IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

DARRYL COTTON, an individual, Appellant/Plaintiff, v. THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, Respondent/Defendant. --- LAWRENCE (a/k/a/ LARRY) GERACI, An individual, Real Party in Interest.	Court of Appeal Case No. D080460 San Diego County Superior Court Case No. 37-2022-000000-CU-MC-CTL

Appeal from the Order by the Honorable James A. Mangione, Judge of the Superior Court of California, County of San Diego, Entered on February 25, 2022 Denying Petitioner's/Plaintiff's Motion to Set Aside Judgment

APPELLANTS' APPENDIX - VOLUME II (PAGES 0119-0256)

Darryl Cotton
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Petitioner/Plaintiff *In Propria Persona*

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, CENTRAL DIVISION

DARRYL COTTON,

Plaintiff,

v.

LAWRENCE (A/K/A LARRY) GERACI, an individual,

Defendant.

Case No.: 37-2022-00000023-CU-MC-CTL

PLAINTIFF'S NOTICE OF EX PARTE APPLICATION AND EX PARTE APPLICATION TO SET ASIDE VOID JUDGMENT OR, ALTERNATIVELY, ORDER SHORTENING TIME ON HEARING TO VACATE VOID JUDGEMENT; DECLARATION OF DARRYL COTTON; MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: 1-12-22
Hearing Time: 8:30am
Judge: James A Mangione
Courtroom: C-75

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on January 3, 2022, Plaintiff DARRYL COTTON will and hereby moves this Court *ex parte* for an order setting aside the judgment issued in *Cotton I*[1] entered against Cotton on August 8, 2019, or, alternatively, an order shortening time on a hearing to vacate the *Cotton I* judgment (the "Application"). Good cause exists for this Application because it is made on the ground that the *Cotton I* judgment is void on its face because it is an act in excess of the Court's jurisdiction, grants relief to Geraci that the law declares shall not be granted, and represents an egregious miscarriage of justice.

[1] "*Cotton I*" means *Larry Geraci v. Darryl Cotton*, Case No. 37-2017-00010073-CU-BC-CTL.

More specifically, Geraci was sanctioned for unlicensed commercial cannabis activities and is barred by California's licensing statutes from owning a cannabis CUP. The *Cotton I* judgment enforces an alleged contract whose object is Geraci's ownership of a cannabis business, which renders the *Cotton I* judgment void on its face as it is in direct violation of California's cannabis licensing statutes. *See Carlson v. Eassa*, 54 Cal.App.4th 684, 691 (Cal. Ct. App. 1997) ("The mere fact that the court has jurisdiction of the subject matter of an action before it does not justify an exercise of a power not authorized by law, or a grant of relief to a party that the law declares shall not be granted.").

This Application is based on this notice, the request for judicial notice, the declaration of Darryl Cotton, the supporting memorandum served and filed herewith, and on the records and file herein and in the *Cotton I* action.

DATED: January 3, 2022

Darryl Cotton
Pro Se

DECLARATION OF DARRYL COTTON IN SUPPORT OF MOTION FOR ORDER TO SET ASIDE VOID JUDGMENT ISSUED IN *COTTON I* OR, ALTERNATIVELY, OST ON MOTION TO VACATE VOID JUDGEMENT

I, Darryl Cotton, declare:

1. I am the plaintiff herein, and I make this declaration in support of this Application seeking an order to vacate the void *Cotton I* judgment entered against me.

2. As shown by this Application and the supporting documents, the *Cotton I* judgment is void for enforcing an illegal contract that grants relief to defendant Lawrence Geraci that the law declares shall not be granted.

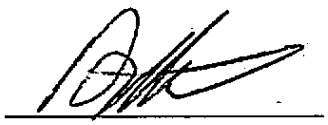
3. The facts set forth in the Application establishing the *Cotton I* judgment are void are all subject to judicial notice and set forth in the supporting Request for Judicial Notice.

4. This Application is focused on the narrow issue of illegality, specifically that Geraci's sanctions for unlicensed commercial cannabis activities bar his ownership of a cannabis CUP or license and the *Cotton I* judgment is therefore void for granting relief in direct violation of California's cannabis licensing statutes.

5. Should the Court require any additional facts, I am prepared to submit supporting evidence to address any concerns the Court may have in addressing the illegality of Geraci's ownership of a CUP.

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

January 3, 2022



Darryl Cotton

MEMORANDUM OF POINTS & AUTHORITIES

INTRODUCTION

In March 2017, defendant Lawrence Geraci filed the *Cotton I* action seeking to enforce an alleged real estate purchase contract against Cotton that even as alleged is an illegal contract because its object, Geraci's ownership of a cannabis conditional use permit ("CUP"), is barred by California's licensing statutes because he has been sanctioned for unlicensed commercial cannabis activities. The *Cotton I* action was filed to extort from Cotton his Property[2] at which the CUP could issue.

On August 19, 2019, the *Cotton I* judgment was entered against Cotton finding that Geraci is not barred by California's cannabis licensing statutes. Such was error.

Since March 2017 - **almost five years!** - Cotton has been subjected to extreme emotional, mental and physical distress by Geraci and his attorneys and agents who have used their wealth and the presumption of integrity the law affords attorneys to effectuate their crimes against Cotton via the judicial system. Across numerous actions they have made the simplicity of Geraci's illegal ownership of a cannabis statute appear to be lawful or no longer able to be redressed by the judiciaries while claiming Cotton is an evil, greedy individual who is seeking to extort them via the judiciary for financial profit. They have inverted the truth completely to make themselves out to be righteous and saintly individuals who are maliciously subjected to Cotton's alleged illegal and legally unsupported attempts to vindicate his rights.

They have done a masterful job and have ruined Cotton's life and that of many other individuals. Geraci and his army of attorneys are legal masterminds that have successfully deceived the judiciaries for years by misrepresenting and fabricating facts and focusing on Cotton's legally unsophisticated attempts to vindicate his rights.

Therefore, in an attempt to finally expose the simplicity of the illegality of Geraci's ownership of a CUP, and prevent Geraci's attorneys from confusing, misdirecting or deceiving this Court through their Machiavellian legal acumen, this Application is focused on four simple facts: (i) Geraci was sanctioned for unlicensed commercial cannabis activities; (ii) California's licensing statutes bars a party for three

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[2] The term "Property" shall mean and refer to the real property located at 6176 Federal Boulevard, San Diego, California.

years from owning a CUP or license if they have been sanctioned for unlicensed commercial cannabis activities; (iii) the *Cotton I* judgment enforces an alleged contract whose object is Geraci's ownership of a CUP that he is barred by law from owning because of his sanctions; and (iv) Geraci's arguments regarding the legality of his ownership of a CUP are without any factual or legal justification.

Cotton respectfully and emphatically requests that this Court please focus on these facts and please see the law and justice are carried out to redress what is an egregious miscarriage of justice.

MATERIAL FACTUAL AND PROCEDURAL BACKGROUND

1. On October 27, 2014, Geraci was sanctioned for unlicensed commercial cannabis activities in the Tree Club Judgment.[3]

2. On June 17, 2015, Geraci was sanctioned for unlicensed commercial cannabis activities in the CCSquared Judgment.[4]

3. On March 21, 2017, Geraci filed *Cotton I* alleging that:

   a. "On November 2, 2016, Plaintiff GERACI and Defendant COTTON entered into a written agreement for the purchase and sale of the PROPERTY on the terms and conditions stated therein." [5] (The "November Document.")

   b. "On or about November 2, 2016, GERACI paid to COTTON $10,000 good faith earnest money to be applied to the sales price of $800,000 and to remain in effect until the license, known as a Conditional Use Permit or CUP is approved, all in accordance with the terms and conditions of the written agreement."[6] (The "Berry CUP Application.")

4. 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.[7]

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[3] Request for Judicial Notice ("RJN"), Ex. 1 (*City of San Diego v. The Tree Club Cooperative, et al.*, San Diego Superior Court Case No. 37-2014-0020897-CU-MC-CTL, Stipulation for Entry of Final Judgement and Permanent Injunction; Judgment Thereon) ("Tree Club Judgment").

[4] RJN, Ex. 2 (*City of San Diego v. CCSquared Wellness Cooperative, et. al.*, Case No. 37-2015-00004430-CU-MC-CTL, Stipulation for Entry of Final Judgment and Permanent Injunction; Judgment Thereon) (the "CCSquared Judgment").

[5] RJN, Ex. 3 (Geraci *Cotton I* complaint) at ¶ 7.

[6] RJN, Ex. 3 (Geraci *Cotton I* complaint) at ¶ 8.

[7] RJN Ex. 4 (motion for directed verdict) and Ex. 5 (summary denial).

5. 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."[8]

6. 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").[9]

7. Geraci opposed the MNT arguing, *inter alia*, the defense of illegality had been waived.[10]

8. Cotton replied, *inter alia*, that the defense of illegality cannot be waived.[11]

9. On October 25, 2019, the court denied the MNT finding that the defense of illegality had been waived.[12]

LEGAL STANDARD

"A judgment absolutely void may be attacked anywhere, directly or collaterally whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever. **A void judgment [or order] is, in legal effect, no judgment.** By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one." *OC Interior Servs., LLC v. Nationstar Mortg., LLC*, 7 Cal.App.5th 1318, 1330 (Cal. Ct. App. 2017) (cleaned up, brackets in original, emphasis added); *see Renoir v. Redstar Corp.* (2004) 123 CA4th 1145, 1154 ("an order denying a motion to vacate void judgment is a void order and appealable") (citing *Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 69).

"Generally, a judgment is void if the court lacked subject matter jurisdiction or jurisdiction over the parties." *Paterra v. Hansen* (2021) 64 Cal.App.5th 507, 535. However, "[s]peaking generally, any

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[8] RJN, Ex. 6 (*Cotton I* judgment).
[9] RJN Ex. 7 (Motion for New Trial).
[10] RJN Ex. 8 (Opposition to Motion for New Trial).
[11] RJN Ex. 9 (Reply to Motion for New Trial).
[12] *See* RJN Ex. 10 Reporters Transcript of the Motion for New Trial hearing held on October 25, 2019 ("RT October 25, 2019") at 3:6-7 ("Counsel, shouldn't this have been raised at some earlier point in time?"); *id.* at 3:22 ("Even if you are correct [about the illegality], hasn't that train come and gone? The judgment has been entered. You are raising this for the first time."); *id.* at 4:4-5 ("But at some point, doesn't your side waive the right to assert this argument? At some point?") and RJN Ex. 11 (order denying Motion for New Trial).

acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari." *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291. Therefore, a lack of jurisdiction resulting in a void judgment also occurs when an act by a Court is an "exercise of a power not authorized by law, or a grant of relief to a party that the law declares ***shall not*** be granted." *Paterra*, 64 Cal.App.5th at 536 (quoting *Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 696) (emphasis added).

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. *People v. Davis* (1904) 143 C 673, 675–676 (affirming order vacating void order made on ex parte basis); *see People v. Glimps* (1979) 92 CA3d 315, 325 (no notice of motion required to set aside order void on its face).

If the judgment is void on its face, no showing of a meritorious case, that is, a good claim or defense, by the party moving for relief is required, *see Bennett v. Hibernia Bank* (1956) 47 C2d 540, 554, and the judgment may be set aside by the court on its own motion, *see Montgomery v. Norman* (1953) 120 CA2d 855, 858. Accordingly, no affidavit or declaration of merits is required to support a motion for relief at law from a judgment on the ground that it is void on its face. *County of Ventura v. Tillett* (1982) 133 CA3d 105, 112.

ARGUMENT

I. California Cannabis licensing statutes bar a party from obtaining a CUP for a period of three years from the date of a party's last sanction for unlicensed commercial cannabis activities.

As in effect in November 2016 when the November Document was executed, California's cannabis licensing statutes codified at BPC, Division 8, Chapter 3.5 (Medical Cannabis Regulation and Safety Act) provided as follows:

1. A license can only be issued to a "***qualified applicant.***" (BPC § 19320(b) ("Licensing authorities administering this chapter may issue state licenses only to ***qualified applicants*** engaging in commercial cannabis activity pursuant to this chapter.") (emphasis added).)

2. If the applicant does not qualify for licensure the State's licensing authorities "***shall deny***" his application. (BPC § 19323(a) ("A licensing authority ***shall deny*** an application if the applicant... does not qualify for licensure under this chapter or the rules and regulations for the state license.") (emphasis added).) BPC § 19323(a) was repealed and replaced by BPC § 26057(a), effective June 27, 2017 by Stats 2017 ch 27 § (SB 94). (BPC § 26057(a) ("The licensing authority shall deny an application if either the applicant, or the premises for which a state license is applied, do not qualify for licensure under this division.") (emphasis added).)

3. An applicant is disqualified for licensure if he has been sanctioned for unauthorized commercial cannabis activities in the three years preceding the submission of an application. (BPC 19323(a),(b)(7) ("A licensing authority shall deny an application if the applicant has been sanctioned by a city for unlicensed commercial medical cannabis activities in the three years immediately preceding the date the application is filed with the licensing authority.") (cleaned up; emphasis added).) BPC § 19323(a),(b)(7) was repealed and replaced by BPC § 26057(b)(7), effective June 27, 2017 by Stats 2017 ch 27 § (SB 94). (BPC § 26057(a),(b)(7) ("The licensing authority shall deny an application if the applicant has been sanctioned by a city for unauthorized commercial in the three years immediately preceding the date the application is filed with the licensing authority.") (cleaned up; emphasis added).

4. As part of the application process, an applicant is required to first lawfully acquire a local government permit/CUP and submit their fingerprints to the State's licensing authorities for a background check with the Department of Justice. BPC § 19322(a)(1),(2) ("A person ***shall not*** submit an application for a state license issued by a licensing authority pursuant to this chapter unless that person has received a license, permit, or authorization from the local jurisdiction. An applicant for any type of state license issued pursuant to this chapter ***shall*** do all of the following: [¶] (1) Electronically submit to the

Department of Justice fingerprint images and related information [for a background check] [¶] (2) Provide documentation issued by the local jurisdiction in which the proposed business is operating certifying that the applicant is or will be in compliance with all local ordinances and regulations.") (emphasis added).

II. Geraci is barred by California's cannabis licensing statutes from owning a CUP.

Geraci was last sanctioned on June 17, 2015 in the CCSquared judgment for unlicensed commercial cannabis activities. Pursuant to BPC § 19323(a),(b)(7), as in effect when the November Document was executed, and BPC § 26057(a),(b)(7), as in effect when the *Cotton I* judgment was entered, Geraci could not lawfully own a CUP until June 18, 2018.

The November Document was executed on November 2, 2016, during the time frame during which Geraci was barred by California's licensing statutes. As the object of the November Document is Geraci's illegal ownership of a CUP, it is, even assuming it were a contract, an illegal contract and judicially unenforceable. *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109 ("The general principle is well established that a contract... made for the purpose of furthering any matter or thing prohibited by ***statute***, or to aid or assist any party therein, is void.") (emphasis added); *see Consul Ltd. v. Solide Enterprises, Inc.*, 802 F.2d 1143, 1148 (9th Cir. 1986) ("A contract to perform acts barred by California's licensing statutes is illegal, void and unenforceable.").

Consequently, the *Cotton I* judgment finding the November Document is a legal contract because Geraci is not barred by California's licensing statutes is void as an "exercise of a power not authorized by law [and] a grant of relief to [Geraci] that the law declares ***shall not*** be granted." *Paterra*, 64 Cal.App.5th at 536 (quoting *Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 696) (emphasis added).

III. Geraci's attorneys deceived the *Cotton I* court into believing that it was legally possible for the defense of illegality to be waived.

> Whatever the state of the pleadings, when the evidence shows that the plaintiff in substance seeks to enforce an illegal contract or recover compensation for an illegal act, ***the court has both the power and duty to ascertain the true facts in order that it may not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids.*** It is immaterial that the parties, whether by inadvertence or consent, even at the trial do not raise the issue. The court may do so of its own motion when the testimony produces evidence of illegality. It is not too late to raise the issue on ***motion for new trial***, in a proceeding to enforce an arbitration award, or even on appeal.

Lewis & Queen v. N. M. Ball Sons (1957) 48 Cal. 2d 141, 147-48 (citations omitted; emphasis added)

In his opposition to the MNT, Geraci argued that Cotton had waived the defense of illegality relying on *Chodosh v. Palm Beach Park Ass'n* 2018 WL 6599824. (RJN, Ex. 8 at 10-12.) Geraci's argument lacks any factual or legal support.

First, the defense of illegality cannot be waived. *City Lincoln-Mercury Co. v. Lindsey* (1959) 52 Cal.2d 267, 274 ("A party to an illegal contract cannot ratify it, cannot be estopped from relying on the illegality, and cannot waive his right to urge that defense."); *Wells v. Comstock* (1956) 46 Cal.2d 528, 532 ("no person can be estopped from asserting the illegality of the transaction").

Second, *Chodosh* provides no basis for the argument put forth by Geraci that Cotton had waived the defense of illegality. In *Chodosh*, the Court addressed the issue of illegality and noted that:

> Two California Supreme Court cases decided after *Lewis & Queen — Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162, 10 Cal. Rptr. 462, 358 P.2d 918 (*Fomco*), and *Apra v. Aureguy* (1961) 55 Cal.2d 827, 13 Cal. Rptr. 177, 361 P.2d 897 (*Apra*) — both *rejected* posttrial defenses of illegal contract because the illegality defense had not been raised in the trial court. (*See Fomco, supra*, 55 Cal.2d at p. 166; *Apra, supra*, 55 Cal.2d at p. 831.)

Chodosh, supra, at *15 (emphasis in original).

However, the *Chodosh* court found that *Fomco* and *Apra* were inapplicable because the issue of illegality had been raised at the trial court and therefore was within the ambit of *Lewis & Queen. Id.* at *15-16 ("The issue having been raised at the trial level, its consideration at the appellate level comes within *Lewis & Queen* and outside the rule of *Fomco* and *Apra*."). Here, the issue of illegality was raised during trial in Cotton's motion for directed verdict and thus is within the ambit of *Lewis & Queen.*

Third, *Chodosh* is an unpublished opinion that was cited to by Geraci in violation of Cal. Rules of Court 8.115 to misrepresent the facts and law that successfully deceived the *Cotton I* court into finding that the defense of illegality had been waived by Cotton.

In sum, *factually*, the defense of illegality had been raised during trial. *Legally*, even if the defense of illegality had not been raised, *Lewis & Queen* is controlling as the defense of illegality can be raised for the first time in a motion for new trial. *Lewis & Queen*, 48 Cal. 2d at 147-48 ("It is not too late to raise the issue [of illegality] on motion for new trial...") (citations omitted).

Geraci's attorneys deceived the *Cotton I* court into incorrectly finding the defense of illegality had been waived.

CONCLUSION

Geraci was sanctioned for illegal cannabis activities and could not by law own a CUP pursuant to the November Document. The *Cotton I* judgment finding that Geraci could own a CUP pursuant to the November Document, in direct violation of California's licensing statutes, is therefore void.

Pursuant to CCP § 473(d) and the Court's inherent power to set aside a void judgment, Cotton respectfully requests the Court issue an order vacating the void *Cotton I* judgment. Alternatively, Cotton requests the Court issue an order shortening time on a hearing to vacate the *Cotton I* judgment.

Dated: January 3, 2021

Darryl Cotton

Pro Se

EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

CITY OF SAN DIEGO, a municipal corporation, Plaintiff, v. THE TREE CLUB COOPERATIVE, INC., a California corporation; JONAH McCLANAHAN, an individual; JOHN C. RAMISTELLA, an individual; JL 6th AVENUE PROPERTY, LLC, a California limited liability company; LAWRENCE E. GERACI, also known as LARRY GERACI, an individual; JEFFREY KACHA, an individual; and DOES 1 through 50, inclusive, Defendants.	Case No. 37-2014-00020897-CU-MC-CTL JUDGE: RONALD S. PRAGER STIPULATION FOR ENTRY OF FINAL JUDGMENT AND PERMANENT INJUNCTION; JUDGMENT THEREON [CCP § 664.6] IMAGED FILE

Plaintiff City of San Diego, a municipal corporation, appearing by and through its attorneys, Jan I. Goldsmith, City Attorney, and by Marsha B. Kerr, Deputy City Attorney, and Defendants JL 6th AVENUE PROPERTY, LLC, a California limited liability company; LAWRENCE E. GERACI, aka LARRY GERACI, an individual; and JEFFREY KACHA, an individual, appearing by and through their attorney, Joseph S. Carmellino, enter into the following Stipulation for Entry of Final Judgment in full and final settlement of the above-captioned case without trial or adjudication of any issue of fact or law, and agree that a final judgment may be so entered:

1. This Stipulation for Entry of Final Judgment (Stipulation) is executed between and among Plaintiff City of San Diego, a municipal corporation, and Defendants JL 6th AVENUE PROPERTY, LLC; LAWRENCE E. GERACI, aka LARRY GERACI; and JEFFREY KACHA only, who are named parties in the above-entitled action (collectively, "Defendants").

2. The parties to this Stipulation are parties to a civil suit pending in the Superior Court of the State of California for the County of San Diego, entitled *City of San Diego, a municipal corporation v., The Tree Club Cooperative, Inc., a California corporation; Jonah McClanahan, an individual; John C. Ramistella, an individual; JL 6th Avenue Property, LLC, a California limited liability company; Lawrence E. Geraci, also known as Larry Geraci, an individual; Jeffrey Kacha, an individual; and DOES 1 through 50, inclusive,* Case No. 37-2014-00020897-CU-MC-CTL. This Stipulation does not affect *City of San Diego v. Tycel Cooperative, Inc., et al.*, San Diego Superior Court case No. 37-2014-00025378-CU-MC-CTL, which is a separate case to be considered separately.

3. The parties wish to avoid the burden and expense of further litigation and accordingly have determined to compromise and settle their differences in accordance with the provisions of this Stipulation. Neither this Stipulation nor any of the statements or provisions contained herein shall be deemed to constitute an admission or an adjudication of any of the allegations of the Complaint. The parties to this Stipulation agree to resolve this action in its entirety as to them and only them by mutually consenting to the entry of this Stipulation in its Entirety and Permanent Injunction by the Superior Court.

4. The address where the tenant Defendants were maintaining a marijuana dispensary business is 1033 Sixth Avenue, San Diego, California, 92101, also identified as Assessor's Parcel Number 534-186-04-00 (PROPERTY).

5. The PROPERTY is owned by JL 6th AVENUE PROPERTY, LLC (JL), according to San Diego County Recorder's Grant Deed, Document No. 2012-0184893, recorded March 29, 2012. Defendants GERACI and KACHA are members of JL and hereby certify they have authority to sign for and bind JL herein.

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6. The legal description of the PROPERTY is:

THE NORTH HALF OF LOT D IN BLOCK 34 OF HORTON'S ADDITION, IN THE CITY OF SAN DIEGO, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, MADE BY L.L. LOCKLING FILED JUNE 21, 1871 IN BOOK 13, PAGE 522 OF DEEDS, IN THE OFFICE OF THE COUNTY OF SAN DIEGO COUNTY.

7. This action is brought under California law and this Court has jurisdiction over the subject matter, the PROPERTY, and each of the parties to this Stipulation.

INJUNCTION

8. The provisions of this Stipulation are applicable to Defendants, their successors and assigns, agents, officers, employees, representatives, and tenants, and all persons, corporations or other entities acting by, through, under or on behalf of Defendants, and all persons acting in concert with or participating with Defendants with actual or constructive knowledge of this Stipulation and Injunction. **Effective immediately upon the date of entry of this Stipulation,** Defendants and all persons mentioned above are hereby enjoined and restrained pursuant to San Diego Municipal Code (SDMC) sections 12.0202 and 121.0311, California Code of Civil Procedure section 526, and under the Court's inherent equity powers, from engaging in or performing, directly or indirectly, any of the following acts:

a. Keeping, maintaining, operating, or allowing the operation of an unpermitted marijuana dispensary, collective or cooperative at the PROPERTY, including but not limited to, a marijuana dispensary, collective, or cooperative in violation of the San Diego Municipal Code.

b. Defendants shall not be barred in the future from any legal and permitted use of the PROPERTY.

COMPLIANCE MEASURES

DEFENDANTS agree to do the following at the PROPERTY:

9. **Within 24 hours from the date of signing this Stipulation,** cease maintaining, operating, or allowing at the PROPERTY any commercial, retail, collective, cooperative, or group establishment for the growth, storage, sale, or distribution of marijuana, including but not limited to any marijuana dispensary, collective, or cooperative organized pursuant to the California Health and Safety Code.

10. The Parties acknowledge that where local zoning ordinances allow the operation of a marijuana dispensary, collective or cooperative as a permitted use in the City of San Diego, then Defendants will be allowed to operate or maintain a marijuana dispensary, collective or cooperative in the City of San Diego as authorized under the law after Defendants provide the following to Plaintiff in writing:

a. Proof that the business location is in compliance with the ordinance; and

b. Proof that any required permits or licenses to operate a marijuana dispensary, collective or cooperative have been obtained from the City of San Diego as required by the SDMC.

11. **If the marijuana dispensary that is operating at the PROPERTY, including but not limited to, The Tree Club Cooperative, Inc., Jonah McClanahan and John C. Ramistella, does not agree to immediately voluntarily vacate the premises, then within 24 hours from the date of signing this Stipulation,** DEFENDANTS shall in good faith use all legal remedies available to evict the marijuana dispensary business known as The Tree Club Cooperative, Inc., Jonah McClanahan and John C. Ramistella or the appropriate party responsible for the leasehold and operation of the marijuana dispensary, including but not limited to, prosecuting an unlawful detainer action.

12. **Within 24 hours from the date of signing this Stipulation,** remove all signage from the exterior of the premises advertising a marijuana dispensary, including but not limited to, signage advertising The Tree Club Cooperative.

13. **Within 24 hours from the date of signing this Stipulation,** post a sign for a minimum of 60 calendar days, conspicuously visible from the exterior of the PROPERTY stating in large bold font and capital letters that can be seen from the public right way, that "The Tree Club Cooperative" is permanently closed and that there is no dispensary operating at this address.

14. Allow personnel from the City of San Diego access to the PROPERTY to inspect for compliance upon 24-hour verbal or written notice. Inspections shall occur between the hours of 8:00 a.m. and 5:00 p.m.

15. When this Stipulation has been filed with the Court, Jeffrey Kacha will personally pick up a conformed copy of the Stipulation and Order from the Office of the City Attorney. He or his attorney will contact the City's investigator, Connie Johnson, at 619-533-5699 within 15 days of the filing of this Stipulation to set a time for Mr. Kacha to pick up the conformed copy.

MONETARY RELIEF

16. **Within 15 calendar days from the date of signing this Stipulation,** Defendants shall pay Plaintiff City of San Diego, for Development Services Department, Code Enforcement Section's investigative costs, the amount of $281.93. Payment shall be in the form of a certified check, payable to the "City of San Diego," and shall be in full satisfaction of all costs associated with the City's investigation of this action to date. The check shall be mailed or personally delivered to the Office of the City Attorney, 1200 Third Avenue, Suite 700, San Diego, CA 92101, Attention: Marsha B. Kerr.

17. Commencing within 30 days of signing this Stipulation, Defendants shall pay to Plaintiff City of San Diego civil penalties in the amount of $25,000, pursuant to SDMC section 12.0202(b) in full satisfaction of all claims against Defendants arising from any of the past violations alleged by Plaintiff in this action. **$19,000 of these penalties is immediately suspended.** These suspended penalties shall only be imposed if Defendants fail to comply with the terms of this Stipulation. Plaintiff City of San Diego agrees to notify Defendants in writing if imposition of the penalties will be sought by Plaintiff and on what basis. Civil penalties in the amount of $6,000 shall be paid in 15 monthly installments of $400.00 each, at 30-day intervals following the date of the first payment as specified above, in the form of a certified check, payable to the "City of San Diego," and delivered to the Office of the City Attorney, Code Enforcement Unit, 1200 Third Avenue, Suite 700, San Diego, California 92101, Attention: Marsha B. Kerr.

ENFORCEMENT OF JUDGMENT

18. In the event of default by Defendants as to any amount due under this Stipulation, the entire amount due shall be deemed immediately due and payable as penalties to the City of San Diego, and Plaintiff shall be entitled to pursue any and all remedies provided by law for the

enforcement of this Stipulation. Further, any amount in default shall bear interest at the prevailing legal rate from the date of default until paid in full.

19. Nothing in this Stipulation shall prevent any party from pursuing any remedies as provided by law to subsequently enforce this Stipulation or the provisions of the SDMC, including criminal prosecution and civil penalties that may be authorized by the court according to the SDMC at a cumulative rate of up to $2,500 per day per violation.

20. Defendants agree that any act, intentional or negligent, or any omission or failure by their contractors, successors, assigns, partners, members, agents, employees or representatives to comply with the requirements set forth in Paragraphs 8-17 above will be deemed to be the act, omission, or failure of Defendants and shall not constitute a defense to a failure to comply with any part of this Stipulation. Further, should any dispute arise between any contractor, successor, assign, partner, member, agent, employee or representative of Defendants for any reason, Defendants agree that such dispute shall not constitute a defense to any failure to comply with any part of this Stipulation, nor justify a delay in executing its requirements.

RETENTION OF JURISDICTION

21. The Court will retain jurisdiction for the purpose of enabling any of the parties to this Stipulation to apply to this Court at any time for such order or directions that may be necessary or appropriate for the construction, operation or modification of the Stipulation, or for the enforcement or compliance therewith, pursuant to Code of Civil Procedure 664.6.

RECORDATION OF JUDGMENT

22. A certified copy of this Judgment shall be recorded in the Office of the San Diego County Recorder pursuant to the legal description of the PROPERTY.

KNOWLEDGE AND ENTRY OF JUDGMENT

23. By signing this Stipulation, Defendants admit personal knowledge of the terms set forth herein. Service by mail shall constitute sufficient notice for all purposes.

///

24. The clerk is ordered to immediately enter this Stipulation.

IT IS SO STIPULATED.

Dated: OCT. 21, 2014

JAN I. GOLDSMITH, City Attorney

By Marsha B Kerr
Marsha B. Kerr
Deputy City Attorney
Attorneys for Plaintiff

Dated: 9/26, 2014

JL 6TH AVENUE PROPERTY, LLC

By
Member

Dated: 10-21-14, 2014

Lawrence E. Geraci aka Larry Geraci, an individual

Dated: 9/26, 2014

Jeffrey Kacha

Dated: 9/26, 2014

Joseph S. Carmellino, Attorney for Defendants JL 6th Avenue Property, LLC, Lawrence E. Geraci aka Larry Geraci and Jeffrey Kacha

///

ORDER

Upon the stipulation of the parties hereto and upon their agreement to entry of this Stipulation without trial or adjudication of any issue of fact or law herein, and good cause appearing therefor, IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: 10/27/14

JUDGE OF THE SUPERIOR COURT

RONALD S. PRAGER

EXHIBIT 2

No Fee GC §6103

FILED
Clerk of the Superior Court
JUN 17 2015

FILED
Clerk of the Superior Court
JUN 17 2015
By: H. CHAVARIN, Deputy
'15 JUN 11 PM 1:57

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

CITY OF SAN DIEGO, a municipal corporation, Plaintiff, v. CCSQUARED WELLNESS COOPERATIVE, a California corporation; BRENT MESNICK, an individual; JL INDIA STREET, LP, formerly known as JL INDIA STREET, LLC; JEFFREY KACHA, an individual; and DOES 1 through 50, inclusive, Defendants.	Case No. 37-2015-00004430-CU-MC-CTL STIPULATION FOR ENTRY OF FINAL JUDGMENT AND PERMANENT INJUNCTION; JUDGMENT THEREON [CCP § 664.6] IMAGED FILE

1. Plaintiff, City of San Diego, a municipal corporation, appearing by and through its attorneys, Jan I. Goldsmith, City Attorney, and Marsha Kerr, Deputy City Attorney; and Defendants, JL INDIA STREET, LP, formerly known as JL INDIA STREET, LLC; JEFFREY KACHA; and LAWRENCE E. GERACI, aka LARRY GERACI (Doe 1) (collectively, "Defendants"), appearing by and through their attorney, Joseph Carmellino, Esq., enter into the following Stipulation for Entry of Final Judgment (Stipulation) in full and final settlement of the above-captioned case without trial or adjudication of any issue of fact or law, and agree that a final judgment may be so entered.

///

2. The parties to this Stipulation are parties in two civil actions pending in the Superior Court of the State of California for the County of San Diego. It is the intention of the parties that the terms of this Stipulation constitute a global settlement of the following cases:

a. *City of San Diego v. CCSquared Wellness Cooperative, et al.*, Case No. 37-2015-00004430-CU-MC-CTL.

b. *City of San Diego v. LMJ 35th Street Property LP, et al.*, Case No. 37-2015-000000972.

3. The parties wish to avoid the burden and expense of further litigation and accordingly have determined to compromise and settle their differences in accordance with the provisions of this Stipulation. Neither this Stipulation nor any of the statements or provisions contained herein shall be deemed to constitute an admission or an adjudication of any of the allegations of the Complaint. The parties to this Stipulation agree to resolve this action in its entirety as to them and only them by mutually consenting to the entry of this Stipulation in its Entirety and Permanent Injunction by the Superior Court.

4. The address where the Defendants were maintaining a marijuana dispensary business at all times relevant to this action is 3505 Fifth Avenue, San Diego, also identified as Assessor's Parcel Number 452-407-17-00 (PROPERTY). The PROPERTY is currently owned by JL INDIA STREET, LP, formerly known as JL INDIA STREET, LLC.

5. The legal description of the PROPERTY is:

> Lot 3 in block 45 of loma grande, in the city of San Diego, County of San Diego, State of California, according to Map thereof No. 692, filed in the Office of the County Recorder of San Diego County, November 23, 1891.

6. This action is brought under California law and this Court has jurisdiction over the subject matter, the PROPERTY, and each of the parties to this Stipulation.

INJUNCTION

7. The provisions of this Stipulation are applicable to Defendants, their successors and assigns, agents, officers, employees, representatives, and tenants, and all persons, corporations or other entities acting by, through, under or on behalf of Defendants, and all persons acting in concert with or participating with Defendants with actual or constructive knowledge of this

Stipulation and Injunction. **Effective immediately upon the date of entry of this Stipulation,** Defendants and all persons mentioned above are hereby enjoined and restrained pursuant to San Diego Municipal Code (SDMC) sections 12.0202 and 121.0311, California Code of Civil Procedure section 526, and under the Court's inherent equity powers, from engaging in or performing, directly or indirectly, any of the following acts:

Keeping, maintaining, operating or allowing any commercial, retail, collective, cooperative or group establishment for the growth, storage, sale or distribution of marijuana, including, but not limited to, any marijuana dispensary, collective or cooperative organized anywhere in the City of San Diego without first obtaining a Conditional Use Permit pursuant to the San Diego Municipal Code.

COMPLIANCE MEASURES

DEFENDANTS agree to do the following at the PROPERTY:

8. **Immediately** cease maintaining, operating, or allowing any commercial, retail, collective, cooperative, or group establishment for the growth, storage, sale, or distribution of marijuana, including but not limited to any marijuana dispensary, collective, or cooperative organized pursuant to the California Health and Safety Code.

9. The Parties acknowledge that where local zoning ordinances allow the operation of a marijuana dispensary, collective or cooperative as a permitted use in the City of San Diego, then Defendants will be allowed to operate or maintain a marijuana dispensary, collective or cooperative in the City of San Diego as authorized under the law after Defendants provide the following to Plaintiff in writing:

a. Proof that the business location is in compliance with the ordinance; and

b. Proof that any required permits or licenses to operate a marijuana dispensary, collective or cooperative have been obtained from the City of San Diego as required by the SDMC.

10. **Within 24 hours from the date of signing this Stipulation,** remove all signage from the exterior of the premises advertising a marijuana dispensary, including but not limited to, signage advertising CCSquared Wellness Cooperative or CCSquared Storefront.

11. **No later than 48 hours from signing this Stipulation** cease advertising on the internet, magazines or through any other medium the existence of CCSquared Wellness Cooperative or CCSquared Storefront at the PROPERTY.

12. **No later than 48 hours from signing this** Stipulation remove all fixtures, items and property associated with a marijuana dispensary business from the PROPERTY.

13. **Within one week of signing this Stipulation,** Defendant will contact City zoning investigator Leslie Sennett at 619-236-6880 to schedule an inspection of the PROPERTY.

MONETARY RELIEF

14. Defendants, jointly and severally, shall pay Plaintiff City of San Diego, for Development Services Department, Code Enforcement Section's investigative costs, the amount of **$2,438.03.** All other attorney fees and costs expended by the parties in the above-captioned case are waived by the parties. The parties agree that payment in full of the monetary amount referenced as investigative costs is applicable to and satisfies payment of investigative costs for both cases referenced in paragraph 2 above.

15. Defendants shall jointly and severally pay to Plaintiff City of San Diego civil penalties in the amount of $75,000, pursuant to SDMC section 12.0202(b) in full satisfaction of all claims against Defendants arising from any of the past violations alleged by Plaintiff in this action. **$37,500 of these penalties is immediately suspended.** Payment in the amount of $37,500 in civil penalties plus $2438.03 in investigative costs referenced in paragraph 14, totaling $39,938.03, shall be made in 24 monthly installments of $1,664.09 each beginning on or before June 5, 2015, and continuing on the fifth of each successive month until paid in full. Receipt of Defendants' initial monthly payment of $1,664.09 on June 4, 2015 is acknowledged. The parties agree that payment in full of the monetary amounts referenced as civil penalties is applicable to and satisfies payment of civil penalties for both of the cases referenced in paragraph 2 above. All payments shall be made in the form of a certified check payable to the "City of San Diego," and shall be mailed or personally delivered to the Office of the City Attorney, 1200 Third Avenue, Suite 700, San Diego, CA 92101, Attention: Marsha B. Kerr.

///

16. The suspended penalties shall only be imposed if Defendants fail to comply with the terms of this Stipulation. Plaintiff City of San Diego agrees to notify Defendants in writing if imposition of the penalties will be sought by Plaintiff and on what basis.

ENFORCEMENT OF JUDGMENT

17. In the event of default by Defendants as to any amount due under this Stipulation, the entire amount due shall be deemed immediately due and payable as penalties to the City of San Diego, and Plaintiff shall be entitled to pursue any and all remedies provided by law for the enforcement of this Stipulation. Further, any amount in default shall bear interest at the prevailing legal rate from the date of default until paid in full. Service by mail shall constitute sufficient notice for all purposes.

18. Nothing in this Stipulation shall prevent any party from pursuing any remedies as provided by law to subsequently enforce this Stipulation or the provisions of the SDMC, including criminal prosecution and civil penalties that may be authorized by the court according to the SDMC at a cumulative rate of up to $2,500 per day per violation occurring after the execution of this Stipulation.

19. Defendants agree that any act, intentional act, omission or failure by their contractors, successors, assigns, partners, members, agents, employees or representatives on behalf of Defendants to comply with the requirements set forth in Paragraphs 7-15 above will be deemed to be the act, omission, or failure of Defendants and shall not constitute a defense to a failure to comply with any part of this Stipulation. Further, should any dispute arise between any contractor, successor, assign, partner, member, agent, employee or representative of Defendants for any reason, Defendants agree that such dispute shall not constitute a defense to any failure to comply with any part of this Stipulation, nor justify a delay in executing its requirements.

RETENTION OF JURISDICTION

20. The Court will retain jurisdiction for the purpose of enabling any of the parties to this Stipulation to apply to this Court at any time for such order or directions that may be necessary or appropriate for the construction, operation or modification of the Stipulation, or for the enforcement or compliance therewith, pursuant to Code of Civil Procedure 664.6.

RECORDATION OF JUDGMENT

21. This Stipulation shall not be recorded unless there is an uncured breach of the terms herein, in which instance a certified copy of this Stipulation and Judgment may be recorded in the Office of the San Diego County Recorder pursuant to the legal description of the PROPERTY.

KNOWLEDGE AND ENTRY OF JUDGMENT

22. By signing this Stipulation, Defendants admit personal knowledge of the terms set forth herein. Service by regular mail shall constitute sufficient notice for all purposes.

23. The clerk is ordered to immediately enter this Stipulation.

IT IS SO STIPULATED.

Dated: June 11, 2015

JAN I. GOLDSMITH, City Attorney

By _____
Marsha B. Kerr
Deputy City Attorney
Attorneys for Plaintiff

Dated: 6-10, 2015

JL INDIA STREET, LP, formerly known as JL INDIA STREET, LLC

By _____
Jeffrey Kacha, General Partner

Dated: 6-10, 2015

_____
Jeffrey Kacha, an individual

Dated: 6-8, 2015

_____
Lawrence E. Geraci, aka Larry Geraci, an individual

///

0145

Dated: 6/11/15, 2015

By _____
Joseph S. Carmellino
Attorney for Defendants Jeffrey Kacha and JL India Street LP, formerly known as JL India Street, LLC

JUDGMENT

Upon the stipulation of the parties hereto and upon their agreement to entry of this Stipulation without trial or adjudication of any issue of fact or law herein, and good cause appearing therefor, IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: 6-17-16

JOHN S. MEYER
JUDGE OF THE SUPERIOR COURT

EXHIBIT 3

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

Attomeys for Plaintiff
LARRY GERACI

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

LARRY GERACI, an individual, Plaintiff, v. DARRYL COTTON, an individual; and DOES 1 through 10, inclusive, Defendants.	Case No. 37-2017-00010073-CU-BC-CTL **PLAINTIFF'S COMPLAINT FOR:** **1. BREACH OF CONTRACT;** **2. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING;** **3. SPECIFIC PERFORMANCE; and** **4. DECLARATORY RELIEF.**

Plaintiff, LARRY GERACI, alleges as follows:

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

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

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

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

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

way and manner responsible for the wrongful acts and occurrences herein alleged, and that damages as herein alleged were proximately caused by their conduct. Plaintiff will seek leave of Court to amend this complaint to state the true names and/or capacities of such fictitiously-named defendants when the same are ascertained.

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

GENERAL ALLEGATIONS

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

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

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

FIRST CAUSE OF ACTION

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

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

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

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

SECOND CAUSE OF ACTION

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

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

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

PROPERTY if GERACI will not accede to his additional terms and conditions, Defendant COTTON has breached the implied covenant of good faith and fair dealing.

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

THIRD CAUSE OF ACTION

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

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

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

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

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

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

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

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

condition precedent, then to deliver title to the PROPERTY to GERACI or his assignee in exchange for receipt of payment from GERACI or assignee of the remaining $790,000.00 balance of the purchase price.

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

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

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

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

FOURTH CAUSE OF ACTION

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

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

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

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

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

On the First and Second Causes of Action:

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

On the Third Cause of Action:

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

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

On the Fourth Cause of Action:

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

On all Causes of Action:

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

6. For costs of suit incurred herein; and

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///

Dated: March 21, 2017

FERRIS & BRITTON,
A Professional Corporation

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

Attorneys for Plaintiff
LARRY GERACI

EXHIBIT A

11/02/2016

Agreement between Larry Geraci or assignee and Darryl Cotton:

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

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

Larry Geraci

Darryl Cotton

ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of San Diego)

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

personally appeared Darryl Cotton and Larry Geraci,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

JESSICA NEWELL
Commission # 2002598
Notary Public - California
San Diego County
My Comm. Expires Jan 27, 2017

Signature _____ (Seal)

EXHIBIT 4

ROA 615
13 pgs

Jacob P. Austin [SBN 290303]
The Law Office of Jacob Austin
P.O.Box 231189
San Diego, CA 92193
Telephone: (619) 357-6850
Facsimile: (888) 357-8501
E-mail:JPA@JacobAustinEsq.com

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 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DARRYL COTTON'S MOTION FOR DIRECTED VERDICT** Date: July 11, 2019 Time: 10:30 a.m. Dept: C-73 Judge: The Hon. Joel R. Wohlfeil

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant/Cross-complainant Darryl Cotton ("Cotton") hereby submits the following points and authorities in support of the Motion for Directed Verdict. Defendant's motion is brought on the grounds that Plaintiff failed to present sufficient evidence to allow a jury to find in his favor on causes of action asserted in his Complaint.

INTRODUCTION

This case arises out of a contract dispute between Plaintiff Larry Geraci ("Plaintiff") and

Defendant and Cross-Complainant Darryl Cotton ("Defendant"). Plaintiff alleges in this action that Defendant breached the terms of a purchase and sale agreement. In his complaint ("Complaint"),

Plaintiff presented his case to the jury, and failed to present sufficient evidence to support a jury finding in his favor on the following causes of action:

(1) First Cause of Action for Breach of Contract Against Darryl Cotton; and

(2) Second Cause of Action for Breach of the Covenant of Good Faith and Fair Dealing Against Darryl Cotton.

In order for the jury to find in favor of the Plaintiff on either cause of action they must first find a valid contract. Mr. Geraci however cannot prove that the parties agreed to the terms of the contract, which they have alleged is only the document signed on November 2, 2016 and expressly does not include the other terms alleged by Mr. Cotton. (Plaintiff's Ex No. 38). As required by California Civil Code § 1580 ("Consent is not mutual, unless the parties all agree upon the same thing in the same sense.") and CACI No. 302 ("When you examine whether the parties agreed to the terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement").

On those grounds, Defendant requests that the Court grant his motion for Directed Verdict as to the foregoing causes of action be granted.

LEGAL ANALYSIS

Defendant moves for a directed verdict on claims asserted by Plaintiff because the claims because Plaintiff has failed to introduce evidence of sufficient substantiality to support a jury verdict. Defendant is entitled to a directed verdict on these claims because CCP § 630 authorizes a directed verdict on issues in a case.

A directed verdict is proper on any issue on which Plaintiff failed to present evidence of sufficient substantiality to support a jury verdict

A motion for a directed verdict under CCP § 630 "tests the legal sufficiency" of the opposing party's evidence. Webb v. Special Elec. Co., Inc. 214 Cal.App.4th 595, 606 (2013). A directed verdict is proper if there is no evidence of sufficient substantiality to support a verdict in plaintiff's favor after

viewing the evidence in the light most favorable to plaintiff, resolving all presumptions, inferences and doubts in plaintiff's favor, and disregarding any conflicting evidence. Wolf v. Walt Disney Pictures & Television, 162 Cal.App.4th 1107, 1119 (2008); Dumin v. Owens-Corning Fiberglas Corp., 28 Cal.App.4th 650, 654. A directed verdict must be granted "where plaintiff's proof raises nothing more than speculation, suspicion, or conjecture." A plaintiff "must therefore produce evidence which supports a logical inference in his favor and which does more than merely permit speculation or conjecture." Westside Center Assoc. v. Safeway Stores 23, Inc., 42 Cal.App.4th 507, 531 (1996). "there must be substantial evidence to create the necessary conflict" Wolf, 162 Cal.App.4th at 1119-1120.

As discussed below, Plaintiff failed to present sufficient evidence to support a jury finding in his favor as to the remaining causes of action in his complaint. Pursuant to the case law and statutory authority cited above, Defendant is entitled to a directed verdict as to the remaining causes of action.

A. PLAINTIFF DID NOT PRESENT SUFFICIENT EVIDENCE TO SUPPORT HIS BREACH OF CONTRACT CAUSE OF ACTION AGAINST DEFENDANT.

a. GERACI HAS FAILED TO PROVE THAT THE NOVEMBER DOCUMENT IS A FULLY INETRGATED CONTACT.

Defendant has maintained and alleged since the beginning of this matter, that Plaintiff has premised his entire case on an alleged contract signed on November 2, 2016, which they purport to be a completely integrated contract. The reason why Plaintiff has pigeonholed himself to this position is so that Plaintiff can maintain that Defendant Cotton's request for assurances were an anticipatory breach of contract. Defendant's demand that the additional terms be memorialized in writing, which were not in the November 2, 2016 document can only be viewed as an anticipatory breach or request for assurances. Plaintiff has admitted this was their theory as recently as July 9, 2019, when asked by this court, "COURT: AND THE FOUNDATION OF YOUR CONTRACT THEORY IS THE NOVEMBER 2, AGREEMENT? [¶] MR. WEINSTEIN: YES, YOUR HONOR" Unedited Real-Time/Draft Transcript July 9, 2019 at 154:24-26.

The testimony given in this case by Mr. Geraci himself shows that the November 2, 2016 document was not an integrated contract. In fact, Mr. Geraci testified the parties agreed to additional terms that were not included in the document. Mr. Geraci specifically testified:

> Q. PARENTHESES, CUP FOR A DISPENSARY, CLOSE PARENS. DID YOU HAVE A DISCUSSION WITH MR. COTTON ABOUT THAT LANGES AT THE TIME YOU DRAFTED THE –THE TWO OF YOU DRAFTED THE AGREEMENT.
> A. YES. IT WAS UNDERSTOOD THAT ON THE APPROVAL OF THE MARIJUAAN DISPENSAY THAT, YOU KNO, I'D BE BEARING THE COSE, AND WE NEED TO GET APPROVAL TO COMPLETE THE ACTUAL PRUCHASE FOR THE PROPERTY.
> Q. OKAY. WHEN YOU SAID IT WAS UNDERSTOOD, WHAT WAS SAID? I MEAN, HOW DDI YOU HAVE THAT UNDERSTANDING?
> A. **AS I WAS TYPING, I SAID, AND I WILL, OF COURSE, BE PAYING FOR THE—THE PROCESS TO GET CUP.**
>
> (*ROUGH REPORTERS TRANSCRIPT* GERCI v. COTTON JULY 3, 2017 AT 93:9-19)(Emphasis added)

So according the Mr. Geraci, both parties agreed to this term however as he was typing the November 2, 2016 document, he did not include it. Clearly the actions of the parties show that this was not intended to be an integrated contract. There for Parol Evidence is admissible to prove the intention of the parties.

b. PAROL EVIDENCE OF THE NOVEMBER EMAIL PROVES MR. COTTON DID NOT INTEND FOR THE NOVEMBER 2, 2016 DOCUMENT TO BE THE FINAL EXPRESSION OF THEIR AGREEMENT.

"The standard elements for a claim for breach of contract are (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff therefrom." Wall Street Network, Ltd. v. New York Times Co. (2008) 164 Cal.App.4th 1171, 1178.

As mentioned above, when a contract is not fully integrated parol evidence is admissible to prove the intention of the parties and to prove fraud. In this case this means the admission of the events of November 2, 2016 which establishes that Neither Mr. Cotton nor Mr. Geraci dispute that on November 2, 2016 they met, reached an agreement regarding the sale of the Property and executed a three-sentence document (the "November Document"). However, the parties dispute the nature of the November Document. Mr. Cotton alleges the November Document is a receipt, Mr. Geraci alleges it is a sale contract for his purchase of the Property. Neither party disputes the following email communications

took place on November 2, 2016. At 3:11 p.m., Mr. Geraci emailed Mr. Cotton a copy of the November Document.

At 6:55 p.m., Mr. Cotton replied to that 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.***

Id. at 6:24-7:1 (the "Request for Confirmation") (emphasis added).

At 9:13 p.m., Mr. Geraci replied: "***No no problem at all.***" Id. at 7:3-4 (i.e., the Confirmation Email) (emphasis added).

This clearly establishes that, at least with regards to Mr. Cotton, he never intended the November Document to be a contract.

B. Plaintiff Did Not Present Sufficient Evidence to Support His Breach of the Covenant of Good Faith and Fair Dealing Cause of Action Against Defendant.

It is well established that every contract has an implied promise of good faith and fair dealing. In fact CACI No. 325 reads as the first element that "1. That [Larry Geraci] and [Darryl Cotton] entered into a contract[.]" Here, as mentioned above, the Plaintiff has failed to prove that the November Document constitutes a contract since they have pigeonholed themselves to just the November Document.

C. Despite Ms. Austin's Testimony Mr. Geraci's Prior Sanctions, and His Intentional Failure to Disclose his Interest, Bar Him From Ownership of Marijuana Dispensary.

On July 1, 2016, the California Secretary of State released a list of propositions including Proposition 64, a voter initiative called the Adult Use of Marijuana Act ("AUMA"). AUMA passed and became law on November 9, 2016. AUMA added Division 10 to the Business & Professions Code (BPC) starting at Section 26000, which was titled "Marijuana." Materially, BPC § 26057 mandates the state licensing authority deny an application for a marijuana license if the applicant has failed to provide material information, including disclosure of all owners of the sought license, or if the applicant had

previously been sanctioned for illegal marijuana activities in the three years preceding the application for a license. PBC § 26000 (Note: 2016 Prop. 64, BPC § 26057).

On February 22, 2017, the City adopted Ordinance No. 20793. As stated in the Recitals of Ordinance No. 20793, "the City of San Diego desires to amend the current medical marijuana cooperative land use regulations in accordance with state law, to apply to the retail of all marijuana."

Here despite the testimony of Ms. Austin, in which she dismisses the need to disclose the applicant in the application with the City, she has admitted that she is actively disregarding these disclosure laws, albeit state law, which is applicable here. In fact the forms state that the owners need to be disclosed, to which Ms. Austin states is just for "conflict check." So basically, Ms. Austin has decide unilaterally that the City does not need that information. This is wholly improper.

CONCLUSION

Plaintiff failed to present sufficient evidence to establish a prima facie case as to the following causes of action:

Respectfully submitted,

DATED: July 11, 2019

THE LAW OFFICE OF JACOB AUSTIN

By _____
JACOB P. AUSTIN
Attorney for Defendant/Cross-Complainant
DARRYL COTTON

26045.
Orders of the panel shall be subject to judicial review under Section 1094.5 of the Code of Civil Procedure upon petition by the bureau or licensing authority or any party aggrieved by such order.

Chapter 5. Licensing

26050.
(a) The license classification pursuant to this division shall, at a minimum, be as follows:
(1) Type 1 - Cultivation; Specialty outdoor; Small.
(2) Type 1A - Cultivation; Specialty indoor; Small.
(3) Type 1B - Cultivation; Specialty mixed-light; Small.
(4) Type 2 - Cultivation; Outdoor; Small.
(5) Type 2A - Cultivation; Indoor; Small.
(6) Type 2B - Cultivation; Mixed-light; Small.
(7) Type 3 - Cultivation; Outdoor; Medium.
(8) Type 3A - Cultivation; Indoor; Medium.
(9) Type 3B - Cultivation; Mixed-light; Medium.
(10) Type 4 - Cultivation; Nursery.
(11) Type 5 - Cultivation; Outdoor; Large.
(12) Type 5A - Cultivation; Indoor; Large.
(13) Type 5B - Cultivation; Mixed-light; Large.
(14) Type 6 - Manufacturer 1.
(15) Type 7 - Manufacturer 2.
(16) Type 8 - Testing.
(17) Type 10 - Retailer.
(18) Type 11 - Distributor.
(19) Type 12 - Microbusiness.
(b) All licenses issued under this division shall bear a clear designation indicating that the license is for commercial marijuana activity as distinct from commercial medical cannabis activity licensed under Chapter 3.5 (commencing with Section 19300) of Division 8. Examples of such a designation include, but are not limited to, "Type 1 - Nonmedical, "or "Type 1 NM."
(c) A license issued pursuant to this division shall be valid for 12 months from the date of issuance. The license may be renewed annually.
(d) Each licensing authority shall establish procedures for the issuance and renewal of licenses.
(e) Notwithstanding subdivision (c), a licensing authority may issue a temporary license for a period of less than 12 months. This subdivision shall cease to be operative on January 1, 2019.

26051.
(a) In determining whether to grant, deny, or renew a license authorized under this division, a licensing authority shall consider factors reasonably related to the determination, including,

but not limited to, whether it is reasonably foreseeable that issuance, denial, or renewal of the license could:

(1) Allow unreasonable restrains on competition by creation or maintenance of unlawful monopoly power;

(2) Perpetuate the presence of an illegal market for marijuana or marijuana products in the state or out of the state;

(3) Encourage underage use or adult abuse of marijuana or marijuana products, or illegal diversion of marijuana or marijuana products out of the state;

(4) Result in an excessive concentration of licensees in a given city, county, or both;

(5) Present an unreasonable risk of minors being exposed to marijuana or marijuana products; or

(6) Result in violations of any environmental protection laws.

(b) A licensing authority may deny a license or renewal of a license based upon the considerations in subdivision (a).

(c) For purposes of this section, "excessive concentration" means when the premises for a retail license, microbusiness license, or a license issued under Section 26070.5 is located in an area where either of the following conditions exist:

(1) The ratio of a licensee to population in the census tract or census division in which the applicant premises are located exceeds the ratio of licensees to population in the county in which the applicant premises are located, unless denial of the application would unduly limit the development of the legal market so as to perpetuate the illegal market for marijuana or marijuana products.

(2) The ratio of retail licenses, microbusiness licenses, or licenses under Section 26070.5 to population in the census tract, division or jurisdiction exceeds that allowable by local ordinance adopted under Section 26200.

26052.

(a) No licensee shall perform any of the following acts, or permit any such acts to be performed by any employee, agent, or contractor of such licensee:

(1) Make any contract in restraint of trade in violation of Section 16600;

(2) Form a trust or other prohibited organization in restraint of trade in violation of Section 16720;

(3) Make a sale or contract for the sale of marijuana or marijuana products, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the consumer or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of such seller, where the effect of such sale, contract, condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce;

(4) Sell any marijuana or marijuana products at less than cost for the purpose of injuring competitors, destroying competition, or misleading or deceiving purchasers or prospective purchasers;

(5) Discriminate between different sections, communities, or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this state, by selling or furnishing marijuana or marijuana products at a lower price in one section, community, or city or 'any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another, for the purpose of injuring competitors or destroying competition; or

(6) Sell any marijuana or marijuana products at less than the cost thereof to such vendor, or to give away any article or product for the purpose of injuring competitors or destroying competition.

(b) Any person who, either as director, officer or agent of any firm or corporation, or as agent of any person, violates the provisions of this chapter, assists or aids, directly or indirectly, in such violation is responsible therefor equally with the person, firm or corporation for which such person acts.

(c) A licensing authority may enforce this section by appropriate regulation.

(d) Any person or trade association may bring an action to enjoin and restrain any violation of this section for the recovery of damages.

26053.

(a) The bureau and licensing authorities may issue licenses under this division to persons or entities that hold licenses under Chapter 3.5(commencing with Section 19300) of Division 8.

(b) Notwithstanding subdivision (a), person or entity that holds a state testing license under this division or Chapter 3.5(commencing with Section 19300) of Division 8 is prohibited from licensure for any other activity, except testing, as authorized under this division.

(c) Except as provided in subdivision (b), a person or entity may apply for and be issued more than one license under this division.

26054.

(a) A licensee shall not also be licensed as a retailer of alcoholic beverages under Division 9 (commencing with Section 23000) or of tobacco products.

(b) No licensee under this division shall be located within a 600-foot radius of a school providing instruction in kindergarten or any grades 1 through 12, day care center, or youth center that is in existence at the time the license is issued, unless a licensing authority or a local jurisdiction specifies a different radius. The distance specified in this section shall be measured in the same manner as provided in paragraph (c) of Section 11362. 768 of the Health and Safety Code unless otherwise provided by law.

(c) It shall be lawful under state and local law, and shall not be a violation of state or local law, for a business engaged in the manufacture of marijuana accessories to possess, transport, purchase or otherwise obtain small amounts of marijuana or marijuana products as necessary to conduct research and development related to such marijuana accessories, provided such marijuana and marijuana products are obtained from a person or entity licensed under this division or Chapter 3.5 (commencing with Section 19300) of Division 8 permitted to provide or deliver such marijuana or marijuana products.

26054.1

(a) No licensing authority shall issue or renew a license to any person that cannot demonstrate continuous California residency from or before January 1, 2015. In the case of an applicant or licensee that is an entity, the entity shall not be considered a resident if any person controlling the entity cannot demonstrate continuous California residency from and before January 1, 2015.

(b) Subdivision (a) shall cease to be operable on December 31, 2019 unless reenacted prior thereto by the Legislature.

26054.2

(a) A licensing authority shall give priority in issuing licenses under this division to applicants that can demonstrate to the authority's satisfaction that the applicant operated in compliance with the Compassionate Use Act and its implementing laws before September 1, 2016, or currently operates in compliance with Chapter 3.5(commencing with Section 19300) of Division 8.

(b) The bureau shall request that local jurisdictions identify for the bureau potential applicants for licensure based on the applicants' prior operation in the local jurisdiction in compliance with state law, including the Compassionate Use Act and its implementing laws, and any applicable local laws. The bureau shall make the requested information available to licensing authorities.

(c) In addition to or in lieu of the information described in subdivision (b), an applicant may furnish other evidence to demonstrate operation in compliance with the Compassionate Use Act or Chapter 3.5 (commencing with Section 19300) of Division 8. The bureau and licensing authorities may accept such evidence to demonstrate eligibility for the priority provided for in subdivision (a).

(d) This section shall cease to be operable on December 31, 2019 unless otherwise provided by law.

26055.

(a) Licensing authorities may issue state licenses only to qualified applicants.

(b) Revocation of a state license issued under this division shall terminate the ability of the licensee to operate within California until the licensing authority reinstates or reissues the state license.

(c) Separate licenses shall be issued for each of the premises of any licensee having more than one location, except as otherwise authorized by law or regulation.

(d) After issuance or transfer of a license, no licensee shall change or alter the premises in a manner which materially or substantially alters the premises, the usage of the premises, or the mode or character of business operation conducted from the premises, from the plan contained in the diagram on file with the application, unless and until prior written assent of the licensing authority or bureau has been obtained. For purposes of this section, material or

substantial physical changes of the premises, or in the usage of the premises, shall include, but not be
limited to, a substantial increase or decrease in the total area of the licensed premises previously diagrammed, or any other physical modification resulting in substantial change in the mode or character of business operation.

(e) Licensing authorities shall not approve an application for a state license under this division if approval of the state license will violate the provisions of any local ordinance or regulation adopted in accordance with Section 26200.

26056.

An applicant for any type of state license issued pursuant to this division shall comply with the same requirements as set forth in Section 19322 of Chapter 3.5 of Division 8 unless otherwise provided by law, including electronic submission of fingerprint images, and any other requirements imposed by law or a licensing authority, except as follows:

(a) Notwithstanding paragraph (2) of subdivision (a) of Section 19322,an applicant need not provide documentation that the applicant has obtained a license, permit or other authorization to operate from the local jurisdiction in which the applicant seeks to operate;

(b) An application for a license under this division shall include evidence that the proposed location meets the restriction in subdivision (b) of Section 26054; and

(c) For applicants seeking licensure to cultivate, distribute, or manufacture nonmedical marijuana or marijuana products, the application shall also include a detailed description of the applicant's operating procedures for all of the following, as required by the licensing authority:
(1) Cultivation.
(2) Extraction and infusion methods.
(3) The transportation process.
(4) The inventory process.
(5) Quality control procedures.
(6) The source or sources of water the applicant will use for the licensed activities, including a certification that the applicant may use that water legally under state law.

(d) The applicant shall provide a complete detailed diagram of the proposed premises wherein the license privileges will be exercised, with sufficient particularity to enable ready determination of the bounds of the premises, showing all boundaries, dimensions, entrances and exits, interior partitions, walls, rooms, and common or shared entryways, and include a brief statement or description of the principal activity to be conducted therein, and, for licenses permitting cultivation, measurements of the planned canopy including aggregate square footage and individual square footage of separate cultivation areas, if any.

26056.5.

The bureau shall devise protocols that each licensing authority shall implement to ensure compliance with state laws and regulations related to environmental impacts, natural resource protection, water quality, water supply, hazardous materials, and pesticide use in accordance

with regulations, including but not limited to, the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code), the California Endangered Species Act (Chapter 1.5 (commencing with Section2050), lake or streambed alteration agreements (Chapter 6 (commencing with Section 1600), the Clean Water Act (33 U.S.C. Sec 1251 et seq.), the Porter-Cologne Water Quality Control Act (Division 7 commencing with Section 13000) of the Water Code), timber production zones, wastewater discharge requirements, and any permit or right necessary to divert water.

26057.

(a) The licensing authority shall deny an application if either the applicant, or the premises for which a state license is applied, do not qualify for licensure under this division.

(b) The licensing authority may deny the application for licensure or renewal of a state license if Any of the following conditions apply:

(1) Failure to comply with the provisions of this division, any rule or regulation adopted pursuant to this division, or any requirement imposed to protect natural resources, including, but not limited to, protections for instream flow and water quality.

(2) Conduct that constitutes grounds for denial of licensure under Chapter 2 (commencing with Section 480) of Division 1.5, except as otherwise specified in this section and Section 26059.

(3) Failure to provide information required by the licensing authority.

(4) The applicant or licensee has been convicted of an offense that is substantially related to the qualifications, functions, or duties of the business or profession for which the application is made, except that if the licensing authority determines that the applicant or licensee is otherwise suitable to be issued a license, and granting the license would not compromise public safety, the licensing authority shall conduct a thorough review of the nature of the crime, conviction, circumstances, and evidence of rehabilitation of the applicant, and shall evaluate the suitability of the applicant or licensee to be issued a license based on the evidence found through the review. In determining which offenses are substantially related to the qualifications, functions, or duties of the business or profession for which the application is made, the licensing authority shall include, but not be limited to, the following:

(A) A violent felony conviction, as specified in subdivision (c) of Section 667.5 of the Penal Code.

(B) A serious felony conviction, as specified in subdivision (c) of Section 1192. 7 of the Penal Code.

(C) A felony conviction involving fraud, deceit, or embezzlement.

(D) A felony conviction for hiring, employing, or using a minor in transporting, carrying, selling, giving away, preparing for sale, or peddling, any controlled substance to a minor; or selling, offering to sell, furnishing, offering to furnish, administering, or giving any controlled substance to a minor.

(E) A felony conviction for drug trafficking with enhancements pursuant to Sections 113 70.4 or 11379.8.

(5) Except as provided in subparagraphs (D) and (E) of paragraph (4) and notwithstanding Chapter 2 (commencing with Section 480) of Division 1.5, a prior conviction, where the sentence, including any term of probation, incarceration, or supervised release, is completed, for possession of, possession for sale, sale, manufacture, transportation, or cultivation of a controlled substance is not considered substantially related, and shall not be the sole ground for denial of a license. Conviction for any controlled substance felony subsequent to licensure shall be grounds for revocation of a license or denial of the renewal of a license.

(6) The applicant, or any of its officers, directors, or owners, has been subject to fines or penalties for cultivation or production of a controlled substance on public or private lands pursuant to Sections 12025 or 12025.1 of the Fish and Game Code.

(7) The applicant, or any of its officers, directors, or owners, has been sanctioned by a licensing authority or a city, county, or city and county for unauthorized commercial marijuana activities or commercial medical cannabis activities, has had a license revoked under this division or Chapter 3.5(commencing with Section 19300) of Division 8 in the three years immediately preceding the date the application is filed with the licensing authority, or has been sanctioned under Sections 12025 or 12025.1 of the Fish and Game Code.

(8) Failure to obtain and maintain a valid seller's permit required pursuant to Part 1 (commencing with Section 6001) of Division 2 of the Revenue and Taxation Code.

(9) Any other condition specified in law.

26058.

Upon the denial of any application for a license, the licensing authority shall notify the applicant in writing.

26059.

An applicant shall not be denied a state license if the denial is based solely on any of the following:

(a) A conviction or act that is substantially related to the qualifications, functions, or duties of the business or profession for which the application is made for which the applicant or licensee has obtained a certificate of rehabilitation pursuant to Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.

(b) A conviction that was subsequently dismissed pursuant to Sections 1203.4, 1203.4a, or 1203.41 of the Penal Code or any other provision allowing for dismissal of a conviction.

Chapter 6. Licensed Cultivation Sites

26060.

(a) Regulations issued by the Department of Food and Agriculture governing the licensing of indoor, outdoor, and mixed-light cultivation sites shall apply to licensed cultivators under this division.

EXHIBIT 5

ROA 620
4/0725

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 07/10/2019 TIME: 09:00:00 AM DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil
CLERK: Andrea Taylor
REPORTER/ERM: Margaret Smith CSR# 9733
BAILIFF/COURT ATTENDANT: R. Camberos

CASE NO: **37-2017-00010073-CU-BC-CTL** CASE INIT.DATE: 03/21/2017
CASE TITLE: **Larry Geraci vs Darryl Cotton [Imaged]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

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EVENT TYPE: Civil Jury Trial

APPEARANCES
Michael R Weinstein, counsel, present for Respondent on Appeal,Cross - Defendant,Cross - Complainant,Plaintiff(s).
Scott H Toothacre, counsel, present for Respondent on Appeal,Cross - Defendant,Cross - Complainant,Plaintiff(s).
Jacob Austin, counsel, present for Defendant,Cross - Complainant,Appellant(s).
Darryl Cotton, Defendant is present.
Larry Geraci, Plaintiff is present.
Rebecca Berry, Cross - Defendant, not present.

8:44 a.m. This being the time previously set for further Jury trial in the above entitled cause, having been continued from July 9, 2019, all parties and counsel appear as noted above and court convenes. The jurors are not present.

Outside the presence of the jury, Court and counsel discuss scheduling, witnesses, jury instructions and verdict forms. The Court will defer hearing any motions until after all the evidence has been completed.

8:50 a.m. Court is in recess.

9:11 a.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above. All jurors are present.

9:12 a.m. **JAMES BARTELL** is swom and examined by Attorney Toothacre on behalf of Plaintiff/Cross-Defendant, Larry Geraci, et al.

9:30 a.m. Cross examination of James Bartell commences by Attorney Austin on behalf of Defendant/Cross-Complainant, Darryl Cotton.

9:42 a.m. The witness is excused.

9:43 a.m. Darryl Cotton, previously sworn, resumes the stand for further direct examination by Attorney Austin on behalf of Defendant/Cross-Complainant, Darryl Cotton.

10:12 a.m. Cross examination of Darryl Cotton commences by Attorney Weinstein on behalf of Plaintiff/Cross-Defendant, Larry Geraci, et al.

The following Court's exhibit(s) is marked for identification and admitted on behalf of Plaintiff/Cross-Defendant:

85) Email to Michael Weinstein from Darryl Cotton, dated 3/28/17

10:22 a.m. Redirect examination of Darryl Cotton commences by Attorney Austin on behalf of Defendant/Cross-Complainant, Darryl Cotton.

10:24 a.m. Recross examination of Darryl Cotton commences by Attorney Weinstein on behalf of Plaintiff/Cross-Defendant, Larry Geraci, et al.

10:25 a.m. The witness is excused.

10:26 a.m. Defendant rests subject to the admission of exhibits.

10:27 a.m. All jurors are admonished and excused for break and Court remains in session.

Outside the presence of the jury, Court and counsel discuss objections.

10:28 a.m. Court is in recess.

10:43 a.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above. All jurors are present.

10:44 a.m. Larry Geraci, previously sworn, resumes the stand for further rebuttal examination by Attorney Weinstein on behalf of Plaintiff/Cross-Defendant, Larry Geraci, et al.

10:45 a.m. Plaintiff rests subject to the admission of exhibits.

10:46 a.m. All jurors are admonished and excused for the evening and Court remains in session.

Outside the presence of the jury, Defense counsel offers court's exhibit 281 into evidence, with objection, objection is sustained.

Defense counsel requests the Court take Judicial Notice of case numbers 2014-20897 and 2015-4430 against Plaintiff Larry Geraci. Objection by the Plaintiff. Objection is sustained.

Defense counsel makes a Motion for Non-Suit on the Plaintiff's Complaint. The Court hears argument. The Motion for Non-Suit as to the Plaintiff's Complaint is denied.

Plaintiff's counsel makes a Motion for Directed Verdict on the Cross-Complaint. The Court hears

argument. The Motion for Directed Verdict is denied as to Breach of Contract claim.

11:35 a.m. Court is in recess.

1:25 p.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above. The jury is not present.

Outside the presence of the jury, Court hears further argument as to Motion for Directed Verdict on Cross-Complaint. The Motion for Directed Verdict as to Malice, Oppression and Punitive Damages is granted. The Motion for Directed Verdict as to Negligent Misrepresentation and Intentional Misrepresentation is denied.

Court and counsel go over jury instructions.

2:58 p.m. Court is in recess.

3:12 p.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above. The jurors are not present.

Outside the presence of the jury, Court and counsel go over jury instructions and the verdict forms.

Per stipulation of counsel, the reporter is waived for tomorrow's hearing.

3:13 p.m. Court is adjourned until 07/11/2019 at 10:30AM in Department 73.

ROA 624
1 page

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 07/11/2019 TIME: 10:30:00 AM DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil
CLERK: Andrea Taylor
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT: R. Camberos

CASE NO: **37-2017-00010073-CU-BC-CTL** CASE INIT.DATE: 03/21/2017
CASE TITLE: **Larry Geraci vs Darryl Cotton [Imaged]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

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EVENT TYPE: Civil Jury Trial

APPEARANCES
Michael R Weinstein, counsel, present for Respondent on Appeal,Cross - Defendant,Cross - Complainant,Plaintiff(s).
Jacob Austin, counsel, present for Defendant,Cross - Complainant,Appellant(s).
Darryl Cotton, Defendant is present.
Elyssa Kulas, counsel appears on behalf of the Plaintiff.

10:30 a.m. This being the time previously set for further Jury trial in the above entitled cause, having been continued from July 10, 2019, all parties and counsel appear as noted above and court convenes. The jurors are not present.

Outside the presence of the jury, Court and counsel discuss jury instructions. Counsel stipulate to the proposed jury instructions and have no further objections.

Motion for Directed Verdict on the Complaint submitted by the Defendant is argued. The Motion for Directed Verdict is denied.

Court and counsel confer regarding Special Verdict forms no. 1 and no. 2. Counsel stipulate to the finalized version of Special Verdict forms no. 1 and no. 2.

Plaintiff's counsel requests additional time for closing arguments. The Court will allow each side 1 hour and 15 minutes.

11:00 a.m. Court is adjourned until 07/15/2019 at 09:00AM in Department 73.

EXHIBIT 6

ROA 650
25 pages

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

LARRY GERACI, an individual, Plaintiff, v. DARRYL COTTON, an individual; and DOES 1 through 10, inclusive, Defendants.	Case No. 37-2017-00010073-CU-BC-CTL Judge: Hon. Joel R. Wohlfeil Dept.: C-73 **JUDGMENT ON JURY VERDICT [PROPOSED BY PLAINTIFF/CROSS-DEFENDANTS]**
DARRYL COTTON, an individual, Cross-Complainant, v. LARRY GERACI, an individual, REBECCA BERRY, an individual, and DOES 1 THROUGH 10, INCLUSIVE, Cross-Defendants.	**[IMAGED FILE]** Action Filed: March 21, 2017 Trial Date: June 28, 2019

This action came on regularly for jury trial on June 28, 2019, continuing through July 16, 2019, in Department C-73 of the Superior Court, the Honorable Judge Joel R. Wohlfeil presiding. Michael R. Weinstein, Scott H. Toothacre, and Elyssa K. Kulas of FERRIS & BRITTON, APC, appeared for Plaintiff and Cross-Defendant, LARRY GERACI and Cross-Defendant, REBECCA BERRY, and Jacob P. Austin of THE LAW OFFICE OF JACOB AUSTIN, appeared for Defendant and Cross-Complainant, DARRYL COTTON.

A jury of 12 persons was regularly impaneled and sworn. Witnesses were sworn and testified and certain trial exhibits admitted into evidence.

During trial and following the opening statement of Plaintiff/Cross-Complainant's counsel, the Court granted the Cross-Defendants' nonsuit motion as to the fraud cause of action against Cross-Defendant Rebecca Berry only in Cross-Complainant's operative Second Amended Cross-Complaint. A copy of the Court's July 3, 2019 Minute Order dismissing Cross-Defendant Rebecca Berry from this action is attached as Exhibit "A."

After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues on two special verdict forms. The jury deliberated and thereafter returned into court with its two special verdicts as follows:

SPECIAL VERDICT FORM NO. 1

We, the Jury, in the above entitled action, find the following special verdict on the questions submitted to us:

Breach of Contract

1. Did Plaintiff Larry Geraci and Defendant Darryl Cotton enter into the November 2, 2016 written contract?

Answer: YES

2. Did Plaintiff do all, or substantially all, of the significant things that the contract required him to do?

Answer: NO

3. Was Plaintiff excused from having to do all, or substantially all, of the significant things that the contract required him to do?

Answer: YES

4. Did all the condition(s) that were required for Defendant's performance occur?

Answer: NO

5. Was the required condition(s) that did not occur excused?

Answer: YES

6. Did Defendant fail to do something that the contract required him to do?

Answer: YES

or

Did Defendant do something that the contract prohibited him from doing?

Answer: YES

7. Was Plaintiff harmed by Defendant's breach of contract?

Answer: YES

Breach of the Implied Covenant of Good Faith and Fair Dealing

8. Did Defendant unfairly interfere with Plaintiffs right to receive the benefits of the contract?

Answer: YES

9. Was Plaintiff harmed by Defendant's interference?

Answer: YES

10. What are Plaintiffs damages?

Answer: $ 260,109.28

A true and correct copy of Special Verdict Form No. 1 is attached hereto as Exhibit "B."

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SPECIAL VERDICT FORM NO. 2

We, the Jury, in the above entitled action, find the following special verdict on the questions submitted to us:

Breach of Contract

1. Did Cross-Complainant Darryl Cotton and Cross-Defendant Larry Geraci enter into an oral contract to form a joint venture?

Answer: NO

Fraud - Intentional Misrepresentation

8. Did Cross-Defendant make a false representation of an important fact to Cross-Complainant?

Answer: NO

Fraud - False Promise

13. Did Cross-Defendant make a promise to Cross-Complainant that was important to the transaction?

Answer: NO

Fraud - Negligent Misrepresentation

19. Did Cross-Defendant make a false representation of an important fact to Cross-Complainant?

Answer: NO

Given the jury's responses, Question 25 regarding Cross-Complainant's damages became inapplicable as a result of the jury's responses.

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A true and correct copy of Special Verdict Form No. 2 is attached hereto as Exhibit "C."

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That Plaintiff LARRY GERACI have and recover from Defendant DARRYL COTTON the sum of $260,109.28, with interest thereon at ten percent (10%) per annum from the date of entry of this judgment until paid, together with costs of suit in the amount of $_____;

2. That Cross-Complainant DARRYL COTTON take nothing from Cross-Defendant REBECCA BERRY; and

3. That Cross-Complainant DARRYL COTTON take nothing from Cross-Defendant LARRY GERACI.

IT IS SO ORDERED.

Dated: 8-19, 2019

Hon. Joel R. Wohlfeil
JUDGE OF THE SUPERIOR COURT

Judge Joel R. Wohlfeil

EXHIBIT 7

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

LARRY GERACI, an individual, Plaintiff, vs. DARRYL COTTON, an individual; and DOES 1-10, inclusive, Defendants.	Case No. 37-2017-00010073-CU-BC-CTL Judge: The Honorable Joel R. Wohlfeil Dept.: C-73 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL** Action Filed: March 21, 2017 Trial Date: June 28, 2019
DARRYL COTTON, an individual, Cross-Complainant, vs. LARRY GERACI, an individual, REBECCA BERRY, an individual, and DOES 1 THROUGH 10, INCLUSIVE, Cross-Defendants.	

TABLE OF CONTENTS

INTRODUCTION 4

ARGUMENT 5

A. STANDARD FOR MOTION FOR NEW TRIAL 4

B. RELEVANT BACKGROUND 4

State Marijuana Laws 5

Local Marijuana Laws 6

Mr. Geraci's Objective Manifestations 8

Mr. Geraci Used the Attorney-Client Privilege as a Shield and a Sword 9

C. THE ALLEGED NOVEMBER 2, 2016 AGREEMENT WAS ILLEGAL 10

D. THE JURY APPLIED AN OBJECTIVE STANDARD TO MR. COTTON, AND A SUBJECTIVE STANDARD TO MR. GERACI 12

E. MR. GERACI USED THE ATTORNEY-CLIENT PRIVILEGE AS A SHIELD AND A SWORD, THEREBY VIOLATING MR. COTTON'S RIGHT TO A FAIR AND IMPARTIAL TRIAL 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

A&M Records, Inc. v. Heilman (1977) 75 Cal.App.3d 554

Alexander v. Codemasters Group Limited (2002) 104 Cal.App.4th 129

Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal.App.3d 832

Bustamante v. Intuit, Inc. (2009) 141 Cal.App.4th 199

Gray v. Robinson (1939) 33 Cal.App.2d 177

Homami v. Iranzadi (1989) 211 Cal.App.3d 1104

Kashani v. Tsann Kuen China Enterprise Co. (2004) 118 Cal. App. 4th 531

Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal.2d 141

May v. Herron, (1954) 127 Cal.App.2d 707

Pacific Wharf & Storage Co. v. Standard American Dredging Co. (1920) 184 Cal. 21

People v. Shelton (2006) 37 Cal.4th 759, 767

Reid v. Google, Inc. (2010) 50 Cal.4th 512

Ryan v. Crown Castle NG Networks Inc. (2016) 6 Cal.App.5th 775

Webber v. Webber (1948) 33 Cal.2d 153 (5, 13)

Yoo v. Jho (2007) 147 Cal.App.4th 1249

STATUTES

Business & Professions Code
Section 19323(a)
Section 19323(b)(8)
Section 19324

Civil Code

Code of Civil Procedure
§657(6)-(7)

Government Code

Senate Bills

Sen. Bill #643 2015-2016 Reg. Sess.,

San Diego Municipal Code

Ordinance 20356
§27.3501
§27.3510
§27.3563
§112.0102(b)
§112.0102(c)
§112.0501(c)
§126.0303
§126.303(a)
§141.0614

INTRODUCTION

Mr. Cotton seeks a new trial on three grounds. First, the alleged November 2, 2016 agreement is illegal and void because Larry Geraci's ("Mr. Geraci") failure to disclose his interest in both the Property[1] and the Conditional Use Permit ("CUP") violates local law and policies, as well as state law. More particularly, the San Diego Municipal Code (the "SDMC") requires those disclosures to be made. Further, Mr. Geraci entered into two stipulated judgments with the City of San Diego ("City") that mandated he complied with the City's CUP requirements, which he purposefully failed to do in his performance of the alleged November 2, 2016 agreement. For his claims against Mr. Cotton, Mr. Geraci asks this Court to assist him in violating the SDMC and the policy of AUMA, which the Court is prohibited from doing. As a result, the jury's finding that the alleged November 2, 2016 agreement is a valid contract is contrary to law.

Second, the jury applied an objective standard to Mr. Cotton's conduct and a subjective standard to Mr. Geraci's as it relates to the alleged November 2, 2016 agreement and subsequent acknowledgement e-mail. The jury found the parties entered into a contract on November 2, 2016 and discounted the acknowledgement e-mail based upon Mr. Geraci's testimony that he only replied to the first line of Mr. Cotton's e-mail. Mr. Geraci's objective conduct demonstrates that either (i) he agreed to a 10% interest that he later refused existed, or (ii) there was an agreement to agree. Had the jury applied an objective standard to the conduct of ***both parties***, it would not – nor could it – have reached the verdict it did. The judgment entered in accordance with the jury's verdict is contrary to law.[2]

Third, Mr. Geraci used the attorney-client privilege as a shield during discovery and a sword at trial, which prohibited Mr. Cotton from receiving a fair and impartial trial. During discovery, Mr. Cotton sought documents and communications by and between Mr. Geraci and Gina Austin ("Ms. Austin") relating to the drafting of various agreements related to the purchase of the Property. Mr. Geraci objected to the request and never produced communications related to the same based upon attorney-client privilege. At trial, however, Mr. Geraci waived the attorney-client privilege, for the first

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[1] The term "Property" shall mean and refer to the real property located at 6176 Federal Boulevard, San Diego, California.

[2] The "agreement to agree" argument is a defense to the breach of contract claim made by Mr. Geraci. The argument should not, and cannot, be considered a judicial admission to the separate issue of Mr. Cotton's claim as to the oral joint venture agreement.

time, and both he and Ms. Austin testified as to their communications. Mr. Cotton was unable to cross-examine either witness with the relevant documents Mr. Geraci withheld during discovery on the ground of attorney-client privilege. The requested communications went to one of the central issues of the case – whether the alleged November 2, 2016 agreement was an agreement, or an agreement to agree. The use of the attorney-client privilege as a sword at trial was made even more improper given the content of the testimony by Mr. Geraci and Ms. Austin, both of whom accused Mr. Cotton of a crime – extortion. As a result, Mr. Cotton did not receive a fair and impartial trial.

ARGUMENT

A. STANDARD FOR MOTION FOR NEW TRIAL.

A verdict may be vacated, in whole or in part, and a new trial granted on all or part of the issues, when either the verdict is contrary to the law, there is an error in law at the trial, there is insufficient evidence to support the verdict, or an irregularity in the proceedings. Cal. Code Civ. Proc. § 657(6)-(7). A party may raise illegality of contract on a motion for new trial. *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 148 (citing *Pacific Wharf & Storage Co. v. Standard American Dredging Co.* (1920) 184 Cal. 21, 23-24)); *Gray v. Robinson* (1939) 33 Cal.App.2d 177, 182 (irregularity in the proceedings); *A&M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 566 (litigant cannot claim privilege during discovery, then testify at trial as to the same matter); *see also Webber v. Webber* (1948) 33 Cal.2d 153, 164 (affidavit not required where motion for new trial "relies wholly upon facts appearing upon the face of the record"). On a motion for new trial, the Court sits as the 13th juror and is "vested with the plenary power – and burdened with a correlative duty – to independently evaluate the evidence." *Ryan v. Crown Castle NG Networks Inc.* (2016) 6 Cal.App.5th 775, 784.

B. RELEVANT BACKGROUND.

Mr. Geraci, an IRS Enrolled Agent, Has Two Judgments Prohibiting the Operation of a Marijuana Dispensary Unless He Complies With the SDMC

Mr. Geraci has been an enrolled agent with the IRS ("Enrolled Agent"), which "means he has a federal license that allows him to represent clients before the IRS," since 1999. (Reporter's Transcript of Trial ("RT") July 3, 2019 at 14:22-16:24; 56:25-57:11, the relevant excerpts of which are attached

hereto as **Exhibit A.**[3]) Prior to his involvement with the Property and during the time in which he was an Enrolled Agent, Mr. Geraci was involved in at least two illegal marijuana dispensaries (the "Illegal Marijuana Dispensaries"). (*See id.* (Mr. Geraci testifying that he has been an enrolled agent since 1999); Stipulation for Entry of Final Judgment and Permanent Injunction; Judgment Thereon [CCP § 664.6] (the "Tree Club Judgment") and Stipulation for Entry of Final Judgment and Permanent Injunction; Judgment Thereon [CCP § 664.6] (the "CCSquared Judgment") (collectively referred to herein as "Geraci Judgments") true and correct copies of which are attached hereto as **Exhibits B and C**, respectively, and incorporated herein by this reference.)

Pursuant to the terms of the Geraci Judgments, Mr. Geraci could only operate or maintain a marijuana dispensary after providing written proof to the City that "any required permits or licenses to operate a marijuana dispensary, collective or cooperative have been obtained from the City of San Diego as required by the SDMC." (**Exhibit B** (Tree Club Judgment) at ¶¶ 10(b), 17 (emphasis added); Exhibit – (CCSquared Judgment) at¶ 9(b).) Unlike paragraphs 9 through 14, paragraph 10(b) in the Tree Club Judgment is not limited to the "PROPERTY." (*See id.*) Unlike paragraphs 8 and 10 in the CCSquared Judgment, paragraph 9 is not limited to the "PROPERTY." (**Exhibit C** (CCSquared Judgment).[4]) Additionally, Mr. Geraci was fined $25,000 in the Tree Club Judgment and $75,000 in the CCSquared Judgment. (**Exhibit B** (Tree Club Judgment) at ¶ 17; **Exhibit C** (CCSquared Judgment) at ¶ 15.)

State Marijuana Laws

In 2003, the State of California (the "State") enacted the Medical Marijuana Program Act (the "MMPA"), which established certain requirements for Medical Marijuana Consumer Cooperatives ("MMCC"). On October 9, 2015, the State passed the Medical Marijuana Public Safety and Environmental Protection Act, 2015 California Senate Bill No. 643, California 2015-2016 Regular Session (hereinafter cited to as "S.B. 643"). Pursuant to S.B. 643, an application must be denied if the applicant does not qualify for licensure. (S.B. 643 at § 10 (adding Cal. Bus. & Prof. Code § 19323(a), (b)(8).) An applicant does not qualify if he has been sanctioned by a city for unauthorized commercial

[3] For the convenience of the Court and to avoid a multiplicity of exhibits, true and correct copies of all relevant excerpts of testimony at trial on July 3, 2019 cited herein are contained in **Exhibit A.** Each excerpt of testimony is clearly identified by a slipsheet and bookmarked for this Court's ease or reference and expedient access.

[4] The CCSquared Judgment was a global settlement of two separate civil actions.

marijuana activity. (*Id.*) Although Section 12, which added § 19324, provides that an applicant shall not be denied a state license if the denial is based upon certain conditions, neither of the two conditions specified applies to § 19323(b)(8). (*Id.* at § 12.) In the Geraci Judgments, the City sanctioned Mr. Geraci for unauthorized commercial marijuana activity. (*See* **Exhibits B and C**.)

On November 8, 2016, the voters of California approved Proposition 64, the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA"). (Control, Regulate, and Tax Adult Use Of Marijuana Act, 2016 Cal. Legis. Serv. Prop. 64 (hereinafter cited as "Prop. 64").) The purpose and intent of AUMA was to: (i) strictly control the cultivation and sale of marijuana "through a system of state licensing, regulation, and enforcement; (ii) allow local governments to enforce state laws and regulations; and (iii) bring marijuana into a regulated and legitimate market to create a transparent and accountable system. (Prop. 64 at §§ 2, 3.) In order to create more legitimacy and transparency, among other things, AUMA requires the disclosure of all persons who have an interest in the license. (*Id.* at § 6.1 (adding §§ 26001(a) (providing broad definition of applicant), 26055(a) (licensing authorities may issue state licenses only to qualified applicants), and 26057 (prohibiting certain applicants from obtaining a license).)

Local Marijuana Laws

After the enactment of the MMPA, the City adopted Ordinance No. 20356 ("Ordinance 20356"). Pursuant to Ordinance 20356, a CUP is required to operate an MMCC. (*See id.* at § 126.0303(a); § 141.0614.) In February 2017, the City adopted Ordinance No. 20793, which requires a conditional use permit for a marijuana outlet. (Ordinance No. 20793) at p. 4 (§ 126.0303).) The approval of a CUP is governed by Process Three, which requires approval by a hearing officer and allows the hearing officer's decision to be appealed to the Planning Commission. SDMC § 112.0501 (providing overview of Process Three).

The City's CUP requirements mandate the disclosure of anyone who holds an interest in the relevant property or a CUP. (*See* **TE 30** (Ownership Disclosure Statement), a true and correct copy of which is attached hereto as **Exhibit D** and incorporated herein by this reference.) SDMC § 112.0102(b) (application shall be made on forms provided by city manager and accompanied by all the information required by the same); SDMC § 112.0102(c) (information requested on forms updated "to comply with

revisions to local, state, or federal law, regulation, or policy. As evidenced by the SDMC, there are at least two reasons for the information mandated by the application forms.

The first reason for the disclosure requirements is conflict of interest laws. (RT July 8, 2019 at 33:10-34:1, the relevant excerpts of which are attached hereto as **Exhibit E**;[5] *see also* SDMC § 27.3563 (prohibiting conflicts of interest).) The City's ethics ordinances (collectively, the "Ethics Ordinances") were adopted "to embrace clear and unequivocal standards of disclosure and transparency in government so as to avoid conflicts of interest." SDMC § 27.3501. The Ethics Ordinances require, among others, that a City official disclose his or her economic interests. *Id.* at § 27.3510. The Ethics Ordinances make it unlawful for any city official to make a municipal decision in which he or she knows, or has reason to know, that they have a disqualifying financial interest. *Id.* at § 27.3561; *see also id.* at §§ 27.3562-63. The Ethics Ordinance applies to hearing officers who make decisions on CUP applications. SDMC § 27.3503 (*see* definitions of "City Official" and "High Level Filer," the latter includes, by cross-reference to Govt. Code § 87200, hearing officers).

The second reason relates to the requirements for obtaining a license for a Marijuana Outlet ("MO"), which requires the applicant/responsible persons to undergo background checks after the issuance of a CUP. SDMC § 112.0102(c); *id.* at §§ 42.1502 (defining responsible persons), 42.1504 (requiring a permit to operate a marijuana outlet), and 42.1507 (requiring background check); (*see also* RT July 9, 2019 at 113:18-114:3 (Ms. Tirandazi, a City employee, testifying that background checks are required after the CUP process) the relevant excerpts of which are attached hereto as **Exhibit F**.[6])

Failure to Disclose Ownership Interest and Geraci Judgments

Mr. Geraci identified the Property and began talking with Mr. Cotton because the Property "may qualify for a dispensary." (**Exhibit A** at 59:18-19.) On October 31, 2016, Ms. Austin – a self-proclaimed expert in cannabis licensing – e-mailed Abhay Schweitzer instructing him to keep Mr. Cotton's name off the CUP application "unless necessary" because Mr. Cotton had "legal issues

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[5] For the convenience of the Court and to avoid a multiplicity of exhibits, true and correct copies of all relevant excerpts of testimony at trial on July 8, 2019 cited herein are contained in **Exhibit E**. Each excerpt of testimony is clearly identified by a slipsheet and bookmarked for this Court's ease or reference and expedient access.

[6] For the convenience of the Court and to avoid a multiplicity of exhibits, true and correct copies of all relevant excerpts of testimony at trial on July 9, 2019 cited herein are contained in **Exhibit F**. Each excerpt of testimony is clearly identified by a slipsheet and bookmarked for this Court's ease or reference and expedient access.

with the City." (Trial Exhibit ("TE") 36, a true and correct copy of which is attached hereto as **Exhibit G** and incorporated herein by this reference; **Exhibit E** at 11:28-13:23) (Ms. Austin characterizing herself as a marijuana expert), *Id.* at 54:10-55:11.) On the same date, Mr. Geraci caused a Form DS-3032 General Application (the "CUP General Application") to be filed with the City. (*See* TE 34, a true and correct copy of which is attached hereto as **Exhibit H** and incorporated herein by this reference, at 34-001.) Rebecca Berry ("Ms. Berry") was identified as the "Lessee or Tenant" and the Permit Holder. (*Id.*) Mr. Geraci is not identified anywhere in the CUP General Application. (*See id.*) Section 7 of the CUP General Application requires the disclosure of, among other things, the Geraci Judgments (*id.* at § 7); however, they were not disclosed. (*See id.*)

On the same date, Ms. Berry executed and submitted the Ownership Disclosure Statement to the City. (*See* **Exhibit D**). As set forth in the Ownership Disclosure Statement, the list "must include the names and addresses of all persons who have an interest in the property, recorded or otherwise, and state the type of interest." (*Id.*) The Ownership Disclosure Statement also required the disclosure of "Other Financially Interested Persons." (*Id.*) The disclosure requirements are mandatory and do not include exceptions for Enrolled Agents. (*See id.*) Notwithstanding, Mr. Geraci is not identified in the Ownership Disclosure Statement. (*Id.*)

Both Mr. Geraci and Ms. Berry testified that the exclusion of Mr. Geraci was purposeful; he was not disclosed because he was as an Enrolled Agent. (**Exhibit A** at 193:19-194:5.) Mr. Geraci also claimed that the lack of disclosure was "for convenience of administration." (*See Plaintiff/Cross-Defendant Larry Geraci's Answers to Special Interrogatories, Set Two, Propounded by Defendant/Cross-Complainant Darryl Cotton* (hereinafter, the "Discovery Responses"), a true and correct copy of which is attached hereto as **Exhibit I** and incorporated herein by this reference, at 12:8-16.) However, Ms. Austin instructed the consultants to leave Mr. Cotton's name off the CUP application unless necessary because of Mr. Cotton's "legal issues with the City." Mr. Geraci also had "legal issues with the City" and he was not disclosed. (**Exhibit E** at 54:24-55:11.)

Mr. Geraci's Objective Manifestations

On November 2, 2016, Messrs. Geraci and Cotton executed the alleged November 2, 2016 agreement, which the jury determined constituted a contract. (TE 38, a true and correct copy of which

is attached hereto as **Exhibit J** and incorporated herein by this reference.) Shortly after receiving a copy of the alleged agreement, Mr. Cotton sent an e-mail stating the 10% equity position in the dispensary was not included in the document and requesting an acknowledgment that a provision regarding the same would be included in "any final agreement." (TE 42, a true and correct copy of which is attached hereto as **Exhibit K** and incorporated herein by this reference.) Mr. Geraci responded, "no problem at all." (*Id.*)

Mr. Geraci then caused certain draft agreements to be exchanged with Cotton. (*See* TE 59 and 62, true and correct copies of which are attached hereto as **Exhibits L and M**, respectively, and incorporated herein by this reference.) The draft agreements did not state they were amending a prior agreement for the purchase of the property, did not reference a prior agreement, and the "Date of Agreement" was "[t]he latest date of execution of the Seller or the Buyer, as indicated on the signature page." (*See e.g.*, **Exhibit** L at 059-003.) The draft agreements included terms that were not included in the November 2, 2016 document, and provide no indication or reference to the alleged November 2, 2016 agreement. (*See id.*) And none of the documents or communications produced by Mr. Geraci ever referenced extortion, which was never raised during the course of discovery.

Mr. Geraci Used the Attorney-Client Privilege as a Shield and a Sword

Mr. Cotton propounded discovery seeking, among other things, documents and communications by and between Mr. Geraci and Ms. Austin. (*See* **Exhibit I** (Discovery Responses) at 13:1-13, 14:8-23.) Mr. Geraci refused to produce any documents or communications based upon attorney-client privilege. (*See id.*) Mr. Geraci waived the attorney-client privilege for the first time and trial, and both he and Ms. Austin testified as to communications regarding the drafting of a purchase agreement and statements Mr. Geraci purportedly made that he was being extorted by Mr. Cotton. (**Exhibit E** at 41:10-26; *see also* **Exhibit A** at 129:22-28 (Mr. Geraci testifying as to the same statements).)[7] The testimony of Mr. Geraci and Ms. Austin was not previously disclosed due to the attorney-client privilege, but and it effectively accused Mr. Cotton of a crime. *See* Pen. Code, § 518 (defining extortion).

[7] "Extortion" is defined as the "...obtaining of property or other consideration from another, with his or her consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right." Cal. Pen. Code § 518. None of the evidence suggests any "wrongful use of force or fear" by Mr. Cotton. Multiple statements equating Mr. Cotton's conduct to extortion were inflammatory and prejudicial.

C. **THE ALLEGED NOVEMBER 2, 2016 AGREEMENT WAS ILLEGAL.**

The Court has a duty to, *sua sponte*, refuse to entertain an action that seeks to enforce an illegal contract. *May v. Herron*, (1954) 127 Cal.App.2d 707, 710-12 (internal citations and quotations omitted) (voiding contract where plaintiff sought to recover balance due on contract, which recovery would have allowed plaintiff to "benefit from his willful and deliberate flouting of a law designed to promote the general public welfare"). "Whether a contract is illegal ... is a question of law to be determined from the circumstances of each particular case." *Kashani v. Tsann Kuen China Enterprise Co.* (2004) 118 Cal. App. 4th 531, 540; *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, 838. A contract is unlawful and unenforceable if it is contrary to, in pertinent part, (1) an express provision of law; or (2) the policy of express law. Cal. Civ. Code § 1667(1)-(3); *Kashani, supra,* at 541 (contract must have a lawful object to be enforceable). For purposes of illegality, the "law" includes statutes, local ordinances, and administrative regulations issues pursuant to the same. *Id.* at 542. "All contracts which have for their object, *directly or indirectly*, to exempt anyone from responsibility for his own ... violation of law, whether willful or negligent, are against the policy of the law." Cal. Civ. Code § 1668 (emphasis added). A contract made for the purpose of furthering any matter prohibited by law, or to aid or assist any party in the violation of the law, is void. *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109 (voiding a contract entered into for the purpose of avoiding state and federal income tax regulations). As summarized in *Yoo v. Jho* (2007) 147 Cal.App.4th 1249:

> No principle of law is better suited than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects to be carried out. The courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act.

Id. at 1255 (internal citations and quotations omitted); *see also Kashani, supra,* at 179; Cal. Civ. Code §§ 1550, 1608. "The test as to whether a demand connected with an illegal transaction is capable of being enforced is whether the claimant requires the aid of an illegal transaction to establish his case." *Brenner v. Haley* (1960) 185 Cal.App.2d 183, 287.

May is instructive. In *May*, the Newmans and May entered into a contract whereby May agreed to construct a home for the Newmans. *May, supra,* at 708. However, May could only perform under the contract by acquiring construction materials through the veteran's priority status under Federal

Priorities Regulation No. 33, which gave preference to veterans in obtaining construction materials. *Id.* The Newmans transferred title to their property to a veteran and May secured construction materials because of his veteran's status. *Id.* at 708-09. The Court of Appeals held that the contract between May and the Newmans, while valid on its face, was illegal because May knew the house was not intended for occupancy by a veteran and May's conduct in performing his obligations under the contract violated the federal regulation.

Mr. Geraci, like May, violated local laws in pursuit of his performance under the alleged November 2, 2016 agreement. On October 31, 2016, Mr. Geraci caused to be filed with the City a CUP application which failed to disclose his ownership interest in the Property, the CUP, or the Geraci Judgments, despite the City's requirement that each of the foregoing be disclosed. (*See* **Exhibit H** at 034-001 (§ 7 requires disclosure of Geraci Judgments), *id.* at 034-004 (requires disclosure of all persons with an interest in the Property and CUP); SDMC § 112.0102(b) (application shall be made on forms provided by city manager and shall be accompanied by all the information required by the same); SDMC § 112.0102(c) (information requested on forms updated "to comply with revisions to local, state, or federal law, regulation, or policy).

The non-disclosure was purposeful. (*See* **Exhibit I** – (Discovery Resp.) at 12:8-16.) Indeed, efforts were undertaken to exclude any reference to Mr. Cotton in the CUP application because of his "legal issues" with the City. There are no disclosure exceptions for Enrolled Agents, and neither the SDMC nor the Geraci Judgments allow Mr. Geraci to comply with some of the CUP requirements. Applying the test of illegal contracts, Mr. Geraci relied upon the General Application and Ownership Disclosure Statement to suggest that he complied with the terms of the alleged November 2, 2016 agreement. As a result, Mr. Geraci asks this Court to assist him in violating local laws, which the Court is prohibited from doing.

The alleged November 2, 2016 agreement also violates the policy of express law in the form of the CUP requirements and AUMA.[8] The policy of the SDMC is disclosure and transparency in

[8] Although AUMA was adopted days after the alleged November 2, 2016 agreement, pursuant to Ordinance No. O-20793, all MMCC applications in the City were replaced with the new retail sales category called an MO. Thus, the CUP application submitted by Ms. Berry on behalf of Mr. Geraci is subject to AUMA. Furthermore, the text of AUMA was circulated in July of 2016 so all of the requirements for potential successful applicants were already known to the public and attorneys specializing in cannabis laws and regulations prior to November 2, 2016.

government. Similarly, the policy of AUMA is to bring marijuana into a regulated and legitimate market to create a transparent and accountable system. Mr. Geraci's efforts, which were undertaken both before and after November 2, 2016, violated both policies. Neither of the policies provides any exceptions for Enrolled Agents, "convenience of administration," or those persons with "legal issues" – all of which Mr. Geraci has used to justify his purposeful non-disclosure.

D. THE JURY APPLIED AN OBJECTIVE STANDARD TO MR. COTTON, AND A SUBJECTIVE STANDARD TO MR. GERACI.

Mutual assent is determined under an objective standard applied to the outward manifestations, the surrounding circumstances, the nature and subject matter of the contract, and subsequent conduct of the parties; assent is not determined by unexpressed intentions or understandings. *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141 (disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 524); *People v. Shelton* (2006) 37 Cal.4th 759, 767 (internal citations and quotations omitted). Agreements to agree are unenforceable because there is no intent to be bound and the Court may not speculate upon what the parties will agree. *Bustamante v. Intuit, Inc.* (2009) 141 Cal.App.4th 199, 213-14 (internal citations and quotations omitted).

There was no dispute relating to the parties' objective manifestations. Shortly after receiving a copy of the alleged November 2, 2016 agreement, Mr. Cotton sent an e-mail stating the 10% equity position in the dispensary was not included in the document and requested an acknowledgment that the same would be included in "any final agreement." (*See* **Exhibit K.**) Mr. Geraci responded "no problem at all." (*Id.*) Mr. Geraci then had draft final agreements prepared and circulated. The draft agreements: (i) do not state they were amending a prior agreement; (ii) do not reference a prior agreement; (iii) state that the "Date of Agreement" was "[t]he latest date of execution of the Seller or the Buyer, as indicated on the signature page;" (iv) do not provide any indication that a prior agreement was reached between the parties; and (v) include terms not set forth in the alleged November 2, 2016 agreement. None of the drafts were signed and none of the documents produced by Mr. Geraci ever referenced extortion.

Only two conclusions could have been reached if the appropriate objective standard had been applied to both Mr. Cotton and Mr. Geraci. The first possible conclusion is that the alleged November 2, 2016 agreement included the 10% interest that Mr. Geraci subsequently refused to acknowledge. The

second possible conclusion is that the e-mail exchange subsequent to the alleged November 2, 2016 agreement demonstrated the parties agreed to agree. And, therefore, the alleged November 2, 2016 agreement was not enforceable.

Instead, the jury reached the conclusion that the alleged November 2, 2016 agreement was a contract. In order to do so, the jury must have applied Mr. Geraci's subjective standard. The jury must have believed Mr. Geraci's unexpressed intentions or understandings (*i.e.*, that he was only responding to the first line of Mr. Cotton's e-mail and the statements to his counsel that he was being extorted). According to Mr. Geraci's testimony, he called Cotton the following day to explain. But if the hours that passed between the November 2, 2016 agreement and Mr. Cotton's e-mail was too late for Mr. Cotton, the day that passed before Mr. Geraci's call was also too late to explain his subjective intent as to his response. Therefore, the jury's conclusion that the alleged November 2, 2016 agreement is a contract stands in direct contrast to the objective standard applied to Mr. Cotton's conduct. The jury cannot apply objective standards to Mr. Cotton and subjective standards to Mr. Geraci.

E. MR. GERACI USED THE ATTORNEY-CLIENT PRIVILEGE AS A SHIELD AND A SWORD, THEREBY VIOLATING MR. COTTON'S RIGHT TO A FAIR AND IMPARTIAL TRIAL.

"[A]n overt act of the trial court ... or adverse party, violative of the right to a fair and impartial trail, amounting to misconduct, may be regarded as an irregularity." *Gray, supra,* 33 Cal.App.2d at 182; *see also Webber, supra,* 33 Cal.2d at 164 (affidavit not required where motion for new trial "relies wholly upon facts appearing upon the face of the record"). Litigation is not a game, and a litigant cannot claim privilege during discovery then testify at trial. *A&M Records, supra,* 75 Cal.App.3d at 566. As the *A&M* Court eloquently put it, "[a] litigant cannot be permitted to blow hot and cold in this manner." *Id.* At the February 8, 2019 hearing on Mr. Cotton's Motion to Compel Further Responses to Discovery to which Mr. Geraci asserted Attorney-Client Privilege, the Court acknowledged as much when it stated: "[T]here is a price to be paid; [Mr. Geraci] can't go back and reopen that area once [he has] narrowed the scope by asserting privilege." (*See* **Exhibit J** February 8, 2019 at 21:1-5. The Court subsequently entered an order prohibiting testimony on matters that Plaintiff asserted attorney-client privilege. Minute Order dated Feb. 8, 2019 (ROA 455) at p. 3 (prohibiting testimony on matters that Plaintiff

asserted privilege in discovery). Mr. Geraci has previously admitted that failure to disclose constitutes "substantial prejudice." *Plaintiff Larry Geraci's Memorandum of Points and Authorities in Opposition to Defendant Darryl Cotton's Motion to Expunge Lis Pendens* dated April 10, 2018 (ROA 179) at 4:7-8. (Mr. Geraci claimed that Cotton's "refusal to participate in discovery has substantially prejudiced Geraci and Berry in preparation of this case.").

Mr. Cotton propounded discovery seeking, among other things, documents and communications by and between Mr. Geraci and Ms. Austin related to the purchase of the Property. (*See* **Exhibit I** (Discovery Responses) at 13:1-13, 14:8-23.) No documents or communications were produced in connection with the request based upon attorney-client privilege. Then, at trial, Mr. Geraci waived privilege and he and Ms. Austin testified as to the very communications Mr. Cotton previously sought.

Mr. Geraci's use of the privilege as a shield and a sword violated Mr. Cotton's right to a fair and impartial trial. One of the central arguments Mr. Cotton presented was that the parties agreed to draft a final agreement. While Mr. Geraci's conduct was consistent with this argument, he and Ms. Austin testified at trial that Mr. Geraci's request for draft agreements was purportedly the result of extortion. The failure to disclose those documents constitutes, as Mr. Geraci previously admitted, substantial prejudicial to Mr. Cotton because it prevented Mr. Cotton from cross-examining Mr. Geraci and Ms. Austin on their inflammatory and prejudicial extortion allegations, as well as proving that the alleged November 2, 2016 agreement was an agreement to agree. Mr. Geraci cannot be permitted to "blow hot and cold."

CONCLUSION

For the reasons set forth herein, Mr. Cotton requests that the Court (i) find that the alleged November 2, 2016 agreement is illegal and void; or (ii) order a new trial and enable Mr. Cotton to conduct discovery related to the communications between Messrs. Geraci and Cotton.

DATED this 13th day of September, 2019.

TIFFANY & BOSCO, P.A.

By_____
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EXHIBIT 8

KOA 676
20 Pages

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, HALL OF JUSTICE

LARRY GERACI, an individual,

Plaintiff,

v.

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

Defendants.

AND RELATED CROSS-ACTION

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

Judge: Hon. Joel R. Wohlfeil

PLAINTIFF/CROSS-DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT/CROSS-COMPLAINANT'S MOTION FOR NEW TRIAL

[IMAGED FILE]

DATE: **October 25, 2019**
TIME: **9:00 a.m.**
DEPT: **C-73**

Filed: March 21, 2017
Trial Date: June 28, 2019
Notice of Entry of Judgment: August 20, 2019

TABLE OF CONTENTS

		PAGE
I.	INTRODUCTION/SUMMARY OF ARGUMENT.....	6
II.	STANDARDS FOR NEW TRIAL MOTION BASED ON C.C.P § 657(6).....	9
	A. Cotton's New Trial Motion is Limited to the Statutory Ground that the Verdict was "Against the Law" under C.C.P. § 657(6)	9
	B. The Correct Standard for a New Trial Motion Based on the Statutory Ground that the Verdict was "Against the Law"	9
III.	ARGUMENT.....	10
	A. MR. COTTON'S ILLEGALITY ARGUMENTS FAIL.....	10
	1. Mr. Cotton Has Waived and Abandoned the "Illegality" Argument.....	10
	2. The Contract at Issue in This Case is Not Illegal.....	13
	3. B&P Code Does Not Bar Mr. Geraci From Applying for a CUP.....	13
	4. It Is Common Practice For CUP Applicants To Use Agents During The Application Process	14
	B. MR. COTTON'S ARGUMENT THAT THE VERDICT IS AGAINST THE LAW BECAUSE THE JURY DISREGARDED THE JURY INSTRUCTIONS FAILS.....	15
	C. MR. COTTON'S ARGUMENT THAT HE WAS DENIED A FAIR TRIAL AS THE RESULT OF ERRORS RELATING TO THE USE OF THE ATTORNEY-CLIENT PRIVILEGE DURING DISCOVERY AND AT TRIAL ALSO FAILS.....	17
IV.	CONCLUSION.....	20

TABLE OF AUTHORITIES

PAGE(S)

CASES

A&M Records, Inc. v. Heilman
(1977) 75 Cal.App.3d 554 ..... 19, 20

Apra v. Aureguy
(1961) 55 Cal.2d 827 10

Bristow v. Ferguson
(1981) 121 Cal.App.3d 823 11

Cassim v. Allstate Ins. Co.
(2004)33 Cal.4th 780 16

Chodosh v. Palm Beach Park Association
2018 WL 6599824 11

Coombs v. Hibberd
(1872) 43 Cal. 452 20

De Felice v. Tabor
(1957) 149 Cal.App.2d 273 9

Fergus v. Songer
(2007) 150 Cal.App.4th 552 10

Fomco, Inc. v. Joe Maggio, Inc.
(1961) 55 Cal.2d 162 10

Hernandez v. County of Los Angeles
(2014) 226 Cal.App.4th 1599 17

Hoffman-Haag v. Transamerica Ins. Co.
(1991) 1 Cal.App.4th 10 15

Horn v. Atchison, T. & S.F.Ry. Co.
(1964) 61 Cal.2d 602 ..... 6, 12

Kralyevich v.Magrini
(1959) 172 Cal.App.2d 784 10

Lewis Queen v. N.M. Ball Sons
(1957) 48 Cal.2d 141 10

TABLE OF AUTHORITIES-Continued

	PAGE(S)
Lewith v. Rehmke (1935) 10 Cal.App.2d 97	7
McCown v. Spencer (1970) 8 Cal.App.3d 216	10
Malkasian v. Irwin (1964) 61 Cal.2d 738	6, 9
Manufacturers' Finance Corp. v. Pacific Wholesale Radio (1933) 130 Cal.App.239	15
Marriage of Beilock (1978) 81 Cal.App.3d 713	10
Miller v. National American Life Ins. Co. (1976) 54 Cal.App.3d 331	12
Morris v. Purity Sausage Co. (1934) 1 Cal.App.2d 120	7
Mosesian v. Pennwalt Corp. (1987) 191 Cal.App.3d 851	9
O'Malley v. Carrick (1922) 60 Cal.App. 48	10
People v. Ault (2004) 33 Cal.4th 1250	9
People v. McKeinnon (2011) 52 Cal.4th 610	16
Peterson v. Peterson (1953) 121 Cal.App.2d 1	7
Quantification Settlement Agreement Cases (2011) 201 Cal.App.4th 758	10
Ryan v. Crown Castle NG Networks Inc. (2016) 6 Cal.App.5th 775	9

///

TABLE OF AUTHORITIES-Continued

	PAGE(S)
Sepulveda v. Ishimaru (1957) 149 Cal.App.2d 543	12
Treber v. Sup. Ct (1968) 68 Ca.2d 128	17
Tagney v. Hoy (1968) 260 Cal.App.2d 372	10

STATUTES

Business & Professions Code	
Section 26000	14
Section 26001(y)	14
Section 26501	12
Section 26057	11, 13
Section 26057(b)	13, 14
Section 26057(b)(7)	18
Code of Civil Procedure	
Section 569	9, 17
Section 657(1)	9, 17
Section 657(5)	9
Section 657(6)	9, 10, 17
Section 657(7)	9, 10, 17
Evidence Code	
Section 352	12
California Constitution	
Art. VI, §13	

OTHER

Civil Trials and Evidence, Post Trial Motions, The Rutter Group ¶ 18:134.1	17
Civil Trials and Evidence, Post Trial Motions, The Rutter Group ¶ 18:201	17

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff/Cross-Defendants submit this Memorandum of Points and Authorities in Opposition to Defendant/Cross-Complainant's Motion for New Trial.

I. INTRODUCTION/SUMMARY OF ARGUMENT

This case came to jury trial on July 1, 2019 and took place over the ensuing three-week period, consisting of 9 trial days. Mr. Cotton received a fair trial. The jury unanimously found in favor of Mr. Geraci and against Mr. Cotton on his causes of action for Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing and awarded damages to Mr. Geraci. (See Special Verdict Form, ROA #635.)[1] Cotton now requests this Court to set aside the verdict.[2]

As a threshold matter, Mr. Cotton's supporting documents were not timely filed and served. CCP § 569(a) provides that "Within 10 days of filing the notice, the moving party ***shall serve upon all other parties*** and file any brief ***and accompanying documents***, including affidavits in support of the motion. ...". Here, Mr. Cotton's Notice of Intent to Move for New Trial was served and filed on September 3, 2019. The ten-day period to file his brief and accompanying documents expired on September 13th. While Mr. Cotton timely filed his ***unsigned*** Memorandum of Points and Authorities just before midnight on September 13th, that filing did not include any accompanying documents. Instead, on Monday, September 16th, (3-days late) Mr. Cotton filed two documents entitled "Errata"

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[1] The jury also unanimously found in favor of Mr. Geraci and against Mr. Cotton on all of Mr. Cotton's claims set forth in his cross-complaint. (See Special Verdict Form, ROA# 636.) Mr. Cotton does not challenge the jury verdict nor seek a new trial in connection with his cross-claims; his memorandum of points and authorities in support of his new trial motion does not argue any grounds for a new trial on his cross-claims. Even if for the sake of argument Mr. Cotton intended to move for a new trial on those claims, that motion would fail for the same reason as his new trial motion fails as to the verdict against him on Mr. Geraci's claims.

[2] Mr. Cotton's counsel, Jacob Austin, did not raise an objection to the admission of any exhibits or the examination with regard to any exhibits. Attorney Austin only made two objections throughout the trial, neither of which have any impact on the pending motion. "In an appeal ... from a judgment after denial of a motion for new trial, the failure of ... counsel to object or except may be treated as a waiver of the error." (5 Witkin, Cal. Procedure (1983 pocket sup.) Attack on Judgment in Trial Court, § 119, p. 307; *Malkasian v. Irwin* (1964) 61 Cal. 2d at p. 747; see *Horn v. Atchison, T. & S.F.Ry. Co.* (1964) 61 Cal.2d 602, 610, cert. den. Sub nom.Atchison, *Topeka & Santa Fe Railway Co. v. Horn*, 380 U.S. 909 [13 L. Ed. 2d 796, 85 S. Ct. 892] ["'In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice.'" (*Sabella* v. Sothern Pac. Co. (1969) 70 Cal.2d at p. 319.)

which contained the accompanying documents in support of his motion.[3] Affidavits or declarations filed too late may be disregarded. (See *Morris v. Purity Sausage Co.* (1934) 1 Cal.App.2d 120; *Lewith v. Rehmke* (1935) 10 Cal.App.2d 97, 105; *Peterson v. Peterson* (1953) 121 Cal.App.2d 1, 9.)

As to the merits of his motion for new trial, Mr. Cotton's asserts three grounds:

First Mr. Cotton contends the November 2, 2016 agreement was illegal and void because Mr. Geraci failed to disclose his interest in both the Property and the Conditional Use Permit ("CUP"). Mr. Cotton erroneously contends the agreement violates local law and policies, as well as state law. The statutes upon which Mr. Cotton relies were not even in effect at the time the November 2, 2016 contract was entered.[4] Even if that is disregarded, the contract was otherwise legal as discussed *infra*.

Additionally, Mr. Cotton has waived the "illegality" argument for two reasons: (1) he never raised illegality as an affirmative defense; and (2) with regard to the "illegality" argument, Attorney Austin represented to the Court at the conclusion of evidence and in response to the Court's inquiries if there were any other exhibits Mr. Austin wished to admit into evidence: "I'm willing to not argue the matter if your Honor is inclined not to include it. We can just – forget about it." (Reporter's Transcript herein after referred to as "RT") (Plaintiff/Cross-Defendants Notice of Lodgment in Opposition to Motion for New Trial ("Plaintiff NOL") (RT, July 10, 2019, p. 69:15-72:26, Ex. 6 to Plaintiff NOL)

Even assuming the illegality argument has not been waived, the argument that the November 2, 2016 contract is illegal fails. Mr. Geraci's stipulated judgments with the City of San Diego, and the

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[3] Mr. Cotton's Errata claims that "[d]ue to a clerical error, an incomplete draft of the Memorandum of Points and Authorities in Support of the Motion for New Trial was uploaded for electronic filing and service instead of the true final copy and, as such, the table of Authorities in the draft was incomplete, the document was not executed and the exhibits referenced therein were not attached." The signature page for the Memorandum of Points & Authorities attached to the Errata is dated, ***September 15, 2019***, (2 days after the papers were filed and served) which belies Mr. Cotton's claim that the motion was complete, filed and served in a timely manner and that the failure to transmit the signature page and accompanying documents was a "clerical error. Indeed, it suggests Mr. Cotton's filing was untimely.

[4] In making his illegality argument, Mr. Cotton cites to B&P Code §§ 26000 (Effective June 27, 2017); 26055 (Effective July 2019); and 26057(a) (Effective January 1, 2019). The contract in question was entered November 2, 2016. The general rule that judicial decisions are given retroactive effect is basic in our legal tradition. In *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207, the California Supreme Court observed: "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." (*United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79, 103 S.Ct. 407, 413, 74 L.Ed.2d 235.) The statutes cited by Mr. Cotton in support of his "illegality" argument were not in effect until after, sometimes years after, entering the contract in question.

use of an agent in application process for the CUP, do not render the contract illegal. Indeed, as set forth herein, several witnesses testified that it is common practice for an applicant on a CUP application for a medical marijuana dispensary to utilize an agent in that process.

Second, Mr. Cotton argues the verdict is against law because the jury disregarded the jury instructions and applied an objective standard to Mr. Cotton's conduct and a subjective standard to Mr. Geraci's conduct as related to the November 2, 2016 Agreement, the "confirmation email" and the "disavowment" allegation. To the contrary, there is no legal basis to conclude that the jury disregarded the jury instructions and applied an objective standard to Mr. Cotton and a subjective standard to Mr. Geraci's conduct. That is simply Mr. Cotton's interpretation of the facts and evidence which he would like to substitute for the jury's unanimous verdict.

Third, Mr. Cotton contends that Mr. Geraci used the attorney-client privilege as a shield during discovery and as a sword during trial, which prohibited Mr. Cotton from receiving a fair and impartial trial.[5] Mr. Cotton has misrepresented the facts, circumstances and the Minute Order issued by the Court in connection with the attorney-client privilege issues during discovery and the waiver of those issues at trial. In spite of asserting the attorney-client privilege with regard to the documents drafted by Gina Austin's office, and contrary to Cotton's arguments herein, those documents were produced to Mr. Cotton during discovery. (Cross-Defendant Rebecca Berry's Responses to Request, For Production of Documents, Set One, Ex. 1 to Plaintiff NOL; and Plaintiff/Cross-Defendant Larry Geraci's Amended Responses to Special Interrogatories, Set Two, Ex. 2 to Plaintiff NOL) The documents were also listed on the Joint TRC Exhibit List and admitted into evidence at trial without objection. (Trial Exhibits 59, 62, Ex. 7 to Plaintiff NOL; RT July 3, 2019, 129:22-133:27, Ex. 3 to NOL; Joint Exhibit List, Ex. 10 to Plaintiff NOL) Mr. Cotton's counsel did not raise any evidentiary objections to the waiver of attorney-client privilege either with regard to the documentary evidence or the testimonial evidence. As such, Mr. Cotton's claim that he was unable to cross-examine either Mr. Geraci or Ms. Austin with the relevant documents (Cotton's P's & A's, p. 5:1-3) is without merit.

[5] This is a C.C.P. § 657(7) issue regarding evidentiary rulings, a ground *not* set forth in the Notice of Intent to Move for New Trial. (See *Treber v. Sup. Ct* (1968) 68 Ca.2d 128, 131; *Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599, 1601-1605.) (Practice Guide: Civil Trials and Evidence, Post Trial Motions, (The Rutter Group 2010) ¶ 18:201.)]

Indeed, armed with those documents during discovery, Mr. Cotton never took the depositions of Mr. Geraci nor Attorney Gina Austin. And he in fact questioned the witnesses about those documents during trial. (RT July 8, 2019, p. 58:3-60:10, Ex. 4 to Plaintiff NOL)

Finally, as a matter of law, a new trial may only be granted when the verdict constitutes a miscarriage of justice. (Calif. Const., Art. VI, §13.) "If it clearly appears that the error could not have affected the result of the trial, the court is bound to deny the motion." [*Bristow v. Ferguson* (1981) 121 Cal.App.3d 823, 826; *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 866-867, (disapproved on other grounds in *People v. Ault* (2004) 33 Cal.4th 1250, 1272.)] Mr. Cotton has not demonstrated the claimed errors likely affected the result of the trial.

II. STANDARDS FOR NEW TRIAL MOTION BASED ON C.C.P. § 657(6)

A. Cotton's New Trial Motion is Limited to the Statutory Ground that the Verdict was "Against Law" under C.C.P. § 657(6)

In his Notice of Intent to Move for New Trial dated September 13, 2019, Mr. Cotton gave notice that he was bring the motion pursuant to C.C.P. § 657(6) on the ground that "the verdict is against the law." (ROA#656.) Yet in his brief, he asserts that his motion for new trial is made on the grounds of "irregularity of proceedings" under C.C.P. § 657(1) and "against the law" under (C.C.P. § 657(7), *neither of which grounds were set forth in his Notice of Intention to Move for New Trial.* (Cotton P's&A's, p. 5:10-21) A notice of intention to move for a new trial is deemed to be a motion for new trial *on the grounds stated in the notice.* (C.C.P. §659.) It is well-established that a new trial order "can be granted only on a ground specified in the motion." (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 745; *De Felice v. Tabor* (1957) 149 Cal.App.2d 273, 274.)

Mr. Cotton also asserts that "the Court sits as the 13th juror and is "vested with the plenary power – and burdened with a correlative duty – to independently evaluate the evidence," (incorrectly citing to *Ryan v. Crown Castle NG Networks Inc.* (2016) 6 Cal.App.5th 775, 784, which concerned C.C.P. § 657(5), not § 657(6). Rather, the "against law" ground differs from the "insufficiency of the evidence" ground in that there is no weighing of evidence or determining credibility. The "against law" ground applies only when the evidence is without conflict in any material point and insufficient as a matter of law to support the verdict. (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 229.)

B. The Correct Standard for a New Trial Motion Based on the Statutory Ground that the Verdict is "Against Law"

The statutory ground under C.C.P. §657(6) that the verdict is "against law" is of very limited application. (*Tagney v. Hoy* (1968) 260 Cal.App.2d 372, citing *Kralyevich v.Magrini* (1959) 172 Cal.App.2d 784 ["A decision can be said to be 'against law' only: (1) where there is a failure to find on a material issue; (2) where the findings are irreconcilable; and (3) where the evidence is insufficient in law and without conflict in any material point.[6] C.C.P. § 657(6) is not a ground to have the court reconsider its rulings. The "against law" ground applies only when the evidence is without conflict in any material point and insufficient *as a matter of law* to support the verdict. (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 229; see *Fergus v. Songer* (2007) 150 Cal.App.4th 552, 567-569 [finding verdict was not "against law" because it was supported by substantial evidence]; *Marriage of Beilock* (1978) 81 Cal.App.3d 713, 728.) C.C.P. § 657(6) does not cover errors that fall within the other sections of C.C.P. § 657, such as § 657(7). (*O'Malley v. Carrick* (1922) 60 Cal.App. 48, 51)

III. ARGUMENT

A. MR. COTTON'S ILLEGALITY ARGUMENTS FAIL

1. Mr. Cotton Has Waived and Abandoned the "Illegality" Argument

Mr. Cotton failed to raise "illegality" as an affirmative defense in his Answer to Plaintiff's Complaint (ROA#17). Normally, affirmative defenses not raised in the answer to complaint or cross-complaint are waived. (E.g., *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 813.) As stated above, Mr. Cotton did not plead "illegality" as an affirmative defense; therefore, Mr. Cotton cites *Lewis Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 146-148), for the proposition that illegality can be raised "at any time." That is a correct statement of the law, however, that rule is not unqualified. Two California Supreme Court cases decided after *Lewis & Queen – Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162, and *Apra v. Aureguy* (1961) 55 Cal.2d 827 – both rejected post-

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[6] Mr. Cotton did not set forth any failure by the court as to a finding on some material issue. Mr. Cotton also did not establish findings that are irreconcilable. Mr. Cotton further did not establish that the evidence is insufficient in law and without conflict on any material point. Other challenges as to the application of law in this case would be governed by C.C.P. § 657(7) not cited in Mr. Cotton's Notice of Intention to Move for New Trial and, therefore, are not reviewable herein. For these reasons alone, Mr. Cotton's arguments for a new trial should be rejected by this Court.

trial defenses of illegal contract because the illegality defense had not been raised in the trial court. (See *Fomco, supra,* 55 Cal.2d at p. 166; 55 Cal.2d at p. 831.) In fact, language in *Fomco* suggests that the high court actually rejected *Lewis & Queen's* dicta that the issue of illegal contract could be raised for the first time on appeal. (See *Chodosh v. Palm Beach Park Association* 2018 WL 6599824)

At trial the "illegality" issue appears to have first come up in response to questions being posed by Attorney Austin in his examination of witnesses. Attorney Weinstein argued Attorney Austin was asking questions of witnesses which implied it was illegal for Mr. Geraci to operate a legally permitted dispensary. Attorney Weinstein pointed out, and the Court agreed, that the two civil judgments on their face did not bar Mr. Geraci from operating a legally permitted dispensary. (RT, July 9, 2019, p. 120:20-121:24, Ex. 5 to Plaintiff NOL) Attorney Weinstein went on to argue that Business & Professions Code Section 26057 was *permissive* and not mandatory and that it dealt with state licenses, not a City CUP. The Court was troubled by the fact that Attorney Austin had not filed a trial brief addressing this issue, nor had Attorney Austin filed any memorandum of points and authorities on the issue. The Court concluded: "So for the time being, I'm tending to agree with the plaintiff's side without the defense having given me something I can look at and absorb." (RT, July 9, 2019, p. 120:20-123:6, Ex. 5 to Plaintiff NOL)

Later that day, Attorney Austin called Joe Hurtado to the stand. Joe Hurtado had a vested interest in the case as he was financing Mr. Cotton's litigation expenses and attorneys' fees. (RT July 9, 2019, p. 150:13-18, Ex. 5 to Plaintiff NOL) Attorney Austin improperly attempted to elicit expert testimony from Joe Hurtado, that it was his opinion that Mr. Geraci did not qualify for a CUP under the Business & Professions Code. (RT, July 9, 2019, 151:22-28, Ex. 5 to Plaintiff NOL) During Attorney Austin's examination of Mr. Hurtado, the Court initiated a side-bar at which Mr. Hurtado's proposed testimony was discussed. The Court permitted Mr. Hurtado to testify to hearsay conversations with Gina Austin and hearsay conversations with anyone else on Mr. Geraci's team. At the conclusion of Mr. Hurtado's testimony, and after excusing the jury, the Court permitted the parties to make a record of that side bar. (RT, July 9, 2019, p. 155:8-158:18, Ex. 5 to Plaintiff NOL) The Court expressed to Attorney Austin that to the extent Mr. Hurtado wanted to express legal opinions, he was not going to permit such testimony. In response, Attorney Austin admitted that "perhaps Mr.

Hurtado should have been designated as an expert...". (RT, July 9, 2019, p. 157:13-15, Ex. 5 to Plaintiff NOL) Mr. Hurtado was not designated as an expert witness and his opinion testimony was properly excluded.

The "illegality" issue was again raised on July 10, 2019, when Attorney Austin offered Trial Exhibit 281 into evidence, which was a copy of Business & Professions Code § 26051; and requested the Court take judicial notice of the two lawsuits in which Mr. Geraci was a named party. The Court sustained Attorney Weinstein's objections to Business & Professions Code § 26051 being admitted into evidence. As to the request for judicial notice of the two prior cases against Mr. Geraci, Attorney Weinstein raised an Evidence Code § 352 objection.

The Court stated:

> Putting aside whether the probative value is substantially outweighed by undue prejudice or any other of the 352 factors including but not limited to cumulativeness, as I read these judgments, Mr. Geraci is not barred from trying to obtain whatever permission he would need or anybody would need from operating a marijuana dispensary. And I thought that was your theory at one point.
>
> And if that were your theory, I'm not seeing anything, well, inside the four corners of these judgments that prohibit Mr. Geraci from, for example, doing the deal that he had proposed to do with Mr. Cotton.

Attorney Austin replied to the Court: "I think there was a change in the law, which would – would change that. ***But I'm willing to not argue the matter if your Honor is inclined not to include it. We can just – forget about it.***" The Court then sustained the objections and declined to take judicial notice of Mr. Geraci's two prior judgments. (RT, July 10, 2019, p. 69:15-72:26, Ex. 6 to Plaintiff NOL) [trial court could properly deny a motion for new trial based on a waiver of the issue during trial. (*Miller v. National American Life Ins. Co.* (1976) 54 Cal.App.3d 331, 346; *Horn v. Atchison, T. & S.F.Ry. Co.*, (1964) 61 Cal.2d 602; *Sepulveda v. Ishimaru*, (1957) 149 Cal.App.2d 543, 547]

It is clear in the instant case, that Attorney Austin abandoned his "illegality" argument; i.e., Mr. Austin's statement to the Court: "I think there was a change in the law, which would – would change that. But I'm willing to not argue the matter if your Honor is inclined not to include it. We can just – forget about it." (RT, July 10, 2019, p. 72:10-13, Ex. 6 to Plaintiff NOL) Having waived this issue during the trial, Mr. Cotton is precluded from urging it as a ground for granting a new trial.

2. The Contract at Issue in This Case is Not Illegal.

Even if the statutes Mr. Cotton relies upon were in effect on November 2, 2016 when the contract was entered (which they were not) and there were no waiver of the "illegality" issue (which there was), the November 2, 2016 agreement remains a legal contract.

The stipulated judgments on their face permit Mr. Geraci to apply for a CUP. In Case Number 37-2014-00020897-CU-MC-CTL, paragraph 8a enjoins Mr. Geraci from "Keeping, maintaining, operating, or allowing the operation of an ***unpermitted marijuana dispensary*** ...". (Italics, Bold Added.) Paragraph 8(b) specifically sates "***Defendants shall not be barred in the future from any legal and permitted use of the PROPERTY.***" (Italics, Bold Added.)

In Case Number 37-2015-00004430-CU-MC-CTL, Paragraph 7 prevents Defendant from "Keeping, maintaining, operating or allowing any commercial, retail, collective, cooperative or group establishment for the growth, storage, sale or distribution of marijuana, including, but not limited to, any marijuana dispensary, collective or cooperative organized anywhere in the City of San Diego ***without first obtaining a Conditional Use Permit pursuant to the San Diego Municipal Code.***" (Italics, bold added)

It was this language in the two stipulated judgments that led this Court to state: "I'm not seeing anything, well, inside the four comers of these judgments that prohibit Mr. Geraci from, for example, doing the deal that he had proposed to do with Mr. Cotton." To which, Attorney Austin stated "***We can just – forget about it.***" (RT, July 10, 2019, p. 69:8-15, Ex. 6 to Plaintiff NOL)

3. The B&P Code Does Not Bar Mr. Geraci From Applying for a CUP

Setting aside waiver and the fact that the two stipulated judgments, on their face, permit Mr. Geraci to obtain a CUP, there is no mandatory provision in the Business & Professions Code which would bar Mr. Geraci from lawfully obtaining a CUP.

Section 26057(b)(7) of the California Business & Professions Code provides that "[t]he licensing authority ***may*** deny the application for licensure or renewal of a **state license** if ... [t]he applicant, or any of its officers, directors or owners, has been sanctioned by a licensing authority or a city, county, or city and county for unauthorized commercial cannabis activities, has had a license suspended or revoked under this division in the three years immediately preceding the date the

application is filed with the licensing authority." (Cal. Bus. & Prof. Code § 26057(b)(7) [*emphasis added*].) Section 26057 is part of a larger division known as the Medicinal and Adult-Use Cannabis Regulation and Safety Act, which has the purpose and intent to "control and regulate the cultivation, distribution, transport, storage, manufacturing, processing, and sale" of commercial medicinal and adult-use cannabis. (Cal. Bus. & Prof. Code § 26000.) Under this division, a "license" refers to a "state license issued under this division, and includes both an A-license and an M-license, as well as a laboratory testing license." (Cal. Bus. & Prof. Code § 26001(y).)

In this case, the CUP is not a state license. Even if this statute were to apply to a CUP, the permissive nature of the authority would not *require* the denial of a CUP license because it is up to the discretion of the licensing authority to make such a decision based on the conditions provided in section 26057(b). (Cal. Bus. & Prof. Code § 26057(b).) In addition, attorney Gina Austin testified at trial the statute would not prevent Mr. Geraci from obtaining a CUP. (RT, July 8, 2019, p. 55:12-57:21, Ex. 4 to Plaintiff NOL)

4. It Is Common Practice For CUP Applicants To Use Agents During The Application Process.

Mr. Cotton argues that Mr. Geraci did not disclose his interest on the Ownership Disclosure Statement and that therefore Mr. Geraci is asking this Court to assist him in violating local laws, which the Court is prohibited from doing. (Cotton P's & A's, p. 12:16-23)

Rebecca Berry, the CUP applicant, signed the CUP forms as Mr. Geraci's agent. This was disclosed to Mr. Cotton from the outset. Prior to Mr. Cotton signing the Ownership Disclosure Statement he knew that Ms. Berry was going to be acting as Mr. Geraci's agent for purposes of the CUP. (RT, July 8, 2019, p. 99:15-19, Ex. 4 to Plaintiff NOL; and Trial Exhibit 30, Ex. 8 to Plaintiff NOL) In fact it was Mr. Cotton's belief that Ms. Berry had to sign the Ownership Disclosure Statement as a Tenant Lessee. (RT, July 8, 2019, pp. 101:26-102:7, Ex. 4 to Plaintiff NOL; and Trial Exhibit 30, Ex. 8 to Plaintiff NOL)

Abhay Schweitzer testified that there is no problem with that (Ms. Berry signing as an agent for Mr. Geraci) because, from the City's perspective, the City is only interested in having someone make the representation that they are the responsible party for paying for the permitting process. (RT,

July 8, 2019, p. 31:22-33:13, Ex. 4 to Plaintiff NOL) And as to the Ownership Disclosure statement, the City's Form is limited, only permitting three choices, none of which fit the circumstances in this case; thus attorney Gina Austin testified that there was no problem from her perspective with Ms. Berry checking tenant/lessee. (RT, July 8, 2019, p. 33:14-35:11, Ex. 4 to Plaintiff NOL) Mr. Schweitzer testified that it is not unusual for an agent to be listed as the owner on the form. (RT, July 9, 2019, p. 60:20-27, Ex. 5 to Plaintiff NOL)

During Mr. Austin's cross-examination of Firouzeh Tirandazi, a City Project Manager III (the highest classification of Project Managers at the City of San Diego), he tried to get her to testify that "anyone with an ownership or financial interest in a marijuana outlet is supposed to be disclosed to the City." Ms. Tirandazi testified that they (the City) are only looking for the property owner and the tenant/lessee. (RT, July 9, 2019, p. 112:23-28; Ex. 5 to Plaintiff NOL) Ms. Tirandazi was unfamiliar with the California Business & Professions Code vis-à-vis the CUP application process. (RT, July 9, 2019, p. 113:1-5, Ex. 5 to Plaintiff NOL)

B. MR. COTTON'S ARGUMENT THAT THE VERDICT IS AGAINST THE LAW BECAUSE THE JURY DISREGARDED THE JURY INSTRUCTIONS FAILS.

Mr. Cotton contends the verdict is contrary to law because, he argues, the jury disregarded the jury instructions and applied an objective standard to Mr. Cotton's conduct and a subjective standard to Mr. Geraci's conduct as related to the November 2, 2016 Agreement, the "confirmation email" and the "disavowment" allegation. To the contrary, there is no legal basis to conclude that the jury disregarded the jury instructions and applied an objective standard to Mr. Cotton and a subjective standard to Mr. Geraci's conduct. That is simply Mr. Cotton's interpretation of the facts and evidence which he would like to substitute for the jury's unanimous verdict.

If the jury has been instructed correctly and returns a verdict contrary to those instructions, the verdict is "against law." (See *Manufacturers' Finance Corp. v. Pacific Wholesale Radio* (1933) 130 Cal.App.239, 243.(A new trial motion based on the "against law" ground permits the moving party to raise new legal theories for the first time; i.e., the trial judge gets a second chance to reexamine the judgment for errors of law. (*Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 15.)

Mr. Cotton asks this Court to accept *his* interpretation of the evidence; disregard the jury's

evaluation and interpretation of the evidence; and grant him a new trial based upon *his* theory of what the evidence shows. Specifically, Mr. Cotton urges that there was no disputed evidence relating to the parties' objective manifestations regarding the contract formation. (Cotton P's&A's, p. 13:16-17.) This is yet another iteration of Mr. Cotton's mantra in numerous motions throughout the litigation that the "disavowment allegation" was case dispositive.

The unanimous verdict of a sophisticated jury militates strict adherence to the principle that courts "credit jurors with intelligence and common sense and presume they generally understand and follow instructions." (*People v. McKeinnon* (2011) 52 Cal.4th 610, 670 ["defendant manifestly fails to show a reasonable likelihood the jury misinterpreted and misapplied the limiting instruction"].) The Court's instructions to the jury, which, "absent some contrary indications in the record," must be presumed heeded by the jury. (*Cassim v. Allstate Ins. Co.* (2004)33 Cal.4th 780 at 803.)

The Court gave CACI Nos. 302 – Contract Formation Essential Factual Elements; 303 – Breach of Contract – Essential Factual Elements; and a host of other instructions regarding contract formation, interpretation and breach. Those instructions were correct statements of the applicable law. Mr. Cotton's counsel did not object to any of those instructions. Mr. Cotton has not overcome the presumption that the jury heeded the Court's instructions. He fails to show a reasonable likelihood the jury misinterpreted and misapplied the jury instructions related to contract formation.

In support of his argument, Mr. Cotton argues that Mr. Geraci had draft "final" agreements prepared and circulated by Attorney Gina Austin, and therefore, the argument goes, the November 2, 2016 Agreement could not have been the final agreement between the parties. This argument simply ignores the testimony of Larry Geraci that he felt he was being extorted by Mr. Cotton and did not want to lose all of the money he had invested in the project and therefore he instructed his attorney, Gina Austin to draft some agreements, attempting to negotiate some terms that Mr. Cotton might be happy with. Those draft agreements were prepared by Gina Austin's office and forwarded to Mr. Cotton. (Trial Exhibit 59, 62, Ex. 7 to Plaintiff NOL; RT July 3, 2019, 129:22-133:27, Ex. 4 to NOL) Mr. Cotton refused to accept those terms and no new agreement was reached. Mr. Geraci became fed-up and filed the instant lawsuit to protect his investment based on the November 2, 2016 written agreement the parties had entered into.

Mr. Cotton sets forth a number of factors which he claims support his interpretation of the evidence that the November 2, 2016 agreement was not the final agreement of the parties. (Cotton Ps &As, p. 13:16-25.) However, Mr. Cotton fails to acknowledge that each of the alleged factors he claims support his argument, are equally supportive of Mr. Geraci's and Attorney Gina Austin's testimony that Mr. Geraci felt he was being extorted by Mr. Cotton and requested Gina Austin to please draft new contracts so he would not lose his investment. (RT July 8, 2019, p. 41:10-26, Ex. 4 to Plaintiff NOL.) Consistent with their testimony, the November 2, 2016, written agreement was neither amended nor superseded by a new agreement.

C. MR. COTTON'S ARGUMENT THAT HE WAS DENIED A FAIR TRIAL AS THE RESULT OF ERRORS RELATING TO THE USE OF THE ATTORNEY-CLIENT PRIVILEGE DURING DISCOVERY AND AT TRIAL ALSO FAILS.

Mr. Cotton contends that Mr. Geraci used the attorney-client privilege as a shield during discovery and as a sword during trial, which prevented Mr. Cotton from receiving a fair and impartial trial. This is a C.C.P. § 657(7) issue regarding evidentiary rulings, a ground *not* set forth in Mr. Cotton's Notice of Intent to Move for New Trial. (See *Treber v. Sup. Ct* (1968) 68 Ca.2d 128, 131; *Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599, 1601-1605.) (Practice Guide: Civil Trials and Evidence, Post Trial Motions, (The Rutter Group 2010) ¶ 18:201.)]

Preliminarily, under C.C.P. § 657(1), evidentiary rulings by which relevant evidence was erroneously excluded (or conversely, irrelevant evidence erroneously admitted) may be grounds for a new trial if prejudicial to the moving party's right to a fair trial. [Civil Trials and Evidence, Post Trial Motions, The Rutter Group 18:134.1] A motion for new trial on this ground *must* be made on affidavits. Mr. Cotton has failed to file any affidavits in support of his motion for new trial

Alternatively, erroneous evidentiary rulings (admitting or excluding evidence may be challenged under C.C.P. §657(7) as an "Error in law, occurring at the trial and excepted to by the party making the application." Mr. Cotton has *not* moved for a new trial based on either C.C.P. § 657(1) or C.C.P. §657(7). Instead, in his Notice of Intent to Move for New Trial (p. 2:8-11), Mr. Cotton has sought a new trial on the sole ground that the verdict is "against law" pursuant to C.C.P. § 657(6). A notice of intention to move for a new trial is deemed to be a motion for new trial *on the grounds stated*

in the notice. (C.C.P. §659.) Mr. Cotton cannot assert grounds for new trial not stated in the Notice.

As to the merits of the argument, Mr. Cotton has misrepresented the facts, circumstances and the Minute Order issued by the Court in connection with the attorney-client privilege issues during discovery and the waiver of those issues at trial.

Mr. Cotton claims there was a Court order prohibiting testimony on matters that Plaintiff asserted attorney-client privilege. (Mr. Cotton's P's & A's, p. 14:26-28) In support of this contention, Mr. Cotton Cites to the Court's Minute Order dated February 8, 2019 (ROA#455 at p. 3.) This misrepresents what that Court Order states. It actually states:

> Plaintiff's objections on the basis of privilege to REQUEST FOR PRODUCTION NO. 29 are SUSTAINED; however, the scope of the request appears to seek relevant documents. Given Plaintiff's election to assert the privilege and/or doctrine in discovery, the Court will ***HEAR*** on the scope of the testimony Plaintiff will be not be permitted to provide at trial on the subject of the DISAVOWMANET ALLEGATION."

Cleary, the Court said it would hear and determine the scope of the testimony allowed; it did not prohibit testimony as alleged by Mr. Cotton. Thereafter, Mr. Cotton's attorney drafted the Notice of Ruling which only prevents Rebecca Berry from testifying on the matter of the disavowment allegation. It does not bar any other witness from so testifying. (ROA# 455, p. 2.)

In addition, Mr. Cotton asserts that Mr. Geraci used the attorney-client privilege as a shield and a sword, thereby violating Mr. Cotton's right to a fair and impartial trial. This argument fails on many levels, and has otherwise been waived by Mr. Cotton's failure to object to either the documentary evidence or the testimonial evidence.[7] In fact, Mr. Cotton's attorney conducted substantial examination of witnesses on these very topics.

Mr. Cotton has waived this argument for the following reasons:

1. He never took the depositions of Mr. Geraci or Gina Austin for ascertain this information from them;

2. In response to Mr. Cotton's requests for the production of all documents relating to the purchase of the property drafted or revised by Gina Austin [RFPs Nos. 18, 19], Mr. Geraci objected on the grounds of attorney-client privilege; however, in response to RFP 19, he added that ***"Responding***

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[7] "Failure to object to the reception of a matter into evidence constitutes an admission that it is competent evidence." (*People v. Close* (1957) 154 Cal.App.2d 545, 552; *People v. Wheeler* (1992) Cal.4th 284, 300.)

Party has produced previously all responsive documents drafted by Ms. Austin or persons employed in her law firm."

3. Indeed, all such responsive documents had been produced and were marked as Trial Exhibits 59 and 62 which were admitted at trial with Mr. Cotton's Attorney's representations that he had no objections to the admission of the documents. (RT July, 3, 2019, pp. 130:18-26; 132:2-7, Ex. 3 to Plaintiff NOL.) Mr. Cotton testified that he received Exhibit 59 on February 27, 2017, and Exhibit 62 on March 2, 2017. (RT July 8, 2019, pp. 137:1-138:6, Ex. 4 to Plaintiff NOL.) In fact Mr. Cotton responded to Mr. Geraci regarding those documents. (RT July 8, 2019, pp. 138:2-141:4, Ex. 4 to Plaintiff NOL; and Trial Exhibits 63 and 70, Ex. 9 to Plaintiff NOL)

4. Larry Geraci testified regarding these exhibits and the surrounding circumstances. Mr. Cotton's attorney noted he had no objection to the admission of those exhibits (RT July 3, 2019, pp. 130:18-26; 132:2-7, Ex. 3 to Plaintiff NOL) and he did not object to the testimony.

5. Attorney Gina Austin testified regarding these exhibits and the surrounding circumstances and Mr. Cotton's attorney made no objections. (RT July 8, 2019, p. 41:10-26, Ex. 4 to Plaintiff NOL)

6. Mr. Cotton's attorney cross-examined Gina Austin regarding the draft agreements drafted by Ms. Austin's office. (RT July 8, 2019, p. 58:3-60:10, Ex. 4 to Plaintiff NOL)

Having failed to make any objections whatsoever to any of the documentary and testimonial evidence of which he now complains, Mr. Cotton has waived any argument that the material should not have been admitted.

Mr. Cotton cites *A&M Records, Inc. v. Hellman* (1977) 75 Cal.App.3d 554, 556 for the proposition that a litigant cannot claim privilege during discovery and then testify at trial. The *A&M Records* case is clearly distinguishable from the case at bar. In that case, a defendant accused of distributing pirated records failed to produce at his deposition documents requested by the plaintiff "and also refused to answer any questions of substance on the constitutional ground (5th Amendment) that his answers might tend to incriminate him." (*A&M Records, supra*, 75 Cal.App.3d at p. 654.) The trial court ordered the defendant to turn over the requested documents by a specified date before trial, or the defendant would be barred from introducing them at trial, and the court also precluded the

defendant "from testifying at trial respecting matters [and] questions ... he refused to answer at his deposition[.]" (*Id.* at p. 655.) The order limit[ed] the scope of [the defendant]'s testimony only, and not that of any other witness" at his company. (*Ibid.*)

First and foremost, this case does not involve a situation where a party claims the 5th Amendment privilege against self-incrimination and then waives it at trial, so the *A & M Records* case has no application to the case at bar. The Court held that a litigant cannot assert his constitutional privilege against self-incrimination in discovery and then waive the privilege and testify at trial. (*Ibid.*) By analogy, and without citation, Mr. Cotton seeks to extend this reasoning to the attorney-client privilege being asserted during discovery and then waived at trial. This argument is inapplicable to this case where the attorney-client documents were produced to Mr. Cotton; were responded to by Mr. Cotton; were offered and admitted at trial with no objection by Mr. Cotton; the witnesses (Larry Geraci and Gina Austin) testified without any objection being made; and where Mr. Cotton's own attorney conducted extensive examination of that witness with regard to the relevant communications between Ms. Austin and her client, Mr. Geraci. And Mr. Cotton himself was examined regarding these exhibits.

IV. CONCLUSION

This Court ensured that Mr. Cotton received a fair trial from a fair and impartial jury. The jury paid careful attention, sifted through the evidence, and carefully came to an appropriate verdict. For the above-stated reasons, the Court should deny Mr. Cotton's motion for a new trial. "There must be some point where litigation in the lower courts terminates" because otherwise "the proceedings after judgment would be interminable". (*Coombs v. Hibberd* (1872) 43 Cal. 452, 453.) It is time to end this litigation in the trial court and respect the jury's judgment.

FERRIS & BRITTON
A Professional Corporation

Dated: September 23, 2019

By: Michael R. Weinstein
Michael R. Weinstein
Scott H. Toothacre
Attorney for Plaintiff/Cross-Defendant LARRY GERACI and Cross-Defendant REBECCA BERRY

EXHIBIT 9

RVA 001
13 Pages

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

LARRY GERACI, an individual,

Plaintiff,

vs.

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

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

vs.

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

REPLY IN SUPPORT OF MOTION FOR NEW TRIAL

Action Filed: March 21, 2017
Trial Date: June 28, 2019

Hr'g Date: October 25, 2017
Time: 9:00 a.m.
Dept.: C-73

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In his *Memorandum of Points and Authorities in Support of Motion for New Trial* (the "Motion for New Trial"), Mr. Cotton demonstrated that: (1) Mr. Geraci failed to comply with the City's and the State's CUP requirements and, therefore, the alleged November 2, 2016 agreement is illegal; (2) the jury applied an objective standard to Mr. Cotton and a subjective standard to Mr. Geraci; and (3) Mr. Geraci used the attorney-client privilege as a shield during discovery and a sword at trial. In his *Opposition to Defendant/Cross-Complainant's Motion for New Trial* (the "Response"), Mr. Geraci attacks the merits of the arguments on three separate grounds.

First, the Response argues that the illegality argument was waived because it was not raised in the Answer. The argument fails because Mr. Cotton reserved the right to assert all affirmative defenses in paragraph 16 of his Answer, illegality cannot be waived, and the Court has a duty, *sua sponte*, to address the argument.

Second, the Response argues that the alleged November 2, 2016 agreement is not illegal because neither the Geraci Judgments[1] nor the California Business & Professions Code ("BPC") prohibit Mr. Geraci from obtaining a CUP. The Motion for New Trial demonstrated that: (i) the SDMC and the BPC required the disclosure of both Mr. Geraci's interest and the Geraci Judgments; (ii) Mr. Geraci filed the CUP application with the City on or about October 31, 2016; (iii) the General Application and Ownership Disclosure Statement failed to disclose the Geraci Judgments and Mr. Geraci's interest, respectively; and, as a result, (iv) the alleged November 2, 2016 agreement was illegal when it was entered into. The Response attempts to get around the non-disclosure issue by relying upon testimony from fact witnesses that it is "common practice" for CUP applicants to use agents during the application process. The Response does not identify any legal authority that suggests "common practice" is a defense to illegality.

Similarly, the Response also advanced several excuses as to why Mr. Geraci's interest was not disclosed. The excuses included: (i) Mr. Geraci's status as an enrolled agent; (ii) "convenience of administration;" and (iii) the City's forms only allowed Ms. Berry to sign as an owner, tenant, or "Redevelopment Agency." The Response does not provide any legal authority that the foregoing allows

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[1] Defined terms have the same meaning given them in the Motion for New Trial unless otherwise defined herein; with the exception of "AUMA" and "Prop. 64," which refer to the same legislation and are referred to herein solely as AUMA.

Mr. Geraci to escape the disclosure requirements or policies of the SDMC or BPC. And the Ownership Disclosure Statement states that additional pages may be attached to disclose interests in the property and permit, while the General Application requires the applicant to check a box (yes or no) to disclose the Geraci Judgments. The arguments are legally and factually unsupported.

For the reasons set forth in the Motion for New Trial and below, the relief sought in the Motion for New Trial should be granted.

I. The Court should consider the attachments and the attorney-client privilege argument.

Mr. Geraci argues that the attachments to the Motion for New Trial should be disregarded. (Resp. at 6:10-7:3.) With the exception of motions "clearly without merit," judges "permit the moving party to file and serve a supporting memorandum beyond the ten-day time limit, particularly when the late filing will not prejudice the opposing party or adversely affect the judge's ability to decide the motion within the [75]-day time limit." Cal. Judges Benchbook Civ. Proc. After Trial § 2.76.[2] The attachments to the Motion for New Trial were part of the record, discovery, or in the public domain (*e.g.* City Ordinances). The exhibits were attached for convenience, the exhibits were part of the record or were legal authority, there is no prejudice to Mr. Geraci, and as a result they should be considered.

Mr. Geraci also argues that the Motion for New Trial must be limited to the "against law" grounds set forth in the *Notice of Intent to Move for New Trial* (the "Notice") and, as a result, the arguments related to the use of the attorney-client privilege as a sword and a shield should be excluded. (Resp. at 9:11-21; *id.* at pp. 17-19.) The attorney-client privilege argument should be considered because the argument and facts also relate to the jury's application of an objective standard to Mr. Cotton's conduct and a subjective standard to Mr. Geraci's conduct. (*See* Resp. at pp. 15-17.) Indeed, the Response argues that Mr. Cotton's objective/subjective argument "ignores the testimony of Larry Geraci that he felt he was being extorted" and "the alleged factors [Mr. Cotton] claims support his argument, are equally supportive of Mr. Geraci's and Attorney Gina Austin's testimony that Mr. Geraci felt he was being extorted." (Resp. at 16:20-24; 17:3-6.)

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[2] CCP § 660 was amended in 2018, extending the time limit from 60 to 75 days.

II. Mr. Cotton did not waive the illegality argument.

In the Response, Mr. Geraci argues that Mr. Cotton waived the illegality argument. (Resp. at 10-12.) Mr. Geraci presents three arguments in support of the waiver argument. For his first argument, Mr. Geraci argues that Mr. Cotton "failed to raise 'illegality' as an affirmative defense in his Answer." (Resp. at 10:17-18.) Mr. Cotton expressly reserved the right to assert affirmative defenses in paragraph 16 of his Answer. (ROA # 17, ¶ 16.) Moreover, a party to an illegal contract cannot waive the right to assert the defense. *City Lincoln-Mercury Co. v. Lindsey* (1959) 52 Cal.2d 267, 273-74 (internal citations omitted); *Wells v. Comstock* (1956) 46 Cal.2d 528, 531-32 ("no person can be estopped from asserting the illegality of the transaction"). The argument also ignores the well-established rule that "even though the defendants in their pleadings do not allege the defense of illegality if the evidence shows the facts from which the illegality appears it becomes 'the duty of the court *sua sponte* to refuse to entertain the action.'" *May v. Herron* (1954) 127 Cal.App.2d 707, 710 (quoting *Endicott v. Rosenthal* (1932), 216 Cal. 721, 728).

For his second argument, Mr. Geraci argues that Mr. Cotton cannot raise illegality in the Motion for New Trial because *Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162 and *Apra v. Aureguy* (1961) 55 Cal.2d 827 "both rejected post-trial defenses of illegal contract because the illegality defense had not been raised in the trial court." (Resp. at 10:23-11:4.) In *Fomco*, the Court noted that "[t]he defense of illegality was not raised in the trial of the action, and no evidence was introduced on the subject." *Fomco*, 55 Cal.2d at 165. The Court then distinguisbed *Lewis & Queen* on the grounds that "tbe issue of illegality was first raised *during the trial* and not for the first time on a motion for new trial." *Id.* at 165 (emphasis in original). Similarly, in *Apra*, the Court relied upon *Fomco* in holding that "questions not raised in the trial court will not be considered on appeal." *Apra*, 55 Cal.2d at 831. Here, the Response acknowledges that the issue of illegality was raised several times during the trial and evidence of Mr. Geraci's failure to disclose his ownership interest was before the Court. (Resp. at pp. 11-12); *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1112 ("Whether the evidence comes from one side

or the other, the disclosure is fatal to the case.") As a result, *Fomco* and *Apra* are distinguishable, *Lewis & Queen* is controlling, and Mr. Cotton can raise illegality in the Motion for New Trial.[3]

For his third argument, Mr. Geraci argues Mr. Cotton waived the illegality issue when Attorney Austin stated that he was willing not to argue an evidentiary objection made after a request to take judicial notice of the Geraci Judgments. (Resp. at 12:17-23.) In support of the argument, Mr. Geraci relies on *Miller v. National American Life Ins. Co.* (1976) 54 Cal.App.3d 331; *Horn v. Atchison, T. & S.F.Ry. Co.* (1964) 61 Cal.2d 602; and *Sepulveda v. Ishimaru* (1957) 149 Cal.App.2d 543. The reliance is misplaced. The language quoted in the Response relates to Attorney Austin's efforts to have the Court take judicial notice of the Geraci Judgments; the statements cannot be construed as a waiver of the illegality argument in its entirety.

Additionally, the Geraci Judgments, and testimony related thereto, was the subject of a motion in limine, which was "a sufficient manifestation of objection to protect the record." (*See* ROA 581.0; ROA 596); *Boston v. Penny Lane Centers, Inc.* (2012) 170 Cal.App.4th 936, 950; Cal Evid. Code § 353. Further, the illegality issue was also the subject of Mr. Cotton's motion for a directed verdict (ROA # 615 at 5:21-22 (arguing the Geraci Judgments prohibit Mr. Geraci from obtaining a CUP, or owing/operating a marijuana dispensary).) And, in any event, *Miller* held that while "waiver and estoppel normally preclude reversal on appeal from a judgment...[] they do not restrict the discretion of the trial judge to grant a new trial" and *City Lincoln-Mercury* held the illegality defense cannot be waived. *Miller*, 54 Cal.App.3d at 346; *City Lincoln-Mercury*, 52 Cal.2d at 273-74. Mr. Cotton has not waived the illegality argument.

III. The Response does not address the SDMC,[4] which requires the disclosure of Mr. Geraci's interest and the Geraci Judgments, or the underlying policy of transparency.

The Response does not dispute that: (i) the SDMC required the disclosure of Mr. Geraci's interest and the Geraci Judgments; (ii) the Geraci Judgments required Mr. Geraci to comply with the

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[3] Although Rule 8.115 of the Cal. Rules of Court restricts citation to unpublished decisions, the Response cites to *Chodosh v. Palm Beach Park Association* 2018 WL 6599824. In *Chodosh*, the issue of illegality "*was* raised at trial – even if obliquely as part of a shotgun blast of allegations of illegality...The issue having been raised at the trail level, its consideration at the appellate level comes within *Lewis & Queen* and outside the rule of *Fomco* and *Apra*." *Id.* at *6 (emphasis in original).

[4] The Motion for New Trial cited to SDMC §§ 112.0102(c), 42.1502, 42.1504, and 42.1507. (*See* Mot. for New Trial at 8:14-19.) Although the Motion for New Trial referenced the code provisions in the context of "marijuana outlets," the provisions were in effect since

requirements of the SDMC;[5] (iii) Mr. Geraci purposefully failed to disclose his interest; and (iv) the non-disclosure was made prior to (and after) the alleged November 2, 2016 agreement was entered into. (Mot. for New Tr. at 7:17-9:25, 12:7-23; *see gen.* Resp.) The Response also does not dispute that transparency is one of the underlying policies of the SDMC - as evidenced by, among other things, the Ownership Disclosure Statement and required background check. (Mot. for New Tr. at 12:24-13:5; *see gen.* Resp.) And, finally, the Response does not address, let alone distinguish, *May v. Herron* (1954) 127 Cal.App.2d 707. (Mot. for New Tr. at 11:1-13:5; *see gen.* Resp.)

Although the Response does not challenge the foregoing facts or law, the Response argues that the use of agents is "common practice" and, therefore, the alleged November 2, 2016 agreement is not illegal. (Resp. at 14:14-15:13.) There are several problems with the argument. First, the Response does not cite to any legal authority for the proposition that "common practice" makes an illegal contract legal. (*See id.*) None exists.

Second, the argument relies upon the testimony of *fact* witnesses. It is axiomatic that a fact witness cannot take the place of the Court to determine the illegality of a contract. It is the Court's duty to determine illegality. *See May, supra* at 710 (it is the Court's duty to determine illegality). Third, even if "common practice" did make an illegal contract legal, Mr. Schweitzer's testimony as a fact witness cannot be construed so broadly as to provide an opinion on what is "common practice" for all CUP applications across the City.[6]

Fourth, the Response reasserted the allegation that the non-disclosures were the result of a limitation of the City's forms. (Resp. at 15:1-4.)[7] The Ownership Disclosure Statement, however, requires the disclosure of all persons who have an interest in the Property/CUP and states: "Attach additional pages if needed." (Mot. for New Tr., Exhibit D (Ownership Disclosure Statement) at Part I.) And the General Application required the Geraci Judgments to be disclosed by checking one of two

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2011. With the adoption of ordinance No. O-20795 in April 2017, the term "medical marijuana consumer cooperatives" was replaced with "marijuana outlets."

[5] The Response acknowledges the Geraci Judgments require Mr. Geraci to obtain a CUP "***pursuant to the San Diego Municipal Code.***" (Resp. at 13:14) (emphasis in original).

[6] Mr. Schweitzer's testimony excluded the fact that the ownership disclosures are also required for the Hearing Officer. (July 8 Tr. at 33:19-34:1.)

[7] The Response also suggests that Ms. Tirandazi testified that the City is "only looking for the property owner and the tenant/lessee." (Resp. at 15:10-11.) The cited portion of the transcript suggests that she looked at the Ownership Disclosure Statement and stated that it was the property owner and a tenant/lessee that would have to be identified. The forms contradict the testimony.

boxes (yes or no) and instructed a copy of the same be attached. (*Id.* at Exhibit H.) The purported shortfalls of the City's forms do not exist or otherwise obviate the disclosure requirements.

Fifth, the argument ignores correspondence from Ms. Austin to Mr. Schweitzer instructing him to keep Mr. Cotton's name off the CUP application "unless necessary" because Mr. Cotton had "legal issues" with the City. (*Id.* at 8:22-9:3.) Sixth, the argument ignores the testimony from Mr. Geraci and Ms. Berry that Mr. Geraci's interest was not disclosed purposefully because of his status as an enrolled agent and administrative convenience. (*Id.* at 9:17-19.) Finally, the argument conflates the use of an agent to complete forms with the SDMC's requirements to disclose Mr. Geraci's interest and the Geraci Judgments. The two issues are separate and distinct, and the use of an agent to complete a form does not somehow change the disclosure requirements.

The purpose of the illegality rule "is not generally applied to secure justice between parties who have made an illegal contract, but from regard for a higher interest – that of the public, whose welfare demands that certain transactions be discouraged." *May, supra* at 712 (quoting *Takeuchi v. Schmuck* (1929) 206 Cal. 782, 786). The Court cannot give effect to the alleged November 2, 2016 agreement because to do so would condone Mr. Geraci, and others, to knowingly and purposefully circumvent the requirements of the SDMC.

IV. AUMA is applicable and its express policy and laws supports the conclusion that the alleged November 2, 2016 agreement is illegal.

As to AUMA's application, the provisions of AUMA were circulated to the public in July 2016, adopted by the voters on November 8, 2016, and became effective on November 9, 2016. With the adoption of AUMA, Mr. Geraci's CUP application, initially filed for a medical marijuana cooperative, was processed as an application for a marijuana outlet. (*See* Mot. for New Tr., Exhibit I (letter from City dated September 26, 2018 referencing CUP for "Marijuana Outlet").) Because AUMA's policies were known at the time of the alleged November 2, 2016 agreement and Mr. Geraci pursued a CUP for a marijuana outlet after AUMA became effective, AUMA's policies are applicable and consistent with the SDMC's policy of transparency and disclosure. *See Industrial Development & Land Co. v. Goldschmidt* (1922) 56 Cal.App. 507, 509 ("A contract in its inception must possess the essentials of having competent parties, a legal object, and a sufficient consideration. Lacking any one of these, no binding obligations

result; hence a contract which contemplates the doing of a thing which is unlawful at the time of the making thereof is void. For the same reason a contract which contemplates the doing of a thing, at first lawful but which afterward and during the running of the contract term becomes unlawful, is affected in the same way and ceases to be operative upon the taking effect of a prohibitory law."). AUMA is applicable.

The Response does not dispute that one of the express policies of AUMA was to bring marijuana "into a regulated and legitimate market [by creating] a transparent and accountable system." (Mot. for New Tr. at 7:5-15.) Further, AUMA sought to limit those persons involved in the marijuana industry by, among other things, prohibiting an applicant who has been sanctioned by a city for unauthorized commercial marijuana activities from obtaining a state license. *See* AUMA at §§ 3 (Purpose and Intent), 6 (adding § 26057(b)(7). In furtherance of that policy, AUMA states that the licensing authority shall deny an application if the applicant does not qualify and, by adding § 26057(b)(7), prohibited an applicant from obtaining a license if they have been sanctioned for unauthorized commercial marijuana activity. AUMA at § 6.1 (adding § 26057(a)-(b)). While pursuing a CUP for a MO, Mr. Geraci failed to disclose his interest and the Geraci Judgments – a direct conflict with AUMA's express policies.

The Response argues § 26057(b) does not bar Mr. Geraci from obtaining a state license because the statute is discretionary. (Resp. at 13-14.) The argument conflicts with two pillars of statutory construction. The interpretation would render meaningless §§ 26057(a) and 26059. *People v. Hudson* (2006) 38 Cal.4th 1002, 1010 (interpretations that render statutory terms meaningless are to be avoided) (internal citations omitted). Section 26057(a) mandates the denial of an application for a state license if the *applicant* does not qualify, while § 26059 prohibits the State from denying an applicant based solely on two grounds – none of which are applicable here. Mr. Geraci's interpretation renders §§ 26057(a) and 26059 meaningless.

The interpretation also applies the same meaning to two separate words. *In re Austin P.* (2004) 118 Cal.App.4th 1124, 1130 ("When different terms are used in parts of the same statutory scheme, they

are presumed to have different meanings."). The mandatory provisions of Section 26057(a) apply to the *applicant*[8] or premises, while the permissive provisions of 26057(b) apply to the *application*.

Here, it is undisputed that Ms. Berry was the named applicant on the CUP application, Ms. Berry was applying for the CUP solely as Mr. Geraci's agent, and Mr. Geraci was and always had been the party pursuing the operation of a marijuana dispensary at the Property. As the central purpose of the alleged November 2, 2016 agreement was Mr. Cotton's operation of a marijuana dispensary at the Property, and his interest was never disclosed, the alleged agreement violated applicable state law and policy and cannot be enforced. *Homami, supra* at 1109.

V. The jury failed to apply an objective standard to both parties, and the Response confirms as much.

In the Response, Mr. Geraci argues that the subjective/objective standard argument "is simply Mr. Cotton's interpretation of the facts" and then goes on to argue that Mr. Geraci "*felt* he was being extorted." (Resp. at 16:20-24, 17:3-6) (emphasis added.) The objective manifestations set forth in the November 2, 2016 e-mail correspondence, the actions of Mr. Geraci thereafter, and the content of the draft agreements are not in dispute. The issue before the Court is whether Mr. Geraci's subjective intent, beliefs, and feelings can be considered by the jury.

First, in explaining his November 2, 2016 e-mail confirming he would provide Mr. Cotton a 10% equity position in the contemplated marijuana dispensary, Mr. Geraci testified that he did not read the entirety of Mr. Cotton's e-mail. However, a party cannot claim he did not read an offer before accepting it. *See Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1587 (plaintiff's claim that he did not read the agreement before signing it did not raise a triable issue of mutual assent) (internal citations omitted).

Second, the Response argues that Mr. Geraci felt he was being extorted and that the facts supporting Mr. Cotton's argument are "equally supportive of Mr. Geraci's and [Ms.] Austin's testimony that Mr. Geraci *felt* he was being extorted by Mr. Cotton and requested [Ms.] Austin to please draft new contracts." (Resp. at 17:4-6) (emphasis added.) A person's undisclosed feelings is subjective and should

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[8] The applicable term "applicant" was defined in § 26001(a)(1), which does not make the terms "applicant" and "application" synonymous.

have been disregarded been disregarded by the jury. *Stewart, supra* at 1587 (a party's subjective intent is irrelevant). Moreover, none of the documents or communications produced at trial reference or otherwise suggest extortion. Mr. Geraci's subjective and inflammatory feelings have no application to the issues.

It is worth noting here that, as it relates to Mr. Geraci using attorney-client privilege as a sword and a shield, the Response argues that *documents* were produced. (Resp. at 18:24-19:9) (emphasis added.)[9] The issue is not about the production of documents; it is the withholding of *communications* that were then used at trial to introduce evidence of Mr. Geraci's subjective and inflammatory feelings.

Third, the Response argues that Mr. Cotton waived the argument because he did not depose Ms. Austin and that, in any event, Mr. Cotton had the opportunity to cross examine Ms. Austin. (Resp. at 18:22-23, 19:16-17.) As to the former, Mr. Geraci claimed privilege during discovery so attempting to take Ms. Austin's deposition would have been a futile act, which the law does not require. *Cates v. Chiang* (2013) 213 Cal.App.4th 791. As to the latter, any attempt to cross-examine Ms. Austin at trial would have been pointless because no communications were disclosed and, therefore, there was no ability to impeach the testimony of either Mr. Geraci or Ms. Austin. Mr. Geraci asserted privilege during discovery then waived the privilege at trial - he cannot blow hot and cold. *A&M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 566.[10]

If an objective standard was applied to both parties, based on the evidence admitted, the jury could have only reached one of two conclusions. The first conclusion is that the parties' agreement included at the very least the terms of the alleged November 2, 2016 agreement *and* the 10% interest that Mr. Geraci confirmed via e-mail. As Mr. Geraci failed and refused to recognize Mr. Cotton's 10% interest, he breached the same and cannot maintain his claim. The second conclusion the jury could

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[9] The Response argues that the Motion for New trial makes a misrepresentation to the Court regarding an order prohibiting testimony on matters that Plaintiff asserted attorney-client privilege. (*See* Mot. for New Trial at 14:23-15:1; Resp. at 18:5-12.). At the February 8, 2019 hearing, the Court stated unequivocally that Mr. Geraci "can't go back and reopen that area once [he has] narrowed the scope by asserting privilege." The subsequent order sustained the objection asserting privilege, but allowed some testimony on the relevant documents. The statement in the Motion for New Trial is not a misrepresentation particularly given the Court's statements at the hearing that there is a "price to be paid" for asserting privilege.

[10] Mr. Geraci attempts to distinguish *A&M Records* based upon the type of privilege asserted. (Resp. at 20:4-6.) There is no meaningful distinction between the use of the 5th Amendment or attorney-client privilege as a sword and a shield, and the Response does not cite to any case law to supporting the distinction. The "blow hot and cold" doctrine has a long and broad application when parties attempt to take inconsistent positions. *See e.g. McDaniels v. General Ins. Co. of America* (1934) 1 Cal.App.2d 454, 459-60. There is no suggestion or authority that the doctrine would not apply here.

have reached, based upon the November 2, 2016 e-mail correspondence and subsequent exchange of draft agreements, is that the parties had an agreement to agree – which is not enforceable. The jury found neither.

Instead, the jury applied a subjective standard to Mr. Geraci. Mr. Geraci defended his November 2, 2016 e-mail and subsequent exchange of draft agreements on two subjective grounds – his testimony that he did not read the entire e-mail and his feeling/belief that he was being extorted. This was improper and a new trial is warranted.

VI. CONCLUSION

The Motion for New Trial should be granted. The alleged November 2, 2016 agreement is illegal as it fails to comply with express provisions of the SDMC, as well as the policies of the SDMC and AUMA. Second, the jury applied an objective standard to Mr. Cotton's conduct and a subjective standard to Mr. Geraci's. Thus, for the reasons set forth in the Motion for New Trial and this Reply, the relief sought in the Motion for New Trial should be granted.

DATED this 30th day of September, 2019.

TIFFANY & BOSCO, P.A.

By: 

EVAN P. SCHUBE
Attorneys for Defendant/Cross-Complainant
Darryl Cotton

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FIRM NAME: Tiffany & Bosco, P.A.
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E-MAIL ADDRESS: eps@tblaw.com
ATTORNEY FOR (name): Defendant/Cross-Complainant Darryl Cotton

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego
STREET ADDRESS: 330 West Broadway
MAILING ADDRESS: 330 West Broadway
CITY AND ZIP CODE: San Diego, CA 92101
BRANCH NAME: Central Division - Civil

CASE NUMBER: 37-2017-00010073-CU-BC-CTL

PLAINTIFF/PETITIONER: LARRY GERACI

DEFENDANT/RESPONDENT: DARRYL COTTON, et al.

JUDICIAL OFFICER: The Honorable Joel R. Wohlfeil

DEPARTMENT: C-73

PROOF OF ELECTRONIC SERVICE

1. I am at least 18 years old.
   a. My residence or business address is *(specify)*:
      1455 Frazee Road, Suite 820
      San Diego, CA 92108

   b. My electronic service address is *(specify)*:
      ybrinkman@tblaw.com

2. I electronically served the following documents *(exact titles)*:
   Reply in Support of Motion for New Trial

   ☐ The documents served are listed in an attachment. *(Form POS-050(D)/EFS-050(D) may be used for this purpose.)*

3. I electronically served the documents listed in 2 as follows:
   a. Name of person served: Michael R. Weinstein, Ferris & Britton, APC

      On behalf of *(name or names of parties represented, if person served is an attorney)*:
      Plaintiff/Cross-Defendant LARRY GERACI and Cross Defendant REBECCA BERRY

   b. Electronic service address of person served:
      mweinstein@ferrisbritton.com

   c. On *(date)*: September 30, 2019

      ☒ The documents listed in item 2 were served electronically on the persons and in the manner described in an attachment. *(Form POS-050(P)/EFS-050(P) may be used for this purpose.)*

Date: September 30, 2019

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

Yvette Brinkman
(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

Form Approved for Optional Use
Judicial Council of California
POS-050/EFS-050 [Rev February 1, 2017]

PROOF OF ELECTRONIC SERVICE
(Proof of Service/Electronic Filing and Service)

Cal. Rules of Court, rule 2.251
www.courts.ca.gov

SHORT TITLE: Larry Geraci v. Darryl Cotton	CASE NUMBER: 37-2017-00010073-CU-BC-CTL

ATTACHMENT TO PROOF OF ELECTRONIC SERVICE (PERSONS SERVED)

(This attachment is for use with form POS-050/EFS-050.)

NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:

Name of Person Served *(If the person served is an attorney, the party or parties represented should also be stated.)*	Electronic Service Address	Date of Electronic Service
Jacob P. Austin, Esq., Atty for Darryl Cotton	jpa@jacobaustinesq.com	Date: 09/30/2019
		Date:
		Date:
		Date:
		Date:
		Date:
		Date:
		Date:
		Date:
		Date:
		Date:
		Date:

EXHIBIT 10

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO, CENTRAL DISTRICT

DEPARTMENT 73 HONORABLE JOEL R. WOHLFEIL, JUDGE

LARRY GERACI, PLAINTIFF, VS. DARRYL COTTON, DEFENDANT.	CASE NO. 37-2017-00010073-CU-BC-CTL OCTOBER 25, 2019 FRIDAY, 9:00 AM MOTION FOR A NEW TRIAL EX PARTE HEARING

REPORTER'S CERTIFIED TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR THE PLAINTIFF: MICHAEL R. WEINSTEIN, ESQ.
SCOTT H. TOOTHACRE, ESQ.
FERRIS & BUTTON, APC
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SAN DIEGO, CA 92101

FOR THE DEFENDANT: EVAN P. SCHUBE, ESQ.
FOR: JACOB AUSTIN, ESQ.
PO BOX 231189
SAN DIEGO, CA 92193

REPORTED BY: ELIZABETH CESENA, CSR 12266
PO BOX 131037, SD, CA 92170
LIZCEZ@GMAIL.COM

SAN DIEGO, CALIFORNIA, OCTOBER 25, 2019, FRIDAY, 9:00 AM

--000--

THE COURT: Item five, Geraci versus Cotton, case number 10073.

MR. WEINSTEIN: Good morning, Your Honor.

Michael Weinstein and Scott Toothacre on behalf of Mr. Geraci and Ms. Berry, who is not a part of this conference.

THE COURT: And Counsel?

MR. SCHUBE: Good morning, Your Honor.

Evan Schube on behalf of Mr. Cotton.

THE COURT: All right. Did I hear you two say that you were submitting?

MR. WEINSTEIN: Yeah. We are submitting, Your Honor, with time to respond.

THE COURT: All right. Counsel?

MR. SCHUBE: Thank you. I'll get to the illegality of the contract issue first. The fact is it cuts to the heart of the motion that we filed and the biggest issue.

A couple of items I wanted to raise with the Court, a couple of factual items I wanted to raise with the Court.

First one, on Exhibit H of our motion, is a leave to file the application to CUP Applications that were filed. In general application, which is Trial Exhibit 4200, it's states that "Notice of violation is required to be disclosed," and skip back to page four of the same Trial Exhibit, the Ownership Disclosure Statement, it also says,

"the name of any person of interest in the property must also be disclosed," and it states to potentially attach pages if needed.

THE COURT: So you are saying the contract is unenforceable?

MR. SCHUBE: Yes.

THE COURT: As a matter of law?

MR. SCHUBE: Yes. CUP was a condition precedent to the contract.

THE COURT: Counsel, up until this point in time, this case was filed in 017. Your side has been screaming at the Court and filed multiple writs asking me to adjudicate the contract as a matter of law in favor of your side.

Now you are asking me in, after an adverse finding, to adjudicate the law for the other side? You are doing a 180. Truly, you are doing a 180.

MR. SCHUBE: I came in on a limited scope. I don't have the background.

THE COURT: I do. They do. They have been sitting --

MR. SCHUBE: But my understanding was there were the motions that were made were based upon my clients understanding of what the agreement is which is not specifically related to the November 2, 2016 agreement that the jury found. Our motion is a bit more limited in that regard. I may be wrong. That's my understanding of the background of the case.

THE COURT: Again, from the Court's perspective as a matter of law up to this point. You have been asking me to adjudicate the contract in your favor. Now you're asking the Court to adjudicate the contract as a matter of law against the other side.

Counsel, shouldn't this have been raised at some earlier point in time?

MR. SCHUBE: Should it have, Your Honor? My personal opinion is that it should have been raised before but it was not and we are where we are and so hence, the reason why we're raising the issue now on a Motion for New Trial.

I think what has been referred to before, the illegality argument has been raised before and raised in the context of reference to State Law and Section 2640 of the California Business and Professions Code. I believe what was not conveyed to the Court was that these requirements for these forms, the specific provisions in the San Diego Municipal Code that require those disclosures and require applicant provide information.

The information was not provided. And --

THE COURT: Even if you are correct, hasn't that train come and gone? The judgment has been entered. You are raising this for the first time.

MR. SCHUBE: Your Honor, illegality of the contract can be raised any time whether in the beginning or during the case or on appeal.

THE COURT: So it's akin to a jurisdictional

challenge?

MR. SCHUBE: I don't know if it's akin to a jurisdictional challenge, but the issue can be raised.

THE COURT: But at some point, doesn't your side waive the right to assert this argument? At some point?

MR. SCHUBE: I am not suggesting we waived that. The Case Law I saw in the motion cited that there is a duty and the duty continues and so I am not aware if there is anything that suggests that we waived that argument.

THE COURT: Anything else, Counsel?

MR. SCHUBE: The other thing I'd like to point out, Section 11.0401 of San Diego Municipal Code specifically states that "every applicant prior be furnished true and complete information." And that's obviously not what happened here. I think it's undisputed and the reasoning for the failure to disclose, there is no exception to either the San Diego Municipal Code or failure to disclose.

THE COURT: Thank you, very much.

MR. SCHUBE: Thank you, Your Honor.

THE COURT: I am not inclined to change the Court's view. Did either one of you need to be heard?

MR. TOOTHACRE: Just to make a record. One comment with respect to the illegality argument. Obviously, we agree with the comments of the Court but the failure to make these disclosures in the CUP, it doesn't make the contract between Geraci and Cotton unenforceable. It's one thing to say that the contract or the form wasn't

properly filled out, that doesn't make the contract unenforceable. That's all we have for the record.

THE COURT: Counsel, the Court observed this case throughout the entirety, including at trial. Quite frankly, I thought your client did well on the witness stand. Truly.

But the jury categorically rejected your side's claim and I am persuaded everybody got a fair trial here. The Court confirms the tentative ruling as the order of the Court. I will direct Plaintiff's side to serve Notice of the Decision. Thank you very much.

MR. WEINSTEIN: Thank you, Your Honor.

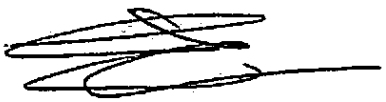
MR. TOOTHACRE: Thank you, Your Honor.

(END OF PROCEEDING AT 9:23 AM)

SAN DIEGO, CALIFORNIA)
) SS:
COUNTY OF SAN DIEGO)

I, ELIZABETH M. CESENA, CSR 12266, A COURT-APPROVED REPORTER OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, DO HEREBY CERTIFY THAT I REPORTED IN SHORTHAND THE PROCEEDINGS, TO THE BEST OF MY ABILITY, IN THE ABOVE-ENTITLED CAUSE AND THAT THE FOREGOING TRANSCRIPT, NUMBERED FROM PAGES 1 TO 7, IS A FULL, TRUE AND CORRECT TRANSCRIPT OF PROCEEDINGS HELD ON OCTOBER 25, 2019.

SAN DIEGO, CALIFORNIA, DATED THIS 9TH DAY OF JUNE, 2020.



ELIZABETH M. CESENA, CSR 12266
CERTIFIED SHORTHAND REPORTER

EXHIBIT 11

ROA 697
1 Page

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 10/25/2019 TIME: 09:00:00 AM DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil
CLERK: Andrea Taylor
REPORTER/ERM: Elizabeth Cesena CSR# 12266
BAILIFF/COURT ATTENDANT: R. Camberos

CASE NO: **37-2017-00010073-CU-BC-CTL** CASE INIT.DATE: 03/21/2017
CASE TITLE: **Larry Geraci vs Darryl Cotton [Imaged]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

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EVENT TYPE: Motion Hearing (Civil)
MOVING PARTY: Darryl Cotton
CAUSAL DOCUMENT/DATE FILED: Motion for New Trial, 09/13/2019

APPEARANCES
Michael R Weinstein, counsel, present for Respondent on Appeal,Cross - Defendant,Cross - Complainant,Plaintiff(s).
Scott H Toothacre, counsel, present for Respondent on Appeal,Cross - Defendant,Cross - Complainant,Plaintiff(s).
Evan Schube, specially appearing for counsel Jacob Austin, present for Defendant,Cross - Complainant,Appellant(s).

The Court hears oral argument and the tentative ruling as follows:
The Motion (ROA # 672) of Defendant / Cross-Complainant DARRYL COTTON ("Cotton") for a new trial or a finding that the alleged November 2, 2016 agreement is illegal and void, is DENIED.

The evidentiary objections (ROA # 679) of Plaintiff / Cross-Defendant LARRY GERACI and Cross-Defendant REBECCA BERRY, are OVERRULED.

Plaintiff to give notice of the Court's ruling.

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Attorney for Defendant Larry Geraci

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

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 judgment void upon its face 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 Calvert 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, and then argued, 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 strengthens 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.)
>
> "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