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Attorney for Defendant/Cross-Complainant DARRYL COTTON

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO – CENTRAL DIVISION**

LARRY GERACI, an individual,
Plaintiff,

vs.

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

Defendants.

DARRYL COTTON, an individual,
Cross-Complainant,

vs.

LARRY GERACI, and individual, REBECCA
BERRY, an individual; and DOES 1 through 10,
Inclusive,

Cross-Defendants.

CASE NO. 37-2017-00010073-CU-BC-CTL

**SEPARATE STATEMENT OF
UNDISPUTED MATERIAL FACTS
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT, OR
ALTERNATIVELY, SUMMARY
ADJUDICATION BY
DEFENDANT/CROSS-COMPLAINANT
DARRYL COTTON
[CCP §437c]**

**Hearing Date: May 23, 2019
Hearing Time: 9:00 a.m.
Department: C-73
Judge: The Hon. Joel R. Wohlfeil**

Complaint filed: March 21, 2017
Trial Date: May 31, 2019

Defendant/Cross-Complainant DARRYL COTTON submits the following separate statement of undisputed material facts in support of his Motion for Summary Judgment, or Alternatively, Summary Adjudication:

1 ///

COTTON'S UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	GERACI'S RESPONSE AND EVIDENCE SUPPORTING EVIDENCE
1. In or around mid-2016, Geraci contacted Cotton and expressed his interest to Cotton in acquiring the Property if further investigation satisfied him that the Property might meet the requirements for a Marijuana Outlet (formerly known as Medical Marijuana Consumer Collectives (MMCC)). Lodged Exhibit No. 1 ¶13.	
2. Geraci believed at that time that a limited number of properties located in the San Diego City Council District 4 might potentially satisfy the CUP requirements for a Marijuana Outlet. Lodged Exhibit No. 1 ¶13.	
3. Geraci and Cotton negotiated the terms of the potential sale of the Property. Lodged Exhibit No. 1 ¶14.	
4. During their negotiations, Geraci discussed with Cotton a zoning issue that would have to be resolved before a CUP could be approved on the Property. Lodged Exhibit 1 ¶14.	
5. On November 2, 2016, the parties met at Geraci's office and executed the three-sentence November Document. The agreement reached was the JVA. Cotton's consideration for entering into the JVA, assuming the CUP was approved, was: (i) \$800,000, (ii) a 10% equity position in the Business, and (iii) the greater of \$10,000 or 10% of the net profits of the Business on a monthly basis. If the CUP was denied, Cotton would keep a \$50,000 non-refundable deposit. At that meeting, Geraci provided \$10,000 towards the \$50,000 and promised to pay the \$40,000 balance and have his attorney reduce the JVA to writing for execution. Cotton	

1	executed the November Document to memorialize his receipt of \$10,000 in cash, at Geraci's request. Lodged Exhibit No. 1 ¶17.	
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3	6. At 3:11 PM, later that same day, Geraci emailed Cotton a copy of the November Document. Lodged Exhibit No. 1 ¶18.	
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5	7. At 6:55 PM, Cotton replied and specifically requested Geraci confirm that a final agreement would provide for a 10% equity position in the Business. Lodged Exhibit No. 1 ¶18.	
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7	8. Cotton's request for written confirmation reads in its entirety as follows: Hi Larry, Thank you for meeting today. Since we executed the Purchase Agreement in your office for the sale price of the property I just noticed the 10% equity position in the dispensary was not language added into that document. I just want to make sure that we're not missing that language in any <i>final agreement</i> as it is a factored element in my decision to sell the property, I'll be fine if you would simply acknowledge that here in a reply.(emphasis added). Lodged Exhibit 2, pg. 9.	
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9	9. At 9:13 PM later that same evening, Geraci replied: " <i>No no problem at all</i> " (i.e., the Confirmation Email). (emphasis added) Lodged Exhibit No. 1 ¶18; Lodged Exhibit No. 2.	
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11	10. Cotton and Geraci texted and emailed extensively between the execution of the November Document and Cotton's receipt of a demand letter from Weinstein alleging the November Document was a fully integrated agreement for the sale of the Property. Lodged Exhibit 2 to the NOL is a copy of all email communications between Cotton and Geraci. Exhibit 3 to the NOL is a copy of all texts between Cotton and Geraci. Lodged Exhibit No.1 ¶17.	
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2	11. Between the execution of the November Document and Cotton's receipt of Weinstein's demand letter, Cotton sent numerous emails and messages that establish he believed the JVA had been reached and was being reduced to writing by Geraci's attorney. Lodged Exhibit No.1 ¶17.	
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6	12. At no point between the execution of the November Document and Cotton's receipt of the demand letter, did Geraci ever dispute or challenge the emails or texts from Cotton that established they were partners in a joint venture. Lodged Exhibit No. 2; Lodged Exhibit No. 3	
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11	Over the course of months <i>after</i> the parties executed the November Document, except for the days leading up to the filing of his Complaint, Geraci's language, actions, and conduct all as reflected in his communication with Cotton via text and email prove that he believed that Cotton and he were joint venturers	
12	Lodged Exhibit No. 2; Lodged Exhibit No. 3.	
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17	13. On March 2, 2017, Geraci emailed Cotton a draft agreement entitled "SIDE AGREEMENT" that had a provision stating that Geraci and Cotton were not partners. Lodged Exhibit No. 2 pgs. 41-48.	
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21	14. The next day, Cotton emailed Geraci: "Larry, [¶] I read the Side Agreement in your attachment and I see that no reference is made to the 10% equity position... In fact para 3.11 [stating we are not partners] looks to avoid our agreement completely. It looks like counsel did not get a copy of that document. Can you explain?"	
22	Cotton texted Geraci later that day: "Did you get my email?" Lodged Exhibit No.1 ¶17.	
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27	15. Geraci replied one minute later: "Yes I did I'm having her rewrite it now[.] As soon as I	
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1 get it I will forward it to you[.]” Lodged
2 Exhibit No. 2 GER0521

3 16. On March 7, 2017, Geraci emailed Cotton
4 a revised Side Agreement. In that email,
5 Geraci wrote:
6 Hi Darryl, I have not reviewed this yet but
7 wanted you to look at it and give me your
8 thoughts. Talking to Matt, the 10k a month
9 might be difficult to hit until the sixth month.
10 .. can we do 5k, and on the seventh month start
11 10k? (the “\$10,000 Confirmation Email”).
12 Lodged Exhibit No.1 ¶17; Exhibit 2, pg. 53-
13 58.

14 17. The revised Side Agreement provided for
15 Cotton to receive 10% of the “net profits”
16 instead of the “10% equity position.” Exhibit
17 2, pg. 53-58.

18 18. On March 16, 2017, Cotton emailed
19 Geraci the following:
20 We started these negotiations 4 months ago
21 and the drafts and our communications have
22 not reflected what agreed upon and are still far
23 from reflecting our original agreement....
24 please confirm that revised final drafts that
25 incorporate the [JVA] terms will be provided
26 by Wednesday at 12:00 PM, I promise to
27 review and provide comments that same day
28 so we can execute the same or next day.
Lodged Exhibit No. 2, pg. 59-69.

19. On March 17, 2017, Geraci requested an
in-person meeting with Cotton via text (“[can
we meet in person]”). Lodged Exhibit No. 3
GER0521

20. Cotton replied via email as follows:
I would prefer that until we have final
agreements that we converse exclusively via
email. My greatest concern is that you get a
denial on the CUP application and not provide
the remaining \$40,000 non-refundable
deposit... Please confirm by 12:00 PM
Monday that you are honoring our agreement

1	and will have final drafts... by Wednesday at 12:00 PM. Lodged Exhibit No. 2, pg. 61.	
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3	21. Geraci failed to reduce the JVA to writing, provide written assurance of performance (e.g, that he would reduce the JVA to writing), or pay the \$40,000 balance due on the non-refundable deposit Lodged Exhibit 2, p.61.	
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5	22. On March 21, 2017, Cotton terminated the agreement with Geraci for breach of contract. Lodged Exhibit No. 2, pg. 59-60.	
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7	23. On March 22, 2017, Geraci's attorney (Michael Weinstein) emailed Cotton a copy of Geraci's Complaint. Lodged Exhibit No. 1 ¶27.	
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9	24. Geraci's Complaint alleges four causes of action all of which are predicated on the allegation that the November Document is a fully integrated agreement: (i) breach of contract, (ii) breach of the covenant of good faith and fair dealing, (iii) specific performance and (iv) declaratory relief. Lodged Exhibit No. 4. (Complaint)	
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11	25. Materially, as alleged in Geraci's Complaint: "On November 2, 2016, [Geraci] and [Cotton] entered into a written agreement for the purchase and sale of the [Property] on the terms and conditions stated therein" and, "[Cotton] has anticipatorily breached the contract by stating that he will not perform the written agreement according to its terms. Among other things, [Cotton] has stated that, contrary to the written terms, the parties agreed to a down payment... of \$50,000... [and] he is entitled to a 10% ownership interest in the [Property.]" [The Complaint does not allege Geraci sent the Confirmation Email by mistake or the Disavowment Allegation.] Lodged Exhibit No. 4, ¶7, ¶11.	
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27	26. On August 25, 2017, Cotton filed a cross-complaint against Berry and Geraci including causes of action for breach of contract,	
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1 intentional misrepresentation, negligent
2 misrepresentation, and false promise with
3 respect to the purchase agreement and the
4 CUP application. In his Cross-complaint,
5 Cotton argues the existence of the JVA and
6 attached the Confirmation Email as evidence
7 of his bargained-for 10% equity position.
8 Lodged Exhibit No. 6.

9 27. On November 20, 2017 Geraci filed his
10 Answer to Cotton's cross-complaint and it
11 did not allege he sent the Confirmation Email
12 by mistake or the Disavowment Allegation.
13 Lodged Exhibit No.7.

14 28. On October 6, 2017, Cotton filed a
15 Petition for Alternative Writ of Mandate
16 against the City of San Diego (the
17 "Petition"), naming Geraci and Berry as real-
18 parties-in-interest, and demanding the City
19 remove Berry from the CUP application on
20 the Property. Cotton's verified Petition
21 described the Confirmation Email and it was
22 attached thereto. Geraci's Verified Answer
23 admits the Confirmation Email is authentic,
24 but he does not allege he sent the
25 Confirmation Email by mistake or the
26 Disavowment Allegation. Lodged Exhibit
27 No. 5.

28 29. On November 30, 2017, Geraci filed a
Verified Answer to Cotton's Petition. Lodged
Exhibit No. 1.

30. Geraci's Verified Answer specifically
confirms he sent the Confirmation Email.
Geraci's Verified Answer admits the
Confirmation Email is authentic, but he does
not allege he sent the Confirmation Email by
mistake or the Disavowment
Allegation..Lodged Exhibit No. 1 ¶18.

31. On September 25, 2017, Geraci provided
verified answers to Form Interrogatories
propounded by Cotton (the "First Form
Discovery Answers"). Lodged Exhibit No. 8.

1	32. Geraci's response to Form Interrogatory 50.1(a) identifies the November Document as the sole agreement alleged in the pleadings. Lodged Exhibit No. 8, pg. 14.	
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4	33. Furthermore, Geraci answers there is no part of the agreement not in writing [50.1(b)]. Lodged Exhibit No. 8, pg. 14.	
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6	34. Geraci answers that there are no documents evidencing any part of the agreement not in writing [50.1(c)] Lodged Exhibit No. 8, pg. 14.	
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9	35. Geraci answers that there are no documents modifying any part of the agreement [50.1(d)]. Lodged Exhibit No. 8, pg. 14.	
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12	36. Geraci answers that there are no modifications not in writing to the agreement [50.1(e)]. Lodged Exhibit No. 8, pg. 14.	
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15	37. Geraci answers that there are no documents evidencing any modification to the agreement not in writing [50.1(f)]. Lodged Exhibit No. 8, pg. 14.	
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18	38. In response to Form Interrogatory 50.2, requiring descriptions of any breaches to the agreement, Geraci provides a lengthy answer alleging Cotton has anticipatorily breached the contract by denying his obligations under the November Document, potentially selling the Property to a third-party and contacting the City to stop the CUP application on the Property. Lodged Exhibit No. 8, pg. 14-15.	
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24	38. In Form Interrogatories 50.3 – 50.5 Geraci answers that there are no other agreements alleged in the pleadings whose performance was excused. However, he does not allege the Disavowment Allegation – Cotton's alleged oral promise to not enforce Geraci's written promise to provide Cotton a 10% equity position because the	
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1	Confirmation Email was allegedly sent by mistake. Lodged Exhibit No. 8, pg. 15.	
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3	39. In Form Interrogatory 50.4, Geraci	
4	answers that no other agreements alleged in	
5	the pleadings were terminated by mutual	
6	agreement, release, accord and satisfaction,	
7	or novation. Lodged Exhibit No. 8, pg. 15.	
8	40. In Form Interrogatory 50.5, Geraci	
9	answers that no other agreements alleged in	
10	the pleadings were unenforceable Lodged	
11	Exhibit No. 8, pg. 15-16	
12	41. Geraci's attorney, Mr. Weinstein, alleges	
13	that these interrogatories did not require the	
14	disclosure of the factual allegation that	
15	Geraci sent the Confirmation Email by	
16	mistake or that Cotton agreed to not enforce	
17	the written promise by Geraci in the	
18	Confirmation Email to provide him a 10%	
19	equity position in the Business. Lodged	
20	Exhibit No. 1 ¶17.	
21	42. On September 28, 2017, Geraci filed a	
22	demurrer to Cotton's operative Cross-	
23	complaint (the "Demurrer"). Lodged Exhibit	
24	No. 10.	
25	43. On October 23, 2017, Cotton, through his	
26	former-counsel, filed an opposition arguing,	
27	<i>inter alia</i> , the Confirmation Email is	
28	evidence of the JVA and Cotton's bargained	
	for 10% equity position in the Business.	
	Lodged Exhibit No. 11.	
	44. On October 27, 2017, Geraci filed his	
	Reply to his Demurrer. Lodged Exhibit	
	No.12.	
	45. In his Reply, Geraci summarized his	
	reasons for why the Confirmation Email fails	
	to establish the November Document is not a	
	fully integrated agreement:	
	Cotton argues that the agreement between the	
	parties is comprised of the November 2, 2016	

1 written agreement (hereafter [the "November
2 Document"]) and certain November emails
3 (hereafter "November Emails") which were
4 incorporated into that document and together
5 evidence the basic terms of the agreement.
6 Cotton's argument fails for a number of
7 reasons: 1) the emails were not integrated into
8 the [November Document]; 2) even if the
9 November Emails were integrated into the
10 [November Document], they are not signed by
11 Geraci, and therefore are barred by the statute
12 of frauds; 3) the November Emails do not in
and of themselves evidence an agreement
between the parties; and 4) Geraci has done
everything required of him under the
[November Document] and therefore has not
breached the contract itself nor the implied
covenant of good faith and fair dealing.
Lodged Exhibit No.12 pg. 2 lines 8-12

13 46. On November 20, 2017, Geraci filed his
14 answer to Cotton's Cross-complaint (the
"Answer"). Lodged Exhibit No. 7.
15 7.

16 47. Geraci's Answer sets forth five
affirmative defenses, which are:

- 17 1. Each of [Cotton's] purported causes
18 of action against [Geraci] fails to state
19 facts sufficient to constitute a cause of
20 action against [Geraci].
- 21 2. [Cotton's] purported first cause of
22 action for breach of contract is barred
23 by the Statute of Frauds[.]
- 24 3. [Cotton's] purported first cause of
25 action for breach of contract, to the
26 extent it purports to state a cause of
27 action for breach of an agreement to
28 negotiate, fails to allege facts
sufficient to state such a claim under
Copeland v. Baskin Robbins USA, 96
Cal.App.4th 1251 (2002).
4. [Cotton's] purported second cause of
action for intentional
misrepresentation is barred by the

1	doctrine of waiver in that [Cotton] has	
2	accepted a substantial benefit in the	
3	form of the efforts and substantial	
4	expense undertaken by [Geraci] to	
5	apply for and obtain approval of a	
6	Conditional Use Permit.	
7	5. [Geraci] currently has insufficient	
8	information upon which to form a	
9	belief as to the existence of additional	
10	and as yet unstated affirmative	
11	defenses. [Geraci] reserves the right	
12	to assert additional affirmative	
13	defenses in the event discovery	
14	discloses the existence of said	
15	affirmative defenses.	
16	Lodged Exhibit No. 7.at pg. 2:6-pg. 3	
17	48. On November 30, 2017, Geraci executed	
18	his Verified Answer to Cotton's Petition for	
19	Writ of Mandate. Lodged Exhibit No. 1	
20	pg.10:10.	
21	49. In his Verified Answer, Geraci "admits	
22	that [the Confirmation Email attached as]	
23	Exhibit 3 to the Verified Petition is a true and	
24	correct copy of certain emails exchanged	
25	between them. [Geraci] further alleges that	
26	[Cotton] intended the [November Document]	
27	to be a binding agreement between the	
28	parties." Lodged Exhibit No. 1 pg. 5, ¶18.	
	50. On February 27, 2018, Geraci executed a	
	declaration in support of a motion for a	
	preliminary injunction to compel Cotton to	
	grant him access to the Property. Without	
	specifically referencing his own Confirmation	
	Email or any other parol evidence, Geraci	
	implies that Cotton's request for written	
	assurance of performance was an attempt by	
	Cotton to immediately get better terms	
	Lodged Exhibit No. 13.	
	In his February 2018 declaration, Geraci again	
	states the November Document is a fully	

1 integrated contract. Further, without
2 specifically referencing his own Confirmation
3 Email or any other parol evidence, implies that
4 Cotton's request for written assurance of
5 performance was an attempt by Cotton to
6 immediately get better terms, ("After we
7 signed the [November Document] for my
8 purchase of the Property, Mr. Cotton
9 immediately began attempts to renegotiate our
10 deal for the purchase of the Property."").
11 Lodged Exhibit No. 13 pg. 4 ¶8.

12 51. On April 9, 2018, Geraci executed his
13 Declaration of Larry Geraci in Opposition to
14 Defendant Darryl Cotton's Motion to
15 Expunge Lis Pendens (the "Lis Pendens
16 Motion"). Lodged Exhibit No. 14.

17 52. In his April 2018 declaration, Geraci
18 raised for the first time the Disavowment
19 Allegation. He alleges he sent the
20 Confirmation Email by *mistake* because he
21 only meant to respond to the first sentence of
22 Cotton's email which thanks him for meeting
23 that day. Lodged Exhibit No. 14 pg. 7 lines 3-
24 5.

25 53. He goes on to describe the Disavowment
26 Allegation as follows:
27 The next day I read the entire email and I
28 telephoned Mr. Cotton.... During that
telephone call I told Mr. Cotton that a 10%
equity position in the dispensary was not part
of our agreement... Mr. Cotton's response
was to say something to the effect of "well,
you don't get what you don't ask for." He was
not upset and he commented further to the
effect that things are "looking pretty good-we
all should make some money here." And that
was the end of the discussion. Lodged Exhibit
No. 14 pg. 7 lines 6-16.

54. On November 8, 2018, Geraci provided
his Responses to Requests for Admissions
propounded by Cotton. Lodged Exhibit No.
15.

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2	55. The judicial admissions material to this	
3	Motion by Geraci are: (i) he was a licensed	
4	real estate agent for over twenty years at the	
5	time of the execution of the November	
6	Document; Lodged Exhibit No. 15 pg. 5 line	
7	24.	
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9	56. (ii) he was aware of the statute of frauds at	
10	the time of the execution of the November	
11	Document; Lodged Exhibit No.15 pg. 6 line 5.	
12		
13	57. (iii) he has never used an agreement of five	
14	sentences or less to formalize and finalize an	
15	arms-length transaction for the purchase and	
16	sale of real property; Lodged Exhibit No. 15	
17	pg. 6 line 15.	
18		
19	58. (v) the \$10,000 provided to Cotton on	
20	November 2, 2016 is a non-refundable	
21	deposit; Lodged Exhibit No. 15 pg. 11 line 27.	
22	[Note: the qualifier after the admission was	
23	deemed stricken by the court after hearing on	
24	Cotton's Motion to Compel: Request For	
25	Judicial Notice No. 11.]	
26		
27	59. (vi) as part of the agreement reached with	
28	Cotton on November 2, 2016, Geraci was	
	responsible for financing and submitting a	
	CUP application on the Property; Lodged	
	Exhibit No. 15 pg. 12; line 7.	
	60. (vii) prior to his April 9, 2018 declaration,	
	Geraci has no emails or texts referencing or	
	describing the Disavowment Allegation.	
	61. (viii) prior to the filing of his Complaint,	
	Geraci did not send a single written	
	communication stating that Cotton had no	
	equitable interest in the CUP application.	
	Lodged Exhibit No. 15 pg 14 lines 2-4	
	62. RFA Response No. 22 contradicts	
	Geraci's prior judicial and evidentiary	
	admissions, including his verified First	

1 Discovery Responses provided in September
2 of 2017 prior to being confronted with
3 Riverisland. Lodged Exhibit No. 15 pg. 12
4 lines 16-21.

5 63. On January 9, 2019, counsel for Cotton
6 emailed counsel for Geraci seeking to
7 reconcile Geraci's RFA Response No. 22 with
8 his First Discovery Answers. Lodged Exhibit
9 16.

10 64. Counsel for Geraci, Mr. Scott Toothacre,
11 did not substantively address factual
12 contradictions therein and conclusory repeats,
13 *inter alia*, that "no pleading or discovery
14 request required the disclosure of the
15 'disavowment allegation.'" Lodged Exhibit
16 No. 17

17 65. On June 4, 2019, Michael R. Weinstein
18 send an email stating: First, our view is that
19 the statute of frauds bars the [Confirmation
20 Email] because it is parol evidence that is
21 being offered to *explicitly contradict* the terms
22 of the [November Document]. Mr. Geraci
23 does not contend that his call to Mr. Cotton on
24 November 3, 2016, resulted in an oral
25 agreement between them that Mr. Cotton was
26 not entitled to a 10% equity position. Rather,
27 Mr. Geraci's position is that there was *never*
28 an oral agreement between them that Mr.
Cotton would receive a 10% equity position.
Even assuming for the sake of argument that
the [Confirmation 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 Document] and not barred by
the statute of frauds. Lodged Exhibit No. 9

29 DATED: March 8, 2019

THE LAW OFFICE OF JACOB AUSTIN

By Jacob P. Austin
JACOB P. AUSTIN

Attorney for Defendant/Cross-Complainant
DARRYL COTTON