

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 12/02/2022

TIME: 09:00:00 AM

DEPT: C-75

JUDICIAL OFFICER PRESIDING: James A Mangione

CLERK: Meaghan Abosamra

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: M. Palafox

CASE NO: **37-2021-00050889-CU-AT-CTL** CASE INIT.DATE: 12/03/2021

CASE TITLE: **Sherlock vs Austin [EFILE]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Antitrust/Trade Regulation

EVENT TYPE: Status Conference (Civil)

EVENT TYPE: Demurrer / Motion to Strike

EVENT TYPE: SLAPP / SLAPPback Motion Hearing

Additional events listed on last page.

APPEARANCES

Amy Sherlock, Plaintiff is present.

Michael R Weinstein, counsel, present for Defendant(s) via remote video conference.

Laura E Stewart, counsel, present for Defendant(s) via remote video conference.

George R Najjar, counsel, present for Defendant(s) via remote video conference.

Andrew Flores, counsel, present for Appellant,Plaintiff(s).

MOTION HEARING:

The Court hears oral argument and confirms the tentative ruling as follows:

Defendant Abhay Schweitzer, individually and doing business as Techne's Special Motion to Strike is granted.

Pursuant to CCP § 425.16, the court must first determine whether the moving party has made a

threshold showing that the challenged cause of action is one arising from protected activity, i.e., the act underlying petitioner's cause of action fits one of the categories delineated in CCP §425.16(e). (CCP §425.16 (b)(1); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.) Defendant bears the initial burden of establishing a prima facie showing that the Plaintiffs' cause of action arises from the Defendant's petition activity. (*Equilon Enterprises, L.L.C. v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.) Here, Defendant alleges that the conduct complained of by Plaintiffs falls within CCP § 425.16(e)(1), which protects "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law."

If the court finds that Defendant has satisfied the first prong, it must then determine whether the opposing party has demonstrated a probability of prevailing on the claim. (*Ibid.*) "Only a cause of action that satisfies both prongs of the anti-SLAPP statute – i.e., that arises from protected speech or petitioning and lacks even minimal merit – is a SLAPP, subject to being stricken under the statute." (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 645.) "[A] plaintiff cannot simply rely on his or her pleadings, even if verified. Rather, the plaintiff must adduce competent, admissible evidence." (*Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 735.)

First Prong

Defendant has shown that the activities alleged in the FAC constitute petitioning "before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law" under CCP §425.16(e)(1). Furthermore, Defendant's actions are not illegal as a matter of law. (See *Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1478 (illegality exception applies "only in 'rare cases in which there is uncontroverted and uncontested evidence that establishes the crime as a matter of law.'").) Therefore, the first prong is satisfied.

Second prong

Plaintiffs have not submitted any evidence, affidavits, declarations, or requests for judicial notice in support of this motion. Therefore, they cannot show a probability of prevailing on the merits with "competent, admissible evidence." (*Hailstone*, 169 Cal.App.4th at 735.) The second prong of the analysis is not met.

If Defendant seeks to recover attorney's fees, it must be filed as a separate motion.

Defendant Jessica McElfresh's Demurrer is sustained without leave to amend.

As to the first cause of action for violation of the Cartwright Act, the complaint must allege, with specificity: "The formation and operation of the conspiracy; the illegal acts done pursuant thereto; a purpose to restrain trade; and the damage caused by such acts." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 265.) Here, the FAC identifies three "overt acts" and/or "concerted action" committed by Defendants in furtherance of the conspiracy: "[1] unlawfully applying for or acquiring CUPs through the use of proxies and/or forged documents, [2] sham litigation, and [3] acts and threats of violence against competitors and/or parties who could threaten or expose their illegal actions in furtherance of the conspiracy." (FAC, ¶ 283.) The second and third acts are alleged only against Defendant Geraci and Defendants Alexander and Stellmacher, respectively. Furthermore, the FAC does not allege that Defendant McElfresh unlawfully applied for or acquired the CUPs at issue.

As to the fifth cause of action for violation of the Unfair Competition Law, Plaintiffs have failed to allege any injury they suffered as a result of Defendant McElfresh's actions. At

most, the FAC alleges potential injuries suffered by Mr. Cotton, who is not a party to this case.

As to the seventh cause of action for civil conspiracy, the Court understands this cause of action to relate to the purported theft of the Sherlock Property. However, there are no allegations against Defendant McElfresh that are in any way related to the Sherlocks, their property, or the Balboa and/or Ramona CUPs.

Defendant's Motion to Strike is denied as moot.

Defendant Jessica McElfresh's Demurrer is sustained without leave to amend.

As to the first cause of action for violation of the Cartwright Act, the complaint must allege, with specificity: "The formation and operation of the conspiracy; the illegal acts done pursuant thereto; a purpose to restrain trade; and the damage caused by such acts." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 265.) Here, the FAC identifies three "overt acts" and/or "concerted action" committed by Defendants in furtherance of the conspiracy: "[1] unlawfully applying for or acquiring CUPs through the use of proxies and/or forged documents, [2] sham litigation, and [3] acts and threats of violence against competitors and/or parties who could threaten or expose their illegal actions in furtherance of the conspiracy." (FAC, ¶ 283.) The second and third acts are alleged only against Defendant Geraci and Defendants Alexander and Stellmacher, respectively. Furthermore, the FAC does not allege that Defendant McElfresh unlawfully applied for or acquired the CUPs at issue.

As to the fifth cause of action for violation of the Unfair Competition Law, Plaintiffs have failed to allege any injury they suffered as a result of Defendant McElfresh's actions. At most, the FAC alleges potential injuries suffered by Mr. Cotton, who is not a party to this case.

As to the seventh cause of action for civil conspiracy, the Court understands this cause of action to relate to the purported theft of the Sherlock Property. However, there are no allegations against Defendant McElfresh that are in any way related to the Sherlocks, their property, or the Balboa and/or Ramona CUPs.

Defendant's Motion to Strike is denied as moot.

The minute order is the order of the Court.

Defendant is directed to provide notice on all parties within five (5) court days.

The Court finds good cause to continue the status conference in this matter as follows:

Status Conference (Civil) is continued pursuant to Court's motion to 04/28/2023 at 09:45AM before Judge James A Mangione.



Judge James A Mangione

ADDITIONAL EVENTS:

EVENT TYPE: Motion Hearing (Civil)

EVENT TYPE: Demurrer / Motion to Strike