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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, 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 MCELFRESH, an 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; EULENTHIAS 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

Judge: Hon. James A. Mangione

DEFENDANT LARRY GERACI'S AND REBECCA BERRY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIAL MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO CIVIL PROCEDURE SECTION 425.16 (ANTI-SLAPP STATUTE)

(Related to ROA #11)

DATE: **October 21, 2022**
TIME: **9:00 am**
DEPT: **C-75**

[IMAGED FILE]

Action Filed: December 3, 2021
Trial Date: Not Yet Set

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I. INTRODUCTION

In the operative First Amended Complaint filed December 23, 2021 (the "FAC," ROA#11), plaintiffs, Flores and Sherlock, variously assert four causes of action against defendants, Larry Geraci and Rebecca Berry, namely: (1) the First COA for Conspiracy to Monopolize in Violation of the Cartwright Act (the "Cartwright Act Claim"); (2) the Fifth COA for Unfair Competition and Unlawful Business Practices (the "UCL Claim"); (3) the Sixth COA for Declaratory Relief (the "Decl Relief Claim," which is brought solely by plaintiff Flores against defendant Geraci); and (4) the Seventh COA for civil conspiracy, which is not a separate claim as a matter of law.

As discussed below, each of the claims asserted against defendants Geraci and Berry are based upon protected activity, namely, allegations of wrongful conduct in connection with seeking a conditional use permit ("CUP") and in connection with litigation activity in prior lawsuits. In addition, plaintiffs cannot establish the requisite minimal merit of their claims based on the alleged protected activities because the litigation privilege set forth Cal. Civ. Code 47(b) and the *Noerr-Pennington* doctrine bar the claims. Additionally, plaintiffs cannot establish the elements of their claims.

II. SUMMARY OF ARGUMENT

The First COA for Violation of the Cartwright Act (Bus. & Prof. Code § 16700) is expressly based upon petitioning activity protected by the anti-SLAPP statute. Plaintiffs allege that "[t]he defining illegal act of the Enterprise is the acquisition of CUPs for its principals" … "in the City and County of San Diego" [FAC, ¶¶ 4, 6], and "[t]his action focuses on the Enterprise's unlawful acts in acquiring four CUPs: (i) the Ramona CUP, (ii) the Balboa CUP, (iii) the Federal CUP, and (iv) the Lemon Grove CUP. [FAC, ¶ 7, fns.3-6]. As to the alleged involvement by Geraci and Berry in the Enterprise, plaintiffs allege they unlawfully applied for and attempted to obtain, although unsuccessfully, a CUP for the Federal Property. [FAC, ¶¶ 119-125]. Additionally, plaintiffs also base their claim upon protected litigation activity, alleging "[t]he unlawful acts taken by the Enterprise in furtherance of the Antitrust Conspiracy include "sham" litigation" wrongfully filed, allegedly which is predatory and anticompetitive conduct. [FAC, ¶¶ 5, 148, 195, 283, 316]. As to this involvement by Geraci and Berry in the Enterprise, plaintiffs allege a litany of wrongful conduct by them in connection with the preparation, filing, and prosecution of the *Cotton I* lawsuit.

The Fifth COA for Unfair Competition (Cal. Bus. & Prof. Code § 17200 et seq.), is also expressly based upon the preparation, filing, and lobbying of CUP applications with the City by Geraci and Berry (FAC ¶ 315); the filing and maintaining of the alleged sham *Cotton I* action by Geraci and F&B (FAC ¶ 316), including Geraci and F&B's alleged collusion to fabricate, present and testify falsely and to suborn perjury (FAC ¶¶ 317.) This COA is based upon protected activity and is inadequately pled.

The Sixth COA for Declaratory Relief, in which Plaintiff Flores (only) seeks to have the *Cotton I* judgment declared void (FAC ¶ 325) is based solely on protected activity in connection with the *Cotton I* judicial proceeding. Plaintiff Flores cannot establish the claim has any merit because a) he lacks standing to bring this claim, and b) the litigation privilege bars the claim.

The Seventh COA for Civil Conspiracy fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc. § 430.10(e).) Conspiracy is not a separate cause of COA.

III. ANTI-SLAPP MOTION GENERAL PRINCIPLES

Under California's anti-SLAPP statute,[1] the court must strike a "cause of action" arising from a defendant's act in furtherance of a constitutionally protected right of petition or free speech unless the plaintiff shows a probability of prevailing on the merits. (Code Civ. Proc., § 425.16, subd. (b)(1).)

The anti-SLAPP analysis involves a two-pronged test. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).) A court must first determine whether the complaint alleges protected free speech or petitioning activity, and whether the claims the movant seeks to strike "aris[e] from" such protected activity. (*Id.* at p. 396; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).) If so, the burden shifts to the plaintiff to establish a prima facie showing of merit in "a summary-judgment-like procedure." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278, 291 (*Soukup*).) If a defendant has established a prima facie showing that a claim is based upon protected activity, the burden shifts to the plaintiff to establish the lawsuit has at least minimal merit. (*Patel v. Chavez* (2020) 48 Cal.App.5th 484, 489.) Any claims or allegations as to which the plaintiff fails to make such a prima facie showing "must be stricken." (*Baral*, *supra*, 1 Cal.5th at p. 395.)

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[1] "SLAPP" is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, fn. 1.)

First Prong. "[T]he moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them." (*Baral*, *supra*, 1 Cal.5th at p. 396.) In other words, the moving defendant must satisfy the first prong – that is, establish that the cause of action arises from protected activity, as defined by statute.

Code Civ. Proc. §425.16(e) is the operative provision and describes four categories of protected speech and conduct. Only the first two are pertinent here: "(1) any written or oral statement or writing made before a . . . judicial proceeding, or any other official proceeding authorized by law; and (2) any written or oral statement or writing made in connection with an issue under consideration or review by a . . .judicial body, or any other official proceeding authorized by law"

"A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, 'the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech.' [Citations.]" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1063 (*Park*).) To determine whether a claim arises from protected activity, courts must "consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Id.* at p.1063.) "Courts then must evaluate whether the defendant has shown any of these actions fall within one or more of the four categories of ' "act[s]" ' protected by the anti-SLAPP statute." (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 884, citing Code Civ. Proc. § 425.16, subd. (e).)

Second Prong. If the defendant meets his burden to establish a prima facie showing that a claim is based on "protected activity" the burden shifts to the plaintiff to establish the lawsuit has at least "minimal merit." (*Park*, *supra*, 2 Cal.5th at p. 1061; *Navellier*, *supra,* 29 Cal.4th at p. 89.) Applying a "summary-judgment-like" test, the court accepts as true the admissible evidence favorable to the plaintiff and evaluates defendants' evidence to determine whether it defeats plaintiffs' showing as a matter of law. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714; *Soukup* 39 Cal.4th at p .291; *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 828 [we must draw "every legitimate favorable inference" from the plaintiff's evidence].) In other words, the court determines "whether a prima facie showing has been made that would warrant the claim going forward." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965 ["Whether plaintiffs have established a prima facie case is a question of law"].) (See *Cuevas-Martinez v. Sun Salt Sand, Inc.*

(2019) 35 Cal.App.5th 1109, 1117.)

IV. ARGUMENT

A. The First Prong - Plaintiffs' Claims Arise from Protected Activity.

First, plaintiffs allege in the FAC, paras 4 and 6, that "[t]he defining illegal act of the Enterprise is the acquisition of CUPs for its principals" … "in the City and County of San Diego" [FAC, ¶¶ 4, 6], and "[t]his action focuses on the Enterprise's unlawful acts in acquiring four CUPs: (i) the Ramona CUP, (ii) the Balboa CUP, (iii) the Federal CUP, and (iv) the Lemon Grove CUP. [FAC, ¶ 7, fns.3-6]. Plaintiffs allege that defendants Austin, Bartell, and Schweitzer are persons "who aid parties to prepare, apply for and acquire CUPs" and engaged in wrongful acts while so doing (FAC, ¶¶ 48-53), and that they were hired by Geraci and were responsible for preparing, submitting, and lobbying a CUP application with the city at the Federal Property that was submitted in the name of Geraci's assistant, Berry. [FAC, ¶ 119].

Geraci's and Berry's filing of applications for a CUP on behalf of themselves (or hiring experts to help them with that task), and any statements made in a proceeding before the local zoning authority, fall under the anti-SLAPP statute as petitioning activity because a local zoning authority proceeding is the proceeding of a governmental administrative body. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 ["[t]he constitutional right to petition . . . includes . . . seeking administrative action"].)

Code Civ. Proc. § 425.16(e)(1) provides that protected activity includes "any written or oral statement or writing made before a legislative, executive, ***or judicial proceeding*** or any other official proceeding authorized by law", i.e., the *Cotton I* litigation in which Larry Geraci sued Cotton and in which Cotton filed a cross-claim against Geraci and Berry. (Emphasis added.)

Code Civ. Proc. § 425.16, subdivision (e) (2) provides that protected activity includes "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive or judicial body, ***or any other official proceeding authorized by law*** i.e. the administrative application for a CUP by Geraci and Berry. (Emphasis added.)

1. Plaintiffs' Claims "Arise From" Petitioning for a CUP and the *Cotton I* Litigation

In determining whether a claim "arises from" protected conduct, the Court looks at the

"allegedly wrongful and injury-producing conduct that provides the foundation for the claims." (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490-91.) "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability – and whether that activity constitutes protected speech or petitioning." (*Navellier*, *supra*, 29 Cal.4th at p. 92.)

a. Identification of Protected Activity

Plaintiffs' FAC bases their claims almost entirely on two types of protected activity: factual allegations relating to the petitioning for CUPs and factual claims regarding prior litigation. [FAC, ¶¶ 4-5].

Regarding CUP activity, plaintiffs admit that the "defining illegal act of the Enterprise is the acquisition of CUPs." [FAC, ¶ 4]. Plaintiffs allege "[t]his action focuses on the Enterprise's unlawful acts in acquiring four CUPs: (i) the Ramona CUP, (ii) the Balboa CUP, (iii) the Federal CUP, and (iv) the Lemon Grove CUP" [FAC, ¶ 7, fns.3-6]. Plaintiffs allege Geraci and Berry unlawfully applied for and attempted to obtain, although unsuccessfully, a CUP for the Federal Property. [FAC, ¶ 119-125]. Plaintiffs complain that Berry did not disclose the ownership interest of Geraci in the CUP application. [FAC, ¶ 315]. Plaintiffs contend that defendants acted in a conspiracy by unlawfully applying for CUPs. [FAC, ¶ 283]. Plaintiffs allege that by preparing, filing, and lobbying for CUP applications, defendants violated Bus. & Prof. Code § 19323, § 26057, and Pen. Code § 115. [FAC, ¶ 315].

Regarding protected litigation activity, plaintiffs allege "[t]he unlawful acts taken by the Enterprise in furtherance of the Antitrust Conspiracy include "sham" litigation" wrongfully filed, allegedly which is predatory and anticompetitive conduct. [FAC, ¶¶ 5, 148, 195, 283, 316]. Plaintiffs allege that on March 22, 2017, Geraci's attorneys served Cotton with *Cotton I* alleging breach of contract claims. [FAC, ¶ 147]. Plaintiffs allege facts regarding *Cotton 1*'s cross-complaint, and the filing of the *Cotton 1* SAC. [FAC, ¶¶ 148-168]. Plaintiffs allege arguments made in court concerning *Cotton 1* [FAC, ¶ ¶170-171] Plaintiffs allege Geraci and Ferris & Britton colluded to fabricate evidence to overcome filing a lawsuit without probable cause. [FAC, ¶¶ 317, Heading 5(F)]. Plaintiffs allege wrongful acts in connection with the "Disavowment Allegation" and the *Lis Pendens* motion in *Cotton 1*. [FAC, ¶¶ 183-190] Plaintiffs further allege that during the *Cotton I* trial, Austin, Berry, Bartell, and

Schweitzer testified on Geraci's behalf. [FAC, ¶¶ 202]. Plaintiffs take issue with the veracity of the witnesses' trial testimony. [FAC, ¶¶ 204-205]. Cotton *lost* that lawsuit, and, following a jury verdict, a judgment was entered against Cotton in favor of Geraci for $260,109.28. [FAC, ¶¶ 199-208]. Cotton made a motion for new trial which was rejected. [FAC, ¶ 209]. Plaintiffs allege that defendants violated plaintiff's civil rights relating to the *Cotton 1* action and that Geraci and his agents perpetuated a fraud on the court. [FAC, ¶¶ 276, 325] Plaintiffs allege that Geraci and Ferris & Britton's behavior regarding the "Disavowment Allegation" and the *Lis Pendens* motion amounts to perjury and violates Pen. Code § 127. [FAC, ¶ 317]. Plaintiffs now contend the *Cotton I* judgment is void because it grants relief to Geraci that the law forbids. [FAC, ¶ 329].

Plaintiffs claims alleged against the other defendant-"co-conspirators" are based on the same type of protected activity.[2] The CUP and litigation activity of which plaintiffs complain is, without a doubt, protected conduct. Plaintiffs' Cartwright Act claim, the UCL claim, the Decl Relief claim, and the Civil Conspiracy are based on the defendants, including Geraci's and Berry's, petitioning activities for CUPs and activities in connection with litigation. Thus, plaintiffs have met their burden to identify and establish that each of plaintiffs' claims are based on protected activity within the meaning of the anti-SLAPP statute.

B. The Second Prong - Plaintiffs Cannot Establish a Probability of Prevailing.

Once the defendant establishes that the anti-SLAPP statute applies, the plaintiff must demonstrate that his claims have merit, based not on speculation or the mere allegations of the pleadings, but with "competent and admissible evidence." (*Tuchscher Dev. Enterprises, Inc. v. San*

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[2] Since Plaintiffs are alleging a conspiracy against defendants as a group, Geraci and Berry identify herein Plaintiffs' additional allegations against other alleged conspirators. Austin, Bartell, and Schweitzer are experienced in applying and acquiring CUPs. [FAC ¶ 48-53]. Austin allegedly provided confidential information to a client regarding CUPs. [FAC ¶ 62]. *Razuki 1* was filed and plaintiffs provide background information about the Balboa CUP litigation. [FAC, ¶¶ 100-102]. *Razuki 2* was filed and plaintiffs allege information from oral agreements and declarations made during litigation. [FAC, ¶¶ 104-106]. Plaintiff provides a summary of *Razuki 1-4* and the history of the Balboa CUP. [FAC, ¶¶ 111-114]. Plaintiffs allege facts about Cotton's attorney's performance at a court hearing. [FAC, ¶ 181]. Nguyen, Young's attorney, allegedly promised and failed to provide Young's testimony. [FAC, ¶¶ 240-248]. Nguyen's failure allegedly amounts to a violation of Cal. Pen. Code section 319. [FAC, ¶ 319]. Plaintiffs contend that McElfresh's representation of Geraci for the Berry CUP application violated Bus. & Prof. Code § 19323, § 26057, and Pen. Code section 115. [FAC, ¶ 318].

Diego Unified Port Dist. (2003) 106 Cal.App.4th 1219, 1236.) Evidence that would not be admissible at trial, such as an "averment on information and belief [,] … cannot show a probability of prevailing on the claim." (*Ibid.*) This is of paramount importance in the instant action where the FAC is replete with delusional and rank speculation about an imaginary cabal designed to monopolize the cannabis world, along with wild allegations of threats of violence and even murder.

While the burden on the second prong belongs to the plaintiff, in determining whether the plaintiff has established a probability of prevailing on the merits of his or her claims, a court considers not only the substantive merits of those claims, *but also all defenses available to them.* (See *Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.) A plaintiff must present evidence to overcome any privilege or defense to the claim that has been raised in order to demonstrate a "probability of success on the merits." (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 323.)

A plaintiff cannot establish a probability of prevailing if, as here, the litigation privilege precludes liability on the claims. (*Optional Capital, Inc. v. Akin Gump Strauss, Haurer & Feld LLp* (2017) 18 Cal.App.5th 95,115; see also, *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 926-27 plaintiff cannot demonstrate a probability of prevailing where plaintiff's defamation action was barred by Civil Code section 47, subd. (b)].) It is well established under California law, that the litigation privilege "is absolute in nature, applying 'to all publications, irrespective of their maliciousness.'" (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241, quoting *Silberg v. Anderson* (1990) 50 Cal.3d 205, 216.) 'The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the action." (*Id.* at p. 212.) The privilege "is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.) The privilege has been interpreted broadly and "any doubt as to whether the privilege applies is resolved in favor of applying it." (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529; *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 23)

Here, Plaintiffs' claims are based entirely on communications protected by the litigation privilege, i.e., petitioning the local zoning authority and filing and prosecuting the *Cotton I* lawsuit.

Local zoning authority proceedings are the type of proceedings to which the litigation privilege applies. The statements made during such proceeding are covered by the litigation privilege as statements made as part of an "official proceeding authorized by law" within the meaning of Civil Code section 47, subdivision (b) because they were made in a quasi-judicial proceeding. (See *Lebbos v. State Bar* (1985) 165 Cal.App.3d 656, 667 [statements made in initiating and pursing a State Bar administrative proceeding were protected by the litigation privilege; *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 362 ["statements that are made in quasi-judicial proceedings ... are privileged to the same extent as statements made in the course of a judicial proceeding"].)

There is no question that the allegations of conduct related to *Cotton I* action are absolutely privileged pursuant to Cal. Civ. Code 47(b) as communications made in a "judicial proceeding". Many cases have explained that Cal. Civ. Code 47(b) encompasses not only testimony in court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit. (See *Rubin v. Green* (1993) 4 Cal.4th 1190, 1194, 1195.)

1. Plaintiffs' First COA - Violation of the Cartwright Act Claim - Fails

a. Plaintiffs Cannot Prove a Violation of the Cartwright Act

In *Quelimane v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47, the California Supreme Court described the required Cartwright Act allegations to maintain an action for combination in restraint of trade as three-fold: "(1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts" (*ibid*), but subsequently indicated that an allegation or inference of purpose to restrain trade should also be present. (See *Kunert v. Mission Financial Services Corp.* (2003) 110 Cal.App.4th 242, 262, n. 15; See also *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 722 [agreement violates Cartwright Act only if "restraint of trade in the commodity is the purpose of the agreement"].)

The California Supreme Court requires a "high degree of particularity in the pleading of Cartwright Act violations." (*A.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 265.) Unlawful combinations must be alleged with specificity, and thus, "general allegations of a conspiracy unaccompanied by a statement of the facts constituting the conspiracy and explaining its objectives and

impact in restraint of trade will not suffice." (*Id.;* See *Truta v. Avis Rent A Car System, Inc.* (1987) 193 Cal.App.3d 802 [conclusory allegations insufficient].)

"[A] plaintiff cannot merely restate the elements of a Cartwright Act violation . . . the plaintiff must allege in its complaint ***certain facts*** in addition to the elements of the alleged unlawful act so that the defendant can understand the nature of the alleged wrong and discovery is not merely a blind 'fishing expedition' for some unknown wrongful acts." (*Smith v. State Farm Mutual Automobile Ins. Co., supra,* 93 Cal.App.4th at p. 722 (emphasis in original), quoting *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1236.)

A Cartwright Act violation requires "a combination of capital, skill or acts by two or more persons" that seeks to achieve an anticompetitive end. (Bus. & Prof. Code, § 16720.) Consequently, "[o]nly separate entities pursuing separate economic interests can conspire within the proscription of the antitrust laws against price fixing combinations." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 189, citing *Copperweld Corp. v. Independence Tube Corp.* (1984) 467 U.S. 752, 769-771 [legally distinct entities do not conspire if they "pursue[] the common interest of the whole rather than interests separate from those of the [group] itself..."].) A Cartwright Act complaint that does not adequately allege concerted action by separate entities with separate and independent interests is subject to dismissal. (*Id.* at p. 52; *Asahi Kasei Pharma Corp. v. CoTherix, Inc.* (2012) 204 Cal.App.4th 1, 14.)

Plaintiffs' FAC falls woefully short from asserting facts that would support a claim for violation of the Cartwright Act under these standards. Plaintiffs only make general allegations of a conspiracy and have not offered a single fact showing that the purpose of the agreement between all 19 defendants was a restraint of trade in CUPs; indeed Geraci's attempt to obtain a CUP was unsuccessful and, aside from the *Cotton I* litigation, there are no allegations that he has engaged in any further conduct after his CUP application was beat out by a competing CUP application. This alone, is enough for Plaintiffs' Cartwright Act claim to be stricken as to Geraci and Berry.

The FAC also fails to allege concerted action by separate entities with separate and independent interests. Plaintiffs' have alleged concerted action "of a small group of wealthy individuals and their agents (the "Enterprise") that have conspired to create an unlawful monopoly in the cannabis market."

(FAC, ¶ 1.) Plaintiffs' entire argument is that everyone was working together and pursuing the common interest of the enterprise. (See *Copperworld Corp. v. Independence Tube Corp., supra,* 467 U.S. at pp. 769-771.) This too, standing alone, is enough for the Court to strike this claim.

b. The Cartwright Act Claim is Barred by *the Noerr-Pennington* Doctrine

In addition to the above-recited infirmities, the Cartwright Act claims have no merit against Geraci and Berry because they are barred by the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine stems from the first amendment right of the people to petition the government for their grievances. (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1064, citing *Sosa v DIRECTV, Inc.* (9th Cir. 2006) 437 F. 3d 923, 929.) The *Noerr-Pennington* doctrine protects activities that constitute "petitioning activity" including petitioning the court. *White v. Lee* (9th Cir. 2000) 227 F.3d 1214, 1231.) This includes filing "[a] complaint, an answer, a counterclaim, and other assorted documents and pleadings, in which plaintiffs or defendants make representations and present arguments to support their request that the court do or not do something." *Freeman v. Lasky, Haas,. & Cohler* (9th Cir. 2005) 410 F.3d 1180, 1184.) Under the *Noerr-Pennington* doctrine, "[t]hose who petition government . . . are generally immune from antitrust liability." (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 964, citing *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.* (1993) 508 U.S. 49, 56.) The *Noerr-Pennington* doctrine has been applied to Cartwright Act cases. *(Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th. 464, 478.)

In *Blank v. Kirwan*, the California Supreme Court similarly held that the *Noerr-Pennington* doctrine applies to Cartwright Act claims and that federal decisions applying the doctrine are persuasive authority under California law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 320.) In *Blank*, the plaintiff alleged that defendants had conspired to monopolize the poker industry and exclude plaintiff by persuading the city council to first legalize the industry and then pass zoning ordinances that made it impossible for plaintiffs to compete. *Id.* at p. 318. The California Supreme Court affirmed a lower court ruling sustaining demurrers to claims under both the Cartwright Act and the UCL. *Id.* at p. 333. The Supreme Court held that the *Noerr-Pennington* doctrine barred such claims regardless of the motive or tactics used by defendants to obtain government action. *Id.* at p. 325. The court reasoned that the First

Amendment right to petition applied equally to state law claims, and that efforts to influence the government are not a "business" act or practice within the meaning of Bus. & Prof. Code § 17200. (*Id.* at p. 330; accord, *Ludwig v. Superior Court*, (1995) 37 Cal.App.4th. 8, 21-23.)

It is anticipated Plaintiffs will argue that their allegations of "sham litigation" fall within an exception to the *Noerr-Pennington* doctrine. Although sham litigation is an exception to the *Noerr-Pennington* doctrine (*People ex rel Harris v. Aguayo* (2017) 11 Cal.App.5th 1150, 1561), this argument will also fail. There is a two part test to differentiate litigation from sham litigation: "first, it "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" [and] second, the litigant's subjective motivation must "conceal an attempt to interfere directly with the business relationships of a competitor . . .through the use [of] the governmental process - as opposed to the outcome of that process - as an anticompetitive weapon." (*Id.*) In ruling on this anti-SLAPP motion, this Court can take judicial notice of the *Cotton I* judgment, which will as a matter of law establish that the *Cotton I* litigation, which concerned the CUP application for the Federal Property, was petitioning activity that was not objectively baseless in that the matter was tried to a jury and judgment was entered against Cotton and in favor of Geraci and Berry.

2. The Unfair Competition and Unlawful Business Practice Claims Fail

The Unfair Business Practices Act shall include "any unlawful, unfair, or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) A plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the facts supporting the statutory elements of the violation. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.)

Plaintiffs rely upon Bus. & Prof. Code § 26057, formerly Bus. & Prof. Code § 19323, to support this UCL claim. That code section states that the licensing authority "shall deny an application if either the applicant, or the premises for which a state license is applied do not qualify for licensure under this division." (Bus. & Prof. Code, § 26057.) The statute goes on to list specific conditions that ***may*** constitute grounds for denial of licensure or renewal. (*Ibid,* emphasis added.)

Plaintiffs' entire argument supporting the UCL claim against Geraci and Berry rests on their assertion that Geraci was ineligible to own a cannabis license or a CUP due to previously being sanctioned for unlicensed commercial cannabis activities. What Plaintiffs do not mention is that

although this type of sanction ***could be grounds for denial***, Bus. & Prof. Code § 26057 allows the licensing authority to decide based on all of the circumstances present. A plain reading of the statute shows that there is no one condition that constitutes and automatic, outright denial. The statute gives the licensing authority complete discretion to weigh factors and decide what ***may*** constitute grounds for denial. This same argument was advanced unsuccessfully by Cotton in the *Cotton I* lawsuit.

As previously stated, *Blank v. Kirwan, supra*, 39 Cal.3d 311 held, *inter alia,* that the First Amendment right to petition applied equally to state law claims, and that efforts to influence the government are not a "business" act or practice within the meaning of Bus. & Prof. Code § 17200. (*Id.* at p. 330; accord, *Ludwig v. Superior Court*, *supra,* 37 Cal.App.4th. at pp. 21-23.) Thus, Geraci's and Berry's attempt to obtain a CUP from a government agency is not even a "business" act or "practice" within the meaning of Bus. & Prof. Code § 17200. For these reasons, plaintiffs cannot establish the minimal merit of their claim and, therefore, the COA should be stricken.

3. The Sixth COA for Declaratory Relief Fails for Lack of Standing.

As argued in the concurrently filed Demurrer, plaintiff Flores does not have standing to bring the Decl Relief Claim. Therefore, Flores cannot establish the minimal merit of this claim and the COA should be stricken.

As stated in *Martin v. Bridgeport Community Assn, Inc.* (2009) 173 Cal.App.4th 1024, 1031: To have standing to sue, a person, or those whom he properly represents, must " 'have a real interest in the ultimate adjudication because [he] has [either] suffered [or] is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented.' [Citation.]" (*Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 707.) Code of Civil Procedure section 367 establishes the rule that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." A real party in interest is one who has "an actual and substantial interest in the subject matter of the action and who would be benefited or injured by the judgment in the action." (*Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co.* (1973) 31 Cal.App.3d 220, 225.)

In the Decl Relief claim, alleged by plaintiff Flores only (not plaintiff Sherlock) against defendant Geraci only (not Berry or any other defendant), Flores "seeks to have the *Cotton I* judgment

declared void for, inter alia, enforcing an illegal contract and being the product of a fraud on the court." [FAC, ¶ 325]. The *Cotton I* judgment is a final judgment entered in *Larry Geraci v. Darryl Cotton*, San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL (hereinafter, *Cotton I*"). (See *Cotton I* Judgment, Ex. 1 to Notice of Lodgment attached hereto. (hereinafter "Geraci NOL".) The *Cotton I* lawsuit was filed on March 22, 2017. (FAC, ¶ 147.) Mr. Geraci, the plaintiff, alleged various claims against Darryl Cotton, the defendant. Darryl Cotton filed a cross-complaint on or around May 12, 2017, in which he, as cross-complainant, alleged various causes of action against claims against Mr. Geraci and Ms. Berry, as cross-defendants. (FAC, ¶ 149.)

In the instant action, there are no allegations, which if true, would demonstrate that Mr. Flores has standing to have the *Cotton I* judgment declared void. The *Cotton I* judgment was entered following a jury verdict in a lawsuit between Darryl Cotton, on the one hand, and Larry Geraci and Rebecca Berry, on the other hand. Mr. Geraci filed a complaint against Mr. Cotton. Mr. Cotton filed a cross-complaint against Mr. Geraci and Ms. Berry. The jury found in favor of Mr. Geraci and against Mr. Cotton on several of his claims and Geraci was awarded monetary damages in excess of $268K against Mr. Cotton. The jury found in favor of Mr. Geraci and against Mr. Cotton on all of Mr. Cotton's cross-claims and awarded him nothing. Mr. Cotton's cross-claims against Ms. Berry were not decided by the jury; the court granted her motion for judgment at the close of the trial. Judgment was entered August 19, 2019, and Mr. Cotton's appeal from the judgment was dismissed by the Fourth DCA on February 11, 2020, and the remittitur issued May 14, 2020. That judgment has been in force and effect since August 19, 2019 and is now final.

Mr. Cotton has already attempted, unsuccessfully, in separate actions filed in state and federal court to have the judgment declared void. Plaintiff Flores herein was not a party to the *Cotton I* lawsuit.

In the FAC, plaintiffs allege that "Cotton is the owner-of-record of the Federal Property ..." (FAC, ¶ 116) and that, at some point in time, Flores "became the equitable owner of the Federal Property" (FAC, ¶ 59). Nowhere in the First Amended Complaint is the latter allegation of equitable ownership described with any particularity. Moreover, Mr. Flores's motion to intervene in the *Cotton I*

lawsuit was denied.[3] Thus, Mr. Flores was not a real party in interest in *Cotton I* who can now seek to void the judgment. He did not have an actual and substantial interest in the subject matter of the *Cotton I* action and, as a non-party to that prior action, the judgment has not injured him.

4. The Sixth Cause COA for Declaratory Relief has no Merit because the *Flores I* Dismissal with Prejudice Bars Flores' Claim to Void the *Cotton I* Judgment.

In order to save space and limit duplication, Defendants Geraci and Berry incorporate by reference herein, as though fully set forth, the same argument made in detail in their Demurrer to the FAC concurrently filed herewith, located at Section C, pages 9-12.

In short, on April 3, 2020, Flores and Sherlock, filed a federal court lawsuit entitled *Andrew Flores, etc. et al. v. Gina M. Austin, etc. et al.*; U.S. District Court Case No. 3:20-cv-00656 (the "*Flores I* lawsuit"; Geraci NOL Ex. 2), which alleged multiple claims against Geraci Berry and many others. On July 9, 2020, Flores and Sherlock filed a FAC. The factual allegations on which Mr. Flores and Ms. Sherlock based their claims extensively overlap those alleged herein. On March 23, 2022, the federal court granted *with prejudice* the motions to dismiss brought by Judge Wohlfeil and by Michael Weinstein, Scott H. Toothacre, Elyssa Kulas, Rachel M. Prendergast, and Ferris & Britton, APC (collectively the "F&B Defendants", i.e, the law firm and its attorneys and paralegal who represented Geraci and Berry in *Cotton I*) as well as dismissed the FAC against all remaining defendants *without prejudice*. (See Order entered March 23, 2022; Geraci NOL Ex. 3) Therefore, the instant action is barred by *res judicata* and issue preclusion.

5. Plaintiffs' Civil Conspiracy Claim is Legally Defective

Plaintiffs cannot establish the minimal merit of his Seventh Cause of Action for Civil Conspiracy because "[c]onspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503; *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131

[3] Mr. Flores attempted to intervene in the Cotton I litigation, but the Court denied his motion. Mr. Flores then filed a writ regarding the order denying his motion to intervene, the writ was denied by the Fourth District Court of Appeal.

Cal.App.4th 802, 823.)

V. CONCLUSION

Plaintiffs' claims are based almost entirely, if not entirely, upon allegations of protected activity, namely, petitioning activities in connection with attempting to obtain CUPs from local zoning authority and allegations of wrongful conduct in connection with the filing and prosecution of litigation. Defendants have identified the allegations constituting these protected activities and have met their burden to satisfy the first prong of the anti-SLAPP analysis. Plaintiffs cannot meet their burden under the second prong to show a likelihood of success on the merits. Plaintiff's claims are barred by the litigation privilege and *Noerr Pennington* doctrine and otherwise fail to establish the essential elements of their various claims. Accordingly, defendants Geraci and Berry respectfully request the Court grant their special motion to strike plaintiffs' FAC (namely, the First, Fifth, Sixth, and Seventh causes of action) alleged against them pursuant to Code Civ. Proc. § 425.16.

Dated: July 22, 2022

FERRIS & BRITTON

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