IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

DARRYL COTTON, an individual, Appellant/Plaintiff, v. THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, Respondent/Defendant. --- LAWRENCE (a/k/a/ LARRY) GERACI, An individual, Real Party in Interest.	Court of Appeal Case No. D080460 San Diego County Superior Court Case No. 37-2022-000000-CU-MC-CTL

Appeal from the Order by the Honorable James A. Mangione, Judge of the Superior Court of California, County of San Diego, Entered on February 25, 2022 Denying Petitioner's/Plaintiff's Motion to Set Aside Judgment

APPELLANTS' OPENING BRIEF

Darryl Cotton
6176 Federal Boulevard
San Diego, CA 92114
151DarrylCotton@gmail.com
Petitioner/Plaintiff *In Propria Persona*

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FOURTH **APPELLATE DISTRICT, DIVISION** ONE	COURT OF APPEAL CASE NUMBER: D080460
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: DARRYL COTTON FIRM NAME: STREET ADDRESS: 1676 Federal Boulevard CITY: San Diego STATE: CA ZIP CODE: 92114 TELEPHONE NO.: (619) 954-4447 FAX NO.: E-MAIL ADDRESS: 151DarrylCotton@gmail.com ATTORNEY FOR (*name*): Appellan/Plaintiff in Propria Persona	SUPERIOR COURT CASE NUMBER: 37-2022-00000023-CU-MC-CTL
APPELLANT/ PETITIONER: DARRYL COTTON RESPONDENT/ REAL PARTY IN INTEREST: SAN DIEGO COUNTY SUPERIOR COURT	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party *(name*): Appellant/Plaintiff Darryl Cotton

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1) LAWRENCE (a/k/a LARRY) GERACI	Defendant/Real Party in Interest
(2)	
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: July 20, 2022

DARRYL COTTON
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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INTRODUCTION

> No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out.

Wong v. Tenneco (1985) 39 Cal.3d 126, 135.

A. Dispositive three facts that mandate this appeal be granted.

This is an appeal from an order denying a motion to vacate a judgment void for enforcing an illegal real estate purchase contract. The illegal contract was for Respondent/Defendant Lawrence Geraci's purchase of Appellant/Plaintiff Darryl Cotton's real property (the "Property"). Only three facts are needed to prove that the judgment is void and must be vacated.

First, in June 2015, Geraci was sanctioned by the City of San Diego for owning and operating an illegal dispensary. Second, on January 1, 2016, California Business and Professions Code ("BPC") § 19323 went into effect, which prohibited parties sanctioned for unlicensed commercial cannabis activities from owning a dispensary for three years from the date of their last sanction. Third, the judgment enforces a contract entered into in November 2016 whose object is Geraci's ownership of a dispensary at the Property, within the three years during which Geraci was barred by law from owning a dispensary.

Based upon just these three indisputable facts and the clear legal principles at issue, the judgment is void for enforcing an illegal contract. This

conclusion is mandated as a matter of law without discretion. The judgment violates express statutes and the most basic principle of law – that a party to an illegal contract cannot go to a court of law to have to have his illegal objects carried out.

And if, as in this case, a wealthy party is able to pay high-end attorneys to go to court to *ask* to have their client's illegal object carried out, and by error a judge *does* aid a party in carrying out his illegal object when asked by an attorney, such a judgment is clearly and absolutely void. A contrary finding is not and cannot be allowed because that would mean the justice system can be used to effectuate crimes and compensate individuals for illegal activity. Intelligent attorneys would only need to deceive a judge in the first instance and could then rely on a judgment entered in error as a shield to prevent their victims from vindicating their rights against them for their illegal actions – a violation of the very purpose for which the justice system exists.

B. Summary of the case.

In November 2016, the agreement reached between Cotton and Geraci for the sale of the Property was subject to a single condition precedent – the approval by the City of San Diego of Geraci's application for a cannabis Conditional Use Permit ("CUP") to operate a dispensary at the Property. A CUP showing compliance with local laws is a prerequisite for applying for a

State cannabis license.

Geraci hired attorney Gina Austin to prepare, submit, and lobby for his ownership of a CUP at the Property with the City. Austin, to illegally acquire a dispensary at the Property for Geraci at the Property, submitted an application for a CUP at the Property in the name of Geraci's receptionist Rebecca Berry (the "Berry Application").

In March 2017, Cotton terminated the agreement with Geraci, sold the Property to a third-party, and Geraci filed suit against Cotton for breach of contract seeking specific performance to force the sale of the Property ("*Cotton I*").

In August 2019, judgment in favor of Geraci was entered against Cotton awarding Geraci approximately $300,000 in damages for breach of contract and costs for suing Cotton.

In October 2019, The Honorable Joel R. Wohlfeil presiding over *Cotton I* denied Cotton's motion for a new trial seeking to have the judgment set aside on the ground that the judgment enforces an illegal contract. Judge Wohlfeil denied the motion stating that Cotton had waived the defense of illegality under the mistaken belief that Cotton had not raised the issue of illegality prior to the motion for new trial and that the defense of illegality could be lawfully waived.

In January 2022, Cotton filed the underlying complaint and motion to

vacate the judgment on the grounds that it is void for enforcing an illegal contract and its rendering was an act in excess of Judge Wohlfeil's jurisdiction, as the defense of illegality cannot be waived as a matter of law.

In opposing the motion to vacate, Geraci did not dispute he had been sanctioned for unlicensed commercial cannabis activities, BPC §19323 barred his ownership of a dispensary, or that the defense of illegality could be waived. Geraci's argument is substantively that since his attorneys successfully deceived Judge Wohlfeil into entering a judgment enforcing an illegal contract, there is nothing Cotton can do about it now.

In February 2022, The Honorable James A. Mangione denied Appellant's motion to vacate the judgment on the grounds that Cotton "***was not precluded***" and "***he received an opportunity***" to raise the issue of illegality before Judge Wohlfeil, and that the judgment was not void on its face.

Judge Mangione's use of language was ambiguous in that it was subject to more than one interpretation – namely, that (1) Cotton did not raise the defense of illegality and/or (2) Judge Wohlfeil lawfully found the defense of illegality could be waived. However, as set forth in Cotton's motion and raised by his counsel at hearing on the motion to vacate before Judge Mangione, *both interpretations were incorrect*. As a result, Judge Mangione gave effect to, validated, ratified and impliedly held the judgment was not

void for enforcing an illegal contract because the defense of illegality can be lawfully waived as found by Judge Wohlfeil.

The defense of illegality cannot be waived as a matter of law without exception. A judgment that enforces an illegal contract in direct violation of California's cannabis licensing statutes is absolutely void. If such were not the case, the concept of void judgments would not exist at all. Any and all judgments and orders that give effect to a void judgment enforcing an illegal contract of this type – *malum in se* (illegal, against good morals, and against public policy) – are "absolutely void." They cannot be lawful by an act of the judiciary in direct contravention of the Legislature's express public policies, statutes enacted pursuant to them, and controlling precedent.

C. Current status of legal representation and focus of the motion to vacate and this appeal.

Simply stated, Cotton believes, and the facts establish, that the *Cotton I* action was filed on facts that negate the possibility of probable cause. *Cotton I* was filed in furtherance of a conspiracy by Geraci and his attorneys to extort the Property from Cotton via the pressures of litigation. Cotton has for years been unable to convince the judiciaries that Geraci's ownership of a dispensary is illegal and *Cotton I* was filed as a sham lawsuit to prevent the sale of the Property to a third party.

Based on the actions by the parties to this action and the courts, Cotton knows the judgment is also void due to being the product of a fraud on the

court and on other grounds that are distasteful to the judiciary. Cotton regrets previously raising the judicial distasteful issues. The consequence of his actions is that he cannot acquire counsel experienced in attorney-client conspiracies with the resources to undertake his case. The local attorneys with whom he has previously worked will not represent Cotton because of the distasteful issues and their lack of expertise and resources to take on Geraci's army of attorneys.

However, Cotton has an agreement with the law firm of Tiffany & Bosco in Arizona who represented him in the motion for new trial and the underlying motion to vacate the judgment. Tiffany & Bosco will represent Cotton once the judgment has been set aside and will bring forth all valid causes of actions against Geraci and his conspirators. But, again, only once the judgment has been set aside and the distasteful reasons for finding the judgment void do not have to be raised (a matter of firm policy).

Thus, the underlying motion and this appeal are focused solely on the issue of illegality due to BPC § 19323 and the fact that the defense of illegality cannot be waived.

ISSUES PRESENTED

A. Did Judge Mangione err finding the judgment is not void on its face for enforcing a contract in violation of BPC §§ 19323 on the grounds that the defense of illegality had been raised and was found to have been waived by Judge Wohlfeil?

B. Did Judge Mangione err by failing to address controlling California Supreme Court precedent – the *Hill* rule – requiring as a matter of law that he treat the judgment as void on its face because Geraci did not oppose the facts that establish the judgment is void for enforcing an illegal, *malum in se* contract?

APPELABILITY

> A void order or judgment may be directly or collaterally attacked at any time. Even when relief is not available under a statute, the court retains inherent power to vacate void orders. The general rule is that nonstatutory motions to vacate are not appealable, but an exception applies when the appellant alleges that the underlying order or judgment is void. The justification for this exception is that if an order or judgment is void, an order denying a motion to vacate that order or judgment is also void and appealable because it gives effect to a void judgment.

Doe v. Regents of University of California (2022) 80 Cal.App.5th 282, 292 (citations omitted); *see Carr v. Kamins* (2007) 151 Cal.App.4th 929, 933 ("An order after judgment that gives effect to a judgment that is void on its face is itself void and subject to appeal even if the judgment itself is not appealed."). Further, an appeal will lie from an order denying a motion to vacate a judgment obtained by extrinsic fraud or mistake. (*In re Marriage of Brockman* (1987) 194 Cal.App.3d 1035, 1047.)

The judgment is void and Judge Mangione's order giving effect to the void judgment is itself also void and, thus, appealable.

STANDARD OF REVIEW

"The issue of whether a judgment is void on its face is a question of law, which we review de novo." (*Calvert v. Al Binali* (2018) 29 Cal.App.5th

954, 961.) "Whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case." (*Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 349-350.) "When the decisive facts are undisputed, we are confronted with a question of law and are not bound by the findings of the trial court." (*Ghirardo v. Antonioli* (1994) 8 Cal. 4th 791, 799; *see Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 603 ("On a pure question of law, trial courts have no discretion. They must, without choice, apply the law correctly.").)

MATERIAL FACTUAL AND PROCEDURAL BACKGROUND

A. California Cannabis Licensing Legislation

On October 9, 2015, California enacted Senate Bill 643 (2015 Cal. SB 643) ("SB 643"), which went into effect on January 1, 2016. SB 643 added § 19323 *et seq.* to the BPC. (SB 643 at § 10.) BPC § 19323 *et seq.*, titled "Denial of Application," set forth the criteria pursuant to which applications for state medical cannabis licensing would be denied.

As in effect on November 2, 2016 – the date on which Cotton and Geraci reached an agreement for the sale of the Property – BPC § 19323 materially provided as follows:

> A licensing authority ***shall deny*** an application if the applicant has been sanctioned by a city for unlicensed commercial cannabis activities in the three years immediately preceding the date the application is filed with the licensing authority.

BPC §§ 19323(a), (b)(7) (cleaned up, emphasis added).

On November 8, 2016, voters approved Proposition 64, the Adult Use of Marijuana Act ("AUMA"). (2016 Cal. Legis. Serv. Prop. 64, effective November 9, 2016.) AUMA legalized the recreational use and sale of marijuana and created a separate licensing and regulatory scheme for *for-profit* cannabis businesses. AUMA added § 26057 *et seq.* to Division 10 of the BPC, which set forth the criteria for the denial of a for-profit license.

BPC § 26057 mirrored the language in BPC § 19323 and also provided that an application for a for-profit cannabis license must be denied if the applicant had been sanctioned in the three years preceding the date was application with the State. (BPC § 26057(a), (b)(7).)

On June 27, 2017, the Legislature enacted SB 94,[1] which created a single regulatory system for the regulation and licensing of both nonprofit medicinal and for-profit recreational cannabis entities. Materially, SB 94 repealed BPC § 19323 and made BPC § 26057 applicable to all cannabis applications with the State. (SB 94 at § 45.)

An applicant for a license was required to disclose any such sanctions in an application for a license with the State. (*See* Cal. Code Regs., tit. 16, §

[1] "SB 94" means the Medicinal and Adult-Use Cannabis Regulation and Safety Act. (2017 Cal SB 94.)

5002(c)(20)(M) ("If applicable, a detailed description of any administrative orders or civil judgments for violations of labor standards, any suspension of a commercial cannabis license, revocation of a commercial cannabis license, or sanctions for unlicensed commercial cannabis activity by a licensing authority, local agency, or state agency against the applicant or a business entity in which the applicant was an owner or officer within the three years immediately preceding the date of the application.").)

Materially summarized, and dispositve in this action, since January 1, 2016 any applicant who had been sanctioned for unlicensed commercial cannabis activities could not lawfully own an interest in any type of cannabis license pursuant to either BPC §§ 19323 or 26057 for three years from the date of their sanction. Any contract whose performance was based on, aided or abetted, or effectuated a violation of this statute would be absolutely void as against direct Legislative intent, express law, public policy and good morals – *malum in se*.

B. Geraci's sanctions for unlicensed commercial cannabis activity.

On October 27, 2014, Geraci was sanctioned by the City of San Diego for unlicensed commercial cannabis activities in *City of San Diego v. The Tree Club Cooperative, Inc. et al.*, Case No. 37-2014-20897 (the "Tree Club

Judgment"). (2 Appellant's Appendix (AA) 131-138.)[2]

On June 17, 2015, Geraci was sanctioned by the City of San Diego for unlicensed commercial cannabis activities in *City of San Diego v. CCSquared Wellness Cooperative, et al.*, Case No. 37-2015-4430 (the "CCSquared Judgment," and collectively with the Tree Club Judgment, the "Geraci Judgments"). (2 AA 140-156.)

C. The agreements regarding the sale of the Property and the Berry Application.

In July 2016, Geraci contacted Cotton because the Property may qualify for a dispensary. (1 AA 105:11-17.) On October 31, 2016, Geraci caused his secretary, Rebecca Berry, to file an application for a CUP at the Property as his "agent" on his behalf (the "Berry Application"). (1 AA 109:5-7.) In the Berry Application Berry certified or declared that she would be the "Permit Holder," the "Owner" of the Property, the "Financially Responsible Party" for the application, and under penalty of perjury that she had disclosed all parties with an interest in the Property. (3 AA 517-520.) Neither Geraci nor Cotton was disclosed as parties with an interest in the CUP. (*Id*.)

On November 2, 2016, Geraci and Cotton met and reached an agreement for the sale of the Property to Geraci and they executed a

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[2] AA cites are preceded by the volume number and followed by the page number.

document (the "November Document"). (1 AA 9, 106:6-8.)

On March 21, 2017, Cotton sent Geraci an email stating he was terminating the agreement they reached on November 2, 2016 and informing him he would be entering into an agreement with a third party because Geraci had failed to reduce their agreement to writing as he had promised to do. (4 AA 877.)[3] That same day, Cotton entered into an agreement with a third-party for the sale of the Property. (4 AA 887-901.)

D. The *Cotton I* complaints.

The next day, March 22, 2017, Geraci's attorney, Michael Weinstein

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[3] The complete email states:

> Larry, I have been in communications over the last 2 days with Firouzeh, the Development Project Manager for the City of San Diego who is handling CUP applications. She made it 100% clear that there are no restrictions on my property and that there is no recommendation that a CUP application on my property be denied. In fact she told me the application had just passed the 'Deemed Complete' phase and was entering the review process. She also confirmed that the application was paid for in October, before we even signed our agreement.
>
> This is our last communication, you have failed to live up to your agreement and have continuously lied to me and kept pushing off creating final legal agreements because you wanted to push it off to get a response from the City without taking the risk of losing the non-refundable deposit in the event the CUP application is denied. To be clear, as of now, you have no interest in my property, contingent or otherwise. I will be entering into an agreement with a third-party to sell my property and they will be taking on the potential costs associated with any litigation arising from this failed agreement with you.

(4 AA 877.)

of Ferris and Britton, served Cotton with the *Cotton I* complaint for breach of contract. (1 AA 74-73.) The complaint alleged the November Document was the final agreement between Cotton and Geraci, Geraci had incurred fees in pursuit of a CUP at the Property, and sought specific performance of the sale of the Property. (1 AA 2-3, 6.)

On May 12, 2017, Cotton filed pro se a cross-complaint alleging, *inter alia*, that (i) on November 2, 2016, the parties reached an oral joint venture agreement for the sale of the Property (the "JVA"), which Geraci promised to reduce to writing; (ii) the November Document was executed as a *receipt* to memorialize Cotton accepting $10,000 toward a non-refundable deposit; (iii) Geraci was fraudulently representing the November Document as a contract; and (iv) Cotton terminated the JVA with Geraci for his failure to reduce the JVA to writing as promised. (3 AA 272-295.)

Cotton's cross-complaint included a conspiracy cause of action against Geraci and Berry alleging that Geraci used Berry as a proxy because his sanctions disqualified him from owning a CUP:

> Berry submitted the CUP 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.

(3 AA 291-292.)

Cotton's original pro se cross-complaint was amended twice by

counsel, the law firm of Finch, Thornton & Baird, in each case referencing Geraci's "legal issues." (3 AA 299, ¶ 12; 3 AA 319, ¶12.)

E. The *Cotton I* trial.

On July 11, 2019, during the trial of *Cotton I*, Cotton moved for a directed verdict arguing that Geraci's ownership of a CUP was barred by BPC § 26057. (2 AA 159-171.) The motion for directed verdict attached a copy of AUMA adding §§ 26050-20659 (licensing) to Division 10 (Cannabis) of the BPC. (2 AA 165-171.) The motion was summarily denied. (3 AA 176.)

During trial, Cotton requested Judge Wohlfeil take judicial notice of the Geraci Judgements, which was denied. (2 AA 174.) Austin testified that the Geraci Judgments do not bar Geraci's ownership of a CUP to operate a dispensary or to own a State license. (2 AA 214:11 ("Gina Austin testified at trial the statute [BPC § 26057] would not prevent Mr. Geraci from obtaining a CUP.").)

The jury found the November Document to be a contract and Cotton breached the contract. (2 AA 178-182.) The damages awarded Geraci were to compensate him for expenses he incurred in pursuit of the CUP via the Berry Application and for ***costs for suing*** Cotton. (3 AA 379.) The amount was $293,721.35, which has not been paid by Cotton, and even now is accruing interest at 10% annum. (3 AA 379.)

F. The Motion for New Trial.

On September 13, 2019, Cotton filed, through specially appearing counsel Tiffany & Bosco, a motion for new trial on the grounds that, *inter alia*, the alleged agreement is illegal because Geraci's ownership of a CUP violates BPC §§ 19323 and 26057. (2 AA 184-199.) Geraci opposition's set forth three reasons why his ownership of a cannabis business is not illegal.

First, because the BPC does not bar Geraci's ownership of a dispensary:

> Mr. Cotton contends the November 2, 2016 agreement was illegal and void because Mr. Geraci failed to disclose his interest in both the Property and the Conditional Use Permit ("CUP"). Mr. Cotton erroneously contends the agreement violates local law and policies, as well as state law. The statutes upon which Mr. Cotton relies were not even in effect at the time the November 2, 20 l 6 contract was entered.

(2 AA 207.)

> In making his illegality argument, Mr. Cotton cites to B&P Code §§ 26000 (**Effective June 27, 2017**); 26055 (**Effective July 2019**); and 26057(a) (**Effective January 1, 2019**).… The statutes cited by Mr. Cotton in support of his "illegality" argument were not in effect until after, sometimes years after, entering the contract in question."

(2 AA 207, fn. 4 (bold added, underline in original).)

> At trial the "illegality" issue appears to have first come up in response to questions being posed by Attorney [Jacob] Austin in his examination of witnesses. Attorney Weinstein argued Attorney [Jacob] Austin was asking questions of witnesses which implied it was illegal for Mr. Geraci to operate a legally permitted dispensary. Attorney Weinstein pointed out and the Court agreed, that the two civil judgments on their face did not

> bar Mr. Geraci from operating a legally permitted dispensary. **Attorney Weinstein went on to argue that Business & Professions Code Section 26057 was *permissive* and not mandatory and that it dealt with state licenses, not a City CUP.** The Court was troubled by the fact that Attorney [Jacob] Austin had not filed a trial brief addressing this issue, nor had Attorney Austin filed any memorandum. of points and authorities on the issue. The Court concluded: "So for the time being, I'm tending to agree with the plaintiff's side without the defense having given me something I can look at and absorb."
>
> ….
>
> In addition, attorney Gina Austin testified at trial the statute would not prevent Mr. Geraci from obtaining a CUP.

(2 AA 211:5-16, 214:11-12 (bold added, underline in original).)

Second, because Cotton waived the defense of illegality:

> Mr. Cotton has waived the "illegality" argument for two reasons: (1) he never raised illegality as an affirmative defense; and (2) with regard to the "illegality" argument, Attorney [Jacob] Austin represented to the Court at the conclusion of evidence and in response to the Court's inquiries if there were any other exhibits Mr. Austin wished to admit into evidence: "I'm willing to not argue the matter if your Honor is inclined not to include it. We can just - forget about it."

(2 AA 207:10-17.)

Third, because the testimony of Geraci's own witnesses prove that it is not illegal for Geraci to own a dispensary:

> Even assuming the illegality argument has not been waived, the argument that the November 2, 2016 contract is illegal fails. Mr. Geraci's stipulated judgments with the City of San Diego, and the use of an agent in application process for the CUP, do not render the contract illegal. Indeed, as set forth herein, several witnesses testified that it is common practice for an applicant on a CUP application for a medical marijuana

dispensary to utilize an agent in that process.

(2 AA 207:18-208:3.)

In his reply, in regard to the issue of waiver of the defense of illegality, Cotton set forth the following authorities establishing the defense of illegality cannot be waived:

> [A] party to an illegal contract cannot waive the right to assert the defense. *City Lincoln-Mercury Co. v. Lindsey* (1959) 52 Cal.2d 267, 273-74 (internal citations omitted); *Wells v. Comstock* (1956) 46 Cal.2d 528, 531-32 ("no person can be estopped from asserting the illegality of the transaction"). The argument also ignores the well-established rule that "even though the defendants in their pleadings do not allege the defense of illegality if the evidence shows the facts from which the illegality appears it becomes 'the duty of the court *sua sponte* to refuse to entertain the action.'" *May v. Herron* (1954) 127 Cal.App.2d 707, 710 (quoting *Endicott v. Rosenthal* (1932), 216 13 Cal. 721, 728).

(2 AA 225:6-13.)

On October 25, 2019, Judge Wohlfeil held a hearing and denied the motion for new trial. (2 AA 244.) Judge Wohlfeil denied the motion on the grounds that the contract was illegal was waived because he mistakenly believed that the evidence and arguments of illegality had not been raised prior to the motion for new trial. Because of the incredulous nature of these two contradicting facts, the following material portions of the hearing are set forth:

> MR. SCHUBE: … I'll get to the illegality of the contract issue first. The fact is it cuts to the heart of the motion that we filed and the biggest issue… the Ownership

Disclosure Statement, it also says, "the name of any person of interest in the property must also be disclosed," and it states to potentially attach pages if needed.

THE COURT: So you are saying the contract is unenforceable?

MR. SCHUBE: Yes.

THE COURT: As a matter of law?

MR. SCHUBE: Yes. CUP was a condition precedent to the contract.

THE COURT: Counsel, up until this point in time, this case was filed in 017. Your side has been screaming at the Court and filed multiple writs asking me to adjudicate the contract as a matter of law in favor of your side. Now you're asking the Court to adjudicate the contract as a matter of law against the other side. **Counsel, shouldn't this have been raised at some earlier point in time?** You are doing a 180. Truly, you are doing a 180…. **Counsel, shouldn't this have been raised at some earlier point in time?**

MR. SCHUBE: Should it have, Your Honor? My personal opinion is that it should have been raised before but it was not and we are where we are and so hence, the reason why we're raising the issue now on a Motion for New Trial. I think what has been referred to before, the illegality argument has been raised before and raised in the context of reference to State Law and Section [26057] of the California Business and Professions Code. I believe what was not conveyed to the Court was that these requirements for these forms, the specific provisions in the San Diego Municipal Code that require those disclosures and require applicant provide information. The information was not provided. And --

THE COURT: **Even if you are correct, hasn't that train come and gone? The judgment has been entered. You are raising this for the <u>first</u> time**.

MR. SCHUBE: **Your Honor, illegality of the contract can be raised any time whether in the beginning or during the case or on appeal**.

THE COURT: So it's akin to a jurisdictional challenge?

MR. SCHUBE: I don't know if it's akin to a jurisdictional challenge, but the issue can be raised.

THE COURT: **But at some point, doesn't your side waive the right to assert this argument? At some point?**

MR. SCHUBE: I am not suggesting we waived that. The Case Law I saw in the motion cited that there is a duty and the duty continues and so I am not aware if there is anything that suggests that we waived that argument.

THE COURT: Anything else, Counsel?

MR. SCHUBE: The other thing I'd like to point out, Section 11.0401 of San Diego Municipal Code specifically states that "every applicant prior be furnished true and complete information." And that's obviously not what happened here. I think its undisputed and the reasoning for the failure to disclose, there is no exception to either the San Diego Municipal Code [f]or failure to disclose.

***

THE COURT: Counsel, the Court observed this case throughout the entirety, including at trial. Quite frankly, I thought your client did well on the witness stand. Truly. **But the jury categorically rejected your side's claim and I am persuaded everybody got a fair trial here**. The Court confirms the tentative ruling as the order of the Court. I will direct Plaintiff's side to serve Notice of the Decision. Thank you very much.

(2 AA 237-241 (emphasis added).)

Judge Wohlfeil's order denying the motion states: "The Motion (ROA # 672) of Defendant / Cross-Complainant DARRYL COTTON ('Cotton') for a new trial or a finding that the alleged November 2, 2016 agreement is illegal and void, is DENIED." (2 AA 244.) There is no authority cited or reasoning provided.

G. The Motion to Vacate.

On January 3, 2022, Cotton filed the underlying complaint (1 AA 5) and motion to vacate the judgment (2 AA 119). On February 10, 2022, Geraci filed his opposition arguing the motion should be denied because: "It is not supported by any relevant admissible evidence. It is time-barred under Code of Civil Procedure Section 473. It is barred by both res judicata and collateral estoppel. Finally, the underlying premise of the motion is patently ludicrous, legally untenable, and unsupported by any proffered legal authority." (2 AA 246:6-10.)

In his opposition, Geraci did ***not*** argue or dispute he was sanctioned in the Geraci Judgments or the BPC barred his ownership of a dispensary.

On February 27, 2022, Cotton filed a reply through specially appearing counsel, Tiffany & Bosco. (4 AA 1088-1095.) On February 25, 2022, Judge Mangione heard argument on the motion to vacate at which Cotton was represented by Tiffany & Bosco. (4 AA 1097.) At the hearing, counsel for Cotton noted that the motion for new trial raised the BPC and

argued: "the entire purpose of the contract is illegal. [Geraci] wasn't allowed to operate a marijuana dispensary, but that's what the very purpose of the contract was." (4 AA 6:21-24.) Judge Mangione replied as follows:

> The Court is going to adopt its tentative ruling in this matter. And in this case, it does not appear that the complaining party did not have an opportunity to present its case in the court and protect himself from any fraud attempted by, in this case, the defendant.
>
> The plaintiff ***was not precluded*** from presenting his illegality argument in court. There was a trial. There was a motion for a new trial. There was an appeal that was dismissed. So under these facts, the Court will again adopt its tentative. And that will be the order of the Court.

(4 AA 6:26-7:9 (emphasis added).)

On February 28, 2022, the notice of ruling denying the motion to vacate was filed. (4 AA 1108.) Judge Mangione's order states:

> Plaintiff ***was not precluded*** from presenting his illegality argument to the court. Plaintiff argues that the judgment is void because it is based on an illegal contract. However, ***he received the opportunity*** to present this argument in a fair, adversarial proceeding. Consequently, relief is not available pursuant to a direct attack against the judgment via independent action. Furthermore, the judgment is not void on its face such that it should be set aside pursuant to Code of Civil Procedure§ 473(d).

(4 AA 1110.)

It is from this ruling denying Cotton's motion to vacate the judgment that Cotton appeals.

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ARGUMENT

JUDGE MANGIONE ERRED CONCLUDING COTTON CANNOT BE GRANTED RELIEF FROM A JUDMENT VOID FOR ENFORCING A CONTRACT IN VIOLATION OF BPC §§ 19323/26057 BECAUSE JUDGE WOHLFEIL FOUND THE DEFENSE OF ILLEGALITY WAIVED AND THAT THE JUDGMENT WAS NOT VOID ON ITS FACE.

> A judgment absolutely void may be attacked anywhere, directly or collaterally whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever. A void judgment [or order] is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one.

(*OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1330 (cleaned up) ("*OC Interior*").)

"Generally, a judgment is void if the court lacked subject matter jurisdiction or jurisdiction over the parties." (*Paterra v. Hansen* (2021) 64 Cal.App.5th 507, 535.) However, a lack or excess of jurisdiction resulting in a void judgment also occurs when an act by a Court is an "exercise of a power not authorized by law, or a grant of relief to a party that the law declares shall not be granted." (*Id*. at 536 (quoting *Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 696); *see 311 South Spring Street Co. v. Department of General Services* (2009) 178 Cal.App.4th 1009, 1018 ("… we define a judgment that is void for excess of jurisdiction to include a judgment that grants relief which the law declares shall not be granted.").)

As demonstrated below, the entry of the judgment by Judge Wohlfeil

is an "exercise of a power not authorized by law [and] a grant of relief to [Geraci] that the law declares shall not be granted." (*Id*. at 536 (quoting *Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 696).) The judgment is therefore absolutely void and can be attacked by anyone, anywhere, including by Cotton in the underlying action in equity. The conclusion that the judgment is absolutely void is compelled as a matter of law, especially as it enforces a contract in direct violation of the most basic principle of law – awarding damages to Geraci for his expenses incurred in pursuit of his illegal acquisition of a dispensary.

The logic leading to this conclusion is simple. The object of the November Document is Geraci's ownership of a dispensary that he is prohibited by law from owning. The contract is an illegal, *malum in se* contract that is void and judicially unenforceable. A judgment that enforces an illegal, *malum in se* contract is absolutely void. The defense of illegality cannot be waived as found by Judge Wohlfeil and ratified by Judge Mangione. Therefore, the judgment is absolutely void, should have been vacated pursuant to Cotton's motion to vacate, and requires reversal.

A. California courts may not enforce illegal, *malum in se* contracts.

Under California law, a contract must have a "lawful object." (Civ. Code § 1550(3).) Contracts without a lawful object are void and unenforceable. (*Id*. §§ 1596, 1598, 1608.) Civil Code § 1667 elaborates that

"unlawful" means: "1. Contrary to an express provision of law; [¶] 2. Contrary to the policy of express law, though not expressly prohibited; or, [¶] 3. Otherwise contrary to good morals." For purposes of illegality, the "law" includes statutes, local ordinances, and administrative regulations issued pursuant to the same. (*Kashani v. Tsann Kuen China Enterprise Co.* (2004) 118 Cal.App.4th 531, 542; *see Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 532 (holding defendant's violations of a conditional use permit could properly form the basis for an Unfair Competition Law claim (BPC § 17200), since such permits have "the force of law.").)

"The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by a statute on the ground of public policy." (*Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109.)

Notwithstanding the foregoing authorities, California courts have carved out exceptions to the statutory and judicial language that illegal contracts are void and unenforceable based upon a variety of public policy factors. (*See Kashani*, 118 Cal.App.4th at 541.) In determining whether an illegal contract may be enforceable:

> The courts often make a distinction between acts which are *malum in se* and those which are *malum prohibitum* in that the acts of the former character are viewed as rendering the agreement ***absolutely void*** in the sense that no right or claim can be derived from them, while acts of the latter character render the agreement void or voidable according to the nature and effect of the act prohibited. Agreements *malum in se* include all those of an immoral character, those which are inequities in themselves, and those opposed to sound public policy or designed to further a crime or obstruct justice.

Vitek, Inc. v. Alvarado Ice Palace, Inc. (1973) 34 Cal.App.3d 586, 593 (emphasis added); s*ee Asdourian v. Araj* (1985) 38 Cal.3d 276, 293 (in banc) (describing *malum in se* agreements similarly).

In *Asdourian*, the California Supreme Court considered whether a contractor was barred under BPC § 7159 from recovering compensation for completed home improvement work under a contract that violated that section because it was not in writing. (*Asdourian* at 289.) The court in deciding to enforce the contract, citing *Vitek* with approval, recognized that "a contract made in violation of § 7159 does not involve the kind of illegality which ***automatically*** renders an agreement void. The contracts at issue were not *malum in se*. They were not immoral in character, inherently inequitable or designed to further a crime or obstruct justice.... Rather, the contracts were *malum prohibitum*, and hence only voidable...." (*Id.* at 293 (emphasis added).)

In *Chateau*, plaintiff and defendant entered into a partnership for the purpose of renting apartments to prostitutes. (*Chateau v. Singla* (1896) 114

Cal. 91, 92.) Plaintiff commenced an action in equity against defendant to dissolve their partnership, for the appointment of a receiver, for a statement of accounts, and generally for the closing up of the business of the partnership. (*Id.* at 91.) Defendant answered plaintiff's complaint by stating that the partnership was illegal, against good morals, and against public policy in that the partnership's purpose was for the carrying on of brothels. (*Id.* at 92.) The trial court held the agreement was not illegal and issued a decree in favor of plaintiff. (*Id.* at 93.) The court's reasoning was that the partners were landlords, not participants of the business of prostitution, and the business was "allowed by the police authorities of the city and county of San Francisco." (*Id.* at 93.)

The California Supreme Court reversed the decision, saying: "It is difficult to see how the court, in view of the evidence and of the law, could have found that the copartnership business was not illegal, against good morals, and against public policy." (*Id.* at 93.) The court found the agreement illegal because Penal Code § 316 made it a misdemeanor to let any apartment knowing that it would be used for the purpose of assignation or prostitution. (*Id*.) In regard to the trial court's reasoning that the police permitted the illegal business, the court said it is "meaningless." (*Id.* at 94.) "Public policy is not made or unmade by the acts or omissions of a police department, nor will it be contended that the police department may abrogate a penal statute

or annul an express mandate of the law." (*Id*.)

In *Polk I*, Evan Polk (plaintiff) and Leonid Gontmakher (defendant) worked together to create a cannabis cultivation business in the State of Washington.[4] After the state passed an initiative regulating the production, distribution, and sale of marijuana, they decided to obtain a license. (*Id*. at *2.) However, because Polk had previously pled guilty to drug related crimes, he was prohibited from obtaining a producer or processor license by the Washington Uniform Controlled Substances Act ("WAC"), absent mitigation of criminal convictions. (*Id*. at *3.) After Polk and Gontmakher realized that Polk could not be listed as an owner of their licensed business, Northwest Cannabis Solutions ("NWCS"), they agreed to move forward with the business anyway, orally agreeing to be "equal partners" in their cannabis growing venture. (*Id.* at *3.) Ultimately, Polk would have a 30% interest in NWCS, which they agreed would be held in the name of one of Gontmakher's relatives. (*Id*. at *3-4.) Subsequently, the parties had a dispute and Polk filed suit alleging he is entitled to an ownership interest in the cannabis business and past and future profits. (*Id*.)

The district court dismissed Polk's original complaint on Gontmakher's motion to dismiss on two independent grounds. First, because

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[4] *Polk v. Gontmakher* (*Polk I*), No. 2:18-cv-01434-RAJ, 2019 U.S. Dist. LEXIS 146724, at *3 (W.D. Wash. Aug. 28, 2019).

Polk's claims seeking past and future profits from cannabis activities violated the Federal Controlled Substances Act. (*Id*. at *6.). Second, because Polk was prohibited from obtaining a license by law, the oral agreement was illegal. (*Id*. at * 8 ("The Court will not enforce an illegal contract.").)

In *Polk III*, the district court dismissed Polk's third amended complaint with prejudice on Gontmakher's motion to dismiss solely on the ground that the contract was illegal.[5] The Court reasoned as follows:

> Under Washington law, "[a] marijuana license must be issued in the name(s) of the true party(ies) of interest." WAC 314-55-035; [citation]. The statute defines a "true party of interest" as any entity or person "with a right to receive some or all of the revenue, gross profit, or net profit from the licensed business during any full or partial calendar or fiscal year" and subjects any true party of interest to a vetting process by the [Washington Liquor and Cannabis Board ("LCB")]. WAC 314-55-035(1). State law prohibits issuance of a license "unless all of the members thereof are qualified to obtain a license as provided in this section." RCW 69.50.331.
>
> Plaintiff does not dispute that his claims seeking a share of profits generated by NWCS would make him a true party of interest under the statute. Because he has not been identified as a true party of interest in NWCS or vetted by the LCB, any grant of relief based on entitlement to a share of NWCS's profits would be in violation of the statute. In other words, by affording Plaintiff such relief, the Court would be effectively recognizing him as a true party of interest in subversion of the LCB and in violation of Washington state law. The Court cannot require payment of a share of NWCS's profits to Plaintiff based on his alleged rights to such profits—either through enforcement of the contract or disgorgement of unjust

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[5] *Polk v. Gontmakher*, No. 2:18-cv-01434-RAJ, 2021 U.S. Dist. LEXIS 53569, at *5 (W.D. Wash. Mar. 22, 2021) ("*Polk III*").

> enrichment and related breaches of equity—without violating state statute. *See Bassidji v. Goe*, 413 F.3d 928, 936 (9th Cir. 2005) (holding that "courts will not order a party to a contract to perform an act that is in direct violation of a positive law directive, even if that party has agreed, for consideration, to perform that act").

(*Id.* at *5-7; *see Shenson v. Fresno Meat Packing Co.* (1950) 96 Cal.App.2d 725, 731 ("It is the rule that a party is forbidden to do indirectly that which he is forbidden to do directly.").)

B. The November Document is an illegal contract because it violates BPC § 19323(a), (b)(7).

Geraci was last sanctioned on June 17, 2015 in the CCSquared Judgment for unlicensed commercial cannabis activities. Pursuant to the plain "shall deny" language set forth by the Legislature in BPC §§ 19323(a), (b)(7), Geraci was absolutely prohibited from owning a dispensary until June 18, 2018. Any contract whose object is Geraci's ownership of a dispensary, or that aids and assists Geraci therein, prior to June 18, 2018, is void. (*See, e.g.,* Civ. Code § 1596 ("The object of a contract must be lawful when the contract is made…."); *Homami*, 211 Cal.App.3d at 1109.)

The sole object of the November Document – Geraci's ownership of a dispensary at the Property – is contrary to an express provision of law. Therefore, the November Document is an illegal contract, void and judicially unenforceable. (*See*, *e.g.*, Civ. Code, § 1598 ("Where a contract has but a single object, and such object is unlawful… the entire contract is void.");

Vierra v. Workers' Comp. Appeals Bd. (2007) 154 Cal.App.4th 1142, 1148 ("A contract that conflicts with an express provision of the law is illegal and the rights thereto cannot be judicially enforced.").)

Although *Polk* is not controlling and only persuasive authority, the facts, law and reasoning apply so directly and clearly, that a contrary finding cannot be rationalized or imagined under any scenario. Geraci, like Polk, sought to illegally acquire a prohibited interest in a cannabis business via a proxy because he was barred by law because of his prior drug sanctions. Geraci, like Polk, should have fared no better – the November Document should have been found violative of BPC § 19323, void and judicially unenforceable. (*See Polk III* at *6 ("The Court cannot require payment of a share of NWCS's profits to Plaintiff based on his alleged rights to such profits—either through enforcement of the contract or disgorgement of unjust enrichment and related breaches of equity—without violating state statute."); *Shenson*, 96 Cal.App.2d at 731 ("It is the rule that a party is forbidden to do indirectly that which he is forbidden to do directly.").)

C. The November Document is *malum in se*.

How is it legally possible that Polk *cannot* enforce an illegal contract in a federal district court in Washington, but Geraci *can* do so in San Diego County? It is not. The California Legislature has determined that Geraci absolutely cannot own a dispensary pursuant to the shall deny language of

BPC § 19323(a). (BPC §19323(a) ("Licensing authorities ***shall deny***…") (emphasis added); *see Paterra*, 64 Cal.App.5th at 536 (Legislative intent by use of the words "***shall not***" in statute demonstrates absolute prohibition of act contrary to statute) (emphasis added).)

Arguments put forth in opposition by Geraci's attorneys are contradicted by law and frivolous as a matter of law: BPC § 19323 *does* bar Geraci's ownership of a dispensary; BPC § 19323 *was* in effect when the November Document was executed; both a CUP and a State license are required to operate a dispensary;[6] applicants can use agents to apply for a CUP/license, but Geraci's attorneys argument that agents can fail to disclose a prohibited principal in an application is a direct factual admission of seeking to commit a fraud upon a licensing agency; and the defense of illegality cannot be waived.

Judge Wohlfeil's finding that the defense of illegality had been waived and an illegal contract can be enforced is void is contrary to law. The judiciary cannot unmake public policy finding the defense of illegality can

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[6] As this Court has noted in another action by one of Austin's clients who illegally acquired ownership of numerous cannabis licenses: "The licenses were required under state laws that closely regulate cannabis businesses. (*See* Bus. & Prof. Code, § 26000 et seq.) Cities and counties also regulate these businesses through their land use and police powers, including through conditional use permits (CUP). (*See id.*, § 26200, subd. (a)(1).)" (*Salam Razuki v. Ninus Malan* (Feb. 24, 2021, No. D075028) ___Cal.App.5th___, fn. 3 [2021 Cal. App. Unpub. LEXIS 1168, at *7].)

be waived or annul BPC § 19323 any more than the police's nonenforcement of prostitution laws could make the subject illegal agreement in *Chateau* lawful. (*See Chateau,* 114 Cal. at 94 ("Public policy is not made or unmade by the acts or omissions of a police department, nor will it be contended that the police department may abrogate a penal statute or annul an express mandate of the law.").)

The agreement, Geraci's performance thereunder, and that of his agents, including his attorneys and the arguments they have made in performance thereunder to effectuate the illegal contract, that has deceived the judiciary and led to the current procedural posture, clearly demonstrate the agreement is *malum in se*. Especially when compared to *Polk*. The *Polk* court actually sympathized with Polk as he had founded and worked to help create the business. (*Polk III*, at * 7 ("The Court sympathizes with Mr. Polk's plight. He helped to build a successful business from the ground up and is now being deprived of the fruits of his labors.").)

It is offensive to all notions of justice, the most basic principle of law barring the courts from aiding or ratifying crimes, and wholly without any legal justification, to force Cotton to compensate Geraci $300,000 in damages for the fees Geraci incurred in seeking to unlawfully acquire a CUP at the Property AND the costs Geraci incurred in suing Cotton.

Especially on the grounds that the defense of illegality can be waived.

This is literally making an innocent victim pay a criminal for the costs incurred by the criminal in perpetrating a crime against the victim. The November Document and Geraci's performance thereunder are immoral; inherently inequitable as to the public, the judiciary, and Cotton; designed to further a crime; and are therefore the type of illegality that "automatically" render the agreement "absolutely void" as *malum in se*. (*Asdourian*, 38 Cal.3d at 293; *Vitek,* 34 Cal.App.3d at 593; Penal Code § 115.)

D. Geraci's filing of *Cotton I* in pursuit of his performance under the November Document constitutes slander of title.

"The elements of the [slander of title] tort are (1) a publication, (2) without privilege or justification, (3) falsity, and (4) direct pecuniary loss." *Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1030 (brackets in original).

First, the filing of the Berry Application with the City of San Diego and the *Cotton I* action with the state court are publications.

Second, pursuant to California Civil Code § 47(c), there is a qualified litigation privilege for a rival claimant to property that is lost when the publication is made with malice. (Cal. Civ. Code § 47(c) (a communication is privileged if it is made "without malice, to a person interested therein, by one who is also interested."); *see Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 622 ("where a rival claimant of property prosecutes an action in good faith to prove his own title to the land, such claimant is

conditionally privileged to disparage another's title to property providing it is done "... by an honest and good faith assertion of an inconsistent legally protected interest in himself." (quoting *Gudger v. Manton* (1943) 21 Cal.2d 537, 545).) Malice exists when a rival claimant "attempt[s] to secure to themselves property as to which they had no legitimate claim." (*Id.* at 622-623.) Here, malice exists because neither Geraci nor Berry had a "legitimate claim" to the Property based upon Berry's false claims to title to the CUP and the Property. (*Shenson,* 96 Cal.App.2d at 731 (***"It is the rule that a party is forbidden to do indirectly that which he is forbidden to do directly***.") (emphasis added).)

Third, Geraci and Berry's claims were false as they were based on the illegal contract. Fourth, recognizable damages suffered by Cotton include his legal fees. (*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 865.)

E. Judge Wohlfeil erred finding the defense of illegality had and can be waived.

First, Judge Wohlfeil erred factually as the record is clear that Cotton pled and raised the defense at trial. (3 AA 291-292 (complaint); 2 AA 159-171 (motion for directed verdict); (2AA 174 (denial of requests for judicial notice of Geraci Judgments during trial).) *A fact which Geraci himself noted in his opposition to the motion for new trial*. (*See*, *e.g.*, 2 AA 214:11-12 ("attorney Austin testified at trial the statute [BPC § 26057] would not prevent Mr. Geraci from obtaining a CUP.") It thus defies reason how Judge

Wohlfeil found the defense of illegality had been waived for failure to raise prior to the motion for new trial.

Second, Judge Wohlfeil erred legally because the defense of illegality cannot be waived and can be raised for the first time in a motion for new trial. As set forth in the seminal California Supreme Court case of *Lewis & Queen*:

> Whatever the state of the pleadings, when the evidence shows that the plaintiff in substance seeks to enforce an illegal contract or recover compensation for an illegal act, the court has both the ***power*** and ***duty*** to ascertain the true facts in order that it may not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids. It is immaterial that the parties, whether by inadvertence or consent, even at the trial do not raise the issue. The court may do so of its own motion when the testimony produces evidence of illegality. ***It is not too late to raise the issue on motion for new trial***, in a proceeding to enforce an arbitration award, or even on appeal.

Lewis & Queen v. N. M. Ball Sons (1957) 48 Cal. 2d 141, 147-48 (citations omitted; emphasis added); *City Lincoln-Mercury Co. v. Lindsey* (1959) 52 Cal.2d 267, 274 ("A party to an illegal contract cannot ratify it, cannot be estopped from relying on the illegality, and ***cannot waive*** his right to urge that defense." (emphasis added).) Judge Wohlfeil had the *power* and the *duty* to not enforce the illegal contract. (*Id*.)

Third, at the hearing for the motion for new trial at which the only issue argued was the illegality of the contract, Judge Wohlfeil stated that "***the jury categorically rejected your side's claim and I am persuaded everybody got a fair trial***." (2 AA 241:3-8) (emphasis added).) To the extent that Judge

Wohlfeil is somehow saying the jury's findings supports a judgment enforcing an illegal contract, such is error. It is error because "[w]hether a contract is illegal or contrary to public policy is a ***question of law***." (*Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 349-350 (emphasis added).) And "[a]ll questions of law… are to be decided by the court." (Evid. Code, § 310(a); *see People v. Walker* (1973) 32 Cal.App.3d 897, 902) ("It is error to submit to a jury as a question of fact an issue that on the record was one of law.").)

The case should never have been filed, not only was there a lack of probable cause, but the facts negate the possibility of probable cause. The case should have been dismissed at the latest by Judge Wohlfeil on Cotton's motion for directed verdict on the grounds of illegality. The case should never have reached a jury. The jury's categorical rejection of Cotton's case at trial cannot support Judge Wohlfeil's finding that the defense of illegality had been waived when he had no discretion *and was required* to find the contract illegal and unenforceable based on Geraci's own pleadings and judicial admissions. (Evid. Code, § 310(a); *Jackson*, 210 Cal.App.3d at 349-350 ("Whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case."); *Ludgate Ins. Co.*, 82 Cal.App.4th at 603 ("On a pure question of law, trial courts have no discretion. They must, without choice, apply the law

correctly.").)

Further, Cotton cannot understand how Judge Wohlfeil can conclude that "***everybody got a fair trial***" when it was entered on the premise that Cotton I was filed against Cotton to enforce an illegal contract and resulted in a judgment that forces Cotton to pay Geraci for his criminal acts against him.

F. Judge Mangione erred finding relief cannot be granted in the underlying action because a void judgment for enforcing an illegal, *malum in se* contract can "be directly or collaterally attacked at any time" and relief in equity is mandated.

In *Hunter*, a party to a stipulated judgment petitioned the court of appeal to issue a writ of prohibition enjoining the superior court from enforcing the judgment on the grounds that it was void for enforcing an illegal contract that violates Civil Code § 1673. (*Hunter v. Superior Court* (1939) 36 Cal.App.2d 100, 112 ("Petitioner is seeking to determine and maintains that the judgment given under the contract is void in its entirety.").) "Considering all of the issues presented, the court [was] mainly concerned with whether or not the judgment is on its face void, and whether or not it is such a judgment as the court had no power or jurisdiction to make under the circumstances." (*Id.*)

The court said:

> Nullity of judgments results from a want of legally organized court or tribunal; want of jurisdiction over the subject-matter or the parties; or want of power to grant the relief contained in the judgment. Whether

> the judgment is void on its face must be determined from an inspection of the judgment roll alone, and unless this record shows affirmatively that the court was without jurisdiction, the judgment is not subject to this summary action…. ***The legality or illegality of the judgment must be determined by the terms and provisions of section 1673 of the Civil Code***. If the judgment comes within the inhibition of that section, then it is to that extent void. There is nothing which the parties to the action could do which would in any way add to its validity. If the contracts upon which the judgment is based are to that extent void, they cannot be ratified either by right, by conduct or by stipulated judgment.

(*Id.* at 112-113 (emphasis added).)

The court granted the petition finding the judgment was void on its face because it enforced an illegal contract that violated Civil Code § 1673, concluding: "If a court grants relief, which under no circumstances it has any authority to grant, its judgment is *to that extent* void." (*Id*. at 116 (emphasis in original).)

Hunter stands for the three propositions: (i) a contract that enforces a judgment in violation of statue is an illegal contract; (ii) a judgment that enforces an illegal contract is void to the extent it enforces an illegal contract; (iii) there is nothing which the parties to the action could do which would in any way add to its validity; and (iv) a judgment that enforces an illegal contract in violation of a statute is void on its face because the relief the judgment grants is on the face of the judgment. (*See id.* at 112 ("Nullity of judgments results from a … want of power to grant the relief contained in the judgment.").)

Therefore, here, as in *Hunter*, the judgment is void because: (i) the November Document is an illegal and void contract because it violates BPC § 19323; (ii) the judgment enforces the void contract; and (iii) it grants relief which Judge Wohlfeil under no circumstances had any authority to grant – damages for Geraci's fees incurred in pursuit of his illegal object to own a dispensary including costs for suing Cotton.

In the words of this Court, the judgment is void as an act in excess of Judge Wohlfeil's jurisdiction because it is an "exercise of a power not authorized by law [and] a grant of relief to [Geraci] that the law declares ***shall not*** be granted." (*Paterra,* 64 Cal.App.5th at 536 (emphasis added); *see 311 South Spring Street Co.,* 178 Cal.App.4th at 1018 ("… we define a judgment that is void for excess of jurisdiction to include a judgment that grants relief which the law declares shall not be granted."); BPC § 19323(a) (licensing authorities "***shall deny***" an application by a disqualified applicant) (emphasis added).)

The judgment is absolutely void and Judge Mangione erred in finding that Cotton cannot be granted relief in an action in equity or pursuant to Code of Civil Procedure § 473(d), especially on the grounds that the defense of illegality had been waived. (*OC Interior*, 7 Cal.App.5th at 1330) ("A judgment absolutely void may be attacked anywhere, ***directly*** or ***collaterally*** whenever it presents itself, either by parties or strangers.") (emphasis added);

JUDGE MANGIONE ERRED IN FAILING TO FOLLOW THE *HILL* RULE AND FINDING THE JUDGMENT VOID.

> As our high court explained many years ago, if a party admits facts showing that a judgment is void, or allows such facts to be established without opposition, then, ***as a question of law***, a court ***must*** treat the judgment as void upon its face.

OC Interior, 7 Cal.App.5th at 1327-1329 (citing *Hill v. City Cab & Transfer Co.* (1889) 79 Cal. 188, 191 (emphasis added); *see Ludgate*, 82 Cal.App.4th at 603 ("On a pure question of law, trial courts have no discretion. They must, without choice, apply the law correctly.").

In his opposition to the motion to vacate, Geraci *did not* dispute that (1) he was not sanctioned in the Geraci Judgments, nor did he argue that (2) BPC §19323 bars his ownership of a dispensary, or (3) that the defense of illegality can be waived. These facts were established without opposition.

As a matter of law, Judge Mangione had no discretion to fail to follow controlling California Supreme Court precedent pursuant to the doctrine of *stare decisis*, treat the judgment as void on its face, and vacate the judgment for enforcing an illegal contract. (*Ludgate*, 82 Cal.App.4th at 603 ("On a pure question of law, trial courts have no discretion. They must, without choice, apply the law correctly.").

CONCLUSION

Judge Wohlfeil erred impermissibly in not setting aside the judgment on the grounds that the defense of illegality could be waived, and thereby

turn an illegal, *malum in se* contract into a lawful, enforceable contract by judicial decree.

Judge Mangione erred impermissibly giving effect to and validating the judgment on the grounds that the defense of illegality had already been adjudicated by Judge Wohlfeil and that the judgment was not void on its face.

This is not the law, and cannot be allowed.

It has been over five years. If Cotton is wrong, Cotton would greatly appreciate if this Court would explain it to Cotton. Otherwise, Cotton intends to continue to litigate until he vindicates his rights pursuant to the authorities above, common sense, and the opinion of **EVERY** attorney and legal professional who Cotton has consulted with or who has reviewed Cotton's case over the last five years (other than Geraci's attorneys and Judge Wohlfeil and Judge Mangione). Based on the language above, it does not matter how many time Cotton loses, the law will not allow the judiciary to commit a crime no matter how many judges and judgments allow, ratify or state otherwise: "***A judgment giving effect to a void judgment is also void***."[7]

Appellant knows that he cannot prosecute an action against Geraci

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[7] *Kenney v. Tanforan Park Shopping Ctr.* (Dec. 15, 2008, Nos. G038323, G039372) (___Cal.App.4th___ [2008 Cal. App.Unpub.LEXIS 10048, at *36-37]) (citing *County of Ventura v. Tillett* (1982) 133 Cal.App.3d 105, 110 and *Security Pac. Nat. Bank v. Lyon* (1980) 105 Cal.App.3d Supp. 8, 13) (emphasis added).

and his army of wealthy conspirators and attorneys, but he doesn't need to. He just needs to prove the judgment is void for illegality. A conclusion that is mandated by express law; the most basic principle of law barring the ***justice*** system from condoning, encouraging and ratifying the effectuation of ***crimes*** via the judiciary; and basic common sense.

Attorneys cannot help their clients commit crimes through the judiciary, obtain void judgments enforcing illegal contracts and activity through misrepresentations of fact and law, force their victims to pay for their litigation defense against criminal illegality, and then rely on those void judgments as shields to bar their victims from vindicating their rights against them in a court of law:

> No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out.
>
> *Wong v. Tenneco* (1985) 39 Cal.3d 126, 135.

The order must be reversed, and the judgment vacated so that counsel for Cotton with the legal sophistication and resources necessary can bring forth suit to vindicate his rights against Geraci and his coconspirators.

Dated: July 21, 2022

Darryl Cotton
Petitioner/Plaintiff *In Propria Persona*

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), the Attached Appellant's Opening Brief was produced using 13-point Times New Roman type style and contains **11,774** words not including the table of contents and authorities, caption page, or this Certificate, as counted by the word processing program used to generate it.

Dated: July 21, 2022

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Darryl Cotton
Petitioner/Plaintiff *In Propria Persona*