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7/14/20

Darryl Cotton
6176 Federal Blvd.
San Diego, CA 92114
Telephone: (619) 954-4447

Plaintiff *Pro Se*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual

Plaintiff,

vs.

CYNTHIA BASHANT, an individual; JOEL WOHLFEIL, an individual; LARRY GERACI, an individual; REBECCA BERRY, an individual; GINA AUSTIN, an individual; MICHAEL R. WEINSTEIN, an individual; JESSICA MCELFRESH, an individual; and DAVID DEMIAN, an individual

Defendants,

Case No. 3:18-cv-00325-BAS-DEB

PLAINTIFF DARRYL COTTON'S MEMORANDUM OF POINTS AND AUTHORITIES (1) IN OPPOSITION TO DEFENDANT MICHAEL WEINSTEIN'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND (2) REQUEST FOR SANCTIONS

Hearing Date: July 27,2020
Time: NA
Judge: Hon. Cynthia Ann Bashant
Courtroom:

Related Case: 20CV0656-BAS-MDD

ORAL ARGUMENT REQUESTED

Plaintiff pro se Darryl Cotton hereby files this opposition to defendant Michael Weinstein of Ferris & Britton's Motion to Dismiss (the "MTD") Plaintiff's First Amended Complaint (the "FAC") filed by her attorneys James J. Kjar, Jon R Schwalbach, and Gregory B. Emdee of KJAR, McKENNA & STOCKKALPER LLP (the "Kjar Law Firm" and with Weinstein, the "Unethical Attorneys").

Introduction

The sham *Cotton I*[1] suit was knowingly filed as an act in furtherance of a criminal conspiracy to extort Cotton's real property (the "Property") to create an unlawful cannabis monopoly in the City of San Diego (the "Antitrust Conspiracy").[2]

Weinstein is the legal mastermind behind the *Cotton I* sham litigation that resulted in a judgment that enforces an illegal contract that was procured through multiple criminal acts that constitute a fraud on the court and is the product of judicial bias.

Having successfully filed and prevailed in the sham *Cotton I* action through criminal acts, Weinstein now shoves the *Cotton I* judgment in the face of this Court as evidence of his integrity and honesty and relies on various legal doctrines to have this court ratify and immunize his criminal actions. Weinstein is a sociopath and vile individual who deserves to be in jail, this is not me disparaging Weinstein, it is statement of fact that this Court will reach as well.

All four of Weinstein's arguments in the MTD fail because the law does not protect attorneys who file frivolous litigation in furtherance of a criminal conspiracy.

In *Flatley v. Mauro*, 39 Cal. 4th 299, 320, 46 Cal. Rptr. 3d 606, 139 P.3d 2 (2006), the California Supreme Court created a fourth exemption to the anti-SLAPP statute. Speech or petitioning activity that is "illegal as a matter of law" is not constitutionally protected and falls outside the protection of the anti-SLAPP statute. In *Flatley*, the Supreme Court disallowed use of the anti-SLAPP statute against a complaint filed by an entertainer based on extortion demands from the defendant attorney. *Flatley*, 39 Cal. 4th at 320.

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[1] "*Cotton I*" means *Geraci v. Cotton*, San Diego Superior Court, Case No. 37-2017-00010073-CU-BC-22 CTL.

[2] Plaintiff does not seek to vindicate his antitrust cause of actions under federal court. But he notes that his action seeking to vindicate his rights in state court for antitrust violations provide equitable support for the relief he seeks herein.

In *Silberg v. Anderson*, 50 Cal.3d 205, 216 (Cal. 1990), the California Supreme Court held that "[t]he only exception to application of section 47(2) [i.e., litigation privilege] to tort suits has been for malicious prosecution actions." The *Cotton I* action is a stereotype of a malicious prosecution action – it was filed and maintained without probable cause.

In *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1183-84 (9th Cir. 2005), the Ninth Circuit held that "While *Noerr-Pennington* immunity is broad, it is not so broad as to cover all litigation: 'Sham' petitions don't fall within the protection of the doctrine."

Critically, the *Freeman* court went on to state that "*Noerr-Pennington* immunity, and the sham exception, also apply to defensive pleadings, *see In re Burlington N., Inc.*, 822 F.2d 518, 532-33 (5th Cir. 1987), because asking a court to deny one's opponent's petition is also a form of petition; thus, we may speak of a "***sham defense***" as well as a "sham lawsuit." *Freeman*, 410 F.3d at 1184 (emphasis added).

Thus, the MTD itself a "***sham defense***" and its very filing is a criminal act in furtherance of the Antitrust Conspiracy whose goal at this point is to violate Cotton's civil rights by preventing him from accessing the judiciaries to vindicate his constitutional rights free of judicial bias, acts and threats of violence against him, people close to him, and material third party witnesses.

The MTD must be denied because it seeks to deceive this Court into ratifying a void judgment that enforces an illegal contract. The Kjar Law Firm's filing of the MTD is unjustifiable, frivolous, seeks to perpetuate a fraud on this Court and warrants sanctions.

Material Summary of the Case

Geraci has been sued and sanctioned at least three times by the City for his owning/management of illegal marijuana dispensaries at his real properties. Consequently, pursuant to State of California (the "State") and City laws, regulations and public policies, Geraci cannot own a conditional use permit ("CUP") or license to operate a legal cannabis dispensary as a matter of law (the "Sanctions Issue").

Cotton is the owner-of-record of real property (the "Property") in the City that qualifies for a cannabis CUP. Geraci, in order to prevent Cotton from selling the Property to a third-party, Chris Williams (a black man), fraudulently induced Cotton into entering an oral joint venture agreement and promised to provide Cotton, *inter alia*, a 10% equity position in the CUP as consideration for the

Property (the "JVA"). However, Geraci could not actually honor the JVA because he could not own a cannabis CUP because of the Sanctions Issue.

To unlawfully circumvent the Sanctions Issue, Geraci hired cannabis expert Austin. Austin prepared Geraci's CUP application at the Property using his secretary, Berry, as a proxy (the "Berry Application"). In the Berry Application, in violation of applicable disclosure laws, regulations and the plain language of the City's CUP application forms that she certified she understood, Berry knowingly and falsely certified that she is the true and sole owner of the CUP being applied for (the "Berry Fraud" and, collectively with the Sanctions Issue, the "Illegality Issues").

Cotton discovered the Berry Fraud and demanded that Geraci reduce the JVA to writing. Geraci refused, Cotton then terminated the JVA with Geraci and entered into a written joint venture agreement with Richard Martin (the "Martin Sale"). The next day, to prevent the Martin Sale, Geraci's attorneys from the law firm of Ferris & Britton ("F&B") served Cotton with a sham action, *Cotton I*, and a recorded lis pendens on the Property (the "F&B Lis Pendens").

The *Cotton I* complaint denies the existence of the JVA and is predicated on the false allegation that a three-sentence document, executed as a *receipt* by Geraci and Cotton, is a *contract* for Geraci's purchase of the Property (the "November Document").

However, on the same day the November Document was executed, Cotton requested that Geraci confirm in writing the November Document is not a contract (the "Request for Confirmation").

Geraci replied and provided the requested confirmation (the "Confirmation Email").

Weinstein filed *Cotton I* in March 2017 relying on outdated case law, *Pendergrass*[3], to argue that statute of frauds and the parol evidence rule barred the admission of the Confirmation Email as evidence the parties mutually assented to the November Document being a receipt and not a contract.

For over a year, Weinstein's SOLE ARGUMENT was that the November Document is contract because it looks like a contract and the Request for Confirmation and the Confirmation Email as evidence of the JVA is barred by the statute of frauds and the parol evidence rule.

In April 2019, Weinstein was confronted with the 2013 decision by the California Supreme

[3] *Bank of America etc. Assn. v. Pendergrass*, 4 Cal.2d 258 (1935).

Court of *Riverisland* that overruled *Pendergrass*,[4] which **SPECIFICALLY** prevented Weinstein from using the parol evidence rule to bar the Confirmation Email as evidence that Geraci was fraudulently representing the November Document to be a contract when it was executed as a receipt.

In response to *Riverisland*, Geraci submitted a declaration that alleged for the first time in the action, in contradiction of over a year of judicial and evidentiary admissions, that Geraci had called Cotton the day after the November Document was executed and ORALLY agreed that the Request for Confirmation that the Request for Confirmation was a "renegotiating" tactic and that the Confirmation Email was sent by mistake (the "Disavowment Allegation"). **THIS IS SIMPLY ABSURD** – *FOR OVER A YEAR* WEINSTIEN ARGUED THAT THE STATUTE OF FRAUDS BARRED COTTON'S ALLEGATION OF AN ORAL AGREEMENT. THEN WHEN CONFRONTED WITH CASE LAW SHOWING WEINSTEIN IS LIABLE FOR FILING A MALICIOUS PROSECUTION ACTION BASED ON THE INDISPUTABLE WRITTEN EVIDENCE, HE COLLUDES TO FABRICATE THE DISAVOWMENT ALLEGATION TO NEGATE THE LEGAL IMPORT OF THE CONFIRMATION EMAIL. **BUT, THE DISAVOWMENT ALLEGATION ITSELF IS BARRED BY THE STATUTE OF FRAUDS!!**

Further, at trial in *Cotton I*, Weinstein colluded with attorney Gina M. Austin, Geraci's cannabis attorney, to misrepresent the law to Judge Wohlfeil. Specifically, that neither of the Illegality Issues barred Geraci's ownership of a cannabis CUP via the Berry Application. That was a blatant lie that Weinstein knew was a blatant lie – a drug dealer can't acquire a regulated license via a fraudulent application submitted in the name of his receptionist to a government agency.

Judge Joel R. Wohlfeil who presided over *Cotton I* trusted Weinstein and Austin's factually and legally contradicted representations and testimony because he is a biased imbecile of epic proportions that decided to believe them based on his personal belief that they are incapable of acting unethically. I can't help that it is still unbelievable to me how this could have ever occurred.

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[4] *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association* ("*Riverisland*") (2013) 55 Cal.4th 1169, 1182 ("[W]e overrule *Pendergrass* and its progeny, and reaffirm the venerable maxim stated in *Ferguson v. Koch* [(1928) 204 Cal. 342, 347]: '***[I]t was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud.***'") (emphasis added).

Statement of Facts

I. THE SANCTIONS ISSUE[5]

1. On June 17, 2015, Geraci executed a Stipulated Judgment as a defendant in which he judicially admitted that:

a. "The address where the Defendants were ***maintaining*** a marijuana dispensary business at all times relevant to this action is 3505 Fifth Ave, San Diego [the 'Geraci Property']." (Request for Judicial Notice ("RJN") No. 1 (the "CCSquared Judgment") at ¶ 4.)

b. "The [Geraci Property] is owned by JL 6th Avenue Property, LLC (JL)… Defendants GERACI and KACHA are members of JL and hereby certify they have authority to sign for and bind herein." (*Id.* at ¶¶ 4-5.)

c. Geraci and his co-defendants agree to be jointly sanctioned as "civil penalties" the amount of $25,000. (*Id.* ¶ 17.)

II. GINA AUSTIN IS AN EXPERT IN LOCAL CANNABIS COMPLIANCE

2. On September 4, 2018, Austin executed a declaration stating: "***I am an expert in cannabis licensing and entitlement at the state and local levels and regularly speak on the topic across the nation***." (RJN No. 2 (Austin Decl.), ¶ 2 (emphasis added).

III. NEGOTIATIONS FOR THE PROPERTY AND THE NOVEMBER DOCUMENT

Per Geraci's sworn declaration:[6]

3. "In approximately September of 2015, I began lining up a team to assist in my efforts to develop and operate a [dispensary] in the [City]." (RJN No. 3 (Geraci Decl.) at ¶ 2.)

4. "I hired… design professional, Abhay Schweitzer of TECHNE[,] a public affairs and public relations consultant with experience in the industry, Jim Bartell of Bartell & Associates. In addition, I hired a land use attorney, Gina Austin of Austin Legal Group." (*Id.*)

5. "In approximately June 2016, [I was introduced to the Property] as a potential site for acquisition and development for use and operation as a [dispensary]." (*Id.* at ¶ 3.)

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[5] There are other legal actions in which Geraci was sanctioned, for simplicity, Cotton only sets forth one.

[6] Cotton does not agree with the facts alleged in Geraci's declaration, Cotton's point in using Geraci's declaration is that even if everything he says is assumed to be true, he fails to state a cause of action.

6. "[I]n approximately mid-July 2016… I expressed my interest to Mr. Cotton in acquiring his Property if our further investigation satisfied us that the Property might meet the requirements for [a dispensary] site." (*Id.*)

7. "On November 2, 2016, Mr. Cotton and I executed [the November Document.]" (*Id.* at ¶ 5.)

8. "After we signed the [November Document], Mr. Cotton immediately began attempts to renegotiate our deal for the purchase of the Property. This literally occurred the evening of the day he signed the [November Document]." (*Id.* at ¶ 10.)

9. "On November 2, 2016, at approximately 6:55 p.m., Mr. Cotton sent me an email, which stated:

> Hi Larry, [¶] Thank you for meeting today. Since we [executed] the Purchase Agreement in your office for the sale price of the property I just noticed the 10% equity position in the dispensary was not language added into that document. I just want to make sure that we're not missing that language in any final agreement as it is a factored element in my decision to sell the property. ***I'll be fine if you simply acknowledge that here in a reply***."

(The "Request for Confirmation") (*Id.* at ¶ 10 (emphasis added).)[7]

10. "I responded from my phone '***No no problem at all.***'" (The "Confirmation Email") (*Id.* (emphasis added).)

11. "The next day I read the entire email and I telephoned Mr. Cotton because the total purchase price I agreed to pay for the subject property was $800,000 and I had never agreed to provide him a 10% equity position in the dispensary as part of my purchase of the property." (*Id.*)

12. "Mr. Cotton's response was to say something to the effect of 'well, you don't get what you don't ask for.' He was not upset and he commented further to the effect that things are 'looking pretty good-we all should make some money here.' And that was the end of the discussion." (The "Disavowment Allegation") (*Id.*).

13. Geraci has no evidence that Cotton mutually assented to the Request for Confirmation being - in contradiction of its plain, clear and unambitious language - a renegotiating (or

[7] The Geraci declaration incorrectly quotes the Request for Confirmation Email as stating "examined," when in fact it said "executed." It is outside the scope of this Opposition to address, but it was a purposeful misstatement to confuse Judge Wohlfeil, which it did.

"extortionate") tactic to acquire a 10% equity position in the CUP that the parties had not agreed to. (*See, gen., id.*)

14. Geraci has no evidence that Cotton mutually assented to the Confirmation Email being sent by mistake and it having no legal effect other than his own self-serving testimony that the Disavowment Allegation took place. (*See, gen., id.*)

IV. THE BERRY FRAUD

15. On October 31, 2016, Berry submitted the Berry Application to the City.

16. Austin personally reviewed and commented on the Berry Application before it was submitted to the City. (RJN No. 4 at Trial Ex 35-004.)

17. The Berry Application included Form DS-318 (Ownership Disclosure Statement (RJN No. 6)) and Form DS-3032 (General Application (RJN No.5)).

18. In the General Application, Berry certified the following to be true:

> I certify that I have read this application and state the above information is correct, and that I am the property owner, authorized agent of the property owner, or other person having a legal right, interest, or entitlement to the use of the property that is the subject of this application (Municipal Code Section 112.0102). I understand that the applicant is responsible for knowing and complying with the governing policies and regulations applicable to the proposed development or permit.

(RJN No. 5.)

19. The Ownership Disclosure Statement required Berry to provide a list that:

> … ***must*** include the names and addresses of ***all*** persons who have an interest in the property, ***recorded or otherwise***, and state the type of interest (*e.g.*, tenants who will benefit from the permit, ***all*** individuals who own the property).

(RJN No. 6) (emphasis added).

20. Berry did not disclose Geraci in any capacity in the Berry Application as required by the plain language of the Ownership Disclosure Statement. (*See id.*)

21. Berry testified at trial in *Cotton I* that the failure to disclose Geraci was purposeful and purportedly because Geraci was an Enrolled Agent with the IRS. (RJN No. 7 at 193:15-194:5 (transcript of Berry's testimony at *Cotton I* trial.)

V. COTTON'S PRO SE CROSS-COMPLAINT AND WEINSTEIN'S MOTION TO DISMISS

22. On May 12, 2017, Cotton filed pro se a cross-complaint in *Cotton I* against Geraci and erry with causes of action for: (i) quiet title, (ii) slander of title, (iii) fraud/fraudulent misrepresentation, (iv) fraud in the inducement, (v) breach of contract, (vi) breach of oral contract, (vii) breach of implied contract, (viii) breach of the implied covenant of good faith and fair dealing, (iv) trespass, (x) conspiracy, and (xi) declaratory and injunctive relief.

23. Cotton's cause of action for breach of oral contract materially stated as follows (emphasis added):

> ***The agreement reached on November 2nd, 2016 is a valid and binding oral agreement between Cotton and Geraci.***
>
> Geraci has breached the agreement by, among other actions described herein, alleging the written November [Document] is the final and entire agreement for the Property.

RJN 10 ¶ 96-98.

24. Cotton's cause of action against Geraci and Berry for conspiracy materially alleged as follows (emphasis added):

> Berry submitted the [Berry Application] in her name on behalf of Geraci because Geraci has been a named defendant in numerous lawsuits brought by the City of San Diego against him for the operation and management of unlicensed, unlawful and illegal marijuana dispensaries. **These lawsuits would ruin Geraci's ability to obtain a CUP himself [i.e., the Sanctions Issue]**.
>
> Berry knew that she was filing a document with the City of San Diego that contained false statements, specifically that she was a lessee of the Property and owner of the [P]roperty [i.e., the Berry Fraud]. Berry, at Geraci's instruction or her own desire, submitted the [Berry Application] as Geraci's agent, and thereby participated in Geraci's scheme to deprive Cotton of his Property and his ownership interest in the [District Four CUP].

25. On June 16, 2017, F&B filed a demurrer to Cotton's pro se cross-complaint (the "First F&B Demurrer").

26. On November 3, 2017, at the hearing on the F&B Demurer, Weinstein argued:

> The issue -- what's really happening in this complaint and what's really alleged, if you look at the factual allegations, is my client failed to reduce to writing the agreement -- the oral agreement that Mr. Cotton says was reached between them. **You can't get around the statute of frauds that easily. You can't have an agreement that requires compliance with the statute of frauds and say, But I don't have to comply with it because I had an oral agreement to put it in writing**; and they failed to put it in writing, so, therefore, the statute of frauds isn't violated. That's not the law. So that's my position on breach of contract claim.

RJN 9 at 10:13-20 (Emphasis added).

27. Weinstein's evil and vile nature is made irrefutable by his own words: you can't "get around the statute of frauds that easily."

28. This is Weinstein's position for over a year when he thought *Pendergrass* would bar the admission of the Confirmation Email.

29. When confronted with *Riverisland*, he colluded with Geraci and Berry to fabricate the Disavowment Allegation.

30. Weinstein had attorney Gina M. Austin testify at trial regarding the legality of Geraci's ownership of a cannabis CUP via the Berry Application.

31. Regarding the City's disclosure requirements, Austin testified at trial in *Cotton I* that she was not aware of the judgments against Geraci (i.e. the CCSquared Judgment). (RJN Ex. 8 at 50:1-7.)

32. Austin also testified that the City does not bar any individuals from acquiring a cannabis CUP. (Id. at 47:10-14 ("[Question:] You are aware that certain people are not eligible for or are barred from obtaining certain CUPs. Correct? [Answer:] Not at the city level, but at the state level, yes.").)

33. Then, after being confronted with form DS-318 from the Berry Application, requiring Berry to provide a list of all persons who have an interest in the Property, Austin was asked why "after reading that, why [did] it seem unnecessary to list Mr. Geraci?" (Id. at 51:25-26.) Austin testified: "I don't know that it - - it was unnecessary or necessary. We just didn't do it." (Id. at 51:27-28 (emphasis added).) coercion

34. In regard to state disclosure requirements, Austin testified that the CCSquared Judgment, if true, would not bar Geraci from lawfully owning a cannabis license pursuant to the Berry Application (the "Sanctions Issue"). (RJN Ex. 8 at 56:16-57:3.)

VI. THE FAC AND THE MTD

35. On May 13, 2020 Cotton filed the FAC that included the following allegations against Austin:

a. "*Cotton I* was filed by attorney Michael Weinstein of Ferris & Britton without probable cause." (FAC ¶ 13.)

b. "Weinstein filed the *Cotton I* complaint relying on *Pendergrass* line of reasoning seeking to use the parol evidence rule as shield to bar the admission of the Confirmation Email and other incriminating parol evidence." (FAC ¶ 78.)

c. ¶¶ 93-101 describes the evolution of the Disavowment Allegation – the fabrication of evidence in response to case law that shows Cotton I was filed without probable cause.

36. On June 26, 2020, Weinstein and his unethical attorneys filed the MTD making four arguments, none of which address the illegality of *Cotton I* judgment or the Disavowment Allegation.

37. According to the Kjar Law Firm, if unethical attorneys file a frivolous lawsuit and are lucky enough to get a judge like Wohlfeil, then ANY crimes can be committed so long as they can get a judgment because then that judgment is a SHIELD that ratifies their illegal activities.

38. That is not the law. And the MTD as manifested, was filed in bad faith, in violation of FRCP 11.

Legal Standard

A complaint must plead sufficient factual allegations to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

"A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare*, 534 F.3d 1116, 1121 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). Here, Cotton does not just allege, he provides the law and Weinstein's own judicial and evidentiary admissions proving that he fabricated the Disavowment Allegation and colluded with Austin to commit a fraud on the court.

ARGUMENT

I. MATERIAL STATE AND CITY LAWS AND REGULATIONS

A. GENERAL CITY CUP APPLICATION REQUIREMENTS

Since August 1993, SDMC § 11.0401 has prohibited the furnishing of false or incomplete information in any application for any type of permit or CUP from the City. (*See* SDMC § 11.0401(b)

("No person willfully shall make a false statement or fail to report any material fact in any application for City license, permit, certificate, employment or other City action under the provisions of the [SDMC].").)

SDMC § 11.0402 provides that "[w]henever in [the SDMC] any act or omission is made unlawful, it shall include causing, permitting, aiding or abetting such act or omission."

SDMC § 121.0302(a) provides that: "It is unlawful for any person to maintain or use any premises in violation of any of the provisions of the Land Development Code, without a required permit, contrary to permit conditions, or without a required variance."

The Land Development Code consists of Chapters 11 through 14 of the SDMC (encompassing §§ 111.0101-1412.0113). (SDMC § 111.0101(a).)

The City's General Application for CUP applications requires - and cites SDMC § 112.0102 - that an applicant certify they are the owner, an agent of the owner, or a person having a legal right to the property on which the CUP application is filed on.

SDMC § 121.0311 states as follows: "Violations of the Land Development Code shall be treated as ***strict liability*** offenses regardless of intent." (Emphasis added.)

B. CANNABIS CUP APPLICATION REQUIREMENTS[8]

SDMC § 42.1502 defines a "cannabis outlet" (i.e., a dispensary) as a "retail establishment operating with a Conditional Use Permit in accordance with… retailer licensing requirements contained in the California Business and Professions Code [("BPC")] sections governing cannabis and medical cannabis." (Emphasis in original.)

BPC § 26057 (Denial of Application) provides as follows:

> (a) The licensing authority ***shall deny*** an application if… the applicant… do[es] not qualify for licensure under this division.
>
> (b) The licensing authority may deny the application for licensure or renewal of a state license if any of the following conditions apply.

[8] The Berry Application was originally a medical cannabis CUP application that was converted to a for-profit cannabis retail CUP application during the course of *Cotton I*. Throughout the Course of *Cotton I*, various cannabis laws and regulations at the State and City level were applicable to medical and non-medical applications that changed over time. For simplicity, Petitioners focus on the primary State statute that applied when the *Cotton I* judgement was issued, BPC § 26057.

> (1) Failure or inability to comply with the provisions of this division, any rule or regulation adopted pursuant to this division…
>
> (3) Failure to provide information required by the licensing authority.
> ….
> (7) The applicant, or any of its officers, directors, or owners, has been sanctioned by a licensing authority or a city, county, or city and county for unauthorized commercial cannabis activities… in the three years immediately preceding the date the application is filed with the licensing authority.

BPC § 26057(a),(b)(1)(3)(7) (emphasis added).

I. THE NOERR-PENNINGTON DOCTRINE DOES NOT IMMUNIZE WEINSTEIN'S FABRICATION OF THE DISAVOWMENT ALLEGATION OR SUBORNING PERJURY FROM AUSTIN ON A CASE DISPOSITIVE ISSUE

A. THE DISAVOWMENT ALLEGATION

The Request for Confirmation and the Confirmation Email prove that Cotton did not mutually assent to the November Document being a contract for Geraci's purchase of the Property. Under *Pendergrass*, barring the Confirmation Email, Weinstein had legal probable cause to argue that the November Document is a contract because it has Cotton's signature and looks like a contract. *IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 641 ("[U]nder *Pendergrass*, external evidence of promises inconsistent with the express terms of a written contract were not admissible, ***even to establish fraud***.") (Emphasis added).

However, post-*Riverisland*, the Confirmation Email is not barred as evidence of Geraci's fraudulent representation of the November Document as a contract when it is clear that there is no mutual assent to such. Thus, Weinstein is guilty for filing a malicious prosecution action.

As the California Supreme Court held in *Casa Herrera*, attorneys filing cases dismissed pursuant to the parol evidence rule are liable for filing a malicious prosecution action. *Casa Herrera, Inc. v. Beydoun*, 32 Cal.4th 336, 349 (Cal. 2004) ("Accordingly, we hold that terminations based on the parol evidence rule are favorable for malicious prosecution purposes.").

THERE IS NOTHING COMPLICATED ABOUT THIS. WEINSTEIN, FACING LIABILITY, HAD TO COME UP WITH SOMETHING TO AVOID FINANCIAL AND LEGAL LIABILTY. He fabricated the Disavowment Allegation never imagining I would get to this point and be in federal court and he would have to try to argue that the Disavowment Allegation was not barred

his own representation of the statute of frauds or that it did not contradict his previous judicial and evidentiary admissions.

And, as I have repeatedly argued, the statute of frauds does not apply to an oral joint venture agreement as I have alleged from day one. *Bank of California v. Connolly* (1973) 36 Cal.App.3d 350, 374 ("[A]n oral joint venture agreement concerning real property is not subject to the statute of frauds even though the real property was owned by one of the joint venturers.").

The decision in *Clear Connection Corp. v. Comcast Cable Commc'ns Mgmt.* ("*Clear Connection*"), LLC, No. 2:12-cv-02910-TLN-DAD, at *9 (E.D. Cal. Dec. 3, 2013) is instructive. In *Clear Connection* "Comcast's motion for judgment on the pleadings as to Clear Connection's fraud claims turns entirely on whether the fraud exception to the parol evidence rule applies in the instant case." *Id.* at *9.

In reaching its decision, the *Clear Connection* court relied on and summarized *Groth-Hill* as follows:

> *Groth-Hill Land Company v. General Motors*, LLC, 2013 WL 3853160 (N.D. Cal. Jul. 23, 2013), which, in reaching its conclusion, cites heavily the California Supreme Court's decision in *Riverisland*, is instructive. In *Groth-Hill*, similar to the instant action, "plaintiffs in their promissory fraud claim [did] not attack the validity of the . . . agreements"; "***[i]nstead, they [sought] to recover based on promises [defendant] allegedly made to them over the phone, promises which run counter to the terms of the written contract.***" *Id.* at *15. The court held that the fraud exception rule did not apply in those circumstances and the parol evidence rule excluded any such evidence. *Id.* at *16.
>
> Here, as was the case in *Groth-Hill*, *Clear Connection* "do[es] not attack the validity of the written agreements or argue that [Comcast] breached the written contracts," but rather "argue[s] that because this proceeding deals with a claim of fraud, the parol evidence rule does not apply." *Id.* at *15. ***Therefore, Clear Connection is "barred, as a matter of state law, from introducing alleged oral promises which contradict the terms of the [fully integrated] written agreements [Clear Connection] signed with" Comcast.*** *Id.* at *16.

Clear Connection at *9 (emphasis added).

Here, identically to *Groth-Hill* and *Clear Connection*, Geraci/Weinstein do not dispute the authenticity of the Request for Confirmation or the Confirmation Email, instead they prevailed in *Cotton I* by seeking "***to recover based on promises [Cotton] allegedly made to them over the phone, promises which run counter to the terms of the written contract.***" *Id.*

These cases cannot be distinguished from the instant situation. Weinstein is exponentially smarter than Wohlfeil. That is why, when faced with Riverisland, requiring the dismissal of *Cotton I*

and making him liable for filing a malicious prosecution action, he fabricated the Disavowment Allegation.

B. GINA M. AUSTIN'S PERJURY SUBORNED BY MICHAEL WEINSTEIN

Not all fraud is fraud on the court, but (i) fraud by any witness on a case dispositive issue or (ii) perjury by ANY officer of the court is a fraud on the court. *See Levander v. Prober* (*In re Levander*), 180 F.3d 1114, 1120 (9th Cir. 1999) (perjury committed by a single non-party witness was so detrimental to the entire case that it was held to be fraud on the court); *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1130 (9th Cir. 1995) ("One species of fraud upon the court occurs when an "officer of the court" perpetrates fraud affecting the ability of the court or jury to impartially judge a case."). Here, Weinstein suborned Austin's perjury on a case dispositive issue – the legality of Geraci's ownership of a cannabis CUP via the Berry Application.

A. THE SANCTIONS ISSUE

Geraci was sanctioned on June 17, 2015 in the CCSquared Judgment for "maintaining" an illegal dispensary at the Geraci Property. At trial in *Cotton I*, Geraci lied and said he has never operated a dispensary. His judicial admission in the Stipulated Judgment directly contradicts his testimony – he "maintained" an illegal marijuana dispensary. END OF STORY.

Even assuming, arguendo, his judicial admissions in the Stipulated Judgment did not directly contradict his testimony, as a co-owner of JL he is still liable. "[A]s the owner of the [Geraci Property] where an illegal marijuana facility was operating, [Geraci is] strictly liable for the offense, regardless of his knowledge, intent, or active participation in the operation. [Citations.]" *City of San Diego v. Medrano*, D071111, at *7 (Cal. Ct. App. Aug. 2, 2017) (unpublished); *see People v. Superior Court of L.A. Cnty.*, 234 Cal.App.4th 1360, 1385 (Cal. Ct. App. 2015) ("[Party's] claim that he lacked knowledge that there was a marijuana facility on his property lacks merit as violation of [the Los Angeles Municipal Code] section 12.21A.1(a) is a strict liability offense.").

Pursuant to BPC § 26057(a),(b)(7), applicable to all cannabis CUP applications with the City (*see* SDMC § 42.1502), Geraci was barred from owning a cannabis CUP until June 18, 2018.

The Berry Application was submitted on October 31, 2016. Therefore, setting aside other arguments, because the November Document's object is Geraci's ownership of a cannabis CUP, which is illegal, it is void and unenforceable. *Consul Ltd. v. Solide Enterprises, Inc.*, 802 F.2d 1143,

1148 (9th Cir. 1986) ("A contract to perform acts barred by California's licensing statutes is illegal, void and unenforceable.").

Austin is a cannabis expert in local compliance laws, Austin knows the strict liability nature of willfully lying in cannabis CUP applications. And so does Weinstein, there is nothing complicated about this. Austin's testimony that she was not aware of the CCSquared Judgment is ridiculous – in over three years Weinstein never once thought to raise the issue of Geraci's sanctions which were raised in Cotton's pro se complaint and thereafter repeatedly raised and argued? This ridiculous position by Weinstein and Austin, coupled with Austin's inability to articulate an explanation for failing to disclose Geraci in the Berry Application (i.e., "We just didn't do it.") is so offensive that Cotton does not understand why the judiciary does not sanction every attorney related to this. Frivolous, baseless litigation is why everyone hates attorneys and do not trust the judicial system.

C. THE BERRY FRAUD

Austin/Berry's failure to disclose Geraci in the Berry Application:

(i) violates the plain and clear requirement set forth in the Ownership Disclosure Form requiring a list of all parties with an interest in the CUP or the Property (required pursuant to SDMC § 112.0102 as cited to in the Ownership Disclosure Form);

(ii) violates SDMC § 11.0401 (prohibiting willful false statements in CUP applications);

(iii) makes Austin, Geraci, Berry, Bartell and Schweitzer jointly liable pursuant to SDMC § 11.0402 (joint liability for aiding & abetting) for which there can be no excuse as the violations are treated as strict liability offenses regardless of intent pursuant to SDMC § 121.0311; and

(iv) violates BPC § 26057(b)(3) ("The applicant has failed to provide information required by the licensing authority."). *See* Cal. Code Regs. tit. 16 § 5003(b)(1) (defining "Owner" for purposes of cannabis applications as, *inter alia*, a "person with an aggregate ownership interest of 20 percent or more in the person applying for a license or a licensee").

In *Homami,* the court declined to enforce an oral contract that provided that a buyer of real property would pay interest secretly to the seller in order to allow the seller to avoid declaring interest income and thus to evade required taxes. *Homami v. Iranzadi*, 211 Cal.App.3d 1104.

In reaching its decision, the court identified a "group of cases… involv[ing] plaintiffs who have attempted to circumvent federal law. Generally, these cases arise where nonveterans seek to

obtain government benefits and entitlements available to veterans only, either by setting up a strawman veteran or otherwise by falsifying documents." *Homami* at 1110.

Here, similarly, Geraci used his secretary Berry as a strawman, or rather a strawwoman, to unlawfully acquire a cannabis CUP that he could not own in his own name. And he did so via a fraudulent application that violated clearly applicable State and City laws and regulations requiring the disclosure of Geraci. This was done at Austin's legal advice.

Therefore, even setting aside the Sanctions Issue, the *Cotton I* judgment is void because in direct contravention of Austin's testimony, Geraci cannot own a cannabis permit via the Berry Application because of the Berry Fraud. "To permit a recovery here on any theory would permit [Geraci, Austin and their conspirators] to benefit from [their] willful and deliberate flouting of [the] law[s] designed to promote the general public welfare. ***This cannot be countenanced by the courts***." *Id.* at 1110 (quoting *May v. Herron*, 127 Cal.App.2d 707, 712 (Cal. Ct. App. 1954) (emphasis added)).

D. WEINSTEIN/AUSTIN COMMITTED PERJURY ABOUT THE ILLEGALITY ISSUES AND THUS COMMITTED A FRAUD ON THE COURT

"Perjury constitutes fraud on the court only in special situations, such as when an officer of the court commits the perjury, or the perjury prevents a critical issue or piece of evidence from coming before the court. [Citations.]" *Myser v. Tangen*, No. C14-0608JLR, at *12 (W.D. Wash. Feb. 5, 2015).

Austin's testimony regarding the Illegality Issues was case-dispositive. Because of her testimony, Judge Wohlfeil sent the breach of contract cause of action to the jury implicitly finding that Geraci can lawfully own a cannabis CUP via the Berry Application even in light of the Illegality Issues. Austin is a liar and Wohlfeil is a biased imbecile who is responsible for subjecting me to hell for over three years because he is too stupid and lazy to check applicable laws and regulations.

Weinstein is smarter than both Austin and Wohlfeil. It is outside the scope of this MTD, but I have the detailed arguments for why Weinstein can be construed as a matter of law as having "constructive knowledge" of the Geraci Judgments and the SDMC which make it illegal for Geraci to own a cannabis CUP. Weinstein cannot rely on Austin's testimony and say, "she lied, I'm innocent, I had nothing to do with the illegal scheme to steal Darryl's property. Gina told me it was legal, she testified that it was so I can justifiably rely on her testimony."

II. COTTON FAC STATES CLAIMS AGAINST WEINSTEIN THAT CAN BE GRANTED.

In *Silberg v. Anderson*, 50 Cal.3d 205, 218-19 (Cal. 1990), the court discussed the strongest litigation privilege, one that Weinstein does not address. Weinstein does not address it because the sole exception to the California litigation privilege is a malicious prosecution action. For the reasons set forth above, the judgement in *Cotton I* offers no defense to Weinstein. And, as a matter or law, based on Geraci's and Weinstein's judicial admissions, judgment in favor of Cotton must be entered in the last state at which *Cotton I* found itself before judgment was issued (Cotton is in this action seeking to access the state courts so he can vindicate his rights there as is his constitutional right).

The *Silberg* court noted that even when the litigation privilege applies there are other avenues to sanction attorneys who commit illegal acts:

> We observe, however, that in a good many cases of injurious communications, other remedies aside from a derivative suit for compensation will exist and may help deter injurious publications during litigation. Examples of these remedies include criminal prosecution for perjury (Pen. Code, § 118 et seq.) or subornation of perjury (Pen. Code, § 653f, subd. (a)); criminal prosecution under Business and Professions Code, section 6128; and State Bar disciplinary proceedings for violation of Business and Professions Code, section 6068, subdivision (d).

In short, there is no doubt that Geraci, Weinstein, Austin, among others, all committed multiple CRIMINAL ACTS and the *Cotton I* judgment is void. Weinstein cannot make his illegal acts legal and if there was any justice in the world he would be criminally convicted and sent to jail to suffer for the suffering he has inflicted on so many others.

III. WEINSTEIN'S ACTIONS ARE CRIMINAL AND NOT PROTECTED.

The California Supreme Court "made it clear in *Flatley* that conduct must be illegal as a ***matter of law*** to defeat a defendant's showing of protected activity. The defendant must concede the point, or the evidence conclusively demonstrate it, for a claim of illegality to defeat an anti-SLAPP motion at the first step." *City of Montebello v. Vasquez*, 1 Cal. 5th 409, 205 Cal. Rptr. 3d 499, 418 (Cal. 2016).

Weinstein concedes all FACTS – Geraci was sanctioned for illegal cannabis activity and sought to acquire a cannabis CUP application via the Berry Application with the Berry Fraud. He concludes in opposition to those undisputed facts and law that Geraci's ownership of a cannabis CUP

is not illegal. He is covering up for the fact that he filed a malicious prosecution action. This is not open to debate. Weinstein's attorneys by submitting the MTD and certifying per FRCP ¶ 11 that they agree with Weinstein's conclusion. Thus, they disrespect this Court and seek to defile it by deceiving it into ratifying a judgment that enforces an illegal contract that was procured through Weinstein's Machiavellian intellect.

IV. COTTON'S CIVIL RIGHTS HAVE BEEN VIOLATED AND THERE IS FEDERAL SUBJECT MATTER JURISDICTION

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. ***Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution.***

Chambers v. Baltimore Ohio R.R, 207 U.S. 142, 148 (1907) (emphasis added).

Weinstein masterminded the *Cotton I* litigation through numerous illegal actions – the most obvious being filing *Cotton I* without probable cause relying on the *Pendergrass* line of reasoning, fabricating the Disavowment Allegation in response to *Riverisland* overruling *Pendergrass*, and misrepresenting the law and suborning Austin's perjured testimony regarding the legality of Geraci's ownership of a cannabis CUP via the Berry Application.

That Judge Wohlfeil is an imbecile is why federal jurisdiction exists – the United States Constitution grants me the right of access to the courts free of biased judges like Wohlfeil and violent corrupt attorneys like Weinstein.

V. THE COURT HAS A DUTY UNDER THESE FACTS TO DECLARE THE *COTTON I* JUDGMENT VOID AND FIND THAT WEINSTEIN CANNOT HIDE HIS ILLEGAL ACTIONS UNDER THE GUISE OF ZEALOUS ADVOCACY.

The Supreme Court, in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, created the standard necessary to establish a fraud on the court claim. There, the court held that a "deliberately planned scheme to present fraudulent evidence constitutes fraud upon the court[.]" *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1132 (9th Cir. 1995) (citing *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 245-46, 250).

More specifically, the *Hazel-Atlas* Court held as follows: "We hold, therefore, that the Circuit

Court on the record here presented [footnote 5] had both the duty and the power to vacate its own judgment and to give the District Court appropriate directions." *Hazel-Atlas*, supra, at 249-50.

In footnote five, the Supreme Court described the "record… presented" that imposed a DUTY on the Circuit Court to vacate the judgment for a fraud on the court:

> We do not hold, and would not hold, that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on ex parte affidavits without examination and cross-examination of witnesses. ***It should again be emphasized that Hartford has never questioned the accuracy of the various documents which indisputably show fraud on the Patent Office and the Circuit Court, and has not claimed, either here or below, that a trial might bring forth evidence to disprove the facts as shown by these documents***. And insofar as a trial would serve to bring forth additional evidence showing that Hazel was not diligent in uncovering these facts, we already have pointed out that such evidence would not in this case change the result.

Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238, 250 n. 5 (1944)

Here, IDENTICAL to *Hazel-Atlaz*, Geraci, Weinstein, Austin and every other attorney who has filed motions to dismiss do NOT dispute the authenticity of the Berry Application or that Geraci was sued and sanctioned for owning and operating illegal marijuana dispensaries. And also identical to Hazel-Atlaz, there is no additional evidence that can be produced that will make Geraci's ownership of a cannabis CUP via the Berry Application legal, nor any testimony that can be produced by Weinstein that would make Weinstein innocent.

Lastly, Cotton wants to be clear that while he is not seeking to vindicate his causes of action against Weinstein for being a co-conspirator in the Antitrust Conspiracy, justice and fairness considerations should persuade this Court to help Cotton vindicate his rights in state court.

Federal antitrust cases can be cited in support of cases brought in state court under California's Cartwright Act. "[T]he *Walker Process* doctrine… provides antitrust liability for the commission of fraud on administrative agencies, for predatory ends." *Clipper Exxpress, v. Rky. Mount. Motor Tariff* ("*Clipper*"), 674 F.2d 1252, 1270 (9th Cir. 1982). In *Clipper*, the Ninth Circuit held "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." *Id.* at 1270. Further, that the "supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from

the antitrust laws." The filing and maintaining of the *Cotton I* action seeking to make the Berry Application lawful notwithstanding the Berry Fraud is simply absurd, and blatantly illegal.

"There is no first amendment protection for furnishing with predatory intent false information to an administrative or ***adjudicatory body***." *Clipper Exxpress, v. Rky. Mount. Motor Tariff*, 674 F.2d 1252, 1270 (9th Cir. 1982) (emphasis added). The "*Walker Process* recognizes that fraudulently supplying information can result in monopolization, and therefore violate the antitrust laws." *Id.* at 1272. *Cotton I* is a stereotype of a sham action filed in furtherance of antitrust conspiracy seeking to create a monopoly in the City.

There can be no defense for ANY attorney that files any petition of any kind with any court seeking to have it ratify a judgment they know enforces an illegal contract. Zealous advocacy of a client falls short of the duty of candor and honesty that every attorney owes the courts. "***[W]here there is danger that the tribunal will be misled, a litigating lawyer must forsake his client's immediate and narrow interests in favor of the interests of the administration of justice itself***." *U.S. v. Shaffer Equipment Co.*, 11 F.3d 450, 458 (4th Cir. 1993) (quoting 1 Geoffrey C. Hazard, Jr. and W. William Hodes, The Law of Lawyering 575-76 (1990) (emphasis added)).

Conclusion

Attorneys from day one of law school are governed by the honor code. That is later codified into the rules of procedure, evidence and ethical rules of professional responsibility under which all attorneys practice law. Judges generally accept as true the written and oral representations of attorneys because the attorneys are officers of the court and it is their duty to be truthful with the court.

Once fraud upon the court occurs, the court is not required to examine the effect that such conduct might have had on the ultimate judgment, but rather the court in fact has a "duty" to take corrective action when fraud upon the court occurs. *Id.* From the attorneys viewpoint the rule should always be "If you lie, you lose".

Geraci is a drug dealer because he has been sanctioned for illegal commercial marijuana sales. Weinstein sought to help him acquire a cannabis CUP via a fraudulent application in violation of the law. When the fraud was exposed and litigation ensured, Weinstein and Austin misrepresented the law and made false representations to Judge Wohlfeil at trial. Judge Wohlfeil is an imbecile who did not check the law and entered a judgment in violation of the law that enforces an illegal contract.

Now, Weinstein is being represented by James J. Kjar, Jon R Schwalbach, and Gregory B. Emdee of KJAR, McKENNA & STOCKKALPER LLP who all seek to perpetuate the criminal conspiracy effectuated in *Cotton I* upon this Court.

I am angry at Judge Wohlfeil and every other judge that has had to consider the illegality issues before them. But the Court should not punish me for being angry. The justice system has failed me. I hope that this Court can redress the wrongs against me, even those wrongs were committed against me by other judges.

I IMPLORE THE COURT TO LOOK PAST MY ANGER AND LOOK AT THE FACTS.

Cotton requests that the Court deny the MTD, grant Cotton leave to amend his complaint, and award Cotton sanctions for Kjar's Law Firm frivolous filing of the MTD.

Dated: July 13, 2020

Darryl Cotton