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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE ex rel. CITY OF DANA POINT, Plaintiff and Respondent, v. BEACH CITIES COLLECTIVE et al., Defendants and Appellants.	G044971 (Super. Ct. No. 30-2010-00352103) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William M. Monroe, Judge. Reversed.

Schwartz Law and Jeffrey M. Schwartz for Defendants and Appellants.

Rutan & Tucker, A. Patrick Muñoz, Douglas J. Dennington and Jennifer J. Farrell for Plaintiff and Respondent.

* * *

Beach Cities Collective and David Lambert (collectively, Beach Cities) appeal from the trial court's entry of judgment in favor of the City of Dana Point (the

City) after granting the City's motion for summary judgment on nuisance abatement causes of action. Beach Cities contends summary judgment was improper because disputed issues of material fact existed on its compliance, as a medical marijuana dispensary, with state medical marijuana law embodied in the Compassionate Use Act of 1996 (the CUA) (Health & Saf. Code, § 11362.5; all further statutory references are to this code unless noted), the Medical Marijuana Program Act (the MMPA) (§ 11362.7 et seq.) and Attorney General guidelines on the topic (the A.G. Guidelines). Beach Cities also contends the trial court erred in imposing civil penalties because it failed to conduct a hearing on relevant facts pertinent to the fines, and the penalty was excessive and therefore unconstitutional.

We recognize the trying circumstance for the parties below and on appeal that governing law concerning medical marijuana in this state has not been a model of clarity and remains, to some degree, in flux. (See, e.g., *City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc.* (2011) 200 Cal.App.4th 885, review granted Jan. 18, 2012, S198638; *Pack v. Superior Court* (2011) 199 Cal.App.4th 1070, review granted Jan. 18, 2012, S197169; but see *City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413 (*Evergreen*) [local government entities may not ban medical marijuana dispensaries altogether].) This appeal, however, turns on settled principles of summary judgment law. Accordingly, we need not reach Beach Cities' second contention concerning civil penalties because we conclude disputed issues of material fact prevented the trial court from properly granting summary judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

The City filed its nuisance complaint against Beach Cities in March 2010, alleging four causes of action, all predicated on the dispensary's allegedly illegal marijuana "cultivation, distribution, possession, and sales taking place at" Beach Cities' location. The City's first three causes of action consisted of: (1) abatement under the narcotics abatement legislation (§ 11570) based on Beach Cities' alleged failure to comply with state medical marijuana law; (2) public nuisance (Civ. Code, §§ 3479, 3480) similarly based on lack of compliance with state medical marijuana law; and (3) violation of the City's zoning code, which did not provide for medical marijuana dispensaries and barred as a public nuisance uses not specifically enumerated in the zoning code. The City based its fourth cause of action for unfair business practices (Bus. & Prof. Code, § 17200) on the state and local violations alleged in the first three causes of action.

On its first two causes of actions, the City alleged Beach Cities failed to comply with state medical marijuana law because "the Dispensary is (a) ***neither*** a collective ***nor*** a cooperative . . . ; (b) ***not*** operating as a non-profit entity . . . ; (c) ***not*** comprised solely of patients and primary caregiver members . . . ; [and] (d) ***not*** purchasing marijuana from, or selling to, those members . . . ." (Original italics and boldface.) The City also alleged Beach Cities' failings included ignoring "requirements relating to membership applications . . . , record keeping . . . , [and] business licenses, sales tax and sellers permits . . . ." Finally, the City also alleged Beach Cities failed to comply with Corporations Code requirements applicable to entities organized as a consumer cooperative.

Discovery commenced and the City focused its attention on establishing whether Beach Cities violated state law by selling marijuana for profit. (See § 11362.765, subd. (a) ["nothing in this section shall authorize . . . any individual or group to cultivate or distribute marijuana for profit"].) In the City's words, it sought to learn whether defendants "were operating within the parameters of the CUA, the MMPA, and the AG Guidelines, or if instead they are nothing more than an illegal, for profit, business enterprise engaged in illegally 'selling' marijuana." The City's discovery efforts did not go smoothly.

Beach Cities filed an ex parte application to stay deposition of its personnel based on its pending demurrer and based on a pending, collateral appeal concerning a Beach Cities' member's right to intervene in the City's nuisance action and another appeal, predating the City's suit, regarding the City's authority in determining City policy to issue legislative subpoenas to dispensaries. After the trial court denied the stay request, Beach Cities failed to produce Lambert for his deposition as the dispensary's most knowledgeable person on the topics in the City's deposition notice, forcing the City to bring a motion to compel his appearance. The trial court granted the City's motion and awarded the City monetary sanctions to compensate for Beach Cities' recalcitrance. On Beach Cities' motion, the trial court issued a protective order specifying that any information the City might elicit from Lambert concerning Beach Cities' members or employees, presumably including matters pertaining to patient or medical privacy, "is to be used for the purposes of this litigation only."

At his deposition, Lambert refused to answer most, but not all, questions concerning Beach Cities' activities involving marijuana, invoking the Fifth Amendment.[1]

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[1] Counsel explained Lambert's and Beach Cities' position at the deposition this way: "Any questions that have to do with any specifics — timelines, money,

For example, according to the City, Lambert declined to answer questions concerning whether (1) Beach Cities sells marijuana products; (2) when it began selling marijuana; (3) the types or strains of marijuana products sold; (4) whether Beach Cities receives monetary compensation in exchange for marijuana; (5) whether Beach Cities acquires all of its marijuana from its members; (6) whether Beach Cities tracks the source of its marijuana; (7) whether Beach Cities takes any steps to ensure marijuana is not distributed to nonmembers; (8) the cash value of the marijuana sold by Beach Cities and the price it pays, if any, for marijuana; (9) the cost to grow marijuana it distributes; (10) how it determines a price for marijuana it sells; or (11) the efforts, if any, made to determine that members or suppliers do not profit by providing marijuana to Beach Cities. The City's inquiries appeared to assume profit is or could be determined at the point of each transaction. The City did not ask whether Beach Cities had a rebate policy or similar program to adjust sale prices or to refund members' contribution amounts, if any, that exceeded fiscal costs calculated on an annual or other basis.[2] Lambert's deposition notice did not include a notice or request to produce any documents.

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quantities — my client will assert the Fifth. That has to do with how federal law works, federal sentencing guidelines, all that stuff."

[2] Agricultural and consumer cooperatives, for example, may refund excess contributions and even pay "dividends" thereon, as a form of interest on capital, without jeopardizing their nonprofit status. (See Food & Agr. Code, §§ 54033 [agricultural cooperatives qualify as "nonprofit" entities], 54120 [eight percent "dividend[]" permissible on "excess of association income over association expenses"]; see generally A. James Roberts III, Understanding Agricultural Cooperatives (1984) 4 Cal. Lawyer, Vol. 4, No. 2, p. 13 ["These dividends are deemed to be in the nature of interest, and therefore do not adversely affect the non-profit character of cooperatives organized under the code"]; see also Corp. Code, §§ 12201 [consumer cooperatives are nonprofit entities, "not organized to make a profit" for themselves or their members], 12244 & 12451 [co-op distributions or refunds permissible; annual distributions on contributed capital limited to 15 percent]; David C. Gurnick, Consumer Cooperatives: What They Are and How They Work (Aug. 1985) 8 L.A. Lawyer, Vol. 8, No. 5, p. 34.)

After Lambert's deposition, the City filed a motion, on which it never obtained a ruling, to compel Lambert to answer as Beach Cities' most knowledgeable corporate officer the questions he had refused to answer about Beach Cities' medical marijuana business. The City relied on authority that, "unlike private individuals, corporations have no privilege against self-incrimination." (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 883 (*Avant! Corp.*).) Alternatively, the City asked for sanctions barring Beach Cities' personnel from further "testifying to any subjects upon which Defendants have asserted the Fifth Amendment privilege against self-incrimination," or "an order precluding Defendants from presenting *any* evidence that their operations comply" with state medical marijuana law. (Italics added.) Nothing in the record, however, indicates the trial court ruled on the City's motion.

Meanwhile, Lambert *had* answered many questions at his deposition that shed light on the nature of Beach Cities' operation. When asked, "What does Beach Cities Collective do," Lambert responded, "It's a medical — medical cannabis collective." He acknowledged that Beach Cities members visit its location "from time to time to obtain medical marijuana." He testified that of the two types of medical marijuana entities recognized in the A.G. Guidelines, cooperatives and collectives, Beach Cities chose to operate as a collective, not a cooperative. He testified Beach Cities incorporated as a nonprofit mutual benefit corporation with a board of directors, and acknowledged he was a Beach Cities director, officer, and employee. He testified Beach Cities had three employees, including himself.

Lambert testified none of Beach Cities' directors or corporate officers received any compensation or paid incentive for their role in those positions. He testified "the only compensation that is paid out by Beach Cities Collective to officers, directors

or employees is paid in the form of compensation to employees." Employees received a "fixed" or "flat" monthly salary. None received "any sort of benefits such as insurance, profit sharing, automobile allowance, or any other benefits."

Lambert testified Beach Cities only provided marijuana to its members. Beach Cities required its members to present a physician's referral for the use of medical marijuana, and Beach Cities verified the validity of each referral by direct telephone or online contact with the referring physician's office, before allowing the member to obtain marijuana. Beach Cities verified with the doctors' offices the period for which each referral was valid, which was usually one year. Beach Cities kept a computer database of information that included its members' names and the expiration date of each member's physician referral. Beach Cities required members to present a driver's license on each visit, which Beach Cities scanned with a barcode reader or similar device to access its database and verify the member's current eligibility to receive marijuana. Beach Cities kept track of all of its members by recording their information in its database, and it did not distribute marijuana to individuals not in the database.

The City scheduled the deposition of Beach Cities' custodian of records but, recognizing the custodian would assert the same Fifth Amendment claims as Lambert, the parties stipulated to forego the deposition pending resolution of their dispute about the validity of the Fifth Amendment claim. The City continued to assert Beach Cities was required to produce Lambert and its records custodian to fully respond at their depositions and produce requested documents. Thus, the parties in essence stipulated to postpone the custodian's deposition until the trial court ruled on the City's motion to compel his appearance or granted the City's sanction request.

The day after the parties' stipulation, the City moved for summary judgment or, in the alternative, summary adjudication. The City asserted it was entitled to judgment as a matter of law on its first and second causes of action, nuisance abatement (§ 11570) and public nuisance (Civ. Code, §§ 3479, 3480), because there was no dispute Beach Cities distributed marijuana and Beach Cities "fail[ed] to produce any evidence . . . in support of the[] only possible affirmative defense," i.e., compliance with state medical marijuana law. The City also asserted Beach Cities' undisputed distribution of marijuana entitled the City to judgment on its third cause of action, public nuisance for violation of its zoning laws. Specifically, City zoning law impliedly banned dispensaries by not recognizing them as a permitted use.[3] Additionally, the City also relied on zoning law banning otherwise unlawful uses of property, including Beach Cities' Health and Safety Code narcotics violations based on its failure to demonstrate its marijuana distribution complied with state medical marijuana law.

Based on these first three causes of action, the City asserted it was entitled to judgment on its fourth cause of action for unfair business practices, and entitled to a permanent injunction enjoining Beach Cities and Lambert from distributing marijuana at the Beach Cities location or anywhere in the City. The City asserted in a footnote in its summary judgment motion that it was entitled on its fourth cause of action to civil penalties, citing Business and Professions Code section 17206. The City expressly limited its claim to a maximum of $750,000 in civil penalties, calculated on a $2,500 per-day penalty assessment for 300 days. The City asserted Beach Cities operated illegally

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[3] We recently held such total local bans on a medical marijuana dispensary function are preempted by state law. (*Evergreen*, *supra*, 203 Cal.App.4th 1413.) Consequently, Dana Point was not entitled to judgment as a matter of law based on its total ban.

for more than 300 days, but "stipulate[d] . . . for purposes of summary judgment" to the 300-day figure.

Beach Cities opposed the motion on grounds disputed issues of material fact existed on whether it was: (1) selling and distributing marijuana, (2) complying with state medical marijuana law, and (3) violating City zoning ordinances. On the first issue, Beach Cities relied on the declaration of one of its principals, Tim Louch, that: "The Collective is not distributing, serving, storing, or keeping marijuana at its [Dana Point] location."[4] Beach Cities now claims on appeal it did not intend to dispute that it "distributed, served, stored, and kept marijuana *in the past*" (original italics), but instead that it read the City's summary judgment motion narrowly to seek relief only on grounds Beach City *currently* "distributes, serves, stores, and keeps marijuana," which was no longer the case because the City had achieved at least a temporary closure of the dispensary in other proceedings based on nonmarijuana-related code violations.

The trial court did not read the City's summary judgment motion so narrowly, pertaining only to present, ongoing marijuana distribution, but instead as an effort to shut down the dispensary permanently, including based on past, unlawful marijuana distribution. The City's motion, for example, included the alleged undisputed fact that Beach Cities operated as a medical marijuana dispensary since the inception of its lease, which identified medical marijuana distribution as Beach Cities' business purpose. Whether Beach Cities distributed marijuana at all became the principal issue debated at the summary judgment hearing.

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[4] Louch and Beach City's landlord settled with the City based on an agreement they would cease participating in dispensary operations in Dana Point, and each obtained a dismissal before the trial court's entry of summary judgment.

The trial court in its tentative ruling denied the City's summary judgment motion on grounds disputed issues of fact existed as to whether Beach Cities currently and formerly had distributed marijuana. The City filed a request for judicial notice to preclude by estoppel Beach Cities' denial it distributed marijuana, given representations by Beach Cities and its counsel in the present and related litigation. The trial court took the matter under submission and eventually granted the City's judicial notice request. Beach Cities does not base its appellate challenge to the trial court's eventual summary judgment ruling on the existence of a disputed fact about whether it sold or distributed medical marijuana, as the City claims. Instead, Beach Cities identifies as the "core issue" of its appeal whether disputed facts prevented the conclusion as a matter of law that its activities were illegal.

Thus, Beach Cities asserted below in its summary judgment opposition that disputed issues of fact remained regarding its compliance with state medical marijuana law, relying on the answers Lambert provided in his deposition testimony, including his testimony Beach Cities was organized and operated as a nonprofit, with procedures to ensure distribution of its product only to qualified medical marijuana patients. Lambert also specified Beach Cities was organized and operated as a collective entity. And Beach Cities further asserted, based on Louch's declaration that because its members obtained their "medicine" at the dispensary, it qualified as a "drug store" under the City's zoning code, a possibility the City apparently had not contemplated in its moving papers. The City never produced any declarations or other evidence Beach Cities failed to obtain a business license, permits or other approvals that may or may not have been necessary for a drug store property use.

Soon after the trial court granted the City's judicial notice request, the court also granted the City's summary judgment motion. As part of its summary judgment ruling, the trial court permanently enjoined and prohibited Beach Cities and Lambert from "selling, serving, storing, keeping, or giving away marijuana within the City of Dana Point and specifically at" Beach Cities' leasehold address. The trial court also ordered Lambert and Beach Cities each to pay the City a civil penalty of $25,000 "pursuant to Health and Safety Code section[] 11581(a), (b), and (c)." The trial court's order also included a multi-million dollar penalty award: "Defendant David Lambert is ordered to pay $1,197,500 to the City of Dana Point (determined by multiply[ing] $2500 by the number of days open, 479 days); and Defendant Beach Cities Collective is ordered to pay $1,197,500 to the City of Dana Point (determined by multiply[ing] $2500 by the number of days open, 479 days), pursuant to Business and Professions Code § 17206."[5]

II

DISCUSSION

A. *Standard of Review and Burdens of Production and Proof*

"'A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.]'" (*Oldcastle Precast, Inc. v. Lumbermens Mut. Cas. Co.* (2009) 170 Cal.App.4th 554, 562.)

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[5] On appeal, the City does not address the discrepancy that it only sought in its summary judgment motion "a total civil penalty of $750,000."

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) "Any party may move for summary judgment in any action or proceeding if it is contended that . . . there is no defense to the action or proceeding." (Code Civ. Proc., § 437c, subd. (a).) Similarly, a plaintiff is entitled to summary adjudication if it establishes there is no defense to that claim. (Code Civ. Proc., § 437c, subd. (f)(1).) "A plaintiff . . . has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action." (Code Civ. Proc., § 437c, subd. (p)(1).)

The party moving for summary judgment bears an initial burden to demonstrate the absence of any triable issue of material fact on the elements of the claims it asserts or opposes. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) Once a plaintiff moving for summary judgment meets that burden, "the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action *or a defense thereto*. The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1), italics added.)

Here, the primary element of all four of the City's causes of action was that Beach Cities' conduct was unlawful. Cultivation, possession, and sale or distribution of marijuana is generally unlawful; indeed, these activities and the use of property for these

activities constitute criminal offenses (§§ 11357-11560, 11366, 11366.5), absent an exception.

If the party moving for summary judgment carries its initial burden, the opposing party then bears a burden of production "to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) Thus, the party opposing summary judgment need not present facts *requiring* judgment for that party at trial or as a matter of law. Rather, it is enough that the evidence establishes a prima facie case in favor of the party's position, though a trier of fact ultimately may find the evidence rebutted. (See *id.* at p. 851 ["'prima facie evidence . . . establishes a rebuttable presumption'"].)

While the burden of production thus may shift to the party opposing summary judgment, the burden of persuasion that no triable issue of fact exists remains on the moving party. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) And that burden of persuasion is tied to the party's burden of proof at trial. "Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would *require* a reasonable trier of fact to find any underlying material fact more likely than not — otherwise, he would not be entitled to judgment *as a matter of law*, but would have to present his evidence to a trier of fact." (*Id.* at p. 851, original italics.) Here, the underlying material facts governing whether Beach Cities' conduct was unlawful included whether it was a nonprofit collective and whether it only distributed marijuana to qualified patients.

To summarize: "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) Summary judgment may not be granted based on evidence or on inferences arising from that evidence that favor the moving party if other evidence or reasonable inferences "raise a triable issue as to any material fact." (*Ibid.*) In making this determination, "we strictly construe the evidence of the moving party and liberally construe that of the opponents, and any doubts as to the propriety of granting the motion should be resolved in favor of the parties opposing the motion." (*Riverside County Community Facilities Dist. v. Bainbridge 17* (1999) 77 Cal.App.4th 644, 653; see also *Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045, 1049 ["All doubts as to whether there are any triable issues of fact are to be resolved in favor of the party opposing summary judgment"].)

B. *We Assume a Burden to Prove Compliance with State Medical Marijuana Law as an Affirmative Defense Rested on Beach Cities*

The City, relying on Supreme Court authority decided in the criminal context, asserts that once it established as an indisputable fact that Beach Cities distributed marijuana,[6] the burden shifted to Beach Cities to prove an affirmative defense that it complied with state medical marijuana law. The City relies on *People v. Mower* (2002) 28 Cal.4th 457 (*Mower*). In *Mower*, the high court determined under "[t]he rule of convenience and necessity" that a criminal defendant must shoulder the burden to produce and prove facts supporting a defense under the CUA to charges of cultivating and possessing marijuana. (*Id.* at p. 477.) It remains, however, the prosecutor's ultimate burden to prove the defendant is guilty of unlawful conduct. (*Id.* at pp. 478-479; Pen.

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[6] The City's separate statement of facts in support of summary judgment cited Lambert's deposition for this fact. There is no basis to dispute this fact. Lambert acknowledged in his deposition that Beach Cities members visit its location "from time to time to obtain medical marijuana."

Code, § 1096; Evid. Code, § 501.) Consequently, the defendant is not required "'to persuade the trier of fact of his innocence'" (*Mower*, at p. 479), which would contradict the due process presumption of innocence in criminal matters (*Taylor v. Kentucky* (1978) 436 U.S. 478).[7] Rather, "as to the facts underlying the defense provided by [the CUA]," the criminal defendant "is required merely to raise a reasonable doubt." (*Mower*, at p. 481.)

We note given the City's assertion the Fifth Amendment generally does not apply in civil matters (see, e.g., *Avant! Corp.*, *supra*, 79 Cal.App.4th at p. 883) that there may be less reason in the civil rather than criminal context to allocate to a defendant the burden of proving facts showing compliance with state medical marijuana law. If the City is correct that the Fifth Amendment does not apply in the circumstances here, which we need not decide, then the plaintiff may obtain through the discovery process the relevant facts to demonstrate as an element of its case the unlawfulness of the defendant's conduct. In other words, the defendant may not remain silent on the topic. The force of discovery sanctions, if necessary, may be utilized to compel the defendant's disclosure of relevant facts.

On the other hand, the Supreme Court's rationale in *Mower* may support imposing a burden on the defendant of showing compliance with state medical marijuana law in both the civil and criminal contexts. The Supreme Court explained that under the rule of convenience and necessity, "unless it is 'unduly harsh or unfair,' the 'burden of proving an exonerating fact may be imposed on a defendant if its existence is

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[7] A presumption of innocence is applicable in civil as well as criminal matters. (*Brill v. Brill* (1940) 38 Cal.App.2d 533, 534; see Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].)

"peculiarly" within his personal knowledge and proof of its nonexistence by the prosecution would be relatively difficult or inconvenient.'" (*Mower*, *supra*, 28 Cal.4th at p. 477.) "The rule often has been invoked when the 'exonerating fact' arises from an exception to a criminal statute." (*Ibid.*)

The Supreme Court concluded it would not be unduly harsh or unfair to allocate to the defendant the burden of proving the facts underlying a compassionate use defense to criminal charges. The court reasoned that the facts relevant to the defense, including that the person qualified as a "'patient'" or "'primary caregiver'" and cultivated or possessed marijuana "'for the personal medical purposes of [a] patient'" upon a physician's recommendation, all lay "peculiarly with a defendant's personal knowledge, and proof of their nonexistence by the prosecution would be relatively difficult or inconvenient." (*Mower*, *supra*, 28 Cal.4th at p. 477.) The Supreme Court also found the CUA constituted an exception to statutes criminalizing the cultivation and possession of marijuana, supporting application of the rule of convenience and necessity. (*Ibid.*) We will assume this rule applies here and Beach Cities therefore had the burden to produce evidence supporting an affirmative defense based on compliance with state medical marijuana law. More precisely, at this stage of the proceedings Beach Cities' burden was to establish at least the existence of a triable issue of fact concerning its defense.

C. *Triable Issues of Fact on Whether Beach Cities Complied with State Medical Marijuana Law Prevented Summary Judgment*

Once the City established as an undisputed fact that Beach Cities distributed marijuana, the burden shifted to Beach Cities to make a prima facie showing of a triable issue of fact on its affirmative defense. Specifically, Beach Cities was required to set forth evidence that its marijuana-related activities were not unlawful (the primary element of the City's causes of action), but instead complied with state medical

marijuana law. As the party opposing summary judgment, however, it was not Beach Cities' duty to *negate* the possibility that its activities were unlawful. Rather, it needed only to set forth prima facie evidence creating a triable issue of fact on this question. (See *Aguilar*, *supra*, 25 Cal.4th at pp. 850-851.)

Here, the City asserted as an undisputed fact in its summary judgment motion that over the course of discovery Beach Cities and Lambert had "failed to present *any* evidence demonstrating their compliance with the CUA, the MMPA, and the A.G. Guidelines." (Italics added.) This was not accurate, however. Beach Cities' separate statement of facts opposing summary judgment relied on Lambert's deposition testimony that Beach Cities filed articles of incorporation as a nonprofit organization and operated as a nonprofit. Lambert testified that none of its employees, officers, or directors enjoyed profit-sharing privileges, and nothing about his testimony suggested Beach Cities had shareholders that received profit distributions. Instead of shareholders, Beach Cities had members, and Lambert testified that Beach Cities was organized as a mutual benefit corporation for the nonprofit purpose of providing medical marijuana to these members. Lambert testified Beach Cities was organized and operated as a medical marijuana collective. Lambert testified about the manner in which Beach Cities provided marijuana to its members, requiring current physician recommendations for marijuana that Beach Cities verified with each physician's office. Lambert testified it verified on each visit a member's identity and that his or her physician's recommendation establishing eligibility to receive marijuana had not expired. Lambert testified Beach Cities only provided medical marijuana to its members, not nonmembers.

The City objected below and reasserts on appeal that Lambert's testimony amounted to conclusory opinions that Beach Cities' activities were "'lawful.'" Not so.

His testimony pertained to facts. Nor is it true, as the City claims as the "key issue" concerning compliance with state medical marijuana law, that Lambert "failed to address . . . whether Appellants were profiting from the distribution of marijuana in violation of the MMPA and AG Guidelines." To the contrary, Lambert testified to discrete *facts*, including that Beach Cities was organized and operated as a nonprofit collective and distributed marijuana only to its members, who Beach Cities verified had current, valid physician recommendations.

A reasonable trier of fact might conclude from these asserted *facts*, if believed, that Beach Cities' conducted its marijuana-related activities in compliance with state medical marijuana law. Or the trier of fact might disbelieve Lambert's version of the facts, and on that basis conclude Beach Cities' marijuana distribution was unlawful. But the credibility of a sole witness to facts is a reason to *deny* summary judgment, not grant it. (Code Civ. Proc., § 437c, subd. (e) ["where the only proof of a material fact offered *in support of summary judgment* is an affidavit or declaration made by an individual who was the sole witness to that fact," italics added].) It is the factfinder's province to resolve credibility questions at trial, not a court by granting summary judgment.

The City also notes in passing that "[t]he refusal to reveal material evidence is deemed to be an admission that the claim or defense is without merit." (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793 ["'There is no question that a court is empowered to apply the ultimate sanction against a litigant who persists in outright refusal to comply with his discovery obligations'"].) We agree this power rests in the trial court's discretion, but the City cites to nowhere in the voluminous record, and we have found nothing, that suggests the trial court exercised this power here. The court did

not grant the City's requests to compel Lambert or other Beach Cities' personnel to testify further, nor did the trial court grant the City's request for sanctions, including the ultimate sanction of striking Beach Cities' defense.

Instead, the trial court granted the City's request for summary judgment. But because each of the City's causes of action rested on establishing that Beach Cities' conduct was unlawful, and disputed issues of underlying fact remained on this question, summary judgment was improper.

III

DISPOSITION

The judgment is reversed. Appellants are entitled to their costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.