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Plaintiff *in Propria Persona*
and Attorney for Plaintiffs
Amy Sherlock, Minors T.S.
and S.S.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

AMY SHERLOCK, an individual and on behalf of her minor children, T.S. and S.S., ANDREW FLORES, an individual;

Plaintiffs,

v.

GINA M. AUSTIN, an individual; AUSTIN LEGALGROUP, 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,

Case No. 37-2021-00050889-CU-AT-CTL
NOTICE OF ERRATE RE: PLAINTIFF OPPOSITION TO GINA M. AUSTIN AND AUSTIN LEGAL'S SPECIAL MOTION TO STRIKE FIRST AMENDED COMPLAINT [ROA 72]

Date: August 5, 2022
Time: 9:00 a.m.
Dept: C-75
Judge: Hon. James A Mangione
Filed December 3, 2021
Trial: Not Set

NOTICE OF ERRATA

Defendants.

TO THE COURT AND TO COUNSEL OF RECORD FOR ALL PARTIES:

PLEASE TAKE NOTICE that Plaintiffs Andrew Flores, Amy Sherlock, and T.S. and S.S. hereby respectfully submit this Notice of Errata on Plaintiff's Opposition to Motion to Strike ROA No. 72. It has come to attention of unsigned counsel that an unexecuted version of the motion was uploaded for electronic filing by mistake. Counsel signed the document electronically via Adobe Sign software however the unsigned version was uploaded. Counsel has included herein the executed version of the motion has been included as Exhibit A for all avoidance of doubt.

DATED: July 30, 2022

THE LAW OFFICE OF ANDREW FLORES

By /s/ Andrew Flores

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

EXHIBIT A

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Plaintiff *in Propria Persona*
and Attorney for Plaintiffs
Amy Sherlock, Minors T.S.
and S.S.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

ANDREW FLORES, an individual, AMY SHERLOCK, on her own behalf and on behalf of her minor children, T.S. and S.S.

Plaintiffs,

vs.

GINA M. AUSTIN, an individual; AUSTIN LEGAL GROUP APC, a California Corporation; GERACI, an individual;; REBECCA BERRY, an individual; JESSICA MCELFRESH, an individual; SALAM RAZUKI, an individual; NINUS MALAN, an individual; FINCH, THORTON, and BAIRD, a Limited Liability Partnership, JAMES D. CROSBY, an individual; ABHAY SCHWEITZER, an individual and dba TECHNE; JAMES (AKA JIM) BARTELL, a California Corporation; NATALIE TRANG-MY NGUYEN, an individual, AARON MAGAGNA, an individual; BRADFORD HARCOURT, an individual; EULENTIAS DUANE ALEXANDER, an individual; ALLIED SPECTRUM, INC, a California corporation, PRDIGIOUS COLLECTIVES, LLC a California Limited Liability Company; and DOES 1 through 50, inclusive,

Defendants.

Case No.: 37-2021-00050889-CU-AT-CTL

PLAINTIFF'S OPPOSITION TO GINA M. AUSTIN AND AUSTIN LEGAL GROUP'S SPECIAL MOTION TO STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT

Date: August 5, 2022
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I. INTRODUCTION

Defendant attorney Gina Austin's business practice – the Proxy Practice – is illegal. The Proxy Practice is not immunized by the litigation privilege or the *Noerr-Pennington* doctrine. Therefore, attorney Austin's motion to strike plaintiffs' complaint pursuant to Code Civil Procedure § 425.16 (the "anti-SLAPP" statute) must be denied (the "Motion").

II. SUMMARY OF THE CASE AND MOTION

Attorney Austin and her law firm have for years successfully carried out an illegal conspiracy with their clients to illegally acquire ownership interests in cannabis businesses. The sole and dispositive factor in making this determination is conclusively established by the "shall deny" language set forth in California Business & Professions Code § 19323 and § 26057.[1]

As set forth below, the Austin Legal Group's interpretation of the statute contradicts its plain language, the Legislative intent pursuant to which they were passed, and the Department of Cannabis Control's interpretation. The litigation filed or maintained by the Austin Legal Group based on the Proxy Practice is in furtherance of the illegal conspiracy and is inherently anticompetitive. It prevents lawful qualified applicants from acquiring ownership of cannabis businesses and prevents, like this Motion, parties with rights to the businesses, and the CUPs/licenses pursuant to which they operate, from vindicating their rights. It is therefore sham litigation and not immunized.

III. MATERIAL FACTUAL AND PROCEDURAL BACKGROUND

A. California's cannabis public policy requires the disclosure of all owners of a cannabis business.

On June 27, 2017, the Legislature enacted the Medicinal and Adult-Use Cannabis Regulation and Safety Act (SB 94). (2017 Cal SB 94.) SB 94 § 1 materially provides as follows:

The Legislature finds and declares as follows:

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[1] Terms not otherwise defined herein have the meaning set forth in the Complaint.

(a) In November 1996, voters approved Proposition 215, which decriminalized the use of medicinal cannabis in California. Since the proposition was passed, most, if not all the regulation has been left to local governments.

(b) In 2015, California enacted three bills—Assembly Bill 243 (Wood, Chapter 688 of the Statutes of 2015); Assembly Bill 266 (Bonta, Chapter 689 of the Statutes of 2015); and Senate Bill 643 (McGuire, Chapter 719 of the Statutes of 2015)—that collectively established a comprehensive state regulatory framework for the licensing and enforcement of cultivation, manufacturing, retail sale, transportation, storage, delivery, and testing of medicinal cannabis in California. This regulatory scheme is known as the Medical Cannabis Regulation and Safety Act (MCRSA).

(c) In November 2016, voters approved Proposition 64, the Adult Use of Marijuana Act (AUMA). Under Proposition 64, adults 21 years of age or older may legally grow, possess, and use cannabis for nonmedicinal purposes, with certain restrictions. In addition, beginning on January 1, 2018, AUMA makes it legal to sell and distribute cannabis through a regulated business.

(d) Although California has chosen to legalize the cultivation, distribution, and use of cannabis, it remains an illegal Schedule I controlled substance under federal law. The intent of Proposition 64 and MCRSA was to ensure a comprehensive regulatory system that takes production and sales of cannabis away from an illegal market and curtails the illegal diversion of cannabis from California into other states or countries.

….

(f) In order to strictly control the cultivation, processing, manufacturing, distribution, testing, and sale of cannabis in a transparent manner that allows the state to fully implement and enforce a robust regulatory system, ***licensing authorities must know the identity of those individuals who have a significant financial interest in a licensee, or who can direct its operation***. Without this knowledge, regulators would not know if an individual who controlled one licensee also had control over another. To ensure accountability and preserve the state's ability to adequately enforce against all responsible parties the state must have access to key information.

(g) So that state entities can implement the voters' intent to issue licenses beginning January 1, 2018, while avoiding duplicative costs and inevitable confusion among licensees, regulatory agencies, and the public and ensuring a regulatory structure that prevents access to minors, protects public safety, public health and the environment, as well as maintaining local control, it is necessary to provide for a single regulatory structure for both medicinal and adult-use cannabis and provide

> for temporary licenses to those applicants that can show compliance with local requirements.

(2017 Cal SB 94 at § 1.)

Pursuant to MCRSA and Proposition 64, the Legislature has mandated always that State cannabis licensing agencies "issue state licenses ***only*** to qualified applicants." (BPC §§ 19320(a) (emphasis added), 26055(a) ("Licensing authorities may issue state licenses ***only*** to qualified applicants." (emphasis added).)

The keys statutes here are BPC § 19323 that applied pursuant to MCRSA and BPC § 26057 that applied pursuant to Proposition 64. Materially summarized, Proposition 64 created the licensing scheme that set forth the criteria for cannabis licenses for *nonprofit* medical entities in BPC § 19323. Proposition 64 created the licensing scheme that set forth the criteria for cannabis licenses for *for-profit* recreational entities in BPC § 26057. SB 94 consolidated the nonprofit and for-profit medical licensing scheme repealing MCRSA, including BPC § 19323, and making the criteria in BPC § 26057 applicable to all cannabis applications.

B. Definition of "applicant" and "owner" under MCRSA and Proposition 64

An "applicant" for a State cannabis license under MCRSA was defined as:

> (1) Owner or owners of a proposed facility, including all persons or entities having ownership interest other than a security interest, lien, or encumbrance on property that will be used by the facility.
>
> (2) If the owner is an entity, "owner" includes within the entity each person participating in the direction, control, or management of, or having a financial interest in, the proposed facility.
>
> (3) If the applicant is a publicly traded company, "owner" means the chief executive officer or any person or entity with an aggregate ownership interest of 5 percent or more.

BPC § 19300.5 (emphasis added).[2]

An "applicant" for a State cannabis license under AUMA was defined as:

> (1) The owner or owners of a proposed licensee. "Owner" mean all persons having (A) an aggregate ownership interest (other than a security interest, lien, or encumbrance) of 20 percent or more in the licensee and (B) the power to direct or cause to be directed, the management or control of the licensee.
>
> (2) If the applicant is a publicly traded company, "owner" includes the chief executive officer and any member of the board of directors and any person or entity with an aggregate ownership interest in the company of 20 percent or more. If the applicant is a nonprofit entity, "owner" means both the chief executive officer and any member of the board of directors.

BPC § 26001(a).[3]

C. Criteria mandating the denial of an application for a State license under MCRSA and Proposition 64.

MCRSA added § 19323 to the BPC that provided the criteria pursuant to which an application must be denied, which materially provided as follows:

> (a) 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 chapter.
>
> (b) The licensing authority ***may deny*** the ***application*** for licensure or renewal of a state license if any of the following conditions apply:
>
> (1) Failure to comply with the provisions of this chapter or any rule or regulation adopted pursuant to this chapter, including but not limited to, any requirement imposed to protect natural resources, instream flow, and water quality pursuant to subdivision (a) of Section 19332.
>
> [….]
>
> (3) The applicant has failed to provide information required by the licensing authority.

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[2] BPC § 19300.5 added by Stats 2016 ch 32 § 8 (SB 837), effective June 27, 2016. Repealed Stats 2017 ch 27 § 2 (SB 94), effective June 27, 2017.

[3]

> […]
>
> (8) The applicant, or any of its officers, directors, or owners, has been sanctioned by a licensing authority or a city, county, or city and county for unlicensed commercial medical cannabis activities or has had a license revoked under this chapter in the three years immediately preceding the date the application is filed with the licensing authority.

Materially, BPC § 26057 was amended by SB 837, which deleted subsection (3) and renumbered subsection (8) to subsection (7), effective June 27, 2016. (Stat 2016 ch 32 at § 27 (SB 837).)

AUMA added § 26057 to the BPC that provided the criteria pursuant to which an application must be denied, which materially provides as follows:

> (a) 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.
>
> (b) The licensing authority ***may deny*** the ***application*** for licensure or renewal of a state license if any of the following conditions apply…. (4) Failure to provide information required by the licensing authority…. (7) The applicant… has been sanctioned by… a city… for unauthorized commercial marijuana activities or commercial medical cannabis activities… in the three years immediately preceding the date the application is filed with the licensing authority...

(Proposition 64 at § 6.1.)

D. Regulations adopted by the Department of Cannabis Control pursuant to Proposition 64 mandate that "owners" like Geraci and Razuki must be disclosed and applications must be denied if the owners have been sanctioned for unlicensed commercial cannabis activities.

Statutes are laws written and passed by the Legislature that apply to the whole State. Regulations are rules created by a State agency that interpret statutes and make them more specific. The Department of Cannabis Control created regulations that apply to cannabis businesses that effectuate the cannabis statutes passed by the Legislature set forth in the Business & Professions Code.

Pursuant to CCR § 5002(c)(20)(M), an applicant is required to disclose "a detailed description of any administrative orders or civil judgments for… ***sanctions for unlicensed commercial cannabis activity by a licensing authority***… against the applicant or a business entity in which the applicant was an owner or officer within the three years immediately preceding the date of the application." (Cal. Code Regs., tit. 16, § 5002(c)(20)(M) (emphasis added).)

Pursuant to CCR § 5032, "Licensees shall not conduct commercial cannabis activities on behalf of, at the request of, or pursuant to a contract with any person who is not licensed under the Act." (Cal. Code Regs., tit. 16, § 5032(b).) This section makes clear that licensees like Malan and Berry, had the Berry Application been approved, cannot conduct commercial cannabis activities "pursuant to a contract with any person who is not licensed" like Geraci and Razuki. The Proxy Practice directly and completely violates this regulation; it is illegal.

E. Lawrence Geraci and Salam Razuki's sanctions for unlicensed commercial cannabis activities.

On October 27, 2014, Geraci was sanctioned by the City of San Diego for unlicensed commercial cannabis activities in *City of San Diego v. The Tree Club Cooperative, Inc. et al.* San Diego Superior Court Case No. 37-2014-0020897-CU-MC-CTL (the "Tree Club Judgement"). (First Amended Complaint ("FAC") at ¶ 43, fn.7.)

On June 17, 2015, Geraci was sanctioned by the City of San Diego for unlicensed commercial cannabis activities in *City of San Diego v. CCSquared Wellness Cooperative, et al.* Case No. 37-2015-00004430-CU-MC-CTL (the "CCSquared Judgment and collectively with the Tree Club Judgment, the "Geraci Judgments"). (FAC at ¶ 43, fn.7.)

On or about April 15, 2015, defendant Razuki was sanctioned for unlicensed commercial cannabis activities in *City of San Diego v. Stonecrest Plaza, LLC* Case No. 37-2014-00009664-CU-MC-CTL (the "*Stonecrest Judgment*"). (FAC at ¶ 46, fn. 8.)

F. The Motion to Strike is entirely predicated on the false argument that BPC §§ 19323/26057 do not bar Geraci and Razuki's ownership of cannabis businesses even though they were not disclosed in the applications and were sanctioned for unlicensed commercial cannabis activities.[4]

The Motion is 20 pages long and attaches an additional 97 pages of exhibits. But the entire validity of the Motion and this case is determined by whether BPC §§ 19323/26057 bar ownership of cannabis businesses by Geraci and Razuki. The entirety of the Austin Legal Group's argument that the statues do not is as follows:

> Plaintiffs allege that Austin's "Proxy Practice is illegal and violates numerous State and City laws, most notably, BPC §§ 19323 et seq. and 26057 et seq." (FAC, ¶ 314.) Business and Professions Code section 26057, formerly section 19323, states 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 backing their "Proxy Practice" allegation rests on their asserted fact that Geraci and Razuki were ineligible to own a cannabis license or 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, section 26057 allows the licensing authority to decide based on all the circumstances. A plain reading of the statute shows there is no one condition that constitutes an automatic, outright denial. ***The statute gives the licensing authority <u>complete</u> <u>discretion</u> to weigh factors and decide what may constitute grounds for denial***.
>
> Further, it is unclear as to how Austin could be implicated for violation of this statute as it does not apply to her. Section 26057 appears to be guidelines for a licensing authority to follow when reviewing applications for cannabis licenses and CUPs. Austin takes no part in reviewing, approving or denying such applications.

(Motion at 17:24-18:14 (emphasis added).)

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[4] Plaintiffs note that the Motion is full of false statements and misrepresentations to this Court. However, as the Motion is based solely on the false argument that BPC §§ 19323/20657, Plaintiffs do not dispute and confuse from the sole case/motion-dispositive issue.

Thus, Attorney Austin's entire motion rests on the claim that the State's cannabis licensing agency has "complete discretion" to deny cannabis applications. That is blatantly false. And so is Attorney Austin's absurd, self-serving failure to understand that if she helps commit a fraud upon a licensing agency by submitting fraudulent applications that she cannot be held liable because she is not the decision maker as to whether those applications are denied or granted.

IV. LEGAL STANDARD

In *Flatley*, the California Supreme Court held that petitioning activity is not protected by the anti-SLAPP statute if "the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law." *Flatley v. Mauro* (2006) 39 Cal.4th 299, 317.

Whether the Proxy Practice violates BPC §§ 19323/26057 and constitutes illegal petitioning is a question of law. *Wilson v. Brawn of California, Inc.* (2005) 132 Cal.App.4th 549, 554 ("Questions of law, such as statutory interpretation or the application of a statutory standard to undisputed facts, are reviewed de novo."); *see Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 349-350 ("Whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case."); *Ghirardo v. Antonioli* (1994) 8 Cal. 4th 791, 799 ("When the decisive facts are undisputed, we are confronted with a question of law and are not bound by the findings of the trial court."); *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 603 ("On a pure question of law, trial courts have no discretion. They must, without choice, apply the law correctly.").)

For purposes of illegality, the "law" includes statutes, local ordinances, and administrative regulations issued pursuant to the same. *Kashani v. Tsann Kuen China Enterprise Co.* (2004) 118 Cal.App.4th 531, 542.

V. ARGUMENT

A. The anti-SLAPP statute does not apply because ALG's Proxy Practice is illegal as a matter of law.

1. ***The plain language of the "shall deny" language of BPC §§ 19323/26057 bars the ownership by Geraci and Razuki of cannabis businesses because they were not disclosed in the applications and they were sanctioned for unlicensed commercial cannabis activities.***

"The fundamental task of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law." *People v. Cruz* (1996) 13 Cal.4th 764, 774-775 (*Cruz*) (quotation omitted). In determining legislative intent, the court turns first to the words themselves for the answer. *Id.* The words of a statute should be accorded their usual, ordinary, and commonsense meaning, keeping in mind the purpose for which the statute was adopted. *Bostock v. Clayton County* (2020) ___U.S.___, 140 S. Ct. 1731, 1738–1739.

In *Paterra*, the court found that the use of the words "***shall not***" in the subject statute requiring a hearing prior to entry of a default judgment reflected the Legislature's intent of "absolutely prohibiting" the entry of a default judgment without the required hearing. *Paterra v. Hansen* (2021) 64 Cal.App.5th 507, 536. Identically here, the Legislature's use of the words "***shall deny***" represent an absolute prohibition to the issuance of a license to an applicant that fails to qualify for a State license. The Legislature intended to create a regulatory system that prevented applicants sanctioned for illegal market from owning legal cannabis businesses. (*See* SB 94 at § 1 (d) ("The intent of Proposition 64 and MCRSA was to ensure a comprehensive regulatory system that takes production and sales of cannabis away from an illegal market…").)

The Austin Legal Group's interpretation of BPC §§ 19323/26057 fails for two obvious reasons, the first one requires no legal education or knowledge, just basic common sense. First, even by the Austin Legal Group's own reasoning, the Department of Cannabis Control *must* apply the alleged permissive criteria in the statues to determine whether to approve or deny a license. But how is the Department of Cannabis Control supposed to apply the alleged permissive criteria to Geraci, Razuki and the Austin Legal Group's other clients - to meet the Legislative mandate that it issue "state

licenses only to qualified applicants" - when they are not disclosed? (BPC §§ 19320(a), 26055(a).) They can't. It is impossible. As a matter of common sense and by the Austin Legal Group's own reasoning, the illegality of the Proxy Practice is clear – a regulated license can't be lawfully issued to a party that is not disclosed in the application to the agency charged with issuing the license.

On this ground alone the Court must find that the Austin Legal Group's petitioning activity is illegal – it is a direct factual admission of perpetrating a fraud upon the State and City licensing agencies and defrauding qualified applicants of the limited number of licenses available. (*See* SB 94 at § 1(f) ("… ***licensing authorities must know the identity of those individuals who have a significant financial interest in a licensee, or who can direct its operation***." (emphasis added); Penal Code § 484(a) ("Every person… who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of … real or personal property… is guilty of theft.").)

Second, assuming that somehow the Department of Cannabis Control magically knew that Geraci and Razuki were owners that were not disclosed in the applications for CUPs/licenses, their applications must be denied because of their sanctions. The claim that the sanctions are not an absolute bar is based on the purposeful misrepresentation of the "shall deny" and "may deny" language contained in subsections (a) and (b) of BPC §§ 19323 and 26057. Subsection (a) has always applied to "applicants" that are individual persons, subsection (b) has always applied to "applications" by applicants that are entities. (*See* BPC §§ 19300.5 (defining owner to include entities), 260001(a) (same).) This is made clear by the language in subsection (b) of both statutes that states: "The applicant, or any of ***its*** officers, directors, or owners, has been sanctioned by a licensing authority…"

This is reasonable and in accord with the plain language of the statutes. For example, if an applicant is an entity and one of the owners was a sanctioned party, but the sanctioned party only owned 1% of the entity, the Department of Cannabis Control could decide that such an interest was not material and could choose to grant the application.

This Court must give the "shall deny" language its plain meaning of being an absolute bar to the issuance of licenses to disqualified applicants. *Cruz*, 13 Cal.4th at 774-775; *Paterra*, 64 Cal.App.5th at 536 (Legislature use of "shall not" reflects Legislature's intent of "absolutely prohibiting" contrary act). This Court cannot ignore the "shall deny" language and give the "may deny" language the application that the Austin Legal Group claims, which would lead to an absurd result – sanctioned parties can legally acquire ownership of cannabis businesses without being disclosed to licensing agencies. *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal. 3d 247, 259 (courts cannot construe statutes in manner contrary to legislative intent that would lead to absurd result and injustice).

As succinctly stated by the United States Supreme Court: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. ***Only the written word is the law, and all persons are entitled to its benefit***." *Bostock v. Clayton Cty.* (2020) ___U.S.___ [140 S.Ct. 1731, 1737] (emphasis added). The "shall deny" language is the law. It is clear and controlling. Thus, "extratextual considerations" – in this case the procedural history of the adjudication of the illegality of the Proxy Practice – are inconsequential.

2. **<u>In construing the "shall deny" language of BPC §§ 19323/26057, the Court should follow the interpretation of Department of Cannabis Control because as the agency charged with its enforcement, its interpretation is entitled to great weight and must be followed unless clearly erroneous.</u>**

When an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts and will be followed if not clearly erroneous. *Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 911. Any potential doubt regarding the Department of Cannabis Control's non-discretionary mandate to deny the applications by Geraci and Razuki are removed by CCR § 5002 requiring the disclosure of the sanctions. (Cal. Code Regs., tit. 16, § 5002(c)(20)(M) (application for State license must include "a detailed description of any administrative orders or civil judgments for… ***sanctions for unlicensed commercial cannabis activity by a licensing authority***…") (emphasis added).

Also, CCR § 5032, which prohibits parties like Berry and Malan working on behalf of, respectively, Geraci and Razuki because Geraci and Razuki are not qualified applicants. (Cal. Code Regs., tit. 16, § 5032(b) ("Licensees shall not conduct commercial cannabis activities on behalf of, at the request of, or pursuant to a contract with any person who is not licensed under the Act.").

The Department of Cannabis Control's interpretation of the statutes requiring the disclosure of sanctions must be followed by this Court because it is not clearly erroneous. Therefore, even assuming that Geraci and Razuki had not been sanctioned, the failure to provide a detailed list of the required sanctions means the subject applications must be denied for (i) failing to provide required information (i.e., their ownership interests) and (ii) because they cannot engage in commercial cannabis activities pursuant to agreements with Berry/Malan. (BPC §§ 19323(a), (b) (3) ("The applicant has failed to provide information required by the licensing authority."); 26057(a), (b)(4) ("Failure to provide information required by the licensing authority."); (Cal. Code Regs., tit. 16, § 5032(b).).

3. The Austin Legal Group's claim is a direct factual admission of violating Penal Code § 115

"Penal Code section 115… makes it a felony to knowingly procure or offer any false or forged instrument for filing in a public office." *People ex rel. Harris v. Aguayo* (2017) 11 Cal.App.5th 1150, 1166.[5] The Austin Legal Group directly admits that the subject applications by Geraci and Razuki contained false statements – their agents' false certifications that they had disclosed all parties with an interest in the proposed properties and CUPs/licenses. Therefore, the Proxy Practice violates Penal Code § 115.

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[5] Penal Code § 115(a) provides: "Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony."

B. *The* Noerr-Pennington *doctrine does not immunize attorneys from petitioning for illegal activity and Plaintiffs will prevail on their claims.*

"The *Noerr-Pennington* doctrine immunizes legitimate efforts to influence a branch of government from virtually all forms of civil liability." *People ex rel. Harris,* 11 Cal.App.5th 1150 at 1160. However, efforts to influence government that are merely a "sham" are not protected by the *Noerr-Pennington* doctrine and are subject to antitrust liability. *See California Transp. v. Trucking Unlimited* (1972) 404 U.S. 508, 512–513; *Hi-Top Steel Corp. v. Lehrer* (1994) 24 Cal. App. 4th 570, 575 (*Hi-Top Steel*). The sham exception encompasses situations in which persons use the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon. *Columbia v. Omni Outdoor Adver.* (1991) 499 U.S. 365, 380 (*Omni*). The sham exception applies to California tort actions for intentional interference with economic relations. *Hi-Top Steel*, 24 Cal. App. 4th at 581-583; *see Clipper Exxpress v. Rocky Mt. Motor Tariff Bureau* (9th Cir. 1982) 674 F.2d 1252, 1271 ("**There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body**.") (emphasis added).

Litigation constitutes a "sham," thereby losing its immunity under the *Noerr-Pennington* doctrine, if (1) the lawsuit is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and (2) the baseless lawsuit conceals 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. *Professional Real Estate Investors v. Columbia Pictures Indus.* (1993) 508 U.S. 49, 60–61 (*PREI*); *see Clipper Exxpress*, 674 F.2d at 1270 ("the Walker Process doctrine… provides antitrust liability for the commission of fraud on administrative agencies, for predatory ends.").

Applying the two-factor test set forth in *PREI,* Austin's petitioning activity in furtherance of the Proxy Practice meets the definition of a sham. *PREI*, 508 U.S. 49, 60–61. First, all litigation based on vindicating or protecting alleged ownership rights by Geraci and Razuki in cannabis businesses is objectively baseless because it is illegal. *See People ex rel. Harris,* 11 Cal.App.5th at 1161 ("Unlawful

actions may not be subject to immunity under the *Noerr-Pennington* doctrine."); *id*. at 1163 ("[F]raud … and recording false documents, among other things, are not protected petitioning activity under *Noerr-Pennington* and its progeny."). No reasonable party, much less an attorney or judge, can believe that Geraci and Razuki can lawfully acquire ownership interests in a regulated CUP/license in violation of BPC §§ 19323/26057.

Second, all litigation based on the Proxy Practice interferes with the business relationship of a competitor. Cannabis CUPs and licenses are highly regulated. Every illegally acquired CUP/license defrauds a qualified applicant. Here, Plaintiffs had ownership rights to the subject CUPs acquired via the Proxy Practice. That the Austin Legal Group continues to argue that their Proxy Practice is not illegal simply demonstrates their *purposeful* and *continued* use of "the governmental process (as opposed to the outcome of that process) as an anticompetitive weapon." *PREI,* 508 U.S. at 60–61; *California Motor*, 404 U.S. at 515 ("First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control."). The claims made in the Motion are without any factual or legal justification and are taken in furtherance of the attorney-client conspiracy between the Austin Legal Group and her clients and give rise to antitrust liability. *Clipper Exxpress*, 674 F.2d at 1270 ("There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body."); *id.* at 1272 ("*Walker Process* recognizes that fraudulently supplying information can result in monopolization, and therefore violate the antitrust laws.").

In *Hi-Top Steel*, the plaintiff brought claims of unfair competition and interference with contract and prospective economic advantage based on the defendants' challenge to the plaintiffs' application for a city permit to install an automobile body shredder. *Hi-Top Steel*, 24 Cal. App. 4th at 572-573. The trial court dismissed these claims on the defendants' motion for judgment on the pleadings. The court of appeal reversed, concluding that the plaintiffs' allegations were sufficient to show that the "defendants undertook petitioning activity solely to delay or prevent plaintiffs' entry into the shredded automobile body market through use of 'the governmental process—as opposed to

the outcome of that process—as an anticompetitive weapon.' " *Id*. at 582-583 (quoting *Omni*, 499 US at 380).

The plaintiffs alleged that: (1) the defendants had prosecuted an appeal without regard for its merits, (2) agreed to withdraw the appeal if the plaintiffs agreed not to compete with them in the automobile body shredding business, (3) threatened to impose additional obstacles if the plaintiffs would not agree, while (4) working toward installing their own shredder, indicating that their professed environmental concerns were not genuine. *Id*. at 581-582. These facts, the court found, were a sufficient basis to conclude that plaintiffs "were not concerned with stopping plaintiffs' installation … through governmental action but through the imposition of costs and burdens associated with the governmental process," and, therefore, to state a claim based on the sham exception to *Noerr-Pennington*. *Id.* at 583.

Here, Judge Wohlfeil found that but-for Cotton's alleged interference with the Berry Application, a CUP would have issued at the Property. (Comp. at ¶ 203 (Judge Wohlfeil at trial: "I think, that it's more probable than not that a CUP had been issued and the dispensary opened...").) In other words, what prevented Cotton from acquiring a CUP at the Property – the interference – was Geraci's petitioning activity with the City of San Diego and the filing of *Cotton I* based on the illegal Proxy Practice. The delay caused by the petitioning activity allowed Attorney Austin's other client to acquire a CUP within 1,000 feet of the Property, thereby disqualifying the Property for a CUP.

Based on *Hi-Top Steel*, and on the undisputed facts here and questions of law regarding illegality, this Court must find that the Austin Legal Group's petitioning activity was not to protect lawful ownership rights in cannabis businesses through governmental action. Rather, to through the imposition of costs and burdens associated with the governmental process to extort and make it financially unfeasible for Plaintiffs to protect and vindicate their rights. Therefore, Plaintiffs state a claim based on the sham exception to *Noerr-Pennington*. *Id.* at 583.

1. Plaintiffs are not barred by Civil Code § 1714.10.

The requirement under Section 1714.10 of the Civil Code that a plaintiff obtain an order allowing a pleading that includes a claim against an attorney for civil conspiracy with his or her client does not apply to a cause of action against an attorney if the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain. (Civ. Code § 1714.10(c).) Additionally, Civ. Code § 1714.10(a) bars only actions against an attorney for conspiring with a client arising from "any attempt to contest or compromise a claim or dispute." Here, Attorney Austin's representation of her client is for her petitioning activity with City and State licensing agencies and litigation in furtherance thereof, not an "attempt to contest or compromise a claim or dispute." Therefore, on its face, Civ. Code § 1714.10 does not apply to the Complaint.

Additionally, exceptions to the prefiling requirement apply here. "There are two statutory exceptions to the prefiling requirement of section 1714.10(a). Section 1714.10, subdivision (c) (hereafter section 1714.10(c)), provides that section 1714.10(a) does "not apply to a cause of action against an attorney for a civil conspiracy with his or her client, where (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain." (*Central Concrete Supply Co., Inc. v. Bursak* (2010) 182 Cal.App.4th 1092, 1099.)

Here, Attorney Austin lied to public agencies, the judiciaries, including this Court in the Motion, committed perjury in the *Cotton I* trial, has masterminded a multiyear criminal conspiracy successfully manipulating the San Diego State Courts to enforce illegal contracts, all for her financial gain via purely criminal petitioning activity, in blatant violation of the law, all originating from the Proxy Practice - submitting false documents to a cannabis licensing agencies to help drug dealers acquire prohibited ownership of legal cannabis businesses. *Clipper Exxpres*, 674 F.2d at 1271 ("***There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body***.") (emphasis added).

Finally, if the Court finds that Plaintiffs have failed to plead sufficient facts to show an exception to the prefiling requirement, Plaintiff's should be allowed to amend the complaint to include such because (1) subdivision (a) states the absolute defense only apply where a prefiling order is required, which as previously stated, is not required based on Attorney Austin's petitioning activity; and no expressed provision of the statute precludes the court from granting leave to amend to include such facts.

> A complaint setting forth either exception specified in section 1714.10(c) need not follow the petition requirements of section 1714.10(a). No express provision in section 1714.10(b) or any other subdivision of that statute precludes a trial court from granting a plaintiff leave to amend to demonstrate a valid conspiracy claim against an attorney by alleging either of the statutory exceptions. Further, nothing in the legislative history of section 1714.10(b) suggests that the trial court lacks its normal discretionary authority to grant leave to amend.

Central Concrete Supply Co., Inc. v. Bursak (2010) 182 Cal.App.4th 1092, 1100.

2. <u>The Proxy Practice is a per se violation of the Cartwright Act.</u>

To prevail in an antitrust action under the Cartwright Act, a plaintiff must prove the following: (1) the formation and operation of the conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts. *Asahi Kasei Pharma Corp. v. CoTherix, Inc.* (2012) 204 Cal.App.4th 1, 8.

The doctrine of per se illegality holds that some acts are prohibited by the antitrust laws regardless of any asserted justification or alleged reasonableness. *Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co.* (1971) 4 Cal.3d 354, 361. These per se illegal practices, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. (*Id*. at 361.)

The Proxy Practice is a per se violation of antitrust laws. It is illegal and intended to deprive competitors - qualified applicants - from acquiring ownership of cannabis businesses.

3. The Proxy Practice violates the Unfair Competition Law.

"The UCL is a law enforcement tool designed to protect consumers and deter and punish wrongdoing." *People ex rel. Harris,* 11 Cal.App.5th at 1159. It prohibits "unfair competition" that is broadly defined to include any unlawful, unfair or fraudulent business act or practice. BPC § 17200. The "unlawful" practices prohibited by the UCL "are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 531-532; *id*. at 532 (holding "conditional use permits are part of local zoning laws…. a violation of a permit's conditions is also a violation of the zoning law, and is therefore unlawful.").

In *Golden State Seafood, Inc. v. Schloss*, plaintiff filed an action for malicious prosecution and a UCL claim against a defendant attorney and his client. *Golden State Seafood, Inc. v. Schloss* ("*Golden State*") (2020) 53 Cal.App.5th 21, 27. The complaint alleged attorney defendant filed a prior lawsuit against plaintiff on behalf of his client knowing he lacked probable cause to bring and maintain the action. *Id*. Defendant attorney appealed the trial court's denial of his anti-SLAPP motion and a motion for reconsideration of same. *Id.* The Court of Appeal affirmed the denials and in reaching its decision on the UCL claim, the Court held: "Knowingly filing or pursuing unmeritorious legal actions that are not factually or legally tenable, for the purpose of earning income, qualifies as an unfair business practice." *Id*. at 40.

Here, as in *Golden State,* Attorney Austin's paid-for services of petitioning based on the Proxy Practice for her clients is an unfair business practice. Attorney Austin, despite her feigned understanding of the plain language of BPC §§ 19323/26057, is knowingly filing and maintaining legal actions on the grounds that the Proxy Practice is not illegal. The Proxy Practice is indisputably illegal anticompetitive conduct and therefore unmeritorious. Consequently, Attorney Austin's petitioning activity is an unfair business practice, is not subject to an anti-SLAPP motion, is not immunized, and constitute violations of the UCL.

4. Plaintiffs' claims are not barred by the litigation privilege.

As demonstrated above, the Proxy Practice is illegal and all litigation based on it is sham litigation that is not immunized by the litigation privilege. *See PREI*, 508 U.S. at 60–61.

5. Because the Proxy Practice is illegal, Plaintiffs have a valid cause of action for conspiracy.

Attorney Austin's claim that Plaintiffs do not make out a cause of action for conspiracy fails because it is predicated on the false assumption that the Proxy Practice is not illegal. The Proxy Practice is illegal. The Austin Legal Group is therefore jointly liable with its clients and third-party joint-tortfeasors for all damages caused to Plaintiffs because of their illegal petitioning activity.

VI. ATTORNEY FEES AND COSTS

Pursuant to Civ. Cod. Proc. § 425.16(c)(1), "if a court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court ***shall*** award costs and reasonable attorney's fees to a plaintiff prevailing on the motion pursuant to Section 128.5." (Emphasis added.)

Plaintiff's ask that the court make a finding that the special motion to strike is in fact frivolous and award reasonable costs and attorney's fees to Plaintiffs. At least as to Mrs. Sherlock and her children.

VII. LEAVE TO AMEND

Plaintiffs request leave to amend deficiencies in their pleading. At the very least, Plaintiffs need to amend their claims to reflect that they did not have direct ownership interests in the Lemon Grove CUP. Former plaintiff Chris Williams had ownership interests in the Lemon Grove CUP, but Williams withdrew as a plaintiff after the filing of the original complaint in this action when he was called by Attorney Austin and he became fearful for the safety of his family.

VIII. CONCLUSION

The "shall deny" language of BPC §§ 19323/26057 is the law. The Austin's Legal Group's petitioning activity for Geraci, Razuki, and all their clients in furtherance of alleged ownership rights via applications that fail to disclose them to licensing agencies is illegal as a matter of law.

But-for (i) Cotton steadfastly and heroically refusing for years to not be extorted of the Property via the pressures of litigation and adverse rulings and (ii) Razuki and Malan's falling out over ownership of their illegal multi-million dollar cannabis empire they built in the City of San Diego, the Austin Legal Group would not be forced in this litigation to nonsensically attempt to argue that the Proxy Practice is not illegal because somehow the Department of Cannabis Control magically knows that Geraci and Razuki had interests in the applications and "shall deny" means "may deny."

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Respectfully submitted,
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