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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

DARRYL COTTON, Plaintiff, v. LAWRENCE (A/K/A LARRY) GERACI, an individual, Defendant.	Case No. 37-2022-00000023-CU-MC-CTL **DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION TO VACATE VOID JUDGMENT** Date: February 25, 2022 Time: 9:00 a.m. Dept.: C-75 Judge: Hon. James A. Mangione Complaint Filed: January 3, 2022 Trial Date: Unassigned

I- INTRODUCTION

In San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL ("Cotton I"), plaintiff Cotton ("Cotton") and defendant Geraci ("Geraci") fought over a real estate transaction and a contract at the core of that transaction. They prosecuted claims for damages against each other arising from that real estate transaction and contract by way of a complaint and cross-complaint. Cotton raised the issue of contract illegality in Cotton I and the court ruled against him. The jury unanimously rejected Cotton's claims and defenses arising from that real estate transaction and contract. The court entered judgment against Cotton. Cotton filed a motion for new trial based on contract illegality. The court heard and denied that motion. Cotton filed notices of appeal. He failed to prosecute his appeals. They were dismissed. Case over.

But, now, two- and one-half years later, Cotton seeks to vacate the Cotton I judgment claiming (1) that the contract at issue in Cotton I was illegal, (2) that Judge Wohfeil was incorrect when he ruled against Cotton on contract illegality, (3) that because the contract was illegal, the judgment based on that contract is "void" and (4) that because the Cotton I judgment is "void", he can set aside the judgment by way of this motion

This motion can only be denied. It is not supported by any relevant admissible evidence. It is time-barred under Code of Civil Procedure Section 473. It is barred by both res judicata and collateral estoppel. Finally, the underlying premise of the motion is patently ludicrous, legally untenable, and unsupported by any proffered legal authority. This motion is a waste of the court's valuable time and an affront to any proper or fair application of the law.[1]

II- ARGUMENT

A. The Motion Should Be Denied Because it is Not Supported by Admissible Evidence

Plaintiff seeks to set aside a judgment entered two and one-half years ago upon jury verdict after a two-week trial because, he argues, that judgment is "void". But plaintiff offers no admissible evidence to support his motion and its startling, and significant, request. Per the court's January 19, 2022 Minute Order (ROA #21), the ex-parte application is deemed the moving papers. The ex-parte application consists of a notice, the memorandum of points and authorities, a five-paragraph declaration from plaintiff consisting of no relevant admissible evidence, and a bunch of various pleadings and documents attached to the memorandum. There are no authenticating declarations, there is no foundation laid, and there is no request for judicial notice for these various documents. Defendant has filed objections to the proffered "evidence". Those objections should be sustained. Plaintiff chose to proceed in an expedited fashion in this matter and on his filed ex-parte papers.

[1] It should be noted this is not the only forum where Cotton has proffered the same patently ridiculous, legally untenable claims. Cotton filed two separate actions in U.S. District Court over these matters (Case No. 3:18-cv-00325-JO-DEB, and Case No. 3:18-cv-02751-GPC-MDD. In the first of those cases, Cotton alleged a broad conspiracy between Geraci, his attorney Michael Weinstein, various other attorneys, San Diego Superior Court Judge Joel Wohfeil and U.S. District Court Cynthia Bashant to deprive him of his property in the subject real estate transaction. Both District Court actions were summarily, and harshly, dismissed. [Request for Judicial Notice Ex. 1 - 5]

Those papers are devoid of admissible relevant evidence. The motion should be denied because it not supported by any relevant admissible evidence[2].

B. <u>The Motion Should Be Denied Because It Is Untimely Under Code of Civil Procedure Section 473(d)</u>

Plaintiff moves to set aside the allegedly "void" Cotton I judgment under CCP § 473(d). At page 4 of his memorandum, plaintiff states as follows:

> CCP § 473(d) provides for relief from void judgments or orders. This provision codifies the inherent power of the court to set aside void judgments and orders, including those made under a lack of jurisdiction and those made in excess of jurisdiction. See Calvert v. Binali (2018) 29 CA5th 954, 960—964. The power of a court to vacate a judgment or order void upon its face is not extinguished by lapse of time, but may be exercised whenever the matter is brought to the attention of the court. While a motion for such action on the part of the court is appropriate, neither motion nor notice to an adverse party is essential; the court has full power to take such action on its own motion and without any application on the part of anyone.

Plaintiff correctly cites long-applicable law that a <u>judgment void upon its face</u> is not extinguished by lapse of time. In fact, a judgment that is void on its face is subject to either direct or collateral attack at any time. *OC Interior Services LLC v. Nationstar Mortgage, LLC* (2017 - 4th Dist) 7 Cal. App 5th 1318, 1327; *In County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1228. But, unless the challenged judgment is void on its face, a motion to vacate under Section 473(d) must be brought within the time limits proscribed by Section 473. As noted in the <u>Calvert</u> case cited by plaintiff, "if a judgment is void on its face, the customary six-month time limit set by section 473 to make other motions to vacate a judgment does not apply." *Calvert v. Binali* (2018) 29 Cal.App.5th, 954, 960-961. Conversely, if a judgment is not void on its face, the six month time limit applies and a motion to vacate made after the period is untimely. Under Section 473, defendants have six

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[2] For example, plaintiff's entire motion is based on the assertion the contract in Cotton I was "illegal". But plaintiff does not even offer that critical agreement as evidence supported by an authenticating declaration, much less any evidence addressing the content, meaning and/or intent of that contract. In his declaration, plaintiff states he is "*prepared to submit supporting evidence to address any concerns the Court may have in addressing the illegality of Geraci's ownership of a CUP.*" That is insufficient. The moving papers are before the court. In two ex-parte applications, plaintiff, for inexplicable reasons given the subject judgment is years old, pushed the court to have this matter heard on an expedited basis and agreed his ex-parte papers would serve as the moving papers. What plaintiff is "prepared to offer" if the court asks or at some future time is irrelevant. The motion before the court is not supported by any relevant admissible evidence. It can only be denied.

months to move to vacate, but if the judgment is void on its face, the six-month time limit does not apply. *Kremerman v. White* (2021) 71 Cal. App.5th 369-370; *National Diversified Services, Inc v. Bernstein* (1985) 168 Cal.App.3d 410, 414.[3] Here, it is without dispute the Cotton I judgment was entered more than six months before the subject motion was filed. The Cotton I judgment was entered August 19, 2019, more than two- and one-half years ago. [See Plaintiff's Memorandum, Page 4, Line 8]. Thus, unless plaintiff has established the Cotton I judgment is void on its face, this motion to vacate is untimely under Section 473(d) and can only be denied.

Plaintiff has not established the Cotton I judgment is void on its face. To prove the judgment is void on its face, the party challenging the judgment is limited to the judgment roll. No extrinsic evidence is allowed. *OC Interior Services LLC v. Nationstar Mortgage, LLC*, *supra*, 7 Cal.App. 5th at 1327-1328; *Johnson v. Hayes Cal Builders, Inc*. (1963) 60 Cal.2d 572, 576; ["The validity of the judgment on its face may be determined only by a consideration of the matters constituting part of the judgment roll."]; *Dill v. Berquist Construction Co*. (1994) 24 Cal.App.4th 1426, 1441, 29 Cal.Rptr.2d 746 [" 'A judgment or order is said to be void on its face when the invalidity is apparent upon an inspection of the judgment roll.'"]; *Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 181; *Calvert v. Binali*, *supra*, 29 Cal.App.5th at 954, 960-961.

Code of Civil Procedure Section 670 defines the contents of the judgment roll in Superior Court as follows:

> In superior courts the following papers, without being attached together, shall constitute the judgment roll:
>
> (a) In case the complaint is not answered by any defendant, the summons, with the affidavit or proof of service; the complaint; the request for entry of default with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; if defendant has appeared by demurrer, and the demurrer has been overruled, then notice of the overruling thereof served on defendant's attorney, together with proof of the service; and in case the service so made is by publication, the affidavit for publication of summons, and the order directing the publication of summons.

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[3] Plaintiff does not appear to dispute that this motion is dependent upon the showing the Cotton I judgment is void on it face. The authorities cited by plaintiff speak to the inherent power of the court, as codified in section 473(d), to set aside a judgment void on its face.

(b) In all other cases, the pleadings, all orders striking out any pleading in whole or in part, a copy of the verdict of the jury, the statement of decision of the court, or finding of the referee, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment; if there are two or more defendants in the action, and any one of them has allowed judgment to pass against him or her by default, the summons, with proof of its service, on the defendant, and if the service on the defaulting defendant be by publication, then the affidavit for publication, and the order directing the publication of the summons.

Plaintiff has not established the Cotton I judgment is void based solely on matters in the Cotton I judgment roll. Plaintiff has not even undertaken that analysis. In fact, it is without dispute that plaintiff's assertion the Cotton I judgment is void is dependent upon matters outside the judgment roll. Plaintiff's argument the Cotton I judgment is void is expressly dependent upon his showing that Geraci was "sanctioned for unlicensed commercial cannabis activities". [Plaintiffs Memorandum, page 4, line 23 through page 5, line 4; page 4, lines 10-11; page 8, lines 4-16]. That Geraci was "sanctioned for unlicensed commercial cannabis activities" clearly cannot be determined from the Cotton I judgment roll. Plaintiff's argument that the Cotton I judgment is void is also dependent upon his showing that "the object of the "November Document" is Geraci's illegal ownership of a CUP". [Plaintiffs Memorandum, page 8, line 4-16] That clearly cannot be gleaned from the Cotton I judgment roll. This assertion would also be dependent on considering the document itself, its meaning, and the intent of Geraci and Cotton in signing it. This clearly cannot be gleaned from the judgment roll.[4] Plaintiff's argument that the Cotton I judgment is void is also expressly dependent upon his showing the illegality of the Cotton I contract was raised during the trial and in the motion for directed verdict.[5] [Plaintiffs Memorandum, page 9, line 22 through page 10, line 4-16] This cannot be gleaned from the judgment roll.

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[4] This also underscores that Cotton simply wants a do-over of Cotton I years after the fact, under the illegitimate guise of a claimed "void judgment". If Cotton thought the verdict and judgment in Cotton I, and the court's rulings on his motions for directed verdict and new trial, were incorrect for all the reasons he now argues, <u>and then argued</u>, he should have prosecuted an appeal and made his case to an appellate court. Cottom commenced just such appeals, they were dismissed. [Declaration of Michael Weinstein, para. 8]

[5] Cotton oddly believes that fact the illegality of the contract in Cotton I was repeatedly raised in that case years ago <u>strengthens</u> his argument that he can raise those same very arguments again now. If illegality was raised and ruled on in Cotton I years ago, res judicata and collateral estoppel clearly bar Geraci from raising that issue again now. The very premise of this entire action and motion is ludicrous.

Plaintiff has not established, and cannot establish, the Cotton I judgment is void on its face. Accordingly, this motion brought under CCP § 473(d) is not timely and must be denied.

C. <u>The Motion Should Be Denied Because It Is Barred by Res Judicata and/or Collateral Estoppel</u>

1. <u>Res Judicata and Collateral Estoppel</u>

The California Supreme Court in *Boeken v. Phillip Morris USA, Inc*., (2010) 48 Cal App.4th 788, 797, described the doctrines of res judicata and collateral estoppel as follows:

> As generally understood, '[t]he doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy.' [Citation.] The doctrine 'has a double aspect.' [Citation.] 'In its primary aspect,' commonly known as claim preclusion, it 'operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]' [Citation.] 'In its secondary aspect,' commonly known as collateral estoppel, '[t]he prior judgment ... "operates" ' in 'a second suit ... based on a different cause of action ... "as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." [Citation.]' [Citation.] 'The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]' " (People v. Barragan (2004) 32 Cal.4th 236, 252–253, 9 Cal.Rptr.3d 76, 83 P.3d 480.)

The Supreme Court in Boeken then specifically addressed claim preclusion, or res judicata, as follows at pages 797-789:

> Here, we are concerned with the claim preclusion aspect of res judicata. To determine whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have "consistently applied the 'primary rights' theory." (Slater v. Blackwood (1975) 15 Cal.3d 791, 795, 126 Cal.Rptr. 225, 543 P.2d 593.) Under this theory, "[a] cause of action ... arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests. 'Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term....' " (McKee v. Dodd (1908) 152 Cal. 637, 641, 93 P. 854.)
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> "In California the phrase 'cause of action' is often used indiscriminately ... to mean counts which state [according to different legal theories] the same cause of action...." (Eichler Homes of San Mateo, Inc. v. Superior Court (1961) 55 Cal.2d 845, 847, 13 Cal.Rptr. 194, 361 P.2d 914.) But for purposes of applying the doctrine of res judicata, the phrase "cause of action" has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. (See Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins.Co. (1993) 5 Cal.4th 854, 860, 21 Cal.Rptr.2d 691, 855 P.2d 1263.) As we explained in Slater v. Blackwood, supra, 15 Cal.3d at page 795, 126 Cal.Rptr. 225, 543 P.2d 593: "[T]he 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might

> be predicated, one injury gives rise to only one claim for relief. 'Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different legal ground for relief.' [Citations.]" Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right. (Agarwal v. Johnson (1979) 25 Cal.3d 932, 954, 160 Cal.Rptr.141, 603 P.2d 58.)

Claim preclusion/Res judicata bar claims that were brought in a prior lawsuit as well as claims that could have been raised in the former action. *Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 975 [" 'the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable' "]. Addressing this concept, the court in *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 576 stated as follows:

> "The fact that different forms of relief are sought in the two lawsuits is irrelevant, for if the rule were otherwise, 'litigation finally would end only when a party ran out of counsel whose knowledge and imagination could conceive of different theories of relief based upon the same factual background.' ... '[U]nder what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged.... "... [A]n issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result...." " (Interinsurance Exchange of the Auto. Club v. Superior Court (1989) 209 Cal.App.3d 177, 181–182, 257 Cal.Rptr. 37, citations & italics omitted.)

2. <u>This Action is Barred by Res Judicata</u>

Cotton filed a cross-complaint, amended twice, in Cotton I. That cross-complaint sought contract, tort, and punitive damages against Geraci arising from the same real property transaction and contract that formed the basis of the Cotton I judgment and which Cotton now seeks to vacate. The cross-complaint was resolved against Cotton by jury verdict. [Declaration of Michael Weinstein, para. 5, Exhibit 6] Given that Cotton had the opportunity to prosecute his illegal contract claims against Geraci, based on the same transaction and contract as, and along with, his other contract and tort claims, he is barred by the doctrine of re judicata from relitigating those illegality claims now. The now-raised contract illegality claims were matters clearly within the scope of the Cotton I action. They were related to the subject-matter of, and relevant to the core issues in, Cotton

I action. They could have been raised in Cotton's cross-complaint. The final judgment in Cotton I clearly bars Cotton from now re-litigating contract illegality claims that could and should have been brought in that case. *Boeken v. Phillip Morris USA, Inc.*, supra, 48 Cal App.4th at 797-798; *Villacres v. ABM Industries Inc.*, supra, 189 Cal.App.4th at 576. Res judicata clearly applies. This motion should be denied.

3. This Action is Barred by Collateral Estoppel

In his moving papers, Cotton repeatedly states the illegality of the Cotton I contact was raised as a defense in the case.

- *"During the trial of Cotton I, Cotton moved for a directed verdict arguing that Geraci's ownership of a CUP was barred by California's cannabis licensing statute Business & Professions ("BPC") § 26057, which was summarily denied."*

  [Plaintiffs Memorandum, page 5, lines 19-21]
- *"On August 19, 2019, the Cotton I judgment was entered, finding that "[Geraci] is not barred by law pursuant to California Business and Professions Code, Division 10 (Cannabis), Chapter 5 (Licensing), § 26057 (Denial of Application) from owning a Marijuana Outlet conditional use permit issued by the City of San Diego."*

  [Plaintiffs Memorandum, page 6, lines 1-4]
- *"On September 13, 2019, Cotton filed a motion for new trial arguing, inter alia, it is illegal for Geraci to own a CUP pursuant to BPC §§ 19323, 26057 (the "MNT")..... Geraci opposed the MNT arguing, inter alia, the defense of illegality had been waived.....Cotton replied, inter alia, that the defense of illegality cannot be waived."*

  [Plaintiffs Memorandum, page 6, lines 5-8]
- *"On October 25, 2019, the court denied the MNT finding that the defense of illegality had been waived."*

  [Plaintiffs Memorandum, page 6, lines 9-10]
- *"In sum, factually, the defense of illegality had been raised during trial."*

  [Plaintiffs Memorandum, page 10, lines 23-24]

In fact, the entire premise of plaintiff's argument in Section II of his memorandum is that Geraci's lawyers skillfully deceived the Cotton I court into wrongfully believing *"that it was legally possible for the defense of illegality to be waived.*" It is at the core of plaintiff's argument that the defense of illegality was raised and, in his view, wrongfully addressed by Judge Wohfeil in Cotton I. And, separate and distinct from the plaintiff's own arguments, the record itself clearly reflects the defense of illegality was raised and litigated in Cotton I. That case ended in a unanimous jury verdict and final judgment against Cotton. [Declaration of Michael Weinstein, paras. 5-6, Ex. 6-7]

Yet, now, years later, Cotton seeks to relitigate the Cotton I illegality issue, and Judge Wohfeil's rulings on that issue, under the guise of a claimed "void" judgment. Collateral estoppel bars him from doing so. As fervently asserted by Cotton, the contract illegality issue raised in this motion was raised and litigated in Cotton I. Cotton I resulted in a final judgment on the merits. Cotton was a party to Cotton I. The elements for application of collateral estoppel are clearly established. *Boeken v. Phillip Morris USA, Inc.,* supra, 48 Cal App.4th at 797. Collateral estoppel clearly applies. The motion should be denied.

D. The Motion Should Be Denied Because the Underlying Premise for the Motion is Patently Ridiculous and Unsupported by Proffered Legal Authority.

Even assuming, solely for the sake of argument, that plaintiff could get beyond the Section 573 time bar and application of res judicata and collateral estoppel, and offered, or even could offer, any supporting admissible relevant evidence, the motion can still only be denied because it is based on a patently ludicrous, legally untenable and unsupportable premise. Cotton argues that Judge Wohfeil was wrong when he rejected the contract illegality argument in Cotton I, that the contract was illegal, and that because the judgment was really based on an illegal contract, it is void and can now be revisited by this court on motion to vacate. Setting aside whether plaintiff has even proven, or could prove, the contract was illegal and that Judge Wohfeil was wrong, or has explained, or could explain, why an appeal in Cotton I wasn't his sole remedy to seek to rectify that perceived error, where is the authority for the startling proposition that if Judge Wohfeil was wrong and the contract was "illegal" that renders the Cotton I judgment void and subject to attack now? Plaintiff

cites no authority for this astounding proposition. Illegality is an affirmative defense to a contract action. It speaks to whether a contract can be enforced. It does not speak to the power or jurisdiction of the court to make decisions about the enforceability of the contract and the applicability of an illegality defense to contract enforcement, or to render enforceable judgments based thereon. If plaintiff's basic premise were correct, whenever an illegality defense is raised and rejected in a contract action, the defendant would always be able to thereafter challenge that judgment, separate and distinct from appeal, by way of a direct or collateral attack on the judgment because he believes the trial court made an error and did not find the contract to be illegal. That is an absurd proposition with no support in the law. It would set up special judicial review rights for defendants raising the illegality defense in contract cases. Where is the case law or statutory basis for such special treatment? If this were the law, and this court denies plaintiff's motion because it doesn't believe Judge Wohfeil erred, couldn't plaintiff simply file another motion to vacate because it is still all based on an illegal contract, and the Court this time, like Judge Wohfeil, is wrong and the judgment remains void? Couldn't he simply keep filing motions to vacate because it is all based on an illegal contract and, in turn, a void judgment until he finds a Judge to bite on his ludicrous argument? Conversely, what if the trial court had sustained an illegality defense, wouldn't that, under plaintiff's premise, immediately divest the court of the power to proceed further in the case and enter a judgment? It's all patently absurd. Illegality is a defense to a contract action, nothing more, nothing less. It does not affect the power or jurisdiction resulting in void judgments. If a defendant loses on the illegality defense, he can appeal. That's it. That how it works. That how the law works. It doesn't work like Cotton suggests in this motion. There is no law proffered by plaintiff that it does. This motion is based on a patently ludicrous, and legally untenable and unsupportable premise. The motion can only be denied.

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III- CONCLUSION

Based on the foregoing, defendant Geraci respectfully requests that the court issue an order denying the motion and dismissing the action.

Dated: February 10, 2022

Respectfully submitted,

/s/ James D. Crosby
James D. Crosby
Attorney for Larry Geraci