

1 FERRIS & BRITTON
A Professional Corporation
2 Michael R. Weinstein (SBN 106464)
Scott H. Toothacre (SBN 146530)
3 501 West Broadway, Suite 1450
San Diego, California 92101
4 Telephone: (619) 233-3131
Fax: (619) 232-9316
5 mweinstein@ferrisbritton.com
stoothacre@ferrisbritton.com

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Superior Court of California,
County of San Diego

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Clerk of the Superior Court
By Treva Cutts, Deputy Clerk

6 Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and
7 Cross-Defendant REBECCA BERRY

8
9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

11 LARRY GERACI, an individual,

12 Plaintiff,

13 v.

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

16 Defendants.

17 DARRYL COTTON, an individual,

18 Cross-Complainant,

19 v.

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

22 Cross-Defendants.

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

Judge:

Hon. Joel R. Wohlfeil

Dept.:

C-73

**PLAINTIFF/CROSS-DEFENDANTS'
NOTICE OF MOTION AND MOTION IN
LIMINE TO EXCLUDE REFERENCE TO
THE "JOINT VENTURE AGREEMENT"
OR THE "JVA"**

[MIL NO. 12 OF 15]

[IMAGED FILE]

Complaint Filed:

March 21, 2017

Trial Date:

June 28, 2019

23 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:**

24 **PLEASE TAKE NOTICE** that on June 28, 2019 at 8:30 a.m. or as soon thereafter as the
25 matter may be heard in Department C-73 of the San Diego Superior Court, located at 330 West
26 Broadway, San Diego, California, Plaintiff/Cross-Defendant, LARRY GERACI, and Cross-
27 Defendant, REBECCA BERRY, will move *in limine* pursuant to Evid. Code §§ 210, 350 and 352
28 for orders precluding any evidence, examination, argument or other reference to an alleged Joint

1 Venture Agreement or JVA between Geraci and Cotton.

2 This motion will be based on this Notice of Motion, the Memorandum of Points and
3 Authorities, and Notice of Lodgment served and filed herewith, on the records and file herein, and
4 on such evidence as may be presented at the hearing of this motion.

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6 FERRIS & BRITTON
A Professional Corporation

7
8 Dated: June 20 2019

9 By: 
Michael R. Weinstein
Scott H. Toothacre

10 Attorney for Plaintiff and Cross-Defendant LARRY
11 GERACI and Cross-Defendant REBECCA BERRY
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In the Joint Trial Readiness Conference Report in Mr. Cotton’s Statement of the Nature of
4 the case, he states that on November 2, 2016 the parties reached *an oral joint venture agreement to*
5 *develop and operate a medical marijuana dispensary* at the property; that Mr. Geraci promised to
6 have his attorney promptly reduce their oral joint venture agreement to writing; that Mr. Cotton
7 terminated the joint venture agreement after Mr. Geraci failed to responded to numerous written
8 requests for assurance of performance, i.e., that he would reduce the joint venture agreement to
9 writing. (Joint Trial Readiness Report, p. 3:11-27, ROA#546) The problem with this argument is
10 that Mr. Cotton has never alleged a Joint Venture Agreement, either in his original Cross-Complaint,
11 his First Amended Cross-Complaint, or in his operative Second Amended Cross-Complaint. It is
12 submitted that he is doing so now because he realizes that his alleged oral agreement for the purchase
13 and sale of the property is barred by the Statute of Frauds. As he has never plead a joint venture
14 agreement any testimony offered and argument made in that regard is barred as irrelevant. Such
15 evidence is also more prejudicial than probative and will result in confusion of the issues.

16 **II. Mr. COTTON’S PLEADINGS**

17 **A. Mr. Cotton’s Cross-Complaint**

18 Mr. Cotton’s initial Cross-Complaint (ROA#15) alleged 11 causes of action as follows: 1)
19 Quiet Title; 2) Slander of Title; 3) Fraud/Fraudulent Misrepresentation; 4) Fraud in the Inducement;
20 5) Breach of Contract; 6) Breach of Oral Contract; 7) Breach of Implied Contract; 8) Breach of the
21 Implied Covenant of Good Faith and Fair Dealing; 9) Trespass; 10) Conspiracy; and 11) Declaratory
22 and injunctive Relief. Nowhere in the original Cross-Complaint does Mr. Cotton allege *an oral*
23 *joint venture agreement to develop and operate a medical marijuana dispensary at the property,*
24 as he has set forth in the nature of the case in the Trial Readiness Conference Report.

25 Mr. Cotton plead that “On November 2, 2016, after months of negotiations, Geraci and
26 Cotton met at Geraci’s office to negotiate the unsettled terms and finalize their agreement *for the*
27 *sale of the Property.* The parties agreed to over thirty different terms *for the sale of the property*
28 and their intention was to reduce those terms to a writing. (ROA #15, Cross-Complaint ¶ 13, italics

1 added.) “The consideration for the *purchase of the Property* consisted of monetary and non-
2 monetary components. Under the terms of the agreement reached, Geraci agreed to provide Cotton,
3 among other things, the following consideration *for the Property*: (a.) The sum of \$800,000; (b.) A
4 10% equity stake in the MMCC upon the City’s approval of the CUP at the Property (the
5 “Business”); and (c.) On a monthly basis, 10% of the profits of the Business for the preceding month
6 or \$10,000, whichever was greater.” (ROA #15, Cross-Complaint ¶14, italics added.) “Further,
7 Geraci would pay Cotton a non-refundable deposit in the amount of \$50,000 (the ‘Non-Refundable
8 Deposit’). Geraci was then to submit a CUP application to the City. If the City granted the
9 application, *the sale and transfer of title to the Property* would be consummated upon Geraci’s
10 payment of the \$750,000 balance. However, if the City rejected the CUP application, the sale and
11 transfer of the Property would not proceed and Cotton would be entitled to retain the \$50,000 Non-
12 Refundable Deposit.” (ROA #15, Cross-Complaint ¶16, italics added, underline original.) Mr.
13 Cotton also alleged that “[t]he Side Agreement was also to include various other material terms,
14 including, without limitation, the 10% equity stake and monthly profit sharing (i.e., 10% of profits
15 or a minimum monthly payment of \$10,000).” (ROA #15, Cross-Complaint ¶ 18)

16 **B. An “Equity Stake” is Not a Joint Venture**

17 A joint venture “requires an agreement under which the parties have (1) a joint interest in a
18 common business, (2) an understanding that *profits and losses will be shared*, and (3) *a right to*
19 *joint control*. [Citations.]” (*Ramirez v. Long Beach Unified School District* (2002) 105 Cal.App.4th
20 182, 193.) By contrast an “equity stake” is “[t]he percentage of a business owned by the holder of
21 some number of shares of stock in that company. Shareholders of a *significant* equity stake in a
22 company *may exercise some level of control*, influence, or participation in the activities of the
23 company.” (BusinessDictionary.com, emphasis added)

24 It cannot be argued that Mr. Cotton plead *an oral joint venture agreement to develop and*
25 *operate a medical marijuana dispensary* at the property. Nowhere in the pleading does Mr. Cotton
26 allege that there was an agreement to share profits *and losses*, nor does he allege a *right* to joint
27 control of the business. Instead, according to Mr. Cotton, he was simply to be paid a 10% equity
28 interest and \$10,000 a month in profits *for the sale of the Property*. In other words, Mr. Cotton did

1 not allege that he would share in any of the potential losses of the business nor does it allege that
2 Mr. Cotton had any obligation under the agreement to do anything or contribute anything to the
3 alleged joint venture. Nor do the pleadings allege that Mr. Cotton would have a right to joint control
4 of the business. According to Mr. Cotton, he was to merely sit back and get monthly payments out
5 of the profits. Under any construction, this is not a joint venture agreement.

6 **C. Mr. Cotton's First Amended Cross-Complaint**

7 On June 30, 2017, Mr. Cotton, represented by Finch, Thornton & Baird, LLP, filed his First
8 Amended Complaint ("FAC") ((ROA #34), which alleged 7 causes of Action as follows: 1) Breach
9 of Contract; 2) Intentional Misrepresentation; 3) Negligent Misrepresentation; 4) False Promise; 5)
10 Intentional Interference with Prospective Economic Relations; 6) Negligent Interference with
11 Prospective Economic Relations; and 7) Declaratory Relief. The terms of the agreement alleged by
12 Mr. Cotton contain the same terms as he alleged in his original Cross-Complaint. (See FAC ¶¶ 14(a),
13 (b), (c), and (d).) Again, Mr. Cotton did not plead the formation, existence, or breach of an alleged
14 Joint Venture Agreement. Nor does Cotton's Prayer for Relief seek the enforcement of a Joint
15 Venture Agreement or damages for an alleged breach of a joint venture agreement. Certainly, if the
16 agreement were a joint venture agreement, experienced attorneys like Finch, Thornton and Baird
17 would know how to plead a cause of action for breach of a joint venture agreement.

18 **D. Mr. Cotton's Second Amended Cross-Complaint**

19 On August 25, 2017, still represented by Finch, Thornton and Baird, Mr. Cotton filed his
20 operative Second Amended Cross-Complaint ("SAC") (ROA #47), which alleges 5 causes of action
21 as follows: 1) Breach of Contract; 2) Intentional Misrepresentation; 3) Negligent Misrepresentation;
22 4) False Promise; and 5) Declaratory Relief. The allegations with regard to Mr. Cotton's breach of
23 Contract Action are as follows:

24 Geraci and Cotton entered into an agreement to negotiate and collaborate in good faith
25 on mutually acceptable purchase and sale documents reflecting the terms for a
26 purchase and sale of the Property and a side agreement for cotton to obtain an equity
27 position in the MMCC to operate at the Property. This agreement is comprised of (a)
28 the November 2, 2016 document signed by Geraci and Cotton, and (b) the November
2, 2016 email exchange between Geraci and Cotton including other agreed-upon terms
and the parties' agreement to negotiate and collaborate in good faith on final deal
documents. (Second Amended Cross-Complaint ¶ 34, p. 11:5-11)

1 Under the parties' contract, Geraci was bound to negotiate the terms of an agreement
2 for the Property in good faith. Geraci breached his obligation to negotiate in good faith
3 by, among other things, intentionally delaying the process of negotiations, failing to
4 deliver acceptable final purchase documents, failing to pay the agreed-upon non-
5 refundable deposit, demanding new and unreasonable terms in order to further delay
6 and hinder the process of negotiations, and failing to timely or constructively respond
7 to Cotton's requests and communications. (Second Amended Cross-Complaint ¶ 36,
8 p. 11:16-22)

9 Again, Cotton has not alleged the formation, existence or breach of a joint venture agreement
10 either in the original Cross-Complaint, First Amended Complaint or the Second Amended Cross-
11 Complaint. As previously noted, a joint venture "requires an agreement under which the parties have
12 (1) a joint interest in a common business, (2) an understanding that profits and losses will be shared,
13 and (3) a right to joint control. [Citations.]" (*Ramirez v. Long Beach Unified School District* (2002)
14 105 Cal.App.4th 182, 193.) Mr. Cotton failed to plead a joint venture agreement.

15 **III. LEGAL ARGUMENT**

16 **A. The Court May Exclude Prejudicial Evidence in Advance of Trial by way of an 17 In Limine Motion.**

18 The court has the inherent power to grant a motion in limine to exclude "any kind of evidence
19 which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly
20 prejudicial." (*Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444; *Peat, Marwick,
21 Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288).

22 **B. Mr. Cotton Has Not Plead A Cause of Action for Breach of A Joint Venture 23 Agreement**

24 In all three iterations of his cross-complaint Mr. Cotton alleged an oral agreement for the
25 purchase and sale of the property; nowhere is a joint venture alleged. "A joint venture "requires an
26 agreement under which the parties have (1) a joint interest in a common business, (2) an
27 understanding that profits *and losses* will be shared, and (3) *a right to joint control*. [Citations.]"
28 (*Ramirez v. Long Beach Unified School District* (2002) 105 Cal.App.4th 182, 193.) (Bold, Italics
added.)

"The pleadings are supposed to define the issues to be tried." (Weil & Brown, Cal. Practice
Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 6:8, p. 6-2.) "[W]hen a complaint

1 contains allegations that are fatal to a cause of action, a plaintiff cannot avoid those defects simply
2 by filing an amended complaint that omits the problematic facts or pleads facts inconsistent with
3 those alleged earlier. [Citation.]” (*Banis Restaurant Design, Inc. v. Serrano*) 134 Cal.App.4th 1035,
4 1044; see also *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1109 [“ ‘A pleader may not attempt to
5 breathe life into a complaint by omitting relevant facts which made his previous complaint
6 defective.’ [Citation.]”.) “Absent an explanation for the inconsistency, a court will read the original
7 defect into the amended complaint, rendering it vulnerable to demurrer again. [Citations.]” (*Banis*
8 *Restaurant Design, Inc. v. Serrano, supra*, 134 Cal.App.4th at p. 1044.)

9 It is axiomatic that evidence must relate to some issue raised by the pleadings, pretrial orders
10 or applicable substantive law. [See Evid. Code § 210] Having failed to raise the issue of a joint
11 venture agreement in the pleadings, Mr. Cotton’s proffered evidence and argument regarding a joint
12 venture agreement is not relevant to any issue in the case and should be excluded.

13 In this case, the joint venture agreement or “JVA” was never plead, instead it was likely
14 concocted based on the realization that Mr. Cotton’s alleged “oral agreement” for the sale of the
15 property is barred by the statute of frauds. However, a joint venture agreement is not barred by the
16 statute of frauds. See, generally, 1 Miller & Starr, Cal.Real Estate 2d (1989) § 1:59, pp. 165-168.)
17 Thus, by arguing the parties agreed to a joint venture (as opposed to an agreement for the sale of
18 property) Mr. Cotton hopes to side-step the application of the statute of frauds to his oral agreement.
19 While this is a novel argument and certainly employs a fair amount of legal gymnastics, Mr. Cotton
20 cannot escape his failure to plead a joint venture agreement in any of the three iterations of his Cross-
21 Complaint.

22 Notwithstanding Mr. Cotton’s assertions in the Trial Readiness Conference Report, that an
23 oral joint venture agreement was formed, existed and was breached by Mr. Geraci, the argument is
24 irrelevant to any issue in this case as no party has alleged a joint venture agreement in the pleadings
25 and has not alleged a breach of a joint venture agreement.

26 **C. The Evidence Would be Extremely Confusing to the Jury and Should be**
27 **Barred Under Cal. Evid. Code § 352**

28 California Evidence Code Section 352 provides: “The court in its discretion may exclude

1 evidence if its probative value is substantially outweighed by the probability that its admission will
2 (a) necessitate undue consumption of time or (b) create substantial damage of undue prejudice, of
3 confusing the issues, or of misleading the jury.

4 Clearly, if Mr. Cotton or Mr. Austin were to refer to a Joint Venture Agreement or “JVA” as
5 Attorney Austin likes to call it, which was never discussed, agreed to, nor made a part of this
6 litigation by pleading the formation, existence and breach of such agreement, it would result in an
7 undue consumption of time and would only serve to confuse the jury as to what the actual agreement
8 is in this case.

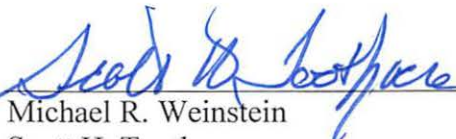
9 To be clear, Mr. Austin may be able to inquire regarding, and Mr. Cotton may be able testify
10 to, the additional terms Mr. Cotton claims were part of the contract (to the extent parol evidence is
11 admissible and does not violate the statute of frauds), however, to refer to those additional terms as
12 a joint venture agreement would be very confusing to the jury. Instead, if otherwise admissible,
13 they should be referred to as Mr. Cotton’s alleged “additional terms” to the November 2, 2016
14 agreement.

15 **IV. CONCLUSION**

16 For all the foregoing reasons, Mr. Geraci asks this Court to issue an order in limine that Mr.
17 Cotton, Attorney Jacob Austin and all attorneys and witnesses be cautioned not to refer to a joint
18 venture agreement and/or JVA which was never alleged in any of the Mr. Cotton’s three attempts at
19 pleading his causes of action.

20
21 FERRIS & BRITTON
22 A Professional Corporation

23 Dated: June 20, 2019

24 By: 
25 Michael R. Weinstein
26 Scott H. Toothacre
27 Attorney for Plaintiff and Cross-Defendant LARRY
28 GERACI and Cross-Defendant REBECCA BERRY

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**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
**ORDER [PROPOSED] RE
PLAINTIFF/CROSS-DEFENDANTS'
MOTION IN LIMINE NO. 12 OF 15 TO
EXCLUDE REFERENCE TO THE
"JOINT VENTURE AGREEMENT" OR
THE "JVA"**
[MIL NO. 12 OF 15]
[IMAGED FILE]
Complaint Filed: March 21, 2017
Trial Date: June 28, 2019

1 After considering all moving, opposition and reply papers, as well as the oral argument of counsel,
2 **IT IS HEREBY ORDERED THAT** Plaintiff/Cross-Defendants' Motion in Limine No. 12 of 15 is
3 [GRANTED/GRANTED WITHOUT PREJUDICE/DENIED/DENIED WITHOUT PREJUDICE].
4 [Any evidence, examination, argument or other reference to an alleged Joint Venture Agreement or
5 JVA between Geraci and Cotton, is precluded, and all counsel are ordered to advise their clients and
6 witnesses of the Court's Order.]

7
8 Dated: July __, 2019

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