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128 pgs

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EXHIBIT 1

**ELECTRONICALLY FILED**  
Superior Court of California,  
County of San Diego

**11/30/2017** at 03:55:00 PM  
Clerk of the Superior Court  
By Rhonda Babers, Deputy Clerk

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Attorneys for Real Party in Interest  
LARRY GERACI and REBECCA BERRY

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

DARRYL COTTON, an individual,  
Petitioner/Plaintiff,

v.

CITY OF SAN DIEGO, a public entity; and  
DOES 1 through 25,

Respondents/Defendants.

REBECCA BERRY, an individual; LARRY  
GERACI, an individual, and ROES 1 through  
25,

Real Parties In Interest.

Case No. 37-2017-00037675-CU-WM-CTL

Judge: Hon. Joel Wohlfeil  
Dept: C-73

**REAL PARTY IN INTEREST LARRY  
GERACI'S VERIFIED ANSWER TO  
PETITION FOR WRIT OF MANDATE**

**[IMAGED FILE]**

Filed: October 6, 2017  
Trial Date: None

Real Party in Interest, LARRY GERACI ("Geraci" or "Real Party in Interest"), answers, paragraph by paragraph, the allegations set forth in the Verified Petition for Alternative Writ of Mandate [Code Civil. Proc., § 1085] filed by Petitioner/Plaintiff, DARRYL COTTON ("Cotton"), as follows:



1           1.     Paragraph 1 of the Petition does not make factual allegations but merely states the relief  
2 requested by Cotton. In response to Paragraph 1, Real Party in Interest denies that Cotton is entitled to  
3 the relief requested; in particular, Real Party in Interest denies that the facts and law require the City of  
4 San Diego ("City") to recognize Cotton as the applicant with respect to Conditional Use Permit  
5 Application—Project No. 520606 for a Conditional Use Permit ("CUP") to operate a Medical  
6 Marijuana Consumer Cooperative ("MMCC") at 6176 Federal Boulevard San Diego, California 92105  
7 (the "Property").

8           2.     In response to paragraph 2, Real Party in interest denies that the relief sought is proper  
9 because Cotton has no other plain, speedy, or adequate legal remedy. Real Party in Interest also denies  
10 that the relief is necessary because the City's refusal to recognize Cotton as the sole applicant on the  
11 Cotton Application is lacking in evidentiary and legal support. [See "*Western States Petroleum Ass'n*  
12 *v. Superior Court* (1995) 9 Cal.4th 559 – criticizing petition containing "only a conclusory argument"  
13 on inadequacy of remedy.] Moreover, Real Party in Interest alleges that Cotton does have a plain  
14 speedy and adequate legal remedy in that, among other things, the City has advised Cotton that he may  
15 file and pursue his own separate CUP Application.

16           3.     In response to paragraph 3, Real Party in Interest admits the allegation that this Court  
17 has jurisdiction over this petition pursuant to Code of Civil Procedure § 1085.

18           4.     In response to paragraph 4, Real Party in Interest admits the allegation that venue is  
19 proper in this Court.

20           5.     In response to paragraph 5, Real Party in Interest admits the allegation that Cotton is,  
21 and at all times mentioned was, an individual living and doing business in California.

22           6.     In response to paragraph 6, Real Party in Interest admits the allegation that the City is,  
23 and at all times mentioned was, a public entity organized and existing under the laws of California.

24           7.     In response to paragraph 7, Real Party in Interest admits the allegation that Rebecca  
25 Berry is, and at all times mentioned was, an individual living and doing business in the County of San  
26 Diego.

27           8.     In response to paragraph 8, Real Party in Interest admits the allegation that Larry Geraci  
28 is, and at all times mentioned was, an individual living and doing business in the County of San Diego.



1           9.     In response to paragraph 9, Real Party in Interest does not have insufficient information  
2 and belief to answer the allegations therein that Cotton does not know the true names and capacities of  
3 the respondents/defendants named as DOES 1-25 and that Cotton is informed and believes that  
4 DOES 1-25 are in some way responsible for the events described in his petition or impacted by them,  
5 and on that basis denies the allegations.

6           10.    In response to paragraph 10, Real Party in Interest does not have sufficient information  
7 and belief to answer the allegations therein that each respondent/defendant (i.e., the City and DOES 1-  
8 25) was an agent, principal, alter ego, and/or employee of the others and each was at all times acting  
9 within the course and scope of said agency, representation, and/or employment and with the permission  
10 of others, and on that basis the denies the allegations.

11          11.    In response to paragraph 11, Real Party in Interest does not have insufficient information  
12 and belief to answer the allegations therein that Cotton does not know the true names and capacities of  
13 the real Party in interest named as ROES 1-25 and that Cotton is informed and believes that ROES 1-25  
14 are in some way responsible for the events described in his petition or impacted by them, and on that  
15 basis denies the allegations.

16          12.    In response to paragraph 12, Real Party in Interest does not have sufficient information  
17 and belief to answer the allegations therein that each real party in interest (i.e., Geraci, Cotton and  
18 ROES 1-25) was an agent, principal, alter ego, and/or employee of the others and each was at all times  
19 acting within the course and scope of said agency, representation, and/or employment and with the  
20 permission of others, and on that basis the denies the allegations, except as follows: Real Party in  
21 Interest admits that Berry was an agent and employee of Geraci at times mentioned in the petition.

22          13.    In response to paragraph 13, Real Party in Interest denies the allegations therein, except  
23 as follows: Real Party in Interest admits that, in or around mid-2016, Geraci contacted Cotton and  
24 expressed his interest to Cotton in acquiring the Property if further investigation satisfied him that the  
25 Property might meet the requirements for an MMCC site. Real Party in Interest also admits Geraci  
26 believed at that time that a limited number of properties located in San Diego City Council District 4  
27 might potentially satisfy the CUP requirements for a MMCC.

28          14.    In response to paragraph 14, Real Party in Interest denies the allegations therein except



1 as follows: Real Party in Interest admits that Geraci and Cotton negotiated regarding the terms of the  
2 potential sale of the Property. Real Party in Interest alleges that during that time Geraci did discuss  
3 with Cotton a zoning issue that would have to be resolved before a CUP could be approved but Real  
4 Party in Interest denies that Geraci represented to Cotton that a CUP application for the Property could  
5 not actually be submitted until after the zoning issue was resolved.

6 15. In response to paragraph 15, Real Party in Interest denies the allegations therein except  
7 as follows: Real Party in Interest admits that on or around October 31, 2016, Geraci asked Cotton to  
8 execute an Ownership Disclosure Statement, which is a required component of all CUP applications;  
9 and Real Party in Interest admits that Geraci told Cotton that he needed the signed document so that  
10 Geraci or his agent could proceed with the submission of a CUP application. Real Party in Interest  
11 alleges that during that time Geraci did discuss with Cotton a zoning issue that would have to be  
12 resolved before a CUP could be approved but Real Party Real Party in Interest denies that Geraci  
13 repeatedly maintained to Cotton that the zoning issue needed to be resolved before a CUP application  
14 could be submitted.

15 16. In response to paragraph 16, Real Party in Interest denies the allegations therein except  
16 as follows: Real Party in Interest admits that Cotton had never met Berry and had never entered into a  
17 lease or other agreement with her; Real Party in Interest admits that Geraci explained to Cotton that  
18 Berry was Geraci's agent and was working on his behalf and his direction; Real Party in Interest admits  
19 that Cotton executed the Ownership Disclosure Statement that Geraci provided to him; and Real Party  
20 in Interest admits that a true and correct copy of the CUP application, including the Ownership  
21 Disclosure Statement, is attached as Exhibit 1 to the Verified Petition.

22 17. In response to paragraph 17, Real Party in Interest denies the allegations therein except  
23 as follows: Real Party in Interest admits that on November 2, 2016, Geraci and Cotton met at Geraci's  
24 office to a) sign a written agreement setting forth the material terms and conditions of the agreement  
25 they had negotiated regarding the purchase and sale of the Property, and b) so Cotton could receive  
26 payment in cash from Geraci of the \$10,000 that they had agreed Geraci would pay Cotton as earnest  
27 money. Real Party in Interest alleges that in advance of that meeting Cotton insisted on receiving the  
28 agreed amount of earnest money in cash rather than in another form of payment.



1       18.     In response to paragraph 18, Real Party in Interest denies the allegations therein except  
2 as follows: Real Party in Interest admits that at the November 2, 2016, meeting the Party executed a  
3 writing stating the material terms and conditions of their agreement and that a true and correct copy of  
4 the November 2, 2016, written agreement is attached as Exhibit 2 to the Verified Petition; and Real  
5 Party in Interest admits that Exhibit 3 to the Verified Petition is a true and correct copy of certain  
6 emails exchanged between them. Real Party in Interest further alleges that the Party intended the  
7 November 2, 2016, written agreement to be a binding agreement between the parties.

8       19.     In response to paragraph 19, Real Party in Interest denies the allegations therein.

9       20.     In response to paragraph 20, Real Party in Interest denies the allegations therein except  
10 as follows: Real Party in Interest admits that the quoted text messages were exchanged between Cotton  
11 and Geraci; and Real Property in Interest admits that Cotton and Geraci had discussions about the status  
12 of the CUP application and, in particular, the zoning issue that needed to be resolved. Real Party in  
13 Interest alleges that during that time Geraci did discuss with Cotton the zoning issue that would have to  
14 be resolved before a CUP could be approved but Real Party Real Party in Interest denies that Geraci  
15 represented to Cotton that a CUP application could not be submitted until the zoning issue was  
16 resolved.

17       21.     In response to paragraph 21, Real Party in Interest denies the allegations therein, except  
18 as follows: Real Party in Interest admits that on or about February 27, 2017, Geraci provided Cotton  
19 with a new draft real estate purchase agreement; however, Real Party in Interest alleges Geraci did so in  
20 furtherance of an effort to negotiate a new agreement with Cotton because Cotton was making  
21 additional demands for compensation and other consideration beyond what the parties had previously  
22 agreed to and set forth in the signed November 2, 2016, written agreement, and which made Geraci  
23 concerned that Cotton would withhold his cooperation and/or interfere with the pending CUP  
24 application that had been submitted. Real Party in Interest further alleges that the parties never reached  
25 a modified or new agreement regarding the purchase and sale of the Property.

26       22.     In response to paragraph 22, Real Party in Interest denies the allegations therein except  
27 as follows: Real Party in Interest admits that on or about March 2, 2017, Geraci email Cotton a draft of  
28 an agreement that contained terms and conditions to which Geraci was willing to agree; and Real Party



1 in Interest admits that or or about the next day Cotton emailed Geraci back with his comments.

2 23. In response to paragraph 23, Real Party in Interest denies the allegations therein except  
3 as follows: Real Party in Interest admits that on or about March 7, 2017, Geraci emailed Cotton a  
4 revised draft of an agreement that contained terms and conditions to which Geraci was willing to agree;  
5 and Real Party in Interest admits that Cotton responded to Geraci in a March 16, 2017, email that is  
6 quoted in part in paragraph 23.

7 24. In response to paragraph 24, Real Party in Interest denies the allegations therein except  
8 as follows: Real Party in Interest admits that the next day Cotton contacted the City's Development  
9 Project Manager responsible for the CUP application; and Real Party in Interest admits that Cotton sent  
10 Geraci the March 16, 2017, email that is quoted in part in paragraph 23. Real Party denies the  
11 allegation that Cotton first learned of the CUP application on March 16, 2017, during this contact with  
12 the City's Development Project Manager.

13 25. In response to paragraph 25, Real Party in Interest admits the allegations therein, except  
14 as follows: Real Party in Interest alleges Geraci never reached any further agreement with Cotton  
15 concerning the purchase and sale of the Property that would amend, modify or replace their prior  
16 November 2, 2016, written agreement.

17 26. In response to paragraph 26, Real Party in Interest denies the allegations therein, except  
18 as follows: Real Party in Interest admits that Cotton sent a March 21, 2017, email to Geraci stating or  
19 asserting that their agreement was terminated and that Geraci had no interest in the Property. Real  
20 Party in Interest alleges that Cotton had no contractual or other basis to terminate their November 2,  
21 2016, written agreement, concerning the purchase and sale of the Property, and that written agreement  
22 remained in force and effect. Real Party in interest further alleges that Geraci had, continued to have,  
23 and has an interest in the Property pursuant to the November 2, 2016, written agreement.

24 27. In response to paragraph 27, Real Party in Interest denies the allegations therein, except  
25 as follows: Real Party in Interest admits on March 22, 2017, Geraci's attorney (Michael Weinstein)  
26 emailed Cotton a copy of a complaint filed by Geraci.

27 28. In response to paragraph 28, Real Party in Interest admits the allegations therein, except  
28 as follows: Real Party in Interest denies Cotton's assertion in his email that Geraci has no rights to the



1 Property. Real Party in interest alleges that Geraci had at the time and thereafter continued to have and  
2 has an interest in the Property pursuant to the November 2, 2016, written agreement.

3 29. In response to paragraph 29, Real Party in Interest admits the allegations therein.

4 30. In response to paragraph 30, Real Party in Interest admits the allegations therein.

5 30(2). In response to the "second" paragraph 30, Real Party in Interest admits the allegations  
6 therein, subject to the following: The City further stated to Cotton that he can submit his own CUP  
7 application for the Property and that the City will process that application.

8 **FIRST CAUSE OF ACTION**

9 **(Writ of Mandate – Against all respondents/defendants and all real Party in interest)**

10 31. Real Party in Interest incorporates by reference the responses to paragraphs 1 through 30  
11 above as though fully set forth

12 32. In response to paragraph 32, Real Party in Interest admits that the City is subject to  
13 California law and is responsible for administering the CUP process according to the San Diego  
14 Municipal Code. Real Party in Interest denies that the City has a ministerial duty to recognize Cotton  
15 as the sole applicant for the CUP application or to process the CUP application with Cotton as the sole  
16 applicant and financially responsible party.

17 33. In response to paragraph 33, Real Party in Interest admits the allegations therein, except  
18 as follows: Real Party in Interest denies that the City has a ministerial duty under the Municipal Code  
19 and California law to recognize Cotton as the sole applicant for the CUP application or to process the  
20 CUP application with Cotton as the sole applicant and financially responsible party.

21 34. In response to paragraph 34, Real Party in Interest denies the allegations therein. Real  
22 Party in Interest denies that the City has a ministerial duty under the Municipal Code and California  
23 law to recognize Cotton as the sole applicant for the CUP application or to process the CUP application  
24 with Cotton as the sole applicant and financially responsible party.

25 ///

26 ///

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1 **SEVENTH AFFIRMATIVE DEFENSE**

2 **(Right to Apply Other Affirmative Defenses Reserved)**

3 7. Because the Petition only alleges conclusions of fact and law, answering Real Party in  
4 Interest cannot fully anticipate all affirmative defenses that may be applicable to this action.  
5 Accordingly, the right to assert additional affirmative defenses, if and to the extent that such affirmative  
6 defenses are applicable, is hereby reserved.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Real Party in Interest prays for judgment against Petitioner as follows:

- 9 1. That the Petition for Writ of Mandamus be denied;  
10 2. That Petitioner takes nothing by virtue of his Petition herein;  
11 3. That the Court dismiss Petitioner's Petition for Writ of Mandamus with prejudice;  
12 4. For reasonable attorneys' fees and costs of suit; and  
13 5. For such other and further relief as this Court deems just and proper.  
14

15 Dated: November 30, 2017

FERRIS & BRITTON  
A Professional Corporation

17  
18 By: 

19 Michael R. Weinstein

20 Scott H. Toothacre


Attorneys for Real Party in Interest

LARRY GERACI  
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Executed on November 30, 2017 in San Diego, California.

  
Larry Geraci

## EXHIBIT 3

ORIGINAL

Darryl Cotton, *In pro se*  
6176 Federal Blvd.  
San Diego, CA 92114  
Telephone: (619) 954-4447  
Fax: (619) 229-9387

Defendant

FILED  
CIVIL BUSINESS OFFICE 13  
CENTRAL DIVISION

2017 MAY -8 1 A 10:42

CLERK SUPERIOR COURT  
SAN DIEGO COUNTY, CA

MAY 11 2017

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN DIEGO

LARRY GERACI, an individual,  
Plaintiff,

vs.

DARRYL COTTON, an individual; and  
DOES 1 through 10, inclusive,  
Defendant.

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

Judge: The Honorable Joel Wohlfeil  
Dept. C-73

DEFENDANT'S ANSWER TO PLAINTIFF'S  
COMPLAINT

Defendant Darryl Cotton ("Defendant" or "Cotton") hereby answers the unverified Complaint filed by Larry Geraci ("Plaintiff" or "Geraci") as follows:

GENERAL DENIAL

1. Under and pursuant to the provisions of California Code of Civil Procedure, specifically, Section 431.30 thereof, Defendant generally denies each and every allegation of said unverified Complaint, and the whole thereof, and each and every allegation of each and every cause of action alleged therein. Defendant further denies that as a direct or proximate result of any acts or omissions on the part of Defendant, Plaintiff sustained or suffered injury or damage in any amount, or in any form whatsoever, as stated in the Complaint.

//



**AFFIRMATIVE DEFENSES**

2. Defendant denies that he has breached any legal, equitable or contractual obligation owed to Plaintiff and asserts that at all times material hereto he acted in good faith and in compliance with all applicable laws.

3. Plaintiff's claims are barred in whole or in part because there was no mutuality of assent and/or a meeting of the minds to form the agreement as alleged in Plaintiff's Complaint.

4. Plaintiff's claims are barred in whole or in part because Defendant is the sole and rightful owner of the Property.

5. Plaintiff's claims are barred in whole or in part by Plaintiff's failure to comply with the actual terms and conditions of their agreement reached on November 2<sup>nd</sup>, 2016.

6. Defendant denies that he has caused Plaintiff to suffer any damages and affirmatively alleges that any alleged damages incurred by Plaintiff were directly and/or proximately caused by Plaintiff's and/or his agents own willful, reckless, intentional and/or negligent acts.

7. Plaintiff's damages, if any, were caused in whole or in part by his failure to mitigate his damages.

8. Any and all damages purportedly sustained by Plaintiff arising out of the subject matter of the Complaint are offset, in whole or in part, by the damages sustained by Defendant as a result of Plaintiff's actions and/or omissions.

9. Circumstances under which Plaintiff requests injunctive relief do not entitle him to any relief.

10. Plaintiff's claims are barred in whole or in part because any agreement the parties reached is excused by one or more of the following: unjust enrichment, lack of consideration, failure of consideration, failure of performance, breach of condition precedent, prior breach by Plaintiff, prevention, unilateral mistake, hindrance and/or frustration of purpose.



1 11. Plaintiff's claims are barred in whole or in part on the grounds of common law  
2 fraud/fraudulent misrepresentation by Plaintiff's actions.

3 12. Plaintiff's claims are barred in whole or in part because any alleged agreement the parties may  
4 have had may be avoided by Defendant on the grounds of fraud in the inducement.

5 13. Plaintiff's allegations in the Complaint are barred to the extent that there are contractual or  
6 statutory pre-prerequisites and/or conditions that were not satisfied by Plaintiff prior to bringing this  
7 action.  
8

9 14. Defendant alleges that the purported agreement at issue between Plaintiff and Defendant  
10 contains vague, overbroad, unclear and/or ambiguous terms or conditions.

11 15. Plaintiff's claims are barred in whole or in part by the doctrine(s) of unclean hands, waiver,  
12 estoppel, breach of implied covenant of good faith and fair dealing and/or laches.  
13

14 16. Defendant reserves the right to assert additional affirmative defenses upon the discovery and  
15 the determination of the applicability thereof.  
16

### 17 PRAYER FOR RELIEF

18 WHEREFORE, Defendant, having fully answered Plaintiff's Complaint, respectfully requests  
19 of the Court judgment in his favor as follows:

20 a. That Plaintiff take nothing by his Complaint and that the same be dismissed with  
21 prejudice;

22 b. For a judicial determination and declaration that Plaintiff is not the rightful owner of  
23 the Property and does not have any valid and enforceable right, title or interest in Defendant's  
24 property at issue herein;

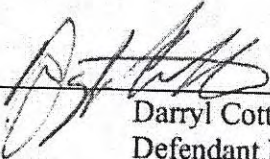
25 c. For an award of general, compensatory and/or special damages in favor of Defendant  
26 to be proven at trial;

27 d. For cost of suit incurred herein, including reasonable legal fees; and  
28

1 e. For such other and further relief as the Court deems just and proper.  
2

3 RESPECTFULLY SUBMITTED

4 Dated: May 8, 2017.  
5

6   
7 Darryl Cotton,  
8 Defendant Pro Se  
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ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address) <b>Darryl Cotton</b> 3176 Federal Blvd. San Diego, CA 92114  TELEPHONE NO.: 619-954-4447 FAX NO. (Optional): 619-229-9387 E-MAIL ADDRESS (Optional): Indagrodarryl@gmail.com ATTORNEY FOR (Name): in Pro se		FOR COURT USE ONLY FILED CIVIL BUSINESS OFFICE 9 CENTRAL DIVISION  2017 MAY 10 P 1:30  CLERK SUPERIOR COURT SAN DIEGO COUNTY, CA
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO</b> STREET ADDRESS: 330 West Broadway MAILING ADDRESS: CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: Central Division		
PETITIONER/PLAINTIFF: Larry Geraci  RESPONDENT/DEFENDANT: Darryl Cotton		
<b>PROOF OF PERSONAL SERVICE—CIVIL</b>		CASE NUMBER 37-2017-00010073-CU-BC-CTL

(Do not use this Proof of Service to show service of a Summons and Complaint.)

1. I am over 18 years of age and not a party to this action.

2. I served the following documents (specify):

Answer

☐ The documents are listed in the Attachment to Proof of Personal Service—Civil (Documents Served) (form POS-020(D)).

3. I personally served the following persons at the address, date, and time stated:

- a. Name: Deborah Barker  
 b. Address: Ferris & Britton, 501 West Broadway, Suite 1450, San Diego, CA 92101  
 c. Date: 5/9/2017  
 d. Time: 2:35 p.m.

☐ The persons are listed in the Attachment to Proof of Personal Service—Civil (Persons Served) (form POS-020(P)).

4. I am

- a. ☒ not a registered California process server. c. ☐ an employee or independent contractor of a registered California process server.  
 b. ☐ a registered California process server. d. ☐ exempt from registration under Business & Professions Code section 22350(b).

5. My name, address, telephone number, and, if applicable, county of registration and number are (specify):

Kim Marugg  
 10303 Loma Rancho Drive  
 Spring Valley, CA 91978  
 619-573-0642

6. ☒ I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

7. ☐ I am a California sheriff or marshal and certify that the foregoing is true and correct.

Date: May 9, 2017

Kim Marugg

(TYPE OR PRINT NAME OF PERSON WHO SERVED THE PAPERS)

(SIGNATURE OF PERSON WHO SERVED THE PAPERS)

## EXHIBIT 2



1 FERRIS & BRITTON  
2 A Professional Corporation  
3 Michael R. Weinstein (SBN 106464)  
4 Scott H. Toothacre (SBN 146530)  
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11 Attorneys for Plaintiff  
12 LARRY GERACI

13 **SUPERIOR COURT OF CALIFORNIA**  
14 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

15 LARRY GERACI, an individual,  
16 Plaintiff,

17 v.

18 DARRYL COTTON, an individual; and  
19 DOES 1 through 10, inclusive,  
20 Defendants.

Case No.

**PLAINTIFF'S COMPLAINT FOR:**

1. **BREACH OF CONTRACT;**
2. **BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING;**
3. **SPECIFIC PERFORMANCE; and**
4. **DECLARATORY RELIEF.**

21 Plaintiff, LARRY GERACI, alleges as follows:

22 1. Plaintiff, LARRY GERACI ("GERACI"), is, and at all times mentioned was, an  
23 individual residing within the County of San Diego, State of California.

24 2. Defendant, DARRYL COTTON ("COTTON"), is, and at all times mentioned was, an  
25 individual residing within the County of San Diego, State of California.

26 3. The real estate purchase and sale agreement entered into between Plaintiff GERACI and  
27 Defendant COTTON that is the subject of this action was entered into in San Diego County, California,  
28 and concerns real property located at 6176 Federal Blvd., City of San Diego, San Diego County,  
California (the "PROPERTY").

4. Currently, and at all times since approximately 1998, Defendant COTTON owned the  
PROPERTY.

5. Plaintiff GERACI does not know the true names or capacities of the defendants sued  
herein as DOES 1 through 20 and therefore sue such defendants by their fictitious names. Plaintiff is



1 informed and believe and based thereon allege that each of the fictitiously-named defendants is in some  
2 way and manner responsible for the wrongful acts and occurrences herein alleged, and that damages as  
3 herein alleged were proximately caused by their conduct. Plaintiff will seek leave of Court to amend  
4 this complaint to state the true names and/or capacities of such fictitiously-named defendants when the  
5 same are ascertained.

6 6. Plaintiff alleges on information and belief that at all times mentioned herein, each and  
7 every defendant was the agent, employee, joint venture, partner, principal, predecessor, or successor in  
8 interest and/or the alter ego of each of the remaining defendants, and in doing the acts herein alleged,  
9 were acting, whether individually or through their duly authorized agents and/or representatives, within  
10 the scope and course of said agencies, service, employment, joint ventures, partnerships, corporate  
11 structures and/or associations, whether actual or ostensible, with the express and/or implied knowledge,  
12 permission, and consent of the remaining defendants, and each of them, and that said defendants  
13 ratified and approved the acts of all of the other defendants.

#### 14 GENERAL ALLEGATIONS

15 7. On November 2, 2016, Plaintiff GERACI and Defendant COTTON entered into a  
16 written agreement for the purchase and sale of the PROPERTY on the terms and conditions stated  
17 therein. A true and correct copy of said written agreement is attached hereto as Exhibit A.

18 8. On or about November 2, 2016, GERACI paid to COTTON \$10,000.00 good faith  
19 earnest money to be applied to the sales price of \$800,000.00 and to remain in effect until the license,  
20 known as a Conditional Use Permit or CUP is approved, all in accordance with the terms and  
21 conditions of the written agreement.

22 9. Based upon and in reliance on the written agreement, Plaintiff GERACI has engaged  
23 and continues to engage in efforts to obtain a CUP for a medical marijuana dispensary at the  
24 PROPERTY, as contemplated by the parties and their written agreement. The CUP process is a long,  
25 time-consuming process, which can take many months if not years to navigate. Plaintiff GERACI's  
26 efforts include, but have not been limited to, hiring a consultant to coordinate the CUP efforts as well as  
27 hiring an architect. Plaintiff GERACI estimates he has incurred expenses to date of more than  
28 \$300,000.00 on the CUP process, all in reliance on the written agreement for the purchase and sale of



1 the PROPERTY to him by Defendant COTTON.

2 **FIRST CAUSE OF ACTION**

3 **(For Breach of Contract against Defendant COTTON and DOES 1-5)**

4 10. Plaintiffs re-allege and incorporate herein by reference the allegations contained in  
5 paragraphs 1 through 9 above.

6 11. Defendant COTTON has anticipatorily breached the contract by stating that he will not  
7 perform the written agreement according to its terms. Among other things, COTTON has stated that,  
8 contrary to the written terms, the parties agreed to a down payment or earnest money in the amount of  
9 \$50,000.00 and that he will not perform unless GERACI makes a further down payment. COTTON  
10 has also stated that, contrary to the written terms, he is entitled to a 10% ownership interest in the  
11 PROPERTY and that he will not perform unless GERACI transfers to him a 10% ownership interest.  
12 COTTON has also threatened to contact the City of San Diego to sabotage the CUP process by  
13 withdrawing his acknowledgment that GERACI has a right to possession or control of the PROPERTY  
14 if GERACI will not accede to his additional terms and conditions and, on March 21, 2017, COTTON  
15 made good on his threat when he contacted the City of San Diego and attempted to withdraw the CUP  
16 application.

17 12. As result of Defendant COTTON's anticipatory breach, Plaintiff GERACI will suffer  
18 damages in an amount according to proof or, alternatively, for return of all sums expended by GERACI  
19 in reliance on the agreement, including but not limited to the estimated \$300,000.00 or more expended  
20 to date on the CUP process for the PROPERTY.

21 **SECOND CAUSE OF ACTION**

22 **(For Breach of the Implied Covenant of Good Faith and Fair Dealing**  
23 **against Defendant COTTON and DOES 1-5)**

24 13. Plaintiffs re-allege and incorporate herein by reference the allegations contained in  
25 paragraphs 1 through 12 above.

26 14. Each contract has implied in it a covenant of good faith and fair dealing that neither  
27 party will undertake actions that, even if not a material breach, will deprive the other of the benefits of  
28 the agreement. By having threatened to contact the City of San Diego to sabotage the CUP process by



1 withdrawing his acknowledgment that Plaintiff GERACI has a right to possession or control of the  
2 PROPERTY if GERACI will not accede to his additional terms and conditions, Defendant COTTON  
3 has breached the implied covenant of good faith and fair dealing.

4 15. As result of Defendant COTTON's breach of the implied covenant of good faith and fair  
5 dealing, Plaintiff GERACI will suffer damages in an amount according to proof or, alternatively, for  
6 return of all sums expended by GERACI in reliance on the agreement, including but not limited to the  
7 estimated \$300,000.00 or more expended to date on the CUP process for the PROPERTY.

### 8 **THIRD CAUSE OF ACTION**

9 **(For Specific Performance against Defendants COTTON and DOES 1-5)**

10 16. Plaintiffs re-allege and incorporate herein by reference the allegations contained in  
11 paragraphs 1 through 15 above.

12 17. The aforementioned written agreement for the sale of the PROPERTY is a valid and  
13 binding contract between Plaintiff GERACI and Defendant COTTON.

14 18. The aforementioned written agreement for the sale of the PROPERTY states the terms  
15 and conditions of the agreement with sufficient fullness and clarity so that the agreement is susceptible  
16 to specific performance.

17 19. The aforementioned written agreement for the purchase and sale of the PROPERTY is a  
18 writing that satisfies the statute of frauds.

19 20. The aforementioned written agreement for the purchase and sale of the PROPERTY is  
20 fair and equitable and is supported by adequate consideration.

21 21. Plaintiff GERACI has duly performed all of his obligations for which performance has  
22 been required to date under the agreement. GERACI is ready and willing to perform his remaining  
23 obligations under the agreement, namely: a) to continue with his good faith efforts to obtain a CUP for  
24 a medical marijuana dispensary; and b) if he obtains CUP approval for a medical marijuana dispensary  
25 thus satisfying that condition precedent, then to pay the remaining \$790,000.00 balance of the purchase  
26 price.

27 22. Defendant COTTON is able to specifically perform his obligations under the contract,  
28 namely: a) to not enter into any other contracts to sell or otherwise encumber the PROPERTY; and b) if

1 Plaintiff GERACI obtains CUP approval for a medical marijuana dispensary thus satisfying that  
2 condition precedent, then to deliver title to the PROPERTY to GERACI or his assignee in exchange for  
3 receipt of payment from GERACI or assignee of the remaining \$790,000.00 balance of the purchase  
4 price.

5 23. Plaintiff GERACI has demanded that Defendant COTTON refrain from taking actions  
6 that interfere with GERACI's attempt to obtain approval of a CUP for a medical marijuana dispensary  
7 and to specifically perform the contract upon satisfaction of the condition that such approval is in fact  
8 obtained.

9 24. Defendant COTTON has indicated that he has or will interfere with Plaintiff GERACI's  
10 attempt to obtain approval of a CUP for a medical marijuana dispensary and that COTTON does not  
11 intend to satisfy his obligations under the written agreement to deliver title to the PROPERTY upon  
12 satisfaction of the condition that GERACI obtain approval of a CUP for a medical marijuana  
13 dispensary and tender the remaining balance of the purchase price.

14 25. The aforementioned written agreement for the purchase and sale of the PROPERTY  
15 constitutes a contract for the sale of real property and, thus, Plaintiff GERACI's lack of a plain, speedy,  
16 and adequate legal remedy is presumed.

17 26. Based on the foregoing, Plaintiff GERACI is entitled to an order and judgment thereon  
18 specifically enforcing the written agreement for the purchase and sale of the PROPERTY from  
19 Defendant COTTON to GERACI or his assignee in accordance with its terms and conditions.

#### 20 FOURTH CAUSE OF ACTION

##### 21 **(For Declaratory Relief against Defendants COTTON and DOES 1-5)**

22 27. Plaintiffs re-allege and incorporate herein by reference the allegations contained in  
23 paragraphs 1 through 14 above.

24 28. An actual controversy has arisen and now exists between Defendant COTTON, on the  
25 one hand, and Plaintiff GERACI, on the other hand, in that COTTON contends that the written  
26 agreement contains terms and condition that conflict with or are in addition to the terms stated in the  
27 written agreement. GERACI disputes those conflicting or additional contract terms.

1        29. Plaintiff GERACI desires a judicial determination of the terms and conditions of the  
2 written agreement as well as of the rights, duties, and obligations of Plaintiff GERACI and defendants  
3 thereunder in connection with the purchase and sale of the PROPERTY by COTTON to GERACI or  
4 his assignee. Such a declaration is necessary and appropriate at this time so that each party may  
5 ascertain their rights, duties, and obligations thereunder.

6        WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

7        **On the First and Second Causes of Action:**

8        1. For compensatory damages in an amount in excess of \$300,000.00 according to proof at  
9 trial.

10       **On the Third Cause of Action:**

11       2. For specific performance of the written agreement for the purchase and sale of the  
12 PROPERTY according to its terms and conditions; and

13       3. If specific performance cannot be granted, then damages in an amount in excess of  
14 \$300,000.00 according to proof at trial.

15       **On the Fourth Cause of Action:**

16       4. For declaratory relief in the form of a judicial determination of the terms and conditions  
17 of the written agreement and the duties, rights and obligations of each party under the written  
18 agreement.

19       **On all Causes of Action:**

20       5. For temporary and permanent injunctive relief as follows: that Defendants, and each of  
21 them, and each of their respective directors, officers, representatives, agents, employees, attorneys, and  
22 all persons acting in concert with or participating with them, directly or indirectly, be enjoined and  
23 restrained from taking any action that interferes with Plaintiff GERACI' efforts to obtain approval of a  
24 Conditional Use Permit (CUP) for a medical marijuana dispensary at the PROPERTY;

25       6. For costs of suit incurred herein; and

26 ///

27 ///

28 ///



1           7.     For such other and further relief as the Court may deem just and proper.

2  
3     Dated: March 21, 2017

FERRIS & BRITTON,  
A Professional Corporation

5  
6     By: Michael R. Weinstein  
       Michael R. Weinstein  
       Scott H. Toothacre

7  
8     Attorneys for Plaintiff  
       LARRY GERACI

# EXHIBIT A



11/02/2016

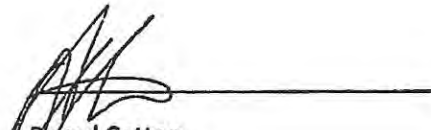
**Agreement between Larry Geraci or assignee and Darryl Cotton:**

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

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



Larry Geraci



Darryl Cotton

## ACKNOWLEDGMENT

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 November 2, 2016 before me, Jessica Newell Notary Public  
(insert name and title of the officer)

personally appeared Darryl Cotton and Larry Geraci,  
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.

Signature

Jessica Newell

(Seal)





## EXHIBIT 4

**ELECTRONICALLY FILED**

Superior Court of California,  
County of San Diego

**11/20/2017 at 09:40:00 AM**

Clerk of the Superior Court  
By Patrick Gonzaga, Deputy Clerk

FERRIS & BRITTON  
A Professional Corporation  
Michael R. Weinstein (SBN 106464)  
Scott H. Toothacre (SBN 146530)  
501 West Broadway, Suite 1450  
San Diego, California 92101  
Telephone: (619) 233-3131  
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mweinstein@ferrisbritton.com  
stoothacre@ferrisbritton.com

Attorneys for Plaintiff  
LARRY GERACI

**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF SAN DIEGO, CENTRAL DIVISION**

LARRY GERACI, an individual,

Plaintiff,

v.

DARRYL COTTON, an individual; and  
DOES 1 through 10, inclusive,

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

v.

LARRY GERACI, an individual, REBECCA  
BERRY, an individual, and DOES 1  
THROUGH 10, INCLUSIVE,

Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil  
Dept.: C-73

**CROSS-DEFENDANT LARRY GERACI'S  
ANSWER TO CROSS COMPLAINANT  
DARRYL COTTON'S UNVERIFIED  
SECOND AMENDED CROSS-  
COMPLAINT**

**[IMAGED FILE]**

Filed: March 21, 2017  
Trial Date: May 11, 2018

Cross-Defendant LARRY GERACI answers Cross-Complainant DARRYL COTTON's  
unverified Second Amended Cross-Complaint, dated August 25, 2017, as follows:

**GENERAL DENIAL**

Under the provisions of section 431.30 of the California Code of Civil Procedure, this  
answering Cross-Defendant denies, generally and specifically, each and every and all allegations in the  
Second Amended Cross-Complaint, and the whole thereof, including each and every purported cause of

**CROSS-DEFENDANT LARRY GERACI'S ANSWER TO CROSS COMPLAINANT DARRYL  
COTTON'S UNVERIFIED SECOND AMENDED CROSS-COMPLAINT**



1 action contained therein, and denies that Cross-Complainant has sustained damages as alleged by  
2 reason of any alleged act, breach, or omission on the party of this answering Cross-Defendant.

3 **AFFIRMATIVE DEFENSES**

4 For a further and separate answer to the Second Amended Cross-Complaint, and by way of  
5 affirmative defenses, this answering Cross-Defendant alleges as follows:

6 **FIRST AFFIRMATIVE DEFENSE**

7 **(Failure to State a Cause of Action)**

8 Each of Cross-Complainant's purported causes of action against this answering Cross-  
9 Defendant fails to state facts sufficient to constitute a cause of action against this answering Cross-  
10 Defendant.

11 **SECOND AFFIRMATIVE DEFENSE**

12 **(Statute of Frauds)**

13 Cross-Complainant's purported first cause of action for breach of contract is barred by the  
14 Statute of Frauds (Civ. Code §1624(a)(3).)

15 **THIRD AFFIRMATIVE DEFENSE**

16 **(Failure to State a Cause of Action for Breach of an Agreement to Negotiate)**

17 Cross-Complainant's purported first cause of action for breach of contract, to the extent it  
18 purports to state a cause of action for breach of an agreement to negotiate, fails to allege facts sufficient  
19 to state such a claim under *Copeland v. Baskin Robbins USA*, 96 Cal.App.4th 1251 (2002).

20 **FOURTH AFFIRMATIVE DEFENSE**

21 **(Waiver)**

22 Cross-Complainant's purported second cause of action for intentional misrepresentation is  
23 barred by the doctrine of waiver in that Cross-Complainant has accepted a substantial benefit in the  
24 form of the efforts and substantial expense undertaken by Cross-Defendants to apply for and obtain  
25 approval of a Conditional Use Permit.

26 **FIFTH AFFIRMATIVE DEFENSE**

27 **(Reservation of Right to Assert Further Defense)**

28 This answering Cross-Defendant currently has insufficient information upon which to form a

1 belief as to the existence of additional and as yet unstated affirmative defenses. This answering Cross-  
2 Defendant reserves the right to assert additional affirmative defenses in the event discovery discloses  
3 the existence of said affirmative defenses.

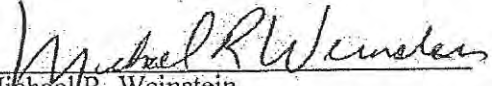
4 **WHEREFORE**, Cross- Defendant LARRY GERACI prays as follows:

- 5 1. That the Second Amended Cross-Complaint be dismissed and Cross-Complainant take  
6 nothing against this answering Cross-Defendant; and  
7 2. Such other and further relief as the Court may deem just and proper.

8 Dated: November 20, 2017

FERRIS & BRITTON,  
A Professional Corporation

9  
10  
11 By:

  
Michael R. Weinstein  
Scott H. Toothacre  
Attorneys for Plaintiff  
LARRY GERACI



## EXHIBIT 5

DAVID S. DEMIAN, SBN 220626  
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ADAM C. WITT, SBN 271502  
E-MAIL: awitt@ftblaw.com

**FINCH, THORNTON & BAIRD, LLP**

ATTORNEYS AT LAW  
4747 EXECUTIVE DRIVE - SUITE 700  
SAN DIEGO, CALIFORNIA 92121-3107  
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FACSIMILE: (858) 737-3101

**ELECTRONICALLY FILED**  
Superior Court of California,  
County of San Diego

**08/25/2017 at 11:44:00 AM**

Clerk of the Superior Court  
By Richard Day, Deputy Clerk

Attorneys for Defendant and Cross-Complainant Darryl Cotton

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE 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

SECOND AMENDED CROSS-COMPLAINT  
FOR:

- (1) BREACH OF CONTRACT;
- (2) INTENTIONAL MISREPRESENTATION;
- (3) NEGLIGENT MISREPRESENTATION;
- (4) FALSE PROMISE; AND
- (5) DECLARATORY RELIEF.

[IMAGED FILE]

Assigned to:  
Hon. Joel R. Wohlfeil, Dept. C-73

Complaint Filed: March 21, 2017  
Trial Date: Not Set

DARRYL COTTON, an individual,

Cross-Complainant

v.

LARRY GERACI, an individual;  
REBECCA BERRY, an individual; and  
ROES 1 through 50,

Cross-Defendants.

/////

1 Defendant and cross-complainant Darryl Cotton ("Cotton") alleges as follows:

2 1. Venue is proper in this Court because the events described below took place in  
3 this judicial district and the real property at issue is located in this judicial district.

4 2. Cotton is, and at all times mentioned was, an individual residing within the  
5 County of San Diego, California.

6 3. Cotton was at all times material to this action the sole record owner of the  
7 commercial real property located at 6176 Federal Boulevard, San Diego, California 92114  
8 ("Property") which is the subject of this dispute.

9 4. Cotton is informed and believes plaintiff and cross-defendant Larry Geraci  
10 ("Geraci") is, and at all times mentioned was, an individual residing within the County of San  
11 Diego, California.

12 5. Cotton is informed and believes cross-defendant Rebecca Berry ("Berry") is,  
13 and at all times mentioned was, an individual residing within the County of San Diego,  
14 California.

15 6. Cotton does not know the true names and capacities of the cross-defendants  
16 named as ROES 1 through 50 and therefore sues them by fictitious names. Cotton is informed  
17 and believes that ROES 1 through 50 are in some way responsible for the events described in  
18 this Second Amended Cross-Complaint. Cotton will seek leave to amend this Second  
19 Amended Cross-Complaint when the true names and capacities of these cross-defendants have  
20 been ascertained.

21 7. At all times mentioned, each cross-defendant was an agent, principal,  
22 representative, employee, or partner of the other cross-defendants, and acted within the course  
23 and scope of such agency, representation, employment, and/or partnership, and with  
24 permission of the other cross-defendants.

25 / / / /

26 / / / /

27 / / / /

28 / / / /



GENERAL ALLEGATIONS

8. In or around August 2016, Geraci first contacted Cotton seeking to purchase the Property. Geraci desired to buy the Property from Cotton because it meets certain requirements of the City of San Diego ("City") for obtaining a Conditional Use Permit ("CUP") to operate a Medical Marijuana Consumer Cooperative ("MMCC") at the Property. The Property is one of a very limited number of properties located in San Diego City Council District 4 that potentially satisfy the CUP requirements for a MMCC.

9. Over the ensuing weeks and months, Geraci and Cotton negotiated extensively regarding the terms of a potential sale of the Property. During these negotiations, Geraci represented to Cotton, among other things, that:

(a) Geraci was a trustworthy individual because Geraci operated in a fiduciary capacity for many high net worth individuals and businesses as an enrolled agent for the IRS and the owner-manager of Tax and Financial Center, Inc., an accounting and financial advisory business;

(b) Geraci, through his due diligence, had uncovered a critical zoning issue that would prevent the Property from being issued a CUP to operate a MMCC unless Geraci lobbied with the City to have the zoning issue resolved first;

(c) Geraci, through his personal and professional relationships, was in a unique position to lobby and influence key City political figures to have the zoning issue favorably resolved and obtain approval of the CUP application once submitted; and

(d) Geraci was qualified to successfully operate a MMCC because he owned and operated several other marijuana dispensaries in the San Diego County area.

10. Cotton, acting in good faith based upon Geraci's representations during the sale negotiations, assisted Geraci with preliminary due diligence in investigating the feasibility of a CUP application at the Property while the parties negotiated the terms of a possible deal. However, despite the parties' work on a CUP application, Geraci represented to Cotton that a CUP application for the Property could not actually be submitted until after the critical zoning issue was resolved or the application would be summarily rejected by the City.

1           11.     On or around October 31, 2016, Geraci asked Cotton to execute an Ownership  
2     Disclosure Statement, which is a required component of all CUP applications. Geraci told  
3     Cotton that he needed the signed document to show that Geraci had access to the Property in  
4     connection with his lobbying efforts to resolve the zoning issue and his eventual preparation of  
5     a CUP application. Geraci also requested that Cotton sign the Ownership Disclosure Statement  
6     as an indication of good-faith while the parties negotiated on the sale terms. At no time did  
7     Geraci indicate to Cotton that a CUP application would be filed prior to the parties entering  
8     into a final written agreement for the sale of the Property. In fact, Geraci repeatedly  
9     maintained to Cotton that the critical zoning issue needed to be resolved before a CUP  
10    application could even be submitted.

11           12.     The Ownership Disclosure Statement that Geraci provided to Cotton to sign in  
12    October 2016 incorrectly indicated that Cotton had leased the Property to Berry. However,  
13    Cotton has never met Berry personally and never entered into a lease or any other type of  
14    agreement with her. At the time, Geraci told Cotton that Berry was a trusted employee who  
15    was very familiar with MMCC operations and who was involved with his other MMCC  
16    dispensaries. Cotton's understanding was that Geraci was unable to list himself on the  
17    application because of Geraci's other legal issues but that Berry was Geraci's agent and was  
18    working in concert with him and at his direction. Based upon Geraci's assurances that listing  
19    Berry as a tenant on the Ownership Disclosure Statement was necessary and proper, Cotton  
20    executed the Ownership Disclosure Statement that Geraci provided to him.

21           13.     On November 2, 2016, Geraci and Cotton met at Geraci's office in an effort to  
22    negotiate the final terms of their deal for the sale of the Property. The parties reached an  
23    agreement on the material terms for the sale of the Property. The parties further agreed to  
24    cooperate in good faith to promptly reduce the complete agreement, including all of the  
25    agreed-upon terms, to writing.

26           14.     The material terms of the agreement reached by the parties at the November 2,  
27    2016 meeting included, without limitation, the following key deal points:

28    / / / /



1 (a) Geraci agreed to pay the total sum of \$800,000 in consideration for the  
2 purchase of the Property, with a \$50,000 non-refundable deposit payable to Cotton  
3 immediately upon the parties' execution of final integrated written agreements and the  
4 remaining \$750,000 payable to Cotton upon the City's approval of a CUP application for the  
5 Property;

6 (b) The parties agreed that the City's approval of a CUP application to  
7 operate a MMCC at the Property would be a condition precedent to closing of the sale (in other  
8 words, the sale of the Property would be completed and title transferred to Geraci only upon  
9 the City's approval of the CUP application and Geraci's payment of the \$750,000 balance of  
10 the purchase price to Cotton; if the City denied the CUP application, the parties agreed the sale  
11 of the Property would be automatically terminated and Cotton would be entitled to retain the  
12 entire \$50,000 non-refundable deposit);

13 (c) Geraci agreed to grant Cotton a ten percent (10%) equity stake in the  
14 MMCC that would operate at the Property following the City's approval of the CUP  
15 application; and

16 (d) Geraci agreed that, after the MMCC commenced operations at the  
17 Property, Geraci would pay Cotton ten percent (10%) of the MMCC's monthly profits and  
18 Geraci would guarantee that such payments would amount to at least \$10,000 per month.

19 15. At Geraci's request, the sale was to be documented in two final written  
20 agreements, a real estate purchase agreement and a separate side agreement, which together  
21 would contain all the agreed-upon terms from the November 2, 2016 meeting. At that meeting,  
22 Geraci also offered to have his attorney "quickly" draft the final integrated agreements and  
23 Cotton agreed.

24 16. Although the parties came to a final agreement on the purchase price and  
25 deposit amounts at their November 2, 2016 meeting, Geraci requested additional time to come  
26 up with the \$50,000 non-refundable deposit. Geraci claimed he needed extra time because he  
27 had limited cashflow and would require the cash he did have to fund the lobbying efforts  
28 needed to resolve the zoning issue at the Property and to prepare the CUP application.



1           17. Cotton was hesitant to grant Geraci more time to pay the non-refundable deposit  
2 but Geraci offered to pay \$10,000 towards the \$50,000 total deposit immediately as a show of  
3 "good-faith," even though the parties had not reduced their final agreement to writing. Cotton  
4 was understandably concerned that Geraci would file the CUP application before paying the  
5 balance of the non-refundable deposit and Cotton would never receive the remainder of the  
6 non-refundable deposit if the City denied the CUP application before Geraci paid the  
7 remaining \$40,000 (thereby avoiding the parties' agreement that the \$50,000 non-refundable  
8 deposit was intended to shift to Geraci some of the risk of the CUP application being denied).  
9 Despite his reservations, Cotton agreed to Geraci's request and accepted the lesser \$10,000  
10 initial deposit amount based upon Geraci's express promise to pay the \$40,000 balance of the  
11 non-refundable deposit prior to submission of the CUP application, at the latest.

12           18. At the November 2, 2016 meeting, the parties executed a three-sentence  
13 document related to their agreement on the purchase price for the Property at Geraci's request,  
14 which read as follows:

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

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

20           Geraci assured Cotton that the document was intended to merely create a record of Cotton's  
21 receipt of the \$10,000 "good-faith" deposit and provide evidence of the parties' agreement on  
22 the purchase price and good-faith agreement to enter into final integrated agreement documents  
23 related to the sale of the Property. Geraci emailed Cotton a scanned copy of the executed  
24 document the same day. Following closer review of the executed document, Cotton wrote in  
25 an email to Geraci several hours later (still on the same day):

26           I just noticed the 10% equity position in the dispensary was not language added  
27 into that document. I just want to make sure that we're not missing that  
28 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.

1 Approximately two hours later, Geraci replied via email, "No no problem at all."

2 19. Thereafter, Cotton continued to operate in good faith under the assumption that  
3 Geraci's attorney would promptly draft the fully integrated agreement documents as the parties  
4 had agreed and the parties would shortly execute the written agreements to document their  
5 agreed-upon deal. However, over the following months, Geraci proved generally unresponsive  
6 and continuously failed to make substantive progress on his promises, including his promises  
7 to promptly deliver the draft final agreement documents, pay the balance of the non-refundable  
8 deposit, and keep Cotton apprised of the status of the zoning issue.

9 20. Over the weeks and months that followed, Cotton repeatedly reached out to  
10 Geraci regarding the status of the zoning issue, the payment of the remaining balance of the  
11 non-refundable deposit, and the status of the draft documents. For example, on January 6,  
12 2017, after Cotton became exasperated with Geraci's failure to provide any substantive  
13 updates, he texted Geraci, "Can you call me. If for any reason you're not moving forward I  
14 need to know." Geraci replied via text, stating: "I'm at the doctor now everything is going fine  
15 the meeting went great yesterday supposed to sign off on the zoning on the 24th of this month  
16 I'll try to call you later today still very sick."

17 21. Between January 18, 2017 and February 7, 2017, the following exchange took  
18 place between Geraci and Cotton via text message:

19 Geraci: "The sign off date they said it's going to be the 30th."

20 Cotton: "This resolves the zoning issue?"

21 Geraci: "Yes"

22 Cotton: "Excellent"...

23 Cotton: "How goes it?"

24 Geraci: "We're waiting for confirmation today at about 4 o'clock"

25 Cotton: "Whats new?"

26 Cotton: "Based on your last text I thought you'd have some information on the  
27 zoning by now. Your lack of response suggests no resolution as of yet."

28 Geraci: "I'm just walking in with clients they resolved it its fine we're just  
waiting for final paperwork."

///

///



1 The above communications between Geraci and Cotton regarding the zoning issue conveyed to  
2 Cotton that the issue had still not yet been fully resolved at that time. As noted, Geraci had  
3 previously represented to Cotton that the CUP application could not be submitted until the  
4 zoning issue was resolved, which was key because Geraci's submission of the CUP application  
5 was the outside date the parties had agreed upon for payment of the \$40,000 balance of the  
6 non-refundable deposit to Cotton. As it turns out, Geraci's representations were untrue and he  
7 knew they were untrue as he had already submitted the CUP application months prior.

8 22. With respect to the promised final agreement documents, Geraci continuously  
9 failed to timely deliver the documents as agreed. On February 15, 2017, more than two  
10 months after the parties reached their agreement, Geraci texted Cotton, "We are preparing the  
11 documents with the attorney and hopefully will have them by the end of this week." On  
12 February 22, 2017, Geraci again texted Cotton, "Contract should be ready in a couple days."

13 23. On February 27, 2017, nearly three months after the parties reached an  
14 agreement on the terms of the sale, Geraci finally emailed Cotton a draft real estate purchase  
15 agreement and stated: "Attached is the draft purchase of the property for 400k. The additional  
16 contract for the 400k should be in today and I will forward it to you as well." However, upon  
17 review, the draft purchase agreement was missing many of the key deal points agreed upon by  
18 the parties at their November 2, 2016 meeting. After Cotton called Geraci for an explanation,  
19 Geraci claimed it was simply due to miscommunication with his attorney and promised to have  
20 her revise the agreement to accurately reflect their deal points.

21 24. On March 2, 2017, Geraci first emailed Cotton a draft of the separate side  
22 agreement that was to incorporate other terms of the parties' deal. Cotton immediately  
23 reviewed the draft side agreement and emailed Geraci the next day stating: "I see that no  
24 reference is made to the 10% equity position... [and] para 3.11 looks to avoid our agreement  
25 completely." Paragraph 3.11 of the draft side agreement stated that the parties had no joint  
26 venture or partnership agreement of any kind, which contradicted the parties' express  
27 agreement that Cotton would receive a ten percent equity stake in the MMCC business as a  
28 condition of the sale of the Property.



1           25.     On or about March 3, 2017, Cotton told Geraci he was considering retaining an  
2 attorney to revise the incomplete and incorrect draft documents provided by Geraci. Geraci  
3 dissuaded Cotton from doing so by assuring Cotton the errors were simply due to a  
4 misunderstanding with his attorney and that Cotton could speak with her directly regarding any  
5 comments on the drafts.

6           26.     On March 7, 2017, Geraci emailed Cotton a revised draft of the side agreement  
7 along with a cover email that stated: "... the 10k a month might be difficult to hit until the  
8 sixth month... can we do 5k, and on the seventh month start 10k?". Cotton, increasingly  
9 frustrated with Geraci's failure to abide by the parties' agreement, responded to Geraci on  
10 March 16, 2017 in an email which included the following:

11                 We started these negotiations 4 months ago and the drafts and our  
12 communications have not reflected what agreed upon and are still far from  
13 reflecting our original agreement. Here is my proposal, please have your  
14 attorney Gina revise the Purchase Agreement and the Side Agreement to  
15 incorporate all the terms we have agreed upon so that we can execute final  
16 versions and get this closed... Please confirm by Monday 12:00 PM whether we  
are on the same page and you plan to continue with our agreement ... If,  
hopefully, we can work through this, please confirm that revised final drafts that  
incorporate the 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.

17           27.     On the same day, Cotton contacted the City's Development Project Manager  
18 responsible for CUP applications. At that time, Cotton discovered for the first time that  
19 Geraci had submitted a CUP application for the Property way back on October 31, 2016,  
20 before the parties even agreed upon the final terms of their deal and contrary to Geraci's  
21 express representations over the previous five months. Cotton expressed his  
22 disappointment and frustration in the same March 16, 2017 email to Geraci:

23                 I found out today that a CUP application for my property was submitted in  
24 October, which I am assuming is from someone connected to you. Although, I  
25 note that you told me that the \$40,000 deposit balance would be paid once the  
26 CUP was submitted and that you were waiting on certain zoning issues to be  
resolved. Which is not the case.

27           28.     On March 17, 2017, after Geraci requested an in-person meeting via text  
28 message, Cotton replied in an email to Geraci which including the following:



1 I would prefer that until we have final agreements that we converse exclusively  
2 via email. My greatest concern is that you get a denial on the CUP application  
3 and not provide the remaining \$40,000 non-refundable deposit. To be frank, I  
4 feel that you are not dealing with me in good faith, you told me repeatedly that  
5 you could not submit a CUP application until certain zoning issues had been  
6 resolved and that you had spent hundreds of thousands of dollars on getting  
7 them resolved. You lied to me, I found out yesterday from the City of San  
8 Diego that you submitted a CUP application on October 31 2016 BEFORE we  
9 even signed our agreement on the 2nd of November... Please confirm by 12:00  
10 PM Monday that you are honoring our agreement and will have final drafts  
11 (reflecting completely the below) by Wednesday at 12:00 PM.

12 Geraci did not provide the requested confirmation that he would honor their agreement or  
13 proffer the requested agreements prior to Cotton's deadlines.

14 29. On March 21, 2017, Cotton emailed Geraci to confirm their agreement was  
15 terminated and that Geraci no longer had any interest in the Property. Cotton also notified  
16 Geraci that he intended to move forward with a new buyer for the Property.

17 30. On March 22, 2017, Geraci's attorney, Michael Weinstein ("Weinstein"),  
18 emailed Cotton a copy of a complaint filed by Geraci in which Geraci claims for the very first  
19 time that the three-sentence document signed by the parties on November 2, 2016 constituted  
20 the parties' complete agreement regarding the Property, contrary to the parties' further  
21 agreement the same day, the entire course of dealings between the parties, and Geraci's own  
22 statements and actions.

23 31. On March 28, 2017, Weinstein emailed Cotton and indicated that Geraci  
24 intended to continue to pursue the CUP application and would be posting notices on Cotton's  
25 property. Cotton responded via email the same day and objected to Geraci or his agents  
26 entering the Property and reiterated the fact that Geraci has no rights to the Property.

27 32. The defendants' refusal to acknowledge they have no interest in the Property  
28 and to step aside from the CUP application has diminished the value of the Property, reduced  
the price Cotton will be able to receive for the Property, and caused Cotton to incur costs and  
attorneys' fees to protect his interest in his Property.

//////

//////

//////

1 FIRST CAUSE OF ACTION

2 (Breach of Contract – Against Geraci and ROES 1 through 50)

3 33. Cotton realleges and incorporates by reference paragraphs 1 through 32, above,  
4 as though set forth in full at this point.

5 34. Geraci and Cotton entered into an agreement to negotiate and collaborate in  
6 good faith on mutually acceptable purchase and sale documents reflecting the terms for a  
7 purchase and sale of the Property and a side agreement for Cotton to obtain an equity position  
8 in the MMCC to operate at the Property. This agreement is comprised of (a) the November 2,  
9 2016 document signed by Geraci and Cotton, and (b) the November 2, 2016 email exchange  
10 between Geraci and Cotton including other agreed-upon terms and the parties' agreement to  
11 negotiate and collaborate in good faith on final deal documents. True and correct copies of the  
12 agreement are attached hereto as Exhibits 1 and 2, respectively.

13 35. Cotton performed all conditions, covenants, and promises required on his part to  
14 be performed in accordance with the terms and conditions of the contract between the parties  
15 or has been excused from performance.

16 36. Under the parties' contract, Geraci was bound to negotiate the terms of an  
17 agreement for the Property in good faith. Geraci breached his obligation to negotiate in good  
18 faith by, among other things, intentionally delaying the process of negotiations, failing to  
19 deliver acceptable final purchase documents, failing to pay the agreed-upon non-refundable  
20 deposit, demanding new and unreasonable terms in order to further delay and hinder the  
21 process of negotiations, and failing to timely or constructively respond to Cotton's requests and  
22 communications.

23 37. As a direct and proximate result of Geraci's breaches of the contract, Cotton has  
24 been damaged in an amount not yet fully ascertainable and to be determined according to proof  
25 at trial.

26 // // //

27 // // //

28 // // //



1 SECOND CAUSE OF ACTION

2 (Intentional Misrepresentation – Against Geraci and ROES 1 through 50)

3 38. Cotton realleges and incorporates by reference paragraphs 1 through 37, above,  
4 as though set forth in full at this point.

5 39. Defendants made statements to Cotton that: (a) were false representations of  
6 material facts; (b) defendants knew to be false or were made recklessly and without regard for  
7 their truth; (c) defendants intended Cotton to rely upon; (d) Cotton reasonably and justifiably  
8 relied upon; (e) Cotton's reasonable reliance upon was a substantial factor in causing harm and  
9 damage to Cotton; and (f) caused damages to Cotton as a direct and proximate result of such  
10 fraudulent statements as described in paragraphs 1 through 32 above.

11 40. The intentional misrepresentations by defendants include at least the following:

12 (a) On or about October 31, 2016, Geraci fraudulently induced Cotton to  
13 execute the Ownership Disclosure Statement by (i) falsely representing that Geraci needed to  
14 show he had access to the Property in connection with his lobbying efforts to resolve the  
15 zoning issue and in connection with the preparation of a CUP application; and (ii) by  
16 indicating the document would only be used as a show of good-faith while the parties  
17 negotiated on the sale terms;

18 (b) On or about November 2, 2016, Geraci fraudulently induced Cotton to  
19 execute the document Geraci now alleges is the fully integrated agreement between the parties  
20 by representing that (i) the CUP application would not be filed until the zoning issue was  
21 resolved; (ii) Geraci would honor the terms of the complete agreement reached by the parties at  
22 their November 2, 2016 meeting; (iii) Geraci would pay the \$40,000 remainder of the \$50,000  
23 non-refundable deposit to Cotton on or before filing a CUP application; and (iv) Geraci  
24 understood and agreed the document was not intended to be the final agreement between the  
25 parties for the purchase of the Property and did not contain all material terms of the parties'  
26 agreement;

27 // // // //

28 // // // //

1 (c) On multiple occasions, Geraci represented to Cotton that a CUP  
2 application for the Property could not be submitted until after the zoning issue was resolved;

3 (d) On multiple occasions, Geraci represented to Cotton that Geraci had not  
4 yet filed a CUP application with respect to the Property when the CUP application had already  
5 been filed; and

6 (e) On multiple occasions, Geraci represented to Cotton that the preliminary  
7 work of preparing a CUP application was merely underway, when, in fact, the CUP application  
8 had already been filed.

9 41. Defendants, through their intentional misrepresentations and the actions taken in  
10 reliance upon such misrepresentations, have diminished the value of the Property, reduced the  
11 price Cotton will be able to receive for the Property, and caused Cotton to incur costs and  
12 attorneys' fees to protect his interest in his Property. As a further result of the intentional  
13 misrepresentations, Cotton has been deprived of the remaining \$40,000 of the non-refundable  
14 deposit that Geraci promised to pay prior to filing a CUP application for the Property.

15 42. The misrepresentations were intentional, willful, malicious, outrageous,  
16 unjustified, done in bad faith and in conscious disregard of the rights of Cotton, with the intent  
17 to deprive Cotton of his interest in the Property. This intentional, willful, malicious,  
18 outrageous and unjustified conduct entitles Cotton to an award of general, compensatory,  
19 special, exemplary and/or punitive damages under Civil Code section 3294.

20 THIRD CAUSE OF ACTION

21 (Negligent Misrepresentation – Against Geraci and ROES 1 through 50)

22 43. Cotton realleges and incorporates by reference paragraphs 1 through 42, above,  
23 as though set forth in full at this point.

24 44. Defendants made statements to Cotton that: (a) were false representations of  
25 material facts; (b) defendants had no reasonable grounds for believing were true when the  
26 statements were made; (c) defendants intended Cotton to rely upon; (d) Cotton reasonably and  
27 justifiably relied upon; (e) Cotton's reasonable reliance upon was a substantial factor in  
28 causing harm and damage to Cotton; and (f) caused damages to Cotton as a direct and



proximate result of such fraudulent statements as described in paragraphs 1 through 32 above.

45. The negligent misrepresentations by defendants include at least the following:

(a) On or about October 31, 2016, Geraci fraudulently induced Cotton to execute the Ownership Disclosure Statement by (i) falsely representing that Geraci needed to show he had access to the Property in connection with his lobbying efforts to resolve the zoning issue and in connection with the preparation of a CUP application; and (ii) by indicating the document would only be used as a show of good-faith while the parties negotiated on the sale terms;

(b) On or about November 2, 2016, Geraci fraudulently induced Cotton to execute the document Geraci now alleges is the fully integrated agreement between the parties by representing that (i) the CUP application would not be filed until the zoning issue was resolved; (ii) Geraci would honor the terms of the complete agreement reached by the parties at their November 2, 2016 meeting; (iii) Geraci would pay the \$40,000 remainder of the \$50,000 non-refundable deposit to Cotton on or before filing a CUP application; and (iv) Geraci understood and agreed the document was not intended to be the final agreement between the parties for the purchase of the Property and did not contain all material terms of the parties' agreement;

(c) On multiple occasions, Geraci represented to Cotton that a CUP application for the Property could not be submitted until after the zoning issue was resolved;

(d) On multiple occasions, Geraci represented to Cotton that Geraci had not yet filed a CUP application with respect to the Property when the CUP application had already been filed; and

(e) On multiple occasions, Geraci represented to Cotton that the preliminary work of preparing a CUP application was merely underway, when, in fact, the CUP application had already been filed.

46. Defendants, through their negligent misrepresentations and the actions taken in reliance upon such misrepresentations, have diminished the value of the Property, reduced the price Cotton will be able to receive for the Property, and caused Cotton to incur costs and

1 attorneys' fees to protect his interest in his Property. As a further result of the negligent  
2 misrepresentations, Cotton has been deprived of the remaining \$40,000 of the non-refundable  
3 deposit that Geraci promised to pay prior to filing a CUP application for the Property.

4 FOURTH CAUSE OF ACTION

5 (False Promise -- Against Geraci and ROES 1 through 50)

6 47. Cotton realleges and incorporates by reference paragraphs 1 through 46, above,  
7 as though set forth in full at this point.

8 48. On November 2, 2016, among other things, Geraci falsely promised the  
9 following to Cotton without any intent of fulfilling the promises:

10 (a) Geraci would pay Cotton the remaining \$40,000 of the non-refundable  
11 deposit prior to filing a CUP application;

12 (b) Geraci would cause his attorney to promptly draft the final integrated  
13 agreements to document the agreed-upon deal between the parties;

14 (c) Geraci would pay Cotton the greater of \$10,000 per month or 10% of the  
15 monthly profits for the MMCC at the Property if the CUP was granted; and

16 (d) Cotton would be a 10% owner of the MMCC business operating at  
17 Property if the CUP was granted.

18 49. Geraci had no intent to perform the promises he made to Cotton on November  
19 2, 2016 when he made them.

20 50. Geraci intended to deceive Cotton in order to, among other things, cause Cotton  
21 to rely on the false promises and execute the document signed by the parties at their November  
22 2, 2016 meeting so that Geraci could later deceitfully allege that the document contained the  
23 parties' entire agreement.

24 51. Cotton reasonably relied on Geraci's promises.

25 52. Geraci failed to perform the promises he made on November 2, 2016.

26 53. Defendants, through their false promises and the actions taken in reliance upon  
27 such false promises, have diminished the value of the Property, reduced the price Cotton will  
28 be able to receive for the Property, and caused Cotton to incur costs and attorneys' fees to



1 protect his interest in his Property. As a further result of the false promises, Cotton has been  
2 deprived of the remaining \$40,000 of the non-refundable deposit that Geraci promised to pay  
3 prior to filing a CUP application for the Property.

4 54. The false promises were intentional, willful, malicious, outrageous, unjustified,  
5 done in bad faith and in conscious disregard of the rights of Cotton, with the intent to deprive  
6 Cotton of his interest in the Property. This intentional, willful, malicious, outrageous and  
7 unjustified conduct entitles Cotton to an award of general, compensatory, special, exemplary  
8 and/or punitive damages under Civil Code section 3294.

9 FIFTH CAUSE OF ACTION

10 (Declaratory Relief – Against Geraci, Berry, and ROES 1 through 50)

11 55. Cotton realleges and incorporates by reference paragraphs 1 through 54, above,  
12 as though set forth in full at this point.

13 56. An actual controversy has arisen and now exists between Cotton and all  
14 defendants concerning their respective rights, liabilities, obligations and duties with respect to  
15 the Property and the CUP application for the Property filed on or around October 31, 2016.

16 57. A declaration of rights is necessary and appropriate at this time in order for the  
17 parties to ascertain their respective rights, liabilities, and obligations because no adequate  
18 remedy other than as prayed for exists by which the rights of the parties may be ascertained.

19 58. Accordingly, Cotton respectfully requests a judicial declaration of rights,  
20 liabilities, and obligations of the parties. Specifically, Cotton requests a judicial declaration  
21 that (a) defendants have no right or interest whatsoever in the Property, (b) Cotton is the sole  
22 interest-holder in the CUP application for the Property submitted on or around October 31,  
23 2016, (c) defendants have no interest in the CUP application for the Property submitted on or  
24 around October 31, 2016, and (d) the Lis Pendens filed by Geraci be released.

25 / / / / /

26 / / / / /

27 / / / / /

28 / / / / /

1 PRAYER FOR RELIEF

2 WHEREFORE, Cotton prays for relief as follows:

3 ON THE FIRST CAUSE OF ACTION:

4 1. For general, special, and consequential damages in an amount not yet fully  
5 ascertained and according to proof at trial, but at least \$40,000; and

6 2. For compensatory and reliance damages in an amount not yet fully ascertained  
7 and according to proof at trial.

8 ON THE SECOND CAUSE OF ACTION

9 1. For general, special, and consequential damages in an amount not yet fully  
10 ascertained but at least \$40,000;

11 2. For compensatory and reliance damages in an amount not yet fully ascertained  
12 and according to proof at trial; and

13 3. For punitive and exemplary damages in an amount just and reasonable to punish  
14 and deter defendants.

15 ON THE THIRD CAUSE OF ACTION

16 1. For general, special, and consequential damages in an amount not yet fully  
17 ascertained but at least \$40,000; and

18 2. For compensatory and reliance damages in an amount not yet fully ascertained  
19 and according to proof at trial.

20 ON THE FOURTH CAUSE OF ACTION

21 1. For general, special, and consequential damages in an amount not yet fully  
22 ascertained but at least \$40,000;

23 2. For compensatory and reliance damages in an amount not yet fully ascertained  
24 and according to proof at trial; and

25 3. For punitive and exemplary damages in an amount just and reasonable to punish  
26 and deter defendants.

27 // // // //

28 // // // //



1 ON THE FIFTH CAUSE OF ACTION

2 1. For a judicial declaration that defendants have no right or interest whatsoever in  
3 the Property;

4 2. For a judicial declaration that Cotton is the sole interest-holder in the CUP  
5 application for the Property submitted on or around October 31, 2016, defendants have no right  
6 or interest in said CUP application, and that defendants are enjoined from further pursuing  
7 such CUP application for the Property; and

8 3. For a judicial order that the Lis Pendens filed by Geraci on the Property be  
9 released.

10 ON ALL CAUSES OF ACTION

11 1. For interest on all sums at the maximum legal rates from dates according to  
12 proof;

13 2. For costs of suit; and

14 3. For such other relief as the Court deems just.

15 DATED: August 25, 2017

Respectfully submitted,

FINCH, THORNTON & BAIRD, LLP

17  
18 By: 

DAVID S. DEMIAN

ADAM C. WITT

Attorneys for Defendant and Cross-Complainant  
Darryl Cotton

26  
27 2403.004/3BQ6279.hkr

## EXHIBIT 6



**ELECTRONICALLY FILED**  
Superior Court of California,  
County of San Diego  
**09/28/2017** at 11:02:00 AM  
Clerk of the Superior Court  
By Katelin O'Keefe, Deputy Clerk

FERRIS & BRITTON  
A Professional Corporation  
Michael R. Weinstein (SBN 106464)  
Scott H. Toothacre (SBN 146530)  
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mweinstein@ferrisbritton.com  
stoothacre@ferrisbritton.com

Attorneys for Plaintiff and Cross-Defendant  
LARRY GERACI

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

LARRY GERACI, an individual,

Plaintiff,

v.

DARRYL COTTON, an individual; and  
DOES 1 through 10, inclusive,

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

v.

LARRY GERACI, an individual, REBECCA  
BERRY, an individual, and DOES 1  
THROUGH 10, INCLUSIVE,

Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil

**NOTICE OF DEMURRER AND  
DEMURRER BY CROSS-DEFENDANT  
LARRY GERACI TO SECOND  
AMENDED CROSS-COMPLAINT BY  
DARRYL COTTON**

**[IMAGED FILE]**

**DATE:** November 3, 2017  
**TIME:** 9:00 a.m.  
**DEPT:** C-73

**Complaint Filed:** March 21, 2017  
**Trial Date:** May 11, 2018

**TO EACH PARTY AND THEIR ATTORNEYS OF THE RECORD:**

**PLEASE TAKE NOTICE** that, on November 3, 2017, at 9:00 a.m. or as soon thereafter as the matter may be heard in Department C-73 of this Court, located at 330 West Broadway, San Diego, California, 92101, Plaintiff and Cross-Defendant, LARRY GERACI (hereafter "Geraci"), will and hereby does move the Court to sustain his demurrer to the Second Amended Cross-Complaint filed on August 25, 2017, by Defendant and Cross-Complainant, DARRYL COTTON (hereafter "Cotton" or

1 "Cross-Complainant"), on each of the grounds set forth below.

2 **DEMURRER**

3 The Cross-Complaint's alleged first, second, third, and fourth causes of action, and each of  
4 them, fail to state facts sufficient to constitute a cause of action against Geraci (Code Civ. Proc.,  
5 § 430.10(e)) on the grounds and for the reasons set forth below and explained in detail in the  
6 accompanying Memorandum of Points and Authorities.

7 **FIRST CAUSE OF ACTION**

8 1. The first cause of action for breach of contract fails to state a cause of action against  
9 Geraci because Cross-Complainant alleges an oral agreement (or partly oral, partly written agreement)  
10 for the purchase and sale of the subject real propertied that is barred by the applicable statute of frauds.

11 2. The first cause of action for breach of contract fails to state a cause of action because it  
12 fails to allege facts resulting in an actionable breach. (Cal. Code Civ. Proc. § 430.10(e).)

13 **SECOND CAUSE OF ACTION**

14 3. The second cause of action for intentional misrepresentation does not state a cause of  
15 action because it fails to allege facts which, if true, are sufficient to establish the element of justifiable  
16 reliance. (Cal. Code Civ. Proc. § 430.10(e).)

17 **THIRD CAUSE OF ACTION**

18 4. The third cause of action for negligent misrepresentation does not state a cause of action  
19 because it fails to allege facts which, if true, are sufficient to establish the element of justifiable  
20 reliance. (Cal. Code Civ. Proc. § 430.10(e).)

21 5. The third cause of action for negligent misrepresentation fails to state a cause of action  
22 because under [California law, a party cannot plead both a cause of action for negligent  
23 misrepresentation and promissory fraud. (Cal. Code Civ. Proc. § 430.10(e).)

24 **FOURTH CAUSE OF ACTION**

25 6. The fourth cause of action for false promise does not state a cause of action because it  
26 fails to allege facts which, if true, are sufficient to establish the element of justifiable reliance. (Cal.  
27 Code Civ. Proc. § 430.10(e).)

28 For each of such reasons, Geraci moves for an order of this Court sustaining the demurrers to



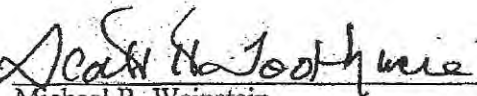
1 the first, second, third, and fourth causes of action without leave to amend unless Cross-Complainant  
2 can make a sufficient offer of proof that he can cure the pleading deficiencies.

3 The demurrers are based upon this Notice of Demurrer and Demurrer, the supporting  
4 Memorandum of Points and Authorities, the supporting Declaration of Michael R. Weinstein, the  
5 records and files in this action, and such further matters that may be properly presented prior to or at the  
6 time of hearing on the motion.

7 **NOTICE IS FURTHER GIVEN** that a tentative ruling is issued the day before the date set  
8 forth for hearing, this court follows rule 3.1308(a)(2) and no notice of intent to appear is required to  
9 appear for argument. The tentative ruling shall be made available at 3:30 p.m. on the court day prior to  
10 the scheduled hearing. The tentative ruling may direct the parties to appear for oral argument, and may  
11 specify the issues on which the court wishes the parties to provide further argument. The tentative  
12 ruling may be obtained by calling the court tentative ruling number at (619) 450-7381 or by navigating  
13 to the court's website [www.sandiego.courts.ca.gov](http://www.sandiego.courts.ca.gov).

14  
15 Dated: September 28, 2017

FERRIS & BRITTON,  
A Professional Corporation

16  
17 By   
18 Michael R. Weinstein  
19 Scott H. Toothacre  
20 Attorneys for Plaintiff and Cross-Defendant  
21 LARRY GERACI  
22  
23  
24  
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27  
28

**ELECTRONICALLY FILED**  
Superior Court of California,  
County of San Diego

**09/28/2017** at 11:02:00 AM  
Clerk of the Superior Court  
By Katelin O'Keefe, Deputy Clerk

FERRIS & BRITTON  
A Professional Corporation  
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mweinstein@ferrisbritton.com  
stoothacre@ferrisbritton.com

Attorneys for Plaintiff and Cross-Defendant  
LARRY GERACI

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

LARRY GERACI, an individual,

Plaintiff,

v.

DARRYL COTTON, an individual; and  
DOES 1 through 10, inclusive,

Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil

**DECLARATION OF MICHAEL R.  
WEINSTEIN IN SUPPORT OF  
CROSS-DEFENDANT LARRY GERACI'S  
DEMURRER TO CROSS-COMPLAINANT  
DARRYL COTTON'S SECOND AMENDED  
CROSS-COMPLAINT**

**[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.

**DATE: November 3, 2017**  
**TIME: 9:00 a.m.**  
**DEPT: C-73**

Complaint Filed: March 21, 2017  
Trial Date: May 11, 2018

I, Michael R. Weinstein, declare:

1. I am an adult individual residing in the County of San Diego, State of California, and I am the attorney in this action for Plaintiff and Cross-Defendant, LARRY GERACI. I have personal knowledge of the foregoing facts and if called as a witness could and would so testify.

2. The purpose of this declaration is to advise the Court that the attorneys for each party have satisfied the meet and confer requirements of Code of Civil Procedure section 430.41. (Code Civ.



1 Proc., §430.41(a)(3).)

2 3. On September 13, 2017, I emailed David Demian, attorney for Defendant and Cross-  
3 Complainant, DARRYL COTTON, a meet and confer letter pursuant to the requirements of Code of  
4 Civil Procedure section 430.41 advising him that Mr. Geraci had objections to the Second Amended  
5 Cross-Complaint and intended to file a demurrer objecting to the first through fourth causes of action  
6 asserted in the Second Amended Cross-Complaint. This meet and confer letter confirmed a prior  
7 telephonic meet and confer engaged in by the attorneys regarding Mr. Geraci's intended demurrer. A  
8 true and correct copy of my September 13, 2017, meet and confer letter is attached as Exhibit A to this  
9 declaration. The attorneys/parties have not been able to resolve the objections to the Second Amended  
10 Cross-Complaint that are the subject of the Demurrer being filed on behalf of Cross-Defendant, Mr.  
11 Geraci.

12 I declare under penalty of perjury under the laws of the State of California, that the foregoing is  
13 true and correct of my personal knowledge. Executed this 28th day of September, 2017, in San Diego,  
14 California.

15  
16   
17 MICHAEL R. WEINSTEIN  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# **EXHIBIT A**



GE4892.001

September 13, 2017

**Via E-Mail and U.S. Mail**

David S. Demian, Esq.  
Adam C. Witt, Esq.  
Finch, Thornton & Baird, LLP  
4747 Executive Drive - Suite 700  
San Diego, CA 92121-3107 Steven Cash

Re: Larry Geraci v. Darryl Cotton  
San Diego Superior Court Case No. 37-2017-00010073

Dear Mr. Demian and Mr. Witt:

David, as I mentioned in our Monday telephone call, we will be filing a demurrer by Larry Geraci to the Second Amended Cross-Complaint. By my calculation, that responsive pleading is due on or before September 29, 2017. Please let me know if you believe the deadline is other than September 29, 2017.

The purpose of this letter is to satisfy the meet and confer requirement of California Code of Civil Procedure section 430.41. This letter confirms that we have already met and conferred about these matters but I invite you to further communicate with me regarding these issues if, after review of the discussion below, you believe further communication would be helpful and might resolve some or all of the issues prior to the filing and hearing of the demurrer.

Mr. Geraci's demurrer will be directed at the first cause of action for breach of contract and the second, third and fourth causes of action for intentional misrepresentation, negligent misrepresentation, and false promise, respectively.

**First Cause of Action for Breach of Contract**

The first cause of action for breach of contract fails to state facts sufficient to constitute a cause of action because it is barred by the applicable Statute of Frauds. The relevant law is found in *Sterling v. Taylor* (2007), 40 Cal.4<sup>th</sup> 757, which makes clear that the memorandum itself must include the essential contractual terms and extrinsic evidence cannot supply those required terms:

We emphasize that a memorandum of the parties' agreement is controlling evidence under the statute of frauds. Thus, extrinsic evidence cannot be employed to prove an agreement at odds with the terms of the memorandum.



This point was made in *Beazell v. Schrader* (1963) 59 Cal.2d 577, 30 Cal.Rptr. 534, 381 P.2d 390. There, the plaintiff sought to recover a 5 percent real estate broker's commission under an oral agreement. (*Id.* at p. 579, 30 Cal.Rptr. 534, 381 P.2d 390.) The escrow instructions, which specified a 1.25 percent commission, were the "memorandum" on which the plaintiff relied to comply with the statute. However, he contended the instructions incorrectly reflected the parties' actual agreement, as shown by extrinsic evidence. (*Id.* at p. 580, 30 Cal.Rptr. 534, 381 P.2d 390.) The *Beazell* court rejected this argument, holding that under the statute of frauds, "the parol agreement of which the writing is a memorandum must be one whose terms are consistent with the terms of the memorandum." (*Id.* at p. 582, 30 Cal.Rptr. 534, 381 P.2d 390.) Thus, in determining whether extrinsic evidence provides the certainty required by the statute, courts must bear in mind that the evidence cannot contradict the terms of the writing.

*Sterling v. Taylor* (2007), *supra*, 40 Cal.4<sup>th</sup> at 771-772. See, *Ukkestad v. RBS Asset Finance, Inc.* 235 Cal.App.4<sup>th</sup> 156 (2015) ["In the context of a case arising from a dispute over the certainty of the terms of sale of real property, our Supreme Court recently endorsed a "flexible, pragmatic view," under which uncertain written contractual terms comply with the statute of frauds as long as they can be made certain by reference to extrinsic evidence, and as long as that evidence is not used to contradict the written terms. (*Sterling, supra*, 40 Cal.4<sup>th</sup> at p. 771, fn. 13, 55 Cal.Rptr.3d 116, 152 P.3d 420.).] See also, *Jacobs v. Locatelli* (2017), 8 Cal.App. 5<sup>th</sup> 317, 325 ["As a result of *Sterling*, it is indisputably the law that "when ambiguous terms in a memorandum are disputed, extrinsic evidence is admissible to resolve the uncertainty." (*Sterling, supra*, 40 Cal.4<sup>th</sup> at p. 767, 55 Cal.Rptr.3d 116, 152 P.3d 420.) The agreement must still provide the essential terms, and it is "clear that extrinsic evidence cannot supply those required terms." (*Ibid.*)]

Here, the only writing signed by both parties is the November 2, 2016 written agreement, which explicitly provides for a \$10,000 down payment ("earnest money to be applied to the sales price"); in fact, the agreement acknowledges receipt of that down payment. Mr. Cotton is alleging that the oral agreement provided for a down payment of \$50,000, which is in direct contradiction of the written term of a \$10,000 down payment.

**Second, Third and Fourth Causes of Action for Intentional Misrepresentation, Negligent Misrepresentation, and False Promise**

Each of these causes of action fails to state facts sufficient to constitute a cause of action because Mr. Cotton has not and cannot allege reasonable and justifiable reliance.

**No Reasonable Reliance**

A necessary element of each of these causes of action is reasonable reliance on the



alleged false representation. [See CACI 1900, 1902, and 1903]

"[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith v. Dahl* (2012) 205 Cal.App.4<sup>th</sup> 1039,1062.)

"Actual reliance occurs when a misrepresentation is "an immediate cause of [a plaintiff's] conduct, which alters his legal relations," and when, absent such representation, "he would not, in all reasonable probability, have entered into the contract or other transaction." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4<sup>th</sup> 951, 976-977.)

"Besides actual reliance, [a] plaintiff must also show "justifiable" reliance, i.e., circumstances were such to make it *reasonable* for [the] defendant's statements without an independent inquiry or investigation." [Citation.] The reasonableness of the plaintiff's reliance is judged by reference to the plaintiff's knowledge and experience. (5 Witkin, summary of Cal. Law, Torts, § 808, p. 1164.) "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact." [Citations.]' [Citation]." (*OCM Principal Opportunities Fund, L.P. CIBC World Markets Corp.* (2007) 157 Cal.App.4<sup>th</sup> 835, 864-865.)

When a promise contradicts the express terms of the contract, proving justifiable reliance is an uphill battle. (*Pacific State Bank v. Greene* (2003) 110 Cal.App.4<sup>th</sup> 375, at 393.) This is because of the general principle that a party who signs a contract "cannot complain of unfamiliarity with the language of the instrument" (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710), the defrauded party must show a reasonable reliance on the misrepresentation that excuses the failure to familiarize himself with the contents of the document. (Rest.2d Contracts, §§ 164, 166; *California Trust Co. v. Cohn* (1932) 214 Cal. 619.) For instance, a "party's *unreasonable* reliance on the other's misrepresentations, resulting in a failure to read a written agreement before signing it, is an insufficient basis, under the doctrine of fraud in the execution ..." for permitting that party to void the agreement. (*Rosenthal v. Great Western Fin. Securities Corp.* 14 Cal.4<sup>th</sup> at p. 423) Thus, the particular circumstances of the contract's execution, including the prominent and discernible provisions of the contents of the writing in issue, must make it reasonable for the party claiming fraud to have nonetheless relied on the mischaracterization. This is not an easily met burden of proof.

- More importantly for purposes of this demurrer, Mr. Cotton has not alleged facts which, if true, are sufficient to support a finding of reasonable reliance. In addition, considering that the misrepresentations Mr. Cotton is claiming are in direct conflict with the clear, unambiguous written agreement signed by Mr. Cotton, it does not appear Mr. Cotton can amend to allege a factual scenario by which Mr. Cotton would be able to establish reasonable reliance on alleged misrepresentations made by Mr. Geraci.

LAW OFFICES  
**FERRIS  
& BRITTON**  
A Professional Corporation

Adam Witt and David Demian


July 27, 2017

Page 4 of 4

If you wish to discuss this matter further please do so by September 21, 2017. I intend to file the demurrer by September 25, 2017, as the next day I am heading out of the country for two weeks.

Thank you.

Respectfully,



MICHAEL R. WEINSTEIN, for  
Ferris & Britton, APC

MRW/

cc: Larry Geraci



## EXHIBIT 7

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**ELECTRONICALLY FILED**  
Superior Court of California,  
County of San Diego

**10/23/2017** at 12:10:00 PM  
Clerk of the Superior Court  
By Katelin O'Keefe, Deputy Clerk

Attorneys for Defendant and Cross-Complainant Darryl Cotton

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE 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

DARRYL COTTON'S OPPOSITION TO  
LARRY GERACI'S DEMURRER TO THE  
SECOND AMENDED CROSS-COMPLAINT

[IMAGED FILE]

Assigned to:  
Hon. Joel R. Wohlfeil, Dept. C-73

Date: November 3, 2017  
Time: 9:00 a.m.  
Dept.: C-73

Complaint Filed: March 21, 2017  
Trial Date: May 11, 2018

AND RELATED CROSS-ACTION.

I

INTRODUCTION

Darryl Cotton's ("Cotton") Second Amended Cross-Complaint ("SACC") alleges Breach of Contract, Intentional Misrepresentation, Negligent Misrepresentation, False Promise, and Declaratory Relief claims against Larry Geraci ("Geraci") stemming from the latter's behavior in a real-estate deal with Cotton. The SACC states facts sufficient to allege each of these causes of action. Geraci's arguments to the contrary lack factual and legal merit.



1 Legally, Geraci's reliance on the Statute of Frauds is misguided. The SACC alleges the  
2 existence of a written agreement that is not subject to the Statute of Frauds. Factually, Geraci's  
3 arguments alternatively ignore and misconstrue allegations in the SACC to suit Geraci's needs.  
4 Indeed, some of Geraci's arguments are utterly irrelevant and non-responsive to Cotton's  
5 SACC. The Court should deny Geraci's demurrer. Should the Court find merit in any of  
6 Geraci's arguments, the Court should grant leave to Cotton to amend.

7 II

8 FACTS

9 In or around August 2016 Geraci approached Cotton and expressed interest in  
10 purchasing real property owned by Cotton located at 6176 Federal Boulevard, San Diego,  
11 California 92114 ("Property"). (SACC, p. 3, ¶ 8.) Geraci was drawn to the Property because it  
12 was potentially eligible to be used as a Medical Marijuana Consumer Cooperative ("MMCC").  
13 (*Id.*) For the Property to run as an MMCC, a Conditional Use Permit ("CUP") must be issued  
14 by the City. A CUP for an MMCC is only issued to eligible properties following a permitting  
15 process which takes several months. (SACC, p. 4, ¶ 11.) Cotton and Geraci engaged in lengthy  
16 negotiations over the terms for potential sale of the Property, and ultimately reached agreement  
17 on several key terms. However, these deal points were never reduced to a fully integrated  
18 written agreement. Instead, at the prodding of Geraci and based on the representations and  
19 promises of Geraci that comprise the fraud related causes of action set forth in the SACC, on  
20 November 2, 2017, the parties executed an ambiguous document ("November Document") and  
21 exchanged emails which were incorporated into that document ("November Emails").  
22 Summarily, Cotton alleges that the November Document and November Emails combine to  
23 evidence the following basic terms of agreement, all as alleged in the SACC:

24 (1) creating a record of Geraci having paid \$10,000.00 in earnest money and that  
25 Cotton would not enter into an agreement with any third party for the Property pending  
26 negotiation of a final agreement;

27 / / / /

1 (2) providing evidence of the parties' agreement on the property's purchase price of  
2 \$800,000.00;

3 (3) providing evidence of the agreement for Cotton to receive a ten percent profits  
4 interest in the MMCC to be established by Geraci; and

5 (4) providing evidence of the parties' good-faith agreement to negotiate in good  
6 faith and to formalize a final, fully integrated document reflecting the material terms of their  
7 purchase agreement. (SACC, p. 6, ¶ 18.)

8 Of course, Geraci now disputes Cotton's allegations as to the November Document and  
9 the November Emails. Geraci asserts the November Document is, despite numerous verbal  
10 and written communications prior to and after the date of the November Document to the  
11 contrary, including the November Emails, a final binding real estate purchase agreement  
12 pursuant to which Cotton promises to sell the Property. The simple fact is that Cotton alleges  
13 otherwise in the SACC and, most importantly at this stage of the case, Cotton's allegations are  
14 sufficient to state each of the causes of action alleged in the SACC.

### 15 III

#### 16 LEGAL STANDARD FOR DEMURRER

17 A demurrer for "failure to state a cause of action" is commonly referred to as a  
18 "general" demurrer. (*McKenney v. Purepac Pharmaceutical Co.* (2008) 167 Cal.App.4th 72,  
19 77.) When a general demurrer challenges a specific cause of action, the test is whether that  
20 cause of action states *any* claim entitling plaintiff to relief. If the essential facts of any valid  
21 claim are present, then the cause of action prevails against the general demurrer. (*Quelimane*  
22 *Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38-39.) Further, and directly  
23 applicable to Geraci's demurrer, "[o]bjections that a complaint is ambiguous or uncertain, or  
24 that essential facts appear only inferentially, or as conclusions of law, or by way of recitals,  
25 must be raised by *special demurrer*, and cannot be reached on general demurrer." (*Johnson v.*  
26 *Mead* (1987) 191 Cal.App.3d 156, 160, original italics.) Lastly, it is well established that if a  
27  
28



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Superior Court of California,  
County of San Diego

**09/28/2017** at 11:02:00 AM

Clerk of the Superior Court  
By Katelin O'Keefe, Deputy Clerk

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LARRY GERACI

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

LARRY GERACI, an individual,

Plaintiff,

v.

DARRYL COTTON, an individual; and  
DOES 1 through 10, inclusive,

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

v.

LARRY GERACI, an individual, REBECCA  
BERRY, an individual, and DOES 1  
THROUGH 10, INCLUSIVE,

Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel Wohlfeil

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

**[IMAGED FILE]**

**DATE:** November 3, 2017  
**TIME:** 9:00 a.m.  
**DEPT:** C-73

**Complaint Filed:** March 21, 2017  
**Trial Date:** May 11, 2018

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1 Plaintiff and Cross-Defendant LARRY GERACI (hereafter "Geraci") respectfully submits these  
2 points and authorities in support of his Demurrer to Cross-Complainant DARRYL COTTON's  
3 (hereafter "Cotton" or "Cross-Complainant") Second Amended Cross-Complaint filed on August 25,  
4 2017 (hereafter "SAXC").

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

6 The SAXC alleges five causes of action by Cotton against Geraci: the first cause of action for  
7 breach of contract; the second cause of action for intentional misrepresentation; the third cause of  
8 action for negligent misrepresentation; the fourth cause of action for false promise; and the fifth cause  
9 of action for declaratory relief. Each of the five causes of action against Geraci arises out of, or relates  
10 to, a dispute concerning a contract for the purchase and sale of real property between Geraci and  
11 Cotton. Geraci demurs to the first, second, third, and fourth causes of action asserted against him upon  
12 the following grounds:

13 1. The first cause of action for breach of contract fails to state a cause of action because  
14 Cotton alleges an oral agreement (or partly oral, partly written agreement) for the purchase and sale of  
15 the subject real property that is barred by the applicable Statute of Frauds. (Civ. Code, § 1624(a)(3).)

16 2. The first cause of action for breach of contract fails to state a cause of action because it  
17 fails to allege a necessary element of that cause of action – actionable breach.

18 3. Each of the misrepresentation claims, the second, third, and fourth causes of action for  
19 the torts of intentional misrepresentation, negligent misrepresentation, and false promise, respectively –  
20 do not state a cause of action as Cotton has not alleged facts which, if true, are sufficient to establish the  
21 element of justifiable reliance.

22 4. Under California law there cannot be a promissory fraud cause of action and a negligent  
23 misrepresentation cause of action based upon the same set of identical facts.

24 **II. FACTUAL ALLEGATIONS**

25 The relevant factual allegations supporting Cotton's first cause of action for breach of contract  
26 are found in the paragraphs of the SAXC, as follows:

27 8. In or around August 2016, Geraci first contacted Cotton seeking to  
28 purchase the Property. Geraci desired to buy the Property from Cotton because it meets  
certain requirements of the City of San Diego ("City") for obtaining a Conditional Use



1 Permit ("CUP") to operate a Medical Marijuana Consumer Cooperative ("MMCC") at  
2 the Property. The Property is one of a very limited number of properties located in San  
3 Diego City Council District 4 that potentially satisfy the CUP requirements for a MMCC.

4 9. Over the ensuing weeks and months, Geraci and Cotton negotiated  
5 extensively regarding the terms of a potential sale of the Property ....

6 13. On November 2, 2016, Geraci and Cotton met at Geraci's office in an  
7 effort to negotiate the final terms of their deal for the sale of the Property. The parties  
8 reached an agreement on the material terms for the sale of the Property. The parties  
9 further agreed to cooperate in good faith the promptly reduce the complete agreement,  
10 including all of the agreed-upon terms, to writing.

11 14. The material terms of the agreement reached by the parties at the  
12 November 2, 2016 meeting included, without limitation, the following key deal points:

13 (a) Geraci agreed to pay the total sum of \$800,000 in consideration for  
14 the purchase of the Property, with a \$50,000 non-refundable deposit payable to Cotton  
15 immediately upon the parties' execution of final integrated written agreements and the  
16 remaining \$750,000 payable to Cotton upon the City's approval of a CUP application for  
17 the property;

18 (b) The parties agreed that the City's approval of a CUP application to  
19 operate a MMCC at the Property would be a condition precedent to closing the sale (in  
20 other words, the sale of the Property would be completed and title transferred to Geraci  
21 only upon the City's approval of the CUP application and Geraci's payment of the  
22 \$750,000 balance of the purchase price to Cotton; if the City denied the CUP application,  
23 the parties agreed the sale of the Property would be automatically terminated and Cotton  
24 would be entitled to retain the entire \$50,000 non-refundable deposit;

25 (c) Geraci agreed to grant Cotton a ten percent (10%) equity stake in  
26 the MMCC that would operate at the Property following the City's approval of the CUP  
27 application; and

28 (d) Geraci agreed that, after the MMCC commenced operations at the  
Property, Geraci would pay Cotton ten percent (10%) of the MMCC's monthly profits  
and Geraci would guarantee that such payments would amount to at least \$10,000 per  
month.

15. At Geraci's request, the sale was to be documented in two final written  
agreements, a real estate purchase agreement and a separate side agreement, which  
together would contain all the agreed-upon terms from the November 2, 2016 meeting.  
At that meeting, Geraci also offered to have his attorney "quickly" draft the final  
integrated agreements and Cotton agreed.

16. Although the parties came to a final agreement on the purchase price and  
deposit amounts at their November 2, 2016 meeting, Geraci requested additional time to  
come up with the \$50,000 non-refundable deposit. Geraci claimed he needed extra time  
because he had limited cash flow and would require the cash he did have to fund the  
lobbying efforts needed to resolve the zoning issue at the Property and to prepare the  
CUP application.

17. Cotton was hesitant to grant Geraci more time to pay the non-refundable  
deposit but Geraci offered to pay \$10,000 towards the \$50,000 total deposit immediately  
as a show of "good-faith," even though the parties had not reduced their final agreement

1 to writing. Cotton was understandably concerned that Geraci would file the CUP  
2 application before paying the balance of the non-refundable deposit and Cotton would  
3 never receive the remainder of the non-refundable deposit if the City denied the CUP  
4 application before Geraci paid the remaining \$40,000 (thereby avoiding the parties'  
5 agreement that the \$50,000 non-refundable deposit was intended to shift to Geraci some  
6 of the risk of the CUP application being denied). Despite his reservations, Cotton agreed  
7 to Geraci's request and accepted the lesser \$10,000 initial deposit amount based upon  
8 Geraci's express promise to pay the \$40,000 balance of the non-refundable deposit prior  
9 to submission of the CUP application, at the latest.

10 18. At the November 2, 2016 meeting, the parties executed a three-sentence  
11 document related to their agreement on the purchase price for the Property at Geraci's  
12 request, which read as follows:

13 Darryl Cotton has agreed to sell the property located at 6176 Federal Blvd,  
14 CA for a sum of \$800,00.00 to Larry Geraci or assignee on the approval of  
15 a Marijuana Dispensary. (CUP for a dispensary)

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

20 Geraci assured Cotton that the document was intended to merely create a record of  
21 Cotton's receipt of the \$10,000 "good-faith" deposit and provide evidence of the parties'  
22 agreement on the purchase price and good-faith agreement to enter into final integrated  
23 agreement documents related to the sale of the Property. Geraci emailed Cotton a  
24 scanned copy of the executed document he same day. Following closer review of the  
25 executed document, Cotton wrote in an email to Geraci several hours later (still on the  
26 same day):

27 I just noticed the 10% equity position in the dispensary was not language  
28 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.

Approximately two hours later, Geraci replied via email, "No no problem at all."

Paragraphs 19-28 set forth a litany of factual allegations that can be summarized as follows:

The written agreement signed November 2, 2016, did not contain all of the material terms and  
conditions of the agreement that Cotton alleges were really agreed to on November 2, 2016. After  
signing that incomplete written agreement<sup>1</sup>, the parties had numerous oral and written communications

<sup>1</sup> Plaintiff and Cross-Defendant Geraci alleges in his Complaint that the written agreement signed November 2, 2016, contains all the material terms and conditions of the agreement for the purchase and sale of the subject real property and is the entire agreement enforceable between the parties. Defendant and Cross-Complainant Cotton contends that written agreement signed November 2, 2016, sets forth only some of the material terms and conditions agreed to by the parties on November 2<sup>nd</sup> and some different and additional material terms and conditions not reflected in a signed writing were agreed to by the parties.



1 about documenting in a signed writing all the material terms and conditions Cotton alleges had been  
2 agreed to orally on November 2<sup>nd</sup>, but never did so. In other words, there is no written agreement  
3 signed by Cotton and Geraci containing all of the material terms and conditions Cotton alleges were  
4 agreed to on November 2<sup>nd</sup>. In addition, one of those material terms and conditions Cotton claims was  
5 orally agreed to (\$50k earnest money) directly contradicts the November 2, 2016, written agreement  
6 which clearly states that \$10k would be paid as earnest money and acknowledges that such payment  
7 has been received.

### 8 **III. LEGAL STANDARD ON DEMURRER**

9 When a complaint, or any cause of action in a complaint, fails to state facts sufficient to  
10 constitute a cause of action, the court may grant a demurrer. (Code Civ. Proc., § 430.30.) The court  
11 considers the allegations on the face of the complaint and any matter of which it must or may take  
12 judicial notice under the Code of Civil Procedure section 430.30(a). (*Groves v. Peterson* (2002)  
13 100 Cal.App.4th 659; Code Civ. Proc., § 430.30(a).) In reviewing the sufficiency of a complaint  
14 against a demurrer, the court treats the demurrer as admitting all material facts properly pleaded.  
15 (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (citing to *Serrano v. Priest* (1971) 5 Cal.3d 584, 591);  
16 *Adelman v. Associated Ins. Co.* (2001) 90 Cal.App.4th 352, 359.) However, contentions, deductions, or  
17 conclusions of fact or law are insufficient to constitute a cause of action. (*Id.*)

18 The court may grant a demurrer with or without leave to amend when it is obvious from the  
19 facts alleged that the plaintiff could not state a cause of action. (See *Hillman v. Hillman Land Co.*  
20 (1947) 81 Cal.App.2d 174, 181; see generally *Carney v. Simmonds* (1957) 49 Cal.2d 84, 97; see  
21 *Smiley v. Citibank* (1995) 11 Cal.4th 138, 164; Code Civ. Proc., § 430.30(j).) The party seeking leave  
22 to amend their pleading bears the burden of establishing that there is a reasonable possibility that the  
23 defect can be cured by amendment. (See *Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318; *Gould v.*  
24 *Maryland Sound Industries* (1995) 31 Cal.App.4th 1137, 1153.)

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26 ///

27 ///

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1 **IV. LEGAL ARGUMENT**

2 **A. THE FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT FAILS TO**  
3 **STATE A CAUSE OF ACTION**

4 **1. Cotton's Allegations of an Oral, or of a Partly Oral or Partly Written**  
5 **Agreement, Violate the Applicable Statute of Frauds – Civ. Code §**  
6 **1624(a)(3)**

7 A contract coming within the statute of frauds is invalid unless it is memorialized by a writing  
8 subscribed by the party to be charged or by the party's agent. (Civ. Code, § 1624; *Secrest v. Security*  
9 *National Mortgage Loan Trust*, (2008) 167 Cal.App.4th 544) An agreement for the sale of real  
10 property or an interest in real property comes within the statute of frauds. (Civ. Code, § 1624(a)(3).)  
11 Here, both parties allege, and therefore it is undisputed, that they signed a November 2, 2016, written  
12 agreement. This written agreement between the parties is the controlling evidence under the statute of  
13 frauds. Cotton alleges, based on extrinsic evidence, that the actual agreement between the parties  
14 contains material terms and conditions in addition to those in the written agreement as well as a term (a  
15 \$50,000 deposit rather than the \$10,000 deposit stated in the written agreement) that expressly conflicts  
16 with a term of the November 2, 2016 agreement. However, such a claim cannot stand as extrinsic  
17 evidence cannot be employed to prove an agreement at odds with the terms of the written  
18 memorandum. (*Beazell v. Schrader* (1963) 59 Cal.2d 577.)

19 The controlling law is set forth in *Sterling v. Taylor* (2007) 40 Cal.4th 757, as follows:

20 We emphasize that a memorandum of the parties' agreement is controlling evidence  
21 under the statute of frauds. Thus, extrinsic evidence cannot be employed to prove an  
22 agreement at odds with the terms of the memorandum. This point was made in *Beazell v.*  
23 *Schrader* (1963) 59 Cal.2d 577, 30 Cal.Rptr. 534, 381 P.2d 390. There, the plaintiff  
24 sought to recover a 5 percent real estate broker's commission under an oral agreement.  
25 (*Id.* at p. 579, 30 Cal.Rptr. 534, 381 P.2d 390.) The escrow instructions, which specified  
26 a 1.25 percent commission, were the "memorandum" on which the plaintiff relied to  
27 comply with the statute. However, he contended the instructions incorrectly reflected the  
28 parties' actual agreement, as shown by extrinsic evidence. (*Id.* at p. 580, 30 Cal.Rptr.  
534, 381 P.2d 390.) The *Beazell* court reject this argument, holding that under the  
statute of frauds, "the parol agreement of which the writing is a memorandum must  
be one whose terms are consistent with the terms of the memorandum." (*Id.* at  
p. 582, 30 Cal.Rptr. 534, 381 P.2d 390.) Thus, in determining whether extrinsic evidence  
provides the certainty required by the statute, courts must bear in mind that the evidence  
cannot contradict the terms of the writing. (Bold added.)

*Sterling v. Taylor*, *supra*, 40 Cal.4th at p. 771-772.

1 See also *Ukkestad v. RBS Asset Finance, Inc.* (2015) 235 Cal.App.4th 156 (“In the context of a  
2 case arising from a dispute over the certainty of the terms of sale of real property, our Supreme court  
3 recently endorsed a “flexible, pragmatic view,” under which uncertain written contractual terms comply  
4 with the statute of frauds as long as the can be made certain by reference to extrinsic evidence, and as  
5 long as the evidence is not used to contradict the written terms. (*Sterling, supra*, 40 Cal.4th at  
6 p. 771, fn. 13.)) See also, *Jacobs v. Locatelli* (2017) 8 Cal.App.5th 317, 325 (“As a result of *Sterling*,  
7 it is indisputably the law that “when ambiguous terms in a memorandum are disputed, extrinsic  
8 evidence is admissible to resolve the uncertainty.” (*Sterling, supra*, 40 Cal.4th at p. 767.) The  
9 agreement must still provide the essential terms, and it is “clear that extrinsic evidence cannot supply  
10 those required terms.” (*Ibid.*))

11 In the instant case, the only writing signed by both parties is the November 2, 2016 written  
12 agreement, which explicitly provides for a \$10,000 down payment (“earnest money to be applied to the  
13 sales price”); in fact, the agreement acknowledges receipt of that down payment. Cotton is alleging  
14 that the oral agreement provided for a down payment of \$50,000, which is in direct contradiction of the  
15 written term of a \$10,000 down payment.

16 **2. The First Cause of Action for Breach of Contract Fails as a Matter of Law**  
17 **as It Does Not Allege Actionable Breach**

18 “To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract,  
19 (2) plaintiff’s performance of the contract or excuse for nonperformance, (3) defendant’s breach, and  
20 (4) resulting damage to the plaintiff.” (*Richman v. Hartley*, (2014) 224 Cal.App.4th 1182, 1186.) “It is  
21 Hornbook law that an agreement to make an agreement is nugatory, and that this is true of material  
22 terms of any contract.” (*Roberts v. Adams* (1958) 164 Cal.App.2d 312, 314.) “[N]either law nor equity  
23 provides a remedy for a breach of an agreement to agree in the future.” (*Id.* at p. 316)

24 The pertinent allegations regarding Cotton’s breach of contract cause of action are found in the  
25 SAXC as follows:

26 36. Under the parties’ contract, Geraci was bound to negotiate the terms of an  
27 agreement for the Property in good faith. Geraci breached his obligation to negotiate in  
28 good faith by, among other things, intentionally delaying the process of negotiations,  
failing to deliver acceptable final purchase documents, failing to pay the agreed-upon  
non-refundable deposit, demanding new and unreasonable terms in order to further delay



1 and hinder the process of negotiations, and failing to timely or constructively response to  
2 Cotton's requests and communications.

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

9  
10 The written contract entered on November 2, 2012 reads as follows:

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

13 Ten Thousand dollars (cash) has been given in good faith earnest money to be applied to  
14 the sales price of \$800,000.00 and to remain in effect until license is approved. Darryl  
Cotton has agreed not to enter into any other contacts (sic) on this property. (SAXC ¶18)

15 Cotton has not alleged that Geraci breached any obligations set forth in the November 2, 2016  
16 written agreement. Cotton has not alleged Geraci failed to pay the \$10k earnest money (in fact, the  
17 written agreement acknowledges it has been paid). And Cotton has not alleged the CUP Application  
18 has been approved and Geraci has failed to tender the remaining balance of the purchase price.

19 Instead, Cotton alleges that on November 2, 2016, the parties orally agreed to other and  
20 different material terms and conditions not set forth in the November 2, 2016, written agreement,  
21 including an obligation to negotiate in good faith to reduce these other and different material terms and  
22 conditions to a signed writing, and that Geraci breached the alleged agreement by failing to negotiate in  
23 good faith to do so. (SAXC, ¶ 36.)

24 This alleged failure to negotiate in good faith to reduce these other and different material terms  
25 and conditions to a signed writing cannot as a matter of law constitute an actionable breach. It is  
26 simply an admission by Cotton that these alleged other and different material terms and conditions  
27 were never reduced to a writing sign by both Cotton and Geraci, and, therefore, the alleged oral (or  
28

1 partly oral, partly written) agreement alleged by Cotton is barred by the Statute of Frauds. Cotton  
2 cannot bootstrap around the Statute of Frauds by alleging that Geraci's failure to negotiate in good faith  
3 to reduce these other and different material terms and conditions to a signed writing was itself an  
4 actionable breach of an otherwise unenforceable contract.

5 **B. THE SECOND, THIRD AND FOURTH CAUSES OF ACTION FAIL TO STATE**  
6 **A CAUSE OF ACTION**

- 7 **1. Each of the misrepresentation claims, the 2nd, 3rd and 4th causes of action**  
8 **for intentional misrepresentation, negligent misrepresentation, and false**  
9 **promise, do not state a cause of action. Cotton has not alleged facts which, if**  
10 **true, are sufficient to establish the element of justifiable reliance.**

11 In order to state a cause of action for intentional misrepresentation, negligent misrepresentation,  
12 or false promise, the plaintiff must allege reasonable reliance on defendant representations. (CACI Nos.  
13 1900, 1902, and 1903.) An essential element for a claim of promissory fraud is a specific allegation of  
14 reliance that is reasonable. (*Behnke v. State Farm* (2011) 196 Cal.App.4th 1443, 1452 (noting  
15 "justifiable reliance" and "reasonable reliance" by the promisee are an essential element).) Stated  
16 differently, to recover for fraud, Plaintiff must show it reasonably relied on the defendant's  
17 misrepresentations. A Plaintiff cannot recover if reliance was not justified or reasonable. (*Wagner v.*  
18 *Benson* (1980) 101 Cal.App.3d 27, 36 ("plaintiffs' reasonable reliance on the alleged misrepresentation  
19 is an essential element of fraud").) "The law is well established that actionable misrepresentations must  
20 pertain to past or existing material facts. Statements or predictions regarding future events are deemed  
21 to be mere opinions which are not actionable." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th  
22 1462, 1469.)

23 "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and  
24 justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental  
25 course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged  
26 damage." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062.)

27 "Actual reliance occurs when a misrepresentation is "an immediate cause of [a plaintiff's]  
28 conduct, which alters his legal relations," and when, absent such representation, "he would not, in all  
reasonable probability, have entered into the contract or other transaction." (*Engala v. Permanente*  
*Medical Group, Inc.* (1997) 15 Cal.4th 951, 976-977.)

1 “Besides actual reliance, [a] plaintiff must also show “justifiable” reliance, i.e., circumstances  
2 were such to make it *reasonable* for [the] plaintiff to rely on defendant’s statements without an  
3 independent inquiry or investigation.” [Citation.] The reasonableness of the plaintiff’s reliance is judged  
4 by reference to the plaintiff’s knowledge and experience. (5 Witkin, Summary of Cal. Law, Torts,  
5 § 808, p. 1164.) “Except in the rare case where the undisputed facts leave no room for a reasonable  
6 difference of opinion, the question of whether a plaintiff’s reliance is reasonable is a question of fact.”  
7 [Citations.] [Citation.”] (*Ocm Principal Opportunities Fund v. Cibo World Markets Corp.* (2007)  
8 157 Cal.App.4th 835, 864-865.)

9 When a promise contradicts the express terms of the contract, proving justifiable reliance is an  
10 uphill battle. (*Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 393.) This is because of the  
11 general principle that a party who signs a contract “cannot complain of unfamiliarity with the language  
12 of the instrument” (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710), the defrauded  
13 party must show a reasonable reliance on the misrepresentation that excuses the failure to familiarize  
14 himself with the contents of the document. (Rest.2d Contracts, §§ 164, 166; *California Trust Co. v.*  
15 *Cohn* (1932) 214 Cal. 619.) For instance, a “party’s *unreasonable* reliance on the other’s  
16 misrepresentations, resulting in a failure to read a written agreement before signing it, is an insufficient  
17 basis, under the doctrine of fraud in the execution ... “ for permitting that party to void the agreement.  
18 (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 423.) Thus, the particular  
19 circumstances of the contract’s execution, including the prominent and discernible provisions of the  
20 contents of the writing in issue, must make it reasonable for the party claiming fraud to have  
21 nonetheless relied on the mischaracterization. This is not an easily met burden of proof.

22 More importantly for purposes of this demurrer, Cotton has not alleged facts which, if true, are  
23 sufficient to support a finding of reasonable reliance. This is self-evident considering that the  
24 misrepresentations Cotton is claiming reliance upon are in direct conflict with the clear, unambiguous  
25 written agreement signed by Cotton. It does not appear Cotton can amend to allege a factual scenario  
26 by which Cotton would be able to establish reasonable reliance on alleged misrepresentations made by  
27 Geraci.  
28



1 Furthermore, Cotton has admitted that he was *hesitant, understandably concerned and despite*  
2 *his hesitation, concerns and reservations* he agreed to Geraci's terms. (SAXC ¶17) It is difficult to  
3 reconcile Cotton's hesitation, concerns and reservations in dealing with Geraci with his claim to have  
4 reasonably relied on Geraci's representations. Rather it appears that Cotton did not trust Geraci's  
5 alleged representations and entered the agreement regardless of his misgivings regarding Geraci. Such  
6 reliance cannot be said to have been reasonable in light of Cotton's admissions in his pleadings.

7 **2. The Third Cause of Action for Negligent Misrepresentation Fails to State a**  
8 **Claim Upon Which Relief May Be Granted Because Intentional Fraud and**  
9 **Negligent Misrepresentation Base On the Same Facts Cannot Co-Exist**

10 Cross-Complainant's Fourth Cause of Action labeled "False Promise", is for a type of fraud  
11 often referred to as "promissory fraud;" i.e., a promise made without the intent to perform. (SAXC,  
12 ¶¶ 47-54) Cross-Complainant's Third Cause of Action for Negligent Misrepresentation and Fourth  
13 Cause of Action for promissory fraud, rely upon the same exact facts (SAXC ¶¶ 43, 47), incorporating  
14 by reference all previous allegations of the complaint], and attempt to plead the "false promise" cause  
15 of action alternatively with the "negligent misrepresentation" cause of action. While pleading  
16 alternative legal theories based on the same facts is usually acceptable, in this instance Cross-  
17 Complainant's Third Cause of Action fails because California law clearly holds that a promise made  
18 without the intent to perform cannot form the basis for a claim of negligent misrepresentation.

19 Cross-Complainant's Third Cause of Action (Negligent Misrepresentation) is on all fours with,  
20 and is governed by, the decision in *Tarmann v. State Farm* (1991) 2 Cal.App.4th 153. There, plaintiff  
21 alleged claims for fraud and negligent misrepresentation based on her contention that the defendant  
22 insurer had falsely promised that it would pay for repairs to her automobile upon their completion.  
23 When the insurance company in fact declined to pay, plaintiff brought an action alleging that the  
24 insurer's representations about payment were either intentionally or negligently false.

25 The trial court sustained Defendant's demurrer to the negligent misrepresentation claim without  
26 leave to amend, and the Court of Appeal affirmed. In so doing, it began its analysis by noting that "to  
27 be actionable, a negligent misrepresentation must ordinarily be as to past or existing material facts.  
28 [P]redictions as to future events, or statements as to future action by some third party, are deemed  
opinions, and not actionable fraud. [Citations omitted]." (*Tarmann, supra*, 2 Cal.App.4th at p. 158.)

1 There is no question that Cotton alleged that the basis of his allegations regarding fraud were that  
2 Geraci promised to take certain actions in the future. (See SAXC ¶¶ 45(c), 45(b), 48(a), 48(b), 48(c),  
3 48(d).)

4 The Court went on to compare the elements of fraud and negligent misrepresentation, as  
5 follows:

6 To maintain an action for deceit based on a false promise, one must specifically allege  
7 and prove, among other things, that the promisor did not intend to perform at the time he  
8 or she made the promise and that it was intended to deceive or induce the promise to do  
9 or not to do a particular thing. [Citations omitted]. Given this requirement, an action  
10 based on a false promise is simply a type of intentional misrepresentation, i.e., actual  
11 fraud. *The specific intent requirement also precludes pleading a false promise claim as a*  
12 *negligent misrepresentation, i.e., 'the assertion, as a fact, of that which is not true, by one*  
13 *who has no reasonable ground for believing it to be true.'* (Civil Code Section 1710,  
14 subd. (2).) Simply put, making a promise with an honest but unreasonable intent to  
15 perform is wholly different from making one with no intent to perform and, therefore,  
16 does not constitute a false promise. Moreover, we decline to establish a new type of  
17 actionable deceit: the negligent false promise. In light of our discussion, the trial court  
18 properly sustained the demurrer to [Plaintiff's] cause of action for negligent  
19 misrepresentation." *Tarmann, supra*, 2 Cal.App.4th at 159 (emphasis added.)

20 Cross-Complainant cannot have it both ways. His allegations that Plaintiff made promises  
21 about future actions without the intent to perform simply cannot support a claim for negligent  
22 misrepresentation. The Demurrer to the Third Cause of Action, as in *Tarmann*, should be sustained  
23 without leave to amend.

#### 24 **V. LEAVE TO AMEND**

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

This Court should grant the motion *without leave to amend unless* Cross-Complainant makes an  
offer of proof that he can in good faith allege facts establishing the elements of each of the remaining

1 claims.

2 **VI. CONCLUSION**

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

5  
6 Dated: September 28, 2017

FERRIS & BRITTON,  
A Professional Corporation

7  
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1 demurrer is sustained, "it is an abuse of discretion to sustain a demurrer without leave to  
2 amend if there is any reasonable possibility that the defect can be cured by amendment."  
3 (*Goodman v. Kennedy* (1976) 18 Cal.App.3d 335, 349.)

4 IV

5 ARGUMENT

6 A. The Statute of Frauds Does Not Apply to Bar the SACC

7 The SACC states facts supporting a claim for breach of a contract. Cotton alleges  
8 Geraci has failed to perform the parties' agreement reached in November 2016. Cotton alleges  
9 the agreement at issue is an agreement to negotiate in good faith to arrive at a commercially  
10 reasonable and fully integrated written agreement or agreements to document the terms for sale  
11 of the Property. (SACC, p. 6, ¶ 18.) Cotton alleges this agreement is evidenced by the  
12 writings attached to the SACC as Exhibits 1 and 2. (SACC, p. 6, ¶ 18.) Both writings are  
13 subscribed to by Geraci and are therefore outside the purview of the statute of frauds.

14 Ultimately, Geraci's demurrer request is irretrievably flawed, as it is based on the  
15 mistaken premises that: (1) there is no dispute as to the interpretation of the November  
16 Document and the November Emails; and (2) that the \$50,000.00 deposit alleged in the SACC  
17 contradicts the November Document's reference to \$10,000.00 of "earnest money." As to the  
18 first point, the existence of a dispute over the terms of the parties' agreement is abundantly  
19 clear from the allegations of the SACC as compared to the allegations of Geraci in the  
20 Complaint. The parties do not agree as to what comprises the terms of this contract. The  
21 SACC properly alleges the existence of a written agreement and refers to parole evidence to  
22 provide detail as to uncertain terms contained in those writings. Accordingly, the statute of  
23 frauds does not apply.

24 Second, the alleged acknowledgement as to payment of \$10,000.00 in the November  
25 Document is not in conflict with a \$50,000.00 deposit. \$10,000.00 was paid and an additional  
26 \$40,000.00 would be captured in the final agreement which Geraci promised to have his  
27 lawyer prepare. (SACC, p. 5, ¶¶ 14(a), 15, and 16; p. 6, ¶ 17.) Cotton agreed to allow a  
28

1 partial down payment of \$10,000.00 – at Geraci’s insistence, no less – with the balance of the  
2 money (\$40,000.00) due at a later date because Geraci needed additional time to come up with  
3 the full \$50,000.00 deposit. (SACC, p. 5, ¶¶ 14(a), 16; p. 6, ¶ 17 [“Cotton was hesitant to  
4 grant Geraci more time to pay the non-fundable deposit but Geraci offered to pay \$10,000.00  
5 towards the \$50,000.00 total deposit immediately as a show of “good-faith,” even though the  
6 parties had not reduced their final agreement to writing.”] [emphasis added].) Contrary, then,  
7 to Geraci’s assertions, the evidence that Cotton seeks to introduce is consistent with – not  
8 contradictory to – the parties written memorandum and is, thus, admissible under *Sterling v.*  
9 *Taylor* (2007) 40 Cal.4th at 757, as a parole agreement consistent with the terms of a writing.  
10 (*Sterling, supra*, 40 Cal.4th at 771-772 [holding that under the statute of frauds a parole  
11 agreement must be “one whose terms are consistent with the terms of the memorandum.”])<sup>1</sup>  
12 As such, Geraci’s initial attempt to demur Cotton’s First Cause of Action is unavailing.

13 Cotton also states a valid claim for breach of contract for another reason. Under  
14 *Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, 1256, Cotton states a valid  
15 breach-of-contract claim if he alleges facts showing that (a) Geraci and he had agreed to  
16 negotiate in good faith; and (b) that the failure “to reach ultimate agreement resulted from a  
17 breach of that’s party obligation to negotiate or to negotiate in good faith.” (*Id.* at p. 1257,  
18 emphasis added.) Cotton does precisely this in the SACC. In fact, the parties’ use of the  
19 phrase “earnest money” confirms Cotton’s interpretation of the November Document and the  
20 November Emails as providing for further negotiation in good faith to arrive at a final  
21 agreement.<sup>2</sup> (SACC, p. 6, ¶ 18.) Cotton’s SACC alleges that Geraci did not honor this  
22 obligation. Cotton, for instance, alleges that Geraci intentionally delayed further negotiations,  
23 that Geraci failed to deliver purchase documents, and that Geraci failed to fully pay the agreed-

24  
25  
26 <sup>1</sup> Notably, in *Sterling* the Court ruled in the context of a summary judgment motion, not in the context of a  
demurrer.

27 <sup>2</sup> Black’s Law Dictionary defines “earnest money” as a “deposit paid (often in escrow) by a prospective buyer  
28 (esp. of real estate) to show a good-faith intention to complete the transaction, and ordinarily forfeited if the  
buyer defaults.”

1 upon \$50,000.00 deposit. (SACC, p. 12, ¶ 36.) If these allegations are assumed as true, as  
2 they must be, Geraci's demurrer to the first cause of action of the SACC should be denied.

3 B. The SACC Alleges Actionable Breach

4 Geraci further attempts to demurrer Cotton's First Cause of Action by arguing that  
5 Geraci fulfilled all the terms of the November Document and that, in any event, Cotton did not  
6 have a duty to act in good faith because the November Document did not contain a good-faith  
7 term. (Demurrer, p. 12, lns. 16-27.) Geraci's first assertion is patently belied by the simple  
8 fact that the terms of the November Document fail to reflect all of the parties' material terms.  
9 Geraci, thus, is wrong in asserting that he fulfilled all of the terms of the parties' agreement:  
10 He breached *at least* one material term of it, *viz.*, the promise to negotiate in good faith to  
11 deliver a proposed final agreement, the promise to deliver a 10 percent interest in the property,  
12 and failing to pay the amounts due for the \$50,000.00 deposit. (SACC, p.11, ¶ 36.)

13 Geraci's second contention (*i.e.*, that he had no duty to act in good faith) fares no better.  
14 The courts have made clear that "[t]here is an implied covenant of good faith and fair dealing  
15 in every contract that neither party will do anything which will injure the right of the other to  
16 receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50  
17 Cal.2d 654, 658.) As Geraci himself points out in quoting verbatim the November Document,  
18 the parties agreed to close the sale of the property for \$800,000.00 upon the City of San  
19 Diego's future approval of the CUP application. (Demurrer p. 8, lns. 5-11 [quoting verbatim  
20 the parties' November document.]) Even assuming the parties' agreement was captured solely  
21 by the November Document, California law bound Geraci to act in good faith. Without  
22 question, the SACC alleges just such a breach, namely, that Geraci intentionally delayed  
23 further negotiations, that Geraci failed to deliver purchase documents, and that Geraci failed to  
24 fully pay the agreed-upon \$50,000 deposit. (SACC, p. 11, ¶ 36.)

25 Simply put, Geraci's attempts to demurrer Cotton's First Cause of Action are  
26 unavailing.

27 / / / / /



1 C. Cotton's SACC Properly Pleads Causes of Action  
2 for Intentional and Negligent Misrepresentation and False Promise

3 1. Cotton Alleges Facts Proving that Geraci  
4 Engaged in Intentional Misrepresentation and False Promise

5 To state a claim for intentional misrepresentation, Cotton must allege that Geraci  
6 misrepresented a fact he knew was false, Geraci intended to defraud Cotton, and Cotton  
7 justifiably relied on Geraci's representations and suffered damage as a result. (*Engalla v.*  
8 *Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974). The elements of False Promise  
9 are nearly identical. (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1059-1060 ["in a  
10 promissory fraud action, to sufficiently allege defendant made a misrepresentation, the  
11 complaint must allege (1) the defendant made a representation of intent to perform some future  
12 action, i.e., the defendant made a promise, and (2) the defendant did not really have that intent  
13 at the time that the promise was made, i.e., the promise was false"]; see also CACI 1902  
14 [entitled False Promise])

15 Cotton's SACC pleads facts in support of all these elements on pages 12-13 and on  
16 pages 15-16. To summarize, the SACC alleges that Geraci:

- 17 • Falsely represented to Cotton that the November 2, 2016 agreement was not the  
18 parties' final, full, and integrated contract between them;
- 19 • Falsely represented to Cotton that he (Geraci) would honor the terms of the  
20 parties' agreement by, among other things, memorializing in writing the full scope of the terms  
21 of their agreement and by exerting good-faith efforts to close the sale of Cotton's Property;
- 22 • Falsely represented to Cotton that he (Geraci) would remit the balance of the  
23 \$50,000.00 non-refundable deposit; and
- 24 • That, as a result of Geraci's representations, Cotton justifiably relied on  
25 Geraci's promises, and that Cotton has incurred harm in the form of diminished property value  
26 and attorneys' fees. (*Id.*) In fact, Geraci assured Cotton he could be relied upon because as an  
27 "Enrolled Agent" he worked in a fiduciary capacity for many high net-worth individuals.

1 (SACC, p.3 ¶ 9(a).)

2 Cotton, in short, has plead his intentional tort claims.

3 2. Cotton Alleges Facts Proving that  
4 Geraci Engaged in Negligent Misrepresentation

5 To prevail on the tort of negligent misrepresentation, Cotton must show that Geraci  
6 made statement of facts that were false and that no reasonable person would have believed  
7 them to be true. (*Tarmann v. State Farm* (1991) 2 Cal.App.4th 153.) Cotton does precisely  
8 this in his SACC. For instance, Cotton alleges that, “[o]n multiple occasions, Geraci  
9 represented to Cotton that *Geraci had not yet filed* a CUP application with respect to the  
10 Property when [in reality] the CUP application had already been filed” and that “[o]n multiple  
11 occasions Geraci represented to Cotton that the preliminary work of preparing a CUP  
12 application was merely underway, when, in fact, the CUP application had already been filed.”  
13 (SACC, p. 14, ¶ 45(d)-(e) [emphasis added]). Each of these italic statements is a statement of  
14 fact that Geraci had no reasonable grounds for believing true: It was Geraci, after all, who  
15 controlled the handling of Cotton’s CUP application and who uttered these statements knowing  
16 that could not have been true.

17 Accordingly, Cotton has plead his Negligent Misrepresentation cause of action.

18 3. Cotton Alleges Reasonable Reliance on Geraci’s  
19 Misrepresentations and Accordingly, Geraci’s Demurrer  
to the Second, Third, and Fourth Causes of Action Fails

20 Geraci requests dismissal of Cotton’s Intentional Misrepresentation, Negligent  
21 Misrepresentation, and False Promise Causes of Action on the grounds that Cotton could not  
22 have reasonably relied on Geraci’s representations. He lodges a few arguments in support of  
23 this claim; however, none of them are persuasive. In fact, Geraci repeatedly argues the merits  
24 of the facts rather than addressing the sufficiency of the allegations. Accordingly, the demurrer  
25 request has no merit.

26 Geraci first asserts, that the alleged misrepresentations contradict the terms of the  
27 parties’ agreement and therefore “proving justifiable reliance is an uphill battle.” (Demurrer,  
28

1 p. 14, lns. 9-21 [citing a slew of case law to that effect] [emphasis added].) Of course, at the  
2 pleading stage the question is not one of proof but of allegations, and here Cotton has met his  
3 burden. Further, there is no contradiction between the terms of the agreement alleged by  
4 Geraci and the allegations of misrepresentation asserted by Cotton.

5 Geraci also argues that Cotton could not have reasonably relied on Geraci's oral  
6 representations because those terms "directly conflict with the clear, unambiguous written  
7 agreement signed by Cotton" in November 2016. (Demurrer, p. 14, lns. 22-27.) Yet, Cotton's  
8 Intentional Misrepresentation, Negligent Misrepresentation, and False Promise Causes of  
9 Action sound in *tort*<sup>3</sup> – not contract – and are not even subject to the same confines that the  
10 parole evidence rules places on contractual actions. (See, e.g., *Riverisland Cold Storage, Inc.*  
11 *v. Fresno-Madera Production Credit Association* (2013) 55 Cal.App.4th 1169, 1172 ["The  
12 parole evidence rule protects the integrity of written *contracts* by making their terms the  
13 exclusive evidence of the parties' agreement."]) Geraci is simply mistaken in asserting that the  
14 strictures of contract law preclude Cotton from reasonably relying on Geraci's oral  
15 representations in proving his tort claims.

16 Geraci finally asserts that Cotton could not have reasonably relied on Geraci's  
17 representations because Cotton harbored concern that Geraci would breach the parties'  
18 agreement. (Demurrer, p. 15, lns. 1-2. [quoting SACC p. 6, ¶ 17.]) Geraci's argument,  
19 however, falsely equates fear that a party would breach an agreement with an absence of  
20 justifiable reliance. Yet, as everyday life reveals, one can justifiably rely on another's promise  
21 while simultaneously harboring concern that the person may not live up to expectations – as,  
22 for instance, occurs when a senior lawyer relies on a junior lawyer's promise to meet a  
23 pressing deadline.

24  
25 <sup>3</sup> Case law confirms this. "Fraud is an intentional *tort*; it is the element of fraudulent intent, or intent to deceive,  
26 that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent  
27 misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or  
28 fiduciary duty one by party might owe to the other." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner &*  
*Smith* (1998) 68 Cal.App.4th 445, 482.) "Negligent misrepresentation is a separate and distinct *tort*, a species of  
the *tort* of deceit." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 227–228.) All emphasis in quotes are added.



1 In sum, Geraci's general assault on Cotton's Second, Third, and Fourth Causes of  
2 Action fail.

3 D. Geraci's Additional Arguments Directed at  
4 Cotton's Third Cause of Action Fare No Better

5 Geraci additionally – and independently – seeks to demurrer Cotton's Third Cause of  
6 Action (Negligent Misrepresentation) on two more grounds. Geraci first argues that Cotton's  
7 negligence claim is impermissibly based on future promises and not on contemporary  
8 representations that Geraci made. (Demurrer, p. 15-16 [quoting *Tarmann v. State Farm* (1991)  
9 2 Cal.App.4th 153, 158 for the proposition that “to be actionable, a negligent misrepresentation  
10 must ordinarily be as to past or existing material facts. [P]redictions as to future events or  
11 statements as to future action by some third party, are deemed opinions, and not actionable  
12 fraud.”])

13 Geraci, however, ignores Cotton's allegations that show that Geraci made  
14 *contemporary* representations of fact that Geraci had no reasonable grounds for believing true.  
15 For instance, Cotton alleges in his SACC that, “[o]n multiple occasions, Geraci represented to  
16 Cotton that *Geraci had not yet filed* a CUP application with respect to the Property when [in  
17 reality] the CUP application had already been filed” and that “[o]n multiple occasions Geraci  
18 represented to Cotton that the preliminary work of preparing a *CUP application was merely*  
19 *underway, when, in fact, the CUP application had already been filed.*” (SACC, p. 14, ¶ 45(d)-  
20 (e) [emphasis added]). Accordingly, Cotton has alleged facts supportive of his allegation that  
21 Geraci negligently misrepresented facts.

22 Geraci also argues that Cotton's negligence claim is demurrable because California law  
23 precludes a party from simultaneously pleading a claim for negligent misrepresentation and  
24 intentional fraud, but that Cotton has plead both. (Demurrer, p. 15, lns. 9-28.) In support of  
25 this argument, Geraci quotes an excerpt of *Tarmann v. State Farm* (1991) 2 Cal.App.4th 153,  
26 158-159 that reads, “[t]he specific intent requirement also precludes pleading a false promise  
27  
28

1 claim as a negligent misrepresentation, i.e., 'the assertion, as a fact, of that which is not true,  
2 by one who has no reasonable ground for believing it to be true.'" (italics in Geraci's  
3 Demurrer).

4 Geraci, however, misconstrues the excerpted portion of *Tarmann*. The court in  
5 *Tarmann* was discussing the *substantive elements* that a party must prove to *prevail* on a  
6 negligent misrepresentation claim, and, in the portion of the opinion that Geraci quotes, the  
7 court merely was instructing that a party cannot establish a negligent misrepresentation claim  
8 by proving the same *mens rea* level – i.e., specific intent – that is required to establish an  
9 intentional misrepresentation claim. (*Tarmann, supra*, 2 Cal.App.4th at p. 159.) Critically,  
10 the *Tarmann* court did not, nor did it seek to, diminish California's well-known and generally-  
11 applicable procedural rule permitting parties to plead inconsistent legal theories. (E.g.: *Lim v.*  
12 *The. TV Corp. Internat* (2002) 99 Cal.App.4th 684, 691 [noting that a party may plead  
13 inconsistent legal theories based on a common set of operative facts.]) Once again, Geraci's  
14 attempt to demurrer Cotton's negligence claim is unavailing.

15 V

16 CONCLUSION

17 For the foregoing reasons, the Court should overrule Geraci's demurrers as to every  
18 cause of action contained in Cotton's SACC. Should the Court find merit in any of Geraci's  
19 arguments, the Court should grant leave to Cotton to amend.

20 DATED: October 23, 2017

Respectfully submitted,

21 FINCH, THORNTON & BAIRD, LLP

22 By: 

23 DAVID S. DEMIAN  
24 ADAM C. WITT  
25 RISHI S. BHATT

26 Attorneys for Defendant and Cross-Complainant  
Darryl Cotton

27 2403.004/3C07994.amq

## EXHIBIT 8



**ELECTRONICALLY FILED**  
Superior Court of California,  
County of San Diego

**10/27/2017 at 09:25:00 AM**

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By E. Filing, Deputy Clerk

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LARRY GERACI

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

LARRY GERACI, an individual,  
Plaintiff,

v.

DARRYL COTTON, an individual; and  
DOES 1 through 10, inclusive,  
Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel Wohlfeil

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

**[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.

**DATE: November 3, 2017**  
**TIME: 9:00 a.m.**  
**DEPT: C-73**

Complaint Filed: March 21, 2017  
Trial Date: May 11, 2018

Plaintiff and Cross-Defendant LARRY GERACI (hereafter "Geraci" or "Plaintiff") respectfully submits these reply points and authorities in support of his demurrer to Defendant and Cross-Complainant DARRYL COTTON'S (hereafter "Cotton" or "Cross-Complainant") Second Amended Cross-Complaint filed on August 25, 2017 (hereafter "SAXC") and in response to Cotton's opposition arguments.

///

1 **I. INTRODUCTION**

2 Cotton's Opposition to Geraci's Demurrer to the Second Amended Cross-Complaint  
3 (hereinafter "Opposition") is unpersuasive as to the issues raised in the Demurrer.

4 Contrary to the allegations in his prior pleadings and, in particular, the subject SAXC, Cotton  
5 argues that the agreement between the parties is comprised of the November 2, 2016 written agreement  
6 (hereafter "Written Agreement") and certain November emails (hereafter "November Emails") which  
7 were *incorporated* into that document and together *evidence* the basic terms of the agreement.  
8 (Opposition, 2:17-23.). Cotton's argument fails for a number of reasons: 1) the emails were not  
9 integrated into the Written Agreement; 2) even if the November Emails were integrated into the Written  
10 Agreement, they are not signed by Geraci, and therefore are barred by the statute of frauds; 3) the  
11 November Emails do not in and of themselves evidence an agreement between the parties; and  
12 4) Geraci has done everything required of him under the Written Agreement and therefore has not  
13 breached the contract itself nor the implied covenant of good faith and fair dealing.

14 As to Cotton's causes of action for intentional and negligent misrepresentation and false  
15 promise, Cotton cannot overcome his own admissions in his pleadings that he was hesitant and  
16 understandably concerned, and despite his hesitation, concerns, and reservations he agreed to Geraci's  
17 terms. (SAXC ¶ 17.) Given these admissions, Cotton has failed to allege reasonable and justifiable  
18 reliance. At a minimum, he has not pleaded facts which would lead one to conclude he acted in  
19 reasonable and justifiable reliance on any statements made by Geraci.

20 Finally, Cotton argues that the *Tarmann v. State Farm* (1991) 2 Cal.App.4th 153 case cited by  
21 Geraci should be disregarded because it discussed the *proof* necessary to prevail on a negligent  
22 misrepresentation claim rather than the *pleading requirements* for such a claim. That argument is  
23 erroneous. The *Tarmann* case arose on demurrer and the Court specifically stated that "[t]he specific  
24 intent requirement [of pleading intentional fraud] precludes pleading a false promise claim as a  
25 negligent misrepresentation . . . ." Cotton cannot plead intentional fraud and negligent  
26 misrepresentation.

27 ///

28 ///

1 **II. LEGAL ANALYSIS**

2 **A. No Integration of Emails with Written Contract**

3 “Under California law, parties may validly incorporate by reference into their contract the terms  
4 of another document.” (*Baker v. Aubry* (1989) 216 Cal.App.3d 1259, 1264.) The reference to the  
5 incorporated document must be clear and unequivocal and the terms of the incorporated document must  
6 be known or easily available to the contracting parties. (*Spellman v. Securities, Annuities & Ins.*  
7 *Services, Inc.* (1992) 8 Cal.App.4th 452, 457; *Chan v. Drexel Burnham Lambert, Inc.* (1986)  
8 178 Cal.App.3d 632, 641; *Baker v. Aubry, supra*, 216 Cal.App.3d at p. 1264; *Slaughter v. Bencomo*  
9 *Roofing Co.* (1994) 25 Cal.App.4th 744.)

10 Neither the actual November 2, 2016 Written Agreement signed by the parties nor the  
11 November Emails, which Cotton alleges “evidence” the basic terms of the contract, contain any  
12 language of incorporation let alone language making a clear and unequivocal reference to the allegedly  
13 incorporated document. The Written Agreement signed by the parties does not make any reference to  
14 those emails being incorporated into the Written Agreement. Therefore, the emails are not incorporated  
15 into the signed contract as a matter of law.

16 **B. Statute of Frauds**

17 Cross-Complainant argues that the SAXC “alleges the existence of a written agreement that is  
18 not subject to the Statute of Frauds.” (Opposition, 2:1-2.) This argument misses the mark.

19 A contract coming within the statute of frauds is invalid unless it is memorialized by a writing  
20 subscribed by the party to be charged or by the party’s agent. (Civ. Code, § 1624.) And it is clear that  
21 an agreement for the sale and purchase of real property comes within the statute of frauds. (Civ. Code,  
22 § 1624(a)(3).) Cotton’s claims alleged in the SAXC unquestionably arises out of an agreement  
23 regarding the sale and purchase of real property.

24 Cross-Complainant further argues that the parties executed an ambiguous document (the Written  
25 Agreement) and exchanged emails (the November Emails) which were *incorporated* into that  
26 document. Cross-Complainant asserts summarily that the Written Agreement and November Emails  
27 “combine to *evidence* the following basic terms of agreement, all as alleged in the SAXC.”  
28 (Opposition, 2:22-23, emphasis added.) This argument also misses the mark.



1 First, the terms and conditions of the Written Agreement, a one-page document which is attached  
2 to both the underlying Complaint and the SAXC, are clear and unambiguous.

3 Cotton clearly alleges in all of his prior cross-complaints, including the instant SAXC, that "[o]n  
4 November 2, 2016, Geraci and Cotton met at Geraci's office ... [and] the parties reached an agreement  
5 on the material terms for the sale of the Property." (SAXC ¶ 13.) At that November 2, 2016 meeting  
6 the parties executed the Written Agreement, which states the following material terms and conditions:

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

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

12 (SAXC ¶ 18.) These terms and conditions could not be more clear and unambiguous.

13 Cotton goes on to attempt to allege an oral agreement, or a partly written and partly oral  
14 agreement, entered into on that November 2, 2016, date with the alleged oral terms and conditions  
15 adding to and/or varying from the terms set forth in the writing in the Written Agreement. Those  
16 allegations cannot, as a matter of law, survive the Statute of Frauds.

17 The Written Agreement is the controlling evidence under the statute of frauds. Cotton alleges,  
18 based on extrinsic evidence, that the actual agreement between the parties contains material terms and  
19 conditions in addition to those in the written agreement as well as a term (a \$50,000 deposit rather than  
20 the \$10,000 deposit stated in the written agreement) that expressly conflicts with a term of the  
21 November 2, 2016 agreement. However, such a claim cannot stand as extrinsic evidence cannot be  
22 employed to prove an agreement at odds with the terms of the written memorandum. (*Beazell v.*  
23 *Schrader*, (1963) 59 Cal.2d 577.) Cotton's argument that the \$10,000 deposit term in the Written  
24 Agreement is ambiguous and can be reconciled with his allegation of an agreement for a \$50,000  
25 deposit is absurd. Nowhere in his allegations are facts from which it can be inferred that they are  
26 anything except conflicting and contradictory terms.

27 Second, Cross-Complainant asserts that the November Emails "... are subscribed to by Geraci  
28 and are therefore outside the purview of the statute of frauds." (Opposition, 4:12-13.) Apparently,

1 Cross-Complainant is arguing that the signature block at the bottom of the emails containing Geraci's  
2 name is tantamount to a signed agreement which would satisfy the statute of frauds, i.e., some sort of  
3 electronic signature within the meaning of Uniform Electronic Transactions Act ("UETA"), Civil Code  
4 section 1633.7. Cross-Complainant is mistaken.

5 Civil Code section 1633.7(a) provides:

- 6 (a) A record or signature may not be denied legal effect of enforceability solely  
because it is in electronic form.
- 7 (b) A contract may not be denied legal effect or enforceability solely because an  
electronic record was used in its formation.
- 8 (c) If a law requires a record to be in writing, an electronic record satisfied the law.
- 9 (d) If a law requires a signature, an electronic signature satisfies the law."

10 "An electronic record or electronic signature is attributable to a person if it was the act of the  
11 person. The act of the person may be shown in any manner . . ." (Civ. Code, § 1633.9(a); see also *Ni v.*  
12 *Slocum* (2011) 196 Cal.App.4th 1636, 1647 ["the Legislature has, through these provisions, expressed  
13 general approval of the use of electronic signature in commercial and governmental transactions"].)

14 Civil Code section 1633.2(h) defines an electronic signature as "an electronic sound, symbol, or  
15 process attached to or logically associated with an electronic record and executed or adopted by a  
16 person with the intent to sign the electronic record." UETA applies, however, only when the parties  
17 *consent to conduct the transaction by electronic means.* (Civ. Code, § 1633.5(b).) "Whether the  
18 parties agree to conduct a transaction by electronic means is determined from the context and  
19 surrounding circumstances, including the parties' conduct . . ." (*Ibid.*) "A party that agrees to conduct  
20 a transaction by electronic means may refuse to conduct other transactions by electronic means . . ."  
21 (Civ. Code, § 1633.5(c).)

22 However, while attributing the name on an e-mail to a particular person and determining that  
23 the printed name is "[t]he act of [this] person" is a necessary prerequisite to considering it a valid  
24 signature, it is insufficient, by itself, to establish that it is an "electronic signature." (Civ. Code,  
25 § 1633.9(a).) Subdivision (h) of section 1633.2 states that "[e]lectronic signature means an electronic  
26 sound, symbol, or process attached to or logically associated with an electronic record and *executed or*  
27 *adopted by a person with the intent to sign the electronic record.*" (Emphasis added. See also Cal.  
28 Civ. Jury Inst. No. 380 [party suing to enforce an agreement formalized by electronic means must

1 prove “based on the context and surrounding circumstances, including the conduct of the parties, that  
2 the parties agreed to use [e.g., e-mail] to formalize their agreement”). By Cross-Complainant’s own  
3 allegations, that was not the case. Rather, cotton alleges the parties intended to finalize the entire  
4 agreement in a formal, signed agreement, not via emails. And he alleges that never happened because  
5 Geraci refused to include in the Written Agreement the additional and varying terms and conditions  
6 agreed to orally on November 2, 2016.

7 “Whether the parties agree to conduct a transaction by electronic means is determined from the  
8 context and surrounding circumstances, including the parties’ conduct . . .” (Civ. Code, § 1633.5(b).)  
9 The absence of an explicit agreement to conduct the transaction by electronic means is not, by itself,  
10 determinative, however, it is a relevant factor to consider. (See *JBB Investment Partners, LTD v. Fair*  
11 (2014) 232 Cal.App.4th 974.

12 There is no allegation that there was an express agreement between the parties to conduct  
13 negotiations electronically and be bound by electronic signatures. Nothing contained within the emails  
14 supports a conclusion that the parties agreed that Geraci’s printed name at the bottom of emails was  
15 intended to be a legally binding signature. Nor does anything in the November Email exchange  
16 indicate that the parties agreed to conduct a transaction by electronic means. Thus, the emails do not  
17 amount to an electronic signature under the UETA, and if they are part of the agreement, they violate  
18 the statute of frauds.

19 **C. Nor is Geraci’s Signature Block on the E-Mails a “Signature” Under Law of**  
20 **Contract**

21 A typed name at the end of an e-mail is not, by itself, a signature under case law. “[I]t is a  
22 universal requirement that the statute of frauds is not satisfied unless it is proved that the name relied  
23 upon as a signature was placed on the document or adopted by the party to be charged *with the*  
24 *intention of authenticating the writing.*” (*Marks v. Walter McCarty Corp.* (1929) 33 Cal.3d 814, 820.)

25 There are no factual allegations that directly allege or from which it can be inferred that Geraci  
26 intended his brief email statements to be a legally binding contract.

27 Moreover, Cross-Complainant alleges that “[t]he parties further agreed to cooperate in good  
28 faith to properly reduce the complete agreement, including all of the agreed-upon terms [as alleged by



1 Cotton in ¶ 14], to writing.” (SAXC ¶ 13.) The SAXC makes clear this never happened. The only  
2 writing signed was the Written Agreement containing the material terms and conditions set forth  
3 therein.

4 **D. The SAXC Does Not Allege Actionable Breach**

5 The actionable breach of which Cross-Complainant complains is “He breached *at least* one  
6 material term of it, viz., the promise to negotiate in good faith to deliver a proposed final agreement, the  
7 promise to deliver a 10 percent interest in the property, and failing to pay the amounts due for the  
8 50,000.00 deposit. (SAXC, p. 11. ¶ 36.)” (Opposition, 6:10-12). Cross-Complainant goes on to assert  
9 that “Without question, the SAXC alleges just such a breach, namely, that Geraci intentionally delayed  
10 further negotiations, that Geraci failed to deliver purchase documents, and that Geraci failed to full pay  
11 the agreed-upon \$50,000 deposit. (SAXC, p. 11, ¶36.)” (Opposition, 6:21-24.)

12 The flaw in Cross-Complainant’s reasoning is that none of these alleged obligations were  
13 contained within the legally binding, signed written contract. Rather, these are terms and conditions  
14 that Cross-Complainant would like to have added to the legally binding, signed written contract.  
15 Plaintiff has performed everything required of him so far under the Written Agreement and Cross-  
16 Complainant cannot and has not alleged otherwise.

17 **E. Cotton Cannot Overcome His Own Admissions That He Acted, Not on Geraci’s**  
18 **Representations, But In Spite of His Hesitations and Concerns Over Geraci’s**  
**Representations – Hence No Reasonable or Justifiable Reliance**

19 As to Cotton’s causes of action for intentional and negligent misrepresentation and false  
20 promise, Cotton cannot overcome his own admissions in his pleadings that he was hesitant,  
21 understandably concerned and despite his hesitation, concerns and reservations he agreed to Geraci’s  
22 terms. (SAXC ¶ 17.) Given these admissions, Cotton has failed to allege reasonable and justified  
23 reliance. At a minimum he has not pleaded facts which would lead one to conclude he acted in  
24 reasonable and justified reliance on any statements made by Geraci.

25 **F. Cotton Alleges that Geraci Made Numerous *Contemporaneous* Representations of**  
26 **Fact that Geraci Had No Reasonable Ground for Believing True – This Allegations**  
27 **Are Belied by the Fact That They Occurred After the Written Agreement Was**  
**Signed.**

28 Cotton argues that Geraci made many contemporaneous representations such as “[o]n multiple

1 occasions, Geraci represented to Cotton that *Geraci had not yet filed* a CUP application with respect to  
2 the Property when [in reality] the CUP application had already been filed” and that “[o]n multiple  
3 occasions Geraci represented to Cotton that the preliminary work of preparing a *CUP application was*  
4 *merely underway, when, in fact, the CUP application had already been filed.*” (SAXC, p. 14, ¶ 45(d)-  
5 (e) [emphasis added.])” (Opposition, 10:15-21.)

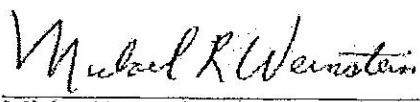
6 With regard to each of these alleged misrepresentations, they all occurred after the Written  
7 Agreement was signed by both parties and after the November Emails, which Cotton now claims are  
8 part of the agreement between the parties “evidencing” the basic terms of the contract. As such, Cotton  
9 has failed to allege that: 1) he reasonably and justifiably relied on these “false representations” as they  
10 were not yet made; 2) that these false representations caused harm or damage; and 3) that Cotton’s  
11 justified and reasonable reliance on these false representations caused him harm or damage, all required  
12 to prove Cotton’s fraud claims. [CACI 1900, 1902, and 1903.]

13 **III. CONCLUSION**

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

16 Dated: October 27, 2017

FERRIS & BRITTON,  
A Professional Corporation

18 By:   
19 Michael R. Weinstein  
20 Scott H. Toothacre  
21 Attorneys for Plaintiff and Cross-Defendant  
22 LARRY GERACI  
23  
24  
25  
26  
27  
28

## EXHIBIT 9



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**ELECTRONICALLY FILED**  
Superior Court of California,  
County of San Diego

**10/06/2017 at 02:22:55 PM**  
Clerk of the Superior Court  
By Erika Engel, Deputy Clerk

Attorneys for Petitioner/Plaintiff Darryl Cotton

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF SAN DIEGO**

**CENTRAL DIVISION**

DARRYL COTTON, an individual,

Petitioner/Plaintiff,

v.

CITY OF SAN DIEGO, a public entity; and  
DOES 1 through 25,

Respondents/Defendants,

REBECCA BERRY, an individual;  
LARRY GERACI, an individual; and  
ROES 1 through 25,

Real Parties In Interest.

CASE NO: 37-2017-00037675-CU-WM-CTL

VERIFIED PETITION FOR  
ALTERNATIVE WRIT OF MANDATE  
[CODE CIV. PROC., § 1085]

**INTRODUCTION**

I. Pursuant to Code of Civil Procedure section 1085, petitioner/plaintiff Darryl Cotton ("Cotton") seeks an alternative writ of mandate and a peremptory writ of mandate directing respondents/defendants City of San Diego ("City") and DOES 1 through 25 to: (1) recognize Cotton, the sole record owner of the real property located at 6176 Federal Boulevard, San Diego, California 92105 ("Property"), as the sole applicant with respect to Conditional Use Permit Application - Project No. 520606 ("Cotton Application") for a Conditional Use Permit ("CUP") to operate a Medical Marijuana Consumer Cooperative ("MMCC") at the

VERIFIED PETITION FOR ALTERNATIVE WRIT OF MANDATE [CODE CIV. PROC., § 1085]

1 Property; and (2) process the Cotton Application with Cotton as the sole applicant. In the  
2 alternative, Cotton seeks an order to show cause directed to the City as to why the Court should  
3 not issue such a writ.

4 2. The relief sought in paragraph 1 is proper because Cotton has no other plain,  
5 speedy, or adequate legal remedy. The relief is necessary because the City's refusal to  
6 recognize Cotton as the sole applicant on the Cotton Application is lacking in evidentiary  
7 support and inconsistent with the City's legal duty.

8 JURISDICTION, VENUE, AND PARTIES

9 3. The Court has jurisdiction over this petition pursuant to Code of Civil Procedure  
10 section 1085.

11 4. Venue is proper in this Court because the City is a public entity located in this  
12 judicial district and the property at issue is located in this judicial district.

13 5. Petitioner/plaintiff Cotton is, and at all times mentioned was, an individual  
14 living and doing business in California.

15 6. Respondent/defendant City is, and at all times mentioned was, a public entity  
16 organized and existing under the laws of California.

17 7. Cotton is informed and believes real party in interest Rebecca Berry ("Berry")  
18 is, and at all times mentioned was, an individual living and doing business in the County of  
19 San Diego.

20 8. Cotton is informed and believes real party in interest Larry Geraci ("Geraci") is,  
21 and at all times mentioned was, an individual living and doing business in the County of San  
22 Diego.

23 9. Cotton does not know the true names and capacities of the  
24 respondents/defendants named as DOES 1 through 25 and, therefore, sues them by fictitious  
25 names. Cotton is informed and believes DOES 1 through 25 are in some way responsible for  
26 the events described in this petition or impacted by them. Cotton will seek leave to amend this  
27 petition when the true names and capacities of these parties have been ascertained.

10. At all times mentioned each respondent/defendant was an agent, principal, representative, alter ego, and/or employee of the others and each was at all times acting within the course and scope of said agency, representation, and/or employment and with the permission of the others.

11. Cotton does not know the true names and capacities of the real parties in interest named as ROES 1 through 25 and, therefore, names them by fictitious names. Cotton is informed and believes ROES 1 through 25 are in some way responsible for the events described in this petition or impacted by them. Cotton will seek leave to amend this petition when the true names and capacities of these parties have been ascertained.

12. At all times mentioned each real party in interest was an agent, principal, representative, alter ego, and/or employee of the others and each was at all times acting within the course and scope of said agency, representation, and/or employment and with the permission of the others.

## BACKGROUND

13. In or around August 2016, Geraci first contacted Cotton seeking to purchase the Property. Geraci desired to buy the Property from Cotton because it meets certain requirements of the City for obtaining a CUP to operate a MMCC at the Property. The Property is one of a very limited number of properties located in San Diego City Council District 4 that potentially satisfy the CUP requirements for a MMCC.

14. Over the ensuing weeks and months, Geraci and Cotton negotiated extensively regarding the terms of a potential sale of the Property. Cotton, acting in good faith based upon Geraci's representations during the sale negotiations, assisted Geraci with preliminary due diligence in investigating the feasibility of a CUP application at the Property while the parties negotiated the terms of a possible deal. However, despite the parties' work on a CUP application, Geraci represented to Cotton that a CUP application for the Property could not actually be submitted until after a critical zoning issue was resolved or the application would be summarily rejected by the City.



1           15. On or around October 31, 2016, Geraci asked Cotton to execute an Ownership  
2 Disclosure Statement, which is a required component of all CUP applications. Geraci told  
3 Cotton that he needed the signed document to show that Geraci had access to the Property in  
4 connection with his lobbying efforts to resolve the zoning issue and his eventual preparation of  
5 a CUP application. Geraci also requested that Cotton sign the Ownership Disclosure Statement  
6 as an indication of good-faith while the parties negotiated on the sale terms. At no time did  
7 Geraci indicate to Cotton that a CUP application would be filed prior to the parties entering  
8 into a final written agreement for the sale of the Property. In fact, Geraci repeatedly  
9 maintained to Cotton that the critical zoning issue needed to be resolved before a CUP  
10 application could even be submitted.

11           16. The Ownership Disclosure Statement that Geraci provided to Cotton to sign in  
12 October 2016 incorrectly indicated that Cotton had leased the Property to Berry. However,  
13 Cotton has never met Berry personally and never entered into a lease or any other type of  
14 agreement with her. At the time, Geraci told Cotton that Berry was a trusted employee who  
15 was very familiar with MMCC operations and who was involved with his other MMCC  
16 dispensaries. Cotton's understanding was that Geraci was unable to list himself on the  
17 application because of Geraci's other legal issues but that Berry was Geraci's agent and was  
18 working in concert with him and at his direction. Based upon Geraci's assurances that listing  
19 Berry as a tenant on the Ownership Disclosure Statement was necessary and proper, Cotton  
20 executed the Ownership Disclosure Statement that Geraci provided to him. A true and correct  
21 copy of the CUP application, including the Ownership Disclosure Statement, is attached hereto  
22 as Exhibit I.

23           17. On November 2, 2016, Geraci and Cotton met at Geraci's office in an effort to  
24 negotiate the final terms of their deal for the sale of the Property. The parties reached an  
25 agreement on the material terms for the sale of the Property. The parties further agreed to  
26 cooperate in good faith to promptly reduce the complete agreement, including all of the  
27 agreed-upon terms, to writing.

1           18.    At the November 2, 2016 meeting, the parties executed a three-sentence  
2 document related to their agreement on the purchase price for the Property at Geraci's request,  
3 which read as follows:

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

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

11           A true and correct copy of the November 2, 2016 agreement is attached hereto as Exhibit 2.  
12 Geraci assured Cotton that the document was intended to merely create a record of Cotton's  
13 receipt of the \$10,000 "good-faith" deposit and provide evidence of the parties' agreement on  
14 the purchase price and good-faith agreement to enter into final integrated agreement documents  
15 related to the sale of the Property. A true and correct copy of the November 2, 2016 email is  
16 attached hereto as Exhibit 3.

17           19.    Thereafter, Cotton continued to operate in good faith under the assumption that  
18 Geraci's attorney would promptly draft the fully integrated agreement documents as the parties  
19 had agreed and the parties would shortly execute the written agreements to document their  
20 agreed-upon deal. However, over the following months, Geraci proved generally unresponsive  
21 and continuously failed to make substantive progress on his promises, including his promises  
22 to promptly deliver the draft final agreement documents, pay the balance of the non-refundable  
23 deposit, and keep Cotton apprised of the status of the zoning issue.

24           20.    Over the weeks and months that followed, Cotton repeatedly reached out to  
25 Geraci regarding the status of the zoning issue, the payment of the remaining balance of the  
26 non-refundable deposit, and the status of the draft documents. For example, between January  
27 18, 2017 and February 7, 2017, the following exchange took place between Geraci and Cotton  
28 via text message:

///

1       Geraci: "The sign off date they said it's going to be the 30th."

2       Cotton: "This resolves the zoning issue?"

3       Geraci: "Yes"

4       Cotton: "Excellent"...

5       Cotton: "How goes it?"

6       Geraci: "We're waiting for confirmation today at about 4 o'clock"

7       Cotton: "Whats new?"

8       Cotton: "Based on your last text I thought you'd have some information on the zoning by now. Your lack of response suggests no resolution as of yet."

9       Geraci: "I'm just walking in with clients they resolved it its fine we're just waiting for final paperwork."

10      The above communications between Geraci and Cotton regarding the zoning issue conveyed to  
11      Cotton that the issue had still not yet been fully resolved at that time. Geraci had previously  
12      represented to Cotton that the CUP application could not be submitted until the zoning issue  
13      was resolved. As it turns out, Geraci's representations were untrue and he knew they were  
14      untrue as he had already submitted the CUP application months prior.

15      21. With respect to the promised final agreement documents, Geraci continuously  
16      failed to timely deliver the documents as agreed. On February 27, 2017, nearly three months  
17      after the parties reached an agreement on the terms of the sale, Geraci finally emailed Cotton a  
18      draft real estate purchase agreement. However, upon review, the draft purchase agreement was  
19      missing many of the key deal points agreed upon by the parties at their November 2, 2016  
20      meeting. After Cotton called Geraci for an explanation, Geraci claimed it was simply due to  
21      miscommunication with his attorney and promised to have her revise the agreement to  
22      accurately reflect their deal points.

23      22. On March 2, 2017, Geraci first emailed Cotton a draft of the separate side  
24      agreement that was to incorporate other terms of the parties' deal. Cotton immediately  
25      reviewed the draft side agreement and emailed Geraci the next day regarding certain missing  
26      and inaccurate material terms.

27      /////

28      /////



1           23.    On March 7, 2017, Geraci emailed Cotton a revised draft of the side agreement  
2 along with a further request to change material terms of the parties' deal. Cotton, increasingly  
3 frustrated with Geraci's failure to abide by the parties' agreement, responded to Geraci on  
4 March 16, 2017 in an email which included the following:

5           We started these negotiations 4 months ago and the drafts and our  
6 communications have not reflected what agreed upon and are still far from  
7 reflecting our original agreement. Here is my proposal, please have your attorney  
8 Gina revise the Purchase Agreement and the Side Agreement to incorporate all  
9 the terms we have agreed upon so that we can execute final versions and get this  
10 closed... Please confirm by Monday 12:00 PM whether we are on the same page  
and you plan to continue with our agreement ... If, hopefully, we can work  
through this, please confirm that revised final drafts that incorporate the 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.

11           24.    On the same day, Cotton contacted the City's Development Project Manager  
12 responsible for CUP applications. At that time, Cotton discovered for the first time that  
13 Geraci had submitted a CUP application for the Property way back on October 31, 2016,  
14 before the parties even agreed upon the final terms of their deal and contrary to Geraci's  
15 express representations over the previous five months. Cotton expressed his  
16 disappointment and frustration in the same March 16, 2017 email to Geraci:

17           I found out today that a CUP application for my property was submitted in  
18 October, which I am assuming is from someone connected to you. Although, I  
19 note that you told me that the \$40,000 deposit balance would be paid once the  
20 CUP was submitted and that you were waiting on certain zoning issues to be  
resolved. Which is not the case.

21           25.    On March 17, 2017, after Geraci requested an in-person meeting via text  
22 message, Cotton replied in an email to Geraci which including the following:

23           /////

24           /////

25           /////

26           /////

27           /////

1 I would prefer that until we have final agreements that we converse exclusively  
2 via email. My greatest concern is that you get a denial on the CUP application  
3 and not provide the remaining \$40,000 non-refundable deposit. To be frank, I  
4 feel that you are not dealing with me in good faith, you told me repeatedly that  
5 you could not submit a CUP application until certain zoning issues had been  
6 resolved and that you had spent hundreds of thousands of dollars on getting them  
7 resolved. You lied to me, I found out yesterday from the City of San Diego that  
8 you submitted a CUP application on October 31 2016 BEFORE we even signed  
9 our agreement on the 2nd of November... Please confirm by 12:00 PM Monday  
10 that you are honoring our agreement and will have final drafts (reflecting  
11 completely the below) by Wednesday at 12:00 PM.

12 Geraci did not provide the requested confirmation that he would honor their agreement or  
13 proffer the requested agreements prior to Cotton's deadlines.

14 26. On March 21, 2017, Cotton emailed Geraci to confirm their agreement was  
15 terminated and that Geraci had no interest in the Property.

16 27. On March 22, 2017, Geraci's attorney, Michael Weinstein ("Weinstein"),  
17 emailed Cotton a copy of a complaint filed by Geraci in which Geraci claims for the very first  
18 time that the three-sentence document signed by the parties on November 2, 2016 constituted  
19 the parties' complete agreement regarding the Property, contrary to the parties' further  
20 agreement the same day, the entire course of dealings between the parties, and Geraci's own  
21 statements and actions.

22 28. On March 28, 2017, Weinstein emailed Cotton and indicated that Geraci  
23 intended to continue to pursue the CUP application and would be posting notices on Cotton's  
24 property. Cotton responded via email the same day and objected to Geraci or his agents  
25 entering the Property and reiterated the fact that Geraci has no rights to the Property.

26 29. On May 12, 2017, Cotton filed a cross-complaint against Berry and Geraci  
27 including causes of action for breach of contract, intentional misrepresentation, negligent  
28 misrepresentation, and false promise with respect to the purchase agreement and the CUP  
application.

30. On September 22, 2017, Cotton, through his attorneys, demanded the City  
remove Berry from the Cotton Application and process it for Cotton. A true and correct copy  
of the September 22, 2017 letter is attached hereto as Exhibit 4.

1           30.    The City responded via email on September 29, 2017, but did not agree to  
2 remove Berry from the Cotton Application and process it on behalf of Cotton. A true and  
3 correct copy of the September 29, 2017 email is attached hereto as Exhibit 5.

4                               FIRST CAUSE OF ACTION

5           (Writ of Mandate ~ Against all respondents/defendants and all real parties in interest)

6           31.    Cotton incorporates by reference paragraphs 1 through 30 above as though set  
7 forth in full at this point.

8           32.    The City is subject to California law. The City is further responsible for  
9 administering the CUP process according to the San Diego Municipal Code ("Municipal  
10 Code"), and is obligated to perform the ministerial duties of: (1) recognizing Cotton as the sole  
11 applicant for the Cotton Application, as required under Municipal Code sections 112.0102 and  
12 113.0103, and (2) processing the Cotton Application with Cotton as the sole applicant and  
13 financially responsible party:

14          33.    As the record owner of the Property, Cotton has a clear, present, legal and  
15 beneficial right in seeing that the City follows the Municipal Code and California law and  
16 recognizes the correct applicant with respect to the Cotton Application.

17          34.    Cotton has no plain, speedy and adequate remedy in the ordinary course of law,  
18 other than the writ by this petition. Cotton has exhausted all available administrative remedies,  
19 if any, available to him. The only means by which Cotton may compel the City to follow the  
20 Municipal Code and California law is this petition for a writ of mandate.

21                               INDEX OF EXHIBITS

22

Exhibit	Description
1	CUP application incl. Ownership Disclosure Statement
2	November 2, 2016 agreement
3	Email dated November 2, 2016 between Cotton and Geraci
4	Letter dated September 22, 2017 from Cotton to the City
5	Email dated September 29, 2017 from City to Cotton

23  
24  
25

26       /////

27       /////



1 PRAYER FOR RELIEF

2 WHEREFORE, Cotton prays as follows:

3 ON ALL CAUSES OF ACTION:

- 4 1. For a writ of mandate to be issued under Code of Civil Procedure section 1085,  
5 and under seal of this Court, ordering the City to recognize Cotton as the sole applicant with  
6 respect to the Cotton Application and to process the Cotton Application with Cotton as the sole  
7 applicant;  
8 2. In the alternative, for an order to show cause directed to the City as to why the  
9 Court should not issue such a writ; and  
10 3. For such other or further relief the Court deems just.

11 DATED: October 6, 2017

Respectfully submitted,

12 FINCH, THORNTON & BAIRD, LLP

13  
14 By: 

15 DAVID S. DEMIAN

ADAM C. WITT

16 Attorneys for Petitioner/Plaintiff DARRYL  
17 COTTON  
18  
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Executed on October 6, 2017 in San Diego, California.

Darryl Cotton

## EXHIBIT 10



FERRIS & BRITTON  
A Professional Corporation  
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Scott H. Toothacre (SBN 146530)  
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Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and  
Cross-Defendant REBECCA BERRY

**ELECTRONICALLY FILED**  
Superior Court of California,  
County of San Diego

**04/10/2018 at 11:10:00 AM**  
Clerk of the Superior Court  
By Katelin O'Keefe, Deputy Clerk

**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

**DECLARATION OF LARRY GERACI IN  
OPPOSITION TO DEFENDANT DARRYL  
COTTON'S MOTION TO EXPUNGE LIS  
PENDENS**

**[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.

**Hearing Date: April 13, 2018**  
**Hearing Time: 9:00 a.m.**

Filed: March 21, 2017  
Trial Date: May 11, 2018

I, Larry Geraci, declare:

1. I am an adult individual residing in the County of San Diego, State of California, and I am one of the real parties in interest in this action. I have personal knowledge of the foregoing facts and if called as a witness could and would so testify.

2. In approximately September of 2015, I began lining up a team to assist in my efforts to develop and operate a Medical Marijuana Consumer Cooperative (MMCC) business (aka a medical

1 marijuana dispensary) in San Diego County. At the time, I had not yet identified a property for the  
2 MMCC business. I hired a consultant, Neal Dutta of Apollo Realty, to help locate and identify  
3 potential property sites for the business. I hired a design professional, Abhay Schweitzer of TECHNE.  
4 I hired a public affairs and public relations consultant with experience in the industry, Jim Bartell of  
5 Bartell & Associates. In addition, I hired a land use attorney, Gina Austin of Austin Legal Group.

6         3.       The search to identify potential locations for the business took some time, as there are a  
7 number of requirements that had to be met. For example: a) only four (4) MMCCs are allowed in a  
8 City Council District; b) MMCCs are not allowed within 1,000 feet of public parks, churches, child  
9 care centers, playgrounds, City libraries, minor-oriented facilities, other MMCCs, residential facilities,  
10 or schools; c) MMCCs are not allowed within 100 feet of a residential zone; and d) the zoning had to be  
11 proper as MMCC's are allowed only in certain zones. In approximately June 2016, Neal Dutta  
12 identified to me real property owned by Darryl Cotton located at 6176 Federal Blvd., City of San  
13 Diego, San Diego County, California, Assessor's Parcel No. 543-020-02-00 (the "Property") as a  
14 potential site for acquisition and development for use and operation as a MMCC. And in  
15 approximately mid-July 2016 Mr. Dutta put me in contact with Mr. Cotton and I expressed my interest  
16 to Mr. Cotton in acquiring his Property if our further investigation satisfied us that the Property might  
17 meet the requirements for an MMCC site.

18         4.       For several months after the initial contact, my consultant, Jim Bartell, investigated  
19 issues related to whether the location might meet the requirements for an MMCC site, including zoning  
20 issues and issues related to meeting the required distances from certain types of facilities and residential  
21 areas. For example, the City had plans for street widening in the area that potentially impacted the  
22 ability of the Property to meet the required distances. Although none of these issues were resolved to a  
23 certainty, I determined that I was still interested in acquiring the Property.

24         5.       Thereafter I approached Mr. Cotton to discuss the possibility of my purchase of the  
25 Property. Specifically, I was interested in purchasing the Property from Mr. Cotton contingent upon  
26 my obtaining approval of a Conditional Use Permit ("CUP") for use as a MMCC. As the purchaser, I  
27 was willing to bear the substantial expense of applying for and obtaining CUP approval and understood  
28 that if I did not obtain CUP approval then I would not close the purchase and I would lose my

1 investment. I was willing to pay a price for the Property based on what I anticipated it might be worth  
2 if I obtained CUP approval. Mr. Cotton told me that he was willing to make the purchase and sale  
3 conditional upon CUP approval because if the condition was satisfied he would be receiving a much  
4 higher price than the Property would be worth in the absence of its approval for use as a medical  
5 marijuana dispensary. We agreed on a down payment of \$10,000.00 and a purchase price of  
6 \$800,000.00. On November 2, 2016, Mr. Cotton and I executed a written purchase and sale agreement  
7 for my purchase of the Property from him on the terms and conditions stated in the agreement  
8 (hereafter the "Nov 2nd Written Agreement"). A true and correct copy of the Nov 2nd Written  
9 Agreement, which was executed before a notary, is attached as Exhibit 2 to Defendant and Cross-  
10 Defendant, Larry Geraci's Notice of Lodgment in Support of Opposition to Motion to Expunge Lis  
11 Pendens (hereafter the "Geraci NOL"). I tendered the \$10,000 deposit to Mr. Cotton as acknowledged  
12 in the Nov 2nd Written Agreement.

13 6. In paragraph 5 of his supporting declaration, Darryl Cotton states:

14 "On November 2, 2016, Geraci and I met at Geraci's office to negotiate the final  
15 terms of the sale of the Property. At the meeting, we reached an oral agreement  
16 on the material terms for the sale of the Property (the "November Agreement").  
17 The November Agreement consisted of the following: If the CUP was approved,  
18 then Geraci would, inter alia, provide me: (i) a total purchase price of \$800,000;  
19 (ii) a 10% equity stake in the MO; and (iii) a minimum monthly equity  
20 distribution of \$10,000. If the CUP was denied, I would keep an agreed upon  
21 \$50,000 non-refundable deposit ("NRD") and the transaction would not close. In  
22 other words, the issuance of a CUP at the Property was a condition precedent for  
23 closing on the sale of the Property and, if the CUP was denied, I would keep my  
24 Property and the \$50,000 NRD."

25 Darryl Cotton and I did meet at my office on November 2, 2016, to negotiate the final terms of  
26 the sale of the Property and we reached an agreement on the final terms of the sale of the Property.  
27 That agreement was not oral. We put our agreement in writing in a simple and straightforward written  
28



1 agreement that we both signed before a notary. (See paragraph 5, *supra*, Nov 2<sup>nd</sup> Written Agreement,  
2 Exhibit 2 to Geraci NOL.) The written agreement states in its entirety:

3 11/02/2016

4 Agreement between Larry Geraci or assignee and Darryl Cotton:

5 Darryl Cotton has agreed to sell the property located at 6176 Federal Blvd.,  
6 CA for a sum of \$800,000 to Larry Geraci or assignee on the approval of a  
Marijuana Dispensary. (CUP for a dispensary.)

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

10 /s/ \_\_\_\_\_  
Larry Geraci

/s/ \_\_\_\_\_  
Darryl Cotton

11 I never agreed to pay Mr. Cotton a \$50,000.00 non-refundable deposit. At the meeting, Mr.  
12 Cotton stated he would like a \$50,000 non-refundable deposit. I said "no." Mr. Cotton then asked for a  
13 \$10,000 non-refundable deposit and I said "ok" and that amount was put into the written agreement.  
14 After he signed the written agreement, I paid him the \$10,000 cash as we had agreed. If I had agreed to  
15 pay Mr. Cotton a \$50,000 deposit, it would have been a very simple thing to change "\$10,000" to  
16 \$50,000" in the agreement before we signed it.

17 I never agreed to pay Mr. Cotton a 10% equity stake in the marijuana dispensary. I never  
18 agreed to pay Mr. Cotton a minimum monthly equity distribution of \$10,000. If I had agreed to pay  
19 Mr. Cotton a 10% equity stake in the marijuana dispensary and a minimum monthly equity distribution  
20 of \$10,000, then it would have also been a simple thing to add a sentence or two to the agreement to  
21 say so.

22 What I did agree to was to pay Mr. Cotton a total purchase price of \$800,000, with the balance  
23 of \$790,000 due upon approval of a CUP. If the CUP was not approved, then he would keep the  
24 Property and the \$10,000. So that is how the agreement was written.

25 7. In paragraph 6 of his supporting declaration, Darryl Cotton states:

26 "At the November 2, 2016, meeting we reached the November Agreement,  
27 Geraci: (i) provided me with \$10,000 in cash towards the NRD of \$50,000, for  
28 which I executed a document to record my receipt thereof (the "Receipt"); (ii)

1           promised to have his attorney, Gina Austin ("Austin"), *promptly* reduce the oral  
2           November Agreement to written agreements for execution; and (iii) promised to  
3           not submit the CUP to the City until he paid me the balance of the NRD."

4           I did pay Mr. Cotton the \$10,000 cash after we signed the Nov 2nd Written Agreement. As  
5           stated above, I never agreed to a \$50,000 deposit and, if I had, it would have been a simple thing to  
6           state that in our written agreement.

7           Mr. Cotton refers to the written agreement (i.e., the Nov 2nd Written Agreement) as a  
8           "Receipt." Calling the Agreement a "Receipt" was never discussed. There would have been no need  
9           for a written agreement before a notary simply to document my payment to him of \$10,000. In  
10          addition, had the intention been merely to document a written "Receipt" for the \$10,000 payment, then  
11          we could have identified on the document that it was a "Receipt" and there would have been no need  
12          to put in all the material terms and conditions of the deal. Instead, the document is expressly called an  
13          "Agreement" because that is what we intended.

14          I did not promise to have attorney Gina Austin reduce the oral agreement to written agreements  
15          for execution. What we did discuss was that Mr. Cotton wanted to categorize or allocate the \$800,000.  
16          At his request, I agreed to pay him for the property into two parts: \$400,000 as payment for the  
17          property and \$400,000 as payment for the relocation of his business. As this would benefit him for tax  
18          purposes but would not affect the total purchase price or any other terms and conditions of the  
19          purchase, I stated a willingness to later amend the agreement in that way.

20          I did not promise to delay submitting the CUP to the City until I paid the alleged \$40,000  
21          balance of the deposit. I agreed to pay a \$10,000 deposit only. Also, we had previously discussed the  
22          long lead-time to obtain CUP approval and that we had already begun the application submittal  
23          process as discussed in paragraph 8 below.

24          8.       Prior entering into the Nov 2nd Written Agreement, Darryl Cotton and I discussed the  
25          CUP application and approval process and that his consent as property owner would be needed to  
26          submit with the CUP application. I discussed with him that my assistant Rebecca Berry would act as  
27          my authorized agent to apply for the CUP on my behalf. Mr. Cotton agreed to Ms. Berry serving as  
28

1 the Applicant on my behalf to attempt to obtain approval of a CUP for the operation of a MMCC or  
2 marijuana dispensary on the Property. On October 31, 2016, as owner of the Property, Mr. Cotton  
3 signed Form DS-318, the Ownership Disclosure Statement for a Conditional Use Permit, by which he  
4 acknowledged that an application for a permit (CUP) would be filed with the City of San Diego on the  
5 subject Property with the intent to record an encumbrance against the property. The Ownership  
6 Disclosure Statement was also signed by my authorized agent and employee, Rebecca Berry, who was  
7 serving as the CUP applicant on my behalf. A true and correct copy of the Ownership Disclosure  
8 Statement signed on October 31, 2016, by Darryl Cotton and Rebecca Berry is attached as Exhibit 1 to  
9 the Geraci NOL. Mr. Cotton provided that consent and authorization as we had discussed that approval  
10 of a CUP would be a condition of the purchase and sale of the Property.

11 9. As noted above, I had already put together my team for the MMCC project. My design  
12 professional, Abhay Schweitzer, and his firm, TECHNE, is and has been responsible for the design of  
13 the Project and the CUP application and approval process. Mr. Schweitzer was responsible for  
14 coordinating the efforts of the team to put together the CUP Application for the MMCC at the Property  
15 and Mr. Schweitzer has been and still is the principal person involved in dealings with the City of San  
16 Diego in connection with the CUP Application approval process. Mr. Schweitzer's declaration  
17 (Declaration of Abhay Schweitzer in Support of Opposition to Motion to Expunge Lis Pendens) has  
18 been submitted concurrently herewith and describes in greater detail the CUP Application submitted to  
19 the City of San Diego, which submission included the Ownership Disclosure Statement signed by  
20 Darryl Cotton and Rebecca Berry.

21 10. After we signed the Nov 2nd Written Agreement for my purchase of the Property, Mr.  
22 Cotton immediately began attempts to renegotiate our deal for the purchase of the Property. This  
23 literally occurred the evening of the day he signed the Nov 2nd Written Agreement.

24 On November 2, 2016, at approximately 6:55 p.m., Mr. Cotton sent me an email, which stated:

25 Hi Larry,

26 Thank you for meeting today. Since we examined the Purchase Agreement in  
27 your office for the sale price of the property I just noticed the 10% equity position  
28 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



1 element in my decision to sell the property. I'll be fine if you simply  
2 acknowledge that here in a reply.

3 I receive my emails on my phone. It was after 9:00 p.m. in the evening that I glanced at my  
4 phone and read the first sentence, "Thank you for meeting with me today." And I responded from my  
5 phone "No no problem at all." I was responding to his thanking me for the meeting.

6 The next day I read the entire email and I telephoned Mr. Cotton because the total purchase  
7 price I agreed to pay for the subject property was \$800,000 and I had never agreed to provide him a  
8 10% equity position in the dispensary as part of my purchase of the property. I spoke with Mr. Cotton  
9 by telephone at approximately 12:40 p.m. for approximately 3-minutes. A true and correct copy of the  
10 Call Detail from my firm's telephone provider showing those two telephone calls is attached as  
11 Exhibit 3 to the Geraci NOL. During that telephone call I told Mr. Cotton that a 10% equity position in  
12 the dispensary was not part of our agreement as I had never agreed to pay him any other amounts above  
13 the \$800,000 purchase price for the property. Mr. Cotton's response was to say something to the effect  
14 of "well, you don't get what you don't ask for." He was not upset and he commented further to the  
15 effect that things are "looking pretty good—we all should make some money here." And that was the  
16 end of the discussion.

17 11. To be clear, prior to signing the Nov 2nd Written Agreement, Mr. Cotton expressed a  
18 desire to participate in different ways in the *operation* of the future MMCC business at the Property.  
19 Mr. Cotton is a hydroponic grower and purported to have useful experience he could provide regarding  
20 the operation of such a business. Prior to signing the Nov 2nd Written Agreement we had preliminary  
21 discussions related to his desire to be involved in the *operation* of the business (not related to the  
22 purchase of the Property) and we discussed the *possibility* of compensation to him (e.g., a percentage of  
23 the net profits) in exchange for his providing various services to the business—but we never reached an  
24 agreement as to those matters related to the operation of my future MMCC business. Those discussions  
25 were not related to the purchase and sale of the Property, which we never agreed to amend or modify.

26 12. Beginning in or about mid-February 2017, and after the zoning issues had been resolved,  
27 Mr. Cotton began making increasing demands for compensation in connection with the sale. We were  
28 several months into the CUP application process which could potentially take many more months to

1 successfully complete (if it could be successfully completed and approval obtained) and I had already  
2 committed substantial resources to the project. I was very concerned that Mr. Cotton was going to  
3 interfere with the completion of that process to my detriment now that the zoning issues were resolved.  
4 I tried my best to discuss and work out with him some further compensation arrangement that was  
5 reasonable and avoid the risk he might try to "torpedo" the project and find another buyer. For  
6 example, on several successive occasions I had my attorney draft written agreements that contained  
7 terms that I that I believed I could live with and hoped would be sufficient to satisfy his demands for  
8 additional compensation, but Mr. Cotton would reject them as not satisfactory. Mr. Cotton continued  
9 to insist on, among other things, a 10% equity position, to which I was not willing to agree, as well as  
10 on minimum monthly distributions in amounts that I thought were unreasonable and to which I was  
11 unwilling to agree. Despite our back and forth communications during the period of approximately  
12 mid-February 2017 through approximately mid-March 2017, we were not able to re-negotiate terms for  
13 the purchase of the property to which we were both willing to agree. The Nov. 2nd Written Agreement  
14 was never amended or modified. Mr. Cotton emailed me that I was not living up to my agreement and  
15 I responded to him that he kept trying to change the deal. As a result, no re-negotiated written  
16 agreement regarding the purchase and sale of the property was ever signed by Mr. Cotton or me after  
17 we signed and agreed to the terms and conditions in the Nov 2d Written Agreement.

18 13. Ultimately, Mr. Cotton was extremely unhappy with my refusal to accede to his  
19 demands and the failure to reach agreement regarding his possible involvement with the *operation of*  
20 the business to be operated at the Property and my refusal to modify or amend the terms and conditions  
21 we agreed to in the Nov 2nd Written Agreement regarding my purchase from him of the Property. Mr.  
22 Cotton made clear that he had no intention of living up to and performing his obligations under the  
23 Agreement and affirmatively threatened to take action to halt the CUP application process.

24 14. Mr. Cotton thereafter made good on his threats. On the morning of March 21, 2017, Mr.  
25 Cotton had a conversation with Firouzeh Tirandazi at the City of San Diego, who was in charge of  
26 processing the CUP Application, regarding Mr. Cotton's interest in withdrawing the CUP Application.  
27 That discussion is confirmed in an 8:54 a.m. e-mail from Ms. Tirandazi to Mr. Cotton with a cc to  
28

1 Rebecca Berry. A true and correct copy of that March 21, 2017, at 8:54 a.m. e-mail is attached as  
2 Exhibit 4 to the Geraci NOL.

3 15. That same day, March 21, 2017, at 3:18 p.m. Mr. Cotton emailed me, reinforcing that he  
4 would not honor the Nov 2nd Written Agreement. In his email he stated that I had no interest in his  
5 property and that "I will be entering into an agreement with a third party to sell my property and they  
6 will be taking on the potential costs associated with any litigation arising from this failed agreement  
7 with you. A true and correct copy of that March 21, 2017, at 3:18 p.m. e-mail is attached as Exhibit 5  
8 to the Geraci NOL.

9 16. Four minutes later that same day, at 3:25 p.m., Mr. Cotton e-mailed Ms. Tirandazi at the  
10 City, with a cc to both me and Rebecca Berry, stating falsely to Ms. Tirandazi: "... the potential buyer,  
11 Larry Gerasi [sic] (cc'ed herein), and I have failed to finalize the purchase of my property. As of today,  
12 there are no third-parties that have any direct, indirect or contingent interests in my property. The  
13 application currently pending on my property should be denied because the applicants have no legal  
14 access to my property. A true and correct copy of that March 21, 2017, at 3:25 p.m. e-mail is attached  
15 as Exhibit 6 to the Geraci NOL. Mr. Cotton's email was false as we had a signed agreement for the  
16 purchase and sale of the Property – the Nov 2nd Written Agreement.

17 17. Fortunately, the City determined Mr. Cotton did not have the authority to withdraw the  
18 CUP application without the consent of the Applicant (Rebecca Berry, my authorized agent).

19 18. Due to Mr. Cotton's clearly stated intention to not perform his obligations under the  
20 written Agreement and in light of his affirmative steps taken to attempt to withdraw the CUP  
21 application, I went forward on March 21, 2017, with the filing of my lawsuit against Mr. Cotton to  
22 enforce the Nov 2<sup>nd</sup> Written Agreement.

23 19. Since the March 21, 2017 filing of my lawsuit, we have continued to diligently pursue  
24 our CUP Application and approval of the CUP. Despite Mr. Cotton's attempts to withdraw the CUP  
25 application, we have completed the initial phase of the CUP process whereby the City deemed the CUP  
26 application complete (although not yet approved) and determined it was located in an area with proper  
27 zoning. We have not yet reached the stage of a formal City hearing and there has been no final  
28 determination to approve the CUP. The current status of the CUP Application is set forth in the



1 Declaration of Abhay Schweitzer.

2 20. Mr. Cotton also has made good on the statement in his March 21, 2017, at 3:18 p.m.  
3 email (referenced in paragraph 15 above - see Exhibit 5 to the Geraci NOL) stating that he would be  
4 "entering into an agreement with a third party to sell my property and they will be taking on the  
5 potential costs associated with any litigation arising from this failed agreement with you. We have  
6 learned through documents produced in my lawsuit that well prior to March 21, 2017, Mr. Cotton had  
7 been negotiating with other potential buyers of the Property to see if he could get a better deal than he  
8 had agreed to with me. As of March 21, 2017, Cotton had already entered into a real estate purchase  
9 and sale agreement to sell the Property to another person, Richard John Martin II.

10 21. Although he entered into this alternate purchase agreement with Mr. Martin as early as  
11 March 21, 2017, to our knowledge in the nine (9) months since, neither Mr. Cotton nor Mr. Martin or  
12 other agent has submitted a separate CUP Application to the City for processing. During that time, we  
13 continued to process our CUP Application at great effort and expense.

14 22. During approximately the last 17 months, I have incurred substantial expenses in excess  
15 of \$150,000 in pursuing the MMCC project and the related CUP application.

16 23. Finally, Mr. Cotton has asserted from the outset of his lawsuit and, again, in paragraph  
17 16 of his supporting declaration, that he did not discover until March 16, 2017, that I had submitted the  
18 CUP Application back on October 31, 2016. That is a blatant lie. I kept Mr. Cotton apprised of the  
19 status of the CUP application and the problems we were encountering (e.g., an initial zoning issue)  
20 from the outset. Attached as Exhibit 7 is a true and correct copy of a text message Mr. Cotton sent me  
21 on November 16, 2016, in which he asks me, "Did they accept the CUP application?" Mr. Cotton was  
22 well aware at that time that we had already submitted the CUP application and were awaiting the City's  
23 completion of its initial review of the completeness of the application. Until the City deems the CUP  
24 application complete it does not proceed to the next step—the review of the CUP application.

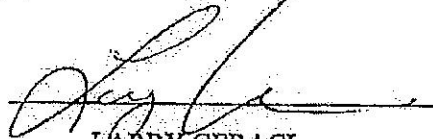
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1 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
2 true and correct. Executed this 9<sup>th</sup> day of April, 2018.

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5 LARRY GERACI  
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