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Plaintiff *Pro Se*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON,
Plaintiff,
v.

CYNTHIA BASHANT, an individual, JOEL WOHLFEIL, an individual, LARRY GERACI, an individual, REBECCA BERRY, an individual; GINA AUSTIN, an individual; MICHAEL WEINSTEIN, an individual; JESSICA MCELFRESH, an individual, and DAVID DEMIAN, an individual

Defendants.

Case No. 3:18-cv-00325-TWR (DEB)
Formerly: 3:18-cv-003250-BAS (DEB)
Related Cases: 3:20-cv-00656-TWR (DEB)

DARRYL COTTON'S OPPOSITION TO JUDGE JOEL R. WOHLFEIL'S MOTION TO DISMISS FIRST AMENDED COMPLAINT AND REQUEST FOR SANCTIONS

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

INTRODUCTION

> In the past dozen years, state and local judges have repeatedly escaped public accountability for misdeeds that have victimized thousands. Nine of ten kept their jobs, a Reuters investigation found – including an Alabama judge who unlawfully jailed hundreds of poor people, many of them Black, over traffic fines.

Michael Berens and John Shiffman, *Reuters Investigates, The Teflon Robe,* ***Objections Overruled: Thousands of U.S. Judges who broke laws or oaths remained on the bench.*** (https://www.reuters.com/investigates/special-report/usa-judges-misconduct/ (Filed June 30, 2020).)

In Cotton's First Amended Complaint (the "FAC") (ECF No. 18.), Cotton alleged and cited to judicially noticeable facts and applicable law to demonstrate that the *Cotton I* judgment entered against him by Joel Robin Wohlfeil is void because the judgments are the result of acts that, *inter alia*, constitute (i) a fraud on the court, (ii) judicial bias, and (iii) enforce an illegal contract. More specifically, that the

November Document[1] cannot be a legal contract as a matter of law because of the Mutual Assent Issue and the Illegality Issue, which were questions of law for Wohlfeil to adjudicate. Questions of law that Wohlfeil never addressed throughout *Cotton I*. Initially, because of his judicial bias in favor of Geraci's attorneys. Then, in his efforts to cover up his judicial bias and avoid the consequences of his actions; such as the instant frivolous motion to dismiss the FAC (the "MTD").

In his MTD, Wohlfeil does not deny that he failed to address the Mutual Assent Issue or the Illegality Issue as questions of law. Neither does he deny that the failure to address questions of law, if they result in Constitutional violations, state a claim under § 1983. In fact, relying on his judicial immunity, Wohlfeil *directly admits* that he violated Cotton's constitutional rights to a fair and impartial trial by allowing the jury to decide questions of law that he was supposed to review, understand, and rule on as the presiding judge by applying applicable law to the undisputed facts. (MTD at 2:12 ("A jury decided the fate of *Cotton I* and rendered a verdict in favor of Geraci and against [Cotton].") (emphasis added); *Lysick v. Walcom*, 258 Cal.App.2d 136, 158 (Cal. Ct. App. 1968) ("It was error… to submit to the jury as a question of fact an issue that on the record was one of law."); Cal. Evid. Code § 310(a) ("All questions of law… are to be decided by the Court.").

Moreover, Wohlfeil ignores the fact that Cotton filed a motion to disqualify him in state court that mandated he disqualify himself from presiding over *Cotton I* because of his judicial bias (the "DQ Motion"). (RJN Ex. 1.) Specifically, his expressed beliefs regarding, among others, Michael Weinstein of Ferris & Britton ("F&B") and Gina Austin of Austin Legal Group ("ALG") that they are "incapable" of acting unethically by filing or maintaining an action lacking probable cause; a belief he stated in open court was based on his personal relationship with Weinstein from before he was a judge and from years of Weinstein and Austin trying cases before him in other matters after he became a judge (the "Extrajudicial Statements"). Wohlfeil denied the DQ Motion, admitting he made the Extrajudicial Statements, but alleging the Extrajudicial Statements were not actually extrajudicial and evidence of his bias (the "DQ Order"). (RJN Ex. 2.) But the case that Wohlfeil relied upon to deny the DQ Motion, *Liteky*, rejected the very argument that Wohlfeil made: an "extrajudicial source" includes "a source

[1] Terms not otherwise defined herein have the meaning set forth in the FAC.

outside the judicial proceeding at hand — which would include as extrajudicial sources earlier judicial proceedings conducted by the same judge…" *Liteky v. United States*, 510 U.S. 540, 545 (1994).

The MTD raises four legal principles to argue that this Court lacks subject matter jurisdiction and that the FAC fails to state a claim against Wohlfeil: (i) judicial immunity, (ii) the Eleventh Amendment, (iii) the *Rooker-Feldman* doctrine, and (iv) that Cotton "has not stated a § 1983 claim because he has not alleged a plausible constitutional violation" against Wohlfeil (MTD at 10:13-14).

All of these arguments are legally frivolous for four simple to understand reasons. First, it is Cotton's Constitutionally protected right to have an impartial judge. *Boddy v. Guerrero*, 179 F.3d 714, 716-17 (9th Cir. 1999) ("It is basic to the concept of due process in the Constitution that a judge be impartial.").

Second, Wohlfeil's expressed beliefs that Weinstein/Austin are "incapable" of filing/maintaining an action without probable cause, based on his interactions with them outside of *Cotton I*, are the archetype definition of judicial bias that mandated him to disqualify himself pursuant to the DQ Motion. *Id.*; *Liteky,* 510 U.S. at 545.

Third, a judgment that violates Cotton's Constitutional due process rights - such as being the product judicial bias, a fraud on the court, and/or which enforces an illegal contract - is void and unenforceable. *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985) ("It is well settled that a judgment is void… if the court acted in a manner inconsistent with due process of law.") (quotation omitted).

Fourth, neither judicial immunity, the Eleventh Amendment, nor the *Rooker-Feldman* doctrine deprive this Court of jurisdiction to vindicate Cotton's constitutional rights pursuant to § 1983 even if Wohlfeil is a state judge; it is in fact the duty of this Court to exercise jurisdiction over this matter because Wohlfeil is a state judge who is using his power to violate the Constitutionally protected rights of US Citizens. *Miofsky v. Superior Court of California*, 703 F.2d 332, 335 (9th Cir. 1983) ("[W]e know of no ground for exempting from the broad reach of § 1983 actions taken by persons acting under color of state law in judicial proceedings, whether those persons are ***judges*** or others appointed by judges to act on behalf of the court…. [D]istrict courts have subject matter jurisdiction over suits brought under § 1983 even when the state action allegedly violating plaintiff's federally protected rights takes the form of state court proceedings.") (emphasis added).

Although the FAC alleges the November Document cannot be a lawful contract as a matter of law, the MTD omits any discussion, much less any analysis, as to how the *Cotton I* judgment can be lawfully valid if it enforces an agreement that lacks mutual assent and a lawful object.

No reasonable attorney, much less a judge, would file the MTD on its stated grounds alleging this Court lacks subject matter jurisdiction and that no cause of action has been alleged in the FAC. Under the facts of this case, the only honorable, just and reasonable course of action that Wohlfeil could have taken would have been to admit that he made mistakes and dealt with the lawful and merited consequences of his actions. He did not. Instead, in order to protect the public perception of him as an intelligent and just judge, to pathetically and desperately cling on to power as an elected official who needs to continuously run for office, he has chosen to file the MTD to purposefully and unlawfully obstruct Cotton from vindicating his rights before this Court. *Victorianne v. Cnty. of San Diego*, No. 14cv2170 WQH (BLM), at *15 (S.D. Cal. Feb. 3, 2016) ("Obstructing access to the courts is a constitutional violation.") (citing *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984)).

The MTD constitutes a sham pleading seeking to perpetrate a fraud on this Court. The filing of the MTD warrants the most severe sanctions possible under the law to prove to the public that judges and government attorneys are not above the law. That judges and attorneys will be treated the same as other US Citizens who engage in unlawful behavior that seeks to defile the justice system. (*Cf. gen.*, Michael Berens and John Shiffman, *Reuters Investigates, The Teflon Robe,* ***Emboldened by Impunity: With 'judges judging judges,' rouges on the bench have little to fear.*** (https://www.reuters.com/investigates/special-report/usa-judges-misconduct/ (Filed June 30, 2020).)

STATEMENT OF FACTS

Wohlfeil does not dispute any of the factual allegations in the FAC with requests for judicially noticeable facts that had to have been established in *Cotton I*. Rather, he makes unwarranted legal conclusions relying on judicial notice of the Cotton I verdicts that do not address the Mutual Assent Issue or the Illegality Issue. Which are legal conclusions that *must* be disregarded by this Court on this MTD. *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013) ("All well-pleaded allegations of material fact in the complaint are accepted as true and are construed in the light most favorable to the non-moving party."). The following facts are not at issue:

I. The parties and the undisputed evidence of their agreement reached on November 2, 2016.

Geraci has been sanctioned at least three times for his ownership/management of the Illegal Marijuana Dispensaries. (FAC ¶¶ 43-45; *see gen.*, MTD (no dispute).) The last time that Geraci was sanctioned was on June 17, 2015. Cotton was and is the owner-of-record of the Property. (FAC ¶5; JW RJN[2] Ex. A at ¶ 4.).) On October 31, 2016, Geraci had Rebecca Berry submit the Berry Application with the Berry Fraud on the Property. (FAC ¶ 62; *see gen.*, MTD (no dispute).)

On November 2, 2016, Cotton and Geraci reached an agreement for the sale of the Property and executed the November Document. (FAC ¶¶ 64-67; *see gen.*, MTD (no dispute).) On the day the November Document was executed by Cotton and Geraci, Cotton sent the Request for Confirmation requesting Geraci confirm in writing their agreement included a 10% equity position for Cotton in the contemplated dispensary at the Property and was not a purchase contract. (FAC ¶¶ 63-67; *see gen.*, MTD (no dispute).) Geraci replied, providing the requested confirmation - the Confirmation Email. (FAC ¶ 67(iii); *see gen.*, MTD (no dispute).)

On March 21, 2017, Cotton emailed Geraci to terminate their agreement because Geraci had failed to reduce their agreement to writing. (FAC ¶ 71; *see gen.*, MTD (no dispute).)

II. Wohlfeil never addressed any questions of law even when presented with undisputed facts and controlling law that required he do so.

Wohlfeil does not dispute that the Request for Confirmation and the Confirmation Email is undisputed evidence that the November Document cannot be a lawful contract because it lacks mutual assent. (*See* FAC ¶¶ 67-68; *see gen.*, MTD (no dispute).) Wohlfeil does not dispute that he never addressed this question of law.

Wohlfeil does not dispute that the *Cotton I* judgment enforces an illegal contract that violates State and City laws, including the statute of frauds. (*See* FAC ¶¶ 105-107; *see gen.*, MTD (no dispute).) Wohlfeil does not dispute that he never addressed this question of law. Also, Wohlfeil does not dispute that he found the defense of illegality had been waived, but he also does not dispute that the defense of illegality cannot be waived.

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[2] "JW RJN" means Joel Wohlfeil's Request for Judicial Notice submitted in support of his MTD.

Wohlfeil does not dispute that Cotton's former attorneys - Jessica McElfresh and Finch, Thornton & Baird - committed a fraud on the court by failing to disclose their relationships with Gina Austin and Lawrence Geraci and seeking to connive at the defeat of Cotton's action by amending his complaint to, *inter alia*, delete the Illegality Issue and the conspiracy charge against Geraci and Berry. (*See* FAC ¶¶ 105-107; *see gen.*, MTD (no dispute).)

III. Wohlfeil knows that he should have disqualified himself pursuant to the DQ Motion for bias.

On September 12, 2018, Cotton filed a motion to disqualify Judge Wohlfeil from continuing to preside over *Cotton I* for bias based primarily on the Extrajudicial Statements. (RJN Ex. 1 (*Cotton I*, ROA 292). On September 17, 2018, Wohlfeil issued the DQ Order denying the DQ Motion alleging the Extrajudicial Statements are not extrajudicial. (RJN Ex. 2 (*Cotton I*, ROA 297)).

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679. A court is "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Farm Credit Servs. v. Am. State Bank*, 339 F.3d 764, 767 (8th Cir. 2003) (citation omitted).

ARGUMENT

I. The MTD is legally frivolous.

"Frivolous" means "[l]acking a legal basis or legal merit; not serious; not reasonably purposeful." Black's Law Dictionary 692 (8th ed. 1999).

A. Judicial immunity does not deprive this Court of subject matter jurisdiction.

"It is now established that judicial immunity does not bar declaratory or injunctive relief in actions under § 1983." *Mullis v. U.S. Bankruptcy Ct., Dist of Nevada*, 828 F.2d 1385, 1391 (9th Cir. 1987). "'Congress intended § 1983 to be an independent protection for federal rights' and… there [is] 'nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate

state judges completely from federal ***collateral*** review.'" *Id.* at 1393 (quoting *Pulliam v. Allen*, 466 U.S. 522, 523 (1984) (emphasis added)).

Wohlfeil's MTD acknowledges that the relief Cotton seeks against him is prospective (MTD at 3:25-26 ("declare Judge Wohlfeil biased and preclude him from continuing to preside over *Cotton I*"), but ignores that very same fact in arguing three pages later that judicial immunity bars this action (MTD at 6:23-24 ("Judge Wohlfeil was simply acting in his judicial capacity and cannot be liable for rulings made in this capacity."). Wohlfeil's belief, that he is absolutely immune even if he blatantly violates a Citizen's Constitutionally protected rights in his judicial capacity is contradicted by law that was already "established" in 1987. *Mullis*, 828 F.2d 1385.

Wohlfeil's judicial immunity does not serve to bar this court's subject matter jurisdiction and the assertion is frivolous; and has been since at least the *Pulliam* decision in 1984. *Pulliam*, 466 U.S. at 541-42 ("[J]udicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.").

B. The Eleventh Amendment does not bar a §1983 cause of action seeking "prospective relief" against state judges.

"Officials who violate federal law are stripped of state authority and do not act for the state because the state cannot confer authority to violate federal law." (17A Moore's Federal Practice - Civil § 123.40 (Suits Against State Officers) (2020) (citing cases).) "[T]he Eleventh Amendment bars § 1983 actions for damages or retrospective injunctive relief against state officials in their official capacities; prospective injunctive relief is not barred, but requires a credible threat of future injury." *Mataele v. Nunn*, No. 09-56364, at *2 (9th Cir. Jan. 17, 2012) (citing *Bank of Lake Tahoe v. Bank of Am.*, 318 F.3d 914, 918 (9th Cir. 2003).

Wohlfeil has violated Cotton's Constitutionally protected rights to, *inter alia*, have an impartial judge preside over a fair trial. Axiomatically, as the basis of this claim is that the judgments entered by Cotton are void due to judicial bias, and this Court finds they are, then to allow Wohlfeil to continue to preside over Cotton's state action in the future would itself continue to violate Cotton's rights. Thus, the relief Cotton seeks is prospective and warranted.

C. The Rooker-Feldman doctrine does not bar this Court's jurisdiction.

Rooker-Feldman does not bar this action for at least seven independent reasons:

First, *Rooker-Feldman* does not bar declaratory action seeking to bar prospective relief against Wohlfeil for his failure to recuse himself. *Fieger v. Ferry*, 471 F.3d 637, 644–646 (6th Cir. 2006) (*Rooker-Feldman* bars declaratory-judgment claim challenging constitutionality of state courts' recusal rules as applied in ***past*** cases, but declaratory-judgment claim challenging those recusal rules as they could be applied in ***future*** cases is independent of past state-court recusal decisions and so is not barred by *Rooker-Feldman*) (emphasis added).

Second, *Rooker-Feldman* is only applicable when federal suit is filed "after the state proceedings ended." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005) (in both *Rooker* and *Feldman*, federal suits were filed after state-court proceedings ended). Here, they were not. And although Wohlfeil was not added to the Complaint until after he entered the *Cotton I* judgment, the relationship back doctrine applies; especially as Cotton filed this action in the first place because Wohlfeil had already made the Extrajudicial Statements on January 25, 2018. *See Merritt v. County of Los Angeles*, 875 F.2d 765, 768 (9th Cir. 1989)

Third, *Rooker-Feldman* only applies to state court losers. Wohlfeil does not dispute that he made the Extrajudicial Statements. Those directly evidence that he prejudged that *Cotton I* was filed with probable cause, meeting the criteria for bias and proving that Cotton's claims were never lawfully litigated meaning Cotton has never lost (and never will because he will never stop). *Boddy v. Guerrero*, 179 F.3d 714, 716-17 ("It is basic to the concept of due process in the Constitution that a judge be impartial."); *Kenneally v. Lungren*, 967 F.2d 329, 333 ("Where a state tribunal has been found incompetent by reason of bias, the Supreme Court has held that there was effectively no opportunity to litigate constitutional claims. Bias exists where a court has prejudged, or reasonably appears to have prejudged an issue.") (internal citations omitted).

Fourth,

> If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal district court. If, on the other hand, a federal plaintiff asserts as ***a legal wrong an allegedly illegal act or omission by an adverse party***, *Rooker-Feldman* does not bar jurisdiction. If there is simultaneously pending federal and

> state court litigation between the two parties dealing with the same or related issues, the federal district court in some circumstances may abstain or stay proceedings; or if there has been state court litigation that has already gone to judgment, the federal suit may be claim-precluded under § 1738. But in neither of these circumstances does *Rooker-Feldman* bar jurisdiction.

Noel v. Hall, 341 F.3d 1148, 1164 (9th Cir. 2003).

Cotton has alleged that Geraci conspired with Cotton's former attorneys, Jessica McElfresh and FTB, by amending Cotton's complaint to, *inter alia*, delete the Illegality Issue and the conspiracy charge against Geraci and Berry (*see* FAC ¶¶ 86-92). And, thus committed a fraud on the court that takes this action outside the purview of *Rooker-Feldman*. *See Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1141 (9th Cir. 2004) ("It has long been the law that a plaintiff in federal court can seek to set aside a state court judgment obtained through extrinsic fraud.").

Fifth, "California law allows an independent action in equity to set aside a judgment obtained by extrinsic fraud, and such ***an equitable action need not be brought in the court that rendered the challenged judgment.***" (18 Moore's Federal Practice -Civil § 133.33(2)(iii) (Claims Alleging Fraud or Other Misconduct in Connection with State-Court Proceedings) (2021) (citing *Young v. Young Holdings Corp.*, 27 Cal. App. 2d 129, 147, 80 P.2d 723, 733 (1938) ("The superior court is vested by the constitution with jurisdiction over 'all cases in equity'; and cases of this kind—that is, for relief against judgments on the ground of fraud in their procurement—constitute a familiar and well-established head of equity jurisdiction. Nor … is this jurisdiction vested in any particular superior court or courts. Every superior court … has jurisdiction of all equity cases that may be brought in it." (quoting *Herd v. Tuohy*, 133 Cal. 55, 59, 65 P. 139, 140 (1901))); *see also Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1141 (9th Cir. 2004) ("Under California law, extrinsic fraud is a basis for setting aside an earlier judgment.").)

Sixth, a federal plaintiff alleging injury from a state-court judgment does not necessarily mean that the plaintiff is asking the federal court to review and reject the state-court judgment. The *Rooker-Feldman* doctrine does not "stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party … , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *Exxon Mobil Corp. v. Saudi Basic Indus.*

Corp., 544 U.S. 280, 293, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005) (quoting *GASH Assocs. v. Village of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993)). In other words, Cotton's independent § 1983 claims – alleging judicial bias, fraud on the court, an unenforceable judgment due to illegality – are not barred by *Rooker-Feldman* even though they raise *contract interpretation* issues already litigated in *Cotton I*. A finding by this Court that judicial bias and a fraud on the court has taken place, "deny[ing] a legal conclusion that [Wohlfeil reached in *Cotton I* (i.e., the November Document is a lawful contract)]" does not deprive this court of jurisdiction. *Id.*

Seventh (and overlapping with the sixth reason set forth above), the "inextricably intertwined" analysis contemplated by *Rooker-Feldman* and raised by Wohlfeil does not apply for two reasons (*see* MTD at 9):

(i) Cotton's § 1983 claims are not inextricably intertwined with Cotton's breach of contract cause of action in *Cotton I* because he sets forth various independent claims, which include that non-parties to *Cotton I* committed a fraud on the court (e.g., Geraci conspiring with McElfresh and FTB's actions in amending Cotton's complaint to delete the Illegality Issue and the conspiracy cause of action from Cotton's complaint (*see* FAC ¶¶ 88-92)). *Noel v. Hall*, 341 F.3d 1148, 1166 (9th Cir. 2003) (federal suit was not forbidden de facto appeal of earlier state-court judgments, even though it sought to litigate claims related to those already litigated in state court, because federal plaintiff "neither asserted as a legal wrong an allegedly erroneous decision by the state court in the earlier state court litigation nor sought relief from the state court judgment. Rather, he asserted as legal wrongs allegedly illegal acts committed by a party against whom he had previously litigated, and sought to litigate related claims against that party").

(ii) Although *some* of the issues raised by Cotton's § 1983 claims are "inextricably intertwined" with *some* of the issues decided by the *Cotton I* judgment (e.g., the finding of whether the November Document is a lawful contract), that does not bring it within the ambit of the "inextricably intertwined" analysis contemplated by *Rooker-Feldman*. *Bell v. City of Boise*, 709 F.3d 890, 897 (9th Cir. 2013) ("The 'inextricably intertwined' language from *Feldman* is not a test to determine whether a claim is a de facto appeal, but is rather a second and distinct step in the *Rooker-Feldman* analysis. Should the action *not* contain a forbidden de facto appeal, the *Rooker-Feldman* inquiry ends." (citation omitted));

Cooper v. Ramos, 704 F.3d 772, 778 (9th Cir. 2012) ("Our circuit has emphasized that only when there is already a forbidden de facto appeal in federal court does the 'inextricably intertwined' test come into play." (internal quotation marks and brackets omitted)); *Garduno v. Autovest LLC*, 143 F. Supp. 3d 923, 925–928 (D. Ariz. 2015) (citing **Moore's** and applying two-step approach under *Noel* and *Bell*, and declining to follow contrary intervening Ninth Circuit decision, *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 859 (9th Cir. 2008), which had conflated the two steps, because *Noel*'s two-step approach had been cited with approval by Supreme Court in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp*, 544 U.S. 280, 293, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)).

Lastly, Cotton notes that Wohlfeil's reliance on *Bianchi* is inapposite. (*See* MTD at 9.) In *Bianchi*, the Ninth Circuit found that *Rooker-Feldman* barred Bianchi's action because his allegations of judicial bias had been adjudicated by the California Supreme Court by judges Bianchi did not allege were biased:

> [I]f Bianchi had come directly to federal court in a § 1983 action to challenge the California Court of Appeal's disposition of his direct appeal, his claim could not be dismissed under *Rooker-Feldman*. Bianchi, however, did not come straight to federal court, but sought to vindicate his federal rights in state court. He sought relief from the same court that allegedly violated his rights, and he twice sought relief from the California Supreme Court.
>
> Bianchi's attempt to have the Court of Appeal recall its remittitur does not bar his federal court suit under *Rooker-Feldman* for the simple reason that the Court of Appeal's denial of relief is allegedly tainted by judicial bias, just as was its initial disposition of his direct appeal.
>
> ***However, Bianchi does not allege that the state Supreme Court's justices should have been recused***. Accordingly, the principle that a challenge to the jurisdiction of a state court to conduct proceedings when its judges should have been recused for bias does not apply to the California Supreme Court's decisions in this case.

Bianchi v. Rylaarsdam, 334 F.3d 895, 904 (emphasis added, cleaned up).

Here, Cotton's claims of judicial bias have never been adjudicated by a judge that Cotton does not allege is biased. And, Cotton did come to this Federal Court on **February 9, 2018** seeking relief when, on **January 25, 2018**, Wohlfeil first stated that he does not believe ALG, F&B or the attorneys for the City of San Diego would act unethically; and that his personal belief was based upon on his years of interactions them outside of Cotton's litigation. (ECF No. 1 (Cotton original federal complaint); ECF No. 3 (Cotton's ex parte application for TRO) at 8:11-17 ("At the oral hearing held on January 25, 2018,

on the Motions to Compel, the state court judge started the hearing by very strongly asserting to Cotton that he does not believe that Geraci' s counsel, against whom Cotton had made allegations of ethical violations against in his Opposition, would take such actions because 'knew them all very well.'").)

That judge Gonzalo Curiel failed to protect Cotton's Civil Rights then cannot serve as a bar to protect judge Wohlfeil now when neither Curiel nor any other judge have adjudicated the allegations of bias. *Bianchi*, 334 F.3d at 903 ("[A]n attack on the authority of a state court to adjudicate a case because a state court judge should have been disqualified is not subject to dismissal under the *Rooker-Feldman* doctrine.").

D. Cotton states a viable § 1983 cause of action against Wohlfeil.

"It is basic to the concept of due process in the Constitution that a judge be impartial." *Boddy v. Guerrero*, 179 F.3d 714, 716-17 (9th Cir. 1999); "Where a state tribunal has been found incompetent by reason of bias, the Supreme Court has held that there was effectively no opportunity to litigate constitutional claims. Bias exists where a court has prejudged, or reasonably appears to have prejudged an issue." *Kenneally v. Lungren*, 967 F.2d 329, 333 (9th Cir. 1992) (internal citations omitted).

In *Miofsky,* "Miofsky, brought [a] civil rights action under 42 U.S.C. § 1983 against the Superior Court of the State of California and three medical doctors who had conducted a psychiatric examination of Miofsky pursuant to court order. Miofsky sought a federal court injunction restraining discovery proceedings in state tort litigation that he claim[ed] would violate rights protected by the United States Constitution. The district court denied relief and dismissed the action on the grounds that it lacked subject matter jurisdiction and, alternatively, that the action was barred under principles of res judicata." *Miofsky v. Superior Court of California*, 703 F.2d 332, 333 (9th Cir. 1983).

On appeal, "[t]he threshold question presented by Miofsky's appeal [was] whether a federal district court has jurisdiction to entertain an action brought under § 1983 to restrain a state court from conducting litigation in a manner that would allegedly deprive a party of rights guaranteed by the United States Constitution." 703 F.2d at 334. The Ninth Circuit phrased the issue as follows: "If, as Miofsky claims, the Constitution does protect the confidentiality of the information [at issue], we know of no ground for exempting from the broad reach of § 1983 actions taken by persons acting under color of state

law in judicial proceedings, whether those persons are judges or others appointed by judges to act on behalf of the court." *Id.* at 335.

In reaching its decision, the Ninth Circuit stated as follows:

> We recognize that, as a general proposition, "state courts shall remain free from interference by federal courts." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 282, 90 S.Ct. 1739, 1741, 26 L.Ed.2d 234 (1970). That has been Congress's mandate since it first enacted the Anti-Injunction Act in 1793, providing that in federal courts "a writ of injunction [shall not] be granted to stay proceedings in any court of a state." Act of March 2, 1793 § 5, 1 Stat. 335 (current version at 28 U.S.C. § 2283 (1976)). However, civil rights actions under § 1983 are among the exceptions to the Anti-Injunction Act that have been "expressly authorized by Act of Congress," *id. See Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972). Thus, as *Mitchum* makes clear, Congress has not rendered federal courts impotent in the face of an infringement of constitutional rights by the judicial arm of state government. As the Court said in *Mitchum*, "***[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, `whether that action be executive, legislative, or judicial.***'" 407 U.S. at 242, 92 S.Ct. at 2162 (quoting Ex parte Virginia, 100 U.S. 339, 346, 25 L.Ed. 676 (1879) (emphasis added)).
>
> In light of *Mitchum*, we conclude that district courts have subject matter jurisdiction over suits brought under § 1983 even when the state action allegedly violating plaintiff's federally protected rights takes the form of state court proceedings. Accordingly, we hold that the district court erred in dismissing Miofsky's claim for lack of subject matter jurisdiction.

Miofsky v. Superior Court of California, 703 F.2d 332, 335 (9th Cir. 1983) (bold and italics added, underline in original).

Here, the issue is whether the Constitution protects Cotton from having his action presided over by a biased judge. It does. *Boddy v. Guerrero*, 179 F.3d 714, 716-17. Thus, as a matter of law pursuant to *Miofsky* this Court does have subject matter jurisdiction. A contrary holding would grant state judges complete immunity to violate the Constitutional rights of Citizens, which is clearly proscribed by *Mitchum*. *Mitchum v. Foster*, 407 U.S. at 242.

Additionally, the evidence reflects that Wohlfeil prejudged whether *Cotton I* was filed with probable cause specifically by prejudging that Weinstein would not file a suit that lacks probable cause (i.e., act unethically by filing a complaint that seeks to enforce a document that they know lacks mutual assent and a lawful object). This is direct evidence of bias. *Kenneally v. Lungren*, 967 F.2d 329, 333.

II. Sanctions are warranted and mandated.

*A. Rule 11 and attorneys' oaths require they **prevent** and **disclose** Fraud Upon the Court.*

Federal Rule of Civil Procedure 11 imposes upon attorneys and parties an affirmative duty to investigate the law and facts before filing any document with the court. *Moser v. Bret Harte Union High Sch. Dist.*, 366 F. Supp. 2d 944, 950 (E.D. Cal. 2005) ("Rule 11 creates and imposes on a party or counsel an affirmative duty to investigate the law and facts before filing.").

Stemming from that duty, counsel and parties have a duty to not conceal facts that they have discovered may negatively impact their legal or factual position. In *Itel Containers International Corporation v. Puerto Rico Marine Management, Inc.*, 108 F.R.D. 96 (1985), the defendant, knowing the court was without jurisdiction, concealed that fact, deceptively answered interrogatories to continue the concealment and litigated the matter for an extended period of time before dismissal. The court found that:

> The defense argument that it did not contain a false statement not only overlooks that **falsity may lie in <u>omission</u>** as well as commission, here defendant's refusal to answer that paragraph of the complaint that asserted diversity jurisdiction; the argument is founded on a false premise in that a misleading message was affirmatively conveyed by inclusion of the counterclaim, namely, that subject matter jurisdiction existed.

Itel Containers Intern. Corp. v. Puerto Rico Marine Management, Inc. (D.N.J. 1985) 108 F.R.D. 96, 102 (emphasis added).

Here, Wohlfeil similarly engaged in deceptive practices by omission – he does NOT state that the November Document is not a lawful contract because it lacks mutual assent and a lawful object. In fact, he tacitly admits that it is not a lawful contract: "an ***alleged*** real estate purchase and sale agreement." (MTD at 2:7-8 (emphasis added).) He is a judge who entered a judgment finding that the November Document ***is*** a lawful contract who then goes on to enter a $300,000 judgment entered against me that is going to lead to me being homeless unless I have my rights vindicated! It is simply incredible to me that such a man is put in a position of judgeship!

Wohlfeil's MTD is in fact evidence of his and his attorneys seeking to commit a fraud on this court through half truths and omissions. Wohlfeil may have judicial immunity and be immune from money damages, but his unethical attorneys are not. They are violating their duties of loyalty and candor

to the court by failing to inform this Court that the *Cotton I* judgment is void in order to protect Wohlfeil from the lawful consequences of his actions; at the direct and knowing expense of violating Cotton's rights. *Nix v. Whiteside*, 475 U.S. 157, 168-69 (1986) ("This special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats and undermines the administration of justice."). I WILL BE FILING A NEW LAWSUIT AGAINT THEM FOR FILING A SHAM PLEADING AND CONSPIRING WITH WOHLFEIL TO COMMIT A FRAUD ON THIS COURT THAT SEEKS TO DEPRIVE COTTON OF LAWFUL ACCESS TO THIS COURT THROUGH THEIR VIOLATION OF THEIR AFFIRMATIVE DUTIES TO THIS COURT "TO PREVENT AND DISCLOSE FRAUDS UPON THE COURT..." *Id.* (emphasis added).

The Supreme Court has held that judicial immunity does not bar prospective injunctive relief under section 1983 of the Civil Right's Act (42 U.S.C. § 1988) nor does it bar an award of attorneys under the Civil Rights Attorneys Fee Award Act of 1976. *Pulliam v. Allen*, 104 S. Ct. 1970 (1984).

Additionally, 42 U.S.C § 1988(b) states:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title... the court, in its discretion, may allow the prevailing party... a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Here, Cotton is not seeking sanctions for Wohlfeil enforcing an illegal contract in *Cotton I*, he is an idiot that was deceived by F&B and judicial immunity is meant to protect exactly that kind of stupidity. However, his judicial immunity does NOT immunize the filing of the MTD that is legally frivolous and reflects his knowledge that he is seeking to enforce an illegal contract at the expense of Cotton's Civil Rights. The MTD is evidence of a conspiracy by Wohlfeil and his attorneys to deprive Cotton of meaningful and lawful access to this Court to prevent him from vindicating his due process rights to an impartial judge in state court. 42 U.S.C. §§ 1983, 1985, 1986.

Furthermore, Wohlfeil and his attorneys failed to make a reasonable inquiry into whether there is any basis for redress against him and has latched on to his immunity as a judge. In fact, Arthur Miller, the principal draftsman of Rule 11 has stated:

> We have lived so long with the emphasis on "duty to client" that redirecting the responsibilities of lawyers to the system is easier said than done. Yet once it is understood that the court system is a societal resource, not merely the private playpen of the litigants, the difficult task of discouraging hyperactivity must be undertaken.
>
> The 1983 amendments to the Federal Rules of Civil Procedure represent a modest step in that direction. They attempt to check abuses by requiring an attorney's signature on all litigation papers — pleadings, motions, and discovery requests and responses — certifying that, based on "reasonable inquiry," there is good ground to support the document and the signer's motivation is not improper. The message is clear. An attorney must "stop and think" before acting — that is the litigator's duty to the system — or be subjected to sanctions. . . .

Miller, "The Adversary System: Dinosaur or Phoenix", 69 Minn.L.Rev. 1, 19 and 21 (1984).

Here there has been a concerted effort to omit controlling precedent. Cotton's action against Wohlfeil is seeking prospective relief as clearly stated in his cause of action against Wohlfeil. Cotton concedes that Wohlfeil is immune to monetary damages for his actions as a judge. However, Wohlfeil is NOT immune as a defendant in this action filing the MTD on its stated grounds that violate Rule 11 and his attorneys duties of loyalty and candor to this Court.

What is viscerally infuriating and makes me hate Wohlfeil and wish him criminal prosecution is that he is immune for monetary damages. Wohlfeil could have admitted he made a mistake and done his job – defend, protect and vindicate justice. But he didn't. Instead, knowing that I have no other assets left in this world, he seeks to prevent me from accessing justice in the court system and condemn me to a life of destitute. His actions are disgraceful and reveal him to have the same level of integrity as Geraci and his attorneys, less than none. How many people has Wohlfeil illegally violated in his position as a judge? How many judges have been protected from their blatantly illegal actions by his attorneys Susanne Koski and Carmela Duke?

They have no respect for the rights of others, no respect for the Constitution they are sworn to

uphold. They are evil. And they will be exposed. Or I will go to jail and will use my criminal trial to expose them.

B. Judicial Corruption cannot withstand the light of public scrutiny.

The Teflon Robe expose quoted in the Introduction is an investigative report that describes in detail the reality that judges are able to blatantly get away with crimes and abuse their positions without any negative consequences. It is simply mind blowing.

Cotton was recently described the sordid history of Chief Justice Sydney Runyan Thomas' predecessor's resignation from office. Alex Kozinski was accused by more than 15 women of sexual misconduct.[3] On December 8, 2017, Kozinski was first accused and thereafter he issued an official statement in which he stated "I would never intentionally do anything to offend anyone and it is regrettable that a handful have been offended by something I ***may*** have said or done." (*Id.* (emphasis added).) "On December 15, the *Washington Post* published a story against Kozinski from 9 more woman, this time with more prominent accusers including colleagues, law students, a professor and a former judge. ***The disclosed sexual misbehavior allegations span more than three decades***, including allegations of unwanted physical touching and invitations by Kozinski to have sex. Four of the women say Kozinski touched or kissed them without permission." (*Id.*)

On December 18, 2017, three days after the *Washington Post* ran their story, Kozinski announced his immediate resignation. (*Id.*) In keeping with the findings of the *Teflon Robe* expose, Kozinski was allowed to retire with full benefits. (*Id.*) He was not even admonished and on December 9, 2019, he was before the Ninth Circuit arguing on behalf of a client (and presumably being paid incredibly sums of money for doing so). (*Id.*)

If any man other than a judge was accused by over 15 woman, especially prominent woman such as the ones who accused Kozinski, there would at the very least have been an investigation. In this case,

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[3] *See*, e.g., https://en.wikipedia.org/wiki/Alex_Kozinski#Allegations_of_sexual_misconduct_and_abusive_employment_practices; id. ("Former law clerk Heidi Bond described how Kozinski forbade her from reading romance novels during her dinner break: the Judge asserted, 'I control what you read, what you write, when you eat. You don't sleep if I say so. You don't shit unless I say so. Do you understand?' Bond also described interactions consistent with cycles of abuse.").

there was no law enforcement investigation and the Federal Justice System itself dropped its ongoing investigation when Kozinski resigned. To put it plainly - it is disgraceful and saddening!

To Cotton, reading the *Teflon Robe* exposes and learning about Kozinski, he finally understands why no attorney wants to directly help him, especially as he cannot subordinate his existing debt to allow new attorneys to represent him on a contingency basis. People who know how corrupt the judicial system is, understand that within it, judges are basically gods that can do what they want with impunity and that they will be protected by other judges. (*See gen., Reuters Investigates, The Teflon Robe,* ***Emboldened by Impunity: With 'judges judging judges,' rouges on the bench have little to fear***.)

However, I take great heart from reading that three days after the *Washington Post* article was published, under the public light Kozinski was coerced into resigning for his actions. Further, unlike the Kozinski matter, the basis of my cause of action against Wohlfeil are not "allegations," they are judicially noticeable facts that establish illegality and do not require trial or discovery.

> An issue of law must be decided by the trial court. (Code Civ. Proc., § 591; Evid. Code, § 310, subd. (a); *see also Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 158, citing *Huebotter v. Follett* (1946) 27 Cal.2d 765, 770 ["It [is] error ... to submit to the jury as a question of fact an issue that on the record was one of law."].) **Where the evidence bearing on the issue is undisputed and permits only one reasonable conclusion, the issue is one of law for the court to resolve**. (*See Curcic v. Nelson Display Co.* (1937) 19 Cal.App.2d 46, 53; *see also People v. Great American Ins. Co.* (1963) 222 Cal.App.2d 552, 554-555 [where facts essential to the determination of a legal issue are not in dispute, a trial court's determination as to the issue is a conclusion of law and not binding on an appellate court].)

Monroe v. Yurosek Farms LLC, F066028, at *19 (Cal. Ct. App. Mar. 7, 2014) (emphasis added).

The MTD by itself reflects Wohlfeil's bad-faith and that of his attorneys and scares everyone connected to this case; what gives Wohlfeil the courage to file such a blatantly frivolous motion? It can't be the facts or the law, those are all on Cotton's side. And his attorneys (or City attorney Phelps) are not protect under the qualified immunity doctrine pursuant to the November 2020, unanimous US Supreme Court ruling in *Taylor v Riojas et al*, 592 U.S. ___ (2020) (Nov. 2, 2020, No. 19-1261). If the conduct at issue is illegal and "clearly established," public officials are not protected.

At this point, I am not scared. I know mutual assent, illegality and an attorneys' duties to prevent a fraud on the court thoroughly. It may be the case that within the legal world, judges are the "strongest." But, I remember a saying from my youth: "The weak fear the strong, the strong fear the strongest, and

the strongest fear the fearless." I am fearless. I am fearless because the material facts are indisputable, established, and subject to judicial notice.

As this Court may be aware, I have been protesting in front of the state and federal courthouses to bring attention to my case and the ratification by twelve judges of an illegal contract that – whether intended or not – serves to hide from the public that Wohlfeil is a biased judge that is not fit for his position. His stupidity may not have been a reason to remove him from his judgeship, but the MTD reflects a malevolent mind that seeks to cling to his power more than to do what is just. That does not comport with the traits and characteristics required of a judge.

However even though I am tired, broken and beaten down, I remain secure in the belief that the facts and law are on my side and mandate that I be provided relief. Given the facts of my case, no matter how much pressure there is to cover up Wohlfeil's actions, his guilt cannot be hidden. And, even if it turns out I cannot have Wohlfeil criminally prosecuted, at the very least I can contribute to his downfall. Sooner or later, I will be able to convince the *Washington Post* (who I emailed this motion to along with other numerous news organizations, law schools and law blogs, including *Retuers' the Teflon Robe*) or another credible publication to publish and bring to the attention of the public how egregious Wohlfeil's actions and how they represent everything that is wrong with the judicial system in America.

I understand that I am besieged by enemies – so called "officers of the court" – on all sides. Even the attorneys for the state court system are knowingly seeking to deprive me of my only asset left in the world to cover up the illegal actions of Wohlfeil. So what?! I have but this one life and I would rather live my life standing on my feet than dying on my knees. I will use it to fight against the evil I see with every fiber of my being. I hope my efforts might become a light to other blue-collar U.S. Citizens who are victims of wealthy criminals and corrupt government agents. Evil only survives in darkness, it cannot withstand the light of public scrutiny. I will die happy if in my lifetime I am but a footnote in a Wikipedia page of Joel Wohlfeil, Cynthia Ann Bashant, and/or Sydney Thomas showing the world that my actions against them contributed, however slightly, to a finding of their having manipulated the judicial system with biased actions that ultimately led to their impeachment.

C. Wohlfeil seeks to deprive Cotton of his constitutionally protected right of access to the Courts to cover-up his mediocre intellect, judicial bias and illegal actions.

"Depriving someone of an arguable (though not yet established) claim inflicts actual injury because it deprives him of something of value arguable claims are settled, bought and sold. Depriving someone of a frivolous claim, on the other hand, deprives him of nothing at all, except perhaps the punishment of Federal Rule of Civil Procedure 11 sanctions." *Lewis v. Casey*, 518 U.S. 343, 354 n. 3 (1996).

Wohlfeil does not just seek to avoid liability for his actions in the MTD, he seeks to have this Court deny jurisdiction over the matter. Indeed, with the filing of his MTD there are now two more attorneys who, in representing Wohlfeil, have continued to perpetuate a fraud upon this court by ignoring and denying what was case dispositive evidence in *Cotton I*. In other words, Wohlfeil and his attorneys are continuing to obstruct my access to the Court with frivolous arguments. *Victorianne v. Cnty. of San Diego*, No. 14cv2170 WQH (BLM), at *15 (S.D. Cal. Feb. 3, 2016) ("Obstructing access to the courts is a constitutional violation.") (citing *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984)).

> The latitude allowed an attorney is not unlimited. He must represent his client within the bounds of the law. [Citation.]; CPR Canon 7. As an officer of the court, he must "preserve and promote the efficient operation of our system of justice." *Chapman v. Pacific Tel. Tel.*,613 F.2d 193, 197 (9th Cir. 1979).

United States v. Thoreen, 653 F.2d 1332, 1339 (9th Cir. 1981).

> Making misrepresentations to the fact finder is inherently obstructive because it frustrates the rational search for truth. It may also delay the proceedings. *In In re Dellinger*,502 F.2d 813, 816 (7th Cir. 1974), cert. denied, 420 U.S. 990, 95 S.Ct. 1425, 43 L.Ed.2d 671 (1975), for example, the Seventh Circuit held that an attorney obstructed justice by putting inadmissible evidence before the jury, hampering its ability to decide the case according to the legal principles provided them. ***A witness's sham denial of knowledge similarly obstructs justice by closing off avenues of inquiry and stifling a jury's ability to ascertain the truth***. United States v. Griffin,589 F.2d 200, 205 (5th Cir.), cert. denied,444 U.S. 825, 100 S.Ct. 48, 62 L.Ed.2d 32 (1979).

United States v. Thoreen, 653 F.2d 1332, 1340-41 (9th Cir. 1981).

Wohlfeil's and his attorneys tactic admission that the November Document is not a lawful contract, coupled with their sham denial that this Court has subject matter jurisdiction to vindicate Cotton's Civil Rights, is criminal behavior pursuant to 18 U.S.C. § 401. *Id.*; "Contumacious misbehavior

by an attorney includes… deceiving the court. Examples of contumacious deceptive behavior are… an attorney's presentation of false evidence…").

CONCLUSION

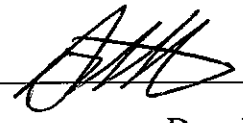
Judge Robinson, this case is so much bigger than me. Its legacy has already been established, now it is only a matter of degree it has fallen to you to stop the various criminal conspiracies at issue here.

I truly believe that this case is a test to determine whether the Rule of Law exists, whether the U.S. Constitution is more than a piece of paper, whether Justice is real. The world is going crazy right now. In the midst of the Covid pandemic and the political unrest surrounding the 2020 presidential election, our society and way of life has degraded to the point that we are a society divided, and one which increasingly refuses to believe in the Rule of Law as all parties seek to impose their will on others. This is wrong. If our society does not have law, consistently and fairly applied, we have nothing. People must respect the judiciary for our society to function.

The situation I've endured has been created by judges seeking to protect judges. It is why I protest each day in front of the state and federal courthouses. But enough is enough. Without all judges aligned to serve the US Constitution, something greater than themselves, our society will continue to degrade with a complete lack of civility and increasing disregard for the basic rights of others.

If Wohlfeil and his attorneys can so openly and blatantly seek to commit crimes to prevent themselves from being held accountable, it is a product of logic to conclude that the Rule of Law does not exist and the US Constitution is nothing more than a piece of paper. So why abide by laws and any kind of social contract when other people are above the law? Why should parties not enforce their own justice and simply do what Geraci and his attorneys and Wohlfeil and his attorneys do, whatever they want and simply lie? I implore you to do the right thing here and deny Wohlfeil's MTD and help to undo the wrongs that this judge has done to not just my case, but to the judiciary as a whole.

DATED: January 11, 2020

By 

Darryl Cotton

DARRYL COTTON
6176 Federal Boulevard
San Diego, CA 92114
Telephone: (619) 954-4447

Plaintiff *Pro Se*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON,
Plaintiff,
v.

CYNTHIA BASHANT, an individual, JOEL WOHLFEIL, an individual, LARRY GERACI, an individual, REBECCA BERRY, an individual; GINA AUSTIN, an individual; MICHAEL WEINSTEIN, an individual; JESSICA MCELFRESH, an individual, and DAVID DEMIAN, an individual

Defendants.

Case No. 3:18-cv-00325-TWR (DEB)
Formerly: 3:18-cv-003250-BAS (DEB)
Related Cases: 3:20-cv-00656-TWR (DEB)

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DARRYL COTTON'S OPPOSITION TO JUDGE JOEL R. WOHLFEIL'S MOTION TO DISMISS FIRST AMENDED COMPLAINT AND REQUEST FOR SANCTIONS

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

Plaintiff hereby requests that this Court take judicial notice of the documents described below and the copies thereof attached hereto in support of his Opposition to Motion Defendant Gina Austin's Motion to Dismiss

The documents listed below and attached hereto as RJN Exhibits Nos. 1–2 conformed copies of pleadings, transcripts, or other papers filed in *Geraci v. Cotton, et al.*, San Diego Superior Court Case No. 37-2017-10073-CU-BC-CTL ("*Cotton I*") and other cases named herein which are currently pending in and/or were previously

adjudicated by the San Diego County Superior Court. This Court may properly take judicial notice of these exhibits pursuant to Federal Rules of Evidence, Rule 201.

RJN NO.	DOCUMENT TITLE/DESCRIPTION
1	*Cotton I*:Statement of Disqualification, September 12, 2018 ROA 292
2	*Cotton I* :Order Re: Statement of Disqualification, September 17, 2018 ROA 297

Dated: January 11, 2021

DARRYL COTTON

By _____

Plaintiff *In Propria Persona*,

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

Plaintiff *Pro Se*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual

Plaintiff,

vs.

CYNTHIA BASHANT, an individual; JOEL WOHLFEIL, an individual; LARRY GERACI, an individual; REBECCA BERRY, an individual; GINA AUSTIN, an individual; MICHAEL R. WEINSTEIN, an individual; JESSICA MCELFRESH, an individual; and DAVID DEMIAN, an individual

Defendants,

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

Related Cases: 3:20-cv-00656-TWR (DEB)

CERTIFICATE OF SERVICE

Hearing Date: NA
Time: NA
Judge: Hon. Todd W. Robinson
Courtroom: 3A

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document(s):

1. DARRYL COTTON'S OPPOSITION TO JUDGE JOEL R. WOHLFEIL'S MOTION TO DISMISS FIRST AMENDED COMPLAINT AND REQUEST FOR SANCTIONS

2. REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DARRYL COTTON'S OPPOSITION TO JUDGE JOEL R. WOHLFEIL'S MOTION TO DISMISS FIRST AMENDED COMPLAINT AND REQUEST FOR SANCTION.

Were served on this date to party/counsel of record:

[X] BY E-MAIL DELIVERY:

[X] BY PERSONAL DELIVERY VIA US MARSHALLS: TO
SUSANNE C. KOSKI,
CARMELA E. DUKE
ATTORNEYS FOR JOEL R. WOHLFEIL
1100 UNION STREET
SAN DIEGO. CA 92101

January 11, 2021

Darryl Cotton

Plaintiff - Pro Se Litigant

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Telephone: (619) 954-4447

2021 JAN 11 PM 4:11

Plaintiff *Pro Se*

NUNC PRO TUNC
Jan 11 2021

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON,
Plaintiff,
v.

CYNTHIA BASHANT, an individual, JOEL WOHLFEIL, an individual, LARRY GERACI, an individual, REBECCA BERRY, an individual; GINA AUSTIN, an individual; MICHAEL WEINSTEIN, an individual; JESSICA MCELFRESH, an individual, and DAVID DEMIAN, an individual
Defendants.

Case No. 3:18-cv-00325-TWR (DEB)
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REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DARRYL COTTON'S OPPOSITION TO JUDGE JOEL R. WOHLFEIL'S MOTION TO DISMISS FIRST AMENDED COMPLAINT AND REQUEST FOR SANCTIONS

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

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2	*Cotton I* :Order Re: Statement of Disqualification, September 17, 2018 ROA 297

Dated: January 11, 2021

DARRYL COTTON

By _____

Plaintiff *In Propria Persona*,

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Attorney for Defendant/Cross-Complainant DARRYL COTTON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, HALL OF JUSTICE

LARRY GERACI, an individual,

Plaintiff,

vs.

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

Defendants.

AND RELATED CROSS-ACTION.

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

VERIFIED STATEMENT OF DISQUALFICATION PURSUANT TO CCP §170.1(a)(6)(A)(iii) AND CCP §170.1(a)(6)(B)

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

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

///

///

///

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. MATERIAL FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

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

> Berry was the Applicant. Cotton and Berry did not have a principal-agent relationship and Berry did not submit the CUP Application on his behalf. Rather, Berry had a principal-agent relationship *with Geraci*. Berry submitted the CUP Application on behalf of Geraci who had entered into a written agreement with Cotton for the purchase of the Property.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Thank you for meeting today. Since we executed the Purchase Agreement in your office for the sale price of the property I just noticed the *10% equity position* in the dispensary was not language added into that document. I just want to make sure that we're *not* missing that language in any *final agreement* as it is a factored element in my decision to sell the property. ***I'll be fine if you would simply acknowledge that here in a reply.***

Exhibit B, p.497 (emphasis added).

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

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

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

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

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

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

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

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

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

Exhibit B, p.503 (emphasis added).

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

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

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

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

Exhibit B, p.531.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. AUSTIN: Well –

THE COURT: – in it's entirety?

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

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

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

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

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

CO COUNSEL: That's it.[33]

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

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

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

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

III. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

83. Judge Wohlfeil has never undertaken the above analysis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. DISQUALIFICATION FOR CAUSE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. THIS PETITION (STATEMENT OF DISQUALIFICATION) IS TIMELY

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. VERIFICATION

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

DATED: September 12, 2018

JACOB P. AUSTIN

EXHIBIT A

IN THE COURT OF APPEAL OF THE S

CASE #: D074587

FOURTH APPELLATE DISTRICT – DIVISION ONE

DARRYL COTTON,

Defendant/Petitioner/Appellant,

v.

THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO,

Respondent.

LARRY GERACI, an individual; REBECCA BERRY, an individual; MICHAEL R. WEINSTEIN, an individual; SCOTT TOOTHACRE, an individual; FERRIS & BRITTON APC, a California corporation; GINA M. AUSTIN an individual; AUSTIN LEGAL GROUP APC, a California corporation; JIM BARTELL, an individual; BARTELL & ASSOCIATES, INC., a California corporation; ABHAY SCHWEITZER, an individual and dba TECHNE; AARON MAGAGNA, an individual; THE CITY OF SAN DIEGO, a public entity; M. TRAVIS PHELPS, MICHELLE SOKOLOWSKI, FIROUZEH TIRANDAZI, CHERLYN CAC, as individuals and as employees of THE CITY OF SAN DIEGO,

Real Parties in Interest.

Court of Appeal Case No. _____
(San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL)

PETITION FOR WRIT OF MANDATE, SUPERSEDEAS AND/OR OTHER APPROPRIATE RELIEF

IMMEDIATE STAY REQUESTED ON AUGUST 28, 2018

JACOB P. AUSTIN [SBN 290303]
Law Office of Jacob Austin
1455 Frazee Road, #500, San Diego, CA 92108
Telephone: (619) 357-6850; Facsimile: (888) 357-8501; JPA@JacobAustinEsq.com
Attorney for Defendant/Petitioner/Appellant DARRYL COTTON

TO BE FILED IN THE COURT OF APPEAL — APP-008

COURT OF APPEAL: FOURTH APPELLATE DISTRICT, DIVISION ONE

COURT OF APPEAL CASE NUMBER:

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 290303
NAME: JACOB P. AUSTIN
FIRM NAME: The Law Office of Jacob Austin
STREET ADDRESS: 1455 Frazee Road, #500
CITY: San Diego STATE: CA ZIP CODE: 92108
TELEPHONE NO.: (619) 357-6850 FAX NO.: (888) 357-8501
E-MAIL ADDRESS: JPA@JacobAustinEsq.com
ATTORNEY FOR (name): Defendant/Petitioner/Appellant DARRYL COTTON

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

APPELLANT/PETITIONER: DARRYL COTTON

RESPONDENT/REAL PARTY IN INTEREST: LARRY GERACI, an individual; REBECCA BERRY, an individual

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Appellant/Petitioner DARRYL COTTON

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) Michael R. Weinstein	Attorney representing Real Parties in Interest Geraci and Berry
(2) Scott Toothacre	Attorney representing Real Parties in Interest Geraci and Berry
(3) Ferris & Britton APC, a California corp.	Law firm at which Michael R. Weinstein & Scott Toothacre practice
(4) Gina M. Austin	Former attorney for Geraci & current attorney for Aaron Magagne
(5) Austin Legal Group APC, California corp.	Law firm owned/operated by Gina M. Austin

[X] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 20, 2018

JACOB P. AUSTIN
(TYPE OR PRINT NAME)

Jacob P. Austin
(SIGNATURE OF APPELLANT OR ATTORNEY)

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS - continued

ATTACHMENT 2

Name of Interested Entity or Person	Nature of Interest (*Explain*)
(6) Gina M. Austin, an individual	Attorney who formerly represented Geraci, and currently represents Aaron Magagna
(7) Austin Legal Group APC, a California corporation	Law Firm of Attorney Gina Austin which formerly represented Geraci, and currently represents Aaron Magagna
(8) Jim Bartell, an individual	Lobbyist providing services to Larry Geraci re CUP application for Petitioner's real property
(9) Bartell & Associates, Inc.	Lobbying firm providing services to Larry Geraci re pending CUP application for Petitioner's real property
(10) Abhay Schweitzer, an individual	Architect providing design and other services for Larry Geraci re pending CUP application for Petitioner's real property
(11) Abhay Schweitzer dba TECHNE	Fictitious Business Name under which Abhay Schweitzer does business providing design and other services for Larry Geraci re CUP application for Petitioner's real property
(12) Aaron Magagna, an individual	Owner of a recently-submitted CUP application for real property located at 6220 Federal Boulevard, City and County of San Diego, California
(13) M. Travis Phelps, an individual and employee of the City of San Diego	Deputy Attorney for the City of San Diego who represented the City of San Diego in a related case in the San Diego County Superior Court entitled *Cotton v. City of San Diego, et al.*, Case No. 37-2017-00037675-CU-WM-CTL
(14) The City of San Diego	The public entity which is processing the CUP applications for Petitioner's real property and the competing CUP application submitted by Aaron Magagna

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS - continued

(15) Michelle Sokolowski, an individual and employee of the City of San Diego	Deputy Director, City of San Diego Development Services Department, Project Submittal and Management Division who was involved in processing the CUP application for Petitioner's real property
(16) Firouzeh Tirandazi, an individual and employee of the City of San Diego	Former Development Project Manager, City of San Diego Development Services Department who was involved in processing the CUP application for Petitioner's real property
(17) Cherlyn Cac, an individual and employee of the City of San Diego	Development Project Manager, City of San Diego Development Services Department who was involved in processing the CUP application for Petitioner's real property

DECLARATION OF JACOB P. AUSTIN REGARDING REPORTERS' TRANSCRIPTS OF HEARINGS PURSUANT TO CRC 8.486(b)(3)

I, Jacob P. Austin, declare:

1. I am the attorney for Petitioner DARRYL COTTON in both this Appellate Petition and the San Diego Superior Court Case from which this Petition is taken entitled *Larry Geraci v. Darryl Cotton, et al.*, Case No. 37-2017-00010073-CU-BC-CTL ("Lower Court Case").

2. The facts contained herein are true and correct as of my personal knowledge, except those facts which are stated upon information and belief; and, as to those facts, I believe them to be true.

3. This declaration is submitted pursuant to California Rules of Court Rule 8.46(b)(3) to summarize the proceedings in the Lower Court Case relevant to this Petition.

4. For the reasons more fully discussed in this Petition, the litigation in the Lower Court Case has rendered Petitioner virtually indigent, such that he has been forced to sell off more and more of his interest in his real property to finance the litigation and to pay the cost of his basic daily needs.

5. Due to Petitioner's financial condition, he was unable to afford the cost of a court reporter for hearings on law and motion matters.

6. Given the gravity of Petitioner's Motion for Appointment of Receiver ("Receiver Motion") and Motion for Judgment on the Pleadings, I paid the cost for the court reporter, and certified copies of the transcripts of those hearings are included in Petitioner's exhibits at V1 E4 and V3 E21.

7. The hearing on the third law and motion matter directly relevant to the issues raised in this Petition is the April 13, 2018 hearing on Petitioner's Motion to Expunge Notice of Pendency of Action (*Lis Pendens*) ("LP Motion") (V1 E4 and V3 E18) is summarized below.

Petitioner's LP Motion

8. Petitioner's LP Motion was brought on the grounds, *inter alia*, that (a) an email sent to Petitioner by Plaintiff/Real Party in Interest Larry Geraci ("Geraci") (the "Confirmation Email") and other evidence presented in the case was undisputed, uncontroverted and case dispositive in nature because it proved that Petitioner and Geraci had never executed a final, legally-binding agreement for the purchase of Petitioner's real property ("Property"), (b) Geraci had not met, nor could he ever meet, his burden of proof to establish by a preponderance of evidence the probable validity of any claim of an ownership interest in the Property, (c) Geraci's own writings constituted willful and knowing misrepresentations made for the specific purpose of defrauding Petitioner, (d) Geraci's case is meritless, and (e) the lawsuit and *lis pendens* were filed for the specific purpose of coercing Petitioner to settle despite the fact that Geraci's case was meritless.

9. Geraci opposed the motion arguing that the evidence was barred by the statute of frauds and parol evidence rule, and supported his argument with a declaration executed April 9, 2018 alleging, *inter alia*, that he had sent the Confirmation Email *by mistake* – the very first time he raised this "mistake" after having had numerous opportunities during the preceding eleven months since he filed the lawsuit. (*See* V2 E10.)

10. At the April 13, 2018 hearing, I argued that the *lis pendens* should be expunged because Geraci's case, premised on a breach of contract, lacked merit and, therefore, Geraci had no viable claim to the Property. I further argued that neither party had considered the document Geraci disingenuously claimed to be the parties' completely integrated agreement to be a final contract. Months of communications between the parties reflect only that the final contract had not been reduced to writing. And until filing his Complaint, Geraci never treated the document as the parties' contract, nor

did he even reference it while his attorney, Gina Austin, was writing and sending drafts of a Purchase and Sale Agreement for the Property.

11. I discussed the document referred to in my moving papers as "The Confirmation Email," and neither Judge Wohlfeil nor Geraci's counsel, Michael R. Weinstein, would even engage in that line of discussion.

12. I also made an oral motion at the Court take testimony of a witness at the hearing, my motion was denied on ground that the Court was not permitted to do so, notwithstanding the fact that a motion to expunge a *lis pendens* is one of the few motions when the Court may take testimony at hearing.

13. Following oral argument, the Court denied the LP Motion on the grounds set forth in its April 13, 2018 Minute Order. *See* V1 E3.

I declare under penalty of perjury according to the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 20, 2018 at San Diego, California.

/s/ Jacob P. Austin
JACOB P. AUSTIN

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Defendant/Petitioner Darryl Cotton ("Petitioner") respectfully petitions this Court for review of Respondent's orders denying (i) Petitioner's *Ex Parte* Application for Appointment of a Receiver ("Receiver Motion")[1] and (ii) Motion for Judgment on the Pleadings ("MJOP")[2] in San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL.[3]

A single question of law – whether or not a three-sentence document is a completely integrated agreement – determines whether this Petition is meritorious and warrants the issuance of a writ. That single question of law is not only ***dispositive*** of both orders of which Petitioner is seeking review, it is also the ***case-dispositive*** issue in the underlying suit.

Prior to the rulings giving rise to this Petition, Petitioner was representing himself *pro se* and, given that he has no legal background, he was not able to adequately defend himself in this action. The two motions giving rise to the orders at issue here were prepared and submitted by counsel for Petitioner ("Counsel"), originally retained to represent Petitioner on a

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[1] V1 E1 p.2.*

***Exhibit Citation Key: Volume No. "V#," Exhibit No. "E#," Page No(s). "p.#," Line No(s). "ln.#."**

[2] V1 E2 p.4.

[3] Petitioner notes that resolution of this Petition will also effectively adjudicate a related appeal that is premised on the same facts at issue here: Petitioner's Appeal of Judgment After Order Denying Motion for Issuance of Peremptory Writ of Mandate in a related case – Court of Appeal Case No. D073766; San Diego Superior Court Case No. 37-2017-00037675-CU-WM-CTL. *See* V1 E3 p.6-9.

limited scope basis starting April 5, 2018, following which he substituted in to fully represent Petitioner in this action beginning May 4, 2018.

As proven herein, the action filed against Petitioner not only lacks merit but, given plaintiff/real-party-in-interest Larry Geraci's ("Geraci") judicial admissions in his declaration dated April 9, 2018, it is clear this suit should have been dismissed in the early stages of this litigation pursuant to the Parol Evidence Rule ("PER") and that it represents a malicious prosecution action. *See Casa Herrera, Inc. v. Beydoun* (*Casa Herrera*) (2004) 32 Cal.4th 336, 349 ("we hold that terminations based on the parol evidence rule are favorable for malicious prosecution purposes.").

I. INTRODUCTION

A. OVERVIEW

The gravamen of this Petition is incredibly simple: Is a three-sentence document executed on November 2, 2016 (the "November Document") by Geraci and Petitioner a completely integrated agreement for the sale of Petitioner's real property (the "Property") to Geraci?

Geraci filed the underlying suit against Petitioner in **March of 2017** premised exclusively on the allegation that the November Document is a completely integrated agreement. However, Geraci's sworn declaration executed in **April of 2018** admits that on the same day the November Document was executed, *at Petitioner's specific request for written assurance of performance*, Geraci confirmed via email that the November Document is not a "final agreement" for sale of the Property (the "Confirmation Email"). Furthermore, also in his **April 2018** declaration, for the first time since filing suit in **March of 2017**, Geraci alleged that he sent his Confirmation Email by *mistake*.

Of critical import is the fact that Geraci did not raise this "mistake" allegation until Petitioner, represented by Counsel, cited for the first time

controlling case law indisputably establishing that Geraci could not bar the admission of his Confirmation Email pursuant to the PER. *See Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (*Riverisland*) (2013) 55 Cal.4th 1169, 1182 (quoting *Ferguson v. Koch* (1928) 204 Cal. 342, 347) ("'***[I]t was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud.***'") (emphasis added).

An immediate stay, coupled with appropriate writ relief, are necessary to stop what has already caused and continues to cause irreparable harm to Petitioner by forcing him to defend himself against a frivolous suit. *See Boy Scouts of America National Foundation v. Superior Court* (2012) 206 Cal.App.4th 428, 438 (writ review of order overruling demurrer was appropriate where resolution of issue in petitioner's favor "would have resulted in a final disposition" as to petitioner).

As proven below, Petitioner's case is as simple as described above. The fact that Petitioner, on these simple and undisputed facts, has been and continues to be coerced into selling his remaining interest in his Property to finance a clearly meritless suit represents a reality of our judicial system: it takes wealth to access justice. In this regard, this case represents a public policy concern as it "reinforce[s] an already too common perception that the quality of justice a litigant can expect is proportional to the financial means at the litigant's disposal." *Neary v. Regents of University of California* (*Neary*) (1992) 3 Cal.4th 273, 287.

B. AN IMMEDIATE STAY SHOULD ISSUE.

"Whether a contract is integrated is a question of law when the evidence of integration is not in dispute." *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (*Founding Members*) (2003) 109 Cal.App.4th 944, 954; *see also* CCP § 1856(d). "***The crucial threshold inquiry, therefore, and one for the court to decide, is***

whether the parties intended their written agreement to be fully integrated. [Citations.]" *See Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1510 (emphasis added).

None of the evidence at issue in this action is disputed by either party. This Petition and the underlying suit could even be adjudicated solely on Geraci's Complaint and April 2018 declaration containing judicial admissions that negate the ***dispositive*** material allegation in his Complaint; that the November Document is a final agreement for his purchase of the Property.

Petitioner does not have, nor has he had, the financial resources to meet his basic personal financial obligations, much less to undertake discovery and other measures in preparation for a trial. Additionally, Counsel is almost exclusively a criminal defense attorney and has never undertaken a civil trial or an appeal/petition such as this; he is representing Petitioner outside the scope of their original agreement solely because he believes this action against Petitioner is frivolous and its current procedural posture reflects an egregious miscarriage of justice. Petitioner respectfully requests that this Court please issue an immediate stay while it reviews this Petition. *See Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 241 (granting of extraordinary writ because party's petition presents an important issue regarding access to justice for *pro per* litigants with limited financial resources).

Additionally, pursuant to CCP § 923, this Court has virtually unlimited discretion to make orders to preserve the *status quo* in protection of its own jurisdiction, including issuance of a stay order other than supersedeas. CCP § 923; *People ex rel. San Francisco Bay Conservation & Development Com. v. Emeryville* (1968) 69 Cal.2d 533, 538-539. Once this Court understands the simplicity of this case, it becomes self-evident that Geraci is motivated to limit his liability to Petitioner. As argued in the

Receiver Motion (and below), the steps being taken by Geraci, if allowed to continue, will deprive this Court of its jurisdiction and its ability to vindicate Petitioner's rights at a later point in time. Geraci is taking steps to sabotage the main subject matter of the dispute in this action: an application for a Conditional Use Permit (the "CUP") for a Marijuana Outlet at the Property currently being processed by the City of San Diego (the "City"). In protection of its jurisdiction, this Court should immediately issue a stay and appoint a receiver to manage the CUP application process pending final resolution of this action. CCP § 923 ("The provisions of this chapter shall not limit the power of a reviewing court... ***to make any order*** appropriate to preserve the *status quo*, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction.") (emphasis added).

C. WHY WRIT RELIEF SHOULD BE GRANTED.

The Court should grant this Petition for the following reasons:

First, the underlying public policy issue here is of widespread interest. *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816. This action represents an abuse of the judiciary as Respondent is being used as an instrument to effectuate a miscarriage of justice.

Second, each of Respondent's orders is clearly erroneous as a matter of law and substantially prejudices Petitioner's case. *Babb v. Superior Court* (*Babb*) (1971) 3 Cal.3d 841, 851. As proven below, the facts are undisputed, incontrovertible, and inextricably lead to the conclusion that Respondent has erred in finding the November Document to be a completely integrated agreement.

Third, Petitioner lacks adequate means, such as a direct appeal, by which to attain relief. *See Fair Employment & Housing Com. v. Superior Court* (*Fair Employment & Housing*) (2004) 115 Cal.App.4th 629, 633 ("Where there is no direct appeal from a trial court's adverse ruling, and the

aggrieved party would be compelled to go through a trial and appeal from a final judgment, a petition for writ of mandate is allowed. Such a situation arises where the trial court has improperly overruled a demurrer."). Respondent's order denying Petitioner's MJOP is non-appealable. And, although the denial of the Receiver Motion is appealable (for which Petitioner filed an Amended Notice of Appeal on July 26, 2018),[4] Petitioner's extraordinary circumstances warrant extraordinary relief. *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 128.

Notwithstanding Petitioner's blue-collar background and his lack of legal education, on such undisputed facts, Respondent should have adjudicated this matter on its own when presented with Petitioner's arguments (even if such arguments were presented in a legally unsophisticated manner by a *pro se* litigant). This case's continued existence is a miscarriage of justice and resolution via the standard appeal process – given Respondent's rulings and the fact that the sole issue of contract integration has been fully briefed – is inadequate and highly prejudicial as the ***threshold*** issue of contract integration is ***case-dispositive*** and negates the need for discovery and a trial. Pursuant to *Mon Chong Loong Trading Corp. v. Superior Court* (2013) 218 Cal.App.4th 87, 92, "where doing so would serve the interests of justice and judicial economy, an appellate court may use its discretion to construe an appeal as a petition for writ of mandate."

Fourth, Petitioner will suffer harm and prejudice in a manner that cannot be corrected on appeal. *Valley Bank of Nev. v. Superior Court* (1975) 15 Cal.3d 652. The basis of Petitioner's Receiver Motion was evidence that Geraci is taking steps to unlawfully sabotage the City's approval of the CUP application for the Property. As more fully described below, by sabotaging

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[4] V1 E5 p.17.

approval of the CUP application, Geraci will be able to greatly diminish his special and consequential damages due to Petitioner. ***At this point in time, the real driver behind the litigation is not Geraci's good faith belief in the merits of his case; rather, it is to prejudice Petitioner by unnecessarily prolonging this litigation while unlawfully taking extra-judicial actions to limit his liability to Petitioner arising from his breach of the contract.*** Specifically, Geraci is using the political influence of his hired lobbyist, Jim Bartell ("Bartell"), to attain approval of a CUP application for an adjacent property (the "Competing CUP") (V2 E9 p.593, ln.11-19; p.391 (Notice of Application for Conditional Use Permit for Marijuana Outlet dated April 5, 2018)) in order to preclude issuance of a CUP for Petitioner's Property, thereby enabling him to limit his liability to Petitioner. If approved, the Competing CUP application would bar issuance of the CUP for the Property because the two properties are located within 1,000 feet of one another. RJN 9 p.116 at §(a)(1) (§141.0504(a)(6), City of San Diego Ordinance No. O-20793, passed February 22, 2017).

New evidence recently discovered by Petitioner reveals that the Competing CUP application was submitted by an individual named Aaron Magagna ("Magagna") who is believed to be an agent of Geraci. This evidence includes but is not limited to the fact that Magagna is represented by both Gina Austin (Geraci's attorney) and Matthew Shapiro ("Shapiro"), who works extensively with Gina Austin and Bartell. V2 E9 p.593, ln.20-27.[5]

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[5] Petitioner notes that, on or about March 12, 2018, Counsel entered Respondent's predominantly vacant courtroom during a recess and observed Shapiro in plain clothes sitting one seat away from Petitioner and his

Materially, the evidence supporting the allegations against Bartell, purportedly a reputable individual with a history of extensive civil service (he is a former chief of staff for a U.S. Congressman), is third-party testimony from a mutual client ***of both*** Bartell and Shapiro. Their client, Ms. Corina Young, had a meeting with Bartell and Shapiro to discuss investment opportunities in Marijuana Outlets. At that meeting, Bartell stated he was getting the CUP application on Petitioner's Property denied because "everyone hates Darryl." V2 E9 p.593, ln.11-16. This comment by Bartell was made in or around December of 2017. Bartell is a political lobbyist hired ***by Geraci*** to get the CUP on Petitioner's Property approved. If Geraci's case was meritorious, Bartell would be using his influence to get the CUP on the Property approved, not to have it denied.

Finally, Geraci has ceased processing the CUP for the Property, whereas the Competing CUP is moving forward through the review process at unprecedented breakneck speed such that it is likely to be approved prior to the CUP application for the Property (despite the CUP application for the

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litigation investor while they were discussing Petitioner's case. When Counsel asked Shapiro why he was there, he replied that he was observing Respondent in preparation for an upcoming hearing before Respondent in another case. After discovering that Magagna had submitted the Competing CUP and was a client of Shapiro, Counsel emailed Shapiro on May 27, 2018 expressing his concern about a number of issues, including Shapiro's possible eavesdropping on the private conversations of Petitioner and his litigation investor in court in March 2018. In response, Shapiro admitted that he had lied to Counsel; the true reason he went to court that day was to "[scope] out" the hearing on Petitioner's case, but seating himself near Petitioner was "truly a coincidence." V2 E9 p.361, ln. 11-12; V2 E9 p.363-370.

Property having been submitted approximately 17 months before the Competing CUP), thereby substantially limiting Geraci's liability to Petitioner, the scope of which will be greater if the CUP application for the Property is approved.

As further described below, this is the Catch-22 in which Geraci and his agents find themselves: they must pretend they believe the November Document is a completely integrated agreement, necessarily requiring them to pursue approval of the CUP for the Property. In reality, however, they do not want the CUP for the Property to be approved because, by doing so, their financial liability to Petitioner will exponentially increase if this case is adjudicated on the merits.

D. ISSUE PRESENTED.

There is one single question that addresses whether Respondent has abused its discretion in denying Petitioner's Receiver Motion, his MJOP and whether this Petition qualifies for extraordinary writ relief: Is the November Document a completely integrated agreement for the sale of Petitioner's Property to Geraci?

E. COUNSEL'S REQUEST.

Should this Court deny this Petition, Counsel respectfully requests, on behalf of his client and himself, that it please provide its reasoning. The urgent basis of this request is that, since the inception of this action on March 21, 2017, Respondent has ***never once*** provided its reasoning for repeatedly finding the November Document to be a completely integrated agreement. It has failed to provide such reasoning despite repeated written

and oral requests by Petitioner[6] and Counsel.[7] Petitioner's belief, supported by Counsel's professional opinion (and whose ethical obligations require him to be truthful with his client), is that there is complete lack of any factual or legal support for Geraci's Complaint and Respondent's rulings. This belief by Petitioner – coupled with the fact that Respondent has stated from the bench that it is personally acquainted with opposing counsel and "does not believe they would act unethically"[8] by bringing forth a meritless case – has led Petitioner to believe that Respondent is actively conspiring against him with Geraci and opposing counsel.

On March 8, 2018, Petitioner underwent an Independent Psychiatric Assessment ("IPA") by Dr. Marcus Ploesser who works as a psychiatrist for the Department of Corrections for the State of California (in addition to his own private practice). Relevantly, his declaration summarizing his findings from the IPA states the following:

> Furthermore, [Petitioner]'s description of his nightmares include vivid scenes of violence towards the attorneys for plaintiff that he believes are not acting in a professional manner. [Petitioner] believes that the attorneys representing plaintiff are "in it together" with the plaintiff to use the lawsuit to "defraud" him of

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[6] *See, e.g.*, V1 E6 p.22, ln.21 – .23, ln.1 ("***I BEG the Court at the hearing to please articulate to me (i) which facts in the record and (ii) on what legal authority it was persuaded that I am not going to prevail on the merits on my cause of action for breach of contract.***") (emphasis in original).

[7] *See, e.g.*, V3 E21 p.1229-1234.

[8] V1 E8 p.254, ln.6-10.

> his property. This point is one of the main foci of his expressed mental distress.
>
> [Petitioner]'s distress due to his perception of a conspiracy against him by attorneys is amplified by what he believes is the Court's disregard for the evidence and arguments he has presented. He states he has never been provided the reasoning for the denial of any relief he sought. ***[Petitioner] expressed that at certain points during the course of the litigation he believed the trial court judge was part of the perceived conspiracy against him.***

V1 E8 p.336, ln.6-21 (emphasis added).

Thus, in the interest of justice and for the mental well-being of Petitioner, Counsel and Petitioner respectfully request that this Court please not issue a summary denial should it find that, notwithstanding the Confirmation Email (and other parol evidence), the November Document *is* a completely integrated agreement.

F. AUTHENTICITY OF EXHIBITS.

All exhibits accompanying this Petition are true and correct copies of the original documents on file with the trial court. Such exhibits are incorporated by this reference as though fully set forth herein. The exhibits are paginated consecutively, and page references in this Petition are to the consecutive pagination.

II.

MATERIAL FACTUAL AND PROCEDURAL BACKGROUND.

A. NEGOTIATIONS FOR THE PROPERTY.

In the Summer of 2016, Geraci was one of several parties who contacted Petitioner seeking to purchase the Property to apply for a CUP and operate a Marijuana Outlet at the Property (the "Business").[9] During these negotiations, Geraci represented that (i) he was a California licensed Real Estate Agent;[10] (ii) he was an Enrolled Agent with the IRS;[11] (iii) he was the Owner and Manager of Tax and Financial Center, Inc. (a sophisticated accounting and financial advisory services firm);[12] (iv) preliminary due diligence on the Property by his experts had revealed a zoning issue which, unless *first* resolved, would prevent the City from even *accepting* a CUP application on the Property (the "Zoning Issue"); (v) through his "professional relationships" and hired lobbyists, he was in a unique position to have the Zoning Issue resolved; (vi) he was highly qualified to operate the Business because he owned and operated multiple cannabis dispensaries in the City;[13] (vii) stated that he could not put the CUP in his name because of the fact that he was an Enrolled Agent with the IRS and the federal

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[9] *See, e.g.,* V2 E9 p.381, ln.11-14.

[10] *Id.* at ln.15-16 (Petitioner's Declaration); p.582 (Accurint Professional Background Report).

[11] *Id.*

[12] V2 E9 p.381, ln.16-17 (Petitioner's Declaration); p.573 at ¶2 (Accurint Professional Background Report).

[13] V2 E9 ln.21-22.

government takes a negative stance against marijuana;[14] and (viii) therefore, Geraci suggested his office manager, Rebecca Berry ("Berry"), was an individual who could be trusted to be the applicant on the CUP application because, *inter alia*, she helped manage his other marijuana dispensaries.[15]

On or around October 31, 2016, Geraci asked Petitioner to execute Form DS-318 (Ownership Disclosure Statement) – a required component of all CUP applications. Geraci told Petitioner that he needed the executed Ownership Disclosure Statement to show third-party experts that he had access to the Property in connection with his planning and lobbying efforts toward resolution of the Zoning Issue. The Ownership Disclosure Statement

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[14] V2 E9 p.582, ¶3.

[15] Petitioner notes that Geraci has been sanctioned in at least three other matters for owning/managing illegal marijuana dispensaries in San Diego, California: *City of San Diego v. The Tree Club Cooperative* Case No. 37-2014-00020897-CU-MC-CTL, *City of San Diego v. CCSquared Wellness Cooperative* Case No. 37-2015-00004430-CU-MC-CTL and, *City of San Diego v. LMJ 35th Street Property LP, et al.,* Case No. 37-2015-000000972. *See* RJNs 1-6, p.1-40. Furthermore, Bus. & Prof. Code § 26057(b)(7) provides that "[t]he licensing authority may deny the application for licensure or renewal of a state license if... [t]he applicant, or any of its officers, directors, or owners, has been sanctioned by a licensing authority or a city, county, or city and county for unauthorized commercial cannabis activities, has had a license suspended or revoked under this division in the three years immediately preceding the date the application is filed with the licensing authority." Petitioner believes that the true reason Geraci suggested Berry as his agent was to circumvent applicable disclosure laws.

identifies Berry as the "Tenant/Lessee" of the Property.[16] Petitioner has never met Berry and has never entered into any form of contract with Berry. Additionally, on October 31, 2016, and unbeknownst to Petitioner, Berry (i) executed Form DS-190 (Affidavit for Medical Marijuana Consumer Cooperatives for Conditional Use Permit (CUP)), stating she is the "Owner" of the Property, [17] and (ii) submitted the current CUP application for the Property to the City without Petitioner's knowledge or consent[18].

Notably, the CUP application required Berry to disclose all parties with an interest in the CUP. In relevant part, the CUP application form states: "Please list below the owner(s) and tenant(s) (if applicable) of the above referenced property. The list **must** include the names and addresses of **all** persons who have an interest in the property, recorded or otherwise, and state the type of property interest (*e.g.*, tenants who will benefit from the permit, all individuals who own the property)."[19]

Thus, Berry, acting as Geraci's agent, knowingly omitted his name as an individual who had an interest in the Property and CUP application, and stated that *she* was the owner of the Property in violation of applicable disclosure laws and requirements. These facts, when coupled with the evidence that Geraci was previously sanctioned on several occasions for operating illegal marijuana dispensaries, makes it clear that he has used his employee/agent as his proxy to acquire a prohibited interest in a Marijuana Outlet. *See* RJNs 1-6, p.1-40.

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[16] V2 E9, p.382, ln.14-18; p.558.

[17] V2 E9 p.559.

[18] V2 E9 p.386, ln.25 – p.397, ln.5.

[19] V2 E9 558 (emphasis added).

B. THE JOINT-VENTURE AGREEMENT IS FORMED.

On the morning of November 2, 2016, Petitioner was still in negotiations with various parties for the Property.[20] Later that day, Petitioner and Geraci entered into an oral joint-venture agreement (the "JVA") pursuant to which, *inter alia,* (i) Petitioner would sell his Property to Geraci; and (ii) Geraci would finance the acquisition of the CUP with the City and development of the Business at the Property. The JVA had a condition precedent: if the CUP was ***approved***, then Geraci would, *inter alia,* provide Petitioner (i) a total purchase price of $800,000 for the Property; (ii) a 10% equity position in the Business; and (iii) the greater of $10,000 or 10% of the net profits of the Business on a monthly basis. If the CUP was ***denied***, Petitioner would keep both his Property *and* the agreed-upon $50,000 non-refundable deposit ("NRD") and the transaction would not close.[21] In other words, the approval and issuance of the CUP at the Property was a condition precedent for closing on the sale of the Property.

At that meeting, Geraci provided $10,000 in cash toward the agreed-upon $50,000 NRD. Geraci then had Petitioner execute a three-sentence document to memorialize his receipt thereof – the November Document. Geraci then promised, *inter alia,* (i) to have his attorney, Gina Austin, *promptly* reduce the JVA to writing and (ii) to not submit the CUP application to the City until he paid the balance of the NRD to Petitioner.[22] Later that same day, November 2, 2016, the following communications took place between Geraci and Petitioner:

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[20] V2 E9 p.382, ln.10-13; p.428-486.

[21] *Id.* at p.382, ln.19 – p.383, ln.2.

[22] *Id.* at p.383, ln.8-14.

At 3:11 p.m., Geraci emailed Petitioner a copy of the November Document which states:

> [Petitioner] has agreed to sell the property located at 6176 Federal Blvd. CA for a sum of $800,000 to Larry Geraci or assignee on the approval of a Marijuana Dispensary. (CUP for a dispensary) [¶] Ten Thousand dollars (cash) has been given in good faith earnest money to be applied to the sales price of $800,000 and to remain in effect until license is approved. [Petitioner] has agreed to not enter into any other contacts *[sic]* on this property.

V2 E9 p.492-495.

At 6:55 p.m., Petitioner replied:

> Thank you for meeting today. Since we executed the Purchase Agreement in your office for the sale price of the property I just noticed the ***10% equity position*** in the dispensary was not language added into that document. I just want to make sure that we're ***not*** missing that language in any ***final agreement*** as it is a factored element in my decision to sell the property. ***I'll be fine if you would simply acknowledge that here in a reply.***

Id. at p.497 (emphasis added).

At 9:13 p.m., Geraci replied: "***No no problem at all***" (*i.e.*, the Confirmation Email). *Id.* (emphasis added).

Thus, because Petitioner recognized the November Document read like both a receipt and a contract, yet contained only some of the terms of the

final agreement, he requested and received from Geraci written assurance of performance (*i.e.*, that the "final agreement" would contain his "10% equity position"). Having received Geraci's Confirmation Email, Petitioner proceeded in good faith believing Geraci's representations that Gina Austin would reduce the JVA to writing and Geraci would honor their agreement.

C. GERACI BREACHES THE JVA AND ATTEMPTS TO DEPRIVE PETITIONER OF HIS BARGAINED-FOR EQUITY POSITION IN THE BUSINESS.

For approximately five months after the November Document was executed, the parties exchanged numerous emails, texts and calls regarding various issues related to the Zoning Issue, CUP application, drafts of the JVA for the sale of the Property and Petitioner's equity position in the Business. During that time however, Geraci continuously failed to accurately reduce the JVA to writing, pay the balance of the NRD, and provide substantive updates regarding his progress in resolving the alleged Zoning Issue – all leading to Petitioner's belief that Geraci was attempting to deprive him of his 10% equity position in the Business.

Attached as "Exhibit 5" to Petitioner's Declaration in support of his Receiver Motion are copies of ***all*** 15 of the email communications that ever took place between Petitioner and Geraci until the filing of the underlying suit spanning the period from October 24, 2016 to March 21, 2017 (the "Email Communications"). V2 E9 p.488-555.

Attached as "Exhibit 2" to Petitioner's Declaration in support of his Receiver Motion is a copy of ***all*** text messages (totaling approximately 550) that ever took place between Petitioner and Geraci and which span the period of July 21, 2016 to May 8, 2017 (the "Text Communications"). *Id.* at p.393-421.

These Text and Email Communications have been provided to Respondent in numerous filings and Geraci has never disputed their authenticity. *See, e.g.,* V2 E9 p.343-421 and V1 E8 p.256-328.

All of the Email and the Text Communications directly prove or unilaterally support the conclusion that (i) the November Document is not a completely integrated agreement; and (ii) the parties were working to reduce the JVA into two agreements before the relationship became hostile – one agreement to provide for the sale of the Property and a second "Side Agreement" to provide for Respondent's 10% equity position in the Business.

Notable communications include the following:

On February 27, 2017, Geraci emailed Petitioner: "Attached is the draft purchase of the property for 400k. The additional contract for the 400k should be in today and I will forward it to you as well."[23] The attached document is titled: "AGREEMENT OF PURCHASE AND SALE OF REAL PROPERTY" (the "Draft Purchase Agreement").[24]

On March 2, 2017, Geraci emailed Petitioner a draft agreement entitled "SIDE AGREEMENT" that was supposed to provide for, *inter alia*, Petitioner's 10% equity position (the "First Draft Side Agreement").[25] The next day, March 3, 2017, Petitioner replied:

> Larry, [¶] I read the Side Agreement in your attachment and I see that no reference is made to the ***10% equity position*** as per my Inda-Gro

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[23] V2 E9 p.501-502.

[24] *Id.* at p.503-528.

[25] *Id.* at p.529-536.

> GERL Services Agreement (see attached) in the new store. In fact para 3.11 [*stating we are not partners*] looks to avoid our agreement completely. It looks like counsel did not get a copy of that document. Can you explain?[26]

Petitioner followed up with Geraci later that day, seeking specific confirmation that Geraci had received the email and understood his concern: the draft did not reflect they *were partners* in the Business.

Petitioner texted: "***Did you get my email?***"[27]

Geraci replied one minute later, "***Yes I did I'm having her rewrite it now[.] As soon as I get it I will forward it to you***" (the "Partnership Confirmation Text").[28] Thus, in his response to Petitioner's concern that they were not partners, Geraci did not deny the accusation, but confirmed that his attorney would address that concern.

On March 6, 2017, Petitioner let Geraci know he would be attending a local cannabis event at which Gina Austin would be the keynote speaker. Geraci texted Petitioner he could speak with Gina Austin directly at the event regarding revisions to the agreements: "***Gina Austin is there she has a red jacket on if you want to have a conversation with her.***"[29] Petitioner was not able to make the event, but Joe Hurtado ("Hurtado") – a transaction adviser whom Petitioner had engaged on a contingent basis to help him sell the

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[26] V2 E9 p.537 (emphasis added).

[27] V2 E2 p.421 (emphasis added).

[28] *Id.* (emphasis added).

[29] *Id.* (emphasis added).

Property to a new buyer if Geraci breached the agreement – did attend.[30] Hurtado spoke with Gina Austin, letting her know that Petitioner would not be attending and that he was concerned because the First Draft Purchase Agreement Petitioner had received did not contain a provision regarding Petitioner's 10% equity interest in the Business.[31] Gina Austin confirmed she was working on reducing the JVA to writing.[32]

The next day, on March 7, 2017, Geraci emailed Petitioner a revised Side Agreement ("Second Draft Side Agreement") drafted by Gina Austin:[33] In that email Geraci wrote:

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

Id. at p.541-542 (the "March Request Email").

The March Request Email clearly and plainly reflects that Geraci had an *established obligation* of $10,000 and he is seeking a concession *from* Petitioner – specifically, a reduction of $5,000 per month for six months while the Business ramped-up.

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[30] V2 E9 p.385, ln.6-13.

[31] *Id.* at p.591 ln.8-18.

[32] *Id.* at ln.19-21.

[33] V1 E8 p.329 (screen shot of metadata of the Second Draft Side Agreement showing that Gina Austin is the author of the document and that it was created on March 6, 2017).

The Second Draft Side Agreement provided for Petitioner to receive 10% of the net revenues of the Business, but did not provide for the 10% equity position as agreed to in the JVA. V2 E9 p.543-546.

On March 14, 2017, having grown deeply suspicious of Geraci's continuous failure to accurately reduce the JVA to writing, Petitioner contacted the City and discovered that Geraci had already submitted a CUP application for the Property. V2 E9 p.386, ln.25 – p.387, ln.11; p.557-561.

On March 16, 2017, Petitioner emailed Geraci:

> [W]e started these negotiations 4 months ago and the drafts and our communications have not reflected what we agreed upon and are still far from reflecting our original agreement. Here is my proposal, please have your attorney Gina revise the Purchase Agreement and Side Agreement to incorporate all the terms we have agreed upon so that we can execute final versions and get this closed. [¶] I really want to finalize this as soon as possible – ***I found out today that a CUP application for my property was submitted in October, which I am assuming is from someone connected to you.*** Although, I note that you told me that the $40,000 deposit balance would be paid once the CUP was submitted and that you were waiting on certain zoning issues to be resolved. Which is not the case. [¶] Please confirm by Monday 12:00 PM whether we are on the same page and you plan to continue with our agreement. Or, if not, so I can return your $10,000 of the $50,000 required

> deposit. If, hopefully, we can work through this, please confirm that revised final drafts that incorporate the terms above will be provided by Wednesday at 12:00 PM....

V2 E9 p.547-548 (emphasis added).

The next day, Geraci texted Petitioner: "***Can we meet tomorrow [?]***" *Id.* at p.416 (emphasis added).

Petitioner replied in relevant part via email:

> Larry, I received your text asking to meet in person tomorrow. I would prefer that until we have final agreements, that we converse exclusively via email.... ***You lied to me***, I found out yesterday from the City of San Diego that you submitted a CUP application on October 31, 2016 BEFORE we even signed our agreement on the 2nd of November. There is no situation where an oral agreement will convince me that you are dealing with me in good faith and will honor our agreement. We need a final written, legal, binding agreement. Please confirm, as requested... that you are honoring our agreement and will have final drafts ... by Wednesday at 12:00 PM.

V2 E9 p.549 (emphasis added).

Thereafter, Geraci repeatedly refused to provide Petitioner assurance of performance (*i.e.*, that he would reduce the JVA to writing). V3 E13

p.887-890. Thus, Petitioner terminated the JVA with Geraci[34] and sold the Property to a third-party on March 21, 2017 (the "Third-Party Sale"). *Id.* at p.895-907.

D. GERACI FILES A COMPLAINT ALLEGING THE NOVEMBER DOCUMENT IS THE "FINAL AGREEMENT."

On March 22, 2017, the day after Petitioner terminated the JVA with Geraci, counsel for Geraci, Michael R. Weinstein ("Weinstein"), emailed Petitioner the Complaint, premised solely on the allegation that the November Document is a completely integrated agreement for the Property. V2 E12 p.644, ln.12-17. Geraci's Complaint alleges:

> (i) On November 2, 2016, [Geraci] and [Petitioner] entered into a written agreement for the purchase and sale of the [Property] on the terms and conditions stated therein.... [and]
> (ii) [Petitioner] has anticipatorily breached the contract by stating that he will not perform the written agreement according to its terms. Among other things, [Petitioner] has stated that, contrary to the written terms, the parties agreed to a down payment... of $50,000... [and] he is entitled to a 10% ownership interest in the [Property.]

V2 E11 p.625, ln.15-17; p.626, ln.6-11.

Geraci's allegation in his Complaint that the November Document is the final agreement for the Property is directly and completely contradicted by his Confirmation Email sent within hours of the execution of the

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[34] V3 E13 p.885.

November Document, as well as by his Email and Text Communications which followed.[35]

E. PETITIONER'S *EX PARTE* APPLICATION AND COUNSEL'S ETHICAL DILEMMA.

On April 4, 2018, Counsel filed an *Ex Parte* Application for Order (1) Shortening Time on [Petitioner]'s Motion to Expunge Notice of Pendency of Action (*Lis Pendens*); and (2) to Compel the Attendance and Testimony of Larry Geraci (the "LP Motion"). V3 E13. As set forth in his supporting declaration and in the moving papers, Counsel declared under penalty of perjury the following:

> In preparation for representing [Petitioner] on his Motion to Expunge the Notice of Action I have, *inter alia*, reviewed (i) every filing in both of [Petitioner]'s actions with Mr. Geraci (Case No. 37-2017-00010073-CU-BC-CTL) and the City of San Diego (37-2017-00037675-CU-WM-CTL); (ii) every document produced to and from [Petitioner] via discovery; (iii) every single email to and from [Petitioner]'s professional and personal email accounts between October 1, 2016 and March 31, 2017; and (iv) interviewed over 17 individuals who were in constant written communications and/or working with [Petitioner] on a daily basis during the same time

[35] Petitioner filed a Second Amended Cross-Complaint alleging, *inter alia,* that the November Document is not the final agreement between the parties. V2 E12 p.635-p.659.

> period noted and which gave rise to the events leading and related to this action.

V3 E13 p.676, ln.10-17.

This statement was presented to Respondent in a section called "Counsel's Ethical Dilemma." V3 E13 p.667, ln.1 – p.671, ln.5. Simply stated, Counsel was representing Petitioner at that point in time on a limited basis, solely for Petitioner's LP Motion, and his review of the record revealed that there was no factual or legal basis to justify any of Respondent's rulings finding – either directly and/or impliedly – that the November Document is a completely integrated agreement for the sale of the Property. Additionally, Counsel's review of the case record revealed that, at a hearing on a motion by Geraci to compel discovery on January 25, 2018, Respondent began the hearing by stating that he was personally acquainted with opposing counsel and that he did not believe they would act unethically by bringing forth a meritless suit.[36]

As stated in the moving papers for the LP Motion, "...Counsel respectfully notes that if [Respondent] is correct in his conclusion regarding the lack of probable cause in this case, and based on his [review of the evidence noted above], then it can ***appear*** that this Court is biased against [Petitioner]. Thus, restated, Counsel's Ethical Dilemma is that he *believes* [Respondent's] maintenance of this action is not reasonable in light of the evidence which has been presented; but he neither believes [Respondent] to be biased against [Petitioner] nor that it would allow its alleged relationship with counsel for Geraci, even if true, to affect its impartiality." V3 E13 p.669, ln.14-19 (emphasis in original).

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[36] V1 E8 p.254, ln.6-10.

F. THE MOTION TO EXPUNGE THE *LIS PENDENS* ON PETITIONER'S PROPERTY.

For over a year prior to the LP Motion, Geraci argued that the PER bars his written promise to provide Petitioner a "10% equity position" in the Business (*i.e.*, the Confirmation Email) and other parol evidence. *See, e.g.*, V3 E15 p.1084-1103. In Petitioner's April 4, 2018 LP Motion, he cited – for the first time in the action – the seminal cases of *Tenzer v. Superscope, Inc.* (*Tenzer*) (1985) 39 Ca1.3d 18 and *Riverisland, supra,* 55 Cal.4th 1169 that indisputably preclude Geraci from using the PER and/or the SOF "as a shield to prevent proof of [his own] fraud." V1 E8 p.247 ln.9-21

In his opposition to the LP Motion citing *Tenzer* and *Riverisland*, Geraci provided a declaration executed on April 9, 2018 admitting that he sent the Confirmation Email promising to provide Petitioner a "10% equity position" in the Business, but alleging that (i) he sent the Confirmation Email by *mistake* because he meant to respond *only* to the first sentence of Petitioner's email thanking him for meeting earlier that day and *not* to the second, third or fourth sentences requesting written confirmation of Petitioner's equity position; and (ii) on November 3, 2016, he called Petitioner who ***orally agreed*** that the November Document is a completely integrated agreement and that he was not entitled to an equity position in the Business (the "Oral Disavowment"). V2 E10 p.617, ln.21–p.618, ln.16.

This purported Oral Disavowment by Petitioner was raised by Geraci for the first time in his April 2018 declaration. In support of this allegation, Geraci provided his redacted cell phone record showing his call to Petitioner on November 3, 2016 at **12:40 p.m.** (V3 E16 p.1113), ostensibly to support his contention that he realized his mistake early the next day and called Petitioner to fix his mistake. However, the redacted portion of Geraci's phone record includes what was either a less than one minute call or a missed incoming call from Petitioner at **12:38 p.m.** reflecting that Geraci was simply

returning Petitioner's call two minutes later at 12:40 p.m. *See* RJN 7 at p.60. Additionally, the phone records reflect that Petitioner and Geraci spoke several times the preceding day, that day, and numerous times thereafter. *Id.* at p.60-82.

Geraci's position is that the record of his three-minute call to Petitioner on November 3, 2017 is "substantial evidence" that Petitioner did, in fact, orally disavow his equity position in the Business. However, when that individual cell phone call is viewed against the entire record, the fact that Petitioner called Geraci *first* that day and the parties were in constant communications during that period of time, it becomes clear that Geraci's *selective* presentation of the evidence of a single cell phone call on that particular day is a clear misrepresentation. Geraci presented Respondent with a highly redacted copy of his phone records in order to give that exact misrepresentation.

Further, in his opposition to the LP Motion, Geraci argued that the draft agreements – the Draft Purchase Agreement, the First Draft Side Agreement, and the Second Draft Side Agreement – forwarded to Petitioner after November 2, 2016 were attempts to renegotiate the deal to include employment for Petitioner. V2 E10 p.617, ln.21–p.618, ln.25. Respondent subsequently denied the LP Motion without addressing the Confirmation Email and premised its ruling on two factually incorrect statements.

First, Respondent's order incorrectly states that the draft agreements provided by Petitioner "appear to be unsuccessful attempts to negotiate changes to the original agreement." V3 E18 p.1149, ¶3. Respondent does not state what language in any of the draft agreements offers support for such a conclusion. The recitals to the draft agreements plainly and clearly reflect that the parties had not yet executed a purchase agreement for the sale of the Property. Furthermore, none of the drafts contain a provision for, or even mention, potential employment of Petitioner of any kind by Geraci. V2 E9

p.503-528, 531-536. The failed "negotiation" statement by Respondent, on which it premised its ruling, is completely devoid of any factual support and clearly contradicted by the plain language in the drafts.

Second, Respondent's order states "the documents [Petitioner] offers in support of his Motion were created ***after*** November 2, 2016...." V3 E18 p.1149, ¶3 (emphasis added). This statement is factually and obviously incorrect. The timestamp on the Confirmation Email proves it was created on the very same day as the November Document, within hours of its execution, and in reply to the same email in which Geraci first sent Petitioner a scanned copy of the November Document. V2 E9 p.492-497.

To be incredibly clear on this point: Respondent's order, on its face, makes it clear that after a year presiding in this action, on the ***threshold*** and ***case-dispositive*** issue, Respondent is not aware that the single most critical piece of evidence – proving Geraci's lawsuit is frivolous – was created within hours of and on the SAME DAY as the November Document.

G. THE MOTION FOR JUDGMENT ON THE PLEADINGS ("MJOP").

Notwithstanding Respondent's order denying the LP Motion on clearly factually incorrect grounds, Counsel, believing Respondent did not find Petitioner credible, hoped to get through to Respondent with simple and undisputed facts. Thus, Counsel prepared and submitted Petitioner's MJOP[37] that focused solely on the question of contract integration. V3 E19 p.1160,

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[37] Counsel notes that he became attorney of record on May 4, 2018 and the deadline to submit a motion for summary judgment was on April 29, 2018. Thus, he had no time to prepare the motion for summary judgment and the only vehicle left to him to summarily end the meritless litigation was via an MJOP.

ln.21-22 ("The sole and dispositive issue in this MJOP is whether the November Document is a completely integrated agreement.").

Respondent issued its tentative ruling denying the MJOP without addressing or providing its substantive reasoning for doing so. V3 E19 p.1227. Counsel also believed he may have lost credibility with Respondent for having referenced Petitioner's allegations of extra-judicial actions by Geraci attempting to force Petitioner to settle. Thus, Counsel asked a colleague to second chair the oral hearing on the MJOP. As the transcript clearly reflects, the ONLY issue on which Counsel and co-chair requested Respondent to focus was the issue of contract integration. Respondent repeatedly refused three separate requests to address the issue:

> **THE COURT:** Good morning to each of you two. Interesting motion, particularly combined with your request for judicial notice. Is there anything else that you'd like to add?
>
> **MR. AUSTIN:** Well, I would like an explanation. So Mr. Geraci, the plaintiff in this case, he submitted the declaration admitting essentially that –
>
> **THE COURT:** It's the "essentially" part that I don't agree with. You make those same comments in your paper. There's four separate causes of action…
>
> **THE COURT:** The court wasn't persuaded that even if I were grant the request to take judicial notice of a declaration granted of a party opponent, it's still not dispositive of the entire complaint. And that's what your motion is directed to, isn't it.

MR. AUSTIN: Well --

THE COURT: -- in it's entirety? *[sic]*

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

THE COURT: Not so sure if I agree with that entire analysis.

Anything else, counsel?

MR. AUSTIN: Well, I was just wondering if you could explain to me, if you believe as a matter of law, the three-sentence contracts that plaintiff claims is an integrated contract. If you believe that to actually be a fully integrated contract.

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

CO COUNSEL: Your Honor, if I may, I'm co counsel on behalf of [Petitioner].

Your Honor, the only thing we really want clarification in the matter whether or not the court deems the contract an integrated contract or not.

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

V1 E4 p.12, ln.5–p.13, ln.26 (emphasis added).

The record in this matter is clear: Respondent has ***never*** provided its reasoning for repeatedly finding that the November Document is a completely integrated agreement. Respondent's statement that it already has addressed the issue is factually false. Respondent, via the summary granting or denying of motions based on the merits of the underlying case, has implicitly found that the November Document is a completely integrated agreement; but, again, it has ***never*** provided its reasoning for deciding so. And, given Respondent's order denying the LP Motion based upon factual findings clearly contradicted by undisputed evidence, it is clear Respondent does not even understand the import of the Confirmation Email or the prejudice Respondent's lack of understanding is causing Petitioner.

H. STATEMENT OF DISQUALIFICATION AND COMPLAINTS TO THE CALIFORNIA STATE BAR ETHICS COMMITTEE.

Given Respondent's admission that it is personally familiar with opposing counsel and it does not believe they are capable of acting unethically, coupled with unsupported factual findings, false statements contained in Respondent's orders and at oral hearings, and its repeated refusal to address the ***threshold*** and ***case-dispositive*** question of contract integration, Counsel will be filing a Verified Statement of Disqualification pursuant to CCP § 170.1(a)(6)(iii) and CCP § 170.1(a)(6)(B) requesting the Respondent judge to recuse himself. The request is premised primarily on

the grounds that a "person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

Additionally, Petitioner (not through Counsel) will be filing a complaint with the State Bar of California against all other attorneys in this matter regarding their filing, maintaining, and/or ratifying a frivolous lawsuit. Petitioner's complaint will contain Counsel's Verified Statement of Disqualification and this Petition.

III. STANDARD OF REVIEW.

"The Code of Civil Procedure provides that mandate 'may be issued ... to compel the performance of an act which the law specially enjoins' (§ 1085) where 'there is not a plain, speedy, and adequate remedy, in the ordinary course of law.' (§ 1086.) Although it is well established that mandamus cannot be issued to control a court's discretion, in unusual circumstances the writ will lie where, under the facts, that discretion can be exercised in only one way. [Citation]." *Babb, supra,* 3 Cal.3d at 850-851.

"'Whether a contract is integrated is a question of law when the evidence of integration is not in dispute.' [Citations.]" *Kanno v. Marwit Capital Partners II, L.P. (Kanno)* (2017) 18 Cal.App.5th 987, 1001.

IV. ARGUMENT

A. RESPONDENT HAS ABUSED ITS DISCRETION IN REPEATEDLY FINDING THAT THE NOVEMBER DOCUMENT IS A COMPLETELY INTEGRATED AGREEMENT.

"An agreement is not ambiguous merely because the parties (**or judges**) disagree about its meaning. Taken in context, words still matter. As Justice Baxter pointed out, written agreements whose language appears clear in the context of the parties' dispute are not open to claims of latent

ambiguity. *Abers v. Rounsavell* (2010) 189 Cal.App.4th 348, 356 (internal citations omitted) (emphasis added).

The PER operates to exclude evidence of a prior agreement or a contemporaneous oral agreement that contradicts terms in a writing that is intended by the parties to be a final expression of their agreement with respect to those terms. CCP § 1856(a). Parties may intend for the writing to finally and completely express only certain terms of their agreement, rather than the entire agreement. If only part of the agreement is integrated, the PER applies only to that part. *Founding Members, supra,* 109 Cal. App. 4th at 953. Unless a written agreement is intended to be "a complete and exclusive statement of the terms of the agreement," the terms of that agreement "may be explained or supplemented by evidence of consistent additional terms." CCP § 1856(b). Generally, the application of the PER to determine whether a contract is a complete integration involves a two-step analysis:[38]

1. Step One: Did the Parties ***intend*** the writing to be a complete or partial integration?

The Fourth District Appellate Court's ("4th DCA") December 22, 2017 opinion in *Kanno* is conceptually identical to Petitioner's case and the analysis described therein to determine whether the parties ***intended*** the writings at issue to be complete or partial integrations is directly and fully controlling here. In *Kanno,* plaintiff sued defendants for breach of oral contract, specific performance, and promise without intent to perform in connection with a transaction that was documented by three writings, each

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

of which had an extensive integration clause. A jury found in favor of plaintiff and the trial court held that the PER did not bar plaintiff's oral agreement and the evidence supported a finding that the parties intended the oral agreement to be part of their agreement. On appeal, as described in appellant's opening paragraph:

> The question presented by this appeal is whether a complex written $23.5 million transaction to purchase all of the assets of plaintiff's company-negotiated by Sheppard Mullin for plaintiff and Paul Hastings for defendants and including multiple separate integrated agreements comprising two binders of materials - can be anything other than a fully integrated agreement.[39]

The 4th DCA affirmed the judgment, finding the oral agreement was not made unenforceable by the PER. In analyzing the PER and whether the documents were completely integrated, the factors considered by the *Kanno* court included: (i) the language and completeness of the written agreement; (ii) whether it contains an integration clause; (iii) the terms of the alleged oral agreement and whether it might contradict those in the writing; (iv) whether the oral agreement might naturally be made as a separate agreement or, in other words, if the oral agreement were true, would it certainly have been included in the written instrument; (v) would evidence of the oral agreement mislead the trier of fact; and (vi) the circumstances at the time of the writing. *Kanno, supra,* 18 Cal.App.5th at 1007. Additionally, (vii) the terms of a

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[39] *Kanno v. Marwit Capital*, 2016 CA App. Ct. Briefs LEXIS 857.

writing "may be explained or supplemented by course of dealing or usage of trade or by course of performance." CCP § 1856(c).

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

a. The November Document does not appear to be a final agreement.

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

Given its short length, its lack of formality, its simplicity given the complicated subject matter it was intended to cover and its grammar and spelling mistakes, these factors weigh in favor of a finding that the November Document does not meet the criteria to be a completely integrated agreement.

b. The November Document does not contain an integration clause.

The presence of an integration clause is given great weight on the issue of integration and it is "very persuasive, if not controlling, on the issue." *Masterson v. Sine* (1968) 68 Cal.2d 222, 225. Conversely, the lack of an integration clause, as here, is evidence the writing is not completely

integrated. *Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 638. Thus, this factor weighs in favor of a finding the November Document is not completely integrated.

c. The terms of the oral JVA do not contradict the November Document.

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

d. The oral agreement – the JVA – would not have been included in the November Document that was meant to be a receipt.

Where a "collateral" oral agreement is alleged, the court must determine whether the subject matter is such that it would "certainly" have been included in the written agreement had it actually been agreed upon; or would "naturally" have been made as a separate agreement. *Id.* at 227. Here, the terms of the JVA as alleged by Petitioner are consistent with the November Document and the Confirmation Email, both of which provide direct, undisputed evidence that the November Document was meant to be a receipt by Petitioner of $10,000 to be applied toward the total agreed-upon $50,000 NRD. As the November Document was meant to be a *receipt*, it is *natural* that it would not have all the material terms reached in the JVA.

Furthermore, it is *natural* that the November Document was created and notarized as part of the JVA as Geraci provided Petitioner the $10,000

in CASH. No reasonable party would provide such a material amount in cash without ensuring adequate proof of its receipt.

Thus, this factor also weighs against a finding that the November Document is a completely integrated agreement.

e. A fact finder would not be misled by the admission of the Confirmation Email and other parol evidence.

Evidence of a collateral oral agreement should be excluded if it is likely to mislead the fact finder. *Id.* The court properly exercises its discretion by weighing the probative value of the extrinsic evidence against the possibility it may mislead the jury. *See* Evid. Code § 352; *Brawthen v. H & R Block, Inc.* (1972) 28 Cal.App.3d 131, 137-138 ("[*Masterson*] points out that evidence of the 'oral collateral agreements should be excluded only when the fact finder is likely to be misled....' ***This permits a limited weighing of the evidence by the trial court for the purpose of keeping 'incredible' evidence from the jury.***") (emphasis added). The undisputed Text and Email Communications are clear and not "incredible." Simply stated, the evidence would not mislead the fact finder and actually clearly establish what took place – the parties were still reducing the JVA to writing when the relationship soured because Petitioner confronted Geraci about having submitted the CUP application on the Property without finalizing the agreement or providing the remainder of the NRD.

f. Geraci's course of performance and conduct explains the meaning of the November Document – it was meant to be a receipt.

"The law imputes to a person the intention corresponding to the reasonable meaning of his language, acts, and conduct." *H. S. Crocker Co. v. McFaddin* (1957) 148 Cal.App.2d 639, 643. With the exception of the days leading up to the filing of the underlying suit by Geraci, Geraci's language, actions, and conduct all reflected that ***he*** believed that he and Petitioner and

were joint-venturers: (i) in response to Petitioner's March Request Email, Geraci sent the Partnership Confirmation Text; (ii) in response to Petitioner's comments stating the drafts Geraci forwarded did not contain his equity position, Geraci forwarded revised drafts that did provide for Petitioner to receive a portion of the net profits (albeit, not an equity position); (iii) at the same time, Geraci continued to have the CUP application for the Property processed, which, per his own Complaint, would require months – if not years – and significant capital investment. V2 E11 p.625, ln.22 – p.626, ln.1.

In addition, Geraci's March Request Email is as damning as the Confirmation Email – Geraci is asking ***of*** Petitioner a concession from his ***established obligation*** to pay $10,000 a month. V2 E9 p.541-542. Geraci's own language offers clear additional evidence that there was an agreed-upon collateral oral agreement not included in the November Document: payments of $10,000 a month.

"A party's conduct occurring between the execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean." *Banning Ranch Conservancy v. Superior Court* (2011) 193 Cal.App.4th 903, 915 (citations and quotations omitted). It was not until Petitioner repeatedly requested that Geraci provide final drafts of the JVA reflecting his equity position that there is any evidence of discord between Petitioner and Geraci. And it was not until Petitioner was served with Geraci's Complaint that Petitioner became aware that Geraci intended to misrepresent the November Document as a completely integrated agreement for the sale of the Property. Most notably, all of the undisputed Email and Text Communications exchanged between the parties throughout this period clearly reflect that the parties considered themselves joint-venturers.

"When a person makes a statement ... under circumstances that would normally call for a response if the statement were untrue, the statement

is admissible for the limited purpose of showing the party's reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." *In re Neilson* (1962) 57 Cal.2d 733, 746. If Geraci intended the November Document to be the "final agreement" as he now alleges, then he should have challenged or repudiated the Text and Email Communications reflecting that he was a joint-venturer with Petitioner. As the law understands, a failure to repudiate material allegations is a tacit admission of them. *See* Evid. Code § 1221. This is not merely a legal concept codified by law, it is also a self-evident truth that is understood by any reasonable individual. *See Keller v. Key System Transit Lines* (1954) 129 Cal.App.2d 593, 596 ("The basis of the rule on admissions made in response to accusations is the fact that human experience has shown that generally it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing.").

For the reasons set forth above, this factor supports the conclusion that the November Document is not the "final agreement" for the Property.

g. The circumstances at the time of writing clearly prove the parties did not intend the November Document to be a completely integrated agreement.

A critical point noted by the *Kanno* court in reaching its decision was the following oral exchange: "[plaintiff] insisted that [defendant] 'promise this to me.' [Defendant] paused and then said, '***[o]kay, [plaintiff], I promise.***'" *Kanno, supra*, at 1009 (emphasis added). Relying heavily on that exchange, the *Kanno* court found that "[t]he evidence supports a finding that the parties intended the terms of the [oral agreement] to be part of their [written] agreement." *Id.* Here, exactly as in *Kanno*, Petitioner emailed Geraci asking him to specifically confirm in writing (*i.e.*, promise) that a "final agreement" would contain his "10% equity position" and Plaintiff clearly and unambiguously did so: "***No no problem at all.***" V2 E9 p.497.

Step One Conclusion

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

2. Step Two: If there is an integration, is the parol evidence being offered consistent with the writing, either: (i) to explain or interpret the agreement by proving a meaning to which the language of the writing is reasonably susceptible; or (ii) to show a collateral oral agreement that was "naturally" made as a separate agreement?

We have established that the November Document is *not* a completely integrated agreement; however, the November Document and the Confirmation Email are both evidence of the JVA – the "final agreement," of which one of the final integrated terms is Petitioner's "10% equity position" in the Business. "An integration may be partial rather than complete: The parties may intend that a writing finally and completely express only certain terms of their agreement rather than the agreement in its entirety. If the agreement is partially integrated, the parol evidence rule applies to the integrated part." *Founding Members, supra,* 109 Cal.App.4th at 953 (citations omitted). Thus, the Confirmation Email and other parol evidence described above are *consistent* with the integrated terms under both Step Two factors:

First, the parol evidence – the Confirmation Email which by itself is ***dispositive*** – helps explain and interpret the November Document for what it was intended to be: a memorialization of Petitioner's receipt of $10,000 *in cash* and not the "final agreement."

Second, the parol evidence is evidence of a *collateral oral agreement* – the JVA. Again, the parol evidence clearly establishes the parties reached an agreement which was a joint-venture. At Petitioner's specific request for assurance of performance, Geraci confirmed the same day via email that a

"final agreement" would contain a "10% equity position." Months later, at Petitioner's objection to the draft agreement written by Attorney Gina Austin and forwarded by Geraci stating they were *not* partners, Geraci replied stating that he was having his attorney revise the documents and the next day Petitioner received the Second Draft Side Agreement; an updated draft that provided for him to receive 10% of the *net profits*. "A joint venture or partnership may be formed orally [citations], or 'assumed to have been organized from a reasonable deduction from the acts and declarations of the parties.' [Citation.]" *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482-483. The only reasonable deduction to be reached here, based on the undisputed communications and actions by and between the parties, is that they both considered themselves joint-venturers.

Step Two Conclusion

Thus, for the reasons set forth above, pursuant to the PER, the parol evidence is proof that the November Document is not a completely integrated agreement and is actually a receipt executed on the day the parties reached the oral agreement – the JVA.

3. The Oral Disavowment is barred by the PER.

"A short and vernacular explanation of the parol evidence rule would be that a party to a written contract cannot be permitted to urge that a contract means something which its terms simply cannot mean." *Ri-Joyce, Inc. v. New Motor Vehicle Bd.* (1992) 2 Cal.App.4th 445, 452. Geraci's Oral Disavowment – that Petitioner orally agreed over the phone to forego the equity position Geraci had promised him in the JVA and confirmed in writing in the Confirmation Email – is barred by the PER. Geraci "cannot be permitted to urge that a contract means something which its terms simply cannot mean." *Id.*

4. The Oral Disavowment is also barred by the SOF.

Geraci was a licensed real estate agent for over 25 years at the time of the execution of the November Document. *See* fn. 10. He cannot, as a matter of law, justify any detrimental reliance for failing to reduce to writing the alleged oral statements made by Petitioner on November 3, 2016. *See Phillippe v. Shapell Indus.* (1987) 43 Cal.3d 1247, 1264.

B. RESPONDENT ABUSED ITS DISCRETION IN DENYING PETITIONER'S REQUEST FOR JUDICIAL NOTICE OF GERACI'S DECLARATION RESULTING IN SEVERE PREJUDICE TO PETITIONER.

On July 13, 2018 Respondent refused to take judicial notice of Geraci's declaration on Petitioner's MJOP. V1 E2 p.004, ¶2. Pursuant to Evid. Code § 453, a trial court must take judicial notice of the matters specified in Evid. Code § 452 if a party requests it to do so and does each of the following: (i) gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable him or her to prepare to meet the request (Evid. Code § 453(a)); and (ii) furnishes the court with sufficient information to enable it to take judicial notice of the matter (Evid. Code § 453(b)). *See Four Star Electric, Inc. v. F & H Construction* (1992) 7 Cal.App.4th 1375, 1379.

Petitioner met the requirements set forth in Evid. Code § 453; thus, Respondent was required to take judicial notice of Plaintiff's statements in his declaration *even if they nullify material allegations in Geraci's Complaint. See Rauber v. Herman* (1991) 229 Cal.App.3d 942, 946 ("Where an allegation [in a party's Complaint] is contrary to law or to a fact of which the court may take judicial notice, ***it is*** to be treated as a ***nullity***.") (emphasis added).

Respondent did not provide its reasoning for failing to deny the request for judicial notice of Geraci's declaration, pursuant to Evid. Code

§ 453, thereby defeating the basis of the MJOP and severely prejudicing Petitioner. Respondent is ***forcing*** Petitioner to undertake the costly burden of discovery and to prepare for trial in a demonstrably meritless suit.

C. RESPONDENT ABUSED ITS DISCRETION IN DENYING PETITIONER'S *EX PARTE* APPLICATION FOR APPOINTMENT OF A RECEIVER.

"If jointly-owned property is in danger of being lost or destroyed or misappropriated, Respondent may appoint a receiver to protect a party's interest in the property, and such an appointment will be upheld on appeal. [CCP] § 564." *Rosenthal v. Rosenthal* (1966) 240 Cal.App.2d 927, 933. On appeal, as articulated in *Moore v. Oberg* (1943) 61 Cal.App.2d 216, 220, "[t]he ultimate fact to be found [is] whether the protection of the interest of plaintiff require[s] the appointment of a receiver." The moving party must make a showing by a "preponderance of the evidence." *Id.* at 220-221.

Petitioner has more than met his burden. As proven above, the November Document is not a completely integrated agreement. Thus, the sole basis of Geraci's Complaint fails. Geraci's own actions and the communications between himself and Petitioner for more than five months prior to the filing of his lawsuit reveal this case for what it is: frivolous. That Geraci – and, notably, his counsel – continue to prosecute this action is simply because Geraci desires to mitigate his financial liability to Petitioner.

Geraci is liable for, *inter alia*, the $10,000 monthly payments he promised Petitioner, which was an identical term bargained for by Petitioner in the Third-Party Sale. V1 E8 p.246 ln.6-10. However, Petitioner was forced to sell those monthly payments to finance this litigation. *Id.* at ln.12-14. Since the life of the CUP is ten years, Geraci's total liability on this issue is $1,200,000 at a minimum.. RJN 9 at p.143 §(i) and p.144 §(n)(1). However, Geraci will ***only*** become liable ***if*** the CUP is approved – pursuant to the condition precedent in the JVA and the terms of the Third-Party Sale.

And, again, Geraci has sole and exclusive control of the CUP application through his employee/agent, Rebecca Berry. In other words, Geraci controls the CUP application.

Given the above analysis, if Geraci loses this action because it is adjudicated on the merits, he will be liable for Petitioner's damages; the amount of which will be determined by the City's approval or denial of the CUP – again, an outcome which is solely within Geraci's control. This is absurd. And countenanced by Respondent.

In light of the foregoing, the fact that Geraci ***and*** his attorneys continue to maintain a suit lacking probable cause begs a simple question: Why would they continue to devote time, capital and resources to obtain approval of the CUP for the benefit of the Third-Party Sale? They would not; they are merely ***pretending*** to do so because they filed suit alleging their cause of action for breach of contract was meritorious. However, they actually intended to prevail by leveraging and increasing the pressure exerted on Petitioner by the litigation process knowing that he lacked the financial resources to hire an attorney. If they ***appear*** to have ceased prosecuting the CUP on the Property, that is an indirect admission that they know they brought forth a meritless suit. They are caught in a Catch-22; having to spend money to ***appear*** as though they want to have the CUP approved, but knowing that if they actually get the CUP approved and this case is adjudicated on the merits, they are just increasing the amounts of special and consequential damages they will owe Petitioner.

Further, as to the attorneys involved, it is self-evident that they would rather appear to be incompetent – and argue to the bitter end that the PER bars the Confirmation Email – than admit they were complicit in a criminal conspiracy to deprive Petitioner of his Property via a malicious prosecution action.

In support of his Receiver Motion, Petitioner provided, *inter alia*, an email dated June 1, 2018 from the City stating that Geraci had done nothing to advance the CUP application for nearly ***six months***. *See* V2 E9 p.587 ("On April 20, 2018, I had sent a letter to the project's point of contact for project inactivity and would be closing the project, due to inactivity for 90 days."). Geraci is failing to prosecute the CUP on the Property so the Competing CUP application can be approved which would result in the denial of the CUP for the Property. The evidence from the City is sufficient to have justified the appointment of a receiver. *See Brush v. Apartment & Hotel Financing Corp.* (1927) 82 Cal.App. 723, 725 (An allegation that real property is deteriorating and will continue to do so and will by the time of trial, be practically worthless because of pleaded conditions is sufficient to justify the appointment of a receiver).

Additionally, Petitioner provided the declaration of Hurtado that includes evidence that Geraci's political lobbyist – Bartell – is using his political influence with the City to have the CUP on Petitioner's Property denied and the Competing CUP submitted by Magagna approved. V2 E9 p.352, ln.6-9; *see* V2 E9 p.593, ln.11-27 (Hurtado Declaration). While these statements cannot be recognized as undisputed facts on an *ex parte* application for a receiver, in light of the fact that the case against Petitioner is meritless, Hurtado's declaration was sufficient to have required the appointment of a receiver. *See Armbrust v. Armbrust* (1946) 75 Cal.App.2d 272, 274.

At the June 14, 2018 hearing on Petitioner's Receiver Motion, counsel Andrew Flores, for Petitioner, directed Respondent to ***both*** the Competing CUP and the City's email stating that there had been no activity on the CUP application for the Property for nearly six months. V3 E21 p.1232, ln.6-20. Counsel explained to Respondent that, because the City Ordinance governing CUPs for Marijuana Outlets prohibits issuance of multiple CUPs within

1,000 feet of each other, if the Competing CUP was granted, by law it would bar issuance of the CUP for Petitioner's Property because the real property which is the subject of the Competing CUP is located less than 1,000 feet from the Property. *Id.* Counsel clearly described a race to get the Competing CUP approved and Geraci's inaction in processing the CUP application for the Property as proven ***by the City***. Respondent, without providing its reasoning, stated that it was "not persuaded [Petitioner] carried [his] burden that would warrant good cause...." V3 E21 p.1232. ln.27 – 1233, ln.2.

D. RESPONDENT ABUSED ITS DISCRETION IN DENYING PETITIONER'S MJOP.

"[An MJOP] is the equivalent of a general demurrer. This motion tests whether the allegations of the pleading under attack support the pleader's cause if they are true.... In order for judicial notice to support a motion for judgment on the pleadings by negating an express allegation of the pleading, the notice must be of something that cannot reasonably be controverted. The same is true of evidentiary admissions or concessions.... Judicial notice may conclusively defeat the pleading as where it establishes res judicata or collateral estoppel. ***The pleader's own concession may have this same conclusive effect***.... In these limited situations, the court, in ruling on a [MJOP], properly looks beyond the pleadings. But it does so only because the party whose pleading is attached will as a matter of law, or law's equivalent of judicial notice of a fact not reasonably subject to contradiction, fail in the litigation." *Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (*Columbia*) (1991) 231 Cal.App.3d at 468-469 (citations and quotations omitted) (emphasis added).

"A judicial admission is a party's unequivocal concession of the truth of a matter and removes the matter as an issue in the case. [Citations.]" *Gelfo v. Lockheed Martin Corp.* (*Gelfo*) (2006) 140 Cal.App.4th 34, 48. "[A]

court may take judicial notice of a party's admissions or concessions, but only in cases where the admission 'can not reasonably be controverted,' such as in answers to interrogatories or requests for admission, or in affidavits and **declarations** filed on the party's behalf. [Citation.]" *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 485 (emphasis added).

Geraci's declaration is a judicial admission that he sent the Confirmation Email confirming the November Document is "not" a "final agreement" on ***November 2, 2016***. Realizing he can neither dispute the authenticity of the email nor bar its admission, Geraci then opposes the legal effect of the Confirmation Email on his case with his Oral Disavowment allegation – that he sent the Confirmation Email by *mistake* and that Petitioner orally agreed the November Document is the final agreement for the sale of his Property. Geraci raises this self-serving Oral Disavowment allegation for the first time in his declaration executed ***April 9, 2018***, which is the only direct evidence Geraci puts forth to support this allegation. And, again, he did so in opposition to Petitioner's LP Motion citing *Riverisland* and *Tenzer* that established that Geraci would not be able to bar the admission of his Confirmation Email – the proof of his fraud; which, prior to then, had been the vanguard of his legal arguments in all motions before Respondent.

In *King v. Andersen* (1966) 242 Cal.App.2d 606, the plaintiff in an assault case admitted at deposition that defendant used "no force." *Id.* at 609. When defendant moved for summary judgment based on plaintiff's deposition concession, plaintiff submitted an affidavit in support of his opposition saying, in fact, defendant had applied unnecessary force. *Id.* at 610. Plaintiff disputed the meaning attributed to his deposition testimony by defendant and argued that the dispute must be submitted to the jury. *Id.* at 609-610. Respondent disagreed and dismissed the case. The Court of Appeal affirmed. *Id.* at 610. Plaintiff could not manufacture a dispute of fact by

submitting additional affidavits. "Where, as here, however, there is a clear and unequivocal admission by the plaintiff, himself, in his deposition . . . we are forced to conclude there is no *substantial evidence* of the existence of a triable issue of fact." *Id.* (emphasis in original).

Here, Geraci is attempting to do the very same thing as the plaintiff in *King*. He sent a clear and unequivocal admission that the November Document is not a final agreement on **November 2, 2016**. The procedural history of this action shows that Geraci was relying on the PER/SOF to bar the admission of the Confirmation Email. When confronted with *Riverisland* and *Tenzer* in **April of 2018**, he submits a declaration saying he sent the Confirmation Email by mistake. In support of this contention, Geraci alleges that Petitioner orally agreed the November Document is a final agreement and, therefore, such dispute should be submitted to the jury. Identical to *King*, ***Geraci's self-serving declaration should not be considered substantial evidence and he should not be allowed to blatantly fabricate a material factual dispute to continue to prosecute a frivolous action***. As noted above, he ceased prosecuting the CUP on the Property and the evidence reveals that Bartell, Geraci's agent, is using his influence with the City to have the CUP on the Property denied. In light of the fact that Geraci should lose this action on the merits, it is reasonable that Geraci is taking actions to limit his liability – that is, using his agents to sabotage the CUP for the Property and obtain approval of the Competing CUP.

In *Joslin*, the 4th DCA held that courts may take judicial notice of a fact and use it to dismiss a case "where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed." *Joslin v. H.A.S Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375. Consistent with summary judgment jurisprudence, *Joslin* held that a party cannot escape dismissal simply by offering an "explanation" of its admission and that explanations that are "inherently incredible" may simply be disregarded. *Id.*

at 376. Geraci's Oral Disavowment allegation falls squarely into this category. Thus, it is forestalled by *Joslin* as it is an "explanation" that is "inherently incredible" and should be disregarded.

To be absolutely clear on this point, when Respondent denied Petitioner's MJOP, it implicitly found the following factual allegations by Geraci to NOT be "inherently incredible." To put it more succinctly, ***this is Geraci's position and Respondent finds the following to be credible:***

(i) *Within hours* of the parties finalizing their agreement on November 2, 2016, Petitioner sent an email to Geraci *pretending* that the terms of the JVA had been reached and in which Petitioner was *already* promised a very specific "10% equity position;" (ii) Geraci *mistakenly* confirmed in writing, at Petitioner's specific request for written confirmation, Petitioner's *pretend* equity position *within hours* of the November Document being executed; (iii) Geraci, a licensed Real Estate Agent (at the time) for over 25 years, *never* sought in *any* manner to document the fact that he mistakenly sent the Confirmation Email despite knowing its legal import under the Statute of Frauds; (iv) Geraci realized, *over a year after filing suit*, that he should raise the Oral Disavowment; and (v) that Geraci did so, *coincidentally*, in response to Petitioner's motion citing, for the first time, the holdings of *Riverisland* and *Tenzer* which prevent Geraci from using the PER as a shield to bar parol evidence that is proof of his own fraud.

In *Rivera v. S. Pac. Transp. Co. (Rivera)* (1990) 217 Cal.App.3d 294, 297-299, the court granted summary judgment based on plaintiff's deposition testimony that a train was moving when he tried to enter. The court rejected plaintiff's attempt to explain his testimony that the train was moving before and after he entered, but was still at the precise moment he got on. *Id.* "When the defendant can establish an absolute defense from the plaintiff's admissions, the credibility of the admissions are valued so highly that the controverting affidavits may be disregarded as irrelevant, inadmissible or

evasive." *Id.* at 299-300 (internal quotations and citations omitted). Similarly, here, Geraci's judicial admission that he sent the Confirmation Email – which he was forced to provide in light of *Riverisland* and *Tenzer* – proves the November Document is not a completely integrated agreement for the sale of the Property. Therefore, the Confirmation Email is an "absolute defense" to Geraci's Complaint. *Id.* Pursuant to *Rivera*, Geraci's Oral Disavowment seeking to explain away Petitioner's "absolute defense" as a "mistake" should "be disregarded as...inadmissible[.]" *Id.*

The court in *Columbia* discussed the appropriateness of judicial notice "to support a motion for judgment on the pleadings by negating an express allegation of the pleading [when] the notice [is] something that cannot ***reasonably be controverted.***" *Id.* at 468 (emphasis added). At issue in *Columbia* was the trial court's granting of an MJOP based on "reliance on the terminology of an incorporated complex contract" that contradicted the pleading at issue. The court reversed, noting that "parol evidence may lead to an interpretation of the contract consistent with the pleading's express allegation." *Id.* at 470. The critical point here from the *Columbia* opinion is whether the "fact" sought to be judicially noticed "cannot reasonably be controverted." *Id.* at 468.

Here, Geraci's judicial admission, that on **November 2, 2016** he confirmed in writing that the November Document is not a completely integrated agreement, "cannot reasonably be controverted" by his own self-serving declaration raising the Oral Disavowment allegation for the first time on **April 9, 2018**. *Id.*

In summary, pursuant to well-established case law – *Joslin*, *Gelfo*, *King*, *Rivera*, *Columbia* - disposing of a case prior to trial by means of a MJOP is appropriate "where the pleader's own concession" means that *on the merits* its "cause is inevitably destined to fail." *Id.* at 469. Such is the case here. The only reason Geraci continues prosecuting this action is to further

his goal to exponentially limit his damages (and those of his agents) to Petitioner by sabotaging the approval of the CUP for the Property.

V. MAIN CONCLUSION

Geraci's litigation strategy can be summarized as follows: the November Document is a completely integrated agreement and the PER bars his Confirmation Email as evidence to contradict the terms set forth therein. However, should Respondent allow the admission of his Confirmation Email, then his Oral Disavowment allegation – that Petitioner agreed the November Document is a completely integrated agreement – will exculpate him from liability because he sent the Confirmation Email by *mistake* and he corrected that mistake *orally* over the phone the next day. In other words, if he can't prevent admission of evidence created on November 2, 2016 ***proving*** his fraud, then he will use his NEW evidence – his self-serving declaration created on April 9, 2018 - to ***disprove*** his fraud. This is absurd.

In *American Internat. Group, Inc. v. Superior Court* (1991) 234 Cal.App.3d 749, 755, the appellate court issued a writ on a petition from a denial of judgment on pleadings where the issue, as here, was purely legal on undisputed facts and of significant legal import. Discussed thoroughly above, and simply self-evident, Petitioner is the victim of a malicious prosecution action that has evolved into a civil a conspiracy orchestrated by numerous individuals seeking to mitigate their damages. If Petitioner had been represented by competent counsel and/or Petitioner had not discredited himself with Respondent (with allegations of threats by Geraci against him seeking to intimidate him into settling), this matter should have been adjudicated in Petitioner's favor in the preliminary stages of this action.

Petitioner's inability to access justice on these facts represents a severe public policy issue; it will already stand as precedent and encourage wealthy individuals to seek to use the judiciary as an instrument to effectuate a

miscarriage of justice against parties who cannot afford legal counsel to defend themselves against meritless cases. *See Neary, supra,* 3 Cal.4th at 287 (***"the quality of justice a litigant can expect is proportional to the financial means at the litigant's disposal."***) (emphasis added).

In light of the foregoing facts, and the underlying public policy concerns at issue here, Petitioner respectfully requests that this Court immediately issue a writ providing Petitioner the critically needed relief set forth below.

VI. PRAYER FOR RELIEF

Petitioner prays that this Court:

1. Grant an immediate stay of the underlying proceeding pending resolution of this Petition;
2. Issue a peremptory Writ of Mandate and/or Writ of Prohibition directing Respondent to:
    a. Vacate its Minute Order dated June 14, 2018 denying Receiver Motion;
    b. Appoint a receiver with the requisite authority and ability to supervise and pursue the City's approval of the CUP application;
    c. Vacate its Minute Order dated July 13, 2018 denying Petitioner's MJOP;
    d. Grant Petitioner's MJOP; and
    e. Order Geraci to pay the remaining costs required to immediately have the CUP application for the Property completed;

3. Award Petitioner his costs, pursuant to Rule 8.493 of the California Rules of Court and any other applicable statutes and/or rules; and

4. Grant such other relief as may be just and proper.

DATED: August 27, 2018 LAW OFFICE OF JACOB AUSTIN

By: _____
Jacob P. Austin
Attorney for Petitioner DARRYL COTTON

WORD COUNT CERTIFICATION

This brief contains 13-point font in Times New Roman typeface, and contains 13614 (permissibly) words as counted by Microsoft Word 2016, the word processing software used to generate this brief.

DATED: August 27, 2018 LAW OFFICE OF JACOB AUSTIN

By: Jacob P. Austin
Attorney for Petitioner DARRYL COTTON

EXHIBIT B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT – DIVISION ONE

DARRYL COTTON,
Defendant/Petitioner/Appellant,
v.
THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO,
Respondent.

LARRY GERACI, an individual; REBECCA BERRY, an individual; MICHAEL R. WEINSTEIN, an individual; SCOTT TOOTHACRE, an individual; FERRIS & BRITTON APC, a California corporation; GINA M. AUSTIN an individual; AUSTIN LEGAL GROUP APC, a California corporation; JIM BARTELL, an individual; BARTELL & ASSOCIATES, INC., a California corporation; ABHAY SCHWEITZER, an individual and dba TECHNE; AARON MAGAGNA, an individual; THE CITY OF SAN DIEGO, a public entity; M. TRAVIS PHELPS, MICHELLE SOKOLOWSKI, FIROUZEH TIRANDAZI, CHERLYN CAC, as individuals and as employees of THE CITY OF SAN DIEGO,
Real Parties in Interest.

Court of Appeal Case No. _____
(San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL)
and
Court of Appeal Case No. D073766
(San Diego Superior Court Case No. 37-2017-00037675-CU-WM-CTL)

EXHIBITS – VOLUME 1 of 3
[EXHIBITS 1-8, Pages 001 – 339]
TO PETITION FOR WRIT OF MANDATE, SUPERSEDEAS AND/OR OTHER APPROPRIATE RELIEF

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INDEX OF EXHIBITS TO
PETITION FOR WRIT OF MANDATE, WRIT OF SUPERSEDEAS
AND/OR OTHER APPROPRIATE RELIEF
VOLUME 1 [EXHIBITS 1 – 8, PAGES 001–339]

FILED
Clerk of the Superior Court
SEP 17 2018
By: C. Beutler, Deputy

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

LARRY GERACI, an individual,

Plaintiff,

v.

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

Defendants.

AND RELATED CROSS-ACTION

Case No: 2017-00010073-CU-BC-CTL

ORDER STRIKING DEFENDANT'S STATEMENT OF DISQUALIFICATION OF JUDGE JOEL R. WOHLFEIL

The Court has reviewed the paperwork that was filed by Defendant Darryl Cotton on September 12, 2018, entitled "Verified Statement of Disqualification" (hereafter "Statement of Disqualification"), which seeks to disqualify Judge Joel R. Wohlfeil from further presiding over the proceedings in the above-entitled case. However, the Statement of Disqualification was not properly served, is untimely, and overall fails to state any legal basis for disqualification on its face. Therefore, the Statement of Disqualification is ordered stricken for the reasons cited below.

I. Authority to Strike the Challenge.

Challenges filed pursuant to Civil Code of Procedure[1] section 170.1 are adjudicated under the procedures set forth in section 170.3. Pursuant to section 170.3, if a judge who should

[1] All further references are to the Code of Civil Procedure unless otherwise stated.

disqualify himself or herself fails to do so, any party may file with the clerk a verified written statement setting forth facts constituting grounds for disqualification. The statement seeking to disqualify the judge "shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. Copies of the statement shall be served on each party or his or her attorney who has appeared and shall be personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers." (§ 170.3 (c)(1).)

Once objection has been made, the judge may, within 10 days after service of the objection, "file a consent to disqualification" (§ 170.3(c)(3)); or file "a written verified answer admitting or denying any or all of the allegations...." (*Id.*) Failure to take any action is tantamount to consenting to disqualification. (§ 170.3(c)(4); *Hollingsworth v. Superior Court* (1987) 191 Cal.App.3d 22, 26.) However, if the statement is untimely filed, has not been served, or on its face discloses no legal grounds for disqualification, the judge against whom it is filed may strike it. (§ 170.4(b).) In striking a challenge the court is not passing on its own disqualification, but instead is passing only on the legal grounds set forth in the Verified Statement.

Should the 10-day period after service pass with the judge taking no action, the judge is deemed disqualified and has no power to act in the case. (§ 170.4(b); *Lewis v. Superior Court* (1988) 198 Cal.App.3d 1101, 1104.)

Here, the Statement of Disqualification was not properly served, is untimely, and overall fails to state any legal basis for disqualification on its face.

II. Service.

Section 170.3(c)(1) requires that a copy of the challenge for cause be personally served on the judge being challenged, or on his or her clerk provided that the judge is present in the courthouse or in chambers. Further, the 10-day period in which to respond does not begin to run until service is effected. Here, Judge Wohlfeil was not personally served, nor was his clerk served while he was present in the courthouse or in chambers. Therefore, the Statement of Disqualification is stricken for lack of service.

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III. Timeliness.

Section 170.3(c)(1) provides in part that the statement seeking to disqualify the judge "shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." The failure to timely file a statement of disqualification promptly upon discovery of the ground for disqualification constitutes a forfeiture or waiver of the right to seek disqualification. (*Tri Counties Bank v. Sup.Ct.* (*Amaya–Guenon*) (2008) 167 Cal.App.4th 1332, 1337-38.) In addition, an untimely disqualification statement may be stricken by the judge against whom it is filed. (§ 170.4(b). "Consequently, if a party is aware of grounds for disqualification of a judge but waits until after a pending motion is decided to present the statement of objection, the statement may be stricken as untimely." (*Tri Counties Bank v. Sup.Ct.* (*Amaya–Guenon*), *supra*, 167 Cal.App.4th at 1338.)

According to the Statement of Disqualification, Defendant asserts that Judge Wohlfeil is biased based on rulings made by the court at several hearings, the latest of which occurred on July 13, 2018. Yet, the present Statement of Disqualification was not filed until September 12, 2018, almost two months after Defendant first became aware of the facts supporting the alleged bias. While Defendant attributes the delay to defense counsel's schedule and other time sensitive obligations, it is clear that the Statement of Disqualification was not "presented at the earliest practicable opportunity." Therefore, the Statement of Disqualification is stricken as untimely pursuant to section 170.4(b), in addition to the reasons set forth below.

IV. The Factual Allegations.

Defendant asserts that Judge Wohlfeil is biased and should be disqualified from the present action because he made "various unsupported rulings and procedurally improper orders in this matter." Specifically, he alleges that Judge Wohlfeil improperly denied Defendant's Motion for Judgment on the Pleadings and Request for Judicial Notice, made statements indicating that the Court had a "fixed opinion" regarding the credibility of Plaintiff and Plaintiff's counsel,[2] failed to rule on the crucial threshold inquiry concerning whether there was an integrated contract, failed to

[2] Although Defendant asserts that Judge Wohlfeil made a statement that he was personally acquainted with Plaintiff's counsel and "does not believe that they would act unethically by filing a meritless suit," citing to Exhibit B, ln. 6-10; p. 1051, 25-28; p. 1055, the documents cited do not contain any such statements by Judge Wohlfeil.

explain the bases for his decisions, took procedurally improper actions which favored Plaintiff, and acted frustrated with Defendant's counsel. (See Statement of Disqualification pp. 14-16; 21; 26-29.)

Defendant is seeking to disqualify Judge Wohlfeil pursuant to section 170.1(a)(6)(A)(iii), which provides a judge is disqualified if, "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Defendant also cites to section 170.1(a)(6)(B), which provides that, "[B]ias or prejudice toward a lawyer in the proceeding may be grounds for disqualification." (§170.1.) The standard is articulated in *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97. However, there are well-established limitations on what evidence may be used to establish bias or prejudice under section 170.1(a)(6)(A)(iii). Section 170.2 expressly provides that it shall not be grounds for disqualification where the judge has "in any capacity expressed a view on a legal or factual issue presented in the proceeding, except as provided in paragraph (2) of subdivision (a) of, or subdivision (b) or (c) of, Section 170.1." In addition, a legal ruling is insufficient to establish bias or prejudice, even if the legal ruling is later determined to be erroneous. (*Dietrich v. Litton Industries, Inc.* (1970) 12 Cal.App.3d 704, 719.) Further, it is not evidence of prejudice or bias when a judge expresses an opinion based upon actual observances and in what he or she considers the discharge of his or her judicial duty. (*Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal. App. 3d 1023, 1031; *Shakin v. Board of Medical Examiners* (1967) 254 Cal. App. 2d 102, 116.) Moreover, the grounds for disqualification must be established by offering admissible evidence, rather than information and belief, hearsay or other inadmissible evidence. (See, *United Farm Workers, supra*, 170 Cal.App.3d at 106, fn.6.) Lastly, in *People v. Sweeney* (1960) 55 Cal.2d 27, 35, the California Supreme Court held that a statement of disqualification based upon the conclusions or speculation of a party "may be ignored or stricken from the files by the trial judge."

As summarized above, Defendant's claims of bias are based solely on his disagreement with the statements and legal rulings made by this Court, and therefore fall squarely within the parameters of the authorities set forth above. Such allegations, without more, cannot establish a

legal basis for disqualification. Every ruling requires the court to resolve a conflict in favor of one party and against another. The opinion formed does not amount to bias and prejudice. (*Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal. App. 4th 1210, 1219-1220.) Thus, it is clearly not legal evidence of bias that the Court made decisions regarding the evidence or issues presented, or ruled in a particular way in this case even if those decisions were, as Defendant contends, in error.

Likewise, statements made in the performance of judicial duties cannot establish a legal basis for disqualification. Judicial remarks that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings ... do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." (*Liteky v. United States* (1994) 510 U.S. 540, 555.) Further, the facts and circumstances prompting a challenge for cause must be evaluated in the context of the entire proceeding and not based solely upon isolated conduct or remarks. (*Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 171-172.)

In the present case, all of the Court's decisions and comments were made during court proceedings, in the context of the factual and evidentiary issues presented, the court's knowledge of the case, and its overall handling of the matters pending before it. As the authorities above clearly indicate, a judge must be able to issue rulings and make statements in connection with the performance of his or her judicial duties, including those concerning the sufficiency of the evidence, the credibility of parties, or any other issues before the court. Thus, any rulings or statements made by Judge Wohlfeil that Defendant believes were intemperate, unfair, or somehow favored the other party fall into the categories set forth in the legal authorities above; namely the Court expressing its views about the legal and factual issues before it, and the expression of opinion in the performance of the court's judicial duties which cannot establish a legal basis for disqualification.

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Further, the Statement of Disqualification is based solely on Defendant's conclusions and interpretation of the Court's rulings and statements. Thus, it lacks sufficient factual or evidentiary support and amounts to no more than mere speculation and conjecture, which likewise cannot form a legal basis for disqualification.

In short, the allegations made by Defendant do not show any bias on the part of the judge, nor do they support any reasonable and objective conclusion that Judge Wohlfeil is, or could reasonably be believed to be, biased. Therefore, the Statement of Disqualification is properly stricken, and this Court may hear any further matters that may come before it in this case.

V. Conclusion.

IT IS HEREBY ORDERED that the Statement of Disqualification of Judge Joel R. Wohlfeil is stricken for the reasons stated above pursuant to section 170.4(b).

This order constitutes a determination of the question of disqualification of the trial judge pursuant to section 170.3(d).

IT IS SO ORDERED.

Dated this 17 day of September 2018.

By: _____
Hon. Joel R. Wohlfeil
Judge of the Superior Court