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10
11 **SUPERIOR COURT OF CALIFORNIA**
12 **COUNTY OF SAN DIEGO, HALL OF JUSTICE**

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

15 Plaintiffs,

16 vs.

17 GINA M. AUSTIN, an individual; AUSTIN LEGAL
GROUP, a professional corporation, LARRY
18 GERACI, an individual, REBECCA BERRY, an
individual; JESSICA MCELFRISH, an individual;
19 SALAM RAZUKI, an individual; NINUS MALAN,
an individual; FINCH, THORTON, AND BARID, a
20 limited liability partnership; ABHAY
SCHWEITZER, an individual and dba TECHNE;
21 JAMES (AKA JIM) BARTELL, an individual;
NATALIE TRANG-MY NGUYEN, an individual,
22 AARON MAGAGNA, an individual; BRADFORD
HARCOURT, an individual; SHAWN MILLER, an
23 individual; LOGAN STELLMACHER, an
individual; EULENTHIAS DUANE ALEXANDER,
24 an individual; STEPHEN LAKE, an individual,
ALLIED SPECTRUM, INC., a California
25 corporation, PRODIGIOUS COLLECTIVES, LLC,
a limited liability company, and DOES 1 through 50,
26 inclusive,

27 Defendants.
28

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
11/21/2022 at 09:29:00 AM
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Case No. 37-2021-00050889-CU-AT-CTL

Judge: Hon. James A. Mangione

**DEFENDANTS, LARRY GERACI AND
REBECCA BERRY'S REPLY
MEMORANDUM IN SUPPORT OF
THEIR MOTION TO STRIKE
PORTIONS OF PLAINTIFFS' FIRST
AMENDED COMPLAINT**

(Related to ROA #11, 195)

DATE: December 2, 2022
TIME: 9:00 am
DEPT: C-75

[IMAGED FILE]

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

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO STRIKE

I. INTRODUCTION

Defendants, Larry Geraci and Rebecca Berry, filed three separate motions directed at Plaintiffs' First Amended Complaint, filed December 23, 2021:

- (1) A demurrer to the First, Fifth, Sixth and Seventh causes of action (the "Geraci/Berry Demurrer");
- (2) A motion to strike to strike certain portions of the complaint (the "Geraci/Berry Motion to Strike"), namely, the Fifth Cause of Action, paragraph 323, at page 37, lines 14-15, which states:

" ... full restitution and/or disgorgement of all revenues, earnings, profits, compensation and benefits, such other monetary relief as the co mi deems just in light of the ill-gotten gains obtained by Defendants as a result of such business acts or practices, and ... "
- (3) A special motion to strike the complaint pursuant to Code of Civil Procedure section 425.16 (the "Geraci/Berry Anti-SLAPP Motion").

Plaintiffs have filed an "omnibus" opposition (ROA #195) that purports to oppose five separate motions in a single pleading, namely, the three Geraci/Berry motions but also the two separate motions to strike by co-defendants Abhay Schweitzer and Jessica McElfresh.

Defendants Geraci/Berry will attempt to parse out from this "omnibus" opposition the matters related to each of their three separate motions and reply to those opposition arguments in three separate Reply memorandums.

This Reply memorandum addresses motion (2), the Geraci/Berry Motion to Strike.

II. REPLY ARGUMENT

The instant Geraci/Berry Motion to Strike seeks merely to strike the Fifth Cause of Action, paragraph 323, at page 37, lines 14-15, which states:

" ... full restitution and/or disgorgement of all revenues, earnings, profits, compensation and benefits, such other monetary relief as the co mi deems just in light of the ill-gotten gains obtained by Defendants as a result of such business acts or practices, and ... "

Defendants Geraci/Berry base this limited motion to strike on the argument that these

1 allegations seek to recover damages and non-restitutionary disgorgement, which are not recoverable
2 under the UCL. (*Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1152
3 22 (2003).

4 In the “omnibus” opposition, Plaintiffs concede the relief should be granted in part. (See
5 Omnibus Opposition, page 3, lines 7-8 [“Plaintiffs concede that Geraci’s Motion to strike should be
6 granted in part to the extent Plaintiffs’ UCL claim in their First Amended Complaint (FAC) seeks non-
7 restitutionary relief”].

8 Plaintiffs go on to argue that under the *Korea Supply* decision, “an individual may recover
9 profits unfairly obtained to the extent that those profits represent monies given to a defendant or
10 benefits in which a plaintiff has an ownership interest (*Korea*, 29 Cal.4th at 1150.)” (See Omnibus
11 Opposition, page 8, lines 5-8.) Plaintiffs further argue, referencing all the defendants collectively, that
12 “but-for defendants’ actions Flores and the Sherlock/Family would have ownership of three cannabis
13 licenses/businesses and that [sic] profits generated therefrom ... But-for the filing of the Cotton I
14 action and the Berry Application, Flores would be the owner of the Federal CUP and the profits
15 generated therefrom... (See Omnibus Opposition, page 9, lines 9-23.) Based on the argument that they
16 would own the three cannabis licenses/businesses but for the defendants’ wrongful conduct, Plaintiffs
17 ask this Court to grant them leave to amend to precisely allege a right to restitutionary disgorgement,
18 namely, restitution to them of profits allegedly generated by the three cannabis licenses/businesses
19 operated on the properties benefiting from the CUPs issued by the City.

20 The Court should reject the request for leave to amend unless Plaintiffs’ counsel can make an
21 offer of proof that Plaintiffs can allege that defendants Larry Geraci and Rebecca Berry *received* any
22 profits generated by the Federal CUP (or either of the other two CUPs) or any other benefits in which
23 Plaintiffs have an ownership interest. In fact, Plaintiffs’ counsel cannot make such an offer of proof
24 because it is untrue. *Neither Geraci nor Berry have an ownership interest in any of those three*
25 *properties or cannabis licenses/ businesses. Neither Geraci nor Berry were awarded a CUP in*
26 *connection with the Federal Blvd. property that was the subject of the Cotton I action; more precisely,*
27 *no CUP was issued by the City for the Federal Blvd. property.*

28 In other words, as to the Federal Blvd. property, Plaintiff Flores is alleging that but for

1 Geraci/Berry's conduct the City would have issued a CUP for the Federal Blvd. property and that he
2 would have been the owner of that Federal Blvd. property and, presumably would have operated a
3 cannabis business/dispensary on that property. Putting aside the fact that a) Flores has alleged Cotton,
4 not Flores, owns the Federal Blvd. property (FAC, para. 116) in which he has some vague "equitable"
5 interest (FAC, para. 59), and b) Geraci was awarded a judgment of approximately \$268K from Cotton
6 following a jury trial in the *Cotton* I action because a jury found *Cotton* breached their agreement and
7 Geraci suffered reliance damages in a unsuccessful effort to obtain a CUP due to Cotton's wrongful
8 actions, Flores allegations in the instant action are not enough to support a claim for restitutionary
9 disgorgement.


10 Put simply, in the absence of allegations that Geraci/Berry themselves *received* profits or
11 monies belonging to the Plaintiffs or have some interest in the three cannabis licenses/businesses, then
12 there is no restitutionary disgorgement to be had from them. Leave to amend should be denied.

13 **III. CONCLUSION**

14 For the reasons stated in the moving papers and above, the Court should grant the Geraci/Berry
15 motion to strike directed to the Fifth Cause of Action, the UCL Claim; in particular, to strike the
16 allegation in paragraph 323, at page 37, lines 14-15 regarding the relief to which plaintiffs are entitled,
17 namely, "... full restitution and/or disgorgement of all revenues, earnings, profits, compensation and
18 benefits, such other monetary relief as the court deems just in light of the ill-gotten gains obtained by
19 Defendants as a result of such business acts or practices, and" A proposed Order was submitted
20 with the moving papers.

21
22 Dated: November 21, 2022

FERRIS & BRITTON
A Professional Corporation

23
24 By: 
25 Michael R. Weinstein
26 Scott H. Toothacre
27 Attorney for Defendants
28 LARRY GERACI and REBECCA BERRY