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

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

Plaintiffs,

vs.

GINA M. AUSTIN, an individual;
AUSTIN LEGAL GROUP, a professional
corporation, LARRY GERACI, an
individual, REBECCA BERRY, an
individual; JESSICA MCELFRISH, an
individual; SALAM RAZUKI, an
individual; NINUS MALAN, an
individual; FINCH, THORTON, AND
BARID, a limited liability partnership;
ABHAY SCHWEITZER, an individual
and dba TECHNE; JAMES (AKA JIM)
BARTELL, an individual; NATALIE
TRANG-MY NGUYEN, an individual,
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

**MEMORANDUM OF POINTS AND
AUTHORITIES 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

1 **I. INTRODUCTION**

2 This case is an improper use of the judicial system by someone who is not even a party to
3 this case, Darryl Cotton. Darryl Cotton has brought two other, similar lawsuits against Jessica
4 McElfresh, both currently pending in federal court: one captioned *Andrew Flores, et al. v. Gina*
5 *Austin, et al.*; and the other captioned *Darryl Cotton v. Cynthia Bashant, et al.* The stated goal in
6 all three of these cases is the same – overturning the judgment against Mr. Cotton in another
7 lawsuit, the *Geraci* case. But suing Ms. McElfresh is not an appropriate way to do that.

8 The First Amended Complaint should be dismissed against Ms. McElfresh with prejudice
9 because it does not, and cannot, state a legally valid claim against her.

10 **II. SUMMARY OF FACTUAL ALLEGATIONS RELEVANT TO MS. McELFRESH**

11 **A. Allegations from the First Amended Complaint**

12 Plaintiffs Amy Sherlock, an individual and on behalf of her minor children, T.S. and SS.,
13 and Andrew Flores have sued Gina Austin, Austin Legal Group, Larry Geraci, Rebecca Berry,
14 Jessica McElfresh, Salam Razuki, Ninus Malan, Finch Thorton & Baird, Abhay Schweitzer,
15 James Bartell, Natalie Nguyen, Aaron Magagna, Bradford Harcourt, Shawn Miller, Logan
16 Stellmacher, Eulenthias Alexander, Stephen Lake, Allied Spectrum, Inc. and Prodigious
17 Collectives, LLC. The operative pleading is the First Amended Complaint (“FAC”).

18 The FAC contains causes of action for: (1) conspiracy to monopolize in violation of the
19 Cartwright Act (*Business & Professions Code* §16700, et seq.); (2) conversion; (3) civil
20 conspiracy; (4) declaratory relief; (5) unfair competition and unlawful business practices
21 (*Business & Professions Code* §17200, et seq.); (6) declaratory relief; and (7) civil conspiracy.
22 Only the causes of action for (1) conspiracy to monopolize in violation of the Cartwright Act
23 (*Business & Professions Code* §16700, et seq.), (5) unfair competition and unlawful business
24 practices (*Business & Professions Code* §17200, et seq.), and (7) civil conspiracy are alleged
25 against Ms. McElfresh.

26 It is alleged that the defendants are part of a conspiracy to create an unlawful monopoly
27 in the cannabis market in San Diego by ensuring that the limited number of conditional use
28 permits (“CUPS”) go to principals of the enterprise. (FAC, ¶¶ 1-2). It is alleged that the

1 Sherlock plaintiffs were deprived of CUPs for properties located at 1210 Olive Street in Ramona
2 (“the Ramona CUP”) and 8863 Balboa Avenue in San Diego (“the Balboa CUP”) owned by their
3 deceased husband/father. (FAC, ¶¶ 64-99). But a majority of the FAC is devoted to discussing
4 how Darryl Cotton was deprived of a CUP for a property located at 6220 Federal Blvd. in San
5 Diego (“the Federal CUP”) and the litigation between Mr. Cotton and defendant Larry Geraci
6 which resulted in a judgment against Mr. Cotton. (FAC, ¶¶ 116-265). In fact, the sixth cause of
7 action is brought by plaintiff Andrew Flores against Mr. Geraci seeking a judicial declaration
8 that the judgment Mr. Geraci obtained against Mr. Cotton is void. (FAC, ¶¶ 324-332). It is
9 alleged that plaintiffs and Mr. Cotton brought two other lawsuits in federal court seeking to have
10 the judgment against Mr. Cotton in the *Geraci* lawsuit declared void, but the Court would not do
11 that for him, so the State court must address it here. (FAC, ¶¶ 276-279).¹

12 With respect to Ms. McElfresh, it is alleged that she was charged in May 2017 with
13 conspiracy to manufacture a controlled substance and obstruction of justice for her efforts to
14 conceal a client’s alleged illegal marijuana manufacturing operations from government
15 inspectors. (FAC, ¶ 54). In July 2018, she entered into a Deferred Prosecution Agreement
16 (“DPA”) that would allow her to plead guilty in 12 months. (FAC, ¶ 55). The DPA prohibited
17 her from violating any other laws (except for minor infractions) or face resumption of all charges
18 filed against her. (FAC, ¶ 56).

19 If is further alleged that during the *Geraci* litigation, Mr. Cotton acquired a “litigation
20 investor” named Mr. Hurtado. (FAC, ¶ 153). In April 2017, Mr. Hurtado consulted with Ms.
21 McElfresh to represent Mr. Cotton and she agreed to do so, but on April 13, 2017, she e-mailed
22 Mr. Hurtado that “upon further reflection” she did “not have the bandwidth” to represent Mr.

23 _____
24 ¹ The two cases are: *Andrew Flores, et al. v. Gina Austin, et al.*, United States District
25 Court for the Southern District of California Case No. 3:20-cv-00656-BAS-DEB; and *Darryl
26 Cotton v. Cynthia Bashant, et al.*, United States District Court for the Southern District of
27 California Case No. 3:18-cv-00325-TWR-DEB. In the *Andrew Flores, et al. v. Gina Austin, et
28 al.* lawsuit, it is alleged that Mr. Flores represented Mr. Cotton in the *Geraci* lawsuit.
Specifically, Mr. Flores alleged that he filed a motion to disqualify the judge presiding over the
Geraci lawsuit, Judge Wohlfeil, on Mr. Cotton’s behalf, but Judge Wohlfeil denied the motion.
(See Exhibit A, First Amended Complaint in the *Flores v. Austin, et al.* lawsuit, ¶¶ 184-194).

1 Cotton and referred Mr. Hurtado to defendant David Demian at Finch, Thornton & Baird. (FAC,
2 ¶¶ 154-156). At that time, Mr. Cotton did not know that Ms. McElfresh had shared clients with
3 defendant Gina Austin or that she also worked for defendant Salam Razuki and Mr. Cotton did
4 not understand “the gravity of an attorney who fails to disclose conflicts of interests between
5 clients.” (FAC, ¶ 182). It is further alleged that the \$260,109.28 judgment against Mr. Cotton in
6 the *Geraci* lawsuit included legal fees for Ms. McElfresh’s representation of Mr. Geraci in
7 advancing the interests of the Federal CUP application with the City (FAC, ¶ 208) and Ms.
8 McElfresh’s representation of Mr. Geraci violated her fiduciary duties to Mr. Cotton as her
9 former client, the terms of her DPA as she knew Mr. Geraci could not lawfully own a CUP, and
10 *Penal Code* §115 (FAC, ¶ 318).

11 It is further alleged that Ms. Austin discouraged someone named Williams from
12 purchasing a property in Lemon Grove because it did not qualify for a CUP. (FAC, ¶¶ 267-269).
13 Subsequently, A CUP was issued for the Lemon Grove property and the parties who acquired the
14 CUP were represented by Ms. McElfresh. (FAC, ¶¶ 270-271).

15 **III. LEGAL AUTHORITY FOR DEMURRER**

16 Under California law, a party is permitted to file a general demurrer to “test the legal
17 sufficiency of factual allegations” of an opponent’s pleading. *Consumer Cause, Inc. v.*
18 *Arkopharma, Inc.* (2003) 106 Cal.App.4th 824, 827. A complaint is subject to a general
19 demurrer if it fails to state sufficient facts to constitute a cause of action. *Code of Civil Procedure*
20 § 430.10(e); *Schmier v. Supreme Ct.* (2000) 78 Cal.App.4th 703, 707.

21 A demurrer to a complaint may be taken to the whole complaint or to any of the causes of
22 action stated therein. *Code of Civil Procedure* § 430.50. Although courts must treat as true all
23 material *facts* alleged in the challenged pleading, “contentions, deductions or conclusions of fact
24 or law alleged in the [pleading] are not considered” in judging the pleading’s sufficiency. *State*
25 *v. Bank of Am. Corp.* (2005) 126 Cal.App.4th 225, 239-240 (citation omitted). In ruling on a
26 demurrer, doubt in the complaint may be resolved against plaintiff, and facts not alleged are
27 presumed not to exist. *Kramer v. Intuit Inc.* (2004) 121 Cal.App.4th 574.

1 The Code specifically authorizes the court to consider, as ground for demurrer, any
2 matter which the court *must* or *may* judicially notice under *Evidence Code* §§ 451 or 452. *Cal.*
3 *Code Civ. Proc.* § 430.30(a).

4 **IV. THE FAC FAILS TO STATE A VALID CAUSE OF ACTION AGAINST JESSICA**
5 **McELFRESH**

6 The specific causes of action in the *Sherlock* FAC alleged against Ms. McElfresh are
7 violation of the Cartwright Act (*Business and Professions Code* § 16700, et seq.), Unfair
8 Business Practices in violation of *Business & Professions Code* § 17200 and civil conspiracy.
9 None of these causes of action state a legally valid claim against her.

10 **A. Violation of the Cartwright Act**

11 The Cartwright Act is contained in California *Business and Professions Code* § 16700, et
12 seq. Sections 16720 and 16726 generally codify the common law prohibition against restraint of
13 trade. *Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 852.
14 Recovery is provided under the Cartwright Act where the activities of a combination of capital,
15 skill or acts by two or more persons result in a restraint of trade. *G.H.I.I. v. MTS, Inc.* (1983) 147
16 Cal.App.3d 256, 265, citing *Weissensee v. Chronicle Publishing Co.* (1976) 59 Cal.App.3d 728,
17 729. In order to maintain a cause of action for such combination in restraint of trade, the
18 complaint must allege: The formation and operation of the conspiracy; the illegal acts done
19 pursuant thereto; a purpose to restrain trade; and the damage caused by such acts. *G.H.I.I.*,
20 *supra*, 147 Cal.App.3d 256, 265, citing *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 119.

21 The Supreme Court demands a “high degree of particularity in the pleading of Cartwright
22 Act violations.” *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305,
23 326–328; *Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 742. Generalized
24 allegations of civil antitrust violations are usually insufficient and the unlawful combination or
25 conspiracy must be alleged with specificity. Thus, general allegations of a conspiracy
26 unaccompanied by a statement of facts constituting the conspiracy and explaining its objectives
27 and impact in restraint of trade will not suffice. Put slightly differently, the lack of factual
28 allegations of specific conduct directed toward furtherance of the conspiracy to eliminate or

1 reduce competition renders the complaint legally insufficient. *G.H.I.I., supra*, 147 Cal.App.3d
2 256, 265, citing *Jones v. H.F. Ahmanson & Co., supra*, 1 Cal.3d 93, 119.

3 Plaintiffs suing under the Cartwright Act must be within the “target area” of the antitrust
4 violation to have standing to sue; i.e., they must have suffered direct injury as a result of the
5 anticompetitive conduct. See, *Cal. Bus. & Prof. Code* § 16750(a); *Cellular Plus, Inc. v. Superior*
6 *Court (U.S. West Cellular)* (1993) 14 Cal.App.4th 1224, 1232; *Vinci v. Waste Management, Inc.*
7 (1995) 36 Cal.App.4th 1811, 1815.

8 Applying these legal authorities to the present case, plaintiffs have failed to allege Ms.
9 McElfresh’s participation in a conspiracy to restrain trade as required by the Cartwright Act. In
10 the FAC, it is alleged that “Defendants committed overt acts and engaged in concerted action in
11 furtherance of their combination and conspiracy to restrain and monopolize, as described above,
12 including but not limited to unlawfully applying for or acquiring CUPs through the use of
13 proxies and/or forged documents, sham litigation, and acts and threats of violence against
14 competitors and/or parties who could threaten or expose their illegal actions in furtherance of the
15 conspiracy.” (FAC, ¶ 283.)

16 None of these allegations have anything to do with Ms. McElfresh. The allegation that
17 the defendants applied for or acquired CUPs through the use of proxies and/or forged documents
18 is directed towards Mr. Geraci and Mr. Geraci’s assistant, Ms. Berry, who plaintiffs claim helped
19 Mr. Geraci to prepare and submit the Federal CUP application in her own name. (FAC, ¶ 119).
20 The allegation that the defendants acquired CUPs through the use of forged documents is
21 directed towards the individuals who plaintiffs claim assisted Mr. Lake and Mr. Harcourt in
22 defrauding the Sherlock plaintiffs out of the Ramona and Balboa CUPs by forging Mr.
23 Sherlock’s signature on the dissolution form for Leading Edge Real Estate, the owner of the
24 Ramona and Balboa properties. (FAC, ¶¶ 64-99 and ¶¶ 285-301). The allegation that the
25 defendants engaged in sham litigation is directed towards Mr. Geraci for bringing the *Geraci*
26 lawsuit. The allegation that the defendants engaged in acts and threats of violence against
27 competitors and/or parties who could threaten or expose their illegal actions is directed towards
28 Mr. Alexander and Mr. Stellmacher, who allegedly threatened Mr. Cotton, and Mr. Magagna

1 who threatened Ms. Young. (FAC, ¶¶ 215-224 and ¶¶ 225-238). As plaintiffs do not allege that
2 Ms. McElfresh had anything to do with any of these incidents, a Cartwright Act violation is not
3 sufficiently pled against Ms. McElfresh.

4 **B. Unfair Competition and Unlawful Business Practices in Violation of *Business***
5 **& *Professions Code* § 17200**

6 California *Business & Professions Code* § 17200 (also known as the Unfair Competition
7 Law”) defines “unfair competition” as “any unlawful, unfair or fraudulent business act or
8 practice...” The Unfair Competition Law permits a cause of action to be brought if a practice
9 violates some other law. In effect, the “unlawful” prong of § 17200 makes a violation of the
10 underlying or “borrowed” law a violation of § 17200. *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939,
11 950; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th
12 163, 180; *Farmers Ins. Exch. v. Sup.Ct.* (1992) 2 Cal.4th 377, 383.

13 A defense to the “borrowed” law extinguishes the Unfair Competition Law claim. *Ingels*
14 *v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1060 [“If the
15 underlying claim is dismissed, then there is no unlawful act upon which to base the derivative
16 Unfair Competition claim”]; *Scripps Clinic v. Sup.Ct.* (2003) 108 Cal.App.4th 917, 938-939;
17 *Krantz v. BT Visual Images, L.L.C.* (2001) 89 Cal.App.4th 164, 178 [the viability of an
18 “unlawful” UCL claim “stands or falls” with the underlying claim].

19 Standing to sue for violations of *Business & Professions Code* § 17200, et seq. (the
20 Unfair Competition Law) is limited to specified public officials and persons who have sustained
21 “injury in fact and ... lost money or property as a result of the unfair competition.” *Cal. Bus. &*
22 *Prof. Code* § 17204.

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

27 Ms. McElfresh disputes that she ever represented Mr. Cotton or that she ever owed any
28 duty to Mr. Cotton. But, assuming these allegations are true, as the Court must do for the

1 purposes of a demurrer, Mr. Cotton is not a plaintiff in this case; Mr. Flores is. Representing Mr.
2 Cotton is not the same thing as representing Mr. Flores and a breach of a fiduciary duty to Mr.
3 Cotton is not a breach of a fiduciary duty to Mr. Flores. There is no conceivable theory upon
4 which Ms. McElfresh owed a fiduciary duty to Mr. Flores and, in fact, it is not alleged anywhere
5 in the FAC that Ms. McElfresh did owe a duty of any kind to Mr. Flores. As such, a breach of
6 fiduciary duty to Mr. Flores cannot be the “borrowed” law which serves as the predicate for the
7 “unlawful business act or practice” under *Business & Professions Code* § 17200.²

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

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

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

23 ² Perhaps another way of saying the same thing is to say Mr. Flores lacks standing to sue
24 Ms. McElfresh under *Business & Professions Code* § 17200 because he has not been injured by
25 anything she allegedly did. Mr. Cotton and Mr. Flores have filed two other lawsuits against Ms.
26 McElfresh besides this one in federal court. The stated goal of all three of the lawsuits is to
27 overturn the judgment against Mr. Cotton in the *Geraci* lawsuit and Mr. Flores represented Mr.
28 Cotton for a time in that lawsuit. (See Exhibit A, First Amended Complaint in the *Flores v.*
Austin, et al. lawsuit, ¶¶ 184-194). Mr. Flores cannot seriously contend he was injured somehow
because he represented Mr. Cotton and Mr. Cotton should have won the *Geraci* lawsuit.

1 **C. Civil Conspiracy**

2 To allege a conspiracy, a plaintiff must plead: (1) formation and operation of the
3 conspiracy; (2) damage resulting to plaintiff; and (3) from a wrongful act done in furtherance of
4 the common design. *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150.

5 It is often said that civil conspiracy is not an independent tort, meaning a plaintiff only
6 pleads a cause of action for civil conspiracy if s/he pleads a cause of action for the underlying
7 wrong. *Hege v. Worthington, Park & Worthington* (1962) 209 Cal.App.2d 670, 678 [the pleaded
8 facts must show that, even without the conspiracy, they give rise to a cause of action];
9 *Prakashpalan v. Engstrom, Lipscomb and Lack* (2014) 223 Cal.App.4th 1105, 1135 [there is no
10 separate tort of civil conspiracy and no action for conspiracy to commit a tort unless the
11 underlying tort is committed and damage results therefrom].

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

15 **V. LEAVE TO AMEND SHOULD BE DENIED**

16 Leave to amend a complaint should be denied where there is no possible way for the
17 plaintiff to amend the complaint to change the legal effect of the pleading. *Goodman v. Kennedy*
18 (1976) 18 Cal.3d 335, 349; *Medina v. Safe-Guard Products* (2008) 164 Cal.App.4th 105, 112, fn.
19 8; *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 [“onus” on plaintiff to show
20 specific ways in which complaint can be amended, and denial of leave to amend affirmed where
21 plaintiff “proffered no specific amendments to the trial court”]; *Chen v. PayPal, Inc.* (2021) 61
22 Cal.App.5th 559, 584.

23 Here, even assuming the truth of the facts alleged in the FAC, plaintiffs have not stated a
24 valid claim against Ms. McElfresh and there is no way they possibly could. None of the
25 plaintiffs claim to have been injured by any of the conduct they attribute to Ms. McElfresh.
26 They only claim she was involved with was Mr. Cotton, who is not even a party to this case.
27 Leave to amend should therefore be denied.

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VI. CONCLUSION

Plaintiffs' FAC fails to, and cannot, state a valid cause of action against Ms. McElfresh.
Ms. McElfresh respectfully requests that the Court sustain this demurrer without leave to amend.

DATED: September 7, 2022

WALSH MCKEAN FURCOLO LLP

By: 

Laura Stewart, Esq.
Attorneys for Defendant JESSICA
MCELFRISH, an individual