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and Attorney for Plaintiffs
AMY SHERLOCK; Minors T.S.
and S.S.; and JANE DOE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ANDREW FLORES, an individual, AMY SHERLOCK, on her own behalf and on behalf of her minor children, T.S. and S.S. Plaintiffs, v. GINA M. AUSTIN, et al., Defendants.	Case No.: 3:20-cv-00656-TWR-DEB RESPONSE IN OPPOSITION OF DEFEDANT JOEL WOHLFEIL'S MOTION TO DISMISS FIRST AMENDED COMPLAINT Date: May 5, 2021 Time: 1:30 p.m. Courtroom: 3A Judge: Hon. Todd W. Robinson

INTRODUCTION

In their First Amended Complaint ("FAC"), Plaintiffs alleged and provided evidentiary support to demonstrate that the judgments issued by Judge Wohlfeil in *Cotton*

1 *I*[1] and *Cotton II* (the "Cotton Judgments") were void for, as material to this motion, being
2 the product of (i) judicial bias, (ii) a fraud on the court, and (iii) enforcing an illegal
3 contract.

4 Judge Joel Wohlfeil's motion to dismiss Plaintiffs' FAC ("MTD") must be denied
5 because it ignores that these claims provide support for Plaintiffs' cause of action
6 pursuant to § 1983 seeking prospective relief. Specifically, that Wohlfeil not be allowed
7 to preside over the *Cotton I* and *Cotton II* once the Cotton Judgments are declared void.
8 To hold otherwise is to state that the Cotton Judgments are void, but that Wohlfeil may
9 continue to preside over *Cotton I* and *Cotton II*. This is not possible as one ground for
10 holding the Cotton Judgments void is Wohlfeil's judicial bias.

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12 **MATERIAL SUMMARY OF ALLEGATIONS FROM THE FAC**

Lawrence Geraci has been sued and sanctioned at least three times by the City of
13 San Diego (the "City") for his owning/management of illegal marijuana dispensaries at
14 his real properties. (*See* FAC ¶¶ 107-109.) Consequently, pursuant to State of California
15 (the "State") and City laws, regulations and public policies, Geraci cannot own a
16 conditional use permit ("CUP") or license to operate a legal cannabis dispensary (the
17 "Sanctions Issue"). (*See* FAC ¶ 132.)

18 Darryl Cotton is the owner-of-record of real property (the "Property") in the City
19 that qualifies for a cannabis CUP. (*See* FAC ¶¶ 112-114.) Geraci, in order to prevent
20 Cotton from selling the Property to a third-party, fraudulently induced Cotton into
21 entering an oral joint venture agreement and promised to provide Cotton, inter alia, a 10%
22 equity position in the CUP as consideration for the Property (the "JVA"). (*See* FAC ¶¶
23 116-118.) However, Geraci could not actually honor the JVA because he could not own
24 a cannabis CUP because of the Sanctions Issue. (*See* FAC ¶ 172.)

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27 [1] For reference all terms not otherwise defined herein have the same meaning as set forth in the FAC.

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1 To unlawfully circumvent the Sanctions Issue, Geraci submitted a CUP application
2 at the Property using his secretary, Rebecca Berry, as a proxy (the "Berry Application").
3 (*See* FAC ¶ 134.) In the Berry Application, in violation of applicable disclosure laws,
4 regulations and the plain language of the City's CUP application forms that she
5 certified she understood, Berry knowingly and falsely certified that she is the true and
6 sole owner of the CUP being applied for (the "Berry Fraud" and, collectively with the
7 Sanctions Issue, the "Illegality Issues"). (*See* FAC ¶ 172.)
8 Cotton discovered the Berry Fraud and demanded that Geraci reduce the JVA to
9 writing. (*See* FAC ¶ 126.) Geraci refused, Cotton then terminated the JVA with Geraci
10 and entered into a written joint venture agreement with Richard Martin (plaintiff-attorney
11 Andrew Flores' predecessor in interest). (*See* FAC ¶ 179.) The next day, Geraci's
12 attorneys from the law firm of Ferris & Britton ("F&B") served Cotton with a sham
13 action, *Cotton I*, and a recorded lis pendens on the Property (the "F&B Lis Pendens").
14 (*See* FAC ¶¶ 126-127.) The *Cotton I* complaint denies the existence of the JVA and is
15 predicated on the false allegation that a three-sentence document, executed as a receipt
16 by Geraci and Cotton, is a contract for Geraci's purchase of the Property (the "November
17 Document"). (*See* FAC ¶ 135,155.)
18 When Cotton first appeared before Wohlfeil, he argued that Weinstein had acted
19 unethically by filing suit that lacked probable cause. Wohlfeil responded that he did not
20 believe that, inter alia, Weinstein was capable of acting unethically. (*See* FAC ¶ 180.)
21 Thereafter, Flores, at a hearing, informed Wohlfeil that Cotton would be filing a motion
22 to disqualify him for his statements that Weinstein was not capable of acting unethically
23 (the "DQ Motion"). (*See* FAC ¶¶ 181-183.) Wohlfeil requested an offer of proof, which
24 Flores responded to, and Wohlfeil stated that he "may" have made those statements
25 because he had known Weinstein since they first began their legal careers as young
26 attorneys. (*Id.*)
27 In the FAC, Plaintiffs allege that the Extrajudicial Statements are evidence of
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1 judicial bias warranting the Cotton Judgments be declared void. (*See* FAC ¶¶ 183-186.)
2 Nowhere in the MTD does Wohlfeil dispute or deny that he made the Extrajudicial
3 Statements or that they do not constitute evidence of judicial bias. (*See gen*. MTD.)

4 Plaintiff's allege that the DQ Motion was properly served on Wohlfel's law clerk
5 and that Wohlfeil made knowing false statements in the DQ Order denying the DQ
6 Motion stating that it was not properly served. (*See* FAC ¶¶ 253-254.)

7 In the FAC, Plaintiffs allege with specificity that the Cotton Judgments are void
8 for enforcing an illegal contract that violates State and City disclosure laws as well as the
9 statute of frauds and the equal dignities rule. (*See* FAC ¶¶ 279-281.) Nowhere in the
10 MTD does Wohlfeil dispute or deny that the Cotton Judgments enforce an illegal
11 contract. (*See gen*. MTD.) Neither does Wohlfeil dispute or deny that he found the
12 defense of illegality had been waived (FAC ¶ 198), but that such a position was both
13 factually and legally contradicted. *Factually*, because Cotton had in fact raised the issue
14 of illegality repeatedly over the course of years. (FAC ¶ 202 (description of numerous
15 times illegality issue raised before Wohlfeil over the course of years).) *Legally*, because
16 it is impossible to waive the defense of illegality before the trial court when the evidence
17 of illegality is before the court. (FAC ¶ 205 (citing *City Lincoln-Mercury Co. v. Lindsey*,
18 52 Cal.2d 267, 274 (Cal. 1959) ("A party to an illegal contract cannot ratify it, cannot be
19 estopped from relying on the illegality, and cannot waive his right to urge that defense.").
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21 **LEGAL STANDARD**

"To survive a motion to dismiss, a complaint must contain sufficient factual matter,
22 accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*,
23 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "While legal conclusions
24 can provide the framework of a complaint, they must be supported by factual allegations."
25 *Id*. at 679. A court is "free to ignore legal conclusions, unsupported conclusions,
26 unwarranted inferences and sweeping legal conclusions cast in the form of factual
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allegations." *Farm Credit Servs. v. Am. State Bank*, 339 F.3d 764, 767 (8th Cir. 2003) (citation omitted).

ARGUMENT

A. Wohlfeil's Extrajudicial Statements are the textbook definition of judicial bias that mandate the Cotton Judgments be declared void.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980). In addition, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954); *Exxon Corp. v. Heinze*, 32 F.3d 1399, 1403 (9th Cir. 1994) ("[T]he Constitution is concerned not only with actual bias but also with 'the appearance of justice.'"). "Bias exists where a court has prejudged, or reasonably appears to have prejudged, an issue." *Kenneally v. Lungren*, 967 F.2d 329, 333 (9th Cir. 1992) (quotation and citation omitted).

"The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

The Extrajudicial Statements are by themselves irrefutable and dispositive evidence on the issue of judicial bias. *Liteky v. United States*, 510 U.S. 540, 545. Wohlfeil prejudged that Weinstein filed *Cotton I* with probable cause.

Further, Wohlfeil's statements at the motion for new trial finding that the defense of illegality had been waived, factually and legally contradicted, would lead any reasonable person to believe that he did not read Cotton's briefs and evidence that he was presented with. An individual does not have to be an attorney to understand that Courts do not have the power to help parties commit crimes. *Erhart v. BOFI Holding, Inc.*, No. 15-cv-02287-BASNLS, at *12 (S.D. Cal. Feb. 14, 2017) ("No principle of law is better

settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out[.]") (quoting *Lee On v. Long*, 37 Cal. 2d 499, 502 (1951)).

The record and Wohlfeil's own failure in his MTD to (i) deny his Extrajudicial Statements are the stereotype of judicial bias, (ii) that he found the defense of illegality had been waived, or (iii) that he conspired with his law clerk to falsely state the DQ Motion was not properly served, would lead any reasonable person to believe that Wohlfeil is not impartial. The failure to meet the requirement that "justice must satisfy the appearance of justice" is fatal to any and all of Wohlfeil's arguments seeking to coverup his actions. *Murchison*, 349 U.S. 133, 136 (1955)).

B. *Wohlfeil's MTD admits he entered the Cotton Judgements that enforce an illegal contract.*

Wohlfeil does not deny that the Cotton Judgments enforce an illegal contract. (*See gen.* MTD.) Wohlfeil admits that the agreement that the *Cotton I* and *Cotton II* judgments is illegal by solely referring to is as an "alleged" contract and at no point addressing the issue of illegality in his MTD. Specifically, that the agreement being enforced by the *Cotton I* and *Cotton II* judgments violates, *inter alia*, Business & Professions Code ("BPC") § 26057, San Diego Municipal Code ("SDMC") § 11.0401(b), and the statute of frauds and the equal dignities rule (Civ. Code §§ 1624(4), 2309). (*See* FAC ¶¶ 279-281.)

Wohlfeil does not have the power to enter a judgment that enforces an illegal contract. *Erhart v. BOFI Holding, Inc.*, No. 15-cv-02287-BASNLS, at *12 (S.D. Cal. Feb. 14, 2017) ("No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out[.]") (quoting *Lee On v. Long*, 37 Cal. 2d 499, 502 (1951)).

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C. Plaintiffs state valid § 1983 causes of action against Wohlfeil.

Due Process. In *Le Grand v. Evan*, 702 F.2d 415 (2d Cir. 1983), appellant asserted a violation of 42 U.S.C.S. § 1983 by defendants, county clerks, city, and state, by refusing to accept applications for a writ of habeas corpus, for a restraining order, for an order to show cause, and for leave to proceed in forma pauperis, which others sought to file on his behalf. "The court stated that refusal of a clerk of a court to accept the papers of a litigant seeking to commence an action under a state statute could have deprived that litigant of federal constitutional right. Therefore, the court reversed and remanded because it found that appellant's complaint alleged enough to raise a colorable claim that defendant had deprived him of federal rights while acting under color of state law." *Id*. at 416.

More specifically the court there stated: "Considering its allegations as truthful, [plaintiff's] complaint alleges enough to raise a colorable claim that Evan [- a state court clerk-] deprived him of federal rights while acting under color of state law. The refusal of a clerk of a court to accept the papers of a litigant seeking to commence an action under a state statute may deprive that litigant of federal constitutional rights." *Le Grand v. Evan*, 702 F.2d 415, 418 (2d Cir. 1983) (citations omitted).

Here, Flores called and confirmed with Wohlfeil's clerk that the DQ Motion was served while Wohlfeil was in chambers. (FAC, Ex. 5 (Flores' phone log showing call to Wohlfeil's chambers)). The FAC alleges that Wohlfeil knowingly made a false statement, conscripting his clerk in the lie, to dismiss the DQ Motion by having his clerk allege he was not in chambers when the DQ Motion was served. As in *Le Grand*, the allegation, supported by Flores' phone records to Wohlfeil's chambers, raises a colorable § 1983 claim.

D. Neither Judicial Immunity nor the Eleventh Amendment bar Plaintiffs' § 1983 causes of action against Wohlfeil.

"It is now established that judicial immunity does not bar declaratory or injunctive relief in actions under§ 1983." *Mullis v. U.S. Bankruptcy Ct., Dist of Nevada*, 828 F.2d 1385, 1391 (9th Cir. 1987). "'Congress intended § 1983 to be an independent protection for federal rights and ... there [is] nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review.'" *Id*. at 1393 (quoting *Pulliam v. Allen*, 466 U.S. 522, 523 (1984) (emphasis added)).

The Ninth Circuit has held that a suit seeking injunctive relief against state officials is not barred. *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1187–1188 (9th Cir. 2003) (suit for injunctive relief against state officials is not barred).

Thus, neither judicial immunity nor the Eleventh Amendment bar Plaintiffs § 1983 claim against Wohlfeil seeking prospective relief to prevent Wohlfeil from presiding over *Cotton I* to which Plaintiffs will be a party once the Cotton Judgments are declared void.

E. Flores states a valid § 1983 claim against Wohlfeil.

Plaintiff Flores has alleged that he maintained a property right in the subject property by way of contract with his predecessor-in-interest Richard J. Martin, who had purchased the subject property at the time that Cotton cancelled the agreement with Geraci. (FAC at 38:9-17). Flores has not had his day in court, as is his right as a indispensable party, to prove the merits of his claims to the subject property.

> [O]ther persons with similar interests are indispensable parties. The reason is that a judgment in favor of one claimant for part of the property or fund would necessarily determine the amount or extent which remains available to the others. Hence, any judgment in the action would inevitably affect their rights. *Bank of California v. Superior Court*, 16 Cal.2d 516, 521 (Cal. 1940)

Allowing Wohlfeil to use his own summary minute order denying Flores' motion to intervene, which has no factual or legal analysis, as a shield to the claims made against him herein, deprives Flores of a property right without due process. It is long established

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precedent that deprivation of a Constitutionally protected right, either by legislation or the judiciary requires due process:

> We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the Laclede case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, -- whether it has had an opportunity to present its case and be heard in its support…. [W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him ***some real opportunity to protect it***.

Brinkerhoff-Faris Trust & Sav. Co. v. Hill (1930) 281 U.S. 673, 681-682.

How can Flores lose his rights to the property pursuant to a minute order in an action that resulted in a judgment that enforces an illegal contract and was the product of judicial bias? He cannot. That is why the law protects parties even from state court judges when they violate the constitutional rights of parties, and this Court is empow ered and duty bound to prevent Wohlfeil from continuing to violate the rights of Plaintiffs in state court. *Miofsky v. Superior Court of California*, 703 F.2d 332, 335 (9th Cir. 1983) ("we know of no ground for exempting from the broad reach of § 1983 actions taken by persons acting under color of state law in judicial proceedings, whether those persons are ***judges*** or others appointed by judges to act on behalf of the court.") (emphasis added).[2]

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[2] *See* Jeffrey W. Stempel. *Playing Forty Questions: Responding to Justice Roberts's Concerns in Caperton and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 S.W.L. REV. 1. 8 (2009) note 87, at 66 ("Although states'

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F. Ratification of the Cotton Judgments ratifies and enforces an illegal contract.

"Contracts for transactions that violate the law are illegal and void under California law." *Saslow v. Andrew*, 898 F.2d 715, 723 (9th Cir. 1990) (emphasis added). "The preclusive effect accorded a state court judgment in a subsequent federal court proceeding is determined by reference to the laws of the rendering state." *U.S. ex Rel. Robinson Rancheria v. Borneo*, 971 F.2d 244, 250 (9th Cir. 1992).

Wohlfeil does not have the power to enter a judgment that violates the law and any order or judgment that enforces an illegal contract is void. *See, e.g., Kalb v. Feuerstein*, 308 U.S. 433, 438, 60 S. Ct. 343, 84 L. Ed. 370 (1940) (bankruptcy proceedings may oust state court of power to foreclose on property, and if state court acts anyway in these circumstances, its order is "not merely erroneous but … beyond its power, void, and subject to collateral attack").

This Court is bound to not ratify or enforce any judgments or orders that enforce a contract contrary to law or is the product of judicial bias. *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985) ("It is well settled that a judgment is void " if the court that considered it lacked jurisdiction of the subject matter, or if the parties or if [the court] acted in a manner inconsistent with due process of law.' [Citation.]") Nothing can make an illegal contract legal or a void judgment enforcing an illegal contract valid, and thus they are able to be collaterally at. *Redlands Etc. Sch. Dist. v. Superior Court*, 20 Cal.2d 348, 362-63 (Cal. 1942) ("It has been held that the affirmance by an appellate court of a void judgment imparts to it no validity; and especially if such affirmance is put upon grounds not touching its validity…. **A judgment absolutely void may be attacked anywhere, directly or collaterally whenever it presents itself, either by parties or *strangers***. It is simply a nullity, and can be neither a basis nor evidence of any right

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rights are an important component of the American system, deference to state courts cannot be so great that it permits decision-making by judges who reasonably appear to lack neutrality.").

1 whatever. Moreover, the affirmance of a void judgment on appeal does not make it
2 valid.") (cleaned up).

3 ***G. Wohlfeil asks this Court to deny Plaintiffs any relief and thereby asks this Court***
4 ***to give effect to the illegal contract which the Cotton Judgments enforce.***

5 "To deny a remedy to reclaim [property procured through an illegal contract] is to
6 give effect to the illegal contract." *Danebo Lumber Co. v. Koutsky-Brennan-Vana Co.*,
7 182 F.2d 489, 495 (9th Cir. 1950) (quoting *Parkersburg v. Brown*, 106 U.S. 487, 503)).
8 Wohlfeil entered judgments that enforce an illegal contract and now, rather than
9 admitting to his mistakes, he asks this Court to deny Plaintiffs any relief in order to cover
10 up his own actions. The Court should not.

11 ***H. Wohlfeil's arguments in his MTD are frivolous.***

12 All of Wohlfeil's arguments in his MTD are frivolous because they presuppose
13 that Plaintiffs have not stated a § 1983 cause of action against him. As set forth above,
14 they have.

15
16 **CONCLUSION**

17 For the reasons set forth above, Plaintiffs request that this Court deny Wohlfeil's
18 MTD and grant Plaintiffs cause of action seeking prospective relief against him.

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20 Dated: April 21, 2021

Respectfully Submitted,
Law Offices of Andrew Flores

21
22 By /s/ Andrew Flores

Plaintiff *In Propria Persona*, and
23 Attorney for Plaintiffs AMY SHERLOCK
24 and Minors T.S. and S.S.

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