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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON,

Plaintiff,

v.

CYNTHIA BASHANT, an individual; JOEL WOHLFEIL, an individual; LARRY GERACI, an individual; REBECCA BERRY, an individual; GINA AUSTIN, an individual; MICHAEL WEINSTEIN, an individual; JESSICA MCELFRESH, an individual, and DAVID DEMIAN, an individual,

Defendants.

Case No. 3:18-cv-00325-TWR (DEB)

PLAINTIFF'S NOTICE OF EX PARTE APPLICATION AND EX PARTE APPLICATION FOR APPOINTMENT OF COUNSEL PURSUANT TO 28 U.S.C. §1915(e)(1)

ORAL ARGUMENT REQUESTED

Hearing Date: TBD
Hearing Time: TBD
Judge: Hon. Todd W. Robinson
Courtroom: 3A

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 27, 2021, Plaintiff DARRYL COTTON will move this Court *ex parte* for an order requesting counsel for representation in this action pursuant to 28 U.S.C. §1915(e)(1).

Mr. Cotton's application is based upon this notice and application, the

accompanying supporting memorandum of points and authorities, the Declaration of Darryl Cotton, the Declaration of Jacob Austin, and the accompanying Request for Judicial Notice.

Good cause exists for this application because Mr. Cotton is an indigent civil litigant that is likely to succeed in a complex legal matter. However, he has been diagnosed with mental conditions that render him incapable of articulating his claims and representing himself.

Good cause exists for this application because Mr. Cotton will likely succeed on the merits of his claims. The primary fact that his claims are based upon is that a state court judgment is void because it enforces an illegal contract that violates California's licensing statutes. *Consul, Ltd. v. Solide Enters., 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."). The state court judgment is therefore void because its entry represents an exercise of judicial power not authorized by law and grants relief to a party that the law declares shall not be granted. *See Carlson v. Eassa*, 54 Cal. App. 4th 684, 691 (1997) ("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.").

Good cause also exists because the establishment of the void judgment based on an illegal contract provides clear evidence that Mr. Cotton is the victim of a civil conspiracy meant to deprive him of his real property via the judiciary and prevent him from recovering damages for same.

Good cause also exists because the establishment of the void judgment evidences that Mr. Cotton has been subjected to extreme mental, emotional and financial damages pursuant to baseless litigation for over four years as he has sought to defend and vindicate his rights.

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Mr. Cotton's circumstances provide good cause for this application.

DATED: August 28, 2021

S/ Jacob P. Austin, Esq.

Jacob Austin
Specially appearing attorney
for plaintiff Darryl Cotton

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MEMORANDUM OF POINTS & AUTHORITIES

INTRODUCTION

Plaintiff Darryl Cotton moves this Court to request counsel for Mr. Cotton pursuant to 28 U.S.C. § 1915(e)(1). This case arises from an agreement reached between Mr. Cotton and Mr. Lawrence Geraci on November 2, 2016 for the sale of the Property[1] from Mr. Cotton to Mr. Geraci. Both parties agree they reached an agreement and executed a document on that day (the "November Document"). Both parties also agree that their agreement was subject to single condition precedent, Mr. Geraci's application and approval of a cannabis conditional use permit ("CUP") at the Property.

However, the parties thereafter disagreed as to the nature of the November Document. Subsequently, Mr. Geraci filed suit in state court, *Cotton I*,[2] alleging the November Document is a purchase contract and seeking specific performance.

The *Cotton I* court found the November Document was a lawful contract and judgment was entered against Mr. Cotton in August 2019. Mr. Cotton seeks to have the *Cotton I* judgment be given no preclusive effect and declared void because it enforces an illegal contract. As demonstrated below, the alleged agreement is illegal.

Mr. Cotton, after having been subjected to baseless litigation for over four years as he has sought to defend and protect his rights, has been mentally impaired. Mr. Cotton's mental condition renders him incapable of fully articulating his claims and representing himself.

Counsel for Mr. Cotton is undertaking this special appearance *pro bono* because counsel cannot represent Mr. Cotton given the complex Civil Rights, torts, and other causes of action he has against multiple defendants that are outside of his specialty and resources to undertake.

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[1] The term "Property" shall mean and refer to the real property located at 6176 Federal Boulevard, San Diego, California.

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

MATERIAL FACTUAL AND PROCEDURAL BACKGROUND

I. An independent psychological assessment has concluded that Mr. Cotton cannot gather relevant evidence, conduct research, or interact with opposing counsel.

In March 2018, Dr. Ploesser[3] prepared his first Independent Psychological Assessment. (Cotton Decl., Ex. 1 (the "March 2018 IPA").) The March 2018 IPA evaluates Mr. Cotton's obsession with the *Cotton I* litigation, conspiracy theories, and his belief that Mr. Geraci and his agents are responsible for taking unlawful actions against him via judicial proceedings and extra-judicial acts of violence. (*Id*. at ¶10.). The March 2018 IPA diagnoses Mr. Cotton with "Post-Traumatic Stress Disorder (F43.10), Intermittent Explosive Disorder (F63.81) and Major Depression (F32,2)." (*Id.* at ¶ 8.) The March 2018 IPA concludes that "the level of emotional and physical distress faced by Mr. Cotton at this time is ***above and beyond*** the stress on any defendant exposed to litigation." (*Id*. at ¶8.)

In July 2021, Dr. Ploesser prepared his second Independent Psychological Assessment. (Cotton Decl., Ex. 2 (July 2021 IPA).) The July 2021 IPA reflects Mr. Cotton's continued obsession with his litigation and his belief that Mr. Geraci and his attorneys are part of a group that are seeking to create a monopoly in the cannabis industry in the City through illegal means. (*Id*.) The July 2021 IPA notes that Mr. Cotton has started taking antidepressant medication and "developed suicidal ideation." (*Id*.) It is Dr. Ploesser's "medical opinion that Mr. Cotton is unable to process facts and legal issues beyond a basic level, unable to gather relevant evidence in [a] manner called for by

[3] Dr. Ploesser is a licensed psychiatrist licensed certified by the American Board of Psychiatry and Neurology in the area of Psychiatry and the subspecialty of Forensic Psychiatry. (Declaration of Darryl Cotton ("Cotton Decl."), Ex. 1 at ¶¶ 4, 5.) Dr. Ploesser is a Fellow of the Royal College of Physicians and Surgeons of Canada (*id*. at ¶ 6), on the clinical faculty at the University of British Columbia (UBC) in the division of Forensic Psychiatry (*id*. at ¶ 7) and the University of California Riverside (Cotton Decl., Ex. 2 at p. 1). Dr. Ploesser is a graduate of Columbia University School of Law in the LLM program (Cotton Decl. at Ex. 1 at ¶ 10). Dr. Ploesser currently works as a psychiatrist for the Department of Corrections for the State of California and has a private practice. (*See* Cotton Decl., Exs. 1 at ¶ 10 and 2 (the "July 2021 IPA") at p. 1).

litigation, unable to conduct complex legal research, and would be incapable of interacting with any counsel representing Mr. Geraci or [his] associates due to his belief that they are 'conspiring' against him." (*Id*.)

The July 2021 IPA further concludes that it is Dr. Ploesser's "professional medical opinion Mr. Cotton's obsessional ruminations around his legal case are bordering a delusional quality, which will make it very difficult for him to competently represent himself in civil litigation." (*Id*.)

II. Mr. Geraci has been sanctioned for unlicensed commercial cannabis activities at his real properties.

Mr. Geraci has been an enrolled agent with the IRS ("Enrolled Agent"), which "means he has a federal license that allows him to represent clients before the IRS," since 1999.[4] Mr. Geraci owns and has operated a tax and financial planning business called Tax and Financial Center since 2001.[5]

Mr. Geraci has been sanctioned by the City for unlicensed cannabis activities at his real properties (the "Geraci Judgments").[6] Pursuant to the terms of the Geraci Judgments, Mr. Geraci could only operate or maintain a dispensary after providing written proof to the City that "any required permits or licenses to operate a marijuana dispensary, collective or cooperative have been obtained from the City of San Diego as required by the [San Diego Municipal Code ("SDMC")]."[7]

The CCSquared Judgment was filed on June 17, 2015. (RJN, Ex. 2.)

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[4] Cotton Decl., Ex. 3 (Reporter's Transcript ("RT") of Trial of July 3, 2019 ("RT July 3, 2019")) at 14:22-16:24; 56:25-57:11).

[5] *Id*. at 55:17-28.

[6] *See* Request for Judicial Notice ("RJN"), Ex. 1 (*City of San Diego v. The Tree Club Cooperative, et al.*, San Diego Superior Court Case No. 37-2014-0020897-CU-MC-CTL, Stipulation for Entry of Final Judgement and Permanent Injunction; Judgment Thereon ("Tree Club Judgment")) at ¶ 17; *id.*, Ex. 2 (*City of San Diego v. CCSquared Wellness Cooperative, et. al.*, Case No. 37-2015-00004430-CU-MC-CTL, Stipulation for Entry of Final Judgment and Permanent Injunction; Judgment Thereon ("CCSquared Judgment")) at ¶ 15).

[7] *See* RJN, Ex. 1 (Tree Club Judgment) at ¶ 10(b); *id.*, Ex. 2 (CCSquared Judgment) at ¶ 8(b).

III. State law prohibits a party from obtaining a CUP or license for a period of three years from the date of their last sanction for unlicensed commercial cannabis activities.

In 2003, the State enacted the Medical Marijuana Program Act (the "MMPA"), which established certain requirements for non-profit Medical Marijuana Consumer Cooperatives ("MMCC"). On June 27, 2016, the California enacted the Medical Marijuana Regulation and Safety Act ("MMRSA"), which, among other things, revised the requirements for an MMCC and the state's licensing statutes for cannabis licenses. (California Bus. & Prof. Code ("BPC") § 19300 *et seq*., added by Stats. 2015, ch. 689, § 4.) As material here, in October 2016, the following material BPC sections provided as follows:

Pursuant to BPC § 19320(b) "no person ***shall*** engage in commercial cannabis activity without possessing both a state license and a local permit, license, or other authorization." (Emphasis added.) However, an applicant could operate without a state license provided the applicant (1) had submitted an application with the state and (2) continues to operate in compliance with all local and state requirements, except possession of the pending state license under review. *See* BPC § 19321(b).

BPC § 19323 provided the following material criteria for the mandatory denial of an application:

> (a) A licensing authority ***shall deny*** an application if the ***applicant***… for which a state license is applied does not qualify for licensure under this chapter or the rules and regulations for the state license.
>
> (b) A licensing authority ***may*** deny an ***application*** for licensure or renewal of a state license, or issue a conditional license, if any of the following conditions apply: … (3) The applicant has failed to provide information required by the licensing authority… (7) The applicant… has been sanctioned by a licensing authority or a city, county, or city for unlicensed commercial cannabis activities… in the three years immediately preceding the date the application is filed with the licensing authority.

BPC § 19323(a),(b)(3),(7) (emphasis added).

BPC § 19323(a) applied to *applicants*, while BPC § 19323(b) applies to *applications*. A failure to comply with the requirements set forth in BPC § 19323(b) by an *applicant* triggers the mandatory "shall deny" language set forth in BPC § 19323(a).

BPC § 19300.5 provided that the definition of an "applicant" included all "owners" of the propose premises. Bus. Prof. § 19300.5(b)(1).

On November 8, 2016, the voters of California approved Proposition 64, the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA"). (Control, Regulate, and Tax Adult Use Of Marijuana Act, 2016 Cal. Legis. Serv. Prop. 64).) AUMA authorizes a person who obtains a state license under AUMA to engage in for-profit commercial adult-use cannabis ("Cannabis Outlet") activity pursuant to that license and applicable local ordinances. In order to create more legitimacy and transparency, among other things, AUMA requires the disclosure of all persons who have an interest in the license. (*Id*. at §6.1 (adding §§ 26001(a) (providing broad definition of applicant), 26055(a) (licensing authorities may issue state licenses only to qualified applicants), and 26057 (prohibiting certain applicants from obtaining a license).)

Effective June 27, 2017, BPC § 19323 *et. seq*. was repealed and replaced by BPC § 29057 *et. seq*., making it applicable to all cannabis applications irrespective of whether they are non-profit or for-profit. (Stats 2017 ch 27 § 2 (SB 94).) The language of Cal. Bus. & Prof. § 29057 *et. seq*. is virtually identical to BPC § 19323 *et. seq*. and also mandates the denial of an application when the applicant has, *inter alia*, failed to comply with local laws, provide required information, or been sanctioned for unlicensed cannabis activities in the preceding three years. BPC §§ 19320(b), 19321(b), 29057(a),(b)(3),(7).

IV. The San Diego Municipal Code prohibits a party from being eligible for a CUP if they apply and provide false information or fail to comply with mandatory disclosures that include sanctions and all parties' interests in the subject property and CUP.

The SDMC prohibits the furnishing of false or incomplete information in any application for any type of permit or CUP from the City. SDMC § 11.0401(b) ("No person

willfully shall make a false statement or fail to report any material fact in any application for City license, permit, certificate, employment or other City action under the provisions of the [SDMC].”). SDMC § 11.0402 provides that “[w]henever in [the SDMC] any act or omission is made unlawful, it shall include causing, permitting, aiding or abetting such act or omission.”

After the enactment of the MMPA, the City adopted Ordinance No. 20356 (“Ordinance 20356”). Pursuant to Ordinance 20356, an MMCC could operate a dispensary in the City if and only if organized as an MMCC with the State and provided that it acquired the appropriate permit and CUP from the City. (*See id*. at § 113.0103 (defining an MMCC); § 126.0303(a); §141.0614.) The City’s CUP requirements and forms mandate the disclosure of anyone who holds an interest in the relevant property or CUP. (*See* RJN, Ex. 3 (Ownership Disclosure Statement).)

Among the reasons for the disclosure are mandatory background checks for all parties who have an interest in the relevant property or CUP being applied for. SDMC § 112.0102(c); *id*. at §§ 42.1502 (defining responsible persons), 42.1504 (requiring a permit to operate a marijuana outlet), and 42.1507 (requiring background check).

V. Mr. Geraci’s attorneys Gina Austin and Jessica McElfresh are experts in cannabis licensing and entitlement.

Ms. Austin is “an ***expert*** in cannabis licensing and entitlement at the state and local levels and regularly speak[s] on the topic across the nation.” (RJN, Ex. 4 (Supplemental Declaration of Gina M. Austin (“Austin Decl.”)) at ¶ 2 (emphasis added).) Ms. Austin has worked on approximately twenty-five (25) cannabis CUP applications with the City, of which approximately twenty-three (23) were approved or successfully maintained. (*See* Cotton Decl., Ex. 4 (RT of Trial July 8, 2019 (“RT July 8, 2019”) at 64:02-20).) Ms. Austin was responsible for the preparation and submission to the City of Mr. Geraci’s CUP application at the Property on October 31, 2016. (*See id*. at 24:28-25:2; 51:17-28; 64:21-24.).

Ms. McElfresh represented Mr. Geraci before the City in advancing the interests of

the CUP application. (*See* Cotton Decl., Ex. 5 (evidence of payment by Mr. Geraci to Ms. McElfresh submitted in *Cotton I* as evidence of his damages ("McElfresh Fee").) In May 2017, Ms. McElfresh was charged with, *inter alia*, Conspiracy to Commit a Crime, Manufacturing of a Controlled Substance, and Obstruction of Justice for her efforts to conceal her client's alleged illegal manufacturing operations from government inspectors. (*See* RJN, Ex. 5 (*People v. McElfresh*, San Diego Superior Court No. CD272111).) In July 2018, Ms. McElfresh entered into a Deferred Prosecution Agreement (the "DPA") that would allow her to plead guilty in twelve months as follows: "On April 28, 2015 [Ms. McElfresh] knowingly facilitated the use of a premises without a required permit, in violation of San Diego Municipal Code § 121.0302(a), to wit: an unpermitted marijuana manufacturing and distribution operation by Med West Distribution, LLC." (RJN, Ex. 6 (DPA) at 2:17-20.)

Prior to the entry of the DPA, a litigated issue was the propriety of the San Diego County District Attorney's office seizing Ms. McElfresh's client files due to attorney-client privilege. Ms. Austin was quoted in various San Diego news publications defending Ms. McElfresh and saying "[w]e have several clients who may also be in the files that were seized by the DA."[8]

VI. Mr. Geraci admits he provided false and incomplete information in the CUP application and failed to disclose his sanctions and his ownership interest in the CUP and Property because he is an Enrolled Agent.

In mid-2016, Mr. Geraci identified the Property and began negotiating with Mr. Cotton for the purchase of the Property because it "may qualify for a dispensary." (*See* Cotton Decl., Ex. 3 (RT July 3, 2019) at 59:18-19.) On October 31, 2016, Mr. Geraci caused a Form DS-3032 General Application to be filed with the City (the "General Application"). (*See* RJN, Ex. 8.) Ms. Berry was identified as the "Lessee or Tenant" and the Permit Holder. (*Id.*) Mr. Geraci is not identified anywhere in the General Application.

[8] *See* RJN, Ex. 7 (Jonah Valdez, *San Diego DA's Prosecution of Pot Attorney Has Sent Chills Through the Legal Community* (August 9, 2017).)

(*See id*.) Section 7 of the General Application requires the disclosure of, among other things, the Geraci Judgments (*id*. at § 7); however, they were not disclosed. (*See id*.) Ms. Berry certified that she read the form, the information provided was correct, and that she "understand[s] the applicant is responsible for knowing and complying with the governing policies and regulations applicable to the proposed development or permit." (*Id*.)

On the same date, Ms. Berry executed and submitted the Ownership Disclosure Statement to the City. (RJN, Ex. 3.) As set forth in the Ownership Disclosure Statement, the list "***must*** include the names and addresses of ***all*** persons who have an interest in the property, ***recorded or otherwise***, and state the type of interest." (*Id*. (emphasis added).) The Ownership Disclosure Statement also required the disclosure of "Other Financially Interested Persons." (*Id*.) The disclosure requirements are mandatory and do not include exceptions for Enrolled Agents. (*See id*.) Notwithstanding, Mr. Geraci is not identified in the Ownership Disclosure Statement. (*Id*.)

Ms. Berry testified that the exclusion of Mr. Geraci was purposeful; he was not disclosed solely because he was as an Enrolled Agent. (Cotton Decl., Ex. 3 (RT July 3, 2019) at 193:19-194:5.) Mr. Geraci also claimed his use of Ms. Berry as an agent and the lack of disclosure was "for convenience of administration."[9]

VII. Finch, Thornton & Baird amended Mr. Cotton's cross-complaint in state court to remove the allegations of illegality and the conspiracy cause of action against Mr. Geraci and Ms. Berry.

In his original *pro se* cross-complaint in *Cotton I*, Mr. Cotton alleged he reached a final, binding oral joint venture agreement with Mr. Geraci for the sale of the Property[10] and that Mr. Geraci and Ms. Rebecca Berry conspired to apply for the CUP at the Property in Ms. Berry's name because Mr. Geraci had been sanctioned. (*See* RJN, Ex. 10 (*Cotton I*

[9] RJN, Ex. 9 (Plaintiff/Cross-Defendant Larry Geraci's Answers to Special Interrogatories, Set Two, Propounded by Defendant/Cross-Complainant Darryl Cotton (the "Discovery Responses")) at 12:8-16.

[10] *See Bank of Cal. v. Connolly*, 36 Cal. App. 3d 350, 374 (1973) ("[A]n oral joint venture agreement concerning real property is not subject to the statute of frauds even though the real property was owned by one of the joint venturers.").

Cross-Complaint ("*Cotton I* XC") at ¶¶ 22, 85-93.) The *Cotton I* XC set forth a conspiracy cause of action against Mr. Geraci and Ms. Berry. (*Id*. at ¶¶ 128-136.)

Subsequent to filing the *Cotton I* XC, Mr. Cotton acquired a litigation investor, Mr. Joe Hurtado, who hired attorney Jessica McElfresh to represent him. (Cotton Decl. at ¶¶ 16-17.) However, Ms. McElfresh, "upon further reflection," stated that she did "not have the bandwidth" to represent Mr. Cotton and referred Mr. Hurtado to David Demian of Thornton & Baird ("FTB"). (*Id*. at ¶¶ 17; *id*. at Ex. 6 (email from Ms. McElfresh recommending Mr. Demian ("McElfresh Email").)

Mr. Demian, a partner, and Adam Witt, an associate, of FTB represented Mr. Cotton in *Cotton I*. (*See* RJN, Ex. 11 (First Amended Cross-complaint ("*Cotton I* FAXC") and Ex. 12 (*Cotton I* Second Amended Cross-complaint ("*Cotton I* SAXC").) FTB amended Mr. Cotton's operative complaint twice. (*Id*.) FTB's amendments removed, *inter alia*, the allegations of illegality against Mr. Geraci and the conspiracy cause of action against Mr. Geraci and Ms. Berry. (*Compare* RJN Ex. 10 (*Cotton I* XC) at ¶¶ 128-135 *with* RJN Ex. 11 (*Cotton I* FAXC) *and* RJN Ex. 12 (*Cotton I* SAXC).) During the course of his representation, Mr. Demian attempted to have Mr. Cotton execute a supporting declaration to argue in an ex parte application that Mr. Geraci was acting on behalf of Mr. Cotton when he had Ms. Berry submit the CUP application in her name.[11]

In late 2017, at a meeting at FTB's office, Mr. Witt, while waiting for Mr. Demian, stated that he had just heard Mr. Demian talking with another partner at FTB and that FTB had shared clients with Mr. Geraci or Mr. Geraci's tax and financial planning business. (Cotton Decl. at ¶ 21.) In December 2017, Mr. Cotton fired Mr. Demian or Mr. Demian quit from Mr. Cotton's representation because Mr. Demian allegedly failed to raise certain case-dispositive evidence before the *Cotton I* court – Mr. Demian said he had a "bad day."

[11] (Cotton Decl. at ¶¶18-20, Ex. 7 (FTB draft ex parte application) at 2:2-5 ("Cotton and Plaintiff/Cross-defendant Geraci reached an agreement regarding the sale of the Property in or around November 2016 ("November Agreement") which included, among other things, **an agreement for Geraci to pursue the Cotton CUP on Cotton's behalf.**") (emphasis added).

(*Id*. at ¶¶ 22-23.) Mr. Demian admitted he failed to raise the evidence and said it was because he had a "bad day." (*Id*. at ¶ 24.)

VIII. Judge Wohlfeil finds that the CUP application would have been approved at the Property but-for what be believed to be Mr. Cotton's alleged unlawful interference.

At the trial of *Cotton I*, Judge Joel Wohlfeil found that the CUP application would have been approved at the Property but-for what he believed to be Mr. Cotton's unlawful interference with the processing of the application with the City. (*See* Cotton Decl., Ex. 8 (RT of Trial of July 10, 2019 ("RT July 10, 2019") at 92:6-12) ("I think, that it's more probable than not that a CUP had been issued and the dispensary opened...").)

Judge Wohlfeil's finding, presuming the lawful possession of a CUP by Mr. Geraci, was supported in part by the testimony of Ms. Austin, Ms. Berry, and Ms. Firouzeh Tirandazi. Ms. Tirandazi is a Development Project Manager for the City's Development Services Department that works on cannabis CUP applications. (Cotton Decl., Ex. 9 (RT of Trial of July 9, 2019 ("RT July 9, 2019") at 85:22-86:15.)

Ms. Austin testified that an attorney should understand if their client is eligible for a cannabis permit. (*See* Cotton Decl., Ex. 4 (RT July 8, 2019) at 5:9.) However, her testimony alleged that she was not aware Mr. Geraci had been sanctioned. (*Id*. at 50:1-7.) Further, Ms. Austin's testimony in regard to whether a party who has been sanctioned for unlicensed marijuana activities repeatedly changed while being questioned on the stand. Her testimony included: (i) that the City does not bar any party from being eligible for a license, (ii) that the City "might" bar some parties from being eligible, and (iii) that the City does take into account sanctions depending on what the sanctions are and provided an example in which a party had been sanctioned but had the judgment amended to reflect "no illegal cannabis activity." (*See id*. at 47:10-49:4.)

Mr. Austin's testimony alleged that she did not know or cannot remember why Mr. Geraci used Ms. Berry as an agent for the CUP application. (*Id*. at 49:15-28.) When presented with the Ownership Disclosure Statement, the plain language of which required

the disclosure of all persons who have interest in the Property, Ms. Austin was asked: "after reading that, why [did] it seem unnecessary to list Mr. Geraci?" (*Id*. at 51:17-26.) Ms. Austin responded: "I don't know that it - - it was unnecessary or necessary. **We just didn't do it**." (*Id*. at 51:25-28 (emphasis added).) Further, that, contrary to its title, "the purpose of [the Ownership Disclosure Form] is for conflict of interests." (*Id*. at 52:3-4.)

Ms. Berry's testimony alleged that while Mr. Geraci was not disclosed because he was an Enrolled Agent, she was not aware that the City's CUP application forms required Mr. Geraci to be disclosed because she did not read them. (*See* Cotton Decl., Ex. 3 (RT July 3, 2019) at 190:2; 193:12-24; 202:5-19) ("I simply signed this. It was filled out by our team and I signed it. Trusting Mr. Geraci and the team.").

Ms. Tirandazi testified for the City at a deposition and at the trial of *Cotton I*. At her deposition, she testified that the purpose of the Ownership Disclosure Form is for the owner of the property to validate they understand that there is an application being submitted on their property and for "conflicts of interests" by the City's decision makers. (Cotton Decl., Ex. 10 (Deposition of Firouzeh Tirandazi on March 14, 2019 ("Tirandazi Deposition") at 26:15-27:16.)

At trial, when was asked if it was her understanding that Mr. Geraci was the individual attempting to acquire a CUP via the CUP application submitted by Ms. Berry, Ms. Tirandazi responded: "I don't – I don't have answer for that question." (Cotton Decl., Ex. 9 (RT July 9, 2019) at 111:20-27.) When asked if a party who had been sanctioned for illegal cannabis activity would be barred from acquiring a CUP, she did not answer that question by stating that she would have to refer to the SDMC. (*Id*. at 113:18-25.)

IX. Judge Wohlfeil finds that Mr. Geraci's ownership of a CUP is not barred by state law and that the defense of illegality had been waived.[12]

During trial, Mr. Cotton moved for a directed verdict arguing BPC § 20657 *et seq*. bars Mr. Geraci's ownership of a CUP, which was denied. (RJN, Ex. 13 (Motion for

[12] This application's focus on the *Cotton I* judgment being void for enforcing an illegal contract is not a waiver by Mr. Cotton finding the judgment void on other grounds.

Directed Verdict) at 5:21-6:10, Ex. 14 (order denying motion).).

The *Cotton I* Judgment found, *inter alia*, that "[Mr. Geraci] is not barred by law pursuant to California Business and Professions Code, Division 10 (Cannabis), Chapter 5 (Licensing), § 26057 (Denial of Application) from owning a Marijuana Outlet conditional use permit issued by the City of San Diego." (RJN, Ex. 15 (Judgment) at 2:15-17.) The $260,109.28 in damages awarded Mr. Geraci include legal fees for Ms. McElfresh's representation of Mr. Geraci in advancing the interests of the CUP application before the City. (*See id*. at 4:14-15; Cotton Decl., Ex. 5 (McElfresh Fee).)

After trial, Mr. Cotton filed a motion for new trial arguing again, *inter alia*, the alleged November 2, 2016 agreement (i.e., the November Document) was an illegal contract and could therefore not be enforced. (*See* RJN, Ex. 16 (Motion for New Trial) at 11:1-13:5.) Mr. Geraci opposed the motion arguing that Mr. Cotton had waived the defense of illegality. (*See* RJN, Ex. 17 (Opp. to Motion for New Trial) at 10:15-12:28.) Judge Wohlfeil denied the motion for new trial finding that the defense of illegality had been waived because he believed the defense of illegality had not previously been raised in the action.[13]

LEGAL STANDARD

The Court may request that an attorney represent an indigent civil litigant upon a showing of "exceptional circumstances." *See Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004); 28 U.S.C. § 1915(e)(1). A finding of exceptional circumstances requires an evaluation of (1) the parties' ability to articulate his claims in light of the complexity of the legal issues involved and (2) the likelihood of success on the merits. *Agyeman*, 390 F.3d at 1103; *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). Neither of these considerations is dispositive and instead must be viewed

[13] *See* Cotton Decl., Ex. 11 (RT of Motion for New Trial hearing on October 25, 2019 ("RT October 25, 2019") at 3:6-7 ("Counsel, shouldn't this have been raised at some earlier point in time?"); *id*. at 3:22 ("Even if you are correct [about the illegality], hasn't that train come and gone? The judgment has been entered. **You are raising this for the first time**."); *id*. at 4:4-5 ("But at some point, doesn't your side ***waive*** the right to assert this argument? At some point?") (emphasis added).

together. *Wilborn*, 789 F.2d at 1331. In deciding on whether to request counsel, some courts take into account a plaintiff's efforts to secure counsel. *See Cota v. Scribner*, No. 09cv2507-AJB (BLM), at *2 (S.D. Cal. Feb. 16, 2012) ("Plaintiff's actions demonstrate 'a reasonably diligent effort to secure counsel,' thereby satisfying a prerequisite some courts have required prior to appointing indigent plaintiffs an attorney.") (quoting *Bailey v. Lawford*, 835 F. Supp. 550, 552 (S.D. Cal. 1993)). Each of these are discussed below.

ARGUMENT

I. Plaintiff has medical conditions that prohibit him from articulating his claims.

Evidence of a nexus between a mental impairment and ability to articulate claims is grounds for appointment of counsel. *See Fletcher v. Quin*, 2018 WL 840174, *2 (S.D. Cal. Feb. 13, 2018) (citations omitted). In deciding whether mental impairment affects a plaintiff and his ability to articulate his claims, courts take into account supporting medical evidence, plaintiff's prior submissions to the court, and the complexity of his claims. *Id.* at *2 (citations omitted).

A. Dr. Ploesser's independent psychological assessments reflect that Mr. Cotton's mental state is near a "delusional" state in regard to his litigation.

As set forth in the March 2018 IPA and July 2021 IPA, Mr. Cotton has been diagnosed with medical conditions that prohibit him from articulating his claims in this litigation. The March 2018 IPA diagnoses Mr. Cotton with "Post-Traumatic Stress Disorder (F43.10), Intermittent Explosive Disorder (F63.81) and Major Depression (F32,2)." (Cotton Decl., Ex. 1 at ¶ 8.)

The July 2021 IPA states that it is Dr. Ploesser's "medical opinion that Mr. Cotton is unable to process facts and legal issues beyond a basic level, unable to gather relevant evidence in [a] manner called for by litigation, unable to conduct complex legal research, and would be incapable of interacting with any counsel representing Mr. Geraci or [his] associates due to his belief that they are 'conspiring' against him." (*Id.*, Ex. 2 at p. 1.) As noted, the July 2021 IPA concludes that "Mr. Cotton's obsessional ruminations around his

legal case are bordering a delusional quality, which will make it very difficult for him to competently represent himself in civil litigation." (*Id*. at 2.)

Based upon the March 2018 IPA and July 2021 IPA, Mr. Cotton's diagnosed medical conditions and mental state prohibit him from articulating his claims in this case.

B. Mr. Cotton's prior submissions to the state and federal courts have been largely copied-and-pasted from his former attorneys, motions in other cases, and edited by friends.

The Court has previously noted that Mr. Cotton is capable of articulating his legal claims, (*see* ECF No. 14 at 2:16-18), however, that conclusion reflects Mr. Cotton's ability to copy-and-paste work performed by his former attorneys in his and related actions, motions submitted to the state and federal courts in other cases, and legal treatises. (*See* Cotton Decl. ¶¶ 25-27.).[14] Further, as this Court noted, Mr. Cotton's operative complaint is defective in that it failed to set forth a cause of action to justify the declaratory relief he is seeking. (*See* ECF No. 71 at 6:3-4 ("Plaintiff has no claim for declaratory relief since he has no underlying cause of action against Austin.").)

C. Mr. Cotton has been unable to secure counsel because of the complexity of his case.

Mr. Cotton has made multiple efforts but cannot obtain counsel to represent him in this action. (Cotton Decl. at ¶¶ 25-29.) Mr. Cotton's inability to secure counsel also reflects his inability to articulate his claims because of their complexity and his mental state. (*Id*. at ¶ 29; Declaration of Jacob Austin at ¶ 6.) Notably, Mr. Cotton's former counsel, the law firm of Tiffany & Bosco, that prepared the Motion for New Trial and know that the *Cotton I* judgment is void for illegality, originally agreed to substitute in represent Mr. Cotton in this action. (*Id*. at ¶ 30.) However, after several months of reviewing and researching the pleadings in this and the related matter, they declined to represent Mr. Cotton because of the complex procedural history and the substantive

[14] Mr. Cotton notes that even a significant portion of this Application has been copied and pasted from the Motion for New Trial prepared by the law firm of Tiffany & Bosco. (*See gen*. RJN, Ex. 16.)

allegations, including bad-faith actions by so many attorneys. (*Id*. at ¶ 31.)

II. Plaintiff is likely to succeed on the merits.

This case is distilled to two main issues: (1) the validity of the *Cotton I* judgment based on an illegal contract and (2) the actions taken by the Mr. Geraci and his agents that reflect they were in furtherance of Mr. Geraci's conspiracy to defraud Mr. Cotton of the Property via the *Cotton I* action. Evidence supporting each is addressed below.

A. The Cotton I Judgment enforces an illegal contract and must be declared void.

"The preclusive effect accorded a state court judgment in a subsequent federal court proceeding is determined by reference to the laws of the rendering state." *U.S. ex Rel. Robinson Rancheria v. Borneo* ("*Robinson*"), 971 F.2d 244, 250 (9th Cir. 1992) (citations omitted). "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." *Robinson*, *supra*, at 251; *Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 696.) ("A judgment is void on its face if the defect is apparent upon examination of the record."). "A contract to perform acts barred by California's licensing statutes is illegal, void and unenforceable." *Consul Ltd. v. Solide Enterprises, Inc.*, 802 F.2d 1143, 1148 (9th Cir. 1986).

1. The Alleged November 2, 2016 Agreement is Illegal.

"Whether a contract is illegal … is a question of law to be determined from the circumstances of each particular case." *Kashani v. Tsann Kuen China Enterprise Co.* (2004) 118 Cal. App. 4th 531, 540. A contract is unlawful and unenforceable if it is contrary to, in pertinent part, (1) an express provision of law; or (2) the policy of express law. Cal. Civ. Code § 1667(1)-(3); *Kashani*, *supra*, at 541 (contract must have a lawful object to be enforceable). "All contracts which have for their object, *directly or indirectly*, to exempt anyone from responsibility for his own … violation of law, whether willful or negligent, are against the policy of the law." Cal. Civ. Code § 1668 (emphasis added). For purposes of illegality, the "law" includes statutes, local ordinances, and administrative

regulations issued pursuant to the same. *Kashani*, *supra*, at 542. A contract made for the purpose of furthering any matter prohibited by law, or to aid or assist any party in the violation of the law, is void. *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109 (voiding a contract entered into for the purpose of avoiding state and federal income tax regulations).

As summarized in *Homami*:

> "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; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim."

Id. at 1111 (quoting *Lee On v. Long* (1951) 37 Cal.2d 499, 502); *see also Kashani*, *supra*, at 179; Cal. Civ. Code §§ 1550, 1608. "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." *Brenner v. Haley* (1960) 185 Cal.App.2d 183, 287.

May is instructive. *May v. Herron*, 127 Cal.App.2d 707, 708 (Cal. Ct. App. 1954). In *May*, the Newmans and May entered into a contract whereby May agreed to construct a home for the Newmans. On the advice of May, the Newmans transferred property to a veteran for the sole purpose of obtaining a veteran's priority under Federal Priorities Regulation No. 33 for construction materials for May to build the home. *Id*. When *May* sued to recover a balance due on the construction contract, the court refused to come to his aid, finding that he had "initiated, suggested and directed a conspiracy to violate and circumvent a federal regulation which had the force of law." *Id*. at 711. Thus, the Court of Appeals held that the contract between May and the Newmans, while valid on its face, was illegal because May knew the house was not intended for occupancy by a veteran and May's conduct in performing his obligations under the contract violated the federal regulation. (*Id*. at 711). The court concluded: "To permit a recovery here on any theory would permit plaintiff to benefit from his willful and deliberate flouting of a law designed

to promote the general public welfare. This cannot be countenanced by the courts." *Id*. at 712.

The foundation of the *Cotton I* judgment is the legality of the alleged November 2, 2016 agreement, which constitutes an illegal contract for at least two reasons. First, the alleged November 2, 2016 agreement is illegal and void because Mr. Geraci cannot own a cannabis dispensary as a result of his sanctions for prior unlicensed cannabis activity. The state's cannabis licensing statutes prohibits him from doing so. Cal. Bus. Prod. Code § 19323(a),(b)(7); *Consul Ltd.,* 802 F.2d at 1148 ("A contract to perform acts barred by California's licensing statutes is illegal, void and unenforceable.").

Second, the alleged November 2, 2016 agreement is illegal and void because Mr. Geraci applied for the CUP in the name of Ms. Berry and failed to disclose his sanctions and his interest in the CUP and Property in violation of state and local law. *See* BPC §§ 19320(b); 19321(b); 19323(a),(b),(3),(7); SDMC § 11.0401(b); RJN Ex. 3 (Ownership Disclosure Form). Contrary to the self-exculpating testimony of Mr. Geraci and his agents, Mr. Geraci used Ms. Berry as a proxy to circumvent applicable State and City disclosure laws to acquire a benefit he could not lawfully obtain in his own name.[15]

As a result, the alleged November 2, 2016 agreement is illegal, the *Cotton I* judgment is void, and Mr. Cotton is likely to succeed on the merits.

2. The Cotton I judgment cannot be given preclusive effect in this Court and must be declared as void because its entry is an exercise of a power not authorized by law and grants relief to Mr. Geraci that the law declares shall not be granted.

"A judgment absolutely void may be attacked anywhere, directly or ***collaterally***

[15] *See* AUMA at § 6.1; BPC § 19300.5 (defining "applicant" as including "all persons" with an ownership interest in the proposed premises); *id.* § 19323(a),(b)(3) (mandating denial for failing to provide information required by licensing authority); SDMC §§ 11.0401(b) (prohibiting making false statements or failing to report material facts in, *inter alia*, CUP applications); *see also* SDMC § 112.0102(c) (requiring applicant/responsible persons to undergo background check); 42.1502 (defining responsible persons), 42.1504 (requiring a permit to operate a dispensary), and 42.1507 (requiring background check); *see also* SDMC § 11.0402 (providing for joint liability for any parties who cause, permit, aid or abet any other party in violating the SDMC).

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 (Cal. Ct. App. 2017) (cleaned up, brackets in original, emphasis added).

> Generally, a judgment is void if the court lacked subject matter jurisdiction or jurisdiction over the parties. [Citations.] Lack of jurisdiction in this "fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288 (*Abelleira*).)
>
> But under certain circumstances the courts have also defined a "lack of jurisdiction" resulting in a void judgment in "a broader sense," to mean the situation when "a court grants 'relief which [it] has no power to grant.'" ([*Carlson v. Eassa*, 54 Cal.App.4th 684, 691 (Cal. Ct. App. 1997)]; *see* [*Sass v. Cohen*, 10 Cal.5th 861, 863 (Cal. 2020)].) Where, for instance, the court has no power to act 'except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites," the court's action outside these rules is considered void. (*Abelleira*, *supra*, 17 Cal.2d at p. 288; *see Carlson*, at pp. 691-692; *Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 538; *Vasquez v. Vasquez* (1952) 109 Cal.App.2d 280, 283-285.)

Paterra v. Hansen, 64 Cal. App. 5th at 535-36.

In *Paterra*, 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 Judge Wohlfeil 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.'" ([*Harbour Vista, LLC v. HSBC Mortg. Servs. Inc.*, 201 Cal. App. 4th 1496, 15006, fn. 11 (2011)].) "[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." (*Id*. at p. 1506.)
>
> 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**.'"].)

Id. (italics in original; bold added).

Here, identically as in *Paterra*, the mandatory "shall" language of BPC § 19323(a) applies and reflects the Legislature's intent to "absolutely prohibit" the approval of a license by an applicant who fails to provide required information, lawfully obtains a local CUP, or who has been sanctioned within three years preceding the submission of an application for a license with the state. *See id*.; BPC §§ 19321(b); 19323(a),(b)(3),(7). Thus, the entry of the *Cotton I* judgment is void as "an exercise of a power not authorized by law [and] a grant of relief to [Mr. Geraci] that the law declares **shall not** be granted." *Paterra*, 64 Cal. App. 5th at 536 (emphasis added).

In *Hunter*, a judgment based on an illegal contract that violated Cal. Civ. Code § 1673 was found void where the illegality appeared on the face of the judgment. *Hunter v.*

Superior Court, 36 Cal.App.2d 100, 113 (Cal. Ct. App. 1939). There, the court concluded: "If a court grants relief, which under no circumstances it has any authority to grant, its judgment is *to that extent* void." *Id*. at 116 (emphasis in original). Here, as the *Cotton I* judgment is premised exclusively on an illegal contract, the Judgment is entirely void. *Id*.

B. The circumstantial evidence strongly supports, if not conclusively so, that Mr. Geraci and his agents took acts in furtherance of his conspiracy to defraud Mr. Cotton of the Property and to prevent Mr. Cotton from recovering damages.

To allege a conspiracy, a plaintiff must plead (1) formation and operation of the conspiracy and (2) damage resulting to plaintiff (3) from a wrongful act done in furtherance of the common design. *Cortese v. Sherwood*, 26 Cal. App. 5th 445, 453 (2018). Any party who takes acts in furtherance of an existing conspiracy is liable for every act previously or subsequently done by any coconspirator in pursuance of conspiracy. *De De Vries v. Brumback* (1960) 53 Cal. 2d 643, 648. Attorneys may also be held liable for fraud for conspiring with their client to defraud a plaintiff:

> When an attorney actively participate[s] in conduct that [goes] way beyond the role of legal representative, he or she may be liable for wrongdoing to the same extent as a nonattorney. A license to practice law does not shield an attorney from liability when he or she engages in conduct that would be actionable if committed by a layperson. An attorney who commits such conduct may be liable under a conspiracy theory when the attorney agrees with his or her client to commit wrongful acts.

Rickley v. Goodfriend, 212 Cal. App. 4th 1136, 1153 (2013).

1. Formation of the conspiracy to defraud Mr. Cotton of the Property.

A plaintiff need not produce evidence showing that the defendants met and actually agreed to undertake the performance of the unlawful act. *Black v. Sullivan* (1975) 48 Cal. App. 3d 557, 567. It is sufficient if the plaintiff can show the defendant's knowing participation in a common plan or design to commit an act or acts constituting a civil wrong, (*id*. at 566–567), and proof of a conspiracy to defraud can be established solely by

circumstantial evidence (*Machado v. Katcher Meat Co.* (1951) 108 Cal. App. 2d 1, 4–6).

Here, the goal of Mr. Geraci's conspiracy was to extort or defraud Mr. Cotton of the Property by filing *Cotton I* falsely representing the November Document was executed with the intent of being a lawful contract. All parties who sought to help Mr. Geraci acquire a CUP via the CUP application submitted by Ms. Berry, filed or maintain litigation against Mr. Cotton on the premise it is lawful for Mr. Geraci to own a CUP (or the *Cotton I* judgment is not void due to illegality), and/or whose actions prevent Mr. Cotton from recovering damages for same, can be proven to have conspired with Mr. Geraci via circumstantial evidence. *Id*.

2. Damages suffered by Mr. Cotton.

Judge Wohlfeil found that but-for Mr. Cotton's alleged unlawful interference with the processing of the CUP application, the CUP would have been granted at the Property. (*See* Cotton Decl., Ex. 8 (RT July 10, 2019) at 92:6-12.) However, Mr. Cotton's interference was not unlawful. As proven above, Mr. Geraci had no right to process an application at the Property. Thus, Mr. Cotton's damages include, but are not limited to, his loss in the interest in the CUP, the loss of value in selling the Property under economic duress to finance his litigation against Mr. Geraci, and attorney and paralegal fees and costs. And the emotional distress he has been unlawfully subjected to for over four years. (*See* Cotton Decl. Exs. 1 (March 2018 IPA) and 2 (July 2021 IPA).)

3. Wrongful acts taken in furtherance of the conspiracy to defraud Mr. Cotton of the Property and to prevent him from recovering damages.

For purposes of imposing liability for fraud based upon a conspiracy, it is not necessary to show that all participants made misrepresentations to plaintiff or otherwise directly participated in actionable fraud. *AREI II Cases* (2013) 216 Cal. App. 4th 1004, 1024. Defendants may be sued for conspiracy to defraud if they knew of the plan to defraud and took actions, in concert with the person who actually committed the misrepresentations or actionable fraud, to further that scheme to their own benefit. *Id*.

Additionally, wrongful acts include acts taken with the goal of avoiding detection of a fraudulent scheme and preventing a victim from recovering damages. *Walters v. United States*, 256 F.2d 840, 844, fn. 5 (9th Cir. 1958) ("Avoidance of detection and prevention of recovery of money lost by the victims are within, and often a material part of, the illegal scheme.") (quoting *United States v. Riedel*, 126 F.2d 81, 83 (7th Cir. 1942); *Riedel*, 126 F.2d at 83 ("A scheme to defraud may well include later efforts to avoid detection of the fraud. A fraudulent scheme would hardly be undertaken, save for profit to the plotters.").

Here, the facts establish that it is unlawful for Mr. Geraci to own a CUP. Ms. Austin filed the CUP application in the name of Ms. Berry and failed to disclose Mr. Geraci in the "Ownership Disclosure Form." (See RJN. Ex. 3.) However, she alleges that, despite the title of the form in large bold letters, its purpose is for conflicts of interests. (*See* Cotton Decl., Ex. 9 (RT July 9, 2019) at 52:3-4.) Ms. Austin's testimony denying knowledge of the Geraci Judgments or state and city law that would bar him from owning a CUP – as "an ***expert*** in cannabis licensing and entitlement at the state and local levels [that] regularly speak[s] on the topic across the nation" – is not credible and can be deemed obstruction of justice. *See* RJN, Ex. 4 (Austin Decl.) at ¶ 2; *United States v. Thoreen*, 653 F.2d 1332, 1341 (9th Cir. 1981) ("A witness's sham denial of knowledge similarly obstructs justice by closing off avenues of inquiry and stifling a jury's ability to ascertain the truth.") (citation omitted).

Ms. Berry cannot avoid liability for submitting the CUP application forms, including the Ownership Disclosure Statement, by alleging she did not read them.[16] Ms. Berry falsely certified the Ownership Disclosure Statement knowing she was claiming to be the applicant and owner.

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[16] *Martindell v. Bodrero*, 256 Cal.App.2d 56, 61 (Cal. Ct. App. 1967) ("It is well established that parol evidence is not admissible to relieve from liability an agent who signs personally without disclosing the name of the principal on the face of the instrument."); *Hollywood Nat. Bank v. International Bus. Mach*, 38 Cal.App.3d 607, 617 (Cal. Ct. App. 1974) ("[W]here the writing is unambiguous on its face, extrinsic evidence is inadmissible to show that a person acted purely as an agent.").

Ms. McElfresh represented Mr. Cotton. Ms. McElfresh then represented Mr. Geraci before the City to further his CUP application, thereby representing his lawful possession of a CUP. Ms. McElfresh's prior complicity in helping a client avoid detection of illegal cannabis operations proves her willingness and ability to take unlawful actions on behalf of her clients. (*See* RJN, Ex. 6 (DPA).)

Mr. Demian was referred by Ms. McElfresh. Mr. Demian failed to disclose that FTB had shared clients with Mr. Geraci. Mr. Demian, contrary to every allegation and declaration made by Mr. Cotton, indisputably reflected by the record in *Cotton I*, removed the allegations of illegality against Mr. Geraci and the conspiracy cause of action against Mr. Geraci and Ms. Berry. Mr. Demian attempted to have Mr. Cotton declare that Mr. Geraci was acting as his agent when he had the CUP application submitted by Ms. Berry. In other words, that Mr. Geraci was not unlawfully attempting to acquire a CUP and making Mr. Cotton's suit and allegations of illegality against Mr. Geraci baseless.

FTB's actions, that cannot be factually or legally justified, prejudiced Mr. Cotton to the benefit of Mr. Geraci. If discovery proves that Mr. Cotton's allegation that FTB does indeed have shared clients with Mr. Geraci or his business, that they did not disclose, coupled with the above, this circumstantial evidence is enough for a reasonable fact finder to find that Mr. Demian was a knowing coconspirator that sought to aid Mr. Geraci in defrauding Mr. Cotton of the Property and preventing Mr. Cotton from recovering damages for same. *See Walters*, 256 F.2d at 844, fn. 5; *Ramey v. General Petroleum Corp.* (1959) 173 Cal. App. 2d 386, 403 (conspiracy to conceal and defeat plaintiff's action for damages).

III. The complexity of Mr. Cotton's case cannot be fully set forth in this application.

In addition to the above, there are at least two additional factors for the Court to consider in determining the complexity of this case, but which are outside the scope of this application to fully brief given the focus of the illegality needed to be established.

First, when a *pro se* litigant omits an "obvious defendant," a district court "should"

allow plaintiff leave to join that defendant. *Wilborn v. Escalderon*, 789 F.2d 1328, 1332 (9th Cir. 1986). Mr. Cotton was deprived of his interest in the CUP, a Constitutionally protected property interest.[17] The City had an affirmative duty to enforce the SDMC and not process Mr. Geraci's CUP application in the name of Ms. Berry. *See Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978). Ms. Tirandazi's testimony, that the purpose of the Ownership Disclosure Form is for conflict of interests mirrors Ms. Austin's testimony and supports the allegation at the very least that they are joint tortfeasors colluding to mislead the *Cotton I* court into believing Mr. Geraci's CUP application was lawful. The City is motivated to avoid liability for failing to enforce the SDMC and being a but-for factor in Mr. Cotton's damages. (*See id.)* Thus, the City should be named as a defendant in Mr. Cotton's action as an "obvious defendant." Mr. Cotton named the City in his original complaint and does not know why he omitted the City in his amended complaint, which he copied-and-pasted from a related matter. (Cotton Decl. at ¶ 32.)[18]

Second, there is case law that supports the position that attorneys who have defended defendants in this action based on the void judgment knew or should have known that their defense would ratify Mr. Geraci's fraudulent scheme and violate Mr. Cotton's Civil Rights to seek judicial redress. *See Stevens v. Rifkin*, 608 F. Supp. 710, 730 (N.D. Cal. 1984). This area of law Civil Rights law is unclear even to the courts and complex beyond the ability of a *pro se* plaintiff to understand, much less litigate. (*Id.)*

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[17] *See O'Connor v. Cty. of Clackamas*, No. 3:11-cv-1297-SI, 2013 U.S. Dist. LEXIS 101713, at *32 (D. Or. July 22, 2013) ("Plaintiffs still would have had the right to file a Section 1983 claim if their constitutional rights had been violated in the permitting process.") (citing *Carpinteria Valley Farms, Ltd. v. Cnty. of Santa Barbara*, 344 F.3d 822, 830 (9th Cir. 2003)).

[18] On this note, Mr. Cotton declares that in his amended complaint he will not name the judicial officers named in his current complaint. (Cotton Decl. at ¶ 33.) Mr. Cotton realizes his beliefs that they conspired with Mr. Geraci are born of the extreme distress he has been suffering over the last several years as he has sought to vindicate his rights and his current situation is the result of the actions of Mr. Geraci and his agents. (*Id.)*

CONCLUSION

"In an appropriate case, a federal court has a duty under section 1915 (d) to assist a party in obtaining counsel willing to serve for little or no compensation." *United States v. 30.64 Acres of Land*, 795 F.2d 796, 804 (9th Cir. 1986).[19] Mr. Cotton's case is such a case.

In view of the March 2018 IPA, the July 2021 IPA, Mr. Cotton's copy-and-paste work that is fatally defective (e.g., complaint, failure to name an obvious defendant), and his inability to secure counsel, it is clear that while Mr. Cotton's filings superficially suggest an ability to articulate claims, he does not have the ability to process facts and legal issues beyond a basic level, or even interact with opposing counsel, in this case.

Even assuming Mr. Cotton was not mentally impaired, the factual and legal complexity of the issues he is facing are vastly beyond the abilities of what any indigent *pro se* litigant can reasonably be expected to undertake in any scenario. It will take difficult and extensive discovery, and significant experience with Civil Rights and client-attorney conspiracies, to fully understand the scope Mr. Geraci's conspiracy and hold all his coconspirators accountable.

The complexity of this undertaking is not something any indigent *pro se* plaintiff without specific and extensive legal knowledge can reasonably be expected to undertake.

Mr. Cotton respectfully requests the Court find his circumstances are extraordinary and request counsel for Mr. Cotton pursuant to § 1915(e).

DATED: August 27, 2021

S/ Jacob P. Austin, Esq.

Jacob Austin
Specially appearing attorney
for plaintiff Darryl Cotton

[19] *30.64 Acres of Land*, 795 F.2d at 804 ("The court does not discharge this duty if it makes no attempt to request the assistance of volunteer counsel or, where the record is not otherwise clear, explain its failure to do so."); *Id.* at 806 ("Any refusal to request an attorney shall be accompanied by factual findings adequate for appellate review.").