1. CREDITORS ADJUSTMENT BUREAU v. MYKA CELLARS, INC., SC20210008

Order of Examination

This matter was continued from April 29, 2022.

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, JULY 29, 2022, IN DEPARTMENT FOUR. PARTIES MAY APPEAR IN PERSON. IF ANY PARTY WISHES TO APPEAR REMOTELY, THEY MUST APPEAR BY ZOOM.

2. E.D.C. GROWERS ADVOC. ALLIANCE, ET AL. v. EL DORADO COUNTY, 21CV0161

(A) Demurrer

(B) Case Management Conference

A. DEMURRER

This action involves El Dorado County's zoning codes regarding commercial cannabis activities. On March 25, 2022, Petitioners/Plaintiffs El Dorado County Growers Advocacy Alliance ("Alliance"), Cybele Holdings, Inc. ("Cybele"), Single Source Solutions, Inc. ("Single Source"), and Lotus Valley Farms, Inc. ("Lotus"), filed a First Amended Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("FAP") against Respondents/Defendants County of El Dorado, El Dorado County Board of Supervisors, El Dorado County Sheriff's Department, and Sheriff John D'Agostini. The FAP asserts two causes of action, which are entitled (1) Writ of Mandate – CCP § 1085, and (2) Declaratory Relief – CCP § 1060.

Pending is Respondents' demurrer to the FAP on the grounds that (1) the entire FAP is barred by the statute of limitation set forth in Government Code § 65009; (2) except for Cybele, the remaining Petitioners each lack standing to assert the claims to the FAP; and (3) each cause of action fails to state facts sufficient to support a claim upon which relief can be granted.

1. Standard of Review

"At the outset it is settled that the sufficiency of a petition in a mandamus proceeding can be tested by demurrer." (*Hilton v. Bd. of Supervisors* (1970) 7 Cal.App.3d 708, 713, citing *Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90, 106–107.)

A demurrer is directed at the face of the pleading and to matters subject to judicial notice. (Code Civ. Proc., § 430.30(a).) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Comm.*

on Children's Television, *Inc. v. Gen. Foods Corp*. (1983) 35 Cal.3d 197, 213.) All properly pleaded allegations of fact in the pleading are accepted as true, however improbable they may be, but not the contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) A judge gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank*, *supra*, 39 Cal.3d at p. 318.)

2. Preliminary Matters

Respondents' request for judicial notice of Exhibits A through G to the Declaration of Lynn A. Garcia is granted. (Evid. Code, §§ 451(a), 452(c), (h).)

3. County's Adoption of Ordinances Re: Commercial Cannabis Activities

By way of background, in 1996 California voters approved Proposition 215, which added section 11362.5 to the Health and Safety Code and was entitled the "Compassionate Use Act of 1996." In 2003, the California Legislature enacted the "Medical Marijuana Program," which was codified at Article 2.5 (commencing with section 11362.7), Chapter 6, Division 10 of the Health and Safety Code. In 2015, the "Medical Cannabis Regulation and Safety Act" ("MCRSA") was enacted.

In 2016, Proposition 64 was approved by voters and legalized the nonmedical use of marijuana for adults over the age of 21. Further, it authorizes local governments to enact additional local requirements for nonmedical cannabis businesses. Proposition 64 added Division 10 to the Business and Professions Code (commencing with section 26000), known as the "Medicinal and Adult-Use Cannabis Regulation and Safety Act" ("MAUCRSA").

On November 6, 2018, the voters of El Dorado County enacted local initiative Measures N, P, Q, R, and S. (FAP, Ex. 2.) These measures related to the taxation, permitting, and enforcement of commercial cannabis activities (Measure N); the authorization and regulation of commercial outdoor/mixed-light cannabis cultivation (Measures P, Q); and the authorization and regulation of retail sale, commercial

distribution, and commercial indoor cannabis cultivation (Measures R, S). (FAP, Ex. 2.) These measures were initially codified in Title 130, Article 9, Chapter 130.14 of the El Dorado County Code ("EDCC"). (*Ibid.*)

In 2019 and 2020, the County Board of Supervisors approved multiple ordinances amending the commercial cannabis code sections. (Dem., Decl. of Lynn A. Garcia, Exs. C [Ord. No. 5109], D [Ord. No. 5110], E [Ord. No. 5111], F [Ord. No. 5123] & G [Ord. No. 5124].) The County's commercial cannabis codes are now codified in Title 3, Chapter 3.22, relating to the taxation of commercial cannabis activities, and Title 130, Chapter 130.41, relating to zoning.

Petitioners claims arise from two County code provisions. First, EDCC § 130.41.100(4)(G) addressing background checks:

> No Commercial Cannabis Use Permit may be issued until a background check of all owners and the Designated Local Contact is completed with review and recommendation by the Sheriff's Office, including but not limited to criminal history, fingerprinting, and any pending charges. The applicant shall be responsible for the cost of the background check. The County may deny an application based on the results of a background check if the County determines that information in the background check makes it more likely than not that any amount of funding for the operation will be or was derived from illegal activity or because the criminal history or other information discovered in the background check of an owner or spouse of an owner weighs against the owner's trustworthiness or ability to run a legal business in compliance with all regulations, including but not limited to the risk of involvement or influence by organized crime, prior convictions involving controlled substances or violent crimes, the likelihood that sales and income will not be truthfully reported, or the risk that cannabis will be illegally provided or sold to individuals under the age of 21.

(*Ibid.*) Section 130.41.100(4)(G) has been in effect since September 2019.

And second, EDCC § 130.41.100(2), addressing the definition of "Owner" as it relates to commercial cannabis activities:

> *Owner* means any person that constitute[s] an "owner" under the regulations promulgated by the Bureau of Cannabis Control and (1) a person with any ownership interest, however small, in the person applying for a permit, unless the interest is solely a security, lien, or encumbrance; (2) the chief executive officer of a nonprofit or other entity; (3) a member of the board of directors of a nonprofit entity; (4) a person who will be participating in the direction, control, or management of the person applying for a permit, including but not limited to a general partner of a partnership, a non-member manager or managing member of a limited liability company, and an officer or director of a corporation; or (5) a person who will share in any amount of the profits of the person applying for a permit or has a financial interest, as defined by the regulations promulgated by the Bureau of Cannabis Control, in the person applying for the permit.

(*Ibid.*) Section 130.41.100(2) has been in effect since October 2019.

4. Discussion

4.1 Statute of Limitation

Respondents assert that the entire FAP is barred by the statute of limitation set forth in Government Code § 65009. Specifically, Respondents argue that because Petitioners are making a facial challenge to the County's "ordinances related to background checks, criminal history, fingerprinting, ownership, and financial interest holders," Petitioners' claims are subject to the 90-day statute of limitation set forth in Government Code § 65009(c). In opposition, Petitioners argue that the County's commercial cannabis code sections at issue are not truly land-use matters, and therefore the statute of limitation period in section 65009 does not apply.

A statute of limitation argument is an affirmative defense. A pleading that alleges facts amounting to an affirmative defense is subject to a general demurrer. (*McKenney v. Purepac Pharm. Co.* (2008) 167 Cal.App.4th 72, 78.) The court may sustain a demurrer based on an affirmative defense only when the face of the complaint discloses that the action is necessarily barred by the defense. (*Brown v. Crandall* (2011) 198 Cal.App.4th 1, 10.)

The court finds that part of Petitioners' challenge is subject to the 90-day statute of limitation and is untimely. Government Code § 65009 provides in relevant part: "[N]o action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision: [¶] … [¶] To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance." (*Id.*, subd. (c)(1)(B).)

Petitioners' lawsuit is, in part, one that "attack[s]" the definition of "owner" adopted by the Board of Supervisors, which definition Petitioners claim is contrary to state law and is overly broad.

Petitioners' assertion that the County's definition of "owner" improperly contradicts state law is not persuasive. MAUCRSA specifically states that "[t]his division *shall not be interpreted to supersede or limit* the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division, including, but not limited to, local zoning and land use requirements …." (Bus. & Prof. Code, § 26200(a)(1) [emphasis added].) Thus, state law does not preempt the County's commercial cannabis code on the ownership issue.

The court finds that Petitioners' challenge to the definition of "owner" constitutes a facial challenge to the ordinance since the alleged defect is in the ordinance itself. The statute of limitation for a facial challenge to an ordinance commences on the date it became effective. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22; *County of Sonoma*

v. Superior Court (2010) 190 Cal.App.4th 1312, 1324.) Government Code § 65009 establishes a 90-day statute of limitation to challenge a zoning ordinance. EDCC § 130.41.100(2), the most recent amendment, became effective on October 10, 2019. (Dem., Decl. of Lynn A. Garcia, Ex. C.) Thus, a challenge to the ordinance's definition of "owner" must have been filed by January 8, 2020. This action was not commenced until November 16, 2021.

It should be noted that Petitioner Alliance admits in the FAP that it "actively participated as a stakeholder in the process of developing" Measures N, P, Q, R, and S "on behalf of its members, customers of members and taxpayers of El Dorado County." (FAP, ¶ 18.) Thus, at least one Petitioner was on notice that Measure N defined "owner," in part, as "a person *with any ownership interest*, *however small* …." (FAP, Ex. 2, p. 10 [emphasis added].) Although the definition was later revised, "owner" has always been defined very broadly in the County's commercial cannabis code.

Respondents' demurrer to Petitioners' challenge regarding ownership is sustained. Because there does not appear to be a reasonable possibility that the FAP can be amended to cure the defect, leave to amend is denied. (See *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 322.)

Separate from challenging the definition of "owner," Petitioners' lawsuit also challenges the manner and circumstances in which the code section addressing background checks and fingerprinting is being *applied* by the County, but they are not challenging the *provision itself*. As such, the statute of limitation in Government Code § 65009 does not apply as to that aspect of Petitioners' challenge to the commercial cannabis code. Accordingly, Respondents' demurrer as to Petitioners' claims regarding the application of EDCC § 130.41.100(4)(G) addressing background checks/fingerprinting is overruled.

The demurrer on the basis of the statute of limitation is sustained in part, without leave to amend, and overruled in part.

4.2 Petitioners' Standing

Next, Respondents contend that each of the Petitioners, other than Cybele, lacks standing to raise any of the claims of the FAP. Those Petitioners are Alliance, Single Source, and Lotus.

Standing to sue is the threshold element required to state a cause of action, and therefore lack of standing may be raised by demurrer. (*Buckland v. Threshold Enterprises*, *Ltd*. (2007) 155 Cal.App.4th 798, 813; *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1000.) Code of Civil Procedure § 367 establishes the rule that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." (*Ibid.*) A real party in interest is one who has "an actual and substantial interest in the subject matter of the action and who would be benefited or injured by the judgment in the action." (*Friendly Vill. Cmty Ass'n*, *Inc. v. Silva & Hill Constr. Co*. (1973) 31 Cal.App.3d 220, 225.)

"A person who invokes the judicial process lacks standing if he, or those whom he properly represents, 'does not have a real interest in the ultimate adjudication because [he] has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented.' [Citation.] … [¶] Where the enforcement of a rule may cause irreparable injury, only *the injured party* may attack its constitutionality by an action to enjoin its enforcement. [Citation.] A writ of mandate is granted ' "only where necessary to protect a substantial right and only when it is shown that some substantial damage will be suffered by the petitioner if said writ is denied." ' [Citations.]' [Citation.] It will not lie where it is apparent the petitioner has ' " 'no direct interest in the action sought to be coerced, and that no benefit can accrue to him from its performance.' " [Citation.]' [Citation.]" (*Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 707–708 [emphasis in original].)

"To establish associational standing, [the petitioner] must demonstrate that its members would otherwise have standing to sue in their own right. [Citation.] To have

standing to seek a writ of mandate, a party must be 'beneficially interested' [citation], i.e., have 'some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.' [Citation.] This standard … is equivalent to the federal 'injury in fact' test, which requires a party to prove by a preponderance of the evidence that it has suffered 'an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." ' [Citation.]" (*Associated Builders & Contractors*, *Inc*. *v*. *San Francisco Airports Comm.* (1999) 21 Cal.4th 352, 361–362.)

The FAP states that Petitioner Alliance is a California Nonprofit Mutual Benefit Corporation in good standing. The Alliance "actively participated as a stakeholder in the process of developing" Measures N, P, Q, R, and S "on behalf of its members, customers of members and taxpayers of El Dorado County." The Alliance's efforts include encouraging legal commercial cannabis and promoting the financial benefit to the County. Alliance's members represent a cross-section of County land owners, citizens, and voters. Alliance and its members agree to submit to lawful background checks and oppose the staff waiver alternative. (FAP, ¶ 18.)

Petitioner Single Source is a California corporation in good standing. Single Source submitted an application for a cannabis cultivation project to the County's Planning Department in 2021. The project would involve the conversion of approximately 2 acres of existing unproductive vineyard within a 46.53 acre agriculturally zoned parcel for outdoor, full-season cannabis cultivation. The project is currently undergoing CEQA review by the County's environmental consultant. Single Source has been unwilling to sign the County's Waiver Agreement, but Petitioner agrees to submit to lawful background checks, including fingerprinting. (FAP, ¶ 20.)

Lastly, Petitioner Lotus is a California corporation in good standing and wholly owned by one person. Lotus is seeking a commercial cannabis cultivation use permit with regard to a 2-acre parcel of land. A "pre-application review" was performed by the County's

Planning Department staff. It is anticipated that shares in Lotus will be divested, sold, and transferred in the future. Lotus and its officers and shareholders agree to submit to background checks, including fingerprinting, but oppose the staff waiver alternative. (FAP, ¶¶ 22–24.)

These statements and allegations about Petitioners sufficiently show that they are beneficially interested in commercial cannabis activities in the County and would be benefited or injured by the judgment in the action. As such, the court finds that Petitioners have standing to pursue this action.

The demurrer on the basis of standing is overruled.

4.3 Whether the FAP States Viable Claims

Lastly, Respondents contend that each cause of action to the FAP fails to state facts sufficient to support a claim upon which relief can be granted. Specifically, Respondents argue that Petitioners have failed to demonstrate a clear, present, and ministerial duty to conduct fingerprint-based background checks for commercial cannabis permits, and Petitioners have failed to demonstrate a clear, present, and beneficial right in Petitioners to the performance of that duty.

A pleading must set forth the facts with sufficient precision to put the defendant on notice about what the plaintiff is complaining and what remedies are being sought. (*Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 636.)

Liberally construing the FAP and accepting the allegations as true, the FAP is adequately pled so as to put Respondents on notice about what Petitioners are complaining and what remedies are being sought.

The demurrer on the basis that the FAP fails to state facts to support a claim upon which relief can be granted is overruled.

B. CASE MANAGEMENT CONFERENCE

Appearances are required.

TENTATIVE RULING # 2: RESPONDENTS' DEMURRER IS SUSTAINED IN PART, WITHOUT LEAVE TO AMEND, AND OVERRULED IN PART. RESPONDENTS MUST FILE AND SERVE THEIR ANSWER TO THE FIRST AMENDED PETITION NO LATER THAN 10 DAYS FROM THE DATE OF SERVICE OF THE NOTICE OF ENTRY OF ORDER. NO HEARING ON THE DEMURRER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM. APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, JULY 29, 2022, IN DEPARTMENT FOUR FOR THE CASE MANAGEMENT CONFERENCE.

3. MAICO ASSET MGMT., INC. v. WOODS, ET AL., PC20210228

Motion to Strike Portions of Plaintiff's Second Amended Complaint

Plaintiff Maico Asset Management purchased a single-family residence in the South Lake Tahoe region as a "flipping opportunity." On November 23, 2021, plaintiff filed a Second Amended Complaint ("SAC") against defendants for (1) intentional misrepresentation, (2) constructive fraud, (3) negligent misrepresentation, (4) negligence, and (5) breach of fiduciary duty. Pending is defendants Jessica Woods's ("Woods") and Sierra Sotheby's International Realty's ("Sotheby's") motion to strike portions of the SAC.

The SAC alleges that in or about January 2018 defendants Woods and Daryl Woods ("Daryl") called plaintiff to solicit him to purchase, remodel, and resell the subject property after the previous buyer (represented by Daryl) backed out. (SAC, ¶¶ 13, 14.) The Woodses asked plaintiff to drive to South Lake Tahoe so they could show him the property. (SAC, ¶ 15.) They described the property as a "homerun flip opportunity" and that plaintiff "could resell the property for $799,000 'all day long, no brainer' to either [an] owner occupier or secondary homeowner for VRBO purposes once the property was renovated." (SAC, ¶¶ 15, 18.) The SAC further alleges that Daryl was "heavily involved in the entire transaction" and that he "acted as Plaintiff's agent via an implied agreement." (SAC, ¶ 16.)

The property was first listed in November 2018. (SAC, ¶ 22.) The property "did not sell for almost two years after acquisition and ultimately sold for $575,000, much less than what had been reasonably expected by Plaintiff, on account of not having the attributes represented by Defendants and not being nearly as valuable as defendants represented when soliciting Plaintiff's purchase of the Subject Property." (SAC, ¶ 41.)

1. Standard of Review

A motion to strike is generally used to address defects appearing on the face of a pleading that are not subject to demurrer. (*Pierson v. Sharp Mem. Hosp.* (1989) 216 Cal.App.3d 340, 342.) The grounds for a motion to strike must appear on the face of the pleading or from any matter which the court is required to take judicial notice. (Code Civ.

Proc., § 437(a).) On a motion to strike, the trial court must read the complaint as a whole, considering all parts in their context, and must assume the truth of all well-pleaded allegations. (*Courtesy Ambulance Serv. v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519.)

2. Preliminary Matters

On June 20, 2022, defendant Chase International Equities Corporation filed a joinder to the instant motion.

Chase cannot join in defendants' motion to strike. A motion to strike must be filed within the same time period in which to answer or demur to a complaint. (Code Civ. Proc., § 435(b)(1).) The time period in which to file a motion to strike may be extended by court order or by stipulation.

The court overruled Chase's demurrer to the SAC in May 2022. Chase did not file a motion to strike along with its demurrer. The deadline for filing a motion to strike was not extended either by court order or by stipulation. Chase answered the SAC on June 1, 2022. As such, Chase cannot join in defendants' motion.

3. Discussion

Defendants Woods and Sotheby's move to strike plaintiff's request for general damages, punitive damages, and attorney fees.

Plaintiff does not oppose defendants' request to strike the request for general damages. Thus, defendants' motion to strike the request for general damages is granted.

Defendants next assert that plaintiff's general references to "the listing agreement" and "purchase and sale agreement" are insufficient to request attorney fees pursuant to contract.

The court disagrees. At the pleading stage, it is not necessary for plaintiff to actually establish an entitlement to contractual attorney fees should it ultimately prevail. (*Taxpayers for Improving Public Safety v. Schwarzenegger* (2009) 172 Cal.App.4th 749, 758.) The motion to strike plaintiff's request for attorney fees is denied.

Lastly, defendants move to strike plaintiff's request for punitive damages. The basis for punitive damages is set forth in Civil Code § 3294:

> In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(*Id.*, subd. (a).) "In the usual case, the question of whether the defendant's conduct will support an award of punitive damages is for the trier of fact, 'since the degree of punishment depends on the peculiar circumstances of each case.' [Citations.]" (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1053.)

Plaintiff's allegation that it was induced into purchasing the subject property based on defendants' fraudulent or negligent misrepresentations about the local real estate market as well as the property's value and characteristics, including the falsehoods that the property backed up to a national forest and adjoined a conservancy lot, are sufficiently pled to support a request for punitive damages. The motion to strike plaintiff's request for punitive damages is denied.

TENTATIVE RULING # 3: DEFENDANTS' MOTION TO STRIKE PORTIONS OF THE SECOND AMENDED COMPLAINT IS GRANTED IN PART AND DENIED IN PART. DEFENDANTS JESSICA WOODS AND SIERRA SOTHEBY'S INTERNATIONAL REALTY MUST FILE AND SERVE THEIR ANSWER TO THE SECOND AMENDED COMPLAINT NO LATER THAN 10 DAYS FROM THE DATE OF SERVICE OF THE NOTICE OF ENTRY OF ORDER. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO

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