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LARRY GERACI

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: Hon. Joel Wohlfeil
Dept.: C-73

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF CROSS-
DEFENDANT LARRY GERACI'S
DEMURRER TO CROSS-COMPLAINT
BY DARRYL COTTON**

[IMAGED FILE]

Hearing Date: July 14, 2017
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1 Plaintiff and Cross-Defendant, LARRY GERACI (hereinafter "Geraci"), respectfully submits
2 these points and authorities in support of his Demurrer to the Cross-Complaint by DARRYL COTTON
3 (hereafter "Cotton" or "Cross-Complainant").

4 **I. RELIEF REQUESTED AND SUMMARY OF THE ARGUMENTS**

5 The Cross-Complaint by Cotton names Geraci as a Cross-Defendant. Cotton alleges eleven
6 causes of action against Geraci: the First Cause of Action for Quiet Title; the Second Cause of Action
7 for Slander of Title; the Third Cause of Action for Fraud/Fraudulent Misrepresentation; the Fourth
8 Cause of Action for Fraud in the Inducement; the Fifth Cause of Action for Breach of Contract; the
9 Sixth Cause of Action for Breach of Oral Contract; the Seventh Cause of Action for Breach of Implied
10 Contract; the Eighth Cause of Action for Breach of the Implied Covenant of Good Faith and Fair
11 Dealing; the Ninth Cause of Action for Trespass; the Tenth Cause of Action for Conspiracy; and the
12 Eleventh Cause of Action for Declaratory and Injunctive Relief.

13 Each of the eleven causes of action against Geraci arises out of, or relates to, a dispute
14 concerning a contract for the purchase and sale of real property between Geraci and Cotton. Geraci
15 demurs to the first, second, fifth, sixth, seventh, eighth, tenth, and eleventh causes of action asserted
16 against him upon the following grounds:

17 1. The first cause of action for quiet title does not state a cause of action against Geraci
18 because an action to quiet title must be verified. (Code Civ. Proc., § 761.020.) The Cross-Complaint's
19 allegations comprising the first cause of action are not verified.

20 2. The first cause of action for quiet title does not state a cause of action against Geraci
21 because it fails to allege that he took actions which created a legally adverse interest in the subject
22 property. The Cross-Complaint alleges that Geraci's filing of his Complaint and the related Lis
23 Pendens created the legally adverse interest. (Cross-Complaint ¶ 61) But such actions are absolutely
24 privileged under Civil Code sections 47(b) and (b)(4).

25 3. The second cause of action for slander of title does not state a cause of action because it
26 is based on allegations of wrongful acts that are privileged as a matter of law. The elements of a
27 slander of title cause of action are: (1) a publication; (2) which is without privilege or justification;
28 (3) which is false; and (4) which causes direct and immediate pecuniary loss. (*Alpha and Omega*

1 *Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 664.) The wrongful acts
2 alleged in support of this claim are the filing of the underlying Complaint and the attendant filing and
3 recording of a Lis Pendens; however, the filing of a Complaint and the filing and recording of a Lis
4 Pendens are each absolutely privileged pursuant to Civil Code section 47, subdivision (b) and
5 subdivision (b)(4) respectively.

6 4. The fifth cause of action for breach of contract does not state a cause of action because
7 Cross-Complainant has failed to allege conduct which would be an actual breach. As the "breach,"
8 Cross-Complainant merely alleges Geraci asserts the written November 2nd Agreement (a copy of
9 which is attached to the Complaint) is the final agreement between the parties for the purchase and sale
10 of the real property. (Cross-Complaint ¶ 98) However, Geraci's assertion that the written
11 November 2nd Agreement is the final agreement between the parties for the purchase and sale of the
12 subject real property cannot by itself be a breach of the differing agreement alleged by Cross-
13 Complainant.

14 5. The sixth cause of action for breach of oral contract does not state a cause of action
15 because: a) Cross-Complainant has failed to allege conduct which would be an actual breach; b) there
16 cannot be an oral contract which contradicts a written contract; and c) the alleged oral contract for the
17 purchase and sale of the subject real property violates the Statute of Frauds. A contract coming within
18 the statute of frauds is invalid unless it is memorialized by a writing subscribed by the party to be
19 charged or by the party's agent. (Civ. Code, § 1624; *Secrest v. Security National Mortgage Loan Trust*,
20 (2008) 167 Cal.App.4th 544) An agreement for the sale of real property or an interest in real property
21 comes within the statute of frauds. (Civ. Code, § 1624(a)(3).)

22 6. The seventh cause of action for breach of the implied contract does not state a cause of
23 action because Cross-Complainant has failed to allege conduct which would be an actual breach; there
24 cannot be an implied contract which contradicts a written contract; and the alleged implied contract for
25 the purchase and sale of the subject real property violates the Statute of Frauds. A contract coming
26 within the statute of frauds is invalid unless it is memorialized by a writing subscribed by the party to
27 be charged or by the party's agent. (Civ. Code, § 1624; *Secrest, supra*, 167 Cal.App.4th 544) An
28 agreement for the sale of real property or an interest in real property comes within the statute of frauds.

1 (Civ. Code, § 1624(a)(3).)

2 7. The eighth cause of action for breach of the implied covenant of good faith and fair
3 dealing does not state a cause of action because it must be based on a contract. This claim appears to
4 be based on Cross-Complainant's alleged oral and/or implied-in-fact contract claims which in-and-of
5 themselves are invalid for reasons stated herein, and therefore, cannot support the covenant claim.
6 Additionally, if the covenant claim alleges nothing more than a breach of contract it is merely
7 superfluous and may be disregarded. Additionally, this cause of action does not support an award of
8 punitive damages as claimed in ¶ 118 of the Cross-Complaint.

9 8. The tenth cause of action for civil conspiracy fails to state a cause of action because
10 there is no such cause of action in California. (*Moran v. Endres* (2006) 135 Cal.App.4th 952, 954.)
11 Rather, conspiracy is "'a legal doctrine that imposes liability on persons who, although not actually
12 committing a tort themselves, share with the immediate tortfeasors a common plan or design in its
13 preparation.' ... 'A conspiracy cannot be alleged as a tort separate from the underlying wrong it is
14 organized to achieve.' (Citation.)" (*Id.* at 954-955.)

15 9. The eleventh cause of action for an injunction fails to state a cause of action because
16 there is no such cause of action in California. "Injunctive relief is a remedy and not, in itself, a cause of
17 action, and a cause of action must exist before injunctive relief may be granted. (Citation.)" (*Shell Oil*
18 *Co. v. Richter* (1942) 52 Cal.App.2d 164, 168; see also *County of Del Norte v. City of Crescent City*
19 (1999) 71 Cal.App.4th 965, 973 (a permanent injunction is attendant to an underlying cause of action).)

20 **II. RELEVANT FACTUAL ALLEGATIONS**

21 The factual allegations supporting Cotton's Sixth Cause of action for Breach of Oral Contract
22 are found in the Cross-Complaint as follows:

23 13. On November 2, 2016, after months of negotiations, Geraci and Cotton met at Geraci's
24 office to negotiate the unsettled terms and finalize their agreement for the sale of the Property. The
25 parties agreed to over thirty different terms for the sale of the Property and their intention was to reduce
those terms to a writing.

26 14. The consideration for the purchase of the Property consisted of monetary and non-
27 monetary components. Under the terms of the agreement reached, Geraci agreed to provide Cotton,
28 among other things, the following consideration for the property:

- (a) The sum of \$800,000;

1 (b) a 10% equity stake in the MMCC upon the City's approval of the CUP at the
Property (the "Business"); and

2 (c) On a monthly bases, 10% of the profits of the Business for the preceding month
3 or \$10,000, whichever was greater.

4 15. A condition precedent to closing the sale of the Property was the City's approval of the
CUP application.

5 16. Further, Geraci would pay Cotton a non-refundable deposit in the amount of \$50,000
6 (the "Non-Refundable Deposit"). Geraci was then to submit a CUP application to the City. If the City
7 granted the application, the sale and transfer of title to the Property to Geraci would be consummated
upon Geraci's payment of the \$750,000 balance. However, if the city rejected the CUP application, the
8 sale and transfer of the Property would not proceed and Cotton would be entitled to retain the \$50,000
Non-Refundable Deposit.

9 17. The transaction was to be effectuated via two agreements: (i) a Real Estate Purchase
Agreement and (ii) a Side Agreement. The Real Estate Purchase Agreement was to specify the
10 payment of \$400,000 from Geraci to Cotton for the purchase of the Property.

11 18. The Side Agreement was to include the additional, remaining \$400,000 payment
obligation (such that, in aggregate, the monetary components of the Real Estate Purchase Agreement
12 and the Side Agreement totaled \$800,000). The Side Agreement was also to include various other
material terms, including, without limitation, the 10% equity stake and monthly profit sharing (i.e.,
13 10% of profits or a minimum monthly payment of \$10,000).

14 19. After the parties finalized consideration for the Property, Geraci requested of Cotton that
the he be given time to put together the \$50,000 Non-Refundable Deposit. Geraci alleged that he
15 needed time as he had limited cash and he would require the cash he did have to immediately fund the
costly preparation of the CUP application and lobbying efforts needed to resolve the Critical Zoning
16 Issue.

17 20. Geraci offered to provide Cotton on that day \$10,000 as a show of "good-taith" towards
the \$50,000 Non-Refundable Deposit even though the parties did not have a final legal agreement for
18 the sale of the Property. Cotton raised his concern, that he would not receive the balance of the Non-
Refundable Deposit if the City Denied the CUP application. Geraci promised to pay the balance of the
19 Non-Refundable Deposit prior to submission of the CUP application with the City and stressed the
need to immediately resolve the Critical Zoning Issue.

20 21. Cotton agreed and Geraci offered to incur the cost of having his attorney, Gina Austin,
"quickly" draft the Real Estate Purchase Agreement and the Side Agreement.

21 22. At Geraci's request, the parties executed a three-sentence agreement that Geraci stated
22 was for there to be a record of Cotton's receipt of the \$10,000 "good-faith" deposit (the "November
23 2nd Agreement").

24 23. That same day at 3:11 PM, Geraci emailed Cotton a scanned copy of the notarized
November 2nd Agreement.

25 24. Later that day at 6:55 PM, Cotton replied to Gereaci, noting: "I just noticed the 10%
26 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
27 sell the property. I'll be fine if you would simply acknowledge that here in a reply."

28 25. Approximately 2 hours later at 9:13 PM, Geraci replied, stating "No no problem at all."

1 26. Cotton, having received written confirmation from Geraci regarding the 10% equity
2 stake, continued to operate in good-faith under the assumption that Geraci's attorney would draft the
3 appropriate legal agreements reflecting the deal the parties reached.

4 27. Thereafter, over the course of the next four months, Cotton continuously reached out to
5 Geraci regarding the following three issues:

6 (a) The progress of the Critical Zoning Issue that precluded the submission of the CUP
7 application;

8 (b) The balance of the non-Refundable Deposit; and

9 (c) The status of the drafts of the Real Estate Purchase Agreement and the Side
10 Agreement.

11 35. On February 27, 2017, Geraci emailed Cotton a draft Agreement of Purchase and Sale of
12 Real Property for the Property (the "First Draft Real Estate Agreement"). The First Draft Real Estate
13 Agreement completely failed to reflect the agreement that Geraci and Cotton had reach on November 2,
14 2016. Cotton called Geraci who said it was a miscommunication between him and his attorney Gina
15 Austin and he promised to have her revise the First Draft Real Estate Agreement.

16 36. On March 2, 2017, Geraci emailed Cotton a draft Side Agreement (the "First Draft Side
17 Agreement").

18 37. On March 3, 2017, having reviewed the First Draft Side Agreement, Cotton emailed
19 Geraci stating: "I see no reference is made to the 10% equity position [and] para 3.11 looks to avoid
20 our agreement completely." Paragraph 3.11 of the First Draft Side Agreement states that the parties
21 have no joint venture or partnership agreement of any kind, in complete contradiction of the deal
22 reached between the parties.

23 40. On March 7, 2017, Geraci emailed Cotton a revised draft of the Side Agreement (the
24 "Second Draft Side Agreement"). The cover email contained the following language: "... the 10k a
25 month might be difficult to hit until the sixth month... can we do 5k, and on the seventh month start
26 10k?"

27 96. The agreement reached on November 2nd, 2016 is a valid and binding agreement
28 between Cotton and Geraci and the November 2nd Agreement was meant to be the written instrument
that solely memorialized the partial receipt of the Non-Refundable Deposit and was not representative
of the entirety of the agreement.

97. Cotton upheld his end of the bargain, by, among other things, not selling his Property
and helping with the preparation of the CUP application.

98. Geraci breached the contract by, among other reasons, alleging the November 2nd
Agreement is the final agreement between the parties for the purchase of the Property.

102. The agreement reached on November 2nd, 2016 is a valid and binding oral agreement
between Cotton and Geraci.

103. Geraci has breached the agreement by, and among other actions described herein,
alleging the written November 2nd Agreement is the final and entire agreement for the property.

104. Cotton performed his obligations as agreed on November 2nd, 2016; among other
things, he did not sell his property and, as a consequence of Geraci's breach of the agreement, is
excused from having done so, but, Geraci, is still liable for the remainder of the balance due on the
Non-Refundable Deposit.

1 105. Cotton has suffered and continues to suffer damages because of Geraci's actions that
2 constitute a breach of oral contract in an amount to be determined at trial, but which is no less than
3 \$2,000,000.

3 **III. LEGAL STANDARD ON DEMURRER**

4 When a complaint, or any cause of action in a complaint, fails to state facts sufficient to
5 constitute a cause of action, the court may grant a demurrer. (Code Civ. Proc., § 430.30.) The court
6 considers the allegations on the face of the complaint and any matter of which it must or may take
7 judicial notice under the Code of Civil Procedure section 430.30(a). (*Groves v. Peterson* (2002) 100
8 Cal.App.4th 659; Code Civ. Proc., § 430.30(a).) In reviewing the sufficiency of a complaint against a
9 demurrer, the court treats the demurrer as admitting all material facts properly pleaded. (*Blank v.*
10 *Kirwan* (1985) 39 Cal.3d 311, 318 (citing to *Serrano v. Priest* (1971) 5 Cal.3d 584, 591); *Adelman v.*
11 *Associated Ins. Co.* (2001) 90 Cal.App.4th 352, 359.) However, contentions, deductions, or
12 conclusions of fact or law are insufficient to constitute a cause of action. (*Id.*)

13 The court may grant a demurrer with or without leave to amend when it is obvious from the
14 facts alleged that the plaintiff could not state a cause of action. (See *Hillman v. Hillman Land Co.*
15 (1947) 81 Cal.App.2d 174, 181; see generally *Carney v. Simmonds* (1957) 49 Cal.2d 84, 97; see
16 *Smiley v. Citibank* (1995) 11 Cal.4th 138, 164; Code Civ. Proc., § 430.30(j).) The party seeking leave
17 to amend their pleading bears the burden of establishing that there is a reasonable possibility that the
18 defect can be cured by amendment. (See *Blank v. Kirwan, supra*, 39 Cal.3d at 318; *Gould v. Maryland*
19 *Sound Industries* (1995) 31 Cal.App.4th 1137, 1153.)

20 **IV. LEGAL ARGUMENT**

21 **A. The First Cause of Action for Quiet Title Fails to State a Cause of Action Because** 22 **the Allegations are Not Verified**

23 Quiet title actions must be verified. (Code Civ. Proc., § 761.020 (stating in part: "The
24 complaint shall be verified . . .").) The Cross-Complaint is not verified. As Cross-Complainant has
25 not filed a verification under penalty of perjury of the allegations in the first cause of action for quiet
26 title, that claim is subject to demurrer. This defect is usually curable by amendment. (See *Natkin v.*
27 *California Unemployment Insurance Appeals Board* (2013) 219 Cal.App.4th 997.)

28 ///

1 **B. The First Cause of Action for Quiet Title Fails to State a Cause of Action Because**
2 **the Cross-Complaint Fails to Allege any Act by Cross-Defendant Geraci which**
3 **Created an Adverse Claim Against Title**

4 The basic procedures, parties, and pleading requirements for quiet title actions are found in
5 Code of Civil Procedure sections 760.010 to 764.080. The purpose of a quiet title action is to establish
6 title against adverse claims to real property or any interest in the property. (Code Civ. Proc.,
7 § 760.020.) In other words, a quiet title action under Code of Civil Procedure section 760.010 is used
8 to remove any adverse claim against title to real property. It is brought against persons having adverse
9 claims to plaintiff's title, including all persons unknown, claiming any legal or equitable right, title,
10 estate, lien, easement, or interest in the property described in the complaint adverse to plaintiff's title,
11 claims or rights, or any cloud on plaintiff's title, claims or rights thereto.

12 The first cause of action for quiet title does not state a cause of action against Geraci because it
13 fails to allege that he took actions which created a legally adverse interest in the subject property. The
14 Cross-Complaint alleges that Geraci's filing of his Complaint and the related Lis Pendens created the
15 legally adverse interest. (Cross-Complaint ¶ 61.) But such actions are absolutely privileged under
16 Civil Code section 47, subdivisions (b) and (b)(4).

17 Geraci's filing the Complaint and Lis Pendens are absolutely privileged pursuant to Civil Code
18 section 47(b), the so-called litigation privilege. As the California Supreme Court noted in *Albertson v.*
19 *Raboff*, (1956) 46 Cal.2d 375, "It is our opinion that the privilege applies to any publication, such as the
20 recordation of a notice of lis pendens, that is required, e. g., Code Civ. Proc. § 749, or permitted, e. g.,
21 Code Civ. Proc. § 409, by law in the course of a judicial proceeding to achieve the objects of the
22 litigation, even though the publication is made outside the courtroom and no function of the court or its
23 officers is involved."

24 The holding in *Albertson* has been limited or "partially abrogated" by a 1992 amendment to
25 Civil Code section 47. (*Park 100 Investment Group II, LLC v. Ryan* (2009) 180 Cal.App.4th 795, 813,
26 fn. 5.) That amendment added the provision currently set forth at Civil Code section 47(b)(4), which
27 states: "A recorded lis pendens is not a privileged publication unless it identifies an action previously
28 filed with a court of competent jurisdiction which affects the title or right of possession of real property,
as authorized or required by law." Thus, "the litigation privilege...applies *if* the lis pendens

(1) identifies an action ‘previously filed’ in a court of competent jurisdiction that (2) affects title or right to possession of real property.” (Citations.) (*La Jolla Group II et al. v. Bruce*, (2012) 211 Cal.App.4th 461, 473.)

Nevertheless, here, the Lis Pendens does provide a legal description identifying the real property and expressly identifying Geraci’s previously filed Complaint by case number and by cause of action. The Complaint asserts claims for breach of contract, breach of the implied covenant of good faith and fair dealing, specific performance, and declaratory relief, which claims all arise under and relate to a written purchase and sale agreement between Geraci and Cotton concerning the subject property, a copy of which is attached to the Complaint. On its face the Complaint is clearly an action that affects title and/or possession to the real property in question. Thus, the statutory conditions for application of the privilege to a recorded lis pendens, as set forth in Civil Code section 47(b)(4), have been satisfied in this case. It follows that the privilege of Civil Code section 47(b) applies to the subject Lis Pendens, thereby precluding liability for slander of title based on the filing of the Complaint and/or the filing and recording of the Lis Pendens.

The demurrer to the first cause of action for quiet title must be sustained without leave to amend as it is based exclusively on conduct which is absolutely privileged. This fatal defect cannot be cured by an amended pleading.

C. The Second Cause of Action for Slander of Title Fails to State a Cause of Action Because the Complained of Conduct Is Privileged

The elements of a cause of action for slander of title are: (1) a publication; (2) which is without privilege or justification; (3) which is false; and (4) which causes direct and immediate pecuniary loss. (*Alpha and Omega Development, LP v. Whillock Contracting, Inc.*, *supra*, 200 Cal.App.4th at 664.)

This cause of action fails for the same reasons the quiet title action fails (see Section B above) because it is based on allegations of wrongful acts that are absolutely privileged as a matter of law or do not disparage title as a matter of law. Inasmuch as these deficiencies cannot be cured the demurrer to this cause of action should be sustained without leave to amend.

///

///

1 **D. The Fifth Cause of Action for Breach of Contract Fails as a Matter of Law as It**
2 **Does Not Plead Whether the Agreement is Written, Oral or Implied**

3 To state a claim for breach of an oral or written contract, a plaintiff must allege (1) the existence
4 of a contract, (2) its own performance or a valid excuse for not performing, (3) the defendant's breach,
5 and (4) resulting damage. (*Oasis West Realty, LLC v. Goldman*, (2011) 51 Cal.4th 811, 821 (listing
6 elements); *Stockton Mortgage, Inc. v. Tope*, (2014) 233 Cal.App.4th 437, 453 ("The elements of a
7 breach of oral contract claim are the same as those for breach of written contract.")) "To prevail on a
8 cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) plaintiff's
9 performance of the contract or excuse for nonperformance, (3) defendant's breach, and (4) resulting
10 damage to the plaintiff." (*Richman v. Hartley*, (2014) 224 Cal.App.4th 1182, 1186.)

11 The pertinent allegations regarding this breach of contract cause of action are found in the
12 Cross-Complaint as follows:

13 96. The agreement reached on November 2nd, 2016 is a valid and binding agreement
14 between Cotton and Geraci and the November 2nd Agreement was meant to be the written instrument
15 that solely memorialized the partial receipt of the Non-Refundable Deposit and was not representative
16 of the entirety of the agreement.

17 97. Cotton upheld his end of the bargain, by, among other things, not selling his Property
18 and helping with the preparation of the CUP application.

19 98. Geraci breached the contract by, among other reasons, alleging the November 2nd
20 Agreement is the final agreement between the parties for the purchase of the Property.

21 It is basic contract law that a breach of contract occurs when a party to a contract deliberately
22 refuses to do that which he or she has agreed and is required to under the contract. (*Spangenberg v.*
23 *Spangenberg*, (1912) 19 Cal.App. 439.) A contract may be breached by "nonperformance," meaning
24 an unjustified failure to perform a material contractual obligation when performance is due, it may be
25 breached by repudiation, or it may be breached by a combination of the two. (*Central Valley General*
26 *Hosp. v. Smith*, (2009) 162 Cal.App.4th 501.)

27 Cross-Complainant has alleged that Geraci breached the contract by merely asserting that the
28 written November 2nd Agreement is the final agreement between the parties for the purchase and sale
of the subject real property. (Cross-Complaint ¶ 98.) Geraci's assertion that the agreement governing
the purchase and sale transaction is different than the agreement alleged by Cross-Complainant is not a

1 breach of that different agreement. In other words, Geraci claiming that the written November 2nd
2 Agreement is the operative agreement does not breach any alleged obligations under the differing
3 agreement alleged by Cross-Complainant. Cross-Complainant is required to plead facts which, if true,
4 would constitute a breach of Geraci's obligations under the agreement alleged by Cross-Complainant.

5 **E. The Sixth Cause of Action for Breach of Oral Contract Fails as a Matter of Law as**
6 **it Fails to Allege Actionable Breach; It Contradicts the Written Agreement; and It**
7 **is Barred by the Statute of Frauds**

8 To state a claim for breach of an oral or written contract, a plaintiff must allege (1) the existence
9 of contract, (2) its own performance or a valid excuse for not performing, (3) the defendant's breach,
10 and (4) resulting damage. (*Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at 821 (listing
11 elements); *Stockton Mortgage, Inc. v. Tope, supra*, 233 Cal.App. 4th at 453 ("The elements of a breach
12 of oral contract claim are the same as those for breach of written contract.").)

13 **1. Cross-Complaint Fails to Allege Actionable Breach**

14 The pertinent allegations with regard to the cause of action for breach of oral contract are as
15 follows:

16 103. Geraci has breached the agreement by, among other actions described herein, alleging
17 the written November 2nd Agreement is the final and entire Agreement.

18 Again, as with the Fifth Cause of Action for Breach of Contract, the Sixth Cause of Action for
19 Breach of Oral Contract suffers from the same infirmity, i.e., it does not allege that Geraci breached any
20 promise made in the oral contract but merely alleges that Geraci asserts the written November 2nd
21 Agreement is the operative contract. Asserting a different contract is the operative agreement does not
22 breach any of Geraci's obligations under Cross-Complainant's alleged oral contract.

23 **2. An Agreement in Writing May Not be Modified By An Oral Agreement**
24 **Unless the Oral Agreement is Executed by the Parties**

25 Cross-Complainant acknowledges the parties entered into a written agreement, i.e., "At Geraci's
26 request, the parties executed a three-sentence agreement..." (Complaint ¶ 22); "The agreement reached
27 on November 2nd, 2016 is a valid and binding Agreement was meant to be the written instrument that
28 solely memorialized the partial receipt of the Non-Refundable Deposit and was not representative of
the entirety of the agreement." (Cross-Complaint ¶ 96.)

Civil Code section 1698 provides:

- (a) A contract in writing may be modified by a contract in writing.
- (b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.
- (c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of Frauds (Section 1624) is required to be satisfied if the contract is within its provisions.
- (d) Nothing in this section precludes in an appropriate case the application of the rules of law concerning estoppel novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.

Section 1698 has a dual operation. On one hand it invalidates oral contracts of modification that are unexecuted, and on the other hand, it validates executed agreements that might otherwise fail for lack of consideration. (*D. L. Godbey & Sons Const. Co. v. Deane et al.*, (1952) 39 Cal.2d 429.)

Here, Cross-Complainant is barred by Civil Code section 1698 from alleging a modification of the written contract because there is no modification in writing and no oral agreement has been executed by the parties.

3. The Alleged Oral Contract is Barred by the Statute of Frauds

The Statute of Frauds requires that contracts for the sale of real property must be in writing containing the signatures of both parties as well as details regarding the exact terms of the agreement to which both parties may be held in a dispute. (See Civ. Code, § 1624.) A contract coming within the statute of frauds is invalid unless it is memorialized by a writing subscribed by the party to be charged or by the party's agent. (*Id.*; *Secrest, supra*, 167 Cal.App.4th 544) An agreement for the sale of real property or an interest in real property comes within the statute of frauds. (Civ. Code, § 1624(a)(3).)

The only written contract between the parties is the written November 2nd Agreement executed by both Cotton and Geraci and which is the subject of, and attached to, the underlying Complaint in this case, and for which Cotton does not allege breach of contract. The oral contract alleged by Cross-Complaint for the purchase and sale of the subject real property is not in writing and thus violates the Statute of Frauds and is therefore invalid.

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1 **F. The Seventh Cause of Action for Breach of Implied Contract Fails as a Matter of**
2 **Law Because There Cannot be an Implied Contract Which Contradicts a Written**
3 **Contract, Additionally, the Alleged Implied Contract Violates the Statute of Frauds**

4 **1. The Alleged Implied Contract is Barred by the Statute of Frauds**

5 The Statute of Frauds requires contracts for the sale of real property to be in writing and contain
6 the signatures of both parties as well as details regarding the exact terms of the agreement to which
7 both parties may be held in a dispute. (See Civ. Code, § 1624.) A contract coming within the statute of
8 frauds is invalid unless it is memorialized by a writing subscribed by the party to be charged or by the
9 party's agent. (*Id.*; *Secrest, supra*, 167 Cal.App.4th 544) An agreement for the sale of real property or
10 an interest in real property comes within the statute of frauds. (Civ. Code, § 1624(a)(3).)

11 The contract itself need not be in writing, but there must be some note in writing signed by the
12 party to be charged, in order for the agreement to be valid. If such does not exist, the contract is
13 invalid. The only written contract between the parties is the written November 2nd Agreement
14 executed by both Cotton and Geraci and which is the subject of and attached to underlying Complaint
15 in this case, and for which Cotton does not allege breach of contract. The implied contract alleged by
16 Cross-Complainant for the purchase and sale of the subject real property is not in writing and thus
17 violates the Statute of Frauds and is, therefore, invalid.

18 **2. There Cannot be an Implied Contract Which Contradicts a Written**
19 **Contract**

20 It is well-settled in California that there cannot be both an express (written or oral) contract and
21 an implied contract that cover the same subject, but require different results. (*Haggard v. Kimberly*
22 *Quality Care, Inc.*, (1995) 39 Cal.App.4th 508, 521.) “[A]n action based on an implied-in-fact or
23 quasi-contract cannot lie where there exists between the parties a valid express contract covering the
24 same subject matter.” (*Lance Camper Manufacturing Corp. v. Republic Indemnity Co.*, (1996)
25 44 Cal.App.4th 194, 203.) In other words, there can be no implied contract separate or different from
26 the Contract. (*Haggard, supra*, 39 Cal.App.4th at 521; *Lance Camper, supra*, 44 Cal.App.4th at 203.)

27 The written November 2nd Agreement between the parties states:

28 Agreement between Larry Geraci or assignee and Darryl Cotton:

1 Darryl Cotton has agreed to sell the property located at 6176 Federal Blvd, CA
2 for a sum of \$800,000.00 to Larry Geraci or assignee on the approval of a Marijuana
3 Dispensary. (CUP for a dispensary)

4 Ten Thousand dollars (cash) has been given in good faith earnest money to be
5 applied to the sales price of \$800,000.00 and to remain in effect until license is
6 approved. Darryl Cotton has agreed to not enter into any other contacts [sic] on this
7 property.

8 Cotton alleges that the Agreement actually should have contained a 10% equity stake and a non-
9 refundable \$50,000 deposit. (Cross-Complaint ¶¶ 14b and 16) These allegedly implied provisions are
10 directly contrary to the written agreement which (1) makes no reference to a 10% equity share
11 whatsoever and (2) requires a \$10,000 deposit instead of the alleged \$50,000 deposit.

12 As the alleged implied-in-fact contract contradicts the written November 2nd Agreement, the
13 demurrer to this cause of action should be sustained without leave to amend.

14 **G. The Eighth Cause of Action for Breach of the Implied Covenant of Good Faith and**
15 **Fair Dealing Does Not State a Cause of Action Because It is Merely Superfluous,**
16 **And In Any Event It Cannot Support A Prayer For Punitive Damages**

17 “The implied covenant of good faith and fair dealing rests upon the existence of some specific
18 contractual obligation. ‘The covenant of good faith is read into contracts in order to protect the express
19 covenants or promises of the contract, not to protect some general public policy interest not direct tied
20 to the contract’s purpose.’ . . . ‘In essence, the covenant is implied as a supplement to the express
21 contractual covenants, to prevent a contracting party from engaging in conduct which (while not
22 technically transgressing the express covenants) frustrates the other party’s rights to the benefits of the
23 contract.’” (*Racine v. Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026,
24 1031-1032.)

25 It is self-evident that there must be a contract in order to have a breach of the covenant of good
26 faith and fair dealing implied in that contract. Indeed, it is the first element of the cause of action. (See
27 CACI 325.) Here, there is a written agreement (the written November 2nd Agreement); however, it
28 does not appear that Cotton is claiming a breach of the covenant of good faith and fair dealing as to that
contract but instead is claiming breach of the implied covenant of good faith and fair dealing in the oral
and/or implied-in-fact contracts that he has alleged. For the reasons stated above, those contracts are
invalid. It follows then that this cause of action too, is invalid.

Moreover, if a claim for the breach of the implied covenant of good faith and fair dealing does

1 nothing more than allege a mere contract breach and, relying on the same alleged acts, simply seeks the
2 same damages or other relief already claimed in a contract cause of action, it may be disregarded as
3 superfluous because no additional claim is actually stated. (*Careau & Co. v. Security Pacific Business*
4 *Credit, Inc.*, (1990) 222 Cal.App.3d 1371, 1395.)

5 In any event, Cross-Complainant's allegation in ¶ 118 that he is entitled to "exemplary and/or
6 punitive damages" for breach of the covenant of good faith and fair dealing is impermissible. The
7 California punitive damages statute provides that the plaintiff may only recover punitive damages "[i]n
8 an action for the breach of an obligation not arising from contract." (Civ. Code, § 3294(a).) Thus, a
9 breach of contract action will not support a punitive damage award no matter how egregious the
10 defendant's conduct. (*Cates Const., Inc. v. Talbot Partners*, (1999) 21 Cal.4th 28, 61) (punitive
11 damages may not be awarded for breach of contract even where the defendants' conduct was "willful,
12 fraudulent, or malicious"). Further, compensation for a breach of the implied covenant of good faith
13 and fair dealing is limited to contract rather than tort remedies and may not include punitive damages.
14 (*Id.* at 43-44.)

15 **H. The Tenth Cause of Action for Conspiracy Does Not State a Cause of Action**
16 **Because as a Matter of Law There is No Separate Cause of Action for Conspiracy.**

17 The Tenth Cause of Action for civil conspiracy fails as a matter of law because there is no such
18 cause of action. (*Moran v. Endres, supra*, 135 Cal.App.4th at 954.) Rather, conspiracy is " 'a legal
19 doctrine that imposes liability on persons who, although not actually committing a tort themselves,
20 share with the immediate tortfeasors a common plan or design in its preparation.' ... 'A conspiracy
21 cannot be alleged as a tort separate from the underlying wrong it is organized to achieve.' (Citation.)"
22 (*Id.* at 954-955.) Inasmuch as civil conspiracy is not a separate cause of action, Geraci's demurrer to
23 this "cause of action" should be sustained without leave to amend.

24 **I. The Eleventh Cause of Action for Injunctive Relief Does Not State a Cause of**
25 **Action Because as a Matter of Law Injunctive Relief is a Remedy, Not a Basis for**
26 **Imposition of Liability.**

27 A cause of action for an injunction is not cognizable as a matter of law. "Injunctive relief is a
28 remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may
be granted. (Citation.)" (*Shell Oil Co. v. Richter, supra*, 52 Cal.App.2d at 168; see also *County of Del*

1 *Norte v. City of Crescent City, supra*, 71 Cal.App.4th at 973 (a permanent injunction is attendant to an
2 underlying cause of action.) Inasmuch as injunctive relief is not a separate cause of action, Berry's
3 demurrer to this "cause of action" should be sustained without leave to amend.

4 **V. LEAVE TO AMEND**

5 The court may grant a demurrer with or without leave to amend, and the burden is on the party
6 seeking leave to amend their pleading to establish that the pleading is capable of amendment. (See
7 *Hillman v. Hillman Land Co., supra*, 81 Cal.App.2d at 181; see generally *Carney v. Simmonds, supra*,
8 49 Cal.2d at 97; see *Smiley v. Citibank, supra*, 11 Cal.4th at 164; see *Blank v. Kirwan, supra*, 39 Cal.3d
9 at 318; *Gould v. Maryland Sound Industries, supra*, 31 Cal.App.4th at 1153; Code Civ. Proc., § 430.30;
10 Cal. Rules of Court, rule 3.1320(g).) A plaintiff does not meet its burden unless it advises the trial
11 court of new information that would contribute to a meaningful amendment. (See e.g. *Ross v. Creel*
12 *Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 749.)

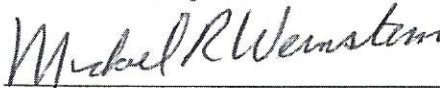
13 This Court should grant the motion *without leave to amend* as to each of the causes of action for
14 conspiracy, injunctive relief, and slander of title as Cross-Complainant cannot amend to remedy the
15 infirmities with these causes of action. As to the other causes of action, they should be sustained
16 without leave to amend, *unless* Cross-Complainant makes an offer of proof that he can in good faith
17 allege facts establishing the elements of each of the remaining claims.

18 **VI. CONCLUSION**

19 For the foregoing reasons and subject to a sufficient offer of proof, Geraci's demurrers to each
20 of the causes of action should each be sustained without leave to amend.

21
22 Dated: June 16, 2017

FERRIS & BRITTON,
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