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GINA M. AUSTIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,

Plaintiff,

v.

GINA M. AUSTIN, an individual;
JESSICA MCELFRISH, an
individual; DAVID S. DEMIAN, an
individual,

Defendants.

CASE NO.: 3:18-cv-0325-JO-DEB

**DEFENDANT GINA M. AUSTIN'S
REPLY TO PLAINTIFF'S
OPPOSITION TO MOTION TO
DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT**

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

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

Courtroom: 4C (4th Floor)
District Judge: Jinsook Ohta
Magistrate Judge: Daniel E. Butcher
Complaint Filed: February 9, 2018
Trial Date: None

I.

INTRODUCTION

Plaintiff Darryl Cotton's ("Plaintiff") Second Amended Complaint ("SAC") is just another failed attempt to plead causes of action against Defendant Gina M. Austin ("Defendant" or "Ms. Austin"). Plaintiff's Opposition does not refute Defendant's Motion to Dismiss and makes no showing of how the SAC alleges any

1 facts to support a claim against Defendant. Instead, a majority of the Opposition
 2 rambles on about Plaintiff's disagreement with the outcome of his state court
 3 proceeding. The Opposition dedicates eleven pages to such disagreement, where
 4 Plaintiff "prays, pleads and begs" this Court to reconsider the decision of the state
 5 court. Plaintiff's SAC, like his First Amended Complaint ("FAC"), was filed purely
 6 for the purpose of trying to relitigate his state court action in this Court instead of
 7 following the proper procedures for an appeal.

8 Much of the remainder of Plaintiff's Opposition is devoted to a discussion of
 9 allegations that do not relate to any named defendant, much less Ms. Austin. What
 10 the Opposition lacks in substance and on-point case law, it makes up for in
 11 extraneous arguments and misinterpretations of the law. The Opposition repeatedly
 12 ignores reality and inappropriately argues Plaintiff "is not an attorney" and "has no
 13 more financial resources." None of these extraneous contentions bear on the issues
 14 before the Court.

15 For these reasons and those set forth below, Plaintiff's Opposition provides
 16 no basis to sustain his claims against Ms. Austin. Nor does it provide a basis for
 17 Plaintiff to obtain leave to amend his Complaint yet again. Therefore, dismissal of
 18 Plaintiff's SAC against Ms. Austin is proper.

19 II.

20 ARGUMENT

21 A. PLAINTIFF HAS FAILED TO PROVE THAT HIS SAC STATES ANY 22 FACTS TO MEET THE REQUISITE PLEADING STANDARDS

23 Plaintiff's SAC fails to allege any facts sufficient to state a claim for relief
 24 against Defendant. The SAC contains no factual allegations to support the alleged
 25 causes of action against Defendant. Furthermore, the SAC contains no other
 26 alleged facts describing or specifying any conduct of Defendant to support any
 27 allegations of wrongdoing.

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Plaintiff's Opposition simply echoes his unsubstantiated pleading and asserts vague and conclusory allegations of a conspiracy as his sole basis for Ms. Austin's liability with respect to both causes of action alleged in the SAC (Deprivation of Civil Rights based on 42 U.S.C. §§1983 and 1985). Yet the Complaint does not contain, and Plaintiff's Opposition does not point to, a single allegation of fact that indicates that Ms. Austin agreed to – or even knew of – such a conspiracy or its objectives. The SAC does not allege that Ms. Austin attended meetings in which the conspiracy was discussed or that she participated in conversations in which it was discussed. Nor does it allege any other facts that indicates that Ms. Austin knew of and agreed to a conspiracy. The only allegations Plaintiff points to in his Opposition, do not name or pertain to Ms. Austin. (See Opposition [Doc. 112], pp. 13-17.) Rule 8 does not allow plaintiffs to substitute boilerplate legal conclusions for allegations of fact, as Plaintiff has done here. Thus, Plaintiff cannot sufficiently state a claim against Ms. Austin simply by asserting a boilerplate allegation that she “conspired” to do something.

B. PLAINTIFF FAILS TO ADDRESS AND THEREBY CONCEDES THE ACTIONS COMPLAINED OF ARE PROTECTED ACTIVITY

Defendant's Motion to Dismiss argues that the actions complained of in the SAC are protected by the litigation privilege under California Code of Civil Procedure section 47(b). (Motion to Dismiss [Doc. 99-1], pp. 11-12.) Plaintiff's Opposition fails to address the litigation privilege and offers no argument regarding whether the privilege applies. Thus, Plaintiff concedes Ms. Austin's alleged activity is protected by the litigation privilege, and dismissal is appropriate. *See Hall v. Mortgage Investors Group*, No. 2:11-CV-00925-JAM-GGH, 2011 U.S. Dist. LEXIS 105999, 2011 WL 4374995, *5 (E.D. Cal. Sept. 16, 2011) (failure to oppose argument amounts to concession as to the truth of the argument); *In re Univ. of S. Cal. Tuition & Fees Covid-19 Refund Litig*, No. CV 20-4066-DMG (PVCx) ///

2021 U.S.Dist.LEXIS 153349, at *19 (C.D.Cal. Aug. 6, 202) (failure to respond to an argument in opposition concedes argument).

C. PLAINTIFF HAS FAILED TO PROVE HE CAN AMEND HIS PLEADING TO STATE SUFFICIENT FACTS

Attempting to support his pleading, Plaintiff's Opposition includes additional "facts" he believes substantiate his allegations of a conspiracy. Plaintiff offers the following facts: (1) Tirandazi is a city agent; (2) she allowed Geraci to process a CUP application in the name of a proxy; (3) she was represented by Geraci's attorney at her deposition; and (4) she lied at trial. (Opposition [Doc. 112], 14:12-18.) Plaintiff's inclusion of these facts fails to prove he has any additional facts to support either of his claims against Ms. Austin.

Furthermore, none of these proposed facts are sufficient to state a claim for conspiracy and they do not concern acts or conduct by Ms. Austin. Defendant has proven there is no plausible claim for relief and Plaintiff's Opposition neglects to argue otherwise. Plaintiff's Opposition provides no additional facts or claims to establish he is able to amend his SAC to meet pleading standards.

D. PLAINTIFF IS NOT ENTITLED TO LEAVE TO AMEND

Leave to amend is not proper if any of the following four factors are present: bad faith, undue delay, prejudice to the opposing party, and/or futility. (*Serra v. Lappin* (9th Cir. 2010) 600 F.3d 1191, 1200.) Much like Plaintiff's FAC, his SAC is clearly brought in bad faith and is a futile and improper attempt to relitigate the underlying state court action. Plaintiff is already on his *third* Complaint. He has had ample opportunity to amend, and he has had that opportunity after having seen prior motions to dismiss filed by Ms. Austin and other defendants which raise the very same issues as the instant motion. (See Austin Mem. In Support of Mot. To Dismiss FAC [seeking dismissal for, *inter alia*, failure of Complaint to allege sufficient facts].) Moreover, the allegations Plaintiff seeks to add are baseless. Leave to file a
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1 *fourth* Complaint is not warranted in these circumstances. Therefore, Defendant
2 respectfully requests that Plaintiff's SAC be dismissed **without leave to amend**.

3 **III.**

4 **CONCLUSION**

5 Plaintiff's SAC fails to state a claim for relief against Ms. Austin. Plaintiff's
6 Opposition fails to prove that the SAC is adequately pled and fails to prove that
7 Plaintiff has sufficient facts to amend his claims. Accordingly, Defendant
8 respectfully requests that this Court dismiss Plaintiff's SAC against Defendant **with**
9 **prejudice**.

10 **PETTIT KOHN INGRASSIA LUTZ & DOLIN PC**

11
12 Dated: April 6, 2022

13 By: /s/ Douglas A. Pettit, Esq.
14 Douglas A. Pettit, Esq.
15 Attorneys for Defendant
16 **GINA M. AUSTIN**
17 E-mail: dpettit@pettitkohn.com
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document(s):

- **DEFENDANT GINA M. AUSTIN'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT**

Was served on this date to counsel of record:

[X] BY MAIL: By placing a copy of the same in the United States Mail, postage prepaid, and sent to their last known address(es) listed below.

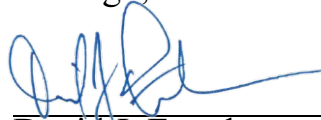
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[X] BY ELECTRONIC TRANSMISSION: I electronically filed the above document(s) with the Clerk of the Court using the CM/ECF system. The CM/ECF system will send notification of this filing to the person(s) listed below.

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



David J. Frandsen