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9 Attorneys for Defendants
10 LARRY GERACI and REBECCA BERRY

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

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

15 Plaintiffs,

16 vs.

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

27 Defendants.
28

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
07/22/2022 at 01:48:00 PM
Clerk of the Superior Court
By Taylor Crandall, Deputy Clerk

Case No. 37-2021-00050889-CU-AT-CTL

Judge: Hon. James A. Mangione

**NOTICE OF HEARING RE DEMURRER
BY DEFENDANTS, LARRY GERACI AND
REBECCA BERRY, TO PLAINTIFFS'
FIRST AMENDED COMPLAINT;
DEMURRER TO FIRST AMENDED
COMPLAINT; REQUEST FOR JUDICIAL
NOTICE; MEMORANDUM OF POINTS
AND AUTHORITIES; AND
DECLARATION OF JAMES A. CROSBY IN
SUPPORT**

(Related to ROA #11)

DATE: October 21, 2022
TIME: 9:00 a.m.
DEPT: C-75

[IMAGED FILE]

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

1 NOTICE OF HEARING

2 **TO THE COURT, ALL PARTIES AND THEIR COUNSEL:**

3 **PLEASE TAKE NOTICE THAT** on October 21, 2022, at 9:00 a.m., or as soon thereafter as
4 the matter may be heard, in Department C-75 of the San Diego County Superior Court, Hall of Justice,
5 located at 330 West Broadway, San Diego, California 92101, defendants, Larry Geraci and Rebecca
6 Berry, will and hereby do demur to the First, Fifth, Sixth and Seventh causes of action in Plaintiffs'
7 First Amended Complaint.

8 This demurrer is made on the grounds that each cause of action fails to allege facts sufficient to
9 state a cause of action on the grounds and for the reasons stated in the Demurrer below and as set forth
10 in this Notice of Motion and accompanying Demurrer, Request for Judicial Notice, Memorandum of
11 Points and Authorities, Declaration of James D. Crosby, and Notice of Lodgment, all pleadings and
12 papers on file in the above-captioned action, and any argument or evidence that may be presented to, or
13 considered by, the Court prior to its ruling.

14 The court will usually post a tentative ruling on the San Diego Superior Court website before
15 the hearing. The Court will not post a tentative ruling if the Court has not completed its analysis of the
16 motion in time to post a tentative ruling or if other circumstances make it impractical or imprudent to
17 post a tentative ruling. If a tentative ruling is posted, it will be available on the San Diego Superior
18 Court website www.sdcourt.ca.gov.

19
20 Dated: July 21, 2022

FERRIS & BRITTON

A Professional Corporation

21
22
23 By: Michael R. Weinstein

Michael R. Weinstein

Scott H. Toothacre

Attorney for Defendants

LARRY GERACI and REBECCA BERRY

1 DEMURRER

2 Defendants Geraci and Berry demur to the First Cause of action –Conspiracy to Monopolize in
3 Violation of the Cartwright Act (Bus. & Prof. Code Section 16700; Fifth Cause of Action – Unfair
4 Competition Law (Cal. Bus. & Prof. Code Section 17200); Sixth Cause of Action –Declaratory Relief –
5 Plaintiff Flores only v. Defendant Geraci only; and Seventh Cause of Action – Civil Conspiracy,
6 pursuant to California Code of Civil Procedure § 430.10, on the following grounds:

7 FIRST COA– Conspiracy to Monopolize in Violation of the Cartwright Act B&P Code 16700

8 1. The First Cause of Action for Conspiracy to Monopolize in Violation of the Cartwright
9 Act (Bus. & Prof. Code § 16700, *et seq.*) fails to state facts sufficient to constitute a cause of action
10 Code of Civ. Proc. § 430.10(e). First Flores/Sherlock lack standing to assert the claim; and second, the
11 claim is not sufficiently pled.

12 FIFTH COA – Unfair Competition Law (Cal. Bus. & Prof. Code 17200

13 2. The Fifth Cause of Action for Violation of the Unfair Competition Law pursuant to Cal.
14 Bus. & Prof. Code § 17200 *et seq.* fails to state facts sufficient to constitute a cause of action. Code
15 Civ. Proc. § 430.10(e). Flores/Sherlock have not (1) suffered an injury in fact, and (2) have not lost
16 money or property as a result of alleged unfair competition.

17 SIXTH COA-Declaratory Relief

18 3. The Sixth Cause of Action for Declaratory Relief fails to state facts sufficient to
19 constitute a cause of action. Code Civ. Proc. § 430.10(e). First, Plaintiffs Flores lacks standing to seek
20 declaratory relief to void a final judgment entered in the prior state court action known as *Cotton I* to
21 which he was not a party; and second, Plaintiff is barred by *res judicata/claim preclusion* by virtue of
22 the entry of a dismissal with prejudice of his substantively identical declaratory relief action in federal
23 court (*Flores I*), from seeking declaratory relief herein attempting to void a final judgment entered in a
24 prior state court action (*Cotton I*), to which he was not a party,

25 SEVENTH CAUSE OF ACTION –Civil Conspiracy

26 4. The Seventh Cause of Action for Civil Conspiracy fails to state facts sufficient to
27 constitute a cause of action. Code Civ. Proc. § 430.10(e). “Conspiracy is not a cause of action, but a
28 legal doctrine that imposes liability on persons who, although not actually committing a tort

1 themselves, share with the immediate tortfeasors a common plan or design in its perpetration.”
2 (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503; *Berg & Berg Enterprises,*
3 *LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823.)
4

5 Dated: July 21, 2022

FERRIS & BRITTON

A Professional Corporation

7 By: Michael R. Weinstein

8 Michael R. Weinstein

9 Scott H. Toothacre

10 Attorney for Defendants

LARRY GERACI and REBECCA BERRY

1 REQUEST FOR JUDICIAL NOTICE

2 Defendants and moving parties, Larry Geraci and Rebecca Berry, request that the Court take
3 judicial notice of the following pleadings filed in other court actions:

4 1. The final judgment entered August 19, 2019 in the prior state court action captioned,
5 *Larry Geraci v. Darryl Cotton*, San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL
6 (hereinafter, the *Cotton I* judgment”), a true and correct copy of which is attached as Exhibit 1 to the
7 Notice of Lodgment in Support of the Demurrer by Defendants, Larry Geraci and Rebecca Berry, to
8 Plaintiffs’ First Amended Complaint.

9 2. The First Amended Complaint filed July 9, 2020, in the prior federal court action
10 captioned *Andrew Flores, etc. et al. v. Gina M. Austin, etc. et al.*; U.S. District Court Case No. 3:20-
11 cv-00656 (the “*Flores I* lawsuit”), a true and correct copy of which is attached as Exhibit 2 to the
12 Notice of Lodgment in Support of the Demurrer by Defendants, Larry Geraci and Rebecca Berry, to
13 Plaintiffs’ First Amended Complaint.

14 3. The Order entered on March 23, 2022, by the federal court in the *Flores I* lawsuit,
15 granting *with prejudice* the motions to dismiss brought by Judge Wohlfeil and by Michael Weinstein,
16 Scott H. Toothacre, Elyssa Kulas, Rachel M. Prendergast, and Ferris & Britton, APC (collectively the
17 “F&B Defendants”, i.e, the law firm and attorneys and paralegal, the lawyers who represented Geraci
18 and Berry in *Cotton I*), a true and correct copy of which is attached as Exhibit 3 to the Notice of
19 Lodgment in Support of the Demurrer by Defendants, Larry Geraci and Rebecca Berry, to Plaintiffs’
20 First Amended Complaint.

21
22 Dated: July 21, 2022

FERRIS & BRITTON,

A Professional Corporation

23
24
25 By: 

Michael R. Weinstein

Scott H. Toothacre

Attorneys for Defendant

LARRY GERACI and REBECCA BERRY

1 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

2 I. RELIEF REQUESTED AND SUMMARY OF THE ARGUMENTS

3 In the operative First Amended Complaint filed December 23, 2021 (ROA#11), Plaintiffs,
4 Andrew Flores and Amy Sherlock, variously assert four causes of action against defendants, Larry
5 Geraci and Rebecca Berry, namely: (1) the First Cause of Action for Conspiracy to Monopolize in
6 Violation of the Cartwright Act (the “Cartwright Act Claim”); (2) the Fifth Cause of Action for Unfair
7 Competition and Unlawful Business Practices (the “UCL Claim”); (3) the Sixth Cause of Action for
8 Declaratory Relief (the “Decl Relief Claim”); and (4) the Seventh Cause of Action For Civil
9 Conspiracy. This Demurrer is directed to these First, Fifth, Sixth, and Seventh Causes of Action. As
10 further argued below, the Court should sustain the demurrer to each of those causes of action on the
11 following grounds:

12 As to the First Cause of Action for Conspiracy to Monopolize in Violation of the Cartwright
13 Act (Bus. & Prof. Code § 16700, *et seq.*) Flores/Sherlock lack standing to assert the claim; and, the
14 claim is not sufficiently pled.

15 As to the Fifth Cause of Action for Violation of the Unfair Competition Law pursuant to Cal.
16 Bus. & Prof. Code § 17200 *et seq.* Flores/Sherlock have not (1) suffered an injury in fact, and (2) have
17 not alleged they lost money or property as a result of alleged unfair competition.

18 As to the Sixth Cause of Action Plaintiffs Flores lacks standing to seek declaratory relief to void
19 a final judgment entered in the prior state court action known as *Cotton I* to which he was not a party.
20 A legal action to void a judgment cannot be brought by an individual whom is displeased with the
21 outcome of a lawsuit *to which he was not a party*. Voiding the state court judgment in *Cotton I* would
22 have no effect upon plaintiff Flores’ Cartwright Claim or UCL Claim herein. There is simply no injury
23 alleged by plaintiffs Flores/Sherlock that would be redressed by the Court voiding a state court
24 judgment to which Flores was not a party. Additionally, the cause of action is barred by *res*
25 *judicata/claim preclusion* by virtue of the entry of a dismissal with prejudice of his substantively
26 identical declaratory relief action in a prior federal court action (*Flores I*).

27 The Seventh Cause of Action for Civil Conspiracy fails to state facts sufficient to constitute a
28 cause of action. Code Civ. Proc. § 430.10(e). “Conspiracy is not a cause of action, but a legal doctrine

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21 outcome of a lawsuit *to which he was not a party*. Voiding the state court judgment in *Cotton I* would
22 have no effect upon plaintiff Flores’ Cartwright Claim or UCL Claim herein. There is simply no injury
23 alleged by plaintiffs Flores/Sherlock that would be redressed by the Court voiding a state court
24 judgment to which Flores was not a party. Additionally, the cause of action is barred by *res*
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26 identical declaratory relief action in a prior federal court action (*Flores I*).

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28 cause of action. Code Civ. Proc. § 430.10(e). “Conspiracy is not a cause of action, but a legal doctrine

1 that imposes liability on persons who, although not actually committing a tort themselves, share with
2 the immediate tortfeasors a common plan or design in its perpetration.” (*Applied Equipment Corp. v.*
3 *Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503; *Berg & Berg Enterprises, LLC v. Sherwood Partners,*
4 *Inc.* (2005) 131 Cal.App.4th 802, 823.)

5 **II. LEGAL STANDARD ON DEMURRER**

6 When a complaint, or any cause of action in a complaint, fails to state facts sufficient to
7 constitute a cause of action, the court may grant a demurrer. (Code Civ. Proc., § 430.30) The court
8 considers the allegations on the face of the complaint and any matter of which it must or may take
9 judicial notice under the Code of Civil Procedure section 430.30(a). (*Groves v. Peterson* (2002)
10 100 Cal.App.4th 659; Code Civ. Proc., § 430.30(a).) In reviewing the sufficiency of a complaint
11 against a demurrer, the court treats the demurrer as admitting all material facts properly pleaded.
12 (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (citing *Serrano v. Priest* (1971) 5 Cal.3d 584, 591);
13 *Adelman v. Associated Ins. Co.* (2001) 90 Cal.App.4th 352, 359.) However, contentions, deductions,
14 or conclusions of fact or law are insufficient to constitute a cause of action. (*Id.*)

15 The court may grant a demurrer with or without leave to amend when it is obvious from the
16 facts alleged that, the plaintiff could not state a cause of action. (See *Hillman v. Hillman Land Co.*
17 (1947) 81 Cal.App.2d 174, 181; see generally *Carney v. Simmonds* (1957) 49 Cal.2d 84, 97; see
18 *Smiley v. Citibank* (1995) 11 Cal.4th 138, 164; Code Civ. Proc., § 430.30(j).) The party seeking leave
19 to amend their pleading bears the burden of establishing that there is a reasonable possibility that the
20 defect can be cured by amendment. (See *Blank v. Kirwan, supra*, 39 Cal.3d at p. 318; *Gould v.*
21 *Maryland Sound Industries* (1995) 31 Cal.App.4th 1137, 1153.)

22 **III. LEGAL ARGUMENT**

23 The First Amended Complaint alleges four purported causes of action against Mr. Geraci and
24 Ms. Berry, namely: (1) the First Cause of Action for Conspiracy to Monopolize in Violation of the
25 Cartwright Act (the “Cartwright Act Claim”); (2) the Fifth Cause of Action for Unfair Competition and
26 Unlawful Business Practices (the “UCL Claim”); (3) the Sixth Cause of Action for Declaratory Relief
27 (the “Decl Relief Claim”); and the Seventh Cause of Action for Civil Conspiracy. This demurrer is
28 directed to the First, Fifth, Sixth, and Seventh Causes of Action.

1 **A. Flores/Sherlock Fail To State A Viable Claim For Violations of the Cartwright Act-**
2 **COA 1**

3 Neither Flores nor Sherlock can maintain a cause of action against Geraci or Berry for
4 violations of the Cartwright Act because 1) they lack standing to assert the claim and 2) the claim is not
5 sufficiently pled.

6 As noted in the moving papers submitted in support of Mr. Lake’s demurrer, a plaintiff suing
7 under the Cartwright Act must be within the “target area” of the antitrust violation to have standing;
8 i.e., they must have suffered direct injury as a result of the anticompetitive conduct. *Cellular Plus, Inc.*
9 *v. Sup. Ct. (U.S. West Cellular)* (1993) 14 Cal.App.4th 1224, 1232; *Vinci Waste Mgmt., Inc.* (1995) 36
10 Cal.App.4th 1811, 1815. An “antitrust injury” is the “type of injury the antitrust laws were intended to
11 prevent, and which flows from the invidious conduct which renders defendants’ act unlawful.” *Kolling*
12 *v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723. Courts interpreting the Carwright Act’s antitrust
13 standing requirement have consistently followed the “market participant rule,” requiring the plaintiff to
14 “show an injury within the area of the economy that is endangered by a breakdown of competitive
15 conditions.” *In re Napster, Inc. Copyright Litig.* (N.D. Cal.2005) 354 F.Supp.2d 1113, 1125-26 (citing
16 *MGM Studios, Inc. v. Grokster, Ltd.* (Cal. 2003) 269 F.Supp.2d 1213, 1224; *Kolling v. Dow Jones &*
17 *Company, Inc.* (1982) 137 Cal.App.3d 709, 724.

18 First, Flores/Sherlock lack standing to bring a claim. They have not sufficiently alleged they
19 are “market participant[s]”. The FAC does not make clear which “market” in which Flores/Sherlock
20 claim to have participated. Even presuming that it is the medical marijuana industry, neither Flores nor
21 Sherlock have alleged an injury in that area. Simply put, neither Sherlock, a private individual, with no
22 alleged ties to the medical marijuana industry, nor Flores, a private attorney, with no alleged ties to the
23 medical marijuana industry, are within the “target area” of the alleged antitrust violation and have not
24 alleged antitrust injury.

25 Irrespective of the standing issues, even if Flores/Sherlock were able to meet this threshold
26 issue, their cause of action is not sufficiently pled. To state a cause of action for conspiracy, a
27 complaint must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts
28 done pursuant to the conspiracy, and (3) the damage resulting from such act or acts. *Chicago Title Ins.*

1 *Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 316. It is incumbent on the complaining
2 party to allege and prove that the party’s business or property has been injured by the very fact of the
3 existence and prosecution of the unlawful trust or combination; that is, to establish an actual injury
4 attributable to something the statutory provisions were designed to prevent. *Kaiser Cement Corp. v.*
5 *Fischback and Moore, Inc.* (9th Cir. 1986) 793 F.2d 1100.

6 “ ‘ “An antitrust claim must plead the formation and operation of the conspiracy and the illegal
7 acts done in furtherance of the conspiracy. [citation.] California requires a ‘high degree of
8 particularity’ in the pleading of a Cartwright Act violation [citation] and therefore generalized
9 allegation of antitrust violations are usually insufficient” ‘ (*Ibid.*) Further, ‘[i]t is well accepted that
10 “the antitrust laws...were enacted for the protection of competition, not competitors.’ ” ‘ [citation] ...
11 Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of
12 antitrust laws.” [citation omitted].” *DeCambre v. Rady Children’s Hospital-San Diego* (2015) 235
13 Cal.App.4th 1, 25.

14 Here, plaintiffs have not specifically alleged injury to themselves resulting from the alleged
15 antitrust conspiracy, let alone the necessary allegation of injury to competition resulting from the
16 antitrust conspiracy. They have not even alleged they are market participants or competitors in an
17 identified relevant and geographic market (presumably, the cannabis industry in San Diego County).

18 Other than entering into an agreement to purchase Cotton’s real property, filing and pursuing an
19 application for a CUP for that property, and litigating a dispute regarding the alleged agreement and
20 transactions with Mr. Cotton, there are no other facts tying Geraci and/or Berry to the alleged
21 conspiracy. Similarly, there are no facts showing that Flores or Sherlock, themselves, were engaged in
22 the medical marijuana industry. Flores and Sherlock have failed to adequately allege they suffered
23 antitrust injury. There is no allegation that either Flores or Sherlock had a business or property within
24 the cannabis industry to damage. Mr. Geraci prevailed in his litigation against Mr. Cotton, obtaining a
25 damage award in his favor and against Mr. Cotton. (FAC, para. 208) Cotton still owns the property
26 “Cotton is the owner-of-record of the Federal Property ...” (FAC, para. 116).

27 No CUP was ever granted for the Cotton property. Even if he Geraci had obtained the CUP the
28 CUP is a property right that runs with the land and not to the individual permittee. See *Imperial v.*

1 *McDougal* (1977) 19 Cal.3d 505; *Malibu Mountains Recreation v. Los Angeles* (1998) 67 Cal.App.4th
2 359, 368. Without a showing of antitrust injury, neither Flores, nor Sherlock, can maintain their first
3 cause of action against Geraci and Berry.

4 **B. The FAC Fails to Sufficiently Allege Unfair Business Practices-COA 5.**

5 California’s unfair competition law permits civil recovery for “any unlawful, unfair, or
6 fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising.”¶. Business
7 & Professions Code § 17200. A private person may assert a UCL claim only if he/she (1) has suffered
8 injury in fact and (2) has lost money or property as a result of the unfair competition. *Hall v. Time, Inc.*
9 (2008) 158 Cal.App.4th 847, 852.

10 As with their claims related to the alleged Cartwright Action violation, there is nothing in the
11 FAC that gives any indication that Flores/Sherlock were market participants, or even attempted to
12 become market participants, in the San Diego cannabis market. There is no ascertainable injury in fact,
13 nor have Flores/Sherlock lost money or property, as more fully discussed above, by any of the facts
14 alleged in the FAC.

15 **C. Flores Lacks Standing to Void the *Cotton I* Judgment-Decl. Relief Claim-COA 6¹**

16 Plaintiff Flores does not have standing to bring the Decl Relief Claim. As stated in *Martin v.*
17 *Bridgeport Community Assn, Inc.* (2009) 173 Cal.App.4th 1024, 1031: “Standing is the threshold
18 element required to state a cause of action and, thus, lack of standing may be raised by demurrer.
19 (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 813, 66 Cal.Rptr.3d 543;
20 *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1000.) To have
21 standing to sue, a person, or those whom he properly represents, must “ ‘have a real interest in the
22 ultimate adjudication because [he] has [either] suffered [or] is about to suffer any injury of sufficient
23 magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented.’
24 [Citation.]” (*Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 707, 93 Cal.Rptr.2d 580.) Code of
25 Civil Procedure section 367 establishes the rule that “[e]very action must be prosecuted in the name of
26 the real party in interest, except as otherwise provided by statute.” A real party in interest is one who

27 _____
28 ¹ The Declaratory Relief claim is brought by plaintiff Flores against defendant Geraci only.

1 has “an actual and substantial interest in the subject matter of the action and who would be benefited or
2 injured by the judgment in the action.” (*Friendly Village Community Assn., Inc. v. Silva & Hill Constr.*
3 *Co.* (1973) 31 Cal.App.3d 220, 225.)”

4 In the Decl Relief claim, Flores “seeks to have the *Cotton I* judgment declared void for, inter
5 alia, enforcing an illegal contract and being the product of a fraud on the court.” (First Amended
6 Complaint (“FAC”, para. 325.)

7 The *Cotton I* judgment is a final judgment entered in a prior state court action captioned, *Larry*
8 *Geraci v. Darryl Cotton*, San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL
9 (hereinafter, *Cotton I*). (See the *Cotton I* Judgment, Exhibit 1 to the Notice of Lodgment in Support of
10 Demurrer by Defendants, Larry Geraci, to Plaintiffs’ First Amended Complaint (hereinafter “Geraci
11 NOL”.)

12 The *Cotton I* lawsuit was filed on March 22, 2017. (FAC, para. 147.) In that lawsuit, plaintiff
13 Geraci, alleged various claims against defendant Darryl Cotton. Darryl Cotton filed a cross-complaint
14 on or around May 12, 2017, in which he, as cross-complainant, alleged various causes of action against
15 claims against Mr. Geraci and Ms. Berry, as cross-defendants. (FAC, para. 149.)

16 In the instant action, there are no allegations, which if true, would demonstrate that Mr. Flores
17 has standing to have the *Cotton I* judgment declared void. The *Cotton I* judgment in the prior lawsuit
18 was entered following a jury verdict. The jury found in favor of Mr. Geraci and against Mr. Cotton on
19 several of his claims and he was awarded monetary damages in excess of \$268K against Mr. Cotton.
20 The jury found in favor of Mr. Geraci and against Mr. Cotton on all of Mr. Cotton’s cross-claims and
21 awarded him nothing. Judgment was entered August 19, 2019, and Mr. Cotton’s appeal from the
22 judgment was dismissed by the Fourth DCA on February 11, 2020, and the remittitur issued May 14,
23 2020. That judgment has been in force and effect since August 19, 2019 and is now final. (Exh 1 to
24 Geraci NOL.)

25 Mr. Cotton has previously attempted unsuccessfully in separate actions filed in state and federal
26 court to have the judgment declared void. Plaintiff Flores herein was not a party to the *Cotton I*
27 lawsuit. The *Cotton I* judgment is only *res judicata* against Mr. Cotton, who is not a party to this
28 action. As a non-party to the prior action, the *Cotton I* judgment has no *res judicata* effect on Mr.

1 Flores.

2 In the First Amended Complaint herein, plaintiffs allege that “Cotton is the owner-of-record of
3 the Federal Property ...” (FAC, para. 116) and that, at some point in time. Flores “became the equitable
4 owner of the Federal Property” (FAC, para. 59). Nowhere in the First Amended Complaint is the latter
5 allegation of equitable ownership fleshed out with any additional factual allegations. Moreover, Mr.
6 Flores’s motion to intervene in the *Cotton I* lawsuit was denied.² Thus, Mr. Flores was not a real party
7 in interest in *Cotton I* who can now seek to void the judgment. He did not have an actual and
8 substantial interest in the subject matter of the *Cotton I* action and, as a non-party to that prior action,
9 the judgment has not injured him. Put a different way, if for sake of argument, *Cotton I* judgment were
10 declared void, then Mr. Geraci could not recover from Mr. Cotton the \$268K he was awarded in the
11 judgment. However, that would have no bearing on the Cartwright Act Claim or the UCL Claim Mr.
12 Flores attempts to assert against Mr. Geraci and Ms. Berry in the instant action.

13 Additionally, by virtue of a prior federal court lawsuit that Andrew Flores and Amy Sherlock
14 brought seeking to void the *Cotton I* judgment, Mr. Flores (as Ms. Sherlock would be) is barred by
15 principles of *res judicata/claim preclusion* from seeking that identical relief in the instant action.

16 There are two prior federal court actions, one brought by Darryl Cotton, the plaintiff in *Cotton I*,
17 the other brought by plaintiffs herein, Flores and Sherlock, **each of which sought to have the *Cotton I***
18 **judgment declared void.** (FAC, para. 276.) Both attempts in federal court to have the *Cotton I*
19 judgment declared void have failed. The instant argument focuses on Flores/Sherlock’s prior federal
20 action seeking to have the *Cotton I* judgment declared void.³

21 _____
22 ² Mr. Flores attempted to intervene in the *Cotton I* litigation, but the Court denied his motion. Mr. Flores then filed a writ
23 regarding the order denying his motion to intervene, the writ was denied by the Fourth District Court of Appeal.

24 ³ In Cotton’s federal court action, *Cotton v. Bashant, et al.*, 18-cv-325 TWR (DEB), on October 22, 2021, the federal
25 court granted motions to dismiss by various of the defendants therein. (See FAC, para. 278.) In particular, Geraci’s
26 motion to dismiss was granted *with prejudice*. The federal court ruled that plaintiff Cotton’s claims, including his
27 declaratory relief claim in seeking to have the *Cotton I* judgment “declared void and vacated,” and which Cotton
28 explicitly stated was a “collateral attack on a state court judgment issued by Judge Joel R. Wohlfeil” by way of federal
court action, was barred by the *Rooker-Feldman* doctrine. The federal court also denied leave to amend as to defendants
therein Geraci and Berry. (See Request for Judicial Notice, item 2, the Order dated 10/22/2021.) In addition, previous to
dismissing Geraci with prejudice, on March 3, 2021, the federal court granted the motion to dismiss by Michael
Weinstein (Geraci and Berry’s lawyer in *Cotton I*) *with prejudice*. The federal court ruled that Cotton lacked standing
and failed to allege a viable claim. The federal court also ruled that, even if Cotton had standing and had allege a viable

1 On April 3, 2020, Flores and Sherlock, filed a federal court lawsuit entitled *Andrew Flores, etc.*
2 *et al. v. Gina M. Austin, etc. et al.*; U.S. District Court Case No. 3:20-cv-00656 (the “*Flores I* lawsuit”),
3 which alleged multiple claims against various of 30+ named defendants therein, including defendants
4 herein, Mr. Geraci and Ms. Berry. On July 9, 2020, plaintiffs Flores and Sherlock filed a First
5 Amended Complaint. The factual allegations on which Mr. Flores and Ms. Sherlock based their claims
6 extensively overlap those alleged in the instant state court lawsuit, including but not limited to the
7 allegations of an antitrust conspiracy. Like in the instant action, in *Flores I* Mr. Flores/Ms. Sherlock
8 sought a declaration against all defendants, including Mr. Geraci and Ms. Berry, that the *Cotton I*
9 judgment is “void for being the product of judicial bias and being procured by acts and/or omissions
10 that constitute a fraud upon the court taken in furtherance of the Antitrust Conspiracy.” (See *Flores I*
11 Complaint, Sixth Cause of Action for Declaratory Relief, para. 311, Exhibit 2 to Geraci NOL.)

12 On March 23, 2022, the federal court granted *with prejudice* the motions to dismiss brought by
13 Judge Wohlfeil and by Michael Weinstein, Scott H. Toothacre, Elyssa Kulas, Rachel M. Prendergast,
14 and Ferris & Britton, APC (collectively the “F&B Defendants”, i.e, the law firm and its attorneys and
15 paralegal who represented Geraci and Berry in *Cotton I*) as well as dismissed the First Amended
16 Complaint against all the numerous remaining defendants *without prejudice* for lack of standing with
17 leave to amend. (See Order entered March 23, 2022, Exhibit 3 to Geraci NOL.) Mr. Flores/Ms.
18 Sherlock did not file an amended complaint within the permitted time frame, so there are no pending
19 claims remaining in that federal lawsuit. Although the dismissal *with prejudice* in *Flores I* was granted
20 in favor of Judge Wohlfeil and the F&B Defendants only, not in favor of Mr. Geraci or Ms. Berry who
21 were dismissed without prejudice, the dismissals are nevertheless *res judicata* as against plaintiff Flores
22 in asserting his Decl. Relief Claim against defendant Geraci.

23 In *Flores I*, the declaratory relief claim was brought against *all* defendants based on the same
24 facts alleged herein. Because Flores had the same interest and sought the same relief on identical facts
25 in their federal court action, Flores cannot relitigate that claim here. Under the doctrine of *res judicata*
26

27
28 claim, the *Noerr-Pennington* doctrine barred his claims. (See Request for Judicial Notice, item 3 the Order dated 3/17/2021.)

1 or collateral estoppel, plaintiff, Flores, cannot relitigate the same claim for declaratory relief he pursued
2 and lost on the merits in the prior federal court lawsuit, albeit against different defendants. Defensive
3 use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely “switching
4 adversaries.” Indeed, “Where a party though appearing in two suits in different capacities is in fact
5 litigating the same right, the judgment in one estops him in the other.” (15 Cal.Jur. 189; see *Bernhard v.*
6 *Bank of America Nat. Trust & Savings Assn.*, 19 Cal.2d, at 813, 122 P.2d, at 895.)

7 **D. Civil Conspiracy-Seventh COA**

8 The Seventh Cause of Action for Civil Conspiracy fails to state facts sufficient to constitute a
9 cause of action. Code Civ. Proc. § 430.10(e). “Conspiracy is not a cause of action, but a legal doctrine
10 that imposes liability on persons who, although not actually committing a tort themselves, share with
11 the immediate tortfeasors a common plan or design in its perpetration.” (*Applied Equipment Corp. v.*
12 *Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503; *Berg & Berg Enterprises, LLC v. Sherwood Partners,*
13 *Inc.* (2005) 131 Cal.App.4th 802, 823.)

14 **IV. CONCLUSION**

15 For the reasons stated above, the Court should sustain without leave to amend the demurrer by
16 defendants Geraci and Berry to the (1) the First Cause of Action for Conspiracy to Monopolize in
17 Violation of the Cartwright Act; (2) the Fifth Cause of Action for Unfair Competition and Unlawful
18 Business Practices; (3) the Sixth Cause of Action for Declaratory Relief; and (4) the Seventh Cause of
19 Action for Civil Conspiracy. A proposed Order has been submitted with these moving papers.

20
21 Dated: July 21, 2022

FERRIS & BRITTON
A Professional Corporation

22
23 By: Michael R. Weinstein
24 Michael R. Weinstein
25 Scott H. Toothacre
26 Attorney for Defendants
27 LARRY GERACI and REBECCA BERRY
28

1 SUPPORTING DECLARATION OF JAMES D. CROSBY

2 1. I am an attorney in good standing with the State Bar and licensed to practice law before
3 all courts in the State of California. I am an attorney in good standing with the State Bar and licensed
4 to practice law before all the courts in the State of California. I, along with Michael R. Weinstein of
5 Ferris & Britton, APC, are counsel of record for defendants, Larry Geraci and Rebecca Berry, in the
6 above-titled action. I have personal knowledge of the facts set forth herein.

7 2. On May 23, 2022, plaintiffs personally served defendant Geraci with the summons and
8 original complaint filed December 3, 2021. Defendant Geraci has not been served with the operative first
9 amended complaint filed December 22, 2021. That first amended complaint contains substantive changes to
10 the original complaint. Defendant Berry has not been served with any process in the matter.

11 3. Given the above, no response to the first amended complaint is currently due from
12 defendants Geraci and Berry.

13 4. Nevertheless, on June 21, 2022, I emailed correspondence to Andrew Flores, attorney for
14 plaintiff Amy Sherlock and and *in pro per* for plaintiff Andrew Flores wherein I: (1) offered to accept
15 service, in behalf of my clients, of the summons and first amended complaint; (2) laid out in specific detail
16 why the first amended complaint is properly subject to demurrer and motion to strike; and (3) offered to
17 meet and confer on the first amended complaint and my proffered grounds for demurrer and motion to
18 strike.

19 5. By email dated June 23, 2022 Mr. Flores told me he would review my meet and confer
20 letter. Subsequent to June 23rd I have received no response from Mr. Flores to the substance of the above-
21 referenced correspondence despite sending a follow up email to Mr. Flores on July 8th reminding him that I
22 had not received a substantive response from him to my meet and confer letter.

23 6. My attempts to meet and confer with Mr. Flores regarding this motion to strike satisfy my
24 meet and confer obligations under Code of Civil Procedure § 430.41.

25 I declare, under penalty of perjury under the laws of the State of California, that the foregoing is
26 true and correct, and that this declaration is executed on July 21, 2022, at San Diego, California.
27

28 _____
JAMES D. CROSBY