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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,

Plaintiff,

vs.

CYNTHIA BASHANT, an individual;

JOEL WOHLFEIL, an individual;

LARRY GERACI, an individual;

REBECCA BERRY, an individual;

GINA AUSTIN, an individual;

MICHAEL WEINSTEIN, an

individual; JESSICA MCELFRISH, an

individual; and DAVID DEMIAN, an

individual,

Defendants

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

**DAVID DEMIAN'S REPLY TO  
PLAINTIFF'S LATE-FILED  
"OMNIBUS" OPPOSITION TO  
MOTION TO DISMISS  
PLAINTIFF'S FIRST AMENDED  
COMPLAINT PURSUANT TO  
FRCP 12 (b)(6) 12(b)(5), FRCP 4**

Judge: The Hon. Todd W. Robinson

Date: May 19, 2021

Time: 1:30 p.m.

Crtrm.: 3A (Schwartz)

**[NO ORAL ARGUMENT  
REQUESTED]**

Defendant DAVID DEMIAN (hereinafter "Demian") submits the following  
reply to plaintiff DARRYL COTTON's (herein "Cotton") late-filed "Omnibus  
Opposition" to his Motion to Dismiss Plaintiff's First Amended Complaint Pursuant  
to FRCP 12(b)(6) 12(b)(5), FRCP 4.

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**I. INTRODUCTION**

Demian previously submitted a Reply statement indicating Plaintiff had failed to file an opposition to Demian Motion to Dismiss, and asked this Court grant this motion. ECF No. 78. Subsequently, plaintiff filed a document entitled “Darryl Cotton’s Omnibus Opposition to (1) Cynthia Bashant’s Statement of Interest and Motion to Dismiss; (2) Larry Geraci and Rebecca Berry Motion to Dismiss First Amended Complaint; and (3) David Demian’s Motion to Dismiss Plaintiff’s First Amended Complaint.” ECF No. 80.

However, Demian requests this Court not consider Plaintiff’s late opposition to Demian’s Motion to Dismiss, as it was due no later than April 21, 2021 pursuant to this Court’s Chamber Order for Civil Cases.

To the extent this Court is inclined to consider it, Demian submits that it fails to provide any basis to deny this motion. Cotton fails to provide any legal authority or factual basis for the two causes of action asserted against Demian, for “Declaratory Relief” and “Punitive Damages,” neither of which state a valid claim. As set forth in the moving papers, and confirmed by Cotton’s opposition, this action is an improper collateral attack by Cotton to attempt to overturn the judgment against him in the underlying *Cotton I* case. Plaintiff’s FAC does not state a claim against Demian and should be dismissed.

Cotton’s “Omnibus Opposition” also fails to address Demian’s additional argument that plaintiff failed to timely serve him in a manner prescribed by Federal Rule of Civil Procedure 4(e) and 4(h). Demian was not served within the time constraints set by Federal Rule of Civil Procedure 4(m), and therefore requests that the Court dismiss him from this action also on this basis.

**II. PLAINTIFF’S FIRST AMENDED COMPLAINT FAILS TO ALLEGE ANY CLAIM AGAINST DEMIAN**

Cotton fails to address the arguments and legal authority raised in Demian’s

1 Motion to Dismiss supporting that Cotton’s claims for declaratory relief and  
2 punitive damages fail to plead any claim against Demian.

3 Not only is there is no actual case or controversy within the meaning of  
4 Article III, section 2 of the United States Constitution to be adjudicated between  
5 Cotton and DEMIAN, a claim for punitive damages is not a cognizable cause of  
6 action.<sup>1</sup> 28 U.S.C. § 2201(a); *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S.  
7 227, 239-40, 57 S. Ct. 461, 463-64, 81 L. Ed. 617 (1937).

8 Here, Cotton continues to argue in his opposition that the judgment reached in  
9 the underlying action against Geraci is “void” on the basis that the contract he  
10 entered into with Geraci was unenforceable, claiming that Geraci did not have the  
11 right to obtain a cannabis permit via the Berry CUP Application. Contrary to  
12 Cotton’s argument, Demian does not accept Cotton’s argument that the contract was  
13 “illegal,” or the judgment is “void.” Regardless, whether or not Geraci could legally  
14 own a cannabis permit is irrelevant to the determination on this motion. Not only  
15 was the judgment a result of the jury’s finding that Geraci and Cotton entered into a  
16 valid agreement *to purchase* Cotton’s real property, a declaratory relief cause of  
17 action is improper to remedy past wrongs and cannot be used to “void” the  
18 underlying judgment. *Jackson v. Clear Recon Corp.*, 2016 U.S. Dist. LEXIS 17261,  
19 \*14 (Cal, ED 2016) [“Plaintiff’s claim for declaratory relief fails because he is  
20 seeking relief for past wrongs.”]

21 Plaintiff’s opposition provides no basis for a claim of declaratory relief  
22 against Demian, or anyone else for that matter, as there is no controversy which can  
23 be determined. Not only was Demian not a party to the underlying state court action,  
24 plaintiff’s third cause of action seeking to reverse the state court judgment is not  
25 \_\_\_\_\_

26 <sup>1</sup> Plaintiff’s claim for Punitive Damages is not a recognized cause of action, as  
27 punitive damages are a remedy, not an independent cause of action. *Ismail v. County*  
28 *of Orange*, 917 F. Supp. 2d 1060, 1073 (C.D. Cal. 2012); *Kleinhammer v. City of*  
*Paso Robles*, 2008 U.S. Dist. LEXIS 138381, fn. 5 (C.D. Cal. March 17, 2008).

1 cognizable as an independent cause of action under the Declaratory Relief Act.  
2 Plaintiff's third cause of action seeking to overturn the underlying judgment and  
3 declare it void fails to present an actual case or present controversy between plaintiff  
4 and Demian. Cotton's claim for declaratory relief is instead an improper attempt to  
5 circumvent the judgment entered in state court and should be dismissed.

6 Plaintiff's argument in his opposition that Demian "shared clients with  
7 Geraci's tax service firm" or that Demian's alleged amendments to Cotton's cross-  
8 complaint to remove conspiracy and fraud allegations against Geraci and Berry,  
9 caused plaintiff to look "like a crazy pro se before Wohlfeil" and caused Wohlfeil to  
10 think Cotton "was an idiot" when he made the same arguments in the litigation in  
11 pro per, neither make sense, nor adds anything to these purported claims.

12 First, Cotton's arguments constitute new allegations not contained in the First  
13 Amended Complaint, which cannot be considered by this Court in ruling on the  
14 sufficiency of the pleading. See *Schneider v. California Dept. of Corrections*, 151  
15 F.3d 1194, 1197 (9<sup>th</sup> Cir. 1998) ("In determining the propriety of a Rule  
16 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's  
17 moving papers, such as a memorandum in opposition to a defendant's motion to  
18 dismiss.").

19 Regardless, even if considered by this Court, these new allegations fail to  
20 allege any claim against Demian, let alone for declaratory relief or punitive  
21 damages. First, whether or not Demian allegedly had a client who also happened to  
22 be a client of Geraci's tax service firm is not a conflict, nor is it relevant to any issue  
23 in this action. Second, any impression the underlying court had of Cotton while  
24 acting in pro per or while represented had no bearing on the jury's findings. Cotton  
25 was not precluded from arguing or presenting evidence to support his theories in the  
26 underlying action. Indeed, Cotton admits that whether it was lawful for Geraci to  
27 own a cannabis CUP via the Berry Application was an issue at trial. (Oppo. pg. 5.)  
28

Moreover, the special verdict shows that Cotton's fraud claims against Geraci were tried to the jury. (ECF No. 67-2, Exh. 1.)

Demian thus respectfully requests this Court dismiss plaintiff's claims against him with prejudice and without leave to amend.

**III. PLAINTIFF FAILS TO OPPOSE DEMIAN'S MOTION TO DISMISS HIM FROM THIS ACTION PURSUANT TO FRCP 12(b)(5) AND FRCP 4 DUE TO PLAINTIFF'S FAILURE TO PROPERLY AND TIMELY EFFECTUATE SERVICE**

Cotton fails to address the second basis for Demian's motion to dismiss, that plaintiff's failure to timely and properly serve him with the FAC requires he be dismissed from this action. Cotton's failure to oppose Demian's motion to dismiss based on FRCP 12(b)(5) and FRCP 4 should be treated as consent to granting this motion. S.D. Cal. Local Rule 7.1(f)(3)(c).

**IV. CONCLUSION**

Accordingly, Defendant DEMIAN respectfully requests that the Court grant his Motion and dismiss Plaintiff's First Amended Complaint ("FAC") and each claim for relief pursuant to Federal Rules of Civil Procedure ("FRCP") Rule 12(b)(6), Rule 12(b)(5) and Rule 4, as to claims against him from this litigation.

DATED: May 10, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: s/ Corinne C. Bertsche  
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-TWR-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 May 10, 2021, I served true copies of the following document(s):

**DAVID DEMIAN'S REPLY TO PLAINTIFF'S LATE-FILED  
"OMNIBUS" OPPOSITION TO MOTION TO DISMISS PLAINTIFF'S  
FIRST AMENDED COMPLAINT PURSUANT TO FRCP 12 (b)(6) 12(b)(5),  
FRCP 4**

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 **May 10, 2021**, at San Diego, California.

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Sondra J. Bradley

**SERVICE LIST**

**Darryl Cotton v. Cynthia Bashant, et al.**

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

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