IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

AMY SHERLOCK, an individual, Minors T.S. and S.S., Andrew Flores, an individual, Plaintiffs and Appellants, v. ABHAY SCHWEITZER, an individual, JESSICA MCELFRESH, an individual, REBECCA BERRY, an individual, LARRY GERACI, an individual. Defendants and Respondents. Defendants and Respondents.	Court of Appeal Case No.: D081839 San Diego County Superior Court Case No.: 37-2021-0050889-CU-AT-CTL

Appeal from the Order by the Honorable James A. Mangione, Judge of the Superior Court of California, County of San Diego, Entered on December 12, 2022, Granting Defendant's/Respondent's Demurrer/Motion to Strike.

APPELLANT'S OPENING BRIEF

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INTRODUCTION

"No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out."[1] This most basic principle is inviolate. Any judgments or orders that effectuate a crime and make the judiciary complicit in that crime are absolutely void.

This is a case in which wealthy drug dealers and their attorneys and agents have violated this most basic principle. These drug dealers made immense, mind-boggling profits from the illegal sale of cannabis via illegal retail cannabis stores - dispensaries. They got caught. By law they were barred from owning legal dispensaries. To break the law and continue to profit from the illegal sale of cannabis, they hired attorneys, political lobbyist, and other professionals to petition to acquire ownership of dispensaries in the name of third parties because they could not lawfully own dispensaries in their own name (the "Strawman Practice").

The Strawman Practice is a per se violation of countless laws,

[1] Wong v. Tenneco, 39 Cal. 3d 126, 135, 216 Cal. Rptr. 412, 418, 702 P.2d 570, 576 (1985)

including California's Cartwright Act. However, to date, Appellants have been unsuccessful in convincing the courts that the Strawman Practice is illegal. Therefore, without waiving countless other claims, because they cannot be waived by appellants and thereby make defendants ongoing criminal actions lawful, they focus on this one sole issue – the Strawman Practice is illegal, an antitrust violation. And, therefore, even if Appellants were not personally injured by defendants' criminal actions, deprived of their ownership of dispensaries via forged documents, they would still have standing to bring their antitrust claims as members of the public for violations of California's antitrust laws.

STATEMENT OF FACTS OF THE CASE MATERIAL TO THRESHOLD ISSUE OF ILLEGALITY OF THE STRAWMAN PRACTICE[2]

Geraci has admitted that he has operated illegal dispensaries in (i) *City of San Diego v. The Tree Club Cooperative, et al.*, San Diego Superior Court Case No. 37-2014-0020897-CU-MC-CTL (the "Tree Club Judgment") and (ii) *City of San Diego v. CCSquared Wellness Cooperative, et. al.*, Case No. 37-2015-00004430-CU-MC-CTL (the "CCSquared Judgment" and, collectively with the Tree Club Judgement, the "Geraci Judgments"). (RJN

[2] In designating the record, Flores failed to include the First Amended Complaint (FAC). Flores respectfully requests that the court take judicial notice of the FAC.

EXS. 1 (FAC at ¶ 43); Ex. 2 (Tree Club Judgment); Ex. 3 (CCSquared Judgment). In the Geraci Judgements Geraci admitted to operating illegal dispensaries in violation of the San Diego Municipal Code (SDMC), was ordered to pay civil penalties and to not operate a dispensary without complying with the SDMC. (*Id*.)

Geraci was last sanctioned on June 17, 2015 in the CCSquared Judgment. As in effect on June 17, 2015, pursuant to California Business U& Professions Code (BPC) § 19323, Geraci could not lawfully own a cannabis license or CUP until at least June 18, 2018. (BPC § 1923(a), (b) (7).)

Attached as Exhibit 7 to the FAC and presented ceaselessly in support of Appellants' arguments is a declaration by Geraci. In his own sworn declaration, Geraci admits that (1) on October 31, 2016 he had his assistant Rebecca Berry apply for a conditional use permit to operate a medical marijuana dispensary with the City of San Diego (the "Berry Application") at Darryl Cotton's then real property (the "Federal Property") (RJN Ex. 1 at 0061, 0079 ln 5-7); (2) that on November 2, 2016, he reached an agreement to purchase the Federal Property with Cotton, subject to a condition precedent, the approval of the Berry Application by the City of San Diego – in other words, the object of the petitioning activity was Geraci's ownership and operation of a dispensary that he could not legally own because he had been caught selling cannabis illegally.

There is no dispute that Berry acted as his alleged agent in the application and she filed the Berry Application without disclosing her alleged agency. (*Id*.) There is no dispute that Schweitzer was engaged by Geraci and prepared and submitted the Berry Application. (RJN Ex. 1 0070 ln.11-20 .) There is no dispute that McElfresh represented Geraci before the City of San Diego in furtherance of the Berry Petition. (RJN Ex. 4.)

On February 25, 2022, the trial court granted Austin's anti-SLAPP motion finding the Strawman Practice is not illegal. The case should have been stayed automatically as the entire case is whether Austin's Strawman Practice is illegal petitioning that is sham petitioning.

On October 21, 2022, the trial court granted Geraci and Berry's demurrer for Appellants' failure to oppose. (Clerk's Transcript (CT)-0135.)

On December 2, 2022, the trial court granted Abhay Schweitzer's motion to strike, holding that his petitioning for Geraci to own and operate a dispensary is not illegal with no explanation for that conclusion. (ER-175 ("Defendant's actions are not illegal as a matter of law.").) Further, because defendants had not provided any evidence. (*Id*.)

In the same order, the trial court granted McElfresh's demurrer. (ER-176.) The Court found that no allegations were made against McElfresh. (*Id.*) The Court did not explain how McElfresh could petition for Geraci to operate a dispensary he could not lawfully own and thereby sale cannabis without

complying with the law and how such is not illegal. (*See, gen., id.*) The trial court's sustained McElfresh's demurrer on various grounds, but all of which presuppose that the Strawman Practice is lawful and her petitioning for Geraci to sell cannabis illegally is lawful. (*See, gen., id*.)

ARGUMENT

1. Petitioning in furtherance of the illegal sale of cannabis is criminally illegal as a matter of law and sham petitioning.

BPC § 19323 as in effect when the Berry Application was submitted and which Austin, Berry, Schweitzer, and McElfresh all aided and abetted Geraci in seeking to have it approved provided that: "A licensing authority ***shall*** deny an application if … [t]he applicant, or any of its officers, directors, or owners, has been sanctioned by a city… for unlicensed commercial medical cannabis activities … in the three years immediately preceding the date the application is filed with the licensing authority." (BPC 19323(a), (b)(7).)

Up until now, defendants and the courts have all found the Strawman Practice is not illegal because, for reasons never stated, this statute does not bar Geraci ownership of a dispensary on the alleged grounds the Department of Cannabis Control is not mandated to deny an application by an application sanctioned for unlicensed commercial cannabis activity - like operating three illegal dispensaries. This is error.

In *HNHPC, Inc. v. Dep't of Cannabis Control*, plaintiff HNHPC, Inc., appealed from a judgment entered after the court sustained, without leave to amend, the demurrer of defendants the Department of Cannabis Control (the "DCC") and Nicole Elliott (collectively defendants) to the first amended petition and complaint (FAP). (94 Cal. App. 5th 60, 63 (2023).) The FAP alleged the DCC failed to perform its mandatory duties and/or failed to properly perform discretionary duties under the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA). (Bus. & Prof. Code, § 26000 et seq.) (*Id.*) Among other things, section 26067 requires the DCC to "establish a track and trace program for reporting the movement of cannabis and cannabis products throughout the distribution chain." (§ 26067, subd. (a).) (*Id.*) To facilitate administration of the track and trace program, the statute also requires the DCC to create an electronic database. (*Id.*, citing subd. (b)(1).) The statute states: "The database *shall be designed to flag irregularities* for the department to investigate." (*Id.*, citing subd. (b)(2), italics added.) While the FAP acknowledged the DCC created a track and trace system, it alleged the system does not flag irregularities as required by section 26067. (*Id.*) Plaintiff accordingly sought mandamus and injunctive relief compelling defendants to comply with their duties and mandating they create and maintain a track and trace system capable of identifying and flagging questionable information for further investigation. (*Id.*) The Court

of Appeals reversed the judgment holding, materially, "the FAP adequately pleaded facts to state a cause of action for a writ of mandate and for injunctive relief, we reverse the judgment." (*Id.* at 63.)

In reaching its decision, the Court of Appeals explained:

> The statute expressly requires the Department to establish an electronic database that "*shall* be designed to flag irregularities for the department to investigate." (§ 26067, subdivision (b)(2), italics added.) Section 19 of the same code states: "'Shall' is mandatory and 'may' is permissive." (*Ibid.*) "We recognize that the use of the word 'shall' in a statute does not necessarily create a mandatory duty." (*Ellena, supra*, 230 Cal.App.4th at p. 211.) (5) But, in the instant case, the statute *requires* the Department to design the electronic database to flag irregularities. (*Wittenburg v. Beachwalk Homeowners Assn.* (2013) 217 Cal.App.4th 654, 667 [158 Cal. Rptr. 3d 508] ["'Ordinarily, the word "may" connotes a discretionary [**17] or permissive act; the word "shall" connotes a mandatory or directory duty'"]; *Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 614 [101 Cal. Rptr. 2d 48] [same].) The Department did not have discretion to

> disregard the express flagging mandate. The court accordingly did not err by finding the [*71] Department's duty under section 26067 was ministerial. The FAP likewise adequately alleged the Department's duty under section 26067 was ministerial.

HNHPC, Inc. v. Dep't of Cannabis Control, 94 Cal. App. 5th 60, 70-71 (2023).

The DCC has to comply because the statute provided that it "shall" take that action. (*Id.*) Here, the DCC had to deny the Berry Application by Geraci if he had been disclosed as the true and sole owner.

In other words, Geraic sold drugs illegally as proven by the Geraci Judgments. BPC section 19323, now section 26057 with identical language, mandated the DCC deny his application so he sought to acquire it and sell cannabis without being licensed - selling drugs without legal authority on its face violates countless laws. All petitioning activity whose object is Geraci's illegal sale of cannabis is criminal as a matter of law because its object is the criminal, illegal sale of cannabis.

There is no dispute that all defendants took actions to aid Geraci in his object of selling cannabis. And his selling is clearly illegal and the motive

for his secret undisclosed ownership of dispensaries is also clear. The question of whether defendants had the specific intent as coconpirators and aidders and abbeters is a question of fact for a jury. (People v. Hopkins, 149 Cal. App. 3d 36, 44, 196 Cal. Rptr. 609, 613 (1983) (“Specific intent is a question of fact for the jury. Intent is rarely susceptible of direct proof and may be inferred from the circumstances disclosed by the evidence.") (cleaned up).)

Dated: September 13, 2023

s/ ANDREW FLORES
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), the Attached Appellant's Opening Brief was produced using 13-point Times New Roman type style and contains 1**,788** words not including the table of contents and authorities, caption page, or this Certificate, as counted by the word processing program used to generate it.

Dated: September 13, 2023

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