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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,

Defendants.

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

OPPOSITION TO DEFENDANT STEPHEN LAKE'S DEMURRER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Date: August 19, 2022
Time: 9:00 a.m.
Dept: C-75
Judge: Hon. James A Mangione
Filed December 3, 2021
Trial: Not Set

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INTRODUCTION[1]

Defendant Stephen Lake's demurrer begins with the adage that "no good deed goes unpunished." (Dem. at 4:3.) To which plaintiffs Amy Sherlock, and minors T.S. and S.S. (the "Sherlock Family") respond: "There is a poet named Dante who wrote a poem called the Inferno. And he and another poet named Virgil in this book were walking down into hell. And at the lower--the lower you went into hell, the more serious the crimes, and those were the crimes which were done with a clear head, not with any emotion or any passion, but simply because ***somebody calculated how to make money out of evil***. ***That's exactly what you did***." (*United States v. Winters* (7th Cir. 1997) 117 F.3d 346, 348 (emphasis added).)

Lake and defendant Bradford Harcourt with clear heads calculated how to make money out of evil – by defrauding the Sherlock Family of two highly valuable businesses, two cannabis dispensaries, after the death of their husband and father, Michael "Biker" Sherlock.

Lake, married to Mrs. Sherlock's sister, and Harcourt were Mr. Sherlock's business partners. The Sherlock Family trusted them. But-for Mrs. Sherlock being contacted about a form filed with the State of California three weeks *after* Mr. Sherlock's death, she would have never learned that Lake and Harcourt lied and stole her and her children's inheritance. An inheritance that Mr. Sherlock acquired at great personal and financial cost over the course of years and which is worth in excess of ten million dollars. In his demurrer, Lake seeks to cover up the theft of the Sherlock Family's inheritance based on his despicable allegation that *implies* that less than 24 hours before Mr. Sherlock purportedly took his life, Mr. Sherlock executed contracts that signed away over ten million dollars of assets. Thereby leaving his family in financial distress, and he, Lake, stepped in to "pick up the pieces" and became the Sherlock Family's protector and savior. In other words, that Mr. Sherlock cared more about Lake and Harcourt than he did about the wellbeing and financial security of his own wife and children.

That Lake and Harcourt have and are acting with evil intent is made clear by the threshold issue pursuant to which the demurrer must be denied. The demurer must be denied because it is entirely premised on the unstated assumption that there exists a lawful contract between Mr. Sherlock and

[1] The Sherlock Family notes that all pleadings, motions, transcripts, and rulings in this and related cases, including the briefs for this motion, and the transcript and ruling when available, can be found at https://151farmers.org/2018/04/01/canna-greed-stay-awake-stay-aware-my-story/.

Harcourt. A contract pursuant to which Harcourt lawfully transferred the Balboa CUP,[2] the Ramona CUP,[3] and the Balboa Property (collectively, the "Sherlock Property") to himself and Lake. No such contract exists, is not even alleged to exist, will be forged if produced, and it is certainly not now before this Court. Lake's actual demurrer arguments, as demonstrated below, are without merit as they are directly contradicted by facts pled, facts subject to judicial notice, and applicable law.

MATERIAL FACTUAL AND PROCEDURAL BACKGROUND ALLEGED IN THE FAC AND FACTS SUBJECT TO JUDICIAL NOTICE

I. Real properties that qualify for dispensaries are extremely limited and incredibly valuable.

Although the City of San Diego has authorized the issuance of 36 CUPs for dispensaries, four per district, due to various regulatory requirements and available properties, "City planning staff concluded that the actual number of dispensaries to be created 'is very likely to be significantly less'" than 30. (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1182.) The dispensary operating at the Balboa Property under the Balboa CUP in the City is one these "less" than 30 dispensaries that can operate (the "Balboa Dispensary").

In October 2021, the County of San Diego adopted ordinance amendments to allow the five existing cannabis dispensaries in the unincorporated County to continue to operate, but prohibited the issuance of additional dispensaries. (Request for Judicial Notice (RJN) Ex. 1 (ordinance) at §§ 3, 5.) The dispensary operating at the Ramona Property pursuant to the Ramona CUP, listed in the ordinance, is among the five existing dispensaries in the unincorporated County (the "Ramona Dispensary"). (*Id.* at § 3.)

II. Material history of the acquisition and disposition of the Sherlock Property.

Mr. Sherlock was the sole and ultimate beneficial owner of the Balboa/Ramona CUPs. Mr. Sherlock shared ownership interests of the Balboa Property with Harcourt as it was owned by Leading Edge Real Estate, LLC (LERE), in which both Mr. Sherlock and Harcourt had membership interests. As alleged in the FAC and subject to judicial notice, subsequent to Mr. Sherlock's death on December 3, 2015, Harcourt transferred (1) the Balboa CUP to himself, (2) the Balboa Property to Lake, and (3) the

[2] The "Balboa CUP" was issued at 8863 Balboa Avenue, Unit E, San Diego, California 92123 (the "Balboa Property").

[3] The "Ramona CUP" was issued at 1210 Olive Street, Ramona, CA 92065 (the "Ramona Property").

Ramona CUP to Lake and Lake's friend, Renny Bowden.

(1) *The Balboa CUP*. On July 29, 2015, the Balboa CUP was recorded with the San Diego County Recorder's Office. (RJN Ex. 2.) It states: "This Conditional Use Permit No. 1296130 is granted by the Planning Commission of the City of San Diego to [LERE], Owner and United Patients Consumer Cooperative, Permittee." (*Id.* at 1.) Mr. Sherlock executed the CUP as the Managing Member of LERE and on behalf of United Patients as the Permittee. (*Id*. at 7.) After Mr. Sherlock passed away, Harcourt transferred the Balboa CUP to his own entity, San Diego Patients Cooperative Corporation (SDPCC), and himself. (FAC ¶ 74.) Harcourt judicially admits to this in his lawsuit against, among others, Salam Razuki and Ninus Malan in which he alleges they stole the Balboa CUP from him after he transferred it to himself ("*Razuki I*").[4]

(2) *The Balboa Property*. On June 18, 2015, LERE acquired the Balboa Property. (FAC ¶ 70; RJN Ex. 4. (grant deed).) In April 2016, Harcourt, on behalf of LERE, executed a grant deed for the Balboa Property in favor of High Sierra, LLC, owned by Lake. (FAC ¶ 81; RJN Ex. 5 (grant deed).) Lake then sold the Balboa Property to Razuki Investments, owned by Razuki. (FAC ¶ 82; RJN Ex. 6 (grant deed).)

(3) *The Ramona CUP*. In January 2015, Mr. Sherlock applied for the Ramona CUP on behalf of Olive Tree Patients Association ("Olive Tree") and Lake executed the application as the owner of the Ramona Property. (RJN Ex. 7 (application).) Mr. Sherlock was granted the Ramona CUP. (FAC ¶ 68; *see* RJN Ex. 8.) Less than two months after Mr. Sherlock's death, on February 2, 2016, Bowden applied for the Ramona CUP on behalf of Olive Tree. (RJN Ex. 9.) On May 24, 2017, the County of San Diego Sherriff's Office renewed the Ramona CUP and it was issued in the names of Olive Tree, Bowden *and* <u>*Lake*</u>. (RJN Ex.10.)

III. <u>Material factual allegations in the FAC as to Lake and Harcourt.</u>

The FAC alleges that Lake and Harcourt conspired to fraudulently steal the Sherlock Property from the Sherlock Family upon Mr. Sherlock's death through forged documents and misrepresentations

[4] RJN Ex. 3 (*San Diego Patients Cooperative Corporation, Inc. v. Razuki Investments, LLC*, San Diego Superior, Court Case No. 37-2017-00020661) (complaint) at ¶ 19 ("After Sherlock passed away in or around December 2015, HARCOURT <u>submitted</u> documentation to the City of San Diego in order to remove [Mr.] Sherlock as the MMCC's responsible person, and HARCOURT then finalized the recording of the CUP with the City of San Diego under SDPCC. Moreover, HARCOURT <u>identified</u> himself as the MMCC's responsible person.") (emphasis added).)

to the Sherlock Family and third parties. (*See* FAC ¶¶ 285-309.)

Mrs. Sherlock did not become aware of the fraudulent theft until plaintiff/attorney Andrew Flores contacted her in January 2020 about a dissolution form filed with the state that dissolved LERE (the "Dissolution Form"). (FAC ¶ 84, Ex. 1 (Dissolution Form).) The Dissolution Form was filed three weeks *after* Mr. Sherlock's death. (*Id.*) Flores informed Mrs. Sherlock that Harcourt had transferred the Balboa CUP to himself. (FAC ¶ 87.) Mrs. Sherlock then spoke with Lake and told him she intended to sue Harcourt and Lake then admitted that him and Harcourt were responsible for the transfer of the Balboa CUP to Harcourt. (*Id.*) Lake admitted "***we did it***" and told Mrs. Sherlock there is "***nothing you can do about it***." (*Id.* (emphasis added).)

Thereafter, in February 2020, an expert handwriting forensic expert concluded that the Dissolution Form was most likely forged. (FAC ¶ 88.) Mrs. Sherlock then confronted Lake with evidence that the Dissolution Form had been forged and her intent to use that evidence to sue Harcourt, Lake responded by alleging:

> he had seen Mr. Sherlock execute the Dissolution Form the day before he passed away and that he was in an extremely emotional state, severely depressed because he had to "sign away" the Balboa CUP, because of the allegedly expensive HOA Litigation, and that is why his signature on the Dissolution Form does not look like his normal signature. Lake said that this was the reason why Biker had committed suicide. ***Lake said that Biker had cost him a lot money and repeatedly attempted to convince Mrs. Sherlock to not sue Harcourt***. Mrs. Sherlock was shocked and outraged but kept calm and asked if she would be getting any proceeds related to the Balboa and Ramona CUPs as a result of Biker's investment of time and capital to acquire them. ***Lake responded that Biker's contributions were "worthless," that Mrs. Sherlock and her children were not entitled to anything, and that she should be content with the proceeds from Mr. Sherlock's life insurance policy***.

(FAC ¶¶ 94-95 (emphasis added).)

As to Harcourt, the FAC attaches as Exhibit 2 an email chain between attorney Flores and attorney Allan Claybon, counsel for Harcourt. (FAC, Ex. 2.) On February 21, 2020, Flores emailed Claybon after first speaking with him and provided Claybon the Dissolution Form, the report concluding it was mostly likely forged, and concluded: "I hope your client has evidence and a credible explanation for what appears to be a forged signature that left him with [the] valuable [Balboa] CUP." (*Id*. (February 21, 2020 email).) Claybon over the course of weeks specifically and repeatedly refused to provide the requested evidence. (*Id*.) Materially, the last email from Claybon concludes: "*My client is willing to*

discuss the information requested ***after taking time to gather evidence***." (*Id*. (March 9, 2020 email) (emphasis added).)

IV. The Cartwright Act claim: Attorney-defendant Gina Austin's Proxy Practice is illegal and a per se violation of the Cartwright Act.

California Business & Professions Code (BPC) § 20657, formerly § 19323, provides the criteria for the mandatory denial of an application for a cannabis license: "The licensing authority ***shall deny*** an application if the applicant has been sanctioned by a city for unauthorized commercial cannabis activities in the three years immediately preceding the date the application is filed with the department." (BPC § 26057(a), (b)(7) (emphasis added, cleaned up).)

Attorney-defendant Gina Austin and her law firm, the Austin Legal Group, represent parties, including defendants Lawrence Geraci and Salam Razuki, who have been sanctioned for unlicensed commercial cannabis activities (principals) in applying for CUPs/licenses through the use of proxies (agents) who do not disclose the principals as the true owners of the CUP applied for (the "Proxy Practice"). (FAC ¶¶ 4, 119, 283.)

The FAC sets forth a Cartwright Act cause of action against defendants for acts taken in furtherance of restraining trade and pursuing a "monopoly" in the cannabis market in the County and City of San Diego primarily through attorney Austin's Proxy Practice and sham litigation in furtherance thereof (the "Antitrust Conspiracy"). (FAC ¶¶ 280-284.) [5] As set forth in the FAC, there have been numerous lawsuits in the State and Federal courts arising from or based on contracts entered into pursuant to the Proxy Practice. (*See*, *gen.*, FAC.) Numerous parties have challenged the legality of the Proxy Practice. (*See*, *e.g.*, FAC ¶ 209.) The first judge to address the issue found the defense of illegality to the Proxy Practice had been waived mistakenly believing that the defense of illegality could be waived and thereby judicial decree turn an illegal contract that violated BPC §§ 19323/20657 into a lawful

[5] *See* FAC ¶¶ 61-63 ("During the course of Flores' investigation, he spoke with an investigative reporter who had interviewed an employee of Razuki after Razuki had been arrested by the FBI (the 'Employee'). The investigative reporter provided Flores a copy of the interview with the Employee. The Employee stated that he was present when Austin provided confidential information from her non-Enterprise clients regarding real properties that qualified for CUPs so that Razuki and his associates could take action to prevent the acquisition of those CUPs by Austin's non-Enterprise clients in furtherance of creating a ***monopoly***. The Employee also stated that Razuki and his associates use Mexican gangs to commit violent acts on their behalf to further their goals when disputes arise in the operations of their dispensaries.") (emphasis added).)

judicially enforceable contract. (FAC ¶ 209; *cf. Vierra v. Workers' Comp. Appeals Bd.* (2007) 154 Cal.App.4th 1142, 1148; *City Lincoln-Mercury Co. v. Lindsey* (1959) 52 Cal.2d 267, 274.)

Pending before this Court is Austin's anti-SLAPP motion in which she argues the Proxy Practice is not illegal and does not give rise to antitrust liability because:

> 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 ***complete discretion*** to weigh factors and decide what may constitute grounds for denial.

(RJN Ex. 11 at 17-18 (emphasis added).)

The opposition to the anti-SLAPP motion argues that Austin's argument makes no sense for two reasons: First, how can the State issue a license to parties that are not disclosed in the applications? It is impossible; it is the perpetration of a fraud on a licensing agency. (RJN Ex. 12 (opposition) at 13:20-14:12).) Second, the Legislature's use of the word "shall deny" reflects an absolute prohibition to the issuance of licenses for parties sanctioned for operating illegal dispensaries like Razuki. (*Id.* at 14:13-15:15).) Austin's seven-page Reply ***did not*** address these two arguments in any manner whatsoever. (*See, gen.*, RJN Ex. 13.) Austin in substance argues she is an honorable attorney of the greatest integrity that is incapable of conspiring with her wealthy clients to commit a crime for money.

Plaintiffs respectfully note they will file a petition for a writ of mandate in Sacramento against the Department of Cannabis Control. Plaintiffs will seek to compel the Department of Cannabis Control to intervene in the numerous cases in the Federal and State courts in San Diego in which illegal contracts based on the Proxy Practice are being enforced and ratified wasting millions of tax payer dollars, to the great prejudice of the public and parties who have been harmed by Austin and her wealthy clients.

LEGAL STANDARD

The Court is well aware of the applicable standards for ruling on a demurrer: the demurrer admits the truth of all material facts pleaded, no matter how unlikely or improbable, the allegations must be accepted as true for the purpose of ruling on the demurrer. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The Courts "also consider matters which may be judicially noticed. Further, [the courts] give the

complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Ibid.*)

ARGUMENT

I. Lake's demurrer must be denied entirely because it rests *exclusively* on the false premise that there exists a lawful contract pursuant to which Mr. Sherlock agreed to have Harcourt sell and transfer Mr. Sherlock's real and personal property to himself and Lake.

"Every first-year law student knows that, to form a contract, one must have (1) an offer, (2) an acceptance, and (3) consideration."[6] (Civ. Code § 1550(4) ("It is essential to the existence of a contract that there should be…. consideration.").) ***WHERE IS THE CONTRACT?*** Neither Lake, Harcourt nor their *numerous* attorneys have alleged the existence of a contract pursuant to which Mr. Sherlock agreed to sell or transfer the Sherlock Property. However, Harcourt and Lake have already made clear their intent to produce and present to this Court a forged contract. Harcourt did so in his last email from his counsel requesting time to "gather evidence," after weeks of refusing to explain his ownership of the Balboa CUP, when he could have just attached it and sent it if it existed. (FAC Ex. 2.) And Lake's demurrer has already set the groundwork for presenting that forged contract by Harcourt by *implying* he saw Mr. Sherlock sign it less than 24 hours before he passed away: "[Mr. Sherlock and Harcourt] were reviewing paperwork and ***signing documents***." (Dem. at 7:16 (emphasis added).)

The *implied* contract by Lake does not exist and Harcourt himself has for over a year refused to allege it exists, much less provide it as requested. What Harcourt *did* do through his attorney is argue it is too late for the Sherlock Family to sue him for the fraudulent theft because too much time has passed (i.e., the statute of limitations). (FAC ¶¶ 98-99.) Is it even possible for a person to act anymore guilty? Any decent and moral person upon being asked by a widow as to how he acquired property that she believed to be her inheritance and that of her children would have provided *some* kind of explanation if innocent. Anything. Harcourt did not and his failure to do so is prima facie evidence of his guilt.

The Court must deny Lake's demurrer because the Court cannot judicially find, impliedly or directly, the existence of such a contract that is not alleged to exist and that is not before the Court.

II. The Sherlock Family states a cause of action for conversion of their personal property.

"Conversion is generally described as the wrongful exercise of dominion over the personal property of another. The basic elements of the tort are (1) the plaintiff's ownership or right to possession

[6] *Tritschler v. Haire* (E.D.Ky. June 1, 2009, Civil Action No. 5:07-437-JMH) 2009 U.S.Dist.LEXIS 45588, at *6, fn. 3.

of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting damages." (*Regent Alliance Ltd. v. Rabizadeh* (2014) 231 Cal.App.4th 1177, 1181 (quotation omitted) (*Regent*).)

"Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial." (*Id.*) "The rule of strict liability applies equally to purchasers of converted goods, or more generally to purchasers from sellers who lack the power to transfer ownership of the goods sold. That is, there is no general exception for bona fide purchasers." (*Id.*)

As material here and stated in plain simple words: (i) a party who sells the personal property of another without any authority is guilty of conversion (*Reynolds v. Lerman* (1956) 138 Cal.App.2d 586) and (ii) the party who purchases the stolen personal property, even in good faith and without knowledge of the theft by the seller, is *still* strictly liable and guilty of conversion as against the true owner because "a thief cannot pass title to stolen property." (*Regent,* 231 Cal. App. 4th at 1185 (quotation omitted).) When plaintiffs prove a claim for conversion, they have the *right* by law to the return of their stolen personal property and not just money damages against the thief who stole property. (*Bainbridge v. Stoner* (1940) 16 Cal.2d 423, 428-429.) It is the purchaser who was defrauded by the thief into stealing stolen property that must then seek damages against the thief. (*Ibid.*)

The case of *Holistic* is nearly factually identical and is controlling on the issue of conversion of the Sherlock Family's personal property, as summarized by the Court of Appeal:

> This case arises from an ownership dispute over a medical marijuana dispensary in Los Angeles. In essence, plaintiff Jamie Kersey claims defendant Christopher Stark transferred his ownership in Holistic Supplements, LLC (hereafter the LLC), to her in April 2015. Unbeknownst to Kersey and despite that alleged transfer, he later converted the LLC from a limited liability company to a corporation and then a mutual benefit corporation in his name called Holistic Supplements Inc. (the corporation) and changed the business address. In that process, he claimed rights to a business tax registration certificate (***BTRC***), ***a city-issued tax document that enabled the dispensary to operate***.
>
> Kersey and the LLC sued Stark and the corporation for conversion, unfair competition, and declaratory relief, among other claims. The case went to a jury trial, presenting the core factual dispute of whether Stark validly signed the April 2015 transfer documents or whether his signatures were forged. The jury ultimately decided only a single claim of

> conversion asserted by the LLC against the corporation, returning a defense verdict. The trial court removed the rest of the claims from the jury by granting nonsuit to defendants.
>
> On appeal, plaintiffs argue nonsuit was improper and the trial court committed prejudicial instructional error on the conversion claim decided by the jury. We agree on both points. We conclude: (1) ***nonsuit was erroneous on Kersey's individual claims because she has standing to sue for conversion of her personal property membership interest in the LLC***; (2) nonsuit was erroneous on claims against Stark in his individual capacity, since he can be held liable for personally participating in the tortious conduct of the corporation; (3) nonsuit was erroneous on plaintiffs' claims under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.; the UCL) because we reject the only two grounds for nonsuit defendants raise on appeal; and (4) ***the BTRC is property subject to conversion, so the trial court prejudicially erred when it instructed the jury it was not***.

Holistic Supplements, LLC v. Stark (2021) 61 Cal.App.5th 530.

A. <u>The Sherlock Family has pled all the elements for a cause of action for conversion of their personal property: the Balboa/Ramona CUPs and their membership interests in LEER.</u>

First, the FAC alleges and judicial facts establish that Mr. Sherlock owned the CUPs and had membership interests in LERE. (FAC ¶¶ 68-71; RJN Exs. 2, 4, 7-8.) Lake does not dispute, nor can he, that upon the death of Mr. Sherlock without a will, all his property transferred to his wife and children as his heirs. (Prob. Code § 6400 ("Any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs as prescribed in this part."); (*id*. § 6401 (intestate share of surviving spouse); *id.* § 6402 (intestate share of heirs other than surviving spouse).) Thus, the Sherlock Family meets the first element – their ownership interests in the CUPs and LERE.

Second, the FAC alleges that Lake conspired with Harcourt upon the death of Mr. Sherlock to fraudulently transfer the Sherlock Family's ownership interests in the CUPs and LERE to themselves or their entities through misrepresentations to the City of San Diego and forged documents, including the Dissolution Form that dissolved LERE. (FAC ¶¶ 291-300.) Harcourt's own complaint against Razuki is his judicial admission that he transferred the Balboa CUP to himself from Mr. Sherlock. (RJN Ex. 3 at ¶ 19.) Judicial facts establish that after Mr. Sherlock's death, Lake claimed ownership of the Balboa Property and the Ramona CUP. (RJN Exs. 5, 6, 9.) These allegations and judicially noticeable facts meet the second element - acts by Lake and Harcourt that constitute the willful interference, without any legal justification, with the Sherlock Family's personal property that deprived them of their use and possession.

Third, the Sherlock Family has suffered damages, which include the lost profits generated from

the operation of the Balboa and Ramona dispensaries, attorneys' fees and costs, as well as their ever-increasing extreme emotional distress caused by the theft of their inheritance that Mr. Sherlock obtained at great financial and personal cost. (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1150-1151 ("emotional distress damages are also recoverable by the victim of conversion").)

B. Lake's arguments that the Sherlock Family fails to state a cause of action for conversion are contradicted by the facts pled, judicially noticeable facts, and applicable law.

All of Lake's despicable, self-exculpating, self-aggrandizing, and evidentiarily contradicted or unsupported allegations describing himself as the savior and protector of the Sherlock Family in order to cover up his and Harcourt's theft of the Sherlock Property must be disregarded on demurrer. (*Blank*, 39 Cal.3d at 318.) However, to show the complete lack of merit of Lake's demurrer to the conversion claim, each of the six factual and legal arguments he sets forth in support thereof are addressed below:

First, Lake argues the conversion claim fails because "it is premised on the conversion of property by [Lake] that [Mr. Sherlock] never owned." (Dem. at 11:4-5.) As proven above, Mr. Sherlock had ownership interests in the Balboa/Ramona CUPs and LERE.

Second, Lake argues the Balboa Property as real property cannot be "the subject of a conversion cause of action." (*Id*. at 11:15-16.) The Sherlock Family agrees that Balboa Property is not subject to a conversion claim. However, Mr. Sherlock's membership interest in LERE, which was the owner of the Balboa Property, *is* subject to a conversion claim. (*Holistic*, 61 Cal.App.5th at 542 ("Kersey's membership interest in the LLC was personal property belonging to her as an individual. As personal property, Kersey's membership interest could be subject to individual claims based on theft of that interest.").) The Sherlock Family, like Kersey in *Holistic*, can sue for damages for the theft of their interests in LEER by Harcourt, which he used to transfer the Balboa Property to himself and Lake. (*Id.*)

Third, Lake's argument that "there has been no showing of any interest held by" Mr. Sherlock in the Balboa Property (Dem. at 11:16-17) is contradicted by Mr. Sherlock membership interest in LEER, which owned the Balboa Property.

Fourth, Lake argues the "Balboa Property was purchased by LERE, not [Mr. Sherlock], and was sold with [Mr. Sherlock's] consent in an effort to repay [Lake's] loan." (*Id.* at 11:19-20.) Lake's allegation of consent is contradicted by the FAC alleging he directly admitted he conspired with Harcourt and stole the Sherlock Property, including the Balboa Property. (*See*, *e.g.*, FAC ¶¶ 87, 94-97.)

Fifth, Lake argues a cause of a conversion cannot be maintained because a CUP "is a property right that runs with the land, not to the individual permittee." (*Id*. at 11:21-22.) Lake's claim is legally baseless: "A CUP creates a *property right* which may not be revoked without constitutional rights of due process. ***Additionally***, a CUP creates a right which runs with the land, not to the individual permittee." (*Malibu Mts. Rec. v. County of L.A.* (1998) 67 Cal.App.4th 359, 367-368 (emphasis added).) A CUP grants two rights, to the permittee and *additionally* to the land upon which it is granted. (*Id.*)

Sixth, Lake argues "there is no allegation that [Lake] ever had an interest in LERE, that he was responsible for the dissolution of LERE, or that he ever received any benefit from the dissolution of LERE." (Dem. at 12:3-4.) Lake's argument is contradicted by allegations in the FAC - he acquired the Balboa Property owned by LERE (FAC ¶ 81) - and basic logic. *If* Harcourt had not unlawfully dissolved LERE, *then* the Sherlock Family would have learned about the existence of LERE as his heirs and successors-in-interest to his membership interest in LERE via yearly State requirements for LLCs. *Then*, the Sherlock Family would have the right to demand an accounting from Harcourt of the disposition of the assets of LERE. *Then,* the accounting would have exposed and revealed Harcourt's liabilities for violations of his fiduciary duties and tortious acts of stealing/converting the Sherlock Property for himself and Lake. (*See Holistic*, 61 Cal.App.5th at 544 ("As the director and shareholder of the corporation, Stark could be held personally liable for participating in, directing, or authorizing tortious conduct."); *Classen v. Weller* (1983) 145 Cal.App.3d 27, 48 ("Corporate officers are liable for their tortious acts committed on behalf of the corporation. Antitrust violations are torts.") (citations omitted).)

III. The Sherlock Family states a claim for violations of the Cartwright Act.

The Cartwright Act prohibits two or more persons from combining to do certain specified anti-competitive acts including creating or carrying out restrictions on trade or commerce and preventing competition in the sale or purchase of any commodity. (BPC § 16720(a), (c).) "[A]greements to establish or maintain a monopoly are restraints of trade made unlawful by the Cartwright Act." (*In re Cipro Cases I & II (2015*) 61 Cal.4th 116, 148.) "Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (*Fisherman's Wharf Bay Cruise Corp. v. Superior Court of San Francisco* (2003) 114 Cal.App.4th 309, 334.)

A. Cartwright Act Standing

To have standing, a plaintiff must show an "antitrust injury," which is defined as: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." (*Knevelbaard Dairies v. Kraft Foods, Inc.* (9th Cir. 2000) 232 F.3d 979, 987.)

Here, first, the FAC plainly alleges the unlawful conduct, the theft of the Sherlock Property by Lake and Harcourt. Second, the Sherlock Family has suffered injury as they have had their businesses and property stolen. Third, their injury flows "from that which makes the conduct unlawful," i.e., the illegal acquisition of cannabis businesses via theft and fraud. Fourth, it is the type of injury antitrust laws were intended to prevent. Illegal actions taken by market participants in a market with extremely limited competitors that restrain and prevent market competition. (*Id*. at 988 ("the central purpose of the antitrust laws, state and federal, is to preserve competition. It is competition… that these statutes recognize as vital to the public interest.").) The City has less than 30 CUPs available, and the unincorporated County only has 5, which have already been issued. The Sherlock Family has suffered an antitrust injury and has standing to bring a Cartwright Act claim.

B. The Proxy Practice is a *per se* violation of the Cartwright Act.

California courts have classified certain activities as per se illegal, i.e., as being prohibited by the Cartwright Act without inquiry into market effects or procompetitive justifications. (*Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 930-931 (*Marin*).) The rationale is that "there are certain agreements or practices which 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.*)

Here, the Proxy Practice is the acquisition of cannabis businesses by parties prohibited from owning cannabis businesses because they were sanctioned for illegal commercial cannabis activity (i.e., operating illegal black-market dispensaries). The illegal acquisition is acquired via fraudulent applications to State and City cannabis licensing agencies. The contracts that effectuate or are based on the Proxy Practice, including attorney Austin's agreements with her clients like Geraci and Razuki to represent them in litigation based on the Proxy Practice, are all illegal contracts because they directly

violate BPC §§ 19323/26057 and cannot be judicially enforced. (*Vierra v. Workers' Comp. Appeals Bd.* (2007) 154 Cal. App. 4th 1142, 1148 ("A contract that conflicts with an express provision of the law is illegal and the rights thereto cannot be judicially enforced.").)

The Proxy Practice and contracts based on them have a "pernicious effect on competition and lack of any redeeming virtue [and should be] 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." (*Marin*, 16 Cal.3d at 930-931.) It simply surreal that the Proxy Practice has been judicially ratified, condoned, and encouraged for over five years. It is a violation of the *Walker Process* doctrine and as clear a per se violation of the Cartwright Act as can possibly be imagined; drug dealers getting undisclosed ownership of legal dispensaries they can't own through attorneys petitioning to government agencies and the courts. (*Clipper Exxpress v. Rocky Mt. Motor Tariff Bureau* (9th Cir. 1982) 674 F.2d 1252, 1270 ("the *Walker Process* doctrine… provides antitrust liability for the commission of fraud on administrative agencies, for predatory ends."); *id*. at 1271 ("There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body.").)

C. <u>Attorney Austin's defense to the Proxy Practice is ridiculous and she knows it, but-for her clients engaging in litigation, her role in helping them illegally acquire cannabis businesses would never be known by judges.</u>

Austin and her attorneys argue the "shall deny" language the Legislature used in BPC §§ 19323/26057 means the Department of Cannabis has "complete discretion" to grant or deny applications. So, Austin is not committing a crime by petitioning for her sanctioned clients via the Proxy Practice.

"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 (quotation omitted). The Legislature's use of "***shall not***" in a statute has been held to reflect the Legislature's intent of "***absolutely prohibiting***" a contrary act. (*Paterra v. Hansen* (2021) 64 Cal.App.5th 507, 536.) "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) 140 S.Ct. 1731, 1737.)

Here, the "***shall not***" language in BPC §§ 19323/26057 is clear and controlling, it is the law. Applicants like Geraci and Razuki are *absolutely prohibited* from owning a cannabis business via the

Proxy Practice. As a matter of law, the Proxy Practice is illegal. (*See 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.").)

D. <u>Lake and Harcourt's theft by itself is a per se violation of the Cartwright Act.</u>

In *Richmond*, plaintiff Richmond Compassionate Care Collective ("RCCC") acquired a CUP to operate a dispensary.[7] However, after RCCC determined the original location at which the CUP was issued was not suitable, RCCC failed to find another code-compliant property and its CUP became void pursuant to local ordinance for failure to open the dispensary. (*Id.* at 4.) RCCC then brought a Cartwright action suing defendants, the only three dispensaries operating in the local market and their agents, alleging they engaged in a group boycott when they "intentionally excluded RCCC from the market by locking up any available properties, or dissuading others from engaging in transactions with RCCC during the time frame RCCC was required to obtain a dispensary location per local ordinance." (*See id.* at 3:9-11.)

In defeating defendants' motion for summary judgment, plaintiff had to demonstrate the existence of a triable issue of fact on the elements of his claim of a group boycott. The Court stated the elements as follows: "To prove a group boycott, RCCC must show (1) that Defendants agreed to prevent RCCC from obtaining a location, (2) that RCCC was harmed; and (3) that Defendant's conduct was a substantial factor in causing RCCC's harm." (*Id.* at 9:3-4 (citing 2 CACI 3403).) The court denied defendants motion, and RCCC prevailed at trial proving defendants prevented him from acquiring a code-compliant property and was awarded $5,000,000 in damages, mandatorily trebled to $15,000,000 pursuant to BPC § 16750(a). (*See* RJN Ex. 14 (verdict form).)

Here, Lake and Harcourt, like defendant competitors in *Richmond*: (1) have prevented the Sherlock Family from obtaining the Balboa and Ramona Dispensaries by stealing the Sherlock Property pursuant to which they operate; (2) they have been harmed as, *inter alia*, they have been deprived of the profits generated by the dispensaries for years; and (3) but-for Lake and Harcourt's theft of the Sherlock Property, they would have ownership of and the profits from the dispensaries.

[7] *Richmond Compassionate Care Collective v. 7 Stars Holistic Found.*, No. C16-01426 (Supr. Ct. of Cal., County of Contra Costa (2021)) ("*Richmond Order*"). A true and correct copy of the *Richmond Order* is attached hereto as Exhibit 1.

E. Lake's argument that the Sherlock Family did not plead a Cartwright Act violation are without merit.

Lake does *not* dispute the Proxy Practice is illegal and an antitrust violation in his demurrer. (*See, gen.*, Dem.) Rather his demurer to the Cartwright Act claim is premised on the assumptions or arguments that the Sherlock Family lacks standing, they do not own the Sherlock Property, Lake did not convert the Sherlock Property, a CUP is not personal property, and "[o]ther than owning the land that the CUPs flowed from, the FAC is utterly devoid of any facts tying LAKE to the alleged conspiracy." (Dem. at 9:3-11:2.) With the exception of the last argument, the other arguments have been addressed above and are meritless. As to his last argument, it is a baseless claim by itself for at least three reasons:

First, as the FAC alleges and the Ramona CUP issued in his name subject to judicial notice proves, he did not just own land. (FAC ¶ 79; RJN Ex. 10.)

Second, Lake admits that he sold the Balboa Property to Razuki. In *Richmond*, the court denied defendants' motion for summary judgment as addressed above. But, it also denied defendants' request that defendant Parle be dismissed. (*Richmond Order* at 9.) The court denied the motion because plaintiffs presented a deed of trust executed by Parle on behalf of an LLC alleged to have been formed in order to own one of the properties that was alleged to have been improperly tied up. (*Id*. at 9-10.) The Court denied the motion explaining that "Ms. Parle's signature is an act. RCCC was prevented from obtaining 3219 Auto Plaza. Whether Ms. Parle's motive, in signing her name, was to participate in the conspiracy, is not a basis on which this Court will grant summary judgment." (*Id*.)

Here, the FAC alleges that Lake conspired with Harcourt to steal the Sherlock Property through forged documents and misrepresentation to third parties. Whether those acts were taken as independent torts or in furtherance of attorney Austin's antitrust conspiracy is an issue for a jury to decide that cannot be granted on a motion for summary judgment, much less a demurrer as is before this Court. (*Id.* (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.* (1962) 370 U.S. 690, 697).)

Third, the joint and several liability rule of conspiracy law has been applied to Cartwright Act claims. (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 544.) This applies to corporate officers, like Harcourt, for their tortious acts committed on behalf of the corporation, including antitrust violations. (*Classen*, 145 Cal.App.3d at 48.) Assuming that Lake and Harcourt were not participants of Austin's Antitrust Conspiracy they still committed fraud/conversion by stealing the Sherlock Property. But-for

their theft of the Balboa Property and CUP, they would not have ended up with Razuki/Malan. Lake and Harcourt are therefore liable as joint tortfeasors with Austin and her clients even if not as coconspirators.

IV. The FAC states causes of action for conspiracy, violation of the UCL, and declaratory relief.

Lake's arguments the Sherlock Family did not state causes of action for conspiracy, violations of the UCL, or for declaratory relief, are based on his assumptions and arguments that the Sherlock Family do not have ownership interests in the Sherlock Property, that Lake and Harcourt did not convert the Sherlock Property, and the Sherlock Family failed to state a cause of action for a violation of the Cartwright Act. (*See* Mot. at 12:24-25, 13:14-19, 13:21-26.) As demonstrated above, these arguments are meritless.

V. The Sherlock Family requests leave to amend the First Amended Complaint.

Defendants requested that the Court should sustain their Demurrer in its entirety without leave to amend. This severe request has no basis in law. Denial of leave to amend constitutes an abuse of discretion unless the complaint shows on its face it is incapable of amendment. (*Blank*, 39 Cal.3d at 318.) However, the Sherlock Family does request leave to amend the FAC to address any deficiencies the Court may find and to add a cause of action for a constructive trust as to the Balboa Property and breach of fiduciary duty claim against Harcourt by the Sherlock Family.

CONCLUSION

As proven, all of Lake's arguments in his demurrer are meritless. However, as threshold matter, the demurrer must be denied because it assumes the existence of a lawful contract pursuant to which Harcourt lawfully transferred the Sherlock Property to himself and Lake. That contract does not exist, is not even alleged to exist, is not now before the Court, and will be proven to be forged when presented to this Court. And there is no doubt that Harcourt and Lake have already forged that contract and other supporting documents. If they don't provide them, Lake and Harcourt will have literally not a scintilla of evidence to prove they did not steal the Sherlock Property after Mr. Sherlock's death, maliciously and despicably depriving a widow and her children of their inheritance.

DATED: August 8, 2022

THE LAW OFFICE OF ANDREW FLORES

By _____

ANDREW FLORES

Pro se plaintiff and attorney for AMY SHERLOCK and minors T.S. and S.S.

EXHIBIT 1

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Attorneys for Plaintiff
RICHMOND COMPASSIONATE
CARE COLLECTIVE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

RICHMOND COMPASSIONATE CARE COLLECTIVE, a California Corporation, Plaintiff, v. RICHMOND PATIENT'S GROUP, a California mutual benefit corporation, HOLISTIC HEALING COLLECTIVE, INC., a California mutual benefit corporation, 7 STARS HOLISTIC FOUNDATINO, INC., a California mutual benefit corporation, WILLIAM KOZIOL, DARRIN PARLE, ALEXIS KOZIOL, REBECCA VASQUEZ, ZEAAD M. HANDOUSH, LISA HIRSCHHORN, ANTWON CLOIRD, CESAR ZEPEDA, and DOES 1-50, Defendants. AND RELATED CROSS-ACTION	CASE NO. C16-01426 **ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Date: January 14, 2021 Time: 9:00 a.m. Dept.: 39 Judge: Hon. Edward G. Weil Date Action Filed: July 22, 2016 Trial Date: March 22, 2021

Defendants' Motion for Summary Judgment came regularly for hearing on January 14, 2021, in Department 39, the Honorable Edward Weil, Judge, presiding.

The Court's tentative ruling was not contested and no appearance was made by counsel for either party. The Court, having considered the pleadings and papers submitted by the parties, adopted the Tentative Ruling which became the Order of the Court. Attached hereto as **Exhibit 1** is the Court's Tentative Ruling.

IT IS HEREBY ORDERED THAT FOR GOOD CAUSE APPEARING:

Defendants' Motion for Summary Judgment is **DENIED**.

COMPLIES WITH CRC 3.1312

Dated: March 18, 2021

HON. EDWARD G. WEIL,
JUDGE OF THE SUPERIOR COURT

EXHIBIT 1

TENTATIVE RULING:

Before the Court is a Motion for Summary Judgment ("Motion"), filed by defendants Richmond Patient's Group ("RPG"), Holistic Healing Collective, Inc. ("HHC"), 7 Stars Holistic Foundation, Inc. ("7 Stars"), William Koziol, Darrin Parle, Alexis Parle (aka Alexis Koziol), Rebecca Vasquez, and Zeaad M. Handoush (collectively, "moving parties" or "Defendants"). The Motion is **denied**.

Plaintiff, Richmond Compassionate Care Collective ("Plaintiff" or "RCCC"), a California Nonprofit Mutual Benefit Corporation, brought this action against Defendants, alleging they violated the Cartwright Act through engaging in a conspiracy to restrain trade and monopolize the local medical marijuana market. Specifically, RCCC claims Defendants intentionally excluded RCCC from the market by locking up any available properties, or dissuading others from engaging in transactions with RCCC during the time frame RCCC was required to obtain a dispensary location per local ordinance. Because RCCC's evidence demonstrates that triable issues of fact exist, summary judgment is improper.

Background and Procedural History

Richmond's medical marijuana Ordinance No. 28-10 NS ("Ordinance"), adopted on September 21, 2010, permitted and regulated medical marijuana collectives. The Ordinance was amended on November 16, 2010 to permit marijuana collectives to operate in Regional Commercial (C-3) Zoning Districts at certain minimum distances from schools and other specified facilities. In order to operate a marijuana dispensary in compliance with the Ordinance, collectives were required to obtain approval for a location by city council. (SSUMF, No. 7 and response.) RPG, HHC and 7 STARS were and are the only three permitted dispensaries operating in Richmond since the Ordinance was passed.

In December 2011, Plaintiff was approved to establish a medical marijuana dispensary in Richmond, at 2920 Hilltop Mall Road. (SSUMF, No. 8 and response.)

In March 2012, the Ordinance was amended to allow collectives to transfer their permits to another location (including C-2 locations, if approved by the city council) and increasing the number of allowed collectives to six. (SSUMF, No. 9 and response.) For a transfer to a C-2 property to be authorized, city council had to find that (i) applicant considered locations within the Regional Commercial (C-3) Zoning District and found no conforming location that would serve the needs of its members; (ii) the proposed location within the General Commercial (C-2) Zoning District would complement the surrounding community while providing necessary services to its members; (iii) the location did not abut a residential use.

Around the same time the Ordinance was amended, RCCC decided not to open a dispensary at 2920 Hilltop Mall Road because of concerns regarding federal law enforcement, and it terminated its lease for that location. (SSUMF, No. 10 and response.)

RCCC intended on transferring its permit to a new location and continued a search it had already begun for a new location to open its collective. There was a very limited supply of conforming properties in Richmond. (SSUMF, No. 29 and response.) Richmond's strict zoning regulations, sensitive use criteria, and the fear of federal enforcement made finding any viable property in Richmond very difficult. (SSUMF, Nos. 12, and response.)

In early 2013, RCCC leased certain C-2 zoned property (425 S. 3rd St) and applied for a transfer of its permit, which was denied. (SSUMF, Nos. 13-14 and response.) Plaintiff contends it continued to search for property during the time it awaited this authorization. (SSUMF, No. 13 response.)

In December of 2014, the Ordinance was amended to reduce the number of dispensary permits from six to three. It was further amended to state that if a permitted dispensary (here, only RCCC) did not open within six months after issuance of the permit, the permit would expire and become void. This amendment went into effect in early January 2015, therefore, all four permitted dispensaries (the three defendants and RCCC) had to be operational by early July 2015.

In 2015, Plaintiff leased C-3 zoned property at 3190 Klose Way and applied to transfer its permit, but the request was denied on May 19. (SSUMF, Nos. 19-20 and response.) Plaintiff also pursued other properties, but was ultimately unable to obtain a location before its permit expired. On November 3, 2015, Plaintiff sought an extension of time to find a location and commence operations, but the city council did not approve the application. (SSUMF, No. 22 and response.)

RCCC sued Defendants, Lisa Hirschhorn, and others for activities including community organizing, interfering with RCCC's ability to obtain a permit, and efforts to influence city council. Those allegations were stricken from RCCC's complaint as being subject to the protection of California's anti-SLAPP statute and the *Noerr-Pennington* doctrine. Related rulings were appealed and affirmed on appeal. The current version of the complaint is the Third Amended Complaint, originally filed in August 2017.

The Third Amended Complaint alleges a single cause of action for violation of the Cartwright Act. RCCC alleges that the three dispensary defendants, along with their agents, conspired to prevent RCCC from obtaining a compliant property in Richmond for the purposes of opening its dispensary for business. They allegedly did this through jointly enlisting (and paying for) the services of certain agents, including Lisa Hirschhorn, by holding secret meetings where they discussed properties potentially available and ways to tie up any C-3 and C-2 conforming properties until RCCC's permit expired. They allegedly monitored websites for any conforming properties for sale in Richmond, approached landlords about risks they might face by engaging in business with RCCC, presented phony leases and letters of intent, and demanded non-compete clauses in their own leases, etc.

Motion and Opposition

Defendants move for summary judgment based on their assertion that no action by them caused harm to RCCC. Defendants argue specifically that (1) the legal cause of RCCC's

alleged injuries was governmental action; (2) damages are speculative since RCCC cannot prove city council would have approved a transfer of its permit to any particular location; (3) for various reasons, RCCC cannot prove it was deprived of any particular compliant property as a result of Defendants' acts; and (4) no evidence exists to show Alexis Parle acted to prevent RCCC from leasing or purchasing property.

In its Opposition, RCCC argues that causation is for the jury to decide, that Defendants' activities were a "group boycott" that is *per se* illegal (2 CACI 3403), and that Alexis Parle is a proper defendant because she participated in the locking up of at least one property, 3219 Auto Plaza, as a board member of the LLC formed to purchase that building. RCCC's brief focuses on several particular properties it claims Defendants tied up.

In support of its arguments, RCCC presents a declaration by counsel, Ronald D. Foreman, with 32 exhibits, including declarations (two by police officers, two by third party witnesses, and one by defendant Lisa Hirschhorn, signed in 2017), and deposition testimony (by RCCC's PMQ, John Valdez, defendant Lisa Hirschhorn, and defendant William Koziol.)

With their reply brief, Defendants submit over fifty pages of objections to RCCC's evidence, as well as two declarations—one from a forensic document examiner, and one from counsel, attaching additional excerpts from the deposition of Lisa Hirschhorn in which she repudiates the declaration from 2017.

Plaintiff responds with its own objections to the evidence on reply and a motion requesting to strike the forensic document examiner's declaration. As an alternative to striking the declaration, Plaintiff requests a continuance of the hearing on this Motion. In light of the rulings on Defendants' objections to Plaintiff's evidence, the Court **denies** Plaintiff's motion to strike and **denies** the request for a continuance. The handwritten notes at issue are not material to the disposition of this Motion.

Evidentiary Matters

Defendants' unopposed request for judicial notice is granted.

The Court rules on Defendants' objections to Plaintiff's evidence as follows. Any objections not specifically ruled on are not material to the disposition of the Motion. (See Code Civ. Proc., § 437c (q).)

Foreman Declaration

- ¶ 13, p. 3:7-10 – Sustained – Conclusory
- ¶ 15, p. 3:13-17 – Sustained - Secondary Evidence Rule
- ¶ 16, p. 3:18-21 – Sustained - Secondary Evidence Rule
- Exhibit 1 – Overruled
- Exhibit 2 – Sustained – Lack of Authentication / Foundation
- Exhibits 3-9 – Overruled
- Exhibit 10 – Overruled
- Exhibit 11 – Overruled

- Exhibit 12 – Overruled
- Exhibit 15 – Sustained – Lack of Authentication / Foundation
- Exhibit 17 – Overruled
- Exhibit 18 – Overruled
- Exhibit 19 – Overruled
- Exhibit 27 – Overruled
- Exhibit 29 – Overruled
- Exhibit 30 – Overruled

Foreman Declaration, Exhibit 20 (Declaration of Darron Price)

- Entire Declaration – Overruled
- ¶13, p. 3:13-17 – Overruled
- ¶16, p. 4:3-9 – Overruled

Foreman Declaration, Exhibit 21 (Declaration of Carlos Plazola)

- Entire Declaration – Overruled

Foreman Declaration, Exhibit 22 (Declaration of Erik Oliver)

- Entire Declaration – Overruled
- ¶ 8, p. 2:19-25 – Overruled
- ¶ 10, p. 3:3-7 – Sustained as to first sentence– Lack of Authentication / Foundation, otherwise overruled
- ¶ 11, p. 3:7-17 – Overruled
- ¶ 12, p. 3:17-21 – Overruled
- ¶ 13, p. 3:21-26 – Overruled
- ¶ 15, p. 4:1-9 – Overruled
- ¶ 17, p. 4:12-21 – Overruled

Foreman Declaration, Exhibit 23 (Declaration of Michael Rood)

- Entire Declaration – Overruled
- ¶ 6, pp. 2:26 –3:7 – Overruled
- ¶ 7, p. 3:8-12 – Overruled
- ¶ 10, p. 3:19-24 – Sustained – speculation as to the sentence beginning "As I later learned…" otherwise overruled
- ¶ 11, pp. 3:24– 4:3 – Overruled
- ¶ 12, p. 4:4-17 – Overruled
- ¶ 13, p. 4:17-21 – Overruled
- ¶ 19, p. 6:4-18 – Overruled

Foreman Declaration, Exhibit 24 (Declaration of Lisa Hirschhorn)

- Entire Declaration – Overruled.

Citing *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, Defendants argue that deposition testimony by Ms. Hirschhorn in November 2020 (after their summary judgment motion was filed) repudiates her 2017 declaration, eviscerating any issue of fact raised by that declaration. The *D'Amico* decision involved admissions made during discovery by the party opposing summary judgment, which that party later contradicted in an attempt to avoid summary judgment. The D'Amico holding should not be read too broadly or uncritically applied. (See *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 482 [overruled on other grounds]; *Turley v. Familian Corp*. (2017) 18 Cal.App.5th 969, 982 [*D'Amico* rule inapplicable to declaration where declaration precedes contrary deposition testimony, and therefore did not contradict any prior testimony].)

Ms. Hirschhorn, a defendant in this matter, made multiple admissions in a declaration written in plain terms. The recanting of her testimony and assertion that the declaration contained false information do, as Defendants point out, subject Ms. Hirschhorn to impeachment at trial, but do not bar the evidence as a matter of law. There is a heightened reliability to admissions partly *because* a party may later change their position. The standard on summary judgment is not whether evidence is credible, but rather whether the disputed facts are material. The Court is not permitted to weigh the evidence. What Ms. Hirschhorn will testify at trial is unknown. She may reverse her position again. Even if she does not, the existence of both the declaration and her repudiation present credibility issues more appropriately weighed by a trier of fact.

- ¶3, p. 2:10-12 –Overruled.
- ¶3, p. 2:12-15 – Overruled.
- ¶4, p. 2:16-22 – Overruled.
- ¶5, p. 3:7-10 – Overruled.
- ¶5, p. 3:9-13 – Overruled.
- ¶6, p. 3:15-28 – Overruled.
- ¶7, p. 4:8-15 – Overruled.
- ¶8, p. 4:20-22 – Overruled.
- ¶8, p. 4:21-26 – Overruled.
- ¶8, p. 5:2-4 – Overruled.
- ¶9, p. 5:9-11 – Overruled.
- ¶9, p. 5:10-13 – Overruled.
- ¶9, p. 5:13-17 – Overruled.
- ¶9, p. 5:16-18 – Overruled.
- ¶9, p. 5:18-24 – Overruled.
- ¶9, pp. 5:26 – 6:1 – Overruled.
- ¶9, p. 6:1-6 – Overruled.
- ¶9, p. 6:6-8 – Overruled.
- ¶9, p. 6:8-16 – Overruled.
- ¶10, p. 6:17-21 – Overruled.
- ¶11, p. 6:21-25 – Overruled.
- ¶12, pp. 6:27 – 7:2 – Overruled.
- ¶12, p. 7:2-11 – Overruled.

- ¶13, p. 7:12-19 – Overruled.
- ¶14, p. 7:20-22 – Overruled.
- ¶15, pp. 7:22 – 8:1 – Overruled.
- ¶16, p. 8:2-12 – Overruled.
- ¶17, p. 8:13-17 – Overruled.
- ¶18, p. 8:18-24 – Overruled.
- ¶19, pp. 8:25 – 9:2 – Overruled.
- ¶20, p. 9:5-8 – Overruled.

Standard

A motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c (c).)

"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 85, hereinafter "*Aguilar*".) "A defendant moving for summary judgment has the initial burden of showing, with respect to each cause of action set forth in the complaint, the cause of action is without merit. A defendant meets that burden by showing one or more elements of the cause of action cannot be established, or there is a complete defense thereto." (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1101.) A defendant moving for summary judgment may meet its burden by showing the plaintiff cannot reasonably obtain needed evidence. (*Levya* at p. 1102.) If defendant makes such a showing, the burden shifts to the plaintiff to produce evidence demonstrating the existence of a triable issue of material fact. " (*Leyva*, at p. 1101; see also *Aguilar*, 25 Cal.4th at pp. 850, 855; Code Civ. Proc., § 437c(o), (p).)

Declarations and other evidence offered in support of a motion for summary judgment are strictly construed, while declarations and evidence offered in opposition to the motion are liberally construed. (*D'Amico, supra,* 11 Cal.3d 1, 20; *Johnson v. American Standard* (2008) 43 Cal.4th 56, 64.) "All doubts as to the propriety of granting the motion—i.e., whether there is any triable issue of material fact—are to be resolved in favor of the party opposing the motion." (*Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1483.)

Discussion

Plaintiff alleges that defendants, as horizontal competitors, engaged in practices that are per se illegal under the Cartwright Act. 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, citations omitted.) The doctrine was developed in response to the attempts of antitrust defendants to justify every restrictive combination on the ground that, in the light of all the economic facts and conditions, the particular practice assailed was reasonable. (*Ibid*.) 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.) Among the practices courts have deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts; and tying arrangements. (*Ibid*.)

To prove a group boycott, RCCC must show (1) that Defendants agreed to prevent RCCC from obtaining a location, (2) that RCCC was harmed; and (3) that Defendant's conduct was a substantial factor in causing RCCC's harm. (2 CACI 3403.)

(1) Agreement

Citing *Aguilar*, Defendants argue they did not prevent RCCC from obtaining certain individual properties, and that the evidence is at least as consistent with permissible competition as with unlawful conspiracy. This sort of "dismemberment" is not the standard by which a court reviews this Motion.

The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. (*In re Automobile Antitrust Cases I & II* (2016) 1 Cal.App.5th 127, 152, citations omitted.) As the court in *Aguilar* noted, antitrust plaintiffs "must often rely on inference rather than evidence since, usually, unlawful conspiracy is conceived in secrecy and lives its life in the shadows." (*Aguilar,* 25 Cal.4th at p. 857.)

In this case, however, no inference is necessary. Direct evidence exists that meetings occurred, and that the purpose of those meetings included limiting competition by preventing RCCC from obtaining a location. (See, e.g., SSUMF, No. 2 response, citing Foreman Decl., Ex. 24 - Hirschhorn Decl., ¶5 ["Our purpose was to take as many steps as necessary to prevent RCCC from buying or leasing any property in Richmond. We did not want RCCC to acquire or lease any property that was in Richmond ordinance from which RCCC could apply to the City for a dispensary permit."].) While perhaps not the basis of RCCC's claims, evidence exists that they also agreed to fix prices, divide the local cannabis market geographically amongst themselves, and split attorneys' and agent fees for their wrongdoing. (See Michael Rood Decl., Ex. 23 to Foreman Decl., ¶13 ["Rebecca Vasquez stated that the dispensary operators in Richmond, including herself, agreed to price their medical cannabis at the same prices in order to prevent competition amongst themselves."]; Lisa Hirschhorn Decl., Ex. 24 to Foreman Decl., ¶7 ["The goal was to geographically control the Richmond dispensary market as dispensaries would be located in north, central and south Richmond."]; *Id*. at ¶¶22-23.)

Lisa Hirschhorn's declaration is the most detailed direct evidence presented, but it is not the only evidence. The declaration is supported by those of Michael Rood, Erik Oliver, Darron Price, Carlos Plazola and William Koziol's deposition testimony. Even if Lisa Hirschhorn's declaration were the only evidence here, the Court may not weigh credibility on summary judgment as Defendants appear to be requesting in their request that the declaration be excluded or discredited. (See above *D'Amico* discussion).

Defendants also specifically argue the Motion should be granted as to Alexis Parle because, they contend, no evidence shows she took any action to prevent Plaintiff from leasing or purchasing any property in Richmond. RCCC responds that she is a board member of RPG and a managing member of Auto Plaza Investments, LLC, an entity formed in order to own one of the properties that is alleged to have been improperly tied up (3219 Auto Plaza). RCCC refers

to a deed of trust for this property apparently bearing Ms. Parle's signature. (SSUMF 133-134 and response.) Ms. Parle's signature is an act. RCCC was prevented from obtaining 3219 Auto Plaza. Whether Ms. Parle's motive, in signing her name, was to participate in the conspiracy, is not a basis on which this Court will grant summary judgment. (See Code Civ. Proc., § 437c (e).)

To the extent Defendants are asserting their motivation and purpose was proper and not to enter into prohibited agreements under the Cartwright Act, evidence exists to create triable issues of fact on this issue.

(2) Whether RCCC Was Harmed

Despite their reference to "speculative damages," Defendants' arguments rest on their contention that their acts were not the *cause* of RCCC's harm. It does not appear to be in dispute that RCCC's permit expired and RCCC was not able to find a suitable location in Richmond.

(3) Causation

Relying on *Blank v. Kirwan* (1985) 39 Cal. 3d 311, Defendants argue the legal cause of RCCC's injury was government action (federal regulations, local zoning, and city council decisions). *Blank* has been addressed in this case already with respect to the Defendants' anti-SLAPP motions.

The question addressed in *Blank* was "whether efforts to influence municipal action that are intended to and actually do produce anticompetitive effects are violative of the Cartwright Act when both private individuals and public officials participate." (*Id*. at p. 316.) There could be no liability for such a conspiracy because the defendants' conduct was protected under the *Noerr-Pennington* doctrine, while government officials are not subject to the Cartwright Act. Following the anti-SLAPP proceedings herein, the TAC no longer seeks to impose liability based on the sort of lobbying protected under the *Noerr-Pennington* doctrine. While evidence may exist related to Defendants' lobbying efforts, this is not the basis of liability alleged in the Third Amended Complaint. *Blank* does not stand for a universal rule that the existence of a government permitting process can insulate otherwise unlawful anti-competitive activities among competitors. Whether permits would have been granted is relevant, but only as a factual issue related to causation of damages.

At issue now are the alleged actions by Defendants to obstruct RCCC from obtaining any suitable location for its dispensary through their cumulative acts of tying up multiple available properties at key times. The anticompetitive activities here were separate from the petitioning activity stricken from RCCC's complaint.

While the court in *Blank* noted the broad discretion of city council as a reason that plaintiff there could not show they had an "expectancy" interest in a permit, the discussion there related to a demurrer to plaintiff's intentional interference with prospective economic advantage cause of action, not a Cartwright Act cause of action. (See *Blank*, 39 Cal.3d at p.330.) As such, the elements necessary to establish were unique to cases involving that tort. The discussion

regarding any expectancy interest was also secondary to the court's ruling that plaintiff lacked an "economic relationship" necessary to establishing intentional interference.

The factual chronology here provides further basis for limiting the application of *Blank*. Here, had RCCC been able to procure a conforming property, its efforts to obtain a permit would not necessarily have been futile. The city council *had already* granted RCCC a permit in the past. City council also *did* grant a permit for at least one of the properties Defendants allegedly locked up for anticompetitive purposes (4800 Bissell). Defendants point to RCCC's letter to city council stating it was unlikely to obtain a permit, but that letter was sent in September 2015, after many of the anticompetitive activities are alleged to have occurred.

In establishing proximate cause, the alleged antitrust violation need not be the sole or controlling cause, only a substantial factor in bringing about the injury. (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23.) As noted by RCCC, causation is generally a question of fact for the jury. (See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.* (1962) 370 U.S. 690, 697 [where the antitrust "plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that the jury, as the trier of the facts, must be permitted to draw from this circumstantial evidence the inference that the necessary causal relation exists.") It is only appropriate to grant summary judgment on the issue of causation if "only one reasonable conclusion could be drawn" from the facts adduced. (See e.g., *Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1450.) Where no properties were available to RCCC to rent or buy, at least partially as a result of Defendants preemptively seeking out and removing those properties from the market, government action cannot be said to be the sole cause of harm as a matter of law.

Plaintiff's evidence is sufficient to create a triable issue of fact as to why it was unable to timely obtain a location.

Conclusion

The sort of admissions reflected in much of RCCC's evidence, including, but not limited to, Lisa Hirschhorn's declaration, creates a triable issue of fact as to the existence of the conspiracy. The causation element is for a jury to decide. Disputed facts include those tending to show Defendants acted in trust to prevent RCCC from acquiring a location. (See, *inter alia*, SSUMF, Nos. 2-3, 31, 36, 40-46, 48-59, and responses.)