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11  
12 **SUPERIOR COURT OF CALIFORNIA**  
13  
14 **COUNTY OF SAN DIEGO – CENTRAL DIVISION**

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

18 Plaintiffs,

19 vs.

20 GINA M. AUSTIN, an individual; AUSTIN  
21 LEGALGROUP, a professional corporation,  
22 LARRY GERACI, an individual, REBECCA  
23 BERRY, an individual; JESSICA MCELFFRESH, an  
24 individual; SALAM RAZUKI, an individual;  
25 NINUS MALAN, an individual; FINCH,  
26 THORTON, AND BARID, a limited liability  
27 partnership; ABHAY SCHWEITZER, an individual  
28 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,  
BARTELL & KWIATKOWSKI, LLC, a California  
limited liability company; and DOES 1 through 50,  
inclusive,

Defendants.

**ELECTRONICALLY FILED**  
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County of San Diego

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

**REPLY IN SUPPORT OF  
DEFENDANT STEPHEN LAKE'S  
DEMURRER TO COMPLAINT**

**Hearing Date:** August 19, 2022  
**Hearing Time:** 9:00 a.m.

Case Filed: December 3, 2021  
Department: C-75  
Judge: Hon. James Mangione  
Trial Date: N/A

1 **REPLY**

2 **I. INTRODUCTION**

3 Plaintiff’s meandering opposition fails to overcome the fatal flaw of the FAC as to the  
4 allegations against LAKE: even taking the allegations in the FAC as true for the purposes of this  
5 demurrer, SHERLOCK cannot possibly maintain any of her claims against LAKE. Plaintiff’s  
6 opposition devotes substantial attention to claims against other defendants – such as Harcourt and  
7 Austin – and, at various points, appears to oppose Austin’s anti-SLAPP motion rather than LAKE’s  
8 demurrer. Even construing these largely inaccurate facts and allegations in a light most favorable to  
9 SHERLOCK, she cannot maintain a claim against LAKE, even through amendment. LAKE should  
10 not be required to expend further time and resources in combating SHERLOCK’s baseless and  
11 frivolous claims. As such, LAKE requests the demurrer be sustained without leave to amend.

12 **II. LEGAL ARGUMENT**

13 *A. SHERLOCK Fails To State A Viable Claim For Violation Of The Cartwright Act*

14 SHERLOCK’s opposition to LAKE’s demur to the Cartwright Act cause of action is puzzling  
15 and does nothing to establish a violation by LAKE. For example, SHERLOCK spends nearly two  
16 pages arguing a Cartwright Act violation by *Gina Austin*, who is not a party to LAKE’s demur. LAKE  
17 has no relationship with Austin or her law firm nor is there any allegation that LAKE did have a  
18 relationship with Austin or her law firm, which makes the inclusion of this argument all the more  
19 confounding. (*See, e.g., Opp.* pp 9-10). SHERLOCK later circles back on this argument claiming that  
20 *Austin’s* proxy practice is a *per se* violation of the Cartwright Act. (*Opp.* 16:16). Again, whether or  
21 not this is true, there is no allegation in either the FAC or in SHERLOCK’s opposition that *LAKE*  
22 was involved in this “Proxy Practice;” thus, even if SHERLOCK were accurate that said action results  
23 in a *per se* violation of the Cartwright Act, there is no indication that said violation would apply to  
24 *LAKE*.

25 Next, SHERLOCK inserts a strawman argument regarding a contract; specifically, that  
26 LAKE’s demurrer “rests exclusively on the false premise that there exists a lawful contract.” (*Opp.*,  
27 11:2-4). It is unclear where SHERLOCK is getting this argument or what bearing the argument has  
28 on SHERLOCK’s failure to state a cause of action against LAKE. SHERLOCK then pivots to alleged

1 wrongdoing by *another* defendant, Harcourt. (*Opp.* 11:17-22). Then, SHERLOCK SHERLOCK’s  
2 strawman arguments and devotion of valuable opposition space against *other* defendants just further  
3 underscores her fundamentally flawed claims against LAKE.

4 Moreover, SHERLOCK fails to sufficiently address her lack of standing to bring a Cartwright  
5 Act violation. Again, as stated in LAKE’s demurrer, SHERLOCK is not a “market participant”.  
6 SHERLOCK, a private individual with no ties to the medical marijuana industry, is not within the  
7 “target area” of the alleged antitrust violation.

8 Standing issues aside, even if SHERLOCK were able to overcome this threshold issue, her  
9 cause of action is not sufficiently pled. To state a cause of action for conspiracy, a complaint must  
10 allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant  
11 thereto, and (3) the damage resulting from such act or acts. *Chicago Title Ins. Co. v. Great Western*  
12 *Financial Corp.* (1968) 69 Cal.2d 305, 316. It is incumbent on the complaining party to allege and  
13 prove that the party’s business or property has been injured by the very fact of the existence and  
14 prosecution of the unlawful trust or combination; that is, to establish an actual injury attributable to  
15 something the statutory provisions were designed to prevent. *Kaiser Cement Corp. v. Fischbach and*  
16 *Moore, Inc.* (9<sup>th</sup> Cir. 1986) 793 F.2d 1100. A high degree of particularity is required in the pleading  
17 of violations prescribed by the statutory provisions governing combinations in restraint of trade.  
18 *DeCambre v. Rady Children’s Hospital-San Diego* (2015) 235 Cal.App.4<sup>th</sup> 1; *Motors, Inc. v. Times*  
19 *Mirror Co.* (1980) 102 Cal.App.3d 735, 742. Other than owning the land that the CUPs flowed from,  
20 the FAC is utterly devoid of any facts tying LAKE to the alleged conspiracy. This lack of factual  
21 specificity is again underscored by SHERLOCK’s opposition, which devotes a substantial amount of  
22 time and attention to the alleged wrongful acts of other defendants while only making general and  
23 vague allegations of LAKE “stealing” property. There are no allegations that LAKE was even  
24 involved in the medical marijuana industry – because he was not – let alone that he conspired with  
25 these other defendants to prevent competition within the industry. Nor is there any allegation or  
26 indication that SHERLOCK, herself, was engaged in the industry or was even contemplating entering  
27 the industry. SHERLOCK has also failed to adequately allege damage to business or property. Again,  
28 there is no allegation that SHERLOCK had a business within the cannabis industry. The opposition

1 fails to address this lack of factual specificity.

2 In addition, SHERLOCK fails to address her inability to establish that any of the property  
3 complaint of ever belong to her or, for that matter, BIKER. As it relates to LAKE, the facts and  
4 pleadings clearly establish that LAKE purchased the Ramona Property, which he owns to this day,  
5 and that LERE purchased the Balboa Property. (FAC ¶¶ 67, 70). This alone cuts against  
6 SHERLOCK’s vague allegations of “theft” of the property – one cannot steal what lawfully belongs  
7 to them. There are no allegations that BIKER ever had any interest in either property. In addition, the  
8 CUPs are not, and were not, the “property” of BIKER or SHERLOCK. A conditional use permit is a  
9 property right that runs with the land, not to the individual permittee. *Imperial v. McDougal* (1977)  
10 19 Cal.3d 505; *Malibu Mountains Recreation v. Los Angeles* (1998) 67 Cal.App.4th 359, 368; *Anza*  
11 *Parking Corp. v. City of Burlingame* (1987) 195 Cal.App.3d 855, 858. SHERLOCK fails to address  
12 this glaring deficiency.

13 Finally, SHERLOCK fails to allege “a combination of capital, skill or acts by two or more  
14 persons” seeking to achieve an anticompetitive end under *Bus. & Prof. Code* § 16720. “Only separate  
15 entities pursuing separate economic interests can conspire within the proscription of the antitrust laws  
16 against price fixing combinations.” *Copperweld Corp. v. Independence Tube Corp.* (1984) 467 U.S.  
17 752, 769-771. Failure to adequately allege such concerted action by separate entities is subject to  
18 dismissal. *Id.* SHERLOCK makes no such allegation here; on the contrary, the FAC indicates the  
19 exact opposition – that the defendants acted as part of a singular “Enterprise” and that all defendants  
20 worked together to pursue a common interest of the singular Enterprise. As such, SHERLOCK cannot  
21 maintain a Cartwright Act violation – even through amendment – and the claim must be dismissed.

22 *B. LAKE’s Demur To The Conversion Cause Of Action Should Be Sustained*

23 Similarly, SHERLOCK’s opposition does little to salvage the conversion claim against  
24 LAKE. The “Sherlock Property” allegedly converted is defined to include BIKER’s “interest in the  
25 Partnership Agreement, LERE, and the Balboa and Ramona CUPs.” (FAC ¶ 71). SHERLOCK  
26 concedes that neither the Balboa Property and Ramona Property can be the subject of a conversion  
27 cause of action as each is real property. (*Opp.* 14:11-12). Moreover, as discussed in the context of the  
28 Cartwright claim, SHERLOCK cannot maintain a claim for conversion of the CUPs. As referenced

1 above, a conditional use permit is a *property* right that runs with the *land*, not to the *individual*  
2 *permittee*. *Imperial v. McDougal* (1977) 19 Cal.3d 505; *Malibu Mountains Recreation v. Los Angeles*  
3 (1998) 67 Cal.App.4<sup>th</sup> 359, 368; *Anza Parking Corp. v. City of Burlingame* (1987) 195 Cal.App.3d  
4 855, 858. In other words, both CUPs belonged to the *land*, not to BIKER or any other individual. Put  
5 another way, SHERLOCK has failed to meet the first prong of her conversion claim – her ownership  
6 or right to possession of any of the property allegedly converted.

7 As it relates to the alleged conversion of BIKER’s interest in LERE, the FAC alleges that  
8 LERE was formed by BIKER and Harcourt. (*FAC* § 69). Moreover, the FAC goes on to allege that  
9 LERE was later dissolved. (*FAC* § 78). There is no allegation that that LAKE ever had an interest in  
10 LERE, that he was responsible for the dissolution of LERE, or that he ever received any benefit from  
11 the dissolution of LERE. Likewise, it is unclear what SHERLOCK is referring to when she references  
12 the “Partnership Agreement” (*see FAC* ¶ 71). The term is not defined anywhere in the FAC and there  
13 is no specificity as to what this alleged partnership entailed.

14 *C. SHERLOCK Fails To Maintain A Claim Against Lake For Either Count Of Conspiracy*

15 SHERLOCK’s Third and Seventh Causes of Action both allege a “civil conspiracy” against  
16 LAKE. Though not entirely clear, both causes of action are seemingly based on SHERLOCK’s faulty  
17 conversion and Cartwright Act claims.

18 For there to be a conspiracy, there must be an unlawful agreement, an overt act committed in  
19 furtherance of the conspiracy, and damage from that act. *Applied Equipment Corp. v. Litton Saudi*  
20 *Arabia Ltd.* (1994) 7 Cal.4<sup>th</sup> 503. Conspiracy is not itself a substantive basis for liability. *Favila v.*  
21 *Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4<sup>th</sup> 189. Civil conspiracy is not an independent  
22 tort under California law. *Pavicich v. Santucci* (2000) 85 Cal.App.4<sup>th</sup> 382; *Everest Investors 8 v.*  
23 *Whitehall Real Estate Limited Partnership XI* (2002) 100 Cal.App.4<sup>th</sup> 1102. There is no separate tort  
24 of civil conspiracy, and there is no civil action for conspiracy to commit a recognized tort unless the  
25 wrongful act itself is committed and damage results therefrom. *Richard B. LeVine, Inc. v. Higashi*  
26 (2005) 131 Cal.App.4<sup>th</sup> 566; *Mehrtash v. Mehrtash* (2001) 93 Cal.App.4<sup>th</sup> 75. When a plaintiff asserts  
27 the existence of a civil conspiracy among the defendants to commit the tortious acts, the source of  
28 any substantive liability arises out of an independent duty running to the plaintiff and its breach; tort

1 liability cannot arise vicariously out participate in the conspiracy itself. *Ferris v. Gatke Corp* (2003)  
2 107 Cal.App.4<sup>th</sup> 1211.

3 Here, there can be no conspiracy by LAKE to commit conversion since there was no  
4 conversion by LAKE. A conspiracy cause of action cannot survive on its own and without adequately  
5 pleading the existence of any underlying tort, i.e., conversion, SHERLOCK cannot maintain either  
6 of her conspiracy causes of action against LAKE.

7 *D. The FAC Fails To Sufficiently Allege Unfair Business Practices*

8 Though SHERLOCK asserts a cause of action pursuant to § 17200 of the California Business  
9 and Professions Code (“UCL”), it is unclear how these allegations relate to LAKE. Indeed, LAKE is  
10 not specifically referenced anywhere in the cause of action. In construing the FAC in a light most  
11 favorable to SHERLOCK, LAKE will assume that the unfair competition relates to the Cartwright  
12 Act violations found in SHERLOCK’s first cause of action.

13 California’s unfair competition law permits civil recovery for “any unlawful, unfair, or  
14 fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising. *Cal. Bus.*  
15 *& Prof. Code* § 17200. A private person may assert a UCL claim only if she (1) has suffered injury  
16 in fact and (2) has lost money or property as a result of the unfair competition. *Hall v. Time, Inc.*  
17 (2008) 158 Cal.App.4<sup>th</sup> 847, 852. The second prong of this standing test “imposes a causation  
18 requirement. The phrase ‘as a result of’ in its plain and ordinary sense means ‘caused by’ and requires  
19 a showing of a causal connection or reliance on the alleged misrepresentation.” *Id.*

20 As with her claims related to the alleged Cartwright Action violation, there is nothing in the  
21 FAC that gives any indication that SHERLOCK was a market participant, or even attempted to  
22 become a market participant, in the San Diego cannabis market. There is no ascertainable injury in  
23 fact nor has SHERLOCK lost money or property, as more fully discussed above, by way of the facts  
24 alleged in the FAC. Moreover, SHERLOCK’s failure to plead a Cartwright Act violation bars her  
25 from asserting a UCL claim on the same grounds.

26 *E. Declaratory Relief*

27 As it relates to LAKE, SHERLOCK asserts a cause of action for declaratory relief seeking a  
28 judicial determination that the transfers of BIKER’s interests in LERE and the Balboa CUP are void.

1 For the reasons discussed above, BIKER did not have an interest in the Balboa CUP and there is  
2 nothing in the FAC that alleges that LAKE either had an interest in LERE or was otherwise involved  
3 in the dissolution of LERE. Thus, the cause of action is merely repetitive of SHERLOCK's other  
4 prior claims.

5 *F. Leave To Amend Should Be Denied*

6 SHERLOCK's request for leave to amend should be denied. SHERLOCK has already  
7 amended her complaint once but has still failed to state a viable cause of action. Moreover, any  
8 attempt to amend the complaint would be futile as SHERLOCK would need to change facts in order  
9 to state a viable claim. Leave to amend should be denied and the complaint against LAKE should be  
10 dismissed.

11 **III. CONCLUSION**

12 LAKE requests that its demurrer be sustained without leave to amend and that it be dismissed  
13 from the action.

14 Dated: August 15, 2022

**BLAKE LAW FIRM**

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16  
17 By: \_\_\_\_\_



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