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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-JO-DEB

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

District Judge:
Hon. Jinsook Ohta

Date: April 13, 2022
Time: 9:00 a.m.
Courtroom: 3A

**[NO ORAL ARGUMENT
REQUESTED]**

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

Defendant JESSICA McELFRESH (“Ms. McElfresh”) submits this reply to plaintiff DARRYL COTTON’s (“plaintiff”) Opposition to her Rule 12(b)(6) motion to dismiss the Second Amended Complaint:

I.

INTRODUCTION

The Second Amended Complaint simply does not state a valid cause of action against Ms. McElfresh. Plaintiff’s only argument with respect to Ms. McElfresh is that she, a private attorney, failed to disclose to plaintiff a prior existing relationship with Geraci. The facts alleged in the Second Amended Complaint actually show that Ms. McElfresh never represented plaintiff (she referred plaintiff’s “litigation investor” to another attorney), so she would have no duty to disclose any conflict to plaintiff. But, even if she did, the failure to disclose a conflict is not sufficient to support a cause of action for violation of 42 U.S.C. §1983 (deprivation of a person’s Constitutional rights under color of State law) or a cause of action for violation of 42 U.S.C. §1985 (prohibiting a witness from testifying in federal court).

II.

THE SECOND AMENDED COMPLAINT DOES NOT STATE A VALID CAUSE OF ACTION AGAINST MS. MCELFRISH

A. The First Cause of Action for Violation of 42 U.S.C. §1983

The first cause of action in the Second Amended Complaint is for violation of 42 U.S.C. §1983 (deprivation of a person’s Constitutional rights under color of State law).

In his Opposition, plaintiff acknowledges that the defendants in this case, who are all private attorneys, are not State actors, but he argues that they acted under color of State law anyway because they conspired with a State actor, namely Tirandazi, to deprive him of a CUP.

Where a plaintiff alleges a private party conspired with state officers, the complaint must contain more than conclusory allegations of a conspiracy. *See Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003) (conclusory allegations insufficient to consider a private attorney a state actor for purposes of § 1983); *Price v. Hawaii*, 939 F.2d 702, 707-09 (9th Cir. 1991) (same); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1979) (per curiam).

To establish liability against a private party based on a conspiracy with a State actor, the plaintiff must allege facts showing the essential elements of conspiracy, namely that the private party and the State actor (1) agreed to accomplish an illegal objective, i.e., had a “meeting of the minds”; (2) committed one or more acts in its furtherance; and (3) had the intent to commit the underlying offense. *Warwick v. University of the Pacific*, 2008 U.S. Dist. LEXIS 97207, citing *United States v. Penagos*, 823 F.2d 346, 348 (9th Cir. 1987); *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir. 1989) (en banc).

Here, there are no factual allegations in the Second Amended Complaint whatsoever to support that Ms. McElfresh had a meeting of the minds with Tirandazi to violate plaintiff’s constitutional rights. It is alleged that Tirandazi is the City official who prevented plaintiff from acquiring a CUP. There are no allegations that Ms. McElfresh had any connection with, knew, met or spoke to Tirandazi about anything at any time. Tirandazi is not even a party to this action.

The only thing plaintiff complains about with respect to Ms. McElfresh is that she had a conflict of interest that she should have disclosed to him. Specifically, plaintiff alleges that Ms. McElfresh failed to disclose to plaintiff that she had previously represented Geraci in connection with his CUP application. This is in direct contradiction to plaintiff’s allegation that Ms. McElfresh referred his litigation investor to attorney David Demian because she did “not have the bandwidth” to represent plaintiff (SAC, ¶¶ 55-56), which shows that she did *not*

1 represent plaintiff, and would therefore have nothing to disclose to him. But, even
 2 assuming that Ms. McElfresh did represent plaintiff and had a duty to disclose a
 3 conflict of interest because of a previous connection to Geraci, which Ms.
 4 McElfresh categorically denies, the failure to disclose a conflict of interest is not
 5 an act to further a conspiracy with Tirandazi to deprive plaintiff of a CUP.

6 Accordingly, the Second Amended Complaint does not state a valid cause of
 7 action against Ms. McElfresh for violation of 42 U.S.C. §1983.

8 **B. The Second Cause of Action for Violation of 42 U.S.C. §1985**

9 The second cause of action in the Second Amended Complaint is for
 10 violation of 42 U.S.C. §1985 (prohibiting a witness from testifying in federal
 11 court).

12 In his Opposition, plaintiff does not argue that the defendants in this case
 13 threatened Young with violence if she testified in court. It is difficult to ascertain
 14 what plaintiff is arguing the defendants actually did, but he seems to be arguing
 15 that they somehow either conspired with Nguyen (Young's attorney) to stop her
 16 from testifying or with Magagna to threaten Young with violence to stop her from
 17 testifying. Again, there are no factual allegations in the Second Amended
 18 Complaint whatsoever to support either conclusion. The Second Amended
 19 Complaint is devoid of any allegations about actions taken on the part of Ms.
 20 McElfresh to further a conspiracy with Nguyen or Magagna to threaten Young.
 21 There are no allegations that Ms. McElfresh had any connection with, knew, met
 22 or spoke to Nguyen or Magagna at any time about anything. Young and Magagna
 23 are not even parties to this action.

24 Again, plaintiff alleges in the Second Amended Complaint that Ms.
 25 McElfresh referred his litigation investor to attorney David Demian because she
 26 did "not have the bandwidth" to represent plaintiff (SAC, ¶¶ 55-56), which shows
 27 that she did *not* represent plaintiff, and would therefore have nothing to disclose to
 28 him. But, again, even assuming that Ms. McElfresh did represent plaintiff and had

1 a duty to disclose a conflict of interest because of a previous connection to Geraci,
 2 which Ms. McElfresh categorically denies, the failure to disclose a conflict of
 3 interest is not an act to further a conspiracy with Young or Magagna to threaten a
 4 witness with violence to prohibit her from testifying in federal court.

5 Accordingly, the Second Amended Complaint does not state a valid cause of
 6 action against Ms. McElfresh for violation of 42 U.S.C. §1985.

7 **III.**

8 **LEAVE TO AMEND SHOULD BE DENIED**

9 Realizing that he has not adequately pled a cause of action against the
 10 defendants in the Second Amended Complaint, plaintiff asks the Court for leave to
 11 amend ... again. The Court should not grant plaintiff leave to amend again
 12 because the deficiencies in the Second Amended Complaint cannot be cured by
 13 amendment.

14 **IV.**

15 **CONCLUSION**

16 For the foregoing reasons, Ms. McElfresh respectfully requests that the
 17 Court grant her motion to dismiss plaintiff's Second Amended Complaint without
 18 leave to amend.

19
 20 DATED: April 6, 2022

WALSH MCKEAN FURCOLO LLP

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