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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

MEMORANDUM OF POINTS AND AUTHORITIES 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**

[IMAGED FILE]

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

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Defendant/Cross-complainant Darryl Cotton ("Cotton"), pursuant to Code of Civ. Pro. ("CCP") § 437c, hereby files this *Motion for Summary Judgment or, Alternatively, Summary Adjudication* (the "Motion").

I. SUMMARY OF THE CASE

The origin of this action arises from a three-sentence document executed by Plaintiff Larry Geraci ("Geraci") and Cotton in November of 2016 (the "November Document"). Cotton is the owner-of-record of the real property ("Property") that is the subject of this action. The Property qualifies for a conditional use permit ("CUP") with the City of San Diego ("City") that would allow the operation of a Marijuana Outlet; a for-profit marijuana retail store (the "Business"). If the CUP were approved at the Property, the Property would be worth no less than $5,000,000. The value of the Property and the potential high profits from the Business are the drivers behind this litigation.

Both parties agree that on November 2, 2016 they came to an agreement for the sale of the Property from Cotton to Geraci and executed the November Document. The parties, however, dispute the nature of the November Document. Geraci filed his Complaint alleging the November Document is a fully integrated *sales agreement* for the Property for a total purchase price of $800,000. Cotton's Cross-complaint alleges the parties reached an oral joint venture agreement pursuant to which Geraci would finance the acquisition of the CUP and Cotton would provide the Property (the "JVA"); the November Document was meant to memorialize Cotton's receipt of $10,000 in cash towards a non-refundable deposit for Cotton to keep in the event the CUP was not approved by the City at the Property. In other words, the November Document is a *receipt*.

Dispositively fatal to Geraci's Complaint is his own judicial admission that he sent an email, within hours of the execution of the November Document, specifically confirming the November Document is not a fully integrated agreement and that he would provide Cotton a 10% equity position in the Business (the "Confirmation Email"). Notwithstanding the Confirmation Email (and other parol evidence establishing the November Document is a receipt), Geraci filed his Complaint alleging the complete opposite.

Geraci's sole litigation strategy, which he employed for over a year after filing suit in March of 2017, was to argue the Confirmation Email as proof of Geraci's fraud was barred by the parol evidence

rule (the "PER"). SOF ¶ 65 ("the statute of frauds bars the [Confirmation Email] because it is parol evidence that is being offered to ***explicitly contradict*** the terms of the [November Document]"). Geraci's legal strategy in filing his Complaint and relying on the PER to act as shield to bar the proof of his fraud – the Confirmation Email - was premised on the 1935 California Supreme Court case of Bank of America etc. Assn. v. Pendergrass, 4 Cal.2d 258 (Pendergrass). In Pendergrass, the California Supreme Court "adopted a limitation on the fraud exception [to the PER]: evidence offered to prove fraud 'must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and ***not a promise directly at variance with the promise of the writing***.' [Pendergrass at 263]." Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn. (Riverisland) (2013) 55 Cal.4th 1169, 1172 (emphasis added).

In April of 2018, Cotton – who was representing himself *pro se* – engaged counsel on a limited basis to file a motion to expunge the lis pendens on his Property recorded by Geraci (the "Lis Pendens Motion"). The Lis Pendens Motion cited for the first time in this action the seminal case of Riverisland, in which the California Supreme Court unanimously overruled 75+ years of California case law premised on the Pendergrass ruling. As held in Riverisland: "we conclude that Pendergrass was an aberration… Pendergrass failed to account for the fundamental principle that fraud undermines the essential validity of the parties' agreement. When fraud is proven, it cannot be maintained that the parties freely entered into an agreement reflecting a meeting of the minds… For these reasons, we overrule [Pendergrass], and its progeny, and reaffirm the venerable maxim stated in Ferguson v. Koch, [204 Cal. 342, 447]: '***[I]t was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud.***'" Riverisland at 1182 (emphasis added).

In other words, Geraci's argument - "the statute of frauds bars the [Confirmation Email] because it is parol evidence that is being offered to ***explicitly contradict*** the terms of the [November Document]" – completely ceased being a valid legal argument four years prior to the filing of his Complaint.

In his opposition to the Lis Pendens Motion citing Riverisland, over a year after filing his Complaint, Geraci alleged for the ***first*** time that on November 3, 2016 (the day after the parties executed the November Document): (i) he 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 Confirmation Email (the "Disavowment Allegation"). The Disavowment Allegation directly contradicts over a year of Geraci's prior judicial and evidentiary admissions and verified discovery responses.

In the aftermath of being confronted with Riverisland and months of discovery disputes between the parties regarding the Disavowment Allegation, the current litigation posture of this case is summarized by Michael Weinstein, counsel for Geraci, as follows:

> First, our view is that the statute of frauds bars the [Confirmation Email] because it is parol evidence that is being offered to ***explicitly contradict*** the terms of the [November Document]. Mr. Geraci does not contend that his call to Mr. Cotton on November 3, 2016, resulted in an oral agreement between them that Mr. Cotton was not entitled to a 10% equity position. Rather, Mr. Geraci's position is that there was ***never*** an oral agreement between them that Mr. Cotton would receive a 10% equity position. Even assuming for the sake of argument that the [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.[1]

Thus, as argued by Weinstein, the PER bars Geraci's own writing – the Confirmation Email - as proof of Geraci's promissory fraud. However, if the PER does not bar Geraci's own writing as evidence of his promissory fraud, then Geraci will prove his own writing is not actually evidence of promissory fraud with ***only*** his own self-serving declaration as evidence supporting the Disavowment Allegation.[2] To put it in other words, if Geraci cannot use the PER to bar the *written* proof of his fraud, he will use only his new *oral* testimony to disprove his fraud.

This Motion moves for summary adjudication on two issues and the four causes of action in Geraci's Complaint. The first issue is a finding that the November Document is not a fully integrated agreement for the sale of the Property. The second, that Geraci's newly raised affirmative defense – the

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[1] Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment or, Alternatively, Summary Adjudication by Defendant/Cross-complainant Darryl Cotton ("SOF") ¶65.

[2] Per Geraci's verified discovery responses, there are no witnesses, documents, records, third-party testimony or evidence of any kind to support the Disavowment Allegation other than his cell phone records reflecting that he called Cotton on November 3, 2016. SOF 54. However, the parties' cell phone records reflect that they spoke numerous times the day before, the day of, and the day after the purported Disavowment Allegation. SOF 10. It is only Geraci's self-serving testimony, first alleged in April of 2018 in opposition to the Lis Pendens Motion citing Riverisland, that provides any evidence to support the purported Disavowment Allegation.

Disavowment Allegation – is barred as a matter of law (for reasons set forth below). Lastly, as to Geraci's Complaint, it fails as each of his four claims have an element requiring Geraci prove the November Document is a valid fully integrated agreement for the sale of the Property.

II. MATERIAL FACTUAL AND PROCEDURAL BACKGROUND (SOLELY PER GERACI'S JUDICIAL AND EVIDENTIARY ADMISSIONS)

A. Negotiations for the Property and the November Document

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)). SOF ¶1. 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. SOF ¶2. Geraci and Cotton negotiated the terms of the potential sale of the Property. SOF ¶3. 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. SOF ¶ 4.

On November 2, 2016, the parties met at Geraci's office and reached an agreement for the sale of the Property. 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. SOF ¶ 5. 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 executed the November Document to memorialize his receipt of $10,000 in cash, at Geraci's request. SOF ¶5. At 3:11 PM, later the same day the JVA was reached, Geraci emailed Cotton a copy of the November Document. SOF. ¶6.

At 6:55 PM, the same day, Cotton replied to Geraci 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 final agreement 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. SOF ¶7, SOF 8. (emphasis added).

At 9:13 PM later that same evening, Geraci replied: "***No no problem at all***" (i.e., the Confirmation Email). SOF ¶9 (emphasis added). Thus, on the day the parties executed the November Document, Cotton believed Geraci's written confirmation that a *final agreement* would provide for his bargained-for 10% equity position in the Business.

B. November 2016 – March 2017: Written Communications Between the Parties

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. [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] SOF ¶10.

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 Gina Austin, Geraci's attorney. SOF ¶11. 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. SOF ¶12. Material communications ***by*** Geraci reflecting the three main terms of the JVA were reached are set forth below:

1. **Term: 10% Equity Position.** 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. SOF ¶13. 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?

Cotton texted Geraci later that day: "Did you get my email?" SOF ¶14.

Geraci replied one minute later: "Yes I did I'm having her rewrite it now[.] As soon as I get it I will forward it to you[.]" SOF ¶15 (the "Partnership Confirmation Text").

2. **Term: $10,000 Per Month.** On March 7, 2017, Geraci emailed Cotton a revised Side Agreement. In that email, Geraci wrote:

> Hi Darryl, I have not reviewed this yet but wanted you to look at it and give me your thoughts. Talking to Matt, the 10k a month might be difficult to hit until the sixth month... can we do 5k, and on the seventh month start 10k?

SOF 16 (the "$10,000 Request Email"). In other words, on March 7, 2017, Geraci is asking a concession from Cotton of an *already established and existing* contractual obligation to pay Cotton $10,000 a month – consistent with Cotton's allegations of the terms reached in the JVA. Despite being confronted with the $10,000 Request Email as evidence numerous times throughout this action, Geraci has never explained why he was obligated to pay Cotton $10,000 a month and why he was asking for a reduction from that obligation if it was not part of the JVA.

The revised Side Agreement provided for Cotton to receive "10% net profits" instead of the "10% equity position," per the JVA. SOF ¶17.

On March 16, 2017, Cotton emailed Geraci the following:

> We started these negotiations 4 months ago and the drafts and our communications have not reflected what agreed upon and are still far from reflecting our original agreement.... please confirm that revised final drafts that incorporate the [JVA] terms will be provided by Wednesday at 12:00 PM, I promise to review and provide comments that same day so we can execute the same or next day.

SOF ¶18.

3. **Term: $50,000 Non-Refundable Deposit.** On March 17, 2017, Geraci requested an in-person meeting with Cotton via text: "can we meet in person[?]" SOF ¶19. 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 and will have final drafts... by Wednesday at 12:00 PM.

SOF ¶20. 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. SOF ¶21. On March 21, 2017, Cotton terminated the agreement with Geraci for breach of contract. SOF ¶22. Materially, as evidenced by the undisputed Text and Email communications between the parties, Geraci never refuted, disputed or challenged Cotton's assertion that Geraci owed him a balance of $40,000 towards the non-refundable deposit. SOF ¶21.

C. Geraci's Complaint

On March 22, 2017, Weinstein emailed Cotton a copy of Geraci's Complaint. SOF ¶23.]. 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 for the sale of the Property: (i) breach of contract, (ii) breach of the covenant of good faith and fair dealing, (iii) specific performance and (iv) declaratory relief. SOF 24. Materially, as alleged in Geraci's Complaint:

(i) "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

(ii) "[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. SOF ¶25.

D. Cotton's Cross-Complaint and Petition for Writ of Mandate

On August 25, 2017, Cotton filed a Cross-complaint against Berry and Geraci including causes of action for breach of contract, intentional misrepresentation, negligent misrepresentation, and false promise with respect to the JVA and the CUP application. SOF ¶26. In his Cross-complaint, Cotton argues the existence of the JVA and attached the Confirmation Email as evidence of his bargained-for 10% equity position. SOF ¶26. On November 20, 2107, Geraci filed his Answer to Cotton's cross-complaint, he did not allege he sent the Confirmation Email by mistake or the Disavowment Allegation. SOF ¶27.

On October 6, 2017, Cotton filed a Verified Petition for Alternative Writ of Mandate against the City of San Diego (the "Petition"), naming Geraci and Berry as real-parties-in-interest, and demanding the City remove Berry from the CUP application on the Property. Cotton's Petition alleged the oral JVA and had the Confirmation Email attached as an exhibit as evidence of his equity position in the Business. SOF ¶28. On November 30, 2017, Geraci filed a Verified Answer to Cotton's Petition. SOF ¶29. 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. SOF ¶30.

E. Geraci's Material and Contradicting Judicial and Evidentiary Admissions

1. First Form Discovery Answers. On September 25, 2017, Geraci provided verified answers to Form Interrogatories propounded by Cotton (the "First Form Discovery Answers"). SOF ¶31. Geraci's response to Form Interrogatory 50.1(a) identifies the November Document as the sole agreement alleged in the pleadings. SOF ¶32. Furthermore, he answers there is no part of the November Document not in writing [50.1(b)] (SOF ¶33), that there are no documents evidencing any part of the November Document not in writing [50.1(c)] (SOF ¶34), that there are no documents modifying any part of the November Document [50.1(d) (SOF ¶35), that there are no modifications not in writing to the November Document [50.1(e)] (SOF ¶36), and that there are no documents evidencing any modification to the November Document not in writing [50.1(f)] (SOF ¶37). Materially, Geraci does not allege that he sent the Confirmation Email by mistake or the Disavowment Allegation.

In response to Form Interrogatory 50.2, requiring descriptions of any breaches to the November Document, 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. [50.2] (SOF ¶38). 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 Confirmation Email was allegedly sent by mistake. SOF ¶38.

In Form Interrogatories 50.3 – 50.5 Geraci answers that no agreements alleged in the pleadings: had their performance excused [50.3] (SOF ¶38); (ii) terminated by mutual agreement, release, accord and satisfaction, or novation [50.4] (SOF ¶39); or (iii) unenforceable (SOF ¶40).

Weinstein alleges that these interrogatories did not require the disclosure of the Disavowment Allegation. SOF ¶41.

2. Geraci's Demurrer and Answer. On September 28, 2017, Geraci filed a demurrer to Cotton's operative Cross-complaint (the "Demurrer"). SOF ¶42. On October 23, 2017, Cotton, through his former-counsel, filed an opposition arguing, *inter alia*, the Confirmation Email is evidence of the

JVA and Cotton's bargained-for 10% equity position in the Business. SOF ¶44.[3] On October 27, 2017, Geraci filed his Reply to his Demurrer. SOF ¶ 44. 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 written agreement (hereafter [the "November Document"]) and certain November emails (hereafter "November Emails") which were incorporated into that document and together evidence the basic terms of the agreement. Cotton's argument fails for a number of reasons: 1) the emails were not integrated into the [November Document]; 2) even if the November Emails were integrated into the [November Document], they are not signed by Geraci, and therefore are barred by the statute 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.

SOF ¶45. Notably, despite even going so far as to argue the emails are not valid because they are not signed by Geraci, he does not allege that he sent the Confirmation Email by mistake or the Disavowment Allegation. SOF ¶45.

On November 20, 2017, Geraci filed his answer to Cotton's Cross-complaint (the "Answer"). SOF ¶46. Geraci's Answer set forth five affirmative defenses, none of which are fraud or encompass the Disavowment Allegation. Geraci's fifth affirmative defense is set forth below:

> [Geraci] currently has insufficient information upon which to form a belief as to the existence of additional and as yet unstated affirmative defenses. [Geraci] reserves the right to assert additional affirmative defenses in the event discovery discloses the existence of said affirmative defenses.

SOF ¶47. The Answer does not allege Geraci sent the Confirmation Email by mistake or the Disavowment Allegation. Notably, Geraci specifically reserves the right to assert additional affirmative defenses ***in the event*** discovery discloses the existence of an additional affirmative defense. In his words, on November 20, 2017, Geraci was not aware of any facts that would support an affirmative defense such as the Disavowment Allegation which purportedly took place a year before on November 3, 2016. Id.

3. Geraci's Verified Answer to Petition. On November 30, 2017, Geraci executed his Verified Answer to Cotton's Petition for Writ of Mandate. SOF ¶48. In his Verified Answer, Geraci

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[3] Cotton notes he fired his former counsel when they inexplicably failed to raise the Confirmation Email as evidence in opposition at an oral hearing before this Court at which Weinstein was arguing the November Document was a contract.

"admits that Exhibit 3 to the Verified Petition is a true and correct copy of certain emails exchanged between them [that include the Confirmation Email]. [Geraci] further alleges that [Cotton] intended the [November Document] to be a binding agreement between the parties." SOF ¶49. In other words, in a Verified Answer, Geraci judicially admits he sent the Confirmation Email, alleges the parties intended the November Document to be a binding agreement, but does not allege that he sent the Confirmation Email by mistake or the Disavowment Allegation. This is inherently illogical, unless Geraci was not aware that post-Riverisland, parol evidence of promissory fraud directly at odds with a writing would not be barred.

4. Geraci's February 2018 Declaration. 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. SOF ¶50. 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. SOF ¶50. ("After we signed the [November Document] for my purchase of the Property, Mr. Cotton immediately began attempts to renegotiate our deal for the purchase of the Property.").

Summarized, in February of 2018, prior to being confronted by Riverisland, Geraci makes disparaging factual allegations against Cotton that took place ***immediately before***, ***during***, and ***after*** the time frame of the purported Disavowment Allegation on November 3, 2016. However, Geraci does ***not*** allege he sent the Confirmation Email by mistake or the Disavowment Allegation.

5. Geraci's April 9, 2018 Declaration. On April 9, 2018, Geraci executed his Declaration of Larry Geraci in Opposition to Defendant Darryl Cotton's Motion to Expunge Lis Pendens (i.e., the Lis Pendens Motion). SOF ¶51. In the Lis Pendens Motion, Cotton cited to Riverisland and the principles articulated therein for the first time in this action. In his April 2018 declaration, Geraci raised for the first time the Disavowment Allegation: Geraci's story that he sent the Confirmation Email by *mistake* because he only meant to respond to the first sentence of Cotton's email thanking him for meeting that day. SOF ¶ 52. As fully described in his sworn-under-penalty-of-perjury declaration:

> The next day I read the entire email and I telephoned Mr. Cotton.... During that telephone call I told Mr. Cotton that a 10% equity position in the dispensary was not part of our agreement... Mr. Cotton's response was to say something to the effect of "well, you don't get what you don't

ask for." 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. SOF 53.

Summarized, Geraci's April 2018 Declaration alleges that Cotton's request for written confirmation of an established obligation by Geraci to provide him a 10% equity position in the Business, to which Geraci replied to with the Confirmation Email, was actually an attempt by Cotton to renegotiate the deal that they had reached hours earlier that day. Notably, Geraci judicially admits that at the time of this alleged conversation with Cotton, he was a licensed real estate agent for over 20 years and he was aware of the statute of frauds. But he never sought to record, memorialize or get in writing anything from Cotton that reflects that Cotton disavowed the interest in real property that Geraci promised him in writing, as required by the statute frauds.

7. Material Judicial Admissions. On November 8, 2018, Geraci provided his Responses to Requests for Admissions propounded by Cotton. SOF ¶54. The judicial admissions material to this Motion by Geraci are: (i) he was a licensed real estate agent for over twenty years at the time of the execution of the November Document (SOF ¶55); (ii) he was aware of the statute of frauds at the time of the execution of the November Document (SOF ¶56); (iii) he has never used an agreement of five sentences or less to formalize and finalize an arms-length transaction for the purchase and sale of real property (SOF ¶ 57); (v) the $10,000 provided to Cotton on November 2, 2016 is a non-refundable deposit (SOF ¶58); (vi) as part of the agreement reached with Cotton on November 2, 2016, Geraci was responsible for financing and submitting a CUP application on the Property (SOF ¶59); (vii) prior to his April 9, 2018 declaration, Geraci has no emails or texts referencing or describing the Disavowment Allegation (SOF ¶60)[4]; (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. SOF ¶61.

6. Geraci's Response to Request for Admission No. 22. Request for Admission No. 22 and Geraci's response thereto is fully set forth below:

REQUEST FOR ADMISSION NO. 22:

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[4] Geraci's complete answer is as follows: "Admitted that there are no non-privileged emails or texts prior to April 9, 2018, referencing or describing the DISAVOWMENT ALLEGATION." SOF. Geraci's complete answer implies that there may be emails or texts with his attorneys that substantiate the Disavowment Allegation. However, the credibility of any emails provided by his attorneys should be highly suspect for the reasons set forth herein.

Admit that prior to YOUR April 9, 2018 declaration, no mention of the DISAVOWMENT ALLEGATION is made in any pleading, discovery request or any other DOCUMENTS YOU served and/or filed in this action.

RESPONSE TO REQUEST FOR ADMISSION NO. 22:

Objection: The request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence. (CCP § 2017.010.)

Notwithstanding and without waiving this objection, Responding Party responds as follows: Admitted that the so called "DISAVOWMENT ALLEGATION" was not made in any pleading or discovery response as it's disclosure was not called for prior to the time it was disclosed, in that a) no pleading filed with the Court required that disclosure as part of any affirmative factual showing; b) no discovery request had been served by Mr. Cotton requiring the disclosure of that information; and c) no deposition had been taken by Mr. Cotton of Mr. Geraci requiring the disclosure of that information.

SOF ¶ 15. Ex. 8 at 12:9-21 ("RFA Response No. 22").

RFA Response No. 22 contradicts Geraci's prior judicial and evidentiary admissions, including his verified First Discovery Responses provided in September of 2017 prior to being confronted with Riverisland. SOF ¶ 62. On January 9, 2019, counsel for Cotton emailed counsel for Geraci seeking to reconcile Geraci's RFA Response No. 22 with his First Discovery Answers. SOF ¶63. Counsel for Geraci, Mr. Scott Toothacre, did not substantively address the factual contradictions therein and conclusory repeated, *inter alia*, that "no pleading or discovery request required the disclosure of the 'disavowment allegation.'" SOF ¶64.

III. LEGAL STANDARD

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850. Summary judgment must be granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CCP § 437c(c).

Summary adjudication, alternatively, is granted if one or more causes of action have no merit. CCP § 437c(f)(1). A cause of action has "no merit" if any element of the cause of action cannot be established, or there is a complete defense to the cause of action. Id.

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IV. ARGUMENT

To prevail on this Motion, Cotton only needs to prove the November Document is not a fully integrated agreement because each of Geraci's four causes of action require as an element that Geraci prove such an integrated agreement exist.

Cotton's parol evidence, most notably the Confirmation Email, clearly establishes the November Document is not a fully integrated agreement. As noted above, Geraci argues "the statute of frauds bars the [Confirmation Email] because it is parol evidence that is being offered to explicitly contradict the terms of the [November Document]." Additionally, if the PER does not bar Cotton's parol evidence, then Geraci's has an affirmative defense – the Disavowment Allegation. For the reasons set forth below, both of Geraci's arguments fail as a matter of law.

A. The November Document was not intended to be a fully integrated agreement.

"The [PER] is codified in Code of Civil Procedure section 1856 and Civil Code section 1625. It provides that when parties enter an integrated written agreement, extrinsic evidence may not be relied upon to alter or add to the terms of the writing. An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement." Riverisland at 1174 (citations and quotations omitted).

"Whether a contract is integrated is a question of law when the evidence of integration is not in dispute." Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc. (Founding Members) (2003) 109 Cal.App.4th 944, 955. "An integration may be partial rather than complete: The parties may intend that a writing finally and completely express only certain terms of their agreement rather than the agreement in its entirety. If the agreement is partially integrated, the parol evidence rule applies to the integrated part." Id. (citations omitted). Here, the November Document is a receipt that is a partially integrated document - it reflects some of the terms reached in the JVA (e.g., $800,000 purchase price). The Confirmation Email provides evidence of additional integrated terms and reflects that a forthcoming "final agreement" would reduce the parties' agreement to writing.

"In considering whether a writing is integrated, the court must consider [1] the writing itself, including whether the written agreement appears to be complete on its face; [2] whether the agreement contains an integration clause; [3] whether the alleged parol understanding on the subject matter at issue

might naturally be made as a separate agreement; and [4] the circumstances at the time of the writing." Founding Members at 953-954.

1. First, the November Document is three sentences long and has spelling and grammar mistakes. Geraci judicially admits that he had been a real estate agent for over 20 years at the time of the execution of the November Document and has never closed an arms-length real estate transaction with a document of five sentences or less. Geraci also judicially admits that as part of the agreement reached and reduced to writing in the November Document, that: (i) the $10,000 was a non-refundable deposit; and (ii) that he was obligated to finance the application and submission of the CUP application at the Property.

The November Document however does not contain those terms providing for the $10,000 to be a *non-refundable* deposit or Geraci's obligation to financing and submitting the CUP application on the Property which he alleges has cost in excess of $300,000. SOF ¶24. These ***judicial admissions*** by Geraci alone directly contradict his Complaint alleging that: "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." SOF ¶25. A non-refundable deposit and obligations requiring capital in the hundreds of thousands of dollars are material terms and would have been included in the November Document if it were intended to be a fully integrated agreement.

2. Second, the November Document does not contain an integration clause.

3. Third, the alleged parol agreement – the JVA – would naturally be made as a separate agreement as the November Document was only intended to be an ad-hoc receipt for $10,000 in cash.

4. Fourth, the circumstances as reflected in the communications and actions between the parties at that time clearly and plainly establish the truth: the parties reached the JVA, which was to be reduced to writing. The most notable and undisputed facts supporting this position are:

a. The Confirmation Email. Geraci judicially admits he sent the Confirmation Email. Cotton, in his request for written assurance of performance, specifically noted that the 10% equity position was "***a factored element in [his] decision to sell the [P]roperty***" earlier that day. SOF ¶ 8. Cotton's specific request was for Geraci to "simply acknowledge that here in a reply." Geraci did so by replying, "No no problem at all." Cotton's and Geraci's intention is therefore easily and clearly

determined from their writings alone – the parties reached an agreement for the sale of the Property and one of the integrated terms reached as part of that agreement was for Cotton to receive a 10% equity position in the Business. "The crucial issue in determining whether there has been an integration is whether the parties intended their writing to serve as the exclusive embodiment of their agreement." Masterson v. Sine (1968) 68 Cal.2d 222, 225. The written communications from the parties that day clearly and plainly establish a joint venture was formed and the November Document was not intended to be a fully integrated agreement for the sale of the Property.

b. Geraci's Course of Conduct and Communications After the November Document was Executed. "The law imputes to a person the intention corresponding to the reasonable meaning of his language, acts, and conduct." H. S. Crocker Co. v. McFaddin (1957) 148 Cal.App.2d 639, 643 (citations omitted.) Here, over the course of months *after* 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. SOF ¶12

c. The Partnership Text. In response to Cotton's March Request Email (concerned that the first draft he received from Geraci stated they were not partners and did not provide for his equity position), Geraci sent the Partnership Confirmation Text – stating that he would have his attorney revise the agreement. SOF 15 ("I'm having her rewrite it now[.] As soon as I get it I will forward to you[.]"). Geraci later sent a revised agreement stating they were partners (albeit providing for Cotton to receive 10% of the net profits instead of 10% of the equity of the Business).

d. The $10,000 Email. On March 7, 2017, Geraci sent Cotton a draft of an agreement that provided for Cotton to receive 10% of the net profits of the Business. In the cover email Geraci asked Cotton if he would agree to a reduction to $5,000 a month from an ***established*** obligation to pay Cotton $10,000 a month for the first six months of the operations of the Business. SOF ¶16 ("the 10k a month might be difficult to hit until the sixth month. . . can we do 5k, and on the seventh month start 10k?"). Relatedly, Geraci's discovery answers state that other than the November Document, that Cotton and he have never entered into any other agreement. SOF ¶32. However, Geraci has never addressed or explained why he sent the $10,000 Email requesting a reduction from $10,000 to $5,000 if the November

Document is a fully integrated agreement for the sale of the Property and Cotton and he have no other contractual relationship. The truth is self-evident, in March of 2017, Geraci was attempting to deprive Cotton of his equity position in the Business, and it was not until Cotton demanded that Geraci reduce the JVA to writing that there is any evidence of discourse between them.

e. Geraci's Failure to Deny the Existence of the JVA. If Geraci intended the November Document to be the fully integrated agreement on November 2, 2016, then he should have challenged or repudiated the Text Communications and Email Communications from Cotton over the subsequent four months reflecting Cotton believed he was a joint-venturer with Geraci in the development of the Business at the Property. See Keller v. Key System Transit Lines (1954) 129 Cal.App.2d 593, 596 ("The basis of the rule on admissions made in response to accusations is the fact that human experience has shown that generally it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing."). Geraci admits in his Response to a Request for Judicial Admission that he never sent Cotton any written communications stating that Cotton did **not** have an equitable interest in the CUP application. SOF ¶61.

In conclusion, the "crucial issue in determining whether there has been an integration is whether the parties ***intended*** their writing to serve as the exclusive embodiment of their agreement." Masterson v. Sine (1968) 68 Cal.2d 222, 225 (emphasis added). Here, as the evidence above indisputably proves, the parties did not intend for the November Document to be an integrated agreement.

B. Riverisland Overruled Pendergrass to Prevent the Manipulation of the Judicial System to Effectuate a Fraud As Geraci is Attempting to do in this Action

As noted above, Riverisland "conclude[d] that Pendergrass was an aberration." Riverisland at 1182. In reaching its decision, the Riverisland court cited various cases, including from other jurisdictions, describing the fraud that was allowed under Pendergrass:

"'Oral promises made without the promisor's intention that they will be performed could be an effective means of deception if evidence of those fraudulent promises were never admissible merely because they were at variance with a subsequent written agreement. [Citation.]'" Riverisland at 1177.

"'The best reason for allowing fraud and similar undermining factors to be proven extrinsically is the obvious one: if there was fraud, or a mistake or some form of illegality, it is unlikely that it was

bargained over or will be recited in the document. To bar extrinsic evidence would be to make the parol evidence rule a shield to protect misconduct or mistake. [Citation.]'" Id.

The language quoted could not be more apt: a review of the arguments made by opposing counsel throughout this litigation, prior to being confronted with Riverisland, uniformly reflect that they never ONCE substantively addressed the fact that the Confirmation Email is a clear, plain promise by Geraci to provide Cotton the consideration he had promised him for his Property. Counsel for Geraci referenced it as "parol evidence," elevating form over substance to help his client effectuate a fraud by attempting to use the PER as a shield to prevent the proof of his client's fraud.

Again, not until confronted with Riverisland, does Geraci allege the Disavowment Allegation. A double-down on his fraud and reflective of his complete lack of integrity, ethics and disdain of the judiciary. And fully joined in by his counsel, Weinstein and Toothacre – they could have argued that they were not aware of Riverisland (the cases they cite in support of their parol evidence rule arguments pre-date Riverisland), but, they did not. Instead, as detailed above, they submitted verified discovery responses contradicting their previous verified discovery responses and blatantly alleging that the Disavowment Allegation was not required to have been produced via discovery prior to April of 2019.

Ultimately, the evidence in this case is undisputed, clear and overwhelming – the November Document is a receipt. This case has only continued to this stage due to the complete lack of ethics by counsel for Geraci who have no qualms helping their client defraud Cotton via the legal system. And, as reflected in their most recent verified discovery responses, making false statements to support their client's purported Disavowment Allegation in an attempt to mitigate their liability now that their reliance on Pendergrass is no longer a legal valid strategy for barring proof of fraud. Cotton respectfully requests that this Court effectuate the principles articulated in Riverisland and not allow the law to be blatantly manipulated to perpetuate an injustice.

C. The Disavowment Allegation is Barred as A Matter of Law.

Geraci's Disavowment Allegation accuses Cotton of fraud. As alleged by Geraci, Cotton orally agreed the November Document is a fully integrated agreement and he would not enforce the 10% equity position promised to him by Geraci in writing in the Confirmation Email. However, Cotton has brought

forth a suit against Geraci alleging that a sales agreement is a receipt and seeking to fraudulently deprive Geraci of the benefit of the bargain they allegedly reached.

The Disavowment Allegation fails, setting aside the complete lack of any factual support and evidentiary and judicial admissions to the contrary, because Geraci did not plead fraud. A complaint or defense alleging fraud is required to be pled with specificity. See Small v. Fritz Cos., Inc. (2003) 30 C4th 167, 184. The claim must also "provide the defendants with the fullest possible details of the charge so they are able to prepare a defense to this serious attack. To withstand demurrer, the *facts* constituting every element of the fraud must be alleged with particularity, and the claim cannot be salvaged by references as to the general policy favoring liberal construction of pleadings" Goldrich v. Natural Y Surgical Specialties (1994) 25 CA4th 772, 782–783 (citation omitted) (emphasis in original). The same rules apply to the pleading of a fraud affirmative defense to a breach of contract claim, or a claim for rescission based on fraud. Thus, the charging party must set out "(1) a representation, (2) that is false, (3) made with knowledge of its falsity, and (4) with an intent to deceive, coupled with (5) actual detrimental reliance and (6) resulting damage." Lim v. The.TV Corp. Internat. (2002) 99 CA4th 684, 694.

Because Geraci failed to plead the Disavowment Allegation as a fraud claim or as an affirmative defense, or even allege the facts that would support those legal theories, he has waived them as a matter of law. California Academy of Sciences v. County of Fresno (1987) 192 Cal.App.3d 1436, 1442 ("A party who fails to plead affirmative defenses waives them.")

D. Geraci's Complaint Fails Because the Four Causes of Action each require Geraci to prove the November Document is fully integrated agreement for the sale of the Property.

Geraci's Complaint fails because each of his four causes of action are predicated on the allegation that the November Document is a fully integrated agreement:

1. The elements of a cause of action for breach of contract are (1) ***the existence of a contract***, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach, and (4) resulting damages to the plaintiff. Oasis West Realty, LLC v. Goldman, 51 Cal. 4th 811, 821 (2011) (emphasis added).

2. "The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is ***the existence of a contractual relationship between the parties***, since the covenant is an implied term in the contract." Smith v. City and County of San Francisco (1990) 225 Cal.App.3d 38, 49 (emphasis added).

3. "The availability of the remedy of specific performance is premised upon well-established requisites. These requisites include: A showing by plaintiff of (1) the inadequacy of his legal remedy; (2) ***an underlying contract*** that is both reasonable and supported by adequate consideration; (3) the existence of a mutuality of remedies; (4) contractual terms which are sufficiently definite to enable the court to know what it is to enforce; and (5) a substantial similarity of the requested performance to that promised in the contract." Tamarind Litho. Workshop v. Sanders (1983) 143 Cal.App.3d 571, 575 (emphasis added).

4. "A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties under a written instrument..." Wellenkamp v. Bank of America (1978) 21 Cal.3d 943, 947. Because Geraci seeks for the Court to declare the November Document a fully integrated agreement and, thus, fails.

V. CONCLUSION

In light of the foregoing, Cotton respectfully requests the Court dismiss the Complaint in its entirety, enter a final judgment against Geraci on his claims, and award Cotton's his attorneys' fees and costs. Alternatively, summary adjudication on the two issues and four claims raised above. Cotton requests the Court authorize it to file a separate application for fees and costs.

DATED: March 8, 2019 THE LAW OFFICE OF JACOB AUSTIN

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