ANDREW FLORES, ESQ (SBN:272958)
LAW OFFICE OF ANDREW FLORES
427 C Street, Suite 220
San Diego CA, 92101
P:619.356.1556
F:619.274.8053
Andrew@FloresLegal.Pro

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

PLAINTIFFS' OMNIBUS OPPSITION TO (1) ABHAY SCHETIZER'S MOTION TO STRIKE; (2) JESSICA MCELFRESH'S MOTION TO STRIKE; AND (3) LARRY GERACI AND REBECCA BERRY'S MOTION TO STRIKE

Date: December 2, 2022
Time: 9:00 a.m.
Dept: C-75
Judge: Hon. James A Mangione
Filed December 3, 2021
Trial: Not Set.

INTRODUCTION

Plaintiffs – attorney Andrew Flores, Amy Sherlock, and her two minor children, T.S. and S.S. (the "Sherlock Family") – hereby submit this omnibus opposition to (1) Abhay Schweitzer's special motion to strike First Amended Complaint ("Schweitzer Motion"); (2) Jessica McElfresh's motion to strike portions of First Amended Complaint ("McElfresh's Motion"); and (3) Lawrence Geraci and Rebecca Berry's special motion to strike portions of First Amended Complaint ("Geraci Motion").

Plaintiffs concede that Geraci's Motion to strike should be granted in part to the extent Plaintiffs' UCL claim in their First Amended Complaint (FAC) seeks non-restitutionary relief. The remainder of the Geraci Motion, and the entirety of the Schweitzer Motion and the McElfresh Motion should be denied. Summarily, because Geraci, Berry, Schweitzer and McElfresh have all taken acts in furtherance of Geraci's illegal acquisition of a cannabis conditional use permit (CUP), which Plaintiffs allege was taken as part of a larger conspiracy by defendants to create a monopoly in the cannabis market in the City and County of San Diego (the "Antitrust Conspiracy").

MATERIAL ALLEGATIONS IN THE FIRST AMENDED COMPLAINT

I. THE ANTITRUST CONSPIRACY

The FAC alleges:

> This case arises from the concerted effort of a small group of wealthy individuals and their agents (the "Enterprise") that have conspired to create an unlawful monopoly in the cannabis market (the "Antitrust Conspiracy") in the City and County of San Diego. The Enterprise includes attorneys from multiple law firms that are used to create the appearance of competition and legitimacy, while in reality the attorneys conspire against some of their own non-Enterprise clients to ensure the acquisition of the limited number of cannabis conditional use permits ("CUPs") available in the City and County go to principals of the Enterprise. At least some of the principals of the Enterprise have a history of being sanctioned for unlicensed commercial cannabis operations (i.e., illegal black-market dispensaries). Consequently, as a matter of law, they cannot own a cannabis CUP for a period of three years from the date of their last sanction. However, these individuals are wealthy and are able to the hire attorneys, political lobbyists, and other professionals to navigate the heavily regulated cannabis licensing process and acquire CUPs illegally. The defining illegal act of the Enterprise is the acquisition of CUPs for its principals through the use of [agents] - who do not disclose the principals as the true

> owners of the CUP applied for and acquired - in order to avoid disclosure laws that would mandate their applications be denied because of the principals' prior sanctions (the "[Strawman] Practice"). The unlawful acts taken by the Enterprise in furtherance of the Antitrust Conspiracy include "sham" litigation and acts and threats of violence against potential competitors and witnesses. Plaintiffs had or would have had interests in CUPs issued in the City and County of San Diego but-for the illegal acts of the Enterprise that were taken in furtherance of the Antitrust Conspiracy.

FAC ¶¶ 1-6.[1]

The California Legislature set forth in BPC § 26055 that the Department of Cannabis Control (DCC) "may issue state licenses only to qualified applicants." (California Business & Professions Code (BPC) § 26055(a) (former § 19320(a)). Further, that pursuant to BPC § 26057, the DCC "***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 [DCC]." (BPC § 26057 (former § 19323) (cleaned up, emphasis added).) Pursuant to

The California Legislature also passed BPC § 26053 that states: "All commercial cannabis activity shall be conducted between licensees." (BPC § 26053(a) (former § 19320(a).) The DCC has adopted a regulation interpreting this language to mean: "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) (emphasis added)). The Strawman Practice is explicitly declared illegal by statute and regulation by the Legislature and the DCC. (*Id.*)

II. LAWRENCE GERACI HAS BEEN SANCTIONED 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"). (FAC

[1] This opposition is limited to the allegations in the FAC. However, Plaintiffs note that they are preparing a motion for leave to amend the FAC based on new discovered and the testimony of parties previously not available. Parties who have been threatened by defendants as referenced in the 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.)

LEGAL STANDARD

Motions to strike reach defects in, or objections to, pleadings that are not challengeable by demurrer. (Code Civ. Proc., § 435, subd. (a)(2).) A motion to strike is authorized in two situations. The first is where a party challenges "irrelevant, false, or improper matter inserted in any pleading." (Code Civ.25 Proc. § 436(a).) The second is where a party challenges any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc. § 436(b).)

ARGUMENT

I. ABHAY SCHWEITZER'S MOTION TO STRIKE MUST BE DENIED BECAUSE IT PRESUPPOSES THAT GERACI'S OWNERSHIP OF A CUP VIA THE FRAUDULENT BERRY APPLICATION IS LAWFUL.

Schweitzer does not dispute that he aided Geraci in applying for a CUP in the name of Berry. (*See*, *gen.*, Schweitzer Motion; FAC ¶ 119 ("Austin, Bartell, and Schweitzer were hired by Geraci and responsible for preparing, submitting, and lobbying a CUP application with the City at the Federal Property that was submitted in the name of Geraci's assistant, Berry (the 'Berry CUP Application')."). Rather he argues that his petitioning activity is protected under California's anti-SLAPP statute. (*See* Schweitzer Motion at 3:10-4:7.) His argument fails.

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. The Strawman Practice is illegal, Schweitzer does not make any arguments or provide any law as to how Geraci can own and operate a cannabis business in the name of Berry in

violation of the San Diego Municipal Code, the BPC and the DCC's regulations. (*See*, *e.g.*, 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 <u>not</u> licensed under the Act**.") (emphasis added).) California Penal Code § 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, 1160.) Schweitzer does not and cannot provide any factual or legal reasoning why his actions do not violate California Penal Code § 115 and serve a predicate act for Plaintiffs' UCL claim. (*People v. Persolve, LLC* (2013) 218 Cal. App. 4th 1267, 1276 (the litigation privilege cannot be used as a defense to defeat an unfair competition action, as such application would effectively render the protections afforded by that underlying statute meaningless).

Whether Schweitzer's acts were taken in furtherance of the Antitrust Conspiracy is question that cannot be decided on a motion to strike and requires that this Court deny Schweitzer's motion. (*See Kumaraperu v. Feldsted* (2015) 237 Cal. App. 4th 60, 69 ("Ordinarily, foreseeability is a question of fact for the finder of fact, but it may be decided as a question of law if under the undisputed facts there is no room for a reasonable difference of opinion.").) Schweitzer's knowing submission of the Berry Application with fraudulent information violates the law, is illegal as a matter of law, and the Court does not reach the second step of the anti-SLAPP analysis. (*Malin v. Singer* (2013) 217 Cal. App. 4th 1283, 1297 ("… the question of whether the defendant's underlying conduct was illegal as a matter of law is preliminary, and unrelated to the second prong question of whether the plaintiff has demonstrated a probability of prevailing, and the showing required to establish conduct illegal as a matter of law…").)[2]

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[2] Plaintiffs note that some of their arguments regarding the Strawman Practice have been raised before and rejected, but they respectfully believe the Courts have erred given the plain language of the statutes and regulations at issue. In *Bostock*, the United States Supreme Court recently emphasized the need for the courts to follow the plain language of the statutes as written: "This Court has explained many times over many years that, when the meaning of the statute's terms is plain,

II. JESSICA MCELFRESH: COMMITTING FRAUD UPON ONE'S CLIENT AND ENGAGING IN A CONSPIRACY THAT INCLUDES DEFRAUDING INNOCENT PARTIES WARRANTS PUNITIVE DAMAGES.

"Attorneys may be liable for participation in tortious acts with their clients, and such liability may rest on a conspiracy." (*Doctors' Co. v. Superior Court*, 49 Cal. 3d 39, 46 (1989) (quotation omitted).) Materially, the FAC sets forth the following allegations against McElfresh:

> In or around April 2017, Hurtado consulted with attorney McElfresh to represent Cotton and she ***agreed*** to represent Cotton. As Hurtado was acting as an agent of Cotton, an attorney-client relationship was established. On or around April 13, 2017, McElfresh emailed Hurtado that "upon further reflection" that she did "not have the bandwidth" to represent Cotton and referred Hurtado to Demian of FTB.

FAC ¶¶ 154-156 (emphasis added).

McElfresh's motion to strike states:

> The factual allegations in the FAC regarding Ms. McElfresh are that she ***considered*** representing Mr. Cotton but decided she could not, so she referred him to another attorney at Finch Thornton & Baird. (FAC, ¶¶ 156-157). Mr. Cotton believes Ms. McElfresh had a conflict of interest because she shared clients with two other defendants and had worked on the application for the Federal CUP. (FAC, ¶¶ 182, 208).

McElfresh Motion at 7:21-26 (emphasis added).

First, McElfresh's motion must be denied because it rests on false representation of the allegations in the FAC. The FAC alleges that McElfresh did ***agree*** to represent Cotton, not that she ***considered*** representing Cotton. As the California Supreme Court "said in *Perkins v. West Coast Lumber Co.* (1900) 129 Cal. 427, 429 [62 P. 57]: 'When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established prima facie.'

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our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." (*Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1749 (emphasis added); id. at 1737.) Plaintiffs respectfully are relying on the plain language of the statutes at issue here as written. However, plaintiffs attorney Andrew Flores also notes that he will shortly be seeking to file a motion to withdraw as counsel as, given this Court's previous finding that the Strawman Practice is not illegal, his co-plaintiffs, the Sherlock Family, have grounds to believe that he has committed fraud against them. Flores and the Sherlock Family are seeking alternate counsel for the Sherlock Family and will also initiate a declaratory relief action in the State of Texas, where the Sherlock Family resides, as to whether Flores committed fraud by seeking to have the Sherlock Family file suit in California against multiple parties on the ground that the Strawman Practice is illegal.

The absence of an agreement with respect to the fee to be charged does not prevent the relationship from arising." (*Miller v. Metzinger*, 91 Cal. App. 3d 31, 39, 154 Cal. Rptr. 22, 27 (1979).) In *Westinghouse Elec. Corp. v. Kerr-McGee Corp.* (7th Cir. 1978) 580 F.2d 1311, 1319, the court said: "The fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result."

McElfresh violated her fiduciary duty to Cotton by representing Geraci before the City in advocating for the Berry Application, which is the gravamen of this action – the Antitrust Conspiracy. Whether McElfresh violated her fiduciary duty to Cotton as an act in furtherance of the Antitrust Conspiracy is a factual question that cannot be decided on a motion to strike. If the Court or the jury finds that that McElfresh did have and did violate her fiduciary duty to Cotton and such evidences her role in the Antitrust Conspiracy pursuant to which Plaintiffs have been damages, then her acts do warrant punitive damages. (*See Greenwood v. Mooradian*, 137 Cal. App. 2d 532, 539 (1955) ("Defendant Murchison's status as attorney for one of the other defendants does not immunize him from liability for torts committed in person or liability for wrongs done pursuant to conspiracy joined by him."); *see also Ross v. Kish*, 145 Cal. App. 4th 188, 204 (2006) ("Malice may still be inferred when a party knowingly brings an action without probable cause.") (cleaned up).)

III. LAWRENCE GERACI AND REBECCA BERRY: THE UCL ALLOWS INJURED PLAINTIFFS THE RIGHT TO RESTITUTION THAT INCLUDES LOST PROFITS AND DISGORGEMENT OF ILL-GOTTEN GAINS.

BPC § 17203 authorizes courts to "make such orders or judgments … as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." The California Supreme Court has defined an order for such restitution as an order "compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken." (*Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144–45 (2003) (*Korea*) (quotation omitted).) In

Cortez, the California Supreme Court explained that the plaintiffs in that case could recover their earned overtime wages as restitution because they had a "vested interest" in their earned wages, and "equity regards that which ought to have been done as done, and thus recognizes equitable conversion." (*Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 178 (2000) (citation omitted). In *Korea*, the California Supreme Court held that in a case involving an individual plaintiff nonrestitutionary disgorgement is not an available remedy under the UCL, but it held that an individual may recover profits unfairly obtained to the extent that those profits represent monies given to a defendant or benefits in which a plaintiff has an ownership interest. (*Korea*, 29 Cal.4th at 1150.)

Here, as set forth above, Plaintiffs contention is that but-for defendants' actions, Flores and the Sherlock Family would have ownership of three cannabis licenses/businesses and that profits generated therefrom. That they are in fact the rightful owners of the cannabis permits pursuant to which the subject cannabis businesses operate under and pursuant to which profits have been generated. The cannabis permits, the dispensary businesses, and the profits are property subject to restitution under a UCL claim. (*Id*. at 1151 ("… restitution is limited to *restoring money or property* to direct victims of an unfair practice…") (emphasis added).) But-for the filing of the *Cotton I* action and the Berry Application, Flores would be the owner of the Federal CUP and the profits generated therefrom. But-for the fraudulent transfer of the Sherlock Property, the Sherlock Family would be the owners of the Sherlock Property as Mr. Sherlock's heirs. These are "vested interests" that Plaintiffs have an equitable right to. (*See Cortez*, 23 Cal.4th at 178 ("equity regards that which ought to have been done as done").) Thus, Geraci and Berry's motion to strike cannot be viewed in isolation and hinges, as does this entire case, on whether they took actions in concert with defendants to unlawfully deprive Plaintiffs of their ownership and vested interests in the value and profits generated from the subject cannabis permits and property and the profits generated therefrom.

The Court should deny Geraci and Berry's motion to strike in part because it presumes that they have not taken unlawful action in concert with the other defendants. Specifically, among others,

defendants Lake, Harcourt, Razuki, Malan, Magagna, and Schweitzer who held or hold the cannabis permits, businesses and profits generated therefrom which in equity belong to Plaintiffs.

However, Plaintiffs concede that to the extent they seek disgorgement of defendants' ill-gotten gains acquired from their *other* victims, that their requested relief under their UCL claim is overbroad. (Plaintiffs will amend their request for relief in the noted motion to file an amended complaint.)

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."

DATED: November 17, 2022

Respectfully submitted,
LAW OFFICE OF ANDREW FLORES

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