ROA 390.1
21 pages

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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
06/26/2019 at 04:59:00 PM
Clerk of the Superior Court
By E- Filing,Deputy Clerk

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 **DEFENDANT/CROSS-COMPLAINANT DARRYL COTTON'S OPPOSITION TO PLAINTIFF/CROSS-DEFENDANT'S MOTION IN LIMINE NO. 1 TO EXCLUDE ANY EVIDENCE OF THE COTTON AND HURTADO FEDERAL LAWSUITS** Dept: C-73 Judge: The Hon. Joel R. Wohlfeil

Defendant/Cross-complainant Darryl Cotton ("Cotton"), submits the following opposition to Plaintiff/Cross-defendant's motion in limine to exclude any evidence of the Cotton and Hurtado federal lawsuits.

INTRODUCTION

Plaintiff/Cross-defendant seeks to exclude any mention of Darryl Cotton's lawsuits filed in the USDC Case No. 3:18-cv-00325-GPC-MDD, and Darryl Cotton and Joe Hurtado's lawsuit filed in USDC Case No. 3:18-cv-02751-GPC-MDD.

Plaintiff/Cross-defendant's motion should be denied for several reasons. First, Plaintiff/Cross-defendant's motion appears to be an attempt to circumvent Cotton's ability to impeach Geraci regarding his November 3, 2016 factual allegations because, again, as here Geraci fails to make those

factual allegations in his answer to USDC Case No. 3:18-cv-02751-GPC-MDD, which constitutes a judicial admission. Second, the lawsuits are evidence of Cotton's pleading of an anti-trust affirmative defense, which, Cotton should be allowed, considering additional new evidence described below. Finally, a motion in limine may not be used to force a party, such as Mr. Cotton and Mr. Hurtado, to conform their testimony to a preconceived factual scenario by Geraci.

ARGUMENT

A. RELEVANCE

Geraci seeks to limit Mr. Cotton's ability to testify as it relates to his filing of a federal complaint. The evidence from these filings are relevant to the case at hand. "Our interpretation of the hearsay rule is consistent with various statutes affording litigants a "day in court," including the opportunity to present all relevant, competent evidence on material issues, ordinarily through the oral testimony of witnesses testifying in the presence of the trier of fact." *Elkins v. Superior Court*, 41 Cal. 4th 1337, 1345 (Cal. 2007) "All relevant evidence is admissible, including evidence bearing on the issue of witness credibility (Evid. Code, §§ 210, 351), and the oral testimony of witnesses supplies valuable evidence relevant to credibility, " *Elkins v. Superior Court*, 41 Cal. 4th 1337, 1356-57 (Cal. 2007).

> ...parties have the right to testify in their own behalf (*Guardianship of Waite* (1939) 14 Cal.2d 727, 730 [citation omitted], and a party's opportunity to call witnesses to testify and to proffer admissible evidence is central to having his or her day in court. (*Kelly v. New West FederalSavings* (1996) 49 Cal.App.4th 659, 677 [Citation omitted]; see *Spector v. Superior Court* (1961) 55 Cal.2d 839, 843, 844 [citation omitted].

Elkins v. Superior Court, 41 Cal. 4th 1337, 1357 (Cal. 2007)

The allegations made in the federal lawsuits, particularly USDC Case No. 3:18-cv-99325-GPC-MDD, which was stayed pending the resolution of this matter are highly relevant. For one, Mr. Cotton, albeit excessively, lays out all the facts surrounding this issue and the individuals involved. It has been Mr. Cotton's assertion from the very beginning that Mr. Geraci has been involved in criminal activity and that he has been harassed by people associated with Geraci. Cotton has also alleged that Geraci used a proxy for the CUP application on the property because he has a past that would prevent him from obtaining final approval of the marijuana outlet in his name. Additionally, that other

individuals, like Gina Austin, Abhay Schweitzer, and Jim Bartell were assisting Geraci in perpetuating this false promise because he would never be able to provide what he promised without such a concerted effort to deceive Cotton.

B. EVIDENCE OF THE PLEADINGS AND FILINGS BY COTTON ARE ADMISSABLE TO IMPEACH GERACI'S TESTIMONY REGARDING HIS ALLEGED FACTS OF NOVEMBER 3, 2016.

It is anticipated that Geraci will attempt to introduce evidence of his allegations regarding a series of events he claims occurred on November 3, 2016, mainly that he called Cotton and told him that a 10% equity position was never part of their agreement, and which allegedly Cotton agreed to. The court has already stated that Geraci's failure to plead these facts previously can be used to impeach him (the court was unwilling to bind his discovery responses to what he had previously omitted from his pleadings).

> As noted, evidence bearing on the issue of credibility of witnesses comes within the basic rule that all relevant evidence is admissible, except as specifically provided by statute. (Evid. Code, §§ 210, 351.) Describing a party's fundamental right to present evidence at trial in a civil case, Witkin observes: "One of the elements of a fair trial is the *right to offer relevant and competent evidence on a material issue.* Subject to such obvious qualifications as the court's power to restrict cumulative and rebuttal evidence . . ., and to exclude unduly prejudicial matter [citation], denial of this fundamental right is almost always considered reversible error. [Citations.]" (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 3, pp. 28-29, italics added.)
>
> *Elkins v. Superior Court*, 41 Cal. 4th 1337, 1357 (Cal. 2007)

In USDC Case No. 3:18-cv-02751-GPC-MDD, Geraci and Berry filed a verified answer. Again, they fail to lay out the facts surrounding the November 3, 2016 factual allegations that Mr. Cotton spoke to Geraci and disclaimed any interest in the marijuana business that was going to be developed on the property.

C. THE FEDERAL LAWSUITS ARE EVIDENCE OF COTTON'S PLEADING OF FACT WHICH SUPPORT AN ANTI-TRUST AFFIRMATIVE DEFENSE.

It is Cotton's contention that what he has previously described, in his multiple filings and declarations, as a conspiracy, is an anti-trust enterprise. On Wednesday, June 26, 2019, a new complaint was filed in the Federal Court for Southern District of California, filed by Andrew Flores, who purchased the contractual interest of Richard Martin, the true legal owner of the subject property.

It has been consistently alleged and acknowledged by Geraci that on the day Cotton terminated the agreement with Geraci, Cotton sold the Property to Richard Martin. Mr. Flores has purchased those contractual rights and has filed a lawsuit alleging that Geraci is a member of an anti-trust enterprise attempting to monopolize the marijuana dispensary permits within the City of San Diego. According to Mr. Flores' complaint, the enterprise consists of approximately eight individuals including Gina Austin who operates as counsel for the enterprise, Salam Razuki and Ninas Milan, who jointly own and operate marijuana dispensaries and are clients of Gina Austin.

Mr. Flores cites to several previously unknown facts and evidence to support this claim. As a disclaimer, Mr. Flores states in his complaint that he deliberately did not disclose this information to Mr. Cotton or his counsel for fear that Mr. Cotton would post such information online or divulge it to some other third party which could then affect his investigation or current investigations by the FBI regarding these issues.

First is an alleged recording by an investigative journalist in which she interviews an individual who was an associate of Mr. Razuki and Mr. Milan which states that they are part of an attempted monopoly of about eight individuals who wish to control all of the marijuana dispensaries in San Diego. The recording further describes that Gina Austin assists the monopoly enterprise by describing to them where her non-enterprise clients are purchasing property and how they may obtain CUP approval before them. This is exactly analogous to Cotton's allegation regarding Mr. Aaron Magagna, who is also a client of Mrs. Austin.

Second is an email from Christopher Williams which states that Abhay Schweitzer is seeking a personal interest in an MMD (medical marijuana dispensary) in San Diego County, including district 4. Based on the proximity of the properties which are properly zoned for a MMD in District 4, only one is available and therefore this refers to the CUP at 6220 Federal Blvd, the competing CUP.

Cotton anticipates affirming a defense surrounding around the conspiracy to commit anti-trust violations. Ultimately, this is the motivation for Geraci's lawsuit, the non-disclosures of the true applicant, and the connections between Gina Austin and Geraci, Mr. Razuki, Abhay Schweitzer, and Aaron Magagna, who all have either been clients of Austin in relation to the cannabis industry or have worked with Austin in procuring CUPs for nefarious individuals.

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CALIFORNIA ASSOCIATION OF REALTORS®

COMMERCIAL PROPERTY PURCHASE AGREEMENT AND JOINT ESCROW INSTRUCTIONS

(NON-RESIDENTIAL)
(C.A.R. Form CPA, Revised 12/15)

Date Prepared: 03/21/2017

1. OFFER:
   A. THIS IS AN OFFER FROM Richard John Martin II ("Buyer"). [X] Individual(s), [ ] A Corporation, [ ] A Partnership, [ ] An LLC, [ ] An LLP, or [ ] Other _____.
   B. THE REAL PROPERTY to be acquired is 6176 Federal Blvd, situated in San Diego (City), San Diego (County), California, 92114-1401 (Zip Code), Assessor's Parcel No. 343-020-02-8 ("Property").
   C. THE PURCHASE PRICE offered is Two Million Dollars $ 2,000,000.00
   D. CLOSE OF ESCROW shall occur on [X] see Addendum 1 (date) (or [ ] _____ Days After Acceptance).
   E. Buyer and Seller are referred to herein as the "Parties." Brokers are not Parties to this Agreement.
2. AGENCY:
   A. DISCLOSURE: The Parties each acknowledge receipt of a [X] "Disclosure Regarding Real Estate Agency Relationships" (C.A.R. Form AD)
   B. CONFIRMATION: The following agency relationships are hereby confirmed for this transaction:
   Listing Agent N/A (Print Firm Name) is the agent of (check one): [ ] the Seller exclusively; or [ ] both the Buyer and Seller.
   Selling Agent N/A (Print Firm Name) (if not the same as the Listing Agent) is the agent of (check one): [ ] the Buyer exclusively; or [ ] the Seller exclusively; or [ ] both the Buyer and Seller.
   C. POTENTIALLY COMPETING BUYERS AND SELLERS: The Parties each acknowledge receipt of a [X] "Possible Representation of More than One Buyer or Seller - Disclosure and Consent" (C.A.R. Form PRBS)
3. FINANCE TERMS: Buyer represents that funds will be good when deposited with Escrow Holder.
   A. INITIAL DEPOSIT: Deposit shall be in the amount of ..... $ _____
   (1) Buyer Direct Deposit: Buyer shall deliver deposit directly to Escrow Holder by electronic funds transfer; [ ] cashier's check, [ ] personal check, [ ] other _____ within 3 business days after Acceptance (or _____);
   OR (2) [ ] Buyer Deposit with Agent: Buyer has given the deposit by personal check (or _____) to the agent submitting the offer (or to _____), made payable to _____. The deposit shall be held uncashed until Acceptance and then deposited with Escrow Holder within 3 business days after Acceptance (or _____).
   Deposit checks given to agent shall be an original signed check and not a copy.
   (Note: Initial and increased deposit checks received by agent shall be recorded in Broker's trust fund log.)
   B. INCREASED DEPOSIT: Buyer shall deposit with Escrow Holder an increased deposit in the amount of ..... $ _____ within ____ Days After Acceptance (or _____).
   If the Parties agree to liquidated damages in this Agreement, they also agree to incorporate the increased deposit into the liquidated damages amount in a separate liquidated damages clause (C.A.R. Form RID) at the time the increased deposit is delivered to Escrow Holder.
   C. [ ] ALL CASH OFFER: No loan is needed to purchase the Property. This offer is NOT contingent on Buyer obtaining a loan. Written verification of sufficient funds to close this transaction IS ATTACHED to this offer or [ ] Buyer shall, within 3 (or _____) Days After Acceptance, Deliver to Seller such verification.
   D. LOAN(S):
   (1) FIRST LOAN: in the amount of ..... $ 1,800,000.00
   This loan will be conventional financing or [ ] Seller financing (C.A.R. Form SFA), [ ] assumed financing (C.A.R. Form AFA), [ ] subject to financing, [ ] Other _____. This loan shall be at a fixed rate not to exceed ____ % or, [ ] an adjustable rate loan with initial rate not to exceed ____ %. Regardless of the type of loan, Buyer shall pay points not to exceed ____ % of the loan amount.
   (2) [ ] SECOND LOAN in the amount of ..... $ _____
   This loan will be conventional financing or [ ] Seller financing (C.A.R. Form SFA), [ ] assumed financing (C.A.R. Form AFA), [ ] subject to financing, [ ] Other _____. This loan shall be at a fixed rate not to exceed ____ % or [ ] an adjustable rate loan with initial rate not to exceed ____ %. Regardless of the type of loan, Buyer shall pay points not to exceed ____ % of the loan amount.
   E. ADDITIONAL FINANCING TERMS: see attached Addendum 1
   F. BALANCE OF DOWN PAYMENT OR PURCHASE PRICE in the amount of ..... $ 200,000.00 to be deposited with Escrow Holder pursuant to Escrow Holder instructions.
   G. PURCHASE PRICE (TOTAL): ..... $ 2,000,000.00
   H. VERIFICATION OF DOWN PAYMENT AND CLOSING COSTS: Buyer (or Buyer's lender or loan broker pursuant to paragraph 3J(1)) shall, within 3 (or ____) Days After Acceptance, Deliver to Seller written verification of Buyer's down payment and closing costs. ([ ] Verification attached.)

Buyer's Initials (X [signature]) (_____) Seller's Initials (X [signature]) (_____)

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CALIFORNIA ASSOCIATION OF REALTORS®

ADDENDUM

(C.A.R. Form ADM, Revised 12/15)

No. 1

The following terms and conditions are hereby incorporated in and made a part of the: ☐ Purchase Agreement, ☐ Residential Lease or Month-to-Month Rental Agreement, ☐ Transfer Disclosure Statement (Note: An amendment to the TDS may give the Buyer a right to rescind), ☐ Other _____

dated March 21, 2017, on property known as 6176 Federal Blvd, San Diego, CA 92114-1401

in which Richard John Martin II is referred to as ("Buyer/Tenant")

and Darryl Cotton is referred to as ("Seller/Landlord")

Memorandum of Understanding

This Memorandum of Understanding ("MOU") is fully incorporated into this purchase agreement.

Seller shall receive a 20% equity stake in the business / MMCC upon approval and completion.

Seller shall receive on a monthly basis, 20% of the profits of the business / MMCC or $10,000, whichever is greater.

The $100,000 earnest money deposit is non-refundable and shall be Seller's to keep even if the CUP application is denied.

The foregoing terms and conditions are hereby agreed to, and the undersigned acknowledge receipt of a copy of this document.

Date March 21, 2017 — Date March 21, 2017

Buyer/Tenant X Richard John Martin II — Seller/Landlord X Darryl Cotton

Buyer/Tenant _____ — Seller/Landlord _____

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CALIFORNIA ASSOCIATION OF REALTORS®

ADDENDUM

(C.A.R. Form ADM, Revised 12/15)

No. 2

The following terms and conditions are hereby incorporated in and made a part of the: [X] Purchase Agreement, [ ] Residential Lease or Month-to-Month Rental Agreement, [ ] Transfer Disclosure Statement (Note: An amendment to the TDS may give the Buyer a right to rescind), [ ] Other

dated March 21, 2017, on property known as 6176 Federal Blvd San Diego, CA 92114-1401

in which Richard John Martin II is referred to as ("Buyer/Tenant")

and Darryl Cotton is referred to as ("Seller/Landlord").

Memorandum of Understanding and Agreement

1) This Memorandum of Understanding and Agreement ("MOUA") amends the agreement reached by Buyer and Seller on March 21, 2017.

2) Notwithstanding any language in this purchase agreement to the contrary, the provisions within this MOUA shall be given effect and supersede any conflicting or ambiguous language within this purchase agreement.

3) Seller hereby transfers and sells to Buyer, with all the associated rights and liabilities, his ownership, rights and interests in the property and the associated CUP application pending before the City of San Diego for $500,000.

4) Buyer shall immediately provide seller with a $50,000 non-refundable deposit.

5) The closing of this sale, including the payment of the balance of the purchase price and all the requirements stated herein, shall be completed upon the favorable resolution of the Larry Geraci lawsuit against Seller for the property.

6) In addition, should a CUP application be approved at the property, Buyer shall pay Seller a one-time payment of $1,500,000. Seller's previous agreement for an equity stake in the business is voided and Seller has no interest in the property or the CUP.

7) CONFIDENTIALITY CLAUSE: SELLER WILL NOT DISCLOSE BUYER'S IDENTITY OR THIS AGREEMENT IN ANY FORM, DIRECTLY OR INDIRECTLY, UNTIL HE HAS RESOLVED THE LEGAL ACTION WITH GERACI. FOR THE AVOIDANCE OF DOUBT, THIS MEANS THAT SELLER WILL NOT INVOLVE OR MENTION BUYER IN ANY FORM TO ANY THIRD-PARTIES, IN ANY LITIGATION PROCEEDINGS OR IN ANY MATTERS REGARDING ALLEGATIONS OF CRIMINAL OR UNLAWFUL ACTIONS. SHOULD SELLER BREACH THIS PROVISION, SELLER HEREBY EXPRESSLY AGREES TO PAY TO BUYER $200,000 FOR BREACH OF THIS PROVISION.

The foregoing terms and conditions are hereby agreed to, and the undersigned acknowledge receipt of a copy of this document.

Date April 15, 2017

Buyer/Tenant X Richard John Martin II

Buyer/Tenant

Date April 15, 2017

Seller/Landlord X Darryl Cotton

Seller/Landlord

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CALIFORNIA ASSOCIATION OF REALTORS®

ADDENDUM

(C.A.R. Form ADM, Revised 12/15)

No. 3

The following terms and conditions are hereby incorporated in and made a part of the: ☐ Purchase Agreement, ☐ Residential Lease or Month-to-Month Rental Agreement, ☐ Transfer Disclosure Statement (Note: An amendment to the TDS may give the Buyer a right to rescind), ☐ Other

dated March 21, 2017, on property known as 6176 Federal Blvd San Diego, CA 92114-1401

in which Richard John Martin II is referred to as ("Buyer/Tenant")

and Darryl Cotton is referred to as ("Seller/Landlord").

This addendum is fully incorporated into this purchase agreement and amends the agreement reached between the parties on March 21, 2017, as amended by addendum 2 on April 15th, 2017.

Buyer hereby agrees to permit Seller to disclose this agreement in his response to Gorael's lawsuit.

For the avoidance of doubt, Seller will not have to pay the $200,000 fine for breach of the Confidentiality provision previously agreed to.

The foregoing terms and conditions are hereby agreed to, and the undersigned acknowledge receipt of a copy of this document.

Date May 12, 2017

Buyer/Tenant X Richard John Martin II

Buyer/Tenant

Date May 12, 2017

Seller/Landlord X Darryl Cotton

Seller/Landlord

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Reviewed by _____ Date _____

EXHIBIT C

AMERIFIRST
FINANCIAL, INC.

Pre-Approval Letter

Friday, April 14, 2017

TO: Whom it may concern
RE: Richard John (R.J.) Martin II

We are pleased to inform you that the above referenced loan application has been *pre-approved* with the following terms and conditions:

Purchase Price: $2,500,000
Loan Program: Jumbo 30 YEAR FIX
Loan amount: $2,000,000

The following conditions must be satisfied for final loan approval:

1) *Appraiser's certification of value along with a final inspection.*
2) *Acceptable Preliminary Title.*
3) *Following standard investor requirements: Evidence of Hazard Insurance, Flood Certification*
4) *Copy of Fully Executed Purchase Contract and Escrow Instructions*

This approval is based on review of the borrower's credit report in conjunction with documentation provided by the borrower regarding employment, income, assets as applicable to the above loan. These items are sufficient to obtain final loan approval provided there are no changes in the borrower's financial situation as required by the loan program.

Please keep in mind the following:

- Upgrades and modifications that increase the purchase price beyond what is indicated above may invalidate this approval and result in disqualification or re-qualification on an alternative loan program offering.
- This approval does not include any contingencies unless specifically noted above. If the loan approval is contingent on sale of another property but that sale does not occur prior to closing on this property, re-qualification on an alternative loan program may be required to complete the purchase.
- At times market conditions require that loan program guidelines and parameters change, which may affect this approval unless your loan has been locked and will close within that lock period. If this occurs, we will review the borrower's file and notify you of any changes that apply.

Sincerely,

Alexis Roper

Alexis Roper
Sr. Mortgage Loan Officer
619-436-8873
aroper@amerifirst.us
NMLS #583371

AmeriFirst Financial, Inc., 1550 E. McKellips Road, Suite 117, Mesa, AZ 85203 (NMLS # 145368). 1-877-276-1974. Copyright 2014. All Rights Reserved. This is not an offer to enter into an agreement. Not all customers will qualify. Information, rates, and programs are subject to change without prior notice. All products are subject to credit and property approval. Not all products are available in all states or for all loan amounts. Other restrictions and limitations apply. License Information: CA: Licensed by The Department of Business Oversight under the California Residential Mortgage Lending Act

EXHIBIT D

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT **CIVIL CODE § 1189**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of San Diego)

On May 03 2017 before me, Rebeca Gonzalez Notary Public
Date Here Insert Name and Title of the Officer

personally appeared Joe Hurtado & Darryl Cotton
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

REBECA GONZALEZ
Notary Public – California
San Diego County
Commission # 2187279
My Comm. Expires Apr 16, 2021

Signature _____
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document
Title or Type of Document: Master Real Estate and Professional Services Agreement Document Date: 3/3/17
Number of Pages: 5 Signer(s) Other Than Named Above: n/a

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Individual ☐ Attorney in Fact
☐ Trustee ☐ Guardian or Conservator
☐ Other: _____
Signer Is Representing: _____

Signer's Name: _____
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Individual ☐ Attorney in Fact
☐ Trustee ☐ Guardian or Conservator
☐ Other: _____
Signer Is Representing: _____

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MASTER REAL ESTATE PURCHASE AND PROFESSIONAL SERVICES AGREEMENT

This Master Real Estate Purchase and Professional Services Agreement (the "Agreement") is made and entered into as of May 3, 2017 by and between Darryl Cotton ("Principal") and Joe Hurtado ("Agent").

RECITALS

WHEREAS, Principal is the owner of Dalbercia Inc. and Fleet Systems (respectively, engaged in commercial electrical work and lighting manufacturing) and the founder and manager of 151 Farms (a nonprofit organization that promotes sustainable, ecological-friendly urban farms);

[REMAINDER OF SECURED LITIGATION FINANCING AGREEMENT REDACTED]

FERRIS & BRITTON
A Professional Corporation
Michael R. Weinstein (SBN 106464)
Scott H. Toothacre (SBN 146530)
501 West Broadway, Suite 1450
San Diego, California 92101
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Superior Court of California,
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06/26/2019 at 01:35:00 PM
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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.	Case No. 37-2017-00010073-CU-BC-CTL Judge: Hon. Joel R. Wohlfeil Dept.: C-73 **PLAINTIFF/CROSS-DEFENDANTS' OPPOSITION TO DEFENDANT/CROSS-COMPLAINANT DARRYL C OTTON'S MOTION IN LIMINE NO. 1 OF 1 TO EXCLUDE GERACI'S NOVEMBER 3RD FACTUAL ALLEGATIONS** **[DEFENDANT MIL NO. 1 OF 1]** **[IMAGED FILE]**
DARRYL COTTON, an individual, Cross-Complainant, v. LARRY GERACI, an individual, REBECCA BERRY, an individual, and DOES 1 THROUGH 10, INCLUSIVE, Cross-Defendants.	Complaint Filed: March 21, 2017 Trial Date: June 28, 2019

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant/Cross-Complainant Darryl Cotton's Motion in Limine [1 of 1] to exclude Geraci's November 3rd factual allegations, is the same tired motion he has been bringing before the Court for the past year. The motion concerns what Cotton's counsel has coined the "Disavowment Allegation" (a term never used by Cotton or Geraci)— which refers to Geraci testimony concerning a November 2nd email response to Cotton and a November 3rd telephone call. The most succinct recitation

of the "Disavowment Allegation" was stated in Cotton's Motion for Summary Judgment, as referring to November 3, 2016 when "(i) [Geraci] called Cotton and explained that he sent the Confirmation Email by mistake and (ii) Cotton orally agreed the November Document is a fully integrated agreement and he is not entitled to the 10% equity position in the Business promised to him in writing by Geraci in the Conformation Email (the "Disavowment Allegation")." (Cotton MSJ Ps& As at 6:25-7:3)

It appears that Cotton seeks to exclude this evidence on the following grounds: (1) the November 3rd factual allegations are barred because it operates as an unpled Affirmative Defense; (2) Geraci's November 3rd factual allegations are barred by the parol evidence rule; (3) Geraci's November 3rd factual allegation are barred by the statute of frauds; (4) Geraci's November 3rd factual allegations have no probative value and is outweighed by the prejudicial affect [sic]. The argument should be rejected, again, and the motion denied.

II. LEGAL ARGUMENT

A. The Pleadings

On March 21, 2017, Plaintiff Geraci filed his Complaint alleging four causes of action for: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) specific performance; and (4) declaratory relief. Geraci recently dismissed the specific performance and declaratory relief causes of action and released the lis pendens after the condition precedent of obtaining a CUP on the property failed to be fulfilled. As a result, only the causes for breach of contract and breach of the covenant of good faith and fair dealing remain.

On May 8, 2017, Defendant Cotton filed his Answer to Geraci's Complaint consisting of a General Denial pursuant to CCP §431.30 and sixteen (16) Affirmative Defenses. Notably none of the affirmative defenses raised by Mr. Cotton assert the statute of frauds as an affirmative contractual defense. Mr. Cotton never sought leave of Court to amend his Answer to assert an affirmative defense of statute of frauds, and as such, he should be barred from raising the statute of frauds at this late juncture. Nevertheless, the statute of frauds, as described below, is inapplicable on the facts and theory espoused by Mr. Cotton.

Mr. Cotton alleged that he sent an email on November 2, 2016, after signing the November

2, 2016 Agreement ("November Written Agreement") stating:

> "Hi Larry, [¶] Thank you for meeting me today. Since we executed the Purchase Agreement in your office for the sale price of the property I just noticed the 10% equity position in the dispensary was not language added into that document. I just want to make sure that we're not missing that language in any final agreement as it is a factored element in my decision to sell the property, I'll be fine if would simply acknowledge that here in a reply." (Cottons Motion in Limine [1 of 1], p. 3:14-18)
>
> Mr. Geraci sent a reply email in which he said "No, no problem at all." (Cotton's Motion In Limine [1 of 1] p. 3:19.)

In response to Cotton's Second Amended Complaint, Larry Geraci filed a General Denial pursuant to Section 431.30 of the California Code of Civil Procedure, in which he denied, generally and specifically, each and every allegation in the Second Amended Cross-Compliant, including each and every purported cause of action contained therein, and denied that Cross-Complainant suffered any damages.

As an affirmative defense, Geraci alleged that each of Mr. Cotton's causes of action in the Second Amended Cross-Complaint failed to state a cause of action, and that Cotton's alleged contract cause of action violated the statute of frauds. Further, Geraci alleged that the contract causes of action failed to state a claim under *Copeland v. Baskin Robbins USA*, 96 Cal.App.4th 1251 (2002); (i.e., where any of the essential elements of a promise are reserved for the future agreement of both parties, no legal obligation arises until such future agreement is made.)

Mr. Cotton now contends that Mr. Geraci should have raised as an affirmative defense that he only read the first line of the Cotton's email before replying to the email. Mr. Cotton has misread *State Farm Mut. Auto Ins. Co. v. Superior* Court (1991) 228 Cal.App.3d 721, which he cites as support for his contention. In reality, as discussed below, that decision actually supports Mr. Geraci's case and defeats Mr. Cotton's argument.

Moreover, Mr. Cotton cannot now claim prejudice as to Mr. Geraci's testimony concerning these facts. Mr. Geraci testified to these facts in his April 10, 2018 Declaration in Opposition to Defendant Darryl Cotton's Motion to Expunge Lis Pendens, ¶10, p. 6:21-7:16 (ROA #108) And, this same testimony was raised in the May 9, 2019 Declaration of Larry Geraci in Opposition to

Defendant Darryl Cotton's Motion for Summary Judgment or, Alternatively, Summary Adjudication. (¶13, p. 4:4-28; ROA #518) Indeed, this testimony has been at the heart several of Mr. Cotton's motions, including his "motion to bind" and his "motion for partial adjudication." Inexplicably, Mr. Geraci's deposition was never taken by Attorney Austin. Any prejudice this evidence may cause, is solely borne by Attorney Austin's failure to take the plaintiff's deposition. Mr. Geraci cannot be faulted for Attorney Austin's neglect.

B. The November 3rd Allegations are Not Barred as an Unpled Affirmative Defense

In this motion, Mr. Cotton contends that the November 3rd allegation is a "new matter" which should have been raised as an affirmative defense (not fraud this time but mistake). (Cotton's P's&A's, p. 5:1-23.) Cotton raised this very issue in his Motion for Summary Judgment, only in that motion he couched his argument in the context of fraud, asserting that his own client was defrauding Mr. Geraci and that therefore Mr. Geraci should have plead mistake in sending the November 2, 2016 email as an affirmative defense to fraud. That argument was as nonsensical as the argument he now makes, wherein he now couches the argument in terms of an affirmative defense of mistake. Mr. Geraci has never claimed an affirmative defense based on fraud or mistake.

Mr. Cotton is mistaken that the November 3rd allegation is an affirmative defense that must be raised independently as a new matter because Mr. Geraci's Answer to the Second Amended Cross-Complaint puts Mr. Cotton's breach of oral agreement allegations directly in issue. "Under a general denial, the defendant may urge any defense tending to show that the plaintiff has no right to recover or no right to recover to the extent that he or she claims. [Fn. 3.]" (49A Cal.Jur.3d (2002) Pleading, § 186, citing in fn. 3 *Aetna Carpet Co. v. Penzner* (1951) 102 Cal.App.2d 859, 960.) As previously stated, Mr. Cotton filed a General Denial to the Second Amended Cross-Complaint and is therefore entitled to urge any factual defense tending to show that Mr. Geraci has no right to recover.

Mistakenly, Mr. Cotton relies on CCP § 431.30(b)(2) to support his assertion that Mr. Geraci's November 3rd allegations should be barred. Under Code of Civil Procedure section 431.30(b)(2), the answer to a complaint must include "[a] statement of any new matter constituting

a defense." The phrase "new matter" refers to something relied on by a defendant which is not put in issue by the plaintiff. (*Shropshire v. Pickwick Stages, Northern Division* (1927) 85 Cal.App. 216, 219.) Thus, where matters are ***not responsive*** to essential allegations of the complaint, they must be raised in the answer as "new matter." (*State Farm Mutual Automobile Insurance Co. v. Superior Court*, (1991) 228 Cal.App.3d 721, 725; citing *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 543.) Where, however, the answer sets forth facts showing some essential allegation of the complaint is not true, such facts are not 'new matter," but only a traverse. (*Goddard v. Fulton* (1963) 21 Cal. 430, 436.)

In the instant case, the fact that Mr. Geraci was only responding to the first sentence of Mr. Cotton's email ***is responsive*** to Mr. Cotton's assertion that he has an oral contract based on the additional facts raised in his email; thus, it is not a new matter and was not required to be set forth in an affirmative defense. (Accord *State Farm Mutual Automobile Insurance Co. v. Superior Court*, *supra* 228 Cal.App.3d at 725-726 – defense of advice of counsel in bad faith insurance case is directed to an essential element of a plaintiff's cause of action, it does not constitute new matter and need not be specifically alleged.) Mr. Cotton's motion must denied on this ground alone.

C. The November 3rd Factual Allegations Are Not Barred by the Parol Evidence Rule.

Mr. Cotton continues to misconstrue and misapply the Parol Evidence Rule and seemingly alleges that Cotton's email to Geraci asking about a 10% equity interest in and of itself uproots the November Written Agreement and makes it a receipt. He leaps to a legal conclusion that the November Written Agreement is not a purchase and sale agreement for the property because of the email that Cotton sent. (Cotton MIL #1, 7:18-21, ROA #551.) Regardless of whether or not the November 2,, 2016 contract is integrated (which Geraci agrees the Court must decide as a preliminary matter), a contract can still be valid, binding, and satisfy the Statute of Frauds even if it is not fully integrated. (See *Kanno v. Marwit Capital Partners II, L.P.* (2017) 18 Cal.App.5th 987.) The question of integration simply affects what the court admits as parol evidence of additional and consistent terms to the written agreement. (*Id.*)

Even assuming Cotton's argument that the parties entered into a Joint Venture Agreement as to

the 10% equity interest, (a matter never raised in Cotton's Cross-Complaint, First Amended Cross-Complaint or Second Amended Cross-Complaint (see Geraci Motion In Limine No. 12 of 15, ROA #566), the Parol Evidence Rule does not preclude Geraci from admitting evidence pertaining to offer and acceptance. Evidence of a ***prior or contemporaneous agreement*** is precluded by the Parol Evidence Rule, not subsequent evidence of failing to accept an additional term. (*Kanno v. Marwit Capital Partners II, L.P.* (2017) 18 Cal.App.5th 987.) Geraci does not intend to admit evidence of the November 3rd Factual Allegations in order to add or supplement any existing terms, but rather to show that there was no acceptance of Cotton's proposed 10% equity position and there was no meeting of the minds as to that term.

Potentially, Cotton can use his email to Geraci on November 2 addressing the 10% equity interest in two ways: 1) as evidence that the parties negotiated and agreed to the 10% equity interest prior to executing the November Written Agreement, or 2) as evidence that the parties subsequently negotiated and agreed to the 10% equity interest after executing the November Written Agreement. Option 1 represents classic parol evidence of a prior or contemporaneous statement that Geraci asks this Court to exclude from evidence in its own Motion in Limine No. 12 of 15. Under option 2, (assuming it does not violate the statute of frauds-see below), Geraci may be entitled to admit evidence pertaining to the offer and acceptance of the proposed oral contract terms. Both an offer and acceptance are required to create a contract. (CACI 309; *See* California Civil Code § 1585.)

D. The November 3rd Factual Allegations are Not Barred by the Statute of Frauds.

Cotton conflates the Parol Evidence Rule with the Statute of Frauds and suggests that evidence of "contradicting" terms are not admissible to satisfy the Statute of Frauds; the Statute of Frauds does not necessarily establish the terms of the parties' contract, but rather determines enforceability based on essential written terms being present. (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 766.) "A memorandum satisfies the statute of frauds if it identifies the subject of the parties' agreement, shows that they made a contract, and states the essential contract terms with reasonable certainty." (*Id.*) Extrinsic evidence only comes into play if the parties reached an agreement on all essential terms. (See *Sterling, supra,* 40 Cal.4th at pp. 766, 775.) Therefore, Cotton's argument that the November 3rd Factual Allegations are inadmissible under the Statute of Frauds is inappropriate,

particularly where Geraci intends to use this evidence to demonstrate that the parties did not have an oral agreement to the 10% equity position.

Cotton erroneously argues that the November Written Agreement, coupled with the Request for Confirmation and Confirmation Email are writings that satisfy the Statute of Frauds. (Cotton MIL #1, 8:171-8, ROA #551.) However, the four corners of a memorandum itself must include the essential contractual terms, and extrinsic evidence cannot supply those required terms to satisfy the Statute of Frauds. (See, e.g., *Friedman v. Bergin* (1943) 22 Cal.2d 535, 537–539.) Three documents together, as Cotton alleges, cannot collectively satisfy the Statute of Frauds; in other words, the 10% equity interest alleged in the "Request for Confirmation" email cannot supply that term to the November Written Agreement, and as an essential term, must satisfy the Statute of Frauds.

Additionally, as mentioned in Geraci's MIL No. 12 of 15, the November 2, 2016 purchase and sale agreement cannot be construed as a JVA falling outside of the Statute of Frauds, i.e., a joint venture "requires an agreement under which the parties have (1) a joint interest in a common business, (2) an understanding that profits and losses will be shared, and (3) a right to joint control. [Citations.]: (*Ramirez v. Long Beach Unified School District* (2002) 105 Cal.App.4th 182, 193.) Mr. Cotton failed to plead a joint venture agreement.

Moreover, nowhere in his Answer to Geraci's Complaint, or anytime thereafter, does Cotton assert the Statute of Frauds as an affirmative defense. Therefore, Cotton cannot now claim that a factual scenario set forth by Plaintiffs is barred. (See Code Civ. Proc. § 431.30(b).)

E. The Evidence Is Not Inflammatory and Prejudicial and Should Not be Barred Under Cal. Evid. Code § 352

In this section of his Motion in Limine, Cotton again attempts to breathe life into his previous argument made on motion for summary judgment, mentioned above, that Mr. Geraci should have "plead fraud with specificity in his Complaint." (Cotton P's&A's, p. 9:7-13) Mr. Cotton's convoluted reasoning on this issue, to the extent it can be understood, is that Mr. Cotton was attempting to fraudulently deprive Mr. Geraci out of the contract, and therefore, it was incumbent upon Mr. Geraci to plead a fraud cause of action against Mr. Cotton. As stated in the opposition to MSJ, the problem with this argument is that it is Attorney Austin that is claiming his own client

acted fraudulently, and therefore, Attorney Austin asserts that Geraci should have plead a fraud cause of action against his client. Absurd! Mr. Geraci has never contended that Mr. Cotton engaged in fraudulent conduct. To plead such a cause of action, therefore, would have been frivolous and not based on the facts.

Next, Mr. Cotton attempts to resurrect his ill-fated "motion to bind" upon which he was sanctioned $1500. Specifically, he contends that if Mr. Geraci is not bound by his prior admission and omission, then Cotton will be severely prejudiced in defending against a sham cause of action and affirmative defense based on factual allegations that are clearly contradicted by Geraci's previous judicial and evidentiary admissions and which were required to be pled with specificity." (Cotton P's&A's p. 9:14-17)

If Mr. Cotton will be prejudiced as a result of this evidence, he has nobody to blame but his own attorney who failed to take Mr. Geraci's deposition over the course of the past two years-even after learning of these facts in Mr. Geraci's April 10, 2018 Declaration. Had he done so, this issue would not even be before the Court. If the evidence were excluded, Plaintiff would be prejudiced because Mr. Austin inexcusably failed to take the deposition of Plaintiff Geraci.

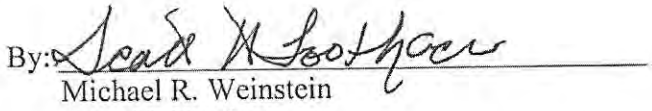
Clearly, this evidence is probative as to Mr. Geraci's state of mind. If Mr. Cotton is able to admit his November 2, 2016 email into evidence over the statute of frauds and parol evidence, which is hotly contested, then the jury is entitled to hear the evidence regarding Mr. Geraci's response to that email to determine what the parties agreed to.

III. CONCLUSION

For all of the foregoing reasons, individually or collectively, Defendant Cotton's Motion in Limine No. 1 of 1, to preclude evidence of Mr. Geraci's November 3, 2016 allegations must be denied.

FERRIS & BRITTON
A Professional Corporation

Dated: June 25, 2019

By: 
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