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Superior Court of California,
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Attorneys for Defendant JESSICA MCELFFRESH, an individual

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

Plaintiffs,

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 MCELFFRESH, 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,
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

**REPLY BRIEF IN SUPPORT OF JESSICA
McELFFRESH'S MOTION TO STRIKE
PORTIONS OF THE FIRST AMENDED
COMPLAINT**

[IMAGED FILE]

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

DATE: December 2, 2022
TIME: 9:00 a.m.
DEPT.: C-75

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

1 **I. INTRODUCTION**

2 Plaintiffs’ request for punitive damages against defendant Jessica McElfresh is in
3 connection with their seventh cause of action for conspiracy. In their opposition, plaintiffs argue
4 that Ms. McElfresh worked for Larry Geraci on the application for the Federal CUP, which was a
5 breach of fiduciary duty to Darryl Cotton. Assuming this is true for the sake of this motion, it
6 still would not provide support for plaintiffs’ cause of action for conspiracy because Mr. Cotton
7 is not a plaintiff in this case, and it certainly would not rise to the level of malice, oppression or
8 fraud required to state a claim for punitive damages, in any event.

9 **II. PLAINTIFFS’ HAVE NOT ADEQUATELY PLED A CLAIM FOR PUNITIVE**
10 **DAMAGES**

11 **A. Darryl Cotton Is Not A Party To This Case, So An Alleged Breach Of**
12 **Fiduciary Duty Owed To Him Does Not Entitle Plaintiffs To Any Damages**
13 **From McElfresh, Let Alone Punitive Damages**

14 In their opposition, plaintiffs argue that Ms. McElfresh violated her fiduciary duty to Mr.
15 Cotton by representing Mr. Geraci in furtherance of the Federal CUP application and that breach
16 of fiduciary duty is the basis for the claim for conspiracy to violate the Cartwright Act.

17 Even assuming these allegations are true, as we must for the purposes of a motion to
18 strike, Mr. Cotton is not a plaintiff in this case. We know that the stated goal of this lawsuit is to
19 overturn the judgment against Mr. Cotton in the *Geraci* case and that Mr. Flores represented Mr.
20 Cotton at one time in the *Geraci* case. But, Mr. Flores cannot seriously contend he was injured
21 somehow because he represented Mr. Cotton and Mr. Cotton should have won the *Geraci*
22 lawsuit and any alleged breach of fiduciary duty to Mr. Cotton cannot form the basis of
23 plaintiffs’ claim for conspiracy to eliminate or reduce competition and free trade in violation of
24 the Cartwright Act. Plaintiffs suing under the Cartwright Act must be within the “target area” of
25 the antitrust violation to have standing to sue; i.e., they must have suffered direct injury as a
26 result of the anticompetitive conduct. See, *Cal. Bus. & Prof. Code* § 16750(a); *Cellular Plus, Inc.*
27 *v. Superior Court (U.S. West Cellular)* (1993) 14 Cal.App.4th 1224, 1232; *Vinci v. Waste*
28 *Management, Inc.* (1995) 36 Cal.App.4th 1811, 1815.

1 Since none of the plaintiffs in this case even claim to have been injured by any conduct
2 they attribute to Ms. McElfresh, they are not entitled to any damages from her, let alone punitive
3 damages.

4 **B. The Allegations Against Ms. McElfresh Do Not Rise To The Level Of Malice,**
5 **Oppression Or Fraud Required To State A Claim For Punitive Damages**

6 The allegation that Ms. McElfresh represented Mr. Cotton when she had already
7 represented Mr. Geraci on the Federal CUP application also would not rise to the level of malice,
8 oppression or fraud. There is nothing in the First Amended Complaint to show Ms. McElfresh:

- 9
- 10 • Intended to cause any plaintiff injury, that her conduct was so vile, base or
11 contemptible that it would be looked down upon and despised by reasonable
12 people, or that her conduct is of a character of outrage frequently associated with
13 a crime (the definition of “malice” or “despicable conduct”). *Cal. Civ. Code*
14 section 3294, subd. (c)(1); CACI 3940; *College Hospital, Inc. v. Superior Court*
15 (*Cromwell*) (1994) 8 Cal.4th 704, 725; *Taylor v. Superior Court* (1979) 24 Cal.3d
16 890, 894;
 - 17 • Subjected any plaintiff to cruel and unjust hardship in conscious disregard of their
18 rights or safety (the definition of “oppression”). *Cal. Civ. Code* section 3294,
19 subd. (c)(2); or
 - 20 • Misrepresented or concealed material facts known to her with the intention of
21 depriving one of the plaintiffs of their property or legal rights (the definition of
22 “fraud”) *Cal. Civ. Code* section 3294, subd. (c)(3).

23 Since there is no malice, oppression or fraud alleged, plaintiffs have not stated a valid
24 claim for punitive damages.

25 **C. The Legal Authorities Plaintiffs’ Cite In Their Opposition Do Not Address**
26 **The Issue Of Punitive Damages**

27 Plaintiffs cite two cases in their opposition to support their claim for punitive damages:
28 *Greenwood v. Mooradian*, 137 Cal.App.2d 532 (1955); and *Ross v. Kish*, 145 Cal.App.4th 188,
204 (2006). Neither of these two cases has any application whatsoever to the present case.

1 In *Greenwood v. Mooradian*, the plaintiff and the defendants were all members of a joint
2 venture and the plaintiff sued the defendants for conspiring to exclude him from the venture and
3 diverting all of the assets of the venture to themselves. The Court did hold that the fact that one
4 of the defendants was an attorney for one of the other defendants did not immunize him for
5 liability for conspiracy, but there was no claim for punitive damages against any of the
6 defendants, so the Court's holding has no apparent application to the present motion to strike
7 punitive damages.

8 In *Ross v. Kish*, an attorney sued his former client for unpaid legal fees and the client
9 responded by suing the attorney for breach of contract and legal malpractice. The Court found
10 that since the client refused to appear for deposition, the client's suit was filed in retaliation for
11 the attorney's attempt to recover unpaid legal fees and a trier of fact could reasonably infer the
12 client filed his suit without probable cause (i.e., the client was subject to a malicious prosecution
13 action). The Court's holding in *Ross* just reinforces that the "malice" required for a malicious
14 prosecution action is lack of probable cause to bring a lawsuit against someone. That holding
15 has no application to the present case, where Ms. McElfresh did not sue anyone and plaintiffs are
16 not suing her for malicious prosecution.

17 **III. CONCLUSION**

18 Plaintiffs' request for punitive damages in the First Amended Complaint should be
19 stricken without leave to amend.

20
21 DATED: November 23, 2022

WALSH MCKEAN FURCOLO LLP

22
23
24 By: 

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