No. D081109

COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

AMY SHERLOCK as Guardian ad Litem, etc., et al.

Plaintiffs and Appellants,

vs.

GINA M. AUSTIN, et al.

Defendants and Respondents.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
SUPERIOR COURT NO. 37-2021-00050889-CU-AT-CTL
THE HONORABLE JAMES A. MANGIONE

RESPONDENTS' BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, rule 8.208(e)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(e)(2)):

Full name of interested entity or person:	Nature of Interest:
Amy Sherlock	Plaintiff/Appellant
Minors T.S. and S.S.	Plaintiffs/Appellants
Andrew Flores	Plaintiff/Appellant
Gina M. Austin	Defendant/Respondent
Austin Legal Group	Defendant/Respondent
Larry Geraci	Defendant
Rebecca Berry	Defendant
Finch, Thornton and Baird	Defendant
Abhay Schweitzer	Defendant
Techne	Defendant
Jim Bartell	Defendant
Natalie Trang-My Nguyen	Defendant
Aaron Magagna	Defendant
Jessica McLees	Defendant
Salam Razuki	Defendant
Ninus Malan	Defendant
Bradford Harcourt	Defendant

Logan Stellmacher	Defendant
Eulenthias Duane Alexander	Defendant
Stephen Lake	Defendant
Allied Spectrum, Inc.	Defendant
Prodigious Collectives, LLC	Defendant

Respectfully submitted,

PETTIT KOHN INGRASSIA LUTZ & DOLIN PC

Dated: February 14, 2023 By: _____

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I.

INTRODUCTION

Appellants filed a lawsuit based on activity that is clearly protected by Code of Civil Procedure section 425.16, the anti-SLAPP[1] statute. Respondents Gina M. Austin and her law firm, Austin Legal Group ("Respondents") specialize in cannabis licensing and entitlement at the state and local levels. Appellants--attorney Andrew Flores, Amy Sherlock, and her minor children--filed a lawsuit against Respondents and 17 other parties, alleging a grand conspiracy to monopolize the cannabis market. The allegations against Respondents relate to their role on behalf of their clients in petitioning for Conditional Use Permits ("CUPs").

As the activity alleged against Respondents is directly grounded in their protected activity of petitioning an administrative agency, it falls directly within the protections of the anti-SLAPP statute, a procedural remedy designed "to dispose of lawsuits brought to chill the valid exercise of a party's constitutional right of petition or free speech." (*Digerati Holdings, LLC v. Young Money Ent't, LLC* (2011) 194 Cal.App.4th 873, 882-883) Thus, the trial court granted Respondents' Special Motion to Strike the First Amended Complaint.

On appeal, Appellants again argue large conspiracies, based on conclusory allegations without support, many of which have nothing to do with Respondents or the anti-SLAPP motion.

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[1] "SLAPP" stands for "Strategic Lawsuits Against Public Participation." It will also be referred to herein as "Section 425.16."

With regard to the anti-SLAPP motion, Appellants argue, without support, that the petitioning activity for the CUPs is "illegal petitioning activity as a matter of law." (AOB 8-9, 11, 20-21, 24-25.) In addition to conclusory allegations, Appellants provide documents from unrelated cases, that were not presented to the trial court.

The trial court properly granted Respondents' Special Motion to Strike Pursuant to Code of Civil Procedure section 425.16. It is uncontested that Respondents' petitioning activity is protected activity. Appellants' argument is the activity is illegal as a matter of law, but it is based on conclusory allegations, unsupported by any facts in the record. Furthermore, once it was established that the activity was protected, the burden shifted to Appellants to show there was a probability of success on the merits. Appellants failed to present any evidence. Therefore, the trial court properly granted the motion.

II.

STATEMENT OF THE CASE

On December 21, 2021, attorney Andrew Flores, in pro per, filed the First Amended Complaint ("FAC") in San Diego Superior Court on his behalf, as well as on behalf of Amy Sherlock and her minor children T.S. and S.S. ("Appellants") (RJN 68-108.)[2] The FAC alleged, inter alia, conspiracy to monopolize in violation of the Cartwright Act, conversion, civil

[2] Appellants filed a Request for Judicial Notice ("RJN") of the FAC. While the proper mechanism is a Motion to Augment, Respondents will cite to the RJN provided by Appellants.

conspiracy, declaratory relief, unfair competition and unlawful business practices, against 19 parties. (RJN 68.)

Three of the causes of action were against all defendants, including Gina Austin and Austin Legal Group ("Respondents"), including conspiracy to monopolize in violation of the Cartwright Act (RJN 101-102), unfair competition (RJN 104-106), and civil conspiracy (RJN 107-108). The other causes of action did not have any allegations against Respondents.

On June 16, 2022, Respondents filed a Special Motion to Strike the FAC pursuant Section 425.16, the anti-SLAPP statute, as the causes of action asserted against Respondents arose from constitutionally protected activity, and Appellants could not establish a probability of prevailing on their claims. (CT 5-121.) Appellants filed an Opposition on July 25, 2022. (CT 122-145.) Respondents filed a Reply on August 2, 2022. (CT 146-154.)

On August 12, 2022, the trial court issued a tentative opinion granting Respondents' anti-SLAPP motion. (CT 155-156.) The court heard argument on August 12, 2022, and confirmed its ruling that same day. (RT 3-6; CT 157-158, 170-171.)

On August 16, 2022, Appellants filed a Notice of Appeal. (CT 166.)

III.

STATEMENT OF FACTS[3]

Gina Austin, an attorney, and her law firm, Austin Legal Group ("ALG"), specialize in representing parties in obtaining Conditional Use Permits ("CUPs") to operate cannabis facilities at the state and local level. (RJN 74.) This lawsuit arises from her representation of clients in advising them about, or obtaining CUPs.[4]

Appellants alleged and now argue that Respondents were operating an illegal law practice because Larry Geraci ("Geraci") submitted a CUP application in his assistant, Rebecca Berry's name, on the property Geraci was attempting to purchase from Darryl Cotton ("Cotton"). (RJN 83-85; AOB 12-16.)

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[3] The Statement of Facts is taken from the FAC and other evidence presented to the trial court. Although Respondents do not agree with many of the allegations, for purposes of the anti-SLAPP motion, a court accepts the plaintiff's evidence as true, along with evidence presented to the trial court. (*Weeden v. Hoffman* (2021) 70 Cal.App.5th 269, 277, fn. 1, 287.) Appellants cite to evidence that they present in this appeal, and was not presented to the trial court. (AOB 13-14.) This Court cannot consider the evidence that was not presented to the trial court. (*Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal.App.5th 657, 684; Cal. Rules of Court, rule 8.204(a)(2)(C).)

[4] The FAC has general allegations, against numerous defendants, including those in the cannabis industry and their attorneys, of a broad and far-reaching conspiracy "to create an unlawful monopoly in the cannabis market" in San Diego. (RJN 69.) The complaint tells a long tale, involving named defendants committing attempted kidnap and murder (RJN 75-76, 82), using "Mexican gangs to commit violent acts" (RJN 76), fraudulently forging documents to divest Sherlock of her interest in property that her husband, who committed suicide, owned (RJN 77-80, 92), committing acts and threats of violence to end the litigation (RJN 95), and bribing witnesses (RJN 96-97). As these allegations do not involve Respondent, they are not relevant, and are not included in the recitation of the Statement of Facts.

Respondents were involved with the acquisition of a CUP at 6176 Federal Boulevard, but abandoned their efforts after another CUP was issued within 1000 feet. (CT 28.)

A. Respondents' Involvement in Applying for a CUP at 6176 Federal Boulevard Was Protected Activity

Plaintiffs' allegations regarding the property at 6176 Federal Boulevard, including their allegations of conspiracy, have been litigated in three separate lawsuits. Geraci, also named in the underlying lawsuit, owned T&F Tax Center, a tax, financial and accounting services business. (RJN 83.) Geraci hired ALG to assist in drafting an agreement for the purchase and sale of the property, and in acquiring a CUP. (CT 28.)

Geraci became interested in the property in mid-2016, and began negotiating with Cotton to purchase the property. (RJN 83.) In November 2016, Geraci and Cotton entered into an agreement regarding the sale of the property. (RJN 84.) Geraci claimed the terms of the agreement were to buy the property for $800,000 with a $10,000 nonrefundable deposit, and were memorialized in a written and notarized document. (RJN 142-143 [Geraci declaration attached as exhibit to FAC]; see also RJN 129-130 [notarized document attached as exhibit to the FAC].) Cotton claimed the parties entered into an oral agreement, and that the nonrefundable deposit was $50,000, which Geraci failed to pay, and that the agreement provided Cotton with a 10 percent equity stake in the CUP, and $10,000 per month or 10 percent of net profits. (RJN 84; CT 70-71 [Cotton's federal complaint].)

In March 2017, Cotton informed Geraci that he was entering into a different agreement with a third party for the sale

of the property. (RJN 86.) On March 21, 2017, Geraci, represented by a law firm other than Austin or ALG, filed a lawsuit against Cotton for breach of contract. (CT 13, 28, 31-38.) On August 25, 2017, Cotton filed a second amended cross-complaint. (CT 13, 39-57.) Initially, Cotton alleged, as Appellants do here, that Rebecca Berry submitted the CUP application in her name because Geraci could not obtain a CUP, but then revised the causes of action to drop these allegations. (RJN 87-88.) A jury found in favor of Geraci on both the complaint and cross-complaint. (CT 13, RJN 94.)[5] Cotton then filed an action in federal court, with the same allegations. (CT 58-118.)

Irrespective of the disputes regarding this property, Respondents' only involvement that is raised in the FAC is their activity in obtaining a CUP on the property. (RJN 83-85; AOB 12-16.)

B. Respondents Were Not Involved In The CUP Applications for The Other Properties that Are Part of the Alleged Conspiracy

According to the FAC, the lawsuit was based on the acquisition of four CUPs, but not the one at 6176 Federal Boulevard. The CUPs were (1) in Ramona; (2) on Balboa Avenue; (3) on 6220 Federal Boulevard; and (4) in Lemon Grove (at 6859 Federal Blvd.) (RJN 70.) Respondents were not involved in the

[5] In spite of the jury finding to the contrary, in the instant FAC, Appellants claimed the lawsuit "was filed without factual or legal probable cause because the November Document [written document] cannot be a lawful contract for at least two reasons: it lacks mutual assent and a lawful object." (RJN 86.)

Ramona CUP, the Federal CUP, or the Lemon Grove CUP. (CT 28.) Respondents were tangentially involved in the Balboa CUP, in helping Michael Sherlock's attorney with the initial application. (CT 28.)

In spite of Appellants' allegations that the lawsuit was based on the four CUPs above, their allegations regarding Respondents involve the CUP at 6176 Federal Boulevard, and their arguments on appeal are based on that CUP. (See AOB 12-18 [facts are all about application for a CUP in Berry's name].)

C. The Causes of Action Against Respondents

Appellants alleged against all defendants, in their first cause of action, a violation of Business and Professions Code section 16700 *et seq.*, the Cartwright Act, in that they "designed, implemented and/or ratified a combination and conspiracy with the specific intent to prevent competition and/or create a monopoly in the cannabis market" in San Diego. (RJN 101-102.)

In their fifth cause of action, Appellants alleged the "acts and practices" of all the defendants were unlawful, unfair, and in violation of the Unfair Competition Law, under Business and Professions Code section 17200. (RJN 104-106.) Specifically related to Respondents, they alleged that "ALG's Proxy Practice is illegal and violates numerous State and City laws, most notably, Bus. & Prof. Code, §§ 19323 *et seq.* and 26057 *et seq*." (RJN 105.) In their seventh cause of action, Appellants alleged a civil conspiracy against all defendants, in that they "took or ratified acts in furtherance of the Antitrust Conspiracy." (RJN 107-108.)

IV.

ARGUMENT

A. Standard of Review

This Court reviews the denial of a Code of Civil Procedure section 425.16 Special Motion to Strike de novo. (*Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 42; *Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 405.) In exercising its independent review, this Court engages in the same two-pronged analysis as the trial court. (*Newport Harbor*, at p. 42.)

First, the court considers whether defendants have made "a threshold showing that the challenged cause of action is one 'arising from' protected activity." (*Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 735, citing *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) Second, "[i]f the court concludes that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Hailstone*, 169 Cal.App.4th at p. 736.) If the plaintiff failed to produce evidence demonstrating its likelihood of success, the special motion to strike should be granted. (*Contreras*, 5 Cal.App.5th at p. 404 [plaintiff may not rely upon unverified allegations and those made "upon information and belief" to show the merits of the claim].)

In making its determination, the Court "considers the pleadings and evidentiary submissions of both the plaintiff and the defendant . . . ." (*Jarrow Formulas, Inc. v. LaMarche* (2003)

31 Cal.4th 728, 741, fn. 10, quoting *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, and citing Code Civ. Proc., § 425.16, subd. (b)(2).) However, "the court does not weigh the credibility or comparative probative strength of competing evidence. . . ." (*Ibid*.)

B. The Trial Court Properly Granted Respondents' Anti-SLAPP Motion as the Lawsuit Involves Protected Activity

Section 425.16, also known as the "anti-SLAPP Statute," was enacted by the California legislature in order to combat "the disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.16.) The anti-SLAPP statute provides for a special motion to strike a cause of action if it arises from the exercise of such rights and lacks minimal merit. Section 425.16 therefore, "provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384, emphasis original; see also *Bel Air Internet v. Morales* (2018) 20 Cal.App.5th 924, 929.)

California's anti-SLAPP statute provides, in relevant part:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(Code Civ. Proc., § 425.16, subd. (b)(1).) The statute is construed broadly to maximize protection for acts in furtherance of the right to petition the courts. (Code Civ. Proc., § 425.16, subd. (a)*; Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119-1121.) As shown below, the activity here was protected, and clearly comes within the statute.

1. Austin's Representation of Her Clients in Obtaining CUP Approvals Is Protected Activity Thereby Satisfying the First Prong of the Inquiry

Section 425.16 sets forth a two-pronged process to evaluate whether a claim should be stricken under the statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88) First, the Court must determine if the movant has made a threshold showing that the challenged claim or claims arise out of activity which is protected under the statute. (Code Civ. Proc., § 425.16, subd. (b)(1); *Navellier*, at p. 88.) The inquiry on the first prong focuses only on whether the actions underlying the challenged claims fall under one of the categories of protected activity described in Section 425.16, subdivision (e). (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1292) Here, it is undisputed that the activity in obtaining CUPs on behalf of clients is protected activity.

a. *Representing Clients in Obtaining CUPs Are Protected*

Under Section 425.16, subdivision (e), protected acts include "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under

consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law."

"[A]ll communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute." (*Contreras*, at p. 408.) In determining whether a claim "arises out of" protected conduct, the court looks at the "allegedly wrongful and injury-producing conduct that provides the foundation for the claims." (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490-491) The court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based" to determine whether the actions underlying the challenged claims constitute protected activity. (Code Civ. Proc., § 425.16, subd. (b)(2).) The focus is not on the plaintiff's cause of action; rather it is on "the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Navellier*, at p. 92.)

Here, the activity is all protected. It is based on or related to Austin and ALG's acquisition of CUPs on behalf of their clients, which are proceedings before the local zoning authority. "It is well established that the protection of the anti-SLAPP statute extends to lawyers and law firms engaged in litigation-related activity." (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 113.) Filing applications on behalf of clients fall under the anti-SLAPP statute as protected activity because a local zoning authority

proceeding is a proceeding of a governmental administrative body. (*Briggs, supra* 19 Cal.4th at 1115 [the constitutional right to petition includes seeking administrative action].)

b. *Appellants Have Not Shown Respondents' Activities Are Illegal as a Matter of Law*

Appellants argue, as they did in the trial court, that Respondents' activity is illegal as a matter of law. (AOB 9-11, 19-22; RT 3-6.) Here, like in the trial court, they make unsupported allegations and bold conclusions that the practice is illegal. Appellants' conclusions are not sufficient. "[C]onduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is alleged to have been unlawful or unethical." (*Contreras*, at p. 414, quoting *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 910-911.)

And while Section 425.16 cannot be invoked for activity that is illegal as a matter of law, for that narrow exception to apply, either the defendant must concede the conduct is illegal, or the evidence must conclusively show that the activity was illegal as a matter of law. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 315, 320.) Appellants have the burden of conclusively proving the defendant's conduct is illegal, and thus not protected activity. (*Cross v. Cooper* (2011) 197 Cal.App.4th 356, 385) Here, Respondents did not concede illegal conduct, and Appellants presented no evidence of illegal conduct, just conclusory allegations, which do not suffice. Thus, this is not "one of those rare cases in which there is uncontroverted and uncontested evidence that establishes the crime as a matter of law." (*Id.* at p. 386.)

2. Appellants Forfeited Their Arguments That The Petitioning Activity Is Illegal As A Matter of Law Pursuant to Penal Code section 118 and Health and Safety Code section 11362.765, subdivision (a)

In the trial court, Appellants argued that Respondents' petitioning activity is illegal as a matter of law because (1) the Business and Professions Code sections 19323 and 26057 that license cannabis owners mandate denial of a license for those sanctioned for unlicensed commercial cannabis activities; (2) California Code of Regulations Section 5032 prohibits parties from working on behalf of those who are not qualified applicants; and (3) the applications contained false statements in violation of Penal Code section 115, knowingly procuring or offering a false or forged instrument for filing in a public office. (CT 134-137.) On appeal, Appellants do not advance the second theory that the practice is illegal, but have new theories that the petitioning activity is illegal as a matter of law—that it is in violation of Penal Code section 118 (perjury), and Health and Safety Code section 11362.765(a) (tax fraud and evasion). (AOB 19-22.) They argue again, like they did in the trial court, that the petitioning activity was a violation of Penal Code section 115 and Business and Professions Code section 19323 and 26057. (AOB 20-24.)

Appellants have forfeited their argument that Respondents' petitioning activity was illegal as a matter of law in violation of Penal Code section 118 or Health and Safety Code section 11362.765, subdivision (a). "It is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the

trial court." (*Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1526, quotation marks and citation omitted [declining to decide a new theory under the anti-SLAPP statute that was not raised in the trial court].) However, even had they not forfeited these theories, they fail on the merits.

3. The Evidence Does Not Show The Petitioning Activity Is Illegal as a Matter of Law Under Penal Code Sections 115 and 118

Appellants claim the petitioning activity is illegal as a matter of law, and cite to Penal Code sections 118, the perjury statute, and 115, for filing false or forged instruments. (AOB 19-20.) Their theory appears to be that Respondents submitted applications for CUPs in Berry's name, when "Geraci was the sole and true proposed beneficial owner of the CUP applied for." (AOB 20.) They merely cite to Austin's declaration in another case, that was not before the trial judge, for their proposition that Geraci and Razuki were required to be disclosed as owners. (AOB 20.)[6]

The elements of perjury are that an untrue statement must be made under oath which is (1) material and (2) knowingly made. (*McGill v. Superior Court* (2011) 195 Cal.App.4th 1454, 1488; Pen. Code, § 118.) Penal Code section 115 provides that it is a felony for a person to knowingly procure or offer a false or

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[6] Appellants submitted a Request for Judicial Notice, whereby they requested this Court to notice various documents that were not before the trial court. Respondents have filed an opposition to their request for the items that were not presented to the trial court. As the documents were not presented to the trial court, they are not relevant, and therefore, not a proper subject for judicial notice. (*Mireskandari v. Gallagher* (2020) 59 Cal.App.5th 346, 359, fn. 11.)

forged instrument to be filed, registered, or recorded in any public office if the instrument, if genuine, might be filed, registered or recorded under any law of the state. (Pen. Code, § 115.)

Appellants did not present any evidence in the trial court that the activity was illegal or violated either of these statutes. Appellants merely made unsupported allegations that the conduct was illegal. (*Contreras*, *supra*, at p. 414.) And Appellants certainly have not shown that the activity is illegal as a matter of law, as is required. (*Flatley*, *supra*, at pp. 320.)

In the FAC, Appellants alleged that "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." (RJN 83.) It further alleged that "On October 31, 2016, Geraci had the Berry CUP Application filed with the City." (RJN 83.) Appellants attached the CUP application to the FAC, which is signed by Abhay Schweitzer and Rebecca Berry. (RJN 127.) Appellants did not allege that Respondents made a statement under oath, or even that they submitted the application. Further, Appellants did not submit any evidence that any untrue statements were knowingly made. To the contrary, Appellants' allegations show that Respondents did not knowingly present any untrue statements. Appellants allege that Austin had previously testified about the CUP, and said she was not aware of the "Geraci judgments" (which presumably refers to his sanctions) and did not know or remember why Geraci used Berry as an agent for the CUP application. (RJN 93-

94; see also AOB 14.)[7] And lastly, as required for perjury, there is no evidence that the statements were material. In order to show materiality, Appellants needed to show that the allegedly untrue statement "could probably have influenced the outcome of the proceedings." (*People v. Pierce* (1967) 66 Cal.2d 53, 61.) Appellants' own allegations in the FAC show the allegedly untrue statement could not have influenced the outcome of the proceedings, as there is no evidence that the CUP was ever issued. Appellants allege that Cotton "took numerous actions to seek to prevent Geraci from being able to process" the CUP application, and that in the action between Cotton and Geraci, the court found that the application would have been approved but for Cotton's actions, thereby implying the application was not approved. (RJN 93; see also RJN 95 [other parties offered to take over the CUP application], 96 [Bartell "owned" the CUP application and he was getting it denied; Geraci was using his best efforts to get the CUP application approved in court and through political lobbying efforts].)

Appellants argue nothing more than conclusory allegations of conspiracy and illegal activity. "Bare allegations of aiding and abetting or conspiracy do not suffice to remove these acts from the protection" of the anti-SLAPP statute. (*Contreras*, *supra*, at p. 399.)

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[7] The FAC also states that the "Cotton I judgment found, inter alia, that Geraci is not barred bylaw . . . from owning a Marijuana Outlet conditional use permit issued by the City of San Diego." (RJN 94.) Certainly if it is alleged that a court found Geraci was not barred from obtaining a CUP, it cannot be said that Respondents knowingly submitted untrue statements to obtain a CUP on Geraci's behalf.

4. Appellants Did Not Present Any Evidence of Tax Fraud or Evasion

Even had Appellants preserved their theory that Appellants' petitioning activity were illegal because it violates tax fraud and evasion laws, it does not fare any better. (AOB 21-22.) As Appellants did not raise this argument in the trial court, they did not present any evidence to support it. Thus, their argument fails from the outset.

Appellants cite Health and Safety Code section 11362.765, subdivision (a) for their argument that the petitioning activity was illegal as a matter of law. (AOB 21.) That section provides defenses to the Medical Marijuana Program Act. (*People v. Mitchell* (2014) 225 Cal.App.4th 1189, 1205.) It provides that the individuals listed in the statute (qualified medical marijuana patients, caregivers, or those who provide assistance to a patient) shall not be subject to criminal liability under various Health and Safety Code sections relating to medical marijuana. It further provides, as cited by Appellants, that "[t]his section does not authorize the individual to smoke or otherwise consume cannabis unless otherwise authorized by this article, nor shall anything in this section authorize any individual or group to cultivate or distribute cannabis for profit." (Health & Saf. Code, § 11362.765.) It is not a statute that criminalizes any conduct, and is not a tax fraud or evasion statute, as Appellants claim. (AOB 21.)

Appellants next cite a United States Supreme Court case addressing whether "aliens who commit certain federal tax crimes are subject to deportation as aliens who have been

convicted of an aggravated felony." (AOB 21, *Kawashima v. Holder* (2012) 565 U.S. 478, 480.) This case is inapplicable and does not provide any support for Appellants' position.

Citing to this Court's unpublished case in Razuki, which was not before the trial court, appellants argue that because the agreement was entered into prior to the time when for-profit commercial cannabis activity was allowed, it violated Health and Safety Code section 11362.765, subdivision (a), "and was therefore illegal." (AOB 21.) Assuming the code Appellants cited to was a criminal statute, it is not clear how it relates to Respondents' petitioning activity in acquiring a CUP. They do not have any evidence that Respondents incurred a tax liability, failed to return a tax return, intentionally provided false information on a tax return or aided, abetted, advised, encouraged or counseled someone to evade their taxes. (See Rev. & Tax. Code, § 19701) As there was no evidence that the CUP was approved, and /or that Respondents were responsible for filing their tax returns, Appellants' argument fails.

Appellants next argue that "there was and is no lawful manner for Razuki or Malan (or Geraci and Berry) to have reported their respective profit distributions from their nonprofit medical cannabis operations." (AOB 22.) Appellants further elaborate that dispensaries are lucrative, cash businesses, so that Razuki and Malan operated a nonprofit entity and "necessarily submitted fraudulent tax returns and engaged in tax evasion/fraud." (AOB 22.) Even if these statements were based on some evidence, it does not relate to Respondents. Again,

Appellants argue nothing more than conclusory allegations of conspiracy and illegal activity. "Bare allegations of aiding and abetting or conspiracy do not suffice to remove these acts from the protection" of the anti-SLAPP statute. (*Contreras*, *supra*, at p. 399.)

5. Appellants Have Not Presented Evidence Of Criminal Activity Under Business and Professions Code Section 26057

Relying on another statute that does not address criminal activity, Appellants argue that Respondents' activities in obtaining CUPs are illegal because of the language in Business and Professions Code section 26057, the statute that lists the reasons to deny an application. Specifically, Appellants argue that because the statute provides that the Department of Cannabis Control "shall deny" an application to an applicant who has been sanctioned for unauthorized commercial activities, Respondents' petitioning activity is "illegal." (AOB 23-24.) Appellants' argument fails for many reasons.

First, Appellants misread and misrepresent the statute. Subsection (a) provides that "[t]he department shall deny an application if either the applicant, or the premises for which a state license is applied, do not qualify for licensure under this division." Subsection (b) provides that "[t]he department may deny the application for licensure or renewal of a state license if any of the following conditions apply." The statute lists nine conditions, including subsection (7),

> [t]he applicant, or any of its officers, directors, or owners, has been sanctioned by the department, the Bureau of Cannabis Control, the Department of Food

> and Agriculture, or the State Department of Public Health or a city, county, or city and county for unauthorized commercial cannabis activities, has had a license suspended or revoked under this division in the three years immediately preceding the date the application is filed with the department.

(Bus. & Prof. Code, § 26057.)

Appellants conflate sections (a) and (b). They take the "shall" language from subsection (a) and ignore the permissive language from subsection (b)(7), which applies the statute to those who have been sanctioned for unauthorized activity. They completely ignore the permissive language, "may" in subdivision (b).

Moreover, the statute Appellants rely on does not address illegal activity. It is a statute that addresses the denial of an application. Appellants' argument is perhaps that because Appellants' clients were prohibited under the statute from obtaining a CUP based on their previous sanctions, it is "illegal" for them to pursue a CUP. However, as noted, there is not a complete prohibition on those who have been previously sanctioned from obtaining an application, as subsection (b) provides that the department "may" deny the application if someone has been sanctioned. (Bus & Prof. Code, § 26057, subd. (b)(7).) The *Flately* rule that the that activity is not protected if it is illegal as a matter of law "only applies to criminal conduct, not to conduct that is illegal" because it violates other statutes or common law. (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 806-810; *Collier v. Harris* (2015) 240 Cal.App.4th 41, 55.) Thus, Appellants have not pointed to any

criminal conduct regarding this statute. If their claim is that Respondents' conduct was illegal for presenting false documents in their applications, as noted above, they have not shown the conduct violated statutes for perjury or presenting a false document.

Even if Appellants' argument and allegations that the plain language of the statute that says, "shall deny" proves that Respondents' activity is illegal (AOB 23-24), it is not sufficient, as they have not presented any *evidence* of such illegality. Respondents did not concede there was illegal activity. (See *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1367, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5 [defendants conceded the illegal nature of their election campaign finance activities].) Nor is the illegality conclusively shown by the evidence. (*Flatley*, *supra*, at p. 316.) Appellants have presented no evidence—they did not present any declarations, affidavits, or requests for judicial notice. (See CT 158.) Appellants' general allegations of conspiracy and illegality are not sufficient to show illegality. (*Contreras*, *supra*, at p. 413.)

In support of their argument, Appellants cite *Wheeler v. Appellate Division of Superior Court* (2021) 72 Cal.App.5th 824, 833, for the proposition that engaging in unlicensed commercial cannabis activity is a crime. (AOB 24.)[8] In *Wheeler*, the court

[8] Appellants overstate the holding, to add that the "secret, undisclosed ownership of cannabis businesses by sanctioned parties is 'engaging in unlicensed commercial cannabis activity [and] is a crime.'" (AOB 24, citing *Wheeler*, *supra*, at p. 833, emphasis omitted.) The court did not address "secret" or

cites to Business and Professions Code section 26038, regarding the penalties for unlicensed commercial cannabis activity. (*Wheeler*, *supra*, at p. 833.) However, there is no evidence, or even allegations, that Respondents were engaging in unlicensed commercial cannabis activity. Thus, Appellants' argument fails.

6. Appellants Have Not Presented Any Evidence to Demonstrate a Probability of Success on the Merits for the Second Prong of the Anti-SLAPP Statute Inquiry

Once it is established that the challenged claims involve protected activity under the anti-SLAPP statute, the burden shifts to the plaintiff to demonstrate by "competent, admissible evidence" a prima facie showing of facts that, if proved at trial, would support a judgment. (*San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76, 94-95.) It has been described as a "summary-judgment-like procedure." (*Id*. at 94.) The court looks to whether the plaintiff has stated and substantiated a legally sufficient claim. (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 63.) If the plaintiff fails to meet this burden, the claims must be stricken. (Code Civ. Proc., § 425.16.) "[T]he plaintiff may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence." (*San Diegans for Open Government*, at p. 95.)

Here, Appellants did not present any competent, admissible evidence. As the trial court explained, "Plaintiffs have not

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"undisclosed" ownership of cannabis businesses. It addressed the conviction of an 80 year-old landlord, who unknowingly rented a building to illegal cannabis dealers. (*Wheeler*, *supra*, at p. 828.)

submitted any evidence, affidavits, declarations, or requests for judicial notice in support of this motion." (CT 158.) Therefore, Appellants did not met their burden of proof that there was a probability they would succeed at trial. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 654-655, disapproved on other grounds in *Equilon*, *supra*, 29 Cal.4th at p. 68, fn. 5.)

Appellants advance three arguments regarding the second prong of the anti-SLAPP statute inquiry. They argue that (1) the trial court should have considered its pleadings in the FAC and Respondents' anti-SLAPP motion, which they claim "did not dispute and admitted that ALG undertakes the Strawman Practice"; (2) the petitioning activity is illegal as a matter of law so the trial court should have denied the motion in the first step of the analysis; and (3) the trial court had an independent duty "to ascertain the true facts" of an illegal contract. (AOB 24-26.) Appellants alternatively argue, without analysis or authority, that the documents that were not presented to the trial court, but are the subject of their request for judicial notice, show that Austin knowingly aided her clients in engaging in unlicensed commercial cannabis activity, which is a crime. (AOB 26.) And lastly, Appellants ask this Court for relief for any of counsel's error,[9] "at least" to allow the Sherlock family to acquire alternative counsel to vindicate their rights. (AOB 26-27.) As will be shown, none of these arguments have merit.

[9] Flores is counsel and also one of the Appellants.

a. *Appellants' Failure to Submit Admissible Evidence Cannot Be Overcome*

Appellants argue that the trial court should have relied on the FAC and Respondents' moving papers, and that they "did not need to argue or provide evidence in support of a fact raised in the FAC," which was admitted to or conceded in Respondents' Motion. (AOB 25.) Appellants argument is legally and factually faulty.

The court must consider the "pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based" (Code Civ. Proc., § 425.16, subd. (b)), "but does not weigh the credibility or comparative probative strength of [the] competing evidence." (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1289.) The prima facie showing of merit for the second prong of the anti-SLAPP statute analysis "must be made with evidence that is admissible at trial. [Citation.] Unverified allegations in the pleadings or averments made on information and belief cannot make the showing." (*Ibid*, citations omitted.) Thus, Appellants "may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence." (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 109; *San Diegans for Open Government*, *supra*, at p. 95)

It is not clear what Appellants believe Respondents "admitted to and conceded" in their anti-SLAPP motion. (AOB 25.) Without citation to the record, argument, or authority, Appellants say Respondents "admitted that ALG undertakes the Strawman Practice." (AOB 25.) Respondents' motion clearly laid

out the factual and legal arguments that demonstrated Appellants' claims should be stricken pursuant to the anti-SLAPP statute, as the lawsuit, as it related to Respondents, was based on their acting within the scope of providing services for their clients and petitioning for CUPs. (CT 5-30.) Austin's declaration, provided in support of the motion, confirmed that she was not involved in many of the CUPs that were the subject of the lawsuit, and where she was, it was in the course of representing clients to assist with CUP applications. (CT 24.)

Appellants' argument should be summarily rejected, as they have provided no legal or factual support for their assertions. (*Meridian, supra,* 67 Cal.App.5th at 684; *Hill v. Affirmed Housing Group* (2014) 226 Cal.App.4th 1192, 1200 [claims presented with no factual or legal support are abandoned]; Cal. Rules of Court, rule 8.240(a)(1)(C) [briefs must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears."].) "In other words, review is limited to issues which have been adequately raised and briefed." (*Meridian Financial*, *supra*, at p. 684, quotations omitted.)

b. *The Illegality of Activity Is Not Related to the Second Prong of the anti-SLAPP Analysis*

Appellants reiterate their argument in their analysis of the second prong of the anti-SLAPP discussion that Respondents' practice is illegal as a matter of law. (AOB 25.) Appellants do not advance any additional arguments. The question of whether the illegality of protected speech or petitioning activity is decided

in the first prong of the analysis. (*Flatley*, *supra*, at p. 320 ["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 . . . is not the same showing as the plaintiff's second prong showing of probability of prevailing"].) As explained in section IV(B)(1)(b), Appellants have not shown Respondents' petitioning activity is illegal.

c. *The Trial Court Did Not Have an Independent Duty to "Ascertain the True Facts"*

Appellants cite a contract case between two contractors, where, on appeal, the plaintiff argued that the trial court should have been bound by issues raised in the pleadings. (AOB 25-26, citing *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 147-148.) There is no allegation in the current case that there was an illegal contract, nor is it a breach of contract case, so the cited authority is not pertinent. Appellants cannot overcome their failure to provide evidence for the second prong of the analysis by stating the trial court, on its own, should have conducted further inquiry. There is simply no support for such an assertion, and is contrary to the well established procedure for determining the merits of claim when evaluating an anti-SLAPP motion. (See *Jarrow Formulas, Inc.*, *supra*, at p. 741, fn. 10 [procedure for making the second prong determination].)

d. *Appellants' Requests for This Court to Review Evidence Not Presented to the Trial Court or to Allow Them to Substitute Counsel at this Stage Should Be Denied*

Without citing any authority, Appellants argue that if they erred in failing to present credible evidence, then this Court should consider the items they submitted in their Request for Judicial Notice, that were not submitted to the trial court, to "establish that Austin did undertake the Strawman Practice for Geraci and Malan and that she knowingly did so to aid her clients to engage in unlicensed commercial cannabis activity, which is a crime." (AOB 26.) "It is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court." (*Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1526, quotation marks and citation omitted [declining to decide a new theory under the anti-SLAPP statute that was not raised in the trial court].)

In reviewing the "trial court's order denying the [anti-SLAPP] motion," this Court must "consider all the evidence presented by the parties." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291, fn. 17.) An appellate court's role is not "to resolve factual issues and exercise discretion in the first instance." (*People v. Asghedom* (2015) 243 Cal.App.4th 718, 728.) Even though the standard of review is de novo, the appellate court does "not transform into a trial court." (*Meridian, supra,* at 684.) Moreover, "the parties to an appeal may not refer to matters outside the record on appeal." (*Ibid*., citing Cal. Rules of

Court, rule 8.204(a)(2)(C).) Thus, there is no support or authority for this Court to review evidence that was not submitted to the trial court.

Next, Appellants ask this court to allow the Sherlock family to acquire new counsel "to aid them in seeking to prove their claims and vindicate their rights." (AOB 26-27.) Again, they cite no authority for their proposition that this Court has the authority to, or should do so. It is not this court's role. Code of Civil Procedure section 904.1 provides that an appeal may be taken from an order granting or denying an anti-SLAPP motion under Section 425.16. (Code Civ. Proc., § 904.1, subd. (13).) There is nothing preventing any party from seeking the advice of new counsel. Appellants did not raise an issue in the trial court about their counsel, therefore, it is not appropriately raised on appeal. If a trial court has not reached an issue, it is not the appellate court's role to issue an advisory opinion. (*Safai v. Safai* (2008) 164 Cal.App.4th 233, 243.)

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V.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court to affirm the trial court's order granting Appellants' Special Motion to Strike Pursuant to Code of Civil Procedure section 425.16.

Respectfully submitted,

PETTIT KOHN INGRASSIA LUTZ & DOLIN PC

Dated: February 14, 2023 By: _____

Douglas R. Pettit, Esq.
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CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 7,356 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

PETTIT KOHN INGRASSIA LUTZ & DOLIN PC

Dated: February 14, 2023 By: _____

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PROOF OF SERVICE
Sherlock, et al. v. Austin, et al.
Court Of Appeal Case Number: D081109
San Diego County Superior Court Case No.: 37-2021-00050889-CU-AT-CTL

I, the undersigned, declare as follows:

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RESPONDENTS' BRIEF

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 14, 2023, at San Diego, California.

/s/ Mona C. Jones
Mona C. Jones

STATE OF CALIFORNIA California Court of Appeal, Fourth Appellate District Division 1	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** California Court of Appeal, Fourth Appellate District Division 1

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Case Number: **D081109**
Lower Court Case Number: **37-2021-00050889-CU-AT-CTL**

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