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Amy Sherlock and Minors T.S.
and S.S.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

GINA M. AUSTIN, an individual; AUSTIN LEGAL GROUP APC, a California Corporation; JOEL R. WOHLFEIL, an individual; LAWRENCE (AKA 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

Case No.: 3:20-cv-00656-BAS-DEB

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS THE FIRST AMENEDED COMPLAINT BY MICHAEL WEINSTEIN, SCOTT H. TOOTHACRE, ELYSSA KULA, RACHEL M. PRENDERGAST, AND FARRIS &BRITTON APC

Hearing Date: August 24, 2020
Time: 10:00 A.M.

ORAL ARGUMENT REQUESTED

District Judge: Cynthia Ann Bashant
Magistrate Judge: Daniel E. Butcher
Courtroom: 4B (4th Floor)
Complaint Filed: April 3, 2020
Trial Date: None

WEINSTEIN, an individual; SCOTT TOOTHACRE, an individual; ELYSSA KULAS, 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; 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, MICHAEL TRAVIS PHELPS, an individual; THE CITY OF SAN DIEGO, a municipality; 2018FMO, LLC, a California Limited Liability Company; FIROUZEH TIRANDAZI, an individual; and DOES 1 through 50, inclusive,

Defendants,

JOHN EK, an individual;
THE EK FAMILY TRUST, 1994 Trust,

Real Parties In Interest

Related Case: 18CV00325-BAS-DEB

Plaintiff's hereby file this opposition to defendants' Michael Weinstein, Scott Toothacre, Elyssa Kulas, and Ferris and Britton ("F&B") (hereinafter, collectively, "Defendants") Motion to Dismiss (the "MTD") Plaintiff's First Amended Complaint (the "FAC"). Plaintiffs also join Darryl Cotton in opposition to other defendants' motion to dismiss in the related case referenced above, to the extent that Cotton's opposition arguments support Plaintiffs' opposition to the instant MTD.

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

Defendants mischaracterize the scheme at issue as "pure litigation conduct," and paint Plaintiffs' claims as simply an attempt to criminalize the filing and maintaining of various lawsuits, including *Cotton I*.[1] This is nothing but a straw man. This case is not about the mere filing/maintaining of meritless lawsuits. Rather, it is about the formation and actions of a criminal enterprise (the "Enterprise") seeking to create an unlawful cannabis monopoly (the "Antitrust Conspiracy"), with sham litigation serving as only a piece of the Antitrust Conspiracy. (FAC ¶¶ 2-4).

Cotton I was adjudicated in favor of Defendants' client, Lawrence Geraci, as a result of, *inter alia*, multiple criminal acts. Having unlawfully acquired the *Cotton I* judgment through criminal acts, that also constitute a fraud on the court, Defendants now hold up the judgment as a shield before this Court as evidence they did not commit criminal acts. But Defendants' evil and illegal actions, and that of their attorneys, is made irrefutable by one simple incontrovertible fact: nowhere in the MTD do they try to articulate their probable cause for the filing of *Cotton I*. Because they can't. Thus, the MTD, on this basis alone must be denied. It is a "tactic admission" that *Cotton I* was filed and maintained without probable cause and was thus a criminal act that is not privileged. *See Bus. Guides, Inc. v. Chromatic Comms. Bus. Guides, Inc.*, 498 U.S. 533 (1991) (O'Connor, J.) (Where party did not deny

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

the truth of allegations, the District Court found that party's silence amounted to a "tacit admission.").

As proven below, even if the substance of Defendants' arguments are reached, they are only general conclusory arguments that ignore the facts and applicable law to argue, nonsensically, that pursuing illegal goals through a lawful medium somehow makes illegal "litigation conduct" lawful.

Argument

I. NEITHER THE FIRST AMENDMENT, THE CALIFORNIA LITIGATION PRIVILEGE OR THE NOERR-PENNINGTON DOCTRINE COMPEL DISMISSAL OF THIS CASE

Defendants would have this Court believe that this lawsuit is premised entirely on their representation of Geraci in *Cotton I* and *Cotton II*. But what Plaintiffs have alleged goes far beyond the filing of *Cotton I* and the defense of Geraci in *Cotton II*. Rather, Plaintiffs' have alleged that Defendants are part of the Enterprise - a multifaceted, wide ranging criminal organization whose actions include the filing of sham litigation, colluding with corrupt City officials and, at the very least, ratification of violence against numerous third party witnesses. Such conduct has nothing to do with their capacity as officers of the court and their clients' First Amendment right to petition the U.S. government for relief.

Even if Plaintiffs' claim seeking declaratory relief that Defendants' actions violated their civil rights by preventing access to the state court, and was entirely based on Defendants' crimes committed in the course of representing Geraci in *Cotton I* and *Cotton II* (which it is not), Defendants' *Noerr-Pennington* argument nonetheless fails.

Defendants claim that none of the alleged violations are nothing more than petitioning activity protected by various legal doctrines. (MTD at 14:19-15:11). But Plaintiffs allegations include bribery, obstruction of justice, witness tampering, falsifying evidence, and suborning perjury. The MTD does not deny the allegations that attorney Toothacre substantively represented public official Tirandazi at her deposition and that she is a member of the Enterprise. Such an allegation, on a MTD, must be treated as true. The Supreme Court has made clear that such activity does not fall under *Noerr-Pennington*: "[O]ne could imagine situations where the most effective means of influencing government

officials is bribery, and we have never suggested that that kind of attempt to influence the government merits protection." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 504 (1988).

Contrary to Defendants' argument, the First Amendment right to petition is not absolute, *McDonald v. Smith*, 472 U.S. 479, 484 (1985), and no citizen enjoys a First Amendment right to petition the government for relief by bribing witnesses, tampering with witnesses, and/or obstructing justice. Indeed, "[n]either the *Noerr–Pennington* doctrine nor the First Amendment more generally protects petitions predicated on fraud or deliberate misrepresentation." *Feld Entm't, Inc. v. Am. Soc. for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288, 307 (D.D.C. 2012) (quoting *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1123 (D.C.Cir.2009)).

Under binding Ninth Circuit precedent, misrepresentations to the judiciary, such as the filing of a case without probable cause (i.e., a sham action), do not enjoy *Noerr-Pennington* immunity. *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1183-84 (9th Cir. 2005) ("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.").

Stated differently, "attempts to influence governmental action through overtly corrupt conduct, such as bribes (in any context) and misrepresentation (in the adjudicatory process) are not normal and legitimate exercises of the right to petition, and activities of this sort have been held to be beyond the protection of *Noerr*." *Feld Entertainment*, 873 F. Supp. 2d at 307 (quoting *Whelan v. Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995)) (other citations omitted). *See also California Transport v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.").

As one court aptly put it:

> One cannot cleanse unlawful conduct by conducting the unlawful conduct through a lawful medium. The right to petition the government does not include the right to bribe a public official. The right to file a lawsuit does not include the right to tamper with a jury. The right to access a public park will not immunize liability

> for an assault in the park. The right to petition a court does not include the right to file a false or frivolous claim. [*Cal. Motor Transport Co*, 404 U.S. at 512.] "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils.'" Id at 515 (quoting *NAACP v. Button,* 371 U.S. 414, 444, 83 S.Ct. 328, 343, 9 L.Ed.2d 405 (1963)); Bill Johnson's Rests ., Inc., 461 U.S. at 743 ("The first amendment interests involved in private litigation—compensation for violated rights and interest, the psychological benefits of vindication, public airing of disputed facts—are not advanced when litigation is based on intentional falsehoods or on knowingly frivolous claims ... [j]ust as false statements are not immunized by the First Amendment right to freedom of speech... baseless litigation is not immunized by the First Amendment right to petition.").

In re Morrison, No. 05-45926, 2009 WL 1856064, at *8 (Bankr. S.D. Tex. June 26, 2009) (denying defendants' motion to dismiss RICO claim based on underlying litigation where plaintiffs alleged defendants made intentional misrepresentations to the court).

In support of their *Noerr-Pennington* argument, Defendants cite a needless amount of cases for the proposition that their litigation conduct is privileged, including *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006). (MTD at 15, fn.4). In *Sosa*, plaintiffs asserted pre-suit demand letters sent by the defendants constituted the predicate acts for their RICO claims. However, *Sosa* involved a completely different fact pattern than what Plaintiffs have alleged here. Indeed, *Sosa* involved neither allegations of witness bribery, obstruction of justice, witness tampering, nor intentional misrepresentations during the adjudicatory process, but rather the "mailing of presuit demand letters" relating to the allegedly illegal accessing of satellite television signals. 437 F.3d at 926.

In holding that DIRECTV's statements in the pre-suit demand letters were protected by *Noerr-Pennington*, the Ninth Circuit emphasized the legitimate role that pre-suit demand letters play in litigation, as well as the public policy and statutory provisions that immunize statements made in pre-suit demand letters under the litigation privilege. *Id*. at 935-939. *Cf. Venetian Casino Resort, L.L.C. v. N.L.R.B.*, 484 F.3d 601, 613 (D.C. Cir. 2007) (distinguishing *Sosa* and holding that the alleged acts at issue "are neither common features of litigation nor statutorily protected litigation privileges," and therefore *Sosa* was inapposite). Critically, the Ninth Circuit also acknowledged that pre-suit demand letters

would not be protected under *Noerr-Pennington* "if the allegedly unlawful conduct consists of making intentional misrepresentations to the court, [because] litigation can be deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Id.* at 938 (citations and internal quotation marks omitted).

Additionally, the Ninth Circuit issued another decision addressing the *Noerr-Pennington* doctrine a few years after *Sosa* that is highly instructive. *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638 (9th Cir. 2009). There, the court held that Kearney's complaint – which alleged intentional misrepresentations and fraud upon the court through suppression of evidence – stated a claim under RICO. It rejected the defendants' *Noerr-Pennington* defense while simultaneously distinguishing *Sosa*:

> Kearney has alleged intentional misrepresentations to the court, and fraud upon the court through the suppression of evidence, that ultimately led to her property being valued lower than it should have been. In *Sosa v. DIRECTV, Inc*., the court described a similar situation of a RICO suit predicated on "fraudulent discovery conduct in prior litigation that induced the plaintiffs to settle the suit for a lower amount than they would have in the absence of the fraud." 437 F.3d 923, 940 (9th Cir. 2006) (discussing *Living Designs, Inc. v. E.I. Dupont de Nemours & Co*., 431 F.3d 353 (9th Cir. 2005)). Although *Living Designs* was not considered under *Noerr–Pennington*, the *Sosa* court said "the conduct alleged quite clearly fell within the third prong of *Kottle*'s sham litigation exception, in that it amounted to a 'knowing fraud ... upon the court depriv[ing] the litigation of its legitimacy.'" Id. (quoting *Kottle*, 146 F.3d at 1060). Kearney's allegations are very similar to those described by the *Sosa* court in *Living Designs* and so should also fall within the third prong of the sham litigation exception. See also *Freeman v. Lasky, Haas & Cohler,* 410 F.3d 1180, 1185 (9th Cir. 2005) ("Had [the discovery misconduct] not been brought to light in time, it is entirely possible that [it] would so have infected the defense of the lawsuit as to make it a sham.").

Id. at 646-47. As *Kearney* makes clear, the Ninth Circuit's opinion in *Sosa* does not support the Defendants' blanket assertion that all conduct incidental to litigation, no matter how egregious or criminal, is entitled to *Noerr-Pennington* immunity.

What Plaintiffs have alleged here is far beyond the conduct discussed by the Ninth Circuit in *Sosa*, and is analogous to the more recent *Feld Entertainment* case, cited above,

wherein the court directly considered allegations of both witness bribery and misrepresentations about the alleged bribes as predicate acts to a RICO claim. Citing D.C. Circuit and United States Supreme Court precedent, the court agreed that "*Noerr-Pennington* does not apply to bribery or to deliberate misrepresentations to the Court." Id. at 307 ("Noerr-Pennington does not apply, first and foremost, to bribes, 'in any context.' . . . Moreover '[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.'") (citing *Whelan v. Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (quoting *Federal Prescription Serv., Inc. v. Am Pharmaceutical Ass'n*, 663 F.2d 253, 263 (D.C. Cir. 1981)), and also citing *Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. at 512–13).

Plaintiffs have alleged that Defendants (as well as the other defendants not a party to this MTD) filed *Cotton I* without probable cause and knew that Geraci and his agents took acts and threats of violence against material witnesses. Plaintiffs allege that Defendants, at the very least, purposefully ratified such violence because they knew the allegations of same were certainly likely to be true as the *Cotton I* action was a sham.

More specifically and one example is Defendants' misrepresentation of the legal import of Young's testimony to the *Cotton I* action. (*See* FAC at ¶¶ 241-243.) As alleged, if true, Young's testimony was case dispositive as it proves that Geraci's agents were acting to sabotage the Berry Application at the Property; evidencing their knowledge that C*otton I* was a sham and seeking to mitigate their damages if their fraud was exposed. Defendants will have the opportunity to dispute the true intent behind their misrepresentations regarding the import of Young's testimony during *Cotton I* after discovery. Defendants' intent in misrepresenting the import of Young's testimony to the *Cotton I* litigation is a factual matter that cannot be adjudicated on a motion to dismiss.

Again, the *Cotton I* action constitutes "sham" litigation within the meaning of the *Noerr-Pennington* doctrine on multiple grounds, including the false representations by F&B and attorney Austin that City and State laws do not prevent Geraci from lawfully owning a cannabis CUP. *Clipper Exxpress, v. Rky. Mount. Motor Tariff*, 674 F.2d 1252, 1271 (9th

Cir. 1982) ("There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body."). Also, for submitting the Berry Application with false information in furtherance of the Antitrust Conspiracy. *See id*. at 1258 ("the *Walker Process* doctrine… extends antitrust liability to one who commits fraud on a court or agency to obtain competitive advantage."). Further, that F&B conspired with Tirandazi to falsely testify that she is not aware that the Berry Fraud mandates denial of the Berry Application in furtherance of the Antitrust Conspiracy. *See id*. at 1270 ("the *Walker Process* doctrine… provides antitrust liability for the commission of fraud on administrative agencies, for predatory ends.").

II. PLAINTIFFS' FAC HAS CLEARLY ALLEGED THAT DEFENDANTS VIOLATED THEIR CIVIL RIGHTS BY PREVENTING THEM FROM ACCESS TO THE STATE COURTS.

Defendants' nonsensically allege that no claims have been alleged against them. "It has long been the law that a plaintiff in federal court can seek to set aside a state court judgment obtained through extrinsic fraud." *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1141 (9th Cir. 2004). Plaintiffs have alleged that Defendants conspired with the law firm of Finch, Thornton & Baird ("FTB") to connive at the defeat of Cotton's case and to knowingly interfere with the sale of the Property to Martin and, subsequently, Flores. Extrinsic fraud includes "where an attorney fraudulently pretends to represent a party, and connives at his defeat…" *Kachig v. Boothe*, 22 Cal.App.3d 626, 633 (Cal. Ct. App. 1971).

Plaintiffs have also alleged that Defendants conspired with Austin to mispresent the law to the Court regarding Geraci's ability to lawfully own a cannabis CUP. The MTD ignores that a fraud on the court is grounds for the vacating of a judgment procured through a fraud on the court by attorneys. *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 249-50 (1944); *Fierro v. Johnson*, 197 F.3d 147, 155 (5th Cir. 1999) ("*Hazel-Atlas* allows a judgment to be attacked on the basis of intrinsic fraud that results from corrupt conduct by officers of the court.").

In short, setting aside numerous other arguments, on these grounds alone, Defendants arguments on these and related grounds are also frivolous.

III. DEFENDANTS CLAIMS ARE SUPPORTED BY FACTS AND LAW

Defendants arguments in opposition are contrary to the undisputed facts and applicable law. Defendants argue: (i) this action is a de facto appeal from the *Cotton I* action; (ii) Plaintiffs fail to state §§ 1983, 1985, and 1986 claims because Defendants are not acting under color of law; (iii) and Plaintiffs § 1985 claim fails to state a claim because there is no racial or class based discrimination; and (iv) California law provides them immunity; (v) Plaintiffs lack standing to sue.

First, Defendants are essentially arguing that the *Rooker-Feldman* doctrine bars Plaintiffs claims. *Kougasian*, 359 F.3d at 1139 (The "*Rooker-Feldman* [doctrine] prohibits a federal district court from exercising subject matter jurisdiction over a suit that is a de facto appeal from a state court judgment."). However, "*Rooker-Feldman* does not apply where the plaintiff in the federal case was in privity with, but not a party to, the underlying state court proceeding." *St. Jon v. Tatro*, Case No.: 15-cv-2552-GPC-JLB, at *17 n.2 (S.D. Cal. Mar. 23, 2016) (citing *Lance v. Dennis*, 546 U.S. 459, 466 (2006)).

Further, even if *Rooker-Feldman* did apply: "Extrinsic fraud on a court is, by definition, not an error by that court. It is, rather, a wrongful act committed by the party or parties who engaged in the fraud. *Rooker-Feldman* therefore does not bar subject matter jurisdiction when a federal plaintiff alleges a cause of action for extrinsic fraud on a state court and seeks to set aside a state court judgment obtained by that fraud." *Kougasian*, at 1141. Further still, "California case law… recognizes a 'newly discovered facts' exception to res judicata." *Kearney v. Foley & Lardner LLP*, Case No.: 05-CV-2112-AJB-JLB, at *16 n.9 (S.D. Cal. Sep. 28, 2016) (citing *Allied Fire Protection v. Diede Constr., Inc.*, 127 Cal. App. 4th 150 (2005)).

Second, "42 U.S.C. § 1985… create[es] a cause of action based on a conspiracy which deprives one of access to justice or equal protection of law." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1232-33 (7th Cir. 1984). The first clause of subsection (2) of § 1985 creates a cause of action against individuals conspiring to deter a party or witness from attending court and testifying; "class-based invidious discrimination [is] not required under

[this] section 1985(2)." *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345, 1354 n.3 (9th Cir. 1981). Additionally, as stated in *Stevens v. Rifkin*, 608 F. Supp. 710, 720 (N.D. Cal. 1984), "where there is an allegation of state action with respect to the conspiracy… class-based discriminatory animus is not required."

As alleged in the FAC, Defendants conspired with the City in furtherance of the Antitrust Conspiracy. And, both Defendants and the City ratified the violent actions directed by or taken by their co-conspirators.

Third, it is well settled that a private party can be held liable for violation of Constitutionally protected rights when they conspire with and agent of the state. As discussed in the *Lugar* case:

> Although stating that § 1983 plaintiff must show both that he has been deprived of a right secured by the Constitution and laws of the United States and that the defendant acted "under color of any statute . . . of any State," [*Adickes v. Kress Co.*, 398 U.S. 144, 150 (1970)], we held that the ***private party's joint participation with a state official in a conspiracy to discriminate would constitute both "state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights" and action "under color' of law for purposes of the statute."*** *Id.*, at 152. In support of our conclusion that a private party held to have violated the Fourteenth Amendment "can be liable under § 1983," *ibid.*, we cited that part of *United States v. Price,* 383 U.S., at 794, n. 7, in which we had concluded that state action and action under color of state law are the same (quoted *supra*, at 928).

Lugar v. Edmondson Oil Co. (1982) 457 U.S. 922, 931-32 (emphasis added); *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.").

Plaintiffs have alleged that Defendants colluded with Tirandazi, Project Manager for the City, to provide false testimony at trial and her deposition. (*See* FAC ¶¶ 274-281). Also, that Defendants colluded with Deputy City Attorney Phelps. Phelps also knew that facts regarding the Illegality Issues and as stated in the FAC, ratified the actions of the Enterprise exactly because he knew of it, was under a duty to stop it, and ultimately by his silence,

assisted it in defrauding the court. (*See* FAC ¶¶ 282-286).

In support of their MTD, Defendants cite *Price v. State of Hawaii* (9th Cir. 1991) 939 F.2d 702, 706-07, for the proposition that there is a presumption against deeming private conduct constituting governmental action, however Defendants fail to cite the other relevant part of *Price:*

> A person may become a state actor by conspiring with a state official, *id.,* or by engaging in joint activity with state officials, *Sable Communications v. Pacific Tel. Tel. Co.,*890 F.2d 184, 189 (9th Cir. 1989) (defendant sought the aid of law enforcement officials in order to use further procedures that would violate the plaintiff's first amendment rights).

At the point where Defendants sought to not only conspire with Tirandazi prior to trial to sabotage the CUP application on the Property by not cancelling the application as requested by the owner of the Property and sought to represent her at deposition so that they could tailor her testimony to their needs they became state actors. (*See* FAC ¶¶ 10-14, 274, 277-280).

Fourth, California law can provide no defense to Plaintiffs causes of action for violation of their civil rights. *Kimes v. Stone*, 84 F.3d 1121, 1127 (9th Cir. 1996) ("Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immunized by state law."); *see Sosa v. Hiraoka*, 920 F.2d 1451, 1460 n. 3 (9th Cir. 1990) (noting that the Supreme Court has "held that state law immunities have no force against § 1983 suits where the state law immunity purports to provide immunity 'over and above those already provided in § 1983'") (quoting *Howlett v. Rose*, 496 U.S. 356, 375 (1990)).

Fifth, Plaintiffs have standing to sue. Although the FAC and this MTD focuses on the Cotton litigation, Plaintiffs are all victims of the Enterprise who have been prevented from seeking judicial redress against the Enterprise in state court as a result of Defendants' illegal actions. Defendants arguments on this ground fail for the simple reason that all of their representations presuppose they have integrity and have not committed illegal acts. The allegations, and the undisputed facts, prove otherwise.

The right to file a lawsuit does not include the right to tamper with or ratify violence against a witness. The right to access a public park will not immunize liability for an assault in the park. The right to petition a court does not include the right to file a false or frivolous claim. "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils.'" *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972) (quoting *NAACP v. Button*, 371 U.S. 415, 444 (1963)).

The California Supreme Court "made it clear in [*Flatley v. Mauro* (2006) 39 Cal.4th 299], 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).

Defendants have conceded all facts relevant to this determination; they do not even attempt to argue otherwise in the MTD. Geraci was sanctioned for illegal cannabis activity and sought to acquire a cannabis CUP application via the Berry Application with the Berry Fraud. Defendants conclude in opposition to those undisputed facts and applicable law, or even just general common law fraud, that Geraci's ownership of a cannabis CUP is not illegal.

IV. PLAINTIFF FLORES WAS NOT ALLOWED TO INTERVENE IN *COTTON I* AND IS THE MASTER OF HIS OWN COMPLAINT.

The FAC details Plaintiff Flores' attempt to intervene in *Cotton I* to protect his contractual interest in the Property. (*See* FAC ¶¶ 182, 264-265). Defendants objected to and opposed Flores' attempt to intervene. As such Flores initiated this action. Plaintiff Flores is not bound by the judgment issued in *Cotton I. See Taylor v. Sturgell* (2008) 553 U.S. 880, 892-93 ("A person who was not a party to a suit generally has not had a "full and fair opportunity to litigate" the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the 'deep- rooted historic tradition that everyone should have his own day in court." Richards,517 U.S., at 798, 116 S.Ct. 1761

(internal quotation marks omitted")) Plaintiff cannot find any legal precedent that would support, nor do Defendants cite any that would stand for the proposition that Plaintiff is required to appeal the *Cotton I* judgment in light of the fact that Plaintiff Flores was not allowed to intervene and not a party to that action. It is well established that a Plaintiff is the "master of his own complaint" and is allowed to choose the venue and forum of redress.

V. PLAINTIFF SHOULD BE ALLOWED TO AMEND COMPLAINT TO INCLUDE ADDITIONAL FACTS REFERENCED HEREIN IF COURT IS INCLINED TO GRANT DEFENDANTS MOTION.

Under Fed. R. Civ. P. 15 (a)(2) leave to amend shall be freely given where justice so requires. In this case Plaintiffs initially filed a 172 page complaint setting forth as many of the facts known to Plaintiffs at the time (and under exigent circumstances as explained therein). This Court ruled on an accompanying Temporary Restraining Order stating that the complaint was "almost impossible to summarize due to its length and confusing nature." As such Plaintiff filed the FAC which was an attempt to be as concise as possible. Should the Court find that FAC is lacking in facts, in the interest of justice, Plaintiffs request the Court allow Plaintiffs to amend to include those relevant facts.

Conclusion

The genesis of Plaintiffs' beliefs that Defendants are part of the Enterprise and have taken acts in furtherance of the Antitrust Conspiracy is the filing of *Cotton I* without probable cause as a stereotype of a malicious prosecution action meant to prevent Plaintiff Flores' predecessor in interest acquisition of the cannabis CUP that was the object of *Cotton I*. "[P]robable cause is an absolute defense to malicious prosecution." *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054-55 (9th Cir. 2009).

All Defendants have to do in the Reply is set what legal authority allowed them to disregard the factual and legal import of the Confirmation Email. If Defendants file a Reply that fails to address this issue, it is yet another tatic admission that they know they prevailed in Cotton I through criminal acts and the instant MTD is a "sham defense" that makes Defendants' joint liable. *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir.

2005) ("a defensive pleading may also be a sham "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.'").

For all of the foregoing reasons, Plaintiffs respectfully submit that the motion to dismiss filed by Defendants should be denied.

Dated: August 10, 2020

Law Offices of Andrew Flores

By /s/ Andrew Flores
Plaintiff *In Propria Persona*, and
Attorney for Plaintiffs AMY SHERLOCK
and Minors T.S. and S.S.