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Attorney for Defendant/Cross-Complainant DARRYL COTTON

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

DECLARATION OF JACOB P. AUSTIN IN SUPPORT OF DEFENDANT DARRYL COTTON'S MOTION FOR JUDGMENT ON THE PLEADINGS

Date: July 13, 2018
Time: 8:30 a.m.
Dept: C-73
Judge: The Hon. Joel R. Wohlfeil

I, JACOB P. AUSTIN, declare:

1. I am the attorney of record for Defendant and Cross-Complainant, DARRYL COTTON ("Cotton" or "Defendant") in this action (hereinafter, the "Litigation").

2. The facts set forth herein are true and correct as of my own personal knowledge, except those facts which are stated upon information and believe; and, as to those facts, I believe them to be true. If called upon to do so, I could and would competently testify to the matters stated herein.

3. This declaration is submitted in support of Darryl Cotton's Motion for Judgment on the Pleadings.

4. On May 29, 2018 at 1:18 p.m., I emailed Plaintiff's counsel, Michael Weinstein, to meet and confer with him regarding this motion as required by Code of Civil Procedure § 439, to advise him concerning certain evidence which I had just discovered, and to inquire whether he would be willing to stipulate to the filing of an amended cross-complaint based upon the new evidence and testimony. Later that afternoon, I followed up with a second email to Mr. Weinstein at 3:10 p.m. to clarify one point I had made in my previous email. True and correct copies of my May 29, 2018 email messages to Mr. Weinstein are attached hereto as Exhibit A.

5. Mr. Weinstein responded on May 30, 2018 stating, *inter alia,* that (a) he did not understand my explanation of the basis for filing a motion for judgment on the pleadings based upon the content of his client's declaration dated April 9, 2018 filed in opposition to Defendant's Motion to Expunge the Lis Pendens on his Property ("LP Opp. Dec."), (b) the LP Opp. Dec. "contains evidence consistent with the notice allegation pleaded in the complaint, (c) Defendant's dispute of "those factual allegations is irrelevant on a motion for judgment on the pleadings, (d) if I filed "such a motion, then please be aware that we may seek sanctions against you and [Defendant]," and he was not willing to "stipulate to an order providing leave for [Defendant] to file an amended Cross-Complaint [as] there is no basis for doing so at this late stage and will only serve *[sic]* to derail and delay the trial date." A true and correct copy of my Mr. Weinstein's May 30, 2018 email message to is attached hereto as Exhibit B.

6. In my June 1, 2018 response to Mr. Weinstein's email, I further articulated the facts upon which I intended to base the Motion for Judgment on the Pleadings. *See* ¶¶4-7 of the true and correct copy of my June 1, 2018 e-mail is attached hereto as Exhibit C.

7. On June 4, 2018, Mr. Weinstein responded that (a) I had met my obligation to meet and confer with regard to filing the Motion for Judgment on the Pleadings, (b) his client would oppose both that motion and any motion I might file for leave to amend the Cross-Complaint, (c) his position was that my entire analysis was flawed and he would address my arguments in his oppositions, (d) the LP Opp. Dec. "supports the claim regarding the written agreement that was reached on November 2, 2016," and (e) "[t]hose issues will be decided at trial." Mr. Weinstein further expounded on his interpretation of the parol evidence rule and the statute of frauds the application of same in connection with the November Document, the parties never agreed to the 10% equity position for Defendant, and his client's

allegation concerning the content of he had with Defendant on November 3, 2018 was parol evidence consistent with the November Document and, as such, was not barred by the statute of frauds. A true and correct copy of Mr. Weinstein's June 4, 2018 email is attached hereto as Exhibit D.

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

JACOB P. AUSTIN

EXHIBIT A

Gmail Jake Austin <jacobaustinesq@gmail.com>

Geraci v. Cotton matter

Jake Austin <jpa@jacobaustinesq.com> Tue, May 29, 1:18 PM
To: Michael Weinstein <MWeinstein@ferrisbritton.com>

Mr. Weinstein,

Based on Mr. Geraci's last declaration filed with the Court in the *lis pendens* pleadings, I will be submitting a motion for Judgment on the Pleadings scheduled to be heard on June 22, 2018. I will have moving papers to you on or before June 1, 2018.

Also, yesterday, I was at a meeting with Mr. Cotton and Ms. Corina Young, who is a client of Mr. Jim Bartell. Ms. Young, approximately six months ago or so, was at a meeting with Mr. Bartell and asked him about her intent to invest in Mr. Cotton's CUP venture – Mr. Cotton was attempting to sell off a portion of his remaining interest in the property, with the disclosure that the property was under litigation, to finance his litigation defense. Mr. Bartell informed Ms. Young that he was getting Mr. Cotton's CUP application denied and that it was "because everyone hates Darryl."

Further, at that meeting with Ms. Young was her attorney, Mr. Matthew Shapiro. Mr. Shapiro has a strong relationship with Mrs. Austin. Mr. Shapiro's client, Mr. Aaron Magagna, is also the applicant on a CUP application filed last month on a property within 1,000 feet of Mr. Cotton's property that, if approved, would result in Mr. Cotton never being able to get a CUP application approved on his property.

Two months ago, before I became attorney-of-record and Mr. Shapiro knew I was associated with this case (and I personally know he has a strong relationship with Mrs. Austin), he sat down, at a hearing in the Geraci v. Cotton matter in front of Judge Wohlfeil, next to Mr. Cotton and his litigation investor in plain clothes. I walked in to the courtroom after he had been eavesdropping on them for a considerable amount of time. I asked him why he was there, he informed me that he was there to prepare for a case in front of Judge Wohlfeil for a client. Over this weekend, I asked him to produce the case number of the matter before Judge Wohlfeil and he asked for time. When I pressed him, explicitly stating that I believed he was buying time to find an attorney that has a case in front of Judge Wohlfeil to associate himself with, he admitted he was there to observe the Geraci v. Cotton matter, but that it was "truly a coincidence" he sat in the immediate vicinity of Mr. Cotton. To be clear, he explicitly lied to me at first and only told the truth when asked to provide proof of his alleged reason for being in front of Judge Wohlfeil.

Further, during the conversation with Ms. Young, Mr. Cotton was probing to make it very clear

regarding the wording and intent of her conversation with Mr. Bartell. He is incredibly livid, Mr. Cotton asked Ms. Young to provide her testimony. She refused the request once she understood that her testimony would provide evidence of a conspiracy between Mr. Geraci, Mr. Bartell and Mrs. Austin, on one hand, and Mr. Aaron Magagna and Mr. Shapiro on the other (the individuals that benefit from Mr. Bartell's use of his political influence to get a denial on Mr. Cotton's property). She stated she would not get involved in any litigation because, in addition to not wanting to be involved in litigation for any reason, she has a significant amount of capital invested in another CUP application that Mr. Bartell was hired to facilitate its approval and she is scared that he will retaliate against her if she provides her testimony or appears to be a "snitch." Mr. Cotton is currently seeking the assistance of a private investigator to locate Ms. Young with the intent of subpoenaing her to be deposed.

Additionally, please see attached, an email exchange between myself and Mr. Shapiro regarding this factual allegation – that he was present at a meeting with Mrs. Young and Mr. Bartell and that Mr. Bartell made the aforementioned statement. Mr. Shapiro does not deny it.

Lastly, Mr. Cotton believes that the engineering company hired by Mr. Geraci to make a recommendation to the City of San Diego has been unduly influenced into making a denial recommendation. On the day of the soils sample, the company was supposed to bore to 50 feet at two locations, however, they only got to 9 and 13 feet before the drills bits broke because the property is essentially on a big rock. The geologist for the engineering company explicitly stated that there are absolutely no problems and they would recommend an approval. Mr. Cotton himself took many pictures while they were there and called me contemporaneously during the procedure letting me know the good news (he had anticipated that Mr. Geraci was using the soils sample as a ruse to have the CUP application denied). However, Mr. Cotton followed-up with the geologist last week to get a copy of the report and she sounded extremely anxious and scared, would not confirm the depths reached were only 9 and 13 feet and insinuated that the company would be recommending a denial.

Thus, based on:

(i) Mr. Geraci's latest declaration with new sworn factual allegations;

(ii) Ms. Young's statements regarding Mr. Bartell that I personally witnessed and will attest to;

(iii) Mr. Shapiro's (a) lie to me regarding his reasoning for sitting down next to Mr. Cotton and his litigation investor, (b) his indirect admission that he was present and heard Mr. Bartell state he was getting Mr. Cotton's CUP application denied, (c) the fact that the competing CUP application is a client of Mr. Shapiro, and (d) the fact that he has a deep relationship with Mrs. Austin (an adverse party to Mr. Cotton); and

(iv) the engineering company's apparent intent to go back on an explicit representation to recommend an approval (that appears to have been coerced);

Mr. Cotton will be seeking to amend his Cross-Complaint.

Please let me know if you would agree to stipulate to an amendment. Mr. Cotton will be seeking to amend his Cross-Complaint to, *inter alia,* respond to the new factual allegations raised by Mr. Geraci and to add as co-defendants the engineering company, Mr. Shapiro, Mr. Magana, and Mr. Bartell. He will also, at a minimum, be bringing forth a cause of action for conspiracy for the reasons stated above.

Also, please consider this notice for an ex-parte TRO scheduled for June 6, 2018 seeking to have the Court appoint a receiver to manage the CUP application. I realize that Mr. Cotton has made this request before, but I believe that with the newly discovered facts and Mr. Geraci's latest factual allegations in his declaration, Mr. Cotton will be able to meet his burden and prove to the court that more likely than not he will prevail on the merits of his cause of action for breach of contract. I will forward the moving papers as soon as they are ready, but no later than 12:00 PM on June 5, 2018.

Lastly, I will have an updated disclosure response to you this week.

-Jacob

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Gmail Jake Austin <jacobaustinesq@gmail.com>

Geraci v. Cotton matter

Jake Austin <jpa@jacobaustinesq.com> Tue, May 29, 2018 at 3:10 PM
To: Michael Weinstein <MWeinstein@ferrisbritton.com>

Mr. Weinstein,

I am following up on the below regarding one point - I just finished a lengthy conversation with Mr. Shapiro. We are going to attempt to settle the potential dispute between Mr. Cotton and Mr. Magagna. But, I want to stress the following – Mr. Shapiro explicitly admits to being at the meeting with Mr. Bartell and Ms. Young and that Mr. Bartell did comment on Mr. Cotton's CUP application. However, he alleges he does not remember clearly what Mr. Bartell said regarding Mr. Cotton's CUP application. I told him that Ms. Young was completely clear, remembered the conversation in detail as she had hoped it would be a good investment, and provided detailed responses to Mr. Cotton's questions before she realized that her testimony had a material impact on a litigation matter.

Mr. Shapiro responded by insinuating that Ms. Young is not a reliable witness for any number of reasons, including the allegation that she smokes marijuana and cannot be trusted.

Needless to say, irrespective of whether the issue with Mr. Shapiro and Mr. Magagna is resolved without litigation, his confirmation of the meeting and the fact that Mr. Bartell did make a statement regarding Mr. Cotton's CUP application is supporting evidence of the conspiracy that Mr. Cotton has been alleging for months.

Jacob

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EXHIBIT B

Gmail

Jake Austin <jacobaustinesq@gmail.com>

Geraci v. Cotton matter

Michael Weinstein <MWeinstein@ferrisbritton.com> Wed, May 30, 10:01 AM
To: Jake Austin <jpa@jacobaustinesq.com>

Dear Mr. Austin,

I do not intend to address your client's allegations below of a conspiracy. It is without merit and based on irrational speculation. I will address the pertinent questions.

First, thank you for notifying me in advance of the motion set for June 22, 2018. Frankly, I do not understand the basis for a renewed motion for judgment on the pleadings. Mr. Cotton sought this once before and it was denied. I do not understand your statement that you will be submitting such a motion "[b]ased on Mr. Geraci's last declaration filed with the Court in the *lis pendens* pleadings." That declaration contains evidence consistent with the notice allegations pleaded in the complaint. That Mr. Cotton disputes those factual allegations is irrelevant on a motion for judgment on the pleadings. If you file such a motion, then please be aware we may seek sanctions against you and Mr. Cotton.

Second, please be advised that we will not stipulate to an order providing leave for Mr. Cotton to file an amended Cross-Complaint. There is no basis for doing so at this late stage and will only serve to derail and delay the trial date as it will add new parties and legal theories to the case. You will need to file a motion seeking leave to amend if that is what your client desires to do.

Third, thank you for the notice of the June 6 ex parte. This ex parte motion to appoint a receiver to manage the CUP application has been heard and denied previously. Please be advise that the motion is not properly heard on an ex parte basis and should be the subject of a noticed motion. My clients will object to the relief being sought on an ex parte basis. In addition, like before, the motion has no merit. If you bring such a motion, I suggest you do so by noticed motion.

Fourth, I look forward to receiving the "updated disclosure response" later this week.

Respectfully,

Michael R. Weinstein
mweinstein@ferrisbritton.com
Ferris & Britton, A Professional Corporation
501 West Broadway, Suite 1450

San Diego, CA 92101-7901

EXHIBIT C

Gmail

Jake Austin <jacobaustinesq@gmail.com>

Geraci v. Cotton matter

Jake Austin <jpa@jacobaustinesq.com> Fri, Jun 1, 2018 at 4:41 PM
To: Michael Weinstein <MWeinstein@ferrisbritton.com>

Mr. Weinstein,

Pursuant to CCP §439, prior to filing a motion for judgment on the pleadings, it was incumbent upon me to have given you 5 days' notice prior to the filing of the motion in order to afford us the opportunity to meet and confer in that regard. Thus, because I failed to provide you the notice required by statute, I have rescheduled the hearing date on the motion for July 13, 2018 at 9:00 a.m.

In order to facilitate an effective and productive meet and confer, my interpretation of the facts and law relevant to this case, and the evidence in support thereof, are set forth below.

Additionally, as noted below, it also is my intent to seek leave of court to amend Mr. Cotton's Cross-Complaint to add, *inter alia,* a cause of action for conspiracy and additional defendants. Please understand that it is not my desire to pursue this course of action; however, while Mr. Cotton can be a challenging individual, he does not deserve to unjustly lose everything of value in his life.

As it currently stands, it is my position that Mr. Geraci brought forth a meritless lawsuit. In light of his declaration filed in opposition to Mr. Cotton's motion to expunge the *lis pendens* filed on his property, I feel this position is now even stronger than ever. In his declaration, Mr. Geraci explicitly confirms that he wrote the email which confirms he would provide Mr. Cotton a "10% equity position," but allegedly did so by accident and the next day he clarified as such via a telephone conversation with Mr. Cotton - it is suspect that Mr. Geraci raises this material factual allegation for the very first time ***nearly 13 months after this case was initiated***, that fact that he did so in response to our moving papers, citing the controlling case law of *Riverisland* and *Tenzer* raised for the first time in this matter, also provides reason to be suspicious of its credibility.

While the parol evidence rule (PER) allows the admission of his written confirmation, it likewise bars as a matter of law his allegation that he called Mr. Cotton the next day and they ***orally agreed*** that Mr. Cotton was not entitled to a 10% equity position. Accordingly, it is my position that dismissal of Mr. Geraci's Complaint is likewise warranted as a matter of law.

Please feel free to correct me if you disagree with my reasoning and point me to the ***evidence*** with which your reasoning is supported.

In your clients' opposition to Mr. Cotton's motion to expunge the *lis pendens,* you alleged that Mrs. Austin drafted agreements in an attempt to appease Mr. Cotton, which did not materialize – *i.e.,* "Ultimately, Mr. Cotton was extremely unhappy with Mr. Geraci's refusal to accede to Mr. Cotton's demands and the failure to reach an agreement regarding his possible involvement with

the *operation* of the business to be operated at the Property...."

In that vein, would you please be so kind as to identify which draft agreement prepared by Mrs. Austin provided for an "operation" role for Mr. Cotton in the business? I have reviewed the documents and, although I cannot remember every provision, I certainly don't recall any language to support your factual statement that the purpose of the draft agreements sent to Mr. Cotton was to attempt to revise the alleged agreement reached on November 2, 2016 to include a role for Mr. Cotton in the "operations" of the contemplated business. At least to me, these arguments appear to lack any evidentiary support whatsoever, and are contradicted by the written communications between Messrs. Geraci and Cotton.

Pursuant to *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, it appears to me that if Mr. Cotton is granted judgment on the pleadings and your client's complaint is dismissed pursuant to the PER, potential exposure to liability for a malicious prosecution cause of action lies. (*Id.* at 349 ("Accordingly, we hold that terminations based on the parol evidence rule are favorable for malicious prosecution purposes.")

Thus, please understand that while I personally do not want to (i) file an ex parte TRO and (ii) seek leave to amend Mr. Cotton's Cross-Complaint to, *inter alia*, allege a conspiracy based on Mr. Shapiro and Ms. Young's testimony, the evidence and my ethical obligations to Mr. Cotton compel me to do so.

Although I am confident in my reasoning based on the facts and evidence, I do look forward to any arguments and facts you have that provide just cause to not bring forth these motions with the Court.

Thus, please provide your specific reasoning for why the PER does not bar Mr. Geraci's oral allegation that Mr. Cotton agreed to forgo the 10% equity position that Mr. Geraci confirmed, at Mr. Cotton's request, in the Confirmation Email.

Also, please point me to locations in the draft agreements forwarded to Mr. Cotton that supports your arguments that the agreements sent by Mrs. Austin were meant to include a role for Mr. Cotton in the "operations" of the contemplated business.

Absent any evidence, I cannot change my course of conduct based on your unsupported legal claims below and I interpret your threat of sanctions against me as seeking to unduly intimidate me into failing to ethically and zealously advocate for the best interests of my client.

Best,
Jacob

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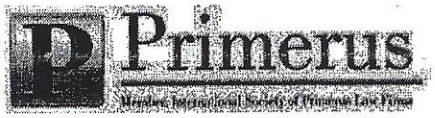

EXHIBIT D

Gmail

Jake Austin <jacobaustinesq@gmail.com>

Geraci v. Cotton matter

Michael Weinstein <MWeinstein@ferrisbritton.com> Mon, Jun 4, 8:34 AM
To: Jake Austin <jpa@jacobaustinesq.com>
Cc: Scott Toothacre <SToothacre@ferrisbritton.com>

Dear Mr. Austin,

Please accept my confirmation that you have fulfilled your meet and confer obligation with respect to your client's stated intention to file a second motion for judgment on the pleadings.

You have also stated your client's intention to file a motion seeking leave of court to amend Mr. Cotton's Cross-Complaint to add, *inter alia,* a cause of action for conspiracy and additional defendants.

My client will oppose both motions. My position is that your entire analysis is flawed. I will address whatever arguments you make in detail in my opposition briefs after you file the respective motions. For now, I will address just a few points.

You continue to insist that Mr. Geraci brought forth a meritless lawsuit and that Mr. Geraci's declaration filed in opposition to Mr. Cotton's motion to expunge the *lis pendens* strengthens that position. We disagree. Mr. Geraci's declaration supports the claim regarding the written agreement that was reached on November 2, 2016. Those issues will be decided at trial.

You state that the parol evidence rule (PER) allows the admission of his written confirmation and likewise bars as a matter of law his allegation that he called Mr. Cotton the next day and they ***orally agreed*** that Mr. Cotton was not entitled to a 10% equity position. Again, we disagree and contend that you are misapplying the parol evidence rule. First, our view is that the statute of frauds bars the latter email because it is parol evidence that is being offered to ***explicitly contradict*** the terms of the written agreement entered into on November 2. Second, Mr. Geraci does not contend that his call to Mr. Cotton on November 3, 2016, resulted in an oral agreement between them that Mr. Cotton was not entitled to a 10% equity position. Rather, Mr. Geraci's position is that there was ***never*** an oral agreement between them that Mr. Cotton would receive a 10% equity position. Even assuming for the sake of argument that the November 2 email is not barred by the parol evidence rule and admissible, the telephone call the next day is parol evidence that Mr. Geraci never agreed to a 10% equity position and, therefore, it is ***consistent*** with the November 2 written agreement and not barred by the statute of frauds.

A motion for judgment on the pleadings is like a demurrer in that the Court looks to the four corners of the pleading in the Complaint. California is a notice pleading jurisdiction. Mr. Geraci's Complaint sufficiently alleges all elements of the various causes of action alleged therein. Mr. Geraci's declaration filed in opposition to Mr. Cotton's motion to expunge the lis pendens does nothing to alter that analysis. In addition, even if Mr. Cotton brought a motion for summary judgment/summary adjudication, which he has not done, the declaration would be evidence creating a material factual dispute that would defeat such a motion. Your client's intended motion for judgment on the pleadings

is frivolous and will be denied for the same reasons that it was denied the first time it was filed. As for the motion for leave of court to amend the Second Amended Cross-Complaint to add a cause of action for conspiracy and additional defendants is simply a further transparent attempt to delay the trial in this action. By bringing in new defendants the trial will have to be continued to give them the opportunity to defend. That would substantially prejudice Mr. Geraci. Quite frankly, I do not see how such delay would be in Mr. Cotton's best interest either. The court should not allow that to happen.

I look forward to receiving service of your client's moving papers for each motion.

Respectfully,

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