No. 23-55018

In the

United States Court of Appeals

For the

Ninth Circuit

IN RE AMY SHERLOCK, on her own behalf and on behalf of her minor children, T.S. and S.S.,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

Respondent,

(*Real parties in interest* listed in following page)

FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 20-CV-656-BAS-DEB

APPELLANTS' REPLY

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Real Parties In Interest.

Table of Contents

REPLY ... 7

I. Neither Judge Joel Wohlfeil nor F&B dispute the material facts and law and thus admit the *Cotton I* and *II* actions are sham petitioning that is illegal as a matter of law and undertaken in furtherance of a crimes. ... 11

II. Neither the Sherlock Family nor Flores were in privity with Cotton in Cotton I or II. ... 15

III. F&B's arguments. ... 18

A. F&B's petitioning is sham petitioning. ... 18

B. Appellants are not precluded from seeking review of the March 23, 2022 Order. ... 22

C. Appellants have Article III standing. ... 23

D. The trial court did abuse its discretion in dismissing the entire action. 25

IV. Judge Wohlfeil's arguments. ... 25

V. Flores erred in filling out the notice of appeal. ... 28

CONCLUSION ... 32

Supreme Court Opinions

Blonder-Tongue Labs. v. Univ. of Ill. Found.,
402 U.S. 313 (1971) 19

Offutt v. United States,
348 U.S. 11 (1954) 27

Parklane Hosiery Co. v. Shore,
439 U.S. 322 (1979) 17, 19

Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.,
508 U.S. 49 (1993) 21

Pulliam v. Allen,
466 U.S. 522 (1984) 27

Smith v. Barry,
502 U.S. 244 (1992) 29

Torres v. Oakland Scavenger Co.,
487 U.S. 312 (1988) 29, 30, 31-32

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.,
382 U.S. 172 (1965) 13

Federal Court Opinions

Boulware v. Nevada,
960 F.2d 793 (9th Cir. 1992) 21, 22

Brubaker v. Bd. of Educ.,
502 F.2d 973 (7th Cir. 1974) 31

Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.,
690 F.2d 1240 (9th Cir. 1982) .... *passim*

Consul, Ltd. v. Solide Enters., Inc.,
802 F.2d 1143 (9th Cir. 1986) 21

Exxon Corp. v. Heinze,
32 F.3d 1399 (9th Cir. 1994) 27

Freeman v. Lasky, Haas & Cohler,
410 F.3d 1180 20

Kenneally v. Lungren,
967 F.2d 329 (9th Cir. 1992) 27, 28

Kotler v. Am. Tobacco Co.,
981 F.2d 7 (1 Cir. 1992) 30

Magadia v. Wal-Mart Associates, Inc.,
999 F.3d 668 (9th Cir. 2021) 24, 26

McKeever v. Block,
932 F.2d 795 (9th Cir. 1991) 15, 23

O'Rourke Bros., Inc. v. Nesbitt Burns, Inc.,
201 F.3d 948 (7th Cir. 2000) 23

Omstead v. Dell, Inc.,
594 F.3d 1081 (9th Cir. 2010) 15-16, 23

Polk v. Gontmakher, No. 2:18-cv-01434-RAJ,
2019 U.S. Dist. LEXIS 146724 (W.D. Wash. Aug. 28, 2019) 20-21

Potters Medical Center v. City Hospital Asso.,
800 F.2d 568 (1986) 13, 14

Singh v. Baidwan,
651 F. App'x 616 (9th Cir. 2016) 13, 16

Suarez v. Bank of Am. Corp., No. 18-cv-01202-MEJ,
2018 U.S. Dist. LEXIS 90290 (N.D. Cal. May 30, 2018) 16

Trevino v. Gates,
99 F.3d 911 (9th Cir. 1996) 26

United States v. Holtzman,
762 F.2d 720 24

Watts v. Pinckney,
752 F.2d 406 17

Williams v. Frey,
551 F.2d 932 (3d Cir. 1977) 30, 31

California State Opinions

Bank of Cal., Nat'l Asso. v. Superior Court of S.F.,
16 Cal. 2d 516 (1940) 18

Christie v. City of El Centro,
135 Cal. App. 4th 767 (2006) 27

Clemmer v. Hartford Ins. Co.,
22 Cal. 3d 865 (1978) 17, 18, 19

Giometti v. Etienne,
219 Cal. 687 (1934) 27

Greif v. Dullea,
66 Cal. App. 2d 986 (1944) 19

Malibu Mts. Rec. v. Cnty. of L.A.,
67 Cal. App. 4th 359 (1998) 24-25, 25

Marsh v. Anesthesia Servs. Med. Grp., Inc.,
200 Cal. App. 4th 480 (2011) 21

Shenson v. Fresno Meat Packing Co.,
96 Cal. App. 2d 725 (1950) 13

Tatum v. S. Pac. Co.,
250 Cal. App. 2d 40 (1967) 27-28, 28

State Cases

2013 AMC 2303 (1st Cir. P.R. March 16, 2012)(1992) 30

State Statutes

California Code of Civ. Proc. § 389 18

California Business & Professions Code § 19323 12

§ 19320(b) 14

§ 26057 24

Federal Rules

Rule 3(c) 29, 30, 31

Rule 4 29

Rule 41(b) 16, 23, 26

REPLY[1]

In 2015, Michael Sherlock, the husband and father of plaintiffs/appellants Amy Sherlock and minors T.S. and S.S. (the "Sherlock Family"), passed away. Upon his death without a will, his ownership interest in certain real and personal property (the "Sherlock Property") passed to his wife and children, which included two conditional use permits (CUP) to operate dispensaries whose market value are each $7,000,000. However, immediately after his death and unbeknownst to the Sherlock Family, the Sherlock Property was fraudulently transferred via forged documents from Mr. Sherlock's name by his business partners.

It was not until January 2020 when plaintiff/appellant attorney Andrew Flores contacted Mrs. Sherlock that they learned that they had been defrauded by Mr. Sherlock's business partners. They were people they trusted. At the time of the filing of this action, litigation between named defendants Salam Razuki and Ninus Malan revealed that they had acquired ownership of certain real property and one of the CUPs that had been issued to Mr. Sherlock having acquired those assets from Mr. Sherlock's former business partners.

Flores represented to the Sherlock Family that they could recover the Sherlock Property of which they were defrauded of through forged documents. Under

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[1] Defined terms have the same meaning given them in Appellants' Opening Brief (hereinafter cited to as "Op. Br.") unless otherwise defined herein.

California law, all real and personal property of which owners have been defrauded of must always be returned even if sold to a bona fide good faith purchaser. The Sherlock Family brought forth suit believing their counsel's representation that it would be easy to recover the Sherlock Property and vindicate their rights against the parties who had defrauded them. Based on evidence, Flores believed that Mr. Sherlock's business partners were members of or associated with the Enterprise.

Flores believed it would be easy for the Sherlock Family to recover their property. The main reason being that Flores had discovered two clients of cannabis expert attorney Gina Austin, Geraci and Razuki were in litigation disputes with, respectively, Cotton and Malan. The publicly available records of their litigation - that will always be available for anyone to confirm for all time – blatantly demonstrate that Geraci and Razuki had judgments entered against them for operating illegal dispensaries. Consequently, because they could not lawfully own a dispensary for operating one illegally, they applied for cannabis conditional use permits in the name of their partners/agents and thereby circumvent background checks with law enforcement agencies specifically intended to prevent drug dealers and criminals from infiltrating legitimate businesses (the "Strawman Practice"). The Strawman Practice is extremely criminally illegal.

Yet, it has been over three years since this action began and Flores has been unsuccessful in proving that the Strawman Practice is even a little illegal. Sometimes

Flores wonders if he has lost touch with reality. Numerous lawsuits are ongoing in the federal and state courts in which the Strawman Practice is being validated by the judiciaries. Numerous adverse judgments have been entered against Appellants and the Sherlock Family is now liable for over a hundred thousand dollars and has expended material sums in seeking to recover her family's inheritance.

Flores has and continues to represent to the Sherlock Family that the Strawman Practice is illegal and that the *Cotton I* and *II* actions are evidence of the Enterprise and the Antitrust Conspiracy. That all adverse judgments and orders against them will be voided. That the illegal ownership and operation of dispensaries to profit from the sale of cannabis violates countless laws, including the Federal Controlled Substance Act (CSA), California's cannabis licensing laws, and the San Diego Municipal Code (SDMC) and someone at some point in some government agency will do something about it.

Over the last three years, Appellants have contacted the San Diego Police Department, the Federal Bureau of Investigation, the Public Integrity Unit of the Department of Justice, the Attorney General's office, the Department of Cannabis Control, and numerous other law enforcement and government agencies, as well as news organizations to attempt to bring public attention to this matter. All of them engage at the beginning and understand that the Strawman Practice is illegal, but then they visibly shrivel up when they understand that the issue Appellants are facing

is needing to expose the illegality of the Strawman Practice in a court of law, which will lead to the voiding of dozens of judgments and orders.

Flores attempted to cease representing the Sherlock Family after the trial court issued its order granting F&B's motion to dismiss on March 22, 2022, and even entered into an agreement to sell his interest in this matter. However, the agreement is in limbo because even with the purchaser putting up $1,000,000 to finance legal representation to take over this matter and recover the dispensaries, no established law firm will take this case. Not even Big Law firms.

In preparing the Opening Brief, Flores spent over 500 hours and the day it was due, he requested an extension. He then spent over 200 hours on it. And on the day it was due, with less than 8 hours before midnight, he started from scratch in a frantic state. Flores has no previous experience with complex litigation, white collar crimes, RICO organizations, or any other type of sophisticated criminal organizations whose illegal goals are effectuated through attorneys. After years of attempting to prove the entire Antitrust Conspiracy and failing, he frantically sought to just prove the simplest issue that will serve to topple this crazy house of cards defendants have built. The Strawman Practice is irrefutable evidence before this Court that a massive criminal conspiracy has been effectuated via the judiciaries for years. [Amy, this is as direct as I can be. You know what language to expect and what it means.]

I. Neither Judge Joel Wohlfeil nor F&B dispute the material facts and law and thus admit the *Cotton I* and *II* actions are sham petitioning that is illegal as a matter of law and undertaken in furtherance of a crimes.

In their responses, neither Judge Joel Wohlfeil nor F&B dispute that (1) Geraci entered into the Geraci Judgements on October 27, 2014 and June 17, 2015; (2) in the Geraci Judgments, Geraci was sanctioned for unlicensed commercial cannabis activity; (3) California Business & Professions Code § 19323 went into effect on January 1, 2016 and barred the issuance of a state license to engage in commercial cannabis activity to a party who had been sanctioned for unlicensed commercial cannabis activity in the three years subsequent to being sanctioned; (4) the City of San Diego required responsible persons for a CUP to undergo background checks as part of the application process, the failure to comply with would make the operation of a dispensary "unlawful"; and (5) on October 31, 2016, Geraci applied for a CUP with the City of San Diego in the name of his employee/agent, Rebecca Berry (the "Strawman Practice" and the "Berry Application"). (Op. Br. at 7-11; *see*, *gen.*, Judge Wohlfeil's Appellee's Brief (Wohlfeil Br.); F&B's Appellees' Brief (F&B Br.).)

Neither Judge Wohlfeil nor F&B dispute that Geraci's application for a CUP in the name of Berry was a fraudulent application with the City of San Diego's Development Services Department (DSD). (Op. Br. at 10-11; WohlfeilSER-121 (DSD "Ownership Disclosure Statement" executed by Berry as part of the Berry

Application stating she is the "Tenant/Lessee" and not disclosing Geraci as the true and sole owner of the CUP being applied for); *see*, *gen.*, Wohlfeil Br.; F&B Br.) Nor can they. (*See Singh v. Baidwan*, 651 F. App'x 616, 617 (9th Cir. 2016); *Shenson v. Fresno Meat Packing Co.*, 96 Cal. App. 2d 725, 733 (1950).)

The "*Walker Process* doctrine[[2]]… extends antitrust liability to one who commits fraud on a court or agency to obtain competitive advantage." (*Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1247 (9th Cir. 1982) (*Clipper*).) The *Walker Process* doctrine was created to provide for antitrust liability for fraudulently procured patents from the Patent Office. (*Id.* at 1260.) However, in *Clipper* this Court extended the *Walker Process* doctrine to provide for antitrust liability to any government agency, "hold[ing] that the fraudulent furnishing of false information to an agency in connection with an adjudicatory proceeding can be the basis for antitrust liability, if the requisite predatory intent is present and the other elements of an antitrust claim are proven." (*Clipper,* 690 F.2d at 1261; *Potters Medical Center v. City Hospital Asso.*, 800 F.2d 568, 580 (1986) (*Potters*) ("the knowing and willful submission of false facts to a government agency falls within the sham exception to the *Noerr-Pennington* doctrine.").) This is because "[t]here is no first amendment protection for furnishing

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[2] *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965) (*Clipper*).

with predatory intent false information to an administrative or adjudicatory body. The first amendment has not been interpreted to preclude liability for false statements." (*Id.* at 1261.)

Here, public records and Geraci's own judicial admission clearly establish beyond any reasonable doubt the truth: Geraci made profit from operating illegal dispensaries, was caught and sanctioned, consequently disqualified from owning a state license, wanted to continue to profit from the sale of cannabis, and so sought to fraudulently acquire the necessary CUP from the City of San Diego, a prerequisite for applying for a state license,[3] via the Strawman Practice in the Berry Application. Geraci's submission of the Berry Application to DSD, misleading DSD as to the true owner and operator of the contemplated dispensary, violates the *Walker Process* doctrine as it is "the knowing and willful submission of false facts to a government agency [and] falls within the sham exception to the *Noerr-Pennington* doctrine." (*Potters*, 800 F.2d at 580; *Clipper*, 690 F.2d at 1261.)

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[3] BPC § 19320(b) ("… no person shall engage in commercial cannabis activity without possessing ***both*** a state license and a local permit, license, or other authorization. A licensee shall not commence activity under the authority of a state license ***until*** the applicant has obtained, in addition to the state license, a local license, permit, or other authorization from the local jurisdiction in which he or she proposes to operate, following the requirements of the applicable local ordinance.") (Added Stats 2015 ch 689 § 4 (AB 266), effective January 1, 2016. Amended Stats 2016 ch 32 § 23 (SB 837), effective June 27, 2016. Repealed Stats 2017 ch 27 § 2 (SB 94), effective June 27, 2017.) (emphasis added).)

This Court also held in *Clipper* "that when there is a conspiracy prohibited by the antitrust laws, and the otherwise legal litigation is nothing but an act in furtherance of that conspiracy, general antitrust principles apply, notwithstanding the existence of *Noerr* immunity." (*Id.* at 1263.) "*Noerr* immunity is based on the first amendment right to petition and to seek to influence governmental action. When, however, the petitioning activity is but a part of a larger overall scheme to restrain trade, there is no overall immunity." (*Id.* at 1263 (citation omitted).)

The trial court thus made an error of law granting F&B's motion to dismiss in its March 22, 2022 order (the "March 22, 2022 Order"). The trial court should have reached the merits of Appellants' claim that F&B petitioning was sham petitioning taken in furtherance of the Antitrust Conspiracy on the grounds that "*Noerr-Pennington* does apply here because… it's not sha[m] litigation because Mr. Geraci was the prevailing party in the underlying action.'" (Op. Br. at 8; *see Clipper*, 690 F.2d at 1264 ("Even if the protests to the ICC were legitimate, if they were part of a larger antitrust conspiracy, the conspiracy is subject to the antitrust laws.").) Therefore, Appellants refusal to file a second amended complaint was not unreasonable and the Court should vacate the judgment and the March 22, 2022 Order. (*McKeever v. Block*, 932 F.2d 795, 797 (9th Cir. 1991) ("The refusal to file a second amended complaint would not be unreasonable if the first amended complaint was dismissed erroneously."); *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084

(9th Cir. 2010) ("A Rule 41(b) dismissal must be supported by a showing of unreasonable delay.").)

Appellants again emphasize that neither response by Judge Wohlfeil nor F&B dispute the ***facts*** or, incriminatingly, even mention or seek to distinguish *Clipper*, *Omstead*, or this Court's appeal controlling holding in *McKeever*. (*See*, *gen.*, Wohlfeil Br.; F&B Br.) Their failure to oppose the facts and law are a concession of the validity of Appellants' argument. (*Singh v. Baidwan*, 651 F. App'x 616, 618 (9th Cir. 2016); *see Suarez v. Bank of Am. Corp.*, No. 18-cv-01202-MEJ, 2018 U.S. Dist. LEXIS 90290, at *19 (N.D. Cal. May 30, 2018) ("As Plaintiff does not address this argument in her Opposition, she concedes this issue.") (citing *Singh*, 651 F. App'x at 618).)

II. Neither the Sherlock Family nor Flores were in privity with Cotton in Cotton I or II.

As a separate threshold and dispositive issue, and Flores is deeply perplexed by this as he knows that Judge Wohlfeil and his attorneys from the Office of the General Counsel of the San Diego Superior Court are vastly more experienced in all aspects of litigation than him, Judge Wohlfeil sets forth in his brief and does not dispute the legal conclusion that: "Flores was not a party in *Cotton I* or *Cotton II*. (WohlfeilSER-52-53). Instead, he is an attorney who made isolated special appearances on behalf of Cotton in *Cotton I* (WohlfeilSER-121) and, at one point, moved to intervene and become a party to the action, which was denied by Judge

Wohlfeil. (WohlfeilSER-52-53, 99). Sherlock and her minor children were also not parties in *Cotton I* or *Cotton II*. (WohlfeilSER-52-53, 99) ***Nor were they in privity with any parties in Cotton I and II***. (WohlfeilSER-99)." (Wohlfeil Br. at 6-7 (emphasis added).)

This admission by Judge Wohlfeil is an admission that the March 22, 2022 Order is void for being rendered in violation of due process. (*See Watts v. Pinckney*, 752 F.2d 406, 409 ("It is well settled that a judgment is void… if the court acted in a manner inconsistent with due process of law.") (cleaned up).). "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." (*Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979); *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 874 (1978) ("This requirement of identity of parties or privity is a requirement of due process of law.").) The doctrine of "collateral estoppel may be applied only if due process requirements are satisfied." (*Clemmer*, 22 Cal. 3d at 875.) "In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication." (*Id.*)

The March 22, 2022 Order impliedly holds that Appellants were in privity

with Cotton in *Cotton I* and barred by collateral estoppel and res judicata, as argued by F&B in their motion to dismiss, from arguing the *Cotton I* judgment was void for, *inter alia*, being rendered in excess of Judge Wohlfeil's jurisdiction for enforcing an illegal contract. (*See* 1-FBSER-0416 ("Plaintiffs' claims are barred by collateral estoppel and res judicata… Plaintiffs are attempting to re-litigate the issue of whether the contract between Cotton and Defendant Geraci was illegal.").)

As to the Sherlock Family, *Cotton I* was a state court real estate breach of contract action between Geraci/Berry and Cotton regarding the Federal Property, filed in March 2017 and with a jury verdict being rendered in July 2019. (WohlfeilSER-112, 121.) Mrs. Sherlock did not even know about the Cotton lawsuit until January 2020 when Flores first contacted her about the Balboa CUP and the Balboa Property. (WohlfeilSER-107.) There is no community of identity or interest and certainly no factual or legal grounds for holding that the Sherlock Family "should reasonably have expected to be bound by the prior adjudication" of *Cotton I*. (*Clemmer*, 22 Cal. 3d at 875.)

Flores, as the successor-in-interest to the purchaser of the property, he was (and is) the owner of the Federal Property. (WohlfeilSER-114.) As such, Flores was an indispensable party to the *Cotton I* action adjudicating the rights of ownership to the Federal Property. (Ca. Code of Civ. Proc. § 389; *Bank of Cal., Nat'l Asso. v. Superior Court of S.F.*, 16 Cal. 2d 516, 522 (1940).) "An indispensable party is not

bound by a judgment in an action in which he was not joined." (*Greif v. Dullea*, 66 Cal. App. 2d 986, 995 (1944).)

Therefore, as a matter of law, the trial court made an error of law holding Appellants were in privity with Cotton, thereby violating Appellants' Constitutional Right to due process. (*Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) ("Some litigants -- those who never appeared in a prior action -- may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position."); *Parklane*, 439 U.S. at 327 n.7; *Clemmer*, 22 Cal. 3d at 874 ("This requirement of identity of parties or privity is a requirement of due process of law.").)

III. F&B's arguments.

In their response, F&B argues that that (1) F&B's petitioning is protected speech (*see* F&B Br. at 27-35); (2) Appellants are precluded from seeking review of the March 22, 2023 order because it is an interlocutory order (*see* F&B Br. at 22-24); (3) Appellants lack standing to bring this appeal (*see* F&B Br. at 25-27); and (4) the district court did not abuse its discretion dismissing the FAC (*see* F&B Br. at 35-41).

A. <u>F&B's petitioning is sham petitioning.</u>

As Flores understands the law, there are five scenarios in which petitioning government agencies or litigation can be held to be sham petitioning that is not immunized by *Noerr-Pennington*: (1) petitioning that is objectively baseless and a concealed attempt to interfere with the plaintiff's business relationships; (2) the filing of a series of petitions brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival; (3) in the context of a judicial proceeding, if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, litigation can be deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy; (4) defensive pleadings can also be considered a sham because asking a court to deny one's opponent's petition is also a form of petition , a "sham defense." (*Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184.) And (5) violations of the *Walker Process* doctrine. (*Clipper*, 690 F.2d at 1261.)

Here, the first and most obvious, it is objectively baseless to petition an agency or court to enforce or ratify an illegal contract. (*Polk v. Gontmakher*, No. 2:18-cv-01434-RAJ, 2019 U.S. Dist. LEXIS 146724, at *8 (W.D. Wash. Aug. 28, 2019) (refusing to enforce alleged ownership rights to cannabis business by party disqualified from licensure and who had interest held in third party's name – the Strawman Practice: "**The Court will not enforce an illegal contract**.") (emphasis

added.); *Consul, Ltd. v. Solide Enters., Inc.*, 802 F.2d 1143, 1148 (9th Cir. 1986) ("A contract to perform acts barred by California's licensing statutes is illegal, void and unenforceable.").) The "federal courts will not condone illegal actions, pursuant to a contract or otherwise." (*Lincoln Transp. Servs. v. CMA CGM (Am.), Ltd. Liab. Co.*, 772 F. App'x 593, 594 (9th Cir. 2019) (citing *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982); *Bassidji v. Goe*, 413 F.3d 928, 936 (9th Cir. 2005).)

Axiomatically, the filing of fraudulent applications with cannabis licensing agencies is a per se violation of antitrust laws. (*Marsh v. Anesthesia Servs. Med. Grp., Inc.*, 200 Cal. App. 4th 480, 493 (2011) (certain restraints which lack redeeming virtue are conclusively presumed to be unreasonable and illegal, and constitute a per se illegal practice.).)

In their response, F&B sets forth only two factual arguments for why their petitioning is not sham petitioning. The rest of their arguments are just self-exculpating legal conclusions that they did not engage in sham petitioning contradicted that are contradicted by facts.

First, and the same reason stated by the trial court for dismissing the FAC, that "as a matter of law, victory 'is by definition a reasonable effort at petitioning for redress and therefore not a sham." (F&B Br. at 19 (quoting *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60 n.5 (1993) (*PREI*).) In *Boulware*, addressing an identical arguments from defendants, the Court said: "Our

decisions instruct that success on the merits, while not dispositive, is an important factor to be considered under the sham inquiry." (*Boulware v. Nevada*, 960 F.2d 793, 798 (9th Cir. 1992) (citing and quoting multiple cases).) The defendants relying on *Omni Res. Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412 (9th Cir. 1984), urged the Court "to hold that their initial success in the Nevada trial court is determinative of the question whether their state court suit was baseless." (*Boulware*, 960 F.2d at 798.) The Court declined "to embrace such a per se approach." (*Id.*) The Court held that "*Omni Resource* cannot be read to stand for the proposition that initial success on the merits by itself precludes a finding that a suit was a sham." (*Id.*) F&B's argument thus fails.

Second, after setting forth situations in which this Court has recognized the sham exception, F&B alleges that "the District Court held, none of these above scenarios apply." (Op. Br. at 34.) This is false. The District Court did ***not*** reach the merits of Appellants' claims that F&B's petitioning is sham petitioning. The trial court incorrectly believed that "the current state of the law" was such that "the Court doesn't really need to look any further" into the merits of Appellants' claims because F&B prevailed for Geraci in *Cotton I*. (ER-109-110 ("There are exceptions… you can get the *Noerr-Pennington* protections just by filing a fake lawsuit. So when litigation is a possible issue, the Court looks at whether that underlying action was objectively baseless. And the Court has looked at, in this case, it doesn't look like

that exception… is going to be viable in this case, Mr. Flores. And the reason for that is Geraci… the party that the Ferris & Britton defendants were representing, they [were] a prevailing party in that underlying case. ***And where the litigation is successful under the current state of the law, it looks like the Court doesn't really need to look any further***.") (emphasis added); ER-114 ("*Noerr-Pennington* does apply here because – again, it's not a sha[m] litigation ***because*** Mr. Geraci was the prevailing party in the underlying action." (emphasis added).)

B. Appellants are not precluded from seeking review of the March 23, 2022 Order.

F&B argues that Appellants cannot challenge the trial court's March 22, 2022 Order because it is an interlocutory order. F&B ignores the legal authorities set forth in the Opening Brief: a "Rule 41(b) dismissal must be supported by a showing of unreasonable delay," (*Omstead,* 594 F.3d at 1084), and the "refusal to file a second amended complaint would not be unreasonable if the first amended complaint was dismissed erroneously." (*McKeever,* 932 F.2d at 797.)

As already noted above, F&B's response does not cite or even try to distinguish this Court's controlling holdings in *Omstead* or *McKeever* that were set forth in the Opening Brief. Further, a Rule 41(b) dismissal can also be vacated if the order was void. (*O'Rourke Bros., Inc. v. Nesbitt Burns, Inc.*, 201 F.3d 948, 951 (7th Cir. 2000) (*O'Rourke*).) In *O'Rourke*, the "only issue [was] whether a Rule 41(b) dismissal with prejudice in this circumstance is a void judgment. If it is void, then it

can be set aside even at this late date. If not, as the [appellant's] counsel stated at argument, it does not matter whether it was right or wrong." (*Id.* at 951.)

The Cotton I and II judgements are void for enforcing illegal contracts. And any judgment or order that enforce, ratify or validate Geraci's illegal ownership of a dispensary, is a clear usurpation of the power delegated to the Department of Cannabis Control by the California Legislature and therefore void. (*See*, BPC § 26057 (denial of license); *see United States v. Holtzman*, 762 F.2d 720, 724 ("An argument can be made that a judgment is void if a court plainly misinterprets the scope of a statutory grant of jurisdiction such that there is a blatant usurpation of power.")

C. Appellants have Article III standing.[4]

To have Article III standing, Appellants must demonstrate that they have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct, and (3) will be redressed by a favorable decision. (*Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668, 673-74 (9th Cir. 2021).) "To show an injury in fact, the plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete

[4] Appellants note that there are numerous grounds for Article III standing arising from the City of San Diego, Judge Wohlfeil, and the acts of threats of violence against material parties to this litigation. But Appellants, again, want to focus on the illegality of the Strawman Practice and the acts taken to defraud parties of CUPs.

and particularized and actual or imminent, not conjectural or hypothetical." (*Id*. at 674 (quotation omitted).)

"A CUP creates a property right which may not be revoked without constitutional rights of due process." (*Malibu Mts. Rec. v. Cnty. of L.A*., 67 Cal. App. 4th 359, 367-68 (1998). "Additionally, a CUP creates a right which runs with the land, not to the individual permittee." (*Id.*)

Attached to Appellants' FAC are true and correct copies of emails sent by Cotton on Christmas Eve, December 24, 2019 and May 29, 2020. The emails were sent to a large number of state and local government officials, attorneys, litigants, news media, and other related parties. The recipients include City of San Diego DSD employee Firouzeh Tirandazi and City attorney Travis Phelps. (WohlfeilSER-166-177.) The emails put Tirandazi and Phelps on notice about, *inter alia*, the Strawman Practice undertaken by Geraci and the acts and threats of violence alleged to be taken on behalf of Geraci. (*Id.*)

The FAC alleges that Phelps knows that Geraci cannot own a cannabis CUP via the Berry Application and to this day, despite being served with various submissions in various legal proceedings, submitting arguments and taking part in numerous cases, and being emailed repeatedly by Cotton with evidence, Phelps has failed to inform the Courts that Geraci cannot own a cannabis CUP via the Berry Application because of the Geraci Judgments. (WohlfeilSER-135.) Phelps was

attorney of record in *Cotton I* and *Cotton II*. (*See id.*)

The FAC alleges that Tirandazi committed perjury at the trial of *Cotton I* when she testified that Geraci's ownership of a CUP via the Berry Application was neither barred by the Geraci Judgments nor filing of the Berry Application via the Strawman Practice. (WohlfeilSER-120.)

This court has "found municipal liability on the basis of ratification when the officials involved adopted and expressly approved of the acts of others who caused the constitutional violation." (*Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir. 1996)

Appellants seek the City return Appellants respective CUPs and money damages. Thus, Appellants have suffered injuries, that are the result of the City, and which can be redressed by a favorable decision and therefore have Article III standing. (*Magadia,* 999 F.3d at 673-74.)

D. The trial court did abuse its discretion in dismissing the entire action.

In sum, for the reasons set forth above, the trial court did abuse its discretion in dismissing Appellants' FAC pursuant to Rule 41(b).

IV. **Judge Wohlfeil's arguments.**

In his response, Judge Wohlfeil argues that (1) Appellants are precluded from seeking review of the March 22, 2023 order because it is an interlocutory order; (2) Appellants have waived any challenge to the order dismissing Judge Wohlfeil; (3) Appellants lack standing; and (4) should the court grant relief, this Court should still

affirm the order dismissing Judge Wohlfeil based on his alleged "absolute immunity." The first argument is the same as set forth by F&B and fails for the same reason.

In *Pulliam v. Allen*, 466 U.S. 522 (1984), the Supreme Court held that judicial immunity did not protect a state judge from claims for injunctive relief in a § 1983 action. The "Due Process Clause entitles a person to an impartial and disinterested tribunal and that a fair trial in a fair tribunal is a basic requirement of due process." (*Exxon Corp. v. Heinze*, 32 F.3d 1399, 1403 (9th Cir. 1994) (cleaned up).) In addition, "justice must satisfy the appearance of justice." (*Offutt v. United States*, 348 U.S. 11, 14 (1954); *Exxon Corp.,* 32 F.3d at 1403 ("[T]he Constitution is concerned not only with actual bias but also with 'the appearance of justice.'").) "Bias exists where a court has prejudged, or reasonably appears to have prejudged, an issue." (*Kenneally v. Lungren*, 967 F.2d 329, 333 (9th Cir. 1992) (quotation and citation omitted).) "'Where a state tribunal has been found incompetent by reason of bias, the Supreme Court has held that there was effectively no opportunity to litigate constitutional claims.'" (*Kenneally v. Lungren*, 967 F.2d 329, 333 (9th Cir. 1992).)

Under California law, the California Supreme Court "has on several occasions pointed out that a judgment rendered by a disqualified judge is void." (*Giometti v. Etienne*, 219 Cal. 687, 689 (1934).) "Because an order rendered by a disqualified judge is null and void, it will be set aside ***without*** determining if the order was

meritorious." (*Christie v. City of El Centro*, 135 Cal. App. 4th 767, 777 (2006) (emphasis added); *Tatum v. S. Pac. Co.*, 250 Cal. App. 2d 40, 43 (1967) (rejecting claim that trial was error free and therefore no prejudice was shown: "[I]t is no answer to say that the judgment was correct because the statute does not say that the judge is disqualified to decide erroneously but that he shall not decide at all").)

On January 25, 2018, Judge Wohlfeil stated from the bench that he does not believe that Weinstein, Austin, or David Demian of Finch, Thornton & Baird are capable of acting unethically against Cotton (Judge Wohlfeil's "Fixed-Opinion" statement). (*See* WohlfeilSER-121.) On August 2, 2018, at an ex parte hearing, Flores, making a special appearance for Cotton's then counsel, noted that Cotton was preparing a motion to disqualify Judge Wohlfeil (the "DQ Motion") and Judge Wohlfeil asked for "an offer of proof." (*Id.*) Flores responded by reminding him of his Fixed-Opinion statement on January 25, 2018. (*Id.*) Judge Wohlfeil responded by saying that he "may" have made the Fixed- Opinion statement because he has known Weinstein since "early on" in their careers when they both started their practices. (*Id.*)

Judge Wohlfeil's statements on January 25, 2018 and August 2, 2018 meet the criteria for bias. He "prejudged... an issue," (*Kenneally*, 967 F.2d at 333), that these attorneys would not act unethically against Cotton. The Cotton I and II judgments are therefore capable of being held void on this ground as well, and

prospective relief would be warranted to prevent Judge Wohlfeil from presiding in those actions once the judgments are vacated.

However, Appellants hereby specifically request that this Court **not** reach these arguments unless the other arguments set forth herein do not warrant relief. From Appellants perspective, the illegality of the Strawman Practice by itself warrants that the Cotton I and II judgments not be given preclusive effect in this matter because they are void for granting Geraci relief in violation of the CSA, California's cannabis licensing laws, the SDMC, and countless other civil and criminal statutes.

V. **Flores erred in filling out the notice of appeal.**

Fed. R. App. P. 3(c) provides that "a notice of appeal shall specify the party or parties taking the appeal." The Supreme Court has made clear that the rule's requirements, while mandatory and jurisdictional, *see Torres v. Oakland Scavenger Co*., 487 U.S. 312, 315-17 (1988), should be construed liberally, *Smith v. Barry*, 502 U.S. 244, 248 (1992). "Courts will liberally construe the requirements of Rule 3." (*Smith*, 502 U.S. at 248.) "While a notice of appeal must specifically indicate the litigant's intent to seek appellate review, the purpose of this requirement is to ensure that the filing provides sufficient notice to other parties and the courts. Thus, the notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal. If a document filed within the time

specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." (*Smith v. Barry*, 502 U.S. 244, 248-49 (1992).)

In assessing whether the Notice of Appeal confers appellate jurisdiction over Flores, T.S. and S.S., the Court is "cognizant that 'the notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal.'" (*Kotler v. Am. Tobacco Co.*, 981 F.2d 7, 11 (1 Cir. 1992) (quoting *Smith*, 502 U.S. at 248). Specifically, the Court reviews the notice to determine whether their intent to appeal the district court's entry of judgment and the March 22, 2022 Order dismissing their action was sufficiently manifest so as to provide clear notice to defendants. (*See id.* (citing *Smith*, 502 U.S. at 248); *see also Torres*, 487 U.S. at 318 (noting that Rule 3(c)'s "specificity requirement" serves to ensure "fair notice" to both the court and opposition regarding an appeal). "In conducting this review, [the Court does] not examine the notice in isolation, but consider[s] the record in its entirety." (2013 AMC 2303, 2309 (1st Cir. P.R. March 16, 2012) (citing *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 276 n.6 (1991); *Kotler v. Am. Tobacco Co*., 926 F.2d 1217, 1221 (1 Cir. 1990), *vacated on other grounds* 505 U.S. 1215 (1992) ("In determining whether appellant's notices of appeal . . . sufficiently demonstrated an intent to appeal that order, we are not limited to the four corners of the notices, but may examine them in the context of the record as a whole.").

In *Williams*, the notice of appeal named only the original plaintiff as appellant. (*Williams v. Frey*, 551 F.2d 932, 934 n.1 (3d Cir. 1977).) Two other persons, Williams and Tillery, had been permitted to intervene, and the caption was amended in the district court to include their names as plaintiffs. (*Id.*) The court of appeals held:

> Under most circumstances, the designation of the party appellant in the notice of appeal will govern. F.R.App.P. 3(c). But in the present case, we will also consider Williams and Tillery as appellants, since there would be no prejudice to the defendants in doing so. In the first place, appellees have so considered them at all stages of this appeal. Second, appellees' brief encompasses the issues of substance decided here. (*Id.*)

In *Brubaker*, the notice of appeal listed Clara S. Brubaker, John W. Brubaker and Ronald K. Sievert in their individual capacities as parties in the appeal. (*Brubaker v. Bd. of Educ.*, 502 F.2d 973, 983 n.4 (7th Cir. 1974).) Relying on Rule 3(c), Federal Rules of Appellate Procedure, appellees argued that because Clara died over one year before the appeal was taken, the notice should have stated that the appeal was being taken in the name of "John Brubaker, individually, and as representative of Clara Brubaker," or words of like import. (*Id.*) The Court allowed the estate Clara Brubaker to proceed to appeal, finding that John Brubaker, who is Clara's personal representative by appointment of the Cook County, Illinois, Probate Court, is also a party. (*Id.*)

In sum, the foregoing authorities provide support for the position that an "unnamed party effectively appeals where a notice is timely filed and the unnamed

party's intention to join in the appeal is clear to all and prejudicial to none.” (*Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 321 (1988) (Brennan, J., dissent) (citing *Harrison*, 715 F. 2d at 1312-1313; *Williams,* 551 F. 2d at 934, n. 1.)

Here, first, the arguments made by Flores and T.S. and S.S. are identical as those of Mrs. Sherlock and she is acting as representative for her children. There is no surprise to defendants. Further, Flores is a litigant, the attorney of record, and executed the notice, demonstrating he is still engaged in this action and no reasonable person aware of the record or facts of this case would believe that Flores would cease to pursue vindication of his rights.

Further, there can be no prejudice to defendants. If the Strawman Practice is criminally illegal as a matter of law, as proven by the litigation records in the Cotton I and II actions and the litigation between Razuki and Malan, then F&B and their coconspirators have perpetrated the largest fraud upon the court in the history of the United States, at least in terms of the sheer number of judges in the federal and state courts.

Alternatively, and Flores can find no direct authority on this issue, but if the March 22, 2022 Order is void for giving effect to the void Cotton I and II judgments, and void for finding that Flores and T.S. and S.S. are in privity with Cotton, and void for being the product of criminal antitrust scheme that has spanned years and whose goal is to prevent Flores and T.S. and S.S. from recovering their real and personal

property, specifically through sham litigation and "sham defenses" like the responses at issue here, then are not the orders dismissing Appellants FAC void?

Put another way, do Flores, T.S., and S.S. lose their First Amendment Right to judicial redress after Flores has been fighting against sham petitioning for years?

CONCLUSION

For the reasons set forth above, Appellants request that this Court grant their appeal. Alternatively, that this Court please explain how Geraci can petition to enforce a contract whose object is his ownership of a dispensary via the Berry Application?

Respectfully submitted,
Law Office of Andrew Flores

Dated: June 26, 2023

By: /s/ Andrew Flores
Andrew Flores
Attorney for
Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Appellants' Reply Brief and attached current Service List with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate

CM/ECF system on June 26, 2023

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Andrew Flores

Andrew Flores

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