

No. 23-55018  
*In the*  
**United States Court of Appeals**  
*For the*  
**Ninth Circuit**

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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)*

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FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA  
CASE No. 20-CV-656-BAS-DEB  
**APPALLANTS' OPENING BRIEF**

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*[Real parties in interest continued from first page]*

GINA M. AUSTIN, an individual, AUSTIN LEGAL GROUP APC, a California Corporation; JOEL R. WOHLFEIL, an individual; LAWRENCE (“LARRY”) GERACI, an individual; TAX & FINANCIAL CENTER, INC., a California Corporation; REBECCA BERRY, an individual; JESSICA MCELFRESH, an individual; SALAM RAZUKI, an individual; NINUS MALAN, an individual; MICHAEL ROBERT WEINSTEIN, an individual; SCOTT TOOTHACRE, an individual; ELYSSA KULAS, an individual; RACHEL M. PRENDERGAST, an individual; FERRIS & BRITTON APC, a California Corporation; DAVID DEMIAN, an individual, ADAM C. WITT, an individual, RISHI S. BHATT, an individual, FINCH, THORTON, and BAIRD, a Limited Liability Partnership; JAMES D. CROSBY, an individual; ABHAY SCHWEITZER, an individual and dba TECHNE; JAMES (AKA JIM) BARTELL, an individual; BARTELL & ASSOCIATES, a California Corporation; MATTHEW WILLIAM SHAPIRO, an individual; MATTHEW W. SHAPIRO, APC, a California corporation; NATALIE TRANG-MY NGUYEN, an individual, AARON MAGAGNA, an individual; A-M INDUSTRIES, INC., a California Corporation; BRADFORD HARCOURT, an individual; ALAN CLAYBON, an individual; SHAWN MILLER, an individual; LOGAN STELLMACHER, an individual; EULENTHIAS DUANE ALEXANDER, an individual; BIANCA MARTINEZ; an individual; THE CITY OF SAN DIEGO, a municipality; 2018FMO, LLC, a California Limited Liability Company; FIROUZEH TIRANDAZI, an individual; STEPHEN G. CLINE, an individual; JOHN DOE, an individual; JOHN EK, an individual; THE EK FAMILY TRUST, 1994 Trust; DARRYL COTTON, an individual,

*Real Parties In Interest.*

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## INTRODUCTION

Attorney Andrew Flores, Amy Sherlock and her minor children T.S. and S.S. (the “Sherlock Family”) appeal the involuntary dismissal of their action pursuant to Federal Rule of Civil Procedure § 41(b) for failing to file a second amended complaint. The order must be reversed because the first amended complaint was dismissed erroneously on the grounds that defendant F&B’s<sup>1</sup> petitioning is not sham litigation and immunized by the *Noerr-Pennington* doctrine.

In April 2020 Appellants filed this action. Appellants allege there is a group of wealthy individuals, attorneys and professionals (the “Enterprise”) in the County and City of San Diego that have conspired to illegally acquire nonprofit dispensaries, to sell cannabis for profit illegally from the nonprofit dispensaries, and to create an illegal monopoly in the cannabis market in the County of San Diego (the “Antitrust Conspiracy”). Appellants allege that the unlawful acts taken by the Enterprise in furtherance of the Antitrust Conspiracy include sham petitioning, forgery, fraud, and acts and threats of violence against potential competitors and witnesses in litigation arising from their illegal activity.

This appeal focuses on just one issue. It is the foundation of Appellants’ case and allegations of the unlawful actions taken by the Enterprise in furtherance of the

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<sup>1</sup> “F&B” means defendants Michael Weinstein, Scott H. Toothacre, Elyssa Kulas, Rachel M. Prendergast, and Ferris & Britton, APC.

Antitrust Conspiracy. That one issue is that F&B's representation of Lawrence Geraci in a state court action seeking to enforce a contract was sham petitioning because the object of the contract, Geraci's ownership of a dispensary, was criminally illegal and violates the Federal Controlled Substance Act (CSA).

### **JURISDICTIONAL STATEMENT**

This Court of Appeals has jurisdiction under 28 U.S.C. § 1291 because it is an appeal of a final decision of a district court of the United States within the Ninth Circuit.

### **STATEMENT OF THE CASE**

Geraci is part of a small group of wealthy individuals and attorneys (the "Enterprise") in the City that have conspired to create an unlawful monopoly in the cannabis market (the "Antitrust Conspiracy"). The Enterprise includes attorneys from multiple law firms that are used to create the appearance of competition and legitimacy, while, in reality, *inter alia*, the attorneys conspire against some of their own non-Enterprise clients to ensure that virtually all cannabis CUPs in the City go to principals of the Enterprise. *Cotton I* was filed as an act in furtherance of the Antitrust Conspiracy.

Petitioners are all victims of the Antitrust Conspiracy. However, their individual cases must be made out with circumstantial evidence or facts that have not yet been judicially established. Proving that *Cotton I* was filed as a sham action

by Geraci and his attorneys is prima facie evidence of the Antitrust Conspiracy. Judicially establishing as a matter of law that Geraci cannot own a cannabis CUP establishes liability against, *inter alia*, the City employees/attorneys who testified on Geraci's behalf or ratified the Berry Application with the Berry Fraud. *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir. 1996) (“We have 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.”).

### **ISSUES PRESENTED**

- I. Is Ferris & Britton's petitioning for Geraci to own a dispensary in the name of a third-party sham petitioning?
- II. Did the trial court abuse its discretion in dismissing the action based on Appellants failure to file an amended complaint complying with the trial court's order that Ferris & Britton's petitioning for Geraci's ownership of a dispensary is not sham petitioning?

### **MATERIAL FACTUAL AND PROCEDURAL SUMMARY**

On October 27, 2014, Geraci was sanctioned for unlicensed commercial cannabis activities in *City of San Diego v. Tree Club Cooperative, et al.* (ER-004-011.)

On June 17, 2015, Geraci was sanctioned for unlicensed commercial cannabis activities in *City of San Diego v. CCSquared, et al.* (collectively with the Tree Club Judgment, the “Geraci Judgments”). (ER-012-018.)

In July 2020, Appellants filed their First Amended Complaint alleging the Enterprise, the Antitrust Conspiracy, and that the *Cotton I*<sup>2</sup> action was sham petitioning by F&B on behalf of Geraci. (ER-019-101.)

On March 23, 2022, the trial court held a hearing on F&B's motion to dismiss and held that F&B's petitioning for Geraci's ownership of a dispensary was not sham petitioning because "*Noerr-Pennington* does apply here because – again, it's not sha[m] litigation because Mr. Geraci was the prevailing party in the underlying action." (ER-114.) The trial granted F&B's motion to dismiss and granted leave to amend. (*See* ER-118-120.)

On November 9, 2022, Appellants filed a response to the trial court's order to show cause for why Appellants had not filed an amended complaint, to which Appellants responded that they did not know how to proceed because, *inter alia*, F&B's petitioning is sham petitioning. (ER-124-126; *see* ER-127-129.)

### **STANDARD OF REVIEW**

"Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an action for failure to comply with any order of the court. This court reviews a district court's decision to dismiss an action for failure to file an amended complaint in a timely manner for abuse of discretion." (*Eldridge v. Block*, 832 F.2d 1132, 1136

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<sup>2</sup> *Lawrence Geraci v. Darryl Cotton*, Superior Court of California, County of San Diego, Case No. 37-2017-00010073-CU-BC-CTL.



(9th Cir. 1987).)

“A Rule 41(b) dismissal *must* be supported by a showing of unreasonable delay. In addition, the district court must weigh the following factors in determining whether a Rule 41(b) dismissal is warranted: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits and (5) the availability of less drastic sanctions.” (*Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084 (9th Cir. 2010) (cleaned up, emphasis added).)

“The refusal to file a second amended complaint would not be unreasonable if the first amended complaint was dismissed erroneously.” (*McKeever v. Block*, 932 F.2d 795, 797 (9th Cir. 1991).) Thus, so long as the trial court erred in holding that F&B’s petitioning was immunized by the *Noerr-Pennington* doctrine, Appellants failure is not unreasonable and the dismissal must be reversed. (*Omstead*, 594 F.3d at 1084 (“A Rule 41(b) dismissal *must* be supported by a showing of unreasonable delay.”) (emphasis added).)

## ARGUMENT

In April 2011, the City of San Diego adopted Ordinance No. 20043 (“Ordinance 20043”). Pursuant to Ordinance 20043, a permit and conditional use permit were required to operate a cannabis dispensary. (*See id.* at § 42.1504.) Materially, the definition of a “responsible person” included “an employee and each

person upon whom a duty, requirement or obligation is imposed by this Division, or who is otherwise responsible for the operation, management, direction, or policy of a medical marijuana consumer cooperative. It also includes an employee who is in apparent charge of the medical marijuana consumer cooperative.” (*Id.* at § 42.1502.)

Further, all “responsible persons in the medical marijuana consumer cooperative **shall** undergo fingerprinting prior to acting as a responsible person.” (*Id.* at § 42.1507(a).) And “[i]t is unlawful for any responsible person in a medical marijuana consumer cooperative to act as a responsible person for the medical marijuana consumer cooperative if he or she: [¶] (1) fails to provide their fingerprints to the City; or [¶] (2) has been convicted of a violent felony or crime of moral turpitude within the past seven years.” (*Id.* at § 42.1507(c), (1-2).)

As in effect on November 2, 2016 when the November Document was executed, California Business & Professions Code § 19323 materially provided that the State’s “licensing authority **shall deny** an application if ... the applicant ... 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).) Geraci was last sanctioned on June 17, 2015. (1-ER-0033-0039.) Consequently, he was disqualified from licensure until June 18, 2018. Geraci applied for a cannabis permit with the City of San Diego on October 31, 2016. (*See* 2-ER-0103-0104.) And he did so in the name

of Berry. (*Id.*) He had no intention of undergoing the background checks required for the issuance of a cannabis permit as required by the SDMC because he would be barred by BPC § 19323 and his application would be denied from the State licensing agencies.

Consequently, F&B's petitioning for Geraci's ownership of a dispensary applied pursuant to a fraudulent application because he was barred by law from owning a dispensary is not immunized by the *Noerr-Pennington* doctrine. (*See Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982) ("We hold 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.").)

## CONCLUSION

F&B's petitioning is sham petitioning. They are attorneys for a criminal organization. The Court should reverse the order and refer this matter to law enforcement agencies who have the resources to fully expose and hold F&B and its coconspirators accountable.

Dated: April 5, 2023

Respectfully submitted,

Law Office of Andrew Flores

By: /s/ Andrew Flores

Andrew Flores

Attorney for

Plaintiffs-Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed Opening Brief of Plaintiffs-Appellants 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 April 5, 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