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3 San Diego, CA 92104  
4 Telephone: (619) 954-4447 NUNC PRO TUNC  
5  
6 Plaintiff *Pro Se* 10/27/20

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CLERK OF DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

**FILED**

Oct 30 2020

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY s/ darcig DEPUTY

7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
9

10  
11 DARRYL COTTON,  
12 Plaintiff,

13 v.

14 LARRY GERACI, an individual, REBECCA  
15 BERRY, an individual; GINA AUSTIN, an  
16 individual; AUSTIN LEGAL GROUP, a  
17 Professional Corporation; MICHAEL  
18 WEINSTEIN, an individual; SCOTT H.  
19 TOOTACRE, an individual; FERRIS &  
20 BRITTON, a Professional Corporation; CITY OF  
21 SAN DIEGO, a public entity, and DOES 1 through  
22 10, Inclusive,  
23 Defendants.

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

PLAINTIFF'S NOTICE OF EX PARTE  
APPLICATION FOR (1) OSC FOR WHY A  
PRELIMINARY INJUNCTION SHOULD NOT  
ISSUE; TO (2) RECORD LIS PENDENS;  
MEMORANDUM OF POINTS AND  
AUTHORITIES; DECLARATION OF DARRYL  
COTTON

Hearing Date: N/A  
Hearing Time: N/A  
Judge: Hon. Todd Robinson  
Courtroom: 3A

20 PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION  
21 AND REQUEST FOR PERMISSION TO FILE A LIS PENDENS,  
22 RESTRAINING ORDER AND PRELIMINARY INJUNCTION

23 This Order to Show Cause shall be based upon the affidavit of Darryl Cotton, sworn to on  
24 October 27, 2020, the complaint filed in this matter, memorandum of points and authorities, the  
25 exhibits referred to herein are attached to the Declaration of Darryl Cotton and other evidence that be  
26 presented at hearing should the Court order one.  
27  
28

1 The legal matter is complex because the gravamen of Cotton's cause of actions are that numerous  
2 City of San Diego (the "City") attorneys and officials are part of and/or ratifying a criminal conspiracy  
3 to create an illegal monopoly in the cannabis market in the City (the "Antitrust Conspiracy"). In  
4 furtherance of this conspiracy, multiple parties, including numerous attorneys from numerous law firms,  
5 have taken criminal acts that include and constitute the filing of sham pleadings and defenses, fraud on  
6 the court, witness tampering, perjury, and other illegal acts that violate Cotton's civil rights.

7 The injunctive relief requested herein seeks an order to show cause for why a preliminary  
8 injunction should not issue to prevent Aaron Magagna from selling and/or encumbering the conditional  
9 use permit ("CUP") issued at 6220 Federal. And the Court's approval that Cotton be allowed to record a  
10 lis pendens at 6220 Federal.

11 DATED: October 27, 2020

  
DARRYL COTTON  
Plaintiff *Pro Se*

**MEMORANDUM OF POINTS & AUTHORITIES**

**INTRODUCTION**

Presently before the Court is Cotton's ex parte application for appointment of counsel pursuant to 28 U.S.C. § 1915(e)(1), whose allegations are incorporated herein as if fully set forth. (Docket No. 36.) As a result of a Freedom of Information Act ("FOIA") request to the City of Lemon Grove provided on Exhibit 4, new evidence has been discovered that proves the *Cotton I* judgment is void for, *inter alia*, being the product of a fraud on the court. The new information provides further support for the conclusion that Cotton is the victim of a conspiracy by Lawrence Geraci and his agents, including his attorneys, who procured a judgment in *Cotton I*<sup>1</sup> through, *inter alia*, extrinsic fraud. Thus justifying this Court's appointing counsel to Cotton. Since March 2017 Cotton has been fighting to protect and vindicate his rights to the Property and he has failed despite the fact that his opponents have never stated a cause of action.

The new evidence also makes other information material and justifies the injunctive relief requested herein seeking an order to show cause for why a preliminary injunction should not issue to prevent Aaron Magagna from selling and/or encumbering the conditional use permit ("CUP") issued at 6220 Federal. And the Court's approval that Cotton be allowed to record a lis pendens at 6220 Federal.

Specifically, the new information includes documents produced by the City of Lemon Grove that (i) on March 21, 2017, the same day *Cotton I* was initiated against Cotton, Abhay Schweitzer, submitted a competing application two buildings away from the Property and (ii) communications with Adam Mintz who was approached by Aaron Magagna who attempted to sell him the 6220 Federal Blvd. CUP for \$10,000,000.

**MATERIAL FACTUAL AND PROCEDURAL BACKGROUND**

Throughout the entirety of this case and that of *Cotton I*,<sup>2</sup> Cotton has maintained and alleged that Plaintiff Geraci, an individual who was previously sanctioned by the City of San Diego for maintaining

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<sup>1</sup> Defined terms not otherwise defined herein have the meaning set forth in the pending ex parte application for appointment of counsel.

<sup>2</sup>

1 an illegal dispensary was sabotaging the CUP application on his property, 6176 Federal Blvd, San Diego,  
2 California 92113 (the "Property") to limit his own liability to Cotton for having breached their oral joint  
3 venture agreement and filing a frivolous lawsuit to prevent the sale of the Property to a third party after  
4 said breach. One of Cotton's major contentions has been that an individual named Arron Magagna, who  
5 filed a competing CUP application on a property just 300 feet from the Property, (the "Competing CUP")  
6 was actually an agent of Geraci and has conspired or ratified the conspiracy against him. If such a project  
7 were approved, it would bar the issuance of a CUP on the Property, which was a condition precedent to  
8 Geraci's purchase of the Property.

9 On January 30, 2019 Geraci's designer and agent Abhay Schweitzer of Techne Design was  
10 deposed and asked why his name was on the City of San Diego's website as an agent of the Competing  
11 CUP and was directly asked if "Techne were assisting in both application that would seem to a conflict  
12 of interest?" which he replied "absolutely, I would agree with that." Exhibit 6 at 35:8. The newly  
13 discovered evidence directly proves that Techne and Abhay Schweitzer did work on the Competing CUP  
14 thereby establishing not only that there was a conflict of interest but also that Geraci's agents were  
15 actively attempting to get the Competing CUP approved, all while they pled to the court that they were  
16 actively trying to have it approved for the benefit of both parties.

17 From June 23 and August 16, 2020 Cotton had a Facebook communications (FB Chat) between  
18 Adam Mintz, (Mintz) a Real Estate Investor and his partner Charla Heimer, (Heimer) President ROR  
19 Investments, LLC. These communications lead to the discovery that Aaron Magagna used a broker,  
20 Jason Klein (Klein) to offer the competing CUP @ 6220 Federal Blvd to Mintz for initially a \$10M offer  
21 just before the trial in *Cotton I* which began on July 3, 2019. Exhibit 7 at pg. 1. Mintz decided not to  
22 pursue the Magagna deal when, among other things, Magagna was slow to give him requested notarized  
23 ownership information and "the deal" had to go through Magagna's Land Use Attorney, Cynthia Mogan-  
24 Reed which Mintz found suspicious. Exhibit 7 at pg 11.

25 On or about July 1, 2020 Mitz sent Cotton an email that detailed all the email communication that  
26 occurred in and around May 2019 between Mintz, Heimer, Klein and Zach Davis (Davis) of Acreage  
27 Holdings regarding the potential purchase of the 6220 CUP. Exhibit 8.  
28



1 The attached documents show that the negotiated yet unexecuted contract amount ended up being  
2 \$6M. Exhibit 9.

3 Based on these suspicions on September 16, 2020 sent a series of emails out to various parties  
4 who had worked for Geraci on the 6176 CUP, DSD officials and the contractor building the 6220 Federal  
5 Blvd. Project. At the time the only thing Cotton saw as unusual was that the project address was listed  
6 as 6302A. Exhibit 1. That address was a City of Lemon Grove address not City of San Diego address at  
7 which the Competing CUP had been approved under.

8 As can be seen in the email, particularly to Michael Morton, AIA who was the architect of record  
9 for the 6176 CUP project, Morton did not want to communicate with Cotton regarding his concerns that  
10 Morton may have been used as a scape goat in the architectural design services for 6176 in that Geraci  
11 had no intention of seeing the CUP approved at that site and would use any ploy at his disposal to delay  
12 the 6176 CUP while the 6220 CUP was approved.

13 It would become clear in Cotton's FOIA request to the City of Lemon Grove on the 6302 project  
14 which is located directly behind and within the 1000' radius that should either of these properties been  
15 approved it would have denied the 6176 CUP application. On September 29, 2020 Cotton met with City  
16 of Lemon Grove Associate Planner, Mike Viglione to discuss the Competing CUP at the 6302 Federal  
17 Blvd property. Cotton filed a FOIA request that day asking specifically for any in process cannabis  
18 related development. Exhibit 4.

19 On or about October 15, 2020 the document production Cotton had requested from the City of  
20 Lemon Grove regarding ownership information and Medical Marijuana Dispensary license applications  
21 for that property. The first thing that Cotton was informed of was that the information that had been  
22 missing from the Building Permit History had been updated to show a new column having been added  
23 for APPLICATION DATE. The dates were shown for the MMD APPLICATION as 03/21/17 for the  
24 application and 04/03/17 for the denial of that application. The BOUNDARY ADJUSTMENT was  
25 shown as 08/14/18 for the application and 10/08/20 for the denial. A denial brought on by Cotton's  
26 inquiries into the property, its owners, its purpose and the intent of the BOUNDARY ADJUSTMENT.

27 On the April 3, 2017 letter from the City of Lemon Grove to a redacted recipient the recipient  
28 was informed of the denial. But further investigation of those FOIA documents proves that it was

Geraci's design team TECHNE that had submitted that application and Michael Morton AIA was the architect who signed off on the March 18, 2017 "Scope of Work" on TECHNE letterhead that was submitted to the City of Lemon Grove on March 21, 2017. Clearly the conflict of interest that Schweitzer declared under oath could not allow them to represent a competing CUP to the 6176 CUP was not the case in March 2017. Exhibit 5.

## ARGUMENT

### I. This Court has Subject Matter Jurisdiction

As set forth in Moore's Federal Practice Guide there are "only four procedures permitted for seeking relief" from a judgment due to a substantive error in a judgment itself. 12 Moore's Federal Practice - Civil ("Moore's") (Ch. 60 (Relief from a Judgment or Order), Subsection C (Scope and Conditions to Relief From Substantive Errors in Judgment Itself), § 60.21 (Only Four Procedures Permitted for Seeking Relief) attached hereto as Exhibit 10. Two procedures are applicable here: (A) this Court's inherent power to set aside a judgment for fraud on the court and (B) an independent action in equity (such as this action).<sup>3</sup>

The *Rooker-Feldman* doctrine does not bar this Court's subject matter jurisdiction. "*Rooker-Feldman* prohibits a federal district court from exercising subject matter jurisdiction over a suit that is a de facto appeal from a state court judgment." *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004). There are four requirements for the application of *Rooker-Feldman*; two may be termed procedural, and two substantive. See *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 85 (2d Cir. 2005). "The procedural requirements are that the federal plaintiff must have lost in state court, and the state-court judgment *must* have been rendered before the district court proceedings commenced." 18 Moore's Federal Practice - Civil § 133.33 (2020) (emphasis added). "The substantive requirements are

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<sup>3</sup> Cotton notes that he will be filing a separate Rule 60(b) motion in Cotton III seeking to set aside that judgment for fraud on the court. Also, additional parties, victims of Geraci and his attorneys, will be filing additional suits in at least two other districts outside of the incestuous San Diego judiciary.

1 that the federal plaintiff must complain of an injury caused by a state-court judgment, and the plaintiff's  
2 suit must invite district-court review and rejection of the state-court judgment." *Id.*

3 Here, procedurally, Cotton filed suit before he lost the *Cotton I* action and *Rooker-Feldman* does  
4 not apply. The United States Supreme Court in *Exxon Mobil* disapproved previous lower-court decisions  
5 that had applied the doctrine to bar federal suits filed before the entry of judgment in state court.<sup>4</sup>

6 Substantively, Cotton is not arguing, inter alia, that his own attorneys committed a fraud on the  
7 court by amending his Complaint to sabotage his case and removing Berry as a defendant from causes of  
8 action that prevented Cotton from making his case (e.g., a conspiracy by, among others, Berry, Geraci  
9 and Austin to apply for a cannabis CUP at the Property by using Berry as a proxy for Geraci). Demian  
10 and FTB effectively acted as Geraci's corrupt agents and committed a fraud on the court. The new  
11 evidence presented here also.

12 In *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 859–860 (9th Cir. 2008), plaintiffs' fraud claim  
13 constituted an impermissible de facto appeal of state-court decision, because "even assuming that the  
14 misconduct that the [plaintiffs] allege rises to the level of extrinsic fraud, such claim was itself separately  
15 litigated before and rejected by an Oregon state court." Here, among many other causes of action, neither  
16 FTB's extrinsic fraud nor Aaron Magagna's threats against Corina Young, witness tampering, as part of  
17 conspiracy to create a monopoly in San Diego were issues that Wohlfeil specifically refused to address  
18 without explanation. *Al-Mansur v. Carville*, No. C 13-03503 LB, 2013 U.S. Dist. LEXIS 134953, at \*18  
19 (N.D. Cal. Sep. 20, 2013) ("*Rooker-Feldman* does not bar federal jurisdiction over federal claims where  
20 a state court declined to address the same claims in state proceedings.").

21 Thus, neither the procedural nor substantive elements are met for application of *Rooker-Feldman*.

22 Lastly, *arguendo*, assuming *Rooker-Feldman* did apply, "*Rooker – Feldman* does not preclude  
23 review of void state court judgments." *Burciaga v. Deutsche Bank Nat'l Trust Co.*, 871 F.3d 380, 385  
24 (5th Cir. 2017). "It is well settled that a judgment is void... 'if the parties or if the court acted in a manner  
25

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26 <sup>4</sup> *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283, 125 S. Ct. 1517, 161 L. Ed. 2d 454  
27 (2005) ("Variously interpreted in the lower courts, the doctrine has sometimes been construed to extend  
28 far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-  
court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary  
application of preclusion law pursuant to [28 U.S.C. § 1738].")



inconsistent with *due process of law.*” *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985) (emphasis added) (quoting Vol. 11, Wright and Miller, Federal Practice and Procedure at 198, 200). “A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside.” *Watts v. Pinckney*, 752 F.2d 406, 410 (9th Cir. 1985) (quoting *Jordon v. Gilligan*, 500 F.2d 701, 704 (6th Cir. 1974)).<sup>5</sup> Simply stated, mistakes happen, but just because Wohlfeil, whether due to corruption, bias, or plain stupidity, entered a judgment enforcing an illegal contract that does not make it valid, it is void – Wohlfeil does not have the power to enforce a contract that violates State and City licensing statutes and make an illegal act legal. *Consul Ltd. v. Solide Enterprises, Inc.*, 802 F.2d 1143, 1148 (9th Cir. 1986) (“A contract to perform acts barred by California’s licensing statutes is illegal, void and unenforceable.”).

In *Kimes v. Stone*, 84 F.3d 1121 (9th Cir. 1996), the Ninth Circuit Court of Appeals concluded that a claim arising under 42 U.S.C. §1983 or §1985(3) could not be immunized by the litigation privilege since the claims arose under constitutional rights or statutory civil rights derived therefrom, citing to *Wyatt v. Cole*, 504 U.S. 158, 112 S.Ct. 1827 (1992). Cotton, as Kimes, alleges that his attorney, David Demian of Finch, Thornton, & Baird, sold out his interests to Geraci by amending his complaint to delete and change material allegations to sabotage Cotton’s case and thereby committed an extrinsic fraud. *Kimes*, 84 F.3d 1127 n.3 (finding litigation immunity does not bar suit to § 1983 action where “[plaintiff’s] complaint accuses his attorneys of selling out his interests.”).

**II. This Court must vacate the Cotton Judgments pursuant to its “inherent power” because an “attorney tampering with the administration of justice requires vacation of judgment, whether or not behavior actually influenced outcome of trial.”<sup>6</sup>**

The concept of fraud on the court has no basis in statute, but began as a court-created equitable device to remedy injustices under the court’s “inherent power.” *Hazel-Atlas Glass Co. v. Hartford-*

<sup>5</sup> See *Redlands Etc. Sch. Dist. v. Superior Court*, 20 Cal.2d 348, 363 (Cal. 1942) (“A judgment absolutely void may be attacked anywhere, directly or collaterally whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever. Moreover, the affirmance of a void judgment on appeal does not make it valid.”) (cleaned up).

<sup>6</sup> *Synanon Foundation, Inc. v. Bernstein*, 503 A.2d 1254, 1263 (D.C. 1986) (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246-47).

1 *Empire Co. ("Hazel Atlas")*, 322 U.S. 238, 248 (1944).<sup>7</sup> "A 'fraud on the court' occurs where it can be  
 2 demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable  
 3 scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by  
 4 improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or  
 5 defense." *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989).

6 Here, the letter from the City of Lemon Grove is evidence of a conspiracy between Tirandazi and  
 7 Schweitzer. At trial both Tirandazi and Schweitzer testified that daycares did not bar the issuance of a  
 8 CUP at 6220 Federal. State and City laws have mechanisms by which a CUP granted by mistake can be  
 9 retroactively approved, but that is in the cases of MISTAKE. It does not apply here because Schweitzer  
 10 knew. And even if this Court, like Wohlfeil, personally does not believe there is a conspiracy with a City  
 11 employee at the very least the letter from Lemon Grove shows that the City did not abide by its own  
 12 regulations, which resulted in a deprivation of Cotton's rights.

### 13 **III. This Court can set aside the Cotton Judgments pursuant to an independent action in equity.**

14 A district court has the power to "entertain an independent action to relieve a party from a  
 15 judgment, order, or proceeding." Rule 60(d)(1). As material here, extrinsic fraud and newly discovered  
 16 evidence provide grounds for maintaining an independent action in equity to set aside judgments. *See*  
 17 Moore's § 60.81 (Grounds for Maintaining an Independent Action in Equity) (attached hereto as Exhibit  
 18 Exhibit 11); *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1141 (9th Cir. 2004) ("It has long been the law  
 19 that a plaintiff in federal court can seek to set aside a state court judgment obtained through extrinsic  
 20 fraud.")<sup>8</sup>

21 Fraud on the Court. Does this Court really think that multiple cannabis, land use attorneys and  
 22 City employees and attorneys don't know whether a Property qualifies for a cannabis permit? City  
 23

24  
 25 <sup>7</sup> Virtually all courts and commentators recognize that the leading case in the field is *Hazel Atlas*. *See*  
 26 *Toscano v. C.I.R.*, 441 F.2d 930, 934 (9th Cir. 1971) ("As Mr. Moore recognizes, the leading case dealing  
 with fraud on the court is *Hazel-Atlas*").

27 <sup>8</sup> "Extrinsic fraud on a court is, by definition, not an error by that court. It is, rather, a wrongful act  
 28 committed by the party or parties who engaged in the fraud. *Rooker-Feldman* therefore does not bar  
 subject matter jurisdiction when a federal plaintiff alleges a cause of action for extrinsic fraud on a state  
 court and seeks to set aside a state court judgment obtained by that fraud." *Kougasian*, 359 F.3d at 1141.



1 Attorney Phelps is the legal mastermind behind the City's actions, even if he is not actively part of the  
 2 Geraci conspiracy, he has perpetrated a fraud on the court by failing to inform the Court it is enforcing  
 3 an illegal contract that legalizes a cannabis dispensary within 1,000 feet of a daycare. Simply despicable.

4 Newly Discovered Evidence.<sup>9</sup> An independent action based on new evidence, in addition to  
 5 meeting the requirements of a Rule 60(b)(2) motion, must also establish that it would be "manifestly  
 6 unconscionable" for the judgment to stand. *Pickford v. Talbott*, 225 U.S. 651, 658 (1912). For relief to  
 7 be granted under Rule 60(b)(2) "the movant must show the evidence (1) existed at the time of the trial,  
 8 (2) could not have been discovered through due diligence, and (3) was of such magnitude that production  
 9 of it earlier would have been likely to change the disposition of the case." *Jones v. Aero/Chem Corp.*,  
 10 921 F.2d 875, 878 (9th Cir. 1990) (quotation omitted).

11 In *Baxter v. Bressman*, 874 F.3d 142, 149 & n.23 (3d Cir. 2017), the Court established that  
 12 elements of fraud are same whether relief is sought by motion under Fed. R. Civ. P. 60(b)(3) or in  
 13 independent action, but latter is not subject to one-year time limit imposed by Fed. R. Civ. P. 60(c)(1).  
 14 In other words, Cotton can use Rule 60(b)(3) case law to establish a fraud on the court in an independent  
 15 action.

16 "Rule 60(b)(3) expressly states that a party may be relieved from a judgment on the basis of fraud,  
 17 regardless of whether the fraud could be classified as 'intrinsic' or 'extrinsic.'" 12 Moore's Federal  
 18 Practice - Civil § 60.43 (2020). "Pursuant to this rule, judgments have been set aside on a wide variety  
 19 of alleged frauds, such as allegations that [1] adverse parties failed to properly respond to discovery  
 20 requests, thus preventing opposing parties from adequately preparing for trial, to [2] claims that evidence  
 21 presented at the trial itself consisted of perjured testimony or false documents." 12 Moore's Federal  
 22 Practice - Civil § 60.43 (2020). "Under Rule 60(b)(3), perjury at trial may, in appropriate circumstances,  
 23  
 24

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25 <sup>9</sup> "[N]ewly discovered evidence" for this purpose includes evidence that was unknown to the moving  
 26 party at the time of trial. [*Parrilla-Lopez v. United States*, 841 F.2d 16, 19 (1st Cir. 1988). In addition,  
 27 evidence that was lost, hidden, or unavailable during trial could qualify as 'newly discovered evidence'  
 28 when later found, even if the evidence was known to the moving party at the time of trial. [*Bain v. MJJ*  
*Prods., Inc.*, 751 F.3d 642, 646–647 (D.C. Cir. 2014).]" 12 Moore's Federal Practice, § 60.42 (Newly  
 Discovered Evidence) (Matthew Bender 3d Ed.).

1 be a ground for relief even though perjury at trial was the classic example of “intrinsic” fraud for which,  
2 before Rule 60(b)(3), there could be no relief.” *Id.*

3 Rule 60(b)(3) is aimed at providing relief for judgments that were unfairly obtained, not those  
4 that are factually inaccurate. The rule is “an escape valve to protect the fairness and integrity of litigation  
5 in federal courts.” *Lonsdorf v. Seefeldt*, 47 F.3d 893, 898 (7th Cir. 1995) (Rule 60(b)(3) was appropriate  
6 because defendant’s use of fraudulently altered document caused plaintiff to suffer injustice). “**Therefore,**  
7 **the moving party does not have to prove that he or she would prevail in a retrial in order to secure**  
8 **relief from judgment on the basis of fraud of an adverse party.**” 12 *Moore’s Federal Practice - Civil* §  
9 60.43 (2020) (citing multiple court of appeal decisions) (emphasis added). “The fraud addressed in Rule  
10 60(b)(3) involves unfair litigation tactics, something that occurs after the litigation has commenced and  
11 before judgment, something that is aimed at subverting the litigation process itself.” *Id.*

12 “[M]isconduct for which relief may be granted under this provision includes witness tampering,  
13 which consists of threatening a witness or attempting to dissuade a witness from testifying.” 12 *Moore’s*  
14 *Federal Practice - Civil* § 60.43 (2020) (citing *Ty Inc. v. Softbelly’s, Inc.*, 353 F.3d 528, 536–537 (7th Cir.  
15 2003) (party seeking relief under Rule 60(b)(3) need show only that witness tampering or other  
16 misconduct affected his or her ability to present case, not that he or she would have won had the  
17 misconduct not occurred).

18 Corina Young’s testimony was never provided. And although certain parties I am aligned with  
19 believe that she is an innocent victim, I don’t care. She was lawfully subpoenaed, and her attorney  
20 promised to provide her testimony attesting, inter alia, that Magagna threatened her when she did not  
21 change her story about comments made by Geraci’s agent, Jim Bartell. Whether she was actually  
22 threatened or is in league with Austin is of no import, her testimony that Bartell was working to have the  
23 Berry Application denied and that Magagna threatened her irrefutably qualify for warranting relief as  
24 described in *Moore’s Federal Practice* addressing this subject as a fraud on the court.

25 “Intentional misconduct gives rise to presumption of substantial interference with opponent’s trial  
26 preparation.” 12 *Moore’s Federal Practice - Civil* § 60.43 (2020) (citing *West v. Bell Helicopter Textron,*  
27 *Inc.*, 803 F.3d 56, 67–69 (1st Cir. 2015)). “Failure to disclose or produce materials requested in discovery  
28 can constitute ‘misconduct’ within the purview of this subsection.” *Anderson v. Cryovac, Inc.*, 862 F.2d

1 910, 923 (1st Cir. 1988). “[R]elief on the ground of misconduct may be justified whether there was evil,  
 2 *innocent or careless purpose.*” *West*, 803 F.3d at 67 (cleaned up). To prevail on a discovery misconduct  
 3 claim, the moving party demonstrate that such “discovery misconduct ... *substantially* ... interfered with  
 4 the aggrieved party's ability fully and fairly to prepare for and proceed at trial.” *Anderson*, 862 F.2d at  
 5 924 (emphasis in original). As argued above, Young’s testimony is dispositive if believed by a jury. It  
 6 shows that Geraci was not actually trying to get the Berry Application approved because if Cotton ever  
 7 prevailed Geraci would be liable for consequential damages. To permanently mitigate his liability, he  
 8 had to have another CUP approved within 1,000 feet to permanently deprive Cotton of the ability of  
 9 getting a CUP at the Property.

10 It is not a coincidence that Schweitzer filed an application for a competing CUP on the same day  
 11 a lawsuit was filed against Cotton! Schweitzer testified that he knew it was a conflict of interest to work  
 12 on a competing CUP, but his employee’s name showed up on the 6220 Federal CUP application.

#### 13 14 **IV. Elements of a TRO**

15 The purpose of a TRO is to preserve the status quo before a preliminary injunction hearing may  
 16 be held; its provisional remedial nature is designed merely to prevent irreparable loss of rights prior to  
 17 judgment. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S.  
 18 423, 439 (1974). The same standard applies to a motion for a TRO and a motion for a preliminary  
 19 injunction. *See Stuhlberg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001).  
 20 To obtain a TRO or preliminary injunction, the moving party must show: (1) a likelihood of success on  
 21 the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief;  
 22 (3) that the balance of equities tips in the moving party's favor; and (4) that an injunction is in the public  
 23 interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

24 Under the Ninth Circuit's “sliding scale” approach, the first and third elements are to be balanced  
 25 such that “serious questions” going to the merits and a balance of hardships that “tips sharply” in favor  
 26 of the movant are sufficient for relief so long as the other two elements are also met. *Alliance for the Wild*  
 27 *Rockies v. Cottrell*, 632 F.3d 1127, 1134-1135 (9th Cir. 2011).

1 A TRO may issue without notice if (i) specific facts in an affidavit<sup>10</sup> or a verified complaint clearly  
 2 show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse  
 3 party can be heard in opposition and (ii) the movant certifies in writing the reasons why notice should  
 4 not be required. FRCP 65(b)(1).

5 *A. Cotton will prevail on his declaratory cause of action.*

6 The Declaratory Judgment Act (“DJA”) provides that: “In a case of actual controversy within its  
 7 jurisdiction ... any court of the United States ... may declare the rights and other legal relations of any  
 8 interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C.  
 9 § 2201(a). Declaratory relief is appropriate where “there is a substantial controversy, between parties  
 10 having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of declaratory  
 11 judgment. A case is ripe where the essential facts establishing the right to declaratory relief have already  
 12 occurred.” *Boeing Co v. Cascade Corp.*, 207 F.3d 1177, 1192 (9th Cir. 2000) (internal quotation marks  
 13 omitted).

14 There is a substantial controversy between Cotton Geraci, the Enterprise and its joint tortfeasors,  
 15 including the City and Cotton’s former attorneys, regarding the validity of the judgments issued against  
 16 Cotton premised on the legality of Geraci owning a cannabis CUP. For the reasons set forth above, Cotton  
 17 will prevail seeking to have the state judgments set aside so he proceed to have his causes of action tried  
 18 before an impartial judge in state court where he seeks to vindicate his causes of action under state law  
 19 that is not possible under federal law because of its stance on cannabis.

20 *B. Cotton and others will be irreparably harmed if the TRO does not issue.*

21 There is no prejudice to Magagna if he is enjoined from selling the CUP issued at 6220 Federal  
 22 while this court sets a hearing to give him an opportunity to vet the City’s requirements for a cannabis  
 23 dispensary and whether it could lawfully issue one at 6220 Federal.  
 24  
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 26

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27 <sup>10</sup> 28 U.S. CODE § 1746  
 28



1                   C. *The balance of equities tip in Cotton's favor because there can be no equity in*  
 2                   *enforcing an illegal contract through a judgement procured through a fraud on the*  
 3                   *court and judicial bias.*

4                   The title says it all.

5                   D. *An injunction is in the public interest.*

6                   As noted by the Facebook conversation and proposal sent by Magagna, it is his intent to sell this  
 7                   Competing CUP to someone who does not know of the litigation history of this property or that he  
 8                   procured it as a member of a conspiracy to sabotage *Cotton I*. Additionally, these individuals are no  
 9                   better than common drug dealers, aside from the fact that they used attorneys and lawsuits to achieve  
 10                  their illegal goals and as a matter of public policy should not be allowed to profit or in anyway decide  
 11                  who takes ownership of these permits for the operation of a marijuana dispensary.

12                  Finally, as a matter of public policy the voters of the State of California, when they voted and  
 13                  passed Proposition 64 in 2016, did so with the expressed intention that transparency be key in the  
 14                  issuing of marijuana related permits and who can own, manage, and run them. These individuals have  
 15                  extensively used proxies to file and obtain permits, use resources from obtained from illegal marijuana  
 16                  operations to fund their legal battles and are not the people the voters would have expected could own a  
 17                  marijuana dispensary in California.

18                               1. Cotton's First Amendment Rights are being violated.

19                  In *Shahbazian v. City of Rancho Palos Verdes*, 17 Cal. App. 5th 823 (2017), the issue was whether  
 20                  the City of Rancho Palos Verdes properly issued a permit for a fence separating two neighbors. The  
 21                  Shahbazians alleged the City of Rancho Verdes violated certain ordinances and selectively applied others  
 22                  in issuing the permit for the fence while denying a permit for a deck the Shahbazians had built. The city  
 23                  filed a special motion to strike under section 425.16, arguing the Shahbazians' complaint targeted  
 24                  "protected speech" because the city's decisions followed official government proceedings. The trial court  
 25                  denied the motion, and the city appealed. On appeal, the court affirmed holding "section 425.16 does not  
 26                  protect a governmental entity's decisions to issue or deny permits, and we agree with the trial court that  
 27                  granting a special motion to strike in these circumstances would chill citizens' attempts to challenge  
 28                  government action." *Shahbazian v. City of Rancho Palos Verdes*, 17 Cal. App. 5th 823, 826, 225 Cal.  
 Rptr. 3d 772, 774 (2017). An independent and concurrent view of this action justifying the relief



1 requested is the City's role in what has transpired and its decision to issue a cannabis CUP at 6220  
2 Federal.

3 The City, as well as Geraci's attorneys and agents have weaponized the judiciary to prevent  
4 Cotton from being able to vindicate his constitutional rights. As stated in *Church of Scientology v.*  
5 *Wollersheim*: "When a party to a lawsuit engages in a course of oppressive litigation conduct designed  
6 to discourage the opponents' right to utilize the courts to seek legal redress, the trial court may properly  
7 apply section 425.16. We hold that in making that determination, the trial court may properly consider  
8 the litigation history between the parties. The legislative rationale in enacting the statute is consistent  
9 with such an analysis because acts which are designed to discourage the bringing of a lawsuit are no more  
10 oppressive than acts which seek to prolong the litigation to a point where it is economically impracticable  
11 to maintain and pursue it to a final conclusion. **When one party to a lawsuit continuously and**  
12 **unsuccessfully uses the litigation process to bludgeon the opponent into submission, those actions**  
13 **must be closely scrutinized for constitutional implications."** 42 Cal. App. 4th 628, 648-49.

14 2. Geraci's attorneys are corrupt and have defiled the state and federal  
15 judiciaries

16 "False testimony and subornation of perjury occur during the trial and do adversely affect the  
17 public at large by interfering with the judicial process as well as impacting on an individual plaintiff."  
18 *Smith v. Superior Court*, 151 Cal.App.3d 491, 499 (Cal. Ct. App. 1984). It is indisputable that Geraci's  
19 attorneys and agents have suborned and committed perjury. Geraci cannot lawfully own a cannabis CUP  
20 via the Berry Application. Austin's testimony stating that he can is manifestly false. It is perjury and a  
21 fraud on the court. If Cotton was wrong, at some point some judge over the last 3 ½ years would have  
22 said so.

23 **V. Lis Pendens**

24 Lis Pendens. A lis pendens may be filed in a District Court. CCP § 405.5. Cotton, as a pro per  
25 litigant, requires and requests this Court approve the recording of a lis pendens at 6220 Federal. CCP §  
26 405.21. A lis pendens is proper to prevent the sale or encumbering of 6220 Federal with the District Four  
27 CUP to a third party who is unaware that the District Four CUP will be found void for having been  
28 procured by illegal acts. *See Integrated Lender Servs., Inc. v. Cty. of L.A.*, 22 Cal. App. 5th 867, 877

1 (2018) (“a party obtaining an interest in the property subsequent to the lis pendens takes with constructive  
2 notice of the pending action and will be bound by the judgment in that action.”).

3 Thus, for the reasons set forth above and pursuant to CCP § 405.21, Cotton respectfully requests  
4 this Court give him leave to record a lis pendens at 6220 Federal.

5 **CONCLUSION**

6 Judge Robinson, I am grateful that you have this case. You are a prosecutor. I had high hopes for  
7 Curiel and Bashant, but their naked political ambition to be promoted to the Ninth Circuit Court of  
8 Appeals has put them in a situation where they cannot admit they made mistakes, to my continued  
9 prejudice. Geraci and his attorneys are criminals. Whatever potential motives would lead the judiciary  
10 to cover up for Wohlfeil’s mistakes, certainly they cannot be countenanced when they allow criminals to  
11 continue to operate their illegal criminal operations.

12  
13 DATED: October 27, 2020

14  
15 By \_\_\_\_\_



16 Darryl Cotton  
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DARRYL COTTON  
6176 Federal Boulevard  
San Diego, CA 92104  
Telephone: (619) 954-4447

Plaintiff *Pro Se*

2020 OCT 27 PM 4:06  
CLERK US DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY \_\_\_\_\_ DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON,  
Plaintiff,

v.

LARRY GERACI, an individual; REBECCA BERRY, an individual; GINA AUSTIN, an individual; AUSTIN LEGAL GROUP, a Professional Corporation; MICHAEL WEINSTEIN, an individual; SCOTT H. TOOTACRE, an individual; FERRIS & BRITTON, a Professional Corporation; CITY OF SAN DIEGO, a public entity, and DOES 1 through 10, Inclusive,  
Defendants.

Case No. 3:18-cv-00325-TWR (DEB)  
Formerly: 3:18-cv-003250-BAS (DEB)

**DECLARATION OF DARRYL COTTON  
IN SUPPORT OF HIS EX PARTE  
APPLICATION FOR (1) OSC FOR WHY A  
PRELIMINARY INJUNCTION SHOULD  
NOT BE ISSUED; AND (2) AN ORDER  
GRANTING PERMISSION TO RECORD A  
LIS PENDENS**

**Hearing Date:** N/A

**Hearing Time:** N/A

**Judge:** Hon. Todd W. Robinson Hon.  
Todd W. Robinson

**Courtroom:** 3A

I, DARRYL COTTON, declare:

1. I am over the age of eighteen years, and the Plaintiff in this action.
2. The facts set forth herein are true and correct as of my own personal knowledge.
3. This declaration is submitted in support of my Order to Show Cause for why a Preliminary Injunction should not be issued prohibiting Aaron Magagna from selling or further encumbering the property at 6220 Federal Blvd., San Diego, CA 92114 and an Order be granted that allows Plaintiff to record a Lis Pendens on that property.
4. I have recently discovered information and evidence that shows that Defendant Geraci and his agents were involved in a conspiracy to deprive me of a Marijuana Outlet (MO) license through manipulation of the Conditional Use Permit (CUP) process through the City of San Diego Development

1 Services Department (DSD), colluding to have the CUP on my Property denied or otherwise barred by  
2 a competing CUP application filed by Aaron Magagna, perjured testimony by key witnesses including  
3 officers of the court, and witness tampering with full knowledge by the officers of the court.

4 5. Geraci had full control of the CUP process at 6176 Federal Blvd. I had no rights as to  
5 how that CUP would be processed.

6 6. Aaron Magagna was granted a CUP at 6220 Federal Blvd. before the 6176 CUP  
7 application process had been completed.

8 7. On or about October 17, 2018 Magagna, an individual with no architectural, engineering  
9 or development experience had successfully completed, from start to finish, the 6220 CUP application  
10 in just under 7 months with the City of San Diego DSD.

11 8. Magagna benefitted enormously from the same City of San Diego DSD Project Manager  
12 Cherlyn Cac (Cac) who had worked on the 6176 CUP for approximately 14 months, leaving that project  
13 and taking over the 6220 CUP project. Cac even went so far as to state at the October 18, 2018 public  
14 hearing (I have the audio recording) that she supported approval of the 6220 CUP over the competing  
15 6176 CUP application.

16 9. Since the 6220 and the 6176 properties were within 1000' of each other which would  
17 have violated City of San Diego set back distances of two licensed MO's the 6176 CUP which was now  
18 24<sup>th</sup> month of Team Geraci CUP processing was denied.

19 10. In GERACI v COTTON (Cotton I) the matter was litigated in a jury trial at which point  
20 Geraci was successful in his arguments that I had contributed to the 6176 CUP process being delayed  
21 and on August 19, 2019 Geraci was awarded \$260,109.28 in that verdict.

22 11. After that verdict I found it strange that the fast tracking of the 6220 CUP did not seem  
23 to have the same urgency as the construction and development of the 6220 MO. On or about June 2020  
24 I noticed that after having been approved some 20 months earlier, the construction work had finally  
25 begun for the 6220 MO.

26 12. On or about September 15, 2020 I noticed that while the construction was underway at  
27 6220 the project address which had been posted for the public to see was listed as 6302A. I knew that  
28 a 6302A Federal Blvd address would not be in the City of San Diego but instead in the City of Lemon

1 Grove so I sent out a series of emails to the builder and the architect of record who had worked for and  
2 on behalf of Geraci, Mr. Michael Morton and his designer for the 6176 CUP application, Mr. Abhay  
3 Schweitzer of TECHNE and Ms. Firouzeh Tirandazi who was Cac's Supervisor at DSD that would  
4 explore this discrepancy. None of the parties wished to engage with me in these discussions. **See**  
5 **EXHIBIT 1**

6 13. Having my concerns as to how the 6302A address was being used for the 6220 MO  
7 development I began investigating the property records at both 6220 and 6302 Federal Blvd.

8 14. On September 18, 2020 I requested and downloaded a San Diego County public records  
9 request for 6302 Federal which shows Magagna having purchased the property from 6320 Federal LLC .  
10 **See EXHIBIT 2**

11 15. I also requested the same San Diego County public records information on the 6220  
12 property and found that Magagna had also been granted an EASEMENT on 06/16/20 of that property  
13 by 6302 Federal LLC and on August 12, 2020 Magagna had granted the City of San Diego an  
14 EASEMENT on the 6220 property. **See EXHIBIT 3.**

15 16. On September 29, 2020 I met with City of Lemon Grove Community Development  
16 Department (CDD) Mr. Mike Viglione, Associate Planner who took my Freedom of Information request  
17 for document production on the permit history for the 6302 property.

18 17. In a series of emails that were meant to memorialize that conversation, I asked  
19 specifically for information relating to the MEDICAL MARIJUANA DISPENSARY (MMD)  
20 application on March 21, 2017 and its denial on April 3, 2017 and the subsequent BOUNDARY  
21 ADJUSTMENTS (BA) application of August 14, 2018 which shows having expired on October 8, 2020.  
22 **See EXHIBIT 4.**

23 18. On or about October 15, 2020 the City of Lemon Grove responded to my FOIA request  
24 by producing documents that while redacted prove that Geraci agents who had been working for him,  
25 supposedly on the 6176 CUP had also been working on a competing MO CUP at 6302 Federal. **See**  
26 **EXHIBIT 5.**

27 19. While the FOIA documents have been redacted and I plan on seeking a subpoena to see  
28 unredacted versions it can be determined that on April 3, 2017 an undisclosed party was denied their



1 MMD request as the location was within 1000' of a "State-licensed family daycare home". See  
2 **EXHIBIT 5 page 1.**

3 20. On March 18, 2017 it is on TECHNE letterhead that an Architect's Investigation and  
4 Scope of Work is submitted to the City of Lemon Grove and while the signature has been redacted it  
5 depicts what would have been Michael Morton, AIA who was at the time of this document being  
6 produced for a competing MMD application, the architect of record for the Geraci 6176 CUP  
7 application. See **EXHIBIT 5 pages 2-3.**

8 21. In **EXHIBIT 5 pages 4-18** it can be seen that there are additional MMD and BA  
9 application information documents that the City of Lemon Grove has that if they were unredacted would  
10 prove ownership information and timelines as to who the parties were and what they were attempting to  
11 do during those critical CUP processing times in order to have a CUP approved that would by being  
12 within 1000' of my 6176 property. Their success in doing this would deny me and the CUP from ever  
13 being granted to me. Based on the timeline and documents that have been provided, even though they  
14 are redacted, that was clearly the plan going back to November 2016.

15 22. On January 30, 2019 Ahbay Schweitzer of TECHNE was being deposed by Cotton's  
16 attorney Jacob Austin and when asked if he would consider his services for a competing cup to be a  
17 conflict of interest he responded with "That - absolutely I would agree with that." See **EXHIBIT 6**

18 23. From June 23 until August 16, 2020 I had a Facebook communications (FB Chat)  
19 between Adam Mintz, (Mintz) a Real Estate Investor and his partner Charla Heimer, (Heimer) President  
20 ROR Investments, LLC that informed me Aaron Magagna was trying to sell the 6220 property to them  
21 for what was an initial asking price of \$10M. See **EXHIBIT 7**

22 24. The FB Chat will reveal what I had suspected but until these communications did not  
23 know. That is Magagna, contrary to his declarations at the 10/18/18 public hearing (I have an audio  
24 recording of that hearing) for the approval of the 6220 CUP he went on and on about how this was for  
25 the community and would provide jobs and with his experience be a shining example about how these  
26 businesses should be run....All BS!

27 25. Magagna had no intention of creating a competing CUP at 6220. Through Geraci, his  
28 whole intention was to see the 6176 CUP denied. As this fact became revealed, Magagna tried to

1 distance himself from the 6220 CUP by offering it to Mintz. Mintz decided not to pursue the Magagna  
2 deal when, among other things, Magagna was slow to give him requested notarized ownership  
3 information and all “the deal” had to go through Magagna’s Land Use Attorney, Cynthia Mogan-Reed  
4 (Reed) (**EXHIBIT 7 page 11**) which Mintz, now aware of the litigation I’m in sees Magagna’s and  
5 Reed’s actions as “fraudulent inducement”.

6 26. On or about July 1, 2020 Mintz sent me an email that detailed all the email  
7 communication that occurred in and around May 2019 between Mintz, Heimer, Klein and Zach Davis  
8 (Davis) of Acreage Holdings regarding the potential purchase of the 6220 CUP. The attached documents  
9 show that the negotiated yet unexecuted contract amount ended up being \$6M. These are sophisticated  
10 investors. Magagana could not BS them. They walked away from the desperate deal that Magagna was  
11 so determined to make with them. **See EXHIBIT 8**

12 27. Despite Magagna using a broker, Jason Klein (Klein) to offer the competing CUP @  
13 6220 Federal Blvd to Mintz and his investors, (**See EXHIBIT 8 pages 5-9**) these were not  
14 unsophisticated investors ready to just throw money at a project that was wrong on so many levels.

15 28. Eventually in a desperate attempt to make the sale Magagna had reduced the sales price  
16 to \$6M and offered the draft agreement to Mintz. As previously stated, these were not unsophisticated  
17 investors and there was just too much about this deal that did not make sense. Mintz and his partners  
18 decided to walk away and this was BEFORE they even knew about me and the litigation I’m embroiled  
19 in with these characters. **See EXHIBIT 9.**

20 29. Attached hereto is a true and correct copy of “Moore’s Federal Practice-Civil § 60.21-  
21 Scope of and Conditions to Relief from Substantive Errors in Judgment Itself” as **EXHIBIT 10.**

22 30. Attached hereto is a true and correct copy of “Moore’s Federal Practice-Civil § 60.81-  
23 Independent Actions in Equity” as **EXHIBIT 11.**

24 31. I have fought these forces for going on 4 years now. This is not what I signed up for! I  
25 have dealt with the worst of the worst in people and over what? A cannabis license? It’s just insane!  
26 These are professional people! Many of them sworn to uphold professional ethics. I now have judges  
27 protecting judges and what started as a simple sham lawsuit has had me fighting for my very life! I’ve  
28

1 even had 5 restraining orders filed against me by the Geraci opposition to prevent me from attending  
2 any public CUP hearings as opposition to what they were participating in.

3 32. On October 27, 2020 sent the motion and this declaration via email to all the parties and  
4 members of the news media so that no one can say that they did not know what was going on in this case.

5 I beseech you to please take into consideration the NEW evidence I have provided here and the  
6 legal arguments I have done my best to make in the accompanying EP Motion. I don't believe when  
7 the facts are considered that I will lose this case but from where I stand now, after 4 years of sham  
8 litigation and the fraud upon the court I've been witness to, I'm not sure I can ever really win either

9  
10  
11 I declare under penalty of perjury according to the laws of the United States that the foregoing  
12 is true and correct, and that this declaration was executed on October 27, 2020 at San Diego, California.

13  
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15 DARRYL COTTON  
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**EXHIBIT 1**



Darryl Cotton &lt;indagrodarryl@gmail.com&gt;

**Re: 6176 and 6220 (APN: 543-020-0400) Federal Blvd CUP Applications**

joe auksel &lt;customerservice@jjhconstruction.com&gt;

Wed, Sep 16, 2020 at 8:36 AM

To: Darryl Cotton &lt;indagrodarryl@gmail.com&gt;, aaron magagna &lt;aaronmagagna@gmail.com&gt;

Cc: michael@m2a.io, CAMarengo@m2a.io, Terry Strom &lt;Terry@strompermit.com&gt;, Andrew Flores &lt;afloreslaw@gmail.com&gt;, zoe villaroman &lt;zoe.g.villaroman@gmail.com&gt;

Darryl

If you believe that JJH Construction has done something unlawful I suggest you contact your lawyer to discuss your options. Outside of that, please discontinue any further correspondence with JJH Construction in the matters you have stated in this and the previous email. Thank you in advance for your consideration in this matter -

J.J.H. Construction, Inc  
542 15th Street, San Diego CA 92101  
Office: 619-269-1951  
License #929802

CustomerService@JJHConstruction.com (reaches all office staff)

*The only one who can satisfy the human heart... is The One who created it!*

\*\*\*\*\* CONFIDENTIALITY NOTICE \*\*\*\*\*

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On Tue, Sep 15, 2020 at 4:32 PM Darryl Cotton <indagrodarryl@gmail.com> wrote:  
Hi Michael,

We have never met nor have we ever spoke. You provided the architectural services as the architect of record to Ahbay Scheitzer of Techne who was working for Larry Geraci to ostensibly secure a license for a Cannabis Dispensary Conditional Use Permit at the 6176 property I own. You may not realize it but we were unsuccessful in getting that CUP because a competing CUP at 6220 Federal Blvd. beat Schewitzer/Geraci to the finish line and got the CUP approval first.

Michael, earlier today I have put the prime contractor on notice as to what is currently being litigated and what will be expanded in the near future to include the architectural services you provided



Case 3:18-cv-00325-TWP-DEB Document 44 Filed 10/30/20 PageID 2385 Page 25 of 168  
Schweitzer, who also has a stake (% ownership) in the 6220 CUP. I have attached a copy of that email and included Joshua Hamilton of JJH Construction (CSLB No 929802) in this email. I have also had previous communication with Terry Strom, of Strom Permitting Services who early on in the 6220 CUP application Terry was listed as DSD POINT OF CONTACT for that project. What concerned me back then was that Strom quickly became a FORMER POINT OF CONTACT and it appeared from that point on that Aaron Magagna, who holds no professional architectural or engineering licenses whatsoever was taking on this project CUP application entirely on his own. Aaron Magagna did in 7 months what a licensed architectural and design team could not do in two years. Having been a contractor and developer for over 20 years in this city, that is where I call bull shit!

Michael I want you to understand that it took going to a state court trial to find out what Schweitzer was doing to you and me with the 6176 Architectural services you provided for Geraci. Section 13.2 of Canna-Greed will detail specifically what went on in the processing of the 6220 CUP. These are chronological events and I would strongly encourage you to review them.

<https://151farmers.org/2017/10/23/canna-greed-stay-awake-stay-aware-my-story/>

Once you've done that you might want to peruse the DSD handling of the 6176 CUP which is detailed in Section 13.3 in the Canna-Greed story.

Now I would like you to see how Schweitzer spent his time and money on the 6176 design services that used not just you but TWO OTHER Architects, on a 1600 sq-ft project that took over 2 years to process with DSD and it NEVER EVEN GOT A COMMUNITY PLANNING GROUP MEETING!!!

This is a January 15, 2020 comparison I did between the 6176 and the 6220 CUP architectural and DSD services processing of the two competing CUPS. Within it you will see the architectural fees paid as line item expenses by TECHNE. Now that this case is being heard in a federal court under, among other charges, antitrust activities that the City of San Diego and others are involved in, the conspiracy between the parties becomes of ever increasing importance.

<https://151farmers.org/wp-content/uploads/2017/10/DSD-Project-Comparisons-5-1.pdf>

Trial Exhibit 147 (See Canna-Greed Section 11.4 for all the Trial Exhibits) is the TECHNE Expense Summary that will support the data described in the previous project comparison.

<https://151farmers.org/wp-content/uploads/2017/10/147.pdf>

Michael like I told Joshua earlier. I'm currently in federal court pursuing my rights in Cotton v Geraci @ <https://151farmers.org/wp-content/uploads/2017/10/05-13-20-Amended-Complaint-Conformed.pdf>

Then we have the parallel federal case to mine which is Flores v Austin @ <https://151farmers.org/wp-content/uploads/2017/10/07-09-20-First-Amended-Complaint.pdf>

And finally I have a flowchart with all working hyperlinks that on page two shows the FBI involvement in our cases involving a long and growing list of defendants to a wide variety of defendants that now include murder for hire charges.

<https://151farmers.org/wp-content/uploads/2017/10/Geraci-Flowcharts-Combined-11.pdf>

Michael as a builder and an architect I don't want to believe either you or Joshua went into this with your eyes wide open as to what this was eventually going to become. **You had no idea** that the 9th circuit decision in the Flores matter is now being petitioned in the United States Supreme Court as a Sua Sponte matter. **You had no way of knowing** that I have done this development work with the city and recognized what it was I was seeing and would not back down but instead I would assemble the evidence that would eventually expose this entire process for what it is! That being said: **there is no way you or even I could have known what this was going to become. But here we are.**

Case 3:18-cv-00385-TWR-DEB Document 44 Filed 10/30/20 PageID 2386 Page 26 of 168  
I want to believe that when you first started the architectural work for Schweizer, Geraci it was under an agreement that you would provide signed, stamped and dated drawings that in a good faith effort would have been a normal approval process. Keep in mind that under a subpoena we'll see that services agreement. Michael, once you review the information in this email I'm confident that both you and Mr. Marengo, your partner at MarengoMorton Architects will agree **that nothing about the 6220 CUP process was normal. And to top it ALL off** the City of San Diego opened ANOTHER CUP number and made Magagna go through the entire process again under 644432.

[https://151farmers.org/wp-content/uploads/2017/10/Project-ID\\_644432\\_Federal-Blvd-M.O.-1.pdf](https://151farmers.org/wp-content/uploads/2017/10/Project-ID_644432_Federal-Blvd-M.O.-1.pdf)

Michael, as I told Joshua in his attached email if you are working with any of the named defendants in either mine or the Flores matter you should really think about how you're going to respond to this email. If you come clean with what you know, I will promise to not name you in the federal complaint. I have cc'd Flores to see if he would agree to the same conditions but I can't speak for him. If I do not hear from you by 2:00 pm PST on 09/18/20 I will assume you have decided that these issues can be explained away and plan my case accordingly.

Sincerely,

Darryl Cotton



Darryl Cotton &lt;indagrodarryl@gmail.com&gt;

---

**RE: 6176 and 6220 (APN: 543-020-0400) Federal Blvd CUP Applications**

---

**Michael Morton** <Michael@m2a.io>

Wed, Sep 16, 2020 at 11:53 AM

To: Darryl Cotton &lt;indagrodarryl@gmail.com&gt;, Claude Anthony Marengo &lt;CAMarengo@m2a.io&gt;

Cc: "customerservice@jjhconstruction.com" &lt;customerservice@jjhconstruction.com&gt;, Terry Strom

&lt;Terry@strompermit.com&gt;, Andrew Flores &lt;afloreslaw@gmail.com&gt;, zoe villaroman

&lt;zoe.g.villaroman@gmail.com&gt;

September 16, 2020

Mr. Cotton,

As the project you referred to was also eliminated from the CUP by the permitted project.

I have no other or further information that I can provide.

Please remove me and my company from any further emails on this subject.

Michael Morton

---

**From:** Darryl Cotton <indagrodarryl@gmail.com>**Sent:** Tuesday, September 15, 2020 4:32 PM**To:** Michael Morton <Michael@m2a.io>; Claude Anthony Marengo <CAMarengo@m2a.io>**Cc:** customerservice@jjhconstruction.com; Terry Strom <Terry@strompermit.com>; Andrew Flores <afloreslaw@gmail.com>; zoe villaroman <zoe.g.villaroman@gmail.com>**Subject:** 6176 and 6220 (APN: 543-020-0400) Federal Blvd CUP Applications

Hi Michael,

We have never met nor have we ever spoke. You provided the architectural services as the architect of record to Ahbay Scheitzer of Techne who was working for Larry Geraci to ostensibly secure a license for a Cannabis Dispensary Conditional Use Permit at the 6176 property I own. You may not realize it but we were unsuccessful in getting that CUP because a competing CUP at 6220 Federal Blvd. beat Schweitzer/Geraci to the finish line and got the CUP approval first.

Michael, earlier today I have put the prime contractor on notice as to what is currently being litigated and what will be expanded in the near future to include the architectural services you provided Schweitzer, who also has a stake (% ownership) in the 6220 CUP. I have attached a copy of that email and included Joshua Hamilton of JJH Construction (CSLB No 929802) in this email. I have also had previous communication with Terry Strom. of Strom Permitting Services who early on in the 6220 CUP application Terry was listed as DSD POINT OF CONTACT for that project. What concerned me back then was that Strom quickly became a FORMER POINT OF CONTACT and it appeared from that point on that Aaron

Case 3:18-cv-00325-TWR-DEB Document 44 Filed 10/30/20 PageID 2388 Page 28 of 168

Magagna, who holds no professional architectural or engineering licenses whatsoever was taking on this project CUP application entirely on his own. Aaron Magagna did in 7 months what a licensed architectural and design team could not do in two years. Having been a contractor and developer for over 20 years in this city, that is where I call bull shit!

Michael I want you to understand that it took going to a state court trial to find out what Schweitzer was doing to you and me with the 6176 Architectural services you provided for Geraci. Section 13.2 of Canna-Greed will detail specifically what went on in the processing of the 6220 CUP. These are chronological events and I would strongly encourage you to review them.

<https://151farmers.org/2017/10/23/canna-greed-stay-awake-stay-aware-my-story/>

Once you've done that you might want to peruse the DSD handling of the 6176 CUP which is detailed in Section 13.3 in the Canna-Greed story.

Now I would like you to see how Schweitzer spent his time and money on the 6176 design services that used not just you but TWO OTHER Architects, on a 1600 sq-ft project that took over 2 years to process with DSD and it NEVER EVEN GOT A COMMUNITY PLANNING GROUP MEETING!!!

This is a January 15, 2020 comparison I did between the 6176 and the 6220 CUP architectural and DSD services processing of the two competing CUPS. Within it you will see the architectural fees paid as line item expenses by TECHNE. Now that this case is being heard in a federal court under, among other charges, antitrust activities that the City of San Diego and others are involved in, the conspiracy between the parties becomes of ever increasing importance.

<https://151farmers.org/wp-content/uploads/2017/10/DSD-Project-Comparisons-5-1.pdf>

Trial Exhibit 147 (See Canna-Greed Section 11.4 for all the Trial Exhibits) is the TECHNE Expense Summary that will support the data described in the previous project comparison.

<https://151farmers.org/wp-content/uploads/2017/10/147.pdf>

Michael like I told Joshua earlier. I'm currently in federal court pursuing my rights in Cotton v Geraci @ <https://151farmers.org/wp-content/uploads/2017/10/05-13-20-Amended-Complaint-Conformed.pdf>

Then we have the parallel federal case to mine which is Flores v Austin @ <https://151farmers.org/wp-content/uploads/2017/10/07-09-20-First-Amended-Complaint.pdf>

And finally I have a flowchart with all working hyperlinks that on page two shows the FBI involvement in our cases involving a long and growing list of defendants to a wide variety of defendants that now include



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Michael as a builder and an architect I don't want to believe either you or Joshua went into this with your eyes wide open as to what this was eventually going to become. **You had no idea** that the 9th circuit decision in the Flores matter is now being petitioned in the United States Supreme Court as a Sua Sponte matter. **You had no way of knowing** that I have done this development work with the city and recognized what it was I was seeing and would not back down but instead I would assemble the evidence that would eventually expose this entire process for what it is! That being said: **there is no way you or even I could have known what this was going to become. But here we are.**

I want to believe that when you first started the architectural work for Schweitzer/Geraci it was under an agreement that you would provide signed, stamped and dated drawings that in a good faith effort would have been a normal approval process. Keep in mind that under a subpoena we'll see that services agreement. Michael, once you review the information in this email I'm confident that both you and Mr. Marengo, your partner at MarengoMorton Architects will agree **that nothing about the 6220 CUP process was normal. And to top it ALL off** the City of San Diego opened ANOTHER CUP number and made Magagna go through the entire process again under 644432.

[https://151farmers.org/wp-content/uploads/2017/10/Project-ID\\_644432\\_Federal-Blvd-M.O.-1.pdf](https://151farmers.org/wp-content/uploads/2017/10/Project-ID_644432_Federal-Blvd-M.O.-1.pdf)

Michael, as I told Joshua in his attached email if you are working with any of the named defendants in either mine or the Flores matter you should really think about how you're going to respond to this email. If you come clean with what you know, I will promise to not name you in the federal complaint. I have cc'd Flores to see if he would agree to the same conditions but I can't speak for him. If I do not hear from you by 2:00 pm PST on 09/18/20 I will assume you have decided that these issues can be explained away and plan my case accordingly.

Sincerely,

Darryl Cotton



Darryl Cotton &lt;indagrodarryl@gmail.com&gt;

**Re: 6176 and 6220 (APN: 543-020-0400) Federal Blvd CUP Applications**

1 message

**Darryl Cotton** <indagrodarryl@gmail.com>

Wed, Sep 16, 2020 at 3:49 PM

To: Michael Morton &lt;Michael@m2a.io&gt;, "Tirandazi, Firouzeh" &lt;FTirandazi@sandiego.gov&gt;, dsdprojectinfo@sandiego.gov

Cc: Claude Anthony Marengo &lt;CAMarengo@m2a.io&gt;, "customerservice@jjhconstruction.com" &lt;customerservice@jjhconstruction.com&gt;, Terry Strom &lt;Terry@strompermit.com&gt;, Andrew Flores &lt;afloreslaw@gmail.com&gt;, zoe villaroman &lt;zoe.g.villaroman@gmail.com&gt;, Jake Austin &lt;jacobaustinesq@gmail.com&gt;, Joe Hurtado &lt;j.hurtado1@gmail.com&gt;

Firouzeh,

This is to inform you and DSD that the the 6220 Federal Blvd., (APN 543-020-0400) CUP that was originally processed under Project No 598124 and then was reissued under Project No 644432 at the same address is being constructed with a different address shown mounted on the construction site. That address on the construction site sign is 6302A Federal Blvd Lemon Grove, CA 91945 and would be a different APN 478-290-0500 and clearly not in the City of San Diego. Attached is an image of that site and the incorrect address sign that has been installed on the upper left corner of the construction fence.

I'm informing you as I would expect you would want to remedy this since the City of San Diego should not be performing inspection services on a property located in Lemon Grove, CA. Also I will be filing a Lis Pendens on this project and I want to make sure the City of San Diego has done their job as it is a City of San Diego construction site requirement that the project be correctly addressed with the proper APN associated with the improvements.

Thank you.

Darryl Cotton

On Wed, Sep 16, 2020 at 11:53 AM Michael Morton &lt;Michael@m2a.io&gt; wrote:

September 16, 2020

Mr. Cotton,

As the project you referred to was also eliminated from the CUP by the permitted project.

I have no other or further information that I can provide.

Please remove me and my company from any further emails on this subject.

Michael Morton

**From:** Darryl Cotton <indagrodarryl@gmail.com>

**Sent:** Tuesday, September 15, 2020 4:32 PM

**To:** Michael Morton <Michael@m2a.io>; Claude Anthony Marengo <CAMarengo@m2a.io>

**Cc:** customerservice@jjhconstruction.com; Terry Strom <Terry@strompermit.com>; Andrew Flores <afloreslaw@gmail.com>; zoe villaroman <zoe.g.villaroman@gmail.com>

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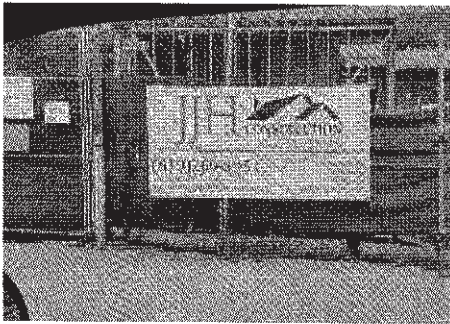
[https://151farmers.org/wp-content/uploads/2017/10/Project-ID\\_644432\\_Federal-Blvd-M.O.-1.pdf](https://151farmers.org/wp-content/uploads/2017/10/Project-ID_644432_Federal-Blvd-M.O.-1.pdf)



Michael, as I told Joshua in his attached email, if you are working with any of the named defendants in either mine or the Flores matter you should really think about how you're going to respond to this email. If you come clean with what you know, I will promise to not name you in the federal complaint. I have cc'd Flores to see if he would agree to the same conditions but I can't speak for him. If I do not hear from you by 2:00 pm PST on 09/18/20 I will assume you have decided that these issues can be explained away and plan my case accordingly.

Sincerely,

Darryl Cotton



09-15-20\_ 6220 Federal Blvd .jpg  
1811K





CSLB 929802

(619)269-1951

[www.JHConstruction.com](http://www.JHConstruction.com)  
[CustomerService@JHConstruction.com](mailto:CustomerService@JHConstruction.com)

Design/Build  
Additions  
Remodels  
Tenant Improvements

## EXHIBIT 2



Search Criteria - APN: 4782900500, Parcel Filter: StartsWith, From Record Date: 9/17/2015, To Record Date: 9/18/2020, Doc Type: All

Row	# Pages	Grantor	Grantee	Document #	Record Date	Doc Type	APN	Record Type	Map #	Map Bk/Pg
1	4	STEWART JEANNE FLORINE		2016- 0053351	02/05/2016	AFFIDAVIT OF DEATH	4782900500	OR		
2	6	DECLARATION OF TRUST OF JAMES P STEWART AND JEANNE F STEWART	6302 FEDERAL LLC	2017- 0015184	01/11/2017	DEED	4782900500	OR		
3	9	HARP BEVERLY J	6302 FEDERAL LLC	2018- 0205046	05/21/2018	EASEMENT	4782900500	OR		
4	6	6302 FEDERAL LLC	MAGAGNA AARON JACOB	2020- 0310969	06/16/2020	EASEMENT	4782900500	OR		



## EXHIBIT 3

Search Criteria - APN: 5430200400, Parcel Filter: StartsWith, From Record Date: 9/17/2015, To Record Date: 9/18/2020, Doc Type: All

Row	# Pages	Grantor	Grantee	Document #	Record Date	Doc Type	APN	Record Type	Map #	Map Bk/Pg
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2	2	EK EDITH PHYLLIS		2019-0105978	03/25/2019	AFFIDAVIT OF DEATH	5430200400	OR		
3	4	EK JOHN DAVID	EK JOHN CARL	2019-0281720	07/15/2019	DEED	5430200400	OR		
4	3	EK JOHN DAVID	MAGAGNA AARON JACOB	2020-0035282	01/23/2020	DEED	5430200400	OR		
5	2	MAGAGNA ALMA LAURA	MAGAGNA AARON JACOB	2020-0035283	01/23/2020	DEED	5430200400	OR		
6	6	EK JOHN CARL		2020-0036764	01/23/2020	AFFIDAVIT OF DEATH	5430200400	OR		
7	1	EK JOHN DAVID	MAGAGNA AARON JACOB	2020-0042458	01/27/2020	DEED	5430200400	OR		
8	6	6302 FEDERAL LLC	MAGAGNA AARON JACOB	2020-0310969	06/16/2020	EASEMENT	5430200400	OR		
9	9	MAGAGNA AARON JACOB	CITY OF SAN DIEGO	2020-0449395	08/12/2020	EASEMENT	5430200400	OR		

EXHIBIT 4



Darryl Cotton &lt;indagrodarryl@gmail.com&gt;

**PRA-144-2020 RE: 6302 Federal Blvd Lemon Grove Property****Shelley Chapel** <schapel@lemongrove.ca.gov>

Thu, Oct 8, 2020 at 4:38 PM

To: Darryl Cotton &lt;indagrodarryl@gmail.com&gt;, Mike Viglione &lt;mviglione@lemongrove.ca.gov&gt;

Cc: Lydia Romero &lt;lromero@lemongrove.ca.gov&gt;, Noah Alvey &lt;nalvey@lemongrove.ca.gov&gt;, Kristen Steinke &lt;kss@lfap.com&gt;

Mr. Cotton,

*I have received your Public Records Act request dated September 29, 2020, for information regarding the 6302 and 6304 Federal Blvd., within the City of Lemon Grove. In accordance with the California Public Records Act we have 10 days in which to respond to your request as to whether we have records responding or not. It has been determined that we do have records responding and will require an additional 10 days due to voluminous amount of research, review and finalize for release as required to ensure a thorough response is provided. You can expect a response no later than October 15, 2020.*

*I will notify you when the records requested are available for review and/or purchase. The Public Records Act allows the City to charge the direct costs of duplication of public records with a copy charge of \$.20 for Black and White copy and \$1.30 for Color copy that is for standard letter sheets of paper, drawings, maps and other media fees will be charged in accordance with the City Master Fee Schedule available on the City website. Should you have any questions in the meantime, please contact me at (619) 825-3841 or schapel@lemongrove.ca.gov*

Kindest regards,



Shelley Chapel, MMC

City Clerk

Office of the City Manager

3232 Main Street | Lemon Grove, CA 91945-1705

Phone: 619.825.3841

Email: [schapel@lemongrove.ca.gov](mailto:schapel@lemongrove.ca.gov)



**CLOSED EVERY FRIDAY**

[www.lemongrove.ca.gov](http://www.lemongrove.ca.gov)



*Confidentiality Notice: Please note that email correspondence with the City of Lemon Grove, along with any attachments, may be subject to the California Public Records Act, and therefore may be subject to disclosure unless otherwise exempt.*

**From:** Darryl Cotton <indagroddarryl@gmail.com>

**Sent:** Thursday, October 8, 2020 9:53 AM

**To:** Mike Viglione <[mviglione@lemongrove.ca.gov](mailto:mviglione@lemongrove.ca.gov)>

Cc: Andrew Flores <afloreslaw@gmail.com>; Noah Alvey <nalvey@lemongrove.ca.gov>; Shelley Chapel <schapel@lemongrove.ca.gov>; Racquel Vasquez <rvasquez@lemongrove.ca.gov>

**Subject:** Re: 6302 Federal Blvd Lemon Grove Property

Hi Mike,

Thank you for your counter help this morning and the followup on my documents request @ 6302 and 6304 Federal Blvd . Per our conversation, as of today the City of Lemon Grove will be issuing a letter denying the Boundary Adjustment application that was applied for on 08/24/20 as having expired. If when Shelley sends me the MMD Application/Documents and the same relative to the Boundary Adjustment Application along with a copy of that closure letter I think that will be all I need.

Thank you very much.

Darryl Cotton

On Tue, Oct 6, 2020 at 8:36 AM Mike Viglione <mviglione@lemongrove.ca.gov> wrote:

Hi Darryl,

This will be added to your records request.

Respectfully,

Mike Viglione  
Associate Planner

City of Lemon Grove

Community Development Department

3232 Main St.

Lemon Grove, CA 91945

(619) 825-3807 phone

(619) 825-3818 fax

[www.lemongrove.ca.gov](http://www.lemongrove.ca.gov)

**From:** Darryl Cotton <[indagroddarryl@gmail.com](mailto:indagroddarryl@gmail.com)>

**Sent:** Friday, October 2, 2020 7:52 AM

**To:** Mike Viglione <[mviglione@lemongrove.ca.gov](mailto:mviglione@lemongrove.ca.gov)>

**Cc:** Andrew Flores <[afloreslaw@gmail.com](mailto:afloreslaw@gmail.com)>; Noah Alvey <[nalvey@lemongrove.ca.gov](mailto:nalvey@lemongrove.ca.gov)>; Shelley Chapel <[schapel@lemongrove.ca.gov](mailto:schapel@lemongrove.ca.gov)>

**Subject:** Re: 6302 Federal Blvd Lemon Grove Property

Mike,

On the City of Lemon Grove Building Permits History (see attached) you gave me I was honing in on the boundary adjustment and missed the third line item from the bottom which shows a Zoning Clearance for a Medical Marijuana Dispensary (MMD) had been applied for and was, per your records, denied. Like the Boundary Adjustment (BA) line item that MMD line item is not dated either. Could you please include in your document production all information related to that MMD application? If it can be emailed that would be ideal otherwise call me and I will come pick the documents up and pay whatever fees are necessary. Thank you.

Darryl Cotton

619.954.4447

On Tue, Sep 29, 2020 at 10:50 AM Mike Viglione <[mviglione@lemongrove.ca.gov](mailto:mviglione@lemongrove.ca.gov)> wrote:

Hi Darryl,

Please see the Medical Marijuana Operations FAQ available at <https://www.lemongrove.ca.gov/home/showdocument?id=3037> regarding permissible marijuana uses in the City of Lemon Grove, specifically item 3. The full medical marijuana ordinance, Chapter 17.32, is also available online with the City's Municipal Code at <http://qcode.us/codes/lemongrove/> for reference.

I will forward your FOIA request to the City Clerk for processing.

Respectfully,

Mike Viglione

Associate Planner

City of Lemon Grove

Community Development Department

3232 Main St.

Lemon Grove, CA 91945

(619) 825-3807 phone

(619) 825-3818 fax

[www.lemongrove.ca.gov](http://www.lemongrove.ca.gov)

**From:** Darryl Cotton <[indagroddarryl@gmail.com](mailto:indagroddarryl@gmail.com)>  
**Sent:** Tuesday, September 29, 2020 10:23 AM  
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**Cc:** Andrew Flores <[afloreslaw@gmail.com](mailto:afloreslaw@gmail.com)>  
**Subject:** 6302 Federal Blvd Lemon Grove Property

Hi Mike,

Thank you for meeting with me today at the counter and giving me the building permit history to the 6302 Federal Blvd property. I attached it so you might see what I'm referencing. Per our discussion you believe, but have not confirmed, that the 6302 property is beyond the 1000' distance requirement that would allow for another cannabis license to be applied for and potentially granted. Per your records that has not happened. You also stated that the City of Lemon Grove does not currently allow for concurrent licensing of a retail cannabis dispensary and cultivation at the same location. If you could confirm that in an email reply, so there is no misunderstanding I would appreciate that. Also per the attached FOIA request I would like to see any and all documents that were submitted in the last line item of the Permit History that is Application No: 0033160 under Permit No: BA1-800-0002. If that can be emailed to me I would appreciate it.

Thank you for your assistance.

Darryl Cotton

619.954.4447



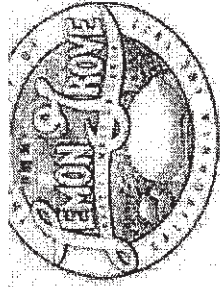
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142K



# Building & Planning Permit Selection

User: mvgilbane

Printed: 09/29/2020 - 8:59 AM

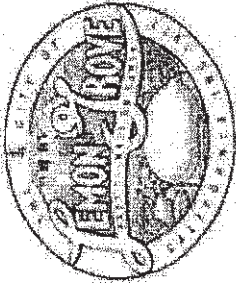


App No	Permit No	Permit Type	Service Address	Permit Status	Date Issued	Description
0006253	000-002-049	BLDGHISTORY	6302 Federal Blvd	Final	1/7/1990	Elect Upgrade 200 Amps
0001628	000-004-077	BLDGHISTORY	6302 Federal Blvd	Final	1/7/1990	Wall Sign
0001743	000-004-266	BLDGHISTORY	6302 Federal Blvd	Final	1/7/1990	Interior Partition And Ceiling
0001993	000-004-664	BLDGHISTORY	6302 Federal Blvd	Expired	1/8/1991	Tenant Improvement
0003161	000-006-433	BLDGHISTORY	6302 Federal Blvd	Expired	1/8/1991	Structure
0003277	000-006-602	BLDGHISTORY	6302 Federal Blvd	Expired	1/8/1991	Fire Restoration
0003290	000-006-626	BLDGHISTORY	6302 Federal Blvd	Expired	1/8/1991	Gas Line
0004064	000-007-873	BLDGHISTORY	6302 Federal Blvd	Expired	1/8/1991	Electrical Subfeed Only
0012811	000-000-505	COMMERCIAL ALTER	6302 Federal Blvd	Expired	11/29/1990	Open Doorway Between Units B/c Lg 1139
0033226	000-100-381	ELECTRICMECHPLER	6302 Federal Blvd B	Final	9/10/1991	Misc Plumbing
0013253	000-100-408	COMMERCIAL ALTER	6302 Federal Blvd B	Expired	9/30/1991	Partition Wall/mech Hood
0017057	000-900-396	COMMERCIAL ALTER	6302 Federal Blvd	Expired		Tenant Improvement- 15,600 sf-NEVER ISSUED
0017176	010-000-052	ROOFING	6302 Federal Blvd	Final	2/9/2010	Reroof less than 5 lbs per square
0019149	001-000-408	COMMERCIAL ALTER	6302 Federal Blvd	Expired	10/9/1991	Tenant improvement - partition wall & mech. hood
0021359	000-800-051	BUSINESSCIVIO	6302 Federal Blvd	Closed	6/24/2008	
0025848	000-000-001	PDPCOMMERCIAL	6302 Federal Blvd	Applied	1/24/2000	Improvements & Expansion Of Existing Industrial Facility
0026033	000-000-410	SEWERRES	6302 Federal Blvd	Void	8/6/2002	MacArthur and Federal 15 houses/2 permits have been issued
0031497	001-700-0002	ZONINGCLEARANCE	6302 Federal Blvd	Denied		MMD Application
0031754	001-700-0104	BUSINESSCIVIO	6302 Federal Blvd	Closed	5/10/2017	No Business License
0033160	001-800-0002	BOUNDARYADJUST	6302 Federal Blvd	Applied		6302 and 6304 BA

# Building Permits Permit Selection

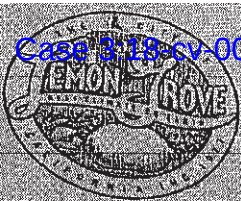
User: mvgilione

Printed: 10/08/2020 - 9:26 AM



App No	Permit No	Permit Type	Service Address	Permit Status	Application Dat	Completion Da	Description
0000253	000-002-049	BLDGHISTORY	6302 Federal Blvd	Final	11/7/1990		Elect Upgrade 200 Amps
0001628	000-004-077	BLDGHISTORY	6302 Federal Blvd	Final	11/7/1990		Wall Sign
0001743	000-004-266	BLDGHISTORY	6302 Federal Blvd	Final	11/7/1990		Interior Partition And Ceiling
0012811	000-000-565	COMMERCIALAL	6302 Federal Blvd	Expired	11/29/1990		Open Doorway Between Units B/c Lg 1139
0013226	000-000-381	ELECTRICMECHP	6302 Federal Blvd B	Final	9/10/1991		Miss Plumbing
0013253	000-000-408	COMMERCIALAL	6302 Federal Blvd B	Expired	9/30/1991		Partition Wall/mech Hood
0019149	000-000-408	COMMERCIALAL	6302 Federal Blvd	Expired	9/30/1991		Tenant Improvement - partition wall & mech hood
0001993	000-004-664	BLDGHISTORY	6302 Federal Blvd	Expired	11/8/1991		Tenant Improvement
0003161	000-006-435	BLDGHISTORY	6302 Federal Blvd	Expired	11/8/1991		Structure
0003277	000-006-602	BLDGHISTORY	6302 Federal Blvd	Expired	11/8/1991		Fire Restoration
0003290	000-006-626	BLDGHISTORY	6302 Federal Blvd	Expired	11/8/1991		Gas Line
0004064	000-007-873	BLDGHISTORY	6302 Federal Blvd	Expired	11/8/1991		Electrical Subfeed Only
0017057	000-000-396	COMMERCIALAL	6302 Federal Blvd	Expired	11/16/1999		Tenant Improvement - 15,600 sf NEVER ISSUED
0025848	PDP-000-001	PDP/COMMERCIAL	6302 Federal Blvd	Applied	1/24/2000		Improvements & Expansion Of Existing Industrial Facility
0026033	SH0-000-410	SEWERRES	6302 Federal Blvd	Void	8/6/2002		MacArthur and Federal 15 houses/2 permits have been issued
0021359	CE0-800-051	BUSINESSGVIO	6302 Federal Blvd	Closed	6/24/2008		Reroof less than 5 lbs per square
0017176	B10-000-052	ROOFING	6302 Federal Blvd	Final	2/9/2010	4/3/2017	NMD Application
0031497	ZC1-000-0007	ZONINGCLEARAN	6302 Federal Blvd	Denied	3/21/2017	5/29/2017	No Business License
0031754	CE1-000-0104	BUSINESSVIO	6302 Federal Blvd	Closed	5/10/2017	10/8/2020	6302 and 6304 BA
0033160	BA1-800-0002	BOUNDARYADJUS	6302 Federal Blvd	Expired	8/14/2018		





# CITY OF LEMON GROVE REQUEST FOR PUBLIC RECORDS

Official Date Stamp

SEP 29 2020 PM 08:57

Received by: \_\_\_\_\_

Specific Description of Document(s)

# of Copies

ANY Project development @  
6302 Federal Blvd Lemon Grove  
were primarily interested in process  
Cannabis related development.

I agree to pay the City of Lemon Grove .20 cents per page, or applicable charge, at the time of receipt of copies.

Name/Organization: Danyle BrownAddress: 6176 Federal Blvd S.D. CA 92114E-Mail Address: inda Gro Danyle@gmail.comTelephone: 619-954 4447Signature: [Signature] 9/29/20

## City Personnel Use Only:

Requested via:

☐ Counter ☐ Telephone ☐ Fax ☐ E-Mail ☐ Mail

Request:

☐ Inspect File ☐ Copies ☐ Data research ☐ Other \_\_\_\_\_

Request routed to: \_\_\_\_\_

Date completed: \_\_\_\_\_

Assisted by: \_\_\_\_\_

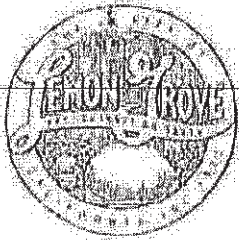
Amount due: \$ \_\_\_\_\_

Additional Comments: \_\_\_\_\_



**EXHIBIT 5**





**CITY OF LEMON GROVE**  
Development Services Department

"Best Climate On Earth"

Date: April 3, 2017



SUBJECT: Denial of Zoning Clearance Application ZC1-700-0007 for property located at 6302 Federal Boulevard, in the City of Lemon Grove (APN: 478-290-05).



On March 21, 2017, staff received the subject application to establish a medical marijuana dispensary (MMD) at the subject property in the City of Lemon Grove. The application has been denied for the following reasons, which may not be all inclusive:

- The property is located within 1,000 feet of a State-licensed family daycare home.

In order for staff to process a conditional use permit application for a MMD, the application must include all of the information required by Chapter 17.32 of the Lemon Grove Municipal Code, as well as the items listed on the City's MMD Planning Permit Checklist. Additionally, the location of the proposed MMD must comply with the zoning requirements and distance restrictions contained within Chapter 17.32. If any of the required items are missing, or if the proposed location does not meet the zoning requirements and distance restrictions, then staff cannot process a conditional use permit application. Please review the requirements of Chapter 17.32 and the MMD Planning Permit Checklist prior to submitting another application. Please also verify that the site chosen meets the distance restrictions established by Chapter 17.32. Staff's decision to deny this application may be appealed to the Lemon Grove City Council pursuant to Lemon Grove Municipal Code, Section 17.28.020(I). Appeals must be filed in writing within 10 calendar days of the date on this denial letter and must include a filing fee of \$75.00. Appeals must be filed using forms provided by the Development Services Department.

Respectfully,



David De Vries, Development Services Director



6302 Federal Blvd., Lemon Grove, CA 91945

## Architect's Investigation and Scope of Work

Saturday, March 18, 2017

Project: 6302 Federal Blvd. MMD

### Site Information:

The project site consists of an irregular shaped lot with an approximate area of 40,946sf (0.94 acres) with a single-story industrial building with an area of approximately 13,686.97sf. The site also contains an asphalt paved parking lot as well as landscaping and a draining channel along the northwestern (rear) property line.

### Project Scope:

The project scope includes converting 2,500sf of the existing 13,686.97sf single-story industrial building into a Medical Marijuana Dispensary. The project suite is located on the northernmost portion of the building. Interior modifications in order to convert the existing space include non-structural walls, lighting, HVAC, finishes, etc... Furthermore the scope of work also includes re-stripping the existing parking lot in order to provide compliant parking stalls, drive aisles, bicycle parking, accessible parking stalls and an accessible path of travel. The parking lot area will also be provided with adequate lighting for safety. Improvements to the exterior of the structure include lighting, the addition of one door, and the infill of an existing large opening with a storefront system with fixed glass and one door.

### Ventilation and Mold Mitigation Strategy:

The proposed project consists of a retail space, reception, bathrooms and back-office space for the staff. None of these spaces will generate mold based on their use. The proposed HVAC system naturally reduces moisture in the air thus further mitigating any potential mold. The HVAC system will also comply with the latest version of the California Building Code and California Mechanical Code requirement by providing a specific amount of outside fresh air to be brought into the space thus ensuring the



appropriate air quality for the occupants. Proper ventilation will be provided through the measures described above.

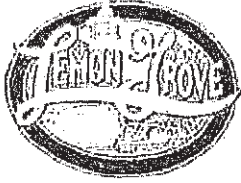
**Odor Mitigation Strategy:**

Medical Marijuana in its fresh flower form has an odor which is not noxious or harmful in any manner. The project is designed with a "man-trap" layout on all entries and exits. Besides improving occupant safety, this layout also controls the transfer of air from interior to exterior thus preventing any potential odors from escaping the facility. Furthermore, the HVAC system will be provided with a charcoal filtration system in order to reduce the odors within the facility and to reduce any potential odors from escaping the facility. Any odor which might escape the facility, will be below a level of impact.

Sincerely,

A black rectangular box redacting the signature of Michael Morton.

Michael Morton AIA - CA License # C-19371



## PLANNING PERMIT APPLICATION

Development Services Department / Planning Division  
 3232 Main Street, Lemon Grove, CA 91945  
 Phone: 619-825-3805 Fax: 619-825-3818  
 www.lemongrove.ca.gov

### APPLICATION REQUEST- SELECT ALL THAT APPLY - (SUBJECT TO OTHER PERMIT REQUIREMENTS)

- |   |   |
|---|---|
| <input type="checkbox"/> Zoning Clearance (ZC)                          | <input type="checkbox"/> Tentative Parcel Map (TPM) - 4 or fewer lots |
| <input type="checkbox"/> Pre-Application (PA)                           | <input type="checkbox"/> Certificate of Compliance (CC)               |
| <input type="checkbox"/> Minor Use Permit (MUP)                         | <input type="checkbox"/> Zoning Amendment (ZA)                        |
| <input type="checkbox"/> Conditional Use Permit (CUP)                   | <input type="checkbox"/> Specific Plan Amendment (SPA)                |
| <input type="checkbox"/> Planned Development Permit (PDP)               | <input type="checkbox"/> General Plan Amendment (GPA)                 |
| <input type="checkbox"/> Minor Modification (MM)                        | <input type="checkbox"/> Modification of _____                        |
| <input type="checkbox"/> Variance (VA)                                  | <input type="checkbox"/> Time Extension for _____                     |
| <input checked="" type="checkbox"/> Boundary Adjustment/Lot Merger (BA) | <input type="checkbox"/> Appeal of _____                              |
| <input type="checkbox"/> Tentative Map (TM) - 5 or more lots            | <input type="checkbox"/> Substantial Conformance Review of _____      |
| <input type="checkbox"/> Other _____                                    |   |

APPLICANT:	[REDACTED]	PHONE:	[REDACTED]
ADDRESS:	[REDACTED]	FAX:	[REDACTED]
		EMAIL:	[REDACTED]
PROPERTY OWNER:	[REDACTED]	PHONE:	[REDACTED]
ADDRESS:	[REDACTED]	FAX:	[REDACTED]
		EMAIL:	[REDACTED]
CONTACT PERSON:	[REDACTED]	PHONE:	[REDACTED]
ADDRESS:	[REDACTED]	FAX:	[REDACTED]
		EMAIL:	[REDACTED]

\*If applicant or property owner is a trust, partnership, or corporation, please attach record(s) of ownership listing all trustees, partners, or officers, as applicable.

PROJECT NAME: 6302 FEDERAL BOUNDARY ADJUSTMENT

PROJECT ADDRESS: 6302-04 FEDERAL BOULEVARD

ASSESSOR PARCEL #: 478-290-04, 05

SITE ACREAGE: 1.42 ac

### DETAILED DESCRIPTION OF PROPOSED PROJECT USE, STRUCTURE, AND IMPROVEMENT:

BOUNDARY ADJUSTMENT OF APPROXIMATELY 0.1 ACRES OF PROPERTY FROM APN 478-290-04 TO APN 478-290-05. NO CHANGE TO EXISTING USE OF PROPERTIES, NO IMPROVEMENTS PROPOSED.

**APPLICANT CERTIFICATION:**

I hereby certify that the statements furnished in this application and in the supplemental materials present the data and information required for this project to the best of my ability, and that the facts, statements, and information presented are true and correct to the best of my knowledge. In addition, I grant permission to the City of Lemon Grove to reproduce submitted materials, including but not limited to plans, exhibits, photographs, and studies for distribution to staff, Planning Commission, City Council and other agencies in order to process this application.

Signature \_\_\_\_\_

Date: \_\_\_\_\_

Name (please print): \_\_\_\_\_

Phone: \_\_\_\_\_

**CONSENT BY PROPERTY OWNER**

If applicant is other than property owner, owner must sign consent to filing. Attach additional sheets if necessary. If property owner is a corporation or trust, a designee authorization letter is required.

I/We, as the owner(s) of the subject property, consent to the filing of this application. We further consent and hereby authorize City representative(s) to enter upon my property for the purpose of examining and inspecting the property in preparation of any reports and/or required environmental review for the processing of the application.

Signature: \_\_\_\_\_

Date: 8/17/18

Name (please print): \_\_\_\_\_

Phone: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Name (please print): \_\_\_\_\_

Phone: \_\_\_\_\_

Note: This application being signed under penalty of perjury and does not require notarization.

**TO BE COMPLETED BY PLANNING STAFF****APPLICATION PROCESSING:**

FILE #(s): \_\_\_\_\_

ACTION:

DATE: \_\_\_\_\_

☐ APPROVED☐ DISAPPROVED

FEES: \_\_\_\_\_

RECEIPT #: \_\_\_\_\_

☐ CONDITIONALLY APPROVED (See Below)

ZONE: \_\_\_\_\_

LAND USE DESIGNATION: \_\_\_\_\_

COMMENTS and/or CONDITIONS: \_\_\_\_\_



# COMMUNITY DEVELOPMENT APPLICATION

**CITY OF LEMON GROVE**  
3232 MAIN STREET  
LEMON GROVE, CA  
91945-1797

Phone (619) 825-3805  
Fax (619) 825-3818



## FOR CITY USE ONLY

Application Date	_____
File Number	_____
Related File(s)	_____
Fees	_____
Receipt #	_____
Staff Planner	_____
PR Meeting Date	_____
Incomplete Letter	_____
Plan, Comm. Date	_____
City Council Date	_____

## Application for Lot Line Adjustment

I hereby request that the Community Development Department and City Engineer approve a lot line adjustment or merger of the properties described below.

This action must comply with all requirements of the State and local Subdivision Ordinance and the Zoning Ordinance.

PARCEL \_\_\_\_\_  
Owner \_\_\_\_\_ Phone no. \_\_\_\_\_

Owner's Address 6304 FEDERAL BLVD., SAN DIEGO, CA 92114

Assessor's Parcel Numbers 478-290-05

Subdivision No. \_\_\_\_\_ Minor Subdivision No. \_\_\_\_\_ Lot No. \_\_\_\_\_

We certify that we are the record owner of the real property described in the proposed lot line adjustment.

Signature \_\_\_\_\_ Date 10-27-17

Signature \_\_\_\_\_ Date \_\_\_\_\_

PARCEL 'A' \_\_\_\_\_  
Owner \_\_\_\_\_ Phone no. \_\_\_\_\_

Owner's Address \_\_\_\_\_

Assessor's Parcel Numbers 478-290-04

Subdivision No. \_\_\_\_\_ Minor Subdivision No. \_\_\_\_\_ Lot No. \_\_\_\_\_

We certify that we are the record owner of the real property described in the proposed lot line adjustment.

Signature \_\_\_\_\_ Date 10/19/17

Signature \_\_\_\_\_ Date \_\_\_\_\_

CITY OF LEMON GROVE

10/14/2018

DEVELOPMENT DEPARTMENT

CITY OF LEMON GROVE  
3232 MAIN STREET  
LEMON GROVE, CALIFORNIA 91945  
(619) 825-3805

CITY OF LEMON GROVE  
AUG 14 2018  
DEVELOPMENT

**COMMUNITY DEVELOPMENT DEPARTMENT  
APPLICANT'S STATEMENT OF DISCLOSURES OF CERTAIN  
OWNERSHIP INTERESTS**

The City requires the following information be disclosed on any application for  
Discretionary Permits, Appeals, Tentative Subdivision Maps, Variances,  
Boundary Adjustments, Zone Reclassifications

- A) List the names of all persons having an interest in the Application.

List the names of all persons having any ownership interest in the Application

- B) If any person identified pursuant to (A) is a corporation or partnership, list the names of all individuals owning more than 10% of the shares in the corporation or owning a partnership interest in the partnership.

- C) If any person identified pursuant to (A) is a non-profit organization or a trust, list the names or any person serving as director of the non-profit organization, a trustee, a beneficiary, or a trustor of the trust.

ATTACH ADDITIONAL PAGES AS NECESSARY

"PERSON" MEANS ANY INDIVIDUAL, FIRM, CO-PARTNERSHIP, JOINT VENTURE, ASSOCIATION, SOCIAL CLUB, FRATERNAL ORGANIZATION, CORPORATION, ESTATE, TRUST, RECEIVER, SYNDICATE, THIS AND ANY OTHER COUNTRY, CITY, COUNTY, MUNICIPALITY, DISTRICT, OR OTHER POLITICAL SUBDIVISION, OR ANY OTHER GROUP OR COMBINATION ACTING AS A UNIT.

I SWEAR UNDER THE PENALTY OF PERJURY THAT THE FOREGOING STATEMENTS CONTAINED IN THIS APPLICATION ARE, TO THE BEST OF MY KNOWLEDGE AND BELIEF, TRUE AND ACCURATE.

SIGNATURE OF APPLICANT

DATE

10/27/17

CITY OF LEMON GROVE  
3232 MAIN STREET  
LEMON GROVE, CALIFORNIA 91945  
(619) 825-3805

CITY OF LEMON GROVE

AUG 14 2018

DEVELOPMENT

COMMUNITY DEVELOPMENT DEPARTMENT  
APPLICANT'S STATEMENT OF DISCLOSURES OF CERTAIN  
OWNERSHIP INTERESTS

The City requires the following information be disclosed on any application for  
Discretionary Permits, Appeals, Tentative Subdivision Maps, Variances,  
Boundary Adjustments, Zone Reclassifications

- A) List the names of all persons having an interest in the Application.

[REDACTED]

- List the names of all persons having any ownership interest in the Application

[REDACTED]

- B) If any person identified pursuant to (A) is a corporation or partnership, list the names of all individuals owning more than 10% of the shares in the corporation or owning a partnership interest in the partnership.

[REDACTED]

- C) If any person identified pursuant to (A) is a non-profit organization or a trust, list the names of any person serving as director of the non-profit organization, a trustee, a beneficiary, or a trustor of the trust.

[REDACTED]

ATTACH ADDITIONAL PAGES AS NECESSARY

"PERSON" MEANS ANY INDIVIDUAL, FIRM, CO-PARTNERSHIP, JOINT VENTURE, ASSOCIATION, SOCIAL CLUB, FRATERNAL ORGANIZATION, CORPORATION, ESTATE, TRUST, RECEIVER, SYNDICATE, THIS AND ANY OTHER COUNTRY, CITY, COUNTY, MUNICIPALITY, DISTRICT, OR OTHER POLITICAL SUBDIVISION, OR ANY OTHER GROUP OR COMBINATION ACTING AS A UNIT.

I SWEAR UNDER THE PENALTY OF PERJURY THAT THE FOREGOING STATEMENTS CONTAINED IN THIS APPLICATION ARE, TO THE BEST OF MY KNOWLEDGE AND BELIEF, TRUE AND ACCURATE.

SIGNATURE OF APPLICANT

DATE

10-27-17

1010

SAN DIEGO, CA 92114

PAY TO THE  
ORDER OF

City of Lemon Grove

DATE

7/25/18

90-7162 41290  
3222

Eighteen Hundred & no/1000

\$ 1,800-

DOLLARS

Security Features  
Outline in Gold

CHASE

JPMorgan Chase Bank, N.A.  
www.Chase.com

FOR

CITY OF LEMON GROVE

AUG 14 2018

DEVELOPMENT SERVICES



## Mike Viglione

---

**From:** Mike Viglione  
**Sent:** Tuesday, October 30, 2018 6:32 PM  
**To:** [REDACTED]  
**Subject:** RE: 6302/6304 Federal Blvd - Boundary Adjustment - BA1-800-0002

[REDACTED]

See answers in red below. I apologize for the long delay.

Respectfully,

Mike Viglione  
Assistant Planner  
City of Lemon Grove  
Development Services Department  
3232 Main St.  
Lemon Grove, CA 91945  
(619) 825-3807 phone  
(619) 825-3818 fax  
[www.lemongrove.ca.gov](http://www.lemongrove.ca.gov)

**From:** [REDACTED]  
**Sent:** Monday, October 22, 2018 11:33 AM  
**To:** Mike Viglione <mviglione@lemongrove.ca.gov>; [REDACTED]  
**Subject:** RE: 6302/6304 Federal Blvd - Boundary Adjustment - BA1-800-0002

Hi Mike. I just wanted to make sure you received my email. Please get back to me when you get a chance, thanks.

[REDACTED]

**From:** [REDACTED]  
**Sent:** Wednesday, October 10, 2018 3:57 PM  
**To:** Mike Viglione; [REDACTED]  
**Subject:** RE: 6302/6304 Federal Blvd - Boundary Adjustment - BA1-800-0002

Mike -- thanks for getting your comments back to us. I have a couple questions for you:

- 1) Comment #8 asks for the existing utilities to be shown. Is this just aboveground utilities? Do we have to show what is in Federal Boulevard, or just on-site? I'd like to minimize this as much as possible so this drawing docs

not get too cluttered. We require all utilities to be shown so that we can accurately assess the impacts of a boundary adjustment.

- 2) Comment #9 asks to show any areas of flooding. I don't believe there is any flooding on the subject properties. Are you aware of some? I will confirm with Engineering but I believe this area of Federal Boulevard is subject to flooding. FEMA's Flood Insurance Rate Maps indicate that this property is within the 1% special flood hazard area.
- 3) Comment #10 asks to show the SDG&E easement recorded on 10/26/51. We already have that on the plat as Easement 2. Do we need to show this differently? If it's on the plat and I overlooked it, then please disregard. All plottable easements must be reflected on the plat and that is the purpose of the comment.
- 4) Comment #11 asks to show the existing and proposed monuments. What is the purpose of this? I've never been asked to show monuments on a lot line adjustment plat. These are always based on record information, not field surveys. And in order to set monuments, we'll have to file a record of survey, which is another cost to the property owner. The Lemon Grove Municipal Code provides the authority for the Planning Director to require monuments to be set with a Boundary Adjustment in Section 16.16.270. Monumentation is a standard condition of approval for Boundary Adjustments in the City and will be inspected with final approval.
- 5) Comment #13 asks for a letter regarding the sanitation service. Is this for trash or sewer? Sewer.
- 6) Condition of Approval #2 appears to be asking for an access easement across APN 543-020-06 for APN 478-290-05. This seems unnecessary since these properties can't be sold individually, as that would leave APN 478-290-05 without street access. And these are owned by the same entity, so how do they grant an easement to themselves? A covenant to hold the properties in common (lot tie agreement) could be a solution in this case as it would assure access by requiring the properties never be sold separately. Though it may be unlikely and in poor judgment to convey these lots separately, I am not aware of anything that prohibit this outcome.
- 7) Condition of Approval #3 asks to research the County Assessor's Office for prior building permits. I searched the Assessor and Building Department websites using the site addresses and found no records. Is there anywhere else we can search for this information? I believe the document would be called the Commercial Construction Record and it is available to property owners or their authorized agents. I believe one of the aforementioned individuals will need to request it at an Assessor's branch office location.

Please respond when you have a chance, and give me a call if you want to discuss any of these questions/comments or if you want to meet in person and go through these. Thanks Mike.



**From:** Mike Viglione [<mailto:mviglione@lemongrove.ca.gov>]  
**Sent:** Thursday, October 04, 2018 8:52 AM  
**To:** [REDACTED]  
**Subject:** 6302/6304 Federal Blvd - Boundary Adjustment - BA1-800-0002

Good Morning,

City of Lemon Grove staff have completed their first review of the application for Boundary Adjustment under record ID BA1-800-0002 between 6302 and 6304 Federal Boulevard and determined that it is incomplete at this time. As such, a Notice of Incomplete with corrections and conditions was prepared and mailed to the applicant on 10/3/2018. Please review the Notice carefully and make all necessary revisions to continue processing your application.

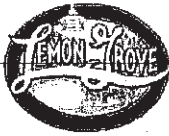
Attached you will find all the materials from yesterday's mailing, including: the Notice of Incomplete, First Invoice, Planning Redlines, and Engineering Redlines.

---

Please do not hesitate to contact me if you have questions or need any clarifications.

Respectfully,

Mike Viglione  
Assistant Planner  
City of Lemon Grove  
Development Services Department  
3232 Main St.  
Lemon Grove, CA 91945  
(619) 825-3807 phone  
(619) 825-3818 fax  
[www.lemongrove.ca.gov](http://www.lemongrove.ca.gov)

**INVOICE**

Development Services Department

3232 Main Street, Lemon Grove, CA 91945

Phone: 619-825-3805 Fax: 619-825-3818

www.ci.lemon-grove.ca.us

BRI to:

Invoice #: 2

Invoice Date: 4/11/2019

Project #: BA1-800-0002

Project Address: APN: 478-290-05-00

Staff Contact: Mike Viglione, Associate Planner

Positions	Activity/Review												Total	
	Review 1		Review 2		Review 3		Review 4		Public Hearing 1		Public Hearing 2			
	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost
City Engineer		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Assistant City Engineer	1.00	\$ 44.00		\$ -		\$ -		\$ -		\$ -		\$ -	1.00	\$ 44.00
Associate Civil Engineer		\$ -	4.00	\$ 236.00		\$ -		\$ -		\$ -		\$ -	4.00	\$ 236.00
Engineering Technician III		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Engineering Inspector		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Management Analyst		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Development Services Director		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Associate Planner		\$ -	3.00	\$ 150.00		\$ -		\$ -		\$ -		\$ -	3.00	\$ 150.00
Assistant Planner	6.00	\$ 262.00		\$ -		\$ -		\$ -		\$ -		\$ -	6.00	\$ 262.00
Development Services Technician		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Code Enforcement Officer/Water Quality Inspector		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Building Inspector		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Supervising Building Inspector		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Plans Examiner		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Building Official		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Mechanical Engineer		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Electrical Engineer		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Energy Plans Examiner		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Structural Engineer		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Fire Marshall		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Fire Inspectors		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Crime Prevention Specialist		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
City Attorney		\$ -	0.25	\$ 52.50		\$ -		\$ -		\$ -		\$ -	0.25	\$ 52.50
Public Works Director		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Reproduction														\$ -
Public Noticing														\$ -
Other (Key Surveyor)		\$ 402.50												\$ 402.50
Total		\$ 728.50	7.25	\$ 438.50	0.00	\$ -	0.00	\$ -	0.00	\$ -	0.00	\$ -	7.25	\$ 1,167.00

Deposits Paid:	1	2	3	4
Date:	8/14/2018			
Amount:	\$1,800			
Receipt #:	25679			

Fees Paid:	1	2	3	4	5	6	7	8
Date:								
Amount:								
Receipt #:								

For Refunds: Please provide copy of Receipt

Payee: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Receipt #: \_\_\_\_\_

Date: \_\_\_\_\_

Hourly Fees are Noted in the Master Fee Schedule.

Total Deposits Paid:	\$	1,800.00
Total Fees Paid:	\$	-
Total Amount Paid:	\$	1,800.00
Total Amount Expended:	\$	1,167.00
Balance Due:	\$	(633.00)





# INVOICE

Development Services Department  
3232 Main Street, Lemon Grove, CA 91945  
Phone: 619-825-3805 Fax: 619-825-3818  
www.ci.lemon-grove.ca.us

Bill to:

San Diego CA 92114

Invoice #:

1

Invoice Date:

10/3/2018

Project #:

BA1-800-0002

Project Address:

APN: 478-290-05-00

Staff Contact:

Mike Viglione, Assistant Planner

Positions	Activity/Review												Total	
	Review 1		Review 2		Review 3		Review 4		Public Hearing 1		Public Hearing 2			
	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost
City Engineer		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Assistant City Engineer	1.00	\$ 44.00		\$ -		\$ -		\$ -		\$ -		\$ -	1.00	\$ 44.00
Associate Civil Engineer		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Engineering Technician III		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Engineering Inspector		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Management Analyst		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Development Services Director		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Principal Planner		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Assistant Planner	6.00	\$ 262.00		\$ -		\$ -		\$ -		\$ -		\$ -	6.00	\$ 262.00
Development Services Technician		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Code Enforcement Officer/Water Quality Inspector		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Building Inspector		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Supervising Building Inspector		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Plans Examiner		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Building Official		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Mechanical Engineer		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Electrical Engineer		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Energy Plans Examiner		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Structural Engineer		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Fire Marshall		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Fire Inspectors		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Crime Prevention Specialist		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
City Attorney		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Public Works Director		\$ -		\$ -		\$ -		\$ -		\$ -		\$ -	0.00	\$ -
Reproduction														\$ -
Public Noticing														\$ -
Other (City Surveyor)														\$ -
Total:		\$ 326.00	0.00	\$ -	0.00	\$ -	0.00	\$ -	0.00	\$ -	0.00	\$ -	0.00	\$ 326.00

Deposits Paid:	1	2	3	4
Date:	8/14/2018			
Amount:	\$1,800			
Receipt #:	25679			

Fees Paid:	1	2	3	4	5	6	7	8
Date:								
Amount:								
Receipt #:								

For Refunds: Please provide copy of Receipt

Payee: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Receipt #: \_\_\_\_\_

Date: \_\_\_\_\_

Hourly Fees are Noted in the Master Fee Schedule.

Total Deposits Paid:	\$ 1,800.00
Total Fees Paid:	\$ -
Total Amount Paid:	\$ 1,800.00
Total Amount Expended:	\$ 326.00
Balance Due:	\$ (1,474.00)

## Property Detail Report

For Property Located At :

6302 FEDERAL BLVD, SAN DIEGO, CA 92114-1406



## Owner Information

Owner Name: [REDACTED]  
 Mailing Address: [REDACTED] SAN DIEGO CA 92114-1406 C001  
 Vesting Codes: //

## Location Information

Legal Description: 0.94 AC M/L IN LOT 13 TR CC012524  
 County: SAN DIEGO, CA APN: 478-290-05-00  
 Census Tract / Block: 30.03 / 1 Alternate APN:  
 Township-Range-Sect: Subdivision: RANCHO MISSION  
 Legal Book/Page: 478-29 Map Reference: 61-F5 /  
 Legal Lot: 130 Tract #: CC012524  
 Legal Block: 25 School District: GROSSMONT UN  
 Market Area: School District Name: GROSSMONT UN  
 Neighbor Code: Munic/Township:

## Owner Transfer Information

Recording/Sale Date: / Deed Type:  
 Sale Price: 1st Mtg Document #:  
 Document #:

## Last Market Sale Information

Recording/Sale Date: 01/11/2017 / 12/20/2016 1st Mtg Amount/Type: \$642,500 / CONV  
 Sale Price: \$1,285,000 1st Mtg Int. Rate/Type: /  
 Sale Type: FULL 1st Mtg Document #: 15185  
 Document #: 15184 2nd Mtg Amount/Type: \$315,000 / CONV  
 Deed Type: GRANT DEED 2nd Mtg Int. Rate/Type: / ADJ  
 Transfer Document #: Price Per SqFt: \$106.92  
 New Construction: Multi/Split Sale: MULTIPLE  
 Title Company: FIRST AMERICAN TITLE NCS  
 Lender: JP MORGAN CHASE BK NA  
 Seller Name: [REDACTED]

## Prior Sale Information

Prior Rec/Sale Date: / Prior Lender:  
 Prior Sale Price: Prior 1st Mtg Amt/Type: /  
 Prior Doc Number: Prior 1st Mtg Rate/Type: /  
 Prior Deed Type: CITY OF LEMON GROVE

## Property Characteristics

Year Built / Eff: 1962 / 1962 Total Rooms/Offices  
 Gross Area: Total Restrooms:  
 Building Area: 12,018 Roof Type:  
 Tot Adj Area: Roof Material:  
 Above Grade: Construction:  
 # of Stories: Foundation:  
 Other Improvements: Building Permit Exterior wall:  
 Basement Area:

Garage Area: AUG 14 2018  
 Garage Capacity:  
 Parking Spaces: DEVELOPMENT SETBACK  
 Heat Type:  
 Air Cond:  
 Pool:  
 Quality:  
 Condition:

## Site Information

Zoning: M Acres: 0.94 County Use: WAREHOUSING (743)  
 Lot Area: 40,946 Lot Width/Depth: x State Use:  
 Land Use: WAREHOUSE Commercial Units: 1 Water Type:  
 Site Influence: Sewer Type: Building Class:

## Tax Information

Total Value: \$1,305,600 Assessed Year: 2018 Property Tax: \$8,066.86  
 Land Value: \$1,025,100 Improved %: 21% Tax Area: 15045  
 Improvement Value: \$280,500 Tax Year: 2017 Tax Exemption:  
 Total Taxable Value: \$1,305,600

18-301878



**Secretary of State**  
**Statement of Information**  
 (Limited Liability Company)

LLC-12

**FILED**  
**Secretary of State**  
**State of California**

JAN 25 2018

**IMPORTANT** — Read instructions before completing this form.

Filing Fee — \$20.00

Copy Fees — First page \$1.00; each attachment page \$0.50;  
 Certification Fee — \$5.00 plus copy fees

2/20/PC

This Space For Office Use Only

1. Limited Liability Company Name (Enter the exact name of the LLC. If you registered in California using an alternate name, see instructions.)	
[REDACTED]	
2. 12-Digit Secretary of State File Number	3. State, Foreign Country or Place of Organization (only if formed outside of California)
201632110060	

4. Business Addresses			
a. Street Address of Principal Office - Do not list a P.O. Box	City (no abbreviations)	State	Zip Code
[REDACTED]	Encinitas	CA	92024
b. Street Address of California Office - If item 4a is not in California - Do not list a P.O. Box	City (no abbreviations)	State	Zip Code
[REDACTED]	Encinitas	CA	92024

5. Manager(s) or Member(s)			
If no managers have been appointed or elected, provide the name and address of each member. At least one name and address must be listed. If the manager/member is an individual, complete items 5a and 5c (leave item 5b blank). If the manager/member is an entity, complete items 5b and 5c (leave item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and addresses on Form LLC-12A (see instructions).			
a. First Name - If an individual - Do not complete item 5b	Middle Name	Last Name	Suffix
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
b. Entity Name - Do not complete item 5a			
c. Address	City (no abbreviations)	State	Zip Code
[REDACTED]	Encinitas	CA	92024

6. Service of Process (Must provide either individual OR Corporation.)			
INDIVIDUAL — Complete items 6a and 6b only. Must include agent's full name and California street address.			
a. California Agent's First Name (if agent is not a corporation)	Middle Name	Last Name	Suffix
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
b. Street Address (if agent is not a corporation) - Do not enter a P.O. Box	City (no abbreviations)	State	Zip Code
[REDACTED]	Encinitas	CA	92024
CORPORATION — Complete item 6c only. Only include the name of the registered agent Corporation.			
c. California Registered Corporate Agent's Name (if agent is a corporation) - Do not complete item 6a or 6b			
[REDACTED]			

7. Type of Business			
a. Describe the type of business or services of the Limited Liability Company			
Property Management			
b. Chief Executive Officer, if elected or appointed			
a. First Name	Middle Name	Last Name	Suffix
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
b. Address	City (no abbreviations)	State	Zip Code
[REDACTED]	Encinitas	CA	92024

9. The information contained herein, including any attachments, is true and correct.

1/3/2018

Date

Type or Print Name of Person Completing the Form

Manager

Title

Signature

Return Address (Optional) (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address. This information will become public when filed. SEE INSTRUCTIONS BEFORE COMPLETING.)

Name:

Company:

Address:

City/State/Zip: Encinitas, CA 92024





Planning \* Engineering \* Mapping  
**POLARIS**  
Development Consultants, Inc.

CITY OF LEMON GROVE

FEB 19 2019

DEVELOPMENT SERVICES

February 5, 2019

272.0

**CITY OF LEMON GROVE – DEVELOPMENT SERVICES DEPARTMENT**  
3232 Main Street  
Lemon Grove, CA 91945

**SUBJECT: BOUNDARY ADJUSTMENT BA1-800-0002 RESUBMITTAL**

We have received the City review comments to our boundary adjustment application for 6302-6304 Federal Boulevard, dated October 3, 2018, and have made the necessary corrections to the plat and related documents.

Below is a summary of how the City comments have been addressed.

Engineering Division Comments

1. The redline comments on the plat have been addressed.

Planning Division Comments

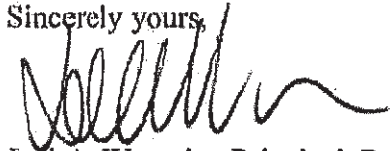
1. The redline comments on the plat and legal descriptions have been addressed.
2. The lot line conventions on the plat and the legend now match.
3. Owner's names of the adjacent parcels have been added to the plat.
4. Setback dimensions have been added to the plat.
5. The centerline has been modified and dimensions added as requested.
6. The plat title has been revised as requested.
7. Separate legal descriptions are provided on the plat as requested.
8. Existing utilities and improvements have been added to the plat as requested.
9. The FEMA flood boundary has been added to the plat.
10. All easements are shown on the plat. The easement mentioned in the comment letter is already identified as easement #2 on the plat.
11. We feel that requiring property owners to research existing monuments and set new monuments for boundary adjustments is overly burdensome and not standard industry practice in Southern California. Most jurisdictions allow for record boundary information to be used for boundary adjustments, not surveyed boundaries. This comment will require the owner to pay to have the existing monuments researched and surveyed, new monuments set, and a record of survey to be filed with the County. This will add several thousand dollars to a process that is already overly expensive. We request that the City review their policy on this comment and remove this requirement.
12. The requested modifications have been added to the plat.
13. A letter from the Lemon Grove Sanitation District is included with this resubmittal.

Conditions of Approval

1. See response to #12 above.
2. At the request of the City, we have prepared a draft "Lot Tie Agreement", based on the City of San Diego's Lot Tie Agreement, and are submitting it for review by the Planning Department. We will make any necessary changes to the agreement, have the owner sign and notarize the document, and then submit the original for City acceptance.
3. The requested Commercial Building Records for the two parcels are included in this resubmittal.

Please feel free to contact me if you have any questions or require any additional information related to this resubmittal.

Sincerely yours,



Joel A. Waymire, Principal, R.C.E. 56258

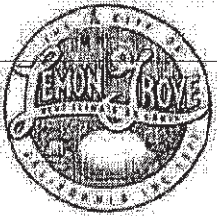
#2 ① Where is that  
Lot Tie Agreement?

② Proves that this was/is  
the 6220 property they  
were working on.

My guess is they  
would have built out  
6302 as it had been  
approved under S.D.

DSD Regulations AFTER  
the LT TIE had been  
Completed.

③ Don't forget all the DSD  
Issues w/ their Web SITE for  
6220 APN & images



**CITY OF LEMON GROVE**  
Development Services Department

"Best Climate On Earth"

October 8, 2020



**Re: Boundary Adjustment BA1-800-0002 between 6302 and 6304 Federal Blvd, APNs: 478-290-04/05**



City records indicate that the application for Boundary Adjustment under record number BA1-800-0002 has been inactive since April 11, 2019. In accordance with Municipal Code Section 17.28.020(J)(1), this application is hereby deemed expired and is now closed. A final statement of accounts is enclosed and reflects a credit of \$260.50 which will be refunded to 6302 Federal LLC within 30 days. A new application may submitted should you wish to pursue this boundary adjustment further.

Feel free to call me at (619) 825-3807 if you have any questions.

Respectfully,



Mike Viglione  
Associate Planner

CC: BA1-800-0002 Project File

Enclosures: 10.8.2020 Final Invoice





# INVOICE

Development Services Department  
3232 Main Street, Lemon Grove, CA 91945  
Phone: 619-825-3805 Fax: 619-825-3818  
www.ci.lemon-grove.ca.us

Bill To:



Invoice #: 191

Invoice Date: 10/2/2020

Project #: 041-800-0401

Project Address: APN: 170-290-05-00

Staff Contact: Mike Vignone, Associate Planner

Activity	Service 1		Service 2		Service 3		Service 4		Service 5		Service 6		Service 7		Service 8		Total	
	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost
City Engineer																		
Assistant City Engineer	1.00	44.00															1.00	44.00
Planning Staff																		
Engineering Staff																		
Contracting Services																		
Public Works Services																		
Associate Engineer			1.00	44.00			1.00	44.00									2.00	88.00
Engineering Services	6.00	264.00															6.00	264.00
Development Services																		
Construction Services																		
Planning Services																		
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EXHIBIT 6

Abhay Schweitzer 1/30/2019

1 BY MR. AUSTIN:  
 2 **Q. Is there — do you know of any reason why Techne**  
 3 **would be listed as an agent?**  
 4 MR. TOOTHACRE: Calls for speculation. If you do  
 5 know, you can answer.  
 6 THE WITNESS: I can speculate. Would you like me to?  
 7 MR. TOOTHACRE: No, don't guess if you don't know the  
 8 answer.  
 9 THE WITNESS: I don't know.  
 10 BY MR. AUSTIN:  
 11 **Q. So you don't know why your name and one of your**  
 12 **employee's name, names, is listed within the customer**  
 13 **information?**  
 14 A. I would speculate if I told you, and I'm not  
 15 going to speculate. So the answer to that is no.  
 16 **Q. So, to your knowledge, has Techne in any capacity**  
 17 **aided Mr. Magagna in his application?**  
 18 A. Absolutely not.  
 19 **Q. Would it be adverse to Mr. Cotton and Mr.**  
 20 **Geraci's application on 6176 if the — if Mr. Magagna's**  
 21 **CUP application went through?**  
 22 MR. TOOTHACRE: Vague and ambiguous. He can answer.  
 23 MR. AUSTIN: All right.  
 24 THE WITNESS: The City of San Diego has a regulation  
 25 through the Municipal Code that MOs, marijuana outlets,

Page 34

1 MR. TOOTHACRE: And just for clarity, which project  
 2 are you referring to?  
 3 THE WITNESS: Mr. Geraci's application for a marijuana  
 4 outlet on Federal Boulevard.  
 5 MR. TOOTHACRE: Thank you.  
 6 MR. AUSTIN: Okay. Thank you.  
 7 BY MR. AUSTIN:  
 8 **Q. Is — is Mr. Dutta a partner of Geraci in this**  
 9 **application?**  
 10 MR. TOOTHACRE: Calls for speculation.  
 11 THE WITNESS: Not that I'm aware of.  
 12 BY MR. AUSTIN:  
 13 **Q. Has Mr. Dutta assisted in the application process**  
 14 **for Mr. Geraci?**  
 15 MR. TOOTHACRE: Same objection.  
 16 THE WITNESS: Not that I'm aware of.  
 17 BY MR. AUSTIN:  
 18 **Q. Has Mr. Dutta ever directed you to do anything on**  
 19 **the application?**  
 20 MR. TOOTHACRE: Vague and ambiguous.  
 21 THE WITNESS: I don't recall him directing me to do  
 22 anything on this application.  
 23 BY MR. AUSTIN:  
 24 **Q. To your knowledge, would Mr. Dutta have any**  
 25 **authority in making any directions or decisions in the**

Page 36

1 can't be within 1,000 feet, and they specify, all that's  
 2 measured, of another approved marijuana outlet.  
 3 Given that's my understanding that Mr. Magagna's  
 4 project is approved and there is no more room for any more  
 5 appeals, that would be detrimental to Mr. Geraci's  
 6 project.  
 7 BY MR. AUSTIN:  
 8 **Q. So if Techne were assisting in both applications,**  
 9 **that would seem like a conflict of interest?**  
 10 MR. TOOTHACRE: Vague and ambiguous, but —  
 11 THE WITNESS: That — absolutely, I would agree with  
 12 that.  
 13 BY MR. AUSTIN:  
 14 **Q. Okay. Thank you. Do you know Neil Dutta?**  
 15 MR. TOOTHACRE: I'm sorry, the name one more time?  
 16 MR. AUSTIN: Neil Dutta, last name, D-u-t-t-a.  
 17 THE WITNESS: I do.  
 18 BY MR. AUSTIN:  
 19 **Q. And how do you know Mr. Dutta.**  
 20 A. I know him through Mr. Geraci.  
 21 **Q. Yes.**  
 22 A. Let me rephrase that.  
 23 I don't recall if it was Mr. Geraci or Mr. Jim Bartell  
 24 who introduced me, but I do know Neil through this  
 25 project.

Page 35

1 **application process? I mean authority from Mr. Geraci.**  
 2 MR. TOOTHACRE: Same objection. Also calls for a  
 3 legal conclusion.  
 4 THE WITNESS: It seems like you're asking me to  
 5 speculate on that.  
 6 BY MR. AUSTIN:  
 7 **Q. All right. Well, were you ever given the**  
 8 **impression that Mr. Dutta could be a decision-maker along**  
 9 **with Mr. Geraci and Miss Barry?**  
 10 MR. TOOTHACRE: Assumes facts not in evidence. Calls  
 11 for a legal conclusion. Calls for speculation.  
 12 THE WITNESS: Do you want me to answer that?  
 13 MR. TOOTHACRE: You can, if you like. It's —  
 14 THE WITNESS: I don't — that's not the impression  
 15 that I have.  
 16 MR. AUSTIN: Okay. I'll direct your attention to  
 17 what will now be labeled as Exhibit 6 which is an e-mail  
 18 to Larry from Jim -- from you dated October 10, 2016 as  
 19 well which is --  
 20 MR. TOOTHACRE: Counsel -- do you have a copy,  
 21 Counsel?  
 22 MR. AUSTIN: Yes.  
 23 MR. TOOTHACRE: Thanks.  
 24 (Defendant's Exhibit 6 was marked for identification)  
 25 ///

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## EXHIBIT 7

## Darryl Cotton and Adam Mintz Facebook Messenger Chat

June 23 thru August 16, 2020



Adam Mintz

Active on Messenger

Attended at University of California  
Lives in Oakland, California



JUN 23, 2020, 10:38 AM

Darryl,

I looked up the case you mentioned on one of your posts (Flores v Austin), and I'm curious:

Are you the CUP/landowner in all of this? It was unclear to me...

The reason I ask is, that guy Aaron Mag(something) was trying to sell my partner and I that dispensary permit April 2019 for like \$10mil.

It sounded all sorts of shady, so I killed the deal, but curious to know if anything was even real, given your current case.

Hi Adam

How do you Magagna?

Yes

How do I know him?

He was trying to sell the dispensary CUP and lot through a real estate broker, Jason Klein...

I see. Have you worked with Jason on other deals?



No, but I just know him as someone who is active in the license/real estate space.

Did Jason have a listing or was this just something he was floating by you as an inside opportunity?

Certainly you had every reason to be suspicious on this deal. Good call.

I'm quite certain it was something he solicited to me, as we were discussing opportunities at the time.

Ya, the Aaron guy just sounded like he was full of shit, and then we ended up with some shit attorney he was using, and she was equally shitty.

So, ya, nothing happened, long story short. Just saw his name mentioned, in addition to the location he was trying to sell, so thought I'd share that tidbit with you

As I said you made the right call. Who was the attorney he was using?

Cynthia something...

Cynthia Moxam-Read

Looks at out right... @ 4 ...

yes

Vanst law

I'm just curious, where do you sit in this case? Are you the true owner?

Not my business, but it just wasn't clear from what I read...

This is the bottom line. Magagna legally owns the CUP right now. But he acquired it illegally and when I prove in my case that he attempted to bribe and threatened someone, that CUP is going to be revoked for being procured through fraud.

do you have anything in paper from them that the CUP was for sell for \$10,000 (100?

I'm sure I have quite a bit...

they told the court it was worth only \$800,000

HAI

Dispensaries in SD do 8 figures...

I'll see what I can dig up today and tomorrow...

 Assuming I can find your information...yes!

It would be greatly appreciated, and I would be happy for us to find a way to work together going forward.

Sure. Either way, I'm happy to help..

Oh ya!

 I'll have to get with my biz partner, as it looks like it's in her dropbox, but it was \$8mil for land and license, and it appears we even had an LOI and purchase sale agreement drafted.

trial@work


I bet it will!

lol

mbagrodany@gmail.com

 Just FYI, I'll have to connect with my biz partner to get access, that might take a day or 2 at the latest. I'll try and see what I might have that's more readily available in the interim.

mbcpho.gusto

 This doesn't have an asking price, but it does say they expect to do 12mil in year one

Is this our guy?

<https://www.loopnet.com/brokerdirectory/profile/jason-klein-95866317/>

<https://www.linkedin.com/in/jason-klein-95866317/>

yes

Just the broker though, I don't he knew much, just my gut given he was just trying to get a commission.

\*doubt

That may be true

  6230 Federal Way.pdf 

 No asking price, but 12mil project rev

Can you do me a favor and see if it's still available and if there is an updated prospectus?

I don't communicate with these people..

This was like a one off..

I would know if they were actively still working it as everything comes across my desk, or my cell phone, one way or another.

People don't know how to keep their mouths shut.

Oh!



Did they even renew the license, I wonder...?

They have the city in their back pocket. They don't have to renew it and to my knowledge has not been renewed.

1

In fact the last time I checked the drawings are still being held by DSD waiting for a buyer.

It's been over a year and nothing has progressed on the site.

Well, that everything I have...this was from like 13 months ago.

no development whatsoever

I know, they couldn't even confirm for me what was the parcel and what wasn't, as it's a strange little piece of land.

No doubt still trying to sell it

Probably just on quieter channels then, I imagine. I'll see if my biz partner has anything to assist, chat soon.

I might have a claim against Cynthia, as we used her services as well, which were absolute shit and she still owes us money back. If she was doing work for me, then she did not do her due diligence when working for me.

sounds good. If your partner feels inclined to see if it's still available that would be the coup de gras in my case

Last note: it looks like Jason Klein is no longer a RE broker, just a cannabis consultant.

... 🙄 1  
 and if CMR cost you anything  
 and you believe its actionable  
 what she did here will be foundational to that claim 1  
 these people are toast  
 I appreciate what you've shared to date

I will do my best, as we were working on a hospitality project prior to COVID, so life is a bit rough for her right now. I just need to catch her at the right time, but I imagine she would love to help given her and I both feel like CMR ripped us off.

 Sure1

you are one of the few people that she would legitimately pitch AND by doing so put you in the middle of what she KNOWS to be a shit show!!!  
 Here is why you should be pissed

Oh, I had to drag my partner away from that shit show, as it was her first cannabis project, and she didn't understand the "shady" behavior in the same way I did.

 I am pissed, I just have way bigger fish to fry given the state of the world.



<https://151farmers.org/wp-content/uploads/2017/10/Child-Care-Setbacks-v8-Doc.pdf>

151farmers.org

151farme.s.org

As far as way bigger fish

get this

We're in the 9th circuit with a Writ of Mandamus naming both a federal and superior court judge

and some 40+ other defendants

many are attorneys who are bliking the sheep, the multiple sheep they lead to slaughter on the SAME property

41

Magagna is just one more example of that

I noticed the laungry list of defendants, but what point are you making? That the 9th circuit wouldn't waste their time if there wasn't a real case to be heard, essentially



?

correct



NICE

you get it! Thank God!

The attorneys for the defendants must love you!

hahaha

I only get it because I'm being sued right now by some other low lifes in SD, so I've been having to go through the motions for over 2 years now.

It is what it is. They created this shit storm. We're just going to clean it up.

Yup

Well, good chatting, and I'm sure we will chat again very soon!

Indeed

and if you know any RICO lawyers or firms feel free to share.

Will do!

my number is 619 954 4447

Thanks.

I'm better with email but feel free to ping me at AdamNiniz@hotmail.com.

and if I can assist on the SD matter please feel free to share the case with me.

41

I may have something that helps you.

 Oh I would, but it's a simple case of someone owing me money, and them suing me for defamation instead of paying me. There is no case...

Like, I could get hit by a bus tomorrow, and my answer to the court would stand on its own just fine.

 Agreed, and thanks

k

 WHOA!

 That's very telling...

Good

Last thing

10 judges have seen this and 3 federal judges have recused themselves

Tell me if you were a federal judge would you want this on your bench?

<https://51farmers.org/wp-content/uploads/2017/10/Gerard-Flowcharts-Combined-1.pdf>

you betcha

TTYL

and thx again





np

Sorry, last thing...I'm just looking over old emails, it appears that Aaron made us use CMR as a condition of getting the deal done.

Interesting...

Fraudulent inducement



Cynthia Morgan Reed



He made us use her, or insisted we use her as our land use attorney,  
highly suspect now knowing more about your situation



CMR3

check

cause she's in on it

1

cause shes in on it

https://www2.dre.ca.gov/PublicASP/pubinfo.asp?start=1

...

Public License Lookup - DRE

www2.dre.ca.gov

CA

your boy's license was revoked

There is more to this story

1 - Not my boy, but thanks.

2 - Someone else told me this once sometime ago, and I looked it up, and he had like 3 DUI's. He gave me some excuse, and I didn't bother exploring any further, as I've had more than enough experience with alcoholics in my life.

According to him, he got it from going in between wherever and Adelanto and/or San Bernardino, but who knows.

He wins licenses under the name Nitble This

"ribble this"

Forgive me. I was being glib.

Yes I reviewed the citations and they appear to be alcohol related

still not positive if he was brokering the Magagna property with a revoked license

but if he was I think it speaks more to CRM not properly vetting him and you're her client.

anyway the Writ goes in tomorrow  
just wrapping up for the night.  
Inx again.

I thought of you first  
Filed just today  
<https://151farmers.org/wp-content/uploads/2017/10/20-71813-Documents.pdf>

of course

JUN 25, 2020, 7:48 PM

151farmers.org

151farmers.org

I'll check it out shortly, thanks for sharing.

NICE!

So this is the official filing then?

I'm not familiar with 9th circuit or anything that hyper technical..

JUN 30, 2020, 12:49 PM

Hey!

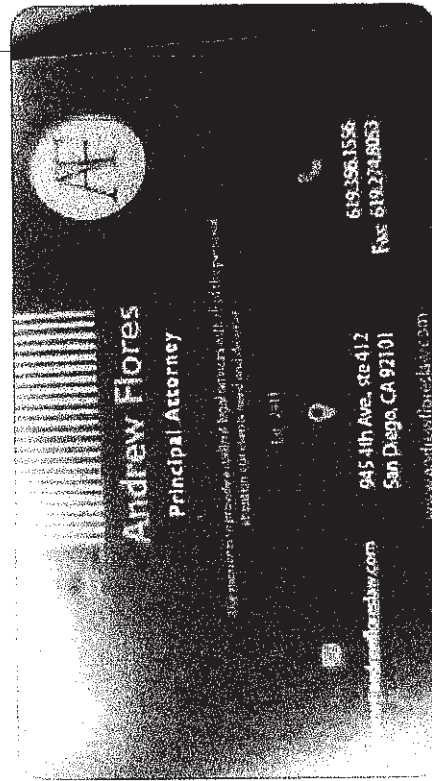
my biz partner will share the PSA's...





 I think that it's best she go through your attorney, if that's ok?

Ok

 Just let me know a good email address, and I'm sure either she, Charla Heimer, or her attorney will connect.




 Got it, even with the shiny spot@

 I'm about to go into a conference call, but I wanted to let you know the good news.

Thank you kindly



 This directly ties CMR, as the PSA was being negotiated through her.

I agree

I wonder if they're still trying to sell it?

JUL 1, 2020, 3:02 PM

Hi Adam

 Hi...

I'd like to forward you an email

 Ok

whats your email address

Oh! lol., I guess that would be helpful!

 AdamMintz@hotmail.com





so true



Wow! Well I'll check it out, and def appreciate it...sorry, a bit tied up at the moment...just like giving people my full attention



good point



You got it!

Who does?

You'll get an idea as to what you avoided by passing on the 6220 property. 1

CNR is likely going to be disbanded over this. 1

You know it's always the little things that trip these people up.

in this case it was an Associate Mgr in Records at DSD

I made it very clear to Mayor Faulkner that there are things happening within the city that his staff has dirty hands.

no worries. 1

the reason I'm sharing this with you is because

because there may be greater implications to what CNR has done to you than I'm aware of. 1

Any questions let me know. As of now they have 48 hours to respond.

Everyone who was included in the email  
which includes CMR  
because she represented Magagna at the Hearing  
I've said nothing specific about her trying to sell the property  
My guess is the city has to take a long hard look at who they are laying down with  
You've been involved in project development over the years. What you're about to see should piss you off that they CMR  
tried to cut their losses by making the problem look like it was the city's.  
If you ever care to chat my cell is 619 054 1447



Much appreciated! I'm sure we will connect at some point in the very near future...chat soon, and thanks again.



JUL 1 2020, 4:30 PM

So, just want to make sure I'm getting this write, as there are clearly a lot of moving pieces.

To d'still down what you just sent me, and correct me if I'm wrong:

The City of San Diego has yet to approve the building plans for the 6220 project, and the project has not even been approved thus far.

You are showing your documents that are in the city's file were filed BEFORE the documents related to 6220. not to mention, a CUP could not be granted on 6220 given that it has not been fully approved.

Is that correct? some?

I've had to deal with ES before....lol

So, repeat back to me what I said, but put it in your terms, if you wouldn't mind.

Cause I'm sure there is more than just the topical stuff I spoke to...

Sure!

You're a fast study


I sensed that

Can you spare 10 min on a call?

Ill walk you through it

 Gimme like 5 minutes and Ill give you a ring.


JUL 1, 2020, 5:52 PM


 I sent you the motherode...I didn't realize I had that stuff archived in a different folder.

 Damn!

There's some GOOOD shit in there..

No problem

 That's really where I'll need my partner, as she handled most of the attorney calls.

 Actually...I only know of one, but you know who would know of way more...Jason Klein, as he was hired to broker this thing.

Sounds good

We'll work off the email

1

Nice job!

A statement of facts would be a nice touch

Add in what you know about other buyers they solicited

CMR will need you to go away

Hmmm

I doubt he would want any part in any trouble, especially since he did a bunch of work for a deal that wasn't real.

So, I guess he got screwed, now that I look at it.

He won't realize that right away.

He's making friends.

I can't say for sure...

But I have to imagine they are friendly if he did work for him...unless it ended poorly.

I always ask myself this.

If it was such a good deal, why are you selling?

I just took it as someone flipping a license.

lots of license sales are just arbitrage.

True, but he's projecting 9m a year or something like that. It makes no sense considering it may be the ONLY license that qualifies in district 4.

The project can not get built. There are two child care facilities within 1000ft of the project location.

I'm going to chat up Andrew. I've shared the emails with him.

Ill get back to you.

ds 1



JM is Jacqueline McGowan who is an Administrator on a Facebook Group called California City and County Regulations Watch (CCRW). McGowan works with lawyers and lobbyists through this group to steer cannabis clients to her consulting group and to those lawyers who maintain the status quo in her group so that the dysfunction that is all things cannabis post Prop 64 will remain for those whose business is supposedly being able to navigate these waters. Cotton was kicked out of CCRW because he called JM and the attorneys in her group for being there to simply self-promote their services. Cotton started the FB group Banned Members as a result of that disbarment from CCRW.

No problem! Say NC to bullies!!!

Keep me in the loop on that!

Regarding Jackie, it already has. Jackie promotes herself as a lobbyist, may even act as one, but she is not a registered lobbyist.

So there's just that one item alone...

Hi Adam. I was saw a post that had been posted by JM on CCRW where she attacks me and you had the temerity to defend me while pointing out how her actions are diminishing what the group could do if it was called to action with meaningful reform.

I'd like to thank you for posting that as you had to know how that would be received.

I'm told the exchange was removed but from what I heard you made your point.

You are a stand up guy!



It will backfire

this week the other side has to reply to our opposition on the Motion to Dismiss

they have

NOTHING!



factually they are done and they know it!

Which is why Gina Austin

 Actually, that's SUPER stupid of them!!!

 Austin?

 Right

 I mean, a judge can easily say that the defendant is influencing a potential jury pool, while making defamatory remarks about the plaintiff in a very public setting.

Either way, judges hate that shit.

NP

 have a great day and keep me in the loop!

one of the defendants in the case is firing off on that post of hers

it means nothing

and Austin is one of the attorneys we're suing

AGREED!!!

Gine Austin

a Canna-Lawyer here in SD

I just wanted to compliment you on not drinking the cool aid

and YES

I will and you too!

1

**EXHIBIT 8**



Darryl Cotton &lt;indagrodarryl@gmail.com&gt;

---

**Fwd: Federal Blvd**

adam mintz <adam.mintz@icloud.com>  
To: indagrodarryl@gmail.com

Wed, Jul 1, 2020 at 5:26 PM

Begin forwarded message:

**From:** Agent Cannabis <jason@agentcannabis.com>  
**Subject:** Re: Federal Blvd  
**Date:** May 7, 2019 at 5:58:52 PM PDT  
**To:** Charla Heimer <char@csquarednvestments.com>  
**Cc:** Adam Mintz <adam@rorinvestments.com>

Charla

He does have the document notarized signed, the affidavit of death of trustee was signed March 25 and recorded with the county, he just has not paid the fee in order to finalize the CUP but he will pay it and get that done prior to close of escrow. This document reflects the new trustee which is John David Ecke

Aaron said if there are no further questions, he asks to forego the meeting tomorrow and get the PSA sent over to him so that he can proof it and get it executed. He is getting frustrated because he has been asking for a list of due diligence items and questions to provide Cynthia for the meeting tomorrow so that he can schedule it and she can be prepared but as I am still not able to provide it to him he can't make sure that Cynthia is prepared and pin her down to a time to meet. She has also been asking for this list to make sure that she knows the topics that are to be discussed....

--

Jason Klein  
858-431-9188  
www.AgentCannabis.com

On Tue, May 7, 2019 at 3:20 PM Charla Heimer <char@csquarednvestments.com> wrote:

Jason,

Couple follow-up questions for you:

- Why hasn't Aaron been able to get the document notarized from a family member yet? I knew he hadn't paid the fee but I have in my notes that when all this first came up and I was on the phone with Aaron that he said he was getting that signed by the family that same week and we could consider that done.
- Does Aaron or Cynthia have in writing who the new Trustee or Executor is?

On Mon, May 6, 2019 at 2:28 PM Agent Cannabis <jason@agentcannabis.com> wrote:  
Steps needed to complete the transfer are as follows:

- 1) Trustee of property needs to sign a notarized authorization form (since last form was signed by the father who passed away) allowing Aaron to legally occupy property for use as a dispensary
- 2) \$17k fee needs to be paid to SD Development Services Division to complete CUP process
- 3) Authorization form needs to be recorded with the county
- 4) Ownership of existing LLC is amended to reflect Charla as legal owner
- 5) Option to purchase land is exercised by Aaron during escrow period
- 6) Aaron executes agreement with Charla to sell her the land simultaneous with closing of Aaron's option to purchase and sale of CUP
- 7) Charla (or whoever you want to be reflected as owner of CUP) needs to complete live scan for city to transfer ownership of CUP

--

Jason Klein  
858-431-9188  
[www.AgentCannabis.com](http://www.AgentCannabis.com)





Darryl Cotton <indagrodarryl@gmail.com>

---

**Fwd: TIME SENSITIVE: San Diego Dispensary**

---

adam mintz <adam.mintz@icloud.com>  
To: indagrodarryl@gmail.com

Wed, Jul 1, 2020 at 5:19 PM

See below:

Begin forwarded message:

**From:** Char Heimer <char@rorinvestments.com>  
**Subject:** Fwd: TIME SENSITIVE: San Diego Dispensary  
**Date:** July 8, 2019 at 3:25:01 PM PDT  
**To:** Adam Mintz <adam@rorinvestments.com>

FYI...

----- Forwarded message -----

**From:** Char Heimer <char@rorinvestments.com>  
**Date:** Mon, Jul 8, 2019 at 2:43 PM  
**Subject:** Re: TIME SENSITIVE: San Diego Dispensary  
**To:** Zach Davis <z.davis@acreageholdings.com>

Hi Zach,  
It is still available because I have been focused on wrapping up two other property closings and had a Lender that didn't perform and put me really behind. I am curious...who were you with at dinner, did they know either Adam or I personally?

Charla Heimer, President  
ROR Investments, LLC  
Email >>> char@rorinvestments.com  
Website >>> rorinvestments.com  
Cell >>> 858-229-5587

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On Mon, Jul 8, 2019 at 2:30 PM Zach Davis <z.davis@acreageholdings.com> wrote:

Hi Charla,

Hope you're well. Your name and Adam's came up randomly at a dinner I attended last night in SF.

Curious if the below opportunity (or others) are still available?

All my best,

Zach

Zach Davis  
Vice President, Corporate M&A  
O: 347-501-6751  
M: 631-456-0396  
E: z.davis@acreageholdings.com  
366 Madison Avenue, 11th Floor  
New York, NY 10017 USA

 Image result for ACREAGE HOLDINGS LOGO jpg

On Thu, May 16, 2019 at 8:30 AM Charla Heimer <char@csquaredinvestments.com> wrote:

Hi Zach,

Here is the Dropbox link that my Partners have been providing to their interested Parties for the San Diego Dispensary Property:

San Diego Dispensary - Federal Blvd. Let me know if you have any questions and/or are interested after reviewing what you have here. By the way, I misspoke regarding the Provisional Application filing, it has not been done yet as my Partners were waiting to see who gets under contract as they have informed me it would make no sense or rather be far more difficult to file the Application under us and then change to new Owner vs. Buyer gets it under their name from the beginning.

#### **CONDITIONAL USE PERMIT**

**CUP #:** 2114346 issued by the City of San Diego

**Approved:** Dec 6<sup>th</sup>, 2018, on file in the Development Services Department

**Granted By:** The Planning Commission of the City of San Diego

**Owner & Permi ee:** John Carl Ek & Edith Phylis Fk, co-trustees of the Ek Family Trust, dated January 5, 1994, Owner, and 2018FMO, LLC, a California Limited Liability Company, Permittee

**Municipal Code:** SDMC Section 126.0305

**Size:** 0.11-acre site

**Legal Descripon:** The Northeasterly 50 feet of the Lot 24 of Map No.2121, in the City of San Diego

**APN:** 543-020-0400 on Federal Blvd in the CO-2-1 Zone within the Encanto Neighborhoods Community Planning area

**Project Includes:** Marijuana Outlet, Construction & operation of a Marijuana Outlet, 2-story 1,682 SF Building, Off-street parking, Landscaping (planting, irrigation, and related improvements). Public & private accessory improvements determined by the Development Services Department to be consistent with the land use & development standards for site in accordance with adopted community plan, the California Environmental Quality Act.

#### **BUREAU OF CANNABIS CONTROL**

**License:** C10-18-0000211-TEMP

**For:** State of California Adult-Use and Medicinal-Retail

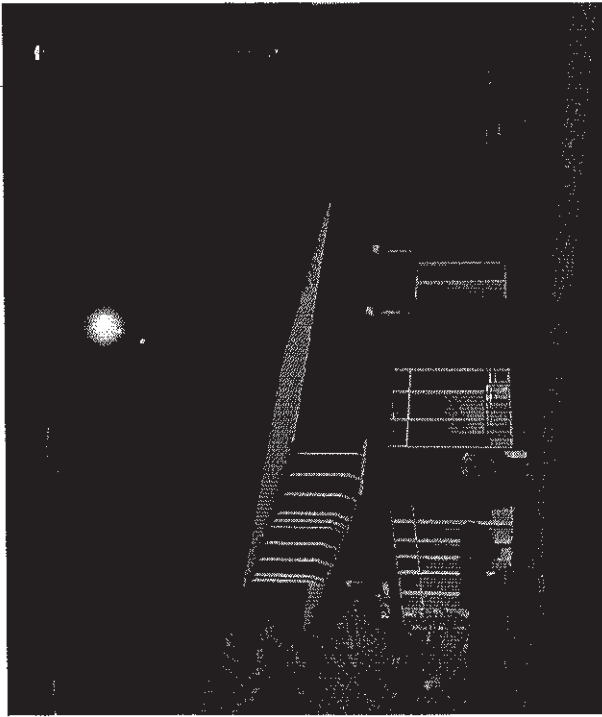
**Valid:** 12/24/2018

**Expires:** 07/22/2019

**Issued To:** 2018FMO LLC

# PROPERTY DETAILS & HIGHLIGHTS

6230 FEDERAL BLVD  
SAN DIEGO, CA 92114



Property Name:	San Diego Marijuana Retail Outlet
Property Address:	6230 Federal Blvd, San Diego, CA 92114
APN:	543-020-05
Lot Size:	0.14 AC
Building Size:	1,800 SF
Rail Access:	N/A
Cross Streets:	Martin Luther King Jr Fwy & Federal Blvd
Year Built:	2019
Number of Stories:	2
Number of Units:	1

## LOCATION OVERVIEW

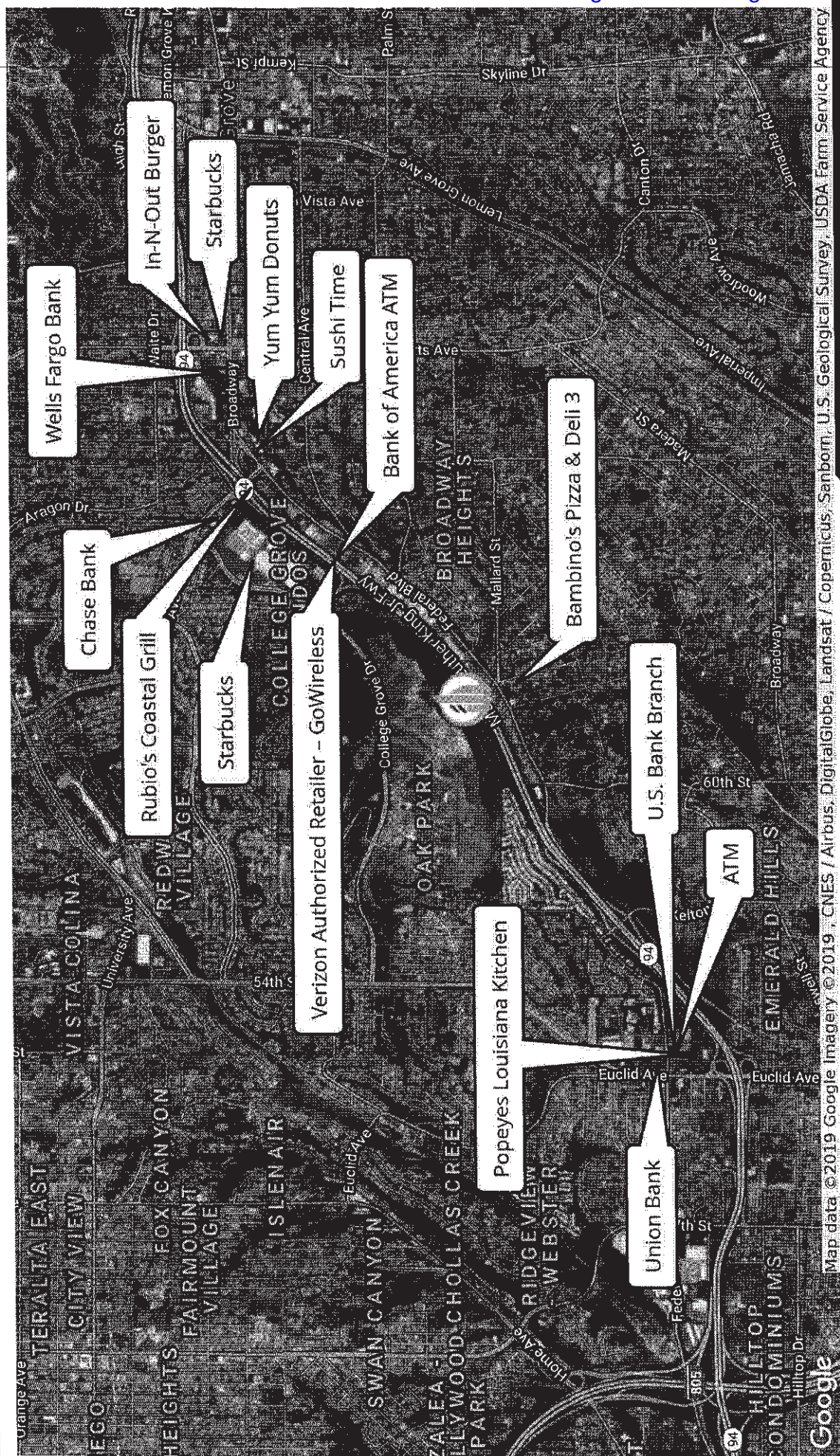
Located in the heart of the City of San Diego, this location boasts freeway visibility and a plentiful traffic count. Currently, there are only 15 licensed retail Marijuana Outlets (MO) in the City of San Diego. The entire county of San Diego has 18 municipalities and the only one that currently allows for Adult Use retail is the City of San Diego. That means that the entire county population of 3,500,000 people are limited to 15 locations where they can buy cannabis for Adult Use. Although the City of La Mesa and Lemon Grove are also allowing retail locations, they are limited to medical only. Chula Vista will be allowing retail, but they are projected to be at least a year away from even beginning to approve applications, and then they will have to begin construction and the development process. The City of Vista and Oceanside are also going to be allowing retail cannabis locations, but Vista is medical only and Oceanside will only be allowing medical delivery. For all these reasons, the City of San Diego retail Marijuana Outlets (MO) are considered to be one of the most sought after cannabis businesses in the entire State of California and even the United States.

## SALE HIGHLIGHTS

- Fully entitled vacant lot ready for construction of 1,800 SF cannabis dispensary built to suit
- Purchase includes real estate and all local and state licenses from the City of San Diego and California Bureau of Cannabis Control (BCC)
- Highly sought after location due to high traffic counts and easy freeway access
- Currently approved for retail and delivery in the City of San Diego and all surrounding areas within the region
- Estimated to generate at least \$12mm in revenue annually



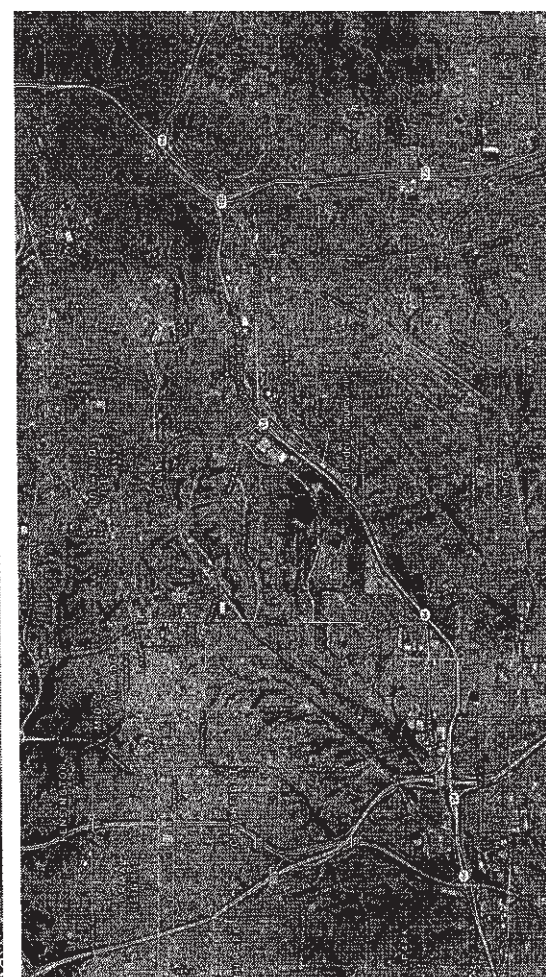
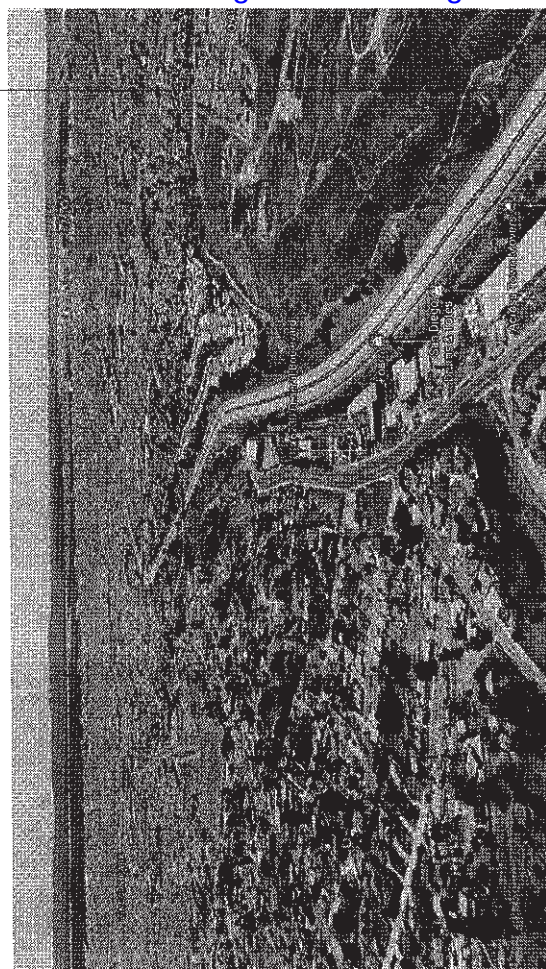
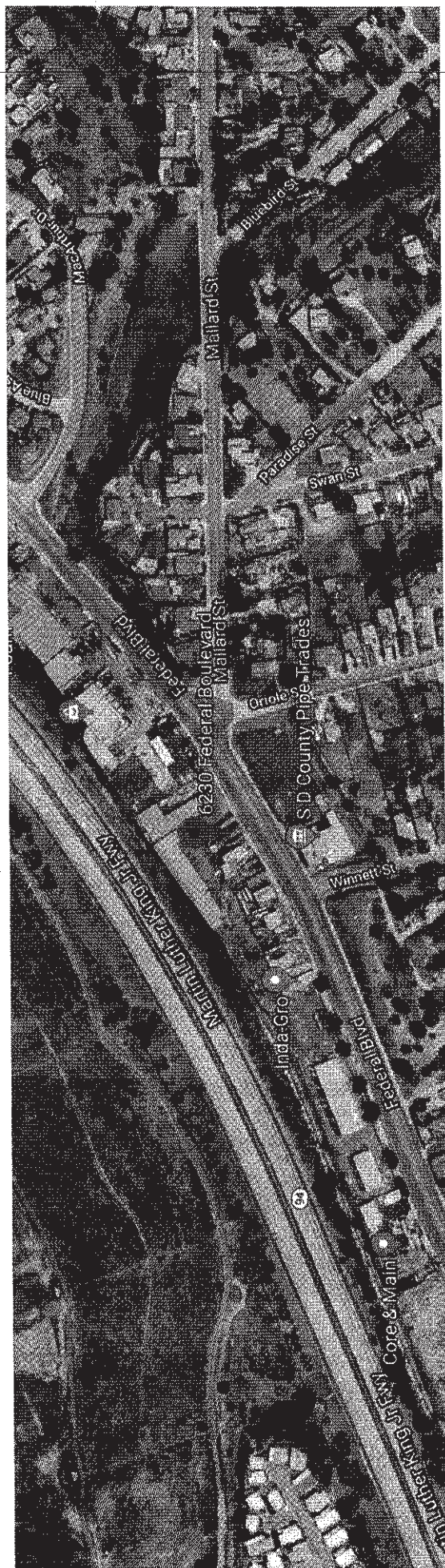
6230 FEDERAL BLVD  
SAN DIEGO, CA 92114





ADDITIONAL PHOTOS

6230 FEDERAL BLVD  
SAN DIEGO, CA 92114





LOCATION MAPS

6230 FEDERAL BLVD  
SAN DIEGO, CA 92114





## DEMOGRAPHICS MAP &amp; REPORT

6230 FEDERAL BLVD  
SAN DIEGO, CA 92114



POPULATION		1 MILE	3 MILES	5 MILES
Total population		15,304	237,119	622,695
Median age		337	317	328
Median age (Male)		326	312	317
Median age (Female)		355	322	338
HOUSEHOLDS & INCOME		1 MILE	3 MILES	5 MILES
Total households		5,014	74,194	207,205
# of persons per HH		31	32	30
Average HH income		\$57,756	\$57,426	\$60,730
Average house value		\$354,134	\$389,161	\$456,518

Premise: 6220 1/3 Federal Blvd, San Diego, CA 92114

RECORDING REQUESTED BY  
CITY OF SAN DIEGO  
DEVELOPMENT SERVICES  
PROJECT INVOICE MAIL STATION  
301  
WHEN RECEIVED MAIL TO  
PROJECT MANAGEMENT  
PERMIT CLERK  
MAIL STATION 301

THE UNIVERSITY OF CHICAGO

EXHIBIT POLICE REPORT NO. 211000  
FEDERAL BULWARD MARSHALLA BUTLET PROJECT NO. 10724  
PLANTING CEMENTS

[illegible]

On 12/15/1964, the following information was received from the Bureau of the Federal Bureau of Investigation, Washington, D.C.:

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

- a. **Decreased mortality rates.** 1,000 fewer foot-and-mouth.
- b. **Thousands of humans killed or injured.** 1,000 square foot-and-mouth in humans.
- c. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- d. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- e. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- f. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- g. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- h. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- i. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- j. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- k. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- l. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- m. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- n. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- o. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- p. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- q. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- r. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- s. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- t. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- u. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- v. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- w. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- x. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- y. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.
- z. **Increased mortality rates.** 1,000 fewer foot-and-mouth in humans.



**BUREAU OF  
CANNABIS  
CONTROL**  
CALIFORNIA

Bureau of Cannabis Control  
(833) 768-5880

## **Adult-Use and Medicinal - Retailer Temporary License**

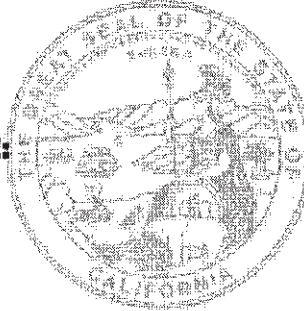
**LICENSE NO:**  
**C10-18-0000211-TEMP**

**VALID:**  
**12/24/2018**

**LEGAL BUSINESS NAME:**  
**2018FMO LLC**

**EXPIRES:**  
**7/22/2019**

**PREMISE:**  
**6220 1/3 FEDERAL BLVD**  
**SAN DIEGO, CA 92114**



*Non-Transferable*

*Prominently display this license  
as required by Title 16 CCR § 5039*

Charla Heimer  
cSQUARED CAPITAL nVESTMENTS  
"Creating equity multiples from investments that challenge the status quo."  
Email: char@csquaredinvestments.com



Cell: 858-229-5587

This communication (including any attachments) is intended for the use of the intended recipient(s) only and may contain information that is confidential, privileged or legally protected. Any unauthorized use or dissemination of this communication is strictly prohibited. If you have received this communication in error, please immediately notify the sender by return email message and delete all copies of the original communication.



Darryl Cotton &lt;indagrodarryl@gmail.com&gt;

---

**JACKPOT - PSA's !!!!**

---

**adam mintz** <adam.mintz@icloud.com>  
To: indagrodarryl@gmail.com

Wed, Jul 1, 2020 at 5:27 PM

Begin forwarded message:

**From:** Charla Heimer <char@csquaredinvestments.com>  
**Subject:** SD Dispensary: Use these documents  
**Date:** May 8, 2019 at 2:34:18 PM PDT  
**To:** Charles Brumfield <lawceb@purebio.com>, David Braunstein <dbraunmx@gmail.com>  
**Cc:** Adam Mintz <adam@rorinvestments.com>

Use these documents when we speak.

---

**2 attachments**

**(2) PSA-6230 Federal Blvd-Land & Joint Escrow Instructions.docx**  
64K



**(3) PSA-6230 Federal Blvd-CUP & License.docx**  
856K



Darryl Cotton <indagrodarryl@gmail.com>

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## Fwd: Basic Questions for SD Dispensary

---

adam mintz <adam.mintz@icloud.com>  
To: indagrodarryl@gmail.com

Wed, Jul 1, 2020 at 5:19 PM

See below:

Begin forwarded message:

**From:** aaron magagna <aaronmagagna@gmail.com>  
**Subject:** Basic Questions for SD Dispensary  
**Date:** May 8, 2019 at 10:52:47 AM PDT  
**To:** char@csquaredinvestments.com  
**Cc:** Agent Cannabis <jason@agentcannabis.com>, adam@rorinvestments.com

Good Morning Charla,

Misc:

- I Aaron Magagna am 100 percent sole owner - please see attached operating agreement
- I Hereby Reconfirm that the agreement is correct when it states that the CUP and State Licenses are the sole assets of the Company. I Confirm no outstanding liabilities, no assets, etc. I Confirm no other business used for this entity no tax returns have been filed for this entity.
- As discussed yesterday, we can have 1 or 2 PSA's, your call. For my own tax purposes, I would not complain if the PSA regarding the sale of lease and option to purchase was on a separate PSA in case I am audited by the IRS, however as long as everything closes simultaneously the number of PSA's are irrelevant to me.
- I have not sought title ins for property.
- Property is vacant land, and is currently being rented for storage.
- The property owner owns more parcels to the east. They currently rent them as well to businesses that will remain open, for now. They are available for purchase.
- I am not related to the Ek family, however do have a very good relationship with them which I have built over the last 18 months.
- please see attached Notarized death of Trustee

SD CUP:

- The CUP needs to be renewed every 5 years, it was issued in December 2018. There is a renewal process. The first renewal, in five years, is automatic upon request. After that, in 10 years, you receive extension from CUP hearing, upon request.
- The CUP does have Conditions that must maintained. They can be found within the conditional use permit itself. None of them being anything out of the ordinary for Marijuana Outlets.
- please see attached link. This link shows our projects approved CUP at this location 6220 federal blvd (look at the second map halfway down the page that reads "Approved Marijuana Outlets and Medical Marijuana Consumer

Cooperatives") its the dark purple dot. It does not specify our "standing" however, as the project was just approved a few months back, and no action has been taken since I can assure you its in good standings.

<https://www.sandiego.gov/blog/marijuana-cultivation-testing-sales-and-delivery>

-The CUPs are transferable to either a person or entity, however we are not transferring the names on the CUP as it is owned, and will remain to owned (unless you decide otherwise) by 2018FMO llc. We would be transferring the ownership of the llc.

BCC:

-Yes this is a temporary license. At the time we applied, December 2018, it was the only option.

-The next step is to apply for the provisional licence from the BCC. I would recommend that be done prior to July 22nd. Preferably 30 days prior.

-The BCC liscense will not be transferred as the permittee will remain the same "2018FMO, llc". The responsibly party, currently me, will be transferred within 30 days of closing, preferable at the time of submitting for the provisional licence.

Please let me know if there are any other questions.

Should I expect to see a copy of this PSA today?

Thanks,  
Aaron

---

## 2 attachments



**Death Of Trustee John Ek.pdf**

365K

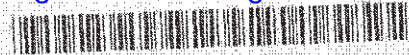


**2018fmo operating agreement.pdf**

4692K



RECORDING REQUESTED BY:

John Ek

Mar 25, 2019 04:59 PM

OFFICIAL RECORDS

Ernest J. Dronenburg, Jr.

SAN DIEGO COUNTY RECORDER

FEES: \$112.00 (SB2 Atkins: \$75.00)

PCOR: AFNF

PAGES: 2

WHEN RECORDED MAIL TO:

Name: Aaron MagagnaAddress: 3639 Midway Dr Suite B #132City: San DiegoState, Zip: CA 92110

## AFFIDAVIT OF DEATH OF TRUSTEE

Assessor's Parcel Number: 543-020-0400

State of California

County of San Diego } ssJohn David Ek of legal age, being first duly sworn, deposes and says:1. John Carl Ek the decedent mentioned in the attached certificate copy ofCertificate of Death, is the same person as Trustee in that certain Declaration of Trust dated 1/5/1994executed by John Carl Ek, and Edith Phyllis Ek as Trustor(s).

2. At the time of the decedent's death, decedent was the owner, as Trustee, of certain real property acquired by a deed

recorded on 1/13/1994 as instrument No. 1994-0029913 in Official Records ofSan Diego

County, California, covering the following described property situated in the said County:

State of California: The Northerly 50 feet of that portion of Block 25 of Tract No. 2 of Encanto Heights, in the city of San Diego, County of San Diego, State of California, according to MAP Parcel No. 1100

3. I am the surviving successor Trustee of the same trust under which said decedent held title as trustee pursuant to the

deed described above, and am designated and empowered pursuant to the terms of said trust to service as trustee thereof.

3/25/19  
DateJohn David Ek  
Print NameJohn David Ek  
Signature

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not to the truthfulness, accuracy, or validity of that document.

State of California

County of San DiegoSubscribed and sworn to (or affirmed) before me on this 28 day of March, 2019, by John David Ek  
proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.[Signature]  
Notary Signature

## EXHIBIT 9



**PURCHASE AND SALE AGREEMENT AND JOINT ESCROW INSTRUCTIONS**

**(6620 1/3 FEDEERAL BOULEVARD, SAN DIEGO, CA 92114)**

This Purchase and Sale Agreement ("**Agreement**") is made as of the date executed ("**Effective Date**"), between Aaron Magagna, an individual ("**Seller**"), and Charla Barbieri Heimer, an individual ("**Buyer**"). The Seller and the Buyer are also referred to herein individually as a "**Party**" and collectively as the "**Parties**".

**RECITALS**

A. On [date] Seller purchased certain real property located in the City of San Diego, County of San Diego, State of California, consisting of a parcel of land, commonly known as 6220 1/3 Federal Boulevard, San Diego, California, with Assessor's parcel number 543-020-05, which is more particularly described in Exhibit A ("**Land**"). {CUP shows APN as 543-020-0400 which is different, confirm just a typo}

B. Seller desires to sell and Buyer desires to purchase the Property as specifically defined and described below.

C. The City of San Diego has issued conditional use permit ("**CUP**") number 2114346 to operate a marijuana outlet (retail, medicinal or combination) on the Land, where marijuana, marijuana products and marijuana accessories are sold to the public. CUP 2114346 is attached hereto as Exhibit B. The Parties intend that the Land be used to operate a marijuana outlet.

In consideration of the mutual covenants and representations herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Buyer and Seller agree, and Escrow Holder (defined in section 2.2) is hereby instructed, as follows:

**ARTICLE 1**

**AGREEMENT OF SALE**

1.1 Purchase and Sale. For good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Seller agrees to sell and Buyer agrees to purchase all Property described below in section 1.2 under the terms and conditions of this Agreement.

1.2. Description of the Property. The property to be sold and purchased under this Agreement ("**Property**") consists of the following:

1.2.1. Land. As described in Recital A. {**Land only, no sticks, bricks, debris, or other items on property?**}

1.2.2. Appurtenances. All privileges, rights, easements appurtenant to the Land, including without limitation all minerals, oil, gas, and other hydrocarbon substances on and under the Land; all development rights, air rights, water, water rights, and water stock relating to the Land; all right, title, and interest of Seller in and to any streets, alleys, passages, water and sewer taps, sanitary or storm drain capacity or reservations and rights under utility agreements, and other permits, licenses, easements, and other rights-of-way included in, adjacent to, or used in connection with the beneficial use and enjoyment of the Land (collectively, the "**Appurtenances**").

1.2.3. Improvements. All buildings, structures, fences, parking areas, or improvements located upon the Land or upon the Improvements, including fixtures, systems, and equipment attached to the Land or Improvements

and used in connection with the operation or occupancy of the Land and Improvements (such as heating and air-conditioning systems, refrigeration, ventilation, garbage disposal, or utility conduits) (collectively, the **"Improvements,"** which together with the Land and the Appurtenances are called the **"Real Property"**). **{Confirm none or state in this section that there are none}.**

1.2.4. Personal Property. Certain tangible personal property and all intangible property owned by Seller that is located on or in or is used in connection with the use or operation of any of the Property (**"Personal Property"**). **{Confirm none or state in this section that there are none}**

## ARTICLE 2

### PURCHASE PRICE

2.1. Amount. The full purchase price (**"Purchase Price"**) for the Property is Six Million Dollars (\$6,000,000.00) and is payable in accordance with this Article 2.

2.2 Opening of Escrow. Within three (3) business days after the Effective Date, Buyer and Seller shall open an escrow (**"Escrow"**) with Orange Coast Title Company as the escrow holder (**"Escrow Holder"**) by delivering a copy of this Agreement signed by Buyer and Seller, and Buyer Delivering to Escrow Holder the First Deposit as provided in section 2.3 below. Escrow Holder shall acknowledge receipt of such items by signing and dating this Agreement, and Escrow Holder shall return a fully signed copy of this Agreement, signed and dated by Escrow Holder, to Buyer and Seller. Escrow Holder shall also prepare its required escrow instructions, if any, for the transactions contemplated by this Agreement, and shall deliver such escrow instructions to Buyer and Seller for execution. The escrow instructions shall be on the standard form of Escrow Holder for transactions like those contemplated herein and shall incorporate this Agreement. If there is any inconsistency between this Agreement and the escrow instructions, then this Agreement shall control unless the intent to amend this Agreement is clearly stated in such escrow instructions.

#### 2.3. Deposits.

2.3.1. Initial Deposit. Within three (3) Business Days after the Effective Date Buyer shall deposit the sum of One Hundred Thousand Dollars (\$100,000.00) Purchase Price applicable (**"Initial Deposit"**) into Escrow. **{LOI stated 5 days}**

2.3.2. Second Deposit. Upon delivery of the Notice of Suitability defined in section 3.3, or upon expiration of the Due Diligence Period, Buyer shall deposit an additional sum of One Hundred Fifty Thousand Dollars (\$150,000.00) Purchase Price applicable into Escrow (**"Second Deposit"**).

2.3.3. Requirements for Deposit. Buyer may make the Initial Deposit and the Second Deposit (collectively, the **"Deposit"**) in cash, or by check payable to the Escrow Holder, or by electronic transfer of funds. Buyer's failure to make either the Initial Deposit or the Second Deposit shall, upon and after twenty four (24) hours written notice to Purchaser and Escrow, automatically terminate the Agreement. The Escrow Holder will hold the Deposit in an interest-bearing account as Buyer directs. After the expiration of the Due Diligence Period, the Deposit is nonrefundable and Escrow shall automatically release the Deposit to Seller. If Buyer terminates this Agreement prior to the Due Diligence Period, Escrow shall return the Initial Deposit to Buyer with interest and neither Party will have any further obligations under this Agreement, except for any Party's indemnification obligations hereunder that expressly survive termination of this Agreement (the **"Surviving Obligations"**). If the Agreement terminates after the Due Diligence Period, Escrow shall pay Seller the Deposit and any interest earned thereon in Escrow, and neither party shall have any further obligations under this Agreement, except for the Surviving Obligations. **{Understand what "surviving obligations" means and/or is referring to, also modify language in both sections to ensure Buyer's deposit can not be lost due to missing a date, Buyer**



**must remove or accept contingencies in writing and that shall dictate whether the deposit is refunded to Buyer or delivered to Seller}.**

2.4. Payment of Balance. Buyer shall pay the balance of the Purchase Price to Seller by depositing cash or a certified or cashier's check payable to Escrow Holder, or by electronic transfer of federal funds, which must be delivered to the Escrow Holder at least three (3) business days before the Closing Date, unless Seller agrees to provide financing to Buyer ("**Seller Financing**") for any portion of the Purchase Price. Any Seller Financing will be at a maximum interest rate of 9.25%. **{Can the 3 business days be a request but not mandatory or else?}**

2.5 Seller Financing. If the Parties mutually agree to Seller Financing, Buyer agrees to deliver to Seller through Escrow at Closing Buyer's promissory note secured by a deed of trust in favor of Seller in the principal amount agreed by the parties ("**Seller Financed Amount**"), bearing interest in the amount of 9.25% per year from the Closing Date, payable in   [number]   installments of   [dollar amount]   beginning on   [date]   and continuing until   [date]  , unless paid sooner. The Seller Financed Amount will be credited against the Purchase Price on the Closing Date. The forms of promissory note and deed of trust to be delivered by Buyer at Closing are attached to this Agreement as   [e.g., Exhibits B and C]  . **{This will not be applicable}.**

### ARTICLE 3

#### CONTINGENCIES

3.1. Seller's Delivery of Documents. Buyer's obligation to purchase the Property is expressly conditioned on Seller's making all documents regarding the Property listed below (collectively, "**Seller Materials**") available to Buyer on or before the fifth (5th) day after the Effective Date.

3.1.1 Preliminary Report. A preliminary report ("**Preliminary Report**") dated no earlier than thirty (30) days before the Effective Date covering the Real Property and issued by Orange Coast Title ("**Title Company**"), together with a legible copy of all exceptions to title shown in the Preliminary Report, including each document, map, and survey referred to in the Preliminary Report. **{Need to review this, ask Orange if it was received?}**

3.1.2. Documents. Copies of all: i) contracts and agreements; ii) licenses, permits and approvals; iii) entitlement and zoning information; iv) leases; v) prior title policies; vi) property condition reports; vii) geotechnical reports; and viii) specific financial information.

3.1.3. Plans. Copies of any existing construction drawings, as-built plans, and specifications for the Property.

3.1.4. Materials Related to Condition of the Property. Any environmental impact reports, "Phase I" or "Phase II" reports, or environmental site assessments concerning hazardous materials on the Property, complaints or notices of the presence of hazardous materials on the Property, geological surveys, soil tests, engineering reports, inspection results, complaints, or notices received regarding the safety of the Property.

3.1.5. Other Documents. All other data, correspondence, documents, agreements, waivers, notices, applications, and other records regarding the Property relating to transactions with taxing authorities, governmental agencies, utilities, vendors, tenants, neighbors, and others with whom Buyer may be dealing from and after the Closing Date.

3.1.6. Excluded Records. The Seller Materials will not include any books, records, documents, or information on the corporate, financial, and accounting records of the operations of Seller individually (as opposed to records concerning the Property), regarding offers or inquiries made by third parties concerning the purchase of

some or all of the Property or appraisals of the value of the ~~Real Property that are attorney-client communications of Seller, that are Seller's attorney's work product, or that are not in the possession of Seller or persons under Seller's control. {I am not okay with any Excluded Records, this seems like a basis for Cynthia to charge for her licensing package that she was going to prepare}.~~

3.2. Due Diligence. Buyer shall conduct such investigations as Buyer may choose to determine the condition of the Property including the right to inspect the Seller Materials and physical inspection of the Property, such as environmental inspection, an appraisal, a survey, and a property condition assessment (such investigations collectively, "**Due Diligence**"), at Buyer's sole expense.

3.3 Buyer's Approval. Buyer's obligation to purchase the Property is expressly conditioned on its approval, in its sole discretion, of the condition of the Property and all other matters concerning the Property. Buyer will have the period from the Effective Date until the date that is twenty-five (25) days after the Effective Date ("**Due Diligence Period**") to perform and decide whether to proceed to Closing. The date the Due Diligence Period expires is the "**Contingency Date**". On or before the Contingency Date, Buyer may deliver written notice to Seller accepting the matters disclosed in the Seller Materials ("**Notice of Suitability**") or terminating this Agreement. If Buyer fails to give such notice on or before the Contingency Date, Buyer shall be deemed to have accepted the matters disclosed in the Seller Materials. By its acceptance or waiver, Buyer will be deemed to have acknowledged that (a) Seller has provided Buyer with access to the Seller Materials and (b) Buyer has had ample opportunity to review and inspect the Seller Materials and make independent factual, physical, and legal examinations and inquiries as Buyer deems necessary or desirable with respect to matters disclosed.

3.4. Approval of Title. Buyer's obligation to purchase the Property is expressly conditioned on Buyer's approval of the condition of title of the Property in accordance with the following procedure: **{Charla to ask Zach what Title Issues they are concerned with or need?}**

3.4.1. Permitted Exceptions. The following exceptions shown on the Preliminary Report ("**Permitted Exceptions**") are approved by Buyer: (a) exceptions for a lien for local real estate taxes and assessments not yet due or payable, (b) the standard preprinted exceptions and exclusions of the Title Company, (c) any other exception shown on the Preliminary Report, other than exceptions for monetary liens, which Buyer does not object to by written notice to Seller within seven (7) days after delivery of the Preliminary Report ("**Buyer's Title Notice**"), or as otherwise provided in this section 3.4. All exceptions on the Preliminary Report other than the Permitted Exceptions will be "**Title Objections**."

3.4.2. Title Objections. With respect to any Title Objection arising or resulting from any act or omission of Seller, Seller will have five (5) days after delivery of Buyer's Title Notice (or Buyer's deemed objection to all exceptions) to specify the manner in which it will remove or cure such Title Objection. With respect to any Title Objection that did not arise or result from any act or omission of Seller, Seller will have ten (10) days after delivery of Buyer's Title Notice to give notice to Buyer in writing ("**Seller's Title Notice**"), stating either (a) the manner in which Seller will remove or cure such Title Objection, or (b) that Seller will not remove or cure such Title Objection. If Seller fails to deliver Seller's Title Notice within the time specified in this section 3.4, Seller will be deemed to have elected not to cure such Title Objection. Despite the foregoing, Seller agrees to remove all liens securing the payment of money that encumber the Property.

3.4.3. Seller Elects Not to Cure. If Seller elects not to cure or remove a Title Objection (or is deemed to have so elected), then Buyer will have ten (10) days after delivery of the Seller's Title Notice to deliver a written notice to Seller ("**Buyer's Election Notice**") of Buyer's election either to (a) proceed with the purchase of the Property, waive such Title Objection, and accept the exception shown in the Preliminary Report as a Permitted Exception, or (b) terminate this Agreement. If Buyer fails to deliver Buyer's Election Notice within the time specified in this section 3.4, Buyer will be deemed to have elected to waive its objections and agreed to proceed

with the purchase and take title to the Property subject to all such title exceptions. **{Modify any language that allows anything to terminate, be waived, assumed to be approved, etc. without putting in writing.}**

3.4.4. Nonmonetary Cure. If Seller is obligated or elects to cure or remove a Title Objection, but the method specified for removing or curing the Title Objection is other than the payment of a specific sum of money, then Buyer will have ten (10) days after delivery of the Seller's Title Notice to deliver Buyer's Election Notice specifying whether it elects to (a) proceed with the purchase of the Property, subject to Seller's removal of the Title Objection, or (b) terminate this Agreement. If Buyer fails to deliver Buyer's Election Notice within the time specified in this section 3.4, Buyer will be deemed to have elected to proceed with the purchase of the Property.

3.4.5. Additional Encumbrances. If any encumbrance or other exception to title arises or is discovered after the delivery of the Preliminary Report ("**Additional Encumbrance**"), the party discovering such Additional Encumbrance must promptly give written notice to the other. No later than five (5) days after delivery of the notice of such Additional Encumbrance, Buyer will deliver a new Buyer's Title Notice to Seller specifying whether the Additional Encumbrance is a Title Objection or a Permitted Exception. If Buyer objects to the Additional Encumbrance, the parties will proceed in the same manner as set forth above for Title Objections arising from the Preliminary Report. If Buyer fails to deliver Buyer's Election Notice within the time specified in this section 3.4, Buyer will be deemed to have waived its objections.

3.4.6. Seller's Failure to Remove Title Objection. If Seller is obligated or elects to cure or remove a Title Objection and fails to do so least five (5) days before the Closing Date, or fails to show that it will be able to do so on Closing, then Seller will be in default under this Agreement, and Buyer will have all its rights and remedies provided by this Agreement. **{What are the rights and remedies that I have with Seller?}**

### 3.5. Review of Physical Condition of Property.

3.5.2. Access to Property. As part of its Due Diligence, Buyer may investigate economic, financial, and accounting matters relating to or affecting the Property or its value, and conduct inspections, tests, and studies with respect to the physical and environmental condition of the Property. Buyer and Buyer's consultants, agents, engineers, inspectors, contractors, and employees ("**Buyer's Representatives**") must be given reasonable access to the Property during regular business hours for the purpose of performing such Due Diligence. Buyer will undertake the Due Diligence at its sole cost and expense, except as provided in section 9.2. Buyer will indemnify, defend with counsel reasonably acceptable to Seller, and hold Seller harmless from all claims (including claims of lien for work or labor performed or materials or supplies furnished), demands, liabilities, losses, damages, costs, fees, and expenses, including Seller's reasonable attorney fees, costs, and expenses, arising from the acts or activities of Buyer or Buyer's Representatives in, on, or about the Property during or arising in connection with Buyer's inspections of the Property.

3.5.3. Assumption of Risk. Subject to the other provisions of this Agreement, Buyer agrees that, by its acceptance or waiver of the contingency in this section 3.5, it assumes the risk that an adverse condition of the Property may not have been revealed by its own Due Diligence. On Buyer's acceptance or waiver of the contingency in this section 3.5, Seller will have no obligation to repair, correct, or compensate Buyer for any condition of the Property, including defects in the Improvements, noncompliance with applicable laws and regulations, including without limitation zoning laws, building codes, and the Americans with Disabilities Act, whether or not such condition of the Property would have been disclosed by Buyer's Due Diligence. {Charla to confirm/compare to standard PSA}

3.6. **Financing Contingency.** Buyer's obligation to purchase the Property is conditioned on Buyer's obtaining, before the Contingency Date, a written commitment for a loan from     [name of lender]     of at least



[amount] Dollars ( [dollar amount] ), secured by a first priority deed of trust on the Property on terms no less favorable than interest at [number] percent ( [number] %) per year, for a term of [number] ( [number] ) years, amortized over [number] ( [number] ) years, with loan fees not to exceed [e.g., one] percent ( [e.g., 1%] ) of the principal amount of the loan, with prepayment permitted at the option of the Buyer subject to a prepayment penalty not to exceed [e.g., one] percent ( [e.g., 1%] ) of the then-outstanding principal amount of the loan, and with such other terms and conditions as Buyer may approve in its sole and absolute discretion. Buyer agrees to use commercially reasonable efforts to obtain such a loan commitment. On or before the Contingency Date, Buyer must deliver written notice to Seller indicating whether the contingency set forth in this section 3.6 (“**Financing Contingency**”) has been met and waiving the Financing Contingency or terminating this Agreement unless Seller elects to provide such financing. If Buyer fails to deliver such notice on or before the Contingency Date, then Buyer will be deemed to have elected to terminate this Agreement unless the Seller elects to provide such financing. If the Financing Contingency is not met or waived by the Contingency Date, Seller may, but is not obligated to, agree to provide such financing on the terms listed above and in accordance with the note and deed of trust attached to this Agreement as Exhibits F and G. If Seller delivers a written commitment to Buyer within three (3) business days after the Contingency Date, the Financing Contingency will be deemed met. {Charla to insert construction mezz debt for above financing contingency}.

3.7. Termination for Failure of a Contingency. If, prior to the Contingency Date, this Agreement is terminated or deemed to be terminated for failure of a contingency set forth in this Article 3, then Escrow Holder shall refund the Deposit, without offset for any charges or claims. Any cancellation fee or other costs of the Escrow Holder or the Title Company resulting from this termination for failure of a contingency prior to the Contingency Date will be borne equally by Seller and Buyer, and each party must pay its own expenses.

## ARTICLE 4

### SELLER’S PRECLOSING COVENANTS

4.1. No Amendments or Agreements. On or after the Effective Date, Seller will not (a) amend or waive any right under any Seller Materials or (b) enter into any lease or other agreement of any type affecting the Property that would survive the Closing Date, without Buyer’s prior written consent. Before the Contingency Date, Buyer may not unreasonably withhold its consent under this section 4.1; after the Contingency Date, however, Buyer will have sole discretion in all such matters. {Change to “after the execution of this contract Seller}.

4.2. Insurance. Through the Closing Date, Seller must maintain or cause to be maintained in full force and effect comprehensive general liability casualty and other insurance on the Property in an amount equal to the full replacement cost of the Improvements.

4.3. Maintenance and Operation. Seller, at its sole cost and expense, must operate the Property in substantially the same manner as it has operated the Property before the Effective Date and must maintain and keep the Property such that on the Closing Date the Property is in at least as good condition and repair as on the Effective Date, reasonable wear and tear excepted. Seller may not make any material alterations to the Property without Buyer’s prior written consent.

4.4. Mechanics’ Liens. Except for materials, supplies, or work provided or ordered for the Property at the request of or for the account of Buyer, on or before the Closing, Seller must (a) pay for all materials, supplies, and work provided or ordered for the Property for which a labor, materialman’s, or mechanics’ lien may be claimed under applicable law and (b) if required by the Title Company, provide the Title Company with such indemnifications or security as it may require to insure title to the Property at the Closing without exception for any unrecorded labor, materialmen’s, or mechanics’ claim of lien.



4.5. No Marketing. Seller agrees not to market, show, or list the Property to any other prospective buyer during the term of this Agreement.

4.6. Existing Financing. Seller must not permit any default, or any event that could give rise to a default with lapse of time or notice, to occur under any existing loan secured by the Property or other financing encumbering the Property.

4.7. Licenses and Permits. Seller will use due diligence and its best efforts to keep in full force and effect, and will renew when necessary, all licenses and permits for the Property.

4.8. Access to Property. Buyer and Buyer's representatives, agents, and designees will have the right at all reasonable times until Closing to enter the Property as provided in section 3.5.2.

4.9. Notification. Seller will promptly notify Buyer of any material change in any condition with respect to the Property or of any material event or circumstance that makes any representation or warranty of Seller under this Agreement untrue or misleading.

4.10. Service Contracts. Seller covenants and agrees that before the Closing Date it will terminate all service contracts, if any, related to the Property.

## **ARTICLE 5**

### **REPRESENTATIONS AND WARRANTIES**

5.1. Seller's Representations and Warranties. Despite anything to the contrary in this Agreement, Seller warrants and represents as of the Effective Date that:

5.1.1. Organization; Authority. This Agreement and the performance of Seller's obligations under it and all documents executed by Seller that are to be delivered to Buyer at the Closing are, or on the Closing Date will be, duly authorized, executed, and delivered by Seller and are, or at the Closing Date will be, legal, valid, and binding obligations of Seller, and do not, and on the Closing Date will not, violate any provision of any agreement or judicial order to which Seller is a party or to which Seller or the Property is subject. No consent of any partner, shareholder, creditor, investor, judicial or administrative body, government agency, or other party is required for Seller to enter into or to perform Seller's obligations under this Agreement, except as has already been obtained.

5.1.2. No Violation of Law. To Seller's knowledge, Seller has received no written notice of any currently outstanding violations of any federal, state, county, or municipal law, ordinance, order, regulation, or requirement affecting the Property.

5.1.3. Litigation. To Seller's knowledge, Seller has not received any written notice of any existing or threatened litigation or arbitration involving the Property.

5.1.4. Seller Materials. To Seller's knowledge, the Seller Materials constitute all books, records, documents, agreements, contracts, reports, and other materials related to the Property that are in Seller's possession or control. To Seller's knowledge, the Seller Materials are true, correct, and complete copies of what they purport to be.

5.1.5. No Condemnation. To Seller's knowledge, Seller has received no written notice of any presently pending or contemplated special assessments or proceedings to condemn or demolish the Property or any part of it, or any proceedings to declare the Property or any part of it a nuisance.

5.1.6. Hazardous Wastes. To Seller's knowledge, Seller has received no written notice of any Hazardous Materials located on, under, or about the Property, except as disclosed in the Seller Materials.

5.1.7. Foreign Person. Seller is not a foreign person and is a "United States Person" as that term is defined in §7701(a)(30) of the Internal Revenue Code of 1986, as amended.

5.1.8. Seller's Knowledge. As used in this Agreement, the phrase "Seller's knowledge" will be limited to the actual knowledge of Aaron Magagna without duty of inquiry or investigation into the matter so qualified. "Seller's knowledge" will not be construed to refer to the knowledge of any other agent or employee or principal of Seller.

5.2. Buyer's Representations and Warranties. Despite anything to the contrary in this Agreement, Buyer hereby warrants and represents that each of the following is true as of the Effective Date and the Closing Date:

5.2.1. Due Authorization. This Agreement and the performance of Buyer's obligations under it and all the documents executed by Buyer that are to be delivered to Seller at the Closing are, or on the Closing Date will be, duly authorized, executed, and delivered by Buyer and are, or at the Closing Date will be, legal, valid, and binding obligations of Buyer, and do not, and on the Closing Date will not, violate any provisions of any agreement or judicial order to which Buyer is a party or to which Buyer or the Property is subject. No consent of any partner, shareholder, creditor, investor, judicial or administrative body, government agency, or other party is required for Buyer to enter into or to perform Buyer's obligations under this Agreement, except as has already been obtained.

5.2.2. USA Patriot Act Representation.

5.2.2.1. Neither Buyer nor its partners, members, officers, directors, investors, or shareholders, nor any of their respective affiliates, is in violation of any federal or state anti-money laundering and anti-terrorism laws.

5.2.2.2 Neither Buyer nor its partners, members, officers, directors, investors, or shareholders, nor any of their respective affiliates, is acting, directly or indirectly, on behalf of terrorists, terrorist organizations, or narcotics traffickers, including those persons or entities designated as a Specially Designated National pursuant to Executive Order 13224 of the President of the United States, dated September 23, 2001 ("**Executive Order**"), as amended, or that appear on the Annex to the Executive Order, or are included on any relevant lists maintained by the Office of Foreign Assets Control of U.S. Department of Treasury, U.S. Department of State, or other U.S. government agencies, all as may be amended from time to time ("**Government List**").

5.2.2.3. Neither Buyer nor its partners, members, officers, directors, investors, or shareholders, nor any of their respective affiliates, in any capacity in connection with the purchase of Property (a) conducts any business or engages in making or receiving any contribution of funds, goods, or services to or for the benefit of any person included in a Government List, (b) deals in, or otherwise engages in any transaction relating to, the Property or interests in property blocked pursuant to the Executive Order, or (c) engages in or conspires to engage in any transaction that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in any anti-money-laundering and anti-terrorism laws.

5.2.2.4. Neither Buyer, nor any person controlling or controlled by Buyer, is a country, territory, individual, or entity named on a Government List, and, to Buyer's actual knowledge, the monies used in connection with this Agreement and amounts committed with respect to this Agreement were not and are not derived from any activities that contravene any applicable anti-money-laundering or anti-bribery laws and regulations (including funds being derived from any person, entity, country, or territory on a Government List or engaged in any unlawful activity defined under 18 USC §1956(c)(7)).

5.3. **Effect of Representations and Warranties.** Each representation and warranty in this Article 5: (a) is material and being relied on by the party to which the representation and warranty is made; (b) is true in all respects as of the Effective Date; (c) must be true in all respects on the Closing Date; and (d) will survive the Closing, except as otherwise provided in this Agreement.

5.4. **"As Is" Purchase.** Subject to the approval or waiver of the Contingencies in Article 3, Seller's preclosing obligations under Article 4, the closing conditions in Article 6, and as a material inducement to Seller's execution and delivery of this Agreement and performance of its duties under this Agreement: EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT, BUYER HAS AGREED TO ACCEPT POSSESSION OF THE PROPERTY ON THE CLOSING DATE ON AN "AS IS" BASIS. SELLER AND BUYER AGREE THAT THE PROPERTY WILL BE SOLD "AS IS, WHERE IS, WITH ALL FAULTS" WITH NO RIGHT OF SET-OFF OR REDUCTION IN THE PURCHASE PRICE, AND SUCH SALE WILL BE WITHOUT REPRESENTATION OR WARRANTY OF ANY KIND, EXPRESS OR IMPLIED (INCLUDING, WITHOUT LIMITATION, WARRANTY OF INCOME POTENTIAL, OPERATING EXPENSES, USES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE), AND SELLER DISCLAIMS AND RENOUNCES ANY SUCH REPRESENTATION OR WARRANTY. Explain "As Is" because the Land is to be purchased cleared off, vacant, free of all debris, etc. as presently the property

5.5. **Release.** Effective from and after the Closing, Buyer hereby waives, releases, acquits, and forever discharges Seller, and Seller's agents, directors, officers, and employees to the maximum extent permitted by law, of and from any and all claims, actions, causes of action, demands, rights, liabilities, damages, losses, costs, expenses, or compensation whatsoever, direct or indirect, known or unknown, foreseen or unforeseen, that it now has or that may arise in the future because of or in any way growing out of or connected with this Agreement and the Property (including without limitation the condition of the Property), except matters arising from Seller's fraud or intentional misrepresentation. BUYER EXPRESSLY WAIVES ITS RIGHTS GRANTED UNDER CALIFORNIA CIVIL CODE §1542, AND ANY OTHER PROVISION OF LAW THAT PROVIDES A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT BUYER DOES NOT KNOW OR SUSPECT TO EXIST IN ITS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY IT MUST HAVE MATERIALLY AFFECTED ITS AGREEMENT TO RELEASE SELLER.

Seller and Buyer have each initialed this section 5.5 to further indicate their awareness and acceptance of each and every provision of this Agreement. The provisions of this section 5.5 will survive the Closing.

Seller's Initials: \_\_\_\_\_

Buyer's Initials: \_\_\_\_\_

## ARTICLE 6

### CLOSING CONDITIONS

6.1. **Buyer's Closing Conditions.** All obligations of Buyer under this Agreement are subject to the fulfillment, before or at the Closing, of each of the following conditions ("**Buyer's Closing Conditions**"). Buyer's Closing Conditions are solely for Buyer's benefit and any or all of Buyer's Closing Conditions may be waived in writing by Buyer in whole or in part without prior notice.

6.1.1. **Title.** As of the Closing, the Title Company shall be irrevocably committed to issue the Owner's Policy to Buyer an ALTA ( [B1970 Form, as amended/June 1, 1987, Form] ) Owner's Extended Coverage Policy of Title Insurance with liability in the full amount of the Purchase Price, insuring title to the Real Property in Buyer, subject only to the Permitted Exceptions, together with such endorsements described below or as may be



reasonably requested by Buyer ("**Title Policy**"). The Title Policy must also include such endorsements or guaranties as Buyer may request. Seller must deliver to the Title Company such instruments, documents, releases, and agreements and must perform such other acts as Title Company may reasonably require in order to issue the Title Policy. Indemnification of the Title Company to induce it to insure any otherwise unpermitted exception to title will not be allowed except with Buyer's prior written consent after full disclosure to Buyer of the nature and substance of such exception and indemnity, which consent will not be unreasonably withheld by Buyer for exceptions not material to marketable title to the Real Property.

6.1.2. The Parties shall enter into and simultaneously close on a purchase agreement (the "**LLC Purchase Agreement**") for purchase by Buyer from the Seller of one hundred percent (100%) of the membership interests (the "**Membership Interest**") of 2018FMO, LLC, a California limited liability company, in the form attached hereto as Exhibit C.

6.1.3. Financing. The financing that Buyer must obtain as described in section 3.6, above, will be ready to close, and the lender that has committed to provide such financing ("**New Lender**") must be ready to disburse the funds into Escrow as described in section 7.4, subject to no conditions other than conveyance of the Property and the Membership Interest by Seller to Buyer.

6.1.4. Approval of Contingencies. Buyer must have acknowledged its approval or waiver of all contingencies as required under Article 3.

6.1.5. Closing Documents. Seller must have delivered to Escrow the documents and funds it is required to deliver through Escrow at Closing.

6.2. Seller's Closing Conditions. Seller's obligation to sell the Property is expressly conditioned on the fulfillment of each condition precedent at or before the Closing ("**Seller's Closing Conditions**"). Seller's Closing Conditions are solely for Seller's benefit and any of Seller's Closing Conditions may be waived in writing by Seller in whole or in part without prior notice.

6.2.1. Approval of Contingencies. It is a Seller's Closing Condition that Buyer must have acknowledged its approval or waiver of all contingencies as required under Article 3.

6.2.2. Purchase Price. Buyer must have delivered the Purchase Price to Escrow.

6.2.3. Delivery of Closing Documents and Funds. Buyer must have delivered to Escrow the documents and funds specified in section 7.4

6.3. Termination for Failure of a Condition. If Buyer's Closing Conditions or Seller's Closing Conditions, as the case may be, have not been previously approved or waived, this Agreement may be terminated by the party in whose favor the Closing Condition runs by written notice to the other. If Buyer has not terminated this Agreement prior to the Contingency Date, then the Deposit shall thereafter be nonrefundable to Buyer. If Buyer terminates this Agreement prior to the Contingency Date, then then Escrow Holder shall return to Buyer the Deposit and any interest earned thereon in Escrow, and neither Party will have any further obligations under this Agreement, except for the Surviving Obligations. Any cancellation fee or other costs of the Escrow Holder and Title Company will be borne equally by Seller and Buyer and each party will pay its own expenses.

## ARTICLE 7

### CLOSING



7.1. Escrow. The Escrow will be opened with the Escrow Holder on the execution of this Agreement. Buyer and Seller will promptly on the Escrow Holder's request execute such additional Escrow instructions as are reasonably required to consummate the transaction contemplated by this Agreement and are not inconsistent with this Agreement.

7.2. Closing Definitions.

7.2.1. Definition. The "**Closing**" means the exchange of money and documents as described in this Article 7 and will be deemed to have occurred when Seller's Deed to Buyer has been recorded, the Escrow Holder holds and can record and deliver the remaining documents described in this Article 7, the Title Company is irrevocably and unconditionally committed to issue the Title Policy, and Buyer has delivered the Purchase Price in immediately available funds to Escrow Holder.

7.2.2. Closing Date. Seller and Buyer agree that the Closing will occur on the "**Closing Date**." The Closing Date will be a date mutually agreeable to Buyer and Seller that is no later than thirty (30) days after the Contingency Date. If the Closing has not occurred within thirty (30) days after the Contingency Date, then subject to section 6.3, either party may elect to terminate this Agreement, the Deposit will be paid to Seller, and neither party will have any obligations to the other except for the Surviving Obligations (defined in section 2.3.3), or on account of any breach of this Agreement. The Closing will be at the offices of Escrow Holder or such other place as the parties may agree.

7.3. Seller's Deposit of Documents and Funds. Seller must deposit into Escrow the following documents duly executed by Seller in form and substance reasonably satisfactory to Buyer:

7.3.1. Deed. The duly executed and acknowledged grant deed in the form attached to this Agreement as Exhibit D ("**Deed**") conveying the Property to Buyer subject only to the Permitted Exceptions;

7.3.2. Bill of Sale. A duly executed bill of sale, in the form attached to this Agreement as Exhibit E, conveying the Personal Property to Buyer free and clear of liens, encumbrances, and restrictions of every kind and description ("**Bill of Sale**");

7.3.3. Nonforeign Certification. Certificates required by §1445 of the Internal Revenue Code of 1986, and the California Revenue and Taxation Code §18662, executed by Seller and in a form satisfactory to Buyer ("**Nonforeign Certification**"), to relieve Buyer of any potential transferee's withholding liability under such statutes;

7.3.4. A duly executed copy of the LLC Purchase Agreement; **{Determine why buying the LLC versus just transferring the name of license –is this the way it must be done to ensure transfer?}**

7.3.5. Additional Documents. Such additional documents, including written Escrow instructions consistent with this Agreement, as may be necessary or desirable to convey the Property in accordance with this Agreement.

7.4. Buyer's Deposit of Documents and Funds. Buyer must deposit into Escrow the following funds and documents duly executed by Buyer in form and substance reasonably satisfactory to Seller:

7.4.1. Purchase Price. The Purchase Price in accordance with Article 2, plus or minus prorations as provided in section 7.7 (including funds, if any, to be provided by the New Lender as described in section 3.6);

7.4.2. New Lender Financing Documents. Duly executed loan and security documents as the New Lender may require with respect to the financing described in section 3.6;

7.4.3. Conveyance Documents. Such documents, including written Escrow instructions consistent with this Agreement, as may be necessary or desirable for conveyance of the Property in accordance with this Agreement.

7.5. Closing. When the Escrow Holder receives all documents and funds identified in sections 7.3 and 7.4, and the Title Company is ready, willing, and able to issue the Title Policy, then, and only then, the Escrow Holder will close Escrow by:

7.5.1. Recording the Deed;

7.5.2. Intentionally omitted. {off the shelf Agreement}

7.5.3. Recording the documents Seller requires to be recorded under section 2.5 with respect to Seller Financing;

7.5.4. Recording any documents required to be recorded by the New Lender with respect to financing described in section 3.6;

7.5.5. Issuing the Title Policy to Buyer;

7.5.6. Delivering to Buyer the Bill of Sale, the Nonforeign Certification, the fully executed LLC Purchase Agreement, copies of all recorded documents related to the transfer or encumbering of the Property, and a copy of Seller's Escrow instructions; and

7.5.8. Paying the Purchase Price to Seller, plus or minus prorations under section 7.7.

7.5.9. Thereafter, Escrow Holder will deliver signed closing statements showing all receipts and disbursements to Buyer and Seller and will file with the Internal Revenue Service (with copies to Buyer and Seller) the reporting statement required under Internal Revenue Code §6045(e).

7.7.5. Property Taxes. All real and personal property ad valorem taxes and special assessments, if any, whether payable in installments or not, including without limitation all supplemental taxes attributable to the period before the Closing Date for the calendar year in which the Closing occurs will be prorated to the Closing Date, based on the latest available tax rate and assessed valuation.

7.7.6. Utility Charges. Charges for utilities, including water, sewer, electric, and gas, will be prorated within thirty (30) days after the Closing Date based on the then most recent bills for such services. Seller must pay for all utility services to the Property for all periods before the Closing and Buyer must pay for all utility services to the Property for the Closing Date and all periods thereafter. {Are there any expenses being paid presently or should be but the current owner is merely paying them because of the land that he owns adjacent to the property?}

7.8. Closing Costs. Closing costs will be allocated as follows:

7.8.1. Seller will pay the cost of a standard title policy;

7.8.2. Buyer shall pay additional costs for an ALTA policy and any ALTA survey requested;

7.8.3. Escrow costs will be shared equally by Seller and Buyer;

7.8.4. Buyer will pay the cost of recording the Deed;

7.8.5. Buyer and Seller shall split equally the attorney fees for the drafting of this agreement (the “**PSA Attorney Fees**”). Seller shall pay Seller’s portion of the PSA Attorney Fees out of Escrow at the time of Closing.

7.8.6 Buyer and Seller will each pay their own attorney fees and costs other than the PSA Attorney Fees (the “**Other Attorney Fees**”). Seller shall pay its Other Attorney Fees out of Escrow at the time of Closing.

Seller shall pay Seller’s portion of attorneys’ fees out of escrow at the time of the closing. Buyer and Seller will each pay their own attorney’s fees and costs;

7.8.6. Buyer will pay costs associated with obtaining the financing described in section 3.6 from the New Lender;

7.8.7. Buyer will pay any sales tax; and

7.8.8. Seller will pay the transfer tax and any documentary and municipal transfer tax.

7.9. Broker’s Commission; Indemnity. Under separate agreement, Seller must pay \_ [name] (“**Broker**”) for its services as broker in this transaction. Neither party has had any contact or dealings regarding the Property, or any communication in connection with the subject matter of this transaction, through any licensed real estate broker or person, other than the Broker, who can claim a commission or finder’s fee as a procuring cause of the sale contemplated in this Agreement. If any other broker or finder perfects a claim for a commission or finder’s fee based on any contract, dealings, or communication with a party (“**Indemnifying Party**”), then the Indemnifying Party must indemnify, defend, and hold the other party (“**Nonindemnifying Party**”) harmless from all costs and expenses (including reasonable attorney fees and costs of defense) incurred by the Nonindemnifying Party in connection with such claim.

7.10 Possession. Seller will deliver exclusive right of possession of the Property to Buyer on the Closing Date.

## ARTICLE 8

### RISK OF LOSS

8.1. Condemnation. If before the Closing Date any action or proceeding is commenced for the condemnation or exercise of the rights of eminent domain of the Property or any portion of it, or if Seller is notified by the duly authorized officer of a duly empowered condemning authority of the intent to commence such action or proceeding (“**Condemnation**”) and if such Condemnation would materially and adversely affect the use or operation of the Property, have the effect of decreasing the square footage of the Improvements, or reduce or eliminate access to the Property, then Buyer may either (a) terminate this Agreement or (b) proceed with the Closing without modifying the terms of this Agreement and without reducing the Purchase Price, on the condition that Seller must assign and turn over, and Buyer will be entitled to keep, all awards for the Condemnation that accrue to Seller. Seller may not negotiate, resist, or stipulate to any Condemnation without Buyer’s written consent. Seller must notify Buyer of any notice of Condemnation of all or any portion of the Property within five (5) days after the receipt of this notice, and Buyer must exercise its option(s) as provided in this section 8.1 within ten (10) days after receipt of such notice. If necessary, the Closing Date will be extended to give Buyer the full 10-day period to make such election.

8.2. Damage and Destruction. If before the Closing Date any damage or destruction of the Property, or any portion of it, will have occurred that results in an Uninsured Loss of Five Hundred Thousand Dollars (\$500,000.00) or less, then at the Closing Seller must assign to Buyer the right to collect any Insurance



Proceeds with respect to such loss and give Buyer a credit against the Purchase Price in the amount of such Uninsured Loss. If such damage or destruction results in an Uninsured Loss of more than Five Hundred Thousand Dollars (\$500,000.00), then within five (5) days after determination of the amount of the Insurance Proceeds Seller must elect either (a) to give Buyer a credit for the entire amount of such Uninsured Loss and assign to Buyer the right to collect any Insurance Proceeds with respect to such loss, or (b) to terminate this Agreement. Despite any such damage or destruction, the Purchase Price for the Property will not be reduced except by the credits referred to above. For purposes of this section 8.2, Uninsured Loss is the difference between (i) the sum of the actual cost necessary for the Seller to fully repair such damage and destruction, as determined by a qualified insurance adjuster selected by the insurance carrier providing insurance for the Property, and (ii) the total amount of Insurance Proceeds, which are the proceeds from any and all insurance with respect to the Property and/or to such loss, including without limitation fire and casualty and liability insurance. Uninsured Losses may arise because of self-insurance, deductible amounts under policies, proceeds of policies insufficient to cover the loss, risks not insured for, or otherwise. If any damage to or destruction of the Property occurs, the Closing Date will be extended until the amount of the Insurance Proceeds is determined and Seller has made any election permitted under this section 8.2.

## **ARTICLE 9**

### **REMEDIES FOR DEFAULT**

9.1. Buyer's Default. Buyer will be deemed to be in default under this Agreement (1) if Buyer fails, for any reason other than Seller's default under this Agreement or the failure of a condition precedent to Buyer's obligation to perform under this Agreement, to meet, comply with, or perform any covenant, agreement, or obligation required on its part within the time limits and in the manner required in this Agreement, or (2) if a material breach of any representation or warranty (made by Buyer) has occurred by reason of Buyer's actual fraud or intentional misrepresentation; provided, however, that no such default will be deemed to have occurred unless and until Seller has given Buyer written notice of this Agreement, describing the nature of the default, and Buyer has failed to cure such default within five (5) days after the receipt of such notice (but in any event before the Closing Date, unless such default occurs after Closing).

9.2. REMEDIES FOR BUYER'S DEFAULT. IF THE CLOSING FAILS TO OCCUR BECAUSE OF BUYER'S DEFAULT UNDER THE TERMS OF THIS AGREEMENT, BUYER WILL BE RESPONSIBLE FOR ALL CANCELLATION CHARGES REQUIRED TO BE PAID TO ESCROW HOLDER AND ANY ESCROW CHARGES. IN ADDITION, THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES WILL TERMINATE AND ANY DEPOSITS NOT YET DISBURSED WILL BE IMMEDIATELY DELIVERED BY ESCROW HOLDER TO SELLER ON SELLER'S REQUEST. THE DEPOSITS WILL BE DEEMED LIQUIDATED DAMAGES FOR BUYER'S NONPERFORMANCE AS SELLER'S SOLE AND EXCLUSIVE REMEDY AGAINST BUYER (INCLUDING, WITHOUT LIMITATION, SELLER'S RIGHTS TO SEEK SPECIFIC PERFORMANCE OF THIS AGREEMENT AND TO RECEIVE DAMAGES) FOR BUYER'S FAILURE TO PURCHASE THE PROPERTY, WHICH SUMS WILL BE PRESUMED TO BE A REASONABLE ESTIMATE OF THE AMOUNT OF ACTUAL DAMAGES SUSTAINED BY SELLER BECAUSE OF BUYER'S BREACH OF ITS OBLIGATION TO PURCHASE THE PROPERTY. FROM THE NATURE OF THIS TRANSACTION, IT IS IMPRACTICABLE AND EXTREMELY DIFFICULT TO FIX THE ACTUAL DAMAGES THAT SELLER WOULD SUSTAIN IF BUYER BREACHES SUCH OBLIGATION. THE IMPRACTICABILITY AND DIFFICULTY OF FIXING ACTUAL DAMAGES IS CAUSED BY, WITHOUT LIMITATION, THE FACT THAT THE PROPERTY IS UNIQUE. GIVEN THE FOREGOING FACTS, AMONG OTHERS, BUYER AND SELLER AGREE THAT LIQUIDATED DAMAGES ARE PARTICULARLY APPROPRIATE FOR THIS TRANSACTION AND AGREE THAT SAID LIQUIDATED DAMAGES MUST BE PAID IN THE EVENT OF BUYER'S BREACH OF ITS OBLIGATION TO PURCHASE THE PROPERTY, DESPITE ANY



WORDS OR CHARACTERIZATIONS PREVIOUSLY USED OR CONTAINED IN THIS AGREEMENT IMPLYING ANY CONTRARY INTENT. THE PAYMENT OF SUCH AMOUNT AS LIQUIDATED DAMAGES IS NOT INTENDED AS A FORFEITURE OR PENALTY WITHIN THE MEANING OF CALIFORNIA CIVIL CODE §3275 OR §3369 BUT IS INTENDED TO CONSTITUTE LIQUIDATED DAMAGES TO SELLER UNDER CALIFORNIA CIVIL CODE §§1671, 1676, AND 1677. NOTHING IN THIS AGREEMENT WILL, HOWEVER, BE DEEMED TO LIMIT BUYER'S LIABILITY TO SELLER FOR DAMAGES OR INJUNCTIVE RELIEF FOR BREACH OF BUYER'S INDEMNITY OBLIGATIONS UNDER SECTION 3.5.2, OR FOR ATTORNEY FEES AND COSTS AS PROVIDED IN SECTION 10.10.

WE ACKNOWLEDGE THIS LIQUIDATED DAMAGES PROVISION:

SELLER'S INITIALS: \_\_\_\_\_ BUYER'S INITIALS: \_\_\_\_\_

9.3. Seller's Default. Seller will be deemed to be in default under this Agreement (1) if Seller fails, for any reason other than Buyer's default under this Agreement or the failure of a condition precedent to Seller's obligation to perform under this Agreement, to meet, comply with, or perform any covenant, agreement, or obligation required on its part within the time limits and in the manner required in this Agreement, or (2) if a material breach of any representation or warranty (made by Seller) has occurred because of Seller's actual fraud or intentional misrepresentation; provided, however, that no such default will be deemed to have occurred unless and until Buyer has given Seller written notice of the default, describing its nature, and Seller has failed to cure such default within FIVE (5) days after receipt of such notice (but in any event before the Closing Date, unless such default occurs after Closing).

9.4. WAIVER OF RIGHT TO SPECIFIC PERFORMANCE. IF SELLER FAILS TO CONVEY THE PROPERTY TO BUYER IN ACCORDANCE WITH THE PROVISIONS OF THIS AGREEMENT, AND SUCH FAILURE CONSTITUTES A DEFAULT UNDER THIS AGREEMENT, THEN BUYER WILL BE ENTITLED TO THE RETURN OF THE DEPOSIT AND ALL INTEREST ACCRUED ON THAT DEPOSIT WHILE IN ESCROW, BUT BUYER WILL NOT HAVE THE RIGHT TO RECEIVE ANY EQUITABLE RELIEF, INCLUDING WITHOUT LIMITATION THE RIGHT TO RECORD A LIS PENDENS AGAINST THE PROPERTY UNDER APPLICABLE LAW OR TO PURSUE THE SPECIFIC PERFORMANCE OF THIS AGREEMENT, BUT BUYER WILL HAVE THE RIGHT TO PURSUE AN ACTION FOR DAMAGES AGAINST SELLER RELATIVE TO SUCH DEFAULT. SELLER AND BUYER ACKNOWLEDGE THAT THEY HAVE READ AND UNDERSTAND THIS SECTION 9.4 AND BY THEIR INITIALS IMMEDIATELY BELOW AGREE TO BE BOUND BY ITS TERMS.

SELLER'S INITIALS: \_\_\_\_\_ BUYER'S INITIALS: \_\_\_\_\_

9.5. Resolution of Disputes. Controversies or claims between Seller and Buyer that arise from (a) this Agreement (including any modifications to this agreement), (b) any document, agreement, or procedure related to or delivered in connection with this Agreement or the Property, (c) any violation of this Agreement, or (d) any claims for damages resulting from any business conducted between Seller and Buyer, including claims for injury to persons, property, or business interests (torts) (collectively, "**Arbitrable Disputes**") will be resolved under this section 9.5, which will survive termination of this Agreement. Wherever this Agreement refers to arbitration as the means of resolving disputes between the parties, the parties agree to follow the procedure described immediately below before commencing arbitration procedures. The filing of a judicial action during the term of this Agreement to enforce the other party's performance under this Agreement, e.g., for an order of attachment, injunction, or other remedy, will not constitute a waiver to the filing party's right or breach of the filing party's obligation to arbitrate; provided, however, that in no circumstances following the termination of this Agreement will Buyer be entitled to record a notice of pending action (lis pendens) or take other action or

seek other remedies that would have the effect of clouding Seller's title or restricting Seller's ability to convey or encumber the Property, free of any claim by Buyer to the Property.

#### 9.5.1. Arbitration of Disputes.

(a) General. Any controversies or claims between Seller and Buyer that arise from Arbitrable Disputes will be settled by arbitration in the City of San Diego, California, in accordance with the Commercial Arbitration Rules (Rules of the American Arbitration Association ("AAA")) if not inconsistent with other provisions of this Agreement, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction. The parties submit to the jurisdiction of the Superior Court of the State of California, County of San Diego, for purposes of confirming any such award and entering judgment. The parties further agree that, despite anything to the contrary that may now or hereafter be contained in the Rules of the AAA, this section 9.5.1 will control.

(b) Appointment. Within ten (10) days after receipt of a notice of arbitration (Demand) from the other party, each party will appoint one person to hear and decide the dispute. The two persons so chosen will, within ten (10) days after their appointment, appoint a third impartial arbitrator (who must be an attorney at law licensed to practice in California), and the final majority decision of the three arbitrators will be final and conclusive on the parties to this Agreement. Each appointment of an arbitrator will be deemed complete on delivery by the appointing party of written notice of appointment of that arbitrator to the San Diego Regional Office of the AAA. If either Seller or Buyer fails to designate its arbitrator within the specified period after receipt of the Demand, then the arbitrator designated by the other party will sit as the sole arbitrator and will be deemed to be the single, mutually approved arbitrator to resolve the Arbitrable Dispute. If the party-appointed arbitrators are unable to appoint an impartial arbitrator, the impartial arbitrator will be appointed under the Rules of the AAA. If the parties cannot agree on a rate of compensation for the arbitrators, they will be compensated for their services at a rate to be determined by the AAA.

(c) Costs. Except as provided in this section 9.5.1, each party will bear its own costs and expenses of arbitration, including, but not limited to, filing fees, attorney fees, the fees of the arbitrator appointed by the party, and costs of transcripts, and each party agrees to pay half of the compensation to be paid to the neutral arbitrator in the arbitration. The arbitrators will not have the power or competence to allocate between the parties in their award any costs, expenses, fees, or share of arbitrators' compensation.

(d) Written Opinion. The arbitrators must, on the request of either Seller or Buyer, issue a written opinion of their findings of fact and conclusions of law. On receipt by the requesting party of this written opinion, the party will have the right to file with the arbitrators a motion to reconsider, and the arbitrators must then reconsider the issues raised by this motion and either confirm or change their majority decision, which will then be final and conclusive on the parties.

(e) Applicability of Code of Civil Procedure. It is specifically contemplated and agreed by the parties that California Code of Civil Procedure §1283.05, as it may be amended from time to time, will be incorporated into, made a part of, and made applicable to the arbitration agreement in this section 9.5.1.

(f) Power of Arbitrators. The arbitrators will have the authority to issue any judgment or order, including punitive damages and equitable relief; provided, however, that the arbitrators' power to provide equitable relief or specific performance will be limited to disputes in connection with the administration of this agreement and will not preclude or restrict implementation of the termination provisions of this Agreement.

(g) Statute of Limitations. For purposes of the statute of limitations, the filing of an arbitration under this section 9.5.1 is the equivalent of the filing of a lawsuit, and any claim or controversy that may be arbitrated under this section 9.5.1 is subject to any applicable statute of limitations. The arbitrators will have the authority



to decide whether any such claim or controversy is barred by the statute of limitations, and, if so, to dismiss the arbitration on that basis.

(h) Disagreement on Arbitrability. If the parties disagree on whether a dispute is an Arbitrable Dispute, the issue of arbitrability will be resolved by litigation unless both parties in their sole discretion agree to make the issue of arbitrability an issue to be decided by the arbitrators under this section 9.5.1.

9.5.2. Statutory Notice. NOTICE: BY INITIALING IN THE SPACE BELOW, YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW, YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

THE UNDERSIGNED HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

SELLER'S INITIALS: \_\_\_\_\_

BUYER'S INITIALS: \_\_\_\_\_

## **ARTICLE 10**

### **GENERAL**

10.1. Notices. Any notices relating to this Agreement must be given in writing and will be deemed sufficiently given and served for all purposes when delivered (i) personally, in which case it will be deemed to be received on delivery; (ii) by generally recognized next-business-day courier service, in which case it will be deemed delivered on the next business day if timely delivered to such service for next-day delivery, postage pre-paid; (iii) by facsimile (provided that sender retains a printed confirmation of delivery to the facsimile number provided below), in which case it will be deemed delivered based on the time shown in the confirmation; (iv) by electronic mail, in which case it will be deemed delivered on the date sent or the next business day after the date sent; or (v) \_\_[e.g., 3]\_\_ days after deposit in the United States mail certified or registered, return receipt requested, with postage prepaid, addressed as follows:

**SELLER:**

Aaron Magagna  
3639 Midway Dr., Suite B #132  
San Diego, CA 92110  
Email: aaronmagagna@gmail.com

**BUYER:**

Charla Barbieri Heimer  
3539 Ticonderoga Street  
San Diego, CA 92117  
Email: char@csquarednvestments.com

**ESCROW HOLDER:**

Orange Coast Title

[address]

Att'n: [name]

Fax No.: [number]

E-mail: [e-mail address]

Either party may change its address by written notice to the other given in the manner set forth above.

10.2. Entire Agreement. This Agreement and all exhibits and agreements referred to in this Agreement constitute the complete, exclusive, and final statement of the terms of the agreement with respect to the sole property between buyer and seller and may not be contradicted by evidence of any prior or contemporaneous agreement. This Agreement specifically supersedes any prior written or oral agreements between the parties. The language in all parts of this Agreement will be construed as a whole in accordance with its fair meaning and without regard to California Civil Code §1654 or similar statutes. Neither party has been induced to enter into this Agreement by, and neither party is relying on, any representation or warranty outside those expressly set forth in this Agreement.

10.3. Amendments and Waivers. No addition to or modification of this Agreement will be effective unless it is made in writing and signed by the party against whom the addition or modification is sought to be enforced. The party benefited by any condition or obligation may waive the same, but such waiver will not be enforceable by another party unless it is made in writing and signed by the waiving party.

10.4. Invalidity of Provision. If any provision of this Agreement as applied to either party or to any circumstance is adjudged by a court of competent jurisdiction to be void or unenforceable for any reason, this fact will in no way affect (to the maximum extent permissible by law) any other provision of this Agreement, the application of any such provision under circumstances different from those adjudicated by the court, or the validity or enforceability of this Agreement as a whole.

10.5. No Merger. This Agreement, each provision of it, and all warranties and representations in this Agreement will survive the Closing and will not merge in any instrument conveying title to Buyer. All representations, warranties, agreements, and obligations of the parties will, despite any investigation made by any party to this Agreement, survive Closing, and the same will inure to the benefit of and be binding on the parties' respective successors and assigns.

10.6. References. Unless otherwise indicated, (a) all article and section references are to the articles and sections of this Agreement, and (b) except where otherwise stated, all references to days are to calendar days. Whenever under the terms of this Agreement the time for performance of a covenant or condition falls on a Saturday, Sunday, or California state holiday, such time for performance will be extended to the next business day. "Business Days" means days other than Saturday, Sunday, and California state holidays. The headings used in this Agreement are provided for convenience only and this Agreement will be interpreted without reference to any headings. The date of this Agreement is for reference purposes only and is not necessarily the date on which it was entered into.

10.7. Governing Law. This Agreement will be governed by the laws of the State of California applicable to contracts made by residents of the State of California and to be performed in California.

10.8. Confidentiality and Publicity. In connection with this Agreement, the Parties have obtained information the Parties consider confidential and/or proprietary including, but not limited to: (i) the names of the Parties and the Parties' agents, attorneys, and consultants; (ii) the fact that Seller may sell the Property and Buyer is a potential purchase of the Property; (iii) information regarding the negotiations, offers, counteroffers, and drafts



of this Agreement; (iv) information about the Property or Seller discovered by Buyer; and (v) any documents received from one another (collectively, the "**Confidential Information**"). The Parties agree to keep the Confidential Information confidential, except to the extent necessary to (a) comply with applicable law and regulations or (b) carry out the obligations set forth in this Agreement. Any such disclosure to third parties must indicate that the information is confidential and should be so treated by the third party. Before the Closing, no press release or other public disclosure may be made by either Party or any of its agents concerning this transaction without the other Party's prior written consent.

10.9. Time. Time is of the essence in the performance of the parties' respective obligations under this Agreement.

10.10. Attorney Fees. In the event of any action or proceeding to enforce a term or condition of this Agreement, any alleged disputes, breaches, defaults, or misrepresentations in connection with any provision of this Agreement or any action or proceeding in any way arising from this Agreement, including any interpleader of the Deposit by the Escrow Holder, the prevailing party in such action, or the nondismissing party when the dismissal occurs other than by a settlement, will be entitled to recover its reasonable costs and expenses, including without limitation reasonable attorney fees and costs of defense paid or incurred in good faith. The "prevailing party," for purposes of this Agreement, will be deemed to be that party who obtains substantially the result sought, whether by settlement, dismissal, or judgment.

10.11. Assignment. This Agreement will inure to the benefit of and be binding on the parties to this Agreement and their respective successors and assigns. Buyer will have the right to assign all or any portion of its interest in this Agreement, provided that Buyer gives written notice of such assignment to Seller before the Closing Date.

10.12. No Third Party Beneficiaries. Nothing in this Agreement, express or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any person other than the parties to it and their respective permitted successors and assigns, nor is anything in this Agreement intended to relieve or discharge any obligation of any third person to any party to this Agreement or give any third person any right of subrogation or action over against any party to this Agreement.

10.13. Remedies Cumulative. The remedies set forth in this Agreement are cumulative and not exclusive to any other legal or equitable remedy available to a party.

10.14. Counterparts. This Agreement may be executed in one or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

10.15. Tax-Deferred Exchange. Seller may use the proceeds from the sale of the Property to effect one (or more) tax-deferred exchange(s) under Internal Revenue Code §1031. Buyer agrees to accommodate Seller in effecting such tax-deferred exchange. Seller will have the right, expressly reserved here, to elect such tax-deferred exchange at any time before the Closing Date. Seller and Buyer agree, however, that consummation of the purchase and sale of Property under this Agreement is not conditioned on such exchange. If Seller elects to make a tax-deferred exchange, Buyer agrees to execute such additional escrow instructions, deeds, documents, agreements, or instruments to effect this exchange, provided that Buyer must incur no additional costs, expenses, or liabilities in this transaction as a result of or in connection with this exchange. Seller agrees to hold Buyer harmless of any liability, damages, or costs, including reasonable attorney fees, that may arise from Buyer's participation in such exchange.

10.16. Interpretation. Throughout this Agreement, (a) the plural and singular numbers will each be considered to include the other; (b) the masculine, feminine, and neuter genders will each be considered to include the

others; (c) “shall,” “will,” “must,” “agrees,” and “covenants” are each mandatory; (d) “may” is permissive; (e) “or” is not exclusive; and (f) “includes” and “including” are not limiting.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date.

SELLER:

\_\_\_\_\_  
Aaron Magagna

Date: \_\_\_\_\_

BUYER:

\_\_\_\_\_  
Charla Barbieri Heimer

Date: \_\_\_\_\_

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**CONSENT OF ESCROW HOLDER**

Orange Coast Title Company ("**Escrow Holder**") accepts the foregoing Purchase and Sale Agreement and Joint Escrow Instructions as escrow instructions, agrees to act as escrow holder and agrees to be bound by their provisions applicable to it as Escrow Holder.

Orange Coast Title Company

Date: \_\_\_\_\_

\_\_\_\_\_  
By:

Its:

## **TABLE OF EXHIBITS**

<b>EXHIBIT</b>	<b>TITLE</b>
<b>A</b>	<b>Description of Property</b>
<b>B</b>	<b>CUP</b>
<b>C</b>	<b>LLC Purchase Agreement</b>
<b>D</b>	<b>Form of Grant Deed</b>
<b>E</b>	<b>Bill of Sale</b>
<b>F</b>	<b>Form of Note for Seller Financing</b>
<b>G</b>	<b>Form of Deed of Trust for Seller Financing</b>



## MEMBERSHIP INTEREST SALE AND PURCHASE AGREEMENT

This MEMBERSHIP INTEREST SALE AND PURCHASE AGREEMENT (this “**Agreement**”) is made as of the date executed (“**Effective Date**”), by and between AARON MAGAGNA (the “**Seller**”) and CHARLA BARBIERI HEIMER (the “**Buyer**”). The Seller and the Buyer are also referred to herein individually as a “**Party**” and collectively as the “**Parties**”.

### RECITALS:

WHEREAS, Seller owns one hundred percent (100%) of the membership interest (the “**Membership Interest**”) of 2018FMO, LLC (the “**Company**”), a California limited liability company, and desires to sell the Membership Interest to the Buyer; and

WHEREAS, Company has been issued and currently holds a conditional use permit (“**CUP**”) number 2114346 issued by the City of San Diego to operate a marijuana outlet (retail, medicinal or combination), where marijuana, marijuana products, and marijuana accessories are {to be sold} sold to the public. CUP 2114346 is attached hereto as Exhibit A; and

WHEREAS, Company has been issued and currently holds a State of California Adult-Use and Medicinal-Retail Temporary License number C10-18-0000211-TEMP (“**State License**”), attached hereto as Exhibit B; and

WHEREAS, the CUP and the State License are the sole assets of the Company; and

WHEREAS, the Seller has agreed to sell, and the Buyer has agreed to buy the Membership Interest, and the Parties desire to set forth the terms and conditions governing the purchase and sale of the Membership Interest.

NOW, THEREFORE, in consideration of the mutual covenants and promises herein made, and for other good and valuable consideration the sufficiency and receipt of which are hereby acknowledged, the Parties hereto agree as follows:

### AGREEMENT

1. Agreement to Sell and Purchase the Membership Interest. In consideration of, and in express reliance upon, the representations and warranties of the Seller and the Buyer in this Agreement, the Seller hereby agrees to irrevocably transfer and convey the Membership Interest to the Buyer and withdraw from the Company for a purchase price of two million dollars (\$2,000,000.00) (the “**Purchase Price**”). Buyer agrees to pay, or cause to be paid, the balance of the Purchase Price to Seller through the Escrow by depositing cash or a certified or cashier’s check payable to the Escrow Holder, or by electronic transfer of federal funds, which must be delivered to the Escrow Holder at least three (3) business days before the Closing Date.

2. Due Diligence. Buyer has provided copies of the Company Articles of Organization, the Operating Agreement, and all permits and licenses in the Company’s name (the “**Licenses**”), which Licenses are the sole assets of the business (the “**Inspection Materials**”). Buyer’s obligation to purchase the Membership Interest is expressly conditioned on its approval, in its sole discretion, of the matters disclosed in Inspection Materials. Buyer will have the period from the Effective Date until the date that is twenty-five (25) days after the Effective Date (“**Contingency Date**”) to review the Inspection Materials and to decide whether to approve the matters disclosed in the Inspection Materials. On or before the Contingency Date, Buyer must deliver written notice to Seller either accepting the matters disclosed in the Inspection Materials or terminating this Agreement. {Modify section to say >>> Buyer must notify Seller of approving and waiving all contingencies or it is assumed that after the inspection period is over if no contingencies were removed, the contract is canceled and Buyer receives earnest deposit back. If Buyer, puts in writing that all contingencies are accepted then the earnest deposit goes non-refundable upon contingencies being removed} If Buyer fails to give such notice on or before the Contingency Date, Buyer will be deemed to have “**NOT**” accepted the matters disclosed in the Inspection Materials. By its acceptance of the contingencies set forth in this Section 2, Buyer

will be deemed to have acknowledged that (a) Seller has provided Buyer with access to the Inspection Materials and (b) Buyer has had ample opportunity to review and inspect the Inspection Materials and to make such independent factual, physical, and legal examinations and inquiries as Buyer deems necessary or desirable with respect to matters disclosed in the Inspection Materials.

3. Opening of Escrow. Within three (3) business days after the Effective Date, Buyer and Seller shall open an escrow ("**Escrow**") with Orange Coast Title Company ("**Escrow Holder**") as the escrow holder by delivering a copy of this Agreement signed by each of Buyer and Seller. Escrow Holder shall acknowledge receipt of such items by signing and dating the signature page of this Agreement, and Escrow Holder shall return a fully signed copy of this Agreement, signed and dated by Escrow Holder, to each of Buyer and Seller. Escrow Holder shall also prepare its required escrow instructions, if any, for the transactions contemplated by this Agreement, and shall deliver such escrow instructions to Buyer and Seller for execution. The escrow instructions shall be on the standard form of Escrow Holder for transactions like those contemplated herein and shall incorporate this Agreement. If there is any inconsistency between this Agreement and the escrow instructions, then this Agreement shall control unless the intent to amend this Agreement is clearly stated in such escrow instructions.

4. Closing. The date of the closing of the purchase and sale of the Membership Interest under this Agreement (the "**Closing Date**") shall occur simultaneously with the purchase agreement for the purchase by the Buyer from the Seller of that certain real property located at 6220 1/3 Federal Boulevard, San Diego, CA (the "**Real Property**") (the "**Real Estate PSA**").

5. Withdrawal. The Company operating agreement dated March 19, 2019 ("**Operating Agreement**"), attached as Exhibit C, provides for withdrawal of a member prior to the dissolution and winding up of the Company by transferring all of its membership interests to any other person. The Parties acknowledge and agree that, by operation of the Operating Agreement Article 7, Seller's withdrawal as a member of the Company, and Buyer's admission as a member of the Company, are each effective upon the sale of the Membership Interest to the Buyer on the Closing Date.

6. Statement of Information. Within seven (7) business days of the Closing Date, Seller shall submit to the California Secretary of State a Statement of Information in the form attached hereto as Exhibit D, showing Buyer as the member/manager of the Company and updating the address and agent for service of process of the Company.

7. Representations and Warranties of Seller. The Seller represents and warrants to the Buyer as follows:

(a) **The Seller has good, valid and marketable title to the Membership Interest free and clear of all mortgages, liens, pledges, security interests, charges, claims and other encumbrances and defects of title of any nature whatsoever.**

(b) **No person has any right or other claim against Seller for any commission, fee or other compensation as a finder or broker in connection with the transaction contemplated by this Agreement.**

8. Representations and Warranties of Buyer. The Buyer represents and warrants to the Seller as follows:

(a) **No person has any right or other claim against the Buyer for any commission, fee or other compensation as a finder or broker in connection with the transaction contemplated by this Agreement.**

(b) **The Buyer is financially capable of bearing the risk of loss of the entire investment represented by the Membership Interest and is able to bear the economic risk of investment in the Membership Interest for an indefinite period of time. {I don't want this section in there}.**

9. Conditions to Purchase. All obligations of the Buyer and Seller to consummate this Agreement are subject to the fulfillment, prior to or on the Closing Date, of each of the following conditions, except in the event the parties hereto shall all waive one or more of such conditions in writing: **{Prefer changing from prior to closing date instead to prior to earnest deposit going non-refundable.}**

(a) The Parties shall have simultaneously entered into and closed on the Real Estate PSA; {Why the need for two contracts versus one? Has Seller sought Title Insurance?}

(b) The representations and warranties of the Seller contained in this Agreement shall be true and correct in all material respects, on and as of the Closing Date, with the same force and effect as though made on and as of such date.

(c) As of the Closing Date the Seller shall have performed and satisfied, in all material respects, each and every obligation to be performed and satisfied under this Agreement on or prior to the time specified herein for such performance or satisfaction. {Prefer to change to "As of the Date of Execution of this document vs. as of the Closing Date}

(d) The representations and warranties of the Buyer contained in this Agreement shall be true and correct in all material respects, on and as of the Closing Date, with the same force and effect as though made on and as of such date.

(e) As of the Closing Date, the Buyer shall have performed and satisfied, in all material respects, each and every obligation to be performed and satisfied under this Agreement on or prior to the time specified herein for such performance or satisfaction.

#### 10. Covenants.

(a) Except or unless otherwise contemplated herein, between the date hereof and the Closing Date, Seller agrees to not cause the Company to: i) issue any membership interests in the Company; ii) issue or grant any options, warrants, or other rights to purchase membership interests in the Company; iii) take any action materially and adversely affecting this Agreement or the transactions contemplated hereby or the Company's financial condition (present or prospective), business, properties, or operations; iv) dispose of any Company assets; or, v) amend its Articles of Organization or Operating Agreement.

(b) After the closing, Seller shall have no function with or responsibility to the Company or to Buyer. Company's ability to maintain or renew the Licenses or obtain any other government licenses, authorizations, or permits ("Government Authorizations") to operate the Company shall be entirely Buyer's responsibility. Buyer and Buyer's heirs, successors, or assigns (the "Buyer Parties") shall hold Seller harmless for any inability of Buyer or the Buyer Parties to cause Company to obtain any Government Authorizations. {Can there be any certain period of time to ensure we bought something of actual value and have license?}

#### 11. Miscellaneous.

(a) This Agreement contains all of the promises, agreements, conditions, terms, understandings, warranties and representations of the Parties with respect to the transactions and business relationships contemplated thereby and herein, and there are no other promises, agreements, conditions, understandings, warranties or representations, oral or written, express or implied, among them other than as set forth in this Agreement. This Agreement supersedes all prior agreements and understandings among the Parties with respect to its subject matter.

(b) This Agreement and all amendments, modifications, authorizations or supplements to this Agreement and the rights, duties, obligations and liabilities of the Parties under such document will be determined in accordance with the applicable provisions of the laws of the State of California, without reference to its doctrines or principles of conflicts of laws.

(c) This Agreement will be binding upon and inure to the benefit of the Parties, their personal



and legal representatives, guardians, successors and assigns.

(d) Neither Party may assign this Agreement or any of the rights, interests, or obligations hereunder without the prior written approval of the other Party.

(e) This Agreement may be executed in any number of counterparts and by the parties hereto in separate counterparts, each of which when so executed and delivered shall be deemed an original and all of which counterparts when taken together shall constitute but one and the same instrument.

IN WITNESS WHEREOF, the Parties have executed and delivered this Agreement as of the dates set forth below.

**Buyer**

CHARLA BARBIERI HEIMER

**Seller**

AARON MAGAGNA

\_\_\_\_\_  
Charla Barbieri Heimer

\_\_\_\_\_  
Aaron Magagna

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**CONSENT OF ESCROW HOLDER**

Orange Coast Title Company ("**Escrow Holder**") accepts the foregoing Purchase and Sale Agreement and Joint Escrow Instructions as escrow instructions, agrees to act as escrow holder and agrees to be bound by their provisions applicable to it as Escrow Holder.

Orange Coast Title Company

Date: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

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Exhibit A

San Diego CUP 2114346

DRAFT

**RECORDING REQUESTED BY  
CITY OF SAN DIEGO  
DEVELOPMENT SERVICES  
PERMIT INTAKE MAIL STATION  
501**

**WHEN RECORDED MAIL TO  
PROJECT MANAGEMENT  
PERMIT CLERK  
MAIL STATION 501**

INTERNAL ORDER NUMBER: 24007747

SPACE ABOVE THIS LINE FOR RECORDER'S USE

**CONDITIONAL USE PERMIT NO. 2114346  
FEDERAL BOULEVARD MARIJUANA OUTLET PROJECT NO. 598124  
PLANNING COMMISSION**

This Conditional Use Permit No. 2114346 ("Permit") is granted by the Planning Commission of the City of San Diego to John Carl Ek and Edith Phyllis Ek, co-trustees of the Ek Family Trust, dated January 5, 1994, Owner, and 2018FMO, LLC, a California Limited Liability Company, Permittee, pursuant to San Diego Municipal Code (SDMC) section 126.0305. The 0.11-acre site is located at Assessor's Parcel Number (APN) 543-020-0400 on Federal Blvd. in the CO-2-1 Zone within the Encanto Neighborhoods Community Plan area. The project site is legally described as: The Northeasterly 50 feet of Lot 24 of Map No. 2121, in the City of San Diego, County of San Diego, State of California, filed in the Office of the County Recorder of San Diego County, on July 20, 1928.

Subject to the terms and conditions set forth in this Permit, permission is granted to Owner and Permittee to operate a Marijuana Outlet described and identified by size, dimension, quantity, type, and location on the approved exhibits [Exhibit "A"] dated December 6, 2018, on file in the Development Services Department.

The project shall include:

- a. Construction of a two-story, 1,682 square foot building;
- b. Operation of Marijuana Outlet in a two-story, 1,682 square-foot building at Assessor's Parcel Number (APN) 543-020-0400 on Federal Boulevard;
- c. Landscaping (planting, irrigation and landscape related improvements);
- d. Off-street parking; and
- e. Public and private accessory improvements determined by the Development Services Department to be consistent with the land use and development standards for this site in accordance with the adopted community plan, the California Environmental Quality Act.

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Exhibit B

State of California Adult-Use and Medicinal-Retail Temporary License number  
C10-18-0000211-TEMP



Bureau of Cannabis Control  
(833) 768-5880

**Adult-Use and Medicinal - Retailer Temporary License**

**LICENSE NO:**  
**C10-18-0000211-TEMP**

**VALID:**  
**12/24/2018**

**LEGAL BUSINESS NAME:**  
**2018FMO LLC**

**EXPIRES:**  
**7/22/2019**

**PREMISE:**  
**6220 1/3 FEDERAL BLVD**  
**SAN DIEGO, CA 92114**

*Non-Transferable*

*Prominently display this license  
as required by Title 16 CCR § 5039*


Exhibit C

2018FMO LLC Operating Agreement

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## Exhibit D

## Form of Statement of Information to be Submitted to the California Secretary of State

	<b>Secretary of State</b> <b>Statement of Information</b> (Limited Liability Company)	<b>LLC-12</b>				
<b>IMPORTANT</b> — This form can be filed online at <a href="http://bizfile.sos.ca.gov">bizfile.sos.ca.gov</a> . Read instructions before completing this form. <b>Filing Fee</b> — \$20.00 <b>Copy Fees</b> — First page \$1.00; each attachment page \$0.50; Certification Fee — \$5.00 plus copy fees						
<i>Above Space For Office Use Only</i>						
<b>1. Limited Liability Company Name</b> (Enter the exact name of the LLC. If you registered in California using an alternate name, see instructions.)						
<b>2. 12-Digit Secretary of State Entity (File) Number</b>	<b>3. State, Foreign Country or Place of Organization</b> (only if formed outside of California)					
<b>4. Business Addresses</b>						
a. Street Address of Principal Office - Do not list a P.O. Box	City (no abbreviations)	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;">State</td> <td style="width: 50%;">Zip Code</td> </tr> <tr> <td style="height: 20px;"></td> <td style="height: 20px;"></td> </tr> </table>	State	Zip Code		
State	Zip Code					
b. Mailing Address of LLC, if different than Item 4a	City (no abbreviations)	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;">State</td> <td style="width: 50%;">Zip Code</td> </tr> <tr> <td style="height: 20px;"></td> <td style="height: 20px;"></td> </tr> </table>	State	Zip Code		
State	Zip Code					
c. Street Address of California Office, if Item 4a is not in California - Do not list a P.O. Box	City (no abbreviations)	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;">State</td> <td style="width: 50%;">Zip Code</td> </tr> <tr> <td style="height: 20px; text-align: center;">CA</td> <td style="height: 20px;"></td> </tr> </table>	State	Zip Code	CA	
State	Zip Code					
CA						
<b>5. Manager(s) or Member(s)</b> <small>If no managers have been appointed or elected, provide the name and address of each member. At least one name and address must be listed. If the manager/member is an individual, complete Items 5a and 5c (leave Item 5b blank). If the manager/member is an entity, complete Items 5b and 5c (leave Item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and address(es) on Form LLC-12A.</small>						
a. First Name, if an individual - Do not complete Item 5b	Middle Name	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 60%;">Last Name</td> <td style="width: 40%;">Suffix</td> </tr> <tr> <td style="height: 20px;"></td> <td style="height: 20px;"></td> </tr> </table>	Last Name	Suffix		
Last Name	Suffix					
b. Entity Name - Do not complete Item 5a						
c. Address	City (no abbreviations)	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;">State</td> <td style="width: 50%;">Zip Code</td> </tr> <tr> <td style="height: 20px; text-align: center;">CA</td> <td style="height: 20px;"></td> </tr> </table>	State	Zip Code	CA	
State	Zip Code					
CA						
<b>6. Service of Process</b> (Must provide either Individual OR Corporation.) <b>INDIVIDUAL</b> — Complete Items 6a and 6b only. Must include agent's full name and California street address.						
a. California Agent's First Name (if agent is not a corporation)	Middle Name	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 60%;">Last Name</td> <td style="width: 40%;">Suffix</td> </tr> <tr> <td style="height: 20px;"></td> <td style="height: 20px;"></td> </tr> </table>	Last Name	Suffix		
Last Name	Suffix					
b. Street Address (if agent is not a corporation) - Do not enter a P.O. Box	City (no abbreviations)	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;">State</td> <td style="width: 50%;">Zip Code</td> </tr> <tr> <td style="height: 20px; text-align: center;">CA</td> <td style="height: 20px;"></td> </tr> </table>	State	Zip Code	CA	
State	Zip Code					
CA						
<b>CORPORATION</b> — Complete Item 6c only. Only include the name of the registered agent Corporation.						
c. California Registered Corporate Agent's Name (if agent is a corporation) — Do not complete Item 6a or 6b						
<b>7. Type of Business</b> Describe the type of business or services of the Limited Liability Company						
<b>8. Chief Executive Officer, if elected or appointed</b>						
a. First Name	Middle Name	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 60%;">Last Name</td> <td style="width: 40%;">Suffix</td> </tr> <tr> <td style="height: 20px;"></td> <td style="height: 20px;"></td> </tr> </table>	Last Name	Suffix		
Last Name	Suffix					
b. Address	City (no abbreviations)	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;">State</td> <td style="width: 50%;">Zip Code</td> </tr> <tr> <td style="height: 20px;"></td> <td style="height: 20px;"></td> </tr> </table>	State	Zip Code		
State	Zip Code					
<b>9. The information contained herein, including any attachments made part of this document, is true and correct.</b>						

Date

Type or Print Name of Person Completing the Form

Title

Signature

LLC-12 (REV 01/2018)

Clear Form

Print Form

2018 California Secretary of State  
[bizfile.sos.ca.gov](http://bizfile.sos.ca.gov)

**EXHIBIT 10**



## **12 Moore's Federal Practice - Civil § 60.21**

**Moore's Federal Practice - Civil > Volume 12: Analysis: Civil Rules 57–63 > Volume 12  
Analysis: Civil Rules 57–63 > Chapter 60 Relief From a Judgment or Order > C. SCOPE OF  
AND CONDITIONS TO RELIEF FROM SUBSTANTIVE ERRORS IN JUDGMENT ITSELF**

### **Author**

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by Joseph T. McLaughlin\*

updates by Thomas D. Rowe, Jr.\*

### **§ 60.21 Only Four Procedures Permitted for Seeking Relief**

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#### **[1] Rule 60(b) Establishes Simple Motion Procedure**

Rule 60 permits the district court to grant relief to a party from a final judgment, order, or proceeding “[o]n motion and just terms.”<sup>1</sup> The express purpose of these provisions of Rule 60 was to take all of the various grounds and procedures available before the rules were adopted, and to substitute either a simple motion procedure or an independent action.<sup>2</sup>

Of course, Rule 60(b) overlaps with other federal rules to a certain extent (see § 60.03). For example, both Rule 59 and Rule 60(b) permit relief if there is newly discovered evidence (see § 60.03[3]). Rule 59(a) permits a new trial motion if filed within 28 days after the entry of the judgment.<sup>3</sup> Rule 60(b)(2) permits a motion to have the judgment set aside on the basis of newly discovered evidence (see § 60.42) if the motion is made within a

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\* Joseph T. McLaughlin (1944–2012) was of counsel with Bingham McCutchen in New York. He received his A.B. from Boston College in 1965, and his J.D. from Cornell Law School in 1968. Mr. McLaughlin was Law Clerk to Chief Justice G. Joseph Tauro, Massachusetts, from 1968 to 1969. He was a Fellow of the American College of Trial Lawyers.

Eleanora DiLorenzo, a member of the Florida, Massachusetts, and New York Bars, Brian L. Porto, a member of the Indiana and Vermont Bars, and Richard Ziade, a member of the New York Bar contributed to the preparation of this chapter. This chapter was originally written for MOORE'S FEDERAL PRACTICE by Professor James Wm. Moore.

\* Thomas D. Rowe, Jr., is Elvin R. Latty Professor of Law Emeritus, Duke University, where he taught Civil Procedure, Complex Civil Litigation, and Federal Courts through 2007.

<sup>1</sup> Fed. R. Civ. P. 60(b).

<sup>2</sup> Fed. R. Civ. P. 60, Committee Note of 1946 (reproduced verbatim at § 60App.11[2]).

<sup>3</sup> See Fed. R. Civ. P. 59(a), (b).

reasonable time, not more than one year after the entry of the judgment (see § 60.65).<sup>4</sup> So there may be some question as to which rule is the more appropriate in any particular situation, and one motion may be appropriate within the 28-day period and another motion appropriate after the 28-day period expires. However, the Advisory Committee has noted that this sort of procedural choice corresponds to the same pre-rule choice between motions for new trials and proceedings on a bill of review.<sup>5</sup> The relationship between Rule 60 and other federal rules is analyzed in § 60.03.

For a detailed discussion of all of the procedural issues affecting a Rule 60(b) motion, see § 60.60 et seq.

## **[2] Independent Actions to Set Aside Judgment Are Preserved**

Nothing in the Rule 60 limits a district court's power to "entertain an independent action to relieve a party from a judgment, order, or proceeding."<sup>6</sup> Relief from judgment through an independent action in equity was well-established before the adoption of the federal rules.<sup>7</sup>

The rationale for preserving this historic remedy in the face of the comprehensive motion procedure established by Rule 60(b), (c) (see [1], above) is not clear from the face of the rule itself. However, Rule 60(b) motions must usually (although not always) be brought in the court that rendered the judgment in question. This rule, its exceptions, and its rationale, is discussed in § 60.60. If it is inconvenient or impossible to bring a motion in that court, an independent action rather than a simple motion might be appropriate (see generally § 60.60[3][b]). However, as discussed in § 60.80 et seq., the historical remedy of an independent action is extremely limited, and a federal court will agree to set aside the judgment of another court only with great reluctance (see § 60.84[2][a]). In one instance, a federal district court in Arizona declined to exercise jurisdiction over an action seeking to set aside a 1936 bankruptcy order issued by a federal district court in California.<sup>8</sup>

The time that has elapsed between the entry of the judgment might dictate an independent action rather than a Rule 60(b) motion, but there will rarely be a clear preference on this basis. The time for bringing a Rule 60(b) motion is always limited to a reasonable time and, in many instances, may not exceed one year (see § 60.65).<sup>9</sup> Therefore, an independent action might be brought in situations in which a Rule 60(b) motion is time barred. However, independent actions in equity are always subject to the equitable doctrine of laches (see § 60.83), so undue delay may end up defeating an independent action as well as a Rule 60(b) motion.

A discussion of the grounds for, limits on, and procedures surrounding independent actions for relief from judgments may be found in § 60.80 et seq. However, the existence and preservation of the right to an

<sup>4</sup> See *Fed. R. Civ. P. 60(b)(2)*.

<sup>5</sup> See *Fed. R. Civ. P. 60(b)*, advisory committee note of 1946 (reproduced verbatim at § 60App.11[2]).

<sup>6</sup> **Rule 60 does not limit independent action.** *Fed. R. Civ. P. 60(d)(1)*; see *United States v. Beggerly*, 524 U.S. 38, 45, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998) (rule makes it clear that remedy of independent action is preserved, and is available when, for example, time limitation to make motion has expired).

<sup>7</sup> **Independent action for relief from judgment is remedy that pre-dates federal rules.** See, e.g., *Treadaway v. Academy of Motion Picture Arts & Sciences*, 783 F.2d 1418, 1420 (9th Cir. 1986) (citing *Moore's* for proposition that power to entertain independent action "is one that is rooted in tradition and governed by general equitable principles").

<sup>8</sup> **Comity may cause court to decline jurisdiction to set aside judgment rendered by another court.** *Treadaway v. Academy of Motion Picture Arts & Sciences*, 783 F.2d 1418, 1421–1422 (9th Cir. 1986) (citing *Lapin v. Shulton, Inc.*, 333 F.2d 169, 172 (9th Cir. 1964) for proposition that "considerations of comity and orderly administration of justice demand that nonrendering court should decline jurisdiction ... and remand the parties ... to the rendering court, so long as it is apparent that a remedy is available there").

<sup>9</sup> *Fed. R. Civ. P. 60(c)(1)*.

independent action should not be confused with other common-law forms of relief from judgments such as writs of coram nobis, nor should an independent action be confused with bills of review. These writs and bills of review proceedings are not the equivalent of an independent action and, in contrast to the preserved independent action, the common-law writs and bill proceedings have been expressly abolished by Rule 60(e) (see [5], *below*).<sup>9,1</sup>

#### [4] Rule Does Not Affect Inherent Power to Set Aside Judgment for Fraud on Court

##### [a] "Fraud on Court" Means Fraud That "Seriously" Affects Integrity of Adjudication Process

Fraud, misrepresentation, or other misleading misconduct by an opposing party is a recognized ground for relief by means of a motion under Rule 60(b).<sup>17</sup> This ground for relief from a judgment is discussed at § 60.43. However, Rule 60(d)(3) expressly states that the rule does not limit a district court's inherent power to set aside a judgment that is obtained by "fraud on the court."<sup>18</sup>

"Fraud on the court" is defined in terms of its effect on the judicial process, not in terms of the content of a particular misrepresentation or concealment. *Fraud on the court* must involve more than injury to a single litigant; it is limited to fraud that "seriously" affects the integrity of the normal process of adjudication.<sup>19</sup> Fraud on the court is limited to fraud that does, or at least attempts to, "defile the court itself" or that is perpetrated by officers of the court "so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases."<sup>20</sup>

Obvious examples of conduct that meet this definition include:

- Bribery of a judge.<sup>21</sup>

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<sup>9,1</sup> Fed. R. Civ. P. 60(e).

<sup>17</sup> See Fed. R. Civ. P. 60(b)(3).

<sup>18</sup> Fed. R. Civ. P. 60(d)(3).

<sup>19</sup> "Fraud on court" is species of fraud that affects more than interests of single litigant. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) (fraud on court "is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society"); see United States v. Sierra Pac. Indus., Inc., 862 F.3d 1157, 1167–1169 (9th Cir. 2017) (if moving party through due diligence could have discovered alleged fraud before judgment, such fraud does not disrupt judicial process and thus does not constitute fraud on court).

<sup>20</sup> Fraud on court is fraud that "defiles" court itself. Torres v. Bella Vista Hosp., Inc., 914 F.3d 15, 19 (1st Cir. 2019) ("'[F]raud on the court' is limited to fraud that 'seriously' affects the integrity of the normal process of adjudication,' 'defile[s] the court itself,' and prevents 'the judicial machinery' from performing its usual function—for example, bribery of a judge or jury tampering." (quoting Moore's)).

1st Circuit Torres v. Bella Vista Hosp., Inc., 914 F.3d 15, 19 (1st Cir. 2019) ("'[F]raud on the court' is limited to fraud that 'seriously' affects the integrity of the normal process of adjudication,' 'defile[s] the court itself,' and prevents 'the judicial machinery' from performing its usual function—for example, bribery of a judge or jury tampering." (quoting Moore's)).

4th Circuit Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters, 675 F.2d 1349, 1356 (4th Cir. 1982) (quoting Moore's for "often cited" definition of fraud on court).

<sup>21</sup> Bribery of judge amounts to fraud on court. Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514, 517, 541 (3d Cir. 1948) ("evidence ... recently offered at the ... criminal trial indicated that [Judge] Davis had been bribed by [Attorney] Kaufman").

- Hiring of an attorney whose sole value in a case is the attorney's intimate or criminal relationship with a judge.<sup>22</sup>
- Any form of jury tampering.<sup>23</sup>

However, fraud on the court is not limited to these types of cases.<sup>24</sup> Virtually all courts and commentators recognize that the leading case in the field is *Hazel Atlas Glass Co. v. Hartford-Empire Co.*<sup>25</sup> In that case, the plaintiff glass company sought a patent that would protect a certain glass-blowing process. The patent office did not believe that the patent was valid. The plaintiff's attorney wrote up an article extolling the wonders of the "new" process, got an officer of the glass-workers' union to sign it, and got it published in a trade journal. This helped secure issuance of the patent. In a subsequent infringement suit, the Third Circuit relied heavily on the article to show the validity of the patent. Long after the judgment was rendered, the allegedly infringing party completed its research into the provenance of the article, and on the basis that the article was fraudulent, got the United States Supreme Court to agree that the infringement judgment should be set aside on the ground that it was procured not only by means of a fraud on the Patent Office, but a fraud on the court as well. The United States Supreme Court stated:<sup>26</sup>

This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possible to have been guilty of perjury. Here ... we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. ... This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. (citations omitted) Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot be complacently tolerated.

#### **[b] Misconduct by Officer of Court Is Persuasive Factor in Fraud on Court**

One of the distinguishing facts in the leading *Hazel-Atlas* case was the participation of a lawyer for one of the parties in the creation as well as the presentation of the fraudulent evidence relied on by the Patent Office and the Third Circuit.<sup>27</sup> As a result, subsequent courts have stated that the participation of an officer of the court in the fraud is either an essential element of fraud on the court contributing to the subversion of

<sup>22</sup> **Employment of attorney for sole purpose of improperly influencing judge is fraud on court.** See *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 540-541 (3d Cir. 1948) ("There was no room for ... [Attorney Kaufman] in this case, and no legitimate service that he was competent to perform. ... He had only one asset to offer his employer, and that was, his personal intimacy and influence with Judge Davis").

<sup>23</sup> **Jury tampering is fraud on court.** *Platt v. Threadgill*, 80 F. 192, 193-195 (4th Cir. 1897) (in case involving quality and value of destroyed cigars, one party inadvertently extended invitation for free cigars to three members of jury).

<sup>24</sup> **Fraud on court is broader than bribery and corruption cases.** See, e.g., *Southerland v. County of Oakland*, 77 F.R.D. 727, 732 (E.D. Mich. 1978), *aff'd sub nom. Southerland v. Irons*, 628 F.2d 978 (6th Cir. 1980) (attorney for plaintiff misrepresented who would pay for costs and fees in order to get court to approve settlement).

<sup>25</sup> ***Hazel-Atlas* is leading case on fraud on court.** See *Toscano v. C.I.R.*, 441 F.2d 930, 934 (9th Cir. 1971) ("As Mr. Moore recognizes, the leading case dealing with fraud on the court is *Hazel-Atlas*").

<sup>26</sup> **Well-planned scheme to deceive both Patent Office and court is fraud on court.** *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-246, 64 S. Ct. 997, 88 L. Ed. 1250 (1944).

<sup>27</sup> **Lawyer's participation in fraud was salient factor in *Hazel-Atlas* decision.** See generally *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 240-244, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) (evidence also shows that union official was subsequently bribed to lie about his lack of true authorship of fraudulent article).



the adjudication process or one element, if not an essential one, that can support a finding of fraud on the court.

The Sixth Circuit has quoted, with approval, a definition of fraud on the court that consists of five elements: (1) conduct on the part of an officer of the court; (2) that is directed to the "judicial machinery" itself; (3) that is intentionally false, wilfully blind to the truth, or is in reckless disregard of truth or falsity; (4) that is a positive averment or is a concealment when one is under a duty to disclose; and (5) that deceives the court. Thus, misconduct of an officer of the court is an essential element of fraud on the court; but there is fraud on the court only if this misconduct precludes proper adjudication by the court.<sup>28</sup>

The Seventh Circuit has held that perjury committed by a party or witness, even one who is an attorney, does not constitute a fraud on the court unless counsel for a party is complicit in the perjury.<sup>28.1</sup>

The Ninth Circuit apparently treats misconduct by an officer of the court as one factor that can support a finding of fraud on the court, part of an alternative to the definition involving subversion of the adjudication process, as discussed in [a], above. The Ninth Circuit has quoted Moore's for the proposition that fraud on the court is a "species of fraud which does or attempts to, defile the court itself or is a fraud perpetrated by officers of the court" (emphasis added).<sup>29</sup> In the case that prompted the definition just quoted, the Ninth Circuit was dealing with a bankruptcy sale that was confirmed on the basis of a perjured affidavit by the debtor-in-possession. The Ninth Circuit refused to follow the normal rule that presentation of perjured testimony is simply fraud between the parties and not fraud on the court (see [c], below). The court ruled in this case that because the debtor-in-possession was an officer of the court, his perjury was different from that of an ordinary party or witness and amounted to fraud on the court.<sup>30</sup> The Second and Sixth Circuits have broadly stated that because attorneys are officers of the court, dishonest conduct by an attorney constitutes fraud on the court.<sup>31</sup>

The Fourth Circuit, though, has emphasized the conduct of one acting as a lawyer in the case: "Although perjury by a witness will not suffice, the 'involvement of an attorney, as an officer of the court, in a scheme to suborn perjury should certainly be considered fraud on the court.'" <sup>32 33</sup> And even the Ninth Circuit has

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<sup>28</sup> **Sixth Circuit defines fraud on court so that conduct by officer of court is essential element.** *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993) (government attorneys failed to disclose exculpatory information in extradition proceedings).

<sup>28.1</sup> **Perjury by witness or party is not fraud on court unless counsel for party is complicit.** *In re Golf 255, Inc.*, 652 F.3d 806, 810 (7th Cir. 2011) ("a witness's lies are not fraud on the court unless a lawyer in the case is complicit in them." [citing Moore's]).

<sup>29</sup> **Ninth Circuit rules that misconduct by officer of court is alternative definition of fraud on court.** *In re Intermagnetics America, Inc.*, 926 F.2d 912, 916-917 (9th Cir. 1991).

<sup>30</sup> **Ninth Circuit rules that perjury by officer of court is fraud on court.** *In re Intermagnetics America, Inc.*, 926 F.2d 912, 916-917 (9th Cir. 1991) ("The district court ... erred in concluding that it was unnecessary to determine whether Anand was an officer of the court at the time he made an admittedly false declaration before the bankruptcy court").

<sup>31</sup> **Second and Sixth Circuits.**

2d Circuit *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972) ("While an attorney 'should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.'" [quoting Moore's (1971 ed.)]).

6th Circuit *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976) ("Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court," citing *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972)).

<sup>32</sup> **Fourth Circuit.** *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 986 (4th Cir. 1987) (quoting *Great Coastal Express, Inc. v. International Bhd. of Teamsters*, 675 F.2d 1349, 1357 (4th Cir. 1982)).

concluded that not every form of misconduct by an attorney is automatically fraud on the court. For example, a cross-complainant who lost on a meritless cross-complaint for indemnity was not entitled to have that judgment set aside merely because the person representing the cross-defendants was unlicensed as an attorney and failed to disclose that fact to the court. This sort of fraud did not, the Ninth Circuit concluded, affect the administration of justice in this case in any significant way.<sup>34</sup>

**[c] Fraud Between Parties, Even If It Involves Perjury, Is Not Fraud on Court**

Fraud on the court may not be established simply by showing some misconduct by one of the parties to the suit. Fraud on the court must be construed narrowly, not only to protect the finality of judgments generally, but specifically to protect the integrity of Rule 60(b)(3), which permits a motion for relief from judgments because of the fraud of a party (see § 60.43),<sup>35</sup> but only if the motion is brought within a reasonable time that is no more than one year after the entry of judgment (see § 60.65[2]).<sup>35.1</sup> If fraud on the court were to be given a broad interpretation that encompassed fraudulent misconduct between the parties, a judgment would always remain subject to challenge, and the one-year time limitation applicable to motions based on Rule 60(b)(3) would be meaningless.<sup>36</sup>

In practice, this means that even fairly despicable conduct will not qualify as fraud on the court. For example, in one case, a community activist was falsely arrested for bank robbery. When he subsequently sued for false arrest, the discovery materials he received and the testimony obtained from police officers indicated that eyewitnesses to the bank robbery had positively identified the plaintiff from his photograph. If this evidence were true, the arrest would have been reasonable, and not politically or personally motivated. Relying on the truth of this evidence, the plaintiff agreed to a dismissal of the false arrest suit, with prejudice, in exchange for a defense waiver of any claims to costs or attorney's fees. In fact, as the plaintiff later discovered, the defendants had breached their discovery obligations and the testimony of the police officers was perjured. The witnesses to the bank robbery were very uncertain as to whether the plaintiff's photograph resembled the bank robber, the photo that the witnesses were shown was "fuzzy," and at a line-up several witnesses positively stated that the plaintiff was *not* the bank robber. Nonetheless, the court refused to set the stipulated dismissal aside for fraud on the court. Neither after-discovered evidence of perjury nor a failure to disclose amounts to fraud on the court. The plaintiff had a full opportunity to challenge and explore the veracity of the defendants' evidence at trial. The plaintiff could have deposed the eyewitnesses before agreeing to dismiss his suit, and the fact that he failed to do so should not be grounds for setting aside a final judgment, despite the misconduct of the defendants.<sup>37</sup>

The very purpose of a trial is to test the credibility and veracity of the evidence. If there is a trial, a party has had a full opportunity to challenge the veracity of evidence. Subsequently discovered facts that show a failure to uncover false evidence will not justify a new trial on the basis of fraud on the court:

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<sup>33</sup> [Reserved]

<sup>34</sup> **Practicing law without license is not necessarily fraud on court.** *Alexander v. Robertson*, 882 F.2d 421, 425 (9th Cir. 1989) ("Nor is it preordained that the unlicensed practice of law, without more, inhibits a court from adjudging cases impartially").

<sup>35</sup> *Fed. R. Civ. P.* 60(b)(3).

<sup>35.1</sup> *Fed. R. Civ. P.* 60(c)(1).

<sup>36</sup> **Fraud on court must be interpreted narrowly to protect integrity of judgments and Rule 60's time limits.** See, e.g., *Broyhill Furniture v. Craftmaster Furniture*, 12 F.3d 1080, 1085 (Fed. Cir. 1993) (citing *Moore's* and numerous cases for proposition that fraud on court must have narrow interpretation).

<sup>37</sup> **Perjured testimony and failure to disclose are not fraud on court.** *Gleason v. Jandrucko*, 860 F.2d 556, 559–560 (2d Cir. 1988) ("neither perjury nor nondisclosure, by itself, amounts to anything more than fraud involving a single litigant").

- **Perjury by a party or witness is not fraud on court.** Perjury by a party or witness, unless suborned by counsel for a party, is not fraud on the court.<sup>37.1</sup> For example, one court refused to set aside a 1954 declaratory judgment that determined that two individuals were not the natural children of a decedent. The refusal came despite substantial evidence that the original 1954 judgment was procured by means of perjured testimony and falsified hospital records. The ruling refusing relief stated:<sup>38</sup>

The possibility of a witness testifying falsely is always a risk in our judicial process, but there are safeguards within the system to guard against such risks. The most basic of these is cross-examination. ... Defendants should not now, in the guise of "fraud upon the court," be allowed to question the credibility of a witness they declined even to cross-examine at the 1954 trial.

Perjury is a fraud on the court only when it involves, or is suborned by, an officer of the court (see [b], *above*).<sup>39</sup>

- **False answers to discovery requests are not fraud on court.** A plaintiff who suffered permanent damage from carbon monoxide poisoning from a faulty car heater was not allowed to set aside a stipulated judgment even though the plaintiff had strong evidence that GM had answered interrogatories falsely. In this case, GM claimed that it had had only one other complaint about the heaters in this car, and that it had no test data on the presence of engine fumes in the passenger compartment. According to the plaintiffs, GM not only had test data showing the problem, but had received over 5,000 complaints about it. Nonetheless, the court stated:<sup>40</sup>

If perjured testimony does not rise to the level of fraud upon the court, it cannot be said that false answers to interrogatories should be given such status.

The policy grounds for Rule 60(b) are clear, there must be an end to litigation. This is particularly so in a case where the parties elected to settle, as opposed to running the risks and expense of trial.

- **A failure to disclose is treated the same as affirmative perjury by an ordinary witness, and is not fraud on court.** There is no distinction between affirmative perjury and a failure to disclose. If an affirmative, perjurious misstatement is not a fraud on the court, neither is a simple failure to disclose.<sup>41</sup> As one court noted:<sup>42</sup>

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<sup>37.1</sup> **Perjury by witness or party is not fraud on court unless counsel for party is complicit.** *In re Golf 255, Inc.*, 652 F.3d 806, 810 (7th Cir. 2011) ("a witness's lies are not fraud on the court unless a lawyer in the case is complicit in them.").

<sup>38</sup> **Perjured testimony should be prevented by cross-examination, not by setting aside judgments years later.** *Lockwood v. Bowles*, 46 F.R.D. 625, 632-634 (D.D.C. 1969) ("The allegation involving perjury presents a more difficult question. But we believe the better view is that where the court or its officers are not involved, there is no fraud on the court within the meaning of Rule 60(b)").

<sup>39</sup> **Only participation by court or officer of court will make perjury fraud on court.** See *Porcelli v. Joseph Schlitz Brewing Co.* 78 F.R.D. 499, 501 (E.D. Wisc. 1978) (citing *Moore's* for distinction between perjury involving officers of court, such as attorneys, and ordinary perjury of witness or party).

<sup>40</sup> **False answers to discovery requests are treated like perjury of ordinary witness, and are not fraud on court.** *Petry v. General Motors Corp.*, 62 F.R.D. 357, 359-361 (E.D. Penn. 1974) ("While the results seem harsh and our sympathies are with the plaintiff, we cannot circumvent the rules").

<sup>41</sup> **Failure to disclose, without more, is not fraud on court.** See *Kerwit Medical Products v. N & H Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980) ("the mere nondisclosure to an adverse party and to the court of facts pertinent to the controversy does not add up to 'fraud upon the court' for purposes of vacating a judgment").

The only implication is that plaintiff knowingly withheld information which was material to the defense, and that plaintiff perjured himself at trial on the issue of damages. Neither instance of conduct defiles the machinery of the court; both instances, when weighed against the policy providing for finality of judgments, serve to demonstrate conduct less egregious than ruled objectionable by other courts. Moreover, neither instance demonstrates a deliberately planned and carefully executed scheme to defraud the court, thus preventing defendants from fully presenting their case.

Perjury or nondisclosure may be treated as a fraud on the court that warrants relief from judgment if the perjury or nondisclosure was not and could not have been an issue prior to the court's entry of judgment.<sup>42.1</sup> Ordinarily, perjury or nondisclosure does not constitute a fraud on the court because the adverse party has an opportunity to challenge the alleged perjured testimony or nondisclosure. However, if neither the adverse party nor the court has any reason to question the veracity of the witness or party offering false testimony, and if the court relies on that testimony in entering judgment, then the fraud constitutes a fraud on the court. For example, in one case a bankruptcy court had entered an order imposing attorney's fees on a corporation that had fraudulently denied having sold any of its assets, when in fact it had secretly transferred all of its assets to shell entities months earlier. The Ninth Circuit held that this fraud constituted a fraud on the court, because it was not and could not have been challenged at the hearing before the bankruptcy court, since neither the adverse parties nor the court knew of the existence of the shell entities. Thus, the parties and the court had no reason to question the corporation's veracity concerning whether it still possessed its assets.<sup>42.2</sup>

#### **[d] Plan or Scheme Is Not Essential Element of Fraud on Court**

At one point in time, the Ninth Circuit stated that an essential element of fraud on the court was "an unconscionable plan or scheme which is designed to improperly influence the court in its decision."<sup>43</sup> The Fifth Circuit followed this rule.<sup>44</sup>

However, even the Ninth Circuit appears to have abandoned the conspiracy or scheme element as essential to establishing fraud on the court. In a later case dealing with a clearly fraudulent scheme to defraud both the IRS and the Tax Court, the Ninth Circuit found fraud on the court but made no mention of this conspiracy or scheme element. The Ninth Circuit instead stated that virtually all definitions of fraud on the court were unhelpful and unpersuasive. In this case, a taxpayer fraudulently filed a joint tax return, falsely claiming that he was married, and then carried this fraud into the Tax Court when the taxpayer sought a redetermination of his tax liability. He lost the redetermination case, and the fraud was discovered when the woman whom the taxpayer falsely claimed was his wife filed an independent action to set the tax redetermination judgment aside. The Ninth Circuit concluded that this conduct was more than just a fraud

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<sup>42</sup> Failure to disclose treated as any other form of perjury, and is not fraud on court. See, e.g., *Williams v. Board of Regents*, 90 F.R.D. 140, 143 (M.D. Geo. 1981) (court notes that defendants could have discovered omission by taking other depositions or submitting interrogatories).

<sup>42.1</sup> Perjury or nondisclosure may be fraud on court if it could not have been issue prior to entry of judgment. *In re Levander*, 180 F.3d 1114, 1118–1120 (9th Cir. 1999) (citing Moore's).

<sup>42.2</sup> Neither adverse parties nor court had reason to challenge veracity. *In re Levander*, 180 F.3d 1114, 1118–1120 (9th Cir. 1999) (citing Moore's).

<sup>43</sup> Ninth Circuit dicta states that improper scheme or plan is essential element of fraud on court. See *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960) (statement is dictum because court concluded that there was no fraud on court when all that was shown was failure of one party to disclose relevant facts).

<sup>44</sup> Fraud perpetrated by officers of court requires evidence of unconscionable scheme. *Rozier v. Ford Motor Co.* 573 F.2d 1332, 1339 (5th Cir. 1978) (relying on *England v. Doyle* 281 F.2d 304, 309 (9th Cir. 1960)); see generally *Browning v. Navarro*, 826 F.2d 335, 344–345 n.12 (5th Cir. 1987) (noting that one district court had found element of plan or scheme to be "a factor of significance" in original *Hazel-Glass* decision).



on the woman who had been unfairly subjected to a judgment to pay part of the fraudulent taxpayer's taxes. The Ninth Circuit concluded that the taxpayer had committed fraud on the court as well. Not only did the Ninth Circuit fail to mention what it had previously required as an essential element, a plan or scheme, the Ninth Circuit also stated:<sup>45</sup>

The distinction between "fraud" on the one hand and "fraud on the court" on the other is by no means clear, and most attempts to state it seem to us to be merely compilations of words that do not clarify. Mr Moore has made a valiant attempt at definition in the portion of his treatise that deals with Rule 60(b). ... The most that we can get out of Moore's definition is that the phrase "fraud on the court" should be read narrowly, in the interest of preserving the finality of judgments, which is an important legal and social interest.

#### **[e] Fraud on Court Need Not Be Committed by or Benefit Party**

Fraud on the court is not limited to situations in which a party commits fraud.<sup>46</sup> As noted above (see [b], [c], above), perjury of a party is ordinarily not a fraud on the court, while perjury by an officer of the court, such as an attorney, may well be. Therefore, there is no requirement that the fraud must be committed by a party to amount to fraud on the court.

Nor does any party have to benefit from a fraud to have that fraud qualify as fraud on the court. Indeed, one court set aside a judgment for fraud on the court when an attorney, as officer of the court, acted *against* the interest of his own client. In this case, the attorney secured a settlement by falsely promising the court that his client would get a fixed dollar amount from the settlement proceeds, even though this meant that the attorney would have to bear some costs and fees out of his own pocket. The attorney subsequently charged his client for those costs, for expert witness fees, and for the costs of a Medicare lien. The attorney's false representations, representations that did not benefit any party other than the lawyer himself, were fraud on the court and justified relief.<sup>47</sup>

The party seeking relief from a judgment on the grounds of fraud on the court does not even have to have been a formal party to the proceeding resulting in the judgment. In one case, a taxpayer worked a fraud on the IRS by filing a joint return and falsely claiming to be married. He extended the fraud to the tax court by asking for a redetermination of his taxes. After he lost the redetermination suit, the woman falsely named as the taxpayer's wife filed a suit for relief from the tax judgment rendered against her in the tax court. The taxpayer had sued in the name of himself and his fictitious wife, but the fictitious wife had no real notice of the suit and was not really present. The Ninth Circuit granted her relief from the judgment anyway.<sup>48</sup>

#### **[f] Adversary Proceedings Required in Challenge to Judgment for Fraud on Court**

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<sup>45</sup> **No fixed definition is conclusive of what is and is not fraud on court.** *Toscano v. C.I.R.*, 441 F.2d 930, 933-934 (9th Cir. 1971) ("What is meant by 'defile the court itself?' What is meant by 'fraud perpetrated by officers of the court?' Does this include attorneys? Does it include the case in which an attorney is deceived by his client and is thus led to deceive the court?").

<sup>46</sup> **Fraud on court not limited to fraud committed by adverse party.** See *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989) (citing *Moore's* for proposition that fraud on court "is clearly not limited to fraud committed by an 'adverse party'").

<sup>47</sup> **Fraud by attorney that does not benefit client may be fraud on court.** *Southerland v. County of Oakland*, 77 F.R.D. 727, 732-733 (E.D. Mich. 1978), *aff'd sub nom. Southerland v. Irons*, 628 F.2d 978, 980 (6th Cir. 1980) ("The fraud in the case at bar is far more aggravated than that perpetrated in *Hazel-Atlas*. In *Hazel-Atlas* the fraud was undertaken for the benefit of the client, while here Mr. Wolk's fraud was for his sole benefit and undertaken at the expense of his client").

<sup>48</sup> **Person who was not party to case resulting in judgment had standing to set aside judgment for fraud on court.** See *Toscano v. C.I.R.*, 441 F.2d 930, 934 (9th Cir. 1971) ("Here, Miss Zelasko claims she was never really before the court"); see also *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989) (citing *Moore's* for proposition that fraud on court does not "necessarily require that the [moving] party was prejudiced by the misconduct").

There are no formal requirements for asserting a claim of fraud on the court. However, the United States Supreme Court has made it clear that a judgment may not be set aside on these grounds without affording all parties who might be affected by its action the right to appear and be heard. The Court has stated:<sup>49</sup>

The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question. ... [A] federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed. ... [O]bviously, a court cannot deprive a successful party of his judgment without a proper hearing.

At the very least, this means not only notice and an opportunity to be heard, but also that fact-finding be based on testimony that is subject to examination and cross-examination.<sup>50</sup>

Beyond this, the Supreme Court has recognized that courts have the power to devise whatever procedures are appropriate. The court whose judgment is questioned may proceed on the motion of a person affected by the judgment or on its own motion. Attorney's fees may be awarded to the successful party. In addition, the court "may avail itself ... of amici to represent the public interest in the administration of justice."<sup>51</sup>

### **[g] No Time Limit or Laches Applies to Relief Based on Fraud on Court**

Because fraud on the court concerns the integrity of the judicial process itself, a judgment may be set aside for fraud on the court at any time. There is no time limit on any party or court.<sup>52</sup> After all, in the leading

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<sup>49</sup> **Normal adversary proceedings must be followed before court may set aside judgment for fraud on court.** Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946).

<sup>50</sup> **Proper adversary proceedings include examination and cross-examination of witnesses.** See Hazel-Atlas Glass Co. v. Hartford-Empire Co. 322 U.S. 238, 250 n.5, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) ("We do not hold, and would not hold, that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on ex parte affidavits without examination and cross-examination of witnesses").

<sup>51</sup> **Variety of procedures may be used in adversary hearing.** See Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580-581, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946) (Court should not, however, award fees to those "amici curiae" who, in fact, represent private clients who are reluctant to submit themselves to court's jurisdiction by intervening and risking adverse determinations).

<sup>52</sup> **No time limit for setting aside judgments based on fraud on court.**

2d Circuit See Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir. 1972) ("no time limit is specified" for fraud on court claims).

3d Circuit See Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514, 522 (3d Cir. 1948) ("when a controversy has been terminated by a judgment, its freedom from fraud may always be the subject of further judicial inquiry; and the general rule that courts do not set aside their judgments after the term at which they were rendered has no application").

9th Circuit See, e.g., Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 640 n.10 (N.D. Cal. 1978), *aff'd per curiam*, 645 F.2d 699, 700 (9th Cir. 1981) ("There is no statute of limitations for fraud on the court").

10th Circuit See, e.g., Bulloch v. United States, 721 F.2d 713, 719 (10th Cir. 1983) ("Rule 60(b) does not impose a time limit on motions asserting fraud on the court"); Wilkin v. Sunbeam Corp., 405 F.2d 165, 166 (10th Cir. 1968) (although motion under Fed. R. Civ. P. 60(b)(2) was untimely, appellate court remanded matter for reconsideration on theory of fraud on court, for which there is no time limit).

D.C. Circuit See, e.g., Lockwood v. Bowles, 46 F.R.D. 625, 634 (D.D.C. 1969) ("the law favors discovery and correction of corruption of the judicial process even more that it requires an end to lawsuits").

*Hazel-Atlas* case, the United States Supreme Court acted in 1944 to tell the Third Circuit that it should set aside its 1932 judgment because it was procured by fraud on the court.<sup>53</sup>

Many cases also imply that laches is not a defense to an action to set aside a judgment procured by fraud on the court.<sup>54</sup> Technically, this is undoubtedly correct. A judgment procured by fraud on the court should not be allowed to stand solely because someone was not diligent in bringing the fraud to the court's notice. On the other hand, in practice, courts will likely consider the delays involved in determining whether the fraud in question is of the magnitude to constitute fraud on the court. The greater the delay, the more deference the court is likely to give to the concept of finality of judgments. As one court noted:<sup>55</sup>

As to actions for relief from fraud on the court it is generally held that the doctrine of laches as such does not apply, but unexplained delays bear on the basic concept of the finality of judgments and the proof.

### **[h] Fraud on Court Must Be Proven by Clear and Convincing Evidence**

When relief from a judgment is sought for fraud on the court, the fraud must be established by clear and convincing evidence.<sup>56</sup> This is the same standard of proof applicable to a motion under Rule 60(b)(3) for relief based on fraud of a party (see § 60.43[4]).

### **[i] Person Seeking Relief Need Not Have "Clean Hands"**

Because fraud on the court is concerned with the integrity of the adjudication process itself, it should be irrelevant whether the party seeking relief has "clean hands" or not. As noted by the Second Circuit:<sup>57</sup>

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<sup>53</sup> **Example of United States Supreme Court setting aside 12-year-old judgment for fraud on court.** See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 251, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) ("judgment is reversed with directions to set aside the 1932 judgment").

<sup>54</sup> **Laches is not defense to action to set aside based on fraud on court.** See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) ("The Circuit Court ... thought that Hazel had not exercised proper diligence in uncovering the fraud and that this should stand in the way of relief. ... But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone").

3d Circuit See *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 525 (3d Cir. 1948) ("It is of no moment that Whitman's application may not have been promptly presented after it was informed as to the facts").

9th Circuit See *Toscano v. C.I.R.*, 441 F.2d 930, 936-937 (9th Cir. 1971) ("The Commissioner also argues that ... there was 'gross neglect' in not filing the motion sooner. ... As to ... [this] argument, what the Supreme Court said in *Hazel-Atlas* ... is pertinent").

<sup>55</sup> **While laches is not defense, unexplained delays may help convince court that there is no fraud amounting to fraud on court.** See *Bullock v. United States*, 721 F.2d 713, 719 (10th Cir. 1983) (Plaintiffs waited 25 years before bringing action to set aside judgment).

<sup>56</sup> **Fraud on court must be proved by clear and convincing evidence.** *Booker v. Dugger* 825 F.2d 281, 283-284 & n.4 (11th Cir. 1987) (inmate's claim that his first habeas corpus lawyer presented perjured testimony in responding to claims of ineffective assistance of counsel were not sufficiently proved).

9th Circuit *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960) ("the burden is on the moving party to establish fraud by clear and convincing evidence").

11th Circuit *Booker v. Dugger* 825 F.2d 281, 283-284 & n.4 (11th Cir. 1987) (inmate's claim that his first habeas corpus lawyer presented perjured testimony in responding to claims of ineffective assistance of counsel were not sufficiently proved).

Were the characterization [of the parties' conduct as "fraud on the court"] accurate, the defrauded district court would have been empowered to take action *sua sponte* to expunge the judgment, and we would suppose that anyone, whether his hands were clean or dirty, could suggest that it do so.

However, this does not mean that clean hands are irrelevant once fraud on the court is established. For example, if a litigant procured a judgment through fraud on the court, the court may not only set that judgment aside, it may dismiss the litigant's claim, with prejudice, regardless of the merits of the claim, because the litigant has engaged in fraud.<sup>58</sup>

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<sup>57</sup> "Clean hands" are irrelevant in resolving claim of fraud on court. See Martina Theatre Corp. v. Schine Chain Theatres, Inc., 278 F.2d 798, 801 (2d Cir. 1960) (quoted statement is dicta because complaint was properly dismissed in that, "clean hands apart, it set forth no sufficient claim for the ... relief sought").

<sup>58</sup> Once fraud on court is established, fraud may be punished in addition to setting judgment aside. See, e.g., Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1119–1120 (1st Cir. 1989) ("a federal district judge can order dismissal or default where a litigant has stooped to the level of fraud on the court").

1st Circuit Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1119–1120 (1st Cir. 1989) ("a federal district judge can order dismissal or default where a litigant has stooped to the level of fraud on the court").

9th Circuit Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585, 589 (9th Cir. 1983) ("courts have inherent power to dismiss an action when a party has wilfully deceived the court").



EXHIBIT 11

## **12 Moore's Federal Practice - Civil § 60.81**

**Moore's Federal Practice - Civil > Volume 12: Analysis: Civil Rules 57–63 > Volume 12 Analysis: Civil Rules 57–63 > Chapter 60 Relief From a Judgment or Order > F. INDEPENDENT ACTIONS IN EQUITY**

### **Author**

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by Joseph T. McLaughlin\*

updates by Thomas D. Rowe, Jr.\*

## **§ 60.81 Grounds for Maintaining an Independent Action in Equity**

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### **[1] Fraud Is Most Common Ground of Independent Action**

#### **[a] Rule 60(b) Relief Is Also Available for Fraud**

Fraud of an opposing party is a ground for relief by way of a motion under Rule 60(b)(3).<sup>1</sup> The motion may be based on any kind of fraud, so long as it chargeable to an opposing party and has an adverse effect on the moving party (see § 60.43). However, the Rule 60(b) motion is generally limited to the court in which the judgment was rendered (see § 60.60), and the motion must be made within one year from the date that the judgment was entered (see § 60.65/27). Independent actions are usually reserved for situations that do not meet the requirements for a motion under the Rule—because the fraud is not chargeable to an opposing party, because the movant seeks relief from a court other than the rendering court, or, most often, because the one-year time limit on fraud-based Rule 60(b) motions has expired.

#### **[b] Independent Action Does Not Relieve as Many Types of Fraud**

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<sup>1</sup> *Fed. R. Civ. P. 60(b)(3)*.

**[i] Relief Is Always Possible for "Extrinsic" Fraud**

Courts hearing independent actions in equity for relief from a judgment because of fraud usually rely on the distinction between "intrinsic" and "extrinsic" fraud.<sup>2</sup> Although the Rule 60(b)(3) motion provides relief for *both* intrinsic and extrinsic fraud (see § 60.43[1][b]),<sup>3</sup> relief will be granted in an independent action only for fraud that is extrinsic, "that is, fraud that actually prevented an issue from being joined or a party from making a valid claim or defense."<sup>4</sup> An example of extrinsic fraud, a fraud that does not involve the issues litigated or the evidence introduced at trial, is when an attorney conspires with an opponent to the detriment of the client. This fraud, although totally outside the issues and evidence litigated, clearly prevents a party from fully and fairly presenting his or her case. Extrinsic fraud was found, for example, when a creditor of a bankrupt recommended that his own attorney represent a competing creditor-employee, and the attorney then failed to advise the client of his rights under the securities laws or the Bankruptcy Act, the creditor's advantages under the arrangement, or the conflict of interest between the creditor and the creditor-employee.<sup>5</sup>

**[ii] Most Courts Refuse to Permit Equitable Relief for "Intrinsic" Fraud**

Even though the distinction between intrinsic and extrinsic fraud was explicitly eliminated in Rule 60(b) motions based on fraud (see § 60.43[1][a]),<sup>6</sup> most courts continue to observe that distinction in independent actions in equity seeking relief from a judgment that was procured by fraud.<sup>7</sup> What the bar

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<sup>2</sup> **Distinction between "intrinsic" and "extrinsic" fraud.** See *Browning v. Navarro*, 826 F.2d 335, 344 & n.11 (5th Cir. 1987) ("intrinsic fraud, that is, fraudulent evidence upon which a judgment is based, is not grounds to set aside a judgment. ... [E]xtrinsic fraud, that is, fraud that was not the subject of the litigation, that infects the actual judicial process, is grounds to set aside a judgment as procured by fraud").

<sup>3</sup> See *Fed. R. Civ. P. 60(b)(3)*.

<sup>4</sup> **Independent action only provides relief for extrinsic fraud.** See, e.g., *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1358 (4th Cir. 1982) (court acknowledges that distinction has been much criticized).

<sup>5</sup> **Attorney conspiring with opponent to defeat client is extrinsic fraud.** *Bizzell v. Hemingway*, 548 F.2d 505, 507 (4th Cir. 1977) ("Equitable relief has long been granted where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side.").

<sup>6</sup> See *Fed. R. Civ. P. 60(b)(3)*.

<sup>7</sup> **Majority view is that more than mere intrinsic fraud is required for independent action.**

1st Circuit *Geo. P. Reintjes Co. v. Riley Stoker Corp.*, 71 F.3d 44, 49 (1st Cir. 1995) ("perjury alone has never been sufficient" to support an independent action for relief from judgment).

2d Circuit See *M.W. Zack Metal Co. v. International Navigation Corporation of Monrovia*, 675 F.2d 525, 530 (2d Cir. 1982) ("Having found that ... Zack had an opportunity to raise these claims in prior proceedings, we need not determine whether the claim is also invalid because each allegation of fraud is intrinsic to these other proceedings").

4th Circuit *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1357-1358 (4th Cir. 1982) ("Notwithstanding the considerable criticism leveled at the intrinsic/extrinsic distinction, ... it is clear that perjury and false testimony are not grounds for relief in an independent action in the Fourth Circuit").

9th Circuit *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) ("Although there is no time limit for these [independent] actions, they may be maintained only for extrinsic fraud. ... Wood's allegation of perjury does not raise an issue of extrinsic fraud").

of relief for intrinsic fraud means, in most cases, is that perjury at trial or in discovery proceedings or presentation of false documents in evidence may not, in most courts, be the basis of an independent action in equity. The notion of "intrinsic" fraud involves the idea that the truth of testimony and evidence was the very purpose of the litigation process. A judgment should not be reopened merely because one party did not adequately investigate and prepare for trial, or adequately cross-examine or impeach witnesses and evidence at trial.<sup>8</sup>

Therefore, there is a reason for precluding relief based only on "intrinsic" fraud. However, it would, undoubtedly, be better if the confusing and unclear "intrinsic" and "extrinsic" terminology could be disposed of in favor of a test that simply measured whether, in equity, the party seeking relief had a full and fair opportunity to litigate the claims now asserted in the earlier proceeding. As a practical matter, many courts rely on this test anyway in measuring for "intrinsic" fraud (see [iv], *below*).

### **[iii] Minority Position Permits Relief for Intrinsic Fraud**

The Third Circuit expressly rejects the distinction between intrinsic and extrinsic fraud, and did so even before Rule 60(b) was amended to permit motions for relief based on fraud.<sup>9</sup> Therefore, in the Third Circuit, when courts look to pre-Rule law to determine the availability of relief from a judgment in an independent action in equity based on a claim of fraud, either extrinsic or intrinsic fraud will suffice.<sup>10</sup>

Under the Third Circuit's position, the one-year limitation on Rule 60(b)(3) motions (see § 60.65(2)) is effectively rendered meaningless. There is no difference in the standard that a party must meet to secure relief either before or after a year has passed since the entry of the judgment from which relief is sought.<sup>10.1</sup> According to the Third Circuit, the one-year time limit is a mere historical artifact. Before the Rule was amended in 1946 to permit fraud as the basis for a motion, federal district courts sat for specific, calendar-limited "terms," and had been free to grant relief from a judgment during the current "term" of the court. After the "term" ended, an independent action in equity was required. According to

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11th Circuit *Travelers Indemnity Co. v. Gore*, 761 F.2d 1549, 1550 (11th Cir. 1985) ("Perjury is an intrinsic fraud which will not support relief from judgment through an independent action").

<sup>8</sup> **Perjury at trial is classic, pre-Rule example of type of "intrinsic" fraud that would not justify relief from judgment.** See *United States v. Throckmorton*, 98 U.S. 61, 66, 25 L. Ed. 93 (1878) ("relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court. ... On the other hand, the doctrine is equally well-settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed").

<sup>9</sup> **Third Circuit rejects intrinsic-extrinsic fraud distinction.** *Publicker v. Shellcross*, 106 F.2d 949, 950 (3d Cir. 1939) ("We believe truth is more important than the trouble it takes to get to it").

<sup>10</sup> **Fraud standard is identical in Rule 60(b) motions and in independent actions in Third Circuit.** See, e.g., *Bandai America Inc. v. Bally Midway Manufacturing Co.*, 775 F.2d 70, 73 (3d Cir. 1985) (proof of fraud in this case was insufficient, "[w]hether we approach Bandai's claim as an action to set aside a release procured by fraud, or as a separate action for relief from a judgment, or as a Fed.R.Civ.P. 60(b)(3) motion, ... [because] in this circuit no significance is attached to the distinction ... between intrinsic and extrinsic fraud").

<sup>10.1</sup> **Same standard applies.** *Baxter v. Bressman (In re Bressman)*, 874 F.3d 142, 149 & n.23 (3d Cir. 2017) (elements of fraud are same whether relief is sought by motion under Fed. R. Civ. P. 60(b)(3) or in independent action, but latter is not subject to one-year time limit imposed by Fed. R. Civ. P. 60(c)(1)).



the Third Circuit, once the concept of terms was eliminated, the one-year time limit was simply substituted to designate which procedure was appropriate at which time.<sup>11</sup>

There is more than some historical justice in this argument, but it does ignore the fundamental principal that the older a judgment grows, the greater finality it should be accorded and the greater the burden on the party seeking to set it aside. Particularly when the claim is that the evidence presented at trial was perjured, the classic example of "intrinsic" fraud (see [ii], above), there is a valid policy purpose served by an inquiry as to why this perjury could not have been uncovered by pretrial investigation, particularly by the exercise of discovery rights and cross-examination at trial. Ignoring the distinction between "intrinsic" and "extrinsic" fraud after a full year has passed from the entry of the judgment does minimize the purpose and importance of the trial process itself.

#### **[iv] Problem of "Intrinsic" Versus "Extrinsic" Fraud Better Solved by Ordinary Res Judicata Principles**

The principle that balances the competing interests of finality of judgments and the need for relief from fraudulently procured judgments more satisfactorily than an abstract distinction between "intrinsic" and "extrinsic" fraud is found in the rule that an independent action for relief from a judgment may not be entertained if "there was an opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action."<sup>12</sup> This principle is a recognition that an independent action is, in many senses, a collateral attack on a judgment and is subject to principle of res judicata—what actually was and could have been litigated in the underlying proceeding may not be relitigated in an independent action to set the underlying judgment.<sup>13</sup>

Curiously, some courts do not recognize that the bar on intrinsic fraud and this application of res judicata principles are related.<sup>14</sup> However, most courts recognize that the ban on intrinsic fraud and the ban on relitigation are intimately related. As explained by the First Circuit:<sup>15</sup>

<sup>11</sup> In Third Circuit, one-year time limit on Rule 60(b)(3) motions has no substantive meaning because relief in independent action is based on identical standard as relief on motion. *Averbach v. Rival Manufacturing Co.*, 809 F.2d 1016, 1021 (3d Cir. 1987) ("Under the old practice, ... the expiration of the term of the court had no effect upon the timeliness of an independent action for relief from judgment. The rule carries forward this same principle").

<sup>12</sup> No relief in independent action when parties had full opportunity to litigate issues in underlying proceeding. See, e.g., *M.W. Zack Metal Co. v. International Navigation Corporation of Monrovia*, 675 F.2d 525, 529–530 (2d Cir. 1982) (quoting *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 n.2 (2d Cir. 1972), court noted that plaintiff could have raised claims that defendant fraudulently concealed certain facts in several earlier proceedings and saw "no reason why the documents that Zack presented below in support of this claim could not have been presented in the prior proceedings").

<sup>13</sup> When party seeking relief had opportunity to litigate same issues in underlying proceeding, res judicata bars relitigation in independent action. See, e.g., *Weldon v. United States*, 70 F.3d 1, 5 (2d Cir. 1995) ("Weldon may not relitigate in *Weldon II* the claims of misrepresentation that she could have litigated, and to a great extent did litigate, in *Weldon I*. Only if Weldon had no opportunity to litigate the allegations of fraud ... could this action go forward").

<sup>14</sup> Some courts do not grasp relation between ban on intrinsic fraud and rule that what has been litigated may not be relitigated. See, e.g., *M.W. Zack Metal Co. v. International Navigation Corporation of Monrovia*, 675 F.2d 525, 530 (2d Cir. 1982) ("Having found that ... Zack had an opportunity to raise these claims in prior proceedings, we need not determine whether the claim is also invalid because each allegation of fraud is intrinsic to these other proceedings").

<sup>15</sup> Most courts agree that what is banned by barring relief from intrinsic fraud is what is barred by forbidding parties to relitigate what should have been litigated in earlier proceeding. *Geo. P. Reintjes Co., Inc. v. Riley Stoker Corp.*, 71 F.3d 44, 49 (1st Cir. 1995) (citing Moore's both for the principle that independent actions may not relitigate issues in prior action and for principle that type of fraud that is basis for independent action must be kept from being identical with Rule 60(b)(3) fraud or time limit of Rule 60(b) motions would become meaningless).

~~[P]erjury alone has never been sufficient [to support an independent action for relief from judgment]. ... The possibility of perjury, even concerted, is a common hazard of the adversary process with which litigants are equipped to deal through discovery and cross-examination, and, where warranted, motion for relief from judgment to the presiding court. ... Were mere perjury sufficient to override the considerable value of finality after the statutory time period for motions on account of fraud has expired, it would upend the Rule's careful balance. ... Discrediting witnesses does not generally justify an "extraordinary" second opportunity.~~

The advantage of focusing the inquiry on what the party seeking relief could have accomplished at the earlier trial serves all the purposes of the "intrinsic" versus "extrinsic" fraud distinction. It protects the sanctity of final judgments from those who did not adequately litigate the issues the first time around. At the same time, the abstract, difficult to understand, and inflexible categories of "intrinsic" versus "extrinsic" are replaced by a flexible, result-oriented test. If, in some rare situation, there is perjury that could not possibly have been discovered or litigated at the first trial, the court hearing the independent action could explore the relevant facts and make the appropriate decision. Research would not have to be undertaken to determine if this fraud were "intrinsic" or "extrinsic," and the entire proceeding would not be resolved on that arcane abstraction.

For a more detailed explanation of res judicata principles generally, see Ch. 131. Claim Preclusion and Res Judicata, and Ch. 132. Issue Preclusion and Collateral Estoppel.

#### **[v] Courts Sometimes Confuse Ordinary Independent Actions With Fraud on Court Claims**

The standards for the proper level of fraud to support an independent action have been unnecessarily confused by courts that have failed to distinguish between an independent action for relief from a judgment that is based on fraud and the concept of "fraud on the court."<sup>16</sup> This is understandable. The leading case establishing the concept of fraud on the court dealt with a situation in which the attorney of a party conspired with witnesses to create phony support for a patent. Even though it was, therefore, dealing with arguably perjured evidence, the sort that could possibly be categorized as "intrinsic," this leading case relied on a different theory that, despite the "intrinsic" nature of the fraud, justified court action to set the underlying patent judgment aside. Although dealing with a separate theory for relief in which the "extrinsic" versus "intrinsic" distinction was meaningless, this leading case attempted to distinguish itself from the cases in which a witness "merely" commits perjury.<sup>17</sup> Given these overlapping concerns and issues, the confusion between the two concepts is almost inevitable. Therefore, even cases that recognize that there is a distinction between the concept of fraud on the court and grounds for an independent action in equity state that the fraud on the court cases "refine" the concept of intrinsic fraud.<sup>18</sup>

<sup>16</sup> Some courts unnecessarily confuse independent actions for relief based on fraud and concept of "fraud on court." See, e.g., *M.W. Zack Metal Co. v. International Navigation Corporation of Monrovia*, 675 F.2d 525, 529-530 (2d Cir. 1982) (court ruled that frauds alleged might be fraud on court, but still denied relief because plaintiff had already had opportunity to litigate alleged fraud in underlying proceeding and because alleged frauds might be "intrinsic").

<sup>17</sup> Leading "fraud on court" case also attempted to distinguish that theory from cases in which witness commits perjury. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-246, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) ("This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possible to have been guilty of perjury").

<sup>18</sup> Many courts erroneously state that cases establishing fraud on court "refine" concept that intrinsic evidence will not support independent action. See, e.g., *Geo. P. Reintjes Co., Inc. v. Riley Stoker Corp.*, 71 F.3d 44, 47-48 (1st Cir. 1995) (although noting that fraud on court "is not the only permissible basis for an independent action," court also stated that "The *Throckmorton* [intrinsic evidence] rule that fraud claimed in the matter tried cannot form the basis for an untimely request for relief from final judgment was refined in *Hazel-Atlas* [leading fraud on court case]").

Although “fraud on the court” will always support relief from a judgment (see § 60.21[4][a]), regardless of whether it is raised by motion under Rule 60(b), in an independent action, or sua sponte, it is a separate concept from the idea of an independent action in equity for relief from a judgment. The independent action is a *remedy* that may be premised on one or more equitable grounds for relief, including fraud, while “fraud on the court” is a *ground* for relief from judgment that may be asserted through a variety of remedial schemes. The text of Rule 60 recognizes that the two concepts are distinct, as they have always been and continue to be addressed in separate provisions of the rule.<sup>19</sup> Moreover, the Committee Note that originally accompanied their inclusion in Rule 60 treats the two concepts in entirely separate paragraphs.<sup>20</sup>

The two concepts address different wrongs. In fraud on the court, the courts attempt (with admittedly limited success) to distinguish between an ordinary claim of fraud between the parties that resulted in a wrongly procured judgment (see § 60.22[4][c]) and a special category of fraud claim that affects the very integrity of the judicial process itself (see § 60.22[4][a]). The “intrinsic” versus “extrinsic” distinction (see [ii], [iii], *above*), or more properly, the rule that a party may not relitigate what that party could have litigated earlier (see [iv], *above*), is needed in the ordinary, inter-parties independent action for relief from fraudulent judgment for the purpose of suitably limiting relief to those instances in which it is merited. If fraud reaches the level of fraud on the court, relief is *always* merited, and no distinction between “intrinsic” or “extrinsic” fraud needs to be made. In the ordinary independent suit, only justice between the parties is at issue, in fraud on the court cases, the integrity of the courts is at issue.<sup>21</sup>

Confusing fraud on the court with the standards for ordinary actions in equity blurs several other important distinctions between the two concepts: (1) since it is the integrity of judicial institutions that is paramount in fraud on the court claims, there is no real time limit on relief for fraud on the court (see § 60.22[4][g]) while a simple independent action in equity is always subject to the doctrine of laches (see § 60.83); (2) because the credibility of institutions is protected by the concept of fraud on the court, relief may be had even if the parties who will benefit from relief have “unclean hands” (see § 60.22[4][ii]), while a total lack of fault, including clean hands, is a prerequisite or an essential element for relief by way of an independent action in equity (see § 60.82[2]).

## [2] Duress Might Be Basis for Relief

<sup>19</sup> Compare Fed. R. Civ. P. 60(d)(1) (preserving remedy of independent action), with, Fed. R. Civ. P. 60(d)(3) (preserving “fraud on the court” as grounds for relief from judgment).

<sup>20</sup> Fed. R. Civ. P. 60, advisory committee note of 1946 (*reproduced verbatim at § 60App.11[2]*).

<sup>21</sup> **Distinction between “intrinsic” and “extrinsic” needed only in inter-parties fraud cases, not in claims of fraud on court.**

2d Circuit See Simons v. United States, 452 F.2d 1110, 1116 n.7 (2d Cir. 1971) (citing **Moore’s**, court noted that complaint alleged only fraud on United States as party to naturalization decree, not different concept of fraud on court rendering that decree).

8th Circuit Greiner v. City of Champlin, 152 F.3d 787, 789 (8th Cir. 1998) (finding of fraud on court is justified only by most egregious misconduct directed at court itself, such as bribery of judges or jury or fabrication of evidence).

9th Circuit See In re Intermagnetics America, Inc., 926 F.2d 912, 916 (9th Cir. 1991) (citing **Moore’s** for proposition that: “The distinction between extrinsic and intrinsic fraud has been criticized by commentators, ... and the distinction generally does not apply to fraud upon the court, but only to fraud by the parties”).



Duress might prevent a party from having a true adversary trial. At least one circuit has suggested that a judgment procured by duress could be set aside in an independent action.<sup>22</sup> However, it is very difficult to find conduct that meets the accepted definition of duress. Insistence on one's legal rights, even if it places another in a desperate situation, is not duress.<sup>23</sup>

### [3] Mistake Is Possible Basis for Relief

The standard formulation of the "elements" of an independent action for relief from a judgment refers to "mistake" as a basis for relief.<sup>24</sup> Relief from judgment due to "mistake" is, of course, also available under Rule 60(b)(1) (see § 60.41), but must be sought within a "reasonable time" that is no more than one year from the entry of the judgment (see § 60.65).<sup>24.1</sup> When relief is sought from a judgment for mistake after the one-year period has elapsed, a party may either utilize an independent action, or try to qualify the nature of the mistake as "clerical" under Rule 60(a) (see § 60.11), which also has no time limit (see § 60.12).<sup>25</sup>

### [4] Newly Discovered Evidence Is Possible Basis for Relief

A handful of cases suggest that newly discovered evidence may serve as a ground for relief in an independent action. Such evidence may also be a ground for relief by motion under Rule 60(b)(2) (see § 60.42), provided that the motion is brought within a "reasonable time" that is no more than one year from the entry of the

<sup>22</sup> **Duress may be basis for relief.** See *Hadden v. Rumsey Products*, 196 F.2d 92, 96 (2d Cir. 1952) (judgment debtor could attack judgment based on cognovit notes for "duress, fraudulent misrepresentation and concealment" in procuring execution of notes); but see *Ira S. Bushey & Sons v. W. E. Hedger Transportation Corp.*, 167 F.2d 9, 18 (2d Cir. 1948) (relief not available for duress when party voluntarily avoided doors of justice).

<sup>23</sup> **Insistence on legal rights is not duress.** See *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 873, 875-876 (5th Cir. 1984) (even though court recognized that Second Circuit had held duress to be grounds for relief from judgment, no relief granted because "the only threat made by Southmark or its agents was to aggressively enforce the personal guarantees on ... loans").

<sup>24</sup> **Mistake mentioned in standard formulation of grounds for relief.** See, e.g., *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 79 (5th Cir. 1970) (quoting *National Surety Company v. State Bank*, 120 F. 593, 599 (8th Cir. 1903), court stated that there were five elements of independent action in equity, including: (1) judgment that ought not, in equity and good conscience, to be enforced; (2) good defense to alleged cause of action on which judgment founded; (3) fraud, accident, or mistake that prevented defendant from obtaining benefit of defense; (4) absence of fault or negligence on part of defendant; and (5) absence of any adequate remedy at law).

1st Circuit Accord *Carteret Savings and Loan Association v. Dr. Neil Jackson*, 812 F.2d 36, 39 n.6 (1st Cir. 1987) (independent action for relief from Florida default judgment based on promissory note for purchase of yacht).

5th Circuit See, e.g., *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 79 (5th Cir. 1970) (quoting *National Surety Company v. State Bank*, 120 F. 593, 599 (8th Cir. 1903), court stated that there were five elements of independent action in equity, including: (1) judgment that ought not, in equity and good conscience, to be enforced; (2) good defense to alleged cause of action on which judgment founded; (3) fraud, accident, or mistake that prevented defendant from obtaining benefit of defense; (4) absence of fault or negligence on part of defendant; and (5) absence of any adequate remedy at law); accord *Addington v. Farmer's Elevator Mutual Insurance Co.*, 650 F.2d 663, 667-668 (5th Cir. 1981) (proposed amendment of complaint construed as attempt to assert independent action on grounds of fraud on court).

<sup>24.1</sup> *Fed. R. Civ. P.* 60(c)(1).

<sup>25</sup> **Once one-year limit for Rule 60(b)(1) motion based on mistake has elapsed, relief from judgment may be had in independent action, or party may attempt to claim that mistake is merely "clerical."** See *Jones v. Anderson-Tully Co.*, 722 F.2d 211, 212 (5th Cir. 1984) (following *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., Inc.*, 213 F.2d 702 (5th Cir. 1954)).



judgment (see § 60.65).<sup>25.1</sup> If that one-year time limitation has expired, newly discovered evidence may be urged as a ground for relief in an independent action, but the party seeking relief must establish all of the other prerequisites to relief for newly discovered evidence under Rule 60(b)(2) (see § 60.42[2]).<sup>26</sup>

Thus, a party's own records that were simply misplaced earlier could not be newly "discovered" (see § 60.42[4]) and an independent action based on the claim that these type of misplaced records were newly discovered may be denied for lack of diligence in failing to discover the evidence at an earlier time (see § 60.42[5]).<sup>27</sup> Evidence of facts that come into existence after the judgment and that did not exist at the time of trial are not newly "discovered" and may not be used to support relief (see § 60.42[3]).<sup>28</sup> The newly discovered evidence must convince the court that it would have produced a different result if it had been available at the time of trial (see § 60.42[9]). For example, the contents of a cockpit recorder and digital flight data recorder of an airliner that was shot down while invading Soviet airspace were examined as after-discovered because they were held in hostile custody until after the trial was completed. Nonetheless, this evidence could not support relief because the contents of the flight recorders supported the factual findings of the judgment.<sup>29</sup>

For further discussion of the standards applicable to Rule 60(b)(2) motions based on newly discovered evidence, see § 60.42.

Some courts have suggested that the party seeking relief in an independent action must not only meet all the Rule 60(b)(2) requirements, but must supply "even more" justification for relief.<sup>30</sup> The idea that an independent action requires a greater showing than would a Rule 60(b) motion finds support in the notion that, in independent actions in equity, the proof must also establish that it would be "manifestly unconscionable" for the judgment to stand (see § 60.82[4]).<sup>31</sup>

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<sup>25.1</sup> *Fed. R. Civ. P. 60(c)(1)*.

<sup>26</sup> **Relief for newly discovered evidence may be available in independent action, but all of prerequisites of Rule 60(b)(2) relief must be shown.** See, e.g., *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 597–598 (5th Cir. 1980) ("we may properly consider defendants' independent action ... on the ground of newly discovered evidence, even though such action was brought more than one year after judgment. ... An independent action ... is not less extraordinary than a Rule 60(b)(2) motion. Thus, parties bringing an independent action ... bear a heavy burden to demonstrate that they have satisfied the requirements ... [for *Fed. R. Civ. P. 60(b)(2)* motions]").

<sup>27</sup> 611 F.2d at 598–599.

<sup>28</sup> **Evidence of facts not in existence at time of trial will not support relief.** *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 873 (5th Cir. 1984) (newly "discovered" evidence in fact involved later condominiumization and sale of real property at huge profit, all of which took place after judgment).

<sup>29</sup> **After discovered evidence must undermine judgment to support relief.** *In re Korean Air Line Disaster of September 1, 1983*, 156 F.R.D. 18, 26 (D.C. Cir. 1994) ("[S]ame substantive standards that govern a motion for relief under Rule 60(b) apply to an independent action in equity. ... [A] party bringing an independent action based on newly discovered evidence bears a 'heavy burden' to demonstrate that these criteria have been met").

<sup>30</sup> **Party seeking relief in independent action must show more than is required under Rule 60(b)(2).** See, e.g., *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 597 (5th Cir. 1980) (citing *Moore's* for proposition that burden is greater in independent action).

<sup>31</sup> **In addition to newly discovered evidence, party seeking relief must show that judgment is "manifestly unconscionable."** *Pickford v. Talbott*, 225 U.S. 651, 658, 32 S. Ct. 687, 56 L. Ed. 1240 (1912) ("In order to warrant the interposition of a court of equity to restrain the enforcement of a judgment at law, it is, of course, not sufficient for the defeated party to show that because of some newly discovered evidence ... he would probably have a better prospect of success on a retrial of the action. He must show something to render it manifestly unconscionable for his successful adversary to enforce the judgment").

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