Jacob P. Austin [SBN 290303]
The Law Office of Jacob Austin
1455 Frazee Road, Suite 500
San Diego, CA 92108
Telephone: (619) 357-6850
Facsimile: (888) 357-8501
E-mail: JacobAustinEsq@gmail.com

Attorney for Defendant/Cross-Complainant DARRYL COTTON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, HALL OF JUSTICE

LARRY GERACI, an individual, Plaintiff, vs. DARRYL COTTON, an individual; and DOES 1 through 10, inclusive, Defendants. AND RELATED CROSS-ACTION.	Case No. 37-2017-00010073-CU-BC-CTL **VERIFIED STATEMENT OF DISQUALFICATION PURSUANT TO CCP §170.1(a)(6)(A)(iii) AND CCP §170.1(a)(6)(B)**

TO THE HONORABLE JOEL R. WOHLFEIL, JUDGE OF THE SUPERIOR COURT:

PLEASE TAKE NOTICE that this Verified Statement of Disqualification is a request by Attorney Jacob P. Austin ("Counsel") that Judge Wohlfeil recuse himself as the judicial officer presiding over the above-captioned proceeding based upon the facts and evidence set forth below (the "Statement").

/ / /

/ / /

/ / /

I. INTRODUCTION

1. Counsel brings forth this Statement pursuant to (i) California Code of Civil Procedure ("CCP") § 170.1(a)(6)(A)(iii) on the grounds that a "person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial," and (ii) CCP §170.1(a)(6)(B) on the grounds that the facts demonstrate "[b]ias or prejudice toward a lawyer in the proceeding."

2. As a threshold issue, Counsel notes that this Statement arises in part from the denial of two motions brought before Judge Wohlfeil. On August 30, 2018 Counsel filed a Petition for Writ of Mandate, Supersedeas and/or Other Appropriate Relief ("Writ Petition") for appellate review from the denial of the two motions. The Writ Petition is material to this Statement, a copy thereof is attached as Exhibit A. The supporting Exhibits to the Writ Petition are attached hereto as Exhibit B.

3. Summarily, this action arises from a real estate contract dispute between Plaintiff Larry Geraci ("Plaintiff") and defendant Darryl Cotton ("Defendant"). Both Plaintiff and Defendant admit that on November 2, 2016: (i) they reached an agreement for the sale of Defendant's real property ("Property") to Plaintiff; (ii) the sale was contingent upon Plaintiff obtaining approval from the City of San Diego ("City") of a Conditional Use Permit ("CUP") that would allow the operation of a for-profit medical marijuana outlet at the Property (the "Business"); (iii) they executed a three-sentence document that reflects Defendant received $10,000 in cash from Plaintiff (the "November Document"); and (iv) Plaintiff, within hours of the execution of the November Document and in response to a specific request by Defendant for written assurance, specifically confirmed via email that the three-sentence November Document is not the final agreement for the sale of the Property (the "Confirmation Email").

4. Plaintiff alleges the November Document is the final and completely integrated agreement for the sale of the Property.

5. Defendant alleges the November Document is a document memorializing his receipt of $10,000 in cash and that the parties reached an oral agreement for a joint venture to develop the Business at the Property (the "Joint Venture Agreement" hereinafter "JVA"). The JVA was to be reduced to writing by Plaintiff's attorney and to include, *inter alia*, a 10% equity position for him in the contemplated business.

6. In March of 2017, Plaintiff brought forth suit alleging that the November Document ***is*** the completely integrated agreement and seeking specific performance to force the sale from Defendant to himself.

7. Plaintiff has maintained throughout the course of this litigation that the Confirmation Email, that negates the entire basis of his Complaint, is barred by the parol evidence rule ("PER").

8. In April of 2018, when confronted with case law allowing the admission of the Confirmation Email and other parol evidence as proof of a fraud, Plaintiff submitted a declaration alleging *for the first time* that he sent the Confirmation Email by *mistake* and that on November 3, 2016, Defendant (i) orally disavowed the interest in the CUP that Plaintiff had promised to him in the Confirmation Email and (ii) agreed the November Document is a completely integrated agreement for the sale of the Property to Plaintiff. Plaintiff provided no explanation why he waited over a year after filing suit to allege such a material and critical factual statement.

9. It is Counsel's absolute belief, based on facts admitted to ***by*** Plaintiff, that this action is frivolous and a stereotypical malicious prosecution action. Plaintiff is seeking to fraudulently misrepresent the November Document as completely integrated agreement for his purchase of the Property in order to deprive Defendant the benefit of the parties' bargain reached on November 2, 2016 that included an equity position in the Business anticipated to be highly lucrative.

10. "Whether a contract is integrated is a question of law when the evidence of integration is not in dispute." *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 954. ***"The crucial threshold inquiry, therefore, and one for the court to decide, is whether the parties intended their written agreement to be fully integrated.*** [Citations.]" *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1510 (emphasis added).

11. Judge Wohlfeil, despite repeated oral and written requests for over a year, has **never** addressed the ***crucial threshold inquiry*** of contract integration.

12. In response to evidence and arguments presented by Defendant (while representing himself pro se) that prove the November Document is not completely integrated, Judge Wohlfeil defended Plaintiff's attorneys Michael Weinstein ("Weinstein") and Gina Austin ("Mrs. Austin") (no relation to Counsel Jacob P. Austin). Specifically, Judge Wohlfeil stated from the bench that he is

personally acquainted with Weinstein and Mrs. Austin and that he does not believe they would act unethically by filing a meritless suit.[1] Furthermore, Judge Wohlfeil stated on a separate occasion that he has known Weinstein for decades since early in their careers and that he "may have made" the statement regarding his belief about Weinstein and Mrs. Austin's inability to be unethical.

13. Pursuant to *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, had Judge Wohlfeil addressed the ***crucial threshold inquiry*** of contract integration and found that the November Document was not a completely integrated agreement because of the PER, then Weinstein and Mrs. Austin would be open to a cause of action for malicious prosecution. *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349 ("we hold that terminations based on the parol evidence rule are favorable for malicious prosecution purposes.").

14. Counsel understands that "the mere fact a judicial officer rules against a party does not show bias. [Citation.] It is a well-settled truism, however, that the ***'trial of a case should not only be fair in fact, but it should also appear to be fair***.' [Citations.]" *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1328 (emphasis added). In this case, fairness and the *appearance of fairness* will be achieved only if the entire case is reassigned to another judicial officer because on these facts, as proven below, this case should not even have to reach a jury trial. Given the facts of the case and Judge Wohlfeil's comments and rulings, it can reasonably *appear* that Judge Wohlfeil has ruled against Defendant because he (i) is seeking to unjustly use his position as a judicial officer to protect Weinstein and Mrs. Austin from a malicious prosecution action and/or (ii) has a fixed opinion that Weinstein and Mrs. Austin are incapable of being unethical to a degree that it impairs his ability to impartially weigh any facts and evidence involving their acts.

15. The undisputed facts set forth below in Section II. (Material Factual and Procedural Background) are laid out chronologically and are meant to support the following six factual findings:

a. Plaintiff is before Judge Wohlfeil as part of a demonstrably unlawful scheme to acquire the CUP at issue here. Plaintiff is prohibited from owning a CUP by numerous applicable City of San Diego and State of California laws and regulations that disqualify individuals who (i) have been sanctioned for being involved in illegal marijuana commercial businesses (ii) and for failing to comply

[1] Exhibit B, ln.6-10; p.1051, ln.25-28; p.1055

with the applicable disclosure obligations as part of the CUP application process (meant to prevent disqualified individuals from acquiring an interest in a CUP for marijuana-related operations);

b. Mrs. Austin and Rebecca Berry ("Berry"), Plaintiff's employee/agent, knowingly omitted Plaintiff's ownership in the Property and the CUP application in contravention of applicable laws and regulations;

c. The November Document is not a completely integrated agreement pursuant to the PER and the record makes it appear that Judge Wohlfeil has consistently and systemically avoided addressing the ***crucial threshold inquiry*** of contract integration which would be the case-dispositive issue;

d. Judge Wohlfeil has stated, and the record makes numerous references to, his belief that Weinstein and/or Mrs. Austin would not act unethically;

e. Some of Judge Wohlfeil's rulings are unsupported by facts or law and, in some instances, contradicted by facts and evidence both Plaintiff and Defendant admit are true; and

f. If Judge Wohlfeil were to appropriately address the issue of contract integration, pursuant to the PER, Weinstein and Mrs. Austin would be exposed to legal and financial liability for filing and/or maintaining a malicious prosecution action.

II. MATERIAL FACTUAL AND PROCEDURAL BACKGROUND

A. *Plaintiff has a history of owning/managing illegal marijuana dispensaries that disqualify him from owning a for-profit Marijuana Outlet; Judge Wohlfeil has never addressed why he allows this case to continue when on its face Plaintiff is using this action to effectuate a fraud.*

16. Plaintiff has been a named defendant and sanctioned in at least three actions by the City for owning/managing illegal marijuana dispensaries. *See City of San Diego v. The Tree Club Cooperative* Case No. 37-2014-00020897-CU-MC-CTL, *City of San Diego v. CCSquared Wellness Cooperative* Case No. 37-2015-00004430-CU-MC-CTL and, *City of San Diego v. LMJ 35th Street Property LP, et al.*, Case No. 37-2015-000000972.[2]

[2] Exhibit C, Stipulation of Judgment, Preliminary Injunction Order

17. Forms DS-190 (Affidavit for Medical Marijuana Consumer Cooperatives for Conditional Use Permit (CUP))[3] and DS-318 (Ownership Disclosure Statement)[4] are two of the forms required by the City Development Services Department as part of the application process for a CUP (the "CUP Application Forms").

18. In relevant part, Form DS-318 states: "Please list below the owner(s) and tenant(s) (if applicable) of the above referenced property. The list **must** include the names and addresses of **all** persons who have an interest in the property, recorded or otherwise, and state the type of property interest (*e.g.*, tenants who will benefit from the permit, all individuals who own the property)."[5]

19. Berry is the employee and agent of Plaintiff.[6]

20. Berry executed and submitted the CUP Application Forms for the Property to the City.[7]

21. Berry ***DID NOT*** list Plaintiff as a person owning or having an interest in the CUP and/or the Property as required.[8] Instead, she listed herself as the "Tenant/Lessee" of the Property on Form DS-318,[9] and "Owner" of the Property on Form DS-190.[10]

22. As described in Plaintiff's ***own*** submission, he admits that Berry, his agent, submitted the CUP Application Forms on his behalf:

> Berry was the Applicant. Cotton and Berry did not have a principal-agent relationship and Berry did not submit the CUP Application on his behalf. Rather, Berry had a principal-agent 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.

Exhibit D at p.6, fn.1. (emphasis in original).

23. California Bus. & Prof. Code §26057(a) states that, "The licensing authority ***shall*** deny an application if either ***the applicant***, or the premises for which a state license is applied, do not qualify for licensure under this division." (emphasis added).

---

[3] Exhibit B, p.559.
[4] Exhibit B, p.558.
[5] Exhibit B, p.558 (emphasis added).
[6] Exhibit B, p.46, ln.2-4.
[7] *Id*.
[8] Exhibit B, p.558.
[9] Exhibit B, p.559.
[10] Exhibit B, p.558.

24. Bus. & Prof. Code §26057(b) sets forth the criteria that ***mandates denial*** under Bus. & Prof. Code §26057(a).

25. "Conduct that constitutes grounds for denial of licensure under Chapter 2 (commencing with Section 480) of Division 1.5, except as otherwise specified in this section and Section 26059." Bus. & Prof. Code §26057(b)(2). Criteria under Bus. & Prof. Code §480 that disqualify Plaintiff from owning an interest include:

a. "A board may deny a license regulated by this code on the grounds that the applicant has one of the following…. ***Done any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself or herself or another, or substantially injure another***." Bus. & Prof. Code §480(a)(2) (emphasis added).

b. "A board may deny a license regulated by this code on the ground that ***the applicant knowingly made a false statement of fact that is required to be revealed in the application for the license***." Bus. & Prof. Code §480(d) (emphasis added).

c. "***Failure to provide information required by the licensing authority***." Bus. & Prof. Code §26057(b)(3) (emphasis added).

d. "The applicant, or any of its officers, directors, or owners, has been ***sanctioned*** by a licensing authority or a city, county, or city and county for ***unauthorized commercial cannabis activities***, has had a license suspended or revoked under this division in the three years immediately preceding the date the application is filed with the licensing authority." Bus. & Prof. Code §26057(b)(7) (emphasis added).

26. San Diego Municipal Code ("SDMC") §42.1501 materially states: "It is the intent of this Division to promote and protect the public health, safety, and welfare of the citizens of San Diego by allowing but strictly regulating the retail sale of marijuana at *marijuana outlets*…. ***It is further the intent of this Division to ensure that marijuana is not diverted for illegal purposes, and to limit its use to those persons authorized under state law***." (Emphasis added.)

27. Plaintiff is disqualified from having an ownership interest in the CUP for the Property because (i) his agents knowingly did not disclose his ownership interest in the CUP Application Forms;

(ii) he has been sanctioned for owning/managing illegal dispensaries; and (iii) this legal action is part of a fraudulent scheme to deprive Defendant of his Property by way of a frivolous lawsuit.

28. Plaintiff's attorney, Mrs. Austin, is handling the CUP application for the Property. Mrs. Austin is considered the premier attorney in San Diego for marijuana related CUP applications with the City of San Diego. Attached hereto as Exhibit E is an article published by the *San Diego Union Tribune* on August 10, 2018 entitled "San Diego's cannabis supply chain is falling into place, with one production business approved and 39 more on tap" stating that, of 24 manufacturing licenses available for marijuana businesses in the City of San Diego, Mrs. Austin represents six of the applicants who are at the "head of the pack."[11]

29. Attached hereto as Exhibit F is an email chain from Mrs. Austin specifically advising Plaintiff's architect that she wanted to review the CUP application for the Property before it was submitted to the City.

30. In short, the plain and clear language on the CUP Application Form required Berry to disclose Plaintiff's ownership interest in the CUP and the Property. She did not. And, Mrs. Austin, specializing in marijuana law, ***knew*** that Berry should have listed Plaintiff as an individual with an interest in the CUP and the Property.

31. Had Plaintiff submitted the CUP Application under his own name, it would have been denied by the City pursuant to the applicable state and local laws and regulations referenced above.

32. To date, Judge Wohlfeil has ***never*** addressed why he allows this action to continue when even Plaintiff has admitted to the facts above that prove he and his agents have violated numerous applicable disclosure laws and regulations. If Judge Wohlfeil addressed this issue, Mrs. Austin would be legally liable for purposefully omitting Plaintiff from the applicable disclosure requirements

/ / /

/ / /

/ / /

/ / /

[11] Exhibit E, San Diego Union Tribune, *San Diego's cannabis supply chain is falling into place, with one production business approved and 39 more on tap,* http://www.sandiegouniontribune.com/news/politics/sd-me-weed-production-20180810-story.html, August 10, 2018 last accessed September 10, 2018

B. Judge Wohlfeil has consistently refused to address the threshold and case-dispositive issue of contract integration; which, if he did, would result in this matter being adjudicated in Defendant's favor and expose Weinstein and Mrs. Austin (and others) to liability for malicious prosecution.

33. Neither Plaintiff nor Defendant dispute that on November 2, 2016 they met, reached an agreement for the sale of the Property to Plaintiff, and executed the November Document. The parties, however, dispute the terms reached and the nature of the November Document.[12]

34. On November 2, 2016 at 3:11 p.m., after the parties reached their agreement and Defendant executed the November Document, Plaintiff emailed Defendant a copy of the November Document.[13]

35. At 6:55 p.m., Defendant replied:

> Thank you for meeting today. Since we executed the Purchase Agreement in your office for the sale price of the property 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***.

Exhibit B, p.497 (emphasis added).

36. At 9:13 p.m., Plaintiff replied: "***No no problem at all***" (the "Confirmation Email"). (*Id.*)

37. For approximately five months after execution of the November Document, the parties exchanged numerous emails, texts and calls regarding various issues related to, *inter alia*, the CUP Application, drafts of the JVA for the sale of the Property and Defendant's equity position in the Business.

38. Copies of 15 email chains representing ***all*** email communications exchanged by Plaintiff and Defendant during the period October 24, 2016 to March 21, 2017 (the "Email Communications") were submitted to the Fourth District Court of Appeal as Exhibit 9 to the Petition. *See* Exhibit B, p.487-555.

[12] Exhibit B, 635-652. [ROA 47].
[13] Exhibit B, p.492-493; p.494-495.

39. Copies of ***all*** text communications exchanged by Plaintiff and Defendant during the period July 21, 2016 to May 8, 2017 (the "Text Communications") were submitted to the Fourth District Court of Appeal as Exhibit 9 to the Petition. *See* Exhibit Bp.392-421.

40. **All** the Email and Text Communications prove incontrovertibly that the parties met sometime in July of 2016, negotiated for several months thereafter and their negotiations culminated in an oral agreement on November 2, 2016 (JVA). Thereafter, as evidenced by their communications and the draft agreements Plaintiff forwarded to Defendant, the parties were working to reduce the JVA to writing until their relationship deteriorated because Plaintiff intentionally attempted to deprive Defendant of his 10% agreed-upon equity position.

41. The most notable Text and Email Communications clearly evidencing that the parties entered into the JVA and were working to reduce the JVA to writing when the relationship became hostile include the following:

42. On **February 27, 2017**, Plaintiff sent an email to Defendant stating: "Attached is the draft purchase of the property for 400k. The additional contract for the 400k should be in today and I will forward it to you as well."[14] The document attached to his email was entitled: "AGREEMENT OF PURCHASE AND SALE OF REAL PROPERTY" (the "Draft Purchase Agreement").[15] The introduction to the Draft Purchase Agreement states:

> THIS AGREEMENT OF PURCHASE AND SALE OF REAL PROPERTY ("Agreement") is made and entered into this_·_ day of _____, **2017**, by and between DARRYL COTTON, an individual resident of San Diego, CA ("Seller"), and 6176 FEDERAL BLVD TRUST dated___ **2017**, or its assignee ("Buyer").

Exhibit B, p.503 (emphasis added).

43. The Draft Purchase Agreement neither provides for nor mentions (i) the employment of Defendant by Plaintiff in any capacity as part of the transaction, or (ii) that the Draft Purchase Agreement is an amendment and/or renegotiation of an existing agreement.

[14] Exhibit B, p.501-502. [ROA 237].
[15] Exhibit B, p.503-528. [ROA 237].

44. On **March 2, 2017**, Plaintiff emailed Defendant a document entitled "SIDE AGREEMENT" (the "First Draft Side Agreement").[16] The Recitals to the Side Agreement state:

> WHEREAS, the Seller and Buyer desire to enter into a Purchase Agreement (the "Purchase Agreement"), dated of even date herewith, pursuant to which the Seller shall sell to Buyer, and Buyer shall purchase from the Seller, the property located at 6176 Federal Blvd., San Diego, California 92114 (the "Property"); and
>
> WHEREAS, the purchase price for the Property is Four Hundred Thousand Dollars ($400,000); and
>
> WHEREAS, a condition to the Purchase Agreement is that Buyer and Seller enter into this Side Agreement that addresses the terms under which Seller shall move his existing business located on the Property.

Exhibit B, p.531.

45. The First Draft Side Agreement neither provides for nor mentions (i) the employment of Defendant by Plaintiff in any capacity as part of the transaction, or (ii) that the draft purchase agreement is an amendment and/or renegotiation of an existing agreement.

46. On **March 6, 2017**, Defendant told Plaintiff that he would be attending a local cannabis event at which Mrs. Austin would be the keynote speaker. Plaintiff texted Defendant saying he could speak directly with Mrs. Austin at the event regarding revisions to the agreements: "***Gina Austin is there she has a red jacket on if you want to have a conversation with her.***"[17]

47. Defendant was not able to make the event, but Joe Hurtado ("Hurtado") – a transaction adviser whom Defendant had engaged on a contingent basis to help him sell the Property to a new buyer if Plaintiff breached the agreement – did attend.[18]

48. Hurtado spoke with Mrs. Austin, letting her know that Defendant would not be attending, and that Defendant was concerned because the First Draft Purchase Agreement he had received did not contain a provision regarding Defendant's 10% equity interest in the Business.[19]

---

[16] Exhibit B, p.529-536. [ROA 237].
[17] Exhibit B, p.421. [ROA 237].
[18] Exhibit B, p.385, ln.6-13 [ROA 237].
[19] Exhibit B, p.591, ln.8-18 [ROA 237].

49. Mrs. Austin confirmed that she was working to reduce the JVA to writing and would forward it shortly. ("My conversation with Mrs. Austin was short, clear, direct, unambiguous and with no possibility for misinterpretation. Mrs. Austin acknowledged that she was working on the drafts for Plaintiff's purchase of Mr. Cotton's Property and that no final agreement had yet been executed.").[20]

50. The next day on **March 7, 2017**, Plaintiff emailed Defendant a second draft Side Agreement (the "Second Draft Side Agreement").[21]

51. The metadata to the Second Draft Side Agreement reflects Mrs. Austin as the "creator" and "author" of the Second Draft Side agreement, and that the document was created on March 6, 2017 (the "Metadata Evidence").[22]

52. The cover email to the March 7, 2017 email Plaintiff sent to Defendant stated:

> Hi Darryl, I have not reviewed this yet but wanted you to look at it and give me your thoughts. Talking to Matt, the 10k a month might be difficult to hit until the sixth month . . . can we do 5k, and on the seventh month start 10k?

Exhibit B, p.541-542 (the "March Request Email").

53. The Recitals to the Second Draft Side Agreement state:

> WHEREAS, the Seller and Buyer have entered into a Purchase Agreement (the "Purchase Agreement"), dated as of approximate even date herewith, pursuant to which the Seller shall sell to Buyer, and Buyer shall purchase from the Seller, the property located at 6176 Federal Blvd., San Diego, California 92114 (the "Property");
>
> WHEREAS, The Buyer intends to operate a licensed medical cannabis at the property ("Business"); and
>
> WHEREAS, in conjunction with Buyer's purchase of the Property, Buyer has agreed to pay Seller $400,000.00 to reimburse and otherwise compensate Seller for Seller relocating his business located at the Property, ***and to share in certain profits of Buyer's future Business***.[23]

[20] Exhibit B, p.591, ln.19-21 [ROA 237].
[21] Exhibit B, p.543-546. [ROA 237].
[22] Exhibit B, p.329.
[23] Exhibit B, p.543-546 [ROA 237] (emphasis added).

54. The Second Draft Side Agreement provides that Defendant would receive 10% of the net profits of the Business, instead of the "10% equity position" agreed upon by the parties in the JVA and specifically confirmed by Plaintiff in the Confirmation Email. [24]

55. The Second Draft Side Agreement neither provides for nor mentions (i) the employment of Defendant by Plaintiff in any capacity as part of the transaction, or (ii) that the draft purchase agreement is an amendment and/or renegotiation of an existing agreement.

56. On **March 21, 2017**, after Plaintiff failed to respond to numerous written requests for assurance of performance – *i.e*., that he would honor the JVA and provide Defendant a "10% equity position" in the Business – Defendant terminated the JVA as a result of Plaintiff's breach.[25]

57. After terminating the JVA on March 21, 2017, Defendant entered into a written agreement for the sale of the Property with a third party (the "Third-Party Sale").[26]

58. On **March 22, 2017**, Plaintiffs' attorney, Weinstein, emailed Defendant a copy of the Complaint filed in this action the preceding day asserting causes of action for breach of contract and specific performance and alleging the November Document is the final agreement for the sale of Defendant's Property.[27]

59. Defendant filed a cross-complaint against Plaintiff and his agent/employee Rebecca Berry ("Berry"). His operative Second Amended Cross-Complaint filed on **August 25, 2017** asserts causes of action for breach of contract, intentional misrepresentation, negligent misrepresentation, false promise and declaratory relief.[28]

60. On **October 6, 2017**, Defendant filed a verified Petition for Writ of Mandate pursuant to Code of Civil Procedure §1085 seeking an alternative writ of mandate and a peremptory writ of mandate directing the City to recognize Defendant as the sole applicant with respect to Conditional Use Permit Application-Project No. 52066 the CUP on the Property (the "City Action").[29]

[24] Exhibit B, p.543-546 [ROA 237].
[25] Exhibit B, p.885 [ROA 160].
[26] Exhibit B, p.895-906 [ROA 160].
[27] Exhibit B, p.625, ln.15-17; p.626, ln.6-11. [ROA 1].
[28] Exhibit B, p.634-659 [ROA 47].
[29] Exhibit B, p.681-691.

61. The dispositive issue in the instant action and the City Action is whether the November Document is a completely integrated agreement.

62. As repeatedly noted, Judge Wohlfeil has never undertaken what should be the "***crucial threshold inquiry*** [to determine] whether the parties intended their written agreement to be fully integrated. [Citations.]" *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1510 (emphasis added).

63. Defendant has, on no less than ***six occasions***, three of which were in open court by counsel and co-counsel, requested that Judge Wohlfeil please provide his reasoning for repeatedly finding that the November Document is a completely integrated agreement throughout the course of this litigation.[30] On more than ***two occasions*** Defendant has literally begged Judge Wohlfeil in writing and orally at hearings to explain why the Confirmation Email, which Plaintiff admits he sent in a sworn declaration, does not prove the November Document is not a completely integrated agreement. Specifically, he stated "***I BEG the Court at the hearing to please articulate to me (i) which facts in the record and (ii) on what legal authority it was persuaded that I am not going to prevail on the merits on my cause of action for breach of contract.***"[31]

64. On July 13, 2018, Judge Wohlfeil denied Defendant's Motion for Judgement on the Pleadings ("MJOP"). During oral argument, Counsel repeatedly asked Judge Wohlfeil to address dispositive issue of contract integration.[32]

> **THE COURT**: Good morning to each of you two. Interesting motion particularly combined with your request for judicial notice. Is there anything else that you'd like to add?
>
> **MR. AUSTIN:** Well, I would like an explanation. So Mr. Geraci, the plaintiff in this case, he submitted the declaration admitting essentially that –

---

[30] Exhibit B, p. 22, ln. 21- p. 23, ln. 1;
Exhibit G p.4, ln.13-15 [ROA 128] MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DARRYL COTTON'S *EX PARTE* APPLICATION FOR A STAY, OR, ALTERNATIVELY JUDGEMENT ON THE PLEADINGS; Exhibit H p. 5 lines 5-7 [ROA 166] OPPOSITION TO PLAINTIFF/CROSS-DEFENDANT LARRY GERACI'S *EX PARTE* APPLICATION FOR AN ORDER SHORTENING TIME TO HEAR MOTION FOR MONETARY AND ESCALATING/TERMINATING SANCTIONS AGAINST DEFENDANT AND CROSS-COMPLAINANT, DARRYL COTTON; Exhibit B, p. 11-15.

[31] Exhibit B, p. 22, ln. 21- p. 23, ln. 1; Exhibit H p. 5 lines 5-7 [ROA 166] OPPOSITION TO PLAINTIFF/CROSS-DEFENDANT LARRY GERACI'S *EX PARTE* APPLICATION FOR AN ORDER SHORTENING TIME TO HEAR MOTION FOR MONETARY AND ESCALATING SANCTIONS

[32] Exhibit B, p.1226-1227 [ROA 253].

THE COURT: It's the "essentially" part that I don't agree with. You make those same comments in your paper. There's four separate causes of action….

THE COURT: The court wasn't persuaded that even if I were grant the request to take judicial notice of a declaration granted of a party opponent, it's still not dispositive of the entire complaint. And that's what your motion is directed to, isn't it.

MR. AUSTIN: Well –

THE COURT: – in it's entirety?

MR. AUSTIN: Because all four causes of action are premised on a breach of contract, so if there's not an integrated contract, according to plaintiff himself, I feel that all four causes of actions fail.

THE COURT: Not so sure if I agree with that entire analysis. Anything else, counsel?
MR. AUSTIN: Well, I was just wondering if you could explain to me, if you believe as a matter of law, the three-sentence contracts that plaintiff claims is an integrated contract. If you believe that to actually be a fully integrated contract.

THE COURT: You know, we've been down this road so many times, counsel. I've explained and reexplained the court's interpretation of your position. I don't know what more to say.

CO COUNSEL: Your Honor, if I may, I'm co-counsel on behalf of Mr. Cotton. ***Your Honor, the <u>only</u> thing we really want clarification in the matter whether or not the court deems the contract an integrated contract or not.***

THE COURT: Again, we've addressed that in multiple motions. I'm not going to go back over it again at this point in time.
Anything else, counsel?

CO COUNSEL: That's it.[33]

[33] Exhibit B, p. 11-15 (emphasis added).

65. This is also at least the *eighth time*[34] Judge Wohlfeil found, without explanation, that the contract was in fact completely integrated. [35]

66. The transcript demonstrates Judge Wohlfeil's exasperation with Defendant and Counsel. Ostensibly, Judge Wohlfeil's frustration arises from what he thinks is Counsel's repeated attempt to challenge an adverse ruling that he has already addressed. However, Judge Wohlfeil is mistaken, he has never addressed the threshold and case-dispositive issue of contract integration.

67. The frustration on Judge Wohlfeil's behalf is unjustified. Rather, it is Defendant who has reason to be frustrated with the adjudication of his case. Counsel does not mean to be disrespectful, but, as more fully described below, there are numerous rulings that demonstrate Judge Wohlfeil does not have a clear understanding of the simplicity of this case and that he has taken procedurally improper actions to the unjustified benefit of Plaintiff.

III. DISCUSSION

A. PLAINTIFF FILED THIS ACTION AS PART OF A FRAUDULENT SCHEME TO ACQUIRE AN INTEREST IN A MARIJUANA RELATED BUSINESS THAT HE IS PROHIBITED FROM OWNING PURSUANT TO CITY AND STATE LAW.

68. It is a matter of public record that Plaintiff has been sanctioned for owning/managing illegal dispensaries.

69. Per Plaintiff's own admissions, his agent, Berry, submitted the CUP application on the Property and omitted naming him as a party with an interest in the Property or the CUP.

70. Plaintiff is before Judge Wohlfeil alleging he is the rightful owner of the Property and the sole owner of the CUP.

---

[34] Exhibit I [ROA 72], Minute Order December 7, 2017.
Exhibit J [ROA 78], Minute Order entered December 12, 2017.
Exhibit K [ROA 129] Minute Order March 06, 2018.
Exhibit L [ROA 106] Minute Order entered January 25, 2018.
Exhibit B, p.1148-1149 [ROA 192]
Exhibit M, p. 2 ¶3 [ROA 222] Minute Order Dated April 27, 2018.
Exhibit B, p.01-02 [ROA 240].
Exhibit B, p.1227[ROA 253].

[35] It is of note that, though I have cited to only eight instances, there are other motions and hearing not referenced herein. In those other hearings and motions the same determinations are made. This would constitute ***at least*** eight instances.

71. By Plaintiff's own admission, setting aside the dispute of contract integration, he has knowingly undertaken a course of action to unlawfully acquire an undisclosed interest in a marijuana related CUP that he is prohibited from owning because of his history with illegal marijuana dispensaries. This is blatant and self-admitted fraud.

72. Judge Wohlfeil has never addressed why he is ratifying Plaintiff's scheme by allowing this case to continue when on undisputed facts, Plaintiff is perpetrating a fraud in violation numerous City of San Diego and State of California regulatory agencies.

73. Mrs. Austin is Plaintiff's attorney who is responsible for overseeing the CUP application for Plaintiff.

74. Thus, as more fully described below, a third-party could reasonably entertain the notion that Judge Wohlfeil is avoiding this issue to "protect" Mrs. Austin from the legal repercussions of violating numerous applicable disclosure laws and regulations and aiding and abetting her client in a scheme whose unlawful goal is to help her client acquire a prohibited interest in a marijuana related CUP. Alternatively, that Judge Wohlfeil believes Mrs. Austin to be ethical to a degree that he cannot impartially review the evidence he is presented with that proves otherwise.

B. PURSUANT TO THE PAROL EVIDENCE RULE THE NOVEMBER DOCUMENT IS NOT A COMPLETELY INTEGRATED AGREEMENT.

75. The issue of contract integration is dispositive in this matter. Plaintiff filed suit alleging that the November Document is the final agreement for his purchase of the Property.

76. A full detailed analysis on the issue of contract integration is described and argued in the Petition filed herewith as Exhibit A at pages 45 – 55. A summarized analysis of the issue of contract integration and the PER is set forth here:

77. "Whether a contract is integrated is a question of law when the evidence of integration is not in dispute." *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 954. "***The crucial threshold inquiry, therefore, and one for the court to decide, is whether the parties intended their written agreement to be fully integrated***. [Citations.]" *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1510 (emphasis added).

78. Generally, the application of the PER to determine whether a contract is a complete integration involves a two-step analysis:[36] In the first step, the factors to be considered include: (i) the language and completeness of the written agreement; (ii) whether it contains an integration clause; (iii) the terms of the alleged oral agreement and whether it might contradict those in the writing; (iv) whether the oral agreement might naturally be made as a separate agreement or, in other words, if the oral agreement were true, would it certainly have been included in the written instrument; (v) would evidence of the oral agreement mislead the trier of fact; and (vi) the circumstances at the time of the writing. *Kanno v. Marwit Capital Partners II, L.P.,* (*Kanno*)*,* 18 Cal.App.5th 987, 1007. Additionally, (vii) the terms of a writing "may be explained or supplemented by course of dealing or usage of trade or by course of performance." CCP §1856(c).

79. Application of these seven factors here leads to only one reasonable and incontrovertible conclusion: the November Document was not ***intended*** to be a completely integrated agreement:

(i) The November Document does not appear to be a final agreement. "We start by asking whether the [November Document] appears on its face to be a final expression of the parties' agreement with respect to the terms included in that agreement. [Citation.]" *Id.* at 1007. In reviewing the November Document, it is readily apparent that it is not – it is three sentences long and is missing many essential terms when compared to even a standard real estate purchase agreement, much less one that has a complicated condition precedent requiring approval of a CUP by the City for a business in the emerging and highly regulated marijuana industry. It also has basic grammar and spelling mistakes (*e.g.*, "contacts" instead of "contracts"). Unlike the writings in *Kanno,* the November Document is <u>not</u> "lengthy, formal, [or] detailed[.]" *Id*. Given its short length, its lack of formality, its simplicity given the complicated subject matter it was intended to cover and its grammar and spelling mistakes, these factors weigh in favor of a finding that the November Document does not meet the criteria to be a completely integrated agreement.

(ii) The November Document does not contain an integration clause. The presence of an integration clause is given great weight on the issue of integration and it is "very persuasive, if not

---

[36] *See Gerdlund v. Elec. Dispensers Int'l* (1987) 190 Cal.App.3d 263, 270; *Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1001; *Kanno*, *supra*, at 1007.

controlling, on the issue." *Masterson v. Sine* (1968) 68 Cal.2d 222, 225. Conversely, the lack of an integration clause, as here, is evidence the writing is not completely integrated. *Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 638. Thus, this factor weighs in favor of a finding the November Document is not completely integrated.

(***iii***) ***The terms of the oral JVA do not contradict the November Document.*** In determining whether a writing was intended as a final expression of the parties' agreement, "collateral oral agreements" that contradict the writing cannot be considered. *Banco Do Brasil, supra*, at 1002-1003. The fact that the November Document does not state it will provide for Defendant's equity position does not mean its *silence* on the subject is a contradiction as Plaintiff argues. As the seminal case of *Masterson* makes clear, silence on a term allows the introduction of extrinsic evidence to show the parties intent on that matter. *Masterson, supra,* at 228-231.

(***iv***) ***The oral agreement – the JVA – would not have been included in the November Document that was meant to be a receipt.*** Where a "collateral" oral agreement is alleged, the court must determine whether the subject matter is such that it would "certainly" have been included in the written agreement had it actually been agreed upon; or would "naturally" have been made as a separate agreement. *Id.* at 227. Here, the terms of the JVA as alleged by Defendant are consistent with the November Document and the Confirmation Email, both of which provide direct, undisputed evidence that the November Document was meant to be a receipt by Defendant of $10,000 to be applied toward the total agreed-upon $50,000 NRD. As the November Document was meant to be a *receipt*, it is *natural* that it would not have all the material terms reached in the JVA. Furthermore, it is *natural* that the November Document was created and notarized as part of the JVA as Plaintiff provided Defendant the $10,000 in <u>CASH</u>. No reasonable party would provide such a material amount in cash without ensuring adequate proof of its receipt.

(v) ***A fact finder would not be misled by the admission of the Confirmation Email and other parol evidence.*** Evidence of a collateral oral agreement should be excluded if it is likely to mislead the fact finder. *Id*. The court properly exercises its discretion by weighing the probative value of the extrinsic evidence against the possibility it may mislead the jury. *See* Evid. Code §352; *Brawthen v. H & R Block, Inc.* (1972) 28 Cal.App.3d 131, 137-138 ("[*Masterson*] points out that evidence of the

'oral collateral agreements should be excluded only when the fact finder is likely to be misled....' ***This permits a limited weighing of the evidence by the trial court for the purpose of keeping 'incredible' evidence from the jury***.") (emphasis added). The undisputed Text and Email Communications are clear and not "incredible." Simply stated, the evidence would not mislead the fact finder and actually clearly establish what took place – the parties were still reducing the JVA to writing when the relationship soured because Defendant confronted Plaintiff about having submitted the CUP application on the Property without finalizing the agreement or providing the remainder of the NRD.

(vi) The circumstances at the time of writing clearly prove the parties did not intend the November Document to be a completely integrated agreement. A critical point noted by the *Kanno* court in reaching its decision was the following oral exchange: "[plaintiff] insisted that [defendant] 'promise this to me.' [Defendant] paused and then said, '***[o]kay, [plaintiff], I promise***.'" *Kanno, supra*, at 1009 (emphasis added). Relying heavily on that exchange, the *Kanno* court found that "[t]he evidence supports a finding that the parties intended the terms of the [oral agreement] to be part of their [written] agreement." *Id*. Here, exactly as in *Kanno*, Defendant emailed Plaintiff asking him to specifically confirm in writing (*i.e.*, promise) that a "final agreement" would contain his "10% equity position" and Plaintiff clearly and unambiguously did so: "***No no problem at all***." Exhibit B, p.497.

(vii) ***Plaintiff's course of performance and conduct explains the meaning of the November Document – it was meant to be a receipt.*** "The law imputes to a person the intention corresponding to the reasonable meaning of his language, acts, and conduct." *H. S. Crocker Co. v. McFaddin* (1957) 148 Cal.App.2d 639, 643. With the exception of the days leading up to the filing of the underlying suit by Plaintiff, Plaintiff's language, actions, and conduct all reflected that ***he*** believed that he and Defendant and were joint-venturers: (i) in response to Defendant's March Request Email, Plaintiff sent the Partnership Confirmation Text; (ii) in response to Defendant's comments stating the drafts Plaintiff forwarded did not contain his equity position, Plaintiff forwarded revised drafts that did provide for Defendant to receive a portion of the net profits (albeit, not an equity position); (iii) at the same time, Plaintiff continued to have the CUP application for the Property processed, which, per his own Complaint, would require months – if not years – and significant capital investment. Exhibit B, p.625, ln.22 – p.626, ln.1.

80. In addition, Plaintiff's March Request Email is as damning as the Confirmation Email – Plaintiff is asking ***of*** Defendant a concession from his ***established obligation*** to pay $10,000 a month. Exhibit B, p.541-542. Plaintiff's own language offers clear additional evidence that there was an agreed-upon collateral oral agreement not included in the November Document: payments of $10,000 a month.

81. In sum, all seven factors lead to one irrefutable conclusion: the November Document was not intended to be a completely integrated agreement for the Property.

82. Pursuant to the second step: the parol evidence is admissible as it helps explain and interpret the November Document for what it was intended to be: a memorialization of Defendant's receipt of $10,000 and **not** the "final agreement." Additionally, the parol evidence is evidence of a *collateral oral agreement* – the JVA.

83. Judge Wohlfeil has never undertaken the above analysis.

84. Plaintiff's argument in opposition to the above contract integration analysis is his oral allegation, raised for the first time in his April 2018 Declaration, that Defendant disavowed the equity interest promised to him by Defendant in his Confirmation Email. Plaintiff's oral allegation is barred by the PER and the Statute of Frauds. Furthermore, because Plaintiff was a licensed real estate agent for over 25 years, he cannot claim any form of detrimental reliance regarding his allegation that Defendant orally disavowed the equity position promised to him by Plaintiff in the Confirmation Email as the law imputes to him knowledge of the Statute of Frauds.

C. THE COURT HAS MADE FACTUALLY UNSUPPORTED FINDINGS AND VIOLATED WELL-ESTABLISHED RULES OF LAW.

85. Judge Wohlfeil has made various unsupported rulings and procedurally improper orders in this matter. The three most egregious rulings that demonstrate clear error, resulting in this case being prolonged to Plaintiff's benefit and Defendant's detriment, are:

86. On January 25, 2018 Judge Wohlfeil denied defendants Writ Petition in the City Action. The City Action is premised on the same facts as in this action. The denial was based on Judge Wohlfeil's reasoning that Defendant is not likely to prevail because the evidence demonstrates that he has not submitted his own separate and competing CUP application and that he would not sustain irreparable harm. *See* Exhibit L, page 3. As to the first point regarding a new application, Judge

Wohlfeil ignores the facts that 1) Defendant was initially not allowed to submit an application by the City; and 2) once the City did allow him to submit a competing application, his CUP would have been severely disadvantaged because the "first come, first serve" nature of application processing by the City. Judge Wohlfeil gave no further facts to support his ruling.

87. On April 13, 2018, Defendant's noticed motion to expunge the *Lis Pendens* on the property ("LP Motion") was denied, the trial court's minute order denying the motion makes two factually false statements that were the premises of its ruling. In other words, the "facts" that the trial court thinks are "facts" and which justify its rulings are plainly false:

i. First, "documents Defendant offers in support of the motion were created *after* November 2, 2016;" and

ii. Second, that the contract drafts back and forth "appear to be unsuccessful attempts to negotiate changes to the original agreement."[37]

88. The crucial document, the Confirmation Email was created on the same day as the November Document, only hours later.

89. As previously noted the agreements back and forth never mention a renegotiation, employment, or any other statement which would conclude that these are attempts to do anything other than memorialize an already established agreement, especially when coupled with the email and text communications.

90. In addition to summary denial of the MJOP on July 13, 2018, the Court also denied Defendant's Request for Judicial Notice of Plaintiff's declaration. There are three critical issues that are raised by the trial court's improper denial of Defendant's Request for Judicial Notice of Plaintiff's declaration. They are particularly important because this single ruling can, separate from the other evidence and arguments presented herein, provide the basis that could reasonably lead a third-party to believe the trial court was not acting impartially:

First, the trial court stated "even if I were to grant the request to take judicial notice of a declaration..."[38] Respectfully, the trial court does not have the discretion to deny taking judicial notice

[37] Exhibit B, p.1148-1149 [ROA 192]
[38] Exhibit B, p. 11-15

of the declaration. As clearly stated by the appellate court in *Four Star Electric, Inc. v. F & H Construction* (1992) 7 Cal.App.4th 1375, 1379: "[Defendant] requested the trial court to take judicial notice of pertinent portions of court files in the prior actions. ***The trial court was required to do so upon request*** (Evid. Code, § 452, subd. (d), 453)[.]" *Id*. at 1379 (emphasis added). Counsel cited *Four Star* in his Reply and proved that he met the requirements pursuant to CCP §§ 452 and 453. Thus, though the trial court was not required to take as true the matters asserted within the declaration, it was required to take notice of the declaration itself and, in accordance with the law, analyze the statements therein. It did not.

Second, the trial court's refusal to take judicial notice appears to be based on a hearsay objection (given the trial court's reference to "party opponents" and prior rulings).[39] This position is error because the declaration in question is a judicial admission and does not constitute hearsay. However, assuming the concept of hearsay did apply, the trial court's ruling would still be incorrect because:

(i) the statement does not need to be taken for its truth; and

(ii) there are several clear exceptions to the hearsay rule that would apply if the concept of hearsay were applicable.[40] The exceptions include:

a. The crucial "statement" in this case is the Confirmation Email that states: "no, no problem at all." The trial court did not need to take the statement for the truth asserted therein, that in fact his confirmation would be "no problem," but rather it should have taken judicial notice that the statement was made, making it a judicial admission and putting the onus on Plaintiff to provide an explanation that is not "inherently incredible." In fact, the trial court has broad discretion to simply disregard testimony that is "inherently incredible" even if there is no adverse testimony to combat the statement;

b. in the hearsay construct, the statement can be used solely as impeachment evidence, again not offered for its truth, but rather to show that Plaintiff's Complaint is contradicted by his declaration; and

---

[39] Counsel notes that in a prior ruling, specifically in the trial courts tentative ruling [ROA 191], it sustained Plaintiffs objections to request for judicial notice which was made primarily on hearsay grounds.

[40] See California Evidence Code § 1200 *et seq*.

c. the statement is clearly an admission by a party opponent and/or an inconsistent statement as it contradicts the very basis of Plaintiff's Complaint alleging the November Document is a completely integrated agreement.[41]

Third, the trial court stated it "wasn't persuaded that even if I were grant the request to take judicial notice of a declaration granted of a party opponent, **it's still not dispositive of the entire complaint**."[42] This is clearly incorrect and Counsel cannot understand what line of reasoning the trial court undertook to reach such a conclusion. Plaintiff brought forth four causes of action,[43] three of them are derivative and only exist if the primary cause of action for breach of contract is valid. As argued above, and further elaborated upon in the Writ Petition, without the breach of contract cause of action, Plaintiff's remaining three causes of action necessarily fail:

(i) "The essence of the implied covenant of good faith ... is that ' "neither party will do anything which injures the right of the other to receive the benefits of the agreement" ' [citations]." *Commercial Union Assurance Companies v. Safeway Stores, Inc.*, 26 Cal.3d 912, 918. Here, the agreement that Plaintiff premises his cause of action for breach of the implied covenant of good faith and fair dealing is shown to be a receipt. The reality is that Plaintiff is the one who violated the implied covenant of good faith and fair dealing by filing and maintaining this lawsuit fraudulently mispresenting a receipt as a final agreement. Simply stated, there first needs to be a valid agreement and Plaintiff's alleged agreement – the November Document - is not. Ergo, there cannot be a breach of the implied covenant of good faith and fair dealing.

(ii) "To qualify for declaratory relief, [a party] would have to demonstrate its action presented two essential elements: (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to [the party's] rights or obligations." *Jolley v. Chase Home Fin., LLC* (2013) 213 Cal. App. 4th 872, 909. Here, the "proper subject" of declaratory relief Plaintiff seeks is "a judicial determination of the terms and conditions of the written agreement as well as of the rights, duties, and obligations of plaintiff GERACI and defendants thereunder in

---

[41] *See* California Evidence Code § 1200 *et. seq.*
[42] Exhibit B, p. 12 ln 21-24 (emphasis added).
[43] Exhibit B, p.624-690 [ROA 1] (Cause of Action in Plaintiff's complaint are: Breach of Contract, Implied Covenant of Good Faith, Specific Performance, and Declaratory relief.)

connection with the purchase and sale of the PROPERTY by COTTON to GERACI or his assignee."[44] In other words Plaintiff's request for declaratory relief is predicated on the allegation that the November Document is a purchase agreement for the sale of the Property. As proven above, it is not. It is a receipt. Therefore, Counsel fails to understand how this cause of action would survive.

(iii) "To obtain specific performance, a plaintiff must make several showings, in addition to proving the elements of a standard breach of contract." *Darbun Enterprises, Inc. v. San Fernando Cmty. Hosp.* (2015) 239 Cal. App. 4th 399, 409. Again, as with the two causes of action above, this cause of action is predicated upon Plaintiff "proving the elements of a standard breach of contract" which he cannot do as the November Document is not a contract. *Id*. Thus, Counsel is unclear how this cause of action can survive if the trial were to adjudicate, pursuant to the PER, that the November Document is not a completely integrated agreement; such a finding, on these facts, would prove that Plaintiff committed fraud by misrepresenting the November Document as a final agreement. In short, the trial court's rulings referenced above are predicated on what the trial court believes to be facts that are incorrect and laws that are not applicable and/or are misapplied.

91. To summarize, and to be absolutely clear on this point, when the trial court denied Defendant's MJOP, the trial court implicitly found the following factual allegations by Plaintiff to NOT be "inherently incredible." Or, in other words, ***this is Plaintiff's explanation of the Confirmation Email and the trial court finds the following to be credible***:

(i) *Within hours* of the parties finalizing their agreement on November 2, 2016, Defendant sent an email to Plaintiff pretending that the JVA had been reached and in which Defendant was already promised a very specific "10% equity position;"

(ii) Plaintiff to have mistakenly confirmed in writing, at Defendant's specific request for written confirmation, Defendant's pretend equity position within hours of the November Document being executed;

(iii) Plaintiff, a licensed Real Estate Agent (at the time) for over 25 years, to have never sought in any manner to document the fact that he mistakenly sent the Confirmation Email despite knowing its legal import under the Statute of Frauds;

[44] Exhibit B, p.629, ln. 1-5

(iv) for Plaintiff to have realized, over a year after filing suit, that he should raise the Oral Disavowment; and

(v) that Plaintiff did so, coincidentally, in response to Defendant's motion citing, for the first time, *Riverisland* and *Tenzer* preventing Plaintiff from using the PER as a shield to bar parol evidence that is proof of his own fraud. (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18; *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n* (2013) 55 Cal.4th 1169).

D. DISQUALIFICATION FOR CAUSE

92. There are two often-cited cases that set forth the standard and analysis that mandate Judge Wohlfeil's recusal per this Statement:

(a) First, in *Hall v. Harker* (*Hall*) (1999) 69 Cal.App.4th 836, a malicious prosecution case was subject to reversal when the trial judge revealed clear bias regarding defendant's profession, *i.e.*, that attorneys tend to initiate and churn litigation for financial gain, regardless of merits of the case or damage to defendant, and then made credibility determinations against defendant on a probable cause issue that was central to the case. *Id*. at 843 ("Whether [attorney] initiated [party's] cross-complaint without probable cause and for an improper purpose was the central issue in the malicious prosecution case against him. [Attorney], of course, maintained he believed his client's version of the facts and presented evidence to support the reasonableness of that belief. The trial judge however, made credibility findings that rejected [Attorney's] story and that of his supporting witnesses. ***It is difficult to imagine a more direct connection between the judge's expressed bias and the gravamen of the case before him***.") (emphasis added).

Here, even more egregious than *Hall*, Judge Wohlfeil has consistently, and without ever providing his reasoning for doing so, (i) turned a case-dispositive issue that is a purely a question of law into a factual dispute; and then (ii) made credibility determinations of the evidence on the case-dispositive issue against Defendant without any evidentiary support (in some instances, in direct and unexplained contradiction of undisputed evidence and controlling case law).

(b) Second, in *Rohr v. Johnson* (1944) 65 Cal.App.2d 208 the court stated: "The mere fact that a judge entertains a ***general*** belief in the honesty of someone he knows is neither unusual nor

indicates that he has such a ***fixed opinion*** as to impair his ability to weigh any evidence involving the acts of that person." *Id*. at 211 (emphasis added). In *Rohr*, the court did not find that the trial judge was biased, noting "[i]t does not here appear that there was any conflict between the testimony produced by the respective parties or that the judge was in any way called upon to decide which of two sets of witnesses was telling the truth. At best, any showing of bias is not strong, and it is very questionable whether the showing thus made could be held sufficient to show the existence of bias." *Id*.

Here, application of the principles articulated in *Rohr* mandate recusal of Judge Wohlfeil because:

i. Judge Wohlfeil's belief in the honesty of Weinstein and Mrs. Austin is not "general" as in *Rohr* because whether this action was ***specifically*** filed and/or maintained by them as a malicious prosecution action goes straight to the issue of the honesty, integrity and credibility of Weinstein and Mrs. Austin. Judge Wohlfeil's "***fixed opinion***" – that Weinstein and Mrs. Austin are incapable of acting unethically by filing/maintaining a lawsuit lacking probable cause – prejudices Defendant because it does not *even allow for the possibility* that this case was filed for the purpose of coercing Defendant into settling with Plaintiff without regard to the merits of Plaintiff's Complaint. Judge Wohlfeil's fixed opinion is causing irreparable harm to Defendant by forcing him to endure the hardships of a meritless litigation action. This, whether inadvertent or unintentional, has further aided Plaintiff and his counsel in their unlawful scheme to prevail via a malicious prosecution action.

ii. The representations and factual assertions of Mrs. Austin to the trial court, in her advocacy of Plaintiff's right to control over the Property, have been that the November Document - executed on November 2, 2016 - is a completely integrated agreement for the sale of the Property. The declaration of Hurtado, a former practicing attorney in the State of New York and California federal judicial law clerk, declares that on March 6, 2017, Mrs. Austin directly and unambiguously stated that the November Document is ***not*** a completely integrated agreement for the sale of the Property. Hurtado's testimony directly contradicts Mrs. Austin's factual representations to this court: one of these two parties, both of whom completely understand the seriousness of violating ethical rules and laws by fabricating material evidence and engaging in a course of conduct meant to ***intentionally*** deceive a trial court, has *knowingly* and *willfully* made a false material factual statement to this Court. Thus, unlike in

Rohr, "here [it does] appear that there [is a] conflict between the testimony produced by the respective parties [and] that the judge [has been] called upon to decide which of two sets of witnesses was telling the truth." *Id*. However, Judge Wohlfeil's *fixed opinion* that Mrs. Austin is incapable of acting unethically (*i.e.*, lying), on the ***threshold*** and ***case-dispositive*** issue, directly and self-evidently prejudices Defendant as it is serving to ***force*** him to continue in a litigation matter that is grinding him down financially, physically and mentally; thereby serving to coerce him into settling a meritless action.

93. Summarized, Counsel's position is that it can ***appear*** that Judge Wohlfeil's fixed opinion and/or bias has led him to improperly turn a pure question of law into a factual dispute, so he can then make unmerited credibility determinations regarding evidence against Defendant because of his personal relationship with Weinstein and Mrs. Austin. If the pure question of law – whether the November Document is a completely integrated contract – were appropriately analyzed via the PER and well-settled case law, then Weinstein and Mrs. Austin would be open to a cause of action for malicious prosecution pursuant to *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349 ("we hold that terminations based on the PER are favorable for malicious prosecution purposes.").

94. In other words, if Judge Wohlfeil has (i) incorrectly turned a legal dispute into a factual dispute and (ii) made rulings that are neither supported by facts nor law, then a "person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial" (CCP § 170.1(a)(6)(A)(iii)) because it can reasonably appear that Judge Wohlfeil is using his position as an Officer of the Court to "protect" his "friends" - Weinstein and/or Mrs. Austin - from a malicious prosecution action because he has a favorable "[b]ias … toward a lawyer in the proceeding" (CCP § 170.1(a)(6)(B)).

95. An alternative theory, that a third-party could reasonably entertain, is that Judge Wohlfeil is simply over-burdened and assumed that this matter could not be as simple as described by Defendant (*i.e.*, one email dispositively proves that Plaintiff is committing fraud and Weinstein/Mrs. Austin brought forth a malicious prosecution action). Thus, Judge Wohlfeil simply ignores the submissions by Defendant and *trusts* that Weinstein/Mrs. Austin are ethical and would be bounded in their arguments based on facts. If such is the case, Judge Wohlfeil has made a serious mistake; based on *undisputed* evidence and the PER, it is clear that Weinstein and Mrs. Austin have made factual representations and

arguments they know to be false. While it is impossible for Counsel to truly understand the motives for Judge Wohlfeil's rulings, being intimately familiar with every piece of evidence in this action, it is clear Judge Wohlfeil has been remiss in his duties.

96. Thus, whatever the reason, in the interest of justice, Judge Wohlfeil should immediately recuse himself from any further actions in this matter. At this point, even if Judge Wohlfeil were to now understand the sheer simplicity of the evidence and facts at issue here, the objective standard has been met. Furthermore, Defendant should not be put in a position in which he "hopes" that throughout the remainder of the litigation Judge Wohlfeil would be capable of being impartial. On that note, assuming there are future adverse rulings to Defendant, they would be overshadowed by the specter that Judge Wohlfeil was ruling in retaliation for Counsel having brought forth this Statement seeking his disqualification in defense of his client's rights.

D. THIS PETITION (STATEMENT OF DISQUALIFICATION) IS TIMELY

97. CCP §170.3(c)(1) provides that a "[Statement of Disqualification] shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." In light of the facts and circumstances set forth below, the timeliness of Counsel's presentation of this Statement is statutorily complaint and consistent with relevant controlling case law.

98. As discussed above, Counsel first appeared in this case to represent Defendant on a limited scope for the sole purpose of drafting, filing and arguing the LP Motion and the related *ex parte* application filed in April 2018. Thereafter, Counsel became attorney of record.

99. The trial court's order denying Defendant's LP Motion made numerous factually inaccurate and unsupported statements. The trial court allowed that motion to be heard on shortened time but denied Defendant the opportunity to file a reply and point out the flaws in Plaintiff's opposition papers. Counsel hoped it was simply a single instance of mistake by the trial court and that he could address the issue again in a subsequent motion.

100. On **April 27, 2018**, Counsel became attorney of record and represented Defendant on his Receiver Application on **June 14, 2018**. The trial court again summarily denied the relief requested, impliedly finding the November Document is a completely integrated agreement. But, again, because

it was an *ex parte* application, the issue of contract integration was not fully briefed (and never had been prior to then).

101. On **June 20, 2018**, Counsel filed the MJOP which fully briefed the issue of contract integration ***for the first time***. Judge Wohlfeil issued a tentative ruling denying the MJOP on July 12, 2018. At the hearing on **July 13, 2018** before this court, Counsel and co-counsel attempted to focus on the sole, dispositive issue of contract integration: specifically, that the November Document is not a completely integrated agreement. "Your Honor, ***the only thing we really want clarification*** in the matter whether or not the court deems the contract an integrated contract or not."[45] Judge Wohlfeil, in an exasperated demeanor that comes across in the transcript from the hearing, stated: (i) "You know, we've been down this road so many times, counsel. I've explained and reexplained the court's interpretation of your position. I don't know what more to say," and (ii) "we've addressed that in multiple motions. I'm not going to go back over it again at this point in time."[46]

102. Judge Wohlfeil, again, has NEVER addressed the threshold and case-dispositive issue of contract integration. And it did not become apparent to Counsel, until the July 13, 2018 hearing that Judge Wohlfeil could reasonably appear to be avoiding the issue of contract integration.

103. As a practical matter, it is noteworthy that, immediately following Counsel's discovery of Judge Wohlfeil's fixed opinion evidenced in his ruling on the MJOP, Counsel was preparing for trial, drafting other filings in this matter while simultaneously preparing this statement which now includes information from the August 2, 2018 hearing where a continuance of the August 17, 2018 trial was granted. Counsel dedicated substantial amount of time to drafting a lengthy Petition for Writ in this matter with the Court of Appeals which was filed on August 30, 2018.

104. Additionally, Counsel had to research and file a Petition for Review with California Supreme Court for the City Action which was filed on August 27, 2018 in order to preserve Defendant's appeal or his appeal would be lost forever. This petition is currently under review with the California Supreme Court. Counsel is primarily a criminal defense attorney and therefore spends much of the regular business day in court and his only opportunity to research and draft what are novel civil law

[45] Exhibit B, p. 13, ln. 19-21 (emphasis added).
[46] *Id.* at ln.12-15, ln. 22-24

issues, to him, take place in the evening and on weekends. As an example, this Statement also required substantial time to research, draft and prepare for filing as Counsel has never had to address the process for seeking the disqualification of a judge. Thus, this Statement is being provided at the earliest time practical given Counsel's other time sensitive obligations.

105. In *Christie v. City of El Centro* the trial court set aside a nonsuit and dismissal in favor of the city and its police department. The trial court granted a new trial after finding that the previous judge who granted the nonsuit was disqualified. It held that as a matter of law the judge was disqualified at the moment he had a conversation with a previously disqualified judge in the same matter. Having found the judge who granted nonsuit disqualified to rule on the matter, the trial court set aside the resulting dismissal. The Court of Appeal affirmed that determination, emphasizing in its opinion that "***disqualification occurs when the facts creating disqualification arise, not when disqualification is established***." *Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776 (emphasis added) (citing *Tatum v. Southern Pacific Co.* (1967) 250 Cal. App. 2d 40, 43; *Urias v. Harris Farms, Inc.* (1991) 234 Cal. App. 3d 415, 422–427.

106. Here, it was not until ***after*** Counsel had fully briefed the motion in the MJOP ***and*** Judge Wohlfeil incorrectly and in a frustrated manner stated he had already addressed the threshold and case-dispositive issue of contract integration, that Counsel became aware of the "facts" (*i.e.*, Judge Wohlfeil's fixed opinion/bias) giving rise to this Statement. Counsel, now, respectfully submits this Statement at the earliest possible opportunity. *See* CCP §170.3(c)(1) "at [his] earliest practicable opportunity after discovering the facts constituting the ground for disqualification."; *North Beverly Park Homeowners Ass'n v. Bisno* (2007) 147 Cal.App.4th 762, re'hrg denied, rvw. denied ("The issue of disqualification must be raised at the ***earliest reasonable opportunity*** after the party becomes aware of the disqualifying facts.").

V. CONCLUSION

A court is not required to determine whether there is actual bias. As noted, the objective test is whether a reasonable member of the public at large, aware of all the facts, would fairly entertain doubts as to the judge's impartiality. *See Christie v. City of El Centro* (2006) 135 Cal. App. 4th 767, 776; *Housing Authority of the County of Monterey v. Jones* (2005) 130 Cal. App. 4th 1029, 1041–1042;

Briggs v. Superior Court (2001) 87 Cal. App. 4th 312, 318–319; *Ng v. Superior Court* (1997) 52 Cal. App. 4th 1010, 1024.

Cumulatively, the facts and cases referenced above clearly meet this objective standard:

First, Plaintiff and his agents knowingly violated numerous City and State disclosure laws and regulations when they omitted Plaintiff's name as a party who has an interest in the Property and the CUP;

Second, the case-dispositive issue is whether the November Document is a completely integrated agreement.

Third, the Confirmation Email and other parol evidence is undisputed evidence that the November Document is not a completely integrated agreement.

Fourth, Judge Wohlfeil has, on no less than ***eight occasions***, impliedly and/or directly found that the November Document is a completely integrated agreement.

Fifth, Judge Wohlfeil has never provided his legal reasoning for why the Confirmation Email, pursuant to contract interpretation laws and well-settled case law, does not disprove Plaintiff's contention that the November Document is a completely integrated agreement.

Sixth, Defendant has, on no less than ***six occasions***, requested that Judge Wohlfeil please provide his reasoning for finding that the November Document is a completely integrated agreement. On more than ***two occasions*** Defendant has literally begged Judge Wohlfeil in writing and orally at hearings to explain why the Confirmation Email does not prove that the November Document is not a completely integrated agreement. *See, e.g*., ("***I BEG the Court…***")[47]

Seventh, some of the purported "facts" referenced by Judge Wohlfeil in support of his rulings represent clear abuses of discretion as the "facts" he references are not facts at all. The ***undisputed evidence*** provided by Plaintiff and Defendant directly contradict the factual findings upon which Judge Wohlfeil premised his rulings.

Eight, Judge Wohlfeil has stated, and the record in this action makes numerous references to, that he does not personally believe Weinstein and Mrs. Austin are capable of acting unethically by filing and/or maintaining a malicious prosecution action.

[47]Exhibit B, p. 22, ln. 21- p. 23, ln. 1

Ninth, it is possible that this case was filed and/or maintained without probable cause (*i.e.*, could be a malicious prosecution action).

Tenth, if this case was filed and/or maintained without probable cause, then that means that Weinstein and Mrs. Austin potentially acted unethically.

Eleventh, the declaration of Hurtado declares that Mrs. Austin knows her representations to this court are false, which is to say that she is acting unethically (*i.e.*, arguing the November Document, executed in November of 2016, is a completely integrated agreement when she was working on the actual final agreements to effectuate the sale in March of 2017). Judge Wohlfeil's expressed opinion that counsel for Plaintiff would not act unethically is clearly "fixed" in light of the facts presented here and highly prejudicial to Defendant.

Twelfth, by allowing this matter to continue, Judge Wohlfeil has ratified Plaintiff's attempt to pursue an interest in the Property and by extension the CUP even though Plaintiff cannot legally own an interest in a Marijuana Outlet under state law.

Thirteen, if Judge Wohlfeil had addressed the threshold issue of contract integration and applied PER properly, the only logical conclusion is that the Confirmation Email (admitted to in Plaintiff's sworn declaration) prove the November Document is not a completely integrated agreement. The consequence of such a ruling would be that Weinstein and Mrs. Austin would be open to a cause of action for malicious prosecution. *See Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349 ("[W]e hold that terminations based on the parol evidence rule are favorable for malicious prosecution purposes.").

"When the allegations of bias relate to factual issues, they are particularly troubling because the appellate court usually defers to the trial court's factual and credibility findings. [Citation.] Implicit in this time-honored standard of review is the assumption that such findings were made fairly and impartially." *Hall v. Harker* (1999) 69 Cal.App.4th 836, 841. Here, if nothing else, whether there exists prejudice or not, Judge Wohlfeil has repeatedly and inexplicably (i) avoided addressing the obvious fraudulent scheme that Plaintiff is engaged in via his agents in seeking to acquire a marijuana related CUP that he is prohibited from owning by law; (ii) falsely stated that he has addressed the threshold issue of contract integration when in fact he has not and has systemically refused to do so for over a

year; and (iii) gotten procedural and material case-dispositive facts wrong that, coupled with his comments as to the ethics of Weinstein and Mrs. Austin, make it impossible for a third-party to believe that Judge Wohlfeil can be impartial. Recusal is mandated.

Counsel respectfully notes that he is at a loss to understand Judge Wohlfeil's actions. He does not believe Judge Wohlfeil has intended to specifically harm Defendant, but, his actions are unjustified and are resulting in severe prejudice to Defendant. Plaintiff and his attorneys are intelligent individuals who, as a result of Judge Wohlfeil's actions, had and continue to have the luxury of covering up their tracks and taking actions to unjustly mitigate their liability to Defendant. That Judge Wohlfeil's bias/fixed-opinion leads him to believe the preceding sentence is unfounded or some form of litigation-hyperbole is why Counsel is compelled to bring forth this Statement in defense of his client's rights.

VI. VERIFICATION

I, Jacob P. Austin, hereby declare under penalty of perjury that I drafted and have read the foregoing Verified Statement, and the facts stated herein are true and correct based upon my direct first-hand personal knowledge and information which I obtained through my review of the pleadings and documents filed in this matter on September 12, 2018.

DATED: September 12, 2018

JACOB P. AUSTIN