No. 22-56077

In the United States Court of Appeals for the Ninth Circuit

DARRYL COTTON, individually,
Plaintiff and Appellant,
v.
GINA M. AUSTIN, individually, JESSICA CLAIRE McELFRESH, individually, and DAVID S. DEMIAN, individually,
Defendants and Appellees.

Appeal from the United States District Court
for the Southern District of California
Case No. 3:18-cv-00325-JO-DEB
The Honorable District Judge Jinsook Ohta

APPELLANTS OPPOSITION TO MOTIONS TO DISMISS APPEAL FOR LACK OF JURISDICTION BY REPONDENTS GINA M. AUSTIN AND DAVID S. DEMIAN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Opinions

Federal Court Opinions

California State Opinions

State Cases

State Statutes

PARTIES IN INTEREST DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Cotton identifies the following parties that he knows or believes have an interest in the adjudication of this motion and case:

Lawrence Geraci
Rebecca Berry
Stephen Lake
Salam Razuki
Sarah Razuki
Matthew Razuki
Marvin Razuki
Heidi Rising
Keith Henderson
Sylvia Gonzales
Elizabeth Juarez
Abhay Schweitzer
Ninus Malan
Bradford Harcourt
James Bartell
Aaron Magagna
Amy Sherlock
David Demian at Finch, Thornton and & Baird
Adam Witt at Finch, Thornton and & Baird
Jason Thornton @ at Finch, Thornton and & Baird
Rishi Bhatt at Finch, Thornton and & Baird
Jason Baird at Finch, Thornton and & Baird
Evan Schube at Tiffany & Bosco
Natalie Trang-My Nguyen at Nguyen Law Corporation
Matthew Shapiro at Shapiro Law
Jacob Austin at Law Offices
JoEllen Baskett at Law Offices
Jessical McElfresh at McElfresh Law, Inc.
Gina M. Austin at Austin Legal Group, APC
Arden Anderson at Austin Legal Group, APC
Ethan T. Boyer at Austin Legal Group, APC

Tamara M. Leetham at Austin Legal Group, APC
Mara Elliott, City Attorney City of San Diego
M. Travis Phelps, Deputy City Attorney City of San Diego
Jana Will, Deputy City Attorney City of San Diego
Jorge Del Portillo, San Diego County District Attorney
Alfred Ferris at Ferris & Britton
Michael Weinstein at Ferris & Britton
Elyssa Kulas at Ferris & Britton
Scott Toothacre at Ferris & Britton
Carmela Duke, San Diego Superior Court
Katherine Parker, DOJ_OUSA
Steven Wilson Blake at Blake Law Firm
Laura E. Stewart at Walsh McKean Furcolo LLP
Gregory B. Emdee at Kjar, McKenna & Stackalper
Jon R. Schwalbach at Kjar, McKenna & Stackalper
Eric R. Dietz at Gordon & Reese
Tatiana Dupuy at Gordon & Reese
Douglas Pettit at Pettit, Kohn Ingrassia, Lutz & Dolin
Julia Dalzell at Pettit, Kohn Ingrassia, Lutz & Dolin
Matthew C. Smith at Pettit, Kohn Ingrassia, Lutz & Dolin
Kayla R. Sealey at Pettit, Kohn Ingrassia, Lutz & Dolin
Kenneth Feldman, Lewis & Brisbois
Tim J. Vanden Heuvel, Lewis & Brisbois
David K. Demergian at Fitzmaurice, Demergian & Gagnon
Steven A. Elia at Elia Law Firm
Douglas Jaffe at Douglas Jaffe Law Offices
Olga Y. Bryan at Ames Karanjia, LLP
James R. Lance at Noonan Lance Boyer & Banach LLP
Genevieve M. Ruch at Noonan Lance Boyer & Banach LLP
Steven A. Elia at Elia Law Firm
Garret F. Groom at Elia Law Firm
James Joseph at Elia Law Firm
Maura Griffin - Aljabi Law Firm
Andrew Flores at Law Offices
Paul A. Beck - Law Offices of Paul A. Beck APC
Charles F. Goria at Goria & Weber
Gregory D. Hagen at Greg Hagen Law
Dana M. Grimes at Grimes & Warwick
Thomas J. Warwick Jr. at Grimes & Warwick
Jay Temple at Grimes & Warwick

Antonia F. Yoon - Kegel, Tobin & Truce
Brian P. Funk at Law Office of Brian P. Funk
Allen Robert Bloom at Law Office of Allen Bloom
Daniel Watts at G10 Law
Steven W. Galuppo at G10 Law

Date: December 21, 2022

Respectfully submitted,

/s/ Darryl Cotton

Darryl Cotton, Appellant, *Pro Se*

INTRODUCTION[1]

The Department of Cannabis Control (DCC), formerly known as the Bureau of Cannabis Control, is the "State of California agency that regulates commercial cannabis licenses for medical and adult-use in California." *United States v. Bureau of Cannabis Control*, No. 20cv1375-BEN-LL, 2020 U.S. Dist. LEXIS 157919, at *1 (S.D. Cal. Aug. 31, 2020) (*US v. DCC*). "When a commercial cannabis business applies for a provisional or annual license, it is required to provide information to the [DCC] such as business ownership interest(s), financial interest(s), personal identifying information (e.g., date of birth and social security number), financial information including banking information, business operating procedures, and state and federal criminal arrest and conviction history." (*Id.* at *1-2 (citing DCC opposition brief).)

[1] This opposition sets forth the minimum facts required for this Court to adjudicate this matter. There are lots of other material and related facts that also give rise to legal grounds for relief, but Cotton is not capable of explaining them all. Cotton focuses on proving the motions should be denied based on the two most simple factual issues that establish a fraud on the court has been perpetrated on the State and Federal courts and that granting the dismissal of Cotton's appeal will perpetuate that fraud and continue what is an egregious miscarriage of justice.

The motion to dismiss by Gina Austin (Austin Motion) and the motion to dismiss by David Demian (Demian Motion) must be denied. Both of them are based on the *Cotton I*[2] and *Cotton II*[3] state court judgments that are void for, *inter alia*, enforcing a (1) forged, (2) illegal contract (3) that was procured through multiple acts that constitute a fraud on the court (4) and that were rendered by Judge Joel Wohlfeil who was disqualified due to bias.

These motions, this case, and numerous related cases in the State of California and the Federal courts arise from one single issue. Appellant/defendant attorney Gina Austin's illegal business practice of acquiring cannabis business for her clients. It is illegal because her clients cannot own cannabis business because they have had judgments entered against them for owning/operating illegal dispensaries. To break the law and unlawfully acquire these cannabis businesses for her clients, Austin applies for the cannabis permits/licenses in the name of her clients' agents/strawmen (the "Strawmen Practice").

[2] *Larry Geraci v. Darryl Cotton*, Superior Court of California, County of San Diego, Case No. 37-2017-00010073-CU-BC-CTL ("Cotton I").

[3] *Cotton v. City of San Diego*, Superior Court of California, County of San Diego, 37-2017-00037675-CU-WM-CTL.

MATERIAL FACTUAL BACKGROUND

I. Geraci is sanctioned for unlicensed commercial cannabis activity in 2014 and 2015.

On October 27, 2014, Geraci had a judgment entered against him and fined by the City of San Diego for owning and operating an illegal dispensary. (*City of San Diego v. Tree Club Cooperative, Inc. et al.*, Case No. 37-2014-20897.).

On June 17, 2015, Geraci had a judgment entered against him and fined by the City of San Diego for owning and operating *two* illegal dispensaries. (*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").

II. Cotton and Geraci reach an agreement for the sale of Cotton's real property (the "Property") subject to a single condition precedent – the approval of a permit for Geraci to own a cannabis business at the Property in the name of Berry.

The following background is taken direct from Geraci's sworn declaration executed on April 9, 2018.

> In approximately June 2016, Neal Dutta identified to me real property owned by Darryl Cotton located at 6176 Federal Blvd., City of San Diego, San Diego County, California, Assessor's Parcel No. 543-020-02-00 (the "Property") as a potential site for acquisition and development for use and operation as a MMCC…. Darryl

Cotton and I [met] at my office on November 2, 2016, to negotiate the final terms of the sale of the Property and we reached an agreement on the final terms of the sale of the Property. That agreement was not oral. We put our agreement in writing in a simple and straightforward written agreement that we both signed before a notary…. After we signed the [November Document] for my purchase of the Property, Mr. Cotton immediately began attempts to renegotiate our deal for the purchase of the Property. This literally occurred the evening of the day he signed the [November Document].

On November 2, 2016, at approximately 6:55 p.m., Mr.

Cotton sent me an email, which stated:

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

I receive my emails on my phone. It was after 9:00 p.m. in the evening that I glanced at my phone and read the first sentence, "Thank you for meeting with me today". And I responded from my phone "No no problem at all" [(the "Confirmation Email")]. I was responding to his thanking me for the meeting. The next day I read the entire email and I telephoned Mr. Cotton because the total purchase price I agreed to pay for the subject property was $800,000 and I had never agreed to provide him a 10% equity

> position in the dispensary as part of my purchase of the property. I spoke with Mr. Cotton by telephone at approximately 12:40 p.m. for approximately 3-minutes. A true and correct copy of the Call Detail from my firm's telephone provider showing those two telephone calls is attached as Exhibit 3 to the Geraci NOL. During that telephone call I told Mr. Cotton that a 10% equity position in the dispensary was not part of our agreement as I had never agreed to pay him any other amounts above the $800,000 purchase price for the property. Mr. Cotton's response was to say something to the effect of "well, you don't get what you don't ask for." He was not upset and he commented further to the effect that things are "looking pretty good—we all should make some money here." And that was the end of the discussion.

Request for Judicial Notice ("RJN"), Ex. 1 (Declaration of Lawrence Geraci) at 2:11-7:16.) Geraci agrees he confirmed in writing that his agreement with Cotton included a 10% equity position for Cotton, but alleges an oral agreement reached on November 3, 2016 between them that contradicts the undisputed writings between the parties.

III. The illegality of the Strawman Practice as a contract defense was fully briefed in *Cotton I* and found to be waived by Judge Wohlfeil.

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 §§ 19323/26057, the San Diego Municipal Code and California's public policies. (RJN Ex. 2 at 11:1-13:5.) 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; second, because Cotton waived the defense of illegality; third, because the testimony of Geraci's own witnesses prove that it is not illegal for Geraci to own a dispensary. (RJN Ex. 3 at 10:15-15:13.) The witnesses included Austin. (*Id.* at 14:11-12 ("**In addition, attorney Gina Austin testified at trial the statute [BPC § 26057] would not prevent Mr. Geraci from obtaining a CUP**.") (emphasis added).)

In Cotton's reply, 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).

(RJN Ex. 4 at 3:6-13.)

On October 25, 2019, Judge Wohlfeil held a hearing and denied the motion for new trial. Judge Wohlfeil denied the motion on the grounds that Cotton had not raised the issue of illegality before the motion for new trial and that Cotton had therefore waived the defense of illegality:

> 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 first 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? …. I am not inclined to change the Court's view**.

RJN Ex. 5 at 3:22-4:21; *see* RJN Ex. 6 (minute order denying motion for new trial).

IV. Demian and FTB's actions regarding the illegality of the Strawman Practice.

Cotton does not have enough room to describe all of Demian's fraudulent actions that he took to sabotage Cotton's case while his

attorney of record and the context required. Cotton just lays out four facts.

First, Demian never disclosed that FTB had shared clients with Geraci's business, Tax & Financial Center, Inc. Cotton discovered this when a junior associate of FTB, Adam Witt, told Cotton this at a meeting while waiting for Demian and told Cotton he had just overheard Demian and another partner at FTB discussing it. (Cotton Decl. at ¶ 4.)

Second, Demian amended Cotton's complaint and removed the allegations and causes of action that Geraci and Berry conspired to unlawfully acquire a cannabis business for Geraci via the Strawman Practice. (Cotton Decl. at ¶ 5.)

Third, on October 31, 2017, F&B and Austin on behalf of Geraci and Berry jointly filed *Real Parties in Interest, Larry Geraci and Rebecca Berry, Memorandum of Points and Authorities in Opposition to Ex Parte Application for Issuance of an Alternative Writ of Mandate or for an Order Setting Expedited Hearing and Briefing Schedule* (the "Opp. to Writ"). (RJN Ex. 7.) FTB/Demian was counsel for Cotton. (See *id*.) The Opp. to Writ materially stated:

> Berry was the Applicant. **Cotton and Berry did *not* have a principal-agent relationship and Berry did not**

> **submit the CUP Application on his behalf**. Rather, Berry had a principal-agent relationship *with Geraci*. Berry submitted the CUP Application on behalf of Geraci who had entered into a written agreement with Cotton for the purchase of the Property.

RJN, Ex. 7 at 4:25-28 (bold added; italics in original).

Fourth, Demian repeatedly attempted to have Cotton declare that he had a principal-agent relationship with Berry and was responsible for having Austin submit the Berry Application in the name of Berry via the Strawman Practice. (Cotton Decl. at ¶ 6.) This contradicts the specific arguments made by Geraci in his Opp. to Writ.

V. Facts related to judicial bias.

The following is taken directly from the affidavit of attorney Andrew Flores who made a special appearance and represented Cotton in *Cotton I*.

> On August 2, 2018, I made a special appearance before Judge Joel Wohlfeil in the *Cotton I* action and informed him a petition seeking his recusal would be filed against him due to a statement he made that proves bias at a hearing he held on January 5, 2018 in both the *Cotton I* and *Cotton II* actions.
>
> Specifically, that on January 5, 2018, in response to allegations by Cotton that they filed Cotton I without probable cause (i.e., a sham) or that they were violating their duty of candor to the court by failing to disclose that Cotton I was a sham (i.e., violating their duty of affirmative duty to prevent a fraud on the court), he stated that he does not personally believe that attorneys

> Weinstein, Austin, David Demian, Adam Witt and Jana Will are "not capable of acting unethically because he has known them from their years of practice before him in other matters" (the "Trusted Attorneys").
>
> In response to my recitation of his January 15, 2017 statement, Judge Wohlfeil responded that he "may have made" that statement regarding his Trusted Attorneys. Further, that as to Weinstein, that he may have made that statement "because he has known Weinstein since early on in their careers when they were both young attorneys and both started their practice" of law (collectively with the January 25, 2018 statement, Judge Wohlfeil's "Bias Statements").

Request for Judicial Notice Ex. 8. (Affidavit of Andrew Flores) at ¶¶ 14-16.

VI. Plaintiff cannot get counsel to represent him to make the claim that the Cotton I and II judgments are void due to bias and because large reputable law firms do not want to sue the attorneys at issue here from Big Law firms.

During the course of this matter Cotton has been represented by attorneys Jacob Austin, Andrew Flores, JoEllen Plaskett, and the law firm of Tiffany & Bosco. Cotton cannot acquire counsel to represent him and has been turned down NOT because of the merits of his case, but because of the judicial bias aspect of his case and the how many defendant attorneys are liable. As has been repeatedly stated to Cotton, it is not "good business" to expose judicial bias or sue other attorneys.

Most recently, the law firms of Sheppard Mullin, Latham & Watkins refused to represent Cotton and did not deny their representation on the merits. (Cotton Decl. at ¶ 7.)

Cotton has made the judicial bias and illegality arguments for years before the state and federal courts. No state or federal court has ever explained by Judge Wohlfeil's bias statements are not bias or why Geraci can own a cannabis business in the name Berry in violation of California's cannabis licensing policies and statutes. (Cotton Decl. at ¶ 8.) Once Cotton is successful in having the judgments declared void and allegations of judicial bias do not need to be made, the law firm of Tiffany & Bosco will represent him in his cases. (Cotton Decl. at ¶ 9.)

ARGUMENT

"A judgment giving effect to a void judgment is also void"[4] because "being worthless in itself, all proceedings founded upon it

[4] *Kenney v. Tanforan Park Shopping Ctr.*, Nos. G038323, G039372, 2008 Cal. App. Unpub. LEXIS 10048, at *36-37 (Dec. 15, 2008) (citing *County of Ventura v. Tillett*, 133 Cal.App.3d 105, 110 (1982) ["an order giving effect to a void judgment is also void and is subject to attack"]; *Security Pac. Nat. Bank v. Lyon*, 105 Cal.App.3d Supp. 8, 13 (1980) ["affirmance of a void judgment or order is itself void"] (emphasis added).

are equally worthless." (*OC Interior*, 7 Cal. App. 5th 1330 (2017)). "***[G]iving effect to a void judgment is a per se abuse of discretion.***" *Kaplan v. Lehrer*, 173 F. App'x 934, 935 (2d Cir. 2006) (emphasis added).

"[U]nder the Full Faith and Credit Act a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give." *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 523, 106 S. Ct. 768, 771 (1986). Under California law:

> 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 Servs., LLC v. Nationstar Mortg., LLC, 7 Cal. App. 5th 1318, 1330 (2017) (*OC Interior)* (cleaned up, brackets in original, emphasis added).)

There is no time limit for bringing an action or motion to vacate a judgment or order obtained via a fraud on the court. (*See, e.g., Bleecher v. Nightingale Nurses, LLC*, No. 07-80378-Civ-DIMITROULEAS/S, 2010 U.S. Dist. LEXIS 101844, at *30 (S.D. Fla. Sep. 8, 2010) ("[T]he one year limitation on vacating judgments based

on fraud by an adverse party, set forth in Fed.R.Civ.P. 60(c), does ***not*** apply to orders procured by fraud of one's own counsel.") (citing *Mckinney v. Boyd*, 604 F.2d 632, 634 (9th Cir. 1968) (emphasis added).).

I. The *Cotton I* and *Cotton II* judgments are void because Judge Wohlfeil was disqualified to render them due to bias.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980). In addition, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954); *Exxon Corp. v. Heinze*, 32 F.3d 1399, 1403 (9th Cir. 1994) ("[T]he Constitution is concerned not only with actual bias but also with 'the appearance of justice.'"). "Bias exists where a court has prejudged, or reasonably appears to have prejudged, an issue." *Kenneally v. Lungren*, 967 F.2d 329, 333 (9th Cir. 1992) (quotation and citation omitted).

The California Supreme Court "has on several occasions pointed out that a judgment rendered by a disqualified judge is void." (*Giometti v. Etienne*, 219 Cal. 687, 689 (1934).) "Because an order rendered by a disqualified judge is null and void, **it will be set aside without**

determining if the order was meritorious." (*Christie v. City of El Centro*, 135 Cal. App. 4th 767, 777 (2006) (emphasis added).)

Judge Wohlfeil's statements to Cotton on January 5, 2018 and to Flores on August 2, 2018 are the textbook definition of judicial bias – he "prejudged... an issue." (*Kenneally*, 967 F.2d at 333.) Based on his personal beliefs of the character of his Trusted Attorneys formed over the course of years practicing before him in other matters (i.e., extrajudicial) – and as to Weinstein from their practicing together when they were "young attorneys" – that they were not "capable" of filing/maintaining a lawsuit lacking probable cause or failing to disclose to him that an action before his was proceeding without probable cause thereby perpetrating a fraud on the court, on him. Judge Wohlfeil already determined that Cotton's cross-complaint that the *Cotton I* action was filed without probable cause was already judged.

The *Cotton I* and *II* judgments are absolutely void on this ground alone under both Federal and California law without even addressing the merits of Cotton's actions set forth below. "The Due Process Clause entitle[d] [Cotton] to an impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980).

II. The November Document is a forged contract.

"Unlawful actions may not be subject to immunity under the *Noerr-Pennington* doctrine." *People ex rel. Harris*, 11 Cal.App.5th at 1161. California Penal Code § 115 "makes it a felony to knowingly procure or offer any false or forged instrument for filing in a public office." Id. at 1166. "[F]raud … and recording false documents, among other things, are not protected petitioning activity under *Noerr-Pennington* and its progeny." *Id.* at 1163.

"Section 470 of the [California] Penal Code provides in part as follows: 'Every person who, with intent to defraud, falsely makes, alters, forges, or counterfeits, any writing obligatory, [or] contract is guilty of forgery.'" (*People v. Nesseth*, 127 Cal. App. 2d 712, 718-19 (1954) (cleaned up).) The "procuring of a genuine signature to an instrument by fraudulent representations constitutes forgery." (*Id.* at 719.)

"'Whether a certain or undisputed state of facts establishes a contract is one of law for the court." (*Vita Planning & Landscape Architecture, Inc. v. HKS Architects, Inc.,* 240 Cal. App. 4th 763, 771 (2015) (*Vita*) (cleaned up).) In order to prove a document is a valid contract, a party must prove the parties "mutually assented" to the document being a contract. (Cal. Civ. Code § 1550(2).) In California,

"a party who fails to read a contract but nonetheless objectively manifests his assent by signing it—absent fraud or knowledge by the other contracting party of the alleged mistake—may [not] later rescind the agreement on the basis that he did not agree to its terms." (*Stewart v. Preston Pipeline Inc.*, 134 Cal. App. 4th 1565, 1589 (2005) (emphasis added).)

Geraci admits that he sent the Confirmation Email confirming in writing that the November Document is not a "final contract." "[Geraci's] opposition—based upon nothing more than his claim that he had not read or understood the agreement before signing it—raised no triable issue on the question of mutual assent." (*Stewart*, 134 Cal. App. 4th at 1565.)

Judge Wohlfeil should have adjudicated the issue of mutual assent based on Geraci's own admissions as a matter of law. It was a miscarriage of justice to present to the jury as a question of fact that on the record was a question of law for the court to decide. (Evid. Code, § 310(a) (A[l questions of law… are to be decided by the court."; *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.").)

Further, the Berry Application was filed on October 31, 2016. Geraci's own judicial admissions establish that his "procuring of [Cotton's] genuine signature to [the November Document on November 2, 2016 was] by fraudulent representations [that it was not a 'final contract'] constitutes forgery." (*Nesseth*, 127 Cal. App. At 719.) Geraci never intended, nor could he legally, honor his agreement with Cotton reached on November 2, 2016 that included a 10% equity position for Cotton.

III. The Strawman Practice has already been adjudicated to be illegal by a federal court and contracts in furtherance thereof are illegal and judicially unenforceable.

> It is beyond cavil that federal courts will not enforce illegal promises. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77, 70 L. Ed. 2d 833, 102 S. Ct. 851 (1982). Indeed, the Supreme Court has opined that: [¶] **a federal court has a duty to determine whether a contract violates federal law before enforcing it.**

Wechsler v. Hunt Health Sys., 216 F. Supp. 2d 347, 354 (S.D.N.Y. 2002) (emphasis added).

In *Polk I*, Evan Polk (plaintiff) and Leonid Gontmakher (defendant) entered into an agreement to create a cannabis cultivation business ("NWCS") in the State of Washington. *Polk v. Gontmakher*, No. 2:18-cv-01434-RAJ, 2019 U.S. Dist. LEXIS146724, at *3 (W.D.

Wash. Aug. 28, 2019) (*Polk I*)). However, because Polk was "prohibited from obtaining a producer or processor license under [Washington law], absent mitigation of his criminal convictions," the parties agreed that "Polk's 'interest' would be held in the name of one of Mr. Gontmakher's relatives." (Id. at *3, 4.) In other words, the Strawman Practice. Thereafter, the parties had a dispute and Polk filed suit alleging he is entitled his ownership interest in NWCS and to past and future profits. (Id. at *4.) The *Polk* court dismissed Polk's original complaint regarding the legality of ownership pursuant to the Strawman Practice as follows:

> Mr. Polk's agreement is also illegal under Washington law…. Enforcing Mr. Polk's agreement undermines this purpose by allowing him to profit from an illegal agreement intentionally forged outside the bounds of the state regulatory system…. Mr. Polk's interest in NWCS was illegal from the very beginning and he knew it…. The Court will not enforce an illegal contract.

(*Polk I* at *6-8.)

Under California law, a contract must have a "lawful object." (Civ. Code § 1550(3).) "A contract to perform acts barred by California's licensing statutes is illegal, void and unenforceable." (*Consul, Ltd. v. Solide Enters., Inc.*, 802 F.2d 1143, 1148 (9th Cir. 1986).)

The California Legislature set forth in BPC § 26055 that the DCC "may issue state licenses only to qualified applicants." Further, that pursuant to BPC § 20657, former § 19323, the DCC "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.") (Cleaned up.)

The California Legislature also passed BPC § 26053 that states: "All commercial cannabis activity shall be conducted between licensees." The DCC adopted a regulation interpreting this language to mean: "Licensees shall not conduct commercial cannabis activities on behalf of, at the request of, or pursuant to a contract with any person who is not licensed under the Act." (Cal. Code Regs. tit. 16, § 5032(b).)

As in *Polk*, any contract that furthers the Strawman Practice or is based on the Strawman Practice is illegal. The "shall deny" language of BPC §§ 19323/26057 is clear and unambiguous. "When, as here, statutory language is clear and unambiguous there is no need for construction, and courts should not indulge in it." *Cal. Fed. Sav. & Loan Ass'n v. City of L.A.*, 11 Cal. 4th 342, 349 (1995) (cleaned up). Thus, this Court's "inquiry begins with the statutory text. If the text is

clear, as it is here, it ends there as well." *Poulsen v. DOD*, 994 F.3d 1046, 1050-51 (9th Cir. 2021) (cleaned up).

Judgements that enforce illegal contracts in violation of licensing and penal statutes are absolutely void. *See, e.g., Hunter v. Superior Court of Riverside Cty.*, 36 Cal. App. 2d 100, 116 (1939) (voiding judgment as an act in excess of the court's jurisdiction for enforcing an illegal contract because if "a court grants relief, which under no circumstances it has any authority to grant, its judgment is to that extent void.").)

The Strawman Practice also violates too many federal civil and penal statutes and regulations to list here. At a minimum, the Court should know better than Cotton that if sanctioned parties are earning undisclosed income from cannabis businesses that they can't report on their IRS tax returns, because they can't lawfully own those businesses, then they are necessarily committing tax fraud, tax evasion, money laundering by filing IRS returns with false information along with their strawmen/agents in whose name the profit distributions are made. (*See, e.g., Dunkin' Donuts v. Martinez*, No. 01-3589-CIV-HUCK, 2003 U.S. Dist. LEXIS 2694, at *15-16, 92 A.F.T.R.2d (RIA) 2003-5671 (S.D.

Fla. Feb. 21, 2003) ("**Filing false returns and related documentation with the IRS constitutes tax evasion**." (emphasis added).)

The federal courts cannot enforce judgments that enforce contracts that violate federal law. The Strawman Practice is illegal and the federal courts have a duty to ensure they are not violating federal law by enforcing a contract found to be valid on the grounds that the defense of illegality had been waived and Judge Wohlfeil would judicially enforce illegality. The Court must ensure that such illegality does not violate Federal Law. *Kaiser Steel Corp.,* 455 U.S. at 77.

IV. Austin and Demian's fraud on the Court.

The fabrication of evidence by a party in which an attorney is implicated and perjury by an attorney constitute a fraud on the court. (*Trendsettah*, 31 F.4th at 1134; *Intermagnetics*, 926 F.2d at 916–917.) Austin's testimony during *Cotton I* that the Strawman Practice is not illegal is both perjury and fabrication of evidence and constitutes a fraud on the court.

Demian's actions, failing to disclose a relationship with Geraci, removing the allegations of the illegality of the Strawman Practice from Cotton's complaints while representing him, and seeking to have Cotton declare that Berry was acting as his agent and responsible for

Austin's submission of the Berry Application via the Strawman Practice are exactly what they appear to be – fraudulent actions taken by Demian/FTB against their own client that constitutes a fraud on the court. (*See Bleecher*, at *30.)

V. The Court must deny the motions to dismiss at the very least pursuant to its inherent authority to vindicate the rights of victims of a fraud on the court.

"A judgment giving effect to a void judgment is also void"[5] because "being worthless in itself, all proceedings founded upon it are equally worthless." (*OC Interior*, 7 Cal. App. 5th 1330 (2017)). "[G]iving effect to a void judgment is a per se abuse of discretion." *Kaplan,* 173 F. App'x at 935 (emphasis added).

Cotton is the victim of an attorney-client conspiracy to extort what used to be his real property via the judiciary. A conspiracy that is ongoing. The judgments and orders that give effect to the void *Cotton I* and *Cotton II* judgments are void and all judgments and orders that give effect to them are also void. Matters should never have reached this stage.

[5] *Kenney,* 2008 Cal. App. Unpub. LEXIS 10048, at *36-37.

CONCLUSION

The Court should deny the motions to dismiss so that Cotton can file his appeal. Void judgments are forever void, unless the party is aware and ceases to seek to have the judgment declared void (i.e., laches). Cotton requests that this Court please exercise its power and stop the illegal Strawman Practice, which is costing and will cost taxpayers millions of dollars in the illegal processing, enforcing, ratification, and judicial costs that have already been spent and will be needed to be spent to vindicate the rights of all parties who have been damaged by attorney Austin's Strawman Practice. It has been almost six years. Cotton's only crimes have been to be fortunate enough to have a property that qualified for a lucrative cannabis dispensary, his lack of wealth and legal knowledge, as well as his determination to seek all parties sought to justice believing in the rule of law and the plain language of the laws and cases he has read.

If I could do it all over again, I would never have criticized any judges. And, in fact, my agreement with T&B is predicated exclusively on T&B not making any allegations of judicial bias. I will never go against a judge again after I get this set aside, it does not make financial or practical sense. Good attorneys know not to go after judges, not good

business. And the ones who do obviously don't have enough business that they worry about antagonizing judges. It creates a demarcation not just only of wealthy, but of access to quality attorneys.

DATED: December 21, 2022

Respectfully submitted,

By: */s/ Darryl Cotton*

Darryl Cotton, Appellant, *Pro Se*

CERTIFICATE OF COMPLIANCE

FOR CASE NUMBER 22-56077

Pursuant to Federal Rules of Appellate Procedure 27(a)(2)(B) and Ninth Circuit Rule 27-1, I certify that Appellee's Motion to Dismiss for Lack of Jurisdiction is proportionally spaced, has a typeface of 14-point or more and contains 5112 words.

DATED: December 21, 2022

By: */s/ Darryl Cotton*
Darryl Cotton, Appellant, *Pro Se*

CERTIFICATE OF SERVICE
FOR CASE NUMBER 22-56077

I hereby certify that on December 21, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

APPELLANTS OPPOSITION TO MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

By: */s/ Darryl Cotton*

Darryl Cotton, Appellant, *Pro Se*