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10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
12 WESTERN DIVISION - LOS ANGELES

13 JERROLL B.R. DOLPHIN,  
14 Plaintiff,  
15  
16 v.  
17 REPUBLIC OF LIBERIA, et al.,  
18 Defendants.

Case No. 2:11-cv-06322-RGK-SH  
MEMORANDUM IN SUPPORT OF  
STATE DEFENDANTS' MOTION TO  
DISMISS PLAINTIFF'S  
FIRST AMENDED COMPLAINT  
PURSUANT TO F.R.C.P. 12(b)(2), (5),  
and (6)

DATE: March 26, 2012  
TIME: 9:00 a.m.  
JUDGE: Honorable R. Gary Klausner

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1 **I. Introduction**

2 Defendants Alan Contreras and State of Oregon, Office of Degree  
3 Authorization (hereafter collectively “State Defendants”) move to dismiss the  
4 action because:

- 5 1. Oregon Defendants have not been properly served as shown by the  
6 Affidavits of Jessica McKie, Jennifer Diallo, and Alan Contreras;
- 7 2. Oregon Defendants are not subject to the personal jurisdiction of this court;  
8 and
- 9 3. Plaintiff has failed to state a claim upon which relief can be granted because  
10 Defendant State of Oregon, Office of Degree Authorization (hereafter,  
11 “ODA”), and Defendant Contreras, in his official capacity only, are immune  
12 from suit pursuant to the Eleventh Amendment; Plaintiff’s state law claims  
13 against Contreras in his individual capacity are barred by the Oregon Tort  
14 Claims Act and the Eleventh Amendment; Plaintiff’s state law claims are  
15 barred by the notice requirement of the Oregon Tort Claims Act; and  
16 Plaintiff fails to allege any action by Contreras in his individual capacity.
- 17 4. Defendant Contreras is entitled to qualified immunity as to Plaintiff’s federal  
18 claims.

19 **II. Factual Allegations**

20 Plaintiff filed his First Amended Complaint on February 8, 2012. Affidavit  
21 of Jessica McKie filed with this motion (McKie Aff.) ¶2, Exh. A. To date,  
22 Plaintiff has not filed proof of service with the court for Oregon Defendants.  
23 McKie Aff. ¶3, Exh. A.

24 On or about November 28, 2011, the Oregon Office of Degree Authorization  
25 received a copy of a summons, proof of service for Alan Contreras, and complaint  
26 for United States District Court, Central District of California, Case No. CV 11-

1 06322. Affidavit of Jennifer Diallo (Diallo Aff.) ¶2, Exh. B, previously filed as  
2 Docket #41 and included as Exhibit D attached to McKie Aff. ¶6. The documents  
3 were mailed to 1500 Valley River Dr. Suite 100, Eugene, Oregon 97401 which is  
4 the address for ODA. Diallo Aff. ¶3, Exh. B. The documents were sent by  
5 U.S.P.S. Priority Mail, in a Medium Flat Rate Box and had no tracking information  
6 or return receipt. Diallo Aff. ¶4, Exh. C.

7 Plaintiff's alleged proof of service for Alan Contreras was mailed to 1500  
8 Valley River Dr. Suite 100, Eugene, Oregon 97401 on November 25 or 28, 2011.  
9 McKie Aff. ¶4, Exh. B. No one at ODA is authorized to accept service on behalf  
10 of the State of Oregon or Alan Contreras. McKie Aff. ¶5; Diallo Aff. ¶5. Alan  
11 Contreras retired from State service on March 31, 2011. Affidavit of Alan  
12 Contreras (Contreras Aff.) ¶1, previously filed as Docket #42 and included as  
13 Exhibit E attached to McKie Aff. ¶7. Alan Contreras has not received a summons  
14 or complaint from Plaintiff in regards to this case. Contreras Aff. ¶2.

15 As in Plaintiff's original Complaint, Plaintiff's numerous claims against  
16 Oregon Defendants are based on only three factual allegations which are repeated  
17 throughout the complaint: (1) that Contreras published a "diploma mill" list on the  
18 State of Oregon, Office of Degree Authorization's website (*see, e.g.*, Compl. ¶ 31);  
19 (2) that Contreras sent a letter to the National Accreditation Board of the Republic  
20 of Ghana (*see, e.g.*, Compl. ¶ 2); and (3) that ODA housed an article by George  
21 Gollin on its website (*see e.g.*, Compl. ¶ 163).

### 22 **III. Motion to Dismiss Standard**

23 Fed. R. Civ. P. 12(b)(5) requires dismissal for insufficient service of process.  
24 Fed. R. Civ. P. 12(b)(2) requires dismissal of a complaint for lack of personal  
25 jurisdiction. Fed. R. Civ. P. 12(b)(6) requires dismissal of a complaint for failure  
26 to state a claim upon which relief can be granted.

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1 Only facts as set forth in the complaint are relevant to a motion to dismiss  
2 under Fed. R. Civ. P. 12(b)(6). While Oregon Defendants reject the truthfulness of  
3 many of Plaintiff's factual assertions, the Court's review is limited to the face of  
4 the complaint, documents referenced by the complaint, and matters of which the  
5 Court may take judicial notice. *Levine v. Diamamthuset, Inc.*, 950 F.2d 1478, 1483  
6 (9th Cir. 1991); *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir.  
7 1996); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). A  
8 complaint may be dismissed as a matter of law for two reasons: (1) lack of a  
9 cognizable legal theory or (2) insufficient facts under a cognizable legal theory.  
10 *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984)  
11 (citing 2A J. Moore, *Moore's Fed. Practice* ¶12.08 at 2271 (2d ed. 1982)). When a  
12 court considers a motion to dismiss, all allegations of the complaint are construed  
13 in the plaintiff's favor. *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 191  
14 (9th Cir. 1987).

15 Conclusory or implausible allegations are not sufficient to avoid dismissal.  
16 *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1950, 173 L.Ed.2d 868 (2009);  
17 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929  
18 (2007). Thus, "for a complaint to survive a motion to dismiss, the non-conclusory  
19 'factual content,' and reasonable inferences from that content, must be plausibly  
20 suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*,  
21 572 F.3d 962, 969 (9th Cir. 2009).

22 A plaintiff's bare allegations that government officials acted with a bad  
23 motive should be disregarded. The Court has clearly stated that "bare allegations of  
24 malice should not suffice to subject government officials either to the costs of trial  
25 or to the burdens of broad-reaching discovery." *Harlow v. Fitzgerald*, 457 U.S.  
26 800, 817-818 (1982).

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1 **IV. Argument**

2 **A. Oregon Defendants have not been properly served.**

3 Plaintiff has failed to properly serve Oregon Defendants. Fed. R. Civ.  
4 P. 12(b)(5) requires dismissal for insufficient service of process. A federal court  
5 does not have jurisdiction over a defendant unless the defendant has been served  
6 properly under FRCP 4. *Direct Mail Specialists, Inc. v. Eclat Computerized*  
7 *Technologies, Inc.*, 840 F.2d 685, 688 (9th Cir. 1988). Without substantial  
8 compliance with Rule 4, “neither actual notice nor simply naming the defendant in  
9 the complaint will provide personal jurisdiction.” *Id.* The time limit for service is  
10 120 days after the complaint is filed. Fed. R. Civ. P. 4(m). Plaintiff filed his  
11 original complaint on August 1, 2011. Exh. A. To date, Plaintiff has failed to  
12 properly serve Oregon Defendants as outlined below. Therefore, Plaintiff has  
13 failed to timely serve Oregon Defendants and his action should be dismissed as to  
14 Oregon Defendants.

15 **1. Plaintiff has failed to properly serve the State of Oregon.**

16 Pursuant to FRCP 4j (2), a State must be served by, “delivering a copy of the  
17 summons and of the complaint to its chief executive officer”; or “serving a copy of  
18 each in the manner prescribed by that state’s law for serving a summons or like  
19 process on such a defendant. Pursuant to Oregon Rule of Civil Procedure (ORCP)  
20 D(3)(g), the State must be served by personal service upon the Attorney General or  
21 by leaving true copies of the summons and the complaint at the Attorney General’s  
22 office with a deputy, assistant, or clerk. Here, Plaintiff mailed a copy of the  
23 summons and complaint to the Office of Degree Authorization (Diallo Aff. ¶¶2 and  
24 3, Exh. B), not its chief executive officer or the Attorney General, which fails to  
25 satisfy the requirements of the federal or state rules for service. Therefore,  
26

1 Plaintiff has failed to properly serve the State and Plaintiff's action should be  
2 dismissed as to the State of Oregon, Office of Degree Authorization.

3 **2. Plaintiff has failed to properly serve Contreras.**

4 Pursuant to FRCP 4(e), an individual in the United States must be served by  
5 service in accordance with state law where the district court is located or where  
6 service is made, or by a method authorized by FRCP 4. For an individual in the  
7 United States, FRCP 4(e) authorizes service of process by personal service on the  
8 defendant, or by leaving a copy of the summons and complaint with someone  
9 residing at the individual defendant's dwelling, or by delivery to an agent  
10 authorized to receive service. Under Oregon law, an individual defendant may be  
11 served:

12 [B]y personal delivery of true copies of the summons and the  
13 complaint to such defendant or other person authorized by appointment  
14 or law to receive service of summons on behalf of such defendant, by  
15 substituted service, or by office service. Service may also be made  
16 upon an individual defendant to whom neither subparagraph (ii) nor  
17 (iii) of this paragraph applies by a mailing made in accordance with  
18 paragraph (2)(d) of this section provided the defendant signs a receipt  
19 for the certified, registered, or express mailing, in which case service  
20 shall be complete on the date on which the defendant signs a receipt  
21 for the mailing. Or. R. Civ. Pro. 7(D)(3)(a)(i).

18 Oregon law further provides that:

19  
20 When required or allowed by this rule or by statute, except as  
21 otherwise permitted, service by mail shall be made by mailing true  
22 copies of the summons and the complaint to the defendant by first class  
23 mail and by any of the following: certified, registered, or express mail  
24 with return receipt requested. Or. R. Civ. Pro. 7(D)(2)(d)(i).

23 Pursuant to California Code of Civil Procedure § 415.40:

24 A summons may be served on a person outside this state in any manner  
25 provided by this article or by sending a copy of the summons and of  
26 the complaint to the person to be served by first-class mail, postage  
prepaid, requiring a return receipt.

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1 The California Code of Civil Procedure permits service by personal delivery  
2 to the defendant or a person authorized by him to receive service of process  
3 (§§ 415.10; 416.90); by leaving a copy at the defendant's office, mailing address,  
4 or dwelling and thereafter mailing a copy to that location (§ 415.20).

5 Here, the Office of Degree Authorization received a copy of the summons  
6 and complaint on or about November 28, 2011. Diallo Aff. ¶2. The documents  
7 were sent by U.S.P.S. Priority Mail, in a Medium Flat Rate Box and had no  
8 tracking information or return receipt. Diallo Aff. ¶4, Exh. C. Plaintiff's proof of  
9 service for Alan Contreras claims that Alan Contreras was served by mail at 1500  
10 Valley River Dr. Suite 100, Eugene, Oregon 97401 on November 25 or 28, 2011.  
11 McKie Aff. ¶4, Exh. B. The above address is for ODA. Diallo Aff. ¶3. Alan  
12 Contreras has not received a summons or complaint from Plaintiff in regards to this  
13 case. Contreras Aff. ¶2.

14 Ignoring Plaintiff's failure to comply with the requirements when mailing  
15 under the rules above (Diallo Aff. ¶4, Exh. C), the only form of service Plaintiff  
16 could possibly have satisfied under any of the above rules was office service.  
17 However, Defendant Contreras retired from State service on March 31, 2011.  
18 Contreras Aff. ¶1; Diallo Affid. ¶6. As a result, ODA was not Defendant  
19 Contreras's office when the summons and complaint were allegedly mailed, or  
20 when they were received by ODA. Therefore, Plaintiff has failed to properly serve  
21 Defendant Contreras, and Plaintiff's action against him should be dismissed.

22 **B. Oregon Defendants are not subject to the jurisdiction of this**  
23 **court.**

24 Fed. R. Civ. P. 12(b)(2) requires dismissal of a complaint for lack of  
25 personal jurisdiction. The parameters of personal jurisdiction are set forth in  
26 Rule (k) of the Federal Rules of Civil Procedure. Whether or not personal

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1 jurisdiction exists in this Court over Oregon Defendants is determined by the  
2 provisions of Rule 4(k)(1)(A), *i.e.*, would Oregon Defendants be subject to the  
3 jurisdiction of a court of general jurisdiction in California?

4 California permits the exercise of personal jurisdiction to the full extent  
5 permitted by due process. *Stone v. State of Texas*, 76 Cal.App.4th 1043, 1047, 90  
6 Cal.Rptr.2d 657 (1999) [“California’s long-arm statute permits courts to exercise  
7 jurisdiction over nonresidents on any basis not inconsistent with federal or state  
8 constitutions. (Code Civ. Proc. 410.10.)”]

9 Whether a California court would have personal jurisdiction over Oregon  
10 Defendants is dependent upon whether the plaintiff has alleged “minimum  
11 contacts” between Oregon Defendants and the State of California for purposes of  
12 general or specific jurisdiction. *Bancroft & Masters, Inc., v. Augusta Nat., Inc.*,  
13 223 F.3d 1082, 1086 (9th Cir. 2000). As noted by the *Stone* court, “When a  
14 defendant moves to quash service of process on jurisdictional grounds, the plaintiff  
15 has the initial burden of demonstrating facts justifying the exercise of  
16 jurisdiction.” *Stone v. State of Texas*, 76 Cal.App.4th 1043, 1048, 90 Cal.Rptr.2d  
17 657 (1999).

18 General jurisdiction requires that the contacts be of the sort that approximate  
19 physical presence. *Bancroft & Masters, Inc., v. Augusta Nat., Inc.*, 223 F.3d 1082,  
20 1086 (9th Cir. 2000). There are no facts alleged in the Complaint that suggest that  
21 Plaintiff is claiming general jurisdiction over Oregon Defendants.

22 Absent general jurisdiction, the California Supreme Court has determined  
23 that a defendant “still may be subject to specific jurisdiction of the forum, if the  
24 defendant has purposefully availed himself or herself of forum benefits [citation],  
25 and the ‘controversy is related to or ‘arises out of’ a defendant’s contacts with the  
26

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1 forum.” *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal.4th 434, 446, 58  
 2 Cal.Rptr.2d 899, 926 P.2d 1085 (1996). Federal courts are in accord.

3 The Ninth Circuit, in *Bancroft*, explained that in order for there to be  
 4 specific jurisdiction: (1) the defendant must have performed some act or  
 5 consummated some transaction within the forum or otherwise purposely availed  
 6 itself of the privileges of conducting activities in the forum; (2) the claim must  
 7 arise out of or result from the defendant’s forum related activities; and (3) the  
 8 exercise of jurisdiction must be reasonable. *Ziegler v. Indian River County*, 64  
 9 F.3d 470, 474 (9th Cir. 1995).

10 **1. Purposeful Availment.**

11 The “purposeful availment” prong of the first element of the specific  
 12 jurisdiction analysis may be met in a tort case by what is called an “effects test” if  
 13 the defendant (1) committed an intentional act that was (2) expressly aimed at the  
 14 forum state, and (3) caused harm, the brunt of which is suffered and which the  
 15 defendant knows is likely to have been suffered in the forum state. *Bancroft &*  
 16 *Masters, Inc., supra*, 223 F.3d at 1087. The Ninth Circuit has also noted that the  
 17 effects test “cannot stand for the broad proposition that a foreign act with  
 18 foreseeable effects in the forum state always gives rise to specific jurisdiction.”  
 19 *Id.* There must be “something more.” *Id.* The something more involves the  
 20 “express aiming” at the forum state. That term does not define itself, but the cases  
 21 indicate that the term “encompasses wrongful conduct individually targeting a  
 22 known forum resident.” *Id.* It must be distinguished from “untargeted  
 23 negligence.” *Id.* at 1087-88.

24 It is the presence of individualized targeting of a known forum resident that  
 25 separates the cases finding jurisdiction under the effects test from those cases in  
 26 which the effects test is unsatisfied. *Id.* at 1088. Plaintiff makes just three factual

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1 allegations of action by Oregon Defendants in the complaint: (1) that Contreras  
2 published a “diploma mill” list on the State of Oregon, Office of Degree  
3 Authorization’s website (*see, e.g.*, Compl. ¶ 31); (2) that Contreras sent a letter to  
4 the National Accreditation Board of the Republic of Ghana (*see, e.g.*, Compl. ¶ 2);  
5 and (3) that ODA housed an article by George Gollin on its website (*see e.g.*,  
6 Compl. ¶ 163). These allegations fail to demonstrate that Oregon Defendants  
7 purposely availed themselves of California law. *Ziegler, supra*, 64 F.3d at 474;  
8 *Stone, supra*, 76 Cal.App.4th at 1048. Therefore, Plaintiff has not met his burden.

9           **2. There Must be Forum-Related Activity by the Defendant.**

10           The second prong of the specific jurisdiction test requires that the claim  
11 arises out of or results from the defendant’s forum-related activities. In the Ninth  
12 Circuit, this involves a “but-for” test. *Bancroft & Masters, Inc., supra*, 223 F.3d at  
13 1088. The test is not met if the causal connection is significantly attenuated. *Doe*  
14 *v. American National Red Cross*, 112 F.3d 1048, 1051 (9th Cir. 1997). In this  
15 case, Plaintiff makes no allegations that tie Oregon Defendants to California in any  
16 way.

17           California courts are authorized to exercise jurisdiction “on any basis not  
18 inconsistent with the Constitution of [California] or of the United States.”  
19 California Code of Civil Procedure § 410.10. The Fourteenth Amendment limits  
20 the extent of personal jurisdiction to those instances that do not violate Due  
21 Process rights. Plaintiff alleges that Oregon Defendants published content at  
22 <http://www.osac.state.or.us/oda/unaccredited.aspx>. This website allows materials  
23 to be accessed from any Internet-ready computer. No information or materials are  
24 sold via this website and there are no interactive features. “A passive website that  
25 does little more than make information available to those who are interested in it is  
26 not grounds for the exercise of personal jurisdiction.” *Zippo Manufacturing Co. v.*

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1 *Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1121 (W.D. Penn. 1997). See also  
 2 *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (C.A.9 Ariz. 1997). (Adopting the  
 3 *Zippo* standard in the Ninth Circuit). As Plaintiff has failed to establish personal  
 4 jurisdiction in a California court over Oregon Defendants, Plaintiff's claims against  
 5 them should be dismissed.

6 **C. Plaintiff has failed to state a claim upon which relief can be**  
 7 **granted.**

8 **1. Plaintiff's federal and state claims against the State and**  
 9 **Contreras in his official capacity are barred by the Eleventh**  
 10 **Amendment.**

10 Fed. R. Civ. P. 12(b)(6) requires dismissal of a complaint for failure to state  
 11 a claim upon which relief can be granted. Under the Eleventh Amendment to the  
 12 U.S. Constitution, federal courts may not entertain a lawsuit brought by a citizen  
 13 against a State, its agencies, or departments without the State's consent. *Seminole*  
 14 *Tribe of Florida v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L.Ed.2d 252  
 15 (1996), citing *Hans v. Louisiana*, 134 U.S. 1, 13, 10 S. Ct. 504, 33 L.Ed.842  
 16 (1890); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S.  
 17 Ct. 900, 79 L.Ed.2d 67 (1984). Eleventh Amendment immunity applies to  
 18 individuals acting in their official capacity. *Will v. Michigan Dept. of State Police*,  
 19 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (a suit against state  
 20 officials in their official capacities is not a suit against the officials but rather is a  
 21 suit against the officials' offices and, thus, is no different from a suit against the  
 22 State itself).

23 "Although the State of Oregon has consented to be sued in Oregon courts for  
 24 the torts committed by its employees, officers, or agents while acting within the  
 25 course and scope of their employment under the OTCA, it has not consented to be  
 26 sued in federal courts for those torts." *Blair v. Toran*, CV-99-956-ST, 1999 U.S.

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1 Dist. LEXIS 20033, at \*69 (D. Or. Dec. 2, 1999). As the State has not expressly  
2 consented to be sued by Plaintiff in a federal court, all of Plaintiff's state and  
3 federal claims against the State, and Contreras in his official capacity, must be  
4 dismissed pursuant to the Eleventh Amendment.

5           **2. Plaintiff's state claims against Contreras in his individual**  
6           **capacity are barred by the Oregon Tort Claims Act and the**  
7           **Eleventh Amendment.**

8           Plaintiff's state law claims against Contreras in his individual capacity fail  
9 because the State and its employees are entitled to absolute immunity from state  
10 law claims, pursuant to the Oregon Tort Claims Act and the Eleventh Amendment.  
11 *See* ORS 30.265 (the state must be substituted as the sole defendant for any state  
12 law claims made against state employees); *Hale v. Arizona*, 993 F.2d 1387, 1398  
13 (9th Cir 1993) (holding that the state is immune from suit in federal court pursuant  
14 to the Eleventh Amendment). Consequently, this Court should dismiss all state  
15 law claims.

16           **3. Plaintiff's state claims against Oregon Defendants are**  
17           **barred by the notice requirement of the Oregon Tort**  
18           **Claims Act.**

19           Plaintiff's state law claims against Oregon Defendants fail because he failed  
20 to comply with the notice requirements set forth in the Oregon Tort Claims Act  
21 ("OTCA"). There is no allegation in the *First Amended Complaint* that tort notice  
22 was provided to the State related to the claims against Oregon Defendants. OTCA  
23 requires that notice of a claim against a public body or officer is given within 180  
24 days of the alleged loss or injury. ORS 30.275(2). "The requirement that notice be  
25 given timely is a substantive condition precedent to recover under the Oregon Tort  
26 Claims Act that, if not satisfied, deprives a plaintiff of the right to make a claim."  
*Tyree v. Tyree*, 116 Or App 317, 320, 840 P.2d 1378 (1992), *rev denied* 35 Or 644

1 (1993). Because Plaintiff failed to provide timely tort claim notice on his state law  
2 claims, they fail as a matter of law.

3 **4. Plaintiff fails to allege any action by Contreras in his**  
4 **individual capacity to support his federal or state law**  
5 **claims.**

6 A complaint may be dismissed as a matter of law for insufficient facts under  
7 a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F2d 530,  
8 533-34 (9th Cir. 1984) (citing 2A J. Moore, *Moore's Fed. Practice* ¶12.08 at 2271  
9 (2d ed. 1982)). A plaintiff may bring a 42 U.S.C. §1983 claim against a person  
10 who deprives them of their constitutional rights under color of state law. To do  
11 that, a plaintiff must bring a claim against the person in his individual capacity.  
12 *Will, supra*, 491 U.S. at 71. Plaintiff names Contreras in his individual capacity,  
13 but alleges only official actions by Contreras in his Complaint: (1) that Contreras  
14 published a “diploma mill” list on the State of Oregon, Office of Degree  
15 Authorization’s website (*see, e.g.*, Compl. ¶ 31); (2) that Contreras sent a letter to  
16 the National Accreditation Board of the Republic of Ghana (*see, e.g.*, Compl. ¶ 2);  
17 and (3) that ODA housed an article by George Gollin on its website (*see e.g.*,  
18 Compl. ¶ 163). Plaintiff admits these actions were official acts taken by Contreras  
19 as Director of the Office of Degree Authorization. *See e.g.* Compl. ¶¶ 234 and  
20 304. Plaintiff’s remaining bare allegations that Contreras acted with a bad motive  
21 towards Plaintiff should be disregarded. *See e.g.* Compl. ¶¶ 2, 3, and 369. The  
22 Court has clearly stated that “bare allegations of malice should not suffice to  
23 subject government officials either to the costs of trial or to the burdens of broad-  
24 reaching discovery.” *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818 (1982). As a  
25 result, Plaintiff fails to allege any action by Contreras in his individual capacity  
26 and any § 1983 claim must fail. Furthermore, because Plaintiff fails to allege any  
action by Contreras in his individual capacity, Plaintiff alleges no facts in support

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1 of his state law claims against Contreras in his individual capacity and all state law  
2 claims against him must fail.

3 **D. Defendant Contreras is entitled to qualified immunity from**  
4 **Plaintiff's federal §1983 claims.**

5 Fed. R. Civ. P. 12(b)(6) requires dismissal of a complaint for failure to state  
6 a claim upon which relief can be granted. Qualified immunity relieves state  
7 officials from the burden of defending a suit for damages if a reasonable official in  
8 the particular circumstances could have believed that his conduct was lawful in  
9 light of clearly established law. *Pearson v. Callahan*, 555 U.S. 223, 243-244  
10 (2009); *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982); *Anderson v.*  
11 *Creighton*, 483 U.S. 635, 640 (1987). Entitlement to qualified immunity is a  
12 question that must be considered prior to the suit moving forward against state  
13 defendants. *Siegert v. Gilley*, 500 U.S. 226, 231 (1991). The Supreme Court has  
14 stated that “[o]ne of the purposes of immunity, absolute or qualified, is to spare a  
15 defendant not only unwarranted liability, but unwarranted demands customarily  
16 imposed upon those defending a long drawn out lawsuit.” *Id.* at 232. Qualified  
17 immunity is “an entitlement not to stand trial or face the other burdens of  
18 litigation.” *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct.  
19 2806 (1985). Consequently, an early determination is favored. In *Mitchell*, the  
20 Court recognized that, if the district court determines that an official is entitled to  
21 qualified immunity on any claim for damages pursuant to 42 U.S.C. § 1983, the  
22 court should dismiss the claim prior to discovery.

23 Plaintiff's allegation that Oregon Defendants acted with a bad motive should  
24 be disregarded. See e.g. Compl, ¶ 221. The Court has clearly stated that “bare  
25 allegations of malice should not suffice to subject government officials either to  
26 the costs of trial or to the burdens of broad-reaching discovery.” *Harlow*, 457 U.S.

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1 at 817-818. Therefore, to overcome qualified immunity, a plaintiff must show that  
2 the government official's conduct violates clearly established federal statutory or  
3 constitutional rights of which a reasonable person would have known. *Id.* at 818.

4 Since the decision in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), federal  
5 courts had decided qualified immunity using a sequential inquiry: (1) whether the  
6 facts alleged demonstrate a violation of a constitutional right and, if so, (2) whether  
7 the constitutional right asserted was "clearly established" at the time of the alleged  
8 misconduct. In *Pearson*, the Court explicitly held that the sequence of steps  
9 required under *Saucier* "should no longer be regarded as mandatory." *Pearson*,  
10 555 U.S. at 236. Rather, the Court concluded that "judges of the district courts and  
11 the courts of appeals should be permitted to exercise their sound discretion in  
12 deciding which of the two prongs of the qualified immunity analysis should be  
13 addressed first in light of the circumstances in the particular case at hand." *Id.*

14 To overcome qualified immunity, "a plaintiff must offer more than general  
15 conclusory allegations that the defendant violated his Constitutional rights."  
16 *Backlund v. Barnhart*, 778 F.2d 1386, 1389 (9th Cir. 1985). Instead, a plaintiff  
17 must plead and prove that a defendant "violated a particular 'clearly established'  
18 right." *Id.* (citations omitted). Defendants "cannot be expected to predict the  
19 future course of constitutional law," but are not shielded from liability for acts that  
20 violate clearly established constitutional rights. *Procunier v. Navarette*, 434 U.S.  
21 555, 562 (1978) (citations omitted); *see also Harlow v. Fitzgerald, supra*, 457 U.S.  
22 at 818. To be clearly established, "[t]he contours of the right must be sufficiently  
23 clear that a reasonable official would understand that what [the official] is doing  
24 violates that right." *Anderson v. Creighton, supra*, 483 U.S. at 640.

25 Here, Plaintiff alleges that Defendant Contreras acted in his official capacity  
26 to (1) publish a "Diploma Mill List" (Compl. ¶31); (2) send a letter to the National

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1 Accreditation Board of the Republic of Ghana (Compl. ¶2, Exh. 49 and 50); and  
2 (3) house an article by George Gollin on its website (Compl. ¶ 163). No  
3 reasonable official of a state office of degree authorization would understand that  
4 (1) providing information about diploma mills; (2) writing a letter to the National  
5 Accreditation Board of the Republic of Ghana ; or (3) posting a link to an article  
6 on the office website, would violate any of Plaintiff's constitutional rights.

7 Plaintiff's allegations that Defendant Contreras violated Oregon statutes  
8 provides no basis for Plaintiff's §1983 claims. Plaintiff must show a violation of a  
9 federal right. *Saucier*, 533 U.S. at 201.

10 Plaintiff's allegations that Defendant Contreras acted with a bad motive  
11 should be disregarded. *See e.g.*, Compl, ¶ 221. The Court has clearly stated that  
12 "bare allegations of malice should not suffice to subject government officials either  
13 to the costs of trial or to the burdens of broad-reaching discovery." *Harlow*, 457  
14 U.S. at 817-818. Therefore, Defendant Contreras is entitled to qualified immunity  
15 from Plaintiff's §1983 claims.

16 **V. Conclusion**

17 For the foregoing reasons, Plaintiff's claims against Oregon Defendants  
18 should be dismissed in their entirety.

19 DATED this 22 day of February, 2012.

20 Respectfully submitted,

21 JOHN R. KROGER  
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