. Vague and conclusory allegations of official
 13 participation in civil rights violations are not sufficient to withstand a motion to
 14 dismiss." *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir.
 15 1982). Also see *Bhardwaj v. Pathak*, 668 Fed. Appx. 763, 765 (9th Cir. 2016) (court
 16 dismissed claim without leave to amend that judge, attorneys and court reporter
 17 conspired to tamper with hearing transcripts as "highly implausible, vague, and
 18 conclusory"); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d
 19 868 (2009) ("The plausibility standard . . . asks for more than a sheer possibility that
 20 a defendant has acted unlawfully."); and *Simmons v. Sacramento County Superior*
 21 *Court*, 318 F.3d 1156, 1161 (9th Cir. 2003) (court held that conclusory allegations of
 22 a private attorney's conspiracy with state officers are insufficient to state a § 1983
 23 claim against the attorney.)

24 Here, the Second Amended Complaint ("SAC") fails to allege any supporting
 25 facts to show that Demian is a state actor or that he acted under the color of state
 26 law, nor can Plaintiff. Neither plaintiff's allegations, nor arguments in his opposition
 27 are sufficient to give rise to an actionable cause of action under section 1983.

28 Plaintiff's allegations and argument that Demian or FTB failed to disclose a prior

1 relationship, amended the pleadings, and attempted to have Cotton admit facts he
 2 refused, do not demonstrate that Demian was a state actor or acted under the color of
 3 the law in his brief representation of Cotton, which ended well before trial and
 4 judgment was entered in *Cotton I* action.

5 Accordingly, plaintiff's First Causes of Action for violation of 42 U.S.C.
 6 § 1983 must be dismissed with prejudice as it cannot be salvaged through any
 7 further attempts to amend the pleadings. Demian, a private individual acting as
 8 an attorney in a civil action, clearly is not a State actor nor did he act under the color
 9 of State law.

10 **B. Plaintiff's Second Cause of Action for Violation of 42 U.S.C. § 1985**
 11 **Fails to Assert a Viable Claim Against Demian**

12 Plaintiff argues that the threats against witness "Young" and "prevention" of
 13 her testimony "in THIS Court" constitutes a violation of plaintiff's civil rights under
 14 42 U.S.C., § 1985. (Dkt. 112, p. 15.) As this action is at the pleading stage, there has
 15 been no testimony by any witness in this action to date which was obstructed.
 16 Instead, plaintiff appears to argue that allegedly preventing Young's testimony in
 17 *Cotton I* also acts to obstruct Young's testimony in *this* action. However, plaintiff
 18 cites no legal support for this theory.

19 Regardless, not only does plaintiff fail to make any specific allegations as to
 20 Demian in support of this cause of action in the SAC, he also does not argue in his
 21 opposition that Demian was in any way involved in preventing Young or any
 22 witness from testifying in this court or otherwise. Plaintiff's allegations do not
 23 implicate Demian at all, but state that "As detailed above, Young has communicated
 24 that she will not testify before this Court because of the attempted bribe and threats
 25 by Magagna." [SAC ¶ 188.] Plaintiff's opposition discusses that attorney Nguyen
 26 somehow prevented Young's testimony. (Dkt. 112, p. 15.)

27 As discussed in the moving papers, plaintiff's allegations in the SAC support
 28 that plaintiff's claims of obstruction in allegedly preventing "Young" from testifying

1 do not involve Demian. Not only does plaintiff not claim that Demian precluded any
 2 witness from testifying, Demian had not been involved or represented Plaintiff as
 3 his attorney for over a year prior to the alleged 2019 events which give rise to
 4 plaintiff's claims. (See SAC ¶¶ 138-142, 145.) Demian had stopped representing
 5 Cotton as of December 2017, and played no role in any purported conspiracy to
 6 prevent Young from testifying in *Cotton I* or this action.

7 Thus, plaintiff has failed to plead the requisite facts to support a claim for
 8 violation of § 1985(2), and his second cause of action for violation of § 1985 fails as
 9 a matter of law.

10 C. Leave to Amend Should be Denied

11 Plaintiff has already been given the opportunity by this Court to plead a
 12 proper claim, and has amended his complaint twice. Like his previous pleadings,
 13 plaintiff's SAC fails to assert any cognizable causes of action against Demian that
 14 could plausibly be amended, and is a futile and improper attempt to relitigate the
 15 underlying state court action against Geraci. Plaintiff has not offered any basis for
 16 amending his claims against Demian and should be denied another opportunity to
 17 drag on this lawsuit any further. *Serra v. Lappin*, 600 F.3d 1191, 1200 (9th Cir.
 18 2010); *Tracht Gut, LLC v. L.A. County Treasurer & Tax Collector*, 836 F.3d 1146,
 19 1152 (9th Cir. 2016); *Stone v. Baum*, 409 F. Supp. 2d 1164, 1175 (Ariz. Dist. 2005).

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1 **II. CONCLUSION**

2 For the foregoing reasons, and as set forth in the moving papers, Demian
3 respectfully requests this court dismiss plaintiff's claims against him with prejudice
4 and without leave to amend.

5 DATED: April 6, 2022

LEWIS BRISBOIS BISGAARD & SMITH LLP

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8 By: 

CORINNE C. BERTSCHE

Attorneys for Defendant DAVID DEMIAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA PROOF OF SERVICE

Darryl Cotton v. Cynthia Bashant, et al.
Case No. 3:18-cv-00325-JO-DEB

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

At the time of service, I was over 18 years of age and not a party to this action. My business address is 550 West C Street, Suite 1700, San Diego, CA 92101.

On **April 6 , 2022**, I served true copies of the following document(s):

**DAVID DEMIAN'S REPLY TO PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED
COMPLAINT**

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

Darryl Cotton (Plaintiff in Pro Per)
6176 Federal Blvd.
San Diego, CA 92114
(619) 954-4447

The documents were served by the following means:

☒ (BY U.S. MAIL) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and:

☒ Placed the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

Additionally, I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

SEE ATTACHED SERVICE LIST

The documents were served by the following means:

☒ (BY COURT'S CM/ECF SYSTEM) Pursuant to Local Rule, I electronically filed the documents with the Clerk of the Court using the CM/ECF system, which sent notification of that filing to the persons listed above.

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1 I declare under penalty of perjury under the laws of the United States of
2 America and the State of California that the foregoing is true and correct.

3 Executed on **April 6, 2022**, at San Diego, California.

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SERVICE LIST

Darryl Cotton v. Cynthia Bashant, et al.

Case No. 3:18-cv-00325-TWR-DEB

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