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Attorney for Defendant/Cross-Complainant DARRYL COTTON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

LARRY GERACI, an individual,

Plaintiff,

vs.

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

Defendants.

AND RELATED CROSS-ACTION.

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

DEFENDANT/CROSS-COMPLAINANT DARRYL COTTON'S MOTION IN LIMINE #1 OF 1 TO EXCLUDE GERACI'S NOVEMBER 3RD FACTUAL ALLEGATIONS

[MOTION IN LIMINE 1 of 1]

Date: June 28, 2019
Time: 8:30 a.m.
Dept: C-73
Judge: The Hon. Joel R. Wohlfeil

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendant/Cross-Complainant, Darryl Cotton ("Defendant") moves for an order, in limine, precluding Plaintiff Larry Geraci from offering in evidence, examination, argument or other reference to an alleged phone call in which Defendant disavows his alleged 10% equity interest in the marijuana business, "Geraci's November 3rd Factual Allegations." This motion is set for hearing June 28, 2019 at 8:30 a.m. in Department C-73 at the above entitled court located at 330 W Broadway, San Diego, CA 92101.

Defendant moves the Court to exclude any reference to the "Geraci's November 3rd Factual Allegations" on the grounds that such evidence/testimony is inadmissible under California Evidence

Code §§ 210, 350, 352, and Code of Civil Procedure §§ 1856(d), 1624.

DATED: June 21, 2019

Respectfully submitted,

Jacob P. Austin

Jacob Austin
Attorney for Defendant/Cross-Complainant

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

In the simplest terms possible the parties allege that they reached an agreement on November 2, 2016 for the sale of 6176 Federal Blvd, San Diego California 92114. Mr. Cotton contends that their agreement was an oral joint venture agreement. Geraci contends that the entire agreement is memorialized in a short, three sentence document. The document Geraci references as the final integrated agreement is alleged by Cotton to be a receipt for a partial cash deposit.

II. BRIEF OVERVIEW OF UNDISPUTED COMMUNICATIONS.

The following is a breakdown of the email communication:

On November 2, 2016, at 3:11 p.m., Geraci emailed Cotton a copy of the November Document.

At 6:55 PM, Cotton replied to the same email as follows:

> Hi Larry, [¶] Thank you for meeting today. Since we executed the Purchase Agreement in your office for the sale price of the property I just noticed the 10% equity position in the dispensary was not language added into that document. I just want to make sure that we're not missing that language ***in any final agreement*** as it is a factored element in my decision to sell the property, ***I'll be fine if you would simply acknowledge that here in a reply***.

(emphasis added).

At 9:13 p.m., Geraci replied: "***No no problem at all".*** (emphasis added).

This alone proves that *Cotton* NEVER intended for the document to be a fully integrated agreement and proves that there was a JVA created with a term which provides for a 10% equity position for Cotton.

III. SUMMARY OF GERACI'S NOVEMBER 3RD ALLEGATIONS.

For over a year of litigation this is where the story ended. More recently Geraci contends that when he responded "No no problem at all" he was mistakenly only responding to the first part of Cotton's email thanking him for the meeting and that the very next day he telephoned Cotton who

orally agreed that he did not have a 10% equity stake in the business ("Geraci's November 3rd Factual Allegations").

To be more specific, after a year of ligation Geraci, for the first time claims:

> I receive my emails on my phone. It was after 9:00 p.m. in the evening that I glanced at my phone and read the first sentence, "Thank you for meeting with me today." And I responded from my phone "No no problem at all." I was responding to his thanking me for the meeting. The next day I read the entire email and I telephoned Mr. Cotton because the total purchase price I agreed to pay for the subject property was $800,000 and I never agreed to provide him a 10% equity position in the dispensary as part of my purchase of the property. I spoke with Mr. Cotton by telephone at approximately 12:40 p.m. for approximately 3-minutes...During that phone call I told Mr. Cotton that a 10% equity position in the dispensary was not part of our agreement as I had never agreed to pay him any other amounts above the $800, 00 purchase price for the property. Mr. Cotton's response was to say something to the effect of "well you don't get what you don't ask for. He was not upset and he commented further to the effect that things are "looking pretty good-we all should make some money here."

Dec Larry Geraci In Opposition to Defendant Darryl Cotton's Motion to Expunge Lis Pendens at 7:3-15

Of note, there is not a single solitary piece of evidence that proves the Geraci's version of this call. The only piece of evidence Geraci points to is his call log showing a few different calls that day between Cotton and Geraci. Geraci admits that there is no evidence to support his allegation.[1]

However, we do also have an email from November 3rd which puts this call into perspective. Approximately one hour after the alleged phone call discussion, at 1:41 p.m., Cotton emails Geraci the following:

> ***Per our phone call*** the name 151 AmeriMeds has not been taken nor has there been any business entity formed from it. If you see this as an opportunity to piggyback some of the work I've done and will continue to do as a 151 Farmers with further opportunities as a potential franchise for your dispensary I'd like you to consider that as the process evolves. We'll firm it up as you see fit.

Cotton Email to Geraci, Nov 3, 2016 1:41 p.m.

IV. ANY MENTION OF GERACI'S NOVMEBER 3rd FACTUAL ALLEGATIONS ARE INADMISSABLE.

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[1] Reporter's Transcript Feb 8, 2019 Cotton's Motion to Compel Further Responses at 20:15-16 (The Court: Will you be producing, or have you produced any document involving this allegation by Mr. Geraci? "Weinstein:...[A]nything that directly talks about what they term the Disavowment Allegation, that was verbal.")

A. GERACI'S NOVEMBER 3RD FACTUAL ALLEGATIONS ARE BARRED BECAUSE IT OPERATES AS AN UNPLED AFFIRMATIVE DEFENSE.

Under California law, an answer must contain "[t]he general or specific denial of the material allegations of the complaint controverted by the defendant" and "[a] statement of any new matter constituting a defense." (Code Civ. Proc., § 431.30, subd. (b)(1) & (2).) "The phrase 'new matter' refers to something relied on by a defendant which is not put in issue by the plaintiff. [Citation.] Thus, where matters are not responsive to essential allegations of the complaint, they must be raised in the answer as 'new matter.'" State Farm Mut. Auto. Ins. Co. v. Superior Court (1991) 228 Cal.App.3d 721, 725.

> Such "new matter" is also known as "an affirmative defense." [Citation] Affirmative defenses must not be pled as "terse legal conclusions," but "rather ... as facts 'averred as carefully and with as much detail as the facts which constitute the cause of action and are alleged in the complaint.'" [Citation.] "***A party who fails to plead affirmative defenses waives them.***" [Citation.]

In re Quantification Settlement Agreement Cases, 201 Cal. App. 4th 758, 812-13 (Cal. Ct. App. 2011) (emphasis added).

In short, Geraci and Ms. Berry were required to set forth the Geraci's November 3rd Factual Allegations – a "new matter" constituting an affirmative defense of mistake - in their answers to Mr. Cotton's pleadings. They did not, consequently, they waived the ability to factually argue Geraci's November 3rd Factual Allegations or a legal affirmative defense of mistake.

Geraci and Ms. Berry admit sent the Confirmation Email, but they do *not* set forth factually the Geraci's November 3rd Factual Allegations or plead a legal affirmative defense of mistake. These are judicial admissions that negate Mr. Geraci's ability to raise the Geraci's November 3rd Factual Allegations – Geraci admits he sent the Confirmation Email confirming to reduce to writing Mr. Cotton's "10% equity position" in a "final agreement."

B. BEFORE THE COURT CAN RULE ON PAROL EVIDENCE IT MUST FIRST ADDRESS CONTRACT INTEGRATION.

The first step in analyzing the admissibility of parol evidence is for the Court, without assistance from the jury, to determine whether the contract at issue is the fully integrated agreement of the parties. (See. Code Civ. Proc., § 1856(d); and Masterson v. Sine, 68 Cal. 2d at 226.). 'The question

for the court is whether the contract "appears to be a complete agreement..." (Masterson v. Sine, 68 Cal.2d at 226.) "If a writing is intended by the parties as a 'complete and exclusive statement of the terms of the agreement...,' the contract is 'fully' or 'completely' integrated and parol evidence is inadmissible even to add terms not inconsistent with the writing." (Esbensen v. Userware International Inc. (1992) 11' Cal.App.4th 631, 637; see generally Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co. (1968) 69 Cal.2d 33, 39 (one may not "add to, detract from, or vary the terms" of a finally and completely integrated contract in an attempt to alter its meaning.))

C. GERACI'S NOVEMBER 3RD FACTUAL ALLEGATIONS ARE BARRED BY THE PAROL EVIDENCE RULE.

The Geraci's November 3rd Factual Allegations was clearly manufactured in response to Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n (Riverisland) (2013) 55 Cal.4th 1169, as it contradicts Mr. Geraci's prior judicial and evidentiary admissions. The critical point to be emphasized here is that pre-Riverisland, because the November Document looks like it could be a sales agreement, an attorney (setting aside ethics) potentially had a flimsy shield to argue the parol evidence rule barred the Confirmation Email (and other parol evidence) as proof of the JVA.

However, post-Riverisland, because parol evidence is always admissible to prove fraud, there ceased being any *legal* theory upon which to bar the *facts* that had already been admitted to for over a year. In other words, it was clear that there was no probable cause for filing suit and Ferris & Britton realized they would be liable for filing a malicious prosecution again. Casa Herrera, Inc. v. Beydoun, 32 Cal. 4th 336, 349 ("we hold that terminations based on the parol evidence rule are favorable for malicious prosecution purposes.").

Thus, given the consequential damages to Mr. Cotton are in the millions, Geraci and his counsel had a choice to make: (i) abide by its professional responsibilities and pay for its actions or (ii) double down and conspire with their client to fabricate evidence. They chose the latter and created the Disavowment Allegation.

Application of the parol evidence leads to an obvious general rule: "plaintiffs are barred from introducing alleged oral promises which contradict the terms of the written agreements they signed."

Kentwool Co. v. Netsuite Inc., Case No. 14-cv-05264-JST, at *9 (N.D. Cal. Feb. 18, 2015) (citing Groth-Hill Land Co., LLC v. General Motors LLC, No. 13-cv-1362-TEH, 2013 WL 3853160, at *15 (N.D. Cal. July 23, 2013).

> Groth-Hill Land Company v. General Motors, LLC, 2013 WL 3853160 (N.D. Cal. Jul. 23, 2013), which, in reaching its conclusion, cites heavily the California Supreme Court's decision in Riverisland, is instructive. In Groth-Hill, similar to the instant action, "plaintiffs in their promissory fraud claim [did] not attack the validity of the . . . agreements"; "[i]nstead, they [sought] to recover based on promises [defendant] allegedly made to them over the phone, promises which run counter to the terms of the written contract." Id. at *15. ***The court held that the fraud exception rule did not apply in those circumstances and the parol evidence rule excluded any such evidence.*** Id. at *16.

Clear Connection Corp. v. Comcast Cable Commc'ns Mgmt., LLC, No. 2:12-cv-02910-TLN-DAD, at *8 (E.D. Cal. Dec. 3, 2013) (emphasis added).

Here, similar to the plaintiffs in Groth-Hill and Clear Connection Corp., Mr. Geraci does not attack the validity of the November Document, instead, he seeks to recover based on a phone call on November 3, 2016 in which Mr. Cotton allegedly communicated he agreed the Confirmation Email was sent by mistake (i.e., a promise that runs counter to the terms of the written contracts). Thus, Mr. Geraci is "barred from introducing alleged oral promises which contradict the terms of the written agreements [he] signed." Kentwool Co., supra, at *9.

In sum, application of the factors above to undisputed evidence, and case law, lead to one simple incontrovertible conclusion *as a matter of law* – the November Document is not a sales contract for Mr. Geraci's purchase of the Property as alleged. Founding Members v. Newport Beach, 109 Cal. App. 4th 944, 954 (Cal. Ct. App. 2003) ("Whether a contract is integrated is a question of law when the evidence of integration is not in dispute.").

D. GERACI'S NOVEMBER 3RD FACTUAL ALLEGATIONS ARE BARRED BY THE STATUTE OF FRAUDS.

On April 9, 2018, over a year after filing suit and being confronted with Riverisland, Mr. Weinstein summarized his client's position as follows:

> First, our view is that the statute of frauds bars the latter email [i.e., the Confirmation Email] because it is parol evidence that is being offered to ***explicitly contradict*** the terms of the [November Document] entered into on November 2. Second, Mr. Geraci does not contend

> that his call to Mr. Cotton on November 3, 2016, resulted in an oral agreement between them that Mr. Cotton was not entitled to a 10% equity position. Rather, Mr. Geraci's position is that there was ***never*** an oral agreement between them that Mr. Cotton would receive a 10% equity position. Even assuming for the sake of argument that the [Confirmation Email] is not barred by the parol evidence rule and admissible, the telephone call the next day is parol evidence that Mr. Geraci never agreed to a 10% equity position and, therefore, it is ***consistent*** with the [November Document] and not barred by the statute of frauds.

(emphasis in original).

First and foremost, pursuant to the parol evidence rule, the parties clearly entered into a joint venture and the statute of frauds does not apply. Bank of California v. Connolly (1973) 36 Cal.App.3d 350, 374 ("[A]n oral joint venture agreement concerning real property is not subject to the statute of frauds even though the real property was owned by one of the joint venturers."). Second, assuming the statute of frauds applied, Mr. Weinstein's convolution of the statute of frauds is self-contradictory and leads to the opposite conclusion he argues for.

A contract coming within the statute of frauds is invalid unless it is memorialized by a writing subscribed by the party to be charged or by the party's agent. Civ; Code, § 1624; Secrest v. Security National Mortgage Loan Trust. (2008) 167 Cal.App.4th 544. An agreement for the sale of real property or an interest in real property comes within the statute of frauds. CCP § 1624(a)(3).

The November Document, the Request for Confirmation and the Confirmation Email are undisputed writings between the parties and they are the controlling evidence under the statute of frauds. Mr. Geraci alleges that he sent the Confirmation Email by mistake, an allegation supported only by his cell phone record of a call on November 3, 2016. Such a claim cannot stand because extrinsic evidence cannot be employed to prove an agreement at odds with the terms of writings that both parties admit they executed and which are subject to the statute of frauds. Sterling v. Taylor, 40 Cal. 4th 757, 771-72 (Cal. 2007) ("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.")

The Confirmation Email is a writing consistent with Mr. Cotton's allegation of the JVA and that the November Document was executed with the intent that it be a receipt. On the other hand, Mr. Geraci's evidence – his self-serving declaration he sent the Confirmation Email by mistake and that Mr.

Cotton allegedly agreed to same with him over the phone on November 3, 2016 - is "at odds with the terms of [his own] memorandum" (i.e., the Confirmation Email) and is not in writing; thus violating the statute of frauds on two grounds and is therefore invalid.

E. THE GERACI'S NOVEMBER 3RD FACTUAL ALLEGATIONS HAVE NO PROBATIVE VALUE AND IS OUTWEIGHED BY THE PREJUDICIAL AFFECT.

Admission of Geraci's November 3rd Factual Allegations substantially prejudices Cotton. Geraci Geraci's November 3rd Factual Allegations is that Cotton agreed the November Document is the final integrated agreement for the sale of the Property, but that he is now falsely representing a sales contract as a receipt. In other words, that Cotton is before the Court attempting to use the Confirmation Email as evidence of a fabricated oral agreement, i.e., the Oral JVA. Thus, if Geraci's November 3rd Factual Allegations were true, Geraci was required to plead fraud with specificity in his Complaint. He did not.

If Geraci is not bound by his prior admission and omission, then Cotton will be severely prejudiced in defending against a sham cause of action and affirmative defense based on factual allegations that are clearly contradicted by Geraci's previous judicial and evidentiary admissions and which were required to be pled with specificity. Geraci claims to be able to avoid this fact by simply not "claiming" or using the term affirmative defense, in operation there is no distinction. As mentioned before there is no other evidence other than the fact that several calls were made the day after November 2, 2016. There are is not one written instrument which evidences this interaction.

V. CONCLUSION.

There is no substantial justification for the reasoning provided in his November 8, 2018 discovery responses stating that no pleading or discovery request required Geraci to set forth his Geraci's November 3rd Factual Allegations prior to April 9, 2018. The irony of Geraci's change in position is self-evident, in the wake of Riverisland, Geraci's has gone from using the parol evidence rule as a *shield* to a *sword* - he originally wanted to use the parol evidence rule to bar the admission of evidence that would prove the Oral JVA (and thus his fraud), but he now seeks to use it to introduce evidence, Geraci's November 3rd Factual Allegations, to disprove his fraud. In

balancing of the alleged probative value to the prejudicial.

DATED: June 21, 2019

Respectfully submitted,

Jacob P. Austin

Jacob Austin
Attorney for Defendant/Cross-Complainant

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

LARRY GERACI, an individual, Plaintiff, vs. DARRYL COTTON, an individual; and DOES 1 through 10, inclusive, Defendants. AND RELATED CROSS-ACTION.	Case No. 37-2017-00010073-CU-BC-CTL **ORDER [PROPOSED] RE DEFENDANT/CROSS-COMPLAINANT'S MOTION IN LIMINE NO. 1 OF 1 TO EXLCUDE THE DISAVOWMENT ALLEGATION** **[MIL NO. 1 OF 1]** **[IMAGED FILE]** Date: June 28, 2019 Time: 8:30 a.m. Dept: C-73 Judge: The Hon. Joel R. Wohlfeil

After considering all moving, opposition and reply papers, as well as the oral argument of counsel, IT IS HEREBY ORDERED THAT Defendant/Cross-Complainant's Motion in Limine No. 1 of 1 is [GRANTED/GRANTED WITHOUT PREJUDICE/DENIED/DENIED WITHOUT PREJUDICE]. [Any evidence, examination, argument or other reference to Plaintiff's November 3, Factual Allegations, is precluded, and all counsel are ordered to advise their clients and witnesses of the Court's Order.]

Dated: July ___, 2019

HON. JOEL R. WOHLFIEL
Judge of the San Diego County
Superior Court