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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON,

Plaintiff,

v.

GINA AUSTIN, an individual; JESSICA MCELFRESH, an individual, and DAVID DEMIAN, an individual,

Defendants.

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

PLAINTIFF'S NOTICE OF EX PARTE APPLICATION AND APPLICATION FOR LEAVE TO FILE ELECRONICALLY VIA CM/ECF; DECLARATION OF DARRYL COTTON

Hearing Date: N/A
Hearing Time: N/A
Judge: Hon. Jinsook Ohta
Courtroom: 4C

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE Plaintiff DARRYL COTTON will and hereby moves this Court *ex parte* for an order for leave to file documents electronically and use the Court's ECF system.

Mr. Cotton's application is based upon this notice and application, the accompanying supporting memorandum of points and authorities, the Declaration of Darryl Cotton, and the record in this action.

Good cause exists for this application because Mr. Cotton is an indigent civil litigant and continuing to print and prepare voluminous amounts of documents in a complex attorney-client conspiracy / Civil Rights action that is having a prejudicial effect on his ability to represent himself and he meets the requirements to file electronically.

DATED: May 20, 2022

Darryl Cotton
Pro Se

DECLARATION OF DARRYL COTTON

I, Darryl Cotton, declare as follows:

1. I the plaintiff in this action and I am an individual over the age of 18 years, residing in the County of San Diego.

2. The facts contained in this declaration are true and correct of my own personal knowledge, except those facts which are stated upon information and belief; and, as to those facts, I believe them to be true. If called upon to do so, I could and would competently testify as to the truth of the facts stated herein.

3. On May 19, 2022, I emailed the instant Application to all parties requesting they agree to its approval. As of today, May 20, 2022, I have not heard back from any party.

4. As demonstrated below, despite the simplicity of the illegal acts from which this case originates, this case is complex and has a voluminous history because of the bad-faith actions by attorneys and their clients.

5. I filed the instant action on February 9, 2018, alleging that, *inter alia*, defendants Lawrence Geraci conspired with parties, including his attorneys to defraud my real property (the "Property") because it qualifies for a lucrative license to operate a dispensary.

6. I have amended my complaint and in doing so, because I was not thinking clearly, I left out the City of San Diego as a defendant in my amended complaint which was error as the City is an indispensable party.

7. To date, this Court has found that the doctrine of res judicata and the Rooker-Feldman doctrine bar review of my causes of actions against some defendants and dismissed them.

8. It is not Cotton's point in this Application to prove that the parties conspired against Cotton, simply to provide sufficient facts to prove that Plaintiff has a factual and legal basis for allegations of his Civil Rights violations and that he should be afforded an opportunity to file electronically so that he may meaningfully seek to protect and vindicate his rights against highly sophisticated parties, including attorneys, who are motivated to prevent Cotton from exposing their actions and, thus, civil and criminal liability.

9. I intend to file a motion for leave to amend my complaint.

10. I have sought attorneys to represent me but they will not because of the allegations of judicial bias I have previously made despite the fact that they unequivocally agree that the subject state judgment is void as an act in excess of the state court's jurisdiction.

11. I have a computer that runs Windows 10, software that converts Word to PDFs (Adobe 10), internet access with Cox at greater than 50 MBs, Internet Explorer 10, and a scanner that can scan at greater than 400 pixels per inch, I have a registered PACER account, and I have an email account that I can access daily for ECF notifications. I can and will comply with all the requirements for filing electronically via the ECF system.

12. Attached hereto as Exhibit 1 is a true and correct copy of an order in *Cotton v. Geraci*, San Diego County Superior Court Case No. 37-2022-00000023-CU-MC-CTL, denying Cotton's motion to vacate the *Cotton I*[1] judgment entered on February 28, 2022.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 19, 2022.

Darryl Cotton

[1] "*Cotton I*" means *Larry Geraci v. Darryl Cotton*, Case No. 37-2017-00010073-CU-BC-CTL.

MEMORANDUM OF POINTS & AUTHORITIES

Introduction

I. Material Background.

Cotton respectfully requests that he be granted leave to file electronically via the Court's Case Management and Electronic Filing System (ECF). On February 9, 2018, Cotton filed this action alleging an attorney-client conspiracy against him that was intended to extort Cotton of his real property that qualifies for a lucrative cannabis business via the pressures of litigation in a state action, *Cotton I*, filed against him by Lawrence Geraci. (ECF No. 1.) *Cotton I* was filed by Geraci alleging a document executed as a receipt was a contract between Geraci and Cotton for Geraci's purchase of the property in November 2016 (the "November Document"). (*Id.*)

Judgment was entered in favor of Geraci in *Cotton I* even though the alleged contract is an illegal contract and was rendered by the state court on the premise that the evidence of illegality had not been presented prior to a motion for new trial and that the defense of illegality can and had been waived.

In his original Complaint in this action, Cotton included the City of San Diego as a defendant alleging they violated it his Constitutional Rights to his property and the CUP the property qualifies for by, *inter alia*, preventing him from processing an application on his own property and not terminating the application for a cannabis conditional use permit submitted by Geraci on the property after Cotton informed the City that he had terminated the agreement with Geraci. (ECF No. 1 at 26:5-27:6); *see Gerhart v. Lake County Mont.* (9th Cir. 2010) 637 F.3d 1013, 1019 ("a person can have a ***constitutionally*** protected property interest in a government benefit, such as a license or permit.") (emphasis added).

On May 13, 2020, Cotton amended his complaint in this action and, among other errors, he failed to include the City of San Diego as a defendant. (ECF No. 18.) He also erred in requesting that this Federal Court void the state court judgment rendered in *Cotton I*. (*Id.* at ¶ 150.) Cotton should have requested the Court not give the state court judgment preclusive effect in adjudicating Cotton's Civil Rights § 1983 causes of action. *See Miofsky v. Superior Court of California* (9th Cir. 1983) 703 F.2d 332, 336 ("In deciding whether to give ***preclusive effect*** to state court decisions in § 1983 actions, federal courts look to the preclusion rules of the state in question.") (emphasis added).

On November 21, 2021, Cotton amended his complaint again and he again failed to include the City of San Diego and other necessary parties as defendants. (*See* ECF No. 97.) Although generally "it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit" (*Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990)), defendants can be held to be indispensable if they are an "active participant" in the complaint's allegations that are "critical to the disposition of the important issues in the litigation." *Laker Airways, Inc. v. British Airways, PLC* (11th Cir. 1999) 182 F3d 843, 848 (quoting *Haas v. Jefferson National Bank*, 442 F.2d 394 (5th Cir. 1971)).

During the course of this action before this Court, this Court has repeatedly found that res judicata and the *Rooker-Feldman* doctrine bar adjudication of the illegality of the alleged agreement in adjudicating Cotton's causes of action and has dismissed Geraci and Berry. Most recently on October 22, 2021. (*See* ECF No. 96 at 7:13-15 ("At bottom, Plaintiff believes that the contract between him and Geraci and Berry is illegal, but that issue has been dealt with in ***state court***.") (emphasis added).

On January 3, 2022, Cotton filed a complaint and motion in state court to have the *Cotton I* judgment set aside on the grounds that its rendering was an act in excess of Judge Wohlfeil's jurisdiction for granting relief the law declares shall not be granted by enforcing an illegal contract.

On February 28, 2022, Judge Mangione, who sits on the same floor and one office over from Judge Wohlfeil, denied the motion to vacate and the entirety of his reasoning is as follows:

> 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).

(A true and correct copy of Judge Mangione's order is attached hereto as Ex 1.)

What would any reasonable person think reading Judge Mangione's order? Judge Mangione's order implies that Cotton failed to do something – presumably present the evidence of illegality – and therefore he cannot afford Cotton relief from a judgment that enforces an illegal contract. Thus, according to Judge Mangione, it is lawful, just and equitable for Cotton to pay Geraci over $300,000 in damages for costs Geraci incurred in seeking to acquire a cannabis business that he cannot lawfully own pursuant

to a judgment that was rendered on the premise that the defense of illegality can and had lawfully been waived. The defense of illegality cannot be waived.

II. Cotton must file for leave to amend his complaint.

A. The alleged contract is an illegal contract.

Pursuant to California Business & Professions Code (BPC) §§ 19323 *et seq.* (as in effect in November 2016 when the alleged agreement was executed) and BPC § 26057 *et seq.* (as in effect when the *Cotton I* judgment was rendered), Geraci was barred by law from owning a cannabis businesses because he has been sanctioned for unlicensed commercial cannabis activities in the preceding three years.[2] Geraci applied for a cannabis conditional use permit at the property in the name of his receptionist, Rebecca Berry, who falsely declared in the application that she is the sole and proposed owner of the CUP applied for.[3]

The alleged contract is therefore an illegal contract because the object of the contract – Geraci's ownership of a dispensary via a proxy, his receptionist, Rebeca Berry – is barred by California's cannabis licensing statutes both because he has been sanctioned and because the application contained false information and was filed to violate California's cannabis licensing statutes that barred his ownership. *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109 ("The general principle is well established that a contract… made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void."); *see Polk v. Gontmakher*, No. 2:18-cv-01434-RAJ, 2019 U.S. Dist. LEXIS 146724, at *3 (W.D. Wash. Aug. 28, 2019) ("*Polk*").[4]

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[2] ECF No. 93-3 (Request for Judicial Notice in Support of Darryl Cotton's Request for Appointment of Counsel), Ex. 1 (*City of San Diego v. The Tree Club Cooperative*, San Diego Superior Court Case No. 37-2014-0020897-CU-MC-CTL. Stipulation for Entry of Final Judgement and Permanent Injunction; Judgment Thereon) and Ex. 2 (*City of San Diego v. CCS quared Wellness Cooperative*, San Diego Superior Court Case No. 37-2015-0004430-CU-MC-CTL. Preliminary Injunction Order).

[3] *Id.* Ex. 3 (Ownership Disclosure Statement by Rebbecca Berry (Form DS-318) dated October 31, 2016).

[4] In *Polk*, Evan Polk (plaintiff) and Leonid Gontmakher (defendant) worked together to create a cannabis cultivation business in Washington. (*Polk* at *3). After Washington State passed an initiative regulating the production, distribution, and sale of marijuana, they decided to obtain a license. (*Id.* at *2.) However,

B. The Cotton I judgment is void for enforcing an illegal contract rendered on the premise that the defense of illegality had been waived.

The *Cotton I* judgment grants Geraci relief in direct violation of BPC § 19323 and is therefore void. "'A judgment is void on its face if the court which rendered the judgment … exceeded its jurisdiction in granting relief which the court had no power to grant.'" *Carr v. Kamins* (2007) 151 Cal.App.4th 929, 933 ((quoting *County of Ventura v. Tillett* (1982) 133 Cal.App.3d 105, 110)); *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.").

Judge Wohlfeil erred finding the defense of illegality had and could lawfully be waived. *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).

For the same reason, Judge Mangione's order is void because "[a]n 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." *Carr v. Kamins* (2007) 151 Cal.App.4th 929, 933.

C. The City of San Diego is an indispensable party to this action for violating Cotton's Civil Rights.

The City had a ministerial duty to ***not*** process an application for a CUP application for a party like Geraci who was sanctioned for unlicensed commercial cannabis activities and who was attempting

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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 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 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 Polk's claims seeking profits from cannabis activities violated the Federal Controlled Substances Act. (*Id.* at *6); and second, because Polk was prohibited from obtaining a license by law, the oral agreement was illegal. (*Id.* at * 8.) The Court concluded: "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.***" (*Id.* at *8 (emphasis added).)

to do so via a fraudulent application and to transfer the CUP application to Cotton. The right to a CUP application before the City of San Diego in the context of a dispute between a real property owner and a party who submitted a CUP application on the property with the City was addressed in *Engebretsen*, in which the California Court of Appeal said:

> Engebretsen showed that the City must process and issue applications for conditional use permits consistent with relevant laws and procedures. (SDMC, § 112.0102, subds. (a) & (b).) The City's ordinances provide that the persons "deemed to have the authority to file an application [are]: [¶] (1) The record owner of the real property that is the subject of the permit, map, or other matter; [¶] (2) The property owner's authorized agent; or [¶] (3) Any other person who can demonstrate a legal right, interest, or entitlement to the use of the real property subject to the application." (SDMC, §§ 112.0102, subd. (a), 113.0103 [defining applicant].) The City's ordinances thus ensure that conditional use permits will only be granted to individuals having the right to use the property in the manner for which the permit is sought. (SDMC, §§ 112.0102, subd. (a), 113.0103; *see Shell Oil*, *supra*, 139 Cal.App.3d at p. 921; *see generally* 66A Cal.Jur.3d Zoning And Other Land Controls § 427 [summarizing California cases].) ***Any other interpretation would raise serious constitutional questions concerning property rights.*** (*Shell Oil*, at p. 921; *see also County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510, 138 Cal. Rptr. 472, 564 P.2d 14 [holding that conditional use permits "run with the land"].)

Engebretsen v. City of San Diego (Nov. 30, 2016, No. D068438) ___Cal.App.5th___ [2016 Cal. App. Unpub. LEXIS 8548, at *15 (emphasis added).[5]

Obviously, the City had a ministerial duty to ***not*** process an application for Geraci whose right to the property was based on an illegal contract and which he fraudulently submitted in the name of his receptionist Berry. This is clearly illegal, Berry could not be granted a CUP and license to operate a dispensary (i.e., a "licensee")[6] and then operate a cannabis business on behalf of Geraci who does not qualify to be a licensee because of his sanctions: "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

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[5] Notably, the plaintiff in *Engebretsen* was represented by defendant David Demian of Finch, Thornton & Baird ("FTB"). FTB ***knows*** that a CUP applicant like Berry acting as an agent for a principal like Geraci must have a right to the property via its principal and because Geraci was barred by law and did not have a valid claim to the property, neither did Berry. Also, that Berry was required to disclose she was acting as an agent for Geraci as a matter of law.

[6] As in effect in November 2016, when the alleged agreement was executed, pursuant to BPC § 19300.5(x), a successful applicant for a state cannabis license to operate dispensary was termed a "Licensee," defined as a "person issued a state license under this chapter to engage in commercial cannabis activity."

under the Act." Cal. Code Regs., tit. 16, § 5032 (Commercial Cannabis Activity), subsection (b); *see also* BPC § 19320(A) (as in effect in November 2016 when the alleged agreement was executed: "All commercial cannabis activity shall be conducted between licensees, except as otherwise provided in this chapter.").

This is the law and basic common sense - a party who is prohibited from owning a gun cannot seek to acquire a gun by applying for a gun permit in the name of a proxy. Identically, parties who are barred by law from owning a cannabis business because they have been sanctioned for *illegal* cannabis activities cannot seek to acquire a license to operate a *legal* cannabis business by applying for a license in the name of a third party.

As Cotton has demonstrated to this Court before, has not prior legal experience and is under extreme emotional, mental and financial pressure as he has sought and seeks to protect and vindicate his rights against sophisticated wealthy parties and their attorneys. (*See, e.g.*, ECF 93 (ex parte application for appointment of counsel) at Exs. 1 and 2 (independent psychological assessments of Cotton concluding he is suffering from emotional and mental stress and is in a near delusional state in regards to this litigation). Cotton is doing the best he can, but the law is complicated, Cotton's allegations are incredible and hard to believe (albeit undeniably true as supported by undisputed facts), and his adversaries are reputable, wealthy and include sophisticated attorneys.

The City is an indispensable party, but-for their processing of the Berry Application, denying Cotton's submission of a CUP application until it would have been futile to file, Cotton would not have been deprived of the value of a CUP at his property, a Constitutionally protected right. (See ECF No. 97 (Second Amended Complaint) at 6:16-7:5 (alleging actions by City's Development Services employee Firouzeh Tirandazi).

D. Neither Res Judicata nor the Rooker-Feldman doctrine bar this Court's ability to address the issue of illegality in adjudicating Cotton's Civil Rights Claims.

Cotton respectfully disagrees with this Court's position in regards to the application of the *Rooker-Feldman* doctrine and res judicata for three reasons. First, because "*Rooker-Feldman* does not apply if the federal action was commenced ***before*** the end of state proceedings." *Cavero v. One W. Bank FSB* (11th Cir. 2015) 617 F.App'x 928, 930 (emphasis added). This action was filed before the state

action ended, and though Cotton erred in seeking to have this Court declare the *Cotton I* judgment void, his amended Complaint does not deprive this Court of jurisdiction to address Cotton' Civil Rights actions.

Second, "It has long been the law that a plaintiff in federal court can seek to set aside a state court judgment obtained through extrinsic fraud." *Kougasian v. TMSL, Inc.* (9th Cir. 2004) 359 F.3d 1136, 1141). Cotton has alleged that attorneys Jessica McElfresh and the law firm of Finch, Thornton & Baird conspired with Geraci to connive at Cotton's defeat by, *inter alia*, (i) failing to disclose they represent Geraci and his clients and amending Cotton's complaint to remove the allegations of illegality against Geraci, (ii) seeking to have Cotton make admissions that would mean it was Cotton who was seeking to unlawfully acquire a CUP via the Berry Application, (iii) telling Cotton that Richard Martin was not an indispensable party (even though he was the equitable owner of the property) to the *Cotton I* action, and (iv) removing the intentional interference causes of action from Cotton's complaint that would have informed the *Cotton I* court that Martin was an indispensable party. (*See* ECF No. 97 (Second Amended Complaint) at 7:7-8:14. This is fraud on the court and not barred by *Rooker-Feldman*. *Kachig v. Boothe* (1971) 22 Cal. App. 3d 626, 633 (fraud on the court includes "where an attorney fraudulently pretends to represent a party, and connives at his defeat…").

Thus, Court has jurisdiction to address the issue of illegality of the alleged contact even though it can reach a different decision than the state court – this Court noted specifically this in its October 22, 2022 order:

> "If... a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction." *Noel*, 341 F.3d at 1164. Thus "[t]he doctrine does not preclude a plaintiff from bringing an 'independent claim' that, though similar or even identical to issues aired in state court, was not subject of a previous judgment by the state court."

(ECF No. 96 at 7:26-28 (quoting *Cooper v. Ramos*, 704 F.3d 772, 778 (9th Cir. 2012) (citing *Skinner v. Switzer*, 562 U.S. 521, 531 (2011)).

Third, "***The doctrine of res judicata is inapplicable to void judgments***. Obviously a judgment, though final and on the merits, has no binding force and is subject to collateral attack if it is wholly void for lack of jurisdiction of the subject matter or person, and perhaps ***for excess of jurisdiction***, or where

it is obtained by ***extrinsic fraud***." *Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239-1240 (quotation omitted, emphasis added). This Court is bound to treat the *Cotton I* judgment as void and not give it preclusive effect as it is void under California law. *Marrese v. American Academy of Orthopedic Surgeons* (1985) 470 U.S. 373, 380 ("It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.") (quoting *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-482 (1982).

III. Cotton meets the requirements for leave to file electronically.

As set forth in detail in his supporting declaration, Cotton meets the requirements for leave to file electronically. (Declaration of Darryl Cotton at ¶ 11.)

CONCLUSION

The origin of this action, the illegality of the filing of the *Cotton I* action against Cotton premised on an illegal contract and a judgment entered enforcing that illegal contract premised on the incorrect legal assumption that the defense of illegality can be waived that can transform an illegal contract into a legal contract is clearly wrong. And it only came about because of the bad-faith actions of Geraci and his agents that include extra-judicial acts.

Cotton needs to file leave to amend his complaint and his ability to do so electronically to file to continue this action will serve the interests of justice, he will be prejudiced if not allowed, and he meets the requirements to file electronically.

May 20, 2022

Darryl Cotton

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Plaintiff *Pro Se*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual Plaintiff, vs. GINA AUSTIN, an individual; JESSICA MCELFRESH, an individual; and DAVID DEMIAN, an individual Defendants,	Case No. 18-cv-00325-JO-DEB **CERTIFICATE OF SERVICE** Hearing Date: NA Time: NA Judge: Hon. Jinsook Ohta Courtroom: 4C

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document(s):

1. DARRYL COTTON, PLAINTIFF'S NOTICE OF EX PARTE APPLICATION AND APPLICATION FOR LEAVE TO FILE ELECTRONICALLY VIA CM/ECF; DECLARATION OF DARRYL COTTON.

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Were served on this date to party/counsel of record:

[X] BY E-MAIL DELIVERY:

Counsel for Defendant Austin: DPettit@PettitKohn.com

Counsel for Defendant McElfresh: LStewart@WMFLLP.COM

Counsel for Defendant Demian: Corinne.Bertsche@LewisBrisbois.com

Interested Party: Katherine.Parker@USDOJ.GOV

Dated: May 20, 2022

Darryl Cotton

Plaintiff – Pro Se Litigant