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Plaintiff *Pro Se*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON,
Plaintiff,
v.

GINA M. AUSTIN, an individual; JESSICA MCELFRESH, an individual, and DAVID S. DEMIAN, an individual

Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS [ECF Dockt. Nos. 98-100]

Hearing Date: N/A
Hearing Time: N/A
Judge: Hon. Jinsook Ohta
Courtroom: 3A

Case No; 3:18-cv-00325-JO-DEB
Formerly: 3:18-cv-00325-TWR-DEB
Related Cases: 3:20-cv-00656-TWR-DEB

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.

Erhart v. BOFI Holding, Inc., No. 15-cv-02287-BASNLS, at *12 (S.D. Cal. Feb. 14, 2017) (quoting *Lee On v. Long*, 37 Cal. 2d 499, 502 (1951) (emphasis added).

INTRODUCTION

Plaintiff Darryl Cotton is at a loss as to what to do and is continuing to increasingly lose his emotional and mental stability as he seeks to access justice in the state and federal courts. As a matter of law, a fact that no defendant disputes, defendant Lawrence Geraci filed suit against Cotton, *Cotton I*,[1] seeking to enforce an illegal contract as part of conspiracy to unlawfully acquire a cannabis conditional

[1] Terms not otherwise defined have the meaning set forth in the amended complaint.

use permit ("CUP"). Cotton pled and repeatedly raised the argument of illegality in *Cotton I* through trial, presided over by Judge Joel Wohlfeil, which was always summarily denied.

Geraci prevailed at trial and was awarded approximately $300,000 in damages against Cotton for his pursuit of cannabis conditional use permit ("CUP") that he cannot lawfully own. After judgment was entered, on motion for new trial via specially appearing counsel from an established law firm, Judge Wohlfeil for the ***first*** time addressed the issue of illegality. Judge Wohlfeil found that Cotton had waived the defense of illegality, under the mistaken belief that Cotton had ***not*** raised the issue of illegality before, and therefore the contract was not illegal.

Judge Wohlfeil erred factually as the record demonstrates that the issue of illegality had been raised and legally, as a matter of law, because the defense of illegality cannot be waived. To find, or allow otherwise, would mean that the justice system can be used to effectuate crimes and compensate individuals for illegal activity. Such is not and cannot be the law.

Cotton, indigent and unable to afford an appeal of the *Cotton I* judgment, and upon the advice of counsel, believed he could have court appointed counsel and have the judgment set aside in this federal court. However, the federal court found that the doctrine of *res judicata* and the *Rooker-Feldman* doctrine bars Cotton's claim that the alleged contract is illegal. However, as demonstrated below, respectfully neither the doctrine of *res judicata* nor the *Rooker-Feldman* bar Cotton's claims that the contract is illegal and the *Cotton I* judgment cannot be given preclusive effect in adjudicating Cotton's causes of action for violations of his Civil Rights.

Mentally, physically and emotionally exhausted, unable to afford an appeal in federal court from this Court's decision, Cotton filed a suit in equity seeking to set aside the judgment as void in state court on the narrow ground of illegality and not the entire conspiracy by Geraci and his agents which form the basis of Cotton's Civil Rights claims before this Court. On February 25, 2022, the state trial court denied the motion finding that because the issue of illegality had been raised in *Cotton I*, Cotton could not seek relief in equity and that the judgment was not void on its face. That is not the law.

The trial court's order did not cite, address, discuss or analyze in any manner the case law provided by Cotton that provides unequivocally that a judgment that provides relief that the law declares shall not be granted is void. *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.").

The denial of the motion to vacate is void as it based on a void judgment.

Cotton is now before this Court opposing motions to dismiss that are premised the validity of the state court's rulings that ratify and enforce a judgment that is void for enforcing an illegal contract on the grounds that the defense of illegality had and can be waived. And, thus, an illegal contract can be made legal. Such is not the law.

The acts taken by defendants were taken in furtherance of Geraci's conspiracy to unlawfully acquire the CUP and they are liable for the actions of all conspirators, including the acts and threats of violence against third parties that violate his Civil Rights that include preventing a witness from providing her testimony in *Cotton I* and before this Court in *this* action.

What is Cotton supposed to do to seek justice? It has been over five years since this matter began and Cotton has done everything he can. A void judgment forever remains void, even if it is affirmed on appeal – does this mean that Cotton must keep filing lawsuits until he gets a judge that addresses the issue of illegality? *In re Application of Wyatt* (1931) 114 Cal.App. 557, 559 ("Even though a void judgment is affirmed on appeal, it is not thereby rendered valid") (citing *Pioneer Land Co. v. Maddux* (1895) 109 Cal. 633, 642-643).

Cotton literally prays, pleads and begs this Court to reconsider the issue of illegality pursuant to the case law set forth below that demonstrates this Court can and should because neither the doctrine of *res judicata* nor the *Rooker-Feldman* apply. Thus, the actions taken by defendants are not just plausible, but nearly conclusive evidence that their actions were taken in furtherance of Geraci's conspiracy to unlawfully acquire a CUP and prevent Cotton from demonstrating the illegality of their actions in court; which make them liable for the actions of all co-conspirators that violate Cotton's Civil Rights.

As matters stand today, he must finish this opposition, seek to appeal the state denial of his motion to vacate, file a new suit in state court for antitrust violations that were not the subject of either the state or this federal action, and then amend his complaint or seek to appeal the dismissal of this action. Cotton is not an attorney. Cotton has no more financial resources to leverage to seek to vindicate his rights.

LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a plaintiff's claims. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Dismissal pursuant to Rule 12(b)(6) is proper when the Complaint fails to allege sufficient facts to support a cognizable legal theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In order to plead a cause of action, a Complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), citing *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 570 (2007). The reviewing court must accept all well-pleaded facts as true, and in the light most favorable to the nonmoving party. *Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002).

ARGUMENT

I. The Federal Court cannot give preclusive effect to a void state court judgment.

A. The Cotton I judgment enforces an illegal contract and is therefore void.

As set forth in the Complaint, because Geraci was sanctioned for unlicensed commercial cannabis activities, pursuant to California Business & Professions Code § 19323 *et seq.* as in effect when the agreement was reached in November 2016, Geraci cannot by law own a cannabis CUP. (FAC ¶¶ 14, 19-21); BPC § 19323(a),(b),(7) ("The licensing authority ***shall deny an application*** if the applicant has been sanctioned by a city for unlicensed commercial medical cannabis activities in the three years immediately preceding the date the application is filed with the licensing authority.") (cleaned up; emphasis added).)

In *Polk I*, Evan Polk (plaintiff) and Leonid Gontmakher (defendant) worked together to create a cannabis cultivation business in Washington.[2] After Washington 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…" (*Id.* at *3.) Polk and Gontmakher "agreed to move forward with the business anyway, orally agreeing to be 'equal partners' in their cannabis growing venture." (*Id.*) Thereafter, they agreed to modify their respective percentages of ownership such that Polk maintained a

[2] *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).

30% ownership stake in the cannabis business and "Mr. Polk's 'interest' would be held in the name of one of Mr. Gontmakher's relatives." (*Id.* at *4.) Subsequently, the parties disputed 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 Polk's claims seeking 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 under Washington law. (*See id.* at * 8 ("Mr. Polk's interest in [the cannabis business] was illegal from the very beginning and he knew it… ***The Court will not enforce an illegal contract.***") (emphasis added).)

In *Polk II*, the court dismissed Polk's amended complaint with prejudice on Gontmakher's motion to dismiss solely on one ground.[3] The Court described Washington's cannabis licensing framework that requires that a cannabis license be issued only in the names of "true party(ies) of interest," who are defined by statute to include any party with a right to revenues from the contemplated cannabis business, and who must undergo a "vetting process" by the Washington Liquor and Cannabis Board. (*Id.* at *5.) The court explained:

> Plaintiff does not dispute that his claims seeking a share of profits generated by [the cannabis business] would make him a true party of interest under the statute. Because he has not been identified as a true party of interest in [the cannabis business] or vetted by the [Washington Liquor and Cannabis Board], any grant of relief based on entitlement to a share of [the cannabis business'] 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 [Washington Liquor and Cannabis Board] and in violation of Washington state law. The Court cannot require payment of a share of [the cannabis business'] 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. *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"). The Court could not, therefore, grant relief on any of Plaintiff's causes of action. Plaintiff thus fails to state a claim upon which relief can be granted.

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

(*Id.* at *6-7.)

Here, like the State of Washington in *Polk*, California's Legislature has always required that a CUP be issued only to a "qualified applicant." (*See* BPC §§ 19320(a) (as in effect in November 2016), *id.* 26055(a).) Because of the Geraci Judgments, Geraci could not have an interest in a CUP until June 17, 2018. (*See* BPC §§ 19323(a),(b)(7); *id.* 26057(a),(b)(7).) Whether a contract is illegal is question of law. *Kashani,* 118 Cal. App. 4th at 540 ("Whether a contract is illegal is a question of law to be determined from the circumstances of each particular case.") *Kashani,* 118 Cal. App. 4th at 540 (cleaned up).

"A contract that conflicts with an express provision of the law is illegal and the rights thereto cannot be judicially enforced." *Vierra v. Workers' Comp. Appeals Bd.* (2007) 154 Cal. App. 4th 1142, 1148. Applying the test of illegal contracts, the agreement is illegal for at least two obvious reasons. *See Brenner v. Haley* (1960) 185 Cal.App.2d 183, 287 ("The test as to whether a demand connected with an illegal transaction is capable of being enforced is whether the claimant requires the aid of an illegal transaction to establish his case.").

First, Geraci is barred by his sanctions from owning the object of the contract – the CUP. Second, Geraci fraudulently attempted to acquire the CUP in the name of his proxy, Berry, who failed to disclose him as the true owner in violation of California cannabis law and the SDMC. (SAC ¶¶ 14-18); *see Consul Ltd. v. Solide Enterprises, Inc.*, 802 F.2d 1143, 1148 (**9th Cir.** 1986) ("A contract to perform acts barred by California's licensing statutes is illegal, void and unenforceable.").

Judge Wohlfeil did not have the authority to find an illegal agreement legal on the incorrect factual and legal assumption that the defense of illegality had and could be waived.

> 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); *see 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).

Pursuant to the doctrine of *stare decisis,* Judge Wohlfeil was obligated to follow the case law set forth in *Lewis & Queen*, address issue of illegality and not enforce an illegal agreement. *Id.* Consequently, his entry of the judgment is an act in excess of his jurisdiction:

> "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*, are in ***excess of jurisdiction***, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari." [*Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 291.]
>
> ....
>
> Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. decisions of this court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court. [Citations.]

Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.

Consequently, the *Cotton I* judgment – enforcing an illegal contract and granting Geraci damages for his unlawful pursuit of a CUP - is therefore void 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*, *supra*, at 536 (quoting *Carlson*, 54 Cal.App.4th at 696 (emphasis added)); *see Wong,* 39 Cal.3d at 135 ("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."); *see Hotels Nevada, LLC v. Bridge Banc, LLC*, 130 Cal. App. 4th 1431, 1437, 30 Cal. Rptr. 3d 903 (2005) ("California law ***obligates*** the trial court to decide

illegality issues when the entire contract is illegal") (emphasis added).

B. The Cotton I judgment granting relief to Geraci in violation of the law is void as an act in excess of the Court's jurisdiction as an exercise of power not authorized by law and a grant of relief to a party that the law declares shall not be granted.

"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 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); *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.***") (emphasis added).

In *Paterra*, a complicated property dispute with numerous competing parties and legal actions spanning over twelve years, the Judge Wohlfeil denied a motion to correct or vacate a portion of a prior quiet title judgment that adjudicated the rights of a defaulting lender. *Id.* at 513. The Court of Appeal reversed and remanded, holding that the judgment was void for three independent reasons. *Id.* at 515. The second reason set forth, dispositive in this matter, was because the trial court did not hold a hearing to adjudicate the lender's rights as required by the mandatory "shall" language of Cal. Code Civ. Pro § 764.010. *Id.* at 536. The court explained:

> [S]ection 764.010 imposes mandatory obligations with respect to default judgments, stating that in a quiet title action, "[t]he court ***shall not*** enter judgment by default but ***shall*** in all cases require evidence of plaintiff's title and hear such evidence as may be offered respecting the claims of any of the defendants … ." (Italics added.) These provisions—**absolutely prohibiting** a default judgment without an evidentiary hearing as to each defaulting defendant's claimed interest—reflect the Legislature's intent to provide a method for adjudicating title to real property to ensure a property owner obtains "'a general decree that would be binding on all people.'" [Citation.] "[O]nce a quiet title judgment on any grounds becomes final, it is good against all the world as of the time of the judgment. There is, for all practical purposes, no going back." [Citation.]
>
> Where, as here, the undisputed record shows the court did not hear evidence respecting plaintiff's quiet title claims against a defaulting defendant, the judgment against that defendant is void as beyond the court's fundamental powers to provide a final determination on title. Accordingly, the judgment against Clarion was void as outside the scope of the court's jurisdiction to grant. (*See Carlson, supra*, 54 Cal.App.4th at p. 696 ["'***The mere fact that the court has jurisdiction of the subject matter of an action before***

> ***it does not justify 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.***'"].)

Paterra, 64 Cal. App. 5th at 535-36 (emphasis added).

Here, as in *Paterra*, the mandatory "***shall deny***" language of BPC §§ 19323(a)/26057(a) applies and reflects the Legislature's intent to "absolutely prohibit" the approval of a CUP or license by an applicant like Geraci who has been sanctioned for unlicensed commercial cannabis activities. Also, an applicant like Berry who knowingly applies with false information to fail to disclose Geraci and his disqualifying sanctions.

Accordingly, the *Cotton I* judgment is void because it is "an exercise of a power not authorized by law [and] a grant of relief to [parties] that the law declares ***shall not*** be granted." *Paterra, supra*, at 536 (quoting *Carlson*, 54 Cal.App.4th at 696 (emphasis added)). Geraci was barred from owning a CUP by law and Judge Wohlfeil erred finding an illegal contract can be made legal by an alleged waiver. *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).

And, for exactly the same reasons, the state trial court's recent denial of Cotton's motion to vacate does not make the *Cotton I* judgment valid. "It has been held that the affirmance by an appellate court of a void judgment imparts to it no validity; and especially if such affirmance is put upon grounds not touching its validity." *Redlands Etc. Sch. Dist. v. Superior Court*, 20 Cal.2d 348, 362 (Cal. 1942) (quoting *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 642). There is nothing that can make a void judgment non-void. Cotton did not have the finances or the legal knowledge or time to appeal the *Cotton I* judgment and thought he could seek relief in this federal court and have court appointed counsel. However, even if he had appealed in state court instead of seeking relief in this federal court, and the void judgment had been affirmed on appeal, the judgment would still remain void. *Id.*; *Hager v. Hager* (1962) 199 Cal.App.2d 259, 261 ("***The affirmance of a void judgment upon appeal imparts no validity to the judgment, but is in itself void by reason of the nullity of the judgment appealed from.***") (emphasis added).

Thus, neither the *Cotton I* judgment nor the recent state court's denial of the motion to vacate

make the *Cotton I* judgment valid – it is void pursuant to California law and this Court must follow the law, not rulings that enforce and ratify and illegal contract in direct violation of the law.

C. This Court cannot give preclusive effect to a void state court judgment.

In *Robinson*, the Ninth Circuit addressed the issue of recognizing a judgment that was void for enforcing an illegal contract. *Robinson*, 971 F.2d at 251 ("Despite the fact that we may not revisit the jurisdictional issue, we must consider whether we may decline to recognize the judgment if it is based upon a void contract where the illegality of that contract appears on the face of the judgment roll.").[4]

The Court stated that "***[t]he preclusive effect accorded a state court judgment in a subsequent federal court proceeding is determined by reference to the laws of the rendering state.***" *Robinson*, 971 F.2d at 250 (citing 28 U.S.C. § 1738; *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S.Ct. 1327, 1331-32, 84 L.Ed.2d 274 (1985)).

The issue in *Robinson* was that an agreement was illegal because it failed to comply with certain regulatory requirements such as providing for the names, addresses and occupations of certain parties. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.* (9th Cir. 1992) 971 F.2d 244, 247 (the "contract failed to meet the mandates of section 81 in a number of other respects. The names, address and occupations of the principals of Borneo and CLIB were not listed. Nor was the time and place of execution stated in the agreement."). Robinson did not deal with a void judgment that grants relief the law declares shall not be granted. *See gen. id.*

However, although factually dissimilar, the legal principals apply here and mandate that this Court not give preclusive effect to the *Cotton I* judgment. The *Robinson* court recognized that "California permits an attack upon a judgment based upon an illegal contract if that contract is made part of the judgment roll and if further judicial action is about to be taken to enforce the terms of the contract." *Id.* at 251. Cotton's Civil Rights claims are further judicial action of unlawful acts that were not part of the *Cotton I* action. It was not known until after the *Cotton I* action that Corina Young's attorney, an associate of attorney Gina Austin, against the desire of her own client, did not provide Young's testimony as

[4] "A contract is part of the judgment roll if it is incorporated by reference in the pleadings or in any other document that is included in the judgment roll by statute." *Robinson*, at 258 n.4.

promised in *Cotton I*. (SAC ¶¶ 137-147.)

This Court is REQUIRED pursuant to 28 U.S.C. § 1738 to apply California law, including the principles set forth in *Hager* and other cases cited herein, to find the *Cotton I* judgment cannot be given preclusive effect in determining Cotton's Civil Rights actions. The *Cotton I* judgment is void under California law and a void judgment will forever remain void pursuant to long established US Supreme Court precedence. *Pennoyer v. Neff*, 95 U.S. 714, 728 (1877) ("The judgment, if void when rendered, will always remain void…").

II. The *Rooker-Feldman* doctrine does not bar this Court's jurisdiction.

The *Rooker-Feldman* doctrine does not apply for two reasons.

First:

> Simply put, "the *Rooker-Feldman* doctrine bars suits 'brought by state-court losers complaining of injuries caused by state-court judgments rendered ***before*** the district court proceedings commenced and inviting district court review and rejection of those judgments.'" Carmona, 544 F.3d at 995 (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)). For *Rooker-Feldman* to apply, the state court proceedings ***must have*** ended in a final judgment ***before*** the federal litigation commenced. *See e.g. Exxon Mobil*, 544 U.S. at 291 (explaining that the doctrine only applies where the "losing party in state court filed suit in federal court ***after*** the state proceedings ended").

Jonas v. Jonas (D.Mont. Aug. 21, 2013, No. CV 13-90-M-DWM-JCL) 2013 U.S.Dist.LEXIS 186016, at *29-30 (emphasis added).

Here, this action began ***BEFORE*** the *Cotton I* action ended. The *Rooker-Feldman* doctrine does not apply - there are no exceptions to this rule set forth by the US Supreme Court.

Second, in *Kougasian*, the Ninth Circuit held that the *Rooker-Feldman* doctrine does not bar a federal plaintiff from asserting as a legal wrong that an adverse party engaged in "conduct which prevent[ed] a [federal plaintiff] from presenting his claim in court." 359 F.3d at 1140 (quoting Wood v. McEwen, 644 F.2d 797, 801 (9th Cir. 1981) (per curiam)). This is because the focus of such a claim is not on any legal error committed by the state court, but rather on "a wrongful act by the adverse party." *Id.* at 1141; *see also Maldonado v. Harris*, 370 F.3d 945, 950 (9th Cir.2004) ("The legal wrong that [the plaintiff] asserts in this action is not an erroneous decision by the state court. . . . [Instead, the plaintiff]

asserts as a legal wrong an allegedly illegal act . . . by an adverse party.'") (quoting *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003)).

Here, Cotton concedes that his complaint as pled is not clear and does not differentiate the incorrect judicial decisions on the issue of illegality and the acts taken by Geraci and his agents that were outside the scope of the *Cotton I* action. Cotton is alleging that Geraci's conspiracy, to which defendants are coconspirators, attempted to, *inter alia*, bribe, threatened and then, through attorney Nguyen, prevented Young's testimony from being provided to Cotton for the *Cotton I* action. (SAC ¶¶ 122-147.) THIS WAS NOT DISCOVERED UNTIL AFTER JUDGMENT HAD BEEN RENDERED IN THE *COTTON I* ACTION. (SAC ¶ 147.) Preventing a witness from going to Court is manifest obstruction of justice constituting a fraud on the court which, pursuant to *Kougasian*, is a "wrongful act by the adverse party" and not subject to the *Rooker-Feldman* doctrine. *Id.*

To the extent Cotton's amended complaint fails to distinguish between the incorrect legal decisions and the unlawful acts of defendants as part of Geraci's conspiracy, Cotton requests leave to amend his Complaint to bring forth his causes of actions based on defendants unlawful actions and not on the incorrect decisions of the state court.

III. Defendants arguments that the doctrine of *res judicata* and the litigation privilege bar this Court from addressing their actions as unlawful in furtherance of illegal conspiracy that violated Cotton's Civil Rights are contradicted by legal authority.

The case law is clear - the doctrines of *res judicata* does not apply to void judgments. *People v. Amaya* (2015) 239 Cal.App.41h 379, 387 ("it is hornbook law that a void judgment has no effect as either *res judicata* or *collateral estoppel*"); *Rochin v. Pat Johnson Manufacturing Co.* (1998) Cal.App.41h 1228, 1239-li~o (cited with approval in *OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318); *see also 311 S. Spring St. Co. v. Dep 't of Gen. Sevs.* (2009) 178 Cal.App.41h 1009, l015. That is because a "void judgment or order is, in legal effect, no judgment." *Rochin*, 61 Cal.App.4th at 1240.

Cotton has alleged that the activities by Geraci and his attorneys is unlawful conduct as a matter of law, including their filing, maintaining and defending of the *Cotton I* action. "[Cotton] may evade the defendants' motions to strike if the 'assertedly protected speech or petitioning activity was illegal as a

matter of law.' *Flatley v. Mauro*, 39 Cal. 4th 299, 305, 46 Cal. Rptr. 3d 606, 139 P.3d 2 (2006). A defendant's conduct is 'illegal as a matter of law' if he either concedes his conduct was illegal or if 'uncontroverted and conclusive evidence' establishes as much.' *Id.* at 320." *Santana v. Cnty. of Yuba* (E.D.Cal. Mar. 31, 2016, No. 2:15-cv-00794 KJM-EFB) 2016 U.S.Dist.LEXIS 44183, at *31.).

In *Golden State*, Golden State Seafood, Inc. ("Golden State") filed an action for malicious prosecution and a UCL claim against William Cohen and his attorney Jamie R. Schloss. *Golden State Seafood, Inc. v. Schloss* ("*Golden State*") (2020) 53 Cal.App.5th 21, 27. The complaint alleged Schloss filed a prior lawsuit against Golden State on behalf of his client Cohen knowing he lacked probable cause to bring and maintain the action. *Id.* Schloss appealed the trial court's denial of his anti-SLAPP motion and a motion for reconsideration of same. *Id.* The Court of Appeal affirmed the denials and in reaching its decision on the UCL claim, the Court stated: "Knowingly filing or pursuing unmeritorious legal actions that are not factually or legally tenable, for the purpose of earning income, qualifies as an unfair business practice." *Id.* at 40.

Here, defendant attorneys enforcement and ratification of Geraci's unlawful scheme is illegal as a matter of law and is not protected activity.

Further, the litigation privilege does not apply. "[T]he California litigation privilege does not apply to federal causes of action." *Richards v. Cty. of L.A.*, No. CV 17-400 BRO (AGRx), 2017 U.S. Dist. LEXIS 220754, at *8 (C.D. Cal. Mar. 31, 2017). Defendants and their conspirators are not entitled to immunity because "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immunized by state law." Kimes v. Stone, 84 F.3d 1121, 1127 (9th Cir. 1996).

IV. Cotton has pled a plausible § 1983 and § 1985 claims.

A. Defendants are acting under color of state law.

> The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful; *Monroe v. Pape*, 365 U.S. 167 (1961); *see United States v. Classic*, 313 U.S. 299, 326 (1941); *Screws v. United States*, 325 U.S. 91, 107-111 (1945); *Williams v. United States*, 341 U.S. 97, 99-100 (1951). Moreover, a private party involved in such a conspiracy, even though

> not an official of the State, can be liable under § 1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. ***It is enough that he is a willful participant in joint activity with the State or its agents***," *United States v. Price*, 383 U.S. 787, 794 (1966).

Adickes v. S. H. Kress & Co. (1970) 398 U.S. 144, 152 (emphasis added).

Here, Cotton alleges that Tirandazi conspired with Geraci and his agents to allow Geraci to unlawfully acquire a CUP and prevent Cotton from acquiring a CUP - it is fact that she was represented at her deposition by Geraci's attorneys and that no City attorney was present. (SAC ¶ 44-52; 75-79.)

In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152–161, the US Supreme Court reversed 44summary judgment for defendant in a civil rights case because ***defendant*** was required to negate the possibility that a store manager and police officer had an opportunity to conspire to violate plaintiff's civil rights, rather than merely pointing out lack of evidence of conspiracy presented by plaintiff.

Here, Cotton's allegations of a conspiracy include that Tirandazi conspired with Geraci and his agents. The specific facts are undisputable – she, a City agent, allowed Geraci to process an application in the name of a proxy, she was represented by Geraci's attorneys at her deposition, and she lied at trial about knowing that Geraci was the true undisclosed owner of the CUP applied for via the Berry CUP Application. On a motion to dismiss, those facts are sufficient to make Cotton's allegations sufficient to state a conspiracy that bring all the actions of defendants, taken in furtherance of the same conspiracy, to be under the color of state law.

B. Cotton was deprived of access to the Courts and Property Rights.

First, because of the filing of *Cotton I* and the City's action in processing Geraci's illegal CUP application, Cotton was deprived of a CUP at his Property without due process and is a Constitutional violation. *See Malibu Mts. Rec. v. Cty. of L.A.*, 67 Cal. App. 4th 359, 367 (1998) ("A CUP creates a property right which may not be revoked without constitutional rights of due process."). But-for the actions of Geraci, his agents and defendants, a CUP would have been approved at the Property.

Second, manifestly, Nguyen's prevention of Young's testimony in Cotton I prevented Cotton from having a fair and adversarial hearing constituting a fraud on the court for which Cotton can seek relief in this Court as part of his Civil Rights causes of action. "California law allows an independent action in equity to set aside a judgment obtained by extrinsic fraud, and such ***an equitable action need***

not be brought in the court that rendered the challenged judgment." (18 Moore's Federal Practice - Civil § 133.33(2)(iii) (Claims Alleging Fraud or Other Misconduct in Connection with State-Court Proceedings) (2021) (citing *Young v. Young Holdings Corp.*, 27 Cal. App. 2d 129, 147, 80 P.2d 723, 733 (1938) ("The superior court is vested by the constitution with jurisdiction over 'all cases in equity'; and cases of this kind—that is, for relief against judgments on the ground of fraud in their procurement—constitute a familiar and well-established head of equity jurisdiction. Nor … is this jurisdiction vested in any particular superior court or courts. Every superior court … has jurisdiction of all equity cases that may be brought in it." (quoting *Herd v. Tuohy*, 133 Cal. 55, 59, 65 P. 139, 140 (1901))); *see also Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1141 (9th Cir. 2004) ("Under California law, extrinsic fraud is a basis for setting aside an earlier judgment.").)

C. The threats against Young and the prevention of her testimony constitute obstruction of justice in THIS Court.

The prevention of Young's testimony by an associate of Gina Austin, attorney Nguyen, is obstruction of justice and constitutes a violation of Cotton's civil rights. Materially, this action was pending and Young's testimony in this action was required and intended for THIS action.

> "Congress undoubtedly intended to protect the whole course of justice, not just one segment of the system, the trial process. Thus, for the purposes of Section 1985(2) an individual is deemed to have 'attended' a court of the United States from the moment that the person files a complaint. Congress certainly did not exceed constitutional bounds when it provided that an individual 'attends' federal court when a complaint is filed. . . . It is beyond question that Congress has the power to do what it did in the first part of Section 1985(2) -- protect the federal system from efforts to obstruct justice."

Wright v. No Skiter, Inc. (10th Cir. 1985) 774 F.2d 422, 425-426 (quoting *Kimble v. D. J. Duffy, Inc.*, 5 Cir., 623 F.2d 1060, 1064-1065.

Here, the instant complaint against Geraci was filed and Young is deemed by the preceding controlling precedent to have "attended" as her testimony is critical to understanding that Magagna took acts in furtherance of Geraci's conspiracy.

Section 1985 requires that the party charged do "any act in furtherance of the object of such conspiracy." The courts have interpreted this language as equivalent to the common law requirement of an act in furtherance of the conspiracy. *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959). An act of

omission has been found to be sufficient for purposes of section 1985. *Huey v. Barloga* (N.D.Ill. 1967) 277 F.Supp. 864, 872-873 ("City officials and police officers are under an affirmative duty to preserve law and order, and to protect the personal safety of persons in the community… Their failure to perform this duty would constitute both a negligent omission and a denial of equal protection of the laws. Accordingly, an unreasonable omission of this nature would be actionable under section 1983.").

As set forth above, the City was obligated to not process Geraci's CUP permit and allow parties like Geraci and Razuki from owning cannabis permits through proxies in violation of California and City of San Diego laws, regulations and public policies. The acts by defendants that directly sought to enforce, ratify and defend the unlawful acquisition are acts in furtherance of an illegal scheme. Their actions, even those that constitute petitioning activity, are not immunized as set forth above as they are illegal as a matter of law. As defendant took unlawful acts, as coconspirators, they are liable for the actions of all parties to the conspiracy whether they directly knew about those actions or not, including the acts and threats of violence against Young.

V. McElfresh and FTB's dual representation is illegal as a matter of law.

Cotton's allegations that McElfresh and FTB represented Cotton and failed to disclose their prior existing relationships with Geraci and his tax business must be treated as true. (*See* SAC ¶¶ 53-65.) Neither McElfresh nor FTB provided Cotton with a written disclosure as required by law – neither allege nor can they prove that they did.

In *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.*, the California Supreme Court summarized the issue before it as follows:

> J-M argues, and the Court of Appeal agreed, that the engagement agreement at issue is unenforceable because it violated rule 3-310(C)(3) of the Rules of Professional Conduct (rule 3-310(C)(3)). That rule provides that an attorney "shall not, without the informed written consent of each client … [¶] … [¶] … [r]epresent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter." (Ibid.) "Simply put," without informed written consent, "an attorney (and his or her firm) cannot simultaneously represent a client in one matter while representing another party suing that same client in another matter." (*Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co.* (N.D.Cal. 2003) 264 F.Supp.2d 914, 919.) This general prohibition applies even if "the simultaneous representations may have nothing in common." *(Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284 [36 Cal. Rptr. 2d 537, 885 P.2d 950] (Flatt).)

(*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, 80.

Thus, because Sheppard failed to provide written disclosure of the conflict of interest, the Supreme Court held that the agreement between it and its client was illegal because it violated the Rules of Professional Conduct. However, the court remanded on the grounds that it was possible that Shepard's violation was not done in bad faith and could recover some fees for its work under the doctrine of *quantum meruit. Id.* at 95-96.

Here, neither McElfresh and FTB can provide a written disclosure and the Court should find that their representation of Cotton without such disclosure was illegal and evidence of the conspiracy that McElfresh and FTB's actions were in furtherance of helping Geraci first acquire the CUP unlawfully by conniving at his defeat and then, as now, by seeking to use a judgment they know was entered by mistake and enforces an illegal contract. The primary issue is Geraci's illegal ownership of a CUP – FTB, referred by McElfresh who represented Geraci for his CUP application, removed the specific allegations of Geraci's illegal ownership, and attempted to have Cotton make judicial and evidentiary admissions that would mean that Cotton was seeking to unlawfully acquire the CUP. There is no scenario where FTB's actions can be seen as anything as other than seeking to connive at Cotton's defeat of his suit to the benefit of Geraci, particularly when coupled with the fact that FTB failed to disclose its shared clients with Geraci.

VI. Defendants' motions to dismiss must be denied.

Defendant's arguments are variations of the same: they did not act under the color of state law, Cotton has not pled § 1983 or § 1985 claims, there was no deprivation to Cotton, and the litigation privilege immunizes their activity.

These arguments as addressed above are not valid. The conspiracy was effectuated under color of state law, Cotton was deprived of a CUP and of access to the courts, illegal activity is not immunized, and no privilege may bar Cotton's federal causes of action for violations of his Civil Rights.

VII. Cotton should be granted leave to amend his complaint to conform to proof.

As noted, Cotton understands that in amending his Complaint Cotton made mistakes. Cotton requests leave to amend his complaint to include Tirandazi and replead his factual allegations focused on the unlawful acts by defendants that constitute a fraud on the court and bring it within the scope of the Ninth Circuit's precedent in *Kougasian* and demonstrate a violation of his civil rights. He will remove his allegations against prior parties dismissed.

Also, Cotton respectfully and strongly requests an oral hearing. It should be telling this Court that all defendants desire to not have an oral hearing – they do not want to answer direct questions from this Court on the record as to why the unlawful actions here are somehow made immune by a judgment entered in error that enforces an illegal contract and why Young's testimony was prevented from being presented in state and *this* federal court.

Lastly, Cotton respectfully requests that this Court exercise its discretion in addressing these issues of unlawful behavior. A fraud has been perpetrated upon both the state and federal courts by sophisticated parties and their sophisticated attorneys. The Court has the power to ensure that it not deceived into ratifying unlawful conduct, even if such conduct is petitioning activity. What has taken place here is clearly illegal and has only reached this needlessly complex procedural posture as a result of Cotton's lack of legal sophistication and wealth.

DATED: March 30, 2022

By _____
Darryl Cotton, Plaintiff, in pro per