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10 Attorneys for Defendant JESSICA MCELFRISH, an individual

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
09/07/2022 at 05:37:00 PM
Clerk of the Superior Court
By Regina Chanez, Deputy Clerk

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO - CENTRAL DIVISION, HALL OF JUSTICE

11 AMY SHERLOCK, an individual and on
12 behalf of her minor children, T.S. and S.S.,
13 ANDREW FLORES, an individual

13 Plaintiffs,

14 vs.

15 GINA M. AUSTIN, an individual;
16 AUSTIN LEGAL GROUP, a professional
17 corporation, LARRY GERACI, an
18 individual, REBECCA BERRY, an
19 individual; JESSICA MCELFRISH, an
20 individual; SALAM RAZUKI, an
21 individual; NINUS MALAN, an
22 individual; FINCH, THORTON, AND
23 BARID, a limited liability partnership;
24 ABHAY SCHWEITZER, an individual
25 and dba TECHNE; JAMES (AKA JIM)
26 BARTELL, an individual; NATALIE
27 TRANG-MY NGUYEN, an individual,
28 AARON MAGAGNA, an individual;
BRADFORD HARCOURT, an
individual; SHAWN MILLER, an
individual; LOGAN STELLMACHER, an
individual; EULENTIAS DUANE
ALEXANDER, an individual; STEPHEN
LAKE, an individual, ALLIED
SPECTRUM, INC., a California
corporation, PRODIGIOUS
COLLECTIVES, LLC, a limited liability
company, and DOES 1 through 50,
inclusive,

Defendants.

CASE NO. 37-2021-00050889-CU-AT-CTL

**DECLARATION OF LAURA E. STEWART
IN SUPPORT OF JESSICA McELFRISH'S
DEMURRER TO THE FIRST AMENDED
COMPLAINT**

[IMAGED FILE]

JUDGE: Hon. James A. Mangione
DEPT.: C-75

DATE: October 21, 2022
TIME: 9:00 a.m.
DEPT.: C-75

COMPLAINT FILED: December 3, 2021
TRIAL DATE: Not Set

DECLARATION OF LAURA E. STEWART

I, Laura E. Stewart, declare:

1. I am an associate at the law firm of Walsh McKean Furcolo, LLP, counsel of record for defendant JESSICA McELFRESH. I am an attorney in good standing and licensed to practice in the State of California. I have personal knowledge of the matters stated herein and, if called as a witness, I could and would testify competently thereto.

2. On August 2, 2022, I called attorney Andrew Flores, counsel for plaintiffs, to meet and confer before filing Ms. McElfresh's demurrer to the First Amended Complaint as required by *Code of Civil Procedure* section 430.41. I indicated the issues with plaintiffs' First Amended Complaint and further indicated my intent to challenge the First Amended Complaint via demurrer.

3. Mr. Flores e-mailed me back that evening saying he was not available to meet and confer until after the deadline, so I filed a declaration stating we were not able to meet and confer and the deadline for Ms. McElfresh to respond to the First Amended Complaint was extended for thirty (30) days, to September 7, 2022. A true and correct copy of my e-mail correspondence with Mr. Flores is attached hereto as Exhibit A.

4. On August 31, 2022, I called Mr. Flores again to meet and confer before filing Ms. McElfresh's demurrer to the First Amended Complaint. This time, I sent Mr. Flores an e-mail discussing in detail the basis for the demurrer, including all of the legal arguments for why the case should be dismissed against Ms. McElfresh along with references to specific allegations in the First Amended Complaint and citations to legal authorities. A true and correct copy of my e-mail correspondence to Mr. Flores is attached hereto as Exhibit B.

5. Mr. Flores never responded to my August 31, 2022 e-mail.

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6. My attempts to meet and confer with Mr. Flores regarding the demurrer satisfy my obligations under *Code of Civil Procedure* section 430.41.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed this 7th day of September, 2022, at San Diego, California.



Laura Stewart, Esq.

EXHIBIT “A”

From: ["Andrew flores" <andrew@floreslegal.pro>](mailto:andrew@floreslegal.pro)
To: ["Laura Stewart" <lstewart@wmflp.com>](mailto:lstewart@wmflp.com)
CC: ["Michelle Davis" <mdavis@wmflp.com>](mailto:mdavis@wmflp.com)
Date: 8/2/2022 8:55:33 PM
Subject: Re: Sherlock v. Austin, et al. // SDCS Court Case No. 37-2021-00050889-CU-AT-CTL

Hello Ms. Stewart,

I am in receipt of your email regarding a meet and confer and approaching deadlines. Looking at my schedule I am in hearings tomorrow and Thursday, but I will have time on Friday between 1-3 pm for a telephone call. Please let me know if that time works for you. Also, with respect to the filing deadline I have no problem with stipulating to an extension so we may properly meet and confer.

Sincerely,

Andrew Flores

From: Laura Stewart <lstewart@wmflp.com>
Sent: Tuesday, August 2, 2022 2:40:22PM
To: Andrew flores <andrew@floreslegal.pro>
Cc: Michelle Davis <mdavis@wmflp.com>
Subject: Sherlock v. Austin, et al. // SDCS Court Case No. 37-2021-00050889-CU-AT-CTL

Dear Mr. Flores,

My office is counsel for defendant Jessica McElfresh with respect to the Sherlock case (Case No. 37-2021-00050889-CU-AT-CTL) pending in the San Diego County Superior Court. I left a voice message for you today because I would like to meet and confer before filing Ms. McElfresh's demurrer and motion to strike punitive damages from the First Amended Complaint as required under the Code. Would you please advise of a good time for us to meet and confer by phone?

With respect to the demurrer, the argument is that the First Amended Complaint does not state a claim upon which relief may be granted against Ms. McElfresh. The Sherlock plaintiffs only complain of an alleged loss of the Ramona and Balboa CUPs, but it is not alleged that Ms. McElfresh had anything to do with the Ramona or Balboa CUPs. With respect to the Federal CUP, it is alleged that Ms. McElfresh represented Mr. Geraci in connection with the Federal CUP application, which allegedly violated her fiduciary duties to Mr. Cotton. Ms. McElfresh disputes that she ever represented Mr. Cotton or ever owed any duty or any sort to Mr. Cotton. But, in any event, Mr. Cotton is not a plaintiff in the Sherlock case, you are. We understand that you represented Mr. Cotton in the Geraci case. In short, none of the plaintiffs in this case claim to have been damaged by anything Ms. McElfresh did or did not do.

With respect to the motion to strike, the argument is that there are insufficient facts pled to show the malice, oppression or fraud required to state a claim for punitive damages.

Based on our current August 8 response date, we understand tomorrow is the 5-day deadline to meet and confer before our demurrer and motion to strike are filed. If you are not available today or tomorrow, we can file a declaration under Code of Civil Procedure sections 430.41 (a)(2) and 435.5(a)(2) to give us some additional time to meet and confer.

Thank you in advance for your courtesy and cooperation.

Laura Stewart, Esq.
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EXHIBIT “B”

From: ["Laura Stewart" <lstewart@wmfillp.com>](mailto:lstewart@wmfillp.com)
To: Andrew@FloresLegal.Pro
CC: ["Michelle Davis" <mdavis@wmfillp.com>](mailto:mdavis@wmfillp.com)
Date: 8/31/2022 3:01:56 PM
Subject: Sherlock v. Austin, et al. // SDCS Court Case No. 37-2021-00050889-CU-AT-CTL

Dear Mr. Flores,

As you know from our prior correspondence, my office is counsel for defendant Jessica McElfresh with respect to the Sherlock case (Case No. 37-2021-00050889-CU-AT-CTL) pending in the San Diego County Superior Court. I called you today and left a message to meet and confer before filing Ms. McElfresh's demurrer and motion to strike punitive damages from the First Amended Complaint ("FAC") as required by Code of Civil Procedure §§430.41 and 435.5. I will set forth the basis for the demurrer and motion to strike in this correspondence.

I. DEMURRER

With respect to the demurrer, the argument is that the FAC does not state a claim upon which relief may be granted against Ms. McElfresh. Discussion of why each of the three causes of action alleged against Ms. McElfresh in the FAC should be dismissed is included here.

First Cause of Action for Violation of the Cartwright Act

Recovery is provided under the Cartwright Act where the activities of a combination of capital, skill or acts by two or more persons result in a restraint of trade. *G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 265, citing *Weissensee v. Chronicle Publishing Co.* (1976) 59 Cal.App.3d 728, 729. In order to maintain a cause of action for such combination in restraint of trade, the complaint must allege: The formation and operation of the conspiracy; the illegal acts done pursuant thereto; a purpose to restrain trade; and the damage caused by such acts. *G.H.I.I., supra*, 147 Cal.App. 256, 265, citing *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 119.

The Supreme Court demands a "high degree of particularity in the pleading of Cartwright Act violations." *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 326–328; *Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 742. Generalized allegations of civil antitrust violations are usually insufficient and the unlawful combination or conspiracy must be alleged with specificity. Thus, general allegations of a conspiracy unaccompanied by a statement of facts constituting the conspiracy and explaining its objectives and impact in restraint of trade will not suffice. Put slightly differently, the lack of factual allegations of specific conduct directed toward furtherance of the conspiracy to eliminate or reduce competition renders the complaint legally insufficient. *G.H.I.I., supra*, 147 Cal.App.256, 265, citing *Jones v. H.F. Ahmanson & Co., supra*, 1 Cal.3d 93, 119.

Applying these legal authorities to the present case, plaintiffs have failed to allege Ms. McElfresh's participation in a conspiracy to restrain trade as required by the Cartwright Act. In the FAC, it is alleged that "Defendants committed overt acts and engaged in concerted action in furtherance of their combination and conspiracy to restrain and monopolize, as described above, including but not limited to unlawfully applying for or acquiring CUPs through the use of proxies and/or forged documents, sham litigation, and acts and threats of violence against competitors and/or parties who could threaten or expose their illegal actions in furtherance of the conspiracy. (FAC, ¶283.) None of these allegations have anything to do with Ms. McElfresh. The allegation that the defendants applied for or acquired CUPs through the use of proxies and/or forged documents is directed towards Mr. Geraci and Mr. Geraci's assistant, Ms. Berry, who Mr. Cotton claims helped Mr. Geraci submit the Federal CUP in her name. (FAC ¶119). The allegation that the defendants acquired CUPs through the use of forged documents is directed towards the individuals who plaintiffs claim assisted Mr. Lake and Mr. Harcourt in defrauding the Sherlock plaintiffs out of the Ramona and Balboa CUPs by forging Mr. Sherlock's signature on the dissolution form for Leading Edge Real Estate, the owner of the Ramona and Balboa properties. (FAC ¶¶ 64-99 and ¶¶ 285-301). The allegation that the defendants engaged in sham litigation is directed towards Mr. Geraci for bringing the *Geraci* lawsuit. The allegation that the defendants engaged in acts and threats of violence against competitors and/or parties who could threaten or expose their illegal actions is directed towards Mr. Alexander and Mr. Stellmacher, who allegedly threatened Mr. Cotton, and Mr. Magagna who threatened Ms. Young. (FAC, ¶¶215-224 and ¶¶ 225-238). As plaintiffs do not allege that Ms. McElfresh had anything to do with any of these incidents, a Cartwright Act violation is not sufficiently pled against Ms. McElfresh.

Fifth Cause of Action for Unfair Competition/Unlawful Business Practices

California *Business & Professions Code* § 17200 (also known as the Unfair Competition Law) defines “unfair competition” as “any unlawful, unfair or fraudulent business act or practice...” The Unfair Competition Law permits a cause of action to be brought if a practice violates some other law. In effect, the “unlawful” prong of § 17200 makes a violation of the underlying or “borrowed” law a violation of § 17200. *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180; *Farmers Ins. Exch. v. Sup.Ct.* (1992) 2 Cal.4th 377, 383. A defense to the “borrowed” law extinguishes the Unfair Competition Law claim. *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1060 [“If the underlying claim is dismissed, then there is no unlawful act upon which to base the derivative Unfair Competition claim”]; *Scripps Clinic v. Sup.Ct.* (2003) 108 Cal.App.4th 917, 938-939; *Krantz v. BT Visual Images, L.L.C.* (2001) 89 Cal.App.4th 164, 178 [the viability of an “unlawful” UCL claim “stands or falls” with the underlying claim].

In the present case, the allegation in the cause of action for unlawful business practices directed towards Ms. McElfresh is the allegation in ¶ 318 of the FAC that her representation of Mr. Geraci in furtherance of the Federal CUP application violated her fiduciary duties to Mr. Cotton as her former client, the terms of her DPA and *Penal Code* § 115.

Ms. McElfresh disputes that she ever represented Mr. Cotton or that she ever owed any duty to Mr. Cotton. But, assuming these allegations are true, as the Court must do for the purposes of a demurrer, Mr. Cotton is not a plaintiff in this case; Mr. Flores is. Representing Mr. Cotton is not the same thing as representing Mr. Flores and a breach of a fiduciary duty to Mr. Cotton is not a breach of a fiduciary duty to Mr. Flores. There is no conceivable theory upon which Ms. McElfresh owed a fiduciary duty to Mr. Flores and, in fact, it is not alleged anywhere in the FAC that Ms. McElfresh did owe a duty of any kind to Mr. Flores. As such, a breach of fiduciary duty to Mr. Flores cannot be the “borrowed” law which serves as the predicate for the “unlawful business act or practice” under § 17200. In fact, Mr. Cotton and Mr. Flores have already filed two other lawsuits against Ms. McElfresh besides this one in federal court. All three of the lawsuits are attempts by Mr. Cotton to overturn the judgment against him in the *Geraci* lawsuit. The only legally valid way for Mr. Cotton to overturn the *Geraci* judgment is by way of an appeal to the Court of Appeal, which he already tried and lost. Another lawsuit in the same Court is simply not the appropriate avenue and the Court should dismiss the *Sherlock* FAC for that reason.

Mr. Flores also lacks standing to sue Ms. McElfresh for a violation of the Deferred Prosecution Agreement (“DPA”) between Ms. McElfresh and the government, since Mr. Flores was not a party to the agreement. The violation of the DPA therefore cannot be the “borrowed law,” either.

Penal Code § 115 makes it a felony to knowingly procure or offer any false or forged instrument to be filed, registered or recorded in any public office of the state. Plaintiffs allege that Ms. McElfresh represented Mr. Geraci in connection with the Federal CUP before the City of San Diego and that violated *Penal Code* § 115. But, violation of a criminal statute only gives the government a right to prosecute the offender, it does not create a private right of action for individuals to sue anybody, and even if it did, the individual who would hold that right is Mr. Cotton, who is not a plaintiff in this case. It is inconceivable how Mr. Flores would have standing to maintain an action for violation of *Penal Code* § 115 against McElfresh.

Since there is no underlying “borrowed” law plaintiffs can sue Ms. McElfresh for, plaintiffs have not stated a cause of action for violation of the Unfair Competition Law against her.

Seventh Cause of Action for Civil Conspiracy

To allege a conspiracy, a plaintiff must plead: (1) formation and operation of the conspiracy. (2) damage resulting to plaintiff and (3) from a wrongful act done in furtherance of the common design. *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150. It is often said that civil conspiracy is not an independent tort, meaning a plaintiff only pleads a cause of action for civil conspiracy if s/he pleads a cause of action for the underlying wrong. *Hege v. Worthington, Park & Worthington* (1962) 209 Cal.App.2d 670, 678 [the pleaded facts must show that, even without the conspiracy, they give rise to a cause of action]; *Prakashpalan v. Engstrom, Lipscomb and Lack* (2014) 223 Cal.App.4th 1105, 1135 [there is no separate tort of civil conspiracy and no action for conspiracy to commit a tort unless the underlying tort is committed and damage results therefrom].

Applying these legal authorities to the present case, plaintiff has not adequately pled a cause of action for civil conspiracy to violate the Cartwright Act against Ms. McElfresh because plaintiffs have not alleged a cause of action for a

violation of the Cartwright Act against her.

II. MOTION TO STRIKE PUNITIVE DAMAGES

With respect to the motion to strike, the argument is that there are insufficient facts pled to state a claim for punitive damages. In order to state a valid claim for punitive damages, the facts alleged in the complaint must provide clear and convincing evidence that the defendant acted out of "malice, oppression or fraud" in committing the tort. Cal. Civil Code §3294(a). "Malice" is defined as conduct "intended by the defendant to cause injury to plaintiff, or despicable conduct that is carried on by the defendant with a willful and conscious disregard for the rights or safety of others." Cal. Civ. Code §3294(c)(1). "Despicable conduct" is defined as "conduct that is so vile, base, or contemptible that it would be looked down upon and despised by reasonable people." CACI 3940; *College Hospital, Inc. v. Superior Court (Cromwell)*(1994) 8 Cal.4th 704, 725. Despicable conduct has been described as "[h]aving the character of outrage frequently associated with crime." *Taylor v. Superior Court*(1979) 24 Cal.3d 890, 894. "Oppression" means "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard for the rights or safety of others." Cal. Civ. Code section 3294, subd. (c)(2). "Fraud" is "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." Cal. Civ. Code section 3294, subd. (c)(3).

California law requires specific factual allegations, not just conclusory characterizations of the defendant's conduct, to support claims for punitive damages. *Smith v. Superior Court (Bucher)*(1992) 10 Cal.App.4th 1033, 1042 [punitive damage claim is insufficient in that it is "devoid of any factual assertions supporting a conclusion petitioners acted with oppression, fraud, or malice"]; *Brousseau v. Jarrett*(1977) 73 Cal.App.3d 864, 872 ["conclusory characterization of defendant's conduct as intentional, willful and fraudulent is a patently insufficient statement of 'oppression, fraud or malice, express or implied,' within the meaning of section 3294"]; *Blake v. Aetna Life Ins. Co.* (1979) 99 Cal. App.3d 901 [an insured must allege sufficient facts to show that an insurance company's actions were of such egregious conduct to warrant a claim for punitive damages].

While plaintiffs allege in the seventh cause of action for conspiracy that "...defendants have acted with malice, oppression, and fraud in conscious disregard on Plaintiffs' rights, thereby warranting an assessment of punitive damages in an amount appropriate to punish Defendants and deter others from engaging in similar misconduct," plaintiffs fail to allege any specific facts supporting that conclusion, at least with respect to Ms. McElfresh. The factual allegations in the First Amended Complaint regarding Ms. McElfresh are that she considered representing Mr. Cotton but decided she could not, so she referred him to another attorney at Finch Thornton & Baird. (FAC, ¶¶156-157). Mr. Cotton believes Ms. McElfresh had a conflict of interest because she shared clients with two other defendants and had worked on Mr. Geraci's CUP application with the City of San Diego. (FAC, ¶¶182, 208). It is further alleged that Ms. Austin discouraged someone named Williams from purchasing a property in Lemon Grove because it did not qualify for a CUP. (FAC, ¶¶267-269). Subsequently, a CUP was issued for the Lemon Grove property and the parties who acquired the CUP were represented by Ms. McElfresh. (FAC, ¶¶270-271). Even assuming these allegations are true, they certainly do not rise to the level of malice, oppression or fraud required to plead a claim for punitive damages.

Based on our current September 7 response date, Friday September 2 is the deadline to meet and confer before our demurrer and motion to strike are filed. If I don't hear from you before Friday, I will go ahead file the demurrer and motion to strike on the 7th with a declaration explaining that I satisfied my obligations to meet and confer as required by the Code by setting forth the arguments for the demurrer and motion to strike in this e-mail.

Thank you in advance for your courtesy and cooperation.

Laura Stewart, Esq.
W|M|F
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