Darryl Cotton
6176 Federal Blvd.
San Diego, CA 92114
Telephone: (619) 954-4447
Fax: (619) 229-9387

Plaintiff *Pro Se*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,

Plaintiff,

vs.

LARRY GERACI, an individual; REBECCA BERRY, an individual; GINA AUSTIN, an individual; AUSTIN LEGAL GROUP, APC, a California corporation; MICHAEL R. WEINSTEIN, an individual; SCOTT TOOTHACRE, an individual; FERRIS & BRITTON, APC, a California corporation; CITY OF SAN DIEGO, a public entity and DOES 1 through 10, inclusive,

Defendants.

Case No. 18-CV-0325-GPC (MDD)

PLAINTIFF'S *EX PARTE* APPLICATION FOR (1) LIFT OF STAY OF THIS PROCEEDING, (2) APPOINTMENT OF COUNSEL, AND (3) INJUNCTIVE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

ORAL ARGUMENT RESPECTFULLY REQUESTED

Date:
Time:
Ctrm: 2D
Judge: The Hon. Gonzalo P. Curiel

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Pursuant to this Court's Order entered May 14, 2019, Plaintiff hereby submits the following Memorandum of Points and Authorities in Support of his *Ex Parte* Application for Lift of Stay of this proceeding, appointment of counsel to represent Plaintiff, and explaining the changed circumstances that warrant lifting the stay in this action.

Additionally, I ask that pursuant to the equitable doctrine of "fraud upon the court" and the bias and bad faith exceptions to the *Younger* doctrine, this Court immediately enjoin the related state action. If not, I will be forced to sell what little equity I have left in my real property (the "Property"). Also, I remain under the pressure of an award of damages to Larry Geraci ("Geraci") as a result of a sham trial. Please help cease my unjust suffering and the ever-increasing mental and emotional harm that these Defendants have caused me. I have attached relevant exhibits to my declaration in support of my request as "Dec Exhibit" which are true and correct copies of original documents.

INTRODUCTION

The origin of this action arises from a three-sentence document executed by Geraci and Darryl Cotton ("Plaintiff") in November of 2016 (the "November Document"). Cotton is the owner-of-record of the real Property that is at the nexus of this action. Neither Geraci nor Cotton dispute that they met on 11/02/16 and executed the November Document.

In his original complaint, *Geraci v. Cotton* (Case No. 37-2017-00010073-CU-BC-CTL), Geraci alleges the November Document is a fully integrated sales agreement for his purchase of the Property from Cotton. Cotton alleges they reached an oral joint venture agreement (the "JVA") and the November Document was executed with the intent that it be a receipt for $10,000 in cash received that day towards a total agreed upon $50,000 non-refundable deposit reached as part of the JVA.

The Property qualifies for a Marijuana Outlet ("MO") which requires a conditional use permit ("CUP") with the City of San Diego ("City") Development Services Department ("DSD") for that type of for-profit marijuana retail store ("The

Business"). If the CUP were approved at the Property, the Property would be worth no less than $5,000,000. The value of the Property and the potential high profits from the Business were the *original* drivers behind this litigation.

As described below, the conspiracy to deprive me of the Property is only one illegal action among many others in furtherance of an unlawful scheme by a small group of wealthy individuals, their many agents outside the law, and finally their unethical attorneys (the "Enterprise") seeking to establish an unlawful monopoly in the marijuana market within the City of San Diego (the "Antitrust Conspiracy"). The litigation *now* is driven by a desperate desire of all defendants (including those previously unknown to be a part of the conspiracy) to avoid the compensatory, consequential and punitive damages they are liable for.

I know that this introduction reinforces the established "conspiracy nut" perception of me – I am alleging a conspiracy by the City and numerous other parties after a jury verdict has been entered against me.[1] But I am stating what I believe to be true because I wish to always be honest and transparent so that at no point in the future can my credibility be impugned or attacked as a result of choosing "smart" litigation tactics.

It is clear to me that Judge Joel R. Wohlfeil ("Judge Wohlfeil") did not, in fact, exercise sound legal judgement and instead, for whatever reason, whether it be for convenience or because he viewed me as a "conspiracy nut," relied solely on the representations of his friends and longtime-colleagues, attorney Gina Austin ("Austin"), attorney Michael Weinstein ("Weinstein") and attorney David Demian ("Demian").

[1] I would also like to apologize to the Court for my original complaint filed at a point in time in which I was not completely mentally or emotionally stable. Since the time of that filing I have become more familiar with professional legal pleadings and the deduction of legal conclusions based on facts. I hope the Court can appreciate that I was under severe emotional, financial, and mental distress throughout that period of time. As reflected by the IPA submitted by Dr. Ploesser, Dec. Exhibit 1, this is not just a façade for an emotional appeal to the Court. It is the simple truth. I understand the perception of me that I created with my allegations, but I am trying to do my best now and keep the issues strictly factual and legal, however sometimes that is difficult to do even in my current state.

Either way it has directly corrupted the impartial function of the court and has subverted the integrity of the court itself.

MATERIAL FACTUAL AND PROCEDURAL HISTORY

I. Relevant Background

A. Material City and State Cannabis Laws and Regulations[2]

General City CUP Requirements. Since August 8, 1993, San Diego Municipal Code ("SDMC") § 11.0401 has prohibited the furnishing of false or incomplete information in any application for any type of permit from the City. *See* SDMC § 11.0401(b) ("No person willfully shall make a false statement or fail to report any material fact in any application for City license, permit, certificate, employment or other City action under the provisions of the San Diego Municipal Code."). Also, SDMC § 11.0402 provides that "[w]henever in this Code any act or omission is made unlawful, it shall include causing, permitting, aiding or abetting such act or omission." Thus, applying for an MO CUP or aiding a party to apply for same from the City and willfully making a false statement in the application is illegal.

State Law. In 2003, the State enacted the Medical Marijuana Program Act (the "MMPA"), which established certain requirements for Medical Marijuana Consumer Cooperatives ("MMCC"). On October 9, 2015, Senate Bill No. 643 ("SB 643") was enacted and added § 19323 to the Cal. Bus. & Prof. Code ("BPC"), which mandated that an application for an MMCC be denied if the applicant did not qualify for licensure. SB 643 at § 10 (adding BPC § 19323).

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[2] I note there are many other laws and regulations that apply to make the actions described here illegal, but I am attempting to focus on the easiest issues to prove to make my case. For example, there are RICO and antitrust laws that make the actions described herein illegal, but I don't know how to explain them clearly and succinctly and I still don't understand them all. *See, e.g.. Clipper Exxpress, v. Rky. Mount. Motor Tariff* (9th Cir. 1982) 674 F.2d 1252, 1258 ("the *Walker Process* doctrine... extends antitrust liability to one who commits fraud on a court or agency to obtain competitive advantage."); *id.* at 1263 n.17 ("Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression.").

BPC § 19323 was amended by 2016 Cal SB 837, effective June 27, 2016, and read in relevant part as follows when the MO CUP at issue in this case was filed on October 28, 2016:

> (a) A licensing authority ***shall*** deny an application if the applicant or the premises for which a state license is applied does not qualify for licensure under this chapter or the rules and regulations for the state license.
>
> (b) A licensing authority ***may*** deny an application for licensure or renewal of a state license, or issue a conditional license, if any of the following conditions apply:
>
> (1) Failure to comply with the provisions of this chapter or any rule or regulation adopted pursuant to this chapter…
>
> (2) Conduct that constitutes grounds for denial of licensure pursuant to Chapter 2 (commencing with Section 480) of Division 1.5.
>
> (3) The applicant has failed to provide information required by the licensing authority.
>
> ....
>
> (7) The applicant, or any of its officers, directors, or owners, has been sanctioned by a licensing authority or a city… for unlicensed commercial medical cannabis activities… in the three years immediately preceding the date the application is filed with the licensing authority.

A review of the enacting and amending legislation make clear that at this point in time the "applicant" could be an individual, in which case the mandatory provisions of subsection (a) applied. Or, if a non-profit or other type of entity was the applicant, the discretionary language of subsection (b) applied.

B. Geraci has been sanctioned at least three times for owning/operating illegal marijuana dispensaries and is therefore barred as a matter of law from owning a cannabis CUP.

Geraci has been sued and settled at least three lawsuits with the City related to his owning/management of illegal marijuana dispensaries (the "Geraci Judgments").[3] The last settlement agreement he entered into was on May 29, 2015 which prohibited him from owning a marijuana business until at least May 29, 2018, if at all.

C. Gina Austin has provided knowingly false testimony to the State Court.

During the state trial in this matter, Attorney Austin testified with respect to her involvement as the drafter of the various agreements between myself and Geraci which were supposed to reflect my 10% interest in the resulting business which was to be created on the Property. However, those agreements never reflected those terms, **instead of an equity interest** the latest draft only including a 10% net profits provision which are substantially different in kind. More important than that Austin provided her legal opinion regarding relevant Business and Profession Codes related to Marijuana. She states:

> Cotton Attorney: Are you familiar with this code [BPC § 26057]?
> Austin: Yes.
> Cotton Attorney: So in subsection (a), it states that the licensing authority shall
> deny an application if either the applicant or the premises for which the state license
> applied do not qualify for the license under this division. Correct?
> Austin: Correct.
> Cotton's Attorney: All right. So although you're [allegedly] not aware of any
> sanctions against Mr. Geraci, if such a thing were in existence, would he be barred
> from having a license issued in his name?

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[3] The three cases are: (i) *City of San Diego v. The Tree Club Cooperative*, Case No. 37-2014-00020897-CU-MC-CTL, (ii) *City of San Diego v. CCSquared Wellness Cooperative* , Case No. 37-2015-00004430-CU-MC-CTL and, (iii) *City of San Diego v. LMJ 35th Street Property LP, et al.*, Case No. 37-2015-000000972.

Austin: No.
[....]
Cotton's Attorney: So if the State had an issue with Mr. Geraci's name [not being
on the application], what would that process be to try and ensure that he could
acquire the license?
Weinstein: Objection. Your Honor. Vague, irrelevant, since we' re not talking about
a state license. That's ...
Judge Wohlfeil: Sustained
Dec Exhibit 2 pg. 3 ln. 18- pg.4 ln. 17.

As an alleged expert Austin should know that Geraci does not qualify for a CUP because (1) he has been previously sanctioned for illegal marijuana activity and (2) they have purposefully hidden his interest in the CUP as to avoid the scrutiny of the licensing entity of his prior sanctions.

II. Material Factual and Procedural History

First and foremost, I would like to express to the Court that though I have learned a lot through this process I am by no means an attorney or able to express complex legal issues. I would ask that the Court please review my motion for new trial, Geraci's opposition, and my response attached to my declaration as a single exhibit. Dec Exhibit 3. This along with the transcript from the hearing on that motion and the Verified Statement of Disqualification will confirm much of what I state below. Dec Exhibit 4 Transcript of the hearing on the Motion for New Trial, Dec Exhibit 5 Verified Statement of Disqualification.

A. Judge Wohlfeil is Biased

On September 12, 2018, I, through counsel, filed a Verified Statement of Disqualification ("DQ") seeking to disqualify Judge Wohlfeil form further presiding over the proceeding in state court. The basis for the motion was primarily on the fact that

he had a favorable bias towards Geraci's attorney Michael Weinstein. The evidence for this bias was in the form of statements made from the bench by Judge Wohlfeil.

The DQ outlined that Geraci was using his attorneys to acquire an interest in a Marijuana Outlet despite the fact that he was ineligible because he had been previously sanctioned on three separate occasions for his involvement in illegal marijuana dispensaries in San Diego, California.

On January 25, 2018, after Plaintiff made a clear allegation against Geraci and his Attorneys acting unethically to deprive him of his Property in order to obtain an illegal interest for Geraci, Judge Wohlfeil commented from the bench that he has known Weinstein for decades wince early in their careers and that he does not believe they would act unethically.

B. Specific Acts by Judge Wohlfeil

a. Judge Wohlfeil Lied About Being Personally Served with the Statement of Disqualification.

As mentioned above on September 12, 2018 through my attorney Jacob Austin we filed the DQ. On September 17, 2018 Judge Wohlfeil struck the DQ. The first ground for striking the DQ cited by Judge Wohlfeil in his order is failure to personally serve him or his clerk as required by the California Code of Civil Procedure § 170.3(C)(1). Judge Wohlfeil maintains that the DQ was not properly served. Dec Exhibit 6 at pg 2 ln 22-27.

This is a lie. My attorney Jacob Austin personally served Judge Wohlfeil's clerk while Judge Wohlfeil was in chambers. In fact, Attorney Andrew Flores ('Flores") called, and has a call log record, Judge Wohlfeil's department just before Jacob Austin arrived at the courthouse to confirm that Judge Wohlfeil was in fact in chambers. According to Flores he spoke with a male clerk who relayed that he was substituting for Judge Wohlfeil's regular clerk and that Judge Wohlfeil was in fact in chamber. That clerk came out to meet Mr. Austin and accepted the Motion from Mr. Jacob Austin. Why Judge Wohlfeil would lie is unknown.

b. Judge Wohlfeil Lied About His Statements Being the Court Expressing its Views About Legal and Factual Issues Before it is also False.

On September 17, 2018 Judge Wohlfeil issued an order striking the Verified Statement of Disqualification. Judge Wohlfeil's second claim is that statements he made, regarding his beliefs related to Weinstein's ethics, are comments related to legal and factual issues before the court. *Id.* at pg. 5 ln. 22-25. The problem is that his statement is extra judicial. It does not rely on fact presented to the court; it relies on his personal experience with Weinstein since they were young attorneys. This is clearly a misrepresentation of his comments to me in open court when I raised the issue of the unethical acts of Geraci and his attorneys.

c. Judge Wohlfeil Claimed I Never Raised and Therefore Waived the Illegality Argument.

On September 13, 2019, I, through counsel filed a motion for new trial in state court. The premise of the motion was that the alleged contract, despite the jury verdict, at its core, sought to enforce and illegal object, mainly that Geraci acquire an interest in a Marijuana Outlet even though he was barred from doing so because of his prior sanctions for illegal marijuana activity. (*See*, fn. 3).

On October 25, 2018 the state court held a hearing on my Motion for New Trial. During that hearing, Judge Wohlfeil on several occasions suggested that I had failed to bring up this issue of illegality and therefore waived the issue. Dec Exhibit 4 Transcript at pg 4 ln 28- pg. 5 ln. 6, pg 5 ln. 20-22, pg. 7 ln. 2-3. However, these facts were brought up specifically in the DQ. Dec Exhibit 5 at pg 5 ¶16-pg ¶32. This outlines the entire factual scenario regarding Geraci's illegal purpose. Though not qualified as an illegal contract argument all the facts are presented and presented a *sua sponte* duty to refuse to entertain an action that seeks to enforce an illegal contract. (*See,* May v. Herron, (1954) 127 Cal.App.2d 707, 710-12 (internal citations and quotations omitted).

d. *Judge Wohlfeil did Not Allow Flores to Intervene.*

On March 21, 2017, shortly after cancelling the joint venture with Geraci because he failed to adequately respond to several requests for assurances with respect to having his attorney memorialize our agreement I entered into a contract for the purchase and sale of the Property with Richard Martin ("Martin"). Throughout the litigation Martin made it clear that he did not want to be part of the litigation even though my former special appearance attorney Flores made it clear that he had a cause of action for intentional interference in a contract because of the fact that Geraci filed his lawsuit with the specific intention of stopping the transfer of the Property to Martin. Flores offered to purchase his contractual right which he did in March of 2019.

On June 26, 2019 Flores filed a motion to intervene in *Geraci v. Cotton,* included in that motion was his declaration describing his prior purchase of Martin's contractual rights, his discovery of evidence of an anti-trust conspiracy, and he attached his purchase agreement. *Geraci v. Cotton*, 37-2017-00010073-CU-BC-CTL, ROA 572.

At the ex parte hearing on Flores' motion to intervene Judge Wohlfeil summarily denied the request claiming that Flores showed no good cause for the relief requested. *Id* at ROA 590. It is clear that Flores is an indispensable party, without his intervention the parties cannot fully adjudicate the dispute. For one if what he has alleged is true then it would subject all parties to further, and inconsistent litigation, because Flores will file a federal complaint.

C. Defendants have Perpetuated a Fraud Upon the Court.

a. Austin's Testimony at Trial- Misrepresentation and Lies.

As outlined above Austin's testimony at trial, which Judge Wohlfeil allowed as an undesignated "cannabis expert" is clearly false and intended to defraud the state court in to believing that Geraci is able to acquire an interest in a Marijuana Outlet and not disclose said interest in the CUP application. As mentioned, this issue is outlined in Dec Exhibit 2 at pg 3 ln. 18- pg 4 ln 24.

b. Demian and his attorney Ken Feldman ("Feldman") failed to inform the court of all the implications of his client's actions in regard to this case.

In Cotton et al v. Geraci et al 18CV02751-GPC-MDD, Feldman's response to the complaint were objections made only on procedural grounds. On September 07, 2019 I sent an email to Demian and Feldman putting them on notice, *inter alia,* that as Officers of the Court they had a duty to inform the court that this case was an attempt to enforce an illegal contract. Dec Exhibit 7.

c. Judge Wohlfeil's Bias has allowed the Fraud to Continue.

Judge Wohlfeil's inability to resolve the issue due to his bias towards Geraci and his attorneys. He has stated in open court to me directly, when I was pro per and told him there was evidence of a conspiracy involving said attorneys, that he did not believe that the attorneys would act unethically because he has known them since they were "young lawyers." If this is not an indication that I have not gotten a fair shake in this process I don't know what is. In fact, when confronted with these facts by Flores at a later hearing, he says "I may have made those comments." He then strikes a well written Statement of Disqualification, which outlines the prior sanctions of Geraci, his own statements, the perception of bias. He does so, not on the merits, but rather saying he was improperly served and that the request is untimely. He was properly served by my former attorney personally served his clerk in chambers. Additionally, just before the service Flores called to confirm that he was in chambers and spoke to his stand in court clerk as his regular court clerk was not in.

D. The City has Conspired with Defendants to Mitigate Their Liability to Plaintiff

a. City Filed Unlawful Lis Pendens.

On April 18, 2017 the City filed an illegal lis pendens on the Property. It was illegal because they knew that the Property was not subject to forfeiture because the Property was also being used for a lawful purpose and there was a tenant living on the Property.

b. City was Required to Cancel the CUP on the Property but Failed to Do So.

On March 21, 2017, Plaintiff asked the City of San Diego to terminate the CUP application on the Property because the contract between he and Geraci was never memorialized and after many requests for assurances Geraci failed to provide a final memorialization of their agreement, as he was required to do.

The City did not cancel the application and instead told me that there could only be one application submitted at the time. In response to my request to have the CUP cancelled, DSD Project Manager, Firouzeh Tirandazi stated via an email that since I was not the "Financially Responsible Party" it would have to Rebecca Berry, (Geraci's proxy for the Application) who was listed as the "Financially Responsible Party" would be the only one eligible to withdraw the CUP application. I, as the property owner, could not do so. This response wsa a knowing deception by the City as is proven by the Court of Appeals decision in *Engebretsen v. City of San Diego*, Case No. D068438 (attached as Dec Exhibit 8). The COA affirmed a writ of mandate against the City specifically because the City to failed to transfer a CUP application on the property to the owner-of-record when the applicant could not establish ownership or right to use the property. The COA specifically informed the City failing to do so violated a property owner's constitutional rights. Therefore, the City had actual and direct guidance that it needed to cancel the CUP application submitted by Geraci in the name of Berry when I demanded that it do so. Any opposition by the City on this issue just proves that it is acting maliciously by helping Geraci obstruct me equal protection of the laws. The CITY knows Geraci can't own a MO CUP applied for under fraud and because Geraci has been sanctioned BY the City!!

c. City Allowed a Competing CUP application to Be Granted Despite the Fact that the Property Did Not Qualify for Such, In Order to Deprive Plaintiff of a CUP on His Property.

On March 14, 2018 a competing CUP application was made on a property located at 6220 Federal Blvd (the "Competing CUP"). This property is located within 300 ft of my Property and if granted would bar my Property from having a CUP because of the rules related to the distances between Marijuana Outlets. The Competing CUP had not 1, but 2 childcare businesses within 1,000 without granting variances, which was raised at the public hearing on the approval of the Competing CUP which the City willfully and intentionally ignored.

E. Due to the Continual Fraud by the Enterprise I am Unable to Afford the $200,000 Needed to Mount an Appeal of the Fraudulently Obtained Jury Verdict.

After trial in state court, I borrowed $5k to have noted appellate attorney Kelly Woodruff ("Woodruff") review my case for her opinion on how to proceed with an Appeal. Dec Exhibit 9. Woodruff was of the opinion that the November Document was not a contract but that if I were to engage her services, she would require $200k to represent me on that appeal given the large number of ROAs and difficulty unraveling the fraud. Even though I always believed I was in the right on the November Document not being a contract and numerous attorneys have agreed with that observation, including now Woodruff, that $200k is money I do not have. Nor do I have any way of borrowing it anymore. I am also currently in default in my appeal of the jury verdict on account of my not being able to properly designate a record for appeal, with my limited legal understanding is difficult to complete. Dec Exhibit 10.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, [4] and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365,374, 172 L. Ed. 2d 249 (2008).

ARGUMENT

I. Likelihood of Success on the Merits

A. The Judgement Entered by Judge Wohlfeil Enforces an Illegal Contract

I humbly and respectfully request that this Court allow me to incorporate by reference the arguments by my counsel who argued this issue before Judge Wohlfeil as shown in Dec Exhibit 3, are the motion for new trial, Geraci's opposition, and my reply.

My contention is that since the very inception of our agreement, Geraci and his attorneys knew that he could not qualify for a conditional use permit for a marijuana outlet because of his prior sanctions. This is why he chose to use a proxy, which circumvents the disclosure laws and transparency policy of applicable state law regarding legal marijuana industry. Though Geraci claims he used a proxy because of his status as a Tax Professional, he has provided no legal reason he is allowed to continue to violate the law and not disclose his ownership interest in the CUP Application. His attorney Austin testified at trial that proxies are a common practice. First, though Austin holds herself out as a "marijuana expert" she was never qualified as an expert but Judge Wohlfeil allowed her to testify to the jury to "common practice" with absolutely no foundation. Additionally, even if it is "common practice" does not mean it is legal to do. Austin has in fact admitted her fraud in open court, but due to his bias and or corruption, Judge Wohlfeil cannot see it.

II. Irreparable Harm

A. *Mental Health.* As I have already mentioned, my mental health is clearly at issue here. If the Defendants are not brought to justice either financially or criminally, I cannot even imagine what type of toll this will take on me. This case has led me mentally down dark paths in which I have considered taking the law into my own hands or stoop to their level to address my grievances. Though I am attempting to represent myself and have drafted this motion, I am constantly under the pressure of anxiety and fear as to what these criminals are willing to do to shut me up, but the principle of the matter is what will not allow me stop seeking justice.

B. *Financial Harm.* Financially, I cannot afford to move forward on an appeal. I simply do not have the legal acumen or financial resources to do so. As I mentioned above, I have borrowed $5,000 to retain an appellate specialist who informed me that there is merit to the appeal but that it will cost over $200,000, money that I do not have as I have exhausted every resource, I have access to. I have even borrowed from family and friends, and not been able to pay back, without being turned down at this point.

C. *Public Policy/Public Good.*

Meanwhile the Enterprise is developing the competing 6220 site and getting ready to open up a dispensary it has been procured by fraud. The property owner of the 6220 site, a Mr. John Ek ("Ek"), is an innocent party and like me, another victim of the Enterprise conspiracy. If the request I seek here is not granted, the development of the competing dispensary is set to begin (which I believe has already started) and if later it is found to be an illegally obtained CUP the development will have to be stopped and returned to its original condition which will bring financial harm to Ek and those current tenants on that 6220 property who have been displaced by the illegally approved CUP being granted at Ek's property.

III. Balance of Equities

The judgement entered against me enforces an alleged contract that has an unlawful object and was procured by a fraud upon the court. All equitable considerations lie solely in my favor.

IV. Public Interest.

"There is an irrefragable linkage between the courts' inherent powers and the rarely-encountered problem of fraud on the court. Courts cannot lack the power to defend their integrity against unscrupulous marauders; if that were so, it would place at risk the very fundament of the judicial system." *Aoude v. Mobil Oil Corp.* (1st Cir. 1989) 892 F.2d 1115, 1119. This issue is one of the most important public interest issues there could be. On the one hand the State is implementing a law that by its very own makes transparency the central focal point, in order to root out the criminal element in the

marijuana industry. To allow these criminals to use the judiciary to effectuate their illegal purposes because they hire attorneys who are willing to fabricate evidence and perjure themselves in open court should be the most important issue before any court. They simply cannot get away with this, otherwise what precedent does that set for other, attorneys, marijuana entrepreneurs, and the public in general.

V. Issues Regarding Defendant City of San Diego have Not Been Address.

The City of San Diego, named herein as a defendant, was not a party to the State Trial in Geraci v. Cotton. There are two specific issues yet to be addressed against this defendant. These issues are regards to violation of my constitutional rights related to my Property. As can be seen in the City of ***Engebretson,*** the City had a responsibility to cancel the application on my property when I requested. They continued to allow Geraci and the Enterprise to control the CUP on my Property, when they were required to cancel the application by their own regulations.

The City also, in order to sabotage the application on my Property and to cover up their own malfeasance, issued a CUP on a property a short distance away from mine which was (1) made by a member of the Enterprise with clear ties to Geraci's attorneys , (2) which was within the 1,000 ft of a daycare in violation of their own regulations explicitly requiring that no dispensary be within 1,000 ft of a daycare, and (3) this is in spite of the fact that the application on my property was filed over a year before the competing CUP. In doing so they have in effect terminated my application.

In this instant the Enterprise was required to seek a variance from the City. However, the City did not require the Enterprise Applicant Aaron Magagna to file for a variance, they simply ignored their own ordinance and state law in order limit their own liability.

Recently there have been actions by other local governments that have come to discover a licensed MO business were found to be in violation of the state mandated 600' minimum setback rules and, as shown in Dec Exhibit 11, have ordered those MO businesses to move.

CONCLUSION

I hope I've given the court enough reasons to unstay my case, prove the urgency in issuing a Temporary Restraining Order and expose these people for who they are and what they've done. As I prepared this motion, just weeks before Christmas, I found myself continuously asking myself; why is it that Weinstein, an Officer of the Court, has been able to use the law to crush me, my friends, family and investors? Why does he and everyone else in the Enterprise, get to have a Merry Christmas with their families when they are criminals who help other criminals achieve their illegal goals through their cozy relationships and knowledge of the law when I do not?

Although I just had a judgment issued by a jury against me in state court, I still steadfastly maintain my enemies are the ones that are "really dumb." Defendants have taken easily proven illegal action in their desperate attempts to avoid liability. This is the driver now for all the litigation – everyone wants to avoid financial liability for their grossly unethical and unlawful actions.

"Generally, [punitive damages] cases fall into three categories: (1) really stupid defendants; (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm." *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 453 n.15.

Although there is a lot of parties overlap to consider in this complaint, for which I attempt to show in the List of Parties Flowchart, Dec Exhibit 12, attorney Gina Austin is the really stupid defendant for testifying that Geraci can own a Marijuana Outlet CUP despite filing the Berry CUP Application under fraudulent pretenses and the fact that he has been sanctioned for illegal marijuana activities in the three years prior to the submission of the Berry CUP Application. She also testified that such is her "common practice"!!

In order to avoid liability on one CUP application, she testified that she has violated the law as to her other 23 approved CUP applications. That means all of her applications have to be reviewed to determine the actual owners are not criminals, like

Geraci, with a history of illegal marijuana operations, who were not disclosed in the CUP applications to the city. Her own testimony provides evidence of the existence of the Enterprise and the Antitrust Conspiracy.

Weinstein, Toothacre, Demian, Witt, Feldman and all the City attorneys are the truly unethical defendants. They are not unaware; criminals can't own marijuana business that they seek to acquire with applications to government agencies containing knowing false information.

Feldman in particular, I assume, must offend this Court. He is a partner at an international law firm, and he markets the fact that he teaches ethics to federal judges even as he takes unethical actions to protect his client's unethical actions in perpetuating a fraud upon both the state and federal courts. I used to think higher profile law firms somehow were more ethical, they are not. They are still ethically ambulance chasing attorneys who will do anything for money so long as they don't get caught, not whether their actions are illegal.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant him the following relief:

1. That this Court issue an order enjoining the State Action as Plaintiff's appeal is currently in default;

2. Lift of the stay in this action, appointment Plaintiff counsel, and grant leave for appointed counsel to amend the Complaint to conform to the facts now known;

3. An order enjoining further development of the Marijuana Outlet at 6220 Federal Boulevard, San Diego as it is within 1,000 feet of two daycares in violation of the SDMC and State law;

4. And for the issuance of a subpoena for attorney Nguyen to immediately present herself at the hearing on this TRO application and explain why she should not be sanctioned for failing to provide the testimony of Corina Young, her client, and an that

she provide the promised testimony. (I note that in the amended complaint I will be naming Nguyen for knowingly violating my civil rights by failing to provide Young's deposition as promised and therefore obstructing justice).

DATED: January 23, 2019

DARRYL COTTON
Plaintiff *Pro Se*

Darryl Cotton
6176 Federal Boulevard
San Diego, CA 92114
Telephone: (619) 954-4447
Fax: (619) 229-9387

Plaintiff *Pro Se*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,

Plaintiff,

vs.

LARRY GERACI, an individual; REBECCA BERRY, an individual; GINA AUSTIN, an individual; AUSTIN LEGAL GROUP, APC, a California corporation; MICHAEL R. WEINSTEIN, an individual; SCOTT TOOTHACRE, an individual; FERRIS & BRITTON, APC, a California corporation; CITY OF SAN DIEGO, a public entity and DOES 1 through 10, inclusive,

Defendants.

Case No. 18-CV-0325-GPC-(MDD)

DECLARATION OF DARRYL COTTON IN SUPPORT OF PLAINTIFF'S *EX PARTE* APPLICATION FOR (1) LIFT OF STAY OF THIS PROCEEDING, (2) APPOINTMENT OF COUNSEL, AND (3) INJUNCTIVE RELIEF

ORAL ARGUMENT RESPECTFULLY REQUESTED

Date:
Time:
Dept:
Judge: **The Hon. Gonzalo P. Curiel**

I, Darryl Cotton, declare:

1. I am the Plaintiff in this action and have personal knowledge of each fact stated in this declaration.

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

4. I am the owner of 6176 Federal Blvd Property ('the Property') which is located in an area which the City of San Diego has zoned appropriate for a Marijuana Outlet.

5. On November 2, 2016, I reached an oral agreement with defendant Larry Geraci for the sale of my property.

6. The terms of our agreement included but were not limited to the following:

A. $50,000 non-refundable deposit towards the purchase of the property

B. Geraci to pursue and pay all costs associated with the Conditional Use Permit (CUP) licensing of a Marijuana Outlet ("MO") with the City of San Diego Development Services Department ("DSD").

C. Upon the granting of the CUP license Geraci was to pay the remaining balance of $750,000 for the purchase of the Property.

7. On November 2, 2016, I met with Geraci and we executed a document ("November Document") for the purposes of reflecting my receipt of $10,000 cash as a good faith partial payment by Geraci toward the agreed-upon $50,000 non-refundable

deposit as he advised he would not be making the $50,000 non-refundable deposit payment until he had managed to have the San Diego Municipal Code updated to reflect that the Property was located in a zone that allowed for a MO to be operated.

8. Later that same day I received an email from Geraci with the November Document as an attachment in which he had titled it "Contract."

9. I responded with an email asking Geraci to confirm by a response email from him that the document that he had titled a 'contract' in his email to me, was not a complete and total representation of what we had orally agreed to earlier that day in his office. My email went on to say that, among other things I expected to me in a contract that memorialized the terms and conditions in our oral agreement would be my 10% equity interest in the newly licensed dispensary, which was a factored element in my decision I had decided to sell my property to Geraci in the first place.

10. Geraci confirmed in the affirmative that the additional terms we had discussed and agreed would be memorialized in a final contract form with his email response – "No, No Problem at All."

11. At trial, Geraci raised for the first time that the "No, No Problem at All" response was a mistake and that he had intended to respond with "No Problem at All".

12. At trial Geraci raised for the first time that he felt he was being "extorted" by what was tantamount to my requests for written assurances.

13. During that time, I had other offers for the purchase of the Property.

14. Between 11/02/16 and 03/17/17 I continued to reach out to Geraci through phone calls and text messages to see how the rezoning issue was coming along since once the rezoning issue was resolved I expected the $40,000 balance of the $50,000 non-refundable deposit was due to be paid.

15. On 3/21/16, I inform Geraci via email that after having reached out to DSD regarding the status of the rezoning I was informed by DSD that the property had been rezoned back in February 2017 and now the property was located in a zone that was compliant for a MO business. I told Geraci that I now knew the level of his deceit and would no longer have any further communication with him. I informed Geraci that I would be entering into an agreement with a third party to sell the property.

16. On 03/21/17, I sold the property to Martin.

17. On 03/25/19, Martin sold the property to Flores.

18. During the course of this litigation I have been forced to sell off any remaining interest I have in the property or joint venture revenues that would have come from the operation of a licensed MO. I have relied on friends and family to help with whatever finances they could provide to assist me in keeping the property while the litigation is ongoing. If it were not for their help and belief in me and the underlying principles based on the facts of this case they would not have offered this support, nor would I have ever asked them for it had I known then what I know now.

21. I had to hire out-of-state counsel, Attorney Evan Schube, to file a Motion for New Trial because, not only did Judge Wohlfeil not "get it," no local attorneys were willing to take the case. Judge Wohlfeil denied that motion.

22. For the appeal, I borrowed $5,000 at 20 percent interest, to hire appellate specialist attorney Kelly Woodruff ("Woodruff") to review the case. Upon her review, she told me that there were merits to my case that could overturn the lower court ruling, and estimated "fees to do so would run around $200K in costs. This is money I don't have nor do I have anyway to borrow that kind of money anymore.

23. Attached hereto is a true and correct copy of Dr. Ploesser's Evaluation of Cotton 3/4/18 as Exhibit 1.

24. Attached hereto is a true and correct copy of the Reply to Opposition Re: Jury Verdict as Exhibit 2.

25. Attached hereto are true and correct copies of the Motion for New Trial, Opposition and Response, as Exhibit 3.

26. Attached hereto is a true and correct copy of the Transcript of the Motion for New Trial Hearing 10/25/19 as Exhibit 4.

27. Attached hereto is a true and correct copy of the Verified Statement of Disqualification 9/12/18 as Exhibit 5.

28. Attached hereto is a true and correct copy of the Order Striking Verified Statement of Disqualification 9/17/18 as Exhibit 6.

29. Attached hereto is a true and correct copy of my email to Demian and Feldman as Exhibit 7.

30. Attached hereto is a true and correct copy *Engebretson v. City of San Diego* Opinion as Exhibit 8.

31. Attached hereto is a true and correct copy of an Email from appellant specialist Kelly Woodruff 11/06/19 as Exhibit 9.

32. Attached hereto is a true and correct copy of the Notice of Default 12/05/19 as Exhibit 10.

33. Attached hereto is a true and correct copy of the News Paper Article for the *Modesto Bee* dated 12/11/19 as Exhibit 11.

34. Attached hereto is a true and correct copy of Flow Chart as Exhibit 12.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 23, 2019 at San Diego, California.

DARRYL COTTON

she provide the promised testimony. (I note that in the amended complaint I will be naming Nguyen for knowingly violating my civil rights by failing to provide Young's deposition as promised and therefore obstructing justice).

DATED: January 23, 2019

DARRYL COTTON
Plaintiff *Pro Se*

Case No.:

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

DARRYL COTTON
Defendant and Appellant,

v.

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

Appeal from Orders of the Superior Court, County of San Diego

37-2017-00010073-CU-BC-CTL
37-2017-00037675-CU-WM-CTL

Honorable Joel R. Wohlfeil, Judge Presiding

INDEPENDENT PSYCHIATRIC ASSESSMENT OF DARRYL COTTON; DECLARATION OF DR. MARKUS PLOESSER IN SUPPORT OF DARRYL COTTON'S EMERGENCY PETITION FOR EXTRAORDINARY WRIT, WRIT OF MANDATE, OR OTHER APPROPRIATE RELIEF

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

I, Markus Ploesser, MD, LLM, DABPN, FRCP(C), declare:

1. On March 4, 2018, I interviewed Mr. Darryl Cotton for an Independent Psychiatric Assessment. At the beginning of the assessment, I informed Mr. Cotton that the assessment was being prepared to assist the Court and not to act as an advocate on his behalf. Mr. Cotton expressed his understanding, agreement and proceeded with the interview and assessment.

DUTY TO COURT

2. I certify that I am aware of my duty as an expert to assist the Court and not to be an advocate for any party. I have prepared this report in conformity with that duty. I will provide testimony in conformity with that duty if I am called upon to provide oral or written testimony.

3. I am solely responsible for the opinions provided in this report. I reserve the right to amend or alter my opinions should additional relevant information become available after the report completion.

QUALIFICATIONS

4. I am a psychiatrist licensed in the State of California, Physician and Surgeon License No. A101564 and the Province of British Columbia, License No. 31564.

5. I am Board certified by the American Board of Psychiatry and Neurology in the area of Psychiatry (Certificate No. 60630) and the subspecialty of Forensic

Psychiatry (Certificate No. 1903).

6. I am a Fellow of the Royal College of Physicians and Surgeons of Canada, with certifications in Psychiatry and Forensic Psychiatry.

7. I am on the clinical faculty at the University of British Columbia (UBC) in the division of Forensic Psychiatry.

8. My prior work experience has included forensic psychiatric evaluation work for the Forensic Psychiatric Hospital and the Forensic Psychiatric Services Commission in Coquitlam, British Columbia. I have written numerous forensic psychiatric assessment reports and testified as an expert witness before the British Columbia Review Board and the Provincial Courts of British Columbia.

9. I currently work as a psychiatrist for the Department of Corrections for the State of California.

10. In addition to my medical qualifications, I am also a graduate of Columbia University School of Law in the LLM program.

11. In preparation for my assessment of Mr. Cotton, I consulted with Dr. Carolyn Candido regarding her medical diagnosis of Mr. Cotton on December 13, 2017. Additionally, I reviewed the declaration previously provided by Dr. Candido regarding her diagnosis of Mr. Cotton prepared on January 22, 2018. (Attached hereto as Exhibit 1.)

12. Prior to my interview with Mr. Cotton, I also discussed the factual

background regarding Mr. Cotton's need for a psychiatric assessment with his legal consultant, Mr. Jacob Austin. Mr. Austin, I was told, is representing Mr. Cotton on a limited basis due to Mr. Cotton's inability to pay for his full legal representation by Mr. Austin.

CLIENT INTERVIEW

13. Mr. Cotton related the following: He is 57 years old. He was born and raised in the Chicago area and has lived in San Diego since 1980. He owns a lighting manufacturing company but reports that over the past approximately 9-12 months he has experienced financial hardship, stress and anxiety originating from a lawsuit against him.

14. Mr. Cotton denies any history of mental health symptoms predating the current lawsuit. He is taking Keppra 500mg twice daily for a seizure disorder, which he started suffering from around the age of 26. He usually suffers from approximately 3 Grand Mal seizures per year. He used to take Dilantin, another anticonvulsant medication. He reports having obtained significant medical benefit from the use of medical cannabis, particularly a high CBD strain which he says has helped to reduce the frequency of his seizures.

15. Mr. Cotton represents he owns a property meeting certain requirements by the City of San Diego and the State of California that would allow the creation and operation of a Medical Marijuana Consumer Collective.

16. Mr. Cotton reports that he has and is being subjected to a variety of threats and harassing behaviors that he believes have been directed against him by the plaintiff in the lawsuit.

17. Mr. Cotton believes that an armed robbery on June 10th, 2017 on his property may have been directed by the plaintiff. He was present at his property at the time of the armed robbery, slamming the door and thereby escaping the robbers inside a building on his property while he called 911. The armed individuals who committed the robbery threatened Mr. Cotton at gun-point before fleeing from the premises. (Mr. Cotton stated the armed-robbery is still unresolved by the police and it was the subject of local news coverage that is still available online.)

18. Mr. Cotton states he followed the armed individuals in his vehicle as they fled from the scene while he was on the phone with 911. He was told by 911 to cease his pursuit due to safety reasons as Mr. Cotton was chasing the armed robbers at high-speed. Mr. Cotton believes he recognized the driver of the getaway vehicle as an employee of the plaintiff.

19. Mr. Cotton appeared particularly intense during his narration regarding one of his employees who was duct-taped and laying face down at gun-point on the ground. Mr. Cotton states that this long-time employee, an electrical-engineer who Mr. Cotton relied upon heavily, quit the next day because of this incident.

20. Mr. Cotton describes starting to experience increased symptoms of stress

and anxiety since the robbery, above that which was caused by the litigation. He had been in his usual state of health prior. He reports that he is now unable to sleep at night, experiences "mood swings" and episodes of explosive rage without apparent triggers. He experiences nightmares around themes of feeling powerless. The nightmares occur in slight variations, and at times he "sees the robbers in his dreams."

21. Furthermore, his description of his nightmares include vivid scenes of violence towards the attorneys for plaintiff that he believes are not acting in a professional manner. Mr. Cotton believes that the attorneys representing plaintiff are "in it together" with the plaintiff to use the lawsuit to "defraud" him of his property. This point is one of the main foci of his expressed mental distress.

22. Mr. Cotton'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. Mr. Cotton 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.

23. Mr. Cotton is also under the belief that his former law firm could have resolved this matter at an early stage in the proceedings but chose not to in order to continue billing legal fees.

24. Mr. Cotton reports no improvement in his mental health symptoms since

the robbery. He describes that since the robbery there have been additional threats made against him by "agents" of the plaintiff. Specifically, he describes that two associates of plaintiff went to his property on February 3, 2017 under the pretense of discussing potential business opportunities, but when they arrived they were there to indirectly threaten him by informing him that it would be "good" for him to "settle with Geraci."

25. Mr. Cotton now feels hopeless, helpless, unable to sleep, with decreased appetite, but either no or only minimal changes in weight.

26. Mr. Cotton states that on December 12, 2017, immediately after a court hearing, he was evaluated in the emergency department of a hospital for a TIA (transitory ischemic attack, a frequent precursor of a stroke).

27. The day after his emergency department discharge, Mr. Cotton states he assaulted a third-party and that is also the day he was diagnosed with Acute Stress Disorder by Dr. Candido.

28. Mr. Cotton expressed having experienced suicidal ideation, most recently on December 13th, 2017. He denied symptoms of psychosis, specifically hallucinations.

OPINIONS AND RECOMMENDATIONS

29. It is my professional opinion that Mr. Cotton currently meets criteria of Post-Traumatic Stress Disorder (F43.10), Intermittent Explosive Disorder (F63.81) and Major Depression (F32.2). He does not present with any objective, observable signs

and symptoms of psychosis.

30. Given the absence of a prior mental health history of psychotic disorder (and the physical symptoms that led to a diagnosis of a TIA and Acute Stress Disorder by separate medical doctors), I have no reason to believe that Mr. Cotton's reports of harassment by the plaintiff would be of delusional quality. It is my professional opinion that Mr. Cotton sincerely believes that the plaintiff and his counsel are in a conspiracy against him and that they represent a threat to his life.

31. It is my medical opinion that Mr. Cotton's symptoms are unlikely to improve as long as current stressors (pending litigation, and what Mr. Cotton believes to be threatening behaviors by plaintiff or his "agents") persist. His symptoms are also likely to be significantly reduced if he believes the Court was not ignoring and disregarding him.

32. It is my medical opinion that Mr. Cotton's mental health condition would likely benefit from a rapid resolution of current legal proceedings. In my professional opinion, the level of emotional and physical distress faced by Mr. Cotton at this time is above and beyond the usual stress on any defendant being exposed to litigation. If causative triggers and threats against Mr. Cotton persist, there is a substantial likelihood that Mr. Cotton may suffer irreparable harm with regards to his mental health.

///

33. Besides a removal of current stressors, his mental health condition would likely benefit from Cognitive Behavioral Therapy for PTSD and depression, as well as a trial of antidepressant medication.

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

DATED: 3/4/2018

Markus Ploesser, MD, LLM, DABPN, FRCP(C)

M. PLOESSER, M.D.
PSYCHIATRIST

ROA 647
11 pages

Jacob P. Austin [SBN 290303]
The Law Office of Jacob Austin
P.O. Box 231189
San Diego, CA 92193
Telephone:(619) 357.6850
Facsimile:(888) 357.8501
Email:JPA@JacobAustinEsq.com

Attorney for Defendant/Cross-Complainant DARRYL COTTON

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

LARRY GERACI, an individual,

Plaintiff,

v.

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

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

v.

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

Cross-Defendants.

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

Judge: The Honorable Joel R. Wohlfeil
Dept: C-73

REPLY TO OBJECTION BY PLAINTIFF/CROSS-DEFENDANTS LARRY GERACI AND REBECCA BERRY TO JUDGMENT ON JURY VERDICT PROPOSED BY DEFENDANT/CROSS-COMPLAINANT DARRYL COTTON

[IMAGED FILE]

Action Filed: **March 21, 2017**
Trial Date: **June 28, 2019**

Defendant/Cross-Complainant Darryl Cotton ("Cotton") hereby files this Response to *Objections by Plaintiff/Cross-defendants Larry Geraci and Rebecca Berry to Judgment on Jury Verdict Proposed by Defendant/Cross-Complainant Darryl Cotton* (the "Objections").

Cotton's counsel ("Counsel") is not *legally* obligated to file this Response.

Counsel is, however, *ethically* compelled to file this Response against the adamant desire of his own client, Cotton. This Response is solely for the benefit of this Court.

This is not a motion. This Court held a trial in this action. This Court made findings. A jury verdict was reached in favor of Plaintiff Lawrence Geraci ("Geraci"). The only matter left for this Court is to enter judgment and thereby enforce Geraci's breach of contract and related claims.

Counsel *could* have waited a matter of days for this Court to enter the proposed judgment submitted by Michael Weinstein ("Weinstein"), counsel for Geraci. However, if this Court enters judgment in favor of Plaintiff, it will be enforcing an illegal contract and this Court's judgment will therefore be void. "A contract that conflicts with an express provision of the law is illegal and the rights thereto cannot be judicially enforced." *Vierra v. Workers' Comp. Appeals Bd.*, 154 Cal. App. 4th 1142, 1148 (2007). *See A.I. Credit Corp. v. Aguilar Sebastinelli* (2003) 113 Cal. App. 4th 1072, 1080 (***"courts do not sit to give effect to . . . illegal contracts."***) (quotation omitted; emphasis added).

Geraci cannot legally own a Conditional Use Permit ("CUP") pursuant to California Business and Professions Code ("BPC"), Division 10 (**Cannabis**), Chapter 5 (**Licensing**), § 26057 (**Denial of Application**) which states that: "[T]he licensing authority ***shall*** deny an application if the ***applicant***.... has been sanctioned by a licensing authority or a city... for unauthorized commercial cannabis activities... in the three years immediately preceding the date the application is filed with the licensing authority."

Cotton has consistently and steadfastly argued this point since he filed his pro se Cross-complaint. Dock. No. 19. Materially, Cotton's *pro se* Cross-complaint alleged that (i) Geraci and Cotton reached an oral joint venture agreement to develop a Marijuana Outlet at the real property of which Cotton is the owner-of-record;[1] (ii) that Geraci was legally barred from owning a Marijuana Outlet;[2] and (iii) that Geraci and his receptionist, Rebecca Berry ("Berry"), conspired to acquire a CUP from the City of San Diego at the Property via a fraudulent application that falsely stated that Berry was the owner of the Property and of the CUP being sought.[3]

Although this Court has expressed its disbelief, Cotton's former attorneys amended his Cross-complaint and dropped this and other material factual allegations. Cotton fired his former attorneys – the law firm of Finch, Thornton & Baird ("FTB") – for fraud in their representation of him in this action. Thereafter, this Court denied Cotton's motions to amend his Cross-complaint to include these allegations, but via discovery and motions Cotton reasserted these allegations thereby amending his Cross-complaint.

At least at trial, it appears this Court was deceived by Geraci, Weinstein and Austin into thinking that it is lawful for Geraci to acquire a CUP via a fraudulent application. On July 8, 2019, Austin testified at trial in this matter as follows:[4]

Cotton's Attorney: Are you familiar with this code [BPC § 26057]?

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[1] Docket. No. 19 (Cotton's Cross-Complaint) (Count Six – Breach of Oral Contract) at 17:10-12 ("The agreement reached on November 2nd, 2016 is a valid and binding oral agreement between Cotton and Geraci.").

[2] *Id.* (Cotton's Cross-Complaint) (Count Ten – Conspiracy) at 21:3-7 ("Berry submitted the CUP application in her name on behalf of Geraci because Geraci has been a named defendant in numerous lawsuits brought by the City of San Diego against him for the operation and management of unlicensed, unlawful and illegal marijuana dispensaries. These lawsuits would ruin Geraci's ability to obtain a CUP himself.").

[3] *Id.*

[4] A true and correct copy of the rough transcript is attached as Exhibit A.

Austin: Yes.

Cotton Attorney: So in subsection (a), it states that the licensing authority shall deny an application if either the applicant or the premises for which the state license applied do not qualify for the license under this division. Correct?

Austin: Correct.

Cotton's Attorney: All right. So although you're [allegedly] not aware of any sanctions against Mr. Geraci, if such a thing were in existence, would he be barred from having a license issued in his name?

Austin: ***No***.

[....]

Cotton's Attorney: So if the State had an issue with Mr. Geraci's name [not being on the application], what would that process be to try and ensure that he could acquire the license?

Weinstein: Objection. Your Honor. Vague, irrelevant, since we're not talking about a state license. That's...

Judge Wohlfeil: Sustained.

The question asked was neither vague nor irrelevant and the objection should not have been sustained by this Court.

As to Austin, her testimony is directly contradicted by the clear and unambiguous language of BPC § 26057. "[T]he word '***shall***' is mandatory." *Woolls v. Superior Court* (2005) 127 Cal. App. 4th 197, 208 (emphasis added). There is no discretion here; Geraci's application must be denied and therefore he cannot seek relief from this Court for something that he cannot legally own – a CUP.

Respectfully, Counsel reviewed Austin's testimony in depth from the trial transcripts and this Court was so blatantly deceived by her that it is clear this Court did

not review any of the applicable laws and regulations at issue here. Virtually everything Austin testified about is a complete lie that that made a mockery of this Court and the judicial system. Although the BPC does contain mechanisms by which individuals that violate laws can proceed through a process to determine whether a license should be denied or revoked, those mechanisms are for crimes that are not directly related to the operations of the license issued. As Austin testified at trial, it would be like if an attorney got a DUI, depending on the circumstances and the history of the individual, the attorney may or may not lose his law license. However, if an attorney conspired to steal from, kidnap and murder her own client, that attorney would definitely lose their law license and there would be no discretion or mechanism in that situation by which that attorney could retain her law license and continue to practice law.

As to Weinstein, he deceived this Court with Austin into thinking that the BPC does not apply to Geraci because a CUP issued by the City is not a "state license."

As defined in the San Diego Municipal Code ("SDMC"): "Marijuana outlet means a retail establishment operating with a Conditional Use Permit... ***in accordance with dispensary or retailer licensing requirements contained in the California Business and Professions Code sections governing marijuana and medical marijuana.***" SDMC § 42.1502 (emphasis added).

SDMC § 42.1502 is clear and unambiguous - a Marijuana Outlet CUP compliant with the City's ***land use regulations*** can only be issued by the City and operate if the applicant meets the requirements for a cannabis license set forth in the BPC.[5] Contrary

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[5] *See also* SDMC Chapter 4 (Health and Sanitation), Article 2 (Health Regulated Businesses and Activities), Division 15 (Marijuana Outlets, Marijuana Production Facilities, and Transportation of Marijuana), § 42.1501 (**Purpose and Intent**) ("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... in accordance with state law. It is further the intent of this

to Weinstein's objections, there is no such thing as a "City license" that can be issued without requiring a "state license."

Austin knows this. In her own words: "***I am an expert in cannabis licensing and entitlement at the state and local levels and regularly speak on the topic across the nation.***"[6] At trial in this matter, she pretended that she did not know if Geraci had previously been sanctioned by the City for unlawful cannabis operations. Another demonstrable lie - perjury. Austin has been served with numerous submissions in this and related matters that contain requests for judicial notice of the lawsuits against Geraci for his management/ownership of illegal marijuana dispensaries – she deceived this Court.

A. THIS COURT IS LEGALLY OBLIGATED TO NOT ENFORCE AN ILLEGAL CONTRACT

> Whatever the state of the pleadings, when the evidence shows that the plaintiff in substance seeks to enforce an illegal contract or recover compensation for an illegal act, **the court has both the power and *duty* to ascertain the true facts** in order that it may not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids. [Citations.] It is immaterial that the parties, whether by inadvertence or consent, even at the trial do not raise the issue. The court may do so of its own motion when the testimony produces evidence of illegality. **It is not too late to raise the issue on motion for new trial, in a proceeding to enforce an arbitration award, or even on appeal.**

Lewis Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 146-48 (emphasis added; citations omitted).

Division to ensure that marijuana is not diverted for illegal purposes, and to limit its use to those persons authorized under state law. ***Nothing in this Division is intended to authorize the... sale... of marijuana... in violation of state law.*** [¶] ***It is not the intent of this Division to supersede or conflict with state law, but to implement [AUMA.]***") (emphasis added).

[6] *Razuki v. Malan,* San Diego County Superior Court, Case No. 37-2018-0034229-CU-BC-CTL, ROA 127, ¶ 2.

In the present case the issue of illegality was raised in Cotton's pro se complaint, consistently thereafter in numerous motions after Cotton fired his former counsel for fraud, and at trial.

B. ILLEGAL CONTRACTS

California courts have held that a lawful contract "must not be in conflict either with express statutes or public policy"—as a corollary, "[a] contract that conflicts with an express provision of the law is illegal and the rights thereto cannot be judicially enforced." *Vierra v. Workers' Comp. Appeals Bd.*, 154 Cal. App. 4th 1142, 1148 (2007) (citations omitted); *see also Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 124 (2000) ("If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced.").

Here, the alleged contract in this action is contrary to express statutes and public policy. The alleged contract in this action was subject to one condition precedent – the issuance of a CUP at the Property to Geraci. That is the "object" of the alleged contract that Geraci sought to enforce in this action. But, Geraci cannot legally own the object of this action for at least three obvious reasons. First, the CUP application filed by Berry constitutes fraud and violates AUMA and federal antitrust laws.[7] *See Clipper Exxpress, v. Rky. Mount. Motor Tariff* (9th Cir. 1982) 674 F.2d 1252, 1258 ("[T]he *Walker Process* doctrine… extends antitrust liability to one who commits fraud on a court or agency to obtain competitive advantage."). Second, Geraci is barred from owning a CUP for the reasons set forth above. Lastly, enforcement of this alleged contract violates the

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[7] Cotton respectfully notes that on June 27, 2019, attorney Andrew Flores argued to this court that he had evidence that directly implicated Gina Austin in an anti-trust conspiracy to acquire all of the marijuana licenses in San Diego. On July 8, 2019 Austin testified in this action that she had acquired approximately 23 of the limited number of cannabis permits issued by the City. The City of San Diego has capped the number of Marijuana Outlet permits to four per City Council District for a maximum total of thirty-six.

underlying public policy that requires disclosure of all parties with an interest in a cannabis license both to prevent the infiltration of organized crime and to prevent monopolies being formed in the cannabis market. *See* BPC § 2600 notes (describing purpose and intent of cannabis regulations); BPC § 26222.3 ("An association that is organized pursuant to this chapter shall not conspire in restraint of trade, or serve as an illegal monopoly, attempt to lessen competition, or to fix prices in violation of law of this state.").

C. COUNSEL'S ETHICAL DILEMMA

For over year, ever since Counsel became Cotton's attorney-of-record, he has struggled with his ethical obligations to his client and the State and Federal judiciaries. Counsel signed-up for a dispute regarding whether a three-sentence document executed by Geraci and Cotton in November of 2016 is or is not a fully integrated sales contract for Geraci's purchase of the Property from Cotton.

What Counsel could never have imagined was that Geraci and his agents are part of a group of individuals who have conspired to create an unlawful monopoly in the marijuana market in the City of San Diego. A group that uses violence in furtherance of its goal to acquire a monopoly and that, *inter alia*, bribed and intimidated witnesses to prevent them from testifying at trial in this matter in violation of 42 U.S.C. § 1985.[8] *See Bell v. Milwaukee* (7th Cir. 1984) 746 F.2d 1205, 1233 ("42 U.S.C. § 1985... create[es] a cause of action based on a conspiracy which deprives one of access to justice or equal protection of law.").

Furthermore, every attorney who represented any party in this and related actions violated their ethical duties to this Court by failing to inform it of the conspiracies against Cotton. They all knew or should have known that (i) Geraci was barred as a matter of law

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[8] *See, e.g.*, Docket No. 546 (Joint Trial Readiness Conference Report).

from owning a marijuana license and this action seeks to enforce an illegal contract, (ii) Geraci could not prevail in this action because he cannot acquire a marijuana permit from the City via an application to the City's Department of Development Services without committing fraud, and (iii) the November Document is not a fully integrated sales contract as a matter of law, therefore rendering the instant litigation the archetype of a sham lawsuit / malicious prosecution action. Consequently, they are all liable under 42 U.S.C. § 1986. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 626 (9th Cir. 1988) ("[§] 1986 imposes liability on every person who knows of an impending violation of [§] 1985 but neglects or refuses to prevent the violation.").[9]

Up until now, Counsel's main dilemma was attempting to convince this court that multiple attorneys from different law firms and the City are legally and financially motivated to prevent the exposure of their individual crimes because they have all contributed to Cotton's damages and are thus jointly liable as joint tortfeasors even if not as co-conspirators.

In a strange turn of events, this Response represented Counsel's greatest ethical dilemma both personally and professionally. Personally, this Court has with open contempt disregarded Counsel's assertion of facts and arguments and never provided its reasoning for its rulings. Counsel relied on this Court impartiality and it made a liar of Counsel. Allowing this Court to enter a judgment to enforce an illegal contract would provide support for Cotton's allegations that this Court is corrupt and has conspired with Weinstein. However, Counsel does not actually believe this Court is corrupt.

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[9] *See Stevens v. Rifkin*, 608 F. Supp. 710, 730 (N.D. Cal. 1984) ("Though there appears to be no clear rule of immunity with respect to the liability under the civil rights laws of attorneys who violate the civil rights of others while representing their clients, cases under the Civil Rights Act indicate that the attorney may be held liable for damages if, on behalf of the client, the attorney takes actions that he or she knows, or reasonably should have known, would violate the clearly established constitutional or statutory rights of another.").

Thus, despite the personal desire for this Court to be held accountable for its errors - and this Court has no conception of the horrific emotional and financial distress its refusal to properly adjudicate this action has caused numerous individuals and their families - Counsel will not perpetuate the same lack of ethics that led to this instant situation.

Professionally, Counsel and Cotton were greatly at odds over the filing of this Response. If this Court takes five minutes to contemplate that Weinstein, Austin and Demian are capable of lying in order to avoid legal and financial liability, and reviewed the applicable laws and regulations at issue here, it would realize that Geraci cannot legally own a CUP and that the entire trial in this action made this Court the proverbial Emperor wearing the Emperors Clothes. This Court presided over trial in this matter and made grand statements from its elevated bench about justice and impartiality in an action in which every attorney knew that this Court had no idea what was actually taking place.

D. WEINSTEIN'S OBJECTIONS TO COTTON'S PROPOSED JUDGMENT

Weinstein in his Opposition does NOT argue that the three findings by this Court, as to ***questions of law*** that Cotton proposes to be included in the final judgment, are incorrect. Rather, Weinstein concludes, without any factual or legal support, that: "To include this partial recitation and characterization of findings and conclusion by the Court is unnecessary, argumentative, and invites confusion." Opp. at 2:5-6.

Cotton's proposed judgment is an edited version of Weinstein's proposed judgment that *only* adds one paragraph stating the Court is including three findings material to the case, which are:

1. The November 2, 2016 written document is a fully integrated sales contract as alleged by Plaintiff in his Complaint.

2. Plaintiff's testimony and evidence at trial neither constitute legal affirmative defenses of mistake or fraud nor contradict his judicial admissions in his Answer to Defendant's Cross-complaint.

3. Plaintiff is not barred by law pursuant to the California Business and Professions Code, Division 10 (Cannabis), Chapter 5 (Licensing), § 26057 (Denial of Application) from owning a Marijuana Outlet conditional use permit issued by the City of San Diego.

These three findings by the Court are questions of law that support Weinstein's client's case. *There is no logical reason for him to oppose their inclusion and there is certainly nothing that is unnecessary, argumentative or that would invite confusion from their inclusion.*

E. CONCLUSION

Counsel sincerely and emphatically requests that this Court consider the possibility that this entire action has been a sham meant to deceive this Court. If not for Cotton's sake, then at least for its own. Counsel does not want to be involved in a litigation matter in which one of the issues is whether this Court has unlawfully conspired with Weinstein to predetermine the outcome of this action in a manner that minimizes the financial liability of numerous attorneys the Court has made statements about that can be used against it to justify allegations of corruption.

DATED: August 19, 2019

By Jacob P. Austin
JACOB P. AUSTIN
Attorney for Defendant
DARRYL COTTON

TIFFANY & BOSCO P.A.
MEGAN E. LEES (SBN 277805)
mel@tblaw.com
MICHAEL A. WRAPP (SBN 304002)
maw@tblaw.com
EVAN P. SCHUBE (*Pro Hac Vice* AZ SBN 028849)
eps@tblaw.com
1455 Frazee Road, Suite 820
San Diego, CA 92108
Tel. (619) 501-3503

Attorneys for Defendant/Cross-Complainant Darryl Cotton

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

LARRY GERACI, an individual,

Plaintiff,

vs.

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

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

vs.

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

Cross-Defendants.

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

Judge: The Honorable Joel R. Wohlfeil
Dept.: C-73

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL

Action Filed: March 21, 2017
Trial Date: June 28, 2019

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INTRODUCTION

Mr. Cotton seeks a new trial on three grounds. First, the alleged November 2, 2016 agreement is illegal and void because Larry Geraci's ("Mr. Geraci") failure to disclose his interest in both the Property[1] and the Conditional Use Permit ("CUP") violates local law and policies, as well as state law. More particularly, the San Diego Municipal Code (the "SDMC") requires those disclosures to be made. Further, Mr. Geraci entered into two stipulated judgments with the City of San Diego ("City") that mandated he complied with the City's CUP requirements, which he purposefully failed to do in his performance of the alleged November 2, 2016 agreement. For his claims against Mr. Cotton, Mr. Geraci asks this Court to assist him in violating the SDMC and the policy of AUMA, which the Court is prohibited from doing. As a result, the jury's finding that the alleged November 2, 2016 agreement is a valid contract is contrary to law.

Second, the jury applied an objective standard to Mr. Cotton's conduct and a subjective standard to Mr. Geraci's as it relates to the alleged November 2, 2016 agreement and subsequent acknowledgement e-mail. The jury found the parties entered into a contract on November 2, 2016 and discounted the acknowledgement e-mail based upon Mr. Geraci's testimony that he only replied to the first line of Mr. Cotton's e-mail. Mr. Geraci's objective conduct demonstrates that either (i) he agreed to a 10% interest that he later refused existed, or (ii) there was an agreement to agree. Had the jury applied an objective standard to the conduct of ***both parties***, it would not – nor could it – have reached the verdict it did. The judgment entered in accordance with the jury's verdict is contrary to law.[2]

Third, Mr. Geraci used the attorney-client privilege as a shield during discovery and a sword at trial, which prohibited Mr. Cotton from receiving a fair and impartial trial. During discovery, Mr. Cotton sought documents and communications by and between Mr. Geraci and Gina Austin ("Ms. Austin") relating to the drafting of various agreements related to the purchase of the Property. Mr. Geraci objected to the request and never produced communications related to the same based upon attorney-client privilege. At trial, however, Mr. Geraci waived the attorney-client privilege, for the first

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[1] The term "Property" shall mean and refer to the real property located at 6176 Federal Boulevard, San Diego, California.

[2] The "agreement to agree" argument is a defense to the breach of contract claim made by Mr. Geraci. The argument should not, and cannot, be considered a judicial admission to the separate issue of Mr. Cotton's claim as to the oral joint venture agreement.

time, and both he and Ms. Austin testified as to their communications. Mr. Cotton was unable to cross-examine either witness with the relevant documents Mr. Geraci withheld during discovery on the ground of attorney-client privilege. The requested communications went to one of the central issues of the case – whether the alleged November 2, 2016 agreement was an agreement, or an agreement to agree. The use of the attorney-client privilege as a sword at trial was made even more improper given the content of the testimony by Mr. Geraci and Ms. Austin, both of whom accused Mr. Cotton of a crime – extortion. As a result, Mr. Cotton did not receive a fair and impartial trial.

ARGUMENT

A. STANDARD FOR MOTION FOR NEW TRIAL.

A verdict may be vacated, in whole or in part, and a new trial granted on all or part of the issues, when either the verdict is contrary to the law, there is an error in law at the trial, there is insufficient evidence to support the verdict, or an irregularity in the proceedings. Cal. Code Civ. Proc. § 657(6)-(7). A party may raise illegality of contract on a motion for new trial. *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 148 (citing *Pacific Wharf & Storage Co. v. Standard American Dredging Co.* (1920) 184 Cal. 21, 23-24)); *Gray v. Robinson* (1939) 33 Cal.App.2d 177, 182 (irregularity in the proceedings); *A&M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 566 (litigant cannot claim privilege during discovery, then testify at trial as to the same matter); *see also Webber v. Webber* (1948) 33 Cal.2d 153, 164 (affidavit not required where motion for new trial "relies wholly upon facts appearing upon the face of the record"). On a motion for new trial, the Court sits as the 13th juror and is "vested with the plenary power – and burdened with a correlative duty – to independently evaluate the evidence." *Ryan v. Crown Castle NG Networks Inc.* (2016) 6 Cal.App.5th 775, 784.

B. RELEVANT BACKGROUND.

Mr. Geraci, an IRS Enrolled Agent, Has Two Judgments Prohibiting the Operation of a Marijuana Dispensary Unless He Complies With the SDMC

Mr. Geraci has been an enrolled agent with the IRS ("Enrolled Agent"), which "means he has a federal license that allows him to represent clients before the IRS," since 1999. (Reporter's Transcript of Trial ("RT") July 3, 2019 at 14:22-16:24; 56:25-57:11, the relevant excerpts of which are attached

hereto as **Exhibit A**.[3]) Prior to his involvement with the Property and during the time in which he was an Enrolled Agent, Mr. Geraci was involved in at least two illegal marijuana dispensaries (the "Illegal Marijuana Dispensaries"). (*See id.* (Mr. Geraci testifying that he has been an enrolled agent since 1999); Stipulation for Entry of Final Judgment and Permanent Injunction; Judgment Thereon [CCP § 664.6] (the "Tree Club Judgment") and Stipulation for Entry of Final Judgment and Permanent Injunction; Judgment Thereon [CCP § 664.6] (the "CCSquared Judgment") (collectively referred to herein as "Geraci Judgments") true and correct copies of which are attached hereto as **Exhibits B and C**, respectively, and incorporated herein by this reference.)

Pursuant to the terms of the Geraci Judgments, Mr. Geraci could only operate or maintain a marijuana dispensary after providing written proof to the City that "any required permits or licenses to operate a marijuana dispensary, collective or cooperative have been obtained from the City of San Diego as required by the SDMC." (**Exhibit B** (Tree Club Judgment) at ¶¶ 10(b), 17 (emphasis added); Exhibit – (CCSquared Judgment) at¶ 9(b).) Unlike paragraphs 9 through 14, paragraph 10(b) in the Tree Club Judgment is not limited to the "PROPERTY." (*See id.*) Unlike paragraphs 8 and 10 in the CCSquared Judgment, paragraph 9 is not limited to the "PROPERTY." (**Exhibit C** (CCSquared Judgment).[4]) Additionally, Mr. Geraci was fined $25,000 in the Tree Club Judgment and $75,000 in the CCSquared Judgment. (**Exhibit B** (Tree Club Judgment) at ¶ 17; **Exhibit C** (CCSquared Judgment) at ¶ 15.)

State Marijuana Laws

In 2003, the State of California (the "State") enacted the Medical Marijuana Program Act (the "MMPA"), which established certain requirements for Medical Marijuana Consumer Cooperatives ("MMCC"). On October 9, 2015, the State passed the Medical Marijuana Public Safety and Environmental Protection Act, 2015 California Senate Bill No. 643, California 2015-2016 Regular Session (hereinafter cited to as "S.B. 643"). Pursuant to S.B. 643, an application must be denied if the applicant does not qualify for licensure. (S.B. 643 at § 10 (adding Cal. Bus. & Prof. Code § 19323(a), (b)(8).) An applicant does not qualify if he has been sanctioned by a city for unauthorized commercial

[3] For the convenience of the Court and to avoid a multiplicity of exhibits, true and correct copies of all relevant excerpts of testimony at trial on July 3, 2019 cited herein are contained in **Exhibit A**. Each excerpt of testimony is clearly identified by a slipsheet and bookmarked for this Court's ease or reference and expedient access.

[4] The CCSquared Judgment was a global settlement of two separate civil actions.

marijuana activity. (*Id.*) Although Section 12, which added § 19324, provides that an applicant shall not be denied a state license if the denial is based upon certain conditions, neither of the two conditions specified applies to § 19323(b)(8). (*Id.* at § 12.) In the Geraci Judgments, the City sanctioned Mr. Geraci for unauthorized commercial marijuana activity. (*See* **Exhibits B and C**.)

On November 8, 2016, the voters of California approved Proposition 64, the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA"). (Control, Regulate, and Tax Adult Use Of Marijuana Act, 2016 Cal. Legis. Serv. Prop. 64 (hereinafter cited as "Prop. 64").) The purpose and intent of AUMA was to: (i) strictly control the cultivation and sale of marijuana "through a system of state licensing, regulation, and enforcement; (ii) allow local governments to enforce state laws and regulations; and (iii) bring marijuana into a regulated and legitimate market to create a transparent and accountable system. (Prop. 64 at §§ 2, 3.) In order to create more legitimacy and transparency, among other things, AUMA requires the disclosure of all persons who have an interest in the license. (*Id.* at § 6.1 (adding §§ 26001(a) (providing broad definition of applicant), 26055(a) (licensing authorities may issue state licenses only to qualified applicants), and 26057 (prohibiting certain applicants from obtaining a license).)

Local Marijuana Laws

After the enactment of the MMPA, the City adopted Ordinance No. 20356 ("Ordinance 20356"). Pursuant to Ordinance 20356, a CUP is required to operate an MMCC. (*See id.* at § 126.0303(a); § 141.0614.) In February 2017, the City adopted Ordinance No. 20793, which requires a conditional use permit for a marijuana outlet. (Ordinance No. 20793) at p. 4 (§ 126.0303).) The approval of a CUP is governed by Process Three, which requires approval by a hearing officer and allows the hearing officer's decision to be appealed to the Planning Commission. SDMC § 112.0501 (providing overview of Process Three).

The City's CUP requirements mandate the disclosure of anyone who holds an interest in the relevant property or a CUP. (*See* **TE 30** (Ownership Disclosure Statement), a true and correct copy of which is attached hereto as **Exhibit D** and incorporated herein by this reference.) SDMC § 112.0102(b) (application shall be made on forms provided by city manager and accompanied by all the information required by the same); SDMC § 112.0102(c) (information requested on forms updated "to comply with

revisions to local, state, or federal law, regulation, or policy. As evidenced by the SDMC, there are at least two reasons for the information mandated by the application forms.

The first reason for the disclosure requirements is conflict of interest laws. (RT July 8, 2019 at 33:10-34:1, the relevant excerpts of which are attached hereto as **Exhibit E**;[5] *see also* SDMC § 27.3563 (prohibiting conflicts of interest).) The City's ethics ordinances (collectively, the "Ethics Ordinances") were adopted "to embrace clear and unequivocal standards of disclosure and transparency in government so as to avoid conflicts of interest." SDMC § 27.3501. The Ethics Ordinances require, among others, that a City official disclose his or her economic interests. *Id.* at § 27.3510. The Ethics Ordinances make it unlawful for any city official to make a municipal decision in which he or she knows, or has reason to know, that they have a disqualifying financial interest. *Id.* at § 27.3561; *see also id.* at §§ 27.3562-63. The Ethics Ordinance applies to hearing officers who make decisions on CUP applications. SDMC § 27.3503 (*see* definitions of "City Official" and "High Level Filer," the latter includes, by cross-reference to Govt. Code § 87200, hearing officers).

The second reason relates to the requirements for obtaining a license for a Marijuana Outlet ("MO"), which requires the applicant/responsible persons to undergo background checks after the issuance of a CUP. SDMC § 112.0102(c); *id.* at §§ 42.1502 (defining responsible persons), 42.1504 (requiring a permit to operate a marijuana outlet), and 42.1507 (requiring background check); (*see also* RT July 9, 2019 at 113:18-114:3 (Ms. Tirandazi, a City employee, testifying that background checks are required after the CUP process) the relevant excerpts of which are attached hereto as **Exhibit F**.[6])

Failure to Disclose Ownership Interest and Geraci Judgments

Mr. Geraci identified the Property and began talking with Mr. Cotton because the Property "may qualify for a dispensary." (**Exhibit A** at 59:18-19.) On October 31, 2016, Ms. Austin – a self-proclaimed expert in cannabis licensing – e-mailed Abhay Schweitzer instructing him to keep Mr. Cotton's name off the CUP application "unless necessary" because Mr. Cotton had "legal issues

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[5] For the convenience of the Court and to avoid a multiplicity of exhibits, true and correct copies of all relevant excerpts of testimony at trial on July 8, 2019 cited herein are contained in **Exhibit E**. Each excerpt of testimony is clearly identified by a slipsheet and bookmarked for this Court's ease or reference and expedient access.

[6] For the convenience of the Court and to avoid a multiplicity of exhibits, true and correct copies of all relevant excerpts of testimony at trial on July 9, 2019 cited herein are contained in **Exhibit F**. Each excerpt of testimony is clearly identified by a slipsheet and bookmarked for this Court's ease or reference and expedient access.

with the City." (Trial Exhibit ("TE") 36, a true and correct copy of which is attached hereto as **Exhibit G** and incorporated herein by this reference; **Exhibit E** at 11:28-13:23) (Ms. Austin characterizing herself as a marijuana expert), *Id.* at 54:10-55:11.) On the same date, Mr. Geraci caused a Form DS-3032 General Application (the "CUP General Application") to be filed with the City. (*See* TE 34, a true and correct copy of which is attached hereto as **Exhibit H** and incorporated herein by this reference, at 34-001.) Rebecca Berry ("Ms. Berry") was identified as the "Lessee or Tenant" and the Permit Holder. (*Id.*) Mr. Geraci is not identified anywhere in the CUP General Application. (*See id.*) Section 7 of the CUP General Application requires the disclosure of, among other things, the Geraci Judgments (*id.* at § 7); however, they were not disclosed. (*See id.*)

On the same date, Ms. Berry executed and submitted the Ownership Disclosure Statement to the City. (*See* **Exhibit D**). As set forth in the Ownership Disclosure Statement, 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 interest." (*Id.*) The Ownership Disclosure Statement also required the disclosure of "Other Financially Interested Persons." (*Id.*) The disclosure requirements are mandatory and do not include exceptions for Enrolled Agents. (*See id.*) Notwithstanding, Mr. Geraci is not identified in the Ownership Disclosure Statement. (*Id.*)

Both Mr. Geraci and Ms. Berry testified that the exclusion of Mr. Geraci was purposeful; he was not disclosed because he was as an Enrolled Agent. (**Exhibit A** at 193:19-194:5.) Mr. Geraci also claimed that the lack of disclosure was "for convenience of administration." (*See Plaintiff/Cross-Defendant Larry Geraci's Answers to Special Interrogatories, Set Two, Propounded by Defendant/Cross-Complainant Darryl Cotton* (hereinafter, the "Discovery Responses"), a true and correct copy of which is attached hereto as **Exhibit I** and incorporated herein by this reference, at 12:8-16.) However, Ms. Austin instructed the consultants to leave Mr. Cotton's name off the CUP application unless necessary because of Mr. Cotton's "legal issues with the City." Mr. Geraci also had "legal issues with the City" and he was not disclosed. (**Exhibit E** at 54:24-55:11.)

Mr. Geraci's Objective Manifestations

On November 2, 2016, Messrs. Geraci and Cotton executed the alleged November 2, 2016 agreement, which the jury determined constituted a contract. (TE 38, a true and correct copy of which

is attached hereto as **Exhibit J** and incorporated herein by this reference.) Shortly after receiving a copy of the alleged agreement, Mr. Cotton sent an e-mail stating the 10% equity position in the dispensary was not included in the document and requesting an acknowledgment that a provision regarding the same would be included in "any final agreement." (TE 42, a true and correct copy of which is attached hereto as **Exhibit K** and incorporated herein by this reference.) Mr. Geraci responded, "no problem at all." (*Id.*)

Mr. Geraci then caused certain draft agreements to be exchanged with Cotton. (*See* TE 59 and 62, true and correct copies of which are attached hereto as **Exhibits L and M**, respectively, and incorporated herein by this reference.) The draft agreements did not state they were amending a prior agreement for the purchase of the property, did not reference a prior agreement, and the "Date of Agreement" was "[t]he latest date of execution of the Seller or the Buyer, as indicated on the signature page." (*See e.g.*, **Exhibit** L at 059-003.) The draft agreements included terms that were not included in the November 2, 2016 document, and provide no indication or reference to the alleged November 2, 2016 agreement. (*See id.*) And none of the documents or communications produced by Mr. Geraci ever referenced extortion, which was never raised during the course of discovery.

Mr. Geraci Used the Attorney-Client Privilege as a Shield and a Sword

Mr. Cotton propounded discovery seeking, among other things, documents and communications by and between Mr. Geraci and Ms. Austin. (*See* **Exhibit I** (Discovery Responses) at 13:1-13, 14:8-23.) Mr. Geraci refused to produce any documents or communications based upon attorney-client privilege. (*See id.*) Mr. Geraci waived the attorney-client privilege for the first time and trial, and both he and Ms. Austin testified as to communications regarding the drafting of a purchase agreement and statements Mr. Geraci purportedly made that he was being extorted by Mr. Cotton. (**Exhibit E** at 41:10-26; *see also* **Exhibit A** at 129:22-28 (Mr. Geraci testifying as to the same statements).)[7] The testimony of Mr. Geraci and Ms. Austin was not previously disclosed due to the attorney-client privilege, but and it effectively accused Mr. Cotton of a crime. *See* Pen. Code, § 518 (defining extortion).

[7] "Extortion" is defined as the "...obtaining of property or other consideration from another, with his or her consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right." Cal. Pen. Code § 518. None of the evidence suggests any "wrongful use of force or fear" by Mr. Cotton. Multiple statements equating Mr. Cotton's conduct to extortion were inflammatory and prejudicial.

C. THE ALLEGED NOVEMBER 2, 2016 AGREEMENT WAS ILLEGAL.

The Court has a duty to, *sua sponte*, refuse to entertain an action that seeks to enforce an illegal contract. *May v. Herron*, (1954) 127 Cal.App.2d 707, 710-12 (internal citations and quotations omitted) (voiding contract where plaintiff sought to recover balance due on contract, which recovery would have allowed plaintiff to "benefit from his willful and deliberate flouting of a law designed to promote the general public welfare"). "Whether a contract is illegal ... is a question of law to be determined from the circumstances of each particular case." *Kashani v. Tsann Kuen China Enterprise Co.* (2004) 118 Cal. App. 4th 531, 540; *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, 838. A contract is unlawful and unenforceable if it is contrary to, in pertinent part, (1) an express provision of law; or (2) the policy of express law. Cal. Civ. Code § 1667(1)-(3); *Kashani, supra,* at 541 (contract must have a lawful object to be enforceable). For purposes of illegality, the "law" includes statutes, local ordinances, and administrative regulations issues pursuant to the same. *Id.* at 542. "All contracts which have for their object, *directly or indirectly*, to exempt anyone from responsibility for his own ... violation of law, whether willful or negligent, are against the policy of the law." Cal. Civ. Code § 1668 (emphasis added). A contract made for the purpose of furthering any matter prohibited by law, or to aid or assist any party in the violation of the law, is void. *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109 (voiding a contract entered into for the purpose of avoiding state and federal income tax regulations). As summarized in *Yoo v. Jho* (2007) 147 Cal.App.4th 1249:

> No principle of law is better suited than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects to be carried out. The courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act.

Id. at 1255 (internal citations and quotations omitted); *see also Kashani, supra,* at 179; Cal. Civ. Code §§ 1550, 1608. "The test as to whether a demand connected with an illegal transaction is capable of being enforced is whether the claimant requires the aid of an illegal transaction to establish his case." *Brenner v. Haley* (1960) 185 Cal.App.2d 183, 287.

May is instructive. In *May*, the Newmans and May entered into a contract whereby May agreed to construct a home for the Newmans. *May, supra,* at 708. However, May could only perform under the contract by acquiring construction materials through the veteran's priority status under Federal

Priorities Regulation No. 33, which gave preference to veterans in obtaining construction materials. *Id.* The Newmans transferred title to their property to a veteran and May secured construction materials because of his veteran's status. *Id.* at 708-09. The Court of Appeals held that the contract between May and the Newmans, while valid on its face, was illegal because May knew the house was not intended for occupancy by a veteran and May's conduct in performing his obligations under the contract violated the federal regulation.

Mr. Geraci, like May, violated local laws in pursuit of his performance under the alleged November 2, 2016 agreement. On October 31, 2016, Mr. Geraci caused to be filed with the City a CUP application which failed to disclose his ownership interest in the Property, the CUP, or the Geraci Judgments, despite the City's requirement that each of the foregoing be disclosed. (*See* **Exhibit H** at 034-001 (§ 7 requires disclosure of Geraci Judgments), *id.* at 034-004 (requires disclosure of all persons with an interest in the Property and CUP); SDMC § 112.0102(b) (application shall be made on forms provided by city manager and shall be accompanied by all the information required by the same); SDMC § 112.0102(c) (information requested on forms updated "to comply with revisions to local, state, or federal law, regulation, or policy).

The non-disclosure was purposeful. (*See* **Exhibit I** – (Discovery Resp.) at 12:8-16.) Indeed, efforts were undertaken to exclude any reference to Mr. Cotton in the CUP application because of his "legal issues" with the City. There are no disclosure exceptions for Enrolled Agents, and neither the SDMC nor the Geraci Judgments allow Mr. Geraci to comply with some of the CUP requirements. Applying the test of illegal contracts, Mr. Geraci relied upon the General Application and Ownership Disclosure Statement to suggest that he complied with the terms of the alleged November 2, 2016 agreement. As a result, Mr. Geraci asks this Court to assist him in violating local laws, which the Court is prohibited from doing.

The alleged November 2, 2016 agreement also violates the policy of express law in the form of the CUP requirements and AUMA.[8] The policy of the SDMC is disclosure and transparency in

[8] Although AUMA was adopted days after the alleged November 2, 2016 agreement, pursuant to Ordinance No. O-20793, all MMCC applications in the City were replaced with the new retail sales category called an MO. Thus, the CUP application submitted by Ms. Berry on behalf of Mr. Geraci is subject to AUMA. Furthermore, the text of AUMA was circulated in July of 2016 so all of the requirements for potential successful applicants were already known to the public and attorneys specializing in cannabis laws and regulations prior to November 2, 2016.

government. Similarly, the policy of AUMA is to bring marijuana into a regulated and legitimate market to create a transparent and accountable system. Mr. Geraci's efforts, which were undertaken both before and after November 2, 2016, violated both policies. Neither of the policies provides any exceptions for Enrolled Agents, "convenience of administration," or those persons with "legal issues" – all of which Mr. Geraci has used to justify his purposeful non-disclosure.

D. THE JURY APPLIED AN OBJECTIVE STANDARD TO MR. COTTON, AND A SUBJECTIVE STANDARD TO MR. GERACI.

Mutual assent is determined under an objective standard applied to the outward manifestations, the surrounding circumstances, the nature and subject matter of the contract, and subsequent conduct of the parties; assent is not determined by unexpressed intentions or understandings. *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141 (disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 524); *People v. Shelton* (2006) 37 Cal.4th 759, 767 (internal citations and quotations omitted). Agreements to agree are unenforceable because there is no intent to be bound and the Court may not speculate upon what the parties will agree. *Bustamante v. Intuit, Inc.* (2009) 141 Cal.App.4th 199, 213-14 (internal citations and quotations omitted).

There was no dispute relating to the parties' objective manifestations. Shortly after receiving a copy of the alleged November 2, 2016 agreement, Mr. Cotton sent an e-mail stating the 10% equity position in the dispensary was not included in the document and requested an acknowledgment that the same would be included in "any final agreement." (*See* **Exhibit K.**) Mr. Geraci responded "no problem at all." (*Id.*) Mr. Geraci then had draft final agreements prepared and circulated. The draft agreements: (i) do not state they were amending a prior agreement; (ii) do not reference a prior agreement; (iii) state that the "Date of Agreement" was "[t]he latest date of execution of the Seller or the Buyer, as indicated on the signature page;" (iv) do not provide any indication that a prior agreement was reached between the parties; and (v) include terms not set forth in the alleged November 2, 2016 agreement. None of the drafts were signed and none of the documents produced by Mr. Geraci ever referenced extortion.

Only two conclusions could have been reached if the appropriate objective standard had been applied to both Mr. Cotton and Mr. Geraci. The first possible conclusion is that the alleged November 2, 2016 agreement included the 10% interest that Mr. Geraci subsequently refused to acknowledge. The

second possible conclusion is that the e-mail exchange subsequent to the alleged November 2, 2016 agreement demonstrated the parties agreed to agree. And, therefore, the alleged November 2, 2016 agreement was not enforceable.

Instead, the jury reached the conclusion that the alleged November 2, 2016 agreement was a contract. In order to do so, the jury must have applied Mr. Geraci's subjective standard. The jury must have believed Mr. Geraci's unexpressed intentions or understandings (*i.e.*, that he was only responding to the first line of Mr. Cotton's e-mail and the statements to his counsel that he was being extorted). According to Mr. Geraci's testimony, he called Cotton the following day to explain. But if the hours that passed between the November 2, 2016 agreement and Mr. Cotton's e-mail was too late for Mr. Cotton, the day that passed before Mr. Geraci's call was also too late to explain his subjective intent as to his response. Therefore, the jury's conclusion that the alleged November 2, 2016 agreement is a contract stands in direct contrast to the objective standard applied to Mr. Cotton's conduct. The jury cannot apply objective standards to Mr. Cotton and subjective standards to Mr. Geraci.

E. MR. GERACI USED THE ATTORNEY-CLIENT PRIVILEGE AS A SHIELD AND A SWORD, THEREBY VIOLATING MR. COTTON'S RIGHT TO A FAIR AND IMPARTIAL TRIAL.

"[A]n overt act of the trial court … or adverse party, violative of the right to a fair and impartial trail, amounting to misconduct, may be regarded as an irregularity." *Gray, supra,* 33 Cal.App.2d at 182; *see also Webber, supra,* 33 Cal.2d at 164 (affidavit not required where motion for new trial "relies wholly upon facts appearing upon the face of the record"). Litigation is not a game, and a litigant cannot claim privilege during discovery then testify at trial. *A&M Records, supra,* 75 Cal.App.3d at 566. As the *A&M* Court eloquently put it, "[a] litigant cannot be permitted to blow hot and cold in this manner." *Id.* At the February 8, 2019 hearing on Mr. Cotton's Motion to Compel Further Responses to Discovery to which Mr. Geraci asserted Attorney-Client Privilege, the Court acknowledged as much when it stated: "[T]here is a price to be paid; [Mr. Geraci] can't go back and reopen that area once [he has] narrowed the scope by asserting privilege." (*See* **Exhibit J** February 8, 2019 at 21:1-5. The Court subsequently entered an order prohibiting testimony on matters that Plaintiff asserted attorney-client privilege. Minute Order dated Feb. 8, 2019 (ROA 455) at p. 3 (prohibiting testimony on matters that Plaintiff

asserted privilege in discovery). Mr. Geraci has previously admitted that failure to disclose constitutes "substantial prejudice." *Plaintiff Larry Geraci's Memorandum of Points and Authorities in Opposition to Defendant Darryl Cotton's Motion to Expunge Lis Pendens* dated April 10, 2018 (ROA 179) at 4:7-8. (Mr. Geraci claimed that Cotton's "refusal to participate in discovery has substantially prejudiced Geraci and Berry in preparation of this case.").

Mr. Cotton propounded discovery seeking, among other things, documents and communications by and between Mr. Geraci and Ms. Austin related to the purchase of the Property. (*See* **Exhibit I** (Discovery Responses) at 13:1-13, 14:8-23.) No documents or communications were produced in connection with the request based upon attorney-client privilege. Then, at trial, Mr. Geraci waived privilege and he and Ms. Austin testified as to the very communications Mr. Cotton previously sought.

Mr. Geraci's use of the privilege as a shield and a sword violated Mr. Cotton's right to a fair and impartial trial. One of the central arguments Mr. Cotton presented was that the parties agreed to draft a final agreement. While Mr. Geraci's conduct was consistent with this argument, he and Ms. Austin testified at trial that Mr. Geraci's request for draft agreements was purportedly the result of extortion. The failure to disclose those documents constitutes, as Mr. Geraci previously admitted, substantial prejudicial to Mr. Cotton because it prevented Mr. Cotton from cross-examining Mr. Geraci and Ms. Austin on their inflammatory and prejudicial extortion allegations, as well as proving that the alleged November 2, 2016 agreement was an agreement to agree. Mr. Geraci cannot be permitted to "blow hot and cold."

CONCLUSION

For the reasons set forth herein, Mr. Cotton requests that the Court (i) find that the alleged November 2, 2016 agreement is illegal and void; or (ii) order a new trial and enable Mr. Cotton to conduct discovery related to the communications between Messrs. Geraci and Cotton.

DATED this 13th day of September, 2019.

TIFFANY & BOSCO, P.A.

By_____
EVAN P. SCHUBE
Attorneys for Defendant/Cross-Complainant
Darryl Cotton

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20 Pages

FERRIS & BRITTON
A Professional Corporation
Michael R. Weinstein (SBN 106464)
Scott H. Toothacre (SBN 146530)
501 West Broadway, Suite 1450
San Diego, California 92101
Telephone: (619) 233-3131
Fax: (619) 232-9316
mweinstein@ferrisbritton.com
stoothacre@ferrisbritton.com

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

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, HALL OF JUSTICE

LARRY GERACI, an individual,

Plaintiff,

v.

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

Defendants.

AND RELATED CROSS-ACTION

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

Judge: Hon. Joel R. Wohlfeil

PLAINTIFF/CROSS-DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT/CROSS-COMPLAINANT'S MOTION FOR NEW TRIAL

[IMAGED FILE]

DATE: **October 25, 2019**
TIME: **9:00 a.m.**
DEPT: **C-73**

Filed: March 21, 2017
Trial Date: June 28, 2019
Notice of Entry of Judgment: August 20, 2019

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff/Cross-Defendants submit this Memorandum of Points and Authorities in Opposition to Defendant/Cross-Complainant's Motion for New Trial.

I. INTRODUCTION/SUMMARY OF ARGUMENT

This case came to jury trial on July 1, 2019 and took place over the ensuing three-week period, consisting of 9 trial days. Mr. Cotton received a fair trial. The jury unanimously found in favor of Mr. Geraci and against Mr. Cotton on his causes of action for Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing and awarded damages to Mr. Geraci. (See Special Verdict Form, ROA #635.)[1] Cotton now requests this Court to set aside the verdict.[2]

As a threshold matter, Mr. Cotton's supporting documents were not timely filed and served. CCP § 569(a) provides that "Within 10 days of filing the notice, the moving party ***shall serve upon all other parties*** and file any brief ***and accompanying documents***, including affidavits in support of the motion. ...". Here, Mr. Cotton's Notice of Intent to Move for New Trial was served and filed on September 3, 2019. The ten-day period to file his brief and accompanying documents expired on September 13th. While Mr. Cotton timely filed his ***unsigned*** Memorandum of Points and Authorities just before midnight on September 13th, that filing did not include any accompanying documents. Instead, on Monday, September 16th, (3-days late) Mr. Cotton filed two documents entitled "Errata"

[1] The jury also unanimously found in favor of Mr. Geraci and against Mr. Cotton on all of Mr. Cotton's claims set forth in his cross-complaint. (See Special Verdict Form, ROA# 636.) Mr. Cotton does not challenge the jury verdict nor seek a new trial in connection with his cross-claims; his memorandum of points and authorities in support of his new trial motion does not argue any grounds for a new trial on his cross-claims. Even if for the sake of argument Mr. Cotton intended to move for a new trial on those claims, that motion would fail for the same reason as his new trial motion fails as to the verdict against him on Mr. Geraci's claims.

[2] Mr. Cotton's counsel, Jacob Austin, did not raise an objection to the admission of any exhibits or the examination with regard to any exhibits. Attorney Austin only made two objections throughout the trial, neither of which have any impact on the pending motion. "In an appeal ... from a judgment after denial of a motion for new trial, the failure of ... counsel to object or except may be treated as a waiver of the error." (5 Witkin, Cal. Procedure (1983 pocket sup.) Attack on Judgment in Trial Court, § 119, p. 307; *Malkasian v. Irwin* (1964) 61 Cal. 2d at p. 747; see *Horn v. Atchison, T. & S.F.Ry. Co.* (1964) 61 Cal.2d 602, 610, cert. den. Sub nom.Atchison, *Topeka & Santa Fe Railway Co. v. Horn*, 380 U.S. 909 [13 L. Ed. 2d 796, 85 S. Ct. 892] ["'In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice.'" (*Sabella* v. Sothern Pac. Co. (1969) 70 Cal.2d at p. 319.)

which contained the accompanying documents in support of his motion.[3] Affidavits or declarations filed too late may be disregarded. (See *Morris v. Purity Sausage Co.* (1934) 1 Cal.App.2d 120; *Lewith v. Rehmke* (1935) 10 Cal.App.2d 97, 105; *Peterson v. Peterson* (1953) 121 Cal.App.2d 1, 9.)

As to the merits of his motion for new trial, Mr. Cotton's asserts three grounds:

First Mr. Cotton contends the November 2, 2016 agreement was illegal and void because Mr. Geraci failed to disclose his interest in both the Property and the Conditional Use Permit ("CUP"). Mr. Cotton erroneously contends the agreement violates local law and policies, as well as state law. The statutes upon which Mr. Cotton relies were not even in effect at the time the November 2, 2016 contract was entered.[4] Even if that is disregarded, the contract was otherwise legal as discussed *infra*.

Additionally, Mr. Cotton has waived the "illegality" argument for two reasons: (1) he never raised illegality as an affirmative defense; and (2) with regard to the "illegality" argument, Attorney Austin represented to the Court at the conclusion of evidence and in response to the Court's inquiries if there were any other exhibits Mr. Austin wished to admit into evidence: "I'm willing to not argue the matter if your Honor is inclined not to include it. We can just – forget about it." (Reporter's Transcript herein after referred to as "RT") (Plaintiff/Cross-Defendants Notice of Lodgment in Opposition to Motion for New Trial ("Plaintiff NOL") (RT, July 10, 2019, p. 69:15-72:26, Ex. 6 to Plaintiff NOL)

Even assuming the illegality argument has not been waived, the argument that the November 2, 2016 contract is illegal fails. Mr. Geraci's stipulated judgments with the City of San Diego, and the

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[3] Mr. Cotton's Errata claims that "[d]ue to a clerical error, an incomplete draft of the Memorandum of Points and Authorities in Support of the Motion for New Trial was uploaded for electronic filing and service instead of the true final copy and, as such, the table of Authorities in the draft was incomplete, the document was not executed and the exhibits referenced therein were not attached." The signature page for the Memorandum of Points & Authorities attached to the Errata is dated, ***September 15, 2019***, (2 days after the papers were filed and served) which belies Mr. Cotton's claim that the motion was complete, filed and served in a timely manner and that the failure to transmit the signature page and accompanying documents was a "clerical error. Indeed, it suggests Mr. Cotton's filing was untimely.

[4] In making his illegality argument, Mr. Cotton cites to B&P Code §§ 26000 (Effective June 27, 2017); 26055 (Effective July 2019); and 26057(a) (Effective January 1, 2019). The contract in question was entered November 2, 2016. The general rule that judicial decisions are given retroactive effect is basic in our legal tradition. In *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207, the California Supreme Court observed: "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." (*United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79, 103 S.Ct. 407, 413, 74 L.Ed.2d 235.) The statutes cited by Mr. Cotton in support of his "illegality" argument were not in effect until after, sometimes years after, entering the contract in question.

use of an agent in application process for the CUP, do not render the contract illegal. Indeed, as set forth herein, several witnesses testified that it is common practice for an applicant on a CUP application for a medical marijuana dispensary to utilize an agent in that process.

Second, Mr. Cotton argues the verdict is against law because the jury disregarded the jury instructions and applied an objective standard to Mr. Cotton's conduct and a subjective standard to Mr. Geraci's conduct as related to the November 2, 2016 Agreement, the "confirmation email" and the "disavowment" allegation. To the contrary, there is no legal basis to conclude that the jury disregarded the jury instructions and applied an objective standard to Mr. Cotton and a subjective standard to Mr. Geraci's conduct. That is simply Mr. Cotton's interpretation of the facts and evidence which he would like to substitute for the jury's unanimous verdict.

Third, Mr. Cotton contends that Mr. Geraci used the attorney-client privilege as a shield during discovery and as a sword during trial, which prohibited Mr. Cotton from receiving a fair and impartial trial.[5] Mr. Cotton has misrepresented the facts, circumstances and the Minute Order issued by the Court in connection with the attorney-client privilege issues during discovery and the waiver of those issues at trial. In spite of asserting the attorney-client privilege with regard to the documents drafted by Gina Austin's office, and contrary to Cotton's arguments herein, those documents were produced to Mr. Cotton during discovery. (Cross-Defendant Rebecca Berry's Responses to Request, For Production of Documents, Set One, Ex. 1 to Plaintiff NOL; and Plaintiff/Cross-Defendant Larry Geraci's Amended Responses to Special Interrogatories, Set Two, Ex. 2 to Plaintiff NOL) The documents were also listed on the Joint TRC Exhibit List and admitted into evidence at trial without objection. (Trial Exhibits 59, 62, Ex. 7 to Plaintiff NOL; RT July 3, 2019, 129:22-133:27, Ex. 3 to NOL; Joint Exhibit List, Ex. 10 to Plaintiff NOL) Mr. Cotton's counsel did not raise any evidentiary objections to the waiver of attorney-client privilege either with regard to the documentary evidence or the testimonial evidence. As such, Mr. Cotton's claim that he was unable to cross-examine either Mr. Geraci or Ms. Austin with the relevant documents (Cotton's P's & A's, p. 5:1-3) is without merit.

[5] This is a C.C.P. § 657(7) issue regarding evidentiary rulings, a ground *not* set forth in the Notice of Intent to Move for New Trial. (See *Treber v. Sup. Ct* (1968) 68 Ca.2d 128, 131; *Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599, 1601-1605.) (Practice Guide: Civil Trials and Evidence, Post Trial Motions, (The Rutter Group 2010) ¶ 18:201.)]

Indeed, armed with those documents during discovery, Mr. Cotton never took the depositions of Mr. Geraci nor Attorney Gina Austin. And he in fact questioned the witnesses about those documents during trial. (RT July 8, 2019, p. 58:3-60:10, Ex. 4 to Plaintiff NOL)

Finally, as a matter of law, a new trial may only be granted when the verdict constitutes a miscarriage of justice. (Calif. Const., Art. VI, §13.) "If it clearly appears that the error could not have affected the result of the trial, the court is bound to deny the motion." [*Bristow v. Ferguson* (1981) 121 Cal.App.3d 823, 826; *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 866-867, (disapproved on other grounds in *People v. Ault* (2004) 33 Cal.4th 1250, 1272.)] Mr. Cotton has not demonstrated the claimed errors likely affected the result of the trial.

II. STANDARDS FOR NEW TRIAL MOTION BASED ON C.C.P. § 657(6)

A. Cotton's New Trial Motion is Limited to the Statutory Ground that the Verdict was "Against Law" under C.C.P. § 657(6)

In his Notice of Intent to Move for New Trial dated September 13, 2019, Mr. Cotton gave notice that he was bring the motion pursuant to C.C.P. § 657(6) on the ground that "the verdict is against the law." (ROA#656.) Yet in his brief, he asserts that his motion for new trial is made on the grounds of "irregularity of proceedings" under C.C.P. § 657(1) and "against the law" under (C.C.P. § 657(7), *neither of which grounds were set forth in his Notice of Intention to Move for New Trial.* (Cotton P's&A's, p. 5:10-21) A notice of intention to move for a new trial is deemed to be a motion for new trial *on the grounds stated in the notice.* (C.C.P. §659.) It is well-established that a new trial order "can be granted only on a ground specified in the motion." (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 745; *De Felice v. Tabor* (1957) 149 Cal.App.2d 273, 274.)

Mr. Cotton also asserts that "the Court sits as the 13th juror and is "vested with the plenary power – and burdened with a correlative duty – to independently evaluate the evidence," (incorrectly citing to *Ryan v. Crown Castle NG Networks Inc.* (2016) 6 Cal.App.5th 775, 784, which concerned C.C.P. § 657(5), not § 657(6). Rather, the "against law" ground differs from the "insufficiency of the evidence" ground in that there is no weighing of evidence or determining credibility. The "against law" ground applies only when the evidence is without conflict in any material point and insufficient as a matter of law to support the verdict. (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 229.)

B. The Correct Standard for a New Trial Motion Based on the Statutory Ground that the Verdict is "Against Law"

The statutory ground under C.C.P. §657(6) that the verdict is "against law" is of very limited application. (*Tagney v. Hoy* (1968) 260 Cal.App.2d 372, citing *Kralyevich v.Magrini* (1959) 172 Cal.App.2d 784 ["A decision can be said to be 'against law' only: (1) where there is a failure to find on a material issue; (2) where the findings are irreconcilable; and (3) where the evidence is insufficient in law and without conflict in any material point.[6] C.C.P. § 657(6) is not a ground to have the court reconsider its rulings. The "against law" ground applies only when the evidence is without conflict in any material point and insufficient *as a matter of law* to support the verdict. (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 229; see *Fergus v. Songer* (2007) 150 Cal.App.4th 552, 567-569 [finding verdict was not "against law" because it was supported by substantial evidence]; *Marriage of Beilock* (1978) 81 Cal.App.3d 713, 728.) C.C.P. § 657(6) does not cover errors that fall within the other sections of C.C.P. § 657, such as § 657(7). (*O'Malley v. Carrick* (1922) 60 Cal.App. 48, 51)

III. ARGUMENT

A. MR. COTTON'S ILLEGALITY ARGUMENTS FAIL

1. Mr. Cotton Has Waived and Abandoned the "Illegality" Argument

Mr. Cotton failed to raise "illegality" as an affirmative defense in his Answer to Plaintiff's Complaint (ROA#17). Normally, affirmative defenses not raised in the answer to complaint or cross-complaint are waived. (E.g., *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 813.) As stated above, Mr. Cotton did not plead "illegality" as an affirmative defense; therefore, Mr. Cotton cites *Lewis Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 146-148), for the proposition that illegality can be raised "at any time." That is a correct statement of the law, however, that rule is not unqualified. Two California Supreme Court cases decided after *Lewis & Queen – Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162, and *Apra v. Aureguy* (1961) 55 Cal.2d 827 – both rejected post-

[6] Mr. Cotton did not set forth any failure by the court as to a finding on some material issue. Mr. Cotton also did not establish findings that are irreconcilable. Mr. Cotton further did not establish that the evidence is insufficient in law and without conflict on any material point. Other challenges as to the application of law in this case would be governed by C.C.P. § 657(7) not cited in Mr. Cotton's Notice of Intention to Move for New Trial and, therefore, are not reviewable herein. For these reasons alone, Mr. Cotton's arguments for a new trial should be rejected by this Court.

trial defenses of illegal contract because the illegality defense had not been raised in the trial court. (See *Fomco, supra,* 55 Cal.2d at p. 166; 55 Cal.2d at p. 831.) In fact, language in *Fomco* suggests that the high court actually rejected *Lewis & Queen's* dicta that the issue of illegal contract could be raised for the first time on appeal. (See *Chodosh v. Palm Beach Park Association* 2018 WL 6599824)

At trial the "illegality" issue appears to have first come up in response to questions being posed by Attorney Austin in his examination of witnesses. Attorney Weinstein argued Attorney Austin was asking questions of witnesses which implied it was illegal for Mr. Geraci to operate a legally permitted dispensary. Attorney Weinstein pointed out, and the Court agreed, that the two civil judgments on their face did not bar Mr. Geraci from operating a legally permitted dispensary. (RT, July 9, 2019, p. 120:20-121:24, Ex. 5 to Plaintiff NOL) Attorney Weinstein went on to argue that Business & Professions Code Section 26057 was *permissive* and not mandatory and that it dealt with state licenses, not a City CUP. The Court was troubled by the fact that Attorney Austin had not filed a trial brief addressing this issue, nor had Attorney Austin filed any memorandum of points and authorities on the issue. The Court concluded: "So for the time being, I'm tending to agree with the plaintiff's side without the defense having given me something I can look at and absorb." (RT, July 9, 2019, p. 120:20-123:6, Ex. 5 to Plaintiff NOL)

Later that day, Attorney Austin called Joe Hurtado to the stand. Joe Hurtado had a vested interest in the case as he was financing Mr. Cotton's litigation expenses and attorneys' fees. (RT July 9, 2019, p. 150:13-18, Ex. 5 to Plaintiff NOL) Attorney Austin improperly attempted to elicit expert testimony from Joe Hurtado, that it was his opinion that Mr. Geraci did not qualify for a CUP under the Business & Professions Code. (RT, July 9, 2019, 151:22-28, Ex. 5 to Plaintiff NOL) During Attorney Austin's examination of Mr. Hurtado, the Court initiated a side-bar at which Mr. Hurtado's proposed testimony was discussed. The Court permitted Mr. Hurtado to testify to hearsay conversations with Gina Austin and hearsay conversations with anyone else on Mr. Geraci's team. At the conclusion of Mr. Hurtado's testimony, and after excusing the jury, the Court permitted the parties to make a record of that side bar. (RT, July 9, 2019, p. 155:8-158:18, Ex. 5 to Plaintiff NOL) The Court expressed to Attorney Austin that to the extent Mr. Hurtado wanted to express legal opinions, he was not going to permit such testimony. In response, Attorney Austin admitted that "perhaps Mr.

Hurtado should have been designated as an expert...". (RT, July 9, 2019, p. 157:13-15, Ex. 5 to Plaintiff NOL) Mr. Hurtado was not designated as an expert witness and his opinion testimony was properly excluded.

The "illegality" issue was again raised on July 10, 2019, when Attorney Austin offered Trial Exhibit 281 into evidence, which was a copy of Business & Professions Code § 26051; and requested the Court take judicial notice of the two lawsuits in which Mr. Geraci was a named party. The Court sustained Attorney Weinstein's objections to Business & Professions Code § 26051 being admitted into evidence. As to the request for judicial notice of the two prior cases against Mr. Geraci, Attorney Weinstein raised an Evidence Code § 352 objection.

The Court stated:

> Putting aside whether the probative value is substantially outweighed by undue prejudice or any other of the 352 factors including but not limited to cumulativeness, as I read these judgments, Mr. Geraci is not barred from trying to obtain whatever permission he would need or anybody would need from operating a marijuana dispensary. And I thought that was your theory at one point.
>
> And if that were your theory, I'm not seeing anything, well, inside the four corners of these judgments that prohibit Mr. Geraci from, for example, doing the deal that he had proposed to do with Mr. Cotton.

Attorney Austin replied to the Court: "I think there was a change in the law, which would – would change that. ***But I'm willing to not argue the matter if your Honor is inclined not to include it. We can just – forget about it.***" The Court then sustained the objections and declined to take judicial notice of Mr. Geraci's two prior judgments. (RT, July 10, 2019, p. 69:15-72:26, Ex. 6 to Plaintiff NOL) [trial court could properly deny a motion for new trial based on a waiver of the issue during trial. (*Miller v. National American Life Ins. Co.* (1976) 54 Cal.App.3d 331, 346; *Horn v. Atchison, T. & S.F.Ry. Co.*, (1964) 61 Cal.2d 602; *Sepulveda v. Ishimaru*, (1957) 149 Cal.App.2d 543, 547]

It is clear in the instant case, that Attorney Austin abandoned his "illegality" argument; i.e., Mr. Austin's statement to the Court: "I think there was a change in the law, which would – would change that. But I'm willing to not argue the matter if your Honor is inclined not to include it. We can just – forget about it." (RT, July 10, 2019, p. 72:10-13, Ex. 6 to Plaintiff NOL) Having waived this issue during the trial, Mr. Cotton is precluded from urging it as a ground for granting a new trial.

2. The Contract at Issue in This Case is Not Illegal.

Even if the statutes Mr. Cotton relies upon were in effect on November 2, 2016 when the contract was entered (which they were not) and there were no waiver of the "illegality" issue (which there was), the November 2, 2016 agreement remains a legal contract.

The stipulated judgments on their face permit Mr. Geraci to apply for a CUP. In Case Number 37-2014-00020897-CU-MC-CTL, paragraph 8a enjoins Mr. Geraci from "Keeping, maintaining, operating, or allowing the operation of an ***unpermitted marijuana dispensary*** ...". (Italics, Bold Added.) Paragraph 8(b) specifically sates "***Defendants shall not be barred in the future from any legal and permitted use of the PROPERTY.***" (Italics, Bold Added.)

In Case Number 37-2015-00004430-CU-MC-CTL, Paragraph 7 prevents Defendant from "Keeping, maintaining, operating or allowing any commercial, retail, collective, cooperative or group establishment for the growth, storage, sale or distribution of marijuana, including, but not limited to, any marijuana dispensary, collective or cooperative organized anywhere in the City of San Diego ***without first obtaining a Conditional Use Permit pursuant to the San Diego Municipal Code.***" (Italics, bold added)

It was this language in the two stipulated judgments that led this Court to state: "I'm not seeing anything, well, inside the four corners of these judgments that prohibit Mr. Geraci from, for example, doing the deal that he had proposed to do with Mr. Cotton." To which, Attorney Austin stated "***We can just – forget about it.***" (RT, July 10, 2019, p. 69:8-15, Ex. 6 to Plaintiff NOL)

3. The B&P Code Does Not Bar Mr. Geraci From Applying for a CUP

Setting aside waiver and the fact that the two stipulated judgments, on their face, permit Mr. Geraci to obtain a CUP, there is no mandatory provision in the Business & Professions Code which would bar Mr. Geraci from lawfully obtaining a CUP.

Section 26057(b)(7) of the California Business & Professions Code 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." (Cal. Bus. & Prof. Code § 26057(b)(7) [*emphasis added*].) Section 26057 is part of a larger division known as the Medicinal and Adult-Use Cannabis Regulation and Safety Act, which has the purpose and intent to "control and regulate the cultivation, distribution, transport, storage, manufacturing, processing, and sale" of commercial medicinal and adult-use cannabis. (Cal. Bus. & Prof. Code § 26000.) Under this division, a "license" refers to a "state license issued under this division, and includes both an A-license and an M-license, as well as a laboratory testing license." (Cal. Bus. & Prof. Code § 26001(y).)

In this case, the CUP is not a state license. Even if this statute were to apply to a CUP, the permissive nature of the authority would not *require* the denial of a CUP license because it is up to the discretion of the licensing authority to make such a decision based on the conditions provided in section 26057(b). (Cal. Bus. & Prof. Code § 26057(b).) In addition, attorney Gina Austin testified at trial the statute would not prevent Mr. Geraci from obtaining a CUP. (RT, July 8, 2019, p. 55:12-57:21, Ex. 4 to Plaintiff NOL)

4. It Is Common Practice For CUP Applicants To Use Agents During The Application Process.

Mr. Cotton argues that Mr. Geraci did not disclose his interest on the Ownership Disclosure Statement and that therefore Mr. Geraci is asking this Court to assist him in violating local laws, which the Court is prohibited from doing. (Cotton P's & A's, p. 12:16-23)

Rebecca Berry, the CUP applicant, signed the CUP forms as Mr. Geraci's agent. This was disclosed to Mr. Cotton from the outset. Prior to Mr. Cotton signing the Ownership Disclosure Statement he knew that Ms. Berry was going to be acting as Mr. Geraci's agent for purposes of the CUP. (RT, July 8, 2019, p. 99:15-19, Ex. 4 to Plaintiff NOL; and Trial Exhibit 30, Ex. 8 to Plaintiff NOL) In fact it was Mr. Cotton's belief that Ms. Berry had to sign the Ownership Disclosure Statement as a Tenant Lessee. (RT, July 8, 2019, pp. 101:26-102:7, Ex. 4 to Plaintiff NOL; and Trial Exhibit 30, Ex. 8 to Plaintiff NOL)

Abhay Schweitzer testified that there is no problem with that (Ms. Berry signing as an agent for Mr. Geraci) because, from the City's perspective, the City is only interested in having someone make the representation that they are the responsible party for paying for the permitting process. (RT,

July 8, 2019, p. 31:22-33:13, Ex. 4 to Plaintiff NOL) And as to the Ownership Disclosure statement, the City's Form is limited, only permitting three choices, none of which fit the circumstances in this case; thus attorney Gina Austin testified that there was no problem from her perspective with Ms. Berry checking tenant/lessee. (RT, July 8, 2019, p. 33:14-35:11, Ex. 4 to Plaintiff NOL) Mr. Schweitzer testified that it is not unusual for an agent to be listed as the owner on the form. (RT, July 9, 2019, p. 60:20-27, Ex. 5 to Plaintiff NOL)

During Mr. Austin's cross-examination of Firouzeh Tirandazi, a City Project Manager III (the highest classification of Project Managers at the City of San Diego), he tried to get her to testify that "anyone with an ownership or financial interest in a marijuana outlet is supposed to be disclosed to the City." Ms. Tirandazi testified that they (the City) are only looking for the property owner and the tenant/lessee. (RT, July 9, 2019, p. 112:23-28; Ex. 5 to Plaintiff NOL) Ms. Tirandazi was unfamiliar with the California Business & Professions Code vis-à-vis the CUP application process. (RT, July 9, 2019, p. 113:1-5, Ex. 5 to Plaintiff NOL)

B. MR. COTTON'S ARGUMENT THAT THE VERDICT IS AGAINST THE LAW BECAUSE THE JURY DISREGARDED THE JURY INSTRUCTIONS FAILS.

Mr. Cotton contends the verdict is contrary to law because, he argues, the jury disregarded the jury instructions and applied an objective standard to Mr. Cotton's conduct and a subjective standard to Mr. Geraci's conduct as related to the November 2, 2016 Agreement, the "confirmation email" and the "disavowment" allegation. To the contrary, there is no legal basis to conclude that the jury disregarded the jury instructions and applied an objective standard to Mr. Cotton and a subjective standard to Mr. Geraci's conduct. That is simply Mr. Cotton's interpretation of the facts and evidence which he would like to substitute for the jury's unanimous verdict.

If the jury has been instructed correctly and returns a verdict contrary to those instructions, the verdict is "against law." (See *Manufacturers' Finance Corp. v. Pacific Wholesale Radio* (1933) 130 Cal.App.239, 243.(A new trial motion based on the "against law" ground permits the moving party to raise new legal theories for the first time; i.e., the trial judge gets a second chance to reexamine the judgment for errors of law. (*Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 15.)

Mr. Cotton asks this Court to accept *his* interpretation of the evidence; disregard the jury's

evaluation and interpretation of the evidence; and grant him a new trial based upon *his* theory of what the evidence shows. Specifically, Mr. Cotton urges that there was no disputed evidence relating to the parties' objective manifestations regarding the contract formation. (Cotton P's&A's, p. 13:16-17.) This is yet another iteration of Mr. Cotton's mantra in numerous motions throughout the litigation that the "disavowment allegation" was case dispositive.

The unanimous verdict of a sophisticated jury militates strict adherence to the principle that courts "credit jurors with intelligence and common sense and presume they generally understand and follow instructions." (*People v. McKeinnon* (2011) 52 Cal.4th 610, 670 ["defendant manifestly fails to show a reasonable likelihood the jury misinterpreted and misapplied the limiting instruction"].) The Court's instructions to the jury, which, "absent some contrary indications in the record," must be presumed heeded by the jury. (*Cassim v. Allstate Ins. Co.* (2004)33 Cal.4th 780 at 803.)

The Court gave CACI Nos. 302 – Contract Formation Essential Factual Elements; 303 – Breach of Contract – Essential Factual Elements; and a host of other instructions regarding contract formation, interpretation and breach. Those instructions were correct statements of the applicable law. Mr. Cotton's counsel did not object to any of those instructions. Mr. Cotton has not overcome the presumption that the jury heeded the Court's instructions. He fails to show a reasonable likelihood the jury misinterpreted and misapplied the jury instructions related to contract formation.

In support of his argument, Mr. Cotton argues that Mr. Geraci had draft "final" agreements prepared and circulated by Attorney Gina Austin, and therefore, the argument goes, the November 2, 2016 Agreement could not have been the final agreement between the parties. This argument simply ignores the testimony of Larry Geraci that he felt he was being extorted by Mr. Cotton and did not want to lose all of the money he had invested in the project and therefore he instructed his attorney, Gina Austin to draft some agreements, attempting to negotiate some terms that Mr. Cotton might be happy with. Those draft agreements were prepared by Gina Austin's office and forwarded to Mr. Cotton. (Trial Exhibit 59, 62, Ex. 7 to Plaintiff NOL; RT July 3, 2019, 129:22-133:27, Ex. 4 to NOL) Mr. Cotton refused to accept those terms and no new agreement was reached. Mr. Geraci became fed-up and filed the instant lawsuit to protect his investment based on the November 2, 2016 written agreement the parties had entered into.

Mr. Cotton sets forth a number of factors which he claims support his interpretation of the evidence that the November 2, 2016 agreement was not the final agreement of the parties. (Cotton Ps &As, p. 13:16-25.) However, Mr. Cotton fails to acknowledge that each of the alleged factors he claims support his argument, are equally supportive of Mr. Geraci's and Attorney Gina Austin's testimony that Mr. Geraci felt he was being extorted by Mr. Cotton and requested Gina Austin to please draft new contracts so he would not lose his investment. (RT July 8, 2019, p. 41:10-26, Ex. 4 to Plaintiff NOL.) Consistent with their testimony, the November 2, 2016, written agreement was neither amended nor superseded by a new agreement.

C. MR. COTTON'S ARGUMENT THAT HE WAS DENIED A FAIR TRIAL AS THE RESULT OF ERRORS RELATING TO THE USE OF THE ATTORNEY-CLIENT PRIVILEGE DURING DISCOVERY AND AT TRIAL ALSO FAILS.

Mr. Cotton contends that Mr. Geraci used the attorney-client privilege as a shield during discovery and as a sword during trial, which prevented Mr. Cotton from receiving a fair and impartial trial. This is a C.C.P. § 657(7) issue regarding evidentiary rulings, a ground *not* set forth in Mr. Cotton's Notice of Intent to Move for New Trial. (See *Treber v. Sup. Ct* (1968) 68 Ca.2d 128, 131; *Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599, 1601-1605.) (Practice Guide: Civil Trials and Evidence, Post Trial Motions, (The Rutter Group 2010) ¶ 18:201.)]

Preliminarily, under C.C.P. § 657(1), evidentiary rulings by which relevant evidence was erroneously excluded (or conversely, irrelevant evidence erroneously admitted) may be grounds for a new trial if prejudicial to the moving party's right to a fair trial. [Civil Trials and Evidence, Post Trial Motions, The Rutter Group 18:134.1] A motion for new trial on this ground *must* be made on affidavits. Mr. Cotton has failed to file any affidavits in support of his motion for new trial

Alternatively, erroneous evidentiary rulings (admitting or excluding evidence may be challenged under C.C.P. §657(7) as an "Error in law, occurring at the trial and excepted to by the party making the application." Mr. Cotton has *not* moved for a new trial based on either C.C.P. § 657(1) or C.C.P. §657(7). Instead, in his Notice of Intent to Move for New Trial (p. 2:8-11), Mr. Cotton has sought a new trial on the sole ground that the verdict is "against law" pursuant to C.C.P. § 657(6). A notice of intention to move for a new trial is deemed to be a motion for new trial *on the grounds stated*

in the notice. (C.C.P. §659.) Mr. Cotton cannot assert grounds for new trial not stated in the Notice.

As to the merits of the argument, Mr. Cotton has misrepresented the facts, circumstances and the Minute Order issued by the Court in connection with the attorney-client privilege issues during discovery and the waiver of those issues at trial.

Mr. Cotton claims there was a Court order prohibiting testimony on matters that Plaintiff asserted attorney-client privilege. (Mr. Cotton's P's & A's, p. 14:26-28) In support of this contention, Mr. Cotton Cites to the Court's Minute Order dated February 8, 2019 (ROA#455 at p. 3.) This misrepresents what that Court Order states. It actually states:

> Plaintiff's objections on the basis of privilege to REQUEST FOR PRODUCTION NO. 29 are SUSTAINED; however, the scope of the request appears to seek relevant documents. Given Plaintiff's election to assert the privilege and/or doctrine in discovery, the Court will ***HEAR*** on the scope of the testimony Plaintiff will be not be permitted to provide at trial on the subject of the DISAVOWMANET ALLEGATION."

Cleary, the Court said it would hear and determine the scope of the testimony allowed; it did not prohibit testimony as alleged by Mr. Cotton. Thereafter, Mr. Cotton's attorney drafted the Notice of Ruling which only prevents Rebecca Berry from testifying on the matter of the disavowment allegation. It does not bar any other witness from so testifying. (ROA# 455, p. 2.)

In addition, Mr. Cotton asserts that Mr. Geraci used the attorney-client privilege as a shield and a sword, thereby violating Mr. Cotton's right to a fair and impartial trial. This argument fails on many levels, and has otherwise been waived by Mr. Cotton's failure to object to either the documentary evidence or the testimonial evidence.[7] In fact, Mr. Cotton's attorney conducted substantial examination of witnesses on these very topics.

Mr. Cotton has waived this argument for the following reasons:

1. He never took the depositions of Mr. Geraci or Gina Austin for ascertain this information from them;

2. In response to Mr. Cotton's requests for the production of all documents relating to the purchase of the property drafted or revised by Gina Austin [RFPs Nos. 18, 19], Mr. Geraci objected on the grounds of attorney-client privilege; however, in response to RFP 19, he added that ***"Responding***

[7] "Failure to object to the reception of a matter into evidence constitutes an admission that it is competent evidence." (*People v. Close* (1957) 154 Cal.App.2d 545, 552; *People v. Wheeler* (1992) Cal.4th 284, 300.)

Party has produced previously all responsive documents drafted by Ms. Austin or persons employed in her law firm."

3. Indeed, all such responsive documents had been produced and were marked as Trial Exhibits 59 and 62 which were admitted at trial with Mr. Cotton's Attorney's representations that he had no objections to the admission of the documents. (RT July, 3, 2019, pp. 130:18-26; 132:2-7, Ex. 3 to Plaintiff NOL.) Mr. Cotton testified that he received Exhibit 59 on February 27, 2017, and Exhibit 62 on March 2, 2017. (RT July 8, 2019, pp. 137:1-138:6, Ex. 4 to Plaintiff NOL.) In fact Mr. Cotton responded to Mr. Geraci regarding those documents. (RT July 8, 2019, pp. 138:2-141:4, Ex. 4 to Plaintiff NOL; and Trial Exhibits 63 and 70, Ex. 9 to Plaintiff NOL)

4. Larry Geraci testified regarding these exhibits and the surrounding circumstances. Mr. Cotton's attorney noted he had no objection to the admission of those exhibits (RT July 3, 2019, pp. 130:18-26; 132:2-7, Ex. 3 to Plaintiff NOL) and he did not object to the testimony.

5. Attorney Gina Austin testified regarding these exhibits and the surrounding circumstances and Mr. Cotton's attorney made no objections. (RT July 8, 2019, p. 41:10-26, Ex. 4 to Plaintiff NOL)

6. Mr. Cotton's attorney cross-examined Gina Austin regarding the draft agreements drafted by Ms. Austin's office. (RT July 8, 2019, p. 58:3-60:10, Ex. 4 to Plaintiff NOL)

Having failed to make any objections whatsoever to any of the documentary and testimonial evidence of which he now complains, Mr. Cotton has waived any argument that the material should not have been admitted.

Mr. Cotton cites *A&M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 556 for the proposition that a litigant cannot claim privilege during discovery and then testify at trial. The *A&M Records* case is clearly distinguishable from the case at bar. In that case, a defendant accused of distributing pirated records failed to produce at his deposition documents requested by the plaintiff "and also refused to answer any questions of substance on the constitutional ground (5th Amendment) that his answers might tend to incriminate him." (*A&M Records, supra*, 75 Cal.App.3d at p. 654.) The trial court ordered the defendant to turn over the requested documents by a specified date before trial, or the defendant would be barred from introducing them at trial, and the court also precluded the

defendant "from testifying at trial respecting matters [and] questions ... he refused to answer at his deposition[.]" (*Id.* at p. 655.) The order limit[ed] the scope of [the defendant]'s testimony only, and not that of any other witness" at his company. (*Ibid.*)

First and foremost, this case does not involve a situation where a party claims the 5th Amendment privilege against self-incrimination and then waives it at trial, so the *A & M Records* case has no application to the case at bar. The Court held that a litigant cannot assert his constitutional privilege against self-incrimination in discovery and then waive the privilege and testify at trial. (*Ibid.*) By analogy, and without citation, Mr. Cotton seeks to extend this reasoning to the attorney-client privilege being asserted during discovery and then waived at trial. This argument is inapplicable to this case where the attorney-client documents were produced to Mr. Cotton; were responded to by Mr. Cotton; were offered and admitted at trial with no objection by Mr. Cotton; the witnesses (Larry Geraci and Gina Austin) testified without any objection being made; and where Mr. Cotton's own attorney conducted extensive examination of that witness with regard to the relevant communications between Ms. Austin and her client, Mr. Geraci. And Mr. Cotton himself was examined regarding these exhibits.

IV. CONCLUSION

This Court ensured that Mr. Cotton received a fair trial from a fair and impartial jury. The jury paid careful attention, sifted through the evidence, and carefully came to an appropriate verdict. For the above-stated reasons, the Court should deny Mr. Cotton's motion for a new trial. "There must be some point where litigation in the lower courts terminates" because otherwise "the proceedings after judgment would be interminable". (*Coombs v. Hibberd* (1872) 43 Cal. 452, 453.) It is time to end this litigation in the trial court and respect the jury's judgment.

FERRIS & BRITTON
A Professional Corporation

Dated: September 23, 2019

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

13 Pages

TIFFANY & BOSCO P.A.
MEGAN E. LEES (SBN 277805)
mel@tblaw.com
MICHAEL A. WRAPP (SBN 304002)
maw@tblaw.com
EVAN P. SCHUBE (*Pro Hac Vice* AZ SBN 028849)
eps@tblaw.com
1455 Frazee Road, Suite 820
San Diego, CA 92108
Tel. (619) 501-3503

Attorneys for Defendant/Cross-Complainant Darryl Cotton

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

LARRY GERACI, an individual,

Plaintiff,

vs.

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

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

vs.

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

Cross-Defendants.

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

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

REPLY IN SUPPORT OF MOTION FOR NEW TRIAL

Action Filed: March 21, 2017
Trial Date: June 28, 2019

Hr'g Date: October 25, 2017
Time: 9:00 a.m.
Dept.: C-73

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In his *Memorandum of Points and Authorities in Support of Motion for New Trial* (the "Motion for New Trial"), Mr. Cotton demonstrated that: (1) Mr. Geraci failed to comply with the City's and the State's CUP requirements and, therefore, the alleged November 2, 2016 agreement is illegal; (2) the jury applied an objective standard to Mr. Cotton and a subjective standard to Mr. Geraci; and (3) Mr. Geraci used the attorney-client privilege as a shield during discovery and a sword at trial. In his *Opposition to Defendant/Cross-Complainant's Motion for New Trial* (the "Response"), Mr. Geraci attacks the merits of the arguments on three separate grounds.

First, the Response argues that the illegality argument was waived because it was not raised in the Answer. The argument fails because Mr. Cotton reserved the right to assert all affirmative defenses in paragraph 16 of his Answer, illegality cannot be waived, and the Court has a duty, *sua sponte*, to address the argument.

Second, the Response argues that the alleged November 2, 2016 agreement is not illegal because neither the Geraci Judgments[1] nor the California Business & Professions Code ("BPC") prohibit Mr. Geraci from obtaining a CUP. The Motion for New Trial demonstrated that: (i) the SDMC and the BPC required the disclosure of both Mr. Geraci's interest and the Geraci Judgments; (ii) Mr. Geraci filed the CUP application with the City on or about October 31, 2016; (iii) the General Application and Ownership Disclosure Statement failed to disclose the Geraci Judgments and Mr. Geraci's interest, respectively; and, as a result, (iv) the alleged November 2, 2016 agreement was illegal when it was entered into. The Response attempts to get around the non-disclosure issue by relying upon testimony from fact witnesses that it is "common practice" for CUP applicants to use agents during the application process. The Response does not identify any legal authority that suggests "common practice" is a defense to illegality.

Similarly, the Response also advanced several excuses as to why Mr. Geraci's interest was not disclosed. The excuses included: (i) Mr. Geraci's status as an enrolled agent; (ii) "convenience of administration;" and (iii) the City's forms only allowed Ms. Berry to sign as an owner, tenant, or "Redevelopment Agency." The Response does not provide any legal authority that the foregoing allows

[1] Defined terms have the same meaning given them in the Motion for New Trial unless otherwise defined herein; with the exception of "AUMA" and "Prop. 64," which refer to the same legislation and are referred to herein solely as AUMA.

Mr. Geraci to escape the disclosure requirements or policies of the SDMC or BPC. And the Ownership Disclosure Statement states that additional pages may be attached to disclose interests in the property and permit, while the General Application requires the applicant to check a box (yes or no) to disclose the Geraci Judgments. The arguments are legally and factually unsupported.

For the reasons set forth in the Motion for New Trial and below, the relief sought in the Motion for New Trial should be granted.

I. The Court should consider the attachments and the attorney-client privilege argument.

Mr. Geraci argues that the attachments to the Motion for New Trial should be disregarded. (Resp. at 6:10-7:3.) With the exception of motions "clearly without merit," judges "permit the moving party to file and serve a supporting memorandum beyond the ten-day time limit, particularly when the late filing will not prejudice the opposing party or adversely affect the judge's ability to decide the motion within the [75]-day time limit." Cal. Judges Benchbook Civ. Proc. After Trial § 2.76.[2] The attachments to the Motion for New Trial were part of the record, discovery, or in the public domain (e.g. City Ordinances). The exhibits were attached for convenience, the exhibits were part of the record or were legal authority, there is no prejudice to Mr. Geraci, and as a result they should be considered.

Mr. Geraci also argues that the Motion for New Trial must be limited to the "against law" grounds set forth in the *Notice of Intent to Move for New Trial* (the "Notice") and, as a result, the arguments related to the use of the attorney-client privilege as a sword and a shield should be excluded. (Resp. at 9:11-21; *id.* at pp. 17-19.) The attorney-client privilege argument should be considered because the argument and facts also relate to the jury's application of an objective standard to Mr. Cotton's conduct and a subjective standard to Mr. Geraci's conduct. (*See* Resp. at pp. 15-17.) Indeed, the Response argues that Mr. Cotton's objective/subjective argument "ignores the testimony of Larry Geraci that he felt he was being extorted" and "the alleged factors [Mr. Cotton] claims support his argument, are equally supportive of Mr. Geraci's and Attorney Gina Austin's testimony that Mr. Geraci felt he was being extorted." (Resp. at 16:20-24; 17:3-6.)

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[2] CCP § 660 was amended in 2018, extending the time limit from 60 to 75 days.

II. Mr. Cotton did not waive the illegality argument.

In the Response, Mr. Geraci argues that Mr. Cotton waived the illegality argument. (Resp. at 10-12.) Mr. Geraci presents three arguments in support of the waiver argument. For his first argument, Mr. Geraci argues that Mr. Cotton "failed to raise 'illegality' as an affirmative defense in his Answer." (Resp. at 10:17-18.) Mr. Cotton expressly reserved the right to assert affirmative defenses in paragraph 16 of his Answer. (ROA # 17, ¶ 16.) Moreover, a party to an illegal contract cannot waive the right to assert the defense. *City Lincoln-Mercury Co. v. Lindsey* (1959) 52 Cal.2d 267, 273-74 (internal citations omitted); *Wells v. Comstock* (1956) 46 Cal.2d 528, 531-32 ("no person can be estopped from asserting the illegality of the transaction"). The argument also ignores the well-established rule that "even though the defendants in their pleadings do not allege the defense of illegality if the evidence shows the facts from which the illegality appears it becomes 'the duty of the court *sua sponte* to refuse to entertain the action.'" *May v. Herron* (1954) 127 Cal.App.2d 707, 710 (quoting *Endicott v. Rosenthal* (1932), 216 Cal. 721, 728).

For his second argument, Mr. Geraci argues that Mr. Cotton cannot raise illegality in the Motion for New Trial because *Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162 and *Apra v. Aureguy* (1961) 55 Cal.2d 827 "both rejected post-trial defenses of illegal contract because the illegality defense had not been raised in the trial court." (Resp. at 10:23-11:4.) In *Fomco*, the Court noted that "[t]he defense of illegality was not raised in the trial of the action, and no evidence was introduced on the subject." *Fomco*, 55 Cal.2d at 165. The Court then distinguished *Lewis & Queen* on the grounds that "the issue of illegality was first raised *during the trial* and not for the first time on a motion for new trial." *Id.* at 165 (emphasis in original). Similarly, in *Apra*, the Court relied upon *Fomco* in holding that "questions not raised in the trial court will not be considered on appeal." *Apra*, 55 Cal.2d at 831. Here, the Response acknowledges that the issue of illegality was raised several times during the trial and evidence of Mr. Geraci's failure to disclose his ownership interest was before the Court. (Resp. at pp. 11-12); *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1112 ("Whether the evidence comes from one side

or the other, the disclosure is fatal to the case.") As a result, *Fomco* and *Apra* are distinguishable, *Lewis & Queen* is controlling, and Mr. Cotton can raise illegality in the Motion for New Trial.[3]

For his third argument, Mr. Geraci argues Mr. Cotton waived the illegality issue when Attorney Austin stated that he was willing not to argue an evidentiary objection made after a request to take judicial notice of the Geraci Judgments. (Resp. at 12:17-23.) In support of the argument, Mr. Geraci relies on *Miller v. National American Life Ins. Co.* (1976) 54 Cal.App.3d 331; *Horn v. Atchison, T. & S.F.Ry. Co.* (1964) 61 Cal.2d 602; and *Sepulveda v. Ishimaru* (1957) 149 Cal.App.2d 543. The reliance is misplaced. The language quoted in the Response relates to Attorney Austin's efforts to have the Court take judicial notice of the Geraci Judgments; the statements cannot be construed as a waiver of the illegality argument in its entirety.

Additionally, the Geraci Judgments, and testimony related thereto, was the subject of a motion in limine, which was "a sufficient manifestation of objection to protect the record." (*See* ROA 581.0; ROA 596); *Boston v. Penny Lane Centers, Inc.* (2012) 170 Cal.App.4th 936, 950; Cal Evid. Code § 353. Further, the illegality issue was also the subject of Mr. Cotton's motion for a directed verdict (ROA # 615 at 5:21-22 (arguing the Geraci Judgments prohibit Mr. Geraci from obtaining a CUP, or owing/operating a marijuana dispensary).) And, in any event, *Miller* held that while "waiver and estoppel normally preclude reversal on appeal from a judgment...[] they do not restrict the discretion of the trial judge to grant a new trial" and *City Lincoln-Mercury* held the illegality defense cannot be waived. *Miller*, 54 Cal.App.3d at 346; *City Lincoln-Mercury*, 52 Cal.2d at 273-74. Mr. Cotton has not waived the illegality argument.

III. The Response does not address the SDMC,[4] which requires the disclosure of Mr. Geraci's interest and the Geraci Judgments, or the underlying policy of transparency.

The Response does not dispute that: (i) the SDMC required the disclosure of Mr. Geraci's interest and the Geraci Judgments; (ii) the Geraci Judgments required Mr. Geraci to comply with the

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3. Although Rule 8.115 of the Cal. Rules of Court restricts citation to unpublished decisions, the Response cites to *Chodosh v. Palm Beach Park Association* 2018 WL 6599824. In *Chodosh*, the issue of illegality "*was* raised at trial – even if obliquely as part of a shotgun blast of allegations of illegality...The issue having been raised at the trail level, its consideration at the appellate level comes within *Lewis & Queen* and outside the rule of *Fomco* and *Apra*." *Id.* at *6 (emphasis in original).

4. The Motion for New Trial cited to SDMC §§ 112.0102(c), 42.1502, 42.1504, and 42.1507. (*See* Mot. for New Trial at 8:14-19.) Although the Motion for New Trial referenced the code provisions in the context of "marijuana outlets," the provisions were in effect since

requirements of the SDMC;[5] (iii) Mr. Geraci purposefully failed to disclose his interest; and (iv) the non-disclosure was made prior to (and after) the alleged November 2, 2016 agreement was entered into. (Mot. for New Tr. at 7:17-9:25, 12:7-23; *see gen.* Resp.) The Response also does not dispute that transparency is one of the underlying policies of the SDMC - as evidenced by, among other things, the Ownership Disclosure Statement and required background check. (Mot. for New Tr. at 12:24-13:5; *see gen.* Resp.) And, finally, the Response does not address, let alone distinguish, *May v. Herron* (1954) 127 Cal.App.2d 707. (Mot. for New Tr. at 11:1-13:5; *see gen.* Resp.)

Although the Response does not challenge the foregoing facts or law, the Response argues that the use of agents is "common practice" and, therefore, the alleged November 2, 2016 agreement is not illegal. (Resp. at 14:14-15:13.) There are several problems with the argument. First, the Response does not cite to any legal authority for the proposition that "common practice" makes an illegal contract legal. (*See id.*) None exists.

Second, the argument relies upon the testimony of *fact* witnesses. It is axiomatic that a fact witness cannot take the place of the Court to determine the illegality of a contract. It is the Court's duty to determine illegality. *See May, supra* at 710 (it is the Court's duty to determine illegality). Third, even if "common practice" did make an illegal contract legal, Mr. Schweitzer's testimony as a fact witness cannot be construed so broadly as to provide an opinion on what is "common practice" for all CUP applications across the City.[6]

Fourth, the Response reasserted the allegation that the non-disclosures were the result of a limitation of the City's forms. (Resp. at 15:1-4.)[7] The Ownership Disclosure Statement, however, requires the disclosure of all persons who have an interest in the Property/CUP and states: "Attach additional pages if needed." (Mot. for New Tr., Exhibit D (Ownership Disclosure Statement) at Part I.) And the General Application required the Geraci Judgments to be disclosed by checking one of two

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2011. With the adoption of ordinance No. O-20795 in April 2017, the term "medical marijuana consumer cooperatives" was replaced with "marijuana outlets."

[5] The Response acknowledges the Geraci Judgments require Mr. Geraci to obtain a CUP "***pursuant to the San Diego Municipal Code.***" (Resp. at 13:14) (emphasis in original).

[6] Mr. Schweitzer's testimony excluded the fact that the ownership disclosures are also required for the Hearing Officer. (July 8 Tr. at 33:19-34:1.)

[7] The Response also suggests that Ms. Tirandazi testified that the City is "only looking for the property owner and the tenant/lessee." (Resp. at 15:10-11.) The cited portion of the transcript suggests that she looked at the Ownership Disclosure Statement and stated that it was the property owner and a tenant/lessee that would have to be identified. The forms contradict the testimony.

boxes (yes or no) and instructed a copy of the same be attached. (*Id.* at Exhibit H.) The purported shortfalls of the City's forms do not exist or otherwise obviate the disclosure requirements.

Fifth, the argument ignores correspondence from Ms. Austin to Mr. Schweitzer instructing him to keep Mr. Cotton's name off the CUP application "unless necessary" because Mr. Cotton had "legal issues" with the City. (*Id.* at 8:22-9:3.) Sixth, the argument ignores the testimony from Mr. Geraci and Ms. Berry that Mr. Geraci's interest was not disclosed purposefully because of his status as an enrolled agent and administrative convenience. (*Id.* at 9:17-19.) Finally, the argument conflates the use of an agent to complete forms with the SDMC's requirements to disclose Mr. Geraci's interest and the Geraci Judgments. The two issues are separate and distinct, and the use of an agent to complete a form does not somehow change the disclosure requirements.

The purpose of the illegality rule "is not generally applied to secure justice between parties who have made an illegal contract, but from regard for a higher interest – that of the public, whose welfare demands that certain transactions be discouraged." *May, supra* at 712 (quoting *Takeuchi v. Schmuck* (1929) 206 Cal. 782, 786). The Court cannot give effect to the alleged November 2, 2016 agreement because to do so would condone Mr. Geraci, and others, to knowingly and purposefully circumvent the requirements of the SDMC.

IV. AUMA is applicable and its express policy and laws supports the conclusion that the alleged November 2, 2016 agreement is illegal.

As to AUMA's application, the provisions of AUMA were circulated to the public in July 2016, adopted by the voters on November 8, 2016, and became effective on November 9, 2016. With the adoption of AUMA, Mr. Geraci's CUP application, initially filed for a medical marijuana cooperative, was processed as an application for a marijuana outlet. (*See* Mot. for New Tr., Exhibit I (letter from City dated September 26, 2018 referencing CUP for "Marijuana Outlet").) Because AUMA's policies were known at the time of the alleged November 2, 2016 agreement and Mr. Geraci pursued a CUP for a marijuana outlet after AUMA became effective, AUMA's policies are applicable and consistent with the SDMC's policy of transparency and disclosure. *See Industrial Development & Land Co. v. Goldschmidt* (1922) 56 Cal.App. 507, 509 ("A contract in its inception must possess the essentials of having competent parties, a legal object, and a sufficient consideration. Lacking any one of these, no binding obligations

result; hence a contract which contemplates the doing of a thing which is unlawful at the time of the making thereof is void. For the same reason a contract which contemplates the doing of a thing, at first lawful but which afterward and during the running of the contract term becomes unlawful, is affected in the same way and ceases to be operative upon the taking effect of a prohibitory law."). AUMA is applicable.

The Response does not dispute that one of the express policies of AUMA was to bring marijuana "into a regulated and legitimate market [by creating] a transparent and accountable system." (Mot. for New Tr. at 7:5-15.) Further, AUMA sought to limit those persons involved in the marijuana industry by, among other things, prohibiting an applicant who has been sanctioned by a city for unauthorized commercial marijuana activities from obtaining a state license. *See* AUMA at §§ 3 (Purpose and Intent), 6 (adding § 26057(b)(7). In furtherance of that policy, AUMA states that the licensing authority shall deny an application if the applicant does not qualify and, by adding § 26057(b)(7), prohibited an applicant from obtaining a license if they have been sanctioned for unauthorized commercial marijuana activity. AUMA at § 6.1 (adding § 26057(a)-(b)). While pursuing a CUP for a MO, Mr. Geraci failed to disclose his interest and the Geraci Judgments – a direct conflict with AUMA's express policies.

The Response argues § 26057(b) does not bar Mr. Geraci from obtaining a state license because the statute is discretionary. (Resp. at 13-14.) The argument conflicts with two pillars of statutory construction. The interpretation would render meaningless §§ 26057(a) and 26059. *People v. Hudson* (2006) 38 Cal.4th 1002, 1010 (interpretations that render statutory terms meaningless are to be avoided) (internal citations omitted). Section 26057(a) mandates the denial of an application for a state license if the *applicant* does not qualify, while § 26059 prohibits the State from denying an applicant based solely on two grounds – none of which are applicable here. Mr. Geraci's interpretation renders §§ 26057(a) and 26059 meaningless.

The interpretation also applies the same meaning to two separate words. *In re Austin P.* (2004) 118 Cal.App.4th 1124, 1130 ("When different terms are used in parts of the same statutory scheme, they

are presumed to have different meanings."). The mandatory provisions of Section 26057(a) apply to the *applicant*[8] or premises, while the permissive provisions of 26057(b) apply to the *application*.

Here, it is undisputed that Ms. Berry was the named applicant on the CUP application, Ms. Berry was applying for the CUP solely as Mr. Geraci's agent, and Mr. Geraci was and always had been the party pursuing the operation of a marijuana dispensary at the Property. As the central purpose of the alleged November 2, 2016 agreement was Mr. Cotton's operation of a marijuana dispensary at the Property, and his interest was never disclosed, the alleged agreement violated applicable state law and policy and cannot be enforced. *Homami, supra* at 1109.

V. The jury failed to apply an objective standard to both parties, and the Response confirms as much.

In the Response, Mr. Geraci argues that the subjective/objective standard argument "is simply Mr. Cotton's interpretation of the facts" and then goes on to argue that Mr. Geraci "*felt* he was being extorted." (Resp. at 16:20-24, 17:3-6) (emphasis added.) The objective manifestations set forth in the November 2, 2016 e-mail correspondence, the actions of Mr. Geraci thereafter, and the content of the draft agreements are not in dispute. The issue before the Court is whether Mr. Geraci's subjective intent, beliefs, and feelings can be considered by the jury.

First, in explaining his November 2, 2016 e-mail confirming he would provide Mr. Cotton a 10% equity position in the contemplated marijuana dispensary, Mr. Geraci testified that he did not read the entirety of Mr. Cotton's e-mail. However, a party cannot claim he did not read an offer before accepting it. *See Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1587 (plaintiff's claim that he did not read the agreement before signing it did not raise a triable issue of mutual assent) (internal citations omitted).

Second, the Response argues that Mr. Geraci felt he was being extorted and that the facts supporting Mr. Cotton's argument are "equally supportive of Mr. Geraci's and [Ms.] Austin's testimony that Mr. Geraci *felt* he was being extorted by Mr. Cotton and requested [Ms.] Austin to please draft new contracts." (Resp. at 17:4-6) (emphasis added.) A person's undisclosed feelings is subjective and should

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[8] The applicable term "applicant" was defined in § 26001(a)(1), which does not make the terms "applicant" and "application" synonymous.

have been disregarded been disregarded by the jury. *Stewart, supra* at 1587 (a party's subjective intent is irrelevant). Moreover, none of the documents or communications produced at trial reference or otherwise suggest extortion. Mr. Geraci's subjective and inflammatory feelings have no application to the issues.

It is worth noting here that, as it relates to Mr. Geraci using attorney-client privilege as a sword and a shield, the Response argues that *documents* were produced. (Resp. at 18:24-19:9) (emphasis added.)[9] The issue is not about the production of documents; it is the withholding of *communications* that were then used at trial to introduce evidence of Mr. Geraci's subjective and inflammatory feelings.

Third, the Response argues that Mr. Cotton waived the argument because he did not depose Ms. Austin and that, in any event, Mr. Cotton had the opportunity to cross examine Ms. Austin. (Resp. at 18:22-23, 19:16-17.) As to the former, Mr. Geraci claimed privilege during discovery so attempting to take Ms. Austin's deposition would have been a futile act, which the law does not require. *Cates v. Chiang* (2013) 213 Cal.App.4th 791. As to the latter, any attempt to cross-examine Ms. Austin at trial would have been pointless because no communications were disclosed and, therefore, there was no ability to impeach the testimony of either Mr. Geraci or Ms. Austin. Mr. Geraci asserted privilege during discovery then waived the privilege at trial - he cannot blow hot and cold. *A&M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 566.[10]

If an objective standard was applied to both parties, based on the evidence admitted, the jury could have only reached one of two conclusions. The first conclusion is that the parties' agreement included at the very least the terms of the alleged November 2, 2016 agreement *and* the 10% interest that Mr. Geraci confirmed via e-mail. As Mr. Geraci failed and refused to recognize Mr. Cotton's 10% interest, he breached the same and cannot maintain his claim. The second conclusion the jury could

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[9] The Response argues that the Motion for New trial makes a misrepresentation to the Court regarding an order prohibiting testimony on matters that Plaintiff asserted attorney-client privilege. (*See* Mot. for New Trial at 14:23-15:1; Resp. at 18:5-12.). At the February 8, 2019 hearing, the Court stated unequivocally that Mr. Geraci "can't go back and reopen that area once [he has] narrowed the scope by asserting privilege." The subsequent order sustained the objection asserting privilege, but allowed some testimony on the relevant documents. The statement in the Motion for New Trial is not a misrepresentation particularly given the Court's statements at the hearing that there is a "price to be paid" for asserting privilege.

[10] Mr. Geraci attempts to distinguish *A&M Records* based upon the type of privilege asserted. (Resp. at 20:4-6.) There is no meaningful distinction between the use of the 5th Amendment or attorney-client privilege as a sword and a shield, and the Response does not cite to any case law to supporting the distinction. The "blow hot and cold" doctrine has a long and broad application when parties attempt to take inconsistent positions. *See e.g. McDaniels v. General Ins. Co. of America* (1934) 1 Cal.App.2d 454, 459-60. There is no suggestion or authority that the doctrine would not apply here.

have reached, based upon the November 2, 2016 e-mail correspondence and subsequent exchange of draft agreements, is that the parties had an agreement to agree – which is not enforceable. The jury found neither.

Instead, the jury applied a subjective standard to Mr. Geraci. Mr. Geraci defended his November 2, 2016 e-mail and subsequent exchange of draft agreements on two subjective grounds – his testimony that he did not read the entire e-mail and his feeling/belief that he was being extorted. This was improper and a new trial is warranted.

VI. CONCLUSION

The Motion for New Trial should be granted. The alleged November 2, 2016 agreement is illegal as it fails to comply with express provisions of the SDMC, as well as the policies of the SDMC and AUMA. Second, the jury applied an objective standard to Mr. Cotton's conduct and a subjective standard to Mr. Geraci's. Thus, for the reasons set forth in the Motion for New Trial and this Reply, the relief sought in the Motion for New Trial should be granted.

DATED this 30th day of September, 2019.

TIFFANY & BOSCO, P.A.

By: 

EVAN P. SCHUBE
Attorneys for Defendant/Cross-Complainant
Darryl Cotton

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: 28,849
NAME: Evan P. Schube, Esq.
FIRM NAME: Tiffany & Bosco, P.A.
STREET ADDRESS: 1455 Frazee Road, Suite 820
CITY: San Diego STATE: CA ZIP CODE: 92108
TELEPHONE NO.: (619) 501-3503 FAX NO.:
E-MAIL ADDRESS: eps@tblaw.com
ATTORNEY FOR (name): Defendant/Cross-Complainant Darryl Cotton

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego
STREET ADDRESS: 330 West Broadway
MAILING ADDRESS: 330 West Broadway
CITY AND ZIP CODE: San Diego, CA 92101
BRANCH NAME: Central Division - Civil

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

PLAINTIFF/PETITIONER: LARRY GERACI

DEFENDANT/RESPONDENT: DARRYL COTTON, et al.

JUDICIAL OFFICER: The Honorable Joel R. Wohlfeil

DEPARTMENT: C-73

PROOF OF ELECTRONIC SERVICE

1. I am at least 18 years old.
   a. My residence or business address is *(specify)*:
   1455 Frazee Road, Suite 820
   San Diego, CA 92108

   b. My electronic service address is *(specify)*:
   ybrinkman@tblaw.com

2. I electronically served the following documents *(exact titles)*:
   Reply in Support of Motion for New Trial

   ☐ The documents served are listed in an attachment. *(Form POS-050(D)/EFS-050(D) may be used for this purpose.)*

3. I electronically served the documents listed in 2 as follows:
   a. Name of person served: Michael R. Weinstein, Ferris & Britton, APC

   On behalf of *(name or names of parties represented, if person served is an attorney)*:
   Plaintiff/Cross-Defendant LARRY GERACI and Cross Defendant REBECCA BERRY

   b. Electronic service address of person served:
   mweinstein@ferrisbritton.com

   c. On *(date)*: September 30, 2019

   ☒ The documents listed in item 2 were served electronically on the persons and in the manner described in an attachment. *(Form POS-050(P)/EFS-050(P) may be used for this purpose.)*

Date: September 30, 2019

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

Yvette Brinkman
(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

Form Approved for Optional Use
Judicial Council of California
POS-050/EFS-050 [Rev. February 1, 2017]

PROOF OF ELECTRONIC SERVICE
(Proof of Service/Electronic Filing and Service)

Cal. Rules of Court, rule 2.251
www.courts.ca.gov

SHORT TITLE: Larry Geraci v. Darryl Cotton	CASE NUMBER: 37-2017-00010073-CU-BC-CTL

ATTACHMENT TO PROOF OF ELECTRONIC SERVICE (PERSONS SERVED)

(This attachment is for use with form POS-050/EFS-050.)

NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:

Name of Person Served *(If the person served is an attorney, the party or parties represented should also be stated.)*	Electronic Service Address	Date of Electronic Service
Jacob P. Austin, Esq., Atty for Darryl Cotton	jpa@jacobaustinesq.com	Date: 09/30/2019
		Date:
		Date:
		Date:
		Date:
		Date:
		Date:
		Date:
		Date:
		Date:
		Date:
		Date:

ROUGH DRAFT FOR FRIDAY AM IN DEPARTMENT 73, CENTRAL

Number five:

THE COURT: Item five, Geraci versus Cotton, case number 100173.

MR. WEINSTEIN: Good morning, Your Honor. Scott Weinstein and Scott Toothacre on behalf of Mr. Geraci and Ms. --, who is not a part of this conference.

THE COURT: And Counsel?

MR. SCHUABE: Good morning, Your Honor. Evan Schuabe on behalf of Mr. Cotton.

THE COURT: All right. Did I hear you two say that you were submitting?

MR. WEINSTEIN: Yeah. We are submitting, Your Honor, with time to respond.

THE COURT: All right. Counsel?

MR. SCHUABE: Thank you. I'll get to the illegality of the contract issue first. The fact is it cuts to the heart of the motion that we filed and the biggest issue.

A couple of items I wanted to raise with the Court, a couple of factual items I wanted to raise with the Court.

First one, on Exhibit H of our motion, is a leave to file the application to CUP applications that were filed. In general application, which is trial Exhibit 4200, it's states that "notice of violation is required to be disclosed," and skip back to page four of the same trial exhibit, the ownership disclosure statement, it also says,

"the name of any person of interest in the property must also be disclosed and it states to potentially attach pages if needed.

THE COURT: So you are saying the contract is unenforceable?

MR. SCHUABE: Yes.

THE COURT: As a matter of law?

MR. SCHUABE: Yes. CUP was a condition precedent to the contract.

THE COURT: Counsel, up until this point in time, this case was filed in 017. Your side has been screaming at the Court and filed multiple writs asking me to adjudicate the contract as a matter of law in favor of your side. Now you are asking me in after an adverse finding to adjudicate the law for the other side, you are doing a 180. Truly, you are doing a 180.

MR. SCHUABE: I came in on a limited scope. I don't have the background.

THE COURT: I do. They do. They have been sitting --

MR. SCHUABE: But my understanding was there were the motions that were made were based upon my client's

understanding of what the agreement is which is not specifically related to the November 2, 2016 agreement that the jury found. Our motion is a bit more limited in that regard. I may be wrong. That's my understanding of the background of the case.

THE COURT: Again, from the Court's perspective as

a matter of law up to this point, you have been asking me to adjudicate the contract in your favor. Now you're asking the Court to adjudicate the contract as a matter of law against the other side.

Counsel, shouldn't this have been raised at some earlier point in time?

MR. SCHUABE: Should it have, Your Honor? My personal opinion is that it should have been raised before but it was not and we are what are and so hence the reason why we're raising the issue now on a motion for new trial. I think what has been referred to before, the illegality argument has been raised before and raised in the context of reference to state law and and Section 2640 of the California business and professions code, I believe what was not conveyed to the Court was that these requirements for these forms, the specific provisions in the San Diego Municipal code that they require those disclosures and require applicant provide information. The information was not provided. And --

THE COURT: Even if you are correct, hasn't that train come and gone? The judgment has been entered. You are raising this for the first time?

MR. SCHUABE: Your Honor, illegality of the contract can be raised any time whether in the beginning or during the case or on appeal.

THE COURT: So it's akin to a jurisdictional challenge?

MR. SCHUABE: I don't know if it's akin to a

jurisdictional challenge but the issue can be raised --

THE COURT: But at some point, doesn't your side waive the right to assert this argument? At some point?

MR. SCHUABE: I am not suggesting we waived that. The case law I saw in the motion cited that there is a duty and the duty continues and so I am not aware if there is anything that suggests that we waived that argument.

THE COURT: Anything else, counsel?

MR. SCHUABE: The other thing I'd like to point out, section 114.01 of San Diego Municipal Code specifically states that every applicant prior be furnished true and complete information. And that's obviously not what happened here. I think it's undisputed and the reasoning for the failure to disclose, there is no exception to either the San Diego Municipal code or failure to disclose.

THE COURT: Thank you, very much.

MR. SCHUABE: Thank you, Your Honor.

THE COURT: I am not inclined to change the Court's view. Did either one of you need to be heard?

MR. TOOTHACRE: Just to make a record. One comment with respect to the illegality argument.

Obviously, we agree with the comments of the Court but the failure to make these disclosures in the CUP, it doesn't make the contract between Geraci and cotton unenforceable. It's one thing to say that the contract or the form wasn't properly filled out, that doesn't make the contract unenforceable. That's all we have for the record.

THE COURT: Counsel, the Court observed this case throughout the entirety, including at trial. Quite frankly, I thought your client did well on the witness stand. Truly. But the jury categorically reflected your side's claim and I am persuaded everybody got a fair trial here. The Court confirms the tentative ruling as the order of the Court. I will direct plaintiff's side to serve notice of the decision. Thank you very much.

MR. WEINSTEIN: Thank you, Your Honor.

MR. TOOTHACRE: Thank you, Your Honor.

(END OF PROCEEDING AT 9:23 AM)

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

Attorney for Defendant/Cross-Complainant DARRYL COTTON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, HALL OF JUSTICE

LARRY GERACI, an individual,

Plaintiff,

vs.

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

Defendants.

AND RELATED CROSS-ACTION.

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

VERIFIED STATEMENT OF DISQUALIFICATION 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").

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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.

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[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 <u>only</u> thing we really want clarification in the matter whether or not the court deems the contract an integrated contract or not.***

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

CO COUNSEL: That's it.[33]

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

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

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

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

III. DISCUSSION

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

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

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

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

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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." *Foundling Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 954. "***The crucial threshold inquiry, therefore, and one for the court to decide, is whether the parties intended their written agreement to be fully integrated.*** [Citations.]" *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1510 (emphasis added).

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

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

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

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

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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

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

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

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

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

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

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

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

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

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

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

D. DISQUALIFICATION FOR CAUSE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. THIS PETITION (STATEMENT OF DISQUALIFICATION) IS TIMELY

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

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

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

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

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

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

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

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

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

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

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

105. In *Christie v. City of El Centro* the trial court set aside a nonsuit and dismissal in favor of the city and its police department. The trial court granted a new trial after finding that the previous judge who granted the nonsuit was disqualified. It held that as a matter of law the judge was disqualified at the moment he had a conversation with a previously disqualified judge in the same matter. Having found the judge who granted nonsuit disqualified to rule on the matter, the trial court set aside the resulting dismissal. The Court of Appeal affirmed that determination, emphasizing in its opinion that "***disqualification occurs when the facts creating disqualification <u>arise</u>, 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 ***<u>and</u>*** 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 ***<u>earliest reasonable opportunity</u>*** after the party becomes aware of the disqualifying facts.").

V. CONCLUSION

A court is <u>not</u> 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

Gmail

Darryl Cotton <indagrodarryl@gmail.com>

Re: Geraci v Cotton

Darryl Cotton <indagrodarryl@gmail.com> Sat, Sep 7, 2019 at 5:36 PM
To: "David S. Demian" <ddemian@ftblaw.com>
Cc: "Adam C. Witt" <awitt@ftblaw.com>, pfinch@ftblaw.com, "Rishi S. Bhatt" <rbhatt@ftblaw.com>, Ken.Feldman@lewisbrisbois.com

David,

It's been almost 2 weeks since my email requesting an FTB billing statement from you and I've heard nothing back. I guess you're choosing to ignore me. The only reason I can think for that is because you know what you and others at FTB did to me to sabotage my case against Geraci was illegal and your failure to provide me with billing statements that you say is money I owe you, will be perceived as not wanting to confirm your illegal actions. Now that the trial is over I am going to prove you conspired with Geraci's attorney Weinstein to sabotage my case when you **purposefully dropped the allegations that Geraci cannot own a CUP as a matter of law.** Attached is Exhibit 1. You also tried to make it appear that I told you that Geraci was my agent, **good thing that Hurtado shut you down in those emails!**

So now you have two choices - send me my updated invoice and affirm that you are requesting those funds from me and are standing by your original amendments to my complaint. Or, you can choose to continue to ignore me. If you don't provide my billing statements and affirm your position that you did not conspired against your own client, then just ignore me.

Adam, you told me you were not going to make partner and now you are. Is this the payoff for fucking over your own client and staying quite? **You were the one that told me that FTB had a shared client with Geraci. David never disclosed that!** You are just as much a piece of shit like David and his partner and your firm.

Rishi, your name is on this, you know that you have an affirmative ethical obligation to inform the court of crimes that have been committed. Is FTB going to guarantee your career for the rest of your life? **Your interests are NOT aligned with this firm.** This will be your only opportunity to not be named in federal court as a co-conspirator in a conspiracy that has threatened innocent families and children and used violence to prevent parties from testifying. BUT-FOR FTB's amendments and dropping the conspiracy charges against Geraci and Berry, and the allegations that Geraci cannot own a CUP because of his previous illegal marijuana activity, **I would not have appeared to be a "conspiracy nut."** A term that your nationally recognized powerhouse firm Lewis Brisbois who you hired to represent you in **your sham federal response.**

It was not just any firm or lawyer you hired to represent you, no it was Attorney Kenneth C. Feldman, who is a **certified specialist in legal malpractice law**, is **Chair of the CA State Bar Legal Malpractice Law Advisory Commission** AND the **author of the CA Legal Malpractice and Malicious Prosecution Liability Handbook!** Rishi your firm hired Mr. Feldman BECAUSE he leads a Malicious Prosecution team and **lectures Federal Judges on Ethics.** You knew you couldn't afford to lose this case and you used the big firm guns to attempt to hide your illegal activities. I can only believe that Mr. Feldman, in his representation and response may have not fully appreciated that, as a matter of law, **the 11/02/16 document is not a contract** and that Geraci, under B&P 26057 could not enter into a contract that awarded cannabis licensing. Read the FUCKING B&P code! **This was a sham pleading!**

Now maybe maybe Rishi and Ken were not fully apprised of the situation, although based on their credentials I find that hard to believe, but as of this email they can no longer make that claim. Before anyone reading this decides on how to respond to this email, if choose to at all, the first thing that I would ask of them is to get familiar with the December 2017 emails you had sent to both me and Hurtado. There was **NEVER a MISUNDERSTANDING** between us David. **I never authorized the removal of Berry** from my complaint and **Geraci was NEVER an agent!** Now with the benefit of hindsight and those emails I can see with absolute crystal clear vision that you were working with Geraci's Attorney Weinstein since day one to undermine my case.

Next I would ask you to visit my website @ 151 Farmers The Canna-Greed Story and drop down to section 11 and 11.1 in particular. There you will see the entire case laid out with links to the court filings. While this court got it wrong by letting this go to a jury trial whereby they Judge Wohlfeil left the jury to determine a matter of law, my new lawyers are preparing for a New Trial and the Notice of Intent has been filed.

So here is what I would like from both Rishi and Feldman. You should let Judge Wohlfeil know what has happened to me in this case and how there has been a miscarriage of justice. If not I have to believe that there is no way that Feldman did

not know I was a victim of a sham l. ation, but he too allowed for it to be perpet d. I am attaching his biography because I refuse to believe he did not know that Geraci filed suit to enforce an illegal contract and FTB acted either fraudulently or at least were professionally negligent. If Feldman doesn't take corrective action now then I must conclude that when he filed his sham motion in federal court, it served to deny me access to the courts and he too KNEW I was the victim of an ongoing conspiracy.

I am telling all of you now that innocent individuals have had their lives threatened and there are multiple families and individuals who are going through severe emotional and financial harm because of what has happened. **DO NOT LATER CLAIM ANY OF YOU WERE NOT MADE AWARE OF THE CONSEQUENCES OF YOUR ACTIONS!**

David, I am going to make sure you, your firm, and everyone who touched this is exposed for the greedy, unethical individuals criminals that you are. I have all the proof I need unless David and Rishi decide to provide false testimony that provides support for the alleged "miscommunication" in which I said that Geraci was my agent. Complete and utter bullshit. Hurtado was an idiot for thinking you guys were the right firm to represent me. You knew exactly what you were doing and we trusted you. Hurtado could not fathom that our attorneys would conspire with opposing counsel to sabotage their own case. You guys are going to make the record books!

But, because Geraci was greedy and decided to get reimbursed for Mcelfresh's services at my trial, I can now go to Judge Curiel. McElfresh, same as you, KNOWS that Geraci could not legally own a marijuana CUP. her appeal for Geraci was a sham. She referred us to you. **And you amended my complaint twice, each time taking out the causes of action and allegations that prevented me from trial.**

Lastly, David don't think I won't mention your sick pedophile joke when we saw that young girl in your lobby at FTB through the glass office meeting room we were in. Both Joe and I were there when you said it. A scumbag like you that screws over his own clients is exactly the sick type of fuck that makes pedophile jokes and thinks its ok to break the law.

Adam and Rishi, you have until Friday to submit something to Judge Curiel explaining that you had nothing to do with the amendments to my pro se complaint and that you never heard me tell David that Geraci was my agent. If you do not, I will name you both in my updated Complaint. **DO NOT LATER CLAIM THAT YOU ARE UNAWARE OF THE VIOLENCE TAKEN BY YOUR CO-CONSPIRATORS AND THAT INNOCENT PEOPLE WHO HAVE BEEN SUPPORTING ME ARE SUFFERING AS A RESULT OF FTB's FRAUDULENT AND MALICIOUS ACTIONS. DO NOT LATER CLAIM YOU ARE INNOCENT AND WERE NOT AWARE. YOU ARE CHOOSING TO GAMBLE THAT I WILL BE PERCEIVED AS A CONSPIRACY NUT AND YOUR CRIMES WILL NEVER BE KNOWN.**

Your deadline is FRIDAY, 09/13/19 by 3:00 pm to respond to this email. Do not bother replying or attempting to settle or argue. **Ferris & Britton tried to settle the case, (see attachment) right AFTER they had just WON a Motion on Summary Judgement.** Why the FUCK would they offer a settlement of ANY KIND at this point? **Because they KNEW this should never hit trial and now that it has, so all your all's slippery lawyer deeds and the fraud you have perpetuated upon the court are going to be exposed!** This should have never made it trial and F&B knew it just so that exactly what just happened in Judge Wohfeil's courtroom wouldn't have happened. Well it did. Judge Wohlfeil is going to look like an imbecile and you David are to be held responsible. **Had you done your job on December 7, 2017, the first time we were before Judge Wohlfeil, and raised the Confirmation Email, Wohlfeil could have done HIS JOB.** Instead, you set in place a series of events that ended in a trial that made Wohlfeil look like a complete imbecile. That is all on you David and the vaunted law firm of Finch, Thornton & Baird! I am going to expose you all you greedy corrupt fuckers for what you are! .

Send me my billing statements. I owe over a $1,000,000 in other attorney fees now plus whatever the balance is for your worthless services are. David, you are a disgusting human being. You fucked over your own client. And your boss hired a national law firm to help cover it up. I don't expect much out of your and your firm but again this is one last chance to do so.

In closing check out this recent post by the FBI on marijuana corruption - https://www.fbi.gov/audio-repository/ftw-podcast-marijuana-industry-corruption-081519.mp3/view

On Tue, Aug 27, 2019 at 9:43 AM Darryl Cotton <indagrodarryl@gmail.com> wrote:

> Mr. Demian;
>
> Would you please forward me a one page FTB accounting that shows all invoices, payments and any balance you show remaining for your legal services?
>
> Thank you.
>
> Darryl Cotton

3 attachments

ROA 649.pdf
10681K

Feldman Kenneth Atty at Lewibrisbois (FTB).pdf
1134K

06-10-19 Settlement Offer 2.pdf
778K

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

Engebretsen v. City of San Diego

Court of Appeal of California, Fourth Appellate District, Division One

November 30, 2016, Opinion Filed

D068438

Reporter
2016 Cal. App. Unpub. LEXIS 8548 *; 2016 WL 6996218

RICK ***ENGEBRETSEN***, Plaintiff and Respondent, v. CITY OF SAN DIEGO, Defendant; RADOSLAV KALLA et al., Real Parties in Interest and Appellants.

Prior History: [*1] APPEAL from a judgment of the Superior Court of San Diego County, No. 37-2015-00017734-CU-WM-CTL, Joel M. Pressman, Judge.

Disposition: Affirmed.

Core Terms

lease, equitable estoppel, ministerial duty, property owner, trial court, parties, City's, Tenant, ***conditional use*** permit, statement of decision, deficiencies, negotiations, holder, supporting evidence, mandamus relief, terminated, financial responsibility, substantial evidence, agency relationship, application process, writ of mandate, possessed, waived

Counsel: Sharif Faust Lawyers, Matthew J. Faust for Real Parties in Interest and Appellants.

Finch, Thornton and Baird, David S. Demian, for Plaintiff and Respondent.

No appearance by Defendant.

Judges: HALLER, Acting P. J.; AARON, J., IRION, J. concurred.

Opinion by: HALLER, Acting P. J.

Opinion

Plaintiff Rick ***Engebretsen*** sought a writ of mandate to compel the City of San Diego (City) to recognize him as the sole applicant for a ***conditional use*** permit (CUP) to operate a medical marijuana consumer cooperative (MMCC) on his property (the Property) and process the application accordingly. ***Engebretsen*** alleged he was the sole record owner and interest holder of the Property throughout the application process. Although real party in interest Radoslav Kalla was listed as the applicant for the CUP, ***Engebretsen*** alleged that Kalla was acting on ***Engebretsen***'s behalf as an agent, Kalla never had an independent legal right to use the Property, and ***Engebretsen*** had since revoked Kalla's agency. The City did not oppose ***Engebretsen***'s writ

petition.

The trial court granted the writ, and in a statement of decision, **[*2]** discussed its basis for finding that (1) Kalla was acting as ***Engebretsen***'s agent in pursuing the CUP; (2) Kalla did not have any independent authority to pursue it or legal interest in the Property; (3) ***Engebretsen***, as the principal, terminated Kalla's agency and became the only proper applicant; and (4) the City had a ministerial duty to process the application in ***Engebretsen***'s name.

On appeal, Kalla and real party in interest Matthew Compton contend the trial court's principal-agent finding is not supported by sufficient evidence, mandamus was not a proper remedy, and the court did not address and consider their equitable estoppel defense in the statement of decision. We conclude substantial evidence supports the court's factual finding of an agency relationship, ***Engebretsen*** established a proper basis for a writ of mandate, and the court implicitly rejected Kalla and Compton's estoppel defense. Therefore, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Engebretsen*'s Property and the Initial Application for a CUP to Operate an MMCC*

Engebretsen's Property, on Carroll Road in San Diego, is located in a City district where up to four properties within the district may be used to **[*3]** operate medical marijuana consumer cooperatives. ***Engebretsen*** was the sole record owner of the Property in fee simple. In early 2014, ***Engebretsen*** retained Paul Britvar to submit an application on ***Engebretsen***'s behalf for a CUP to operate an MMCC and seek out prospective parties to lease or purchase the Property. The scope of ***Engebretsen*** and Britvar's principal-agent relationship is well documented and undisputed in this case.

The Land Development Code (LDC), within the San Diego Municipal Code (SDMC), governs the City's CUP application process and sets forth the individuals who are authorized to file an application. (SDMC, § 112.0102.) On an initial CUP application form, Britvar certified he was the "Authorized Agent of Property Owner." On a required ownership disclosure form, he listed ***Engebretsen*** as the sole owner and interest holder in the Property. Compton, as vice president of Bay Front LLC, signed a separate form naming the company as the financially responsible party to cover the City's costs in processing the application.

Engebretsen *Authorizes Kalla to Continue the CUP Application Process*

Up until August 2014, Kalla and Compton were dealing with Britvar over lease and/or purchase negotiations, **[*4]** but Kalla and Compton wished to negotiate directly with ***Engebretsen***. ***Engebretsen*** began communicating primarily with Kalla. Thereafter, ***Engebretsen*** terminated Britvar's agency and orally authorized Kalla as his agent to continue the CUP application process while they attempted to negotiate a lease or purchase agreement for the Property. In October 2014, unknown to ***Engebretsen***, Britvar assigned his "interest" in the CUP application to Kalla.

On October 23, 2014, Kalla filed a revised application form with the City for the CUP to operate an MMCC on the Property (the Application). As Britvar had done, Kalla marked himself as the "Authorized Agent of Property Owner" in the "Applicant" box on the Application; ***Engebretsen*** is listed on the same form as the "Property Owner." Kalla signed the Application and certified the correctness of the supplied information. Kalla did not indicate he was a property owner, tenant, or "other person having a legal right, interest, or entitlement to the use of the property that is the subject of this application." With the Application, Kalla also filed an updated ownership disclosure form signed by ***Engebretsen***, again showing ***Engebretsen*** as the sole owner and **[*5]** interest holder in the Property.

Between November 2014 and February 2015, Kalla and ***Engebretsen*** negotiated directly with each other on possible terms for the lease or purchase of the Property. ***Engebretsen*** sent Kalla a letter of intent for the lease of the Property (First LOI). The First LOI provides: "Tenant agrees to pay for all costs and fees related to obtaining the CUP." Further, the First LOI states: "Lease Agreement shall be contingent upon Landlord obtaining CUP and Tenant obtaining any other governmental permits and licenses required for Tenant's Use."[1] Kalla did not sign the First LOI.

In response to the First LOI, Kalla provided ***Engebretsen*** with a letter of intent for a lease and

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[1] Within the exchanged documents, the "Landlord" or "Seller" is defined as ***Engebretsen*** and the "Tenant" or "Buyer" is defined as Kalla, Compton, and/or a company under their control.

purchase option (Second LOI). Kalla's Second LOI states: "Lease Agreement shall be contingent upon Tenant on behalf of Landlord obtaining CUP and Tenant obtaining any other governmental permits and licenses required for Tenant's Use." ***Engebretsen*** did not sign the Second LOI. The parties continued to exchange multiple letters **[*6]** of intent and proposed leases in good faith, but could not reach an agreement. In general, ***Engebretsen*** preferred to structure the deal as a lease while Kalla and Compton preferred an outright purchase/sale.

Engebretsen Revokes Kalla's Agency, and the City Refuses to Process the Application in Engebretsen's Name

Because negotiations with Kalla reached an impasse, ***Engebretsen*** contacted the City in March 2015 to be recognized as the sole applicant on the Application. The City responded that it did not consider ***Engebretsen*** to be the applicant. ***Engebretsen*** next met with a City representative to discuss removing Kalla's name from the Application, but the City refused. Subsequently, ***Engebretsen*** repeatedly met or communicated with City representatives, including through his counsel, to convey that he was the sole owner and interest holder in the Property, he had terminated Kalla's agency, Kalla had no independent legal right to pursue the Application, and ***Engebretsen*** would be the financially responsible party. The City continuously refused to follow ***Engebretsen***'s instructions.

In April 2015, the City informed ***Engebretsen*** that Compton had designated Kalla as the new financially responsible party **[*7]** for the Application, against ***Engebretsen***'s wishes. The City would not accept ***Engebretsen*** as the financially responsible party for the Application without Kalla's signature. Later that month, the City's hearing officer approved the Application for issuance of a CUP, with Kalla listed as the applicant and prospective permit holder. The Application was the fourth and last one approved by the City for a CUP to operate an MMCC in the district where the Property is located. A third party appealed the Application approval decision for unrelated reasons, and the hearing on that appeal was set to be heard by the City's Planning Commission on June 25, 2015.

Engebretsen's Petition for Writ of Mandate

In May 2015, ***Engebretsen*** filed a verified petition for writ of mandate directing the City to: (1) recognize ***Engebretsen*** as the sole applicant on the Application and (2) process the Application with ***Engebretsen*** as the sole applicant. The court set the matter for trial on an expedited basis. The City filed a statement of nonopposition to ***Engebretsen***'s petition for writ of mandate.

On June 16, 2015, the court conducted a trial and heard testimony from Kalla and Compton. Kalla testified he and Compton "believed **[*8]** [they] had a lease contract on the property" based on Britvar's representations, but admitted that negotiations with ***Engebretsen*** "fell completely apart" and the parties never actually executed a lease agreement. Compton confirmed he and Kalla had no lease agreement on the Property and they agreed to be financially responsible for the Application because they thought they "were going to be able to lease" the Property. The City took no position at trial.

After closing argument, the court gave its tentative ruling from the bench, granting ***Engebretsen***'s petition for a writ of mandate. As part of the ruling, ***Engebretsen*** would have to pay the City the amounts Kalla and Compton had paid for the Application's processing, so the City could then reimburse Kalla and Compton. In making its ruling, the court noted the undisputed facts that ***Engebretsen*** was the record owner of the Property and Kalla and Compton did not enter into a lease or purchase agreement for the Property. The court commented that Kalla and Compton had not shown they had "any interest in [the] property whatsoever," and had "moved forward absent a legally binding agreement under any circumstances." Kalla and Compton requested a **[*9]** statement of decision on several disputed issues, and the court directed counsel for ***Engebretsen*** to draft a proposed statement. Following the trial, the court issued a minute order summarizing its ruling.

On June 23, 2015, Kalla and Compton filed a notice of appeal. The next day, the court ordered that the notice of appeal would not operate as a stay of execution on the judgment and writ to be issued.

On July 20, 2015, the court filed its statement of decision (SOD). Kalla and Compton did not object to the SOD, propose any revisions, or otherwise inform the trial court that the SOD failed to address an issue. On August 18, 2015, the court rendered its judgment, which attached and incorporated the SOD by reference, and

issued the writ of mandate.[2]

DISCUSSION

I. *Standard of Review*

When an appellate court reviews a trial court's judgment on a petition for a writ of mandate, it applies the substantial evidence test to the trial court's findings of fact and independently reviews the trial court's **[*10]** conclusions on questions of law, which include the interpretation of a statute and its application to the facts. (Klajic v. Castaic Lake Water Agency (2001) 90 Cal.App.4th 987, 995, 109 Cal. Rptr. 2d 454 (*Klajic*).) The substantial evidence test applies to both express and implied findings of fact. (Rey Sanchez Investments v. Superior Court (2016) 244 Cal.App.4th 259, 262, 197 Cal. Rptr. 3d 575.) "'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651, 51 Cal. Rptr. 2d 907.) When reviewing the trial court's factual findings, we ask whether it was "reasonable for a trier of fact to make the ruling in question in light of the whole record." (Id. at p. 652.)

II. *The Trial Court Properly Issued a Writ of Mandate*

Kalla and Compton contest the court's finding of an agency relationship, the propriety of mandamus relief, and the court's implied rejection of their equitable estoppel defense.

A. *The Court's Finding Regarding the Existence of an Agency Relationship Is Supported by Substantial Evidence*

Kalla and Compton argue insufficient evidence supported the trial court's factual finding that Kalla acted as ***Engebretsen***'s agent in pursuing a CUP application and the court placed undue weight on the application form submitted by Kalla to the City.

"An agent is one who represents another, called the principal, in dealings with third persons." **[*11]** (Civ. Code, § 2295.) "Any person may be authorized to act as an agent, including an adverse party to a transaction." (Michelson v. Hamada (1994) 29 Cal.App.4th 1566, 1579, 36 Cal. Rptr. 2d 343.) Agency may be implied from the circumstances and conduct of the parties. (*Ibid.*) Indicia of an agency relationship include the agent's power to alter legal relations between the principal and others and the principal's right to control the agent's conduct. (Vallely Investments, L.P. v. BancAmerica Commercial Corp. (2001) 88 Cal.App.4th 816, 826, 106 Cal. Rptr. 2d 689.) "The existence of an agency relationship is a factual question for the trier of fact whose determination must be affirmed on appeal if supported by substantial evidence." (Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp. (2007) 148 Cal.App.4th 937, 965, 56 Cal. Rptr. 3d 177 (*Garlock*).)

Here, substantial evidence supports the court's finding that Kalla was acting as ***Engebretsen***'s agent in completing the Application. Kalla certified on the Application form that he was ***Engebretsen***'s authorized agent, thereby representing and binding ***Engebretsen*** in dealings with the City regarding the CUP application. Kalla had no other basis or authority to complete a CUP application for the Property—he was neither a property owner nor a legal interest holder. In addition, ***Engebretsen*** declared under penalty of perjury that he orally authorized Kalla as his agent to continue the application process initiated by agent Britvar. Other evidence suggests **[*12]** that Kalla understood the CUP was for ***Engebretsen***'s benefit as the Property owner until Kalla executed a lease or purchase agreement. Furthermore, ***Engebretsen*** consistently believed he was able to terminate Kalla's agency with respect to the Application at any time, as a principal is entitled to do. (See Malloy v. Fong (1951) 37 Cal.2d 356, 370, 232 P.2d 241 ["The power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities."].) Kalla and Compton essentially ask us on appeal to reweigh or draw alternative inferences from the evidence, which we may not do. (Garlock, supra, 148 Cal.App.4th at p. 966.) The court's agency finding was reasonable.

B. ***Engebretsen*** *Established a Proper Basis for Mandamus Relief*

Kalla and Compton contend that ***Engebretsen*** did not establish a basis for mandamus relief because the City did not have a ministerial duty to recognize ***Engebretsen*** as the applicant and ***Engebretsen*** possessed a plain, speedy, and adequate legal remedy.

1. *Writs of Mandate Generally*

Under Code of Civil Procedure section 1085, subdivision (a), the trial court may issue a writ of

[2] We denied Kalla and Compton's request for judicial notice dated February 19, 2016, of a separate lawsuit filed by ***Engebretsen*** against them. Accordingly, that matter is not part of the record on appeal.

mandate "to any . . . person . . . to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use **[*13]** and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that . . . person."

"A traditional writ of mandate under Code of Civil Procedure section 1085 is a method for compelling a public entity to perform a legal and usually ministerial duty. [Citation.] The trial court reviews an administrative action pursuant to Code of Civil Procedure section 1085 to determine whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the agency failed to follow the procedure and give the notices the law requires. [Citations.] 'Although mandate will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion. [Citation.] In determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld.'" (Klajic, supra, 90 Cal.App.4th at p. 995, fn. omitted; California Public Records Research, Inc. v. County of Stanislaus (2016) 246 Cal.App.4th 1432, 1443, 201 Cal. Rptr. 3d 745.)

2. *The City Had a Ministerial Duty*

Kalla and Compton argue the City did not have ministerial duty in this case because **[*14]** (1) there is no City procedure for amending a CUP application, (2) allowing amendments may allow "dangerous or untrustworthy" people to operate an MMCC, and (3) a writ of prohibition was the appropriate remedy to stop the City from processing the Application in Kalla's name. We reject these arguments.

To obtain mandamus relief, ***Engebretsen*** was required to demonstrate that the City had a "clear, present, ministerial duty" to perform the requested action. (Alliance for a Better Downtown Millbrae v. Wade (2003) 108 Cal.App.4th 123, 129, 133 Cal. Rptr. 2d 249.) "A ministerial duty is an act that a public officer is obligated to perform in a prescribed manner required by law when a given state of facts exists." (*Ibid.*) An act is not ministerial when it involves the exercise of discretion or judgment. (County of San Diego v. State of California (2008) 164 Cal.App.4th 580, 596, 79 Cal. Rptr. 3d 489.)

Courts have concluded that city and county employees are engaged in ministerial acts when ascertaining whether procedural requirements have been met. (E.g., Billig v. Voges (1990) 223 Cal.App.3d 962, 968-969, 273 Cal. Rptr. 91 [clerk correctly rejected referendum petition because it did not comply with Elections Code]; Palmer v. Fox (1953) 118 Cal.App.2d 453, 455-456, 258 P.2d 30 [compelling county engineer to process building permit application where plaintiffs submitted all required paperwork]; see also Shell Oil Co. v. City and County of San Francisco (1983) 139 Cal.App.3d 917, 921, 189 Cal. Rptr. 276 (*Shell Oil*) [compelling city to process a lessee's application for a ***conditional use*** permit because lessee was **[*15]** an "owner" under the city's relevant ordinance].)

In this case, ***Engebretsen*** showed that the City must process and issue applications for ***conditional use*** permits consistent with relevant laws and procedures.[3] (SDMC, § 112.0102, subds. (a) & (b).) The City's ordinances provide that the persons "deemed to have the authority to file an application [are]: [¶] (1) The *record owner* of the real property that is the subject of the permit, map, or other matter; [¶] (2) The property owner's authorized agent; or [¶] (3) Any other person who can demonstrate a legal right, interest, or entitlement to the use of the real property subject to the application." (SDMC, §§ 112.0102, subd. (a), 113.0103 [defining *applicant*].) The City's ordinances thus ensure that ***conditional use*** permits will only be granted to individuals having the right to use the property in the manner for which the permit is sought. (SDMC, §§ 112.0102, subd. (a), 113.0103; see Shell Oil, supra, 139 Cal.App.3d at p. 921; see generally 66A Cal.Jur.3d Zoning And Other Land Controls § 427 [summarizing California cases].) Any other interpretation would raise serious constitutional questions concerning property rights. (Shell Oil, at p. 921; see also County of Imperial v. McDougal (1977) 19 Cal.3d 505, 510, 138 Cal. Rptr. 472, 564 P.2d 14 [holding that ***conditional use*** permits "run with the land"].)

Engebretsen demonstrated he was the only person who possessed the right to use the Property, Kalla never independently possessed such a right, Kalla was

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[3] "[A] ***conditional use*** permit grants an owner **[*16]** permission to devote a parcel to a use that the applicable zoning ordinance allows not as a matter of right but only upon issuance of the permit." (Neighbors in Support of Appropriate Land Use v. County of Tuolumne (2007) 157 Cal.App.4th 997, 1006, 68 Cal. Rptr. 3d 882.)

acting for ***Engebretsen***'s benefit in completing the Application (*Civ. Code, § 2330*), and ***Engebretsen*** had terminated Kalla's agency. Under the circumstances, the City had a ministerial duty to process the CUP application for ***Engebretsen***, the Property owner.

Regarding Kalla and Compton's remaining arguments, there is no evidence in the record that requiring the City to process the Application in ***Engebretsen***'s name would lead to dangerous MMCC operations.[4] Finally, Kalla and Compton have not cited any authority to support their position that a writ of prohibition was an available remedy. A writ of prohibition "arrests the proceedings of any tribunal, corporation, board, or person *exercising judicial functions*, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." (*Code Civ. Proc., § 1102*, italics added.) A writ of prohibition may not restrain ministerial or nonjudicial **[*17]** acts, including an administrative decision to grant a permit. (*Whitten v. California State Board of Optometry (1937) 8 Cal.2d 444, 445, 65 P.2d 1296*; *F.E. Booth Co. v. Zellerbach (1929) 102 Cal.App. 686, 687, 283 P. 372*.) The trial court did not err in concluding the City had a ministerial duty to process the Application in ***Engebretsen***'s name.

3. ***Engebretsen*** *Did Not Have an Adequate Legal Remedy*

Kalla and Compton next argue that ***Engebretsen*** possessed an adequate legal remedy of filing and/or pursuing a new CUP application, precluding mandamus relief.[5] This argument lacks merit.

A writ of mandate generally will not issue when the plaintiff possesses a "plain, speedy and adequate remedy in the ordinary course of law." (*Powers v. City of Richmond (1995) 10 Cal.4th 85, 114, 40 Cal. Rptr. 2d 839, 893 P.2d 1160*.) Here, ***Engebretsen*** showed he did not possess such a remedy. The City refused **[*18]** to process the Application in ***Engebretsen***'s name, and it approved the Application with Kalla named as the prospective permit holder. Also, the City would not be issuing any more ***conditional use*** permits to operate MMCC's within the same city district. (SDMC, § 141.0614.) If the CUP was granted to Kalla, ***Engebretsen*** had no other immediate means to obtain a CUP for his Property from the City. Moreover, ***Engebretsen*** showed that the parties needed a determination in time to respond to an unrelated appeal of the City's decision to approve the Application. The court did not err in granting mandamus relief.

C. *The Court Did Not Commit Reversible Error in Connection with Kalla and Compton's Equitable Estoppel Defense*

At trial, Kalla and Compton opposed the issuance of a writ of mandate under a theory of equitable estoppel. Specifically, their counsel argued that ***Engebretsen*** was estopped from obtaining the CUP in his name because Kalla and Compton relied on ***Engebretsen***'s promises to sign a lease. Under *Code of Civil Procedure section 632*, Kalla and Compton requested a statement of decision on the court's "finding and reasoning as to the application of equitable estoppel" in the case.

The SOD did not explicitly address equitable estoppel, but instead **[*19]** sets forth in significant detail the factual background supporting the court's implicit rejection of the theory. Kalla and Compton did not object to the SOD below or argue it was deficient for failing to address an issue. On appeal, they contend the trial court erred in not addressing their equitable estoppel defense in its SOD and that the evidence supports their defense. We conclude they waived the argument regarding a deficient SOD and substantial evidence supports the court's implied rejection of their defense.

1. *Kalla and Compton Waived or Forfeited Their Claim Regarding the Court's Failure to Address Equitable Estoppel in the Statement of Decision*

In a court trial, "first, a party must request a statement of decision as to specific issues to obtain an explanation of the trial court's tentative decision (*§ 632*); second, if the court issues such a statement, a party claiming deficiencies therein must bring such defects to the trial court's attention to avoid implied findings on appeal favorable to the judgment (*§ 634*)." (*In re Marriage of Arceneaux (1990) 51 Cal.3d 1130, 1134, 275 Cal. Rptr. 797, 800 P.2d 1227* (*Arceneaux*).) *Code of Civil Procedure section 634* "clearly refers to a party's need to point out deficiencies in the trial court's statement of

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[4] As ***Engebretsen*** also points out, a different section of the SDMC requires background checks for people operating or working at an MMCC (SDMC, § 42.1507), which is unaffected by provisions of the LDC.

[5] Kalla and Compton also assign error to the trial court's omitting to address the issue of alternative legal remedies in its SOD. As we discuss, *infra*, they waived the argument by failing to object to the SOD or pointing out the alleged deficiency to the trial court. Regardless, any error was harmless because ***Engebretsen*** sufficiently stated a basis to obtain writ relief.

decision as a condition of avoiding such implied findings, rather **[*20]** than merely to request such a statement initially as provided in section 632." (Arceneaux, at p. 1134.) "[I]f a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment." (Id. at pp. 1133-1134.)

Here, Kalla and Compton did not bring any alleged deficiencies in the SOD to the trial court's attention. If they had, the SOD could have been corrected and made part of the record on appeal. Accordingly, Kalla and Compton have waived or forfeited their argument relating to the court's alleged failure to address equitable estoppel, and we will imply all necessary findings to support the court's judgment. (Agri-Systems, Inc. v. Foster Poultry Farms (2008) 168 Cal.App.4th 1128, 1135, 85 Cal. Rptr. 3d 917.)

2. *The Court's Implied Rejection of Kalla and Compton's Equitable Estoppel Defense Is Supported by Substantial Evidence*

Substantial evidence supports the court's implied rejection of Kalla and Compton's equitable estoppel defense. (See Acquire II, Ltd. v. Colton Real Estate Group (2013) 213 Cal.App.4th 959, 970, 153 Cal. Rptr. 3d 135 ["the appellate court applies the doctrine of implied findings and presumes the trial court made all necessary findings supported by substantial evidence"].) "'Generally speaking, four elements must be present in order to apply the **[*21]** doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'" (Golden Gate Water Ski Club v. County of Contra Costa (2008) 165 Cal.App.4th 249, 257, 80 Cal. Rptr. 3d 876 (*Golden Gate*).) The defense does not apply when even one element is missing. (*Ibid.*)

Here, it was virtually undisputed that the parties engaged in arm's-length, good faith negotiations for several months, but they simply could not reach a suitable lease or purchase agreement. The record supports that Kalla and Compton pursued the Application despite knowing they had not yet signed any agreement with ***Engebretsen***, the Property owner. As a result, Kalla and Compton were not "ignorant of the true facts." (Golden Gate, supra, 165 Cal.App.4th at p. 259.)

Similarly, ***Engebretsen*** only sought to be recognized as the sole applicant when he realized that the parties could not reach a mutually acceptable agreement. Consequently, Kalla and Compton failed to establish that equitable estoppel prevented the City from recognizing ***Engebretsen*** as the CUP applicant.

DISPOSITION

The judgment **[*22]** is affirmed. ***Engebretsen*** shall recover his costs on appeal.

HALLER, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.

End of Document

Gmail

Darryl Cotton <indagrodarryl@gmail.com>

ACH Payment

1 message

Darryl Cotton <indagrodarryl@gmail.com> Wed, Nov 6, 2019 at 12:35 PM
To: Kelly Woodruff <kelly@kwoodrufflaw.com>
Cc: Joe Hurtado <j.hurtado1@gmail.com>

Hi Kelly,

I apologize for the delay but a payment of $5K has been wire transferred to your account today. If there are any issues with you receiving it please let me know. Thank you.

Darryl Cotton

11-06-19 Wire Transfer Cotton to Woodruff (5K).pdf
2016K

Wire Transfer Outgoing Request

CHASE

Wire Transfer Sender Information

Sender Name: DARRYL COTTON				
Account Name: DALBERCIA, INC.		Street Address: 6176 FEDERAL BLVD		
City: SAN DIEGO	State: CA	Zip: 92114-1401	Country: USA	Daytime Phone: 619-266-4004 619-954-4447
Primary ID Type: Driver's License	ID Issuer: CA	ID Number: c1335591	ID Issue Date: 05/16/2019	ID Exp: 05/29/2024
Secondary ID Type:	ID Issuer:	ID Number:	ID Issue Date:	ID Exp:
Comments:				

Wire Transfer Information

Request Date: 11/06/2019	Request time: 03:02:03PM Eastern time	Effective date: 11/06/2019	Wire Type: Domestic
Debit Account #: XXXXX0632	Debit Account Type: PLAT BUS CHECKING	Wire Amount (US dollars): $5,000.00	
Qualifying Account #:	Qualifying Account Type:	Source of funds: Checking	Wire Fee: Refer to Account Agreement for Pricing
Currency type to be sent: US Dollars	Exchange rate: N/A	Foreign currency amount: N/A	Amount to Collect (USD): $5,000.00
FX Contract Number:			

Recipient Account Information

Account Name: Kelly A. Woodruff, Attorney				
Street Address:	Account Number: 80006034245			
	City:	State:	Zip:	Country:
Text to Recipient:				

Receiving Bank Information

Bank Name: First Republic Bank				
Street Address: 224 BROOKWOOD RD	Bank ABA/SWIFT Code: 321081669			
	City: ORINDA	State: CA	Zip: 94563-3015	Country: USA
Intermediary Bank Name:				
Street Address:	Intermediary Bank ABA:			
	City:	State:	Zip:	Country:
Text to Receiving Bank:				

Wire Transfer Agreement

1. Service.

The terms and provisions in this Wire Transfer Agreement ("Agreement") describe our wire transfer service, including what you can expect from us (JPMorgan Chase Bank, N.A.) and the security procedures we will take when you send a wire transfer. If there is a conflict between any section of your Deposit Account Agreement and this Agreement, the provisions of this Agreement will apply.

The following types of wire transfers, when completed by a branch banker or by a Chase Private Client banker, are governed by this Agreement:

- **Domestic Wire Transfer:** A wire transfer sent to a bank within the U.S., including its territories.
- **International Wire Transfer:** A wire transfer sent in either U.S. or foreign currencies, including using our Chase Global Transfer service, to a bank outside the U.S. **Consumer International Wire Transfers** are wires that are sent from an account used primarily for personal, family, or household purposes.

By providing your signature as authorization, as part of our security procedures, you agree to these terms and conditions and authorize us to provide you Domestic Wire Transfers or International Wire Transfers. Wire transfers, when completed using our Online Services or Mobile Services, are governed by a separate agreement.

2. Security Procedures.

These security procedures are only to help prevent unauthorized access to your account. All wire transfer requests go through an internal review, and we may need to contact you to verify information about your wire transfer. We may impose stricter security procedures for any particular wire transfer you make, but we have no obligation to do so. If we choose to impose stricter security procedures, we will not be liable to you for any delays or losses, and we will not be obligated to impose such security procedures in the future.

(a) For Chase Branch Wire Transfers Only:

When you request a wire transfer in a branch you will be required to provide your signature as authorization for each wire transfer and show valid identification. You acknowledge these security procedures used for wire requests you make in a branch are a commercially reasonable method of verifying your branch wire transfer. You are responsible for any wire transfer issued in your name using these security procedures, whether or not you actually authorized the transfer.

(b) For Chase Private Client Customers Only:

Only Chase Private Client Telephone Banking can complete your wire transfer request using this service. To request wire transfers, you must provide your signature as authorization and maintain an active Chase Private Client Checking or Savings account. On the authorization form you can place a dollar limit on the wire transfers you request.

- You may request a wire transfer by telephone, and you agree that we will confirm your request by using any of the following security procedures, at our discretion:
  - Confirming certain personal information about you.
  - Contacting you, another account holder or someone else you have listed on the authorization form.
- You may request a wire transfer by email, and you agree that we will confirm your request by contacting you or another account holder.
- We may call you at any phone number we have for you in our records or to the phone numbers provided on the authorization form.
- You acknowledge that we offer wire transfer services in person at our branches, or online which provide a higher level of security for your accounts, and you can use these options instead. You acknowledge the respective security procedures above for wire transfers are a commercially reasonable method of verifying your wire transfer. You are responsible for any wire transfer issued in your name using these security procedures, whether or not you actually authorized the transfer.
- If you do not specify the account from which to subtract the funds, we can subtract the amount of the wire transfer from any account you designated on the authorization form.

3. Processing, Canceling, Delays and Notifications of Wire Transfers.

(a) Processing: We'll start processing your wire transfer the same business day if we receive it before the cutoff times we establish from time to time or provide you at the time you request your transfer. If we receive your request after that time, we'll process it the following business day. After we start processing your wire transfer, you must have available funds in the deposit account you designated in your Instructions.

(b) Canceling: You have the right to cancel Consumer International Wire Transfers at no cost to you within 30 minutes after you have authorized us to send it. For all other wire transfers, once you have submitted a wire transfer for the current business day, you cannot cancel it after we've begun processing, but you may request us to attempt to return the funds to you. If the recipient's bank agrees, your funds may be returned to you, but likely not the full amount that was originally sent. We will not automatically cancel your wire transfer due to the transfer being delayed by more than five business days; if we do cancel your wire transfer we'll notify you.

(c) Modifying: Once a wire transfer has begun processing, we will not be able to change any type of wire transfer requests unless the recipient's bank agrees. If the recipient's bank declines to change the wire transfer request, you will be responsible for the transfer you initially requested.

(d) Internal Review: During our internal review, we may subtract funds from your account or place a hold on your account and it may result in processing delays. Once we have released the wire transfer, the recipient's bank may delay credit to the recipient due to their own internal review processes.

(e) Notifications: We will send you an email notification on the status of your wire transfer. It will be sent to an email address you have provided. We may also notify you verbally of the status of your wire transfer, but we are not required to do so. If you do not have an email address on file, if the email is returned undeliverable, or we are unable to send an email due to system failures or outages beyond our reasonable control, it is your responsibility to monitor your account for the status of your wire transfer. You may contact us for the status of your wire transfer. These notification methods are deemed to be commercially reasonable. Any other information we may provide upon successfully scheduling a wire transfer is only an indication that we've received your request and not an indication that we've accepted your wire transfer.

4. Identifying Number.

We or any other bank involved in the wire transfer will complete your wire transfer request using the account number or bank identification number you provide, even if the numbers do not match the recipient's or bank's name. ***If you provided us an incorrect account number for the recipient or an incorrect routing or identification number for the recipient's bank, you could lose the amount of the transfer.***

Gmail Search mail

10,857

In anticipation of your reply I remain.

Darryl Cotton

On Thu, Oct 31, 2019 at 2:40 PM Kelly Woodruff <kelly@kwoodrufflaw.com> wrot

> Thank you, Joe. I'm very sorry for what you're going through.
>
> Andrew, it is nice to meet you through email, and thank you for your help. Can
> notice of appeal. As I told Joe, if in doubt, Darryl should file the notice because
>
> Darryl, attached is an engagement agreement and a W-9 for tax purposes. Ple
> information is as follows:
>
> Kelly A. Woodruff, Attorney
> First Republic Bank
> Attorney Trust Account
> Account No.: 80006034245
> Routing Number: 321081669
>
> I look forward to working with you!
>
> Best,
> Kelly

Thank you! You too. Thanks, you too!

Reply Reply all Forward

Wire Transfer Agreement - continued

5. Future Dated Wire Transfers.
You may request a future dated (one-time) domestic wire transfer, up to 10 business days from the current business day's cutoff time. You cannot cancel a future dated wire transfer once it has been requested.

6. Foreign Exchange Transfer.
It is our discretion in which foreign currencies we will send wire transfers, and these can change at any time. If you send a wire transfer in a foreign currency, you authorize us to deduct the amount from your account at the exchange rate we offered at the time you requested it. The foreign exchange rates we use are determined by us in our sole discretion.

The exchange rate we use will include a spread and may include commissions or other costs that we, our affiliates, or our vendors may charge in providing foreign currency exchange to you. The exchange rate may vary among customers depending on your relationship, products with us or the type of transaction being conducted, the dollar amount, type of currency, and the date and the time of the exchange. You should expect that these rates will be less favorable than rates quoted online or in publications.

If the funds are returned or payment cannot be made for any reason, we will not be liable for more than the amount of the wire transfer at our exchange rate at the time we return the funds to you, less charges taken by any other bank involved in the wire transfer. If you cancel a funds transfer request, other than a cancellation of a Consumer International Funds Transfer within 30 minutes after you authorized us to send it, and it causes a loss or cost to us, we may subtract funds from your account to cover these losses. If your initial request is returned, cancelled or changed, your new wire transfer request will be subject to a new exchange rate.

If the wire transfer is not in the currency of the recipient's account, the recipient's bank or another processing bank may reject the wire transfer or convert it. If converted, you agree the wire transfer may be converted to a different currency at their exchange rate and may subtract additional fees.

7. Fees and Payment Route.
We may charge a fee when you use this service. Please refer to your account agreement or product information for fees that may apply. We may use any funds transfer system we believe reasonable to complete your request, regardless of any instructions you might give us. If we also are the recipient's bank, we may complete your request using an internal transfer. You are responsible for all fees and taxes, including our fees and any fees charged by other funds transfer systems or banks involved in the transfer.

8. Wire Transfer System Rules and Laws.
The use of this service is subject to all applicable U.S. federal and state laws, regulations, rules and wire transfer arrangements, including the respective state's Uniform Commercial Code Article 4A, as may be applicable. If you make a Consumer International Wire Transfer, it is also subject to additional federal laws and regulations which, in the event of a conflict with this Agreement, will govern. All of your wire transfers must comply with U.S. laws, including the regulations and economic sanctions administered by the U.S. Treasury Department's Office of Foreign Asset Control and other applicable laws.

9. Indemnification.
You will indemnify us for all claims, expenses, liabilities, and losses (including reasonable legal fees) if you or a third party makes a claim against us for any of our actions or services in this Agreement, unless they prove gross negligence or willful misconduct. You understand this section will survive even if you close your account or this Agreement is terminated.

10. Failure to Perform; Limitation of Liability.
We are only responsible for performing the services specified in this Agreement. We will not be liable for the failure or delay of any wire transfer or for failing to meet other obligations in the Agreement because of circumstances or causes beyond our control, including governmental, legal or regulatory restrictions or prohibitions, third party actions, natural disasters, equipment or system failures, labor disputes, wars or riots. We are not liable for any indirect, special or consequential damages.
Any provision of this Agreement that limits the bank's liability does not negate the bank's duty (if any) under applicable law to act in good faith and with reasonable care.

11. Changes to the Agreement
We may change the terms of this Agreement, including fees and features of this service, at any time. If any change would adversely affect you, we will notify you in advance, unless the change is necessary to comply with a legal requirement.

We may direct you to a branch or to your Chase Private Client banker for the content of any changes or the revised Agreement unless the law requires a different method. Your use of this service after we have made such changes available will be considered your agreement to the change.

By providing your signature as authorization, you agree to these terms and conditions, that the wire transfer information in this document is accurate and you authorize us to process this wire transfer.

Recipient Bank's Identifier (ABA/SWIFT): 021081669 **Recipient's Account Number:** 80006034245

Sender's Signature: _____ **Date:** 11/06/19

Email Address: indagroderryl@gmail.com

Transaction Number (Contact ID): 584498804740001

The Email Address and Transaction Number provided will be used for communication purposes.

Branch / Department Information

Initiated by: JAIME A VEGA MACIEL Initiating Branch: College Grove - 7414 Phone: 619-447-0559 Request Time: 03:02:03PM

Wire Transfer: ☐ Approved ☐ Declined Approved/Declined by (Print): _____

Approved/Declined by (Signature): _____ Date: _____

Decline Reason: _____ Comments: _____

Approving Manager (wire amount over limit): _____

Method of Approval (attach required supporting documentation) ☐ Phone call ☐ Email ☐ Other (explain): _____

Wire Tracking Information

FX Contract Number (if applicable) _____

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
APPEALS SECTION
STREET ADDRESS: 1100 Union St, Rm 218
MAILING ADDRESS: 1100 Union St, Rm 218
CITY AND ZIP CODE: San Diego, CA 92101
BRANCH NAME: Central
TELEPHONE NUMBER: (619) 844-2348

FOR COURT USE ONLY

APPELLANT: Darryl Cotton

RESPONDENT: Larry Geraci

Short Title: Larry Geraci vs Darryl Cotton [Imaged]

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

COURT OF APPEAL CASE NUMBER:

NOTICE OF DEFAULT

The appeal filed on 11/21/2019 in the above-entitled case is in default for:

Failure to designate the record on appeal

Pursuant to California Rules of Court, the appeal may be dismissed unless the act necessary to procure the record is performed within 15 days from the mailing of this notice.

DUE DATE: 12/23/2019

If you do not wish to proceed with your appeal, please file an Abandonment of Appeal in the office of the Superior Court at the address listed above.

CLERK OF THE SUPERIOR COURT

Date: 12/05/2019

C. De Los Santos , Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
1100 Union St, Rm 218
San Diego, CA 92101

SHORT TITLE: Larry Geraci vs Darryl Cotton [Imaged]

CLERK'S CERTIFICATE OF SERVICE BY MAIL	SUPERIOR COURT CASE NUMBER: **37-2017-00010073-CU-BC-CTL**
	COURT OF APPEAL CASE NUMBER:

I certify that I am not a party to this cause. I certify that a true copy of NOTICE OF DEFAULT was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The certification occurred at San Diego, California on 12/05/2019. The mailing occurred at Gardena, California on 12/06/2019.

Clerk of the Court, by: C. De Los Santos, Deputy

MICHAEL R WEINSTEIN
FERRIS & BRITTON APC
501 W BROADWAY # 1450
SAN DIEGO, CA 92101

DARRYL COTTON
6176 FEDERAL BOULEVARD
SAN DIEGO, CA 92114

The Modesto Bee IMPACT2020

The Modesto Bee

LOCAL

Modesto church opposed nearby cannabis outlet. The county vote was unanimous

BY KEN CARLSON

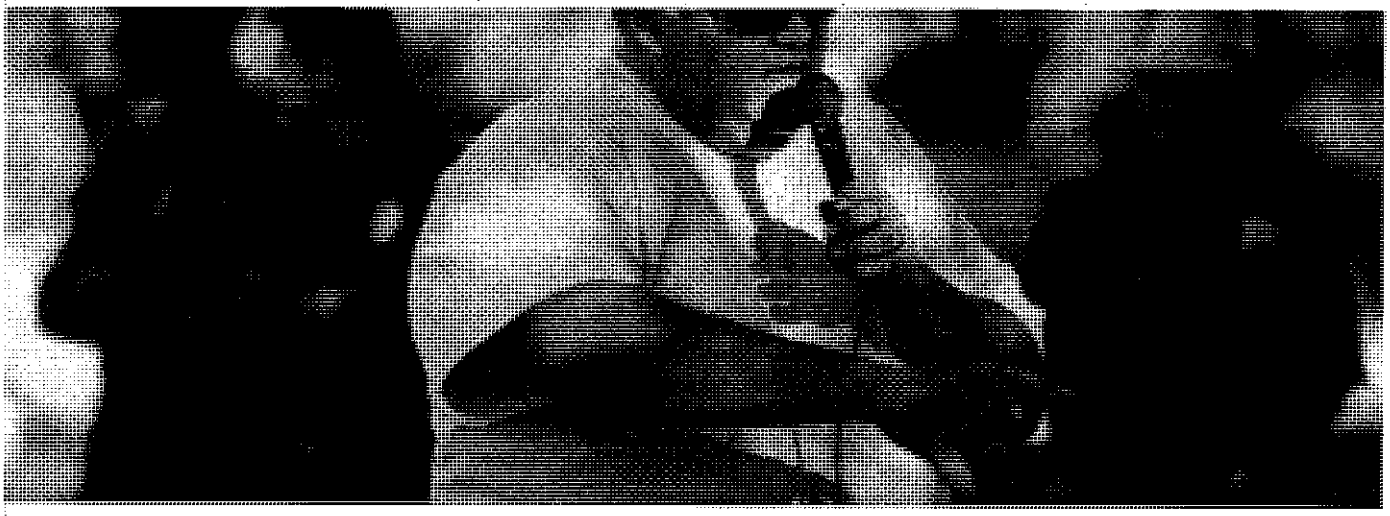
DECEMBER 11, 2019 06:19 AM

From an outlet on Lone Palm Avenue tucked away in an industrial zone in Modesto, the People's Remedy has provided cannabis products for adults and patients with medical needs.

Co-owner Mark Ponticelli has made a public stance for doing things right and making cannabis a legitimate enterprise in Stanislaus County. But the People's Remedy ran into a stumbling block in seeking one of the 61 commercial cannabis permits allowed by the county.

The dispensary is next door to or just 89 feet from a church and K-12 private school. A county ordinance and state law require at least 600 feet distance between a cannabis business and a school.

TOP ARTICLES



Public can attend vigil, funeral for former Modesto Councilman Dave Lopez

County supervisors, on a 5-0 vote Tuesday, essentially turned down the People's Remedy request for a waiver of the 600-foot rule, but gave the dispensary until late January to find another location.

"I don't know how it got this far (in the county permitting process)," said Board of Supervisors Chairman Terry Withrow, noting he would never support a dispensary near a school.

Under the medical co-op provisions of state law, the dispensary has operated since 2015 in an older industrial area off Woodland Avenue, just east of Highway 99. Originally, the owners didn't realize a school was operated in the New Harvest Christian Fellowship in a metal building next door, and they tried without success to contact church leaders about the permit application, county staff said.

The People's Remedy made a case to waive the 600-foot rule by trying to show it has not created hassles for the church and school.

Only three times in four years were sheriff deputies called to the site — twice for accidental 'panic button" activations on the store's security system and once for a burglary attempt before the store had onsite security.

Proponents said the store's 24/7 security today has a positive impact for neighboring businesses. Four of them signed letters supporting the dispensary.

Alan Layman, a nearby business owner, countered the marijuana outlet does not have enough parking for its employees and customers.

Levi Romero, an assistant pastor for New Harvest Christian Fellowship, said he works with church members who are former addicts and it's not compatible to have a marijuana outlet next door.

Romero said he has seen dispensary customers urinate on the side of the church building. Other customers smelling of marijuana have asked to use the restrooms during school hours, he said.

In addition, a dispensary employee started attending church services and tried to solicit business from church members, the assistance pastor said.

According to its website, the People's Remedy has three other stores — on McHenry Avenue in Modesto, in Oakdale and in Patterson.

Since 2004, the school attendance at New Harvest Christian Fellowship has ranged between eight and 40 students, and 19 attended the school in 2018-19.

People's Remedy staff said the dispensary has helped people who suffer from Parkinson's disease, anxiety and depression and post traumatic stress disorder. Almost 30 families would be affected if the store closes and employees lose their jobs.

The owner of the store building said that, with the rental payments from People's Remedy, he is able to meet payroll for his small trucking business.

Modesto attorney George Petrulakis, representing the dispensary, said the permit application met the standards for parking and the business has been a good neighbor.

Supervisor Kristin Olsen said she wished the church neighbors had come forward earlier to discuss concerns.

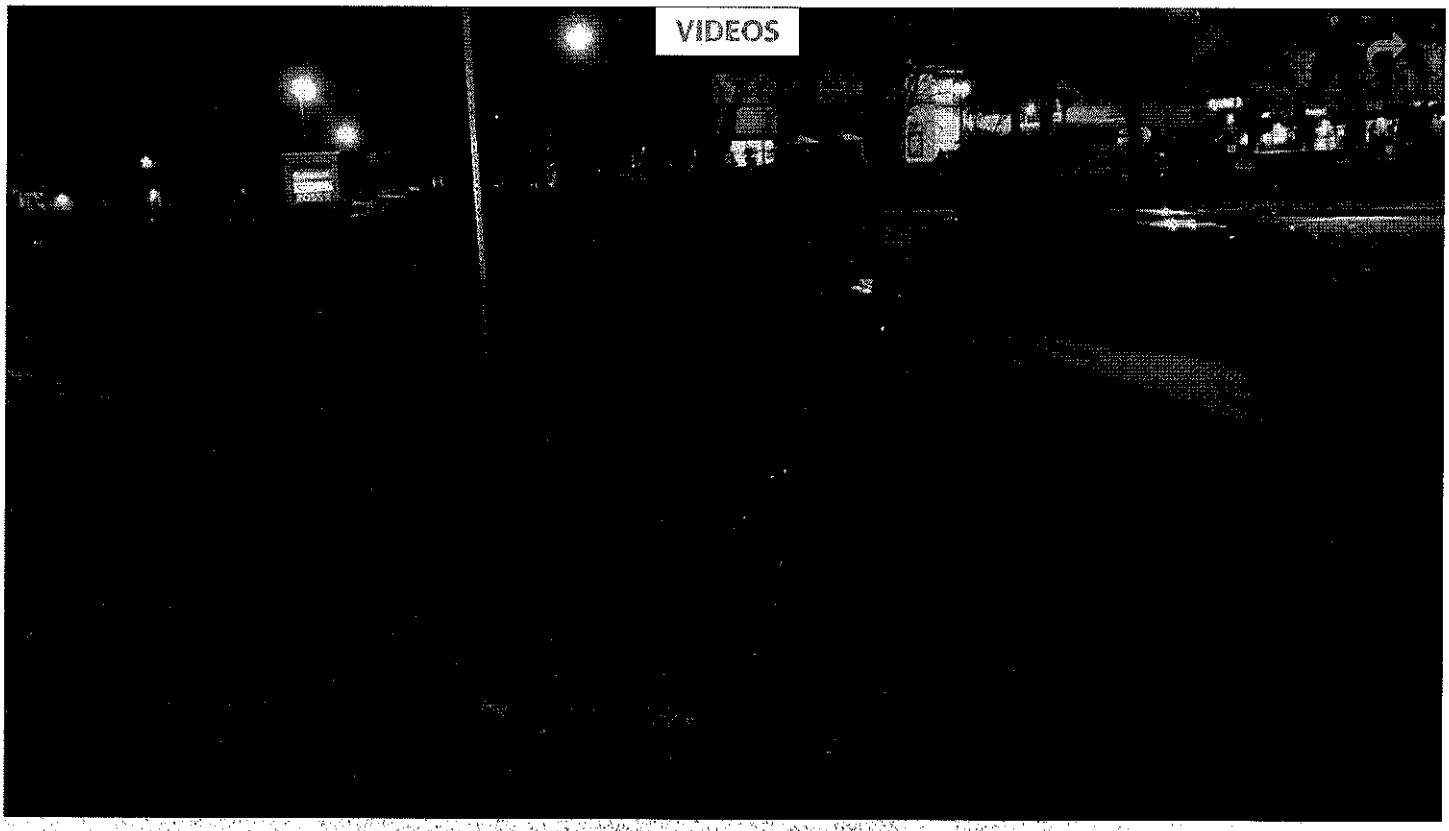
By giving the dispensary more time to find a location that meets requirements, Petrulakis said, his clients won't have a blanket permit denial on their record, though they may have to consider possible sites inside the city.

A development agreement for the Lone Palm store could have provided $3.5 million in fees to the county over five years just from the retail sales. Fees tied to distribution activity could have generated $150,000.

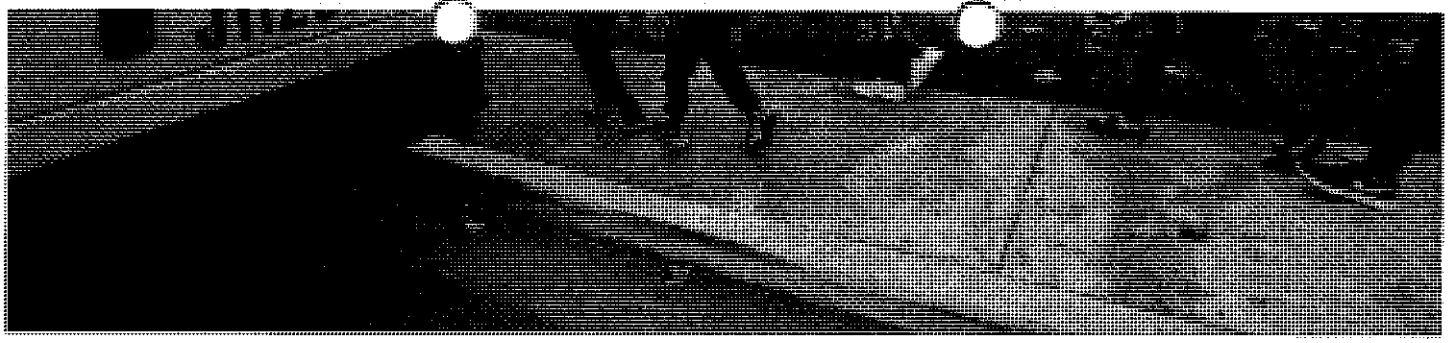
KEN CARLSON 209-578-2321

Ken Carlson covers county government and health care for The Modesto Bee. His coverage of public health, medicine, consumer health issues and the business of health care has appeared in The Bee for 15 years.

COMMENTS



Worker describes scene after fatal crash in Modesto CA



Boy describes school bus ride that led to DUI arrest in Diablo Grande

VIEW MORE VIDEO →

TRENDING STORIES

Chase turns deadly as passenger is killed in Modesto crash; driver arrested

DECEMBER 18, 2019 7:16 AM

Woman killed in Modesto when she intentionally runs into train, witnesses tell police

DECEMBER 17, 2019 12:46 PM

Passenger killed in Modesto crash following pursuit is ID'd. Driver faces murder charge

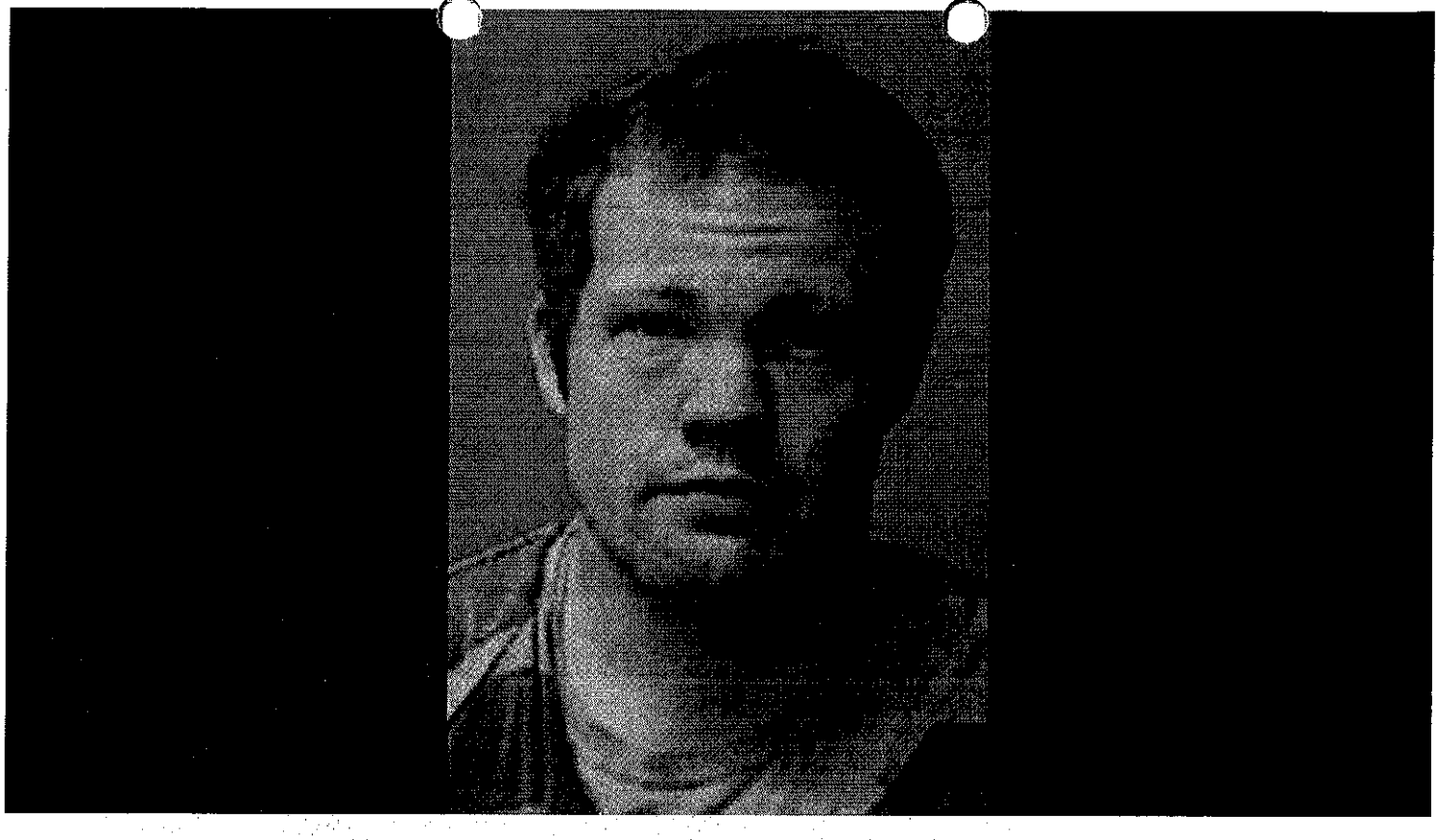
DECEMBER 19, 2019 9:39 AM

Modesto police arrest four near Texas Roadhouse tied to over 100 vehicle burglaries

DECEMBER 17, 2019 4:23 PM

Police release more details, Modesto man's name in deadly Sonora crash

DECEMBER 18, 2019 10:17 AM



CRIME

Passenger killed in Modesto crash following pursuit is ID'd. Driver faces murder charge

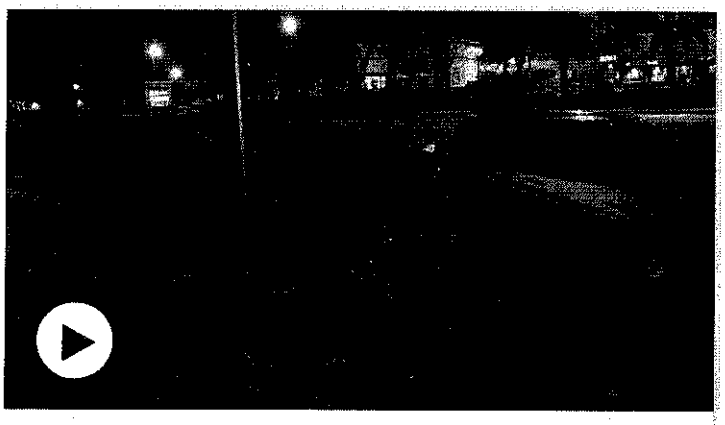
BY DEKE FARROW

DECEMBER 19, 2019 09:39 AM

The woman killed in a crash early Wednesday on Oakdale Road in Modesto after a high-speed police pursuit that began in Ceres has been identified as Kendra Sanguinetti of Sonora. The driver faces a murder charge.

KEEP READING →

MORE LOCAL



CRIME

Chase turns deadly as passenger is killed in Modesto crash; driver arrested

DECEMBER 18, 2019 7:16 AM

LOCAL

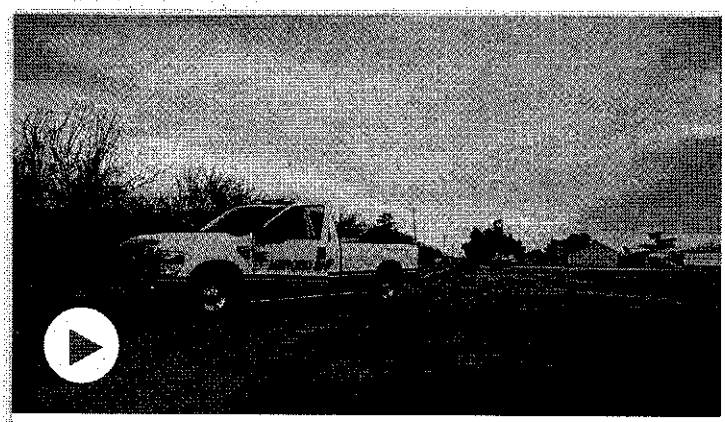
Public can attend vigil, funeral for former Modesto Councilman Dave Lopez

DECEMBER 18, 2019 3:26 PM

LOCAL

Modesto residents check on progress toward 'a dynamic, vibrant downtown'

DECEMBER 18, 2019 4:38 PM



LOCAL

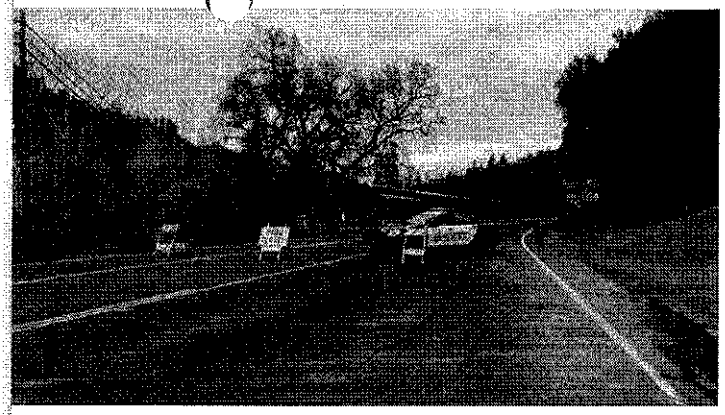
Suspect arrested in unprovoked shooting of Merced County Sheriff's deputy, officials say

DECEMBER 18, 2019 8:33 AM

CRIME

Update: Student describes dangerous bus ride leading to driver's DUI arrest

DECEMBER 18, 2019 11:51 AM



LOCAL

Police release more details, Modesto man's name in deadly Sonora crash

DECEMBER 18, 2019 10:17 AM

A Personnel Flowchart for Competing Licensed Marijuana Outlets at 6176 and 6220 Federal Boulevard, San Diego, CA 92114

'Team Geraci' is: Larry Geraci, Tax & Financial Advisor, Enrolled Agent, Real Estate Agent, Owner of Tax and Financial Center

Abhay Schweitzer, AIA
The Enterprise
6176 Point of Contact

Rebecca Berry, Office Mgr
The Enterprise
6176 CUP Proxy for Geraci

Jessica McElfresh, Esq 265209
The Enterprise
Represented Cotton and Geraci

Jim Bartell. Consultant
The Enterprise
6176 CUP Lobbyist

Gina Austin, Esq 246833
The Enterprise
Represents Geraci & Magagna

Darryl Cotton, Owner
6176 Federal Blvd.
151 Farms & Inda-Gro

Judge Gonzalo Curiel
9th Circuit
Federal Court
18CV0325 GPC MDD
18CV2571 W AGS

Ken Malbrough, Chairperson Chollas Valley Community Planning Group (CPG)
Ken and the CPG would be the one party (CPG Bylaws) that had a responsibility to both Cotton, as the Property Owner and Geraci/Berry as the CUP applicant. As can be seen by this 3/14/17 letter from DSD to Geraci's representative, Barbara Harris Permitting Services, the CPG contact requirements are clearly spelled out for Team Geraci. but as the property owner, Malbrough ceases all communication with Cotton, thus under the Brown Act Cotton has no access or rights within the CPG.

Aaron Magagna, Applicant
Competing 6220 CUP

Joseph Hurtado
Cotton's
Litigation Investor

John Ek, Property Owner
Competing 6220 CUP
06/01/18 Email

David Demian, Esq 220626
Finch Thorton & Baird
Represented Cotton from
06/30/17 thru 12/08/17

K. Feldman, Esq 130699
Lewis & Brisbois
Represents FTB
5/3/19 FTB Opposition

Matt Shapiro, Esq 292542
Matthew Shapiro Law
Magagna Attorney
Civil Conspiracy Emails

Jacob Austin, Esq 290303
Represents Cotton from
04/04/18 thru current

D. Pettit, Esq 160371
Pettit & Kohn
Represents Gina Austin
3/26/19 ALG Opposition

Michael Weinstein, Esq - 106464
Scott Toothacre, Esq - 146530
Elyssa Kulas, Esq - 317559
Ferris & Britton Law
Representing Geraci
9/23/19 Opposition to New Trial

Judge Joel Wohlfeil
Superior Court Tips from the Bench
03/21/17 Geraci v Cotton
5/12/17 Cotton's Cross Complaint
6/30/17 1st Amended X Complaint
8/25/17 2nd Amended X Complaint
11/06/17 Overrules Demurrer
12/07/17 Denies TRO
1/18/18 Denies Sealed Doc Request
1/25/18 Denies WOM
4/03/18 Denies 3rd Party Receiver
4/03/18 Orders Access to Property
4/05/18 Denies Motion to Stay
4/13/18 Denies Removal of LP
9/17/18 Denies DQ Motion
6/27/19 Denies Flores MOI
7/03/19 Denies Non-Suit
7/13/18 Denies JOP
4/29/19 Denies Motion to Bind
5/23/19 Denies MSJ
7/01/19 Denies Fraud Charges
7/10/19 Denies Directed Verdict
7/13/19 Cotton's Motion for New Trial
9/23/19 Geraci's Objections
9/30/19 Cotton's Reply to Objections
10/25/19 Denies Motion for New Trial

Bianca Martinez, Agent
Bartell and Associates
6176 CUP Lobbyist who worked for Bartell and Geraci had been promised an equity interest in the new Marijuana Outlet.

Cynthia Reed, Esq 204235
Vanst Law - Attorney/Lobbyist
Represents Magagna @ the
10/18/18 (Pg 4) Testimony

Andre Flores, Esq 272958
Purchases 6176 Property
6/27/19 Denied MOI

E. Deitz, Esq 222565
T. Dupuy, Esq 246705
Gordon & Rees
Represents Weinstein
5/3/19 F&B Opposition

Michael Phelps, Esq - 258246
Jana Wells, Esq - 211064
Defendant's Attorney
10/06/17 Cotton v City of San Diego
05/21/18 Appellate WOM
Mark Skeels, Esq 209766
Plaintiff's Attorney
City of San Diego v Cotton

Firouzeh Tirandazi, Senior Manager
Cherlyn Cac, Project Manager
City of SD Development Services Dept. (DSD) for both of the 6176 and 6220 CUP applications

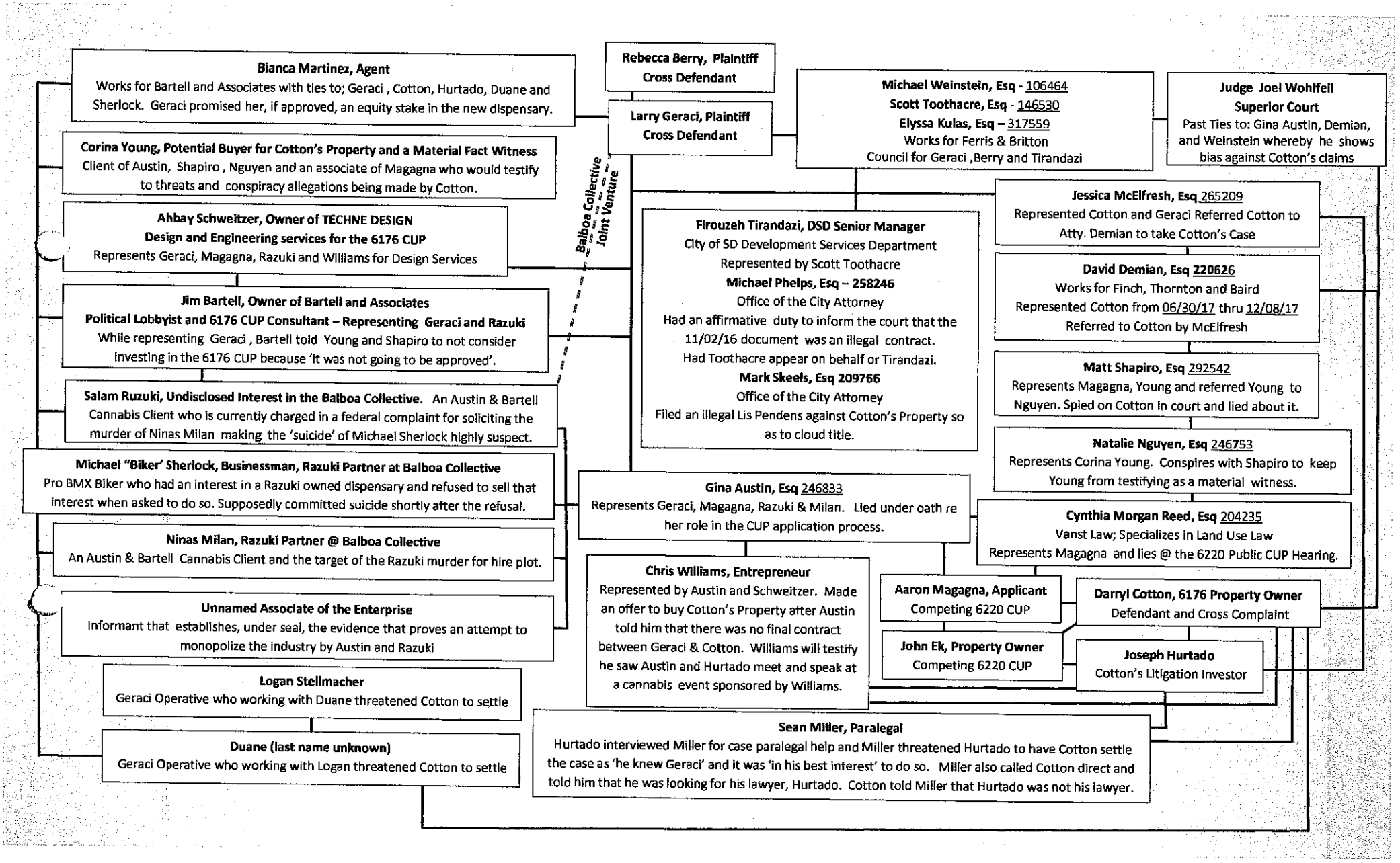
Corina Young, Fact Witness
Testifies to statements made by Bartell, Shapiro and Nguyen re 6176 CUP Processing
(See Text Messages)

Evan Schube, Esq
Tiffany and Bosco
Represents Cotton in
Motion for New Trial

Michelle Sokolowski, Deputy Director
PJ Fitzgerald, Asst. Deputy Director
Martha Blake, Senior Planner
Laura Black, Program Manager
City of SD - DSD
Gerry Braun, Chief of Staff
City of SD City Attorney's Office
Cheri Hoy, Assistant to the Chief of Staff
City of SD Mayors Office Staff
Ken Malbrough, Chairperson
Chollas Valley Community Planning Group
07/25/18 Emails & 07/27/18 Emails

Natalie Nguyen, Esq 246753
Represents Corina Young.
Refuses to allow Young to Testify under Subpoena
Emails re Young Deposition

Salam Ruzuki, Businessman
. An Austin & Bartell Cannabis Cabal Client Soliciting Murder
United States v Razuki


Bianca Martinez, Agent
Works for Bartell and Associates with ties to; Geraci , Cotton, Hurtado, Duane and Sherlock. Geraci promised her, if approved, an equity stake in the new dispensary.
Rebecca Berry, Plaintiff
Cross Defendant
Michael Weinstein, Esq - 106464
Scott Toothacre, Esq - 146530
Elyssa Kulas, Esq – 317559
Works for Ferris & Britton
Council for Geraci ,Berry and Tirandazi
Judge Joel Wohlfeil
Superior Court
Past Ties to: Gina Austin, Demian, and Weinstein whereby he shows bias against Cotton's claims
Corina Young, Potential Buyer for Cotton's Property and a Material Fact Witness
Client of Austin, Shapiro , Nguyen and an associate of Magagna who would testify to threats and conspiracy allegations being made by Cotton.
Larry Geraci, Plaintiff
Cross Defendant
Balboa Collective
Joint Venture
Jessica McElfresh, Esq 265209
Represented Cotton and Geraci Referred Cotton to Atty. Demian to take Cotton's Case
Ahbay Schweitzer, Owner of TECHNE DESIGN
Design and Engineering services for the 6176 CUP
Represents Geraci, Magagna, Razuki and Williams for Design Services
Firouzeh Tirandazi, DSD Senior Manager
City of SD Development Services Department
Represented by Scott Toothacre
Michael Phelps, Esq – 258246
Office of the City Attorney
Had an affirmative duty to inform the court that the 11/02/16 document was an illegal contract.
Had Toothacre appear on behalf or Tirandazi.
Mark Skeels, Esq 209766
Office of the City Attorney
Filed an illegal Lis Pendens against Cotton's Property so as to cloud title.
David Demian, Esq 220626
Works for Finch, Thornton and Baird
Represented Cotton from 06/30/17 thru 12/08/17
Referred to Cotton by McElfresh
Jim Bartell, Owner of Bartell and Associates
Political Lobbyist and 6176 CUP Consultant – Representing Geraci and Razuki
While representing Geraci , Bartell told Young and Shapiro to not consider investing in the 6176 CUP because 'it was not going to be approved'.
Matt Shapiro, Esq 292542
Represents Magagna, Young and referred Young to Nguyen. Spied on Cotton in court and lied about it.
Salam Ruzuki, Undisclosed Interest in the Balboa Collective. An Austin & Bartell Cannabis Client who is currently charged in a federal complaint for soliciting the murder of Ninas Milan making the 'suicide' of Michael Sherlock highly suspect.
Natalie Nguyen, Esq 246753
Represents Corina Young. Conspires with Shapiro to keep Young from testifying as a material witness.
Michael "Biker' Sherlock, Businessman, Razuki Partner at Balboa Collective
Pro BMX Biker who had an interest in a Razuki owned dispensary and refused to sell that interest when asked to do so. Supposedly committed suicide shortly after the refusal.
Gina Austin, Esq 246833
Represents Geraci, Magagna, Razuki & Milan. Lied under oath re her role in the CUP application process.
Cynthia Morgan Reed, Esq 204235
Vanst Law; Specializes in Land Use Law
Represents Magagna and lies @ the 6220 Public CUP Hearing.
Ninas Milan, Razuki Partner @ Balboa Collective
An Austin & Bartell Cannabis Client and the target of the Razuki murder for hire plot.
Chris Williams, Entrepreneur
Represented by Austin and Schweitzer. Made an offer to buy Cotton's Property after Austin told him that there was no final contract between Geraci & Cotton. Williams will testify he saw Austin and Hurtado meet and speak at a cannabis event sponsored by Williams.
Aaron Magagna, Applicant
Competing 6220 CUP
Darryl Cotton, 6176 Property Owner
Defendant and Cross Complaint
Unnamed Associate of the Enterprise
Informant that establishes, under seal, the evidence that proves an attempt to monopolize the industry by Austin and Razuki
John Ek, Property Owner
Competing 6220 CUP
Joseph Hurtado
Cotton's Litigation Investor
Logan Stellmacher
Geraci Operative who working with Duane threatened Cotton to settle
Sean Miller, Paralegal
Hurtado interviewed Miller for case paralegal help and Miller threatened Hurtado to have Cotton settle the case as 'he knew Geraci' and it was 'in his best interest' to do so. Miller also called Cotton direct and told him that he was looking for his lawyer, Hurtado. Cotton told Miller that Hurtado was not his lawyer.
Duane (last name unknown)
Geraci Operative who working with Logan threatened Cotton to settle