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8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

10 LARRY GERACI, an individual,

11 Plaintiff,

12 v.

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

15 Defendants.

16 DARRYL COTTON, an individual,

17 Cross-Complainant,

18 v.

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

21 Cross-Defendants.  
22  
23  
24  
25  
26  
27  
28

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.)

25 ///

26 ///

27 ///

28 ///

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. CIBC 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

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