

Case No. D073979

**IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION ONE**

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DARRYL COTTON  
Defendant and Petitioner,

v.

The Superior Court, County of San Diego, Respondent.  
LARRY GERACI, an individual, REBECCA BERRY, an individual,  
CITY OF SAN DIEGO, a public entity,  
Real Parties in Interest.

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**EXHIBITS IN SUPPORT OF  
PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION  
OR OTHER APPROPRIATE RELIEF  
AND REQUEST FOR IMMEDIATE STAY**

**VOLUME II – EXHIBITS 8-14**

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Darryl Cotton  
6176 Federal Blvd.  
San Diego, CA 92114  
Telephone: (619) 954-4447  
Petitioner, Self-Represented

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REBECCA BERRY

**SUPERIOR COURT OF CALIFORNIA**  
**COUNTY OF SAN DIEGO, CENTRAL DIVISION**

LARRY GERACI, an individual,

Plaintiff,

v.

DARRYL COTTON, an individual; and  
DOES 1 through 10, inclusive,

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

v.

LARRY GERACI, an individual, REBECCA  
BERRY, an individual, and DOES 1  
THROUGH 10, INCLUSIVE,

Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil  
Dept.: C-73

**CROSS-DEFENDANT REBECCA BERRY'S  
ANSWER TO CROSS-COMPLAINANT  
DARRYL COTTON'S UNVERIFIED  
SECOND AMENDED CROSS-COMPLAINT**

**[IMAGED FILE]**

Complaint Filed: March 21, 2017  
Trial Date: May 11, 2018

Cross-Defendant REBECCA BERRY answers Cross-Complainant DARRYL COTTON's  
unverified Second Amended Cross-Complaint, dated August 25, 2017, as follows:

**GENERAL DENIAL**

Under the provisions of section 431.30 of the California Code of Civil Procedure, this  
answering Cross-Defendant denies, generally and specifically, each and every and all allegations in

1 the Second Amended Cross-Complaint, and the whole thereof, including each and every purported  
2 cause of action contained therein, and denies that Cross-Complainant has sustained damages as  
3 alleged by reason of any alleged act, breach, or omission on the party of this answering Cross-  
4 Defendant.

5 **AFFIRMATIVE DEFENSES**

6 For a further and separate answer to the Second Amended Cross-Complaint, and by way of  
7 affirmative defenses, this answering Cross-Defendant alleges as follows:

8 **FIRST AFFIRMATIVE DEFENSE**

9 **(Failure to State a Cause of Action)**

10 Cross-Complainant's sole purported cause of action against this answering Cross-Defendant –  
11 the fifth cause of action for declaratory relief— fails to state facts sufficient to constitute a cause of  
12 action against this answering Cross-Defendant.

13 **SECOND AFFIRMATIVE DEFENSE**

14 **(Lack of Contractual Privity)**

15 Cross-Complainant lacks contractual privity with this answering Cross-Defendant and,  
16 therefore, is not entitled to an order of declaratory relief as it relates to any contract alleged in the  
17 Second Amended Cross-Complaint.

18 **THIRD AFFIRMATIVE DEFENSE**

19 **(Reservation of Right to Assert Further Defense)**

20 This answering Cross-Defendant currently has insufficient information upon which to form a  
21 belief as to the existence of additional and as yet unstated affirmative defenses. This answering  
22 Cross-Defendant reserves the right to assert additional affirmative defenses in the event discovery  
23 discloses the existence of said affirmative defenses.

24 **WHEREFORE**, Cross- Defendant REBECCA BERRY prays as follows:

25 1. That the Second Amended Cross-Complaint be dismissed and Cross-Complainant take  
26 nothing against this answering Cross-Defendant; and

27 ///

28 ///

1           2.     Such other and further relief as the Court may deem just and proper.  
2

3     Dated: September 25, 2017

FERRIS & BRITTON,  
A Professional Corporation

4           By: Michael R. Weinstein  
5               Michael R. Weinstein  
6               Scott H. Toothacre

7           Attorneys for Plaintiff and Cross-Defendant  
8           LARRY GERACI and Cross-Defendant  
9           REBECCA BERRY  
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7 Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and  
Cross-Defendant REBECCA BERRY

8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

10 LARRY GERACI, an individual,

11 Plaintiff,

12 v.

13 DARRYL COTTON, an individual; and  
DOES 1 through 10, inclusive,

14 Defendants.

15  
16 DARRYL COTTON, an individual,

17 Cross-Complainant,

18 v.

19 LARRY GERACI, an individual, REBECCA  
BERRY, an individual, and DOES 1  
20 THROUGH 10, INCLUSIVE,

21 Cross-Defendants.  
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Case No. 37-2017-00010073-CU-BC-CTL

**PROOF OF SERVICE BY MAIL**

**[IMAGED FILE]**

1 I, Anna K. Lizano, declare that: I am over the age of 18 years and not a party to the case; I am  
2 employed in, or am a resident of, the County of San Diego, California; and my business address is:  
3 501 West Broadway, Suite 1450, San Diego, California 92101.

4 On, September 25, 2017, I served the following document:

5 **1. CROSS-DEFENDANT REBECCA BERRY'S ANSWER TO CROSS-**  
6 **COMPLAINANT DARRYL COTTON'S UNVERIFIED SECOND AMENDED**  
7 **CROSS-COMPLAINT.**

8 **[X] MAIL.** I placed a true copy of each document in a separate envelope addressed to each addressee,  
9 respectively, and then sealed each envelope and, with postage thereon fully prepaid, I placed each for  
10 deposit in the United States Postal Service, this same day, at my business address shown above,  
11 following ordinary business practices:

12 David S. Demian, Esq.  
13 Adam C. Witt, Esq.  
14 FINCH, THORNTON & BAIRD, LLP  
15 4747 Executive Drive, Suite 700  
16 San Diego, California 92121

17 *Attorneys for Defendant and Cross-Complainant*  
18 *Darryl Cotton*

19 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
20 true and correct.

21 Dated: September 25, 2017

FERRIS & BRITTON,  
A Professional Corporation

22   
23 Anna K. Lizano

FERRIS & BRITTON  
A Professional Corporation  
Michael R. Weinstein (SBN 106464)  
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LARRY GERACI

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN DIEGO, CENTRAL DIVISION**

LARRY GERACI, an individual,

Plaintiff,

v.

DARRYL COTTON, an individual; and  
DOES 1 through 10, inclusive,

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

v.

LARRY GERACI, an individual, REBECCA  
BERRY, an individual, and DOES 1  
THROUGH 10, INCLUSIVE,

Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil

**NOTICE OF DEMURRER AND  
DEMURRER BY CROSS-DEFENDANT  
LARRY GERACI TO SECOND  
AMENDED CROSS-COMPLAINT BY  
DARRYL COTTON**

**[IMAGED FILE]**

**DATE: November 3, 2017  
TIME: 9:00 a.m.  
DEPT: C-73**

**Complaint Filed: March 21, 2017  
Trial Date: May 11, 2018**

**TO EACH PARTY AND THEIR ATTORNEYS OF THE RECORD:**

**PLEASE TAKE NOTICE** that, on November 3, 2017, at 9:00 a.m. or as soon thereafter as the matter may be heard in Department C-73 of this Court, located at 330 West Broadway, San Diego, California, 92101, Plaintiff and Cross-Defendant, LARRY GERACI (hereafter "Geraci"), will and hereby does move the Court to sustain his demurrer to the Second Amended Cross-Complaint filed on August 25, 2017, by Defendant and Cross-Complainant, DARRYL COTTON (hereafter "Cotton" or



1 "Cross-Complainant"), on each of the grounds set forth below.

2 **DEMURRER**

3 The Cross-Complaint's alleged first, second, third, and fourth causes of action, and each of  
4 them, fail to state facts sufficient to constitute a cause of action against Geraci (Code Civ. Proc.,  
5 § 430.10(e)) on the grounds and for the reasons set forth below and explained in detail in the  
6 accompanying Memorandum of Points and Authorities.

7 **FIRST CAUSE OF ACTION**

8 1. The first cause of action for breach of contract fails to state a cause of action against  
9 Geraci because Cross-Complainant alleges an oral agreement (or partly oral, partly written agreement)  
10 for the purchase and sale of the subject real propertied that is barred by the applicable statute of frauds.

11 2. The first cause of action for breach of contract fails to state a cause of action because it  
12 fails to allege facts resulting in an actionable breach. (Cal. Code Civ. Proc. § 430.10(e).)

13 **SECOND CAUSE OF ACTION**

14 3. The second cause of action for intentional misrepresentation does not state a cause of  
15 action because it fails to allege facts which, if true, are sufficient to establish the element of justifiable  
16 reliance. (Cal. Code Civ. Proc. § 430.10(e).)

17 **THIRD CAUSE OF ACTION**

18 4. The third cause of action for negligent misrepresentation does not state a cause of action  
19 because it fails to allege facts which, if true, are sufficient to establish the element of justifiable  
20 reliance. (Cal. Code Civ. Proc. § 430.10(e).)

21 5. The third cause of action for negligent misrepresentation fails to state a cause of action  
22 because under [California law, a party cannot plead both a cause of action for negligent  
23 misrepresentation and promissory fraud. (Cal. Code Civ. Proc. § 430.10(e).)

24 **FOURTH CAUSE OF ACTION**

25 6. The fourth cause of action for false promise does not state a cause of action because it  
26 fails to allege facts which, if true, are sufficient to establish the element of justifiable reliance. (Cal.  
27 Code Civ. Proc. § 430.10(e).)

28 For each of such reasons, Geraci moves for an order of this Court sustaining the demurrers to

1 the first, second, third, and fourth causes of action without leave to amend unless Cross-Complainant  
2 can make a sufficient offer of proof that he can cure the pleading deficiencies.

3 The demurrers are based upon this Notice of Demurrer and Demurrer, the supporting  
4 Memorandum of Points and Authorities, the supporting Declaration of Michael R. Weinstein, the  
5 records and files in this action, and such further matters that may be properly presented prior to or at the  
6 time of hearing on the motion.

7 **NOTICE IS FURTHER GIVEN** that a tentative ruling is issued the day before the date set  
8 forth for hearing, this court follows rule 3.1308(a)(2) and no notice of intent to appear is required to  
9 appear for argument. The tentative ruling shall be made available at 3:30 p.m. on the court day prior to  
10 the scheduled hearing. The tentative ruling may direct the parties to appear for oral argument, and may  
11 specify the issues on which the court wishes the parties to provide further argument. The tentative  
12 ruling may be obtained by calling the court tentative ruling number at (619) 450-7381 or by navigating  
13 to the court's website [www.sandiego.courts.ca.gov](http://www.sandiego.courts.ca.gov).

14  
15 Dated: September 28, 2017

FERRIS & BRITTON,  
A Professional Corporation

16  
17  
18 By 

Michael R. Weinstein  
Scott H. Toothacre

Attorneys for Plaintiff and Cross-Defendant  
LARRY GERACI

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LARRY GERACI

8 **SUPERIOR COURT OF CALIFORNIA**  
9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

10 LARRY GERACI, an individual,

11 Plaintiff,

12 v.

13 DARRYL COTTON, an individual; and  
14 DOES 1 through 10, inclusive,

15 Defendants.

16 DARRYL COTTON, an individual,

17 Cross-Complainant,

18 v.

19 LARRY GERACI, an individual, REBECCA  
20 BERRY, an individual, and DOES 1  
THROUGH 10, INCLUSIVE,

21 Cross-Defendants.  
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Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel Wohlfeil

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF CROSS-  
DEFENDANT LARRY GERACI'S  
DEMURRER TO SECOND AMENDED  
CROSS-COMPLAINT BY DARRYL  
COTTON**

**[IMAGED FILE]**

**DATE:** November 3, 2017  
**TIME:** 9:00 a.m.  
**DEPT:** C-73

Complaint Filed: March 21, 2017  
Trial Date: May 11, 2018

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1 Plaintiff and Cross-Defendant LARRY GERACI (hereafter "Geraci") respectfully submits these  
2 points and authorities in support of his Demurrer to Cross-Complainant DARRYL COTTON's  
3 (hereafter "Cotton" or "Cross-Complainant") Second Amended Cross-Complaint filed on August 25,  
4 2017 (hereafter "SAXC").

5 **I. RELIEF REQUESTED AND SUMMARY OF THE ARGUMENTS**

6 The SAXC alleges five causes of action by Cotton against Geraci: the first cause of action for  
7 breach of contract; the second cause of action for intentional misrepresentation; the third cause of  
8 action for negligent misrepresentation; the fourth cause of action for false promise; and the fifth cause  
9 of action for declaratory relief. Each of the five causes of action against Geraci arises out of, or relates  
10 to, a dispute concerning a contract for the purchase and sale of real property between Geraci and  
11 Cotton. Geraci demurs to the first, second, third, and fourth causes of action asserted against him upon  
12 the following grounds:

13 1. The first cause of action for breach of contract fails to state a cause of action because  
14 Cotton alleges an oral agreement (or partly oral, partly written agreement) for the purchase and sale of  
15 the subject real property that is barred by the applicable Statute of Frauds. (Civ. Code, § 1624(a)(3).)

16 2. The first cause of action for breach of contract fails to state a cause of action because it  
17 fails to allege a necessary element of that cause of action – actionable breach.

18 3. Each of the misrepresentation claims, the second, third, and fourth causes of action for  
19 the torts of intentional misrepresentation, negligent misrepresentation, and false promise, respectively –  
20 do not state a cause of action as Cotton has not alleged facts which, if true, are sufficient to establish the  
21 element of justifiable reliance.

22 4. Under California law there cannot be a promissory fraud cause of action and a negligent  
23 misrepresentation cause of action based upon the same set of identical facts.

24 **II. FACTUAL ALLEGATIONS**

25 The relevant factual allegations supporting Cotton's first cause of action for breach of contract  
26 are found in the paragraphs of the SAXC, as follows:

27 8. In or around August 2016, Geraci first contacted Cotton seeking to  
28 purchase the Property. Geraci desired to buy the Property from Cotton because it meets  
certain requirements of the City of San Diego ("City") for obtaining a Conditional Use



1 Permit ("CUP") to operate a Medical Marijuana Consumer Cooperative ("MMCC") at  
2 the Property. The Property is one of a very limited number of properties located in San  
3 Diego City Council District 4 that potentially satisfy the CUP requirements for a MMCC.

4 9. Over the ensuing weeks and months, Geraci and Cotton negotiated  
5 extensively regarding the terms of a potential sale of the Property . . . .

6 13. On November 2, 2016, Geraci and Cotton met at Geraci's office in an  
7 effort to negotiate the final terms of their deal for the sale of the Property. The parties  
8 reached an agreement on the material terms for the sale of the Property. The parties  
9 further agreed to cooperate in good faith the promptly reduce the complete agreement,  
10 including all of the agreed-upon terms, to writing.

11 14. The material terms of the agreement reached by the parties at the  
12 November 2, 2016 meeting included, without limitation, the following key deal points:

13 (a) Geraci agreed to pay the total sum of \$800,000 in consideration for  
14 the purchase of the Property, with a \$50,000 non-refundable deposit payable to Cotton  
15 immediately upon the parties' execution of final integrated written agreements and the  
16 remaining \$750,000 payable to Cotton upon the City's approval of a CUP application for  
17 the property;

18 (b) The parties agreed that the City's approval of a CUP application to  
19 operate a MMCC at the Property would be a condition precedent to closing the sale (in  
20 other words, the sale of the Property would be completed and title transferred to Geraci  
21 only upon the City's approval of the CUP application and Geraci's payment of the  
22 \$750,000 balance of the purchase price to Cotton; if the City denied the CUP application,  
23 the parties agreed the sale of the Property would be automatically terminated and Cotton  
24 would be entitled to retain the entire \$50,000 non-refundable deposit;

25 (c) Geraci agreed to grant Cotton a ten percent (10%) equity stake in  
26 the MMCC that would operate at the Property following the City's approval of the CUP  
27 application; and

28 (d) Geraci agreed that, after the MMCC commenced operations at the  
Property, Geraci would pay Cotton ten percent (10%) of the MMCC's monthly profits  
and Geraci would guarantee that such payments would amount to at least \$10,000 per  
month.

15. At Geraci's request, the sale was to be documented in two final written  
agreements, a real estate purchase agreement and a separate side agreement, which  
together would contain all the agreed-upon terms from the November 2, 2016 meeting.  
At that meeting, Geraci also offered to have his attorney "quickly" draft the final  
integrated agreements and Cotton agreed.

16. Although the parties came to a final agreement on the purchase price and  
deposit amounts at their November 2, 2016 meeting, Geraci requested additional time to  
come up with the \$50,000 non-refundable deposit. Geraci claimed he needed extra time  
because he had limited cash flow and would require the cash he did have to fund the  
lobbying efforts needed to resolve the zoning issue at the Property and to prepare the  
CUP application.

17. Cotton was hesitant to grant Geraci more time to pay the non-refundable  
deposit but Geraci offered to pay \$10,000 towards the \$50,000 total deposit immediately  
as a show of "good-faith," even though the parties had not reduced their final agreement

1 to writing. Cotton was understandably concerned that Geraci would file the CUP  
2 application before paying the balance of the non-refundable deposit and Cotton would  
3 never receive the remainder of the non-refundable deposit if the City denied the CUP  
4 application before Geraci paid the remaining \$40,000 (thereby avoiding the parties'  
5 agreement that the \$50,000 non-refundable deposit was intended to shift to Geraci some  
6 of the risk of the CUP application being denied). Despite his reservations, Cotton agreed  
7 to Geraci's request and accepted the lesser \$10,000 initial deposit amount based upon  
8 Geraci's express promise to pay the \$40,000 balance of the non-refundable deposit prior  
9 to submission of the CUP application, at the latest.

10  
11 18. At the November 2, 2016 meeting, the parties executed a three-sentence  
12 document related to their agreement on the purchase price for the Property at Geraci's  
13 request, which read as follows:

14 Darryl Cotton has agreed to sell the property located at 6176 Federal Blvd,  
15 CA for a sum of \$800,00.00 to Larry Geraci or assignee on the approval of  
16 a Marijuana Dispensary. (CUP for a dispensary)

17 Ten Thousand dollars (cash) has been given in good faith earnest money  
18 to be applied to the sales price of \$800,000.00 and to remain in effect until  
19 license is approved. Darryl Cotton has agreed not to enter into any other  
20 contacts[sic] on this property.

21 Geraci assured Cotton that the document was intended to merely create a record of  
22 Cotton's receipt of the \$10,000 "good-faith" deposit and provide evidence of the parties'  
23 agreement on the purchase price and good-faith agreement to enter into final integrated  
24 agreement documents related to the sale of the Property. Geraci emailed Cotton a  
25 scanned copy of the executed document he same day. Following closer review of the  
26 executed document, Cotton wrote in an email to Geraci several hours later (still on the  
27 same day):

28 I just noticed the 10% equity position in the dispensary was not language  
added into that document. I just want to make sure that we're not missing  
that language in any final agreement as it is a factored element in my  
decision to sell the property. I'll be fine if you would simply acknowledge  
that here in a reply.

Approximately two hours later, Geraci replied via email, "No no problem at all."

Paragraphs 19-28 set forth a litany of factual allegations that can be summarized as follows:

The written agreement signed November 2, 2016, did not contain all of the material terms and  
conditions of the agreement that Cotton alleges were really agreed to on November 2, 2016. After  
signing that incomplete written agreement<sup>1</sup>, the parties had numerous oral and written communications

<sup>1</sup> Plaintiff and Cross-Defendant Geraci alleges in his Complaint that the written agreement signed November 2, 2016, contains all the material terms and conditions of the agreement for the purchase and sale of the subject real property and is the entire agreement enforceable between the parties. Defendant and Cross-Complainant Cotton contends that written agreement signed November 2, 2016, sets forth only some of the material terms and conditions agreed to by the parties on November 2<sup>nd</sup> and some different and additional material terms and conditions not reflected in a signed writing were agreed to by the parties.

1 about documenting in a signed writing all the material terms and conditions Cotton alleges had been  
2 agreed to orally on November 2<sup>nd</sup>, but never did so. In other words, there is no written agreement  
3 signed by Cotton and Geraci containing all of the material terms and conditions Cotton alleges were  
4 agreed to on November 2<sup>nd</sup>. In addition, one of those material terms and conditions Cotton claims was  
5 orally agreed to (\$50k earnest money) directly contradicts the November 2, 2016, written agreement  
6 which clearly states that \$10k would be paid as earnest money and acknowledges that such payment  
7 has been received.

### 8 **III. LEGAL STANDARD ON DEMURRER**

9 When a complaint, or any cause of action in a complaint, fails to state facts sufficient to  
10 constitute a cause of action, the court may grant a demurrer. (Code Civ. Proc., § 430.30.) The court  
11 considers the allegations on the face of the complaint and any matter of which it must or may take  
12 judicial notice under the Code of Civil Procedure section 430.30(a). (*Groves v. Peterson* (2002)  
13 100 Cal.App.4th 659; Code Civ. Proc., § 430.30(a).) In reviewing the sufficiency of a complaint  
14 against a demurrer, the court treats the demurrer as admitting all material facts properly pleaded.  
15 (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (citing to *Serrano v. Priest* (1971) 5 Cal.3d 584, 591);  
16 *Adelman v. Associated Ins. Co.* (2001) 90 Cal.App.4th 352, 359.) However, contentions, deductions, or  
17 conclusions of fact or law are insufficient to constitute a cause of action. (*Id.*)

18 The court may grant a demurrer with or without leave to amend when it is obvious from the  
19 facts alleged that the plaintiff could not state a cause of action. (See *Hillman v. Hillman Land Co.*  
20 (1947) 81 Cal.App.2d 174, 181; see generally *Carney v. Simmonds* (1957) 49 Cal.2d 84, 97; see  
21 *Smiley v. Citibank* (1995) 11 Cal.4th 138, 164; Code Civ. Proc., § 430.30(j).) The party seeking leave  
22 to amend their pleading bears the burden of establishing that there is a reasonable possibility that the  
23 defect can be cured by amendment. (See *Blank v. Kirwan, supra*, 39 Cal.3d at p. 318; *Gould v.*  
24 *Maryland Sound Industries* (1995) 31 Cal.App.4th 1137, 1153.)

25 ///

26 ///

27 ///

28 ///

1 **IV. LEGAL ARGUMENT**

2 **A. THE FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT FAILS TO**  
3 **STATE A CAUSE OF ACTION**

4 **1. Cotton's Allegations of an Oral, or of a Partly Oral or Partly Written**  
5 **Agreement, Violate the Applicable Statute of Frauds – Civ. Code §**  
6 **1624(a)(3)**

7 A contract coming within the statute of frauds is invalid unless it is memorialized by a writing  
8 subscribed by the party to be charged or by the party's agent. (Civ. Code, § 1624; *Secrest v. Security*  
9 *National Mortgage Loan Trust*, (2008) 167 Cal.App.4th 544) An agreement for the sale of real  
10 property or an interest in real property comes within the statute of frauds. (Civ. Code, § 1624(a)(3).)  
11 Here, both parties allege, and therefore it is undisputed, that they signed a November 2, 2016, written  
12 agreement. This written agreement between the parties is the controlling evidence under the statute of  
13 frauds. Cotton alleges, based on extrinsic evidence, that the actual agreement between the parties  
14 contains material terms and conditions in addition to those in the written agreement as well as a term (a  
15 \$50,000 deposit rather than the \$10,000 deposit stated in the written agreement) that expressly conflicts  
16 with a term of the November 2, 2016 agreement. However, such a claim cannot stand as extrinsic  
17 evidence cannot be employed to prove an agreement at odds with the terms of the written  
18 memorandum. (*Beazell v. Schrader* (1963) 59 Cal.2d 577.)

19 The controlling law is set forth in *Sterling v. Taylor* (2007) 40 Cal.4th 757, as follows:

20 We emphasize that a memorandum of the parties' agreement is controlling evidence  
21 under the statute of frauds. Thus, extrinsic evidence cannot be employed to prove an  
22 agreement at odds with the terms of the memorandum. This point was made in *Beazell v.*  
23 *Schrader* (1963) 59 Cal.2d 577, 30 Cal.Rptr. 534, 381 P.2d 390. There, the plaintiff  
24 sought to recover a 5 percent real estate broker's commission under an oral agreement.  
25 (*Id.* at p. 579, 30 Cal.Rptr. 534, 381 P.2d 390.) The escrow instructions, which specified  
26 a 1.25 percent commission, were the "memorandum" on which the plaintiff relied to  
27 comply with the statute. However, he contended the instructions incorrectly reflected the  
28 parties' actual agreement, as shown by extrinsic evidence. (*Id.* at p. 580, 30 Cal.Rptr.  
29 534, 381 P.2d 390.) The *Beazell* court reject this argument, **holding that under the**  
30 **statute of frauds, "the parol agreement of which the writing is a memorandum must**  
31 **be one whose terms are consistent with the terms of the memorandum."** (*Id.* at  
32 p. 582, 30 Cal.Rptr. 534, 381 P.2d 390.) Thus, in determining whether extrinsic evidence  
33 provides the certainty required by the statute, courts must bear in mind that **the evidence**  
34 **cannot contradict the terms of the writing.** (Bold added.)

35 *Sterling v. Taylor, supra*, 40 Cal.4th at p. 771-772.

1 See also *Ukkestad v. RBS Asset Finance, Inc.* (2015) 235 Cal.App.4th 156 (“In the context of a  
2 case arising from a dispute over the certainty of the terms of sale of real property, our Supreme court  
3 recently endorsed a “flexible, pragmatic view,” under which uncertain written contractual terms comply  
4 with the statute of frauds as long as the can be made certain by reference to extrinsic evidence, **and as**  
5 **long as the evidence is not used to contradict the written terms.** (*Sterling, supra*, 40 Cal.4th at  
6 p. 771, fn. 13.)) See also, *Jacobs v. Locatelli* (2017) 8 Cal.App.5th 317, 325 (“As a result of *Sterling*,  
7 it is indisputably the law that “when ambiguous terms in a memorandum are disputed, extrinsic  
8 evidence is admissible to resolve the uncertainty.” (*Sterling, supra*, 40 Cal.4th at p. 767.) The  
9 agreement must still provide the essential terms, and it is “clear that extrinsic evidence cannot supply  
10 those required terms.” (*Ibid.*))

11 In the instant case, the only writing signed by both parties is the November 2, 2016 written  
12 agreement, which explicitly provides for a \$10,000 down payment (“earnest money to be applied to the  
13 sales price”); in fact, the agreement acknowledges receipt of that down payment. Cotton is alleging  
14 that the oral agreement provided for a down payment of \$50,000, which is in direct contradiction of the  
15 written term of a \$10,000 down payment.

16 **2. The First Cause of Action for Breach of Contract Fails as a Matter of Law**  
17 **as It Does Not Allege Actionable Breach**

18 “To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract,  
19 (2) plaintiff’s performance of the contract or excuse for nonperformance, (3) defendant’s breach, and  
20 (4) resulting damage to the plaintiff.” (*Richman v. Hartley*, (2014) 224 Cal.App.4th 1182, 1186.) “It is  
21 Hornbook law that an agreement to make an agreement is nugatory, and that this is true of material  
22 terms of any contract.” (*Roberts v. Adams* (1958) 164 Cal.App.2d 312, 314.) “[N]either law nor equity  
23 provides a remedy for a breach of an agreement to agree in the future.” (*Id.* at p. 316)

24 The pertinent allegations regarding Cotton’s breach of contract cause of action are found in the  
25 SAXC as follows:

26 36. Under the parties’ contract, Geraci was bound to negotiate the terms of an  
27 agreement for the Property in good faith. Geraci breached his obligation to negotiate in  
28 good faith by, among other things, intentionally delaying the process of negotiations,  
failing to deliver acceptable final purchase documents, failing to pay the agreed-upon  
non-refundable deposit, demanding new and unreasonable terms in order to further delay



1 and hinder the process of negotiations, and failing to timely or constructively response to  
2 Cotton's requests and communications.

3 It is basic contract law that a breach of contract occurs when a party to a contract deliberately  
4 refuses to do that which he or she has agreed and is required to under the contract. (*Spangenberg v.*  
5 *Spangenberg* (1912) 19 Cal.App. 439.) A contract may be breached by "nonperformance," meaning an  
6 unjustified failure to perform a material contractual obligation when performance is due, it may be  
7 breached by repudiation, or it may be breached by a combination of the two. (*Central Valley General*  
8 *Hosp. v. Smith* (2009) 162 Cal.App.4th 501.)

9 The written contract entered on November 2, 2012 reads as follows:

10 Darryl Cotton has agreed to sell the property located at 6176 Federal Blvd, CA for a sum  
11 of \$800,000.00 to Larry Geraci or assignee on the approval of a Marijuana Dispensary.  
12 (CUP for a dispensary)

13 Ten Thousand dollars (cash) has been given in good faith earnest money to be applied to  
14 the sales price of \$800,000.00 and to remain in effect until license is approved. Darryl  
Cotton has agreed not to enter into any other contacts (sic) on this property. (SAXC ¶18)

15 Cotton has not alleged that Geraci breached any obligations set forth in the November 2, 2016  
16 written agreement. Cotton has not alleged Geraci failed to pay the \$10k earnest money (in fact, the  
17 written agreement acknowledges it has been paid). And Cotton has not alleged the CUP Application  
18 has been approved and Geraci has failed to tender the remaining balance of the purchase price.

19 Instead, Cotton alleges that on November 2, 2016, the parties orally agreed to other and  
20 different material terms and conditions not set forth in the November 2, 2016, written agreement,  
21 including an obligation to negotiate in good faith to reduce these other and different material terms and  
22 conditions to a signed writing, and that Geraci breached the alleged agreement by failing to negotiate in  
23 good faith to do so. (SAXC, ¶ 36.)

24 This alleged failure to negotiate in good faith to reduce these other and different material terms  
25 and conditions to a signed writing cannot as a matter of law constitute an actionable breach. It is  
26 simply an admission by Cotton that these alleged other and different material terms and conditions  
27 were never reduced to a writing sign by both Cotton and Geraci, and, therefore, the alleged oral (or  
28

1 partly oral, partly written) agreement alleged by Cotton is barred by the Statute of Frauds. Cotton  
2 cannot bootstrap around the Statute of Frauds by alleging that Geraci's failure to negotiate in good faith  
3 to reduce these other and different material terms and conditions to a signed writing was itself an  
4 actionable breach of an otherwise unenforceable contract.

5 **B. THE SECOND, THIRD AND FOURTH CAUSES OF ACTION FAIL TO STATE**  
6 **A CAUSE OF ACTION**

- 7 1. Each of the misrepresentation claims, the 2nd, 3rd and 4th causes of action  
8 for intentional misrepresentation, negligent misrepresentation, and false  
9 promise, do not state a cause of action. Cotton has not alleged facts which, if  
10 true, are sufficient to establish the element of justifiable reliance.

11 In order to state a cause of action for intentional misrepresentation, negligent misrepresentation,  
12 or false promise, the plaintiff must allege reasonable reliance on defendant representations. (CACI Nos.  
13 1900, 1902, and 1903.) An essential element for a claim of promissory fraud is a specific allegation of  
14 reliance that is reasonable. (*Behnke v. State Farm* (2011) 196 Cal.App.4th 1443, 1452 (noting  
15 "justifiable reliance" and "reasonable reliance" by the promisee are an essential element).) Stated  
16 differently, to recover for fraud, Plaintiff must show it reasonably relied on the defendant's  
17 misrepresentations. A Plaintiff cannot recover if reliance was not justified or reasonable. (*Wagner v.*  
18 *Benson* (1980) 101 Cal.App.3d 27, 36 ("plaintiffs' reasonable reliance on the alleged misrepresentation  
19 is an essential element of fraud").) "The law is well established that actionable misrepresentations must  
20 pertain to past or existing material facts. Statements or predictions regarding future events are deemed  
21 to be mere opinions which are not actionable." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th  
22 1462, 1469.)

23 "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and  
24 justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental  
25 course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged  
26 damage." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062.)

27 "Actual reliance occurs when a misrepresentation is "an immediate cause of [a plaintiffs]  
28 conduct, which alters his legal relations," and when, absent such representation, "he would not, in all  
reasonable probability, have entered into the contract or other transaction.'" (*Engala v. Permanente*  
*Medical Group, Inc.* (1997) 15 Cal.4th 951, 976-977.)

1 “Besides actual reliance, [a] plaintiff must also show “justifiable” reliance, i.e., circumstances  
2 were such to make it *reasonable* for [the] plaintiff to rely on defendant’s statements without an  
3 independent inquiry or investigation.’ [Citation.] The reasonableness of the plaintiff’s reliance is judged  
4 by reference to the plaintiff’s knowledge and experience. (5 Witkin, Summary of Cal. Law, Torts,  
5 § 808, p. 1164.) “Except in the rare case where the undisputed facts leave no room for a reasonable  
6 difference of opinion, the question of whether a plaintiff’s reliance is reasonable is a question of fact.”  
7 [Citations.]’ [Citation.”] (*Ocm Principal Opportunities Fund v. CIBC World Markets Corp.* (2007)  
8 157 Cal.App.4th 835, 864-865.)

9 When a promise contradicts the express terms of the contract, proving justifiable reliance is an  
10 uphill battle. (*Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 393.) This is because of the  
11 general principle that a party who signs a contract “cannot complain of unfamiliarity with the language  
12 of the instrument” (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal .3d 699, 710), the defrauded  
13 party must show a reasonable reliance on the misrepresentation that excuses the failure to familiarize  
14 himself with the contents of the document. (Rest.2d Contracts, §§ 164, 166; *California Trust Co. v.*  
15 *Cohn* (1932) 214 Cal. 619.) For instance, a “party’s *unreasonable* reliance on the other’s  
16 misrepresentations, resulting in a failure to read a written agreement before signing it, is an insufficient  
17 basis, under the doctrine of fraud in the execution ... “ for permitting that party to void the agreement.  
18 (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 423.) Thus, the particular  
19 circumstances of the contract’s execution, including the prominent and discernible provisions of the  
20 contents of the writing in issue, must make it reasonable for the party claiming fraud to have  
21 nonetheless relied on the mischaracterization. This is not an easily met burden of proof.

22 More importantly for purposes of this demurrer, Cotton has not alleged facts which, if true, are  
23 sufficient to support a finding of reasonable reliance. This is self-evident considering that the  
24 misrepresentations Cotton is claiming reliance upon are in direct conflict with the clear, unambiguous  
25 written agreement signed by Cotton. It does not appear Cotton can amend to allege a factual scenario  
26 by which Cotton would be able to establish reasonable reliance on alleged misrepresentations made by  
27 Geraci.  
28



1 Furthermore, Cotton has admitted that he was *hesitant, understandably concerned and despite*  
2 *his hesitation, concerns and reservations* he agreed to Geraci's terms. (SAXC ¶17) It is difficult to  
3 reconcile Cotton's hesitation, concerns and reservations in dealing with Geraci with his claim to have  
4 reasonably relied on Geraci's representations. Rather it appears that Cotton did not trust Geraci's  
5 alleged representations and entered the agreement regardless of his misgivings regarding Geraci. Such  
6 reliance cannot be said to have been reasonable in light of Cotton's admissions in his pleadings.

7 **2. The Third Cause of Action for Negligent Misrepresentation Fails to State a**  
8 **Claim Upon Which Relief May Be Granted Because Intentional Fraud and**  
9 **Negligent Misrepresentation Base On the Same Facts Cannot Co-Exist**

10 Cross-Complainant's Fourth Cause of Action labeled "False Promise", is for a type of fraud  
11 often referred to as "promissory fraud;" i.e., a promise made without the intent to perform. (SAXC,  
12 ¶¶ 47-54) Cross-Complainant's Third Cause of Action for Negligent Misrepresentation and Fourth  
13 Cause of Action for promissory fraud, rely upon the same exact facts (SAXC ¶¶ 43, 47), incorporating  
14 by reference all previous allegations of the complaint], and attempt to plead the "false promise" cause  
15 of action alternatively with the "negligent misrepresentation" cause of action. While pleading  
16 alternative legal theories based on the same facts is usually acceptable, in this instance Cross-  
17 Complainant's Third Cause of Action fails because California law clearly holds that a promise made  
18 without the intent to perform cannot form the basis for a claim of negligent misrepresentation.

19 Cross-Complainant's Third Cause of Action (Negligent Misrepresentation) is on all fours with,  
20 and is governed by, the decision in *Tarmann v. State Farm* (1991) 2 Cal.App.4th 153. There, plaintiff  
21 alleged claims for fraud and negligent misrepresentation based on her contention that the defendant  
22 insurer had falsely promised that it would pay for repairs to her automobile upon their completion.  
23 When the insurance company in fact declined to pay, plaintiff brought an action alleging that the  
24 insurer's representations about payment were either intentionally or negligently false.

25 The trial court sustained Defendant's demurrer to the negligent misrepresentation claim without  
26 leave to amend, and the Court of Appeal affirmed. In so doing, it began its analysis by noting that "to  
27 be actionable, a negligent misrepresentation must ordinarily be as to past or existing material facts.  
28 [P]redictions as to future events, or statements as to future action by some third party, are deemed  
opinions, and not actionable fraud. [Citations omitted]." (*Tarmann, supra*, 2 Cal.App.4th at p. 158.)

1 There is no question that Cotton alleged that the basis of his allegations regarding fraud were that  
2 Geraci promised to take certain actions in the future. (See SAXC ¶¶ 45(c), 45(b), 48(a), 48(b), 48(c),  
3 48(d).)

4 The Court went on to compare the elements of fraud and negligent misrepresentation, as  
5 follows:

6 To maintain an action for deceit based on a false promise, one must specifically allege  
7 and prove, among other things, that the promisor did not intend to perform at the time he  
8 or she made the promise and that it was intended to deceive or induce the promisee to do  
9 or not to do a particular thing. [Citations omitted]. Given this requirement, an action  
10 based on a false promise is simply a type of intentional misrepresentation, i.e., actual  
11 fraud. *The specific intent requirement also precludes pleading a false promise claim as a*  
12 *negligent misrepresentation, i.e., 'the assertion, as a fact, of that which is not true, by one*  
13 *who has no reasonable ground for believing it to be true.'* (Civil Code Section 1710,  
14 subd. (2).) Simply put, making a promise with an honest but unreasonable intent to  
15 perform is wholly different from making one with no intent to perform and, therefore,  
16 does not constitute a false promise. Moreover, we decline to establish a new type of  
17 actionable deceit: the negligent false promise. In light of our discussion, the trial court  
18 properly sustained the demurrer to [Plaintiff's] cause of action for negligent  
19 misrepresentation." *Tarmann, supra*, 2 Cal.App.4th at 159 (emphasis added.)

20 Cross-Complainant cannot have it both ways. His allegations that Plaintiff made promises  
21 about future actions without the intent to perform simply cannot support a claim for negligent  
22 misrepresentation. The Demurrer to the Third Cause of Action, as in *Tarmann*, should be sustained  
23 without leave to amend.

## 24 V. LEAVE TO AMEND

25 The Court may grant a demurrer with or without leave to amend, and the burden is on the party  
26 seeking leave to amend their pleading to establish that the pleading is capable of amendment. (See  
27 *Hillman v. Hillman Land Co., supra*, 81 Cal.App.2d at p. 181; see generally *Carney v. Simmonds,*  
28 *supra*, 49 Cal.2d at p. 97; see *Smiley v. Citibank, supra*, 11 Cal.4th at p. 164; see *Blank v. Kirwan,*  
*supra*, 39 Cal.3d at p. 318; *Gould v. Maryland Sound Industries, supra*, 31 Cal.App.4th at p. 1153;  
Code Civ. Proc., § 430.30; Cal. Rules of Court, rule 3.1320(g).) A plaintiff does not meet its burden  
unless it advises the trial court of new information that would contribute to a meaningful amendment.  
(See e.g. *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 749.)

This Court should grant the motion *without leave to amend unless* Cross-Complainant makes an  
offer of proof that he can in good faith allege facts establishing the elements of each of the remaining

1 claims.

2 **VI. CONCLUSION**

3 For the foregoing reasons and subject to a sufficient offer of proof, Geraci's demurrers to each  
4 of the causes of action should each be sustained without leave to amend.

5  
6 Dated: September 28, 2017

FERRIS & BRITTON,  
A Professional Corporation

7  
8 By: Scott H. Toothacre

9 Michael R. Weinstein

10 Scott H. Toothacre

11 Attorneys for Plaintiff and Cross-Defendant  
12 LARRY GERACI  
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11 Attorneys for Plaintiff and Cross-Defendant  
12 LARRY GERACI

13 **SUPERIOR COURT OF CALIFORNIA**  
14 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

15 LARRY GERACI, an individual,

16 Plaintiff,

17 v.

18 DARRYL COTTON, an individual; and  
19 DOES 1 through 10, inclusive,

20 Defendants.

21 DARRYL COTTON, an individual,

22 Cross-Complainant,

23 v.

24 LARRY GERACI, an individual, REBECCA  
25 BERRY, an individual, and DOES 1  
26 THROUGH 10, INCLUSIVE,

27 Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil

**DECLARATION OF MICHAEL R.  
WEINSTEIN IN SUPPORT OF  
CROSS-DEFENDANT LARRY GERACI'S  
DEMURRER TO CROSS-COMPLAINANT  
DARRYL COTTON'S SECOND AMENDED  
CROSS-COMPLAINT**

**[IMAGED FILE]**

**DATE: November 3, 2017**  
**TIME: 9:00 a.m.**  
**DEPT: C-73**

Complaint Filed: March 21, 2017  
Trial Date: May 11, 2018

28 I, Michael R. Weinstein, declare:

1. I am an adult individual residing in the County of San Diego, State of California, and I am the attorney in this action for Plaintiff and Cross-Defendant, LARRY GERACI. I have personal knowledge of the foregoing facts and if called as a witness could and would so testify.

2. The purpose of this declaration is to advise the Court that the attorneys for each party have satisfied the meet and confer requirements of Code of Civil Procedure section 430.41. (Code Civ.

1 Proc., §430.41(a)(3).)

2 3. On September 13, 2017, I emailed David Demian, attorney for Defendant and Cross-  
3 Complainant, DARRYL COTTON, a meet and confer letter pursuant to the requirements of Code of  
4 Civil Procedure section 430.41 advising him that Mr. Geraci had objections to the Second Amended  
5 Cross-Complaint and intended to file a demurrer objecting to the first through fourth causes of action  
6 asserted in the Second Amended Cross-Complaint. This meet and confer letter confirmed a prior  
7 telephonic meet and confer engaged in by the attorneys regarding Mr. Geraci's intended demurrer. A  
8 true and correct copy of my September 13, 2017, meet and confer letter is attached as Exhibit A to this  
9 declaration. The attorneys/parties have not been able to resolve the objections to the Second Amended  
10 Cross-Complaint that are the subject of the Demurrer being filed on behalf of Cross-Defendant, Mr.  
11 Geraci.

12 I declare under penalty of perjury under the laws of the State of California, that the foregoing is  
13 true and correct of my personal knowledge. Executed this 28th day of September, 2017, in San Diego,  
14 California.

15  
16   
17 MICHAEL R. WEINSTEIN  
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# **EXHIBIT A**

GE4892.001

September 13, 2017

**Via E-Mail and U.S. Mail**

David S. Demian, Esq.  
Adam C. Witt, Esq.  
Finch, Thornton & Baird, LLP  
4747 Executive Drive - Suite 700  
San Diego, CA 92121-3107 Steven Cash

Re: Larry Geraci v. Darryl Cotton  
San Diego Superior Court Case No. 37-2017-00010073

Dear Mr. Demian and Mr. Witt:

David, as I mentioned in our Monday telephone call, we will be filing a demurrer by Larry Geraci to the Second Amended Cross-Complaint. By my calculation, that responsive pleading is due on or before September 29, 2017. Please let me know if you believe the deadline is other than September 29, 2017.

The purpose of this letter is to satisfy the meet and confer requirement of California Code of Civil Procedure section 430.41. This letter confirms that we have already met and conferred about these matters but I invite you to further communicate with me regarding these issues if, after review of the discussion below, you believe further communication would be helpful and might resolve some or all of the issues prior to the filing and hearing of the demurrer.

Mr. Geraci's demurrer will be directed at the first cause of action for breach of contract and the second, third and fourth causes of action for intentional misrepresentation, negligent misrepresentation, and false promise, respectively.

**First Cause of Action for Breach of Contract**

The first cause of action for breach of contract fails to state facts sufficient to constitute a cause of action because it is barred by the applicable Statute of Frauds. The relevant law is found in *Sterling v. Taylor* (2007), 40 Cal.4<sup>th</sup> 757, which makes clear that the memorandum itself must include the essential contractual terms and extrinsic evidence cannot supply those required terms:

We emphasize that a memorandum of the parties' agreement is controlling evidence under the statute of frauds. Thus, extrinsic evidence cannot be employed to prove an agreement at odds with the terms of the memorandum.

This point was made in *Beazell v. Schrader* (1963) 59 Cal.2d 577, 30 Cal.Rptr. 534, 381 P.2d 390. There, the plaintiff sought to recover a 5 percent real estate broker's commission under an oral agreement. (*Id.* at p. 579, 30 Cal.Rptr. 534, 381 P.2d 390.) The escrow instructions, which specified a 1.25 percent commission, were the "memorandum" on which the plaintiff relied to comply with the statute. However, he contended the instructions incorrectly reflected the parties' actual agreement, as shown by extrinsic evidence. (*Id.* at p. 580, 30 Cal.Rptr. 534, 381 P.2d 390.) The *Beazell* court rejected this argument, holding that under the statute of frauds, "the parol agreement of which the writing is a memorandum must be one whose terms are consistent with the terms of the memorandum." (*Id.* at p. 582, 30 Cal.Rptr. 534, 381 P.2d 390.) Thus, in determining whether extrinsic evidence provides the certainty required by the statute, courts must bear in mind that the evidence cannot contradict the terms of the writing.

*Sterling v. Taylor* (2007), *supra*, 40 Cal.4<sup>th</sup> at 771-772. See, *Ukkestad v. RBS Asset Finance, Inc.* 235 Cal.App.4th 156 (2015) ["In the context of a case arising from a dispute over the certainty of the terms of sale of real property, our Supreme Court recently endorsed a "flexible, pragmatic view," under which uncertain written contractual terms comply with the statute of frauds as long as they can be made certain by reference to extrinsic evidence, and as long as that evidence is not used to contradict the written terms. (*Sterling, supra*, 40 Cal.4th at p. 771, fn. 13, 55 Cal.Rptr.3d 116, 152 P.3d 420.).] See also, *Jacobs v. Locatelli* (2017), 8 Cal.App. 5th 317, 325 ["As a result of *Sterling*, it is indisputably the law that "when ambiguous terms in a memorandum are disputed, extrinsic evidence is admissible to resolve the uncertainty." (*Sterling, supra*, 40 Cal.4th at p. 767, 55 Cal.Rptr.3d 116, 152 P.3d 420.) The agreement must still provide the essential terms, and it is "clear that extrinsic evidence cannot supply those required terms." (*Ibid.*)]

Here, the only writing signed by both parties is the November 2, 2016 written agreement, which explicitly provides for a \$10,000 down payment ("earnest money to be applied to the sales price"); in fact, the agreement acknowledges receipt of that down payment. Mr. Cotton is alleging that the oral agreement provided for a down payment of \$50,000, which is in direct contradiction of the written term of a \$10,000 down payment.

**Second, Third and Fourth Causes of Action for Intentional Misrepresentation, Negligent Misrepresentation, and False Promise**

Each of these causes of action fails to state facts sufficient to constitute a cause of action because Mr. Cotton has not and cannot allege reasonable and justifiable reliance.

**No Reasonable Reliance**

A necessary element of each of these causes of action is reasonable reliance on the



alleged false representation. [See CACI 1900, 1902, and 1903]

“[T]here are two causation elements in a fraud cause of action. First, the plaintiff’s actual and justifiable reliance on the defendant’s misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage.” (*Beckwith v. Dahl* (2012) 205 Cal.App.4<sup>th</sup> 1039, 1062.)

“Actual reliance occurs when a misrepresentation is “an immediate cause of [a plaintiff’s] conduct, which alters his legal relations,” and when, absent such representation, “he would not, in all reasonable probability, have entered into the contract or other transaction.” (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4<sup>th</sup> 951, 976-977.)

“Besides actual reliance, [a] plaintiff must also show “justifiable” reliance, i.e., circumstances were such to make it *reasonable* for [the] defendant’s statements without an independent inquiry or investigation.” [Citation.] The reasonableness of the plaintiff’s reliance is judged by reference to the plaintiff’s knowledge and experience. (5 Witkin, summary of Cal. Law, Torts, § 808, p. 1164.) “Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff’s reliance is reasonable is a question of fact.” [Citations.] [Citation.]” (*OCM Principal Opportunities Fund, L.P. CIBC World Markets Corp.* (2007) 157 Cal.App.4<sup>th</sup> 835, 864-865.)

When a promise contradicts the express terms of the contract, proving justifiable reliance is an uphill battle. (*Pacific State Bank v. Greene* (2003) 110 Cal.App.4<sup>th</sup> 375, at 393.) This is because of the general principle that a party who signs a contract “cannot complain of unfamiliarity with the language of the instrument” (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710), the defrauded party must show a reasonable reliance on the misrepresentation that excuses the failure to familiarize himself with the contents of the document. (Rest.2d Contracts, §§ 164, 166; *California Trust Co. v. Cohn* (1932) 214 Cal. 619.) For instance, a “party’s *unreasonable* reliance on the other’s misrepresentations, resulting in a failure to read a written agreement before signing it, is an insufficient basis, under the doctrine of fraud in the execution ...” for permitting that party to void the agreement. (*Rosenthal v. Great Western Fin. Securities Corp.* 14 Cal.4<sup>th</sup> at p. 423) Thus, the particular circumstances of the contract’s execution, including the prominent and discernible provisions of the contents of the writing in issue, must make it reasonable for the party claiming fraud to have nonetheless relied on the mischaracterization. This is not an easily met burden of proof.

More importantly for purposes of this demurrer, Mr. Cotton has not alleged facts which, if true, are sufficient to support a finding of reasonable reliance. In addition, considering that the misrepresentations Mr. Cotton is claiming are in direct conflict with the clear, unambiguous written agreement signed by Mr. Cotton, it does not appear Mr. Cotton can amend to allege a factual scenario by which Mr. Cotton would be able to establish reasonable reliance on alleged misrepresentations made by Mr. Geraci.

LAW OFFICES  
**FERRIS  
& BRITTON**

A Professional Corporation

Adam Witt and David Demian

July 27, 2017

Page 4 of 4

If you wish to discuss this matter further please do so by September 21, 2017. I intend to file the demurrer by September 25, 2017, as the next day I am heading out of the country for two weeks.

Thank you.

Respectfully,



MICHAEL R. WEINSTEIN, for  
Ferris & Britton, APC

MRW/

cc: Larry Geraci

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6 Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and  
7 Cross-Defendant REBECCA BERRY

8  
9 **SUPERIOR COURT OF CALIFORNIA**  
10 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

11 LARRY GERACI, an individual,  
12 Plaintiff,

13 v.

14 DARRYL COTTON, an individual; and  
DOES 1 through 10, inclusive,  
15 Defendants.

16  
17 DARRYL COTTON, an individual,  
18 Cross-Complainant,

19 v.

20 LARRY GERACI, an individual, REBECCA  
BERRY, an individual, and DOES 1  
21 THROUGH 10, INCLUSIVE,

22 Cross-Defendants.  
23  
24  
25  
26  
27  
28

Case No. 37-2017-00010073-CU-BC-CTL

**PROOF OF SERVICE BY MAIL**

**[IMAGED FILE]**

1 I, Debra L. Barker, declare that: I am over the age of 18 years and not a party to the case; I am  
2 employed in, or am a resident of, the County of San Diego, California; and my business address is:  
3 501 West Broadway, Suite 1450, San Diego, California 92101.

4 On, September 28, 2017, I served the following document:

- 5 1. **NOTICE OF DEMURRER AND DEMURRER BY CROSS-DEFENDANT**  
6 **LARRY GERACI TO SECOND AMENDED CROSS-COMPLAINT BY**  
7 **DARRYL COTTON;**
- 8 2. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-**  
9 **DEFENDANT LARRY GERACI'S DEMURRER TO SECOND AMENDED**  
10 **CROSS-COMPLAINT BY DARRYL COTTON;**
- 11 3. **DECLARATION OF MICHAEL R. WEINSTEIN IN SUPPORT OF CROSS-**  
12 **DEFENDANT LARRY GERACI'S DEMURRER TO CROSS-COMPLAINANT**  
13 **DARRYL COTTON'S SECOND AMENDED CROSS-COMPLAINT.**

14 I placed a true copy of each document in a separate envelope addressed to each addressee, respectively,  
15 and then sealed each envelope and, with postage thereon fully prepaid, I placed each for deposit in the  
16 United States Postal Service, this same day, at my business address shown above, following ordinary  
17 business practices:

18 David S. Demian, Esq.  
19 Adam C. Witt, Esq.  
20 FINCH, THORNTON & BAIRD, LLP  
21 4747 Executive Drive, Suite 700  
22 San Diego, California 92121

23 *Attorneys for Defendant and Cross-Complainant*  
24 *Darryl Cotton*

25 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
26 true and correct.

27 Dated: September 28, 2017

FERRIS & BRITTON,  
A Professional Corporation

  
Debra L. Barker, Paralegal

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF SAN DIEGO**

**CENTRAL DIVISION**

LARRY GERACI, an individual,

Plaintiff,

v.

DARRYL COTTON, an individual; and  
DOES 1 through 10, inclusive,

Defendants.

CASE NO: 37-2017-00010073-CU-BC-CTL

DARRYL COTTON'S OPPOSITION TO  
LARRY GERACI'S DEMURRER TO THE  
SECOND AMENDED CROSS-COMPLAINT

[IMAGED FILE]

Assigned to:  
Hon. Joel R. Wohlfeil, Dept. C-73

Date: November 3, 2017  
Time: 9:00 a.m.  
Dept.: C-73

Complaint Filed: March 21, 2017  
Trial Date: May 11, 2018

AND RELATED CROSS-ACTION.

I

**INTRODUCTION**

Darryl Cotton's ("Cotton") Second Amended Cross-Complaint ("SACC") alleges Breach of Contract, Intentional Misrepresentation, Negligent Misrepresentation, False Promise, and Declaratory Relief claims against Larry Geraci ("Geraci") stemming from the latter's behavior in a real-estate deal with Cotton. The SACC states facts sufficient to allege each of these causes of action. Geraci's arguments to the contrary lack factual and legal merit.

1 Legally, Geraci's reliance on the Statute of Frauds is misguided. The SACC alleges the  
2 existence of a written agreement that is not subject to the Statute of Frauds. Factually, Geraci's  
3 arguments alternatively ignore and misconstrue allegations in the SACC to suit Geraci's needs.  
4 Indeed, some of Geraci's arguments are utterly irrelevant and non-responsive to Cotton's  
5 SACC. The Court should deny Geraci's demurrer. Should the Court find merit in any of  
6 Geraci's arguments, the Court should grant leave to Cotton to amend.

7 II

8 FACTS

9 In or around August 2016 Geraci approached Cotton and expressed interest in  
10 purchasing real property owned by Cotton located at 6176 Federal Boulevard, San Diego,  
11 California 92114 ("Property"). (SACC, p. 3, ¶ 8.) Geraci was drawn to the Property because it  
12 was potentially eligible to be used as a Medical Marijuana Consumer Cooperative ("MMCC").  
13 (*Id.*) For the Property to run as an MMCC, a Conditional Use Permit ("CUP") must be issued  
14 by the City. A CUP for an MMCC is only issued to eligible properties following a permitting  
15 process which takes several months. (SACC, p. 4, ¶11.) Cotton and Geraci engaged in lengthy  
16 negotiations over the terms for potential sale of the Property, and ultimately reached agreement  
17 on several key terms. However, these deal points were never reduced to a fully integrated  
18 written agreement. Instead, at the prodding of Geraci and based on the representations and  
19 promises of Geraci that comprise the fraud related causes of action set forth in the SACC, on  
20 November 2, 2017, the parties executed an ambiguous document ("November Document") and  
21 exchanged emails which were incorporated into that document ("November Emails").  
22 Summarily, Cotton alleges that the November Document and November Emails combine to  
23 evidence the following basic terms of agreement, all as alleged in the SACC:

24 (1) creating a record of Geraci having paid \$10,000.00 in earnest money and that  
25 Cotton would not enter into an agreement with any third party for the Property pending  
26 negotiation of a final agreement;

27 / / / /

1 (2) providing evidence of the parties' agreement on the property's purchase price of  
2 \$800,000.00;

3 (3) providing evidence of the agreement for Cotton to receive a ten percent profits  
4 interest in the MMCC to be established by Geraci; and

5 (4) providing evidence of the parties' good-faith agreement to negotiate in good  
6 faith and to formalize a final, fully integrated document reflecting the material terms of their  
7 purchase agreement. (SACC, p. 6, ¶ 18.)

8 Of course, Geraci now disputes Cotton's allegations as to the November Document and  
9 the November Emails. Geraci asserts the November Document is, despite numerous verbal  
10 and written communications prior to and after the date of the November Document to the  
11 contrary, including the November Emails, a final binding real estate purchase agreement  
12 pursuant to which Cotton promises to sell the Property. The simple fact is that Cotton alleges  
13 otherwise in the SACC and, most importantly at this stage of the case, Cotton's allegations are  
14 sufficient to state each of the causes of action alleged in the SACC.

### 15 III

#### 16 LEGAL STANDARD FOR DEMURRER

17 A demurrer for "failure to state a cause of action" is commonly referred to as a  
18 "general" demurrer. (*McKenney v. Purepac Pharmaceutical Co.* (2008) 167 Cal.App.4th 72,  
19 77.) When a general demurrer challenges a specific cause of action, the test is whether that  
20 cause of action states *any* claim entitling plaintiff to relief. If the essential facts of any valid  
21 claim are present, then the cause of action prevails against the general demurrer. (*Quelimane*  
22 *Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38-39.) Further, and directly  
23 applicable to Geraci's demurrer, "[o]bjections that a complaint is ambiguous or uncertain, or  
24 that essential facts appear only inferentially, or as conclusions of law, or by way of recitals,  
25 must be raised by *special demurrer*, and cannot be reached on general demurrer." (*Johnson v.*  
26 *Mead* (1987) 191 Cal.App.3d 156, 160, original italics.) Lastly, it is well established that if a  
27  
28

1 demurrer is sustained, "it is an abuse of discretion to sustain a demurrer without leave to  
2 amend if there is any reasonable possibility that the defect can be cured by amendment."  
3 (*Goodman v. Kennedy* (1976) 18 Cal.App.3d 335, 349.)

4 IV

5 ARGUMENT

6 A. The Statute of Frauds Does Not Apply to Bar the SACC

7 The SACC states facts supporting a claim for breach of a contract. Cotton alleges  
8 Geraci has failed to perform the parties' agreement reached in November 2016. Cotton alleges  
9 the agreement at issue is an agreement to negotiate in good faith to arrive at a commercially  
10 reasonable and fully integrated written agreement or agreements to document the terms for sale  
11 of the Property. (SACC, p. 6, ¶ 18.) Cotton alleges this agreement is evidenced by the  
12 writings attached to the SACC as Exhibits 1 and 2. (SACC, p. 6, ¶ 18.) Both writings are  
13 subscribed to by Geraci and are therefore outside the purview of the statute of frauds.

14 Ultimately, Geraci's demurrer request is irretrievably flawed, as it is based on the  
15 mistaken premises that: (1) there is no dispute as to the interpretation of the November  
16 Document and the November Emails; and (2) that the \$50,000.00 deposit alleged in the SACC  
17 contradicts the November Document's reference to \$10,000.00 of "earnest money." As to the  
18 first point, the existence of a dispute over the terms of the parties' agreement is abundantly  
19 clear from the allegations of the SACC as compared to the allegations of Geraci in the  
20 Complaint. The parties do not agree as to what comprises the terms of this contract. The  
21 SACC properly alleges the existence of a written agreement and refers to parole evidence to  
22 provide detail as to uncertain terms contained in those writings. Accordingly, the statute of  
23 frauds does not apply.

24 Second, the alleged acknowledgement as to payment of \$10,000.00 in the November  
25 Document is not in conflict with a \$50,000.00 deposit. \$10,000.00 was paid and an additional  
26 \$40,000.00 would be captured in the final agreement which Geraci promised to have his  
27 lawyer prepare. (SACC, p. 5, ¶¶ 14(a), 15, and 16; p. 6, ¶ 17.) Cotton agreed to allow a  
28



1 *partial* down payment of \$10,000.00 – at Geraci’s insistence, no less – *with the balance of the*  
2 *money (\$40,000.00) due at a later date* because Geraci needed additional time to come up with  
3 the full \$50,000.00 deposit. (SACC, p. 5, ¶¶ 14(a), 16; p. 6, ¶ 17 [“Cotton was hesitant to  
4 grant Geraci more time to pay the non-fundable deposit but *Geraci offered to pay \$10,000.00*  
5 *towards the \$50,000.00 total deposit immediately as a show of “good-faith,” even though the*  
6 *parties had not reduced their final agreement to writing.”*] [emphasis added].) Contrary, then,  
7 to Geraci’s assertions, the evidence that Cotton seeks to introduce is *consistent* with – not  
8 contradictory to – the parties written memorandum and is, thus, admissible under *Sterling v.*  
9 *Taylor* (2007) 40 Cal.4th at 757, as a parole agreement consistent with the terms of a writing.  
10 (*Sterling, supra*, 40 Cal.4th at 771-772 [holding that under the statute of frauds a parole  
11 agreement must be “one whose terms are consistent with the terms of the memorandum.”])<sup>1</sup>  
12 As such, Geraci’s initial attempt to demur Cotton’s First Cause of Action is unavailing.

13 Cotton also states a valid claim for breach of contract for another reason. Under  
14 *Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, 1256, Cotton states a valid  
15 breach-of-contract claim if he alleges facts showing that (a) Geraci and he had agreed to  
16 negotiate in good faith; and (b) that the failure “*to reach ultimate agreement resulted from a*  
17 *breach of that’s party obligation to negotiate or to negotiate in good faith.”* (*Id.* at p. 1257,  
18 emphasis added.) Cotton does precisely this in the SACC. In fact, the parties’ use of the  
19 phrase “earnest money” confirms Cotton’s interpretation of the November Document and the  
20 November Emails as providing for further negotiation in good faith to arrive at a final  
21 agreement.<sup>2</sup> (SACC, p. 6, ¶ 18.) Cotton’s SACC alleges that Geraci did not honor this  
22 obligation. Cotton, for instance, alleges that Geraci intentionally delayed further negotiations,  
23 that Geraci failed to deliver purchase documents, and that Geraci failed to fully pay the agreed-

24  
25  
26 <sup>1</sup> Notably, in *Sterling* the Court ruled in the context of a summary judgment motion, not in the context of a  
demurrer.

27 <sup>2</sup> Black’s Law Dictionary defines “earnest money” as a “*deposit paid (often in escrow) by a prospective buyer*  
28 *(esp. of real estate) to show a good-faith intention to complete the transaction, and ordinarily forfeited if the*  
*buyer defaults.”*

1 upon \$50,000.00 deposit. (SACC, p. 12, ¶ 36.) If these allegations are assumed as true, as  
2 they must be, Geraci's demurrer to the first cause of action of the SACC should be denied.

3 B. The SACC Alleges Actionable Breach

4 Geraci further attempts to demurrer Cotton's First Cause of Action by arguing that  
5 Geraci fulfilled all the terms of the November Document and that, in any event, Cotton did not  
6 have a duty to act in good faith because the November Document did not contain a good-faith  
7 term. (Demurrer, p. 12, Ins. 16-27.) Geraci's first assertion is patently belied by the simple  
8 fact that the terms of the November Document fail to reflect all of the parties' material terms.  
9 Geraci, thus, is wrong in asserting that he fulfilled all of the terms of the parties' agreement:  
10 He breached *at least* one material term of it, *viz.*, the promise to negotiate in good faith to  
11 deliver a proposed final agreement, the promise to deliver a 10 percent interest in the property,  
12 and failing to pay the amounts due for the \$50,000.00 deposit. (SACC, p.11, ¶ 36.)

13 Geraci's second contention (*i.e.*, that he had no duty to act in good faith) fares no better.  
14 The courts have made clear that "[t]here is an implied covenant of good faith and fair dealing  
15 in every contract that neither party will do anything which will injure the right of the other to  
16 receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50  
17 Cal.2d 654, 658.) As Geraci himself points out in quoting verbatim the November Document,  
18 the parties agreed to close the sale of the property for \$800,000.00 upon the City of San  
19 Diego's future approval of the CUP application. (Demurrer p. 8, Ins. 5-11 [quoting verbatim  
20 the parties' November document.]) Even assuming the parties' agreement was captured solely  
21 by the November Document, California law bound Geraci to act in good faith. Without  
22 question, the SACC alleges just such a breach, namely, that Geraci intentionally delayed  
23 further negotiations, that Geraci failed to deliver purchase documents, and that Geraci failed to  
24 fully pay the agreed-upon \$50,000 deposit. (SACC, p. 11, ¶ 36.)

25 Simply put, Geraci's attempts to demurrer Cotton's First Cause of Action are  
26 unavailing.

27 / / / / /

1 C. Cotton's SACC Properly Pleads Causes of Action  
2 for Intentional and Negligent Misrepresentation and False Promise

3 1. Cotton Alleges Facts Proving that Geraci  
4 Engaged in Intentional Misrepresentation and False Promise

5 To state a claim for intentional misrepresentation, Cotton must allege that Geraci  
6 misrepresented a fact he knew was false, Geraci intended to defraud Cotton, and Cotton  
7 justifiably relied on Geraci's representations and suffered damage as a result. (*Engalla v.*  
8 *Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974). The elements of False Promise  
9 are nearly identical. (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1059-1060 ["in a  
10 promissory fraud action, to sufficiently allege defendant made a misrepresentation, the  
11 complaint must allege (1) the defendant made a representation of intent to perform some future  
12 action, i.e., the defendant made a promise, and (2) the defendant did not really have that intent  
13 at the time that the promise was made, i.e., the promise was false"]; see also CACI 1902  
14 [entitled False Promise])

15 Cotton's SACC pleads facts in support of all these elements on pages 12-13 and on  
16 pages 15-16. To summarize, the SACC alleges that Geraci:

- 17 • Falsely represented to Cotton that the November 2, 2016 agreement was not the  
18 parties' final, full, and integrated contract between them;
  - 19 • Falsely represented to Cotton that he (Geraci) would honor the terms of the  
20 parties' agreement by, among other things, memorializing in writing the full scope of the terms  
21 of their agreement and by exerting good-faith efforts to close the sale of Cotton's Property;
  - 22 • Falsely represented to Cotton that he (Geraci) would remit the balance of the  
23 \$50,000.00 non-refundable deposit; and
  - 24 • That, as a result of Geraci's representations, Cotton justifiably relied on  
25 Geraci's promises, and that Cotton has incurred harm in the form of diminished property value  
26 and attorneys' fees. (*Id.*) In fact, Geraci assured Cotton he could be relied upon because as an  
27 "Enrolled Agent" he worked in a fiduciary capacity for many high net-worth individuals.
- 28

1 (SACC, p.3 ¶ 9(a).)

2 Cotton, in short, has plead his intentional tort claims.

3 2. Cotton Alleges Facts Proving that  
4 Geraci Engaged in Negligent Misrepresentation

5 To prevail on the tort of negligent misrepresentation, Cotton must show that Geraci  
6 made statement of facts that were false and that no reasonable person would have believed  
7 them to be true. (*Tarmann v. State Farm* (1991) 2 Cal.App.4th 153.) Cotton does precisely  
8 this in his SACC. For instance, Cotton alleges that, “[o]n multiple occasions, Geraci  
9 represented to Cotton that *Geraci had not yet filed* a CUP application with respect to the  
10 Property when [in reality] the CUP application had already been filed” and that “[o]n multiple  
11 occasions Geraci represented to Cotton that the preliminary work of preparing a *CUP*  
12 *application was merely underway, when, in fact, the CUP application had already been filed.*”  
13 (SACC, p. 14, ¶ 45(d)-(e) [emphasis added]). Each of these italic statements is a statement of  
14 fact that Geraci had no reasonable grounds for believing true: It was Geraci, after all, who  
15 controlled the handling of Cotton’s CUP application and who uttered these statements knowing  
16 that could not have been true.

17 Accordingly, Cotton has plead his Negligent Misrepresentation cause of action.

18 3. Cotton Alleges Reasonable Reliance on Geraci’s  
19 Misrepresentations and Accordingly, Geraci’s Demurrer  
20 to the Second, Third, and Fourth Causes of Action Fails

21 Geraci requests dismissal of Cotton’s Intentional Misrepresentation, Negligent  
22 Misrepresentation, and False Promise Causes of Action on the grounds that Cotton could not  
23 have reasonably relied on Geraci’s representations. He lodges a few arguments in support of  
24 this claim; however, none of them are persuasive. In fact, Geraci repeatedly argues the merits  
25 of the facts rather than addressing the sufficiency of the allegations. Accordingly, the demurrer  
26 request has no merit.

27 Geraci first asserts, that the alleged misrepresentations contradict the terms of the  
28 parties’ agreement and therefore “proving justifiable reliance is an uphill battle.” (Demurrer,

1 p. 14, lns. 9-21 [citing a slew of case law to that effect] [emphasis added].) Of course, at the  
2 pleading stage the question is not one of proof but of allegations, and here Cotton has met his  
3 burden. Further, there is no contradiction between the terms of the agreement alleged by  
4 Geraci and the allegations of misrepresentation asserted by Cotton.

5 Geraci also argues that Cotton could not have reasonably relied on Geraci's oral  
6 representations because those terms "directly conflict with the clear, unambiguous written  
7 agreement signed by Cotton" in November 2016. (Demurrer, p. 14, lns. 22-27.) Yet, Cotton's  
8 Intentional Misrepresentation, Negligent Misrepresentation, and False Promise Causes of  
9 Action sound in *tort*<sup>3</sup> – *not* contract – and are *not* even subject to the same confines that the  
10 parole evidence rules places on contractual actions. (See, e.g., *Riverisland Cold Storage, Inc.*  
11 *v. Fresno-Madera Production Credit Association* (2013) 55 Cal.App.4th 1169, 1172 ["The  
12 parole evidence rule protects the integrity of written *contracts* by making their terms the  
13 exclusive evidence of the parties' agreement."]) Geraci is simply mistaken in asserting that the  
14 strictures of contract law preclude Cotton from reasonably relying on Geraci's oral  
15 representations in proving his tort claims.

16 Geraci finally asserts that Cotton could not have reasonably relied on Geraci's  
17 representations because Cotton harbored concern that Geraci would breach the parties'  
18 agreement. (Demurrer, p. 15, lns. 1-2. [quoting SACC p. 6, ¶ 17.]) Geraci's argument,  
19 however, falsely equates fear that a party would breach an agreement with an absence of  
20 justifiable reliance. Yet, as everyday life reveals, one can justifiably rely on another's promise  
21 while simultaneously harboring concern that the person may not live up to expectations – as,  
22 for instance, occurs when a senior lawyer relies on a junior lawyer's promise to meet a  
23 pressing deadline.

24  
25 <sup>3</sup> Case law confirms this. "Fraud is an intentional *tort*; it is the element of fraudulent intent, or intent to deceive,  
26 that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent  
27 misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or  
28 fiduciary duty one by party might owe to the other." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner &*  
*Smith* (1998) 68 Cal.App.4th 445, 482.) "Negligent misrepresentation is a separate and distinct *tort*, a species of  
the *tort* of deceit." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 227-228.) All emphasis in quotes are added.

1 In sum, Geraci's general assault on Cotton's Second, Third, and Fourth Causes of  
2 Action fail.

3 D. Geraci's Additional Arguments Directed at  
4 Cotton's Third Cause of Action Fare No Better

5 Geraci additionally – and independently – seeks to demurrer Cotton's Third Cause of  
6 Action (Negligent Misrepresentation) on two more grounds. Geraci first argues that Cotton's  
7 negligence claim is impermissibly based on future promises and not on contemporary  
8 representations that Geraci made. (Demurrer, p. 15-16 [quoting *Tarmann v. State Farm* (1991)  
9 2 Cal.App.4th 153, 158 for the proposition that "to be actionable, a negligent misrepresentation  
10 must ordinarily be as to past or existing material facts. [P]redictions as to future events or  
11 statements as to future action by some third party, are deemed opinions, and not actionable  
12 fraud."])

13 Geraci, however, ignores Cotton's allegations that show that Geraci made  
14 *contemporary* representations of fact that Geraci had no reasonable grounds for believing true.  
15 For instance, Cotton alleges in his SACC that, "[o]n multiple occasions, Geraci represented to  
16 Cotton that *Geraci had not yet filed* a CUP application with respect to the Property when [in  
17 reality] the CUP application had already been filed" and that "[o]n multiple occasions Geraci  
18 represented to Cotton that the preliminary work of preparing a *CUP application was merely*  
19 *underway, when, in fact, the CUP application had already been filed.*" (SACC, p. 14, ¶ 45(d)-  
20 (e) [emphasis added]). Accordingly, Cotton has alleged facts supportive of his allegation that  
21 Geraci negligently misrepresented facts.

22 Geraci also argues that Cotton's negligence claim is demurrable because California law  
23 precludes a party from simultaneously pleading a claim for negligent misrepresentation and  
24 intentional fraud, but that Cotton has plead both. (Demurrer, p. 15, lns. 9-28.) In support of  
25 this argument, Geraci quotes an excerpt of *Tarmann v. State Farm* (1991) 2 Cal.App.4th 153,  
26 158-159 that reads, "[t]he specific intent requirement also precludes pleading a false promise  
27  
28

1 claim as a negligent misrepresentation, i.e., 'the assertion, as a fact, of that which is not true,  
2 by one who has no reasonable ground for believing it to be true.'" (italics in Geraci's  
3 Demurrer).

4 Geraci, however, misconstrues the excerpted portion of *Tarmann*. The court in  
5 *Tarmann* was discussing the *substantive elements* that a party must prove to *prevail* on a  
6 negligent misrepresentation claim, and, in the portion of the opinion that Geraci quotes, the  
7 court merely was instructing that a party cannot establish a negligent misrepresentation claim  
8 by proving the same *mens rea* level – i.e., specific intent – that is required to establish an  
9 intentional misrepresentation claim. (*Tarmann, supra*, 2 Cal.App.4th at p. 159.) Critically,  
10 the *Tarmann* court did not, nor did it seek to, diminish California's well-known and generally-  
11 applicable procedural rule permitting parties to plead inconsistent legal theories. (E.g.: *Lim v.*  
12 *The TV Corp. Internat* (2002) 99 Cal.App.4th 684, 691 [noting that a party may plead  
13 inconsistent legal theories based on a common set of operative facts.]) Once again, Geraci's  
14 attempt to demurrer Cotton's negligence claim is unavailing.

15 V

16 CONCLUSION

17 For the foregoing reasons, the Court should overrule Geraci's demurrers as to every  
18 cause of action contained in Cotton's SACC. Should the Court find merit in any of Geraci's  
19 arguments, the Court should grant leave to Cotton to amend.

20 DATED: October 23, 2017

Respectfully submitted,

21 FINCH, THORNTON & BAIRD, LLP

22  
23 By: 

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ADAM C. WITT

RISHI S. BHATT

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Attorneys for Defendant and Cross-Complainant Darryl Cotton

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN DIEGO  
CENTRAL DIVISION

LARRY GERACI, an individual,

Plaintiff,

v.

DARRYL COTTON, an individual; and  
DOES 1 through 10, inclusive,

Defendants.

CASE NO: 37-2017-00010073-CU-BC-CTL

PROOF OF SERVICE VIA GOLDEN STATE  
OVERNIGHT

[IMAGED FILE]

Assigned to:  
Hon. Joel R. Wohlfeil, Dept. C-73

Complaint Filed: March 21, 2017  
Trial Date: Not Set

AND RELATED CROSS-ACTION.

I, Alexandria M. Quindt, declare that:

I am over the age of eighteen years and not a party to the action; I am employed in the County of San Diego, California, where the mailing occurred; and my business address is 4747 Executive Drive, Suite 700, San Diego, California 92121-3107. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with Golden State Overnight pursuant to which practice the correspondence will be deposited with Golden State Overnight this same day in the ordinary course of business. I caused to be served the following document(s): DARRYL COTTON'S OPPOSITION TO LARRY GERACI'S DEMURRER TO THE SECOND AMENDED CROSS-COMPLAINT, by placing a copy thereof in a separate envelope for each addressee listed as follows:



1 Michael R. Weinstein, Esq.  
2 Scott H. Toothacre, Esq.  
3 Ferris & Britton  
4 A Professional Corporation  
5 501 West Broadway, Suite 1450  
6 San Diego, California 92101  
7 Telephone: (619) 233-3131  
8 Facsimile: (619) 232-9316  
9 Email: mweinstein@ferrisbritton.com  
10 stoothacre@ferrisbritton.com  
11

ATTORNEYS FOR PLAINTIFF AND  
CROSS-DEFENDANT LARRY GERACI,  
AND CROSS-DEFENDANT REBECCA  
BERRY

12 I then sealed the envelope(s) and, with the postage thereon fully prepaid, either  
13 deposited it/each Golden State Overnight or placed it/each for collection and mailing on  
14 October 23, 2017, at San Diego, California, following ordinary business practices.  
15

16 I declare under penalty of perjury under the laws of the State of California that the  
17 foregoing is true and correct.  
18

19 Executed on October 23, 2017.

20  
21  
22  
23  
24  
25  
26  
27  
28  
  
Alexandria M. Quintt

2403.004/proof.amq

FERRIS & BRITTON  
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Michael R. Weinstein (SBN 106464)  
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Attorneys for Plaintiff and Cross-Defendant  
LARRY GERACI

**SUPERIOR COURT OF CALIFORNIA**  
**COUNTY OF SAN DIEGO, CENTRAL DIVISION**

LARRY GERACI, an individual,

Plaintiff,

v.

DARRYL COTTON, an individual; and  
DOES 1 through 10, inclusive,

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

v.

LARRY GERACI, an individual, REBECCA  
BERRY, an individual, and DOES 1  
THROUGH 10, INCLUSIVE,

Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel Wohlfeil

**REPLY MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT OF  
CROSS-DEFENDANT LARRY GERACI'S  
DEMURRER TO SECOND AMENDED  
CROSS-COMPLAINT BY DARRYL  
COTTON**

**[IMAGED FILE]**

**DATE: November 3, 2017**  
**TIME: 9:00 a.m.**  
**DEPT: C-73**

**Complaint Filed: March 21, 2017**  
**Trial Date: May 11, 2018**

Plaintiff and Cross-Defendant LARRY GERACI (hereafter "Geraci" or "Plaintiff") respectfully submits these reply points and authorities in support of his demurrer to Defendant and Cross-Complainant DARRYL COTTON'S (hereafter "Cotton" or "Cross-Complainant") Second Amended Cross-Complaint filed on August 25, 2017 (hereafter "SAXC") and in response to Cotton's opposition arguments.

///

1 **I. INTRODUCTION**

2 Cotton's Opposition to Geraci's Demurrer to the Second Amended Cross-Complaint  
3 (hereinafter "Opposition") is unpersuasive as to the issues raised in the Demurrer.

4 Contrary to the allegations in his prior pleadings and, in particular, the subject SAXC, Cotton  
5 argues that the agreement between the parties is comprised of the November 2, 2016 written agreement  
6 (hereafter "Written Agreement") and certain November emails (hereafter "November Emails") which  
7 were *incorporated* into that document and together *evidence* the basic terms of the agreement.  
8 (Opposition, 2:17-23.). Cotton's argument fails for a number of reasons: 1) the emails were not  
9 integrated into the Written Agreement; 2) even if the November Emails were integrated into the Written  
10 Agreement, they are not signed by Geraci, and therefore are barred by the statute of frauds; 3) the  
11 November Emails do not in and of themselves evidence an agreement between the parties; and  
12 4) Geraci has done everything required of him under the Written Agreement and therefore has not  
13 breached the contract itself nor the implied covenant of good faith and fair dealing.

14 As to Cotton's causes of action for intentional and negligent misrepresentation and false  
15 promise, Cotton cannot overcome his own admissions in his pleadings that he was hesitant and  
16 understandably concerned, and despite his hesitation, concerns, and reservations he agreed to Geraci's  
17 terms. (SAXC ¶ 17.) Given these admissions, Cotton has failed to allege reasonable and justifiable  
18 reliance. At a minimum, he has not pleaded facts which would lead one to conclude he acted in  
19 reasonable and justifiable reliance on any statements made by Geraci.

20 Finally, Cotton argues that the *Tarmann v. State Farm* (1991) 2 Cal.App.4th 153 case cited by  
21 Geraci should be disregarded because it discussed the *proof* necessary to prevail on a negligent  
22 misrepresentation claim rather than the *pleading requirements* for such a claim. That argument is  
23 erroneous. The *Tarmann* case arose on demurrer and the Court specifically stated that "[t]he specific  
24 intent requirement [of pleading intentional fraud] precludes pleading a false promise claim as a  
25 negligent misrepresentation . . . ." Cotton cannot plead intentional fraud and negligent  
26 misrepresentation.

27 ///

28 ///

1 **II. LEGAL ANALYSIS**

2 **A. No Integration of Emails with Written Contract**

3 “Under California law, parties may validly incorporate by reference into their contract the terms  
4 of another document.” (*Baker v. Aubry* (1989) 216 Cal.App.3d 1259, 1264.) The reference to the  
5 incorporated document must be clear and unequivocal and the terms of the incorporated document must  
6 be known or easily available to the contracting parties. (*Spellman v. Securities, Annuities & Ins.*  
7 *Services, Inc.* (1992) 8 Cal.App.4th 452, 457; *Chan v. Drexel Burnham Lambert, Inc.* (1986)  
8 178 Cal.App.3d 632, 641; *Baker v. Aubry, supra*, 216 Cal.App.3d at p. 1264; *Slaughter v. Bencomo*  
9 *Roofing Co.* (1994) 25 Cal.App.4th 744.)

10 Neither the actual November 2, 2016 Written Agreement signed by the parties nor the  
11 November Emails, which Cotton alleges “evidence” the basic terms of the contract, contain any  
12 language of incorporation let alone language making a clear and unequivocal reference to the allegedly  
13 incorporated document. The Written Agreement signed by the parties does not make any reference to  
14 those emails being incorporated into the Written Agreement. Therefore, the emails are not incorporated  
15 into the signed contract as a matter of law.

16 **B. Statute of Frauds**

17 Cross-Complainant argues that the SAXC “alleges the existence of a written agreement that is  
18 not subject to the Statute of Frauds.” (Opposition, 2:1-2.) This argument misses the mark.

19 A contract coming within the statute of frauds is invalid unless it is memorialized by a writing  
20 subscribed by the party to be charged or by the party’s agent. (Civ. Code, § 1624.) And it is clear that  
21 an agreement for the sale and purchase of real property comes within the statute of frauds. (Civ. Code,  
22 § 1624(a)(3).) Cotton’s claims alleged in the SAXC unquestionably arises out of an agreement  
23 regarding the sale and purchase of real property.

24 Cross-Complainant further argues that the parties executed an ambiguous document (the Written  
25 Agreement) and exchanged emails (the November Emails) which were *incorporated* into that  
26 document. Cross-Complainant asserts summarily that the Written Agreement and November Emails  
27 “combine to *evidence* the following basic terms of agreement, all as alleged in the SAXC.”  
28 (Opposition, 2:22-23, emphasis added.) This argument also misses the mark.

1 First, the terms and conditions of the Written Agreement, a one-page document which is attached  
2 to both the underlying Complaint and the SAXC, are clear and unambiguous.

3 Cotton clearly alleges in all of his prior cross-complaints, including the instant SAXC, that "[o]n  
4 November 2, 2016, Geraci and Cotton met at Geraci's office ... [and] the parties reached an agreement  
5 on the material terms for the sale of the Property." (SAXC ¶ 13.) At that November 2, 2016 meeting  
6 the parties executed the Written Agreement, which states the following material terms and conditions:

7 Darryl Cotton has agreed to sell the property located at 6176 Federal Blvd, CA  
8 for a sum of \$800,000.00 to Larry Geraci or assignee on the approval of a  
Marijuana Dispensary. (CUP for a dispensary)

9 Ten Thousand dollars (cash) has been given in good faith earnest money "to be  
10 applied to the sales price of \$800,000.00 and to remain in effect until license is  
11 approved. Darryl Cotton has agreed not to enter into any other contacts on this  
property.

12 (SAXC ¶ 18.) These terms and conditions could not be more clear and unambiguous.

13 Cotton goes on to attempt to allege an oral agreement, or a partly written and partly oral  
14 agreement, entered into on that November 2, 2016, date with the alleged oral terms and conditions  
15 adding to and/or varying from the terms set forth in the writing in the Written Agreement. Those  
16 allegations cannot, as a matter of law, survive the Statute of Frauds.

17 The Written Agreement is the controlling evidence under the statute of frauds. Cotton alleges,  
18 based on extrinsic evidence, that the actual agreement between the parties contains material terms and  
19 conditions in addition to those in the written agreement as well as a term (a \$50,000 deposit rather than  
20 the \$10,000 deposit stated in the written agreement) that expressly conflicts with a term of the  
21 November 2, 2016 agreement. However, such a claim cannot stand as extrinsic evidence cannot be  
22 employed to prove an agreement at odds with the terms of the written memorandum. (*Beazell v.*  
23 *Schrader*, (1963) 59 Cal.2d 577.) Cotton's *argument* that the \$10,000 deposit term in the Written  
24 Agreement is ambiguous and can be reconciled with his allegation of an agreement for a \$50,000  
25 deposit is absurd. Nowhere in his allegations are facts from which it can be inferred that they are  
26 anything except conflicting and contradictory terms.

27 Second, Cross-Complainant asserts that the November Emails "... are subscribed to by Geraci  
28 and are therefore outside the purview of the statute of frauds." (Opposition, 4:12-13.) Apparently,

1 Cross-Complainant is arguing that the signature block at the bottom of the emails containing Geraci's  
2 name is tantamount to a signed agreement which would satisfy the statute of frauds, i.e., some sort of  
3 electronic signature within the meaning of Uniform Electronic Transactions Act ("UETA"), Civil Code  
4 section 1633.7. Cross-Complainant is mistaken.

5 Civil Code section 1633.7(a) provides:

- 6 (a) A record or signature may not be denied legal effect of enforceability solely  
7 because it is in electronic form.  
8 (b) A contract may not be denied legal effect or enforceability solely because an  
9 electronic record was used in its formation.  
10 (c) If a law requires a record to be in writing, an electronic record satisfied the law.  
11 (d) If a law requires a signature, an electronic signature satisfies the law."

12 "An electronic record or electronic signature is attributable to a person if it was the act of the  
13 person. The act of the person may be shown in any manner . . ." (Civ. Code, § 1633.9(a); see also *Ni v.*  
14 *Slocum* (2011) 196 Cal.App.4th 1636, 1647 ["the Legislature has, through these provisions, expressed  
15 general approval of the use of electronic signature in commercial and governmental transactions"].)

16 Civil Code section 1633.2(h) defines an electronic signature as "an electronic sound, symbol, or  
17 process attached to or logically associated with an electronic record and executed or adopted by a  
18 person with the intent to sign the electronic record." UETA applies, however, only when the parties  
19 *consent to conduct the transaction by electronic means.* (Civ. Code, § 1633.5(b).) "Whether the  
20 parties agree to conduct a transaction by electronic means is determined from the context and  
21 surrounding circumstances, including the parties' conduct . . ." (*Ibid.*) "A party that agrees to conduct  
22 a transaction by electronic means may refuse to conduct other transactions by electronic means . . ."  
(Civ. Code, § 1633.5(c).)

23 However, while attributing the name on an e-mail to a particular person and determining that  
24 the printed name is "[t]he act of [this] person" is a necessary prerequisite to considering it a valid  
25 signature, it is insufficient, by itself, to establish that it is an "electronic signature." (Civ. Code,  
26 § 1633.9(a).) Subdivision (h) of section 1633.2 states that "[e]lectronic signature means an electronic  
27 sound, symbol, or process attached to or logically associated with an electronic record and *executed or*  
28 *adopted by a person with the intent to sign the electronic record.*" (Emphasis added. See also Cal.  
Civ. Jury Inst. No. 380 [party suing to enforce an agreement formalized by electronic means must

1 prove “based on the context and surrounding circumstances, including the conduct of the parties, that  
2 the parties agreed to use [e.g., e-mail] to formalize their agreement”). By Cross-Complainant’s own  
3 allegations, that was not the case. Rather, cotton alleges the parties intended to finalize the entire  
4 agreement in a formal, signed agreement, not via emails. And he alleges that never happened because  
5 Geraci refused to include in the Written Agreement the additional and varying terms and conditions  
6 agreed to orally on November 2, 2016.

7 “Whether the parties agree to conduct a transaction by electronic means is determined from the  
8 context and surrounding circumstances, including the parties’ conduct . . .” (Civ. Code, § 1633.5(b).)  
9 The absence of an explicit agreement to conduct the transaction by electronic means is not, by itself,  
10 determinative, however, it is a relevant factor to consider. (See *JBB Investment Partners, LTD v. Fair*  
11 (2014) 232 Cal.App.4th 974.

12 There is no allegation that there was an express agreement between the parties to conduct  
13 negotiations electronically and be bound by electronic signatures. Nothing contained within the emails  
14 supports a conclusion that the parties agreed that Geraci’s printed name at the bottom of emails was  
15 intended to be a legally binding signature. Nor does anything in the November Email exchange  
16 indicate that the parties agreed to conduct a transaction by electronic means. Thus, the emails do not  
17 amount to an electronic signature under the UETA, and if they are part of the agreement, they violate  
18 the statute of frauds.

19 **C. Nor is Geraci’s Signature Block on the E-Mails a “Signature” Under Law of**  
20 **Contract**

21 A typed name at the end of an e-mail is not, by itself, a signature under case law. “[I]t is a  
22 universal requirement that the statute of frauds is not satisfied unless it is proved that the name relied  
23 upon as a signature was placed on the document or adopted by the party to be charged *with the*  
24 *intention of authenticating the writing.*” (*Marks v. Walter McCarty Corp.* (1929) 33 Cal.3d 814, 820.)

25 There are no factual allegations that directly allege or from which it can be inferred that Geraci  
26 intended his brief email statements to be a legally binding contract.

27 Moreover, Cross-Complainant alleges that “[t]he parties further agreed to cooperate in good  
28 faith to properly reduce the complete agreement, including all of the agreed-upon terms [as alleged by

1 Cotton in ¶ 14], to writing.” (SAXC ¶ 13.) The SAXC makes clear this never happened. The only  
2 writing signed was the Written Agreement containing the material terms and conditions set forth  
3 therein.

4 **D. The SAXC Does Not Allege Actionable Breach**

5 The actionable breach of which Cross-Complainant complains is “He breached *at least* one  
6 material term of it, *viz.*, the promise to negotiate in good faith to deliver a proposed final agreement, the  
7 promise to deliver a 10 percent interest in the property, and failing to pay the amounts due for the  
8 50,000.00 deposit. (SAXC, p. 11. ¶ 36.)” (Opposition, 6:10-12). Cross-Complainant goes on to assert  
9 that “Without question, the SAXC alleges just such a breach, namely, that Geraci intentionally delayed  
10 further negotiations, that Geraci failed to deliver purchase documents, and that Geraci failed to full pay  
11 the agreed-upon \$50,000 deposit. (SAXC, p. 11, ¶36.)” (Opposition, 6:21-24.)

12 The flaw in Cross-Complainant’s reasoning is that none of these alleged obligations were  
13 contained within the legally binding, signed written contract. Rather, these are terms and conditions  
14 that Cross-Complainant would like to have added to the legally binding, signed written contract.  
15 Plaintiff has performed everything required of him so far under the Written Agreement and Cross-  
16 Complainant cannot and has not alleged otherwise.

17 **E. Cotton Cannot Overcome His Own Admissions That He Acted, Not on Geraci’s**  
18 **Representations, But In Spite of His Hesitations and Concerns Over Geraci’s**  
**Representations – Hence No Reasonable or Justifiable Reliance**

19 As to Cotton’s causes of action for intentional and negligent misrepresentation and false  
20 promise, Cotton cannot overcome his own admissions in his pleadings that he was hesitant,  
21 understandably concerned and despite his hesitation, concerns and reservations he agreed to Geraci’s  
22 terms. (SAXC ¶ 17.) Given these admissions, Cotton has failed to allege reasonable and justified  
23 reliance. At a minimum he has not pleaded facts which would lead one to conclude he acted in  
24 reasonable and justified reliance on any statements made by Geraci.

25 **F. Cotton Alleges that Geraci Made Numerous Contemporaneous Representations of**  
26 **Fact that Geraci Had No Reasonable Ground for Believing True – This Allegations**  
27 **Are Belied by the Fact That They Occurred After the Written Agreement Was**  
**Signed.**

28 Cotton argues that Geraci made many contemporaneous representations such as “[o]n multiple



1 occasions, Geraci represented to Cotton that *Geraci had not yet filed* a CUP application with respect to  
2 the Property when [in reality] the CUP application had already been filed” and that “[o]n multiple  
3 occasions Geraci represented to Cotton that the preliminary work of preparing a *CUP application was*  
4 *merely underway, when, in fact, the CUP application had already been filed.*” (SAXC, p. 14, ¶ 45(d)-  
5 (e) [emphasis added.])” (Opposition, 10:15-21.)

6 With regard to each of these alleged misrepresentations, they all occurred after the Written  
7 Agreement was signed by both parties and after the November Emails, which Cotton now claims are  
8 part of the agreement between the parties “evidencing” the basic terms of the contract. As such, Cotton  
9 has failed to allege that: 1) he reasonably and justifiably relied on these “false representations” as they  
10 were not yet made; 2) that these false representations caused harm or damage; and 3) that Cotton’s  
11 justified and reasonable reliance on these false representations caused him harm or damage, all required  
12 to prove Cotton’s fraud claims. [CACI 1900, 1902, and 1903.]

13 **III. CONCLUSION**

14 For the foregoing reasons and subject to a sufficient offer of proof, Geraci’s demurrers to each  
15 of the causes of action should each be sustained without leave to amend.

16 Dated: October 27, 2017

FERRIS & BRITTON,  
A Professional Corporation

17  
18  
19 By:



Michael R. Weinstein  
Scott H. Toothacre

Attorneys for Plaintiff and Cross-Defendant  
LARRY GERACI

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7 Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and  
Cross-Defendant REBECCA BERRY

8 **SUPERIOR COURT OF CALIFORNIA**  
9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

10 LARRY GERACI, an individual,

11 Plaintiff,

12 v.

13 DARRYL COTTON, an individual; and  
14 DOES 1 through 10, inclusive,

15 Defendants.

16 DARRYL COTTON, an individual,

17 Cross-Complainant,

18 v.

19 LARRY GERACI, an individual, REBECCA  
20 BERRY, an individual, and DOES 1  
THROUGH 10, INCLUSIVE,

21 Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

**PROOF OF SERVICE BY OVERNIGHT  
DELIVERY**

**[IMAGED FILE]**

1 I, Anna K. Lizano, declare that: I am over the age of 18 years and not a party to the case; I am  
2 employed in, or am a resident of, the County of San Diego, California; and my business address is:  
3 501 West Broadway, Suite 1450, San Diego, California 92101.

4 On, October 27, 2017, I served the following document:

5 1. **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
6 **CROSS-DEFENDANT LARRY GERACI'S DEMURRER TO SECOND**  
**AMENDED CROSS-COMPLAINT BY DARRYL COTTON.**

7 **[X] OVERNIGHT DELIVERY.** I enclosed said document in an envelope or package provided by the  
8 overnight service carrier and addressed to the persons at the addresses listed in the Service List below.  
9 I placed the envelope or package for collection and overnight delivery at an office or a regularly  
10 utilized drop box of the overnight service carrier or delivered such document to a courier or driver  
11 authorized by the overnight service carrier to receive documents.

12 David S. Demian, Esq.  
13 Adam C. Witt, Esq.  
14 FINCH, THORNTON & BAIRD, LLP  
15 4747 Executive Drive, Suite 700  
16 San Diego, California 92121  
awitt@ftblaw.com  
ddemian@ftblaw.com

17 *Attorneys for Defendant and Cross-Complainant*  
18 *Darryl Cotton*

19 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
20 true and correct.

21 Dated: October 27, 2017

FERRIS & BRITTON,  
A Professional Corporation

23   
24 Anna K. Lizano

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): David S. Demian, SBN 220626 Adam C. Witt, SBN 271502 Finch, Thornton & Baird, LLP 4747 Executive Drive, Suite 700 San Diego, California 92121 TELEPHONE NO.: (858) 737-3100 FAX NO. (Optional): (858) 737-3101 E-MAIL ADDRESS (Optional): ddemian@ftblaw.com; awitt@ftblaw.com ATTORNEY FOR (Name): Defendant and Cross-Complainant Darryl Cotton	FOR COURT USE ONLY
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO</b> STREET ADDRESS: 330 W. Broadway MAILING ADDRESS: CITY AND ZIP CODE: San Diego, California 92101 BRANCH NAME: Central Division	
PLAINTIFF/PETITIONER: Larry Geraci DEFENDANT/RESPONDENT: Darryl Cotton, et al.	
<b>NOTICE OF ENTRY OF JUDGMENT OR ORDER</b>  (Check one): <input checked="" type="checkbox"/> <b>UNLIMITED CASE</b> (Amount demanded exceeded \$25,000) <input type="checkbox"/> <b>LIMITED CASE</b> (Amount demanded was \$25,000 or less)	CASE NUMBER: 37-2017-00010073-CU-BC-CTL [IMAGED FILE]

## TO ALL PARTIES :

1. A judgment, decree, or order was entered in this action on (date): November 6, 2017
2. A copy of the judgment, decree, or order is attached to this notice.

Date: November 9, 2017

David S. Demian

(TYPE OR PRINT NAME OF ☒ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)


(SIGNATURE)

PLAINTIFF/PETITIONER: Larry Geraci  
 DEFENDANT/RESPONDENT: Darryl Cotton, et al.

CASE NUMBER:  
 37-2017-00010073-CU-BC-CTL

**PROOF OF SERVICE BY FIRST-CLASS MAIL  
 NOTICE OF ENTRY OF JUDGMENT OR ORDER**

*(NOTE: You cannot serve the Notice of Entry of Judgment or Order if you are a party in the action. The person who served the notice must complete this proof of service.)*

1. I am at least 18 years old and not a party to this action. I am a resident of or employed in the county where the mailing took place, and my residence or business address is *(specify)*:  
 4747 Executive Drive, Suite 700, San Diego, California 92121
  
  2. I served a copy of the *Notice of Entry of Judgment or Order* by enclosing it in a sealed envelope with postage fully prepaid and *(check one)*:
    - a. ☐ deposited the sealed envelope with the United States Postal Service.
    - b. ☒ placed the sealed envelope for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.
  
  3. The *Notice of Entry of Judgment or Order* was mailed:
    - a. on *(date)*: November 9, 2017
    - b. from *(city and state)*: San Diego, California
  
  4. The envelope was addressed and mailed as follows:
 

<ol style="list-style-type: none"> <li>a. Name of person served:            SEE ATTACHED SERVICE LIST.</li> <li>Street address:</li> <li>City:</li> <li>State and zip code:</li> </ol>	<ol style="list-style-type: none"> <li>c. Name of person served:</li> <li>Street address:</li> <li>City:</li> <li>State and zip code:</li> </ol>
<ol style="list-style-type: none"> <li>b. Name of person served:</li> <li>Street address:</li> <li>City:</li> <li>State and zip code:</li> </ol>	<ol style="list-style-type: none"> <li>d. Name of person served:</li> <li>Street address:</li> <li>City:</li> <li>State and zip code:</li> </ol>
- ☒ Names and addresses of additional persons served are attached. *(You may use form POS-030(P).)*

5. Number of pages attached 1.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: November 9, 2017

Alexandria M. Quindt

(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

SERVICE LIST

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Scott H. Toothacre, Esq.  
Ferris & Britton  
A Professional Corporation  
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ATTORNEYS FOR PLAINTIFF AND  
CROSS-DEFENDANT LARRY GERACI,  
AND CROSS-DEFENDANT REBECCA  
BERRY

## **Exhibit 1**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF SAN DIEGO  
CENTRAL

MINUTE ORDER

DATE: 11/06/2017

TIME: 03:04:00 PM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Juanita Cerda

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: 37-2017-00010073-CU-BC-CTL CASE INIT.DATE: 03/21/2017

CASE TITLE: **Larry Geraci vs Darryl Cotton [Imaged]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

---

**APPEARANCES**

---

After entertaining the arguments of counsel and taking the matter under submission on 11/3/17, the Court confirms the tentative ruling overruling the general demurrer to causes of action 1-4 in the Second Amended Cross-Complaint.

---

**Tentative (as confirmed by the Court)**

The general Demurrer (ROA # 52) of Plaintiff and Cross-Defendant LARRY GERACI ("Cross-Defendant" or "Geraci") to causes of action 1 - 4 in the Second Amended Cross-Complaint ("SAC-C") filed on August 25, 2017, by Defendant and Cross- complainant DARRYL COTTON ("Cotton" or "Cross-Complainant"), is **OVERRULED**.

Cross-Defendant's Answer to the SAC-C must be filed and served within twenty (20) days of this hearing.

**1st COA: BREACH OF CONTRACT**

Cross-Defendant argues that the written memorandum is contradicted by the alleged oral agreement, and as a result violates the statute of frauds. Cross-Defendant argues: "In the instant case, the only writing signed by both parties is the November 2, 2016 written agreement, which explicitly provides for a \$10,000 down payment ('earnest money to be applied to the sales price'); in fact, the agreement acknowledges receipt of that down payment. Cotton is alleging that the oral agreement provided for a down payment of \$50,000, which is in direct contradiction of the written term of a \$10,000 down payment." However, this argument lacks merit because the written memorandum attached to the SAC-C is unclear. The acknowledgement as to payment of \$10,000 does not necessarily mean that the total deposit was not, in fact, \$50,000 (such that \$40,000 remained due). As alleged, there is no conflict. In addition, it is not clear whether the statute of frauds applies to an agreement to negotiate a real estate agreement in good faith.

Cross-Defendant also argues that this cause of action does not allege an actionable breach. This



argument also lacks merit. Numerous California cases have expressed the view the law provides no remedy for breach of an "agreement to agree" in the future. *Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal. App. 4th 1251, 1256. On the other hand, in an appropriate case, a party may seek to enforce a valid, enforceable contract to negotiate the terms of an agreement in good faith. *Id.* at 1257. "Persons are free to contract to do just about anything that is not illegal or immoral. Conducting negotiations to buy and sell ice cream is neither." *Id.* (footnote omitted). The SAC-C sufficiently alleges breach of an agreement to negotiate in good faith.

**2nd COA: INTENTIONAL MISREPRESENTATION****3rd COA: NEGLIGENT MISREPRESENTATION****4th COA: FALSE PROMISE**

Cross-Defendant argues that the SAC-C does not allege facts which are sufficient to establish the element of justifiable reliance because "the misrepresentations Cotton is claiming reliance upon are in direct conflict with the clear, unambiguous written agreement signed by Cotton." This argument lacks merit.

Reasonable reliance on the alleged misrepresentation is an essential element of fraud. *Wagner v. Benson* (1980) 101 Cal. App. 3d 27, 36 ("At trial, reliance may be demonstrated to be unreasonable in light of plaintiffs' intelligence and experience."). The agreement to conduct further negotiations toward a comprehensive agreement does not necessarily conflict with the very short acknowledgement of a pending sale and the receipt of "good faith earnest money." This element is sufficiently alleged, and this is an issue of fact that cannot be determined via this Demurrer.

Cross-Defendant also argues that "promises about future actions without the intent to perform simply cannot support a claim for negligent misrepresentation." An action based on a false promise is a type of intentional misrepresentation, i.e., actual fraud. *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal. App. 4th 153, 159. The specific intent requirement precludes pleading a false promise claim as a negligent misrepresentation. *Id.* Making a promise with an honest but unreasonable intent to perform is wholly different from making one with no intent to perform and, therefore, does not constitute a false promise. *Id.* On the other hand, "[w]hen a pleader is in doubt about what actually occurred or what can be established by the evidence, he or she may plead in the alternative and make inconsistent factual allegations." *Edmon & Karnow, Cal. Prac. Guide: Civ. Pro. Before Trial* (The Rutter Group 2017) at ¶ 6:242. For example: A Complaint seeking damages for fraud may properly allege both intentional misrepresentation and negligent misrepresentation. *Id.* 6:243. Each version of the facts or each legal theory should be pleaded in a separate cause of action in the Complaint. *Id.* at 6:244. This argument lacks merit because this cause of action is alleged as an alternative to the claim of false promise. Sufficient facts are alleged supporting negligent misrepresentation.

IT IS SO ORDERED

*Joel R. Wohlfeil*

Judge Joel R. Wohlfeil

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7 Attorneys for Plaintiff  
LARRY GERACI

8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

10 LARRY GERACI, an individual,

11 Plaintiff,

12 v.

13 DARRYL COTTON, an individual; and  
14 DOES 1 through 10, inclusive,

15 Defendants.

16 DARRYL COTTON, an individual,

17 Cross-Complainant,

18 v.

19 LARRY GERACI, an individual, REBECCA  
20 BERRY, an individual, and DOES 1  
THROUGH 10, INCLUSIVE,

21 Cross-Defendants.  
22

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil  
Dept.: C-73

**CROSS-DEFENDANT LARRY GERACI'S  
ANSWER TO CROSS COMPLAINANT  
DARRYL COTTON'S UNVERIFIED  
SECOND AMENDED CROSS-  
COMPLAINT**

**[IMAGED FILE]**

Filed: March 21, 2017  
Trial Date: May 11, 2018

23 Cross-Defendant LARRY GERACI answers Cross-Complainant DARRYL COTTON's  
24 unverified Second Amended Cross-Complaint, dated August 25, 2017, as follows:

25 **GENERAL DENIAL**

26 Under the provisions of section 431.30 of the California Code of Civil Procedure, this  
27 answering Cross-Defendant denies, generally and specifically, each and every and all allegations in the  
28 Second Amended Cross-Complaint, and the whole thereof, including each and every purported cause of

1 action contained therein, and denies that Cross-Complainant has sustained damages as alleged by  
2 reason of any alleged act, breach, or omission on the party of this answering Cross-Defendant.

3 **AFFIRMATIVE DEFENSES**

4 For a further and separate answer to the Second Amended Cross-Complaint, and by way of  
5 affirmative defenses, this answering Cross-Defendant alleges as follows:

6 **FIRST AFFIRMATIVE DEFENSE**

7 **(Failure to State a Cause of Action)**

8 Each of Cross-Complainant's purported causes of action against this answering Cross-  
9 Defendant fails to state facts sufficient to constitute a cause of action against this answering Cross-  
10 Defendant.

11 **SECOND AFFIRMATIVE DEFENSE**

12 **(Statute of Frauds)**

13 Cross-Complainant's purported first cause of action for breach of contract is barred by the  
14 Statute of Frauds (Civ. Code §1624(a)(3).)

15 **THIRD AFFIRMATIVE DEFENSE**

16 **(Failure to State a Cause of Action for Breach of an Agreement to Negotiate)**

17 Cross-Complainant's purported first cause of action for breach of contract, to the extent it  
18 purports to state a cause of action for breach of an agreement to negotiate, fails to allege facts sufficient  
19 to state such a claim under *Copeland v. Baskin Robbins USA*, 96 Cal.App.4th 1251 (2002).

20 **FOURTH AFFIRMATIVE DEFENSE**

21 **(Waiver)**

22 Cross-Complainant's purported second cause of action for intentional misrepresentation is  
23 barred by the doctrine of waiver in that Cross-Complainant has accepted a substantial benefit in the  
24 form of the efforts and substantial expense undertaken by Cross-Defendants to apply for and obtain  
25 approval of a Conditional Use Permit.

26 **FIFTH AFFIRMATIVE DEFENSE**

27 **(Reservation of Right to Assert Further Defense)**

28 This answering Cross-Defendant currently has insufficient information upon which to form a

1 belief as to the existence of additional and as yet unstated affirmative defenses. This answering Cross-  
2 Defendant reserves the right to assert additional affirmative defenses in the event discovery discloses  
3 the existence of said affirmative defenses.


4 **WHEREFORE**, Cross- Defendant LARRY GERACI prays as follows:

5 1. That the Second Amended Cross-Complaint be dismissed and Cross-Complainant take  
6 nothing against this answering Cross-Defendant; and

7 2. Such other and further relief as the Court may deem just and proper.

8 Dated: November 20, 2017

FERRIS & BRITTON,  
A Professional Corporation

9  
10 By:   
11 Michael R. Weinstein  
12 Scott H. Toothacre  
13 Attorneys for Plaintiff  
14 LARRY GERACI  
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7 Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and  
Cross-Defendant REBECCA BERRY

8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

10 LARRY GERACI, an individual,

11 Plaintiff,

12 v.

13 DARRYL COTTON, an individual; and  
14 DOES 1 through 10, inclusive,

15 Defendants.

16 DARRYL COTTON, an individual,

17 Cross-Complainant,

18 v.

19 LARRY GERACI, an individual, REBECCA  
20 BERRY, an individual, and DOES 1  
THROUGH 10, INCLUSIVE,

21 Cross-Defendants.  
22  
23  
24  
25  
26  
27  
28

Case No. 37-2017-00010073-CU-BC-CTL

**PROOF OF SERVICE BY MAIL**

**[IMAGED FILE]**

1 I, Anna K. Lizano, declare that: I am over the age of 18 years and not a party to the case; I am  
2 employed in, or am a resident of, the County of San Diego, California; and my business address is:  
3 501 West Broadway, Suite 1450, San Diego, California 92101.

4 On, November 20, 2017, I served the following document:

5 1. **CROSS-DEFENDANT LARRY GERACI'S ANSWER TO CROSS**  
6 **COMPLAINANT DARRYL COTTON'S UNVERIFIED SECOND AMENDED**  
7 **CROSS-COMPLAINT.**

8 **[X] MAIL.** By placing a true copy of each document in a separate envelope addressed to each  
9 addressee below, respectively, and then sealed each envelope and, with postage thereon fully prepaid, I  
10 placed each for deposit in the United States Postal Service, this same day, at my business address  
11 shown above, following ordinary business practices:

12 David S. Demian, Esq.  
13 Adam C. Witt, Esq.  
14 FINCH, THORNTON & BAIRD, LLP  
15 4747 Executive Drive, Suite 700  
16 San Diego, California 92121  
17 awitt@ftblaw.com  
18 ddemian@ftblaw.com

19 *Attorneys for Defendant and Cross-Complainant*  
20 *Darryl Cotton*

21 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
22 true and correct.

23 Dated: November 20, 2017

FERRIS & BRITTON,  
A Professional Corporation

24   
25 Anna K. Lizano  
26  
27  
28

1 FERRIS & BRITTON  
2 A Professional Corporation  
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11 Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and  
12 Cross-Defendant REBECCA BERRY

13 **SUPERIOR COURT OF CALIFORNIA**  
14 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

15 LARRY GERACI, an individual,

16 Plaintiff,

17 v.

18 DARRYL COTTON, an individual; and  
19 DOES 1 through 10, inclusive,

20 Defendants.

21 DARRYL COTTON, an individual,

22 Cross-Complainant,

23 v.

24 LARRY GERACI, an individual, REBECCA  
25 BERRY, an individual, and DOES 1  
26 THROUGH 10, INCLUSIVE,

27 Cross-Defendants.

**FILED**  
Clerk of the Superior Court

DEC -7 2017

By: J. CERDA

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil  
Dept.: C-73

**PLAINTIFF AND CROSS-DEFENDANT,  
LARRY GERACI, AND CROSS-  
DEFENDANT, REBECCA BERRY,  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO EX  
PARTE APPLICATION FOR A  
TEMPORARY RESTRAINING ORDER  
AND ORDER TO SHOW CAUSE RE  
PRELIMINARY INJUNCTION**

**[IMAGED FILE]**

**DATE: December 7, 2017**  
**TIME: 8:30 a.m.**  
**DEPT: C-73**

Complaint Filed: March 21, 2017  
Trial Date: May 11, 2018

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1 Plaintiff and Cross-Defendant, LARRY GERACI (hereafter "Geraci"), and Cross-Defendant,  
2 REBECCA BERRY (hereafter "Berry"), submit these points and authorities in opposition to the ex  
3 parte application filed by Defendant and Cross-Complainant, DARRYL COTTON (hereafter "Cotton")  
4 for issuance of a temporary restraining order and order to show cause re preliminary injunction.

5 **I. INTRODUCTION**

6 This civil action has been pending since March 21, 2017. Discovery is ongoing with  
7 depositions of all the parties—Darryl Cotton, Rebecca Berry, and Larry Geraci—scheduled to be taken  
8 next week. Trial is May 11, 2018.

9 On October 6, 2017, after this action had been pending for more than six (6) months, Defendant  
10 Cotton filed a related action, a Petition for Writ of Mandate (Case No. 37-2017-00037675) (the "Writ  
11 of Mandate Action") seeking a writ of mandate *compelling the City of San Diego* to recognize him as  
12 the true applicant in place of Berry on the CUP Application submitted by Berry, as Geraci's agent, for a  
13 Conditional Use Permit for operation of a medical marijuana dispensary. Cotton thereafter filed a first  
14 ex parte application seeking, among other things, the issuance of an alternative writ of mandate  
15 *compelling the City of San Diego* to recognize Cotton as the true applicant in place of Berry in  
16 connection with the subject CUP Application. *After extensive briefing and oral argument* on  
17 October 31, 2017, and on November 2, 2017, the Hon. Judge Edward Sturgeon *denied the ex parte*  
18 *request for issuance of an alternative writ* and transferred the action to this court where the instant  
19 earlier-filed, related action was pending. A copy of the transcript of the November 2, 2017, hearing  
20 before Judge Sturgeon and of his Minute Order denying the ex parte application makes clear that the  
21 denial was on the merits rather than without prejudice. (See Exhibits 8 and 9 to the concurrently filed  
22 Opposition Notice of Lodgment.)

23 Having had his request for immediate issuance of an alternative writ denied on the merits by  
24 Judge Sturgeon, Cotton now attempts by this ex parte application to obtain a temporary restraining  
25 order ("TRO") and order to show cause ("OSC") re preliminary injunction ("PI") to effectively obtain  
26 the same relief. He asks this Court to issue a "mandatory" injunction, namely, a TRO *compelling Larry*  
27 *Geraci and Rebecca Berry* to recognize Cotton as a co-applicant on the pending CUP Application  
28 submitted by applicant Berry and that is currently being processed by the City of San Diego.

1 This ex parte application for a TRO is a thinly disguised attempt to achieve the nearly identical  
2 relief that was denied by Judge Sturgeon in connection with his first ex parte application in Cotton's  
3 related Writ of Mandate Action. This ex parte application should be denied for a whole host of reasons  
4 set forth below. There is simply no basis for the Court issuing a TRO or PI to compel Geraci and Berry  
5 to recognize him as co-applicant on the CUP Application. All of the issues central to this action, the  
6 Petition, and the relief requested herein depend on the resolution of disputed facts which must be  
7 decided by jury after trial, which is already set for May 11, 2018.

8 Section II, *supra*, sets forth the relevant Procedural Background.

9 Section III, *supra*, sets forth the numerous reasons why his court should deny this ex parte  
10 request for a TRO and OSC re PI.

## 11 **II. PROCEDURAL BACKGROUND**

12 On March 21, 2017, Larry Geraci filed the instant action against Darryl Cotton asserting causes  
13 of action for breach of contract and specific performance of a written agreement entered into between  
14 them on November 2, 2016 for the purchase and sale from Cotton to Geraci of the Property (the "Nov  
15 2nd Written Agreement"). Cotton has cross-complained against Geraci and Berry; his operative  
16 Second Amended Cross-Complaint, dated August 25, 2017, asserts damage claims against Geraci for  
17 breach of contract, intentional misrepresentation, negligent misrepresentation; false promise  
18 (promissory fraud) as well as a declaratory relief claim against both Geraci and Berry. Neither Geraci,  
19 in his complaint, nor Cotton, in his cross-complaint, seek any injunctive relief.

20 This action is already set for trial on May 11, 2018, and the central issue in that case is the  
21 validity and enforceability of that Nov 2nd Written Agreement. That is also the central issue in  
22 the related writ of mandate proceeding discussed below as it provides the basis for the  
23 Geraci/Berry's contention that Berry is an "other person who can demonstrate a legal right,  
24 interest, or entitlement to the use of the real property subject to the [CUP] application." (SDMC,  
25 §§ 112.0102, subd. (a)(3), 113.0103 [defining applicant].)

26 On October 6, 2017, Cotton filed a verified Petition for Writ of Mandate pursuant to Code of  
27 Civil Procedure section 1085 seeking an alternative writ of mandate and a peremptory writ of mandate  
28 directing respondent City of San Diego, to: (1) recognize Cotton as the sole applicant with respect to

1 Conditional Use Permit Application—Project No. 52066 (the “CUP Application”<sup>1</sup>) for a Conditional  
2 Use Permit (“CUP”) to operate a Medical Marijuana Consumer Cooperative (“MMCC”) at 6176  
3 Federal Boulevard, San Diego, California 92105 (the “Property”); and (2) process the CUP  
4 Application with Cotton as the sole applicant. In the alternative, Cotton seeks an order to show cause  
5 directed to the City of San Diego as to why the Court should not issue such a writ. In his petition  
6 Cotton named Larry Geraci and Rebecca Berry as Real Parties in Interest. The Writ of Mandate  
7 Action was assigned to the Hon. Eddie C. Sturgeon in Department C-67. Cotton did not file a Notice  
8 of Related Action advising the court that this prior-related action (*Larry Geraci v. Darryl Cotton*, Case  
9 No. 37-2017-00010073-CU-BC-CTL) was pending before Judge Wohlfeil. The writ petition is an  
10 attempt to hijack the CUP Application validly and properly submitted by Berry, on behalf of Geraci, to  
11 the City of San Diego, which application has been in process for more than twelve (12) months already  
12 and for which Geraci has already incurred expenses in excess of \$150,000. It is also an attempt to  
13 circumvent this earlier-filed instant action set for trial on May 11, 2018.

14 On October 30, 2017, Cotton filed his first ex parte application in this later-filed, Writ of  
15 Mandate Action, seeking the ex parte issuance of an alternative writ of mandate or for an order setting  
16 an expedited hearing date and briefing schedule on the petition. The ex parte hearing was set for  
17 October 31, 2017. On October 31, 2017, at the hearing, Real Parties in Interest filed their opposition  
18 papers. (Oppo NOL, Ex. 1-7; Oppo RFN, paras. 1-9.) Judge Sturgeon heard oral argument on October  
19 31 and then continued the matter until November 2, 2017, so he could consider the moving papers and  
20 opposition papers and hear additional argument. On November 2, 2017, Judge Sturgeon heard  
21 additional argument and then ruled on the merits, denying the first ex parte application. Judge Sturgeon  
22 also ordered the action transferred to Judge Wohlfeil in light of the instant, earlier-filed, related action.  
23 (See Transcript of November 2, 2017 Ex Parte Hearing, Ex. 8 to the Oppo NOL; see Minute Order  
24

25 <sup>1</sup> In his petition Cotton refers to the CUP Application as the “Cotton Application.” This misleading reference is consistent  
26 with his wrongful attempt to hijack the application. Berry was the Applicant. Cotton and Berry did not have a principal-  
27 agent relationship and Berry did not submit the CUP Application on his behalf. Rather, Berry had a principal-agent  
28 relationship *with Geraci*. Berry submitted the CUP Application on behalf of Geraci who had entered into a written  
agreement with Cotton for the purchase of the Property. Thus, Berry was and is a “person who can demonstrate a legal  
right, interest, or entitlement to the use of the real property” within the meaning of the Municipal Code. (SDMC, §§  
112.0102, subd. (a), 113.0103 [defining applicant].)

1 dated November 2, 2017, denying the ex parte application, Ex. 9 to the Oppo NOL.)

2 ----- A mere thirty-five (35) days have transpired since Judge Sturgeon denied Cotton's ex parte  
3 application, and now Cotton has filed the instant ex parte application seeking nearly identical relief, but  
4 against Geraci and Berry rather than against the City of San Diego. Cotton seeks to backdoor the ruling  
5 in the related Writ of Mandate Action for which he cannot seek reconsideration and seek a second bite  
6 at the apple in the instant, earlier-filed related action.

7 **III. OPPOSITION ARGUMENT**

8 **A. This ex parte application is a de facto motion for reconsideration of Judge**  
9 **Sturgeon's prior ruling in the related Writ of Mandate Action and should be**  
10 **denied for the reasons set forth in the opposition papers submitted therein and the**  
11 **reasons supporting Judge Sturgeon's denial of that ex parte application**

12 This ex parte application is a *de facto* motion for reconsideration under Code of Civil Procedure  
13 section 1008 of Judge Sturgeon's prior ruling only thirty-five (35) days ago denying his first ex parte  
14 application seeking the nearly identical relief in connection with Cotton's Petition for Writ of Mandate  
15 (the Related Action). The following is obvious: Cotton recognizes that he cannot again seek this relief  
16 *against the City of San Diego* in the Writ of Mandate Action because he cannot comply with the Code  
17 of Civil Procedure section 1008 requirements for motions for reconsideration in that he cannot make a  
18 showing of any new facts, circumstances, or law during the last 35 days (since the first ex parte  
19 hearing) justifying the renewed ex parte application. (*Even Zohar Construction & Remodeling, Inc., v.*  
20 *Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830.) If he sought such ex parte relief again against the  
21 City in the Writ of Mandate Action, the court would be required to deny such an ex parte application  
22 because it lacks jurisdiction to hear the renewed motion. So instead, Cotton attempts to get around this  
23 by seeking substantially similar relief against Geraci and Berry in the instant related action.

24 However, the same reasons supporting denial of that ex parte application seeking to compel *the*  
25 *City of San Diego* to recognize Cotton as the true applicant on the CUP Application also support denial  
26 of an order compelling *Geraci and Berry* to recognize Cotton as a co-applicant. Cotton cannot  
27 establish he has any right to be recognized by Geraci/Berry as a co-applicant on the CUP Application  
28 for the same reasons as were set forth in detail in the opposition papers to the first ex parte application  
in the Writ of Mandate Action, which are fully incorporated herein by reference. (See Plaintiff and

1 Cross-Defendant, Larry Geraci, and Cross-Defendant, Rebecca Berry, Request for Judicial Notice in  
2 Opposition to Ex Parte Application for Temporary Restraining Order and Order to Show Cause  
3 Regarding Preliminary Injunction dated December 7, 2017 and filed concurrently herewith (hereafter  
4 "Oppo RFJN"), paragraphs 1 thru 7; Plaintiff and Cross-Defendant, Larry Geraci, and Cross-  
5 Defendant, Rebecca Berry, Notice of Lodgment in Opposition to Ex Parte Application for Temporary  
6 Restraining Order and Order to Show Cause Regarding Preliminary Injunction dated December 7, 2017  
7 and filed concurrently herewith (hereafter "Oppo NOL"), Exhibits 1 thru 9.)

8 **B. Cotton cannot establish he is entitled to a TRO**

9 An injunction is an extraordinary remedy use to require a defendant [or cross-defendant] to take,  
10 or refrain from taking, a specified action *when necessary to protect a legal right being pursued by the*  
11 *plaintiff [or cross-complainant]*. Thus, a party seeking a temporary restraining order or preliminary  
12 injunction *must show that the relief sought in the underlying lawsuit depends, in whole or in part, on*  
13 *restraining the commission or continuance of an act that would cause irreparable injury*. Here,  
14 Cotton's operative Second Amended Cross-Complaint has not plead that he is entitled to and seeks  
15 injunctive relief on any of his claim; rather, as plead his cross-complaint seeks damages only. Cotton  
16 cannot establish that the requested TRO (and preliminary injunction) is necessary to protect the damage  
17 claims he is pursuing.

18 In addition, to be entitled to a TRO, Cotton must establish that unless the status quo is preserved  
19 he will suffer "great or irreparable injury" before the matter can by determined at a preliminary  
20 injunction hearing. (Code Civ. Proc., §§ 526(a)(2), 527(a).) Cotton has not done so.

21 First, Cotton seeks a mandatory, not prohibitory injunction. He is not asking the court *to*  
22 *preserve* the status quo pending the preliminary injunction hearing; rather, Cotton is asking the court *to*  
23 *disturb* the status quo by compelling Geraci and Berry to recognize his as a co-applicant on a CUP  
24 Application for which Berry has been the sole applicant during the more than one year that CUP  
25 Application has been submitted to and processed by the City of San Diego at which the City of San  
26 Diego. On November 2, 2016, Cotton and Geraci signed a written agreement for the sale of the  
27 subject Property to Geraci. A condition of the sale is Geraci's obtaining approval of a CUP for the  
28 operation of a medical marijuana dispensary at the Property. As Cotton, admits, Geraci, through his

1 agent and the CUP applicant, Berry, has been pursuing the CUP Application for more than a year.  
2 Geraci has incurred expenses of over \$150,000 in this endeavor. That has been the status quo for more  
3 than a year. Cotton now seeks to disturb (not preserve) the status quo on an emergency basis but can  
4 point to no emergency that necessitates this be done pending a hearing on the request for a PI.

5 Second, Cotton has made no showing of any irreparable harm that would accrue to him if the  
6 TRO is denied pending a hearing on the request for a PI. He suggests in his declaration that he needs  
7 immediate relief because he understands a dedication is supposed to occur any day now. (See Cotton  
8 Decl, para. 21.) However, that argument reflects a misunderstanding of the dedication process.  
9 Irrespective of when an "offer of dedication" is made, the City cannot and will not accept any "offer of  
10 dedication" until a public hearing, which is not imminent.

11 Third, as shown in the opposition to the first ex parte application, Cotton indicated to the City  
12 as far back as May 15, 2017, that he intended to seek relief in connection with the CUP Application.  
13 (See 5/15/17 email from Cotton to Firouzeh Tirandazi at the City, Oppo NOL, Ex. 6 (the Opposition  
14 NOL to the first ex parte application, Ex. 8 ["Please consider this record of our conversation on Friday  
15 of my attempt to have the Ownership Disclosure Statement updated *and my notice of my intent to seek*  
16 *the Court's help.*"). And then he waited five (5) months to do so by filing the writ petition and  
17 first ex parte application in the Writ of Mandate Action. Any harm Cotton claims to be at risk of  
18 suffering, if any, is a result of his failure to act in a timely fashion, not from any actions by either  
19 Geraci/Berry or the City of San Diego.

20 **C. Cotton cannot establish that he is entitled to a preliminary injunction (PI)**

21 Cotton cannot establish that he is entitled to a PI under the standards by which Court's make  
22 such determinations. When deciding whether to issue a preliminary injunction, a trial court will  
23 evaluate two interrelated factors: 1) the likelihood that the moving party will prevail on the merits at  
24 trial [*Langford v. Superior Court* (1987) 43 Cal. 3d 21, 28]; and (2) the interim harm that the plaintiff is  
25 likely to sustain if the injunction were denied, as compared to the harm that the defendant is likely to  
26 suffer if the preliminary injunction were issued [*Common Cause v. Board of Supervisors* (1989) 49 Cal.  
27 3d 432, 442]. An order for a preliminary injunction is based on a showing that it is desirable to  
28 maintain the status quo pending a determination of the merits of the litigation. (*Continental Baking Co.*

1 v. Katz (1968) 68 Cal. 2d 512, 528; Cox Cable San Diego, Inc. v. Bookspan (1987) 195 Cal. App. 3d  
2 22, 25.) The more likely it is that plaintiff will ultimately prevail; the less severe must be the harm that  
3 plaintiff alleges will occur if the injunction does not issue. (King v. Meese (1987) 43 Cal. 3d 1217.)  
4 Cotton fails on all counts.

5 First, Cotton cannot show a reasonable probability of prevailing on the merits at trial. In the  
6 related Writ of Mandate Action, Judge Sturgeon rejected the argument that the City of San Diego had a  
7 clear, ministerial duty to process the CUP Application with Cotton as the sole applicant and, thus, to  
8 replace Berry with Cotton as the applicant him or otherwise recognize him as the sole applicant on the  
9 CUP Application. Cotton's argument was and is flawed because Cotton cannot demonstrate that he  
10 was the only person who possessed the right to use the Property. The City's ordinances provide that the  
11 persons "deemed to have the authority to file an application [are]: [¶] (1) The record owner of the real  
12 property that is the subject of the permit, map, or other matter; [¶] (2) The property owner's authorized  
13 agent; or [¶] (3) Any other person who can demonstrate a legal right, interest, or entitlement to  
14 the use of the real property subject to the application." (SDMC, §§ 112.0102, subd. (a), 113.0103  
15 [defining applicant].) Thus, the Municipal Code makes clear that the "record owner" is not the only  
16 person deemed to have authority to file a CUP application.

17 It is undisputed that Cotton and Berry did *not* have a principal-agent relationship and Berry did  
18 not submit the CUP Application on his behalf. Rather, as conceded by Cotton in his moving papers,  
19 *Berry had a principal-agent relationship with Geraci*. Berry submitted the CUP Application as an  
20 agent on behalf of Geraci, who had entered into a written agreement with Cotton for the purchase of the  
21 Property. In other words, Berry can demonstrate a "legal right, interest, or entitlement to the use of the  
22 real property subject to the application" (SDMC, § 112.0102, subd. (a)(3).) Berry was and is entitled to  
23 pursue the CUP Application on behalf of her principal, Geraci, who has a contractual interest in the  
24 Property by virtue of his agreement with Cotton to purchase the Property. The municipal code does not  
25 give rise to any obligation by Geraci/Berry to recognize Cotton as a co-applicant let alone supply the  
26 basis for a clear, ministerial duty by the City to recognize Cotton as the true applicant in place of Berry.

27 Second, Cotton cannot show he is likely to sustain interim harm pending the May 11, 2018, trial  
28 if the preliminary injunction is denied that exceeds the harm that Geraci/Berry are likely to suffer if the



1 preliminary injunction is issued. In other words, the balancing of the harms does not favor Cotton.

2 ——— If the TRO (and PI) are denied, pending trial on May 11, 2018, Geraci/Berry will continue to  
3 pursue approval of the CUP Application. The evidence presented demonstrates due diligence by  
4 Geraci/Berry in pursuing approval for over a year and at an expense to date of over \$150,000. Cotton  
5 has provided no evidence that Geraci/Berry are not pursuing approval diligently or have taken any  
6 adverse, harmful action to interfere with obtaining CUP approval. And why would they? Geraci/Berry  
7 have every incentive to do so as approval of a CUP to operate a dispensary is a condition that must be  
8 satisfied for Geraci to consummate the purchase of the Property. Moreover, as all the parties concede,  
9 a CUP runs with the land. If the CUP Application submitted by Berry is ultimately approved, *then that*  
10 *will benefit, not harm, Cotton, should Cotton ultimately prevail on the merits regarding Nov 2nd*  
11 *Written Agreement that is being litigated in the instant action.* In other words, if Cotton is denied his  
12 TRO and PI but prevails at trial, he will remain owner of the Property to which the approved CUP  
13 attaches. Thus, Cotton can point to no irreparable harm he will suffer if Geraci and/or Berry are not  
14 compelled to recognize him as a co-applicant on Berry's CUP Application pending the May 11, 2018,  
15 trial.

16 On the other hand, if Cotton is granted his TRO or PI, then he has every incentive as a co-  
17 applicant to torpedo the CUP approval process so that the condition required for Geraci to  
18 acquire the Property is not satisfied and Cotton can instead sell the Property to another buyer he  
19 has lined up for a purchase price of \$2,000,000 (compared to the \$800,000 purchase price he will  
20 receive from Geraci). In other words, if Cotton is granted his TRO and/or PI but Geraci prevails at  
21 trial, Geraci's victory may be a pyrrhic one as Cotton would have a \$1.2 million reason to destroy the  
22 CUP approval process in order to free Cotton to close the more lucrative deal he has made with  
23 another buyer, Richard Martin II, for the purchase and sale of the Property.

24 **D. Cotton is blatantly attempting to substantially deprive Geraci/Berry of due process.**

25 Cotton's moving papers are 129 pages, including exhibits. (The moving papers for his  
26 concurrently filed ex parte application in the Writ of Mandate Action exceed 200 pages, including  
27 exhibits.) The Register of Actions reveals that Cotton scheduled an ex parte hearing in the Writ of  
28 Mandate Action for November 16, then rescheduled it for November 21, rescheduled it for November

22, and rescheduled it again for December 7. Yet notice that Cotton was going to seek this ex parte relief for a TRO and OSC re Preliminary Injunction in the instant action was not given by Cotton's counsel to Geraci/Berry's counsel until the last possible moment- namely, by email at 7:19 p.m. the evening of December 5. That notice gave generic notice that the ex parte application would seek a TRO and OSC but it did not state the precise relief being sought- in other words, it did not state what actions by Geraci and/or Cotton it was going to seek to restrain or enjoin.<sup>2</sup> The precise relief to be sought was not known until the ex parte moving papers were served at 10:47 a.m. yesterday, December 6.

California Rules of Court, rule 3.1206, requires service of the moving papers at the "first reasonable opportunity." Cotton has known he was going to bring these ex parte applications for many weeks yet Cotton did not give notice to the last possible minute of the precise relief that would be requested or the basis for that relief and did not serve moving papers until it was strategically advantageous, and clearly not at his "first reasonable opportunity." It is fair to say this was all done to disadvantage Plaintiff/Cross-Defendants in preparing a substantive opposition.

#### IV. CONCLUSION

For the foregoing reasons this Court should deny Cotton's ex parte attempt to obtain the requested relief—a TRO compelling Geraci and Berry to recognize Cotton as a co-applicant. Moreover, it is worth repeating that, as conceded by Cotton, a CUP runs with the land. If the CUP Application submitted by Berry is ultimately approved, *then that will benefit, not harm, Cotton, should Cotton ultimately prevail on the merits regarding Nov 2nd Written Agreement that is being litigated in the instant lawsuit set for trial on May 11, 2018.* What Cotton really seeks by this ex parte application is a TRO (and later a PI) that will enable him to prevent Geraci/Berry from obtaining approval of a CUP and thereby prevent satisfaction of the condition precedent to Geraci acquiring the Property from

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<sup>2</sup> California Rules of Court, rule 3.1203 requires notice by 10 a.m. the day before the hearing, so Petitioner gave notice a mere "23 minutes" before the deadline.

1 Cotton, which will free up Cotton to close the more lucrative deal he has made with another buyer,  
2 Richard Martin II, for the purchase and sale of the Property for a purchase price of \$2 million.  
3

4 Dated: December 7, 2017

FERRIS & BRITTON,  
A Professional Corporation

6  
7 By: Michael R. Weinstein  
8 Michael R. Weinstein  
9 Scott H. Toothacre  
10 Attorneys for  
11 Plaintiff and Cross-Defendant LARRY GERACI and  
12 Cross-Defendant REBECCA BERRY  
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7 Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and  
Cross-Defendant REBECCA BERRY

**FILED**  
Clerk of the Superior Court

DEC -7 2017

By: J. CERDA

8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

10 LARRY GERACI, an individual,

11 Plaintiff,

12 v.

13 DARRYL COTTON, an individual; and  
14 DOES 1 through 10, inclusive,

15 Defendants.

16 DARRYL COTTON, an individual,

17 Cross-Complainant,

18 v.

19 LARRY GERACI, an individual, REBECCA  
20 BERRY, an individual, and DOES 1  
THROUGH 10, INCLUSIVE,

21 Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil

**PLAINTIFF AND CROSS-DEFENDANT,  
LARRY GERACI, AND CROSS-  
DEFENDANT, REBECCA BERRY,  
REQUEST FOR JUDICIAL NOTICE IN  
OPPOSITION TO EX PARTE  
APPLICATION FOR A TEMPORARY  
RESTRAINING ORDER AND ORDER TO  
SHOW CAUSE RE PRELIMINARY  
INJUNCTION**

**[IMAGED FILE]**

**DATE:** December 7, 2017  
**TIME:** 8:30 a.m.  
**DEPT:** C-73

Complaint Filed: March 21, 2017  
Trial Date: May 11, 2018

1 Plaintiff and Cross-Defendant, LARRY GERACI, and Cross-Defendant, REBECCA BERRY,  
2 hereby request that the court take judicial notice under the provisions of Evidence Code sections 451  
3 and/or 452 of the following pleadings previously filed in the related action, *Darryl Cotton v. City of*  
4 *San Diego, et al.*, San Diego Superior Court Case No. 37-2017-00037675-CU-WM-CTL:

5 1. Real Parties in Interest, Larry Geraci and Rebecca Berry, Memorandum of Points and  
6 Authorities in Opposition to Ex Parte Application for Issuance of an Alternative Writ of Mandate or for  
7 an Order Setting an Expedited Hearing and Briefing Schedule, filed October 31, 2017 (Dkt. Entry  
8 No. 17).

9 2. Declaration of Larry Geraci in Support of Opposition to Ex Parte Application for  
10 Issuance of an Alternative Writ of Mandate or for an Order Setting an Expedited Hearing and Briefing  
11 Schedule, filed October 31, 2017 (Dkt. Entry No. 17).

12 3. Declaration of Abhay Schweitzer in Support of Opposition to Ex Parte Application for  
13 Issuance of an Alternative Writ of Mandate or for an Order Setting an Expedited Hearing and Briefing  
14 Schedule, filed October 31, 2017 (Dkt. Entry No. 17).

15 4. Declaration of Michael R. Weinstein in Support of Opposition to Ex Parte Application  
16 for Issuance of an Alternative Writ of Mandate or for an Order Setting an Expedited Hearing and  
17 Briefing Schedule, filed October 31, 2017 (Dkt. Entry No. 17).

18 5. Real Parties in Interest Larry Geraci and Rebecca Berry Request for Judicial Notice in  
19 Opposition to Ex Parte Application for Issuance of an Alternative Writ of Mandate or for an Order  
20 Setting an Expedited Hearing and Briefing Schedule, filed October 31, 2017 (Dkt. Entry No. 17).

21 6. Real Parties in Interest Larry Geraci and Rebecca Berry Notice of Lodgment in  
22 Opposition to Ex Parte Application for Issuance of an Alternative Writ of Mandate or for an Order  
23 Setting an Expedited Hearing and Briefing Schedule, filed October 31, 2017 (Dkt. Entry No. 17).

24 7. Proof of Service dated October 31, 2017, and filed November 1, 2017 (Dkt. Entry  
25 No. 25).

26 8. Transcript of Ex Parte Hearing, dated November 2, 2017, before Judge Eddie C.  
27 Sturgeon.

28 ///

1           9.     Minute Order by Judge Eddie C. Sturgeon, entered November 2, 2017, denying the ex  
2 parte request (Dkt. Entry No. 23).

3  
4 Dated: December 7, 2017

Respectfully submitted,  
FERRIS & BRITTON  
A Professional Corporation

5  
6 By: Michael R. Weinstein  
7     Michael R. Weinstein  
8     Scott H. Toothacre  
9     Attorneys for  
10    Plaintiff and Cross-Defendant LARRY GERACI and  
11    Cross-Defendant REBECCA BERRY  
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DEC 12 2017

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Cross-Defendant REBECCA BERRY

**SUPERIOR COURT OF CALIFORNIA**  
**COUNTY OF SAN DIEGO, CENTRAL DIVISION**

LARRY GERACI, an individual,

Plaintiff,

v.

DARRYL COTTON, an individual; and  
DOES 1 through 10, inclusive,

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

v.

LARRY GERACI, an individual, REBECCA  
BERRY, an individual, and DOES 1  
THROUGH 10, INCLUSIVE,

Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil

**PLAINTIFF AND CROSS-DEFENDANT,  
LARRY GERACI, AND CROSS-  
DEFENDANT, REBECCA BERRY,  
NOTICE OF LODGMENT IN  
OPPOSITION TO EX PARTE  
APPLICATION FOR A TEMPORARY  
RESTRAINING ORDER AND ORDER TO  
SHOW CAUSE RE PRELIMINARY  
INJUNCTION**

**[IMAGED FILE]**

**DATE:** December 7, 2017  
**TIME:** 8:30 a.m.  
**DEPT:** C-73

Complaint Filed: March 21, 2017  
Trial Date: May 11, 2018

1 Plaintiff and Cross-Defendant, LARRY GERACI (hereafter "Geraci"), and Cross-Defendant,  
2 REBECCA BERRY (hereafter "Berry"), hereby lodge the following documents as exhibits to this  
3 Notice of Lodgment ("NOL") in opposition to the ex parte application filed by Defendant and Cross-  
4 Complainant, DARRYL COTTON (hereafter "Cotton") for issuance of a temporary restraining order  
5 and order to show cause re preliminary injunction:

Ex. No.	Exhibit Description	Evidentiary Foundation
1.	Real Parties in Interest, Larry Geraci and Rebecca Berry, Memorandum of Points and Authorities in Opposition to Ex Parte Application for Issuance of an Alternative Writ of Mandate or for an Order Setting an Expedited Hearing and Briefing Schedule, filed October 31, 2017 (Dkt. Entry No. 17)	Request for Judicial Notice, ¶ 1
2.	Declaration of Larry Geraci in Support of Opposition to Ex Parte Application for Issuance of an Alternative Writ of Mandate or for an Order Setting an Expedited Hearing and Briefing Schedule, filed October 31, 2017 (Dkt. Entry No. 17)	Request for Judicial Notice, ¶ 2
3.	Declaration of Abhay Schweitzer in Support of Opposition to Ex Parte Application for Issuance of an Alternative Writ of Mandate or for an Order Setting an Expedited Hearing and Briefing Schedule, filed October 31, 2017 (Dkt. Entry No. 17)	Request for Judicial Notice, ¶ 3
4.	Declaration of Michael R. Weinstein in Support of Opposition to Ex Parte Application for Issuance of an Alternative Writ of Mandate or for an Order Setting an Expedited Hearing and Briefing Schedule, filed October 31, 2017 (Dkt. Entry No. 17)	Request for Judicial Notice, ¶ 4



Ex. No.	Exhibit Description	Evidentiary Foundation
5.	Real Parties in Interest Larry Geraci and Rebecca Berry Request for Judicial Notice in Opposition to Ex Parte Application for Issuance of an Alternative Writ of Mandate or for an Order Setting an Expedited Hearing and Briefing Schedule, filed October 31, 2017 (Dkt. Entry No. 17)	Request for Judicial Notice, ¶ 5
6.	Real Parties in Interest Larry Geraci and Rebecca Berry Notice of Lodgment in Opposition to Ex Parte Application for Issuance of an Alternative Writ of Mandate or for an Order Setting an Expedited Hearing and Briefing Schedule, filed October 31, 2017 (Dkt. Entry No. 17)	Request for Judicial Notice, ¶ 6
7.	Proof of Service dated October 31, 2017, and filed November 1, 2017 (Dkt. Entry No. 25)	Request for Judicial Notice, ¶ 7
8.	Transcript of Ex Parte Hearing dated November 2, 2017, before Judge Eddie C. Sturgeon	Request for Judicial Notice, ¶ 8
9.	Minute Order by Judge Eddie C. Sturgeon, entered November 2, 2017, denying the ex parte request (Dkt. Entry No. 23)	Request for Judicial Notice, ¶ 9

Dated: December 7, 2017

FERRIS & BRITTON  
A Professional Corporation

By: Michael R. Weinstein  
Michael R. Weinstein  
Scott H. Toothacre  
Attorneys for  
Plaintiff and Cross-Defendant LARRY GERACI and  
Cross-Defendant REBECCA BERRY