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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 MCELFFRESH,
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 LAKE,
25 an individual, ALLIED SPECTRUM, INC., a
California corporation, PRODIGIOUS
26 COLLECTIVES, LLC, a limited liability
company, and DOES 1 through 50, inclusive,

27 Defendants.
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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
07/22/2022 at 03:08:00 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 MOTION AND MOTION BY
DEFENDANTS, LARRY GERACI AND
REBECCA BERRY, TO STRIKE
PORTIONS OF PLAINTIFFS' FIRST
AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES; AND DECLARATION OF
JAMES D. CROSBY IN SUPPORT**

(Related to ROA #11)

DATE: October 21, 2022
TIME: 9:00 am
DEPT: C-75

[IMAGED FILE]

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

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

2 **NOTICE IS HEREBY GIVEN THAT** on October 21, 2022 at 9:00 a.m., in Department C-75
3 of the San Diego County Superior Court, Hall of Justice, located at 330 West Broadway, San Diego,
4 California 92101, defendants, Larry Geraci and Rebecca Berry, will and hereby do move to strike
5 certain portions of Plaintiff’s unverified First Amended Complaint filed December 23, 2021, in this
6 action, namely:

- 7 1. First Amended Complaint, Fifth Cause of Action, paragraph 323, at page 37, lines 14-
8 15:

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

11 This motion to strike is made on the ground these allegations are improper as a matter of law
12 for the reasons stated below:

13 A UCL action is equitable in nature and, therefore, only equitable remedies, typically in the
14 form of injunctive relief and restitution, are available. (See *Kraus v. Trinity Management Servs., Inc.*
15 23 Cal.4th 116, 126-127 (2000) [defining restitution as “compelling a UCL defendant to return
16 money obtained through an unfair business practice to those persons in interest from whom the
17 property was taken ...”].)

18 First, the allegation in paragraph 323 seeking “full restitution and/or disgorgement *of all*
19 *[defendants’] revenues, earnings, profits, compensation and benefits*” (italics added for emphasis)
20 must be stricken because such a request is for *non-restitutionary* disgorgement, which relief is not
21 available under the UCL. (See *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1152
22 (2003).) As *Korea Supply* makes clear, under the UCL the plaintiffs are only entitled to restitution
23 from defendants *of plaintiffs’ money or property* taken from them by the defendants. Non-
24 restitutionary disgorgement of the defendants’ revenues, earnings, profits, compensation and benefits
25 that defendants’ made as a result of the alleged wrongful conduct (i.e., as a result of their alleged acts
26 to restrain competition in the cannabis market) is not available as a matter of law. Moreover,
27 plaintiffs will be unable to cure this deficiency by amendment because plaintiffs Flores and Sherlock
28 cannot allege that defendants Geraci or Berry took any money or property from them.

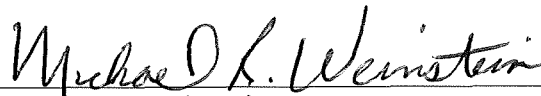
1 Second, the allegation in paragraph 323 seeking “such other *monetary* relief as the court
2 deems just” (italics added for emphasis) must be stricken as that is a request for monetary damages,
3 which relief is not available under the UCL.

4 Defendants Geraci and Berry bring this motion to strike on the grounds stated herein and based
5 upon this Notice and the supporting Memorandum of Point and Authorities and Declaration of Michael
6 R. Weinstein filed herewith, as well as upon any subsequent Reply Memorandum and any oral
7 argument at the hearing on the motion.

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

13
14 Dated: July 21, 2022

FERRIS & BRITTON
A Professional Corporation

15
16 By: 
17 Michael R. Weinstein
18 Scott H. Toothacre
19 Attorney for Defendants
20 LARRY GERACI and REBECCA BERRY
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In the operative First Amended Complaint filed December 23, 2021 (ROA#11), Plaintiffs,
4 Andrew Flores and Amy Sherlock, assert four causes of action against defendants, Larry Geraci and
5 Rebecca Berry, namely: (1) the First Cause of Action for Conspiracy to Monopolize in Violation of the
6 Cartwright Act (the “Cartwright Act Claim”); (2) the Fifth Cause of Action for Unfair Competition and
7 Unlawful Business Practices (the “UCL Claim”); (3) the Sixth Cause of Action for Declaratory Relief
8 (the “Decl Relief Claim”); and (4) the Seventh Cause of Action for Civil Conspiracy.

9 This motion to strike is directed to the Fifth Cause of Action, the UCL Claim; in particular, to
10 the allegation in paragraph 323, at page 37, lines 14-15 regarding the relief to which plaintiffs are
11 entitled, namely, “... full restitution and/or disgorgement of all revenues, earnings, profits,
12 compensation and benefits, such other monetary relief as the court deems just in light of the ill-gotten
13 gains obtained by Defendants as a result of such business acts or practices, and” As discussed
14 below, the Court should strike those allegations in paragraph 323 because they seek *non-restitutionary*
15 *disgorgement* and *money damages*, neither of which is an available remedy under the UCL. By striking
16 those allegations the plaintiffs will be limited to requesting injunctive relief. Plaintiffs are unable to
17 amend to allege entitlement to restitution of their own money or property as they cannot alleged that
18 defendants Geraci or Berry have taken any money or property from plaintiffs.

19 **II. LEGAL STANDARD – MOTION TO STRIKE**

20 Motions to strike reach defects in, or objections to, pleadings that are not challengeable by
21 demurrer. (Code Civ. Proc., § 435, subd. (a)(2).) The grounds for a motion to strike, like a demurrer,
22 must appear on the face of the pleading under attack or from matter of which the court may take
23 judicial notice. (Code Civ. Proc., § 437.) A motion to strike is authorized in two situations. The first is
24 where a party challenges “irrelevant, false, or improper matter inserted in any pleading.” (Code Civ.
25 Proc. § 436(a).) The second is where a party challenges any pleading not drawn or filed in conformity
26 with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc. § 436(b).) A motion
27 to strike can be used to attack the entire pleading, or any part thereof, i.e., even single words or phrases
28 (unlike demurrers). (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 393-394; *Warren v. Atchison, Topeka &*

1 *Santa Fe Ry. Co.* (1971) 19 Cal.App.3d 24, 40; *1550 Laurel Owner's Ass'n, Inc. v. Appellate Div. of*
2 *Sup. Ct. (Munshi)* (2018) 28 Cal.App.5th 1146, 1156.)

3 **III. ARGUMENT**

4 This motion to strike is directed at the Fifth Cause of Action for Unfair Competition and
5 Unlawful Business Practices (the "UCL Claim"). Defendants Geraci and Berry ask the Court to strike
6 improper allegations in paragraph 323 that request relief/remedies not available as a matter of law
7 under the UCL.

8 **A. The Court should strike the following allegations in paragraph 323 related to the relief** 9 **requested for the alleged UCL violations:**

- 10 1. First Amended Complaint, Fifth Cause of Action, Paragraph 323, at page 37, lines 14-
11 15:

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

16 The Fifth Cause of Action, the UCL Claim, asserts a claim against Mr. Geraci and Ms. Berry for
17 violation of the UCL. (Cal. Bus. & Prof. Code §§ 17200 et seq.) As the remedies for the alleged UCL
18 violations, Plaintiffs seek "full restitution and/or disgorgement *of all revenues, earnings, profits,*
19 *compensation and benefits, [and] such other monetary relief* as the court deems just in light of the ill-
20 gotten obtained by Defendants as the result of such business acts or practices, and an injunction
21 prohibiting Defendants from engaging in the practices described herein" (FAC, para 323, italics added
22 for emphasis). Only the request for injunctive relief is proper.

23 A UCL action is equitable in nature. A plaintiff is limited to "seeking an injunction against
24 unfair business practices" or, in the context of "[a]ctual direct victims of unfair competition, restitution.
25 (*Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1152 (2003). In other words, only
26 equitable remedies, typically in the form of injunctive relief and restitution, are available. (See *Kraus v.*
27 *Trinity Management Servs., Inc.* 23 Cal.4th 116, 126-127 (2000) [defining restitution as "compelling a
28 UCL defendant to return money obtained through an unfair business practice to those persons in
interest from whom the property was taken ..."].)

First, the allegation in paragraph 323 seeking "full restitution and/or disgorgement *of all [the*

1 *defendants’] revenues, earnings, profits, compensation and benefit* “ (italics added for emphasis) that
2 the defendants’ obtained as a result of their allegedly wrongful conduct must be stricken because such a
3 request is for *non-restitutionary disgorgement*, which relief is not available under the UCL. (*Korea*
4 *Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1152 (2003). As *Korea Supply* makes clear,
5 under the UCL the plaintiffs are only entitled to restitution from defendants *of plaintiffs’ money or*
6 *property* taken from them by the defendants. Non-restitutionary disgorgement of the defendants’
7 revenues, earnings, profits, compensation and benefits that defendants’ made as a result of the alleged
8 wrongful conduct (i.e., as a result of their alleged acts to restrain competition in the cannabis market) is
9 not available. Moreover, plaintiffs Flores and Sherlock will be unable to cure this deficiency by
10 amendment because they cannot allege that defendants Geraci or Berry took any money or property
11 from them.

12 Second, the allegation in para. 323 seeking “such other *monetary relief* as the court deems just”
13 (italics added for emphasis) must be stricken as it seeks money damages, which is relief not available
14 under the UCL. (*Korea Supply, supra*, 29 Cal. 4th at 1152).

15 **IV. CONCLUSION**

16 For the reasons stated above, the Court should grant the motion by defendants Geraci and Berry
17 to strike the specified portions of paragraph 323 in Plaintiff’s Third Amended Complaint, which
18 improperly seek remedies not available for violations of the UCL.

19 Dated: July 21, 2022

FERRIS & BRITTON
A Professional Corporation

20 By: Michael R. Weinstein
21 Michael R. Weinstein
22 Scott H. Toothacre
23 Attorney for Defendants
LARRY GERACI and REBECCA BERRY

