ROA 243
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT DARRYL COTTON'S MOTION FOR JUDGMENT ON THE PLEADINGS

Date: July 13, 2018
Time: 9:00 a.m.
Dept: C-73
Judge: The Hon. Joel R. Wohlfeil

TABLE OF CONTENTS

Table of Authorities

Cases **Page(s)**

Statutes

Other Authority

Defendant/Cross-Complainant Darryl Cotton ("Defendant") brings forth this motion for Judgment on the Pleadings ("MJOP") pursuant to Code of Civil Procedure ("CCP") § 438. Defendant's MJOP should be granted because, *inter alia*, Plaintiff Larry Geraci's ("Plaintiff") judicial admissions – in his sworn declaration provided in this action in April of 2018 – are subject to judicial notice and establish that Plaintiff's Complaint cannot state a cause of action as a matter of law pursuant to the parol evidence rule ("PER").

Defendant's real property (the "Property") qualifies for a Conditional Use Permit ("CUP") with the City of San Diego (the "City") that would allow the operations of a Marijuana Outlet - a retail cannabis store (the "Business"). In November of 2016, Defendant and Plaintiff entered into an oral joint-venture agreement (the "JVA") pursuant to which, *inter alia,* (i) Defendant would sell his Property to Plaintiff and (ii) Plaintiff would finance the acquisition of the CUP with the City and the development of the Business at the Property. However, Plaintiff breached the JVA by attempting to deprive Defendant of a bargained-for 10% equity position in the Business and Defendant terminated the JVA. Thereafter, Plaintiff brought forth this suit in ***March 2017*** alleging the parties never entered into the JVA and that a three-sentence document executed in ***November 2016*** (the "November Document") is a completely integrated agreement for Defendant's Property.[1] For over a year Plaintiff has argued that his own written promise in an email, ***specifically confirming*** the November Document is "not" a "final agreement" (the "Confirmation Agreement"), is barred by the PER and the statute of frauds ("SOF"). This had been Plaintiff's sole position on this issue *until* April 9, 2018. Declaration of Darryl Cotton ("Cotton Decl.") ¶ 4.

On April 4, 2018, Defendant filed a Motion for Expungement of Notice of Pendency of Action (*Lis Pendens*) (the "LP Motion"). (ROA # 161.) The LP Motion argued, for the *first time in this action*, that neither the PER nor the SOF can "***be used as a shield to prevent the proof of [one's own] fraud***" – in this case, that Plaintiff could not bar his own Confirmation Agreement proving his own fraud. Cotton Decl. ¶ 5. As explained by the Supreme Court in the seminal case of *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169 at 1183:

> [W]e overrule *Bank of America etc. Assn. v. Pendergrass*, *supra,* 4 Cal.2d 258, and its progeny, and reaffirm the venerable maxim stated in *Ferguson v. Koch,* [204 Cal. 342, 347]: '***[I]t was never intended that the parol evidence rule should be used as a shield to prevent***

[1] Request for Judicial Notice ("RJN"), Exhibit ("Ex.") 1 (the Complaint).

> ***the proof of fraud***.' [¶] This court took a similar action in *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18 (*Tenzer*). *Tenzer* disapproved a 44-year-old line of cases to bring California law into accord with the Restatement Second of Torts, holding that a fraud action is not barred when the allegedly fraudulent promise is unenforceable under the statute of frauds. Considerations that were persuasive in *Tenzer* also support our conclusion here. The *Tenzer* court decided the Restatement view was better as a matter of policy. (*Tenzer*, *supra*, 39 Cal.3d at p. 29.) ***It noted the principle that a rule intended to prevent fraud, in that case the statute of frauds, should not be applied so as to facilitate fraud***. (*Id.* at p. 30.) (Emphasis added).

For the first time since he filed suit, in support of his opposition to the LP Motion, Plaintiff filed a sworn declaration executed on April 9, 2018 ("Plaintiff's Declaration")[2] in which he: (i) *admits* that he sent the Confirmation Agreement, but (ii) alleges that it was a *mistake* because he only meant to respond to the first sentence of Defendant's email (thanking him for meeting earlier that day) and not the second, third or fourth sentences in which Defendant specifically requested that Plaintiff respond and confirm a "final agreement" would contain his bargained-for "10% equity position" in the Business as it was "a factored element in [his] decision to sell the [P]roperty;" and (iii) alleges that on November 3, 2016, he called Defendant who ***orally agreed*** with Plaintiff that the November Document ***is*** the final complete integrated agreement for the sale of the Property (the "Oral Disavowment").[3] Cotton Decl. ¶ 6.

Defendant, pursuant to CCP §439, reached out to meet and confer with Plaintiff's counsel regarding this MJOP prior to filing. Defendant noted that per Plaintiff's judicial admissions in his declaration, dismissal of Plaintiff's Complaint is mandated pursuant to the PER. Plaintiff's counsel responded; his position is that the PER/SOF bar his client's Confirmation Agreement; however, should this Court admit the Confirmation Agreement, then Defendant's counsel contends Plaintiff's Oral Disavowment is sufficient evidence to create "a material factual dispute" requiring a trial.[4] In other words, if Plaintiff can't prevent the admission of his own writing ***proving*** his own fraud, then he will use his NEW parol evidence – the Oral Disavowment – to ***disprove*** his fraud. This is manifestly absurd and an obvious fabrication in *response* to the principles articulated in *Riverisland* and *Tenzer* in the LP Motion.

FACTUAL AND PROCEDURAL BACKGROUND

As alleged in Plaintiff's Complaint filed on March 21, 2017:

(i) "On November 2, 2016, [Plaintiff] and [Defendant] entered into a written agreement for

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[2] RJN Ex. 2 (Larry Geraci Declaration).
[3] *Id.* at p. 6, ln. 21 – p. 7, ln. 16.
[4] Declaration of Jacob Austin, Ex. D.

the purchase and sale of the [Property] on the terms and conditions stated therein." (RJN 1 at ¶7.);

(ii) "On or about November 2, 2016, [Plaintiff] paid to [Defendant] $10,000 good faith earnest money to be applied to the sales price of $800,000.00 and to remain in effect until the license, known as a Conditional Use Permit or CUP is approved, all in accordance with the terms and conditions of the written agreement." (RJN 1 at ¶8.); and

(iii) "[Defendant] has anticipatorily breached the contract by stating that he will not perform the written agreement according to its terms. Among other things, [Defendant] has stated that, contrary to the written terms, the parties agreed to a down payment… of $50,000… [and] he is entitled to a 10% ownership interest in the [Property.]" (RJN 1 at ¶11.)

On April 9, 2018, Plaintiff's Declaration was filed - it is a masterfully crafted response to the principles of *Riverisland* and *Tenzer,* filled with extraneous self-serving factual allegations whose primary goal is to introduce the fabricated Oral Disavowment. The only material statements buried in Plaintiff's declaration are his (i) ADMISSION that he sent the Confirmation Agreement; (ii) ADMISSIONS to alleged terms reached with Defendant relating to the sale of the Property that would be included in the November Document if it were a completely integrated agreement; and (iii) Oral Disavowment. The material statements from Plaintiff's Declaration are:

(i) "On November 2, 2016, at approximately 6:55 p.m., Mr. Cotton sent me an email, which stated: [¶] […] 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 simply acknowledge that here in a reply**." (Geraci Declaration p. 6, ln. 25 - p. 7, ln. 1);

(ii) "[A]fter 9:00 p.m. […] I responded from my phone '***No no problem at all.***'" (Geraci Decl. p. 7, ln. 4-5);

(iii) "The next day I read the entire email and I telephoned Mr. Cotton…During that telephone call I told Mr. Cotton that a 10% equity position in the dispensary was not part of our agreement… Mr. Cotton's response was to say something to the effect of "well, you don't get what you don't ask for." (Geraci Decl. p. 7, ll. 6-14);

(iv) "I agreed to pay him for the property into two parts: $400,000 as payment for the property and $400,000 as payment for relocation of his business. As this would benefit him for tax purposes but would not affect the total price or any other terms and conditions of the purchase." (Geraci Decl. p. 5, ll.16-19);

(v) "Prior entering into the Nov 2nd written agreement, […] I discussed with [Mr. Cotton] that my assistant Rebecca Berry would act as my authorized agent to apply for the CUP on my behalf. Mr. Cotton agreed to Ms. Berry serving as the Applicant on my behalf" (Geraci Decl. p. 5, ln. 24 – p.6, ln 1);

(vi) "As a purchaser, I was willing to bear the substantial expense of applying for and obtaining the CUP approval and understood that if I did not obtain approval then

I would not close the purchase and would lose my investment"(Geraci Decl. p. 2, ll. 25 - p. 3, ln. 1); and

(vii) "Mr. Cotton then asked for a $10,000 non-refundable deposit and I said "ok" and that amount was put into the written agreement." (Geraci Decl. p.4- ll. 12-13)

Summarized, Plaintiff would have this court disregard the clear language in his Confirmation Agreement to strike an unambiguous integrated term - Defendant's equity position - based on his Oral Disavowment with Defendant on November 3, 2016. A factually and legally unsupported position. *See Sass v. Hank* (1951) 108 Cal.App.2d 207, 214 (***"[A]n important covenant cannot be stricken from a written contract solely upon the ipse dixit of a party thereto***.") (emphasis added).

LEGAL STANDARD

> [A MJOP] is the equivalent of a general demurrer. [Citation.] This motion tests whether the allegations of the pleading under attack support the pleader's cause if they are true. [Citation.] [¶] [I]n order for judicial notice to support a motion for judgment on the pleadings by **negating** an express allegation of the pleading, the notice must be of something that cannot reasonably be controverted. [Citations.] The same is true of evidentiary admissions or concessions. [¶] Judicial notice may conclusively defeat the pleading as where it establishes res judicata or collateral estoppel. ***The pleader's own concession may have this same conclusive effect.***[5] [¶] In these limited situations, the court, in ruling on a [MJOP], properly looks beyond the pleadings. But it does so only because the party whose pleading is attached will as a matter of law, or law's equivalent of judicial notice of a fact not reasonably subject to contradiction, fail in the litigation.

Columbia Casualty Co. v. Northwestern Nat. Ins. Co. (1991) 231 Cal.App.3d 457, 468 (emphasis added).

"A trial court has no discretion in granting or denying a [MJOP]." *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 603. "On a pure question of law, trial courts have no discretion. They must, without choice, apply the law correctly." *Id.*

ARGUMENT

The sole and dispositive issue in this MJOP is whether the November Document is a completely integrated agreement. "'Whether a contract is integrated is a question of law when the evidence of integration is not in dispute.' [Citations.]" *Kanno v. Marwit Capital Partners II, L.P.* (*Kanno*) (2017) 18 Cal.App.5th 987, 1001 (emphasis added). "The crucial issue in determining whether there has been an integration is

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[5] *See Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 485 ("[A] court may take judicial notice of a party's admissions or concessions, but only in cases where the admission 'cannot reasonably be controverted,' such as in answers to interrogatories or requests for admission, or in affidavits and ***declarations*** filed on the party's behalf. [Citations.]") (emphasis added); *Lueras v. BAC Home Loans Servicing, LP* (*Lueras*) (2013) 221 Cal.App.4th 49, 93-94 (analyzing numerous opinions for appropriateness and effect of judicial admissions in briefs, arguments, and other documents submitted to the court and concluding: "***In sum, we are not permitted to turn a blind eye to [a party's] admissions[.]***") (emphasis added).

whether the parties intended their writing to serve as the exclusive embodiment of their agreement." *Masterson v. Sine* (1968) 68 Cal.2d 222, 225.

I. The November Document and the Confirmation Agreement Are Both Partially Integrated Agreements Relating to the Same Transaction.

The 4th DCA's November 29, 2017 opinion in *R.W.L. Enterprises v. Oldcastle, Inc.* (2017) 17 Cal.App.5th 1019 ("*Oldcastle*"), is directly controlling on this specific issue: whether the November Document and the Confirmation Agreement should be construed, as a matter of law, as part of the same transaction pursuant to CCP § 1642. The *Oldcastle* Court held, *inter alia*, that the trial court erred in awarding fees based on construing the credit application together with the dealer agreement pursuant to CCP § 1642. A reference in one agreement did not "clearly" and "unequivocally" demonstrate an intent to incorporate a future arrangement and took into consideration, notably, an integration clause and the fact the agreements were executed years apart from each other. In reaching its decision, Justice Huffman articulated the principles under which two agreements should be held to be part of the same transaction pursuant to CCP § 1642:

> "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." (Civ. Code, § 1642.) Although the statute refers expressly to several "contracts," the language has been broadened by case law to apply to instruments or writings that are not on their own contracts. (1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 770, p. 826; *Harm v. Frasher* (1960) 181 Cal.App.2d 405, 413 [5 Cal. Rptr. 367].) Civil Code section 1642 "'is most frequently applied to writings executed contemporaneously, but it is likewise applicable to agreements executed by the parties at different times if the later document is in fact a part of the same transaction.'" (*Versaci v. Superior Court* (2005) 127 Cal.App.4th 805, 814 [Citation].)

Oldcastle, supra, at 1027-1028.

Unlike in *Oldcastle*, here, the November Document ***does not*** have an integration clause, the Conformation Agreement and the November Document were executed by the same parties, on the same day, within hours of each other, relate to the same subject matter and the Confirmation Agreement was sent ***by*** Plaintiff at Defendant's specific request for confirmation of a term that was not included in the November Document. Both documents here were "executed contemporaneously" and can only reasonably lead to the conclusion that they both should relate to the same transaction – the sale of the Property from Defendant to Plaintiff for which he would receive an equity position. Further, of great import in *Oldcastle* was the fact that the two agreements were executed nine years apart – one in 2001 and one in 2010 and there was no clear

reference between them. Here, the November Document and the Confirmation Agreement were executed within hours of each other. *Oldcastle, supra,* 1031 ("[H]ere, where the two writings were executed nine years apart, we believe an integration clause in the later writing weighs heavily against a finding that the parties intended to add terms to their prior agreement.").

The *Oldcastle* Court further explained that, "**For the terms of another document to be incorporated into the document executed by the parties *the reference must be clear and unequivocal*[.]**" [Citation.] (italics in original, emphasis in bold added). "**The contract need not recite that it 'incorporates' another document, so long as it 'guide[s] the reader to the incorporated document.**" [Citation.] (emphasis added). To be construed together, the separate instruments must be "so interrelated as to be considered one contract." [Citation.] This standard compels our result. *Oldcastle, supra,* at 1027-1028.

Here, it is undisputed that Defendant's email requesting confirmation of his equity position clearly and directly references the November Document. Plaintiff wrote: "I just noticed the 10% equity position in the dispensary was not language added into ***that document*** [(*i.e.*, the November Document)]. I just want to make sure that we're not missing ***that language*** [(*i.e.*, the 10% equity position)] in any ***final agreement*** as it is factored element in my decision to sell the property." (Geraci Decl. p. 6, ll. 25 - p. 7, ln. 1) Thus, Defendant's reference is "***clear and unequivocal.***" *Id.*

Versaci, relied on in *Oldcastle* heavily, is also instructive here – the question in *Versaci* was whether a college superintendent's 2002–2003 performance goals were part of his 2001 employment contract so as to be subject to a California Public Records Act request. The court concluded that a "mere reference" in the employment contract to the fact that goal-setting would be part of the evaluation process "does not clearly and unequivocally evidence the parties' intent to incorporate the yet to be determined goals into the contract." *Versaci* at p. 817. In contrast, here, Defendant's email to Plaintiff seeking confirmation is not a "mere reference" nor is the language forward-seeking in any manner; Defendant is clearly and plainly requesting CONFIRMATION of a *previously established term* of an agreement reached between the parties that would be reduced to writing in a forthcoming *final agreement*.

Lastly, as noted in *Oldcastle*, "[w]hen the parties to a written contract have agreed to it as an 'integration'—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms.' [*Masterson, supra,* at 225]" *Oldcastle*, *supra*, at 1023, fn. 3. Here, Plaintiff's

admissions in his declaration provide a great deal of support for the conclusion the November Document is not a complete integrated agreement. Included in Plaintiff's Declaration are five judicial admissions that support this conclusion because if it was, then these terms would have been "naturally" included (*Masterson, supra,* at 227): (i) Plaintiff agreed to split the payment of the $800,000 into two $400,000 payments, one for the property and another to relocated Defendant's business; (Geraci Decl. p. 5, ll.16-19) (ii) Plaintiff and Defendant agree that Plaintiff will use a third party (Rebecca Berry) as an agent for the application of the CUP prior to the signing of the November Document; (Geraci Decl. p. 5, ln. 24 – p. 6, ln.1) (iii) Plaintiff confirmed and acknowledged a 10% equity position in the dispensary for Defendant; (Geraci Decl. p. 7, ll. 4-5), (iv) It was the intention of the parties to make the $10,000 deposit to be non-refundable; (Geraci Decl. p. 4, ll. 12-13) and (v) Plaintiff admitted that he agreed to pay ALL of the cost associated with the CUP process. (Geraci Decl. p. 2, ln. 25 - p. 3, ln 1.) All of these elements were stated by Plaintiff in his sworn affidavit. These are material terms to the November Document that had the parties intended to have a completely integrated agreement, would have been easy to add.

II. The Parol Evidence Rule Does Not Bar the Confirmation Agreement, But Does Bar the Oral Disavowment.

The Fourth District Appellate Court's ("4th DCA") December 22, 2017 opinion by in *Kanno* is directly and fully controlling here. In *Kanno*, plaintiff sued defendants for breach of oral contract, specific performance, and promise without intent to perform in connection with a transaction that was documented by three writings, each of which had an extensive integration clause. A jury found in favor of plaintiff on his claim for breach of an oral agreement. The trial court held that the PER did not bar plaintiff's oral agreement. On appeal, as described in appellant's opening paragraph:

> The question presented by this appeal is whether a complex written $23.5 million transaction to purchase all of the assets of plaintiff's company-negotiated by Sheppard Mullin for plaintiff and Paul Hastings for defendants and including multiple separate integrated agreements comprising two binders of materials-can be anything other than a fully integrated agreement.[6]

The 4th DCA affirmed the judgment. The 4th DCA found that the oral agreement was not made unenforceable by the PER notwithstanding the integration clauses in the three completely integrated agreements. In reaching its decision, the 4th DCA "address[ed] the definition, meaning, and scope of the parol evidence rule under

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6 *Kanno v.Marwit Capital*, 2016 CA App. Ct. Briefs LEXIS 857.

California law.... to determine whether the three written agreements were intended as partial integrations (final expressions), complete integrations (complete and exclusive statements), or not integrated writings at all." *Kanno*, 18 Cal.App.5th at 991. As described by Judge O'Leary in *Kanno*:

> [CCP §] 1856 creates two levels of contract integration or finality: (1) the parties intended the writing to be the final expression of their agreement; and (2) the parties intended the writing to be the complete and exclusive statement of the terms of their agreement. [¶] If a writing falls within level 1 (the writing is a final expression) then a prior or contemporaneous oral agreement is admissible if it does not contradict the writing, and evidence of consistent additional terms may be used to explain or supplement the writing. (§ 1856, subd. (a).) *Ibid.* [¶] If a writing falls within level 2 (complete and exclusive statement) then evidence of consistent additional terms may not be used to explain or supplement the writing. (§ 1856, subd. (b).)

In other words, as further clarified in *Kanno* and commonly referred to in many other opinions, Level 1 refers to a "partially integrated agreement" and Level 2 is a "completely integrated agreement."[7] For consistency, hereinafter, the references shall be to "partial" and "complete" integration. Here, Plaintiff alleges that the November Document is a completely integrated agreement. The Court in *Kanno*, specifically laid out the facts required to determine if a contract is partially or fully integrated:

> ***The issue of contract integration may be analyzed by addressing four questions***: "(1) does the written agreement appear on its face to be a complete agreement; obviously, the presence of an 'integration' clause will be very persuasive, if not controlling, on this issue; (2) does the alleged oral agreement directly contradict the written instrument; (3) can it be said that the oral agreement might naturally have been made as a separate agreement or, to put it another way, if the oral agreement had been actually agreed to, would it certainly have been included in the written instrument; and (4) would evidence of the oral agreement be likely to mislead the trier of fact." (Citing *Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1002–1003.)

Kanno, supra, at 1007 (emphasis added).

A. Applying the Parol Evidence Rule to the November Document.

1. Does the November Document appear on its face to be a complete 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. Unlike in *Kanno*,

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[7] ("Some clarification of terms is in order. Case law sometimes uses the term 'integration' to mean a complete integration, *i.e.*, the second level of integration. Justice Traynor did so in *Masterson v. Sine*, *supra*, at 225. To be consistent with California statute, we use the term 'final expression' to mean the level of integration referred to in section 1856, subdivision (a), and the term 'complete and exclusive statement' to mean the level of integration referred to in section 1856, subdivision (b). A final expression corresponds to a ***partially integrated agreement*** under section 210, subdivision (2) of the Restatement Second of Contracts, and a complete and exclusive statement corresponds to a ***completely integrated agreement*** under section 210, subdivision (1) of the Restatement Second of Contracts.") (emphasis added).) *Kanno, supra,* at 1000.

the November Document does not appear to be so because it is not "lengthy, formal, detailed… and has [no] integration clause." *Id.* "The integration clause is a factor, and persuasive, but it is not controlling." *Id.* The lack of an integration clause weighs in favor of Defendant. Further, the November Document is three sentences long, is missing many essential terms when compared to even a standard real estate purchase agreement, much less one that has a condition precedent requiring the approval of a CUP by the City for the Business, and has grammar and spelling mistakes (*e.g.*, "contacts" instead of "contracts").

"To determine whether the [November Document] is the final expression [(*i.e.*, partially integrated)] or the complete and exclusive statement [(*i.e.*, completely integrated)] of the parties' agreement, [the court] must look beyond the four corners of the agreement." *Id.* As noted above, Plaintiff's judicial admissions provide dispositive support for the conclusion that the November Document is not a complete integrated agreement.

The *Kanno* Court noted an exchange between the parties: "[plaintiff] insisted that [defendant] 'promise this to me.' [Defendant] paused and then said, '***[o]kay, [plaintiff], I promise***.'" Id. at 1009 (emphasis added). Relying heavily on that exchange, it 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." *Ibid.* Here, the case is even stronger for Defendant: Defendant emailed Plaintiff asking him to confirm in writing (*i.e.*, promise) that a "final agreement" would contain his "equity position" and Plaintiff replied, "***No no problem at all.***" (Geraci Decl. p. 6, ll.25 a – p. 7, ln. 1.)

Thus, as in *Kanno*, "[t]he presence of [two] agreements therefore is persuasive evidence the parties did not intend the [November Document] to be the 'complete and exclusive statement' of the parties' agreement." *Id.* at 1008. Furthermore, by the Plaintiffs own admission there have been agreements made both prior to the November Document and thereafter that were relating to the same transaction. Namely that the Plaintiff would use an agent for the CUP and that the payment for the property would be reduced to $400,000 with a $400,000 relocation fee.

Lastly, of note on this issue, the November Document is three-sentences long and misspells the word "contract" (*i.e.*, contact). It is an undisputed fact that Plaintiff was a real estate agent for over 25 years (suspiciously allowing his license to expire the same month he filed this lawsuit against Defendant and

AFTER Defendant had threatened to report Plaintiff to the California Board of Realtors)[8]. In sum, the November Document does not appear to be a final complete integrated agreement.

2. Does the alleged oral agreement directly contradict the written instrument?

Plaintiff's Disavowment is that the parties never reached a JVA and that Defendant's email, requesting written assurance of performance, is an attempt to renegotiate the deal reached which is fully reflected in the November Document. As such, Plaintiff's Oral Disavowment directly contradicts the written, integrated term providing for Defendant's "10% equity position" that would be reduced to writing in a forthcoming "final agreement" and is thus barred by the PER.

Conversely, the Confirmation Agreement, sent by Plaintiff at Defendant's specific request for written confirmation of a material term, does not vary or contradict the terms in the November Document. This Court has already ruled and stated exactly the same in denying Plaintiff's demurrer to Defendant's cross-complaint.[9] Notwithstanding this Court's explicit ruling, Plaintiff continues to argue the November Document is not ambiguous and, consequently, the Confirmation Agreement is barred as it seeks to vary and contradict the terms in the November Document. In other words, he argues the two documents should be read separately.

3. Can it be said that the oral agreement might naturally have been made as a separate agreement or, to put it another way, if the oral agreement had been actually agreed to, would it certainly have been included in the written instrument?

The November Document was meant to be a "receipt." The Confirmation Agreement was meant to be just that – a confirmation of the most material term reached in the JVA – Defendant's equity position – to provide assurance to Defendant while a "final agreement" that reduced the JVA to writing was being prepared by Plaintiff's counsel.

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[8] RJN 4 (State of California Bureau of Real Estate License Information for Larry E Geraci).

[9] RJN 3 (11/6/2017 Minute Order denying Plaintiff's general Demurrer (ROA # 52)) at p.1. ("[Plaintiff] argues that the [November Document] is contradicted by the alleged oral agreement, and as a result violates the statute of frauds. [Plaintiff] argues: "In the instant case, the only writing signed by both parties is the November 2, 2016 [November Document], which explicitly provides for a $10,000 down payment ('earnest money to be applied to the sales price'); in fact, the agreement acknowledges receipt of that down payment. [Defendant] is alleging that the oral agreement provided for a down payment of $50,000, which is in direct contradiction of the written term of a $10,000 down payment." However, ***this argument lacks merit because the* [November Document] attached to the SAC-C is unclear.** ***The acknowledgement as to payment of $10,000 does not necessarily mean that the total deposit was not, in fact, $50,000 (such that $40,000 remained due). As alleged, there is no conflict.***") (emphasis added).

The *Kanno* defendants also sought to create a dispute between documents related to the same transaction by arguing that some terms contained in some agreements were contradictory; however, the Court held that because some of the agreements in dispute were "silent on the matter … does not directly contradict" other agreements which did contain such a term. *Id.* at 1010. In other words, Plaintiff is urging this Court to do exactly what a party in *Kanno* failed to do – namely, to interpret the silence of a term in one document as being contradicted if not reflected in another document. In this case, the mere fact that the Confirmation Agreement provides for an equity position and the November Document does not – pursuant to *Kanno* –does not result in a conflict which would bar introduction of the Confirmation Agreement.

> [I]n determining the issue of integration, the collateral agreement will be examined only insofar as it does not directly contradict an express term of the written agreement; "***it cannot reasonably be presumed that the parties intended to integrate two directly contradictory terms in the same agreement***." [Citation.] In the case of prior or contemporaneous representations, the collateral agreement must be one which might naturally be made as a separate contract, *i.e.*, if in fact agreed upon need not certainly have appeared in writing.'" (*Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1002 [Citation], disapproved on other grounds in *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1182 [Citation].)

Kanno, supra, at 999-1001 (emphasis added).

This is the gravamen of this motion. Plaintiff's Confirmation Agreement and his Oral Disavowment contain "two directly contradictory terms [that are part of] the same agreement [*i.e.*, the JVA]." *Id.* Thus, Plaintiff's Oral Disavowment is barred.

Defendant notes that "even in situations where the court concludes that it would not have been natural for the parties to make the alleged collateral oral agreement, parol evidence of such an agreement should nevertheless be permitted if the court is convinced that the unnatural actually happened in the case being adjudicated." *Masterson, supra,* at 228, fn. 1.; *Kanno, supra*, at 1009. However, in this case, given that this Court can judicially notice that Plaintiff was a California Licensed Real Estate Agent for over 25 years[10]; is an Enrolled Agent with the IRS; and the fact that Plaintiff did <u>not</u> raise the Oral Disavowment for over a year until confronted with *Riverisland* and *Tenzer*, there is no evidence to support the "unnatural" happened here.

To be clear, for the unnatural to have happened here, that would require at a minimum: (i) Defendant to have sent an email to Plaintiff <u>*pretending*</u> that a deal had been reached in which he was <u>*already*</u> promised

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[10] RJN 4 (State of California Bureau of Real Estate license information for Larry E Geraci).

a very specific "10% equity position;" (ii) Plaintiff to have *mistakenly* confirmed in writing Defendant's pretend position; (iii) Plaintiff, a licensed Real Estate Agent at the time for over 25 years, to not have ever sought in any manner to document the fact that he mistakenly sent the Confirmation Agreement; (iv) for Plaintiff to have realized, over a year after filing suit, that he should raise the Oral Disavowment; and (vi) that he did so, coincidentally, in response to Defendant's motion citing controlling case law that would prevent Plaintiff from using the PER as a shield to bar proof of his own fraud (*i.e.*, the Confirmation Agreement).

That is exactly what Plaintiff is arguing. This is a factually and legally flawed position. The Court must make a preliminary determination of the credibility of the evidence, as described by the Supreme Court in *Masterson*, "[e]vidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled. **The rule must therefore be based on the credibility of the evidence**." *Masterson v. Sine* (1968) 68 Cal.2d 222, 227 (emphasis added). There is nothing credible about Plaintiff's Oral Disavowment.

4. Mislead the trier of fact. Evidence of a collateral oral agreement should be excluded if it is likely to mislead the fact finder. *Masterson, supra,* at 227. Here, the November Document and the confirmation email would not mislead the trier of fact.

B. Applying the Parol Evidence Rule to Plaintiff's Oral Disavowment

1. The more complete the agreement appears to be on its face, the more likely it was intended as a "final expression" of the agreement. As noted above, the November Document has no integration clause and its absence supports a finding that November Document is not completely integrated. *Wallis v. Farmers Group, Inc.* (1990) 220 CA3d 718, 730, 269 CR 299, 305 (disapproved on other grounds in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389, 394).

Where a written contract is not the parties' complete and final agreement, evidence of a separate oral agreement is admissible on any matter on which the written agreement is silent and that is *not inconsistent with its written terms. Masterson, supra,* at 226-228. Here, Plaintiff's Oral Disavowment is inconsistent with the written terms in the Confirmation Agreement. The plain language in the Confirmation Agreement reflects that the parties did not intend for either the November Document or the Confirmation Agreement to be a final agreement as they both clearly contemplated a "final agreement" that would provide for Defendant's equity position. However, the Confirmation Agreement clearly reflects that the parties intended the Confirmation Agreement to be a final and complete agreement with respect to a particular term - Defendant's equity position.

Masterson, *supra,* at 225. As such, the PER bars extrinsic evidence as to those matters determined to be partially integrated. *Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 730, (disapproved on other grounds in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389, 394 & fn. 2). "Parol evidence may not be offered to contradict the terms of even a partially integrated writing." *Esbensen v. Userware Int'l, Inc.* (1992) 11 Cal.App.4th 631, 638. Thus, here, Plaintiff's Oral Disavowment is barred.

2. 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,* 1002-1003. In *Banco Do Brasil, g*uarantors claimed bank had orally agreed to extend a $2 Million line of credit, but this directly contradicted their written guaranty stating their obligation was "absolute and unconditional." The claimed oral agreement could not be considered in determining whether the writing was an integration. Similarly, here, Plaintiff Oral Disavowment directly contradicts his written confirmation that he would provide Defendant an equity position in a forthcoming "final agreement."

3. 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. *Masterson*, *supra,* at 227. Here, had Defendant actually agreed to the Oral Disavowment, it would be natural for Plaintiff, a California Licensed Real Estate Agent for over 25 years, to have memorialized Defendant's alleged agreement with him that the November Document was a completely integrated agreement. It is not *natural* to assume that Plaintiff has allowed over a year since he filed this suit before raising this allegation. *Id.*

4. Evidence of a collateral oral agreement should be excluded if it is likely to mislead the fact finder. *Masterson, supra,* at 227. Here, there is no support for Plaintiff's Oral Disavowment and light of his undisputed communications and judicial admissions, it would lead to mislead a fact finder. Once it is found that the parties intended the writing to be the "final expression" of their agreement (*i.e.*, an integration), contrary expressions of intent are excluded. A party is not permitted to escape its obligations "by showing he did not intend to do what his words bound him to do." *Brant v. California Dairies* (1935) 4 Cal.2d 128, 134. In this case, Plaintiff clearly originally sought to deprive Defendant of the equity position that he had bargained for. Lastly, and directly on point here, while extrinsic evidence is admissible to show what the

parties *meant by what they said*, it is inadmissible to show the parties meant something *other than* what they said. *See Larsen v. Johannes* (1970) 7 Cal.App.3d 491, 500.

For all the reasons set forth above, the PER bars Plaintiff's Oral Disavowment.

III. Plaintiff's "Mistake"

The bottom line is that Plaintiff's Confirmation Agreement is fatal to his Complaint. His argument in opposition – the Oral Disavowment – is that he sent it by mistake. "When the terms of an instrument have been reduced to writing and are not ambiguous, any extrinsic evidence is excluded unless the validity of the agreement is in dispute or a mistake or imperfection of the writing is put in issue. [CCP §§ 1856, 1625.]" *Brant v. California Dairies, Inc.*, 4 Cal.2d 128, 134. Plaintiff will no doubt oppose this motion based on his alleged mistake, but should not be successful in his attempt – his judicial admissions and his Confirmation Agreement reflect his ***intent***. Thus, the evidence he offers cannot be admitted under that paradigm. A contract cannot be varied by the undisclosed intention of one of the parties. *Bell v. Minor*, 88 Cal.App.2d 879, 882 "***[W]here the terms of an agreement are set forth in writing, and the words are not equivocal or ambiguous, the writing or writings will constitute the contract of the parties, and one party is not permitted to escape from its obligations by showing that he did not intend to do what his words bound him to do***." *Brant, supra,* at 134.

"[T]he law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on that subject." *Crow v. P.E.G. Constr. Co.* (1957) 156 Cal.App.2d 271, 278-279. Plaintiff is simply attempting to renege on his obligations to Defendant and is before this court asking it to ignore the plain, clear language of his Confirmation Agreement and simply ignore the Confirmation Agreement. *Crow, supra,* at 278 ("In other words, when the language of a contract is plain and unambiguous it is not within the province of a court to rewrite or alter by construction what has been agreed upon.").

CONCLUSION

The reality is that the facts in this matter are incredibly simple – Plaintiff and Defendant reached an oral joint venture agreement and, at some point thereafter, Plaintiff chose to renege on the deal he had reached

with Defendant and sought to deprive Defendant of a bargained-for equity position. Plaintiff's judicial admissions confirming he sent the Confirmation Agreement and other material terms not in the November Document prove it is not a complete integrated agreement and, thus, are fatal to Plaintiff's Complaint.

Lastly, Defendant wants to be **emphatically** clear with this Court about Plaintiff's Oral Disavowment: it is a blatant lie. The details in Plaintiff's declaration that Defendant stated "well, you don't get what you don't ask for" and "looking pretty good-we all should make some money here" are complete fabrications. They are contradicted by ***every*** piece of undisputed evidence created before the inception of this lawsuit and reflect Plaintiff's willingness to ***falsify evidence*** to manipulate this Court to reach a favorable result for himself. This Court must recognize the patently obvious motivation behind Plaintiff's lies, if this suit is adjudicated in Defendant's favor pursuant to the PER, then Defendant shall have a cause of action for malicious prosecution against Plaintiff. *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***."). The fact that Plaintiff raised the Oral Disavowment over a year after filing suit, and *only* when confronted with controlling case law preventing his use of the PER as a shield to bar proof of his own fraud, leads to only one logical and reasonable conclusion – it is a malicious and manipulative lie.

DATED: June 20, 2018

THE LAW OFFICE OF JACOB AUSTIN

By _____
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