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Attorneys for Defendants
LARRY GERACI and REBECCA BERRY

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 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

NOTICE OF HEARING RE DEMURRER BY DEFENDANTS, LARRY GERACI AND REBECCA BERRY, TO PLAINTIFFS' FIRST AMENDED COMPLAINT; DEMURRER TO FIRST AMENDED COMPLAINT; REQUEST FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; AND DECLARATION OF JAMES A. CROSBY IN SUPPORT

(Related to ROA #11)

DATE: **October 21, 2022**
TIME: **9:00 a.m.**
DEPT: **C-75**

[IMAGED FILE]

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

NOTICE OF HEARING

TO THE COURT, ALL PARTIES AND THEIR COUNSEL:

PLEASE TAKE NOTICE THAT on October 21, 2022, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department C-75 of the San Diego County Superior Court, Hall of Justice, located at 330 West Broadway, San Diego, California 92101, defendants, Larry Geraci and Rebecca Berry, will and hereby do demur to the First, Fifth, Sixth and Seventh causes of action in Plaintiffs' First Amended Complaint.

This demurrer is made on the grounds that each cause of action fails to allege facts sufficient to state a cause of action on the grounds and for the reasons stated in the Demurrer below and as set forth in this Notice of Motion and accompanying Demurrer, Request for Judicial Notice, Memorandum of Points and Authorities, Declaration of James D. Crosby, and Notice of Lodgment, all pleadings and papers on file in the above-captioned action, and any argument or evidence that may be presented to, or considered by, the Court prior to its ruling.

The court will usually post a tentative ruling on the San Diego Superior Court website before the hearing. The Court will not post a tentative ruling if the Court has not completed its analysis of the motion in time to post a tentative ruling or if other circumstances make it impractical or imprudent to post a tentative ruling. If a tentative ruling is posted, it will be available on the San Diego Superior Court website www.sdcourt.ca.gov.

Dated: July 21, 2022

FERRIS & BRITTON

A Professional Corporation

By: Michael R. Weinstein

Michael R. Weinstein
Scott H. Toothacre
Attorney for Defendants
LARRY GERACI and REBECCA BERRY

DEMURRER

Defendants Geraci and Berry demur to the First Cause of action –Conspiracy to Monopolize in Violation of the Cartwright Act (Bus. & Prof. Code Section 16700; Fifth Cause of Action – Unfair Competition Law (Cal. Bus. & Prof. Code Section 17200); Sixth Cause of Action –Declaratory Relief – Plaintiff Flores only v. Defendant Geraci only; and Seventh Cause of Action – Civil Conspiracy, pursuant to California Code of Civil Procedure § 430.10, on the following grounds:

FIRST COA– Conspiracy to Monopolize in Violation of the Cartwright Act B&P Code 16700

1. The First Cause of Action for Conspiracy to Monopolize in Violation of the Cartwright Act (Bus. & Prof. Code § 16700, *et seq.*) fails to state facts sufficient to constitute a cause of action Code of Civ. Proc. § 430.10(e). First Flores/Sherlock lack standing to assert the claim; and second, the claim is not sufficiently pled.

FIFTH COA – Unfair Competition Law (Cal. Bus. & Prof. Code 17200

2. The Fifth Cause of Action for Violation of the Unfair Competition Law pursuant to Cal. Bus. & Prof. Code § 17200 *et seq.* fails to state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). Flores/Sherlock have not (1) suffered an injury in fact, and (2) have not lost money or property as a result of alleged unfair competition.

SIXTH COA-Declaratory Relief

3. The Sixth Cause of Action for Declaratory Relief fails to state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). First, Plaintiffs Flores lacks standing to seek declaratory relief to void a final judgment entered in the prior state court action known as *Cotton I* to which he was not a party; and second, Plaintiff is barred by *res judicata/claim preclusion* by virtue of the entry of a dismissal with prejudice of his substantively identical declaratory relief action in federal court (*Flores I*), from seeking declaratory relief herein attempting to void a final judgment entered in a prior state court action (*Cotton I*), to which he was not a party,

SEVENTH CAUSE OF ACTION –Civil Conspiracy

4. The Seventh Cause of Action for Civil Conspiracy fails to state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). "Conspiracy 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 Cal.App.4th 802, 823.)

Dated: July 21, 2022

FERRIS & BRITTON

A Professional Corporation

By: Michael R. Weinstein

Michael R. Weinstein
Scott H. Toothacre
Attorney for Defendants
LARRY GERACI and REBECCA BERRY

REQUEST FOR JUDICIAL NOTICE

Defendants and moving parties, Larry Geraci and Rebecca Berry, request that the Court take judicial notice of the following pleadings filed in other court actions:

1. The final judgment entered August 19, 2019 in the prior state court action captioned, *Larry Geraci v. Darryl Cotton*, San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL (hereinafter, the *Cotton I* judgment"), a true and correct copy of which is attached as Exhibit 1 to the Notice of Lodgment in Support of the Demurrer by Defendants, Larry Geraci and Rebecca Berry, to Plaintiffs' First Amended Complaint.

2. The First Amended Complaint filed July 9, 2020, in the prior federal court action captioned *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"), a true and correct copy of which is attached as Exhibit 2 to the Notice of Lodgment in Support of the Demurrer by Defendants, Larry Geraci and Rebecca Berry, to Plaintiffs' First Amended Complaint.

3. The Order entered on March 23, 2022, by the federal court in the *Flores* I lawsuit, granting *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 attorneys and paralegal, the lawyers who represented Geraci and Berry in *Cotton I*), a true and correct copy of which is attached as Exhibit 3 to the Notice of Lodgment in Support of the Demurrer by Defendants, Larry Geraci and Rebecca Berry, to Plaintiffs' First Amended Complaint.

Dated: July 21, 2022

FERRIS & BRITTON,

A Professional Corporation

By: Michael R. Weinstein

Michael R. Weinstein
Scott H. Toothacre
Attorneys for Defendant
LARRY GERACI and REBECCA BERRY

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

I. RELIEF REQUESTED AND SUMMARY OF THE ARGUMENTS

In the operative First Amended Complaint filed December 23, 2021 (ROA#11), Plaintiffs, Andrew Flores and Amy Sherlock, variously assert four causes of action against defendants, Larry Geraci and Rebecca Berry, namely: (1) the First Cause of Action for Conspiracy to Monopolize in Violation of the Cartwright Act (the "Cartwright Act Claim"); (2) the Fifth Cause of Action for Unfair Competition and Unlawful Business Practices (the "UCL Claim"); (3) the Sixth Cause of Action for Declaratory Relief (the "Decl Relief Claim"); and (4) the Seventh Cause of Action For Civil Conspiracy. This Demurrer is directed to these First, Fifth, Sixth, and Seventh Causes of Action. As further argued below, the Court should sustain the demurrer to each of those causes of action on the following grounds:

As to the First Cause of Action for Conspiracy to Monopolize in Violation of the Cartwright Act (Bus. & Prof. Code § 16700, *et seq.*) Flores/Sherlock lack standing to assert the claim; and, the claim is not sufficiently pled.

As to the Fifth Cause of Action for Violation of the Unfair Competition Law pursuant to Cal. Bus. & Prof. Code § 17200 *et seq.* Flores/Sherlock have not (1) suffered an injury in fact, and (2) have not alleged they lost money or property as a result of alleged unfair competition.

As to the Sixth Cause of Action Plaintiffs Flores lacks standing to seek declaratory relief to void a final judgment entered in the prior state court action known as *Cotton I* to which he was not a party. A legal action to void a judgment cannot be brought by an individual whom is displeased with the outcome of a lawsuit *to which he was not a party.* Voiding the state court judgment in *Cotton I* would have no effect upon plaintiff Flores' Cartwright Claim or UCL Claim herein. There is simply no injury alleged by plaintiffs Flores/Sherlock that would be redressed by the Court voiding a state court judgment to which Flores was not a party. Additionally, the cause of action is barred by *res judicata/claim preclusion* by virtue of the entry of a dismissal with prejudice of his substantively identical declaratory relief action in a prior federal court action (*Flores I*).

The Seventh Cause of Action for Civil Conspiracy fails to state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). "Conspiracy is not a cause of action, but a legal doctrine

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II. LEGAL STANDARD ON DEMURRER

When a complaint, or any cause of action in a complaint, fails to state facts sufficient to constitute a cause of action, the court may grant a demurrer. (Code Civ. Proc., § 430.30) The court considers the allegations on the face of the complaint and any matter of which it must or may take judicial notice under the Code of Civil Procedure section 430.30(a). (*Groves v. Peterson* (2002) 100 Cal.App.4th 659; Code Civ. Proc., § 430.30(a).) In reviewing the sufficiency of a complaint against a demurrer, the court treats the demurrer as admitting all material facts properly pleaded. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (citing *Serrano v. Priest* (1971) 5 Cal.3d 584, 591); *Adelman v. Associated Ins. Co.* (2001) 90 Cal.App.4th 352, 359).) However, contentions, deductions, or conclusions of fact or law are insufficient to constitute a cause of action. (*Id.*)

The court may grant a demurrer with or without leave to amend when it is obvious from the facts alleged that, the plaintiff could not state a cause of action. (See *Hillman v. Hillman Land Co.* (1947) 81 Cal.App.2d 174, 181; see generally *Carney v. Simmonds* (1957) 49 Cal.2d 84, 97; see *Smiley v. Citibank* (1995) 11 Cal.4th 138, 164; Code Civ. Proc., § 430.30(j).) The party seeking leave to amend their pleading bears the burden of establishing that there is a reasonable possibility that the defect can be cured by amendment. (See *Blank v. Kirwan, supra,* 39 Cal.3d at p. 318; *Gould v. Maryland Sound Industries* (1995) 31 Cal.App.4th 1137, 1153.)

III. LEGAL ARGUMENT

The First Amended Complaint alleges four purported causes of action against Mr. Geraci and Ms. Berry, namely: (1) the First Cause of Action for Conspiracy to Monopolize in Violation of the Cartwright Act (the "Cartwright Act Claim"); (2) the Fifth Cause of Action for Unfair Competition and Unlawful Business Practices (the "UCL Claim"); (3) the Sixth Cause of Action for Declaratory Relief (the "Decl Relief Claim"); and the Seventh Cause of Action for Civil Conspiracy. This demurrer is directed to the First, Fifth, Sixth, and Seventh Causes of Action.

A. Flores/Sherlock Fail To State A Viable Claim For Violations of the Cartwright Act-COA 1

Neither Flores nor Sherlock can maintain a cause of action against Geraci or Berry for violations of the Cartwright Act because 1) they lack standing to assert the claim and 2) the claim is not sufficiently pled.

As noted in the moving papers submitted in support of Mr. Lake's demurrer, a plaintiff suing under the Cartwright Act must be within the "target area" of the antitrust violation to have standing; i.e., they must have suffered direct injury as a result of the anticompetitive conduct. *Cellular Plus, Inc. v. Sup. Ct. (U.S. West Cellular)* (1993) 14 Cal.App.4th 1224, 1232; *Vinci Waste Mgmt., Inc.* (1995) 36 Cal.App.4th 1811, 1815. An "antitrust injury" is the "type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' act unlawful." *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723. Courts interpreting the Carwright Act's antitrust standing requirement have consistently followed the "market participant rule," requiring the plaintiff to "show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." *In re Napster, Inc. Copyright Litig.* (N.D. Cal.2005) 354 F.Supp.2d 1113, 1125-26 (citing *MGM Studios, Inc. v. Grokster, Ltd.* (Cal. 2003) 269 F.Supp.2d 1213, 1224; *Kolling v. Dow Jones & Company, Inc.* (1982) 137 Cal.App.3d 709, 724.

First, Flores/Sherlock lack standing to bring a claim. They have not sufficiently alleged they are "market participant[s]". The FAC does not make clear which "market" in which Flores/Sherlock claim to have participated. Even presuming that it is the medical marijuana industry, neither Flores nor Sherlock have alleged an injury in that area. Simply put, neither Sherlock, a private individual, with no alleged ties to the medical marijuana industry, nor Flores, a private attorney, with no alleged ties to the medical marijuana industry, are within the "target area" of the alleged antitrust violation and have not alleged antitrust injury.

Irrespective of the standing issues, even if Flores/Sherlock were able to meet this threshold issue, their cause of action is not sufficiently pled. To state a cause of action for conspiracy, a complaint must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant to the conspiracy, and (3) the damage resulting from such act or acts. *Chicago Title Ins.*

Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 316. It is incumbent on the complaining party to allege and prove that the party's business or property has been injured by the very fact of the existence and prosecution of the unlawful trust or combination; that is, to establish an actual injury attributable to something the statutory provisions were designed to prevent. *Kaiser Cement Corp. v. Fischback and Moore, Inc.* (9th Cir. 1986) 793 F.2d 1100.

" ' "An antitrust claim must plead the formation and operation of the conspiracy and the illegal acts done in furtherance of the conspiracy. [citation.] California requires a 'high degree of particularity' in the pleading of a Cartwright Act violation [citation] and therefore generalized allegation of antitrust violations are usually insufficient" ' (*Ibid.*) Further, '[i]t is well accepted that "the antitrust laws...were enacted for the protection of competition, not competitors.' " ' [citation] ... Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws." [citation omitted]." *DeCambre v. Rady Children's Hospital-San Diego* (2015) 235 Cal.App.4th 1, 25.

Here, plaintiffs have not specifically alleged injury to themselves resulting from the alleged antitrust conspiracy, let alone the necessary allegation of injury to competition resulting from the antitrust conspiracy. They have not even alleged they are market participants or competitors in an identified relevant and geographic market (presumably, the cannabis industry in San Diego County).

Other than entering into an agreement to purchase Cotton's real property, filing and pursuing an application for a CUP for that property, and litigating a dispute regarding the alleged agreement and transactions with Mr. Cotton, there are no other facts tying Geraci and/or Berry to the alleged conspiracy. Similarly, there are no facts showing that Flores or Sherlock, themselves, were engaged in the medical marijuana industry. Flores and Sherlock have failed to adequately allege they suffered antitrust injury. There is no allegation that either Flores or Sherlock had a business or property within the cannabis industry to damage. Mr. Geraci prevailed in his litigation against Mr. Cotton, obtaining a damage award in his favor and against Mr. Cotton. (FAC, para. 208) Cotton still owns the property "Cotton is the owner-of-record of the Federal Property ..." (FAC, para. 116).

No CUP was ever granted for the Cotton property. Even if he Geraci had obtained the CUP the CUP is a property right that runs with the land and not to the individual permittee. See *Imperial v.*

McDougal (1977) 19 Cal.3d 505; *Malibu Mountains Recreation v. Los Angeles* (1998) 67 Cal.App.4th 359, 368. Without a showing of antitrust injury, neither Flores, nor Sherlock, can maintain their first cause of action against Geraci and Berry.

B. The FAC Fails to Sufficiently Allege Unfair Business Practices-COA 5.

California's unfair competition law permits civil recovery for "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising."¶. Business & Professions Code § 17200. A private person may assert a UCL claim only if he/she (1) has suffered injury in fact and (2) has lost money or property as a result of the unfair competition. *Hall v. Time, Inc.* (2008) 158 Cal.App.4th 847, 852.

As with their claims related to the alleged Cartwright Action violation, there is nothing in the FAC that gives any indication that Flores/Sherlock were market participants, or even attempted to become market participants, in the San Diego cannabis market. There is no ascertainable injury in fact, nor have Flores/Sherlock lost money or property, as more fully discussed above, by any of the facts alleged in the FAC.

C. Flores Lacks Standing to Void the *Cotton I* Judgment-Decl. Relief Claim-COA 6[1]

Plaintiff Flores does not have standing to bring the Decl Relief Claim. As stated in *Martin v. Bridgeport Community Assn, Inc.* (2009) 173 Cal.App.4th 1024, 1031: "Standing is the threshold element required to state a cause of action and, thus, lack of standing may be raised by demurrer. (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 813, 66 Cal.Rptr.3d 543; *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1000.) 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, 93 Cal.Rptr.2d 580.) 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

[1] The Declaratory Relief claim is brought by plaintiff Flores against defendant Geraci only.

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, 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." (First Amended Complaint ("FAC", para. 325.)

The *Cotton I* judgment is a final judgment entered in a prior state court action captioned, *Larry Geraci v. Darryl Cotton*, San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL (hereinafter, *Cotton I*"). (See the *Cotton I* Judgment, Exhibit 1 to the Notice of Lodgment in Support of Demurrer by Defendants, Larry Geraci, to Plaintiffs' First Amended Complaint (hereinafter "Geraci NOL".)

The *Cotton I* lawsuit was filed on March 22, 2017. (FAC, para. 147.) In that lawsuit, plaintiff Geraci, alleged various claims against defendant Darryl Cotton. 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, para. 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 in the prior lawsuit was entered following a jury verdict. The jury found in favor of Mr. Geraci and against Mr. Cotton on several of his claims and he 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. 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. (Exh 1 to Geraci NOL.)

Mr. Cotton has previously 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. The *Cotton I* judgment is only *res judicata* against Mr. Cotton, who is not a party to this action. As a non-party to the prior action, the *Cotton I* judgment has no *res judicata* effect on Mr.

Flores.

In the First Amended Complaint herein, plaintiffs allege that "Cotton is the owner-of-record of the Federal Property ..." (FAC, para. 116) and that, at some point in time. Flores "became the equitable owner of the Federal Property" (FAC, para. 59). Nowhere in the First Amended Complaint is the latter allegation of equitable ownership fleshed out with any additional factual allegations. Moreover, Mr. Flores's motion to intervene in the *Cotton I* lawsuit was denied.[2] 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. Put a different way, if for sake of argument, *Cotton I* judgment were declared void, then Mr. Geraci could not recover from Mr. Cotton the $268K he was awarded in the judgment. However, that would have no bearing on the Cartwright Act Claim or the UCL Claim Mr. Flores attempts to assert against Mr. Geraci and Ms. Berry in the instant action.

Additionally, by virtue of a prior federal court lawsuit that Andrew Flores and Amy Sherlock brought seeking to void the *Cotton I* judgment, Mr. Flores (as Ms. Sherlock would be) is barred by principles of *res judicata/claim preclusion* from seeking that identical relief in the instant action.

There are two prior federal court actions, one brought by Darryl Cotton, the plaintiff in *Cotton I*, the other brought by plaintiffs herein, Flores and Sherlock, **each of which sought to have the *Cotton I* judgment declared void**. (FAC, para. 276.) Both attempts in federal court to have the *Cotton I* judgment declared void have failed. The instant argument focuses on Flores/Sherlock's prior federal action seeking to have the *Cotton I* judgment declared void.[3]

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[2] 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.

[3] In Cotton's federal court action, *Cotton v. Bashant, et al.*, 18-cv-325 TWR (DEB), on October 22, 2021, the federal court granted motions to dismiss by various of the defendants therein. (See FAC, para. 278.) In particular, Geraci's motion to dismiss was granted *with prejudice*. The federal court ruled that plaintiff Cotton's claims, including his declaratory relief claim in seeking to have the *Cotton I* judgment "declared void and vacated," and which Cotton explicitly stated was a "collateral attack on a state court judgment issued by Judge Joel R. Wohlfeil" by way of federal court action, was barred by the *Rooker-Feldman* doctrine. The federal court also denied leave to amend as to defendants therein Geraci and Berry. (See Request for Judicial Notice, item 2, the Order dated 10/22/2021.) In addition, previous to dismissing Geraci with prejudice, on March 3, 2021, the federal court granted the motion to dismiss by Michael Weinstein (Geraci and Berry's lawyer in *Cotton I*) *with prejudice*. The federal court ruled that Cotton lacked standing and failed to allege a viable claim. The federal court also ruled that, even if Cotton had standing and had allege a viable

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"), which alleged multiple claims against various of 30+ named defendants therein, including defendants herein, Mr. Geraci and Ms. Berry. On July 9, 2020, plaintiffs Flores and Sherlock filed a First Amended Complaint. The factual allegations on which Mr. Flores and Ms. Sherlock based their claims extensively overlap those alleged in the instant state court lawsuit, including but not limited to the allegations of an antitrust conspiracy. Like in the instant action, in *Flores I* Mr. Flores/Ms. Sherlock sought a declaration against all defendants, including Mr. Geraci and Ms. Berry, that the *Cotton I* judgment is "void for being the product of judicial bias and being procured by acts and/or omissions that constitute a fraud upon the court taken in furtherance of the Antitrust Conspiracy." (See *Flores I* Complaint, Sixth Cause of Action for Declaratory Relief, para. 311, Exhibit 2 to Geraci NOL.)

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 First Amended Complaint against all the numerous remaining defendants *without prejudice* for lack of standing with leave to amend. (See Order entered March 23, 2022, Exhibit 3 to Geraci NOL.) Mr. Flores/Ms. Sherlock did not file an amended complaint within the permitted time frame, so there are no pending claims remaining in that federal lawsuit. Although the dismissal *with prejudice* in *Flores I* was granted in favor of Judge Wohlfeil and the F&B Defendants only, not in favor of Mr. Geraci or Ms. Berry who were dismissed without prejudice, the dismissals are nevertheless *res judicata* as against plaintiff Flores in asserting his Decl. Relief Claim against defendant Geraci.

In *Flores I*, the declaratory relief claim was brought against *all* defendants based on the same facts alleged herein. Because Flores had the same interest and sought the same relief on identical facts in their federal court action, Flores cannot relitigate that claim here. Under the doctrine of *res judicata*

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claim, the *Noerr-Pennington* doctrine barred his claims. (See Request for Judicial Notice, item 3 the Order dated 3/17/2021.)

or collateral estoppel, plaintiff, Flores, cannot relitigate the same claim for declaratory relief he pursued and lost on the merits in the prior federal court lawsuit, albeit against different defendants. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely "switching adversaries." Indeed, "Where a party though appearing in two suits in different capacities is in fact litigating the same right, the judgment in one estops him in the other." (15 Cal.Jur. 189; see *Bernhard v. Bank of America Nat. Trust & Savings Assn.*, 19 Cal.2d, at 813, 122 P.2d, at 895.)

D. Civil Conspiracy-Seventh COA

The Seventh Cause of Action for Civil Conspiracy fails to state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). "Conspiracy 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 Cal.App.4th 802, 823.)

IV. CONCLUSION

For the reasons stated above, the Court should sustain without leave to amend the demurrer by defendants Geraci and Berry to the (1) the First Cause of Action for Conspiracy to Monopolize in Violation of the Cartwright Act; (2) the Fifth Cause of Action for Unfair Competition and Unlawful Business Practices; (3) the Sixth Cause of Action for Declaratory Relief; and (4) the Seventh Cause of Action for Civil Conspiracy. A proposed Order has been submitted with these moving papers.

Dated: July 21, 2022

FERRIS & BRITTON
A Professional Corporation

By: Michael R. Weinstein
Michael R. Weinstein
Scott H. Toothacre
Attorney for Defendants
LARRY GERACI and REBECCA BERRY

SUPPORTING DECLARATION OF JAMES D. CROSBY

1. I am an attorney in good standing with the State Bar and licensed to practice law before all courts in the State of California. I am an attorney in good standing with the State Bar and licensed to practice law before all the courts in the State of California. I, along with Michael R. Weinstein of Ferris & Britton, APC, are counsel of record for defendants, Larry Geraci and Rebecca Berry, in the above-titled action. I have personal knowledge of the facts set forth herein.

2. On May 23, 2022, plaintiffs personally served defendant Geraci with the summons and original complaint filed December 3, 2021. Defendant Geraci has not been served with the operative first amended complaint filed December 22, 2021. That first amended complaint contains substantive changes to the original complaint. Defendant Berry has not been served with any process in the matter.

3. Given the above, no response to the first amended complaint is currently due from defendants Geraci and Berry.

4. Nevertheless, on June 21, 2022, I emailed correspondence to Andrew Flores, attorney for plaintiff Amy Sherlock and and *in pro per* for plaintiff Andrew Flores wherein I: (1) offered to accept service, in behalf of my clients, of the summons and first amended complaint; (2) laid out in specific detail why the first amended complaint is properly subject to demurrer and motion to strike; and (3) offered to meet and confer on the first amended complaint and my proffered grounds for demurrer and motion to strike.

5. By email dated June 23, 2022 Mr. Flores told me he would review my meet and confer letter. Subsequent to June 23rd I have received no response from Mr. Flores to the substance of the above-referenced correspondence despite sending a follow up email to Mr. Flores on July 8th reminding him that I had not received a substantive response from him to my meet and confer letter.

6. My attempts to meet and confer with Mr. Flores regarding this motion to strike satisfy my meet and confer obligations under Code of Civil Procedure § 430.41.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct, and that this declaration is executed on July 21, 2022, at San Diego, California.

JAMES D. CROSBY