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GINA M. AUSTIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,
Plaintiff,

v.

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 MCELFFRESH, an individual; and DAVID DEMIAN, an individual,

Defendants.

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

**DEFENDANT GINA M. AUSTIN'S
NOTICE OF MOTION AND
MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED
COMPLAINT**

Date: March 16, 2022
Time: 1:30 p.m.

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

Courtroom: 3A (3rd Floor)
District Judge: Todd W. Robinson
Magistrate Judge: Daniel E. Butcher
Complaint Filed: February 9, 2018
Trial Date: None

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on **March 16, 2022, at 1:30 p.m.**, or as soon thereafter as the matter may be heard in Courtroom 3A of the above-entitled Court, located at United States Courthouse – Southern District, Edward J. Schwartz U.S. Courthouse, 221 W. Broadway, San Diego, California 92101, Defendant GINA M. AUSTIN (“Defendant”) will and hereby does move this Court for an

1 Order dismissing her from Plaintiff DARRYL COTTON's ("Plaintiff") Second
2 Amended Complaint filed on November 22, 2021 ("SAC"). **Oral argument will**
3 **not be heard unless requested by the Court.**

4 This Motion is made on the grounds that Plaintiff's Second Amended
5 Complaint fails to state a claim for which relief can be granted and fails to plead
6 any facts or allegations against Defendant Austin with any requisite particularity
7 required by the Federal Rules of Civil Procedure.

8 This Motion is based upon this Notice of Motion, the accompanying
9 Memorandum of Points and Authorities, Declaration of Michelle L. Propst, Esq.,
10 Request for Judicial Notice with attached Exhibits, and all pleadings, records and
11 files herein, such matters of which the Court may take judicial notice, and any
12 evidence or argument presented at the hearing on this motion.

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

14
15 Dated: December 6, 2021

By: /s/ Michelle L. Propst, Esq.

Douglas A. Pettit, Esq.

Michelle L. Propst, Esq.

Attorneys for Defendant

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Defendants.

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**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
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MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant GINA AUSTIN (“Defendant” or “Ms. Austin”), by and through
3 her attorneys of record, Pettit Kohn Ingrassia Lutz & Dolin, files the following
4 Motion to Dismiss Plaintiff’s Second Amended Complaint pursuant to F.R.C.P.
5 12(b)(6).

6 **I.**

7 **INTRODUCTION**

8 By way of this motion, Defendant seeks an order of dismissal of this action
9 on grounds that the Second Amended Complaint (“SAC”) fails to state a claim
10 upon which relief can be granted against Defendant. Plaintiff Darryl Cotton’s
11 (“Plaintiff”) SAC is merely another attempt by Plaintiff to assert baseless causes of
12 action against Ms. Austin, for acting within her scope as an attorney, providing
13 legal services to her client and testifying in a state civil jury trial.

14 Without any reasonable grounds or basis for doing so, Plaintiff filed the
15 SAC, and now attempts to build upon the previously alleged “scheme” against her
16 by concocting a false narrative and by filing baseless claim pursuant to 42 U.S.C.
17 sections 1983 and 1985.

18 Plaintiff has spent years litigating various actions based upon the same facts,
19 and has now clearly lost sight of his own justification and cause for originally
20 bringing suit in the underlying action. Plaintiff now elects to allege a fictional
21 scheme, turns himself into a victim, and drags the named defendants into yet
22 another meritless and frivolous action.

23 Much like First Amended Complaint, the SAC does not meet the required
24 pleading standards and ultimately fails to allege any cause of action against Ms.
25 Austin. The SAC is entirely devoid of any fact (or fiction) which could render her
26 liable for the supposed harm or practically speaking, under any cognizable legal
27 theory. In other words, Plaintiff’s SAC fails to meet the pleading standard required

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1 of the asserted causes of action and does not state facts sufficient to plead any
2 plausible legal theory against Ms. Austin.

3 This most recent filing fails to state any recognizable claim against Ms.
4 Austin based upon the subject action of this lawsuit. Plaintiff stretches his own
5 imagination in an attempt to preserve his original claims against Ms. Austin and the
6 other defendants based only on meritless assertions, accusations and assumptions.
7 The action should be dismissed without leave to amend and with prejudice.

8 II.

9 PROCEDURAL HISTORY

10 This action arises out of an unsuccessful underlying agreement for the
11 purchase and sale of real property between Plaintiff and Co-Defendant Geraci.

12 On March 21, 2017, a complaint was filed against Plaintiff in San Diego
13 Superior Court in *Geraci v. Cotton*, Case No.: 37-2017-00010073-Cu-BC-CTL, for
14 breach of contract claims.

15 In response, Plaintiff filed a lengthy complaint in this Court, alleging twenty
16 (20) causes of action. This Court stayed Plaintiff's first action, *sua sponte*, pending
17 the resolution of a state court action brought simultaneously by Plaintiff.

18 Following a jury trial in Plaintiff's state court action, *Geraci v. Cotton*, Case
19 No. 37-2017-00010073-CU-BCD-CTL, judgment was entered in favor of Geraci
20 and against Plaintiff on both the complaint and the cross-complaint.

21 On May 13, 2020, Plaintiff filed the First Amended Complaint ("FAC").

22 On May 27, 2020, Defendant filed a Motion to Dismiss the FAC.

23 On March 17, 2021, the Court granted Defendant's Motion to Dismiss the
24 FAC with leave to amend.

25 On May 14, 2021, Plaintiff filed a Notice of Appeal in the United States
26 Court of Appeals for the Ninth Circuit. Subsequently, on June 11, 2021, the United
27 States Court of Appeals for the Ninth Circuit dismissed the appeal on grounds the

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1 order challenged was neither final nor appealable. (Defendant's Request for Judicial
2 Notice, Exhibit "1".)

3 On October 22, 2021, the Court granted Plaintiff thirty (30) days to file an
4 amended complaint against Defendants Austin, Jessica McElfresh, and David
5 Demian.

6 On November 22, 2021, Plaintiff filed this SAC.

7 Plaintiff now alleges two causes of action for damages pursuant to 42 U.S.C.
8 sections 1983 and 1985. Neither cause of action is actionable against Ms. Austin
9 nor includes any specific factual allegations against Ms. Austin which create a basis
10 or theory of liability nor asserts facts pled to support any claim against her.

11 III.

12 LEGAL STANDARD

13 A motion to dismiss is proper under Rule 12(b)(6) where the pleadings fail to
14 state a claim upon which relief can be granted. (Fed. R. Civ. P. 12(b)(6).) The
15 Federal Rules require a pleading to contain "a short and plain statement of the claim
16 showing that the pleader is entitled to relief." (Fed. R. Civ. P. 8(b).) "Dismissal can
17 be based on the lack of a cognizable legal theory or the absence of sufficient facts
18 alleged under a cognizable legal theory." (*Navarro v. Block*, 250 F.3d 729, 732 (9th
19 Cir. 2007) (citing *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
20 1990).)

21 To survive a motion to dismiss, a complaint must contain sufficient factual
22 matter, and when accepted as true must "state a claim to relief that is plausible on
23 its face." (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v.*
24 *Twombly*, (2007) 550 U.S. 544, 570). A complaint is facially plausible if it includes
25 facts which allow the court to draw reasonable inferences the defendant is liable for
26 the actions alleged. (*Id.* (citing *Twombly*, 550 U.S. at 556).) When looking to the
27 plausibility of the complaint, the court must consider whether an "obvious

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1 alternative explanation" exists for defendant's behavior. (*Id.* at 682 (quoting
2 *Twombly*, 550 U.S. at 567).

3 The Ninth Circuit has instructed that a plaintiff's complaint at the motion to
4 dismiss stage is "entitled to the presumption of truth[.]" (*Starr v. Baca*, 652 F.3d
5 1202, 1216 (9th Cir. 2011).) Whether the relevant pleading standard is met is
6 analyzed under a two-prong principal:

7 "[T]o be entitled to the presumption of truth, allegations in a complaint
8 . . . must contain sufficient allegations of underlying facts to give fair
9 notice and to enable the opposing party to defend itself effectively.
10 Second, the factual allegations that are taken as true must plausibly
suggest an entitlement to relief, such that it is not unfair to require the
opposing party to be subjected to the expense of discovery and
continued litigation."

11 (*Id.* at 1216.) The Ninth Circuit has further explained: "Plaintiff's complaint may
12 be dismissed only when defendant's plausible alternative explanation is so
13 convincing that plaintiff's explanation is implausible." (*Eclectic Props. East, LLC v.*
14 *Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (citing *Starr*, *supra* 652
15 F.3d at 1216) (emphasis in original).)

16 Not only is there no cognizable legal theory contained in the SAC and
17 dismissal is proper on those grounds, but those factual assertions which are
18 included are insufficient to satisfy even the most basic and well-articulated pleading
19 standard and do not state a claim against Ms. Austin.

20 IV.

21 ARGUMENT

22 The SAC fails to state any fact sufficient to state a claim for relief against
23 Ms. Austin and contains no factual allegation to support either of the two
24 independent causes of action asserted therein. Additionally, the SAC does not
25 contain any adequate or sufficient allegations which plausibly infer that Ms. Austin
26 was specifically culpable for any alleged harm suffered by Plaintiff in any way, and
27 therefore does not show that Plaintiff is plausibly entitled to relief.
28

A. THE SAC FAILS TO STATE ANY CLAIMS AGAINST MS. AUSTIN UPON WHICH RELIEF CAN BE GRANTED.

The SAC is a vague and speculative attempt by Plaintiff to maintain the ongoing and vexatious litigation against Ms. Austin. It requires a hypothesis as to wrong has been committed, what claim is being brought and on what grounds such claim lie.

Plaintiff wholly fails to give “fair notice” of what claims are asserted and those “grounds upon which [they] rest[.]” (*Bell Atlantic Corp.*, *supra*, 550 U.S. at 555.) The SAC fails to include either a cognizable legal theory or sufficient facts which can apprise Ms. Austin of the basis of this lawsuit and upon which grounds Plaintiff now seeks relief. (*Navarro*, *supra*, 250 F.3d at 732.)

Without a cognizable legal theory pled and without sufficient facts to support a cognizable legal theory, Ms. Austin cannot prepare a defense. The SAC is a twenty-two page narration of the various alleged wrongdoings suffered by Plaintiff, fit into a newly concocted legal theory which details his delusion and obsession with the lawsuit first filed roughly three years ago. The pleading is virtually devoid of any factual allegations which create a basis for liability or which sufficiently notice Ms. Austin of the true nature of the claims brought against her.

The SAC contains the following statements directed at Ms. Austin: that she practiced and/or advised clients in regulatory cannabis law (SAC ¶¶ 24, 36); provided testimony in the Cotton I proceedings (SAC ¶¶ 67-73); that she prepared legal documents for her clients (SAC ¶¶ 160-61); and attended law school and was admitted to the California Bar in 2006 (SAC ¶ 137).

Simply put, these facts fall short of providing Ms. Austin with any notice of the claims asserted against her as there are no stated, conceivable grounds for a finding of liability or sufficient facts which support the causes of action plead. Ms. Austin’s involvement in any of alleged wrongdoings is merely left to pure conjecture and speculation.

**B. PLAINTIFF FAILED TO STATE FACTS THAT GIVE RISE TO
A SECTION 1983 ACTION.**

A plaintiff must meet two conditions in order to state a claim for relief in an action brought pursuant to 42 U.S.C. § 1983: that the conduct complained of was committed by a person acting under color of state law; and that the conduct deprived the plaintiff of a constitutional right. (*Rinker v. Napa County*, 831 F.2d 829, 831 (9th Cir. 1987) (citing *Parratt v. Taylor*, 451 U.S. 527, 535, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981))). Section 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . Causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

(42 U.S.C. § 1983.) Dismissal of a Section 1983 claim is proper if the complaint is devoid of factual allegations that give rise to a plausible inference of either element.

Much like the Complaint, and the First Amended Complaint, the SAC is devoid of any allegations that give rise to any plausible inference that Ms. Austin acted under color of state law, or that Ms. Austin acted to deprive Plaintiff of his constitutional rights. Neither element is specifically alleged or addressed from the factual allegations of the SAC, and as such both are at issue.

1. The SAC Fails to Allege Austin Acted Under Color of State Law.

The SAC contains no allegation showing Ms. Austin was a state agent, or that her actions were in any way ratified, condoned or instigated by the state.

"The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" (*McDade v. West*, 223 F.3d 1135, 1139-40 (9th Cir. 2000) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988).) The Supreme Court has treated the definition of 'under color of state law' to mean the same thing as 'state action' within the meaning

1 of the Fourteenth Amendment. (*Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982)
 2 (citing *United States v. Price*, 383 U.S. 787, 794, n. 7 (1966).)

3 Generally, only a state actor rather than a private party, may be liable under
 4 Section 1983 because "§ 1983 excludes from its reach merely private conduct, no
 5 matter how discriminatory or wrong." (*American Mfrs. Mut. Ins. Co. v. Sullivan*,
 6 526 U.S. 40, 49 (1999) (citing *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982).)
 7 However, non-state actors may be liable when acting or conspiring with state
 8 actors. (See *United States v. Price*, 383 U.S. 787, 794 (1966).) For private conduct
 9 to constitute state action, there must be "such a close nexus between the State and
 10 the challenged action that seemingly private behavior may be fairly treated as that
 11 of the State itself." (*Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002).)

12 As stated above, the SAC does nothing more than *hope* to establish a basis
 13 for liability. There is simply no allegation in the SAC, even when taken as true,
 14 which infers or is sufficient to infer that Ms. Austin, at any time, acted under color
 15 of state law rather than as a private individual. (*American Mfrs. Mut. Ins. Co, supra*,
 16 526 U.S. 40, 49). The only fact directed to Ms. Austin and the state is the statement
 17 that Ms. Austin was "responsible for preparing, submitting, and lobbying a CUP
 18 application with the City at the Federal Property. . ." (SAC ¶ 36).

19 Notwithstanding the ludicrous attempt to draw any inference from this
 20 assertion, there is no allegation in the SAC which creates a plausible inference of
 21 either any state involvement in Ms. Austin's law practice or that the actions are
 22 remotely representative of a nexus between Ms. Austin's conduct and the state itself
 23 (*Lee, supra* 276 F.3d at 554). Ms. Austin is for all purposes a private citizen,
 24 engaging in private conduct. She is neither a state actor, is not alleged to be a state
 25 actor, and is not alleged to have been acting under color of law within the meaning
 26 of Section 1983.

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1 Therefore, Plaintiff's Section 1983 action should be dismissed because the
 2 facts alleged do not support a plausible inference that Ms. Austin acted in any way
 3 under color of state law.

4 **2. The SAC Fails To Allege Plaintiff Suffered Any Deprivation of A**
 5 **Constitutional Right.**

6 The SAC is entirely devoid of an allegation that Ms. Austin deprived
 7 Plaintiff of his Constitutional rights. Section 1983 provides a cause of action
 8 against any person who deprives an individual of federally guaranteed rights under
 9 color of state law. (42 U.S.C. § 1983.)

10 Although speculative, it appears that the SAC identifies two supposed rights
 11 at issue: Plaintiff's (1) meaningful access to the Courts (SAC ¶182); and (2) right to
 12 acquire a CUP (SAC ¶ 185). To identify these rights, Plaintiff asserts bare and
 13 conclusory statements, without any factual or plausible grounds for showing any
 14 right of his has been threatened, let alone made deprived of. Rather, certain actions
 15 of Ms. Austin are noted, including testifying in court (SAC ¶ 68); being a licensed,
 16 and experienced attorney practicing in cannabis licensing (SAC ¶ 24); representing
 17 her client in preparing and submitting cannabis licensing paperwork (SAC ¶ 36);
 18 and for attending law school and being admitted to the California Bar (SAC ¶ 137).
 19 The SAC lacks any attempt to link liability with any of the aforementioned acts.

20 Further, without meeting the first prong of the Section 1983 requirement for
 21 state action, Plaintiff wholly fails to show that any action taken by Ms. Austin was
 22 taken while acting under color of state law and prevented Plaintiff from accessing
 23 the courts or denying his "right" to a conditional use permit. (42 U.S.C. § 1983).

24 Notwithstanding that the allegations fail to meet the pleading standard of the
 25 first prong of a Section 1983 action, even if such allegations are found and taken as
 26 true, the SAC fails to allege Plaintiff suffered a deprivation of a constitutional right
 27 or a federal statutory right for Section 1983 purposes.

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**C. PLAINTIFF FAILED TO STATE FACTS THAT GIVE RISE TO
A SECTION 1985 ACTION.**

Plaintiff has failed to set forth any essential elements of a Section 1985 action and fails to provide any sufficient facts on which a plausible claim for relief under Section 1985 can be made.

42 U.S.C. section 1985 (2), part one, prohibits conspiracies which interfere with the administration of justice in federal and state court. (42 U.S.C.S. § 1985(2)). Section § 1985(2) is composed of three elements: (1) a conspiracy between two or more persons, (2) to deter a witness by force, intimidation, or threat from attending federal court or testifying freely in a matter there pending, which (3) causes injury to the claimant. (See 42 U.S.C. § 1985(3); see *David v. United States*, 820 F.2d 1038, 1040 (9th Cir. 1987)). 42 U.S.C. section 1985(3) provides a civil cause of action to the injured party against one or more of the conspirators. (42 U.S.C. § 1985(3)).

1. The SAC Fails to Allege Sufficient Facts As To The Existence Of A Conspiracy.

As an initial point, vague and conclusory allegations of a conspiracy are insufficient to withstand a motion to dismiss for failure to state a claim. (*Ivey v. Board of Regents of University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). In order to state a claim for civil conspiracy, a plaintiff must allege the following: "(1) the formation and operation of the conspiracy; (2) wrongful conduct in furtherance of the conspiracy; and (3) damages arising from the wrongful conduct." (*Kidron v. Movie Acquisition Corp.*, 40 Cal. App. 4th 1571, 1581 (1996).)

Much like the first cause of action, the Section 1985 action fails to specify any contention or facts specifically attributable to the existence of an alleged conspiracy between the defendants, the wrongful conduct at issue or the damages suffered by Plaintiff. Instead, the SAC states only that "the acts taken by defendants, *as jointly liable coconspirators* and/or join tortfeasors, include the

1 attempted bribery and threats against Young to prevent her from testifying in this
2 federal court.” (SAC ¶ 189).

3 The only mention of Ms. Austin in relation to Young, and thus as a
4 “coconspirator” is the assertion that Ms. Austin and Young’s *attorney* attended law
5 school together and were admitted to the California Bar in the same year. (SAC ¶
6 137). This is neither wrongful conduct nor suggests a conspiracy operation. There
7 is no alternative or plausible inference of any involvement of Ms. Austin or the
8 existence of a conspiracy that can be drawn from the SAC (*Twombly, supra* 550
9 U.S. at 567).

10 It is obvious from the lack of sufficient facts that Plaintiff has no reasonable
11 grounds for declaring the existence of a conspiracy. There is no evidence,
12 allegation or requisite detail to support such false contentions. Because the facts
13 alone are insufficient to show a conspiracy among the defendants, the Section 1985
14 action fails and should be dismissed.

15 **2. Plaintiff Suffered No Actionable Injury.**

16 A plaintiff must show that the conspiracy “hampered” their ability to present
17 an effective case in federal court. (*Rutledge v. Arizona Bd. of Regents*, 859 F.2d
18 732, 735 (9th Cir. 1988) (citing *David v. United States*, 820 F.2d 1038, 1040 (9th
19 Cir. 1987) (holding appellant must show a conspiracy to deter a witness by force or
20 intimidation from attending court or testifying freely, which resulted in injury to the
21 plaintiff.) Generally, “allegations of witness intimidation under § 1985(2) will not
22 suffice for a cause of action unless it can be shown the *litigant* was harmed in being
23 able to present an effective case.” (*David, supra*, 820 F.2d at 1040.)

24 Wholly absent from the SAC is any allegation that Plaintiff suffered harm as
25 a result of the alleged conspiracy. Here, Plaintiff has not sustained his burden to
26 allege the existence of a conspiracy nor the existence of an injury to his as a result.
27 Plaintiff failed to provide any evidence of the formation and operation of a

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1 conspiracy and attempts to fit his baseless version of the facts into a legal theory
2 that does not fit the circumstances.

3 **D. THE ACTIONS COMPLAINED OF ARE PROTECTED**
4 **ACTIVITY WITHIN THE MEANING OF CIVIL CODE**
5 **SECTION 47(b).**

6 The litigation privilege protects communicative actions or speech performed
7 by attorneys within the scope of their representation of a client in a judicial or
8 quasi-judicial proceedings. (See Civ. Code § 47(b).)

9 Civil Code section 47(b) explicitly provides a publication is privileged if it is
10 made “[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other
11 official proceeding authorized by law, or (4) in the initiation or course of any other
12 proceeding authorized by law. . . .” (Civ. Code § 47(b).)

13 “The principal purpose of section 47(2) is to afford litigants and witnesses
14 [citation omitted] the utmost freedom of access to the courts without fear of being
15 harassed subsequently by derivative tort actions.” (*Silberg v. Anderson*, 50 Cal. 3d
16 205, 213 (1990)). Open communication is “a fundamental adjunct to the right of
17 access to judicial and quasi-judicial proceedings.” (*Id.* (quoting *Pettitt v. Levy*, 28
18 Cal. App. 3d 484, 490-491 (1972).)

19 The actions complained of in the SAC are based on Ms. Austin’s speech and
20 communicative conduct in judicial proceedings. The SAC includes allegations
21 concerning Ms. Austin’s testimony in prior litigation proceedings (SAC ¶¶ 67-73),
22 and in the course of petitioning activity on behalf of her clients (SAC ¶¶ 36, 160,
23 161.) However, Plaintiff fails to specify any conduct that would be excepted from
24 the litigation privilege. An exception to the litigation privilege does not exist
25 merely because Plaintiff has speculated, asserted, or alleged an illegality or civil
26 violation. (Civ. Code § 47(b); see *Bergstein v. Stroock & Stroock & Lavan LLP*,
27 236 Cal. App. 4th 793, 805-810 (2015).

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1 Thus, Ms. Austin's actions, as complained of in the SAC are subject to the
2 litigation privilege and are protected activity within Civil Code section 47(b).

3 V.

4 **CONCLUSION**

5 Plaintiff's SAC fails to state a claim for relief against Ms. Austin. No facts
6 within the SAC even remotely infer or impute any wrongdoing. Accordingly,
7 Defendant respectfully requests this Court dismiss Plaintiff's SAC against
8 Defendant **with prejudice**.

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

10
11 Dated: December 6, 2021

By: /s/ Michelle L. Propst, Esq.

Douglas A. Pettit, Esq.

Michelle L. Propst, Esq.

Attorneys for Defendant

GINA M. AUSTIN

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Attorneys for Defendant
GINA M. AUSTIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,
 Plaintiff,

v.

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-0325-TWR-DEB

DECLARATION OF MICHELLE L. PROPST IN SUPPORT OF DEFENDANT GINA M. AUSTIN'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

Date: March 16, 2022
Time: 1:30 p.m.

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

Courtroom: 3A (3rd Floor)
 District Judge: Todd W. Robinson
 Magistrate Judge: Daniel E. Butcher
 Complaint Filed: February 9, 2018
 Trial Date: None

I, Michelle L. Propst, declare as follows:

1. I am an attorney duly licensed to practice law before all of the courts of the State of California and am an associate with the law firm of Pettit Kohn Ingrassia Lutz & Dolin PC, attorneys of record for Defendant GINA M. AUSTIN ("Defendant"), in the above-captioned case. I am familiar with the facts and

1 proceedings of this case and if called as a witness, I could and would competently
2 testify to the following facts of my own personal knowledge.

3 2. On or about February 9, 2018, Plaintiff filed a Complaint, Case No.: 3-
4 18-cv-00325-GPC-MDD.

5 3. On May 13, 2020 Plaintiff filed the First Amended Complaint.

6 4. On May 27, 2020, Defendant filed a Motion to Dismiss the FAC.

7 5. On March 17, 2021, the Court granted Defendant's Motion to Dismiss
8 the FAC with leave to amend.

9 6. On May 14, 2021, Plaintiff filed a Notice of Appeal in the United
10 States Court of Appeals for the Ninth Circuit, rather than filing an amended
11 complaint in this Court.

12 7. On June 11, 2021, the United States Court of Appeals for the Ninth
13 Circuit dismissed the appeal on grounds the order challenged was neither final nor
14 appealable.

15 8. On October 22, 2021, the Court granted Plaintiff thirty (30) days to file
16 an amended complaint against Defendants Austin, Jessica McElfresh, and David
17 Demian.

18 9. On November 22, 2021, Plaintiff filed the Second Amended
19 Complaint.

20
21 I declare under penalty of perjury under the laws of the State of California
22 that the foregoing is true and correct.

23 Executed this 6th day of December, 2021, at San Diego, California.

24
25 /s/ Michelle L. Propst
Michelle L. Propst

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Michelle L. Propst, Esq., Bar No. 335966
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Attorneys for Defendant
GINA M. AUSTIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,
Plaintiff,

v.

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 MCELFFRESH, an individual; and DAVID DEMIAN, an individual,

Defendants.

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

**REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF DEFENDANT
GINA M. AUSTIN'S MOTION TO
DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT**

Date: March 16, 2022
Time: 1:30 p.m.

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

Courtroom: 3A (3rd Floor)
District Judge: Todd W. Robinson
Magistrate Judge: Daniel E. Butcher
Complaint Filed: February 9, 2018
Trial Date: None

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1 **PLEASE TAKE NOTICE** that on March 16, 2022, Defendant GINA M.
2 AUSTIN (“Defendant”) hereby requests the Court to take judicial notice pursuant
3 to Federal Rules of Evidence 201 of the following documents:

- 4
5 1. Order Dismissing Notice of Appeal United States Court of Appeals for the
6 Ninth Circuit Order, Filed June 11, 2021 (attached hereto as **Exhibit 1**).
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TABLE OF CONTENTS OF EXHIBITS

**IN SUPPORT OF DEFENDANT GINA M. AUSTIN'S
MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT**

EXHIBIT	DESCRIPTION	PAGE
1.	United States Court of Appeals for the Ninth Circuit Order	2

PETTIT KOHN INGRASSIA LUTZ & DOLIN PC

Dated: December 6, 2021

By: /s/ Michelle L. Propst, Esq.

Douglas A. Pettit, Esq.

Michelle L. Propst, Esq.

Attorneys for Defendant

GINA M. AUSTIN

E-mail: dpettit@pettitkohn.com

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN 11 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DARRYL COTTON, an individual,

Plaintiff-Appellant,

v.

LARRY GERACI, an individual; et al.,

Defendants-Appellees.

No. 21-55519

D.C. No.

3:18-cv-00325-TWR-DEB

Southern District of California,
San Diego

ORDER

Before: SILVERMAN, NGUYEN, and R. NELSON, Circuit Judges.

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. *See* Fed. R. Civ. P. 54(b); *Chacon v. Babcock*, 640 F.2d 221, 222 (9th Cir. 1981) (order is not appealable unless it disposes of all claims as to all parties or judgment is entered in compliance with rule); *see also WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (dismissal of complaint with leave to amend is not appealable). Consequently, this appeal is dismissed for lack of jurisdiction.

DISMISSED.

Douglas A. Pettit, Esq., Bar No. 160371
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Attorneys for Defendant
GINA M. AUSTIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,
Plaintiff,

v.

LARRY GERACI, an individual;
REBECCA BERRY, an individual;
GINA AUSTIN, an individual;
AUSTIN LEGAL GROUP, a
professional corporation; MICHAEL
WEINSTEIN, an individual; SCOTT
H. TOOTHACRE, an individual;
FERRIS & BRITTON, a professional
corporation; CITY OF SAN DIEGO,
a public entity; and DOES 1 through
10, inclusive,

Defendants.

CASE NO.: 3:18-cv-0325-BAS-MDD

CERTIFICATE OF SERVICE

Date: March 16, 2022
Time: 1:30 p.m.

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

Courtroom: 3A (3rd Floor)
District Judge: Todd W. Robinson
Magistrate Judge: Daniel E. Butcher
Complaint Filed: February 9, 2018
Trial Date: None

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

1. **DEFENDANT GINA M. AUSTIN'S NOTICE OF MOTION AND
MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED
COMPLAINT;**
2. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF DEFENDANT GINA M. AUSTIN'S MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED COMPLAINT;**
3. **DECLARATION OF MICHELLE L. PROPST IN SUPPORT OF
DEFENDANT GINA M. AUSTIN'S MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED COMPLAINT;**

1
2 **4. REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT**
3 **GINA M. AUSTIN'S MOTION TO DISMISS PLAINTIFF'S SECOND**
4 **AMENDED COMPLAINT; and**

5 **5. ORDER GRANTING DEFENDANT GINA M. AUSTIN'S MOTION**
6 **TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT**

7 Were served on this date to counsel of record:

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

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

14 Darryl Cotton
15 6176 Federal Blvd.
16 San Diego, CA 92114
17 PH: (619) 954-4447
18 **PLAINTIFF PRO SE**

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20 Lewis Brisbois Bisgaard & Smith LLP
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26 **Attorney for Defendant**
27 **DAVID DEMIAN**

28 Laura E. Stewart, Esq.
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Attorney for Defendant
JESSICA McELFRESH

Executed on **December 6, 2021**, at San Diego, California.

Kathleen B. Boyer