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FILED
Clerk of the Superior Court
APR 17 2024
By: N. Calantoc, Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, CENTRAL DIVISION

DARRYL COTTON, an individual,

Plaintiff

v.

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

Defendant.

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

NOTICE OF AND EX PARTE APPLICATTION (1) TO VACATE VOID JUDGMENT AND COURT REFERRAL TO THE DEPARTMENT OF JUSTICE

Hearing Date: April 17, 2024
Hearing Time: 8:30
Judge: Honorable James Mangione
Courtroom: 75
Related Case: 37-2021-00050889-CU-AT-CTL

Plaintiff Darryl Cotton ("Cotton") hereby apply *ex parte* for (1) an order vacating a void judgment and (2) a court referral to the California Department of Justice to investigate the alleged criminal activities contained herein. Based on new evidence, good cause exists for this application because:

## Introduction

1. Cotton ("I/me") is an individual who fortuitously owned real property that became highly valuable because it qualified for a cannabis dispensary and was targeted by defendant Lawrence Geraci ("Geraci") and his unethical agents and attorneys who first sought to extort me of my real property and then fabricated evidence and misrepresented the facts and law to the judiciaries for years to make me out to be a crazy pro se litigant allegedly hell bent on extorting Geraci and his agents for my own evil desire for financial gain. With this motion I will provide the court with new evidence that had it been available during my earlier litigation would have been case dispositive to support those allegations of, *inter alia* conspiracy.

2. Cotton will not be using this Motion to cite previous arguments that represent judgments enforcing illegal contracts such as in the "strawman" practice. While those arguments are all still meritorious in the Courts determination of this motion, they have been made. I will instead be directing the Court's attention to new evidence that supports the allegations of, *inter alia*, a conspiracy.

**Background**

3. Cotton has been involved in litigation with defendant Lawrence Geraci ("Geraci") since March of 2017. (*Cotton 1* Judgement)[1],

4. The *Cotton I* judgment enforces an illegal contract whose object is defendant Geraci's ownership of a cannabis conditional use permit ("CUP")[2] that he is barred from owning because he has been sanctioned for unlicensed cannabis activities.

5. Geraci and his agents, most notably attorney Gina Austin, a self-avowed expert in cannabis law and regulation, through their knowledge of the law, deceived the *Cotton I* court into believing that Geraci could lawfully own a CUP and thereby prevailed in *Cotton I*.

6. Most notably Austin provided false or incomplete information in the CUP application at my 6176 Federal Blvd., property which is in direct violation of San Diego Municipal Code ("SDMC") § 11.0401(b) ("No person willfully shall make a false statement or fail to report any material fact in any application for City license, permit, certificate, employment or other City action under the provisions of the [SDMC]").

7. In *Cotton I* the court failed to address the core issue of my complaint which was under Business and Professions Code ("BPC") § 26057:

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[1] The "*Cotton I* Judgment" means the judgment entered in *Larry Geraci v. Darryl Cotton*, Case No. 37-2017-00010073-CU-BC-CTL

[2] "[A] conditional use permit grants an owner permission to devote a parcel to a use that the applicable zoning ordinance allows not as a matter of right but only upon issuance of the permit." *Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1006.

1 The department *shall deny* an application if the applicant has been sanctioned by a city for
2 unauthorized cannabis activities in the three years immediately preceding the date the
3 application was filed with the department.

4 8. Geraci had been sanctioned by the City of San Diego in 37-2014-00020897-CU-MC-CTL
5 and 37-2015-00004430-CU-MC-CTL both within the three years of the 6176 CUP application. Armed
6 with this knowledge, Attorney Austin employed a proxy or strawman to replace Geraci in Rebecca Berry,
7 his secretary in the submitted application.

8 9. On September 12, 2018, a VERIFIED STATEMENT OF DISQUALIFICATION
9 PURSUANT TO CCP §170.1(a)(6)(A)(iii) AND CCP § 170.1(a)(6)(B) was filed. (EX-A)

10 10. On September 27, 2018, Judge Wohlfeil issued an order denying the
11 DISQUALIFICATION. (Ex-B)

12 11. On June 21, 2019, in *Cotton I*, Plaintiff Geraci filed a motion *in limine* seeking to prevent
13 Defendant Cotton from introducing evidence that, *inter alia,* included threats from several individuals,
14 i.e. Duane (last name unknown)[3], that had threatened Cotton to settle *Cotton I.* (See EX-C, No. 7).

15 12. On June 21, 2019, in *Cotton I,* Plaintiff Geraci filed a motion *in limine* opposing the
16 introduction or any reference to Defendant Cotton's reference to Cotton's US District Court lawsuits
17 (USDC Case No. 3:18-cv-00325-GPC-MDD and USDC Case No. 3:18-cv-02751-GPC-MDD) where
18 those Causes of Action alleged, *inter alia,* RICO and CONSPIRACY. (See EX-D, No. 1)

19 13. On July 1, 2019, the court issued a Minute Order granting Plaintiff Geraci's motion that
20 any evidence, examination, argument or other reference that my allegations Geraci is somehow connected
21 to Duane to force a settlement of the instant action be excluded. (See Ex-E, No. 7 (#561)) and that further
22 excluded Cotton from making any reference to either US District Court cases. (See EX-E, No.1 (#555))

23 14. On August 19, 2019, an ENTRY OF JUDGMENT was entered into against Cotton in the
24 amount of $260,109.28. (EX-F)

25
26
27 [3] As Duane's full name was not known at the time Cotton's cross complaint to *Cotton I* was filed, he
28 was a DOE until his full name, Eulenthias "Duane" Alexander, was discovered.

15. On September 19, 2019, Cotton's attorneys filed a MOTION FOR NEW TRIAL: (EX-G)

16. On September 23, 2019, Geraci's attorneys filed their opposition to the NEW TRIAL stating that, *inter alia,* "It Is Common Practice for CUP Applicants To Use Agents During The Application Process." (EX-H)

17. While I have been unable to retain legal counsel to represent me and continue to represent myself as a *pro se* litigant, I have been able to watch the development of a related case, AMY SHERLOCK ET AL v. GINA M. AUSTIN ET AL, Case No. 37-2021-00050889-CU-AT-CTL ("*Sherlock I*") as many of the parties, i.e. Geraci, Austin and Alexander, have conspired to deprive Amy Sherlock ("Mrs. Sherlock") using many of the same tactics that were employed against me.

18. The similarities in the two cases are well known to this court as both matters are presently before your Honor.

19. The main differences between our cases are that Mrs. Sherlock lost a husband as a direct result of the CUP licensing process and she was able to acquire competent legal representation whereas I am still alive in my fight for justice and continue to represent myself in this process.

20. I have developed a close relationship with Mrs. Sherlock and regularly share case related information between us which helps us better understand and expose the relationships we've discovered that exist between clients of Gina Austin as well as the numerous lies and contradictions she has told to multiple courts and licensing authorities.

**New Evidence**

21. Beginning in December 2023 there have been 21 Grand Jury Complaints filed all related to criminal activity discovered within, and as a result of, the CUP processing. I received a letter from the Grand Jury on April 10, 2024, which stated that my Grand Jury Complaint, Case No. 2023/2024-025 has been reviewed and is being held over for the new Grand Jury session scheduled to convene in July 2024. (See EX-I)

22. There are ongoing federal and state investigations regarding public corruption and tax evasion issues associated with Gina Austin represented licensees being conducted.

23. On March 8, 2024, Mrs. Sherlock filed a CA BAR complaint against attorney William L. Miltner. (See EX-J)

24. As an Exhibit within that BAR complaint, Mrs. Sherlock relies on a Private Investigator ("PI") report that stems from a meeting the PI had with Mr. Eulenthias "Duane" Alexander ("Alexander") in which Alexander, one of the named defendants in *Sherlock I.* Alexander provides the PI with evidence as to what he admits were his and others within their enterprise, who all had active roles in conspiring and executing both the monopoly they were creating and the deprivation and theft of Mrs. Sherlock's property and her rights to those assets that her deceased husband, Michael "Biker" Sherlock ("Biker") had acquired through the CUP application process. (See EX-J, Pg's 001-020)

25. The same Alexander who had threatened me to settle my case with Geraci is now providing both myself and Mrs. Sherlock with what can only be seen as personally incriminating evidence against but was proffered to shed light on a group conspiracy that turned against him to the point, he felt compelled to contact Mrs. Sherlock's attorney, Andrew Flores and offer this information without any type of inducement.

26. As further evidence that these bad actors are driven by bad intent, Mrs. Sherlock has had Mr. Scott Roder, a nationally recognized 3rd party investigator review the crime scene and forensic evidence offered by the San Diego County Medical Examiner that concluded Biker had committed suicide and determined in his report that to the contrary, the physical evidence is "100 percent inconsistent with a self-inflicted GSW ('gunshot wound')." (See EX-K @ Pg.9)

27. As more information is discovered and shared there are other parties, in related cases, who will come forward to further expose the criminal misconduct Gina Austin engaged in on behalf of clients such as Geraci to acquire these CUP's. I have not included them in this motion since they do not directly relate to Geraci, however a portion of them can be seen in Exhibit D, the Grand Jury Complaints and the hyperlinked evidence contained within them.

## Legal Arguments

28. Under the Doctrine of State Decisis this court would look at the BPC § 26057 and determine that the word SHALL mandates that Geraci would have had to been disclosed during the CUP application process. Unfortunately for me not only did Judge Wohlfeil never address the issue, Geraci WAS using a strawman in Rebeccas Berry as to identify himself during the application would have barred him from being awarded the CUP. As such each and every judgment since *Cotton I* has relied on Res Judicata decisions that were legally flawed. It is only as a result of the new evidence being provided by one of the defendants in the Sherlock case does this point get to be revisited for the tremendous harm this has caused me and the public at large.

29. "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 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 anyone." *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); *Rochin v. Pat Johnson Mfg. Co.*, 67 Cal. App. 4th 1228, 1239, 79 Cal. Rptr. 2d 719, 725 (1998) ("An attack on a void judgment may also be direct, since a court has inherent power, apart from statute, to correct its records by vacating a judgment which is void on its face, for such a judgment is a nullity and may be ignored.").)

30. "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 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).

31. 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 an *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).

32. 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.

33. A judgment giving effect to a void judgment is also void. (*See County of Ventura v. Tillett* (1982) 133 Cal.App.3d 105, 110 ("an order giving effect to a void judgment is also void and is subject to attack"); *Security Pac. Nat. Bank v. Lyon* (1980) 105 Cal.App.3d Supp. 8, 13 ("affirmance of a void judgment or order is itself void"); *see also Kenney v. Tanforan Park Shopping Ctr.*, Nos. G038323,

1 G039372, 2008 Cal. App. Unpub. LEXIS 10048, at *36 (Dec. 15, 2008) ("A judgment giving effect to a
2 void judgment is also void.").

3 34. Importantly "Under the doctrine of stare decisis, all tribunals exercising inferior
4 jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the
5 doctrine of stare decisis makes no sense. The decision of this court are binding upon and must be followed
6 by all the state courts of California. Decisions of every division of the District Courts of Appeal are
7 binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is
8 so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior
9 jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to
10 attempt to overrule decisions of a higher court." (*Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d
11 450, 455 (1962)

12

13 35. "The doctrine of res judicata is inapplicable to void judgments." *Rochin v. Pat Johnson*
14 *Mfg. Co.*, 67 Cal. App. 4th 1228, 1239, 79 Cal. Rptr. 2d 719, 726 (1998). As stated plainly by the Rochin
15 court: "A 'final' but void order can have no preclusive effect. A void judgment [or order] is, in legal
16 effect, no judgment. By it no rights are divested. From it no rights can be obtained. ***Being worthless in***
17 ***itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone.***" (*Id.* at
18 1240 (cleaned up).)

19 36. The legal language above stands for the simple and plainly understood proposition that if
20 an order or judgment is void, it is not valid and both actually and literally "worthless." (*Id.*) As are all
21 proceedings and orders and judgments that give effect to void orders and judgments. (Id.) As applicable
22 here, it stands for the plainly understood proposition that if parties are able to deceive the court into
23 ratifying criminal activity, those judgments and orders are void and cannot be giving legal effect. Even
24 if affirmed on appeal or not appealed at all. (*Hager v. Hager*, 199 Cal. App. 2d 259, 261 (1962) ("The
25 affirmance of a void judgment upon appeal imparts no validity to the judgment but is in itself void by
26 reason of the nullity of the judgment appealed from.").

27

28

## Conclusion

37. Should it have even gone to trial, had the evidence contained in this Motion to Vacate been available during *Cotton I*, the jury would have had evidence that would have been impossible to ignore or explain away, resulting in an entirely different verdict. I believe that with the new evidence provided in this Motion to Vacate the court now has the authority and duty to vacate the original *Cotton I* judgment and make the referral to the California Department of Justice where they have the resources to pursue those allegations that rise to criminal activity and fraud upon the court.

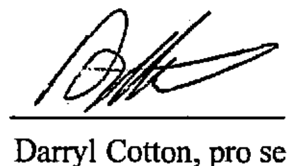
## Prayer for Relief

WHEREFORE, Cotton prays judgment as follows:

1. That the *Cotton I* Judgment be vacated and set aside pursuant to Code Civ. Proc. § 473(d), the Court's inherent authority to vacate a void judgment entered in error or in excess of the authority of the Court, and/or any other basis at law.
2. For costs of suit herein incurred.
3. For damages as allowed by law.
4. For such other and further relief as the court may deem proper.

On April 15, 2024, at approximately 1:00 pm, I spoke with defendants' attorney James Crosby and informed him of the instant *ex parte* application with my intention to file electronically by 10:00 am on April 16, 2024. I mailed this motion for *ex parte* application to defendants' attorneys.

I declare under penalty of perjury under the laws of the State of California that the forgoing is true and correct. This declaration was executed on April 15, 2024, at San Diego, California.



Darryl Cotton, pro se

# EXHIBIT A

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FILED
San Diego Superior Court
SEP 12 2018
By: ____________, Deputy

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN DIEGO, HALL OF JUSTICE**

| | |
|---|---|
| LARRY GERACI, an individual,<br>Plaintiff,<br>vs.<br>DARRYL COTTON, an individual; and DOES 1 through 10, inclusive,<br>Defendants. | Case No. 37-2017-00010073-CU-BC-CTL |
| AND RELATED CROSS-ACTION. | **VERIFIED STATEMENT OF DISQUALFICATION PURSUANT TO CCP §170.1(a)(6)(A)(iii) AND CCP §170.1(a)(6)(B)** |

**TO THE HONORABLE JOEL R. WOHLFEIL, JUDGE OF THE SUPERIOR COURT:**

**PLEASE TAKE NOTICE** that this Verified Statement of Disqualification is a request by Attorney Jacob P. Austin (<u>"Counsel"</u>) that Judge Wohlfeil recuse himself as the judicial officer presiding over the above-captioned proceeding based upon the facts and evidence set forth below (the <u>"Statement"</u>).

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## I. INTRODUCTION

1. Counsel brings forth this Statement pursuant to (i) California Code of Civil Procedure ("CCP") § 170.1(a)(6)(A)(iii) on the grounds that a "person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial," and (ii) CCP §170.1(a)(6)(B) on the grounds that the facts demonstrate "[b]ias or prejudice toward a lawyer in the proceeding."

2. As a threshold issue, Counsel notes that this Statement arises in part from the denial of two motions brought before Judge Wohlfeil. On August 30, 2018 Counsel filed a Petition for Writ of Mandate, Supersedeas and/or Other Appropriate Relief ("Writ Petition") for appellate review from the denial of the two motions. The Writ Petition is material to this Statement, a copy thereof is attached as Exhibit A. The supporting Exhibits to the Writ Petition are attached hereto as Exhibit B.

3. Summarily, this action arises from a real estate contract dispute between Plaintiff Larry Geraci ("Plaintiff") and defendant Darryl Cotton ("Defendant"). Both Plaintiff and Defendant admit that on November 2, 2016: (i) they reached an agreement for the sale of Defendant's real property ("Property") to Plaintiff; (ii) the sale was contingent upon Plaintiff obtaining approval from the City of San Diego ("City") of a Conditional Use Permit ("CUP") that would allow the operation of a for-profit medical marijuana outlet at the Property (the "Business"); (iii) they executed a three-sentence document that reflects Defendant received $10,000 in cash from Plaintiff (the "November Document"); and (iv) Plaintiff, within hours of the execution of the November Document and in response to a specific request by Defendant for written assurance, specifically confirmed via email that the three-sentence November Document is not the final agreement for the sale of the Property (the "Confirmation Email").

4. Plaintiff alleges the November Document is the final and completely integrated agreement for the sale of the Property.

5. Defendant alleges the November Document is a document memorializing his receipt of $10,000 in cash and that the parties reached an oral agreement for a joint venture to develop the Business at the Property (the "Joint Venture Agreement" hereinafter "JVA"). The JVA was to be reduced to writing by Plaintiff's attorney and to include, *inter alia*, a 10% equity position for him in the contemplated business.

6. In March of 2017, Plaintiff brought forth suit alleging that the November Document *is* the completely integrated agreement and seeking specific performance to force the sale from Defendant to himself.

7. Plaintiff has maintained throughout the course of this litigation that the Confirmation Email, that negates the entire basis of his Complaint, is barred by the parol evidence rule ("PER").

8. In April of 2018, when confronted with case law allowing the admission of the Confirmation Email and other parol evidence as proof of a fraud, Plaintiff submitted a declaration alleging *for the first time* that he sent the Confirmation Email by *mistake* and that on November 3, 2016, Defendant (i) orally disavowed the interest in the CUP that Plaintiff had promised to him in the Confirmation Email and (ii) agreed the November Document is a completely integrated agreement for the sale of the Property to Plaintiff. Plaintiff provided no explanation why he waited over a year after filing suit to allege such a material and critical factual statement.

9. It is Counsel's absolute belief, based on facts admitted to *by* Plaintiff, that this action is frivolous and a stereotypical malicious prosecution action. Plaintiff is seeking to fraudulently misrepresent the November Document as completely integrated agreement for his purchase of the Property in order to deprive Defendant the benefit of the parties' bargain reached on November 2, 2016 that included an equity position in the Business anticipated to be highly lucrative.

10. "Whether a contract is integrated is a question of law when the evidence of integration is not in dispute." *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 954. "*The crucial threshold inquiry, therefore, and one for the court to decide, is whether the parties intended their written agreement to be fully integrated.* [Citations.]" *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1510 (emphasis added).

11. Judge Wohlfeil, despite repeated oral and written requests for over a year, has never addressed the ***crucial threshold inquiry*** of contract integration.

12. In response to evidence and arguments presented by Defendant (while representing himself pro se) that prove the November Document is not completely integrated, Judge Wohlfeil defended Plaintiff's attorneys Michael Weinstein ("Weinstein") and Gina Austin ("Mrs. Austin") (no relation to Counsel Jacob P. Austin). Specifically, Judge Wohlfeil stated from the bench that he is

personally acquainted with Weinstein and Mrs. Austin and that he does not believe they would act unethically by filing a meritless suit.[1] Furthermore, Judge Wohlfeil stated on a separate occasion that he has known Weinstein for decades since early in their careers and that he "may have made" the statement regarding his belief about Weinstein and Mrs. Austin's inability to be unethical.

13. Pursuant to *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, had Judge Wohlfeil addressed the ***crucial threshold inquiry*** of contract integration and found that the November Document was not a completely integrated agreement because of the PER, then Weinstein and Mrs. Austin would be open to a cause of action for malicious prosecution. *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349 ("we hold that terminations based on the parol evidence rule are favorable for malicious prosecution purposes.").

14. Counsel understands that "the mere fact a judicial officer rules against a party does not show bias. [Citation.] It is a well-settled truism, however, that the ***'trial of a case should not only be fair in fact, but it should also appear to be fair.'*** [Citations.]" *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1328 (emphasis added). In this case, fairness and the *appearance of fairness* will be achieved only if the entire case is reassigned to another judicial officer because on these facts, as proven below, this case should not even have to reach a jury trial. Given the facts of the case and Judge Wohlfeil's comments and rulings, it can reasonably *appear* that Judge Wohlfeil has ruled against Defendant because he (i) is seeking to unjustly use his position as a judicial officer to protect Weinstein and Mrs. Austin from a malicious prosecution action and/or (ii) has a fixed opinion that Weinstein and Mrs. Austin are incapable of being unethical to a degree that it impairs his ability to impartially weigh any facts and evidence involving their acts.

15. The undisputed facts set forth below in Section II. (Material Factual and Procedural Background) are laid out chronologically and are meant to support the following six factual findings:

a. Plaintiff is before Judge Wohlfeil as part of a demonstrably unlawful scheme to acquire the CUP at issue here. Plaintiff is prohibited from owning a CUP by numerous applicable City of San Diego and State of California laws and regulations that disqualify individuals who (i) have been sanctioned for being involved in illegal marijuana commercial businesses (ii) and for failing to comply

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[1] Exhibit B, ln.6-10; p.1051, ln.25-28; p.1055

with the applicable disclosure obligations as part of the CUP application process (meant to prevent disqualified individuals from acquiring an interest in a CUP for marijuana-related operations);

b. Mrs. Austin and Rebecca Berry ("Berry"), Plaintiff's employee/agent, knowingly omitted Plaintiff's ownership in the Property and the CUP application in contravention of applicable laws and regulations;

c. The November Document is not a completely integrated agreement pursuant to the PER and the record makes it appear that Judge Wohlfeil has consistently and systemically avoided addressing the ***crucial threshold*** ***inquiry*** of contract integration which would be the case-dispositive issue;

d. Judge Wohlfeil has stated, and the record makes numerous references to, his belief that Weinstein and/or Mrs. Austin would not act unethically;

e. Some of Judge Wohlfeil's rulings are unsupported by facts or law and, in some instances, contradicted by facts and evidence both Plaintiff and Defendant admit are true; and

f. If Judge Wohlfeil were to appropriately address the issue of contract integration, pursuant to the PER, Weinstein and Mrs. Austin would be exposed to legal and financial liability for filing and/or maintaining a malicious prosecution action.

## II. MATERIAL FACTUAL AND PROCEDURAL BACKGROUND

### A. *Plaintiff has a history of owning/managing illegal marijuana dispensaries that disqualify him from owning a for-profit Marijuana Outlet; Judge Wohlfeil has never addressed why he allows this case to continue when on its face Plaintiff is using this action to effectuate a fraud.*

16. Plaintiff has been a named defendant and sanctioned in at least three actions by the City for owning/managing illegal marijuana dispensaries. *See City of San Diego v. The Tree Club Cooperative* Case No. 37-2014-00020897-CU-MC-CTL, *City of San Diego v. CCSquared Wellness Cooperative* Case No. 37-2015-00004430-CU-MC-CTL and, *City of San Diego v. LMJ 35th Street Property LP, et al.*, Case No. 37-2015-000000972.[2]

[2] Exhibit C, Stipulation of Judgment, Preliminary Injunction Order

17. Forms DS-190 (Affidavit for Medical Marijuana Consumer Cooperatives for Conditional Use Permit (CUP))[3] and DS-318 (Ownership Disclosure Statement)[4] are two of the forms required by the City Development Services Department as part of the application process for a CUP (the "CUP Application Forms").

18. In relevant part, Form DS-318 states: "Please list below the owner(s) and tenant(s) (if applicable) of the above referenced property. 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 property interest (e.g., tenants who will benefit from the permit, all individuals who own the property)."[5]

19. Berry is the employee and agent of Plaintiff.[6]

20. Berry executed and submitted the CUP Application Forms for the Property to the City.[7]

21. Berry ***DID NOT*** list Plaintiff as a person owning or having an interest in the CUP and/or the Property as required.[8] Instead, she listed herself as the "Tenant/Lessee" of the Property on Form DS-318,[9] and "Owner" of the Property on Form DS-190.[10]

22. As described in Plaintiff's *own* submission, he admits that Berry, his agent, submitted the CUP Application Forms on his behalf:

> Berry was the Applicant. Cotton and Berry did not have a principal-agent relationship and Berry did not submit the CUP Application on his behalf. Rather, Berry had a principal-agent relationship *with Geraci*. Berry submitted the CUP Application on behalf of Geraci who had entered into a written agreement with Cotton for the purchase of the Property.

Exhibit D at p.6, fn.1. (emphasis in original).

23. California Bus. & Prof. Code §26057(a) states that, "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).

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[3] Exhibit B, p.559.
[4] Exhibit B, p.558.
[5] Exhibit B, p.558 (emphasis added).
[6] Exhibit B, p.46, ln.2-4.
[7] *Id.*
[8] Exhibit B, p.558.
[9] Exhibit B, p.559.
[10] Exhibit B, p.558.

24. Bus. & Prof. Code §26057(b) sets forth the criteria that *mandates denial* under Bus. & Prof. Code §26057(a).

25. "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." Bus. & Prof. Code §26057(b)(2). Criteria under Bus. & Prof. Code §480 that disqualify Plaintiff from owning an interest include:

a. "A board may deny a license regulated by this code on the grounds that the applicant has one of the following.... *Done any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself or herself or another, or substantially injure another.*" Bus. & Prof. Code §480(a)(2) (emphasis added).

b. "A board may deny a license regulated by this code on the ground that *the applicant knowingly made a false statement of fact that is required to be revealed in the application for the license.*" Bus. & Prof. Code §480(d) (emphasis added).

c. "*Failure to provide information required by the licensing authority.*" Bus. & Prof. Code §26057(b)(3) (emphasis added).

d. "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 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." Bus. & Prof. Code §26057(b)(7) (emphasis added).

26. San Diego Municipal Code ("SDMC") §42.1501 materially states: "It is the intent of this Division to promote and protect the public health, safety, and welfare of the citizens of San Diego by allowing but strictly regulating the retail sale of marijuana at *marijuana outlets.... It is further the intent of this Division to ensure that marijuana is not diverted for illegal purposes, and to limit its use to those persons authorized under state law.*" (Emphasis added.)

27. Plaintiff is disqualified from having an ownership interest in the CUP for the Property because (i) his agents knowingly did not disclose his ownership interest in the CUP Application Forms;

(ii) he has been sanctioned for owning/managing illegal dispensaries; and (iii) this legal action is part of a fraudulent scheme to deprive Defendant of his Property by way of a frivolous lawsuit.

28. Plaintiff's attorney, Mrs. Austin, is handling the CUP application for the Property. Mrs. Austin is considered the premier attorney in San Diego for marijuana related CUP applications with the City of San Diego. Attached hereto as Exhibit E is an article published by the *San Diego Union Tribune* on August 10, 2018 entitled "San Diego's cannabis supply chain is falling into place, with one production business approved and 39 more on tap" stating that, of 24 manufacturing licenses available for marijuana businesses in the City of San Diego, Mrs. Austin represents six of the applicants who are at the "head of the pack."[11]

29. Attached hereto as Exhibit F is an email chain from Mrs. Austin specifically advising Plaintiff's architect that she wanted to review the CUP application for the Property before it was submitted to the City.

30. In short, the plain and clear language on the CUP Application Form required Berry to disclose Plaintiff's ownership interest in the CUP and the Property. She did not. And, Mrs. Austin, specializing in marijuana law, *knew* that Berry should have listed Plaintiff as an individual with an interest in the CUP and the Property.

31. Had Plaintiff submitted the CUP Application under his own name, it would have been denied by the City pursuant to the applicable state and local laws and regulations referenced above.

32. To date, Judge Wohlfeil has *never* addressed why he allows this action to continue when even Plaintiff has admitted to the facts above that prove he and his agents have violated numerous applicable disclosure laws and regulations. If Judge Wohlfeil addressed this issue, Mrs. Austin would be legally liable for purposefully omitting Plaintiff from the applicable disclosure requirements

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[11] Exhibit E, San Diego Union Tribune, *San Diego's cannabis supply chain is falling into place, with one production business approved and 39 more on tap*, http://www.sandiegouniontribune.com/news/politics/sd-me-weed-production-20180810-story.html, August 10, 2018 last accessed September 10, 2018

1 B. *Judge Wohlfeil has consistently refused to address the threshold and case-dispositive issue of contract integration; which, if he did, would result in this matter being adjudicated in Defendant's favor and expose Weinstein and Mrs. Austin (and others) to liability for malicious prosecution.*

33. Neither Plaintiff nor Defendant dispute that on November 2, 2016 they met, reached an agreement for the sale of the Property to Plaintiff, and executed the November Document. The parties, however, dispute the terms reached and the nature of the November Document.[12]

34. On November 2, 2016 at 3:11 p.m., after the parties reached their agreement and Defendant executed the November Document, Plaintiff emailed Defendant a copy of the November Document.[13]

35. At 6:55 p.m., Defendant replied:

> 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.***

Exhibit B, p.497 (emphasis added).

36. At 9:13 p.m., Plaintiff replied: "*No no problem at all*" (the "Confirmation Email"). (*Id.*)

37. For approximately five months after execution of the November Document, the parties exchanged numerous emails, texts and calls regarding various issues related to, *inter alia*, the CUP Application, drafts of the JVA for the sale of the Property and Defendant's equity position in the Business.

38. Copies of 15 email chains representing *all* email communications exchanged by Plaintiff and Defendant during the period October 24, 2016 to March 21, 2017 (the "Email Communications") were submitted to the Fourth District Court of Appeal as Exhibit 9 to the Petition. *See* Exhibit B, p.487-555.

[12] Exhibit B, 635-652. [ROA 47].
[13] Exhibit B, p.492-493; p.494-495.

39. Copies of *all* text communications exchanged by Plaintiff and Defendant during the period July 21, 2016 to May 8, 2017 (the "Text Communications") were submitted to the Fourth District Court of Appeal as Exhibit 9 to the Petition. *See* Exhibit B p.392-421.

40. All the Email and Text Communications prove incontrovertibly that the parties met sometime in July of 2016, negotiated for several months thereafter and their negotiations culminated in an oral agreement on November 2, 2016 (JVA). Thereafter, as evidenced by their communications and the draft agreements Plaintiff forwarded to Defendant, the parties were working to reduce the JVA to writing until their relationship deteriorated because Plaintiff intentionally attempted to deprive Defendant of his 10% agreed-upon equity position.

41. The most notable Text and Email Communications clearly evidencing that the parties entered into the JVA and were working to reduce the JVA to writing when the relationship became hostile include the following:

42. On February 27, 2017, Plaintiff sent an email to Defendant stating: "Attached is the draft purchase of the property for 400k. The additional contract for the 400k should be in today and I will forward it to you as well."[14] The document attached to his email was entitled: "AGREEMENT OF PURCHASE AND SALE OF REAL PROPERTY" (the "Draft Purchase Agreement").[15] The introduction to the Draft Purchase Agreement states:

> THIS AGREEMENT OF PURCHASE AND SALE OF REAL PROPERTY ("Agreement") is made and entered into this _ day of ______, 2017, by and between DARRYL COTTON, an Individual resident of San Diego, CA ("Seller"), and 6176 FEDERAL BLVD TRUST dated ___ 2017, or its assignee ("Buyer").

Exhibit B, p.503 (emphasis added).

43. The Draft Purchase Agreement neither provides for nor mentions (i) the employment of Defendant by Plaintiff in any capacity as part of the transaction, or (ii) that the Draft Purchase Agreement is an amendment and/or renegotiation of an existing agreement.

[14] Exhibit B, p.501-502. [ROA 237].
[15] Exhibit B, p.503-528. [ROA 237].

44. On March 2, 2017, Plaintiff emailed Defendant a document entitled "SIDE AGREEMENT" (the "First Draft Side Agreement").[16] The Recitals to the Side Agreement state:

> WHEREAS, the Seller and Buyer desire to enter into a Purchase Agreement (the "Purchase Agreement"), dated of even date herewith, pursuant to which the Seller shall sell to Buyer, and Buyer shall purchase from the Seller, the property located at 6176 Federal Blvd., San Diego, California 92114 (the "Property"); and
>
> WHEREAS, the purchase price for the Property is Four Hundred Thousand Dollars ($400,000); and
>
> WHEREAS, a condition to the Purchase Agreement is that Buyer and Seller enter into this Side Agreement that addresses the terms under which Seller shall move his existing business located on the Property.

Exhibit B, p.531.

45. The First Draft Side Agreement neither provides for nor mentions (i) the employment of Defendant by Plaintiff in any capacity as part of the transaction, or (ii) that the draft purchase agreement is an amendment and/or renegotiation of an existing agreement.

46. On March 6, 2017, Defendant told Plaintiff that he would be attending a local cannabis event at which Mrs. Austin would be the keynote speaker. Plaintiff texted Defendant saying he could speak directly with Mrs. Austin at the event regarding revisions to the agreements: ***"Gina Austin is there she has a red jacket on if you want to have a conversation with her."***[17]

47. Defendant was not able to make the event, but Joe Hurtado ("Hurtado") – a transaction adviser whom Defendant had engaged on a contingent basis to help him sell the Property to a new buyer if Plaintiff breached the agreement – did attend.[18]

48. Hurtado spoke with Mrs. Austin, letting her know that Defendant would not be attending, and that Defendant was concerned because the First Draft Purchase Agreement he had received did not contain a provision regarding Defendant's 10% equity interest in the Business.[19]

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[16] Exhibit B, p.529-536. [ROA 237].
[17] Exhibit B, p.421. [ROA 237].
[18] Exhibit B, p.385, ln.6-13 [ROA 237].
[19] Exhibit B, p.591, ln.8-18 [ROA 237].

49. Mrs. Austin confirmed that she was working to reduce the JVA to writing and would forward it shortly. ("My conversation with Mrs. Austin was short, clear, direct, unambiguous and with no possibility for misinterpretation. Mrs. Austin acknowledged that she was working on the drafts for Plaintiff's purchase of Mr. Cotton's Property and that no final agreement had yet been executed.").[20]

50. The next day on March 7, 2017, Plaintiff emailed Defendant a second draft Side Agreement (the "Second Draft Side Agreement").[21]

51. The metadata to the Second Draft Side Agreement reflects Mrs. Austin as the "creator" and "author" of the Second Draft Side agreement, and that the document was created on March 6, 2017 (the "Metadata Evidence").[22]

52. The cover email to the March 7, 2017 email Plaintiff sent to Defendant stated:

> Hi Darryl, I have not reviewed this yet but wanted you to look at it and give me your thoughts. Talking to Matt, the 10k a month might be difficult to hit until the sixth month . . . can we do 5k, and on the seventh month start 10k?

Exhibit B, p.541-542 (the "March Request Email").

53. The Recitals to the Second Draft Side Agreement state:

> WHEREAS, the Seller and Buyer have entered into a Purchase Agreement (the "Purchase Agreement"), dated as of approximate even date herewith, pursuant to which the Seller shall sell to Buyer, and Buyer shall purchase from the Seller, the property located at 6176 Federal Blvd., San Diego, California 92114 (the "Property");
>
> WHEREAS, The Buyer intends to operate a licensed medical cannabis at the property ("Business"); and
>
> WHEREAS, in conjunction with Buyer's purchase of the Property, Buyer has agreed to pay Seller $400,000.00 to reimburse and otherwise compensate Seller for Seller relocating his business located at the Property, ***and to share in certain profits of Buyer's future Business.***[23]

[20] Exhibit B, p.591, ln.19-21 [ROA 237].
[21] Exhibit B, p.543-546. [ROA 237].
[22] Exhibit B, p.329.
[23] Exhibit B, p.543-546 [ROA 237] (emphasis added).

1 54. The Second Draft Side Agreement provides that Defendant would receive 10% of the net
2 profits of the Business, instead of the "10% equity position" agreed upon by the parties in the JVA and
3 specifically confirmed by Plaintiff in the Confirmation Email.[24]

4 55. The Second Draft Side Agreement neither provides for nor mentions (i) the employment
5 of Defendant by Plaintiff in any capacity as part of the transaction, or (ii) that the draft purchase
6 agreement is an amendment and/or renegotiation of an existing agreement.

7 56. On March 21, 2017, after Plaintiff failed to respond to numerous written requests for
8 assurance of performance – *i.e.*, that he would honor the JVA and provide Defendant a "10% equity
9 position" in the Business – Defendant terminated the JVA as a result of Plaintiff's breach.[25]

10 57. After terminating the JVA on March 21, 2017, Defendant entered into a written
11 agreement for the sale of the Property with a third party (the "Third-Party Sale").[26]

12 58. On March 22, 2017, Plaintiffs' attorney, Weinstein, emailed Defendant a copy of the
13 Complaint filed in this action the preceding day asserting causes of action for breach of contract and
14 specific performance and alleging the November Document is the final agreement for the sale of
15 Defendant's Property.[27]

16 59. Defendant filed a cross-complaint against Plaintiff and his agent/employee Rebecca
17 Berry ("Berry"). His operative Second Amended Cross-Complaint filed on August 25, 2017 asserts
18 causes of action for breach of contract, intentional misrepresentation, negligent misrepresentation, false
19 promise and declaratory relief.[28]

20 60. On October 6, 2017, Defendant filed a verified Petition for Writ of Mandate pursuant to
21 Code of Civil Procedure § 1085 seeking an alternative writ of mandate and a peremptory writ of mandate
22 directing the City to recognize Defendant as the sole applicant with respect to Conditional Use Permit
23 Application-Project No. 52066 the CUP on the Property (the "City Action").[29]

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[24] Exhibit B, p.543-546 [ROA 237].
[25] Exhibit B, p.885 [ROA 160].
[26] Exhibit B, p.895-906 [ROA 160].
[27] Exhibit B, p.625, ln.15-17; p.626, ln.6-11. [ROA 1].
[28] Exhibit B, p.634-659 [ROA 47].
[29] Exhibit B, p.681-691.

61. The dispositive issue in the instant action and the City Action is whether the November Document is a completely integrated agreement.

62. As repeatedly noted, Judge Wohlfeil has never undertaken what should be the "*crucial threshold inquiry* [to determine] whether the parties intended their written agreement to be fully integrated. [Citations.]" *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1510 (emphasis added).

63. Defendant has, on no less than *six occasions*, three of which were in open court by counsel and co-counsel, requested that Judge Wohlfeil please provide his reasoning for repeatedly finding that the November Document is a completely integrated agreement throughout the course of this litigation.[30] On more than *two occasions* Defendant has literally begged Judge Wohlfeil in writing and orally at hearings to explain why the Confirmation Email, which Plaintiff admits he sent in a sworn declaration, does not prove the November Document is not a completely integrated agreement. Specifically, he stated "***I BEG the Court at the hearing to please articulate to me (i) which facts in the record and (ii) on what legal authority it was persuaded that I am not going to prevail on the merits on my cause of action for breach of contract.***"[31]

64. On July 13, 2018, Judge Wohlfeil denied Defendant's Motion for Judgement on the Pleadings ("MJOP"). During oral argument, Counsel repeatedly asked Judge Wohlfeil to address dispositive issue of contract integration.[32]

> THE COURT: Good morning to each of you two. Interesting motion particularly combined with your request for judicial notice. Is there anything else that you'd like to add?
>
> MR. AUSTIN: Well, I would like an explanation. So Mr. Geraci, the plaintiff in this case, he submitted the declaration admitting essentially that --

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[30] Exhibit B, p. 22, ln. 21- p. 23, ln. 1;
Exhibit G p.4, ln.13-15 [ROA 128] MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DARRYL COTTON'S *EX PARTE* APPLICATION FOR A STAY, OR, ALTERNATIVELY JUDGEMENT ON THE PLEADINGS; Exhibit H p. 5 lines 5-7 [ROA 166] OPPOSITION TO PLAINTIFF/CROSS-DEFENDANT LARRY GERACI'S *EX PARTE* APPLICATION FOR AN ORDER SHORTENING TIME TO HEAR MOTION FOR MONETARY AND ESCALATING/TERMINATING SANCTIONS AGAINST DEFENDANT AND CROSS-COMPLAINANT, DARRYL COTTON; Exhibit B, p. 11-15.

[31] Exhibit B, p. 22, ln. 21- p. 23, ln. 1; Exhibit H p. 5 lines 5-7 [ROA 166] OPPOSITION TO PLAINTIFF/CROSS-DEFENDANT LARRY GERACI'S *EX PARTE* APPLICATION FOR AN ORDER SHORTENING TIME TO HEAR MOTION FOR MONETARY AND ESCALATING SANCTIONS

[32] Exhibit B, p.1226-1227 [ROA 253].

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**THE COURT:** It's the "essentially" part that I don't agree with. You make those same comments in your paper. There's four separate causes of action....

**THE COURT:** The court wasn't persuaded that even if I were grant the request to take judicial notice of a declaration granted of a party opponent, it's still not dispositive of the entire complaint. And that's what your motion is directed to, isn't it.

**MR. AUSTIN:** Well –

**THE COURT:** – in it's entirety?

**MR. AUSTIN:** Because all four causes of action are premised on a breach of contract, so if there's not an integrated contract, according to plaintiff himself, I feel that all four causes of actions fail.

**THE COURT:** Not so sure If I agree with that entire analysis. Anything else, counsel?
**MR. AUSTIN:** Well, I was just wondering if you could explain to me, if you believe as a matter of law, the three-sentence contracts that plaintiff claims is an integrated contract. If you believe that to actually be a fully integrated contract.

**THE COURT:** You know, we've been down this road so many times, counsel. I've explained and reexplained the court's interpretation of your position. I don't know what more to say.

**CO COUNSEL:** Your Honor, if I may, I'm co-counsel on behalf of Mr. Cotton. ***Your Honor, the only thing we really want clarification in the matter whether or not the court deems the contract an integrated contract or not.***

**THE COURT:** Again, we've addressed that in multiple motions. I'm not going to go back over it again at this point in time.
Anything else, counsel?

**CO COUNSEL:** That's it.[33]

[33] Exhibit B, p. 11-15 (emphasis added).

65. This is also at least the *eighth time*[34] Judge Wohlfeil found, without explanation, that the contract was in fact completely integrated.[35]

66. The transcript demonstrates Judge Wohlfeil's exasperation with Defendant and Counsel. Ostensibly, Judge Wohlfeil's frustration arises from what he thinks is Counsel's repeated attempt to challenge an adverse ruling that he has already addressed. However, Judge Wohlfeil is mistaken, he has never addressed the threshold and case-dispositive issue of contract integration.

67. The frustration on Judge Wohlfeil's behalf is unjustified. Rather, it is Defendant who has reason to be frustrated with the adjudication of his case. Counsel does not mean to be disrespectful, but, as more fully described below, there are numerous rulings that demonstrate Judge Wohlfeil does not have a clear understanding of the simplicity of this case and that he has taken procedurally improper actions to the unjustified benefit of Plaintiff.

## III. DISCUSSION

### A. PLAINTIFF FILED THIS ACTION AS PART OF A FRAUDULENT SCHEME TO ACQUIRE AN INTEREST IN A MARIJUANA RELATED BUSINESS THAT HE IS PROHIBITED FROM OWNING PURSUANT TO CITY AND STATE LAW.

68. It is a matter of public record that Plaintiff has been sanctioned for owning/managing illegal dispensaries.

69. Per Plaintiff's own admissions, his agent, Berry, submitted the CUP application on the Property and omitted naming him as a party with an interest in the Property or the CUP.

70. Plaintiff is before Judge Wohlfeil alleging he is the rightful owner of the Property and the sole owner of the CUP.

[34] Exhibit I [ROA 72], Minute Order December 7, 2017.
Exhibit J [ROA 78], Minute Order entered December 12, 2017.
Exhibit K [ROA 129] Minute Order March 06, 2018.
Exhibit L [ROA 106] Minute Order entered January 25, 2018.
Exhibit B, p.1148-1149 [ROA 192]
Exhibit M, p. 2 ¶3 [ROA 222] Minute Order Dated April 27, 2018.
Exhibit B, p.01-02 [ROA 240].
Exhibit B, p.1227[ROA 253].

[35] It is of note that, though I have cited to only eight instances, there are other motions and hearing not referenced herein. In those other hearings and motions the same determinations are made. This would constitute *at least* eight instances.

71. By Plaintiff's own admission, setting aside the dispute of contract integration, he has knowingly undertaken a course of action to unlawfully acquire an undisclosed interest in a marijuana related CUP that he is prohibited from owning because of his history with illegal marijuana dispensaries. This is blatant and self-admitted fraud.

72. Judge Wohlfeil has never addressed why he is ratifying Plaintiff's scheme by allowing this case to continue when on undisputed facts, Plaintiff is perpetrating a fraud in violation numerous City of San Diego and State of California regulatory agencies.

73. Mrs. Austin is Plaintiff's attorney who is responsible for overseeing the CUP application for Plaintiff.

74. Thus, as more fully described below, a third-party could reasonably entertain the notion that Judge Wohlfeil is avoiding this issue to "protect" Mrs. Austin from the legal repercussions of violating numerous applicable disclosure laws and regulations and aiding and abetting her client in a scheme whose unlawful goal is to help her client acquire a prohibited interest in a marijuana related CUP. Alternatively, that Judge Wohlfeil believes Mrs. Austin to be ethical to a degree that he cannot impartially review the evidence he is presented with that proves otherwise.

## B. PURSUANT TO THE PAROL EVIDENCE RULE THE NOVEMBER DOCUMENT IS NOT A COMPLETELY INTEGRATED AGREEMENT.

75. The issue of contract integration is dispositive in this matter. Plaintiff filed suit alleging that the November Document is the final agreement for his purchase of the Property.

76. A full detailed analysis on the issue of contract integration is described and argued in the Petition filed herewith as Exhibit A at pages 45 – 55. A summarized analysis of the issue of contract integration and the PER is set forth here:

77. "Whether a contract is integrated is a question of law when the evidence of integration is not in dispute." *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 954. "*The crucial threshold inquiry, therefore, and one for the court to decide, is whether the parties intended their written agreement to be fully integrated.* [Citations.]" *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1510 (emphasis added).

1 78. Generally, the application of the PER to determine whether a contract is a complete
2 integration involves a two-step analysis:[36] In the first step, the factors to be considered include: (i) the
3 language and completeness of the written agreement; (ii) whether it contains an integration clause;
4 (iii) the terms of the alleged oral agreement and whether it might contradict those in the writing;
5 (iv) whether the oral agreement might naturally be made as a separate agreement or, in other words, if
6 the oral agreement were true, would it certainly have been included in the written instrument; (v) would
7 evidence of the oral agreement mislead the trier of fact; and (vi) the circumstances at the time of the
8 writing. *Kanno v. Marwit Capital Partners II, L.P.*, (*Kanno*), 18 Cal.App.5th 987, 1007. Additionally,
9 (vii) the terms of a writing "may be explained or supplemented by course of dealing or usage of trade
10 or by course of performance." CCP §1856(c).

11 79. Application of these seven factors here leads to only one reasonable and incontrovertible
12 conclusion: the November Document was not *intended* to be a completely integrated agreement:

13 *(i) The November Document does not appear to be a final agreement.* "We start by asking
14 whether the [November Document] appears on its face to be a final expression of the parties' agreement
15 with respect to the terms included in that agreement. [Citation.]" *Id.* at 1007. In reviewing the
16 November Document, it is readily apparent that it is not—it is three sentences long and is missing many
17 essential terms when compared to even a standard real estate purchase agreement, much less one that
18 has a complicated condition precedent requiring approval of a CUP by the City for a business in the
19 emerging and highly regulated marijuana industry. It also has basic grammar and spelling mistakes
20 (*e.g.*, "contacts" instead of "contracts"). Unlike the writings in *Kanno*, the November Document is not
21 "lengthy, formal; [or] detailed[.]" *Id.* Given its short length, its lack of formality, its simplicity given
22 the complicated subject matter it was intended to cover and its grammar and spelling mistakes, these
23 factors weigh in favor of a finding that the November Document does not meet the criteria to be a
24 completely integrated agreement.

25 *(ii) The November Document does not contain an integration clause.* The presence of an
26 integration clause is given great weight on the issue of integration and it is "very persuasive, if not
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[36] *See Gerdlund v. Elec. Dispensers Int'l* (1987) 190 Cal.App.3d 263, 270; *Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1001; *Kanno, supra*, at 1007.

controlling, on the issue." *Masterson v. Sine* (1968) 68 Cal.2d 222, 225. Conversely, the lack of an integration clause, as here, is evidence the writing is not completely integrated. *Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 638. Thus, this factor weighs in favor of a finding the November Document is not completely integrated.

*(iii)* ***The terms of the oral JVA do not contradict the November Document.*** In determining whether a writing was intended as a final expression of the parties' agreement, "collateral oral agreements" that contradict the writing cannot be considered. *Banco Do Brasil, supra,* at 1002-1003. The fact that the November Document does not state it will provide for Defendant's equity position does not mean its *silence* on the subject is a contradiction as Plaintiff argues. As the seminal case of *Masterson* makes clear, silence on a term allows the introduction of extrinsic evidence to show the parties intent on that matter. *Masterson, supra,* at 228-231.

*(iv)* ***The oral agreement – the JVA – would not have been included in the November Document that was meant to be a receipt.*** Where a "collateral" oral agreement is alleged, the court must determine whether the subject matter is such that it would "certainly" have been included in the written agreement had it actually been agreed upon; or would "naturally" have been made as a separate agreement. *Id.* at 227. Here, the terms of the JVA as alleged by Defendant are consistent with the November Document and the Confirmation Email, both of which provide direct, undisputed evidence that the November Document was meant to be a receipt by Defendant of $10,000 to be applied toward the total agreed-upon $50,000 NRD. As the November Document was meant to be a *receipt*, it is *natural* that it would not have all the material terms reached in the JVA. Furthermore, it is *natural* that the November Document was created and notarized as part of the JVA as Plaintiff provided Defendant the $10,000 in CASH. No reasonable party would provide such a material amount in cash without ensuring adequate proof of its receipt.

(v) ***A fact finder would not be misled by the admission of the Confirmation Email and other parol evidence.*** Evidence of a collateral oral agreement should be excluded if it is likely to mislead the fact finder. *Id.* The court properly exercises its discretion by weighing the probative value of the extrinsic evidence against the possibility it may mislead the jury. *See* Evid. Code §352; *Brawthen v. H & R Block, Inc.* (1972) 28 Cal.App.3d 131, 137-138 ("[*Masterson*] points out that evidence of the

'oral collateral agreements should be excluded only when the fact finder is likely to be misled....' *This permits a limited weighing of the evidence by the trial court for the purpose of keeping 'incredible' evidence from the jury.*") (emphasis added). The undisputed Text and Email Communications are clear and not "incredible." Simply stated, the evidence would not mislead the fact finder and actually clearly establish what took place – the parties were still reducing the JVA to writing when the relationship soured because Defendant confronted Plaintiff about having submitted the CUP application on the Property without finalizing the agreement or providing the remainder of the NRD.

(vi) *The circumstances at the time of writing clearly prove the parties did not intend the November Document to be a completely integrated agreement.* A critical point noted by the *Kanno* court in reaching its decision was the following oral exchange: "[plaintiff] insisted that [defendant] 'promise this to me.' [Defendant] paused and then said, '*[o]kay, [plaintiff], I promise.*'" *Kanno, supra,* at 1009 (emphasis added). Relying heavily on that exchange, the *Kanno* court found that "[t]he evidence supports a finding that the parties intended the terms of the [oral agreement] to be part of their [written] agreement." *Id.* Here, exactly as in *Kanno,* Defendant emailed Plaintiff asking him to specifically confirm in writing (*i.e.,* promise) that a "final agreement" would contain his "10% equity position" and Plaintiff clearly and unambiguously did so: "*No no problem at all.*" Exhibit B, p.497.

(vii) *Plaintiff's course of performance and conduct explains the meaning of the November Document – it was meant to be a receipt.* "The law imputes to a person the intention corresponding to the reasonable meaning of his language, acts, and conduct." *H. S. Crocker Co. v. McFaddin* (1957) 148 Cal.App.2d 639, 643. With the exception of the days leading up to the filing of the underlying suit by Plaintiff, Plaintiff's language, actions, and conduct all reflected that *he* believed that he and Defendant and were joint-venturers: (i) in response to Defendant's March Request Email, Plaintiff sent the Partnership Confirmation Text; (ii) in response to Defendant's comments stating the drafts Plaintiff forwarded did not contain his equity position, Plaintiff forwarded revised drafts that did provide for Defendant to receive a portion of the net profits (albeit, not an equity position); (iii) at the same time, Plaintiff continued to have the CUP application for the Property processed, which, per his own Complaint, would require months – if not years – and significant capital investment. Exhibit B, p.625, ln.22 – p.626, ln.1.

80. In addition, Plaintiff's March Request Email is as damning as the Confirmation Email – Plaintiff is asking *of* Defendant a concession from his *established obligation* to pay $10,000 a month. Exhibit B, p.541-542. Plaintiff's own language offers clear additional evidence that there was an agreed-upon collateral oral agreement not included in the November Document: payments of $10,000 a month.

81. In sum, all seven factors lead to one irrefutable conclusion: the November Document was not intended to be a completely integrated agreement for the Property.

82. Pursuant to the second step: the parol evidence is admissible as it helps explain and interpret the November Document for what it was intended to be: a memorialization of Defendant's receipt of $10,000 and not the "final agreement." Additionally, the parol evidence is evidence of a *collateral oral agreement* – the JVA.

83. Judge Wohlfeil has never undertaken the above analysis.

84. Plaintiff's argument in opposition to the above contract integration analysis is his oral allegation, raised for the first time in his April 2018 Declaration, that Defendant disavowed the equity interest promised to him by Defendant in his Confirmation Email. Plaintiff's oral allegation is barred by the PER and the Statute of Frauds. Furthermore, because Plaintiff was a licensed real estate agent for over 25 years, he cannot claim any form of detrimental reliance regarding his allegation that Defendant orally disavowed the equity position promised to him by Plaintiff in the Confirmation Email as the law imputes to him knowledge of the Statute of Frauds.

## C. THE COURT HAS MADE FACTUALLY UNSUPPORTED FINDINGS AND VIOLATED WELL-ESTABLISHED RULES OF LAW.

85. Judge Wohlfeil has made various unsupported rulings and procedurally improper orders in this matter. The three most egregious rulings that demonstrate clear error, resulting in this case being prolonged to Plaintiff's benefit and Defendant's detriment, are:

86. On January 25, 2018 Judge Wohlfeil denied defendants Writ Petition in the City Action. The City Action is premised on the same facts as in this action. The denial was based on Judge Wohlfeil's reasoning that Defendant is not likely to prevail because the evidence demonstrates that he has not submitted his own separate and competing CUP application and that he would not sustain irreparable harm. *See* Exhibit L, page 3. As to the first point regarding a new application, Judge

Wohlfeil ignores the facts that 1) Defendant was initially not allowed to submit an application by the City; and 2) once the City did allow him to submit a competing application, his CUP would have been severely disadvantaged because the "first come, first serve" nature of application processing by the City. Judge Wohlfeil gave no further facts to support his ruling.

87. On April 13, 2018, Defendant's noticed motion to expunge the *Lis Pendens* on the property ("LP Motion") was denied, the trial court's minute order denying the motion makes two factually false statements that were the premises of its ruling. In other words, the "facts" that the trial court thinks are "facts" and which justify its rulings are plainly false:

i. First, "documents Defendant offers in support of the motion were created *after* November 2, 2016;" and

ii. Second, that the contract drafts back and forth "appear to be unsuccessful attempts to negotiate changes to the original agreement."[37]

88. The crucial document, the Confirmation Email was created on the same day as the November Document, only hours later.

89. As previously noted the agreements back and forth never mention a renegotiation, employment, or any other statement which would conclude that these are attempts to do anything other than memorialize an already established agreement, especially when coupled with the email and text communications.

90. In addition to summary denial of the MJOP on July 13, 2018, the Court also denied Defendant's Request for Judicial Notice of Plaintiff's declaration. There are three critical issues that are raised by the trial court's improper denial of Defendant's Request for Judicial Notice of Plaintiff's declaration. They are particularly important because this single ruling can, separate from the other evidence and arguments presented herein, provide the basis that could reasonably lead a third-party to believe the trial court was not acting impartially:

First, the trial court stated "even if I were to grant the request to take judicial notice of a declaration..."[38] Respectfully, the trial court does not have the discretion to deny taking judicial notice

[37] Exhibit B, p.1148-1149 [ROA 192]
[38] Exhibit B, p. 11-15

of the declaration. As clearly stated by the appellate court in *Four Star Electric, Inc. v. F & H Construction* (1992) 7 Cal.App.4th 1375, 1379: "[Defendant] requested the trial court to take judicial notice of pertinent portions of court files in the prior actions. ***The trial court was <u>required</u> to do so upon request*** (Evid. Code, § 452, subd. (d), 453)[.]" *Id.* at 1379 (emphasis added). Counsel cited *Four Star* in his Reply and proved that he met the requirements pursuant to CCP §§ 452 and 453. Thus, though the trial court was not required to take as true the matters asserted within the declaration, it was required to take notice of the declaration itself and, in accordance with the law, analyze the statements therein. It did not.

<u>Second</u>, the trial court's refusal to take judicial notice appears to be based on a hearsay objection (given the trial court's reference to "party opponents" and prior rulings).[39] This position is error because the declaration in question is a judicial admission and does not constitute hearsay. However, assuming the concept of hearsay did apply, the trial court's ruling would still be incorrect because:

(i) the statement does not need to be taken for its truth; and

(ii) there are several clear exceptions to the hearsay rule that would apply if the concept of hearsay were applicable.[40] The exceptions include:

a. The crucial "statement" in this case is the Confirmation Email that states: "no, no problem at all." The trial court did not need to take the statement for the truth asserted therein, that in fact his confirmation would be "no problem," but rather it should have taken judicial notice that the statement was made, making it a judicial admission and putting the onus on Plaintiff to provide an explanation that is not "inherently incredible." In fact, the trial court has broad discretion to simply disregard testimony that is "inherently incredible" even if there is no adverse testimony to combat the statement;

b. in the hearsay construct, the statement can be used solely as impeachment evidence, again not offered for its truth, but rather to show that Plaintiff's Complaint is contradicted by his declaration; and

[39] Counsel notes that in a prior ruling, specifically in the trial courts tentative ruling [ROA 191], it sustained Plaintiffs objections to request for judicial notice which was made primarily on hearsay grounds.
[40] See California Evidence Code § 1200 *et seq.*

c. the statement is clearly an admission by a party opponent and/or an inconsistent statement as it contradicts the very basis of Plaintiff's Complaint alleging the November Document is a completely integrated agreement.[41]

Third, the trial court stated it "wasn't persuaded that even if I were grant the request to take judicial notice of a declaration granted of a party opponent, it's still not dispositive of the entire complaint."[42] This is clearly incorrect and Counsel cannot understand what line of reasoning the trial court undertook to reach such a conclusion. Plaintiff brought forth four causes of action,[43] three of them are derivative and only exist if the primary cause of action for breach of contract is valid. As argued above, and further elaborated upon in the Writ Petition, without the breach of contract cause of action, Plaintiff's remaining three causes of action necessarily fail:

(i) "The essence of the implied covenant of good faith ... is that ' "neither party will do anything which injures the right of the other to receive the benefits of the agreement" ' [citations]." *Commercial Union Assurance Companies v. Safeway Stores, Inc.*, 26 Cal.3d 912, 918. Here, the agreement that Plaintiff premises his cause of action for breach of the implied covenant of good faith and fair dealing is shown to be a receipt. The reality is that Plaintiff is the one who violated the implied covenant of good faith and fair dealing by filing and maintaining this lawsuit fraudulently mispresenting a receipt as a final agreement. Simply stated, there first needs to be a valid agreement and Plaintiff's alleged agreement – the November Document - is not. Ergo, there cannot be a breach of the implied covenant of good faith and fair dealing.

(ii) "To qualify for declaratory relief, [a party] would have to demonstrate its action presented two essential elements: (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to [the party's] rights or obligations." *Jolley v. Chase Home Fin., LLC* (2013) 213 Cal. App. 4th 872, 909. Here, the "proper subject" of declaratory relief Plaintiff seeks is "a judicial determination of the terms and conditions of the written agreement as well as of the rights, duties, and obligations of plaintiff GERACI and defendants thereunder in

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[41] *See* California Evidence Code § 1200 *et. seq.*

[42] Exhibit B, p. 12 ln 21-24 (emphasis added).

[43] Exhibit B, p.624-690 [ROA 1] (Cause of Action in Plaintiff's complaint are: Breach of Contract, Implied Covenant of Good Faith, Specific Performance, and Declaratory relief.)

connection with the purchase and sale of the PROPERTY by COTTON to GERACI or his assignee."[44] In other words Plaintiff's request for declaratory relief is predicated on the allegation that the November Document is a purchase agreement for the sale of the Property. As proven above, it is not. It is a receipt. Therefore, Counsel fails to understand how this cause of action would survive.

(iii) "To obtain specific performance, a plaintiff must make several showings, in addition to proving the elements of a standard breach of contract." *Darbun Enterprises, Inc. v. San Fernando Cmty. Hosp.* (2015) 239 Cal. App. 4th 399, 409. Again, as with the two causes of action above, this cause of action is predicated upon Plaintiff "proving the elements of a standard breach of contract" which he cannot do as the November Document is not a contract. *Id.* Thus, Counsel is unclear how this cause of action can survive if the trial were to adjudicate, pursuant to the PER, that the November Document is not a completely integrated agreement; such a finding, on these facts, would prove that Plaintiff committed fraud by misrepresenting the November Document as a final agreement. In short, the trial court's rulings referenced above are predicated on what the trial court believes to be facts that are incorrect and laws that are not applicable and/or are misapplied.

91. To summarize, and to be absolutely clear on this point, when the trial court denied Defendant's MJOP, the trial court implicitly found the following factual allegations by Plaintiff to NOT be "inherently incredible." Or, in other words, ***this is Plaintiff's explanation of the Confirmation Email and the trial court finds the following to be credible***:

(i) *Within hours* of the parties finalizing their agreement on November 2, 2016, Defendant sent an email to Plaintiff pretending that the JVA had been reached and in which Defendant was already promised a very specific "10% equity position;"

(ii) Plaintiff to have mistakenly confirmed in writing, at Defendant's specific request for written confirmation, Defendant's pretend equity position within hours of the November Document being executed;

(iii) Plaintiff, a licensed Real Estate Agent (at the time) for over 25 years, to have never sought in any manner to document the fact that he mistakenly sent the Confirmation Email despite knowing its legal import under the Statute of Frauds;

[44] Exhibit B, p.629, ln. 1-5

(iv) for Plaintiff to have realized, over a year after filing suit, that he should raise the Oral Disavowment; and

(v) that Plaintiff did so, coincidentally, in response to Defendant's motion citing, for the first time, *Riverisland* and *Tenzer* preventing Plaintiff from using the PER as a shield to bar parol evidence that is proof of his own fraud. (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18; *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n* (2013) 55 Cal.4th 1169).

**D. DISQUALIFICATION FOR CAUSE**

92. There are two often-cited cases that set forth the standard and analysis that mandate Judge Wohlfeil's recusal per this Statement:

(a) First, in *Hall v. Harker* (*Hall*) (1999) 69 Cal.App.4th 836, a malicious prosecution case was subject to reversal when the trial judge revealed clear bias regarding defendant's profession, *i.e.*, that attorneys tend to initiate and churn litigation for financial gain, regardless of merits of the case or damage to defendant, and then made credibility determinations against defendant on a probable cause issue that was central to the case. *Id.* at 843 ("Whether [attorney] initiated [party's] cross-complaint without probable cause and for an improper purpose was the central issue in the malicious prosecution case against him. [Attorney], of course, maintained he believed his client's version of the facts and presented evidence to support the reasonableness of that belief. The trial judge however, made credibility findings that rejected [Attorney's] story and that of his supporting witnesses. ***It is difficult to imagine a more direct connection between the judge's expressed bias and the gravamen of the case before him.***") (emphasis added).

Here, even more egregious than *Hall*, Judge Wohlfeil has consistently, and without ever providing his reasoning for doing so, (i) turned a case-dispositive issue that is a purely a question of law into a factual dispute; and then (ii) made credibility determinations of the evidence on the case-dispositive issue against Defendant without any evidentiary support (in some instances, in direct and unexplained contradiction of undisputed evidence and controlling case law).

(b) Second, in *Rohr v. Johnson* (1944) 65 Cal.App.2d 208 the court stated: "The mere fact that a judge entertains a *general* belief in the honesty of someone he knows is neither unusual nor

indicates that he has such a *fixed opinion* as to impair his ability to weigh any evidence involving the acts of that person." *Id.* at 211 (emphasis added). In *Rohr*, the court did not find that the trial judge was biased, noting "[i]t does not here appear that there was any conflict between the testimony produced by the respective parties or that the judge was in any way called upon to decide which of two sets of witnesses was telling the truth. At best, any showing of bias is not strong, and it is very questionable whether the showing thus made could be held sufficient to show the existence of bias." *Id.*

Here, application of the principles articulated in *Rohr* mandate recusal of Judge Wohlfeil because:

i. Judge Wohlfeil's belief in the honesty of Weinstein and Mrs. Austin is not "general" as in *Rohr* because whether this action was *specifically* filed and/or maintained by them as a malicious prosecution action goes straight to the issue of the honesty, integrity and credibility of Weinstein and Mrs. Austin. Judge Wohlfeil's "*fixed opinion*" – that Weinstein and Mrs. Austin are incapable of acting unethically by filing/maintaining a lawsuit lacking probable cause – prejudices Defendant because it does not *even allow for the possibility* that this case was filed for the purpose of coercing Defendant into settling with Plaintiff without regard to the merits of Plaintiff's Complaint. Judge Wohlfeil's fixed opinion is causing irreparable harm to Defendant by forcing him to endure the hardships of a meritless litigation action, This, whether inadvertent or unintentional, has further aided Plaintiff and his counsel in their unlawful scheme to prevail via a malicious prosecution action.

ii. The representations and factual assertions of Mrs. Austin to the trial court, in her advocacy of Plaintiff's right to control over the Property, have been that the November Document - executed on November 2, 2016 - is a completely integrated agreement for the sale of the Property. The declaration of Hurtado, a former practicing attorney in the State of New York and California federal judicial law clerk, declares that on March 6, 2017, Mrs. Austin directly and unambiguously stated that the November Document is *not* a completely integrated agreement for the sale of the Property. Hurtado's testimony directly contradicts Mrs. Austin's factual representations to this court: one of these two parties, both of whom completely understand the seriousness of violating ethical rules and laws by fabricating material evidence and engaging in a course of conduct meant to *intentionally* deceive a trial court, has *knowingly* and *willfully* made a false material factual statement to this Court. Thus, unlike in

1 *Rohr*, "here [it does] appear that there [is a] conflict between the testimony produced by the respective
2 parties [and] that the judge [has been] called upon to decide which of two sets of witnesses was telling
3 the truth." *Id.* However, Judge Wohlfeil's ***fixed opinion*** that Mrs. Austin is incapable of acting
4 unethically (*i.e.*, lying), on the ***threshold*** and ***case-dispositive*** issue, directly and self-evidently
5 prejudices Defendant as it is serving to ***force*** him to continue in a litigation matter that is grinding him
6 down financially, physically and mentally; thereby serving to coerce him into settling a meritless action.

7 93. Summarized, Counsel's position is that it can ***appear*** that Judge Wohlfeil's fixed opinion
8 and/or bias has led him to improperly turn a pure question of law into a factual dispute, so he can then
9 make unmerited credibility determinations regarding evidence against Defendant because of his
10 personal relationship with Weinstein and Mrs. Austin. If the pure question of law – whether the
11 November Document is a completely integrated contract – were appropriately analyzed via the PER and
12 well-settled case law, then Weinstein and Mrs. Austin would be open to a cause of action for malicious
13 prosecution pursuant to *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349 ("we hold that
14 terminations based on the PER are favorable for malicious prosecution purposes.").

15 94. In other words, if Judge Wohlfeil has (i) incorrectly turned a legal dispute into a factual
16 dispute and (ii) made rulings that are neither supported by facts nor law, then a "person aware of the
17 facts might reasonably entertain a doubt that the judge would be able to be impartial" (CCP
18 § 170.1(a)(6)(A)(iii)) because it can reasonably appear that Judge Wohlfeil is using his position as an
19 Officer of the Court to "protect" his "friends" - Weinstein and/or Mrs. Austin - from a malicious
20 prosecution action because he has a favorable "[b]ias ... toward a lawyer in the proceeding" (CCP
21 § 170.1(a)(6)(B)).

22 95. An alternative theory, that a third-party could reasonably entertain, is that Judge Wohlfeil
23 is simply over-burdened and assumed that this matter could not be as simple as described by Defendant
24 (*i.e.*, one email dispositively proves that Plaintiff is committing fraud and Weinstein/Mrs. Austin
25 brought forth a malicious prosecution action). Thus, Judge Wohlfeil simply ignores the submissions by
26 Defendant and ***trusts*** that Weinstein/Mrs. Austin are ethical and would be bounded in their arguments
27 based on facts. If such is the case, Judge Wohlfeil has made a serious mistake; based on ***undisputed***
28 evidence and the PER, it is clear that Weinstein and Mrs. Austin have made factual representations and

arguments they know to be false. While it is impossible for Counsel to truly understand the motives for Judge Wohlfeil's rulings, being intimately familiar with every piece of evidence in this action, it is clear Judge Wohlfeil has been remiss in his duties.

96. Thus, whatever the reason, in the interest of justice, Judge Wohlfeil should immediately recuse himself from any further actions in this matter. At this point, even if Judge Wohlfeil were to now understand the sheer simplicity of the evidence and facts at issue here, the objective standard has been met. Furthermore, Defendant should not be put in a position in which he "hopes" that throughout the remainder of the litigation Judge Wohlfeil would be capable of being impartial. On that note, assuming there are future adverse rulings to Defendant, they would be overshadowed by the specter that Judge Wohlfeil was ruling in retaliation for Counsel having brought forth this Statement seeking his disqualification in defense of his client's rights.

D. THIS PETITION (STATEMENT OF DISQUALIFICATION) IS TIMELY

97. CCP §170.3(c)(1) provides that a "[Statement of Disqualification] shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." In light of the facts and circumstances set forth below, the timeliness of Counsel's presentation of this Statement is statutorily complaint and consistent with relevant controlling case law.

98. As discussed above, Counsel first appeared in this case to represent Defendant on a limited scope for the sole purpose of drafting, filing and arguing the LP Motion and the related *ex parte* application filed in April 2018. Thereafter, Counsel became attorney of record.

99. The trial court's order denying Defendant's LP Motion made numerous factually inaccurate and unsupported statements. The trial court allowed that motion to be heard on shortened time but denied Defendant the opportunity to file a reply and point out the flaws in Plaintiff's opposition papers. Counsel hoped it was simply a single instance of mistake by the trial court and that he could address the issue again in a subsequent motion.

100. On April 27, 2018, Counsel became attorney of record and represented Defendant on his Receiver Application on June 14, 2018. The trial court again summarily denied the relief requested, impliedly finding the November Document is a completely integrated agreement. But, again, because

it was an *ex parte* application, the issue of contract integration was not fully briefed (and never had been prior to then).

101. On June 20, 2018, Counsel filed the MJOP which fully briefed the issue of contract integration ***for the first time***. Judge Wohlfeil issued a tentative ruling denying the MJOP on July 12, 2018. At the hearing on July 13, 2018 before this court, Counsel and co-counsel attempted to focus on the sole, dispositive issue of contract integration: specifically, that the November Document is not a completely integrated agreement. "Your Honor, ***the only thing we really want clarification*** in the matter whether or not the court deems the contract an integrated contract or not."[45] Judge Wohlfeil, in an exasperated demeanor that comes across in the transcript from the hearing, stated: (i) "You know, we've been down this road so many times, counsel. I've explained and reexplained the court's interpretation of your position. I don't know what more to say," and (ii) "we've addressed that in multiple motions. I'm not going to go back over it again at this point in time."[46]

102. Judge Wohlfeil, again, has NEVER addressed the threshold and case-dispositive issue of contract integration. And it did not become apparent to Counsel, until the July 13, 2018 hearing that Judge Wohlfeil could reasonably appear to be avoiding the issue of contract integration.

103. As a practical matter, it is noteworthy that, immediately following Counsel's discovery of Judge Wohlfeil's fixed opinion evidenced in his ruling on the MJOP, Counsel was preparing for trial, drafting other filings in this matter while simultaneously preparing this statement which now includes information from the August 2, 2018 hearing where a continuance of the August 17, 2018 trial was granted. Counsel dedicated substantial amount of time to drafting a lengthy Petition for Writ in this matter with the Court of Appeals which was filed on August 30, 2018.

104. Additionally, Counsel had to research and file a Petition for Review with California Supreme Court for the City Action which was filed on August 27, 2018 in order to preserve Defendant's appeal or his appeal would be lost forever. This petition is currently under review with the California Supreme Court. Counsel is primarily a criminal defense attorney and therefore spends much of the regular business day in court and his only opportunity to research and draft what are novel civil law

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[45] Exhibit B, p. 13, ln. 19-21 (emphasis added).
[46] *Id.* at ln.12-15, ln. 22-24

1 issues, to him, take place in the evening and on weekends. As an example, this Statement also required
2 substantial time to research, draft and prepare for filing as Counsel has never had to address the process
3 for seeking the disqualification of a judge. Thus, this Statement is being provided at the earliest time
4 practical given Counsel's other time sensitive obligations.

5 105. In *Christie v. City of El Centro* the trial court set aside a nonsuit and dismissal in favor
6 of the city and its police department. The trial court granted a new trial after finding that the previous
7 judge who granted the nonsuit was disqualified. It held that as a matter of law the judge was disqualified
8 at the moment he had a conversation with a previously disqualified judge in the same matter. Having
9 found the judge who granted nonsuit disqualified to rule on the matter, the trial court set aside the
10 resulting dismissal. The Court of Appeal affirmed that determination, emphasizing in its opinion that
11 "***disqualification occurs when the facts creating disqualification arise, not when disqualification is***
12 ***established.***" *Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776 (emphasis added) (citing
13 *Tatum v. Southern Pacific Co.* (1967) 250 Cal. App. 2d 40, 43; *Urias v. Harris Farms, Inc.* (1991) 234
14 Cal. App. 3d 415, 422–427.

15 106. Here, it was not until *after* Counsel had fully briefed the motion in the MJOP ***and*** Judge
16 Wohlfeil incorrectly and in a frustrated manner stated he had already addressed the threshold and case-
17 dispositive issue of contract integration, that Counsel became aware of the "facts" (*i.e.*, Judge Wohlfeil's
18 fixed opinion/bias) giving rise to this Statement. Counsel, now, respectfully submits this Statement at
19 the earliest possible opportunity. *See* CCP §170.3(c)(1) "at [his] earliest practicable opportunity after
20 discovering the facts constituting the ground for disqualification."; *North Beverly Park Homeowners*
21 *Ass'n v. Bisno* (2007) 147 Cal.App.4th 762, re'hrg denied, rvw. denied ("The issue of disqualification
22 must be raised at the ***earliest reasonable opportunity*** after the party becomes aware of the disqualifying
23 facts.").

24 ## V. CONCLUSION

25 A court is not required to determine whether there is actual bias. As noted, the objective test is
26 whether a reasonable member of the public at large, aware of all the facts, would fairly entertain doubts
27 as to the judge's impartiality. *See Christie v. City of El Centro* (2006) 135 Cal. App. 4th 767, 776;
28 *Housing Authority of the County of Monterey v. Jones* (2005) 130 Cal. App. 4th 1029, 1041–1042;

1 *Briggs v. Superior Court* (2001) 87 Cal. App. 4th 312, 318–319; *Ng v. Superior Court* (1997) 52 Cal.
2 App. 4th 1010, 1024.

3 Cumulatively, the facts and cases referenced above clearly meet this objective standard:

4 *First*, Plaintiff and his agents knowingly violated numerous City and State disclosure laws and
5 regulations when they omitted Plaintiff's name as a party who has an interest in the Property and the
6 CUP;

7 *Second*, the case-dispositive issue is whether the November Document is a completely integrated
8 agreement.

9 *Third*, the Confirmation Email and other parol evidence is undisputed evidence that the
10 November Document is not a completely integrated agreement.

11 *Fourth*, Judge Wohlfeil has, on no less than ***eight occasions***, impliedly and/or directly found that
12 the November Document is a completely integrated agreement.

13 *Fifth*, Judge Wohlfeil has never provided his legal reasoning for why the Confirmation Email,
14 pursuant to contract interpretation laws and well-settled case law, does not disprove Plaintiff's
15 contention that the November Document is a completely integrated agreement.

16 *Sixth*, Defendant has, on no less than ***six occasions***, requested that Judge Wohlfeil please provide
17 his reasoning for finding that the November Document is a completely integrated agreement. On more
18 than ***two occasions*** Defendant has literally begged Judge Wohlfeil in writing and orally at hearings to
19 explain why the Confirmation Email does not prove that the November Document is not a completely
20 integrated agreement. *See, e.g.*, (*"I BEG the Court..."*)[47]

21 *Seventh*, some of the purported "facts" referenced by Judge Wohlfeil in support of his rulings
22 represent clear abuses of discretion as the "facts" he references are not facts at all. The ***undisputed***
23 ***evidence*** provided by Plaintiff and Defendant directly contradict the factual findings upon which Judge
24 Wohlfeil premised his rulings.

25 *Eight*, Judge Wohlfeil has stated, and the record in this action makes numerous references to,
26 that he does not personally believe Weinstein and Mrs. Austin are capable of acting unethically by filing
27 and/or maintaining a malicious prosecution action.

28

[47] Exhibit B, p. 22, ln. 21- p. 23, ln. 1

*Ninth*, it is possible that this case was filed and/or maintained without probable cause (*i.e.*, could be a malicious prosecution action).

*Tenth*, if this case was filed and/or maintained without probable cause, then that means that Weinstein and Mrs. Austin potentially acted unethically.

*Eleventh*, the declaration of Hurtado declares that Mrs. Austin knows her representations to this court are false, which is to say that she is acting unethically (*i.e.*, arguing the November Document, executed in November of 2016, is a completely integrated agreement when she was working on the actual final agreements to effectuate the sale in March of 2017). Judge Wohlfeil's expressed opinion that counsel for Plaintiff would not act unethically is clearly "fixed" in light of the facts presented here and highly prejudicial to Defendant.

*Twelfth*, by allowing this matter to continue, Judge Wohlfeil has ratified Plaintiff's attempt to pursue an interest in the Property and by extension the CUP even though Plaintiff cannot legally own an interest in a Marijuana Outlet under state law.

*Thirteen*, if Judge Wohlfeil had addressed the threshold issue of contract integration and applied PER properly, the only logical conclusion is that the Confirmation Email (admitted to in Plaintiff's sworn declaration) prove the November Document is not a completely integrated agreement. The consequence of such a ruling would be that Weinstein and Mrs. Austin would be open to a cause of action for malicious prosecution. *See Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349 ("[W]e hold that terminations based on the parol evidence rule are favorable for malicious prosecution purposes.").

"When the allegations of bias relate to factual issues, they are particularly troubling because the appellate court usually defers to the trial court's factual and credibility findings. [Citation.] Implicit in this time-honored standard of review is the assumption that such findings were made fairly and impartially." *Hall v. Harker* (1999) 69 Cal.App.4th 836, 841. Here, if nothing else, whether there exists prejudice or not, Judge Wohlfeil has repeatedly and inexplicably (i) avoided addressing the obvious fraudulent scheme that Plaintiff is engaged in via his agents in seeking to acquire a marijuana related CUP that he is prohibited from owning by law; (ii) falsely stated that he has addressed the threshold issue of contract integration when in fact he has not and has systemically refused to do so for over a

year; and (iii) gotten procedural and material case-dispositive facts wrong that, coupled with his comments as to the ethics of Weinstein and Mrs. Austin, make it impossible for a third-party to believe that Judge Wohlfeil can be impartial. Recusal is mandated.

Counsel respectfully notes that he is at a loss to understand Judge Wohlfeil's actions. He does not believe Judge Wohlfeil has intended to specifically harm Defendant, but, his actions are unjustified and are resulting in severe prejudice to Defendant. Plaintiff and his attorneys are intelligent individuals who, as a result of Judge Wohlfeil's actions, had and continue to have the luxury of covering up their tracks and taking actions to unjustly mitigate their liability to Defendant. That Judge Wohlfeil's bias/fixed-opinion leads him to believe the preceding sentence is unfounded or some form of litigation-hyperbole is why Counsel is compelled to bring forth this Statement in defense of his client's rights.

## VI. VERIFICATION

I, Jacob P. Austin, hereby declare under penalty of perjury that I drafted and have read the foregoing Verified Statement, and the facts stated herein are true and correct based upon my direct first-hand personal knowledge and information which I obtained through my review of the pleadings and documents filed in this matter on September 12, 2018.

DATED: September 12, 2018

JACOB P. AUSTIN

# EXHIBIT A

Court of Appeal, Fourth Appellate District, Division One
Kevin J. Lane, Clerk/Executive C
Electronically RECEIVED on 8/30/2018 at 4:29:16 PM

Court of Appeal, Fourth Appellate District, Division One
Kevin J. Lane, Clerk/Executive Officer
Electronically FILED on 8/30/2018 by Jose Rodriguez, Deputy Clerk

CASE #: D074587

IN THE COURT OF APPEAL OF THE S'

FOURTH APPELLATE DISTRICT – DIVISION ONE

DARRYL COTTON,
Defendant/Petitioner/Appellant,

v.

THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO,

Respondent.

LARRY GERACI, an individual; REBECCA BERRY, an individual; MICHAEL R. WEINSTEIN, an individual; SCOTT TOOTHACRE, an individual; FERRIS & BRITTON APC, a California corporation; GINA M. AUSTIN an individual; AUSTIN LEGAL GROUP APC, a California corporation; JIM BARTELL, an individual; BARTELL & ASSOCIATES, INC., a California corporation; ABHAY SCHWEITZER, an individual and dba TECHNE; AARON MAGAGNA, an individual; THE CITY OF SAN DIEGO, a public entity; M. TRAVIS PHELPS, MICHELLE SOKOLOWSKI, FIROUZEH TIRANDAZI, CHERLYN CAC, as individuals and as employees of THE CITY OF SAN DIEGO,

Real Parties in Interest.

Court of Appeal Case No. ________
(San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL)

# PETITION FOR WRIT OF MANDATE, SUPERSEDEAS AND/OR OTHER APPROPRIATE RELIEF

## <u>IMMEDIATE STAY REQUESTED ON AUGUST 28, 2018</u>

JACOB P. AUSTIN [SBN 290303]
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| COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION ONE | COURT OF APPEAL CASE NUMBER: |
|---|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 290303<br>NAME: JACOB P. AUSTIN<br>FIRM NAME: The Law Office of Jacob Austin<br>STREET ADDRESS: 1455 Frazee Road, #500<br>CITY: San Diego STATE: CA ZIP CODE: 92108<br>TELEPHONE NO.: (619) 357-6850 FAX NO.: (888) 357-8501<br>E-MAIL ADDRESS: JPA@JacobAustinEsq.com<br>ATTORNEY FOR (name): Defendant/Petitioner/Appellant DARRYL COTTON | SUPERIOR COURT CASE NUMBER:<br>37-2017-00010073-CU-BC-CTL |
| APPELLANT/PETITIONER: DARRYL COTTON<br>RESPONDENT/REAL PARTY IN INTEREST: LARRY GERACI, an individual; REBECCA BERRY, an individual | |
| **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**<br>*(Check one):* [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE | |

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1. This form is being submitted on behalf of the following party *(name)*: Appellant/Petitioner DARRYL COTTON

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

| Full name of interested entity or person | Nature of interest *(Explain)*: |
|---|---|
| (1) Michael R. Weinstein | Attorney representing Real Parties in Interest Geraci and Berry |
| (2) Scott Toothacre | Attorney representing Real Parties in Interest Geraci and Berry |
| (3) Ferris & Britton APC, a California corp. | Law firm at which Michael R. Weinstein & Scott Toothacre practice |
| (4) Gina M. Austin | Former attorney for Geraci & current attorney for Aaron Magagne |
| (5) Austin Legal Group APC, California corp. | Law firm owned/operated by Gina M. Austin |

[X] Continued on attachment 2.

**The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).**

Date: August 20, 2018

JACOB P. AUSTIN
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)



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APP-008 [Rev. January 1, 2017]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS - continued

## ATTACHMENT 2

| Name of Interested Entity or Person | Nature of Interest *(Explain)* |
|---|---|
| (6) Gina M. Austin, an Individual | Attorney who formerly represented Geraci, and currently represents Aaron Magagna |
| (7) Austin Legal Group APC, a California corporation | Law Firm of Attorney Gina Austin which formerly represented Geraci, and currently represents Aaron Magagna |
| (8) Jim Bartell, an individual | Lobbyist providing services to Larry Geraci re CUP application for Petitioner's real property |
| (9) Bartell & Associates, Inc. | Lobbying firm providing services to Larry Geraci re pending CUP application for Petitioner's real property |
| (10) Abhay Schweitzer, an Individual | Architect providing design and other services for Larry Geraci re pending CUP application for Petitioner's real property |
| (11) Abhay Schweitzer dba TECHNE | Fictitious Business Name under which Abhay Schweitzer does business providing design and other services for Larry Geraci re CUP application for Petitioner's real property |
| (12) Aaron Magagna, an individual | Owner of a recently-submitted CUP application for real property located at 6220 Federal Boulevard, City and County of San Diego, California |
| (13) M. Travis Phelps, an individual and employee of the City of San Diego | Deputy Attorney for the City of San Diego who represented the City of San Diego in a related case in the San Diego County Superior Court entitled *Cotton v. City of San Diego, et al.*, Case No. 37-2017-00037675-CU-WM-CTL |
| (14) The City of San Diego | The public entity which is processing the CUP applications for Petitioner's real property and the competing CUP application submitted by Aaron Magagna |

## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS - continued

| | |
|---|---|
| (15) Michelle Sokolowski, an individual and employee of the City of San Diego | Deputy Director, City of San Diego Development Services Department, Project Submittal and Management Division who was involved in processing the CUP application for Petitioner's real property |
| (16) Firouzeh Tirandazi, an individual and employee of the City of San Diego | Former Development Project Manager, City of San Diego Development Services Department who was involved in processing the CUP application for Petitioner's real property |
| (17) Cherlyn Cac, an individual and employee of the City of San Diego | Development Project Manager, City of San Diego Development Services Department who was involved in processing the CUP application for Petitioner's real property |

**DECLARATION OF JACOB P. AUSTIN REGARDING REPORTERS' TRANSCRIPTS OF HEARINGS PURSUANT TO CRC 8.486(b)(3)**

I, Jacob P. Austin, declare:

1. I am the attorney for Petitioner DARRYL COTTON in both this Appellate Petition and the San Diego Superior Court Case from which this Petition is taken entitled *Larry Geraci v. Darryl Cotton, et al.*, Case No. 37-2017-00010073-CU-BC-CTL ("Lower Court Case").

2. The facts contained herein are true and correct as of my personal knowledge, except those facts which are stated upon information and belief; and, as to those facts, I believe them to be true.

3. This declaration is submitted pursuant to California Rules of Court Rule 8.46(b)(3) to summarize the proceedings in the Lower Court Case relevant to this Petition.

4. For the reasons more fully discussed in this Petition, the litigation in the Lower Court Case has rendered Petitioner virtually indigent, such that he has been forced to sell off more and more of his interest in his real property to finance the litigation and to pay the cost of his basic daily needs.

5. Due to Petitioner's financial condition, he was unable to afford the cost of a court reporter for hearings on law and motion matters.

6. Given the gravity of Petitioner's Motion for Appointment of Receiver ("Receiver Motion") and Motion for Judgment on the Pleadings, I paid the cost for the court reporter, and certified copies of the transcripts of those hearings are included in Petitioner's exhibits at V1 E4 and V3 E21.

7. The hearing on the third law and motion matter directly relevant to the issues raised in this Petition is the April 13, 2018 hearing on Petitioner's Motion to Expunge Notice of Pendency of Action (*Lis Pendens*) ("LP Motion") (V1 E4 and V3 E18) is summarized below.

**Petitioner's LP Motion**

8. Petitioner's LP Motion was brought on the grounds, *inter alia*, that (a) an email sent to Petitioner by Plaintiff/Real Party in Interest Larry Geraci ("Geraci") (the "Confirmation Email") and other evidence presented in the case was undisputed, uncontroverted and case dispositive in nature because it proved that Petitioner and Geraci had never executed a final, legally-binding agreement for the purchase of Petitioner's real property ("Property"), (b) Geraci had not met, nor could he ever meet, his burden of proof to establish by a preponderance of evidence the probable validity of any claim of an ownership interest in the Property, (c) Geraci's own writings constituted willful and knowing misrepresentations made for the specific purpose of defrauding Petitioner, (d) Geraci's case is meritless, and (e) the lawsuit and *lis pendens* were filed for the specific purpose of coercing Petitioner to settle despite the fact that Geraci's case was meritless.

9. Geraci opposed the motion arguing that the evidence was barred by the statute of frauds and parol evidence rule, and supported his argument with a declaration executed April 9, 2018 alleging, *inter alia*, that he had sent the Confirmation Email *by mistake* – the very first time he raised this "mistake" after having had numerous opportunities during the preceding eleven months since he filed the lawsuit. (*See* V2 E10.)

10. At the April 13, 2018 hearing, I argued that the *lis pendens* should be expunged because Geraci's case, premised on a breach of contract, lacked merit and, therefore, Geraci had no viable claim to the Property. I further argued that neither party had considered the document Geraci disingenuously claimed to be the parties' completely integrated agreement to be a final contract. Months of communications between the parties reflect only that the final contract had not been reduced to writing. And until filing his Complaint, Geraci never treated the document as the parties' contract, nor

did he even reference it while his attorney, Gina Austin, was writing and sending drafts of a Purchase and Sale Agreement for the Property.

11. I discussed the document referred to in my moving papers as "The Confirmation Email," and neither Judge Wohlfeil nor Geraci's counsel, Michael R. Weinstein, would even engage in that line of discussion.

12. I also made an oral motion at the Court take testimony of a witness at the hearing, my motion was denied on ground that the Court was not permitted to do so, notwithstanding the fact that a motion to expunge a *lis pendens* is one of the few motions when the Court may take testimony at hearing.

13. Following oral argument, the Court denied the LP Motion on the grounds set forth in its April 13, 2018 Minute Order. *See* V1 E3.

I declare under penalty of perjury according to the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 20, 2018 at San Diego, California.

JACOB P. AUSTIN

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Defendant/Petitioner Darryl Cotton ("Petitioner") respectfully petitions this Court for review of Respondent's orders denying (i) Petitioner's *Ex Parte* Application for Appointment of a Receiver ("Receiver Motion")[1] and (ii) Motion for Judgment on the Pleadings ("MJOP")[2] in San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL.[3]

A single question of law – whether or not a three-sentence document is a completely integrated agreement – determines whether this Petition is meritorious and warrants the issuance of a writ. That single question of law is not only ***dispositive*** of both orders of which Petitioner is seeking review, it is also the ***case-dispositive*** issue in the underlying suit.

Prior to the rulings giving rise to this Petition, Petitioner was representing himself *pro se* and, given that he has no legal background, he was not able to adequately defend himself in this action. The two motions giving rise to the orders at issue here were prepared and submitted by counsel for Petitioner ("Counsel"), originally retained to represent Petitioner on a

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[1] V1 E1 p.2.*

***Exhibit Citation Key:** Volume No. "V#," Exhibit No. "E#," Page No(s). "p.#," Line No(s). "ln.#."**

[2] V1 E2 p.4.

[3] Petitioner notes that resolution of this Petition will also effectively adjudicate a related appeal that is premised on the same facts at issue here: Petitioner's Appeal of Judgment After Order Denying Motion for Issuance of Peremptory Writ of Mandate in a related case – Court of Appeal Case No. D073766; San Diego Superior Court Case No. 37-2017-00037675-CU-WM-CTL. *See* V1 E3 p.6-9.

limited scope basis starting April 5, 2018, following which he substituted in to fully represent Petitioner in this action beginning May 4, 2018.

As proven herein, the action filed against Petitioner not only lacks merit but, given plaintiff/real-party-in-interest Larry Geraci's ("Geraci") judicial admissions in his declaration dated April 9, 2018, it is clear this suit should have been dismissed in the early stages of this litigation pursuant to the Parol Evidence Rule ("PER") and that it represents a malicious prosecution action. *See Casa Herrera, Inc. v. Beydoun* (*Casa Herrera*) (2004) 32 Cal.4th 336, 349 ("we hold that terminations based on the parol evidence rule are favorable for malicious prosecution purposes.").

## I. INTRODUCTION

### A. OVERVIEW

The gravamen of this Petition is incredibly simple: Is a three-sentence document executed on November 2, 2016 (the "November Document") by Geraci and Petitioner a completely integrated agreement for the sale of Petitioner's real property (the "Property") to Geraci?

Geraci filed the underlying suit against Petitioner in **March of 2017** premised exclusively on the allegation that the November Document is a completely integrated agreement. However, Geraci's sworn declaration executed in **April of 2018** admits that on the same day the November Document was executed, *at Petitioner's specific request for written assurance of performance*, Geraci confirmed via email that the November Document is not a "final agreement" for sale of the Property (the "Confirmation Email"). Furthermore, also in his **April 2018** declaration, for the first time since filing suit in **March of 2017**, Geraci alleged that he sent his Confirmation Email by *mistake*.

Of critical import is the fact that Geraci did not raise this "mistake" allegation until Petitioner, represented by Counsel, cited for the first time

controlling case law indisputably establishing that Geraci could not bar the admission of his Confirmation Email pursuant to the PER. *See Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (*Riverisland*) (2013) 55 Cal.4th 1169, 1182 (quoting *Ferguson v. Koch* (1928) 204 Cal. 342, 347) ("'***[I]t was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud.***'") (emphasis added).

An immediate stay, coupled with appropriate writ relief, are necessary to stop what has already caused and continues to cause irreparable harm to Petitioner by forcing him to defend himself against a frivolous suit. *See Boy Scouts of America National Foundation v. Superior Court* (2012) 206 Cal.App.4th 428, 438 (writ review of order overruling demurrer was appropriate where resolution of issue in petitioner's favor "would have resulted in a final disposition" as to petitioner).

As proven below, Petitioner's case is as simple as described above. The fact that Petitioner, on these simple and undisputed facts, has been and continues to be coerced into selling his remaining interest in his Property to finance a clearly meritless suit represents a reality of our judicial system: it takes wealth to access justice. In this regard, this case represents a public policy concern as it "reinforce[s] an already too common perception that the quality of justice a litigant can expect is proportional to the financial means at the litigant's disposal." *Neary v. Regents of University of California* (*Neary*) (1992) 3 Cal.4th 273, 287.

B. AN IMMEDIATE STAY SHOULD ISSUE.

"Whether a contract is integrated is a question of law when the evidence of integration is not in dispute." *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (*Founding Members*) (2003) 109 Cal.App.4th 944, 954; *see also* CCP § 1856(d). "***The crucial <u>threshold</u> inquiry, therefore, and one for the court to decide, is***

***whether the parties intended their written agreement to be fully integrated.*** [Citations.]" *See Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1510 (emphasis added).

None of the evidence at issue in this action is disputed by either party. This Petition and the underlying suit could even be adjudicated solely on Geraci's Complaint and April 2018 declaration containing judicial admissions that negate the ***dispositive*** material allegation in his Complaint; that the November Document is a final agreement for his purchase of the Property.

Petitioner does not have, nor has he had, the financial resources to meet his basic personal financial obligations, much less to undertake discovery and other measures in preparation for a trial. Additionally, Counsel is almost exclusively a criminal defense attorney and has never undertaken a civil trial or an appeal/petition such as this; he is representing Petitioner outside the scope of their original agreement solely because he believes this action against Petitioner is frivolous and its current procedural posture reflects an egregious miscarriage of justice. Petitioner respectfully requests that this Court please issue an immediate stay while it reviews this Petition. *See Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 241 (granting of extraordinary writ because party's petition presents an important issue regarding access to justice for *pro per* litigants with limited financial resources).

Additionally, pursuant to CCP § 923, this Court has virtually unlimited discretion to make orders to preserve the *status quo* in protection of its own jurisdiction, including issuance of a stay order other than supersedeas. CCP § 923; *People ex rel. San Francisco Bay Conservation & Development Com. v. Emeryville* (1968) 69 Cal.2d 533, 538-539. Once this Court understands the simplicity of this case, it becomes self-evident that Geraci is motivated to limit his liability to Petitioner. As argued in the

Receiver Motion (and below), the steps being taken by Geraci, if allowed to continue, will deprive this Court of its jurisdiction and its ability to vindicate Petitioner's rights at a later point in time. Geraci is taking steps to sabotage the main subject matter of the dispute in this action: an application for a Conditional Use Permit (the "CUP") for a Marijuana Outlet at the Property currently being processed by the City of San Diego (the "City"). In protection of its jurisdiction, this Court should immediately issue a stay and appoint a receiver to manage the CUP application process pending final resolution of this action. CCP § 923 ("The provisions of this chapter shall not limit the power of a reviewing court... ***to make any order*** appropriate to preserve the *status quo*, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction.") (emphasis added).

C. WHY WRIT RELIEF SHOULD BE GRANTED.

The Court should grant this Petition for the following reasons:

First, the underlying public policy issue here is of widespread interest. *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816. This action represents an abuse of the judiciary as Respondent is being used as an instrument to effectuate a miscarriage of justice.

Second, each of Respondent's orders is clearly erroneous as a matter of law and substantially prejudices Petitioner's case. *Babb v. Superior Court* (*Babb*) (1971) 3 Cal.3d 841, 851. As proven below, the facts are undisputed, incontrovertible, and inextricably lead to the conclusion that Respondent has erred in finding the November Document to be a completely integrated agreement.

Third, Petitioner lacks adequate means, such as a direct appeal, by which to attain relief. *See Fair Employment & Housing Com. v. Superior Court* (*Fair Employment & Housing*) (2004) 115 Cal.App.4th 629, 633 ("Where there is no direct appeal from a trial court's adverse ruling, and the

aggrieved party would be compelled to go through a trial and appeal from a final judgment, a petition for writ of mandate is allowed. Such a situation arises where the trial court has improperly overruled a demurrer."). Respondent's order denying Petitioner's MJOP is non-appealable. And, although the denial of the Receiver Motion is appealable (for which Petitioner filed an Amended Notice of Appeal on July 26, 2018),[4] Petitioner's extraordinary circumstances warrant extraordinary relief. *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 128.

Notwithstanding Petitioner's blue-collar background and his lack of legal education, on such undisputed facts, Respondent should have adjudicated this matter on its own when presented with Petitioner's arguments (even if such arguments were presented in a legally unsophisticated manner by a *pro se* litigant). This case's continued existence is a miscarriage of justice and resolution via the standard appeal process – given Respondent's rulings and the fact that the sole issue of contract integration has been fully briefed – is inadequate and highly prejudicial as the ***threshold*** issue of contract integration is ***case-dispositive*** and negates the need for discovery and a trial. Pursuant to *Mon Chong Loong Trading Corp. v. Superior Court* (2013) 218 Cal.App.4th 87, 92, "where doing so would serve the interests of justice and judicial economy, an appellate court may use its discretion to construe an appeal as a petition for writ of mandate."

Fourth, Petitioner will suffer harm and prejudice in a manner that cannot be corrected on appeal. *Valley Bank of Nev. v. Superior Court* (1975) 15 Cal.3d 652. The basis of Petitioner's Receiver Motion was evidence that Geraci is taking steps to unlawfully sabotage the City's approval of the CUP application for the Property. As more fully described below, by sabotaging

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[4] V1 E5 p.17.

approval of the CUP application, Geraci will be able to greatly diminish his special and consequential damages due to Petitioner. ***At this point in time, the real driver behind the litigation is not Geraci's good faith belief in the merits of his case; rather, it is to prejudice Petitioner by unnecessarily prolonging this litigation while unlawfully taking extra-judicial actions to limit his liability to Petitioner arising from his breach of the contract.*** Specifically, Geraci is using the political influence of his hired lobbyist, Jim Bartell ("Bartell"), to attain approval of a CUP application for an adjacent property (the "Competing CUP") (V2 E9 p.593, ln.11-19; p.391 (Notice of Application for Conditional Use Permit for Marijuana Outlet dated April 5, 2018)) in order to preclude issuance of a CUP for Petitioner's Property, thereby enabling him to limit his liability to Petitioner. If approved, the Competing CUP application would bar issuance of the CUP for the Property because the two properties are located within 1,000 feet of one another. RJN 9 p.116 at §(a)(1) (§141.0504(a)(6), City of San Diego Ordinance No. O-20793, passed February 22, 2017).

New evidence recently discovered by Petitioner reveals that the Competing CUP application was submitted by an individual named Aaron Magagna ("Magagna") who is believed to be an agent of Geraci. This evidence includes but is not limited to the fact that Magagna is represented by both Gina Austin (Geraci's attorney) and Matthew Shapiro ("Shapiro"), who works extensively with Gina Austin and Bartell. V2 E9 p.593, ln.20-27.[5]

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[5] Petitioner notes that, on or about March 12, 2018, Counsel entered Respondent's predominantly vacant courtroom during a recess and observed Shapiro in plain clothes sitting one seat away from Petitioner and his

Materially, the evidence supporting the allegations against Bartell, purportedly a reputable individual with a history of extensive civil service (he is a former chief of staff for a U.S. Congressman), is third-party testimony from a mutual client *of both* Bartell and Shapiro. Their client, Ms. Corina Young, had a meeting with Bartell and Shapiro to discuss investment opportunities in Marijuana Outlets. At that meeting, Bartell stated he was getting the CUP application on Petitioner's Property denied because "everyone hates Darryl." V2 E9 p.593, ln.11-16. This comment by Bartell was made in or around December of 2017. Bartell is a political lobbyist hired *by Geraci* to get the CUP on Petitioner's Property approved. If Geraci's case was meritorious, Bartell would be using his influence to get the CUP on the Property approved, not to have it denied.

Finally, Geraci has ceased processing the CUP for the Property, whereas the Competing CUP is moving forward through the review process at unprecedented breakneck speed such that it is likely to be approved prior to the CUP application for the Property (despite the CUP application for the

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litigation investor while they were discussing Petitioner's case. When Counsel asked Shapiro why he was there, he replied that he was observing Respondent in preparation for an upcoming hearing before Respondent in another case. After discovering that Magagna had submitted the Competing CUP and was a client of Shapiro, Counsel emailed Shapiro on May 27, 2018 expressing his concern about a number of issues, including Shapiro's possible eavesdropping on the private conversations of Petitioner and his litigation investor in court in March 2018. In response, Shapiro admitted that he had lied to Counsel; the true reason he went to court that day was to "[scope] out" the hearing on Petitioner's case, but seating himself near Petitioner was "truly a coincidence." V2 E9 p.361, ln. 11-12; V2 E9 p.363-370.

Property having been submitted approximately 17 months before the Competing CUP), thereby substantially limiting Geraci's liability to Petitioner, the scope of which will be greater if the CUP application for the Property is approved.

As further described below, this is the Catch-22 in which Geraci and his agents find themselves: they must pretend they believe the November Document is a completely integrated agreement, necessarily requiring them to pursue approval of the CUP for the Property. In reality, however, they do not want the CUP for the Property to be approved because, by doing so, their financial liability to Petitioner will exponentially increase if this case is adjudicated on the merits.

### D. ISSUE PRESENTED.

There is one single question that addresses whether Respondent has abused its discretion in denying Petitioner's Receiver Motion, his MJOP and whether this Petition qualifies for extraordinary writ relief: Is the November Document a completely integrated agreement for the sale of Petitioner's Property to Geraci?

### E. COUNSEL'S REQUEST.

Should this Court deny this Petition, Counsel respectfully requests, on behalf of his client and himself, that it please provide its reasoning. The urgent basis of this request is that, since the inception of this action on March 21, 2017, Respondent has ***never once*** provided its reasoning for repeatedly finding the November Document to be a completely integrated agreement. It has failed to provide such reasoning despite repeated written

and oral requests by Petitioner[6] and Counsel.[7] Petitioner's belief, supported by Counsel's professional opinion (and whose ethical obligations require him to be truthful with his client), is that there is complete lack of any factual or legal support for Geraci's Complaint and Respondent's rulings. This belief by Petitioner – coupled with the fact that Respondent has stated from the bench that it is personally acquainted with opposing counsel and "does not believe they would act unethically"[8] by bringing forth a meritless case – has led Petitioner to believe that Respondent is actively conspiring against him with Geraci and opposing counsel.

On March 8, 2018, Petitioner underwent an Independent Psychiatric Assessment ("IPA") by Dr. Marcus Ploesser who works as a psychiatrist for the Department of Corrections for the State of California (in addition to his own private practice). Relevantly, his declaration summarizing his findings from the IPA states the following:

> Furthermore, [Petitioner]'s description of his nightmares include vivid scenes of violence towards the attorneys for plaintiff that he believes are not acting in a professional manner. [Petitioner] believes that the attorneys representing plaintiff are "in it together" with the plaintiff to use the lawsuit to "defraud" him of

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[6] *See, e.g.*, V1 E6 p.22, ln.21 – .23, ln.1 ("***I BEG the Court at the hearing to please articulate to me (i) which facts in the record and (ii) on what legal authority it was persuaded that I am not going to prevail on the merits on my cause of action for breach of contract.***") (emphasis in original).

[7] *See, e.g.*, V3 E21 p.1229-1234.

[8] V1 E8 p.254, ln.6-10.

> his property. This point is one of the main foci of his expressed mental distress.
>
> [Petitioner]'s distress due to his perception of a conspiracy against him by attorneys is amplified by what he believes is the Court's disregard for the evidence and arguments he has presented. He states he has never been provided the reasoning for the denial of any relief he sought. ***[Petitioner] expressed that at certain points during the course of the litigation he believed the trial court judge was part of the perceived conspiracy against him.***

V1 E8 p.336, ln.6-21 (emphasis added).

Thus, in the interest of justice and for the mental well-being of Petitioner, Counsel and Petitioner respectfully request that this Court please not issue a summary denial should it find that, notwithstanding the Confirmation Email (and other parol evidence), the November Document *is* a completely integrated agreement.

F. AUTHENTICITY OF EXHIBITS.

All exhibits accompanying this Petition are true and correct copies of the original documents on file with the trial court. Such exhibits are incorporated by this reference as though fully set forth herein. The exhibits are paginated consecutively, and page references in this Petition are to the consecutive pagination.

## II.

## MATERIAL FACTUAL AND PROCEDURAL BACKGROUND.

### A. NEGOTIATIONS FOR THE PROPERTY.

In the Summer of 2016, Geraci was one of several parties who contacted Petitioner seeking to purchase the Property to apply for a CUP and operate a Marijuana Outlet at the Property (the "Business").[9] During these negotiations, Geraci represented that (i) he was a California licensed Real Estate Agent;[10] (ii) he was an Enrolled Agent with the IRS;[11] (iii) he was the Owner and Manager of Tax and Financial Center, Inc. (a sophisticated accounting and financial advisory services firm);[12] (iv) preliminary due diligence on the Property by his experts had revealed a zoning issue which, unless *first* resolved, would prevent the City from even *accepting* a CUP application on the Property (the "Zoning Issue"); (v) through his "professional relationships" and hired lobbyists, he was in a unique position to have the Zoning Issue resolved; (vi) he was highly qualified to operate the Business because he owned and operated multiple cannabis dispensaries in the City;[13] (vii) stated that he could not put the CUP in his name because of the fact that he was an Enrolled Agent with the IRS and the federal

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[9] *See, e.g.*, V2 E9 p.381, ln.11-14.

[10] *Id.* at ln.15-16 (Petitioner's Declaration); p.582 (Accurint Professional Background Report).

[11] *Id.*

[12] V2 E9 p.381, ln.16-17 (Petitioner's Declaration); p.573 at ¶2 (Accurint Professional Background Report).

[13] V2 E9 ln.21-22.

government takes a negative stance against marijuana;[14] and (viii) therefore, Geraci suggested his office manager, Rebecca Berry ("Berry"), was an individual who could be trusted to be the applicant on the CUP application because, *inter alia*, she helped manage his other marijuana dispensaries.[15]

On or around October 31, 2016, Geraci asked Petitioner to execute Form DS-318 (Ownership Disclosure Statement) – a required component of all CUP applications. Geraci told Petitioner that he needed the executed Ownership Disclosure Statement to show third-party experts that he had access to the Property in connection with his planning and lobbying efforts toward resolution of the Zoning Issue. The Ownership Disclosure Statement

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[14] V2 E9 p.582, ¶3.

[15] Petitioner notes that Geraci has been sanctioned in at least three other matters for owning/managing illegal marijuana dispensaries in San Diego, California: *City of San Diego v. The Tree Club Cooperative* Case No. 37-2014-00020897-CU-MC-CTL, *City of San Diego v. CCSquared Wellness Cooperative* Case No. 37-2015-00004430-CU-MC-CTL and, *City of San Diego v. LMJ 35th Street Property LP, et al.*, Case No. 37-2015-000000972. *See* RJNs 1-6, p.1-40. Furthermore, Bus. & Prof. Code § 26057(b)(7) 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." Petitioner believes that the true reason Geraci suggested Berry as his agent was to circumvent applicable disclosure laws.

identifies Berry as the "Tenant/Lessee" of the Property.[16] Petitioner has never met Berry and has never entered into any form of contract with Berry. Additionally, on October 31, 2016, and unbeknownst to Petitioner, Berry (i) executed Form DS-190 (Affidavit for Medical Marijuana Consumer Cooperatives for Conditional Use Permit (CUP)), stating she is the "Owner" of the Property, [17] and (ii) submitted the current CUP application for the Property to the City without Petitioner's knowledge or consent[18].

Notably, the CUP application required Berry to disclose all parties with an interest in the CUP. In relevant part, the CUP application form states: "Please list below the owner(s) and tenant(s) (if applicable) of the above referenced property. The list <u>must</u> include the names and addresses of <u>all</u> persons who have an interest in the property, recorded or otherwise, and state the type of property interest (*e.g.*, tenants who will benefit from the permit, all individuals who own the property)."[19]

Thus, Berry, acting as Geraci's agent, knowingly omitted his name as an individual who had an interest in the Property and CUP application, and stated that *she* was the owner of the Property in violation of applicable disclosure laws and requirements. These facts, when coupled with the evidence that Geraci was previously sanctioned on several occasions for operating illegal marijuana dispensaries, makes it clear that he has used his employee/agent as his proxy to acquire a prohibited interest in a Marijuana Outlet. *See* RJNs 1-6, p.1-40.

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[16] V2 E9, p.382, ln.14-18; p.558.

[17] V2 E9 p.559.

[18] V2 E9 p.386, ln.25 – p.397, ln.5.

[19] V2 E9 558 (emphasis added).

B. THE JOINT-VENTURE AGREEMENT IS FORMED.

On the morning of November 2, 2016, Petitioner was still in negotiations with various parties for the Property.[20] Later that day, Petitioner and Geraci entered into an oral joint-venture agreement (the "JVA") pursuant to which, *inter alia,* (i) Petitioner would sell his Property to Geraci; and (ii) Geraci would finance the acquisition of the CUP with the City and development of the Business at the Property. The JVA had a condition precedent: if the CUP was ***approved***, then Geraci would, *inter alia,* provide Petitioner (i) a total purchase price of $800,000 for the Property; (ii) a 10% equity position in the Business; and (iii) the greater of $10,000 or 10% of the net profits of the Business on a monthly basis. If the CUP was ***denied***, Petitioner would keep both his Property ***and*** the agreed-upon $50,000 non-refundable deposit ("NRD") and the transaction would not close.[21] In other words, the approval and issuance of the CUP at the Property was a condition precedent for closing on the sale of the Property.

At that meeting, Geraci provided $10,000 in cash toward the agreed-upon $50,000 NRD. Geraci then had Petitioner execute a three-sentence document to memorialize his receipt thereof – the November Document. Geraci then promised, *inter alia,* (i) to have his attorney, Gina Austin, *promptly* reduce the JVA to writing and (ii) to not submit the CUP application to the City until he paid the balance of the NRD to Petitioner.[22] Later that same day, November 2, 2016, the following communications took place between Geraci and Petitioner:

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[20] V2 E9 p.382, ln.10-13; p.428-486.

[21] *Id.* at p.382, ln.19 – p.383, ln.2.

[22] *Id.* at p.383, ln.8-14.

At 3:11 p.m., Geraci emailed Petitioner a copy of the November Document which states:

> [Petitioner] has agreed to sell the property located at 6176 Federal Blvd. CA for a sum of $800,000 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 and to remain in effect until license is approved. [Petitioner] has agreed to not enter into any other contacts *[sic]* on this property.

V2 E9 p.492-495.

At 6:55 p.m., Petitioner replied:

> 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 p.497 (emphasis added).

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

Thus, because Petitioner recognized the November Document read like both a receipt and a contract, yet contained only some of the terms of the

final agreement, he requested and received from Geraci written assurance of performance (*i.e.*, that the "final agreement" would contain his "10% equity position"). Having received Geraci's Confirmation Email, Petitioner proceeded in good faith believing Geraci's representations that Gina Austin would reduce the JVA to writing and Geraci would honor their agreement.

C. GERACI BREACHES THE JVA AND ATTEMPTS TO DEPRIVE PETITIONER OF HIS BARGAINED-FOR EQUITY POSITION IN THE BUSINESS.

For approximately five months after the November Document was executed, the parties exchanged numerous emails, texts and calls regarding various issues related to the Zoning Issue, CUP application, drafts of the JVA for the sale of the Property and Petitioner's equity position in the Business. During that time however, Geraci continuously failed to accurately reduce the JVA to writing, pay the balance of the NRD, and provide substantive updates regarding his progress in resolving the alleged Zoning Issue – all leading to Petitioner's belief that Geraci was attempting to deprive him of his 10% equity position in the Business.

Attached as "Exhibit 5" to Petitioner's Declaration in support of his Receiver Motion are copies of ***all*** 15 of the email communications that ever took place between Petitioner and Geraci until the filing of the underlying suit spanning the period from October 24, 2016 to March 21, 2017 (the "Email Communications"). V2 E9 p.488-555.

Attached as "Exhibit 2" to Petitioner's Declaration in support of his Receiver Motion is a copy of ***all*** text messages (totaling approximately 550) that ever took place between Petitioner and Geraci and which span the period of July 21, 2016 to May 8, 2017 (the "Text Communications"). *Id.* at p.393-421.

These Text and Email Communications have been provided to Respondent in numerous filings and Geraci has never disputed their authenticity. *See, e.g.*, V2 E9 p.343-421 and V1 E8 p.256-328.

***All*** of the Email and the Text Communications directly prove or unilaterally support the conclusion that (i) the November Document is not a completely integrated agreement; and (ii) the parties were working to reduce the JVA into two agreements before the relationship became hostile – one agreement to provide for the sale of the Property and a second "Side Agreement" to provide for Respondent's 10% equity position in the Business.

Notable communications include the following:

On February 27, 2017, Geraci emailed Petitioner: "Attached is the draft purchase of the property for 400k. The additional contract for the 400k should be in today and I will forward it to you as well."[23] The attached document is titled: "AGREEMENT OF PURCHASE AND SALE OF REAL PROPERTY" (the "Draft Purchase Agreement").[24]

On March 2, 2017, Geraci emailed Petitioner a draft agreement entitled "SIDE AGREEMENT" that was supposed to provide for, *inter alia*, Petitioner's 10% equity position (the "First Draft Side Agreement").[25] The next day, March 3, 2017, Petitioner replied:

> Larry, [¶] I read the Side Agreement in your attachment and I see that no reference is made to the ***10% equity position*** as per my Inda-Gro

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[23] V2 E9 p.501-502.

[24] *Id.* at p.503-528.

[25] *Id.* at p.529-536.

> GERL Services Agreement (see attached) in the new store. In fact para 3.11 [*stating we are not partners*] looks to avoid our agreement completely. It looks like counsel did not get a copy of that document. Can you explain?[26]

Petitioner followed up with Geraci later that day, seeking specific confirmation that Geraci had received the email and understood his concern: the draft did not reflect they *were partners* in the Business.

Petitioner texted: "***Did you get my email?***"[27]

Geraci replied one minute later, "***Yes I did I'm having her rewrite it now[.] As soon as I get it I will forward it to you***" (the "Partnership Confirmation Text").[28] Thus, in his response to Petitioner's concern that they were not partners, Geraci did not deny the accusation, but confirmed that his attorney would address that concern.

On March 6, 2017, Petitioner let Geraci know he would be attending a local cannabis event at which Gina Austin would be the keynote speaker. Geraci texted Petitioner he could speak with Gina Austin directly at the event regarding revisions to the agreements: "***Gina Austin is there she has a red jacket on if you want to have a conversation with her.***"[29] Petitioner was not able to make the event, but Joe Hurtado ("Hurtado") – a transaction adviser whom Petitioner had engaged on a contingent basis to help him sell the

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[26] V2 E9 p.537 (emphasis added).

[27] V2 E2 p.421 (emphasis added).

[28] *Id.* (emphasis added).

[29] *Id.* (emphasis added).

. Property to a new buyer if Geraci breached the agreement – did attend.[30] Hurtado spoke with Gina Austin, letting her know that Petitioner would not be attending and that he was concerned because the First Draft Purchase Agreement Petitioner had received did not contain a provision regarding Petitioner's 10% equity interest in the Business.[31] Gina Austin confirmed she was working on reducing the JVA to writing.[32]

*The next day*, on March 7, 2017, Geraci emailed Petitioner a revised Side Agreement ("Second Draft Side Agreement") drafted by Gina Austin.[33] In that email Geraci wrote:

> Hi Darryl, I have not reviewed this yet but wanted you to look at it and give me your thoughts. Talking to Matt, the 10k a month might be difficult to hit until the sixth month . . . can we do 5k, and on the seventh month start 10k?

*Id.* at p.541-542 (the "March Request Email").

The March Request Email clearly and plainly reflects that Geraci had an *established obligation* of $10,000 and he is seeking a concession *from* Petitioner – specifically, a reduction of $5,000 per month for six months while the Business ramped-up.

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[30] V2 E9 p.385, ln.6-13.

[31] *Id.* at p.591 ln.8-18.

[32] *Id.* at ln.19-21.

[33] V1 E8 p.329 (screen shot of metadata of the Second Draft Side Agreement showing that Gina Austin is the author of the document and that it was created on March 6, 2017).

The Second Draft Side Agreement provided for Petitioner to receive 10% of the net revenues of the Business, but did not provide for the 10% equity position as agreed to in the JVA. V2 E9 p.543-546.

On March 14, 2017, having grown deeply suspicious of Geraci's continuous failure to accurately reduce the JVA to writing, Petitioner contacted the City and discovered that Geraci had already submitted a CUP application for the Property. V2 E9 p.386, ln.25 – p.387, ln.11; p.557-561.

On March 16, 2017, Petitioner emailed Geraci:

> [W]e started these negotiations 4 months ago and the drafts and our communications have not reflected what we agreed upon and are still far from reflecting our original agreement. Here is my proposal, please have your attorney Gina revise the Purchase Agreement and Side Agreement to incorporate all the terms we have agreed upon so that we can execute final versions and get this closed. [¶] I really want to finalize this as soon as possible – ***I found out <u>today</u> that a CUP application for my property was submitted in October, which I am assuming is from someone connected to you.*** Although, I note that you told me that the $40,000 deposit balance would be paid once the CUP was submitted and that you were waiting on certain zoning issues to be resolved. Which is not the case. [¶] Please confirm by Monday 12:00 PM whether we are on the same page and you plan to continue with our agreement. Or, if not, so I can return your $10,000 of the $50,000 required

> deposit. If, hopefully, we can work through this, please confirm that revised final drafts that incorporate the terms above will be provided by Wednesday at 12:00 PM....

V2 E9 p.547-548 (emphasis added).

The next day, Geraci texted Petitioner: "***Can we meet tomorrow [?]***" *Id.* at p.416 (emphasis added).

Petitioner replied in relevant part via email:

> Larry, I received your text asking to meet in person tomorrow. I would prefer that until we have final agreements, that we converse exclusively via email.... ***You lied to me***, I found out yesterday from the City of San Diego that you submitted a CUP application on October 31, 2016 BEFORE we even signed our agreement on the 2nd of November. There is no situation where an oral agreement will convince me that you are dealing with me in good faith and will honor our agreement. <u>We need a final written, legal, binding agreement. Please confirm, as requested... that you are honoring our agreement and will have final drafts</u> ... by Wednesday at 12:00 PM.

V2 E9 p.549 (emphasis added).

Thereafter, Geraci repeatedly refused to provide Petitioner assurance of performance (*i.e.*, that he would reduce the JVA to writing). V3 E13

p.887-890. Thus, Petitioner terminated the JVA with Geraci[34] and sold the Property to a third-party on March 21, 2017 (the "Third-Party Sale"). *Id.* at p.895-907.

### D. GERACI FILES A COMPLAINT ALLEGING THE NOVEMBER DOCUMENT IS THE "FINAL AGREEMENT."

On March 22, 2017, the day after Petitioner terminated the JVA with Geraci, counsel for Geraci, Michael R. Weinstein ("Weinstein"), emailed Petitioner the Complaint, premised solely on the allegation that the November Document is a completely integrated agreement for the Property. V2 E12 p.644, ln.12-17. Geraci's Complaint alleges:

> (i) On November 2, 2016, [Geraci] and [Petitioner] entered into a written agreement for the purchase and sale of the [Property] on the terms and conditions stated therein.... [and] (ii) [Petitioner] has anticipatorily breached the contract by stating that he will not perform the written agreement according to its terms. Among other things, [Petitioner] has stated that, contrary to the written terms, the parties agreed to a down payment... of $50,000... [and] he is entitled to a 10% ownership interest in the [Property.]

V2 E11 p.625, ln.15-17; p.626, ln.6-11.

Geraci's allegation in his Complaint that the November Document is the final agreement for the Property is directly and completely contradicted by his Confirmation Email sent within hours of the execution of the

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[34] V3 E13 p.885.

November Document, as well as by his Email and Text Communications which followed.[35]

E. PETITIONER'S *EX PARTE* APPLICATION AND COUNSEL'S ETHICAL DILEMMA.

On April 4, 2018, Counsel filed an *Ex Parte* Application for Order (1) Shortening Time on [Petitioner]'s Motion to Expunge Notice of Pendency of Action (*Lis Pendens*); and (2) to Compel the Attendance and Testimony of Larry Geraci (the "LP Motion"). V3 E13. As set forth in his supporting declaration and in the moving papers, Counsel declared under penalty of perjury the following:

> In preparation for representing [Petitioner] on his Motion to Expunge the Notice of Action I have, *inter alia*, reviewed (i) every filing in both of [Petitioner]'s actions with Mr. Geraci (Case No. 37-2017-00010073-CU-BC-CTL) and the City of San Diego (37-2017-00037675-CU-WM-CTL); (ii) every document produced to and from [Petitioner] via discovery; (iii) every single email to and from [Petitioner]'s professional and personal email accounts between October 1, 2016 and March 31, 2017; and (iv) interviewed over 17 individuals who were in constant written communications and/or working with [Petitioner] on a daily basis during the same time

[35] Petitioner filed a Second Amended Cross-Complaint alleging, *inter alia*, that the November Document is not the final agreement between the parties. V2 E12 p.635-p.659.

period noted and which gave rise to the events
leading and related to this action.

V3 E13 p.676, ln.10-17.

This statement was presented to Respondent in a section called "Counsel's Ethical Dilemma." V3 E13 p.667, ln.1 – p.671, ln.5. Simply stated, Counsel was representing Petitioner at that point in time on a limited basis, solely for Petitioner's LP Motion, and his review of the record revealed that there was no factual or legal basis to justify any of Respondent's rulings finding – either directly and/or impliedly – that the November Document is a completely integrated agreement for the sale of the Property. Additionally, Counsel's review of the case record revealed that, at a hearing on a motion by Geraci to compel discovery on January 25, 2018, Respondent began the hearing by stating that he was personally acquainted with opposing counsel and that he did not believe they would act unethically by bringing forth a meritless suit.[36]

As stated in the moving papers for the LP Motion, "...Counsel respectfully notes that if [Respondent] is correct in his conclusion regarding the lack of probable cause in this case, and based on his [review of the evidence noted above], then it can ***appear*** that this Court is biased against [Petitioner]. Thus, restated, Counsel's Ethical Dilemma is that he *believes* [Respondent's] maintenance of this action is not reasonable in light of the evidence which has been presented; but he neither believes [Respondent] to be biased against [Petitioner] nor that it would allow its alleged relationship with counsel for Geraci, even if true, to affect its impartiality." V3 E13 p.669, ln.14-19 (emphasis in original).

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[36] V1 E8 p.254, ln.6-10.

F. THE MOTION TO EXPUNGE THE *LIS PENDENS* ON PETITIONER'S PROPERTY.

For over a year prior to the LP Motion, Geraci argued that the PER bars his written promise to provide Petitioner a "10% equity position" in the Business (*i.e.*, the Confirmation Email) and other parol evidence. *See, e.g.*, V3 E15 p.1084-1103. In Petitioner's April 4, 2018 LP Motion, he cited – for the first time in the action – the seminal cases of *Tenzer v. Superscope, Inc.* (*Tenzer*) (1985) 39 Cal.3d 18 and *Riverisland, supra,* 55 Cal.4th 1169 that indisputably preclude Geraci from using the PER and/or the SOF "as a shield to prevent proof of [his own] fraud." V1 E8 p.247 ln.9-21

In his opposition to the LP Motion citing *Tenzer* and *Riverisland,* Geraci provided a declaration executed on April 9, 2018 admitting that he sent the Confirmation Email promising to provide Petitioner a "10% equity position" in the Business, but alleging that (i) he sent the Confirmation Email by *mistake* because he meant to respond *only* to the first sentence of Petitioner's email thanking him for meeting earlier that day and *not* to the second, third or fourth sentences requesting written confirmation of Petitioner's equity position; and (ii) on November 3, 2016, he called Petitioner who ***orally agreed*** that the November Document is a completely integrated agreement and that he was not entitled to an equity position in the Business (the "Oral Disavowment"). V2 E10 p.617, ln.21–p.618, ln.16.

This purported Oral Disavowment by Petitioner was raised by Geraci for the first time in his April 2018 declaration. In support of this allegation, Geraci provided his redacted cell phone record showing his call to Petitioner on November 3, 2016 at **12:40 p.m.** (V3 E16 p.1113), ostensibly to support his contention that he realized his mistake early the next day and called Petitioner to fix his mistake. However, the redacted portion of Geraci's phone record includes what was either a less than one minute call or a missed incoming call from Petitioner at **12:38 p.m.** reflecting that Geraci was simply

returning Petitioner's call two minutes later at 12:40 p.m. *See* RJN 7 at p.60. Additionally, the phone records reflect that Petitioner and Geraci spoke several times the preceding day, that day, and numerous times thereafter. *Id.* at p.60-82.

Geraci's position is that the record of his three-minute call to Petitioner on November 3, 2017 is "substantial evidence" that Petitioner did, in fact, orally disavow his equity position in the Business. However, when that individual cell phone call is viewed against the entire record, the fact that Petitioner called Geraci *first* that day and the parties were in constant communications during that period of time, it becomes clear that Geraci's *selective* presentation of the evidence of a single cell phone call on that particular day is a clear misrepresentation. Geraci presented Respondent with a highly redacted copy of his phone records in order to give that exact misrepresentation.

Further, in his opposition to the LP Motion, Geraci argued that the draft agreements – the Draft Purchase Agreement, the First Draft Side Agreement, and the Second Draft Side Agreement – forwarded to Petitioner after November 2, 2016 were attempts to renegotiate the deal to include employment for Petitioner. V2 E10 p.617, ln.21–p.618, ln.25. Respondent subsequently denied the LP Motion without addressing the Confirmation Email and premised its ruling on two factually incorrect statements.

First, Respondent's order incorrectly states that the draft agreements provided by Petitioner "appear to be unsuccessful attempts to negotiate changes to the original agreement." V3 E18 p.1149, ¶3. Respondent does not state what language in any of the draft agreements offers support for such a conclusion. The recitals to the draft agreements plainly and clearly reflect that the parties had not yet executed a purchase agreement for the sale of the Property. Furthermore, none of the drafts contain a provision for, or even mention, potential employment of Petitioner of any kind by Geraci. V2 E9

p.503-528, 531-536. The failed "negotiation" statement by Respondent, on which it premised its ruling, is completely devoid of any factual support and clearly contradicted by the plain language in the drafts.

Second, Respondent's order states "the documents [Petitioner] offers in support of his Motion were created ***after*** November 2, 2016...." V3 E18 p.1149, ¶3 (emphasis added). This statement is factually and obviously incorrect. The timestamp on the Confirmation Email proves it was created on the very same day as the November Document, within hours of its execution, and in reply to the same email in which Geraci first sent Petitioner a scanned copy of the November Document. V2 E9 p.492-497.

To be incredibly clear on this point: Respondent's order, on its face, makes it clear that after a year presiding in this action, on the ***threshold*** and ***case-dispositive*** issue, Respondent is not aware that the single most critical piece of evidence – proving Geraci's lawsuit is frivolous – was created within hours of and on the SAME DAY as the November Document.

## G. THE MOTION FOR JUDGMENT ON THE PLEADINGS ("MJOP").

Notwithstanding Respondent's order denying the LP Motion on clearly factually incorrect grounds, Counsel, believing Respondent did not find Petitioner credible, hoped to get through to Respondent with simple and undisputed facts. Thus, Counsel prepared and submitted Petitioner's MJOP[37] that focused solely on the question of contract integration. V3 E19 p.1160,

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[37] Counsel notes that he became attorney of record on May 4, 2018 and the deadline to submit a motion for summary judgment was on April 29, 2018. Thus, he had no time to prepare the motion for summary judgment and the only vehicle left to him to summarily end the meritless litigation was via an MJOP.

ln.21-22 ("The sole and dispositive issue in this MJOP is whether the November Document is a completely integrated agreement.").

Respondent issued its tentative ruling denying the MJOP without addressing or providing its substantive reasoning for doing so. V3 E19 p.1227. Counsel also believed he may have lost credibility with Respondent for having referenced Petitioner's allegations of extra-judicial actions by Geraci attempting to force Petitioner to settle. Thus, Counsel asked a colleague to second chair the oral hearing on the MJOP. As the transcript clearly reflects, the ONLY issue on which Counsel and co-chair requested Respondent to focus was the issue of contract integration. Respondent repeatedly refused three separate requests to address the issue:

> **THE COURT**: Good morning to each of you two. Interesting motion, particularly combined with your request for judicial notice. Is there anything else that you'd like to add?
>
> **MR. AUSTIN**: Well, I would like an explanation. So Mr. Geraci, the plaintiff in this case, he submitted the declaration admitting essentially that –
>
> **THE COURT**: It's the "essentially" part that I don't agree with. You make those same comments in your paper. There's four separate causes of action...
>
> **THE COURT**: The court wasn't persuaded that even if I were grant the request to take judicial notice of a declaration granted of a party opponent, it's still not dispositive of the entire complaint. And that's what your motion is directed to, isn't it.

**MR. AUSTIN:** Well --

**THE COURT:** -- in it's entirety? *[sic]*

**MR. AUSTIN:** Because all four causes of action are premised on a breach of contract, so if there's not an integrated contract, according to plaintiff himself, I feel that all four causes of actions fail.

**THE COURT:** Not so sure if I agree with that entire analysis.

Anything else, counsel?

**MR. AUSTIN:** Well, I was just wondering if you could explain to me, if you believe as a matter of law, the three-sentence contracts that plaintiff claims is an integrated contract. If you believe that to actually be a fully integrated contract.

**THE COURT:** You know, we've been down this road so many times, counsel. I've explained and reexplained the court's interpretation of your position. I don't know what more to say.

**CO COUNSEL:** Your Honor, if I may, I'm co counsel on behalf of [Petitioner].

***Your Honor, the <u>only</u> thing we really want clarification in the matter whether or not the court deems the contract an integrated contract or not.***

> **THE COURT:** Again, we've addressed that in multiple motions. I'm not going to go back over it again at this point in time.
>
> Anything else, counsel?
>
> **CO COUNSEL:** That's it.

V1 E4 p.12, ln.5–p.13, ln.26 (emphasis added).

The record in this matter is clear: Respondent has ***never*** provided its reasoning for repeatedly finding that the November Document is a completely integrated agreement. Respondent's statement that it already has addressed the issue is factually false. Respondent, via the summary granting or denying of motions based on the merits of the underlying case, has implicitly found that the November Document is a completely integrated agreement; but, again, it has ***never*** provided its reasoning for deciding so. And, given Respondent's order denying the LP Motion based upon factual findings clearly contradicted by undisputed evidence, it is clear Respondent does not even understand the import of the Confirmation Email or the prejudice Respondent's lack of understanding is causing Petitioner.

## H. STATEMENT OF DISQUALIFICATION AND COMPLAINTS TO THE CALIFORNIA STATE BAR ETHICS COMMITTEE.

Given Respondent's admission that it is personally familiar with opposing counsel and it does not believe they are capable of acting unethically, coupled with unsupported factual findings, false statements contained in Respondent's orders and at oral hearings, and its repeated refusal to address the ***threshold*** and ***case-dispositive*** question of contract integration, Counsel will be filing a Verified Statement of Disqualification pursuant to CCP § 170.1(a)(6)(iii) and CCP § 170.1(a)(6)(B) requesting the Respondent judge to recuse himself. The request is premised primarily on

the grounds that a "person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

Additionally, Petitioner (not through Counsel) will be filing a complaint with the State Bar of California against all other attorneys in this matter regarding their filing, maintaining, and/or ratifying a frivolous lawsuit. Petitioner's complaint will contain Counsel's Verified Statement of Disqualification and this Petition.

## III. STANDARD OF REVIEW.

"The Code of Civil Procedure provides that mandate 'may be issued ... to compel the performance of an act which the law specially enjoins' (§ 1085) where 'there is not a plain, speedy, and adequate remedy, in the ordinary course of law.' (§ 1086.) Although it is well established that mandamus cannot be issued to control a court's discretion, in unusual circumstances the writ will lie where, under the facts, that discretion can be exercised in only one way. [Citation]." *Babb, supra,* 3 Cal.3d at 850-851.

"'Whether a contract is integrated is a question of law when the evidence of integration is not in dispute.' [Citations.]" *Kanno v. Marwit Capital Partners II, L.P.* (*Kanno*) (2017) 18 Cal.App.5th 987, 1001.

## IV. ARGUMENT

### A. RESPONDENT HAS ABUSED ITS DISCRETION IN REPEATEDLY FINDING THAT THE NOVEMBER DOCUMENT IS A COMPLETELY INTEGRATED AGREEMENT.

"An agreement is not ambiguous merely because the parties (<u>or judges</u>) disagree about its meaning. Taken in context, words still matter. As Justice Baxter pointed out, written agreements whose language appears clear in the context of the parties' dispute are not open to claims of latent

ambiguity. *Abers v. Rounsavell* (2010) 189 Cal.App.4th 348, 356 (internal citations omitted) (emphasis added).

The PER operates to exclude evidence of a prior agreement or a contemporaneous oral agreement that contradicts terms in a writing that is intended by the parties to be a final expression of their agreement with respect to those terms. CCP § 1856(a). Parties may intend for the writing to finally and completely express only certain terms of their agreement, rather than the entire agreement. If only part of the agreement is integrated, the PER applies only to that part. *Founding Members, supra,* 109 Cal. App. 4th at 953. Unless a written agreement is intended to be "a complete and exclusive statement of the terms of the agreement," the terms of that agreement "may be explained or supplemented by evidence of consistent additional terms." CCP § 1856(b). Generally, the application of the PER to determine whether a contract is a complete integration involves a two-step analysis:[38]

1. Step One: Did the Parties ***intend*** the writing to be a complete or partial integration?

The Fourth District Appellate Court's ("4th DCA") December 22, 2017 opinion in *Kanno* is conceptually identical to Petitioner's case and the analysis described therein to determine whether the parties ***intended*** the writings at issue to be complete or partial integrations is directly and fully controlling here. In *Kanno,* plaintiff sued defendants for breach of oral contract, specific performance, and promise without intent to perform in connection with a transaction that was documented by three writings, each

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[38] *See Gerdlund v. Elec. Dispensers Int'l* (1987) 190 Cal.App.3d 263, 270; *Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1001; *Kanno, supra,* at 1007.

of which had an extensive integration clause. A jury found in favor of plaintiff and the trial court held that the PER did not bar plaintiff's oral agreement and the evidence supported a finding that the parties intended the oral agreement to be part of their agreement. On appeal, as described in appellant's opening paragraph:

> The question presented by this appeal is whether a complex written $23.5 million transaction to purchase all of the assets of plaintiff's company- negotiated by Sheppard Mullin for plaintiff and Paul Hastings for defendants and including multiple separate integrated agreements comprising two binders of materials - can be anything other than a fully integrated agreement.[39]

The 4th DCA affirmed the judgment, finding the oral agreement was not made unenforceable by the PER. In analyzing the PER and whether the documents were completely integrated, the factors considered by the *Kanno* court included: (i) the language and completeness of the written agreement; (ii) whether it contains an integration clause; (iii) the terms of the alleged oral agreement and whether it might contradict those in the writing; (iv) whether the oral agreement might naturally be made as a separate agreement or, in other words, if the oral agreement were true, would it certainly have been included in the written instrument; (v) would evidence of the oral agreement mislead the trier of fact; and (vi) the circumstances at the time of the writing. *Kanno, supra,* 18 Cal.App.5th at 1007. Additionally, (vii) the terms of a

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[39] *Kanno v. Marwit Capital,* 2016 CA App. Ct. Briefs LEXIS 857.

writing "may be explained or supplemented by course of dealing or usage of trade or by course of performance." CCP § 1856(c).

Application of these seven factors here leads to only one reasonable and incontrovertible conclusion: the November Document was not *intended* to be a completely integrated agreement:

*a. The November Document does not appear to be a final agreement.*

"We start by asking whether the [November Document] appears on its face to be a final expression of the parties' agreement with respect to the terms included in that agreement. [Citation.]" *Id.* at 1007. In reviewing the November Document, it is readily apparent that it is not – it is three sentences long and is missing many essential terms when compared to even a standard real estate purchase agreement, much less one that has a complicated condition precedent requiring approval of a CUP by the City for a business in the emerging and highly regulated marijuana industry. It also has basic grammar and spelling mistakes (*e.g.*, "contacts" instead of "contracts"). Unlike the writings in *Kanno,* the November Document is not "lengthy, formal, [or] detailed[.]" *Id.*

Given its short length, its lack of formality, its simplicity given the complicated subject matter it was intended to cover and its grammar and spelling mistakes, these factors weigh in favor of a finding that the November Document does not meet the criteria to be a completely integrated agreement.

*b. The November Document does not contain an integration clause.*

The presence of an integration clause is given great weight on the issue of integration and it is "very persuasive, if not controlling, on the issue." *Masterson v. Sine* (1968) 68 Cal.2d 222, 225. Conversely, the lack of an integration clause, as here, is evidence the writing is not completely

integrated. *Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 638. Thus, this factor weighs in favor of a finding the November Document is not completely integrated.

c. *The terms of the oral JVA do not contradict the November Document.*

In determining whether a writing was intended as a final expression of the parties' agreement, "collateral oral agreements" that contradict the writing cannot be considered. *Banco Do Brasil, supra,* at 1002-1003. The fact that the November Document does not state it will provide for Petitioner's equity position does not mean its *silence* on the subject is a contradiction as Geraci argues. As the seminal case of *Masterson* makes clear, silence on a term allows the introduction of extrinsic evidence to show the parties intent on that matter. *Masterson, supra,* at 228-231.

d. *The oral agreement – the JVA – would not have been included in the November Document that was meant to be a receipt.*

Where a "collateral" oral agreement is alleged, the court must determine whether the subject matter is such that it would "certainly" have been included in the written agreement had it actually been agreed upon; or would "naturally" have been made as a separate agreement. *Id.* at 227. Here, the terms of the JVA as alleged by Petitioner are consistent with the November Document and the Confirmation Email, both of which provide direct, undisputed evidence that the November Document was meant to be a receipt by Petitioner of $10,000 to be applied toward the total agreed-upon $50,000 NRD. As the November Document was meant to be a *receipt,* it is *natural* that it would not have all the material terms reached in the JVA.

Furthermore, it is *natural* that the November Document was created and notarized as part of the JVA as Geraci provided Petitioner the $10,000

in CASH. No reasonable party would provide such a material amount in cash without ensuring adequate proof of its receipt.

Thus, this factor also weighs against a finding that the November Document is a completely integrated agreement.

### e. *A fact finder would not be misled by the admission of the Confirmation Email and other parol evidence.*

Evidence of a collateral oral agreement should be excluded if it is likely to mislead the fact finder. *Id.* The court properly exercises its discretion by weighing the probative value of the extrinsic evidence against the possibility it may mislead the jury. *See* Evid. Code § 352; *Brawthen v. H & R Block, Inc.* (1972) 28 Cal.App.3d 131, 137-138 ("[*Masterson*] points out that evidence of the 'oral collateral agreements should be excluded only when the fact finder is likely to be misled....' ***This permits a limited weighing of the evidence by the trial court for the purpose of keeping 'incredible' evidence from the jury.***") (emphasis added). The undisputed Text and Email Communications are clear and not "incredible." Simply stated, the evidence would not mislead the fact finder and actually clearly establish what took place – the parties were still reducing the JVA to writing when the relationship soured because Petitioner confronted Geraci about having submitted the CUP application on the Property without finalizing the agreement or providing the remainder of the NRD.

### f. *Geraci's course of performance and conduct explains the meaning of the November Document – it was meant to be a receipt.*

"The law imputes to a person the intention corresponding to the reasonable meaning of his language, acts, and conduct." *H. S. Crocker Co. v. McFaddin* (1957) 148 Cal.App.2d 639, 643. With the exception of the days leading up to the filing of the underlying suit by Geraci, Geraci's language, actions, and conduct all reflected that *he* believed that he and Petitioner and

were joint-venturers: (i) in response to Petitioner's March Request Email, Geraci sent the Partnership Confirmation Text; (ii) in response to Petitioner's comments stating the drafts Geraci forwarded did not contain his equity position, Geraci forwarded revised drafts that did provide for Petitioner to receive a portion of the net profits (albeit, not an equity position); (iii) at the same time, Geraci continued to have the CUP application for the Property processed, which, per his own Complaint, would require months – if not years – and significant capital investment. V2 E11 p.625, ln.22 – p.626, ln.1.

In addition, Geraci's March Request Email is as damning as the Confirmation Email – Geraci is asking ***of*** Petitioner a concession from his ***established obligation*** to pay $10,000 a month. V2 E9 p.541-542. Geraci's own language offers clear additional evidence that there was an agreed-upon collateral oral agreement not included in the November Document: payments of $10,000 a month.

"A party's conduct occurring between the execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean." *Banning Ranch Conservancy v. Superior Court* (2011) 193 Cal.App.4th 903, 915 (citations and quotations omitted). It was not until Petitioner repeatedly requested that Geraci provide final drafts of the JVA reflecting his equity position that there is any evidence of discord between Petitioner and Geraci. And it was not until Petitioner was served with Geraci's Complaint that Petitioner became aware that Geraci intended to misrepresent the November Document as a completely integrated agreement for the sale of the Property. Most notably, all of the undisputed Email and Text Communications exchanged between the parties throughout this period clearly reflect that the parties considered themselves joint-venturers.

"When a person makes a statement ... under circumstances that would normally call for a response if the statement were untrue, the statement

is admissible for the limited purpose of showing the party's reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." *In re Neilson* (1962) 57 Cal.2d 733, 746. If Geraci intended the November Document to be the "final agreement" as he now alleges, then he should have challenged or repudiated the Text and Email Communications reflecting that he was a joint-venturer with Petitioner. As the law understands, a failure to repudiate material allegations is a tacit admission of them. *See* Evid. Code § 1221. This is not merely a legal concept codified by law, it is also a self-evident truth that is understood by any reasonable individual. *See Keller v. Key System Transit Lines* (1954) 129 Cal.App.2d 593, 596 ("The basis of the rule on admissions made in response to accusations is the fact that human experience has shown that generally it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing.").

For the reasons set forth above, this factor supports the conclusion that the November Document is not the "final agreement" for the Property.

g. ***The circumstances at the time of writing clearly prove the parties did not intend the November Document to be a completely integrated agreement.***

A critical point noted by the *Kanno* court in reaching its decision was the following oral exchange: "[plaintiff] insisted that [defendant] 'promise this to me.' [Defendant] paused and then said, ***'[o]kay, [plaintiff], I promise.'***" *Kanno, supra*, at 1009 (emphasis added). Relying heavily on that exchange, the *Kanno* court found that "[t]he evidence supports a finding that the parties intended the terms of the [oral agreement] to be part of their [written] agreement." *Id.* Here, exactly as in *Kanno*, Petitioner emailed Geraci asking him to specifically confirm in writing (*i.e.*, promise) that a "final agreement" would contain his "10% equity position" and Plaintiff clearly and unambiguously did so: ***"No no problem at all."*** V2 E9 p.497.

*Step One Conclusion*

In sum, all seven factors lead to one irrefutable conclusion: the November Document was ***not intended*** to be a completely integrated agreement for the Property.

2. Step Two: If there is an integration, is the parol evidence being offered consistent with the writing, either: (i) to explain or interpret the agreement by proving a meaning to which the language of the writing is reasonably susceptible; or (ii) to show a collateral oral agreement that was "naturally" made as a separate agreement?

We have established that the November Document is *not* a completely integrated agreement; however, the November Document and the Confirmation Email are both evidence of the JVA – the "final agreement," of which one of the final integrated terms is Petitioner's "10% equity position" in the Business. "An integration may be partial rather than complete: The parties may intend that a writing finally and completely express only certain terms of their agreement rather than the agreement in its entirety. If the agreement is partially integrated, the parol evidence rule applies to the integrated part." *Founding Members, supra,* 109 Cal.App.4th at 953 (citations omitted). Thus, the Confirmation Email and other parol evidence described above are *consistent* with the integrated terms under both Step Two factors:

*First,* the parol evidence – the Confirmation Email which by itself is ***dispositive*** – helps explain and interpret the November Document for what it was intended to be: a memorialization of Petitioner's receipt of $10,000 *in cash* and not the "final agreement."

*Second,* the parol evidence is evidence of a *collateral oral agreement* – the JVA. Again, the parol evidence clearly establishes the parties reached an agreement which was a joint-venture. At Petitioner's specific request for assurance of performance, Geraci confirmed the same day via email that a

"final agreement" would contain a "10% equity position." Months later, at Petitioner's objection to the draft agreement written by Attorney Gina Austin and forwarded by Geraci stating they were *not* partners, Geraci replied stating that he was having his attorney revise the documents and the next day Petitioner received the Second Draft Side Agreement; an updated draft that provided for him to receive 10% of the *net profits*. "A joint venture or partnership may be formed orally [citations], or 'assumed to have been organized from a reasonable deduction from the acts and declarations of the parties.' [Citation.]" *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482-483. The only reasonable deduction to be reached here, based on the undisputed communications and actions by and between the parties, is that they both considered themselves joint-venturers.

*Step Two Conclusion*

Thus, for the reasons set forth above, pursuant to the PER, the parol evidence is proof that the November Document is not a completely integrated agreement and is actually a receipt executed on the day the parties reached the oral agreement – the JVA.

3. The Oral Disavowment is barred by the PER.

"A short and vernacular explanation of the parol evidence rule would be that a party to a written contract cannot be permitted to urge that a contract means something which its terms simply cannot mean." *Ri-Joyce, Inc. v. New Motor Vehicle Bd.* (1992) 2 Cal.App.4th 445, 452. Geraci's Oral Disavowment – that Petitioner orally agreed over the phone to forego the equity position Geraci had promised him in the JVA and confirmed in writing in the Confirmation Email – is barred by the PER. Geraci "cannot be permitted to urge that a contract means something which its terms simply cannot mean." *Id.*

4. The Oral Disavowment is also barred by the SOF.

Geraci was a licensed real estate agent for over 25 years at the time of the execution of the November Document. *See* fn. 10. He cannot, as a matter of law, justify any detrimental reliance for failing to reduce to writing the alleged oral statements made by Petitioner on November 3, 2016. *See Phillippe v. Shapell Indus.* (1987) 43 Cal.3d 1247, 1264.

B. RESPONDENT ABUSED ITS DISCRETION IN DENYING PETITIONER'S REQUEST FOR JUDICIAL NOTICE OF GERACI'S DECLARATION RESULTING IN SEVERE PREJUDICE TO PETITIONER.

On July 13, 2018 Respondent refused to take judicial notice of Geraci's declaration on Petitioner's MJOP. V1 E2 p.004, ¶2. Pursuant to Evid. Code § 453, a trial court must take judicial notice of the matters specified in Evid. Code § 452 if a party requests it to do so and does each of the following: (i) gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable him or her to prepare to meet the request (Evid. Code § 453(a)); and (ii) furnishes the court with sufficient information to enable it to take judicial notice of the matter (Evid. Code § 453(b)). *See Four Star Electric, Inc. v. F & H Construction* (1992) 7 Cal.App.4th 1375, 1379.

Petitioner met the requirements set forth in Evid. Code § 453; thus, Respondent was required to take judicial notice of Plaintiff's statements in his declaration *even if they nullify material allegations in Geraci's Complaint. See Rauber v. Herman* (1991) 229 Cal.App.3d 942, 946 ("Where an allegation [in a party's Complaint] is contrary to law or to a fact of which the court may take judicial notice, ***it is*** to be treated as a ***nullity***.") (emphasis added).

Respondent did not provide its reasoning for failing to deny the request for judicial notice of Geraci's declaration, pursuant to Evid. Code

§ 453, thereby defeating the basis of the MJOP and severely prejudicing Petitioner. Respondent is ***forcing*** Petitioner to undertake the costly burden of discovery and to prepare for trial in a demonstrably meritless suit.

C. RESPONDENT ABUSED ITS DISCRETION IN DENYING PETITIONER'S *EX PARTE* APPLICATION FOR APPOINTMENT OF A RECEIVER.

"If jointly-owned property is in danger of being lost or destroyed or misappropriated, Respondent may appoint a receiver to protect a party's interest in the property, and such an appointment will be upheld on appeal. [CCP] § 564." *Rosenthal v. Rosenthal* (1966) 240 Cal.App.2d 927, 933. On appeal, as articulated in *Moore v. Oberg* (1943) 61 Cal.App.2d 216, 220, "[t]he ultimate fact to be found [is] whether the protection of the interest of plaintiff require[s] the appointment of a receiver." The moving party must make a showing by a "preponderance of the evidence." *Id.* at 220-221.

Petitioner has more than met his burden. As proven above, the November Document is not a completely integrated agreement. Thus, the sole basis of Geraci's Complaint fails. Geraci's own actions and the communications between himself and Petitioner for more than five months prior to the filing of his lawsuit reveal this case for what it is: frivolous. That Geraci – and, notably, his counsel – continue to prosecute this action is simply because Geraci desires to mitigate his financial liability to Petitioner.

Geraci is liable for, *inter alia*, the $10,000 monthly payments he promised Petitioner, which was an identical term bargained for by Petitioner in the Third-Party Sale. V1 E8 p.246 ln.6-10. However, Petitioner was forced to sell those monthly payments to finance this litigation. *Id.* at ln.12-14. Since the life of the CUP is ten years, Geraci's total liability on this issue is $1,200,000 at a minimum.. RJN 9 at p.143 §(i) and p.144 §(n)(1). However, Geraci will ***only*** become liable ***if*** the CUP is approved – pursuant to the condition precedent in the JVA and the terms of the Third-Party Sale.

And, again, Geraci has sole and exclusive control of the CUP application through his employee/agent, Rebecca Berry. In other words, Geraci controls the CUP application.

Given the above analysis, if Geraci loses this action because it is adjudicated on the merits, he will be liable for Petitioner's damages; the amount of which will be determined by the City's approval or denial of the CUP – again, an outcome which is solely within Geraci's control. This is absurd. And countenanced by Respondent.

In light of the foregoing, the fact that Geraci ***and*** his attorneys continue to maintain a suit lacking probable cause begs a simple question: Why would they continue to devote time, capital and resources to obtain approval of the CUP for the benefit of the Third-Party Sale? They would not; they are merely ***pretending*** to do so because they filed suit alleging their cause of action for breach of contract was meritorious. However, they actually intended to prevail by leveraging and increasing the pressure exerted on Petitioner by the litigation process knowing that he lacked the financial resources to hire an attorney. If they ***appear*** to have ceased prosecuting the CUP on the Property, that is an indirect admission that they know they brought forth a meritless suit. They are caught in a Catch-22; having to spend money to ***appear*** as though they want to have the CUP approved, but knowing that if they actually get the CUP approved and this case is adjudicated on the merits, they are just increasing the amounts of special and consequential damages they will owe Petitioner.

Further, as to the attorneys involved, it is self-evident that they would rather appear to be incompetent – and argue to the bitter end that the PER bars the Confirmation Email –, than admit they were complicit in a criminal conspiracy to deprive Petitioner of his Property via a malicious prosecution action.

In support of his Receiver Motion, Petitioner provided, *inter alia*, an email dated June 1, 2018 from the City stating that Geraci had done nothing to advance the CUP application for nearly *six months*. *See* V2 E9 p.587 ("On April 20, 2018, I had sent a letter to the project's point of contact for project inactivity and would be closing the project, due to inactivity for 90 days."). Geraci is failing to prosecute the CUP on the Property so the Competing CUP application can be approved which would result in the denial of the CUP for the Property. The evidence from the City is sufficient to have justified the appointment of a receiver. *See Brush v. Apartment & Hotel Financing Corp.* (1927) 82 Cal.App. 723, 725 (An allegation that real property is deteriorating and will continue to do so and will by the time of trial, be practically worthless because of pleaded conditions is sufficient to justify the appointment of a receiver).

Additionally, Petitioner provided the declaration of Hurtado that includes evidence that Geraci's political lobbyist – Bartell – is using his political influence with the City to have the CUP on Petitioner's Property denied and the Competing CUP submitted by Magagna approved. V2 E9 p.352, ln.6-9; *see* V2 E9 p.593, ln.11-27 (Hurtado Declaration). While these statements cannot be recognized as undisputed facts on an *ex parte* application for a receiver, in light of the fact that the case against Petitioner is meritless, Hurtado's declaration was sufficient to have required the appointment of a receiver. *See Armbrust v. Armbrust* (1946) 75 Cal.App.2d 272, 274.

At the June 14, 2018 hearing on Petitioner's Receiver Motion, counsel Andrew Flores, for Petitioner, directed Respondent to ***both*** the Competing CUP and the City's email stating that there had been no activity on the CUP application for the Property for nearly six months. V3 E21 p.1232, ln.6-20. Counsel explained to Respondent that, because the City Ordinance governing CUPs for Marijuana Outlets prohibits issuance of multiple CUPs within

1,000 feet of each other, if the Competing CUP was granted, by law it would bar issuance of the CUP for Petitioner's Property because the real property which is the subject of the Competing CUP is located less than 1,000 feet from the Property. *Id.* Counsel clearly described a race to get the Competing CUP approved and Geraci's inaction in processing the CUP application for the Property as proven ***by the City***. Respondent, without providing its reasoning, stated that it was "not persuaded [Petitioner] carried [his] burden that would warrant good cause...." V3 E21 p.1232, ln.27 – 1233, ln.2.

D. RESPONDENT ABUSED ITS DISCRETION IN DENYING PETITIONER'S MJOP.

"[An MJOP] is the equivalent of a general demurrer. This motion tests whether the allegations of the pleading under attack support the pleader's cause if they are true.... In order for judicial notice to support a motion for judgment on the pleadings by negating an express allegation of the pleading, the notice must be of something that cannot reasonably be controverted. The same is true of evidentiary admissions or concessions.... Judicial notice may conclusively defeat the pleading as where it establishes res judicata or collateral estoppel. ***The pleader's own concession may have this same conclusive effect....*** In these limited situations, the court, in ruling on a [MJOP], properly looks beyond the pleadings. But it does so only because the party whose pleading is attached will as a matter of law, or law's equivalent of judicial notice of a fact not reasonably subject to contradiction, fail in the litigation." *Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (*Columbia*) (1991) 231 Cal.App.3d at 468-469 (citations and quotations omitted) (emphasis added).

"A judicial admission is a party's unequivocal concession of the truth of a matter and removes the matter as an issue in the case. [Citations.]" *Gelfo v. Lockheed Martin Corp.* (*Gelfo*) (2006) 140 Cal.App.4th 34, 48. "[A]

court may take judicial notice of a party's admissions or concessions, but only in cases where the admission 'can not reasonably be controverted,' such as in answers to interrogatories or requests for admission, or in affidavits and <u>declarations</u> filed on the party's behalf. [Citation.]" *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 485 (emphasis added).

Geraci's declaration is a judicial admission that he sent the Confirmation Email confirming the November Document is "not" a "final agreement" on ***November 2, 2016***. Realizing he can neither dispute the authenticity of the email nor bar its admission, Geraci then opposes the legal effect of the Confirmation Email on his case with his Oral Disavowment allegation – that he sent the Confirmation Email by *mistake* and that Petitioner orally agreed the November Document is the final agreement for the sale of his Property. Geraci raises this self-serving Oral Disavowment allegation for the first time in his declaration executed ***April 9, 2018***, which is the only direct evidence Geraci puts forth to support this allegation. And, again, he did so in opposition to Petitioner's LP Motion citing *Riverisland* and *Tenzer* that established that Geraci would not be able to bar the admission of his Confirmation Email – the proof of his fraud; which, prior to then, had been the vanguard of his legal arguments in all motions before Respondent.

In *King v. Andersen* (1966) 242 Cal.App.2d 606, the plaintiff in an assault case admitted at deposition that defendant used "no force." *Id.* at 609. When defendant moved for summary judgment based on plaintiff's deposition concession, plaintiff submitted an affidavit in support of his opposition saying, in fact, defendant had applied unnecessary force. *Id.* at 610. Plaintiff disputed the meaning attributed to his deposition testimony by defendant and argued that the dispute must be submitted to the jury. *Id.* at 609-610. Respondent disagreed and dismissed the case. The Court of Appeal affirmed. *Id.* at 610. Plaintiff could not manufacture a dispute of fact by

submitting additional affidavits. "Where, as here, however, there is a clear and unequivocal admission by the plaintiff, himself, in his deposition . . . we are forced to conclude there is no *__substantial__* *__evidence__* of the existence of a triable issue of fact." *Id.* (emphasis in original).

Here, Geraci is attempting to do the very same thing as the plaintiff in *King*. He sent a clear and unequivocal admission that the November Document is not a final agreement __on__ **November 2, 2016**. The procedural history of this action shows that Geraci was relying on the PER/SOF to bar the admission of the Confirmation Email. When confronted with *Riverisland* and *Tenzer* in **April of 2018**, he submits a declaration saying he sent the Confirmation Email by mistake. In support of this contention, Geraci alleges that Petitioner orally agreed the November Document is a final agreement and; therefore, such dispute should be submitted to the jury. Identical to *King*, ***Geraci's self-serving declaration should not be considered __substantial evidence__ and he should not be allowed to blatantly fabricate a material factual dispute to continue to prosecute a frivolous action***. As noted above, he ceased prosecuting the CUP on the Property and the evidence reveals that Bartell, Geraci's agent, is using his influence with the City to have the CUP on the Property denied. In light of the fact that Geraci should lose this action on the merits, it is reasonable that Geraci is taking actions to limit his liability – that is, using his agents to sabotage the CUP for the Property and obtain approval of the Competing CUP.

In *Joslin*, the 4th DCA held that courts may take judicial notice of a fact and use it to dismiss a case "where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed." *Joslin v. H.A.S Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375. Consistent with summary judgment jurisprudence, *Joslin* held that a party cannot escape dismissal simply by offering an "explanation" of its admission and that explanations that are "inherently incredible" may simply be disregarded. *Id.*

at 376. Geraci's Oral Disavowment allegation falls squarely into this category. Thus, it is forestalled by *Joslin* as it is an "explanation" that is "inherently incredible" and should be disregarded.

To be absolutely clear on this point, when Respondent denied Petitioner's MJOP, it implicitly found the following factual allegations by Geraci to NOT be "inherently incredible." To put it more succinctly, ***this is Geraci's position and Respondent finds the following to be credible:***

(i) *Within hours* of the parties finalizing their agreement on November 2, 2016, Petitioner sent an email to Geraci *pretending* that the terms of the JVA had been reached and in which Petitioner was *already* promised a very specific "10% equity position;" (ii) Geraci *mistakenly* confirmed in writing, at Petitioner's specific request for written confirmation, Petitioner's *pretend* equity position *within hours* of the November Document being executed; (iii) Geraci, a licensed Real Estate Agent (at the time) for over 25 years, *never* sought in *any* manner to document the fact that he mistakenly sent the Confirmation Email despite knowing its legal import under the Statute of Frauds; (iv) Geraci realized, *over a year after filing suit*, that he should raise the Oral Disavowment; and (v) that Geraci did so, *coincidentally*, in response to Petitioner's motion citing, for the first time, the holdings of *Riverisland* and *Tenzer* which prevent Geraci from using the PER as a shield to bar parol evidence that is proof of his own fraud.

In *Rivera v. S. Pac. Transp. Co. (Rivera)* (1990) 217 Cal.App.3d 294, 297-299, the court granted summary judgment based on plaintiff's deposition testimony that a train was moving when he tried to enter. The court rejected plaintiff's attempt to explain his testimony that the train was moving before and after he entered, but was still at the precise moment he got on. *Id.* "When the defendant can establish an absolute defense from the plaintiff's admissions, the credibility of the admissions are valued so highly that the controverting affidavits may be disregarded as irrelevant, inadmissible or

evasive." *Id.* at 299-300 (internal quotations and citations omitted). Similarly, here, Geraci's judicial admission that he sent the Confirmation Email – which he was forced to provide in light of *Riverisland* and *Tenzer* – proves the November Document is not a completely integrated agreement for the sale of the Property. Therefore, the Confirmation Email is an "absolute defense" to Geraci's Complaint. *Id.* Pursuant to *Rivera*, Geraci's Oral Disavowment seeking to explain away Petitioner's "absolute defense" as a "mistake" should "be disregarded as...inadmissible[.]" *Id.*

The court in *Columbia* discussed the appropriateness of judicial notice "to support a motion for judgment on the pleadings by negating an express allegation of the pleading [when] the notice [is] something that cannot ***reasonably be controverted.***" *Id.* at 468 (emphasis added). At issue in *Columbia* was the trial court's granting of an MJOP based on "reliance on the terminology of an incorporated complex contract" that contradicted the pleading at issue. The court reversed, noting that "parol evidence may lead to an interpretation of the contract consistent with the pleading's express allegation." *Id.* at 470. The critical point here from the *Columbia* opinion is whether the "fact" sought to be judicially noticed "cannot reasonably be controverted." *Id.* at 468.

Here, Geraci's judicial admission, that on **November 2, 2016** he confirmed in writing that the November Document is not a completely integrated agreement, "cannot reasonably be controverted" by his own self-serving declaration raising the Oral Disavowment allegation for the first time on **April 9, 2018**. *Id.*

In summary, pursuant to well-established case law – *Joslin, Gelfo, King, Rivera, Columbia* - disposing of a case prior to trial by means of a MJOP is appropriate "where the pleader's own concession" means that *on the merits* its "cause is inevitably destined to fail." *Id.* at 469. Such is the case here. The only reason Geraci continues prosecuting this action is to further

his goal to exponentially limit his damages (and those of his agents) to Petitioner by sabotaging the approval of the CUP for the Property.

## V. MAIN CONCLUSION

Geraci's litigation strategy can be summarized as follows: the November Document is a completely integrated agreement and the PER bars his Confirmation Email as evidence to contradict the terms set forth therein. However, should Respondent allow the admission of his Confirmation Email, then his Oral Disavowment allegation – that Petitioner agreed the November Document is a completely integrated agreement – will exculpate him from liability because he sent the Confirmation Email by *mistake* and he corrected that mistake *orally* over the phone the next day. In other words, if he can't prevent admission of evidence created on November 2, 2016 ***proving*** his fraud, then he will use his NEW evidence – his self-serving declaration created on April 9, 2018 - to ***disprove*** his fraud. This is absurd.

In *American Internat. Group, Inc. v. Superior Court* (1991) 234 Cal.App.3d 749, 755, the appellate court issued a writ on a petition from a denial of judgment on pleadings where the issue, as here, was purely legal on undisputed facts and of significant legal import. Discussed thoroughly above, and simply self-evident, Petitioner is the victim of a malicious prosecution action that has evolved into a civil a conspiracy orchestrated by numerous individuals seeking to mitigate their damages. If Petitioner had been represented by competent counsel and/or Petitioner had not discredited himself with Respondent (with allegations of threats by Geraci against him seeking to intimidate him into settling), this matter should have been adjudicated in Petitioner's favor in the preliminary stages of this action.

Petitioner's inability to access justice on these facts represents a severe public policy issue; it will already stand as precedent and encourage wealthy individuals to seek to use the judiciary as an instrument to effectuate a

miscarriage of justice against parties who cannot afford legal counsel to defend themselves against meritless cases. *See Neary, supra,* 3 Cal.4th at 287 ("***the quality of justice a litigant can expect is proportional to the financial means at the litigant's disposal.***") (emphasis added).

In light of the foregoing facts, and the underlying public policy concerns at issue here, Petitioner respectfully requests that this Court immediately issue a writ providing Petitioner the critically needed relief set forth below.

## VI. PRAYER FOR RELIEF

Petitioner prays that this Court:

1. Grant an immediate stay of the underlying proceeding pending resolution of this Petition;
2. Issue a peremptory Writ of Mandate and/or Writ of Prohibition directing Respondent to:
    a. Vacate its Minute Order dated June 14, 2018 denying Receiver Motion;
    b. Appoint a receiver with the requisite authority and ability to supervise and pursue the City's approval of the CUP application;
    c. Vacate its Minute Order dated July 13, 2018 denying Petitioner's MJOP;
    d. Grant Petitioner's MJOP; and
    e. Order Geraci to pay the remaining costs required to immediately have the CUP application for the Property completed;

3. Award Petitioner his costs, pursuant to Rule 8.493, of the California Rules of Court and any other applicable statutes and/or rules; and

4. Grant such other relief as may be just and proper.

DATED: August 27, 2018    LAW OFFICE OF JACOB AUSTIN

By

Jacob P. Austin
Attorney for Petitioner DARRYL COTTON

**WORD COUNT CERTIFICATION**

This brief contains 13-point font in Times New Roman typeface, and contains 13614 (permissibly) words as counted by Microsoft Word 2016, the word processing software used to generate this brief.

DATED: August 27, 2018 LAW OFFICE OF JACOB AUSTIN

By [signature]
Jacob P. Austin
Attorney for Petitioner DARRYL COTTON

# EXHIBIT B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT – DIVISION ONE

| | |
|---|---|
| DARRYL COTTON,<br>Defendant/Petitioner/Appellant,<br>v.<br>THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO,<br>Respondent.<br><br>LARRY GERACI, an individual; REBECCA BERRY, an individual; MICHAEL R. WEINSTEIN, an individual; SCOTT TOOTHACRE, an individual; FERRIS & BRITTON APC, a California corporation; GINA M. AUSTIN an individual; AUSTIN LEGAL GROUP APC, a California corporation; JIM BARTELL, an individual; BARTELL & ASSOCIATES, INC., a California corporation; ABHAY SCHWEITZER, an individual and dba TECHNE; AARON MAGAGNA, an individual; THE CITY OF SAN DIEGO, a public entity; M. TRAVIS PHELPS, MICHELLE SOKOLOWSKI, FIROUZEH TIRANDAZI, CHERLYN CAC, as individuals and as employees of THE CITY OF SAN DIEGO,<br>Real Parties in Interest. | Court of Appeal Case No. ________<br>(San Diego Superior Court Case No. 37-2017-00010073-CU-BC-CTL)<br>and<br>Court of Appeal Case No. D073766<br>(San Diego Superior Court Case No. 37-2017-00037675-CU-WM-CTL) |

# EXHIBITS – VOLUME 1 of 3
## [EXHIBITS 1-8, Pages 001 – 339]

## TO PETITION FOR WRIT OF MANDATE, SUPERSEDEAS AND/OR OTHER APPROPRIATE RELIEF

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**INDEX OF EXHIBITS TO**
**PETITION FOR WRIT OF MANDATE, WRIT OF SUPERSEDEAS**
**AND/OR OTHER APPROPRIATE RELIEF**
**VOLUME 1 [EXHIBITS 1 – 8, PAGES 001–339]**


| EXH. | DATE | DESCRIPTION | PAGE RANGE |
|---|---|---|---|
| 1 | 06/14/18 | Minute Order Denying Motion for Appointment of Receiver [ROA 240] | 001 – 002 |
| 2 | 07/13/18 | Minute Order Denying Motion for Judgment on the Pleadings [ROA 256] | 003 – 004 |
| 3 | 03/14/18 | Notice of Entry of Judgment or Order denying Motion to Expunge *Lis Pendens*; Proof of Service by Mail [ROA 74] | 005 – 009 |
| 4 | 07/13/18 | Certified Copy of Reporter's Transcript of Hearing July 13, 2018 | 010 – 015 |
| 5 | 07/26/18 | Amended Notice of Appeal of June 14, 2018 Order Denying Motion for Appointment of Receiver [ROA 281] | 016 – 017 |
| 6 | 12/11/17 | Declaration of Darryl Cotton's *Ex Parte* Application for an Order Granting Motion for Reconsideration re Application for Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction; | 018 – 020 |
| | | Memorandum of Points and Authorities in Support of Darryl Cotton's *Ex Parte* Application for an Order Granting Motion for Reconsideration re Application for Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction; | 021 – 049 |
| | | Request for Judicial Notice in Support of Darryl Cotton's *Ex Parte* Application for an Order Granting Motion for Reconsideration re Application for Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction [ROA 77] | 050 – 187 |

**INDEX OF EXHIBITS TO**
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**AND/OR OTHER APPROPRIATE RELIEF**
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| EXH. | DATE | DESCRIPTION | PAGE RANGE |
|---|---|---|---|
| 7 | 08/01/18 | Darryl Cotton's *Ex Parte* Application for an Order (1) Continuing Trial Scheduled for August 17, 2018, and (2) a Stay of This Proceeding [ROA 264]; | 188 – 190 |
| | | Memorandum of Points and Authorities [ROA 264]; | 191 – 196 |
| | | Declaration of Jacob P. Austin in Support of Darryl Cotton's *Ex Parte* Application for an Order (1) Continuing Trial Scheduled for August 17, 2018, and (2) a Stay of This Proceeding [ROA 264]; | 197 – 223 |
| | | Declaration Regarding Notice of Darryl Cotton's *Ex Parte* Application for an Order (1) Continuing Trial Scheduled for August 17, 2018, and (2) a Stay of This Proceeding [ROA 264] | 224 – 225 |
| 8 | 04/04/18 | Notice of Motion and Motion to Expunge Notice of Pendency of Action (*Lis Pendens*) [ROA 161] | 226 – 228 |
| | | Darryl Cotton's Memorandum of Points and Authorities in Support of Motion to Expunge Notice of Pendency of Action (*Lis Pendens*) [ROA 161] | 229 – 249 |
| | | Darryl Cotton's Declaration in Support of Motion to Expunge Notice of Pendency of Action (*Lis Pendens*) [ROA 161] | 250 - 339 |

# EXHIBIT B

ROA 297
6 pages

FILED
Clerk of the Superior Court

SEP 17 2018

By: C. Beutler, Deputy

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

LARRY GERACI, an individual,

Plaintiff,

v.

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

Defendants.

AND RELATED CROSS-ACTION

Case No: 2017-00010073-CU-BC-CTL

**ORDER STRIKING DEFENDANT'S STATEMENT OF DISQUALIFICATION OF JUDGE JOEL R. WOHLFEIL**

The Court has reviewed the paperwork that was filed by Defendant Darryl Cotton on September 12, 2018, entitled "Verified Statement of Disqualification" (hereafter "Statement of Disqualification"), which seeks to disqualify Judge Joel R. Wohlfeil from further presiding over the proceedings in the above-entitled case. However, the Statement of Disqualification was not properly served, is untimely, and overall fails to state any legal basis for disqualification on its face. Therefore, the Statement of Disqualification is ordered stricken for the reasons cited below.

I. Authority to Strike the Challenge.

Challenges filed pursuant to Civil Code of Procedure[1] section 170.1 are adjudicated under the procedures set forth in section 170.3. Pursuant to section 170.3, if a judge who should

[1] All further references are to the Code of Civil Procedure unless otherwise stated.

1 disqualify himself or herself fails to do so, any party may file with the clerk a verified written
2 statement setting forth facts constituting grounds for disqualification. The statement seeking to
3 disqualify the judge "shall be presented at the earliest practicable opportunity after discovery of
4 the facts constituting the ground for disqualification. Copies of the statement shall be served on
5 each party or his or her attorney who has appeared and shall be personally served on the judge
6 alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse
7 or in chambers." (§ 170.3 (c)(1).)

8 Once objection has been made, the judge may, within 10 days after service of the objection,
9 "file a consent to disqualification" (§ 170.3(c)(3)); or file "a written verified answer admitting or
10 denying any or all of the allegations...." (*Id.*) Failure to take any action is tantamount to consenting
11 to disqualification. (§ 170.3(c)(4); *Hollingsworth v. Superior Court* (1987) 191 Cal.App.3d 22,
12 26.) However, if the statement is untimely filed, has not been served, or on its face discloses no
13 legal grounds for disqualification, the judge against whom it is filed may strike it. (§ 170.4(b).) In
14 striking a challenge the court is not passing on its own disqualification, but instead is passing only
15 on the legal grounds set forth in the Verified Statement.

16 Should the 10-day period after service pass with the judge taking no action, the judge is
17 deemed disqualified and has no power to act in the case. (§ 170.4(b); *Lewis v. Superior Court*
18 (1988) 198 Cal.App.3d 1101, 1104.)

19 Here, the Statement of Disqualification was not properly served, is untimely, and overall
20 fails to state any legal basis for disqualification on its face.

21 II. Service.

22 Section 170.3(c)(1) requires that a copy of the challenge for cause be personally served on
23 the judge being challenged, or on his or her clerk provided that the judge is present in the
24 courthouse or in chambers. Further, the 10-day period in which to respond does not begin to run
25 until service is effected. Here, Judge Wohlfeil was not personally served, nor was his clerk served
26 while he was present in the courthouse or in chambers. Therefore, the Statement of
27 Disqualification is stricken for lack of service.

28 / / /

III. Timeliness.

Section 170.3(c)(1) provides in part that the statement seeking to disqualify the judge "shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." The failure to timely file a statement of disqualification promptly upon discovery of the ground for disqualification constitutes a forfeiture or waiver of the right to seek disqualification. (*Tri Counties Bank v. Sup.Ct. (Amaya–Guenon)* (2008) 167 Cal.App.4th 1332, 1337-38.) In addition, an untimely disqualification statement may be stricken by the judge against whom it is filed. (§ 170.4(b). "Consequently, if a party is aware of grounds for disqualification of a judge but waits until after a pending motion is decided to present the statement of objection, the statement may be stricken as untimely." (*Tri Counties Bank v. Sup.Ct. (Amaya–Guenon), supra*, 167 Cal.App.4th at 1338.)

According to the Statement of Disqualification, Defendant asserts that Judge Wohlfeil is biased based on rulings made by the court at several hearings, the latest of which occurred on July 13, 2018. Yet, the present Statement of Disqualification was not filed until September 12, 2018, almost two months after Defendant first became aware of the facts supporting the alleged bias. While Defendant attributes the delay to defense counsel's schedule and other time sensitive obligations, it is clear that the Statement of Disqualification was not "presented at the earliest practicable opportunity." Therefore, the Statement of Disqualification is stricken as untimely pursuant to section 170.4(b), in addition to the reasons set forth below.

IV. The Factual Allegations.

Defendant asserts that Judge Wohlfeil is biased and should be disqualified from the present action because he made "various unsupported rulings and procedurally improper orders in this matter." Specifically, he alleges that Judge Wohlfeil improperly denied Defendant's Motion for Judgment on the Pleadings and Request for Judicial Notice, made statements indicating that the Court had a "fixed opinion" regarding the credibility of Plaintiff and Plaintiff's counsel,[2] failed to rule on the crucial threshold inquiry concerning whether there was an integrated contract, failed to

[2] Although Defendant asserts that Judge Wohlfeil made a statement that he was personally acquainted with Plaintiff's counsel and "does not believe that they would act unethically by filing a meritless suit," citing to Exhibit B, ln. 6-10; p. 1051, 25-28; p. 1055, the documents cited do not contain any such statements by Judge Wohlfeil.

explain the bases for his decisions, took procedurally improper actions which favored Plaintiff, and acted frustrated with Defendant's counsel. (See Statement of Disqualification pp. 14-16; 21; 26-29.)

Defendant is seeking to disqualify Judge Wohlfeil pursuant to section 170.1(a)(6)(A)(iii), which provides a judge is disqualified if, "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Defendant also cites to section 170.1(a)(6)(B), which provides that, "[B]ias or prejudice toward a lawyer in the proceeding may be grounds for disqualification." (§170.1.) The standard is articulated in *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97. However, there are well-established limitations on what evidence may be used to establish bias or prejudice under section 170.1(a)(6)(A)(iii). Section 170.2 expressly provides that it shall not be grounds for disqualification where the judge has "in any capacity expressed a view on a legal or factual issue presented in the proceeding, except as provided in paragraph (2) of subdivision (a) of, or subdivision (b) or (c) of, Section 170.1." In addition, a legal ruling is insufficient to establish bias or prejudice, even if the legal ruling is later determined to be erroneous. (*Dietrich v. Litton Industries, Inc.* (1970) 12 Cal.App.3d 704, 719.) Further, it is not evidence of prejudice or bias when a judge expresses an opinion based upon actual observances and in what he or she considers the discharge of his or her judicial duty. (*Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal. App. 3d 1023, 1031; *Shakin v. Board of Medical Examiners* (1967) 254 Cal. App. 2d 102, 116.) Moreover, the grounds for disqualification must be established by offering admissible evidence, rather than information and belief, hearsay or other inadmissible evidence. (See, *United Farm Workers, supra*, 170 Cal.App.3d at 106, fn.6.) Lastly, in *People v. Sweeney* (1960) 55 Cal.2d 27, 35, the California Supreme Court held that a statement of disqualification based upon the conclusions or speculation of a party "may be ignored or stricken from the files by the trial judge."

As summarized above, Defendant's claims of bias are based solely on his disagreement with the statements and legal rulings made by this Court, and therefore fall squarely within the parameters of the authorities set forth above. Such allegations, without more, cannot establish a

1 legal basis for disqualification. Every ruling requires the court to resolve a conflict in favor of one
2 party and against another. The opinion formed does not amount to bias and prejudice. (*Moulton*
3 *Niguel Water Dist. v. Colombo* (2003) 111 Cal. App. 4th 1210, 1219-1220.) Thus, it is clearly not
4 legal evidence of bias that the Court made decisions regarding the evidence or issues presented, or
5 ruled in a particular way in this case even if those decisions were, as Defendant contends, in error.
6 Likewise, statements made in the performance of judicial duties cannot establish a legal
7 basis for disqualification. Judicial remarks that are critical or disapproving of, or even hostile to,
8 counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.
9 "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course
10 of the current proceedings ... do not constitute a basis for a bias or partiality motion unless they
11 display a deep-seated favoritism or antagonism that would make fair judgment impossible."
12 (*Liteky v. United States* (1994) 510 U.S. 540, 555.) Further, the facts and circumstances prompting
13 a challenge for cause must be evaluated in the context of the entire proceeding and not based solely
14 upon isolated conduct or remarks. (*Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 171-172.)
15 In the present case, all of the Court's decisions and comments were made during court
16 proceedings, in the context of the factual and evidentiary issues presented, the court's knowledge
17 of the case, and its overall handling of the matters pending before it. As the authorities above
18 clearly indicate, a judge must be able to issue rulings and make statements in connection with the
19 performance of his or her judicial duties, including those concerning the sufficiency of the
20 evidence, the credibility of parties, or any other issues before the court. Thus, any rulings or
21 statements made by Judge Wohlfeil that Defendant believes were intemperate, unfair, or somehow
22 favored the other party fall into the categories set forth in the legal authorities above; namely the
23 Court expressing its views about the legal and factual issues before it, and the expression of opinion
24 in the performance of the court's judicial duties which cannot establish a legal basis for
25 disqualification.
26 / / /
27 / / /
28 / / /

Further, the Statement of Disqualification is based solely on Defendant's conclusions and interpretation of the Court's rulings and statements. Thus, it lacks sufficient factual or evidentiary support and amounts to no more than mere speculation and conjecture, which likewise cannot form a legal basis for disqualification.

In short, the allegations made by Defendant do not show any bias on the part of the judge, nor do they support any reasonable and objective conclusion that Judge Wohlfeil is, or could reasonably be believed to be, biased. Therefore, the Statement of Disqualification is properly stricken, and this Court may hear any further matters that may come before it in this case.

V. Conclusion.

IT IS HEREBY ORDERED that the Statement of Disqualification of Judge Joel R. Wohlfeil is stricken for the reasons stated above pursuant to section 170.4(b).

This order constitutes a determination of the question of disqualification of the trial judge pursuant to section 170.3(d).

IT IS SO ORDERED.

Dated this 17 day of September 2018.

By: ______________________

Hon. Joel R. Wohlfeil
Judge of the Superior Court

# EXHIBIT C

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By Treva Cutts, Deputy Clerk

**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF SAN DIEGO, CENTRAL DIVISION**

| | |
|---|---|
| LARRY GERACI, an individual,<br><br>Plaintiff,<br><br>v.<br><br>DARRYL COTTON, an individual; and DOES 1 through 10, inclusive,<br><br>Defendants. | Case No. 37-2017-00010073-CU-BC-CTL<br><br>Judge: Hon. Joel R. Wohlfeil<br>Dept.: C-73<br><br>**PLAINTIFF/CROSS-DEFENDANTS' MOTION IN LIMINE TO EXCLUDE REFERENCE TO MR. COTTON'S ALLEGATIONS REGARDING INTIMIDATION BY SEAN MILLER, LOGAN STULMACHER AND AN INDIVIDUAL NAMED DUANE**<br><br>**[NO. 7 OF 15]**<br><br>**[IMAGED FILE]**<br><br>Complaint Filed: March 21, 2017<br>Trial Date: June 28, 2019 |
| DARRYL COTTON, an individual,<br><br>Cross-Complainant,<br><br>v.<br><br>LARRY GERACI, an individual, REBECCA BERRY, an individual, and DOES 1 THROUGH 10, INCLUSIVE,<br><br>Cross-Defendants. | |

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

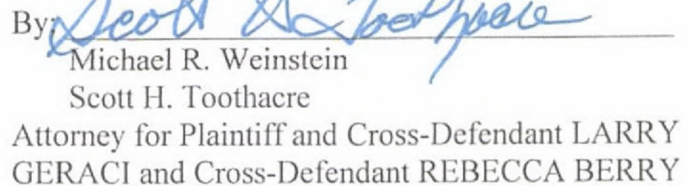
**PLEASE TAKE NOTICE** that on June 28, 2019 at 8:30 a.m. or as soon thereafter as the matter may be heard in Department C-73 of the San Diego Superior Court, located at 330 West Broadway, San Diego, California, Plaintiff/Cross-Defendant, LARRY GERACI, and Cross-Defendant, REBECCA BERRY, will move *in limine* pursuant to Evid. Code §§ 210, 350, 352, 703, and 1101(a) for orders precluding any evidence, examination, argument or other reference to Mr. Cotton and Mr. Hurtado's allegations that Mr. Geraci is somehow connected to Sean Miller, Logan

Stulmacher and an individual known only as Duane, individuals whom they allege threatened Mr. Cotton and Mr. Hurtado to force a settlement of the instant action.

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

FERRIS & BRITTON
A Professional Corporation

Dated: June 20, 2019



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

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 A. Sean Miller

4 During his deposition Mr. Hurtado testified that he was attempting to hire a paralegal to help
5 Attorney Jacob Austin with this case. Mr. Hurtado found Sean Miller either off of Craigslist or a
6 paralegal referral service. Mr. Hurtado met with Mr. Miller and gave Mr. Miller the case file to read
7 to become familiar with this litigation. Mr. Hurtado testified that while reviewing the file, Mr. Miller
8 said "Oh, I know Larry Geraci." (Hurtado Depo. p. 88:7-89:15, true and correct excerpts are attached
9 as Exhibit 5 to NOL.) Allegedly Mr. Miller also told Mr. Hurtado either he was "out on parole" or
10 that he was a "convict." (Hurtado Depo. 89:16-21, a true and correct excerpt is attached hereto as
11 Exhibit 1.) Mr. Hurtado testified that Mr. Miller has been convicted of witness tampering and money
12 laundering. (Hurtado Depo. 92:22-23, a true and correct excerpt is attached hereto as Exhibit 1.)
13 Mr. Hurtado then threatened Mr. Miller that if he talked to Larry Geraci about their meeting that
14 Mr. Hurtado would report Mr. Miller to the State Bar. Mr. Miller said "I get it" and the two parted
15 ways amicably. (Hurtado Depo. p. 90:3-16, true and correct excerpts are attached as Exhibit 5 to
16 NOL.)

17 Mr. Hurtado further testified that two hours after the meeting, Mr. Miller called him and said
18 "I think it would be in your best interests if you contact Mr. Cotton, you know, and get him to settle."
19 Although this alleged statement seems fairly innocuous, Mr. Hurtado took it as a threat which
20 "scared the shit out of [him]." (Hurtado Depo. p. 90:17-91:9, true and correct excerpts are attached
21 as Exhibit 5 to NOL.) Mr. Hurtado specifically asked Mr. Miller if he had spoken to Mr. Geraci to
22 which he replied "**no**". (Hurtado Depo. 91:10-12, true and correct excerpts are attached as Exhibit
23 5 to NOL.) Nevertheless, Mr. Hurtado somehow concluded the "threat" from Mr. Miller was really
24 a threat coming from Mr. Geraci. Mr. Hurtado has no evidentiary support for this conclusion, it is
25 merely based on his irrational conjecture and speculation.

26 B. Logan Stulmacher and Duane (last name unknown)

27 According to Mr. Hurtado, Logan Stulmacher and an individual known only as Duane,
28 contacted Darryl Cotton ostensibly to discuss a business proposition. However, when they met with

1 Mr. Cotton, they insinuated that he should settle with Mr. Geraci. From this conversation Mr. Geraci
2 and Mr. Hurtado have concluded that Mr. Geraci sent Logan Stulmacher and Duane to intimidate
3 Mr. Cotton into settling with Mr. Geraci. (Hurtado Depo. 96:13-97:1, a true and correct excerpt is
4 attached as Exhibit 5 to NOL.) Specifically, the threat was "One was, like, a criminal element of,
5 like, physical intimidation. The other one was that Geraci and Bartell have all this influence with
6 the city, so they could have the police just show up and -- I don't want to speculate but make (sic)
7 things difficult for him." (Hurtado Depo. 99:13-100:1, a true and correct excerpt is attached as
8 Exhibit 5 to NOL.)

9 Mr. Hurtado believes Logan threatened Mr. Cotton a second time, after Mr. Cotton filed his
10 federal lawsuit. Allegedly Logan returned to Mr. Cotton's property and had a heated discussion
11 (which was videotaped) telling Mr. Cotton "Hey, keep me out of this; I don't want to be a part of
12 this anymore." (Hurtado Depo. 100:5-22, a true and correct excerpt is attached as Exhibit 5 to NOL.)

13 **C. Mr. Hurtado and Mr. Cotton's Federal Complaint**

14 Based on the above-referenced alleged incidents, Mr. Cotton and Mr. Hurtado filed a
15 Complaint in the United States District Court Southern District of California Case No. '18CV2751
16 W AGS, alleging that Sean Miller ("Miller") is an agent of Geraci and a violent convict out on parole
17 who was found guilty on two counts of committing wire fraud, in violation of 18 U.S.C. § 1343, two
18 counts of money laundering, in violation of 18 U.S.C. § 1957, and one count of witness tampering,
19 in violation of 18 U.S.C. § 1512(b)(3); *United States v. Miller*, 531 F.3d 340, 342 (6th Cir. 2008).
20 Miller threatened Hurtado and his family with the goal of having Hurtado use his influence with
21 Cotton to have him forcibly settle with Geraci. (Federal Complaint ¶ 21, a true and correct copy is
22 attached as Exhibit 3 to NOL.)

23 Mr. Hurtado and Mr. Cotton further alleged that "Geraci's efforts included physical threats
24 and intimidation tactics that were not only aimed at Cotton, but also Cotton's friends, employees
25 and his litigation investor Mr. Hurtado." (Federal Complaint ¶23, 7:10-12, a true and correct copy
26 is attached as Exhibit 3 to NOL.)

27 On May 14, 2019, the Federal Court dismissed Mr. Hurtado and Mr. Cotton's federal action
28 with prejudice. (A true and correct copy of the Federal Court Order is attached as Exhibit 4 to NOL.)

## II. LEGAL ARGUMENT

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

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

### B. Mr. Cotton and Mr. Hurtado's Irrational Speculation – That Individuals They Contacted, Threatened Them as an Agent of Geraci Is Inadmissible Hearsay

Clearly the statements alleged to have been made by Sean Miller, Logan Stulmacher and Duane [last name unknown] are out of court statements offered for the truth of the matter asserted. As such, they should be excluded as hearsay pursuant to Evidence Code § 1200 et seq. It is anticipated that Mr. Cotton and Mr. Hurtado may claim that the statements were not made for the truth of the matter stated, but rather, as to their respective states of mind. However, neither Mr. Cotton's nor Mr. Hurtado's states of mind are in issue. To that extent, the hearsay statements are irrelevant to any issue in the case and inadmissible.

### C. The Evidence is Not Made on Personal Knowledge – Evidence Code § 703

Pursuant to Evidence Code Section 703, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Here, neither Mr. Hurtado nor Mr. Cotton have personal knowledge that Mr. Geraci had anything whatsoever to do with the alleged threats made by Mr. Miller, Mr. Stulmacher or Duane. As such, the evidence is inadmissible for lack of personal knowledge.

### D. The Evidence is Inadmissible Evidence of Character – Evidence Code § 1101(a)

Evidence Code § 1101(a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

Mr. Cotton and Mr. Hurtado's speculation that Mr. Geraci may have been involved in the

alleged intimidation and threats alleged by Mr. Cotton and Mr. Hurtado is irrelevant in this case with the sole exception of attempting to besmirch Mr. Geraci's good character. As such, it should be excluded.

**E. The Evidence is More Prejudicial than Probative – Evidence Code § 352**

Evidence Code Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or misleading the jury."

It is self-evident that any unsubstantiated speculation that Mr. Geraci was somehow involved in having Mr. Cotton and Mr. Hurtado threatened to try to force a settlement of this case is highly inflammatory and would result in great prejudice to Mr. Geraci. Admission of this evidence will irreparably harm Mr. Geraci's character with the jury and will likely result in a mistrial. The evidence should be excluded pursuant to Evidence Code Section 352.

## III. CONCLUSION

For all the foregoing reasons, Mr. Geraci asks this Court to issue an order in limine that Mr. Cotton, Attorney Jacob Austin and all attorneys and witnesses be cautioned not to refer to Mr. Cotton and Mr. Hurtado's allegations that they were threatened by Sean Miller, Logan Stulmacher and Duane and their speculation that Mr. Geraci had anything to do with those alleged threats.

FERRIS & BRITTON
A Professional Corporation

Dated: June 21, 2019

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

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8 **SUPERIOR COURT OF CALIFORNIA**

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

| | |
|---|---|
| LARRY GERACI, an individual,<br>Plaintiff,<br>v.<br>DARRYL COTTON, an individual; and DOES 1 through 10, inclusive,<br>Defendants. | Case No. 37-2017-00010073-CU-BC-CTL<br>Judge: Hon. Joel R. Wohlfeil<br>Dept.: C-73<br>**ORDER [PROPOSED] RE PLAINTIFF/CROSS-DEFENDANTS' MOTION IN LIMINE NO. 7 OF 15 TO EXCLUDE REFERENCE TO MR. COTTON'S ALLEGATIONS REGARDING INTIMIDATION BY SEAN MILLER, LOGAN STULMACHER AND AN INDIVIDUAL NAMED DUANE**<br>**[NO. 7 OF 15]**<br>**[IMAGED FILE]**<br>Complaint Filed: March 21, 2017<br>Trial Date: June 28, 2019 |
| DARRYL COTTON, an individual,<br>Cross-Complainant,<br>v.<br>LARRY GERACI, an individual, REBECCA BERRY, an individual, and DOES 1 THROUGH 10, INCLUSIVE,<br>Cross-Defendants. | |

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1 After considering all moving, opposition and reply papers, as well as the oral argument of counsel,
2 **IT IS HEREBY ORDERED THAT** Plaintiff/Cross-Defendants' Motion in Limine No. 7 of 15 is
3 [GRANTED/GRANTED WITHOUT PREJUDICE/DENIED/DENIED WITHOUT PREJUDICE].
4 [Any evidence, examination, argument or other reference to Mr. Cotton and Mr. Hurtado's
5 allegations that Mr. Geraci is somehow connected to Sean Miller, Logan Stulmacher and an
6 individual known only as Duane, individuals whom they allege threatened Mr. Cotton and Mr.
7 Hurtado to force a settlement of the instant action, is precluded, and all counsel are ordered to advise
8 their clients and witnesses of the Court's Order.]
9
10 Dated: July __, 2019

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

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# EXHIBIT D

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**ELECTRONICALLY FILED**
Superior Court of California,
County of San Diego
**06/21/2019** at 03:16:00 PM
Clerk of the Superior Court
By Treva Cutts,Deputy Clerk

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

**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF SAN DIEGO, CENTRAL DIVISION**

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| LARRY GERACI, an individual,<br><br>Plaintiff,<br><br>v.<br><br>DARRYL COTTON, an individual; and DOES 1 through 10, inclusive,<br><br>Defendants. | Case No. 37-2017-00010073-CU-BC-CTL<br><br>Judge: Hon. Joel R. Wohlfeil<br>Dept.: C-73<br><br>**PLAINTIFF/CROSS-DEFENDANTS' NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE ANY EVIDENCE OF THE COTTON AND HURTADO FEDERAL COURT LAWSUITS**<br><br>**[MIL NO. 1 OF 15]**<br><br>**[IMAGED FILE]**<br><br>Complaint filed: March 21, 2017<br>Trial Date: June 28, 2019 |
| DARRYL COTTON, an individual,<br><br>Cross-Complainant,<br><br>v.<br><br>LARRY GERACI, an individual, REBECCA BERRY, an individual, and DOES 1 THROUGH 10, INCLUSIVE,<br><br>Cross-Defendants. | |

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

**PLEASE TAKE NOTICE** that on June 28, 2019 at 8:30 a.m. or as soon thereafter as the matter may be heard in Department C-73 of the San Diego Superior Court, located at 330 West Broadway, San Diego, California, Plaintiff/Cross-Defendant, LARRY GERACI, and Cross-Defendant, REBECCA BERRY, will move *in limine* pursuant to Evid. Code §§ 210, 350 and 352 for orders precluding any evidence, examination or reference to Darryl Cotton's lawsuit filed in the USDC Case No. 3:18-cv-00325-GPC-MDD, and Darryl Cotton and Joe Hurtado's lawsuit filed in

1 the USDC Case No. 3:18-cv-02751-GPC-MDD.

2 This motion will be based on this Notice of Motion, the Memorandum of Points and

3 Authorities served and filed herewith, on the records and file herein, and on such evidence as may

4 be presented at the hearing of this motion.

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6 FERRIS & BRITTON
A Professional Corporation

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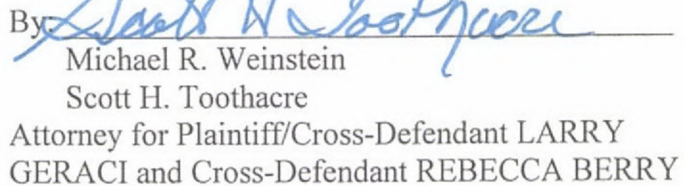

8 Dated: June 20, 2019 By: ______________________________

9 Michael R. Weinstein
Scott H. Toothacre

10 Attorney for Plaintiff/Cross-Defendant LARRY
GERACI and Cross-Defendant REBECCA BERRY

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

On or about August 25, 2017, Mr. Cotton, through his attorneys David S. Demian and Adam C. Witt of Finch, Thornton and Baird, filed his operative Second Amended Cross-Complaint in this action alleging 5 causes of action as follows: 1) Breach of Contract; 2) Intentional Misrepresentation; 3) Negligent Misrepresentation; 4) False Promise, and 5) Declaratory Relief. Mr. Cotton's Second Amended Cross-Complaint makes no allegations related to a vast criminal enterprise headed by Larry Geraci, and makes no reference to any alleged conspiracy or racketeering by Mr. Geraci, Ms. Berry, their counsel or anyone else.

Thereafter, on February 9, 2018, and on December 6, 2018, respectively, Mr. Cotton filed two federal court lawsuits naming the Plaintiff/Cross-Defendants and their counsel in the instant action and Mr. Hurtado was joined as an additional Plaintiff in the second of those federal court lawsuits. Both federal court complaints are replete with vitriolic accusations against Mr. Geraci and Ms. Berry based upon unfounded, wild, and outlandish theories of a vast criminal conspiracy run by Mr. Geraci. The fact that these ridiculous complaints have been filed, and the baseless, inflammatory contents of those federal court complaints[1] must be excluded in the instant State Case. If these matters come before the jury, it would certainly be grounds for a mistrial.

These matters are wholly irrelevant to the instant action in that the Second Amended Complaint makes no assertions with regard to conspiracies, nor has Mr. Cotton sought joint-and-several liability based upon a conspiracy theory. As such, these accusations would be made only in an attempt to prejudice the jury against Mr. Geraci, Ms. Berry and their counsel.

### II. THE FEDERAL COMPLAINTS

**Cotton's First Federal Court Complaint**

On February 9, 2018, Mr. Cotton, proceeding in pro per, filed a federal Complaint in the

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[1] After the initial federal court lawsuit, the judge therein stayed the action *sua sponte*; it is currently stayed pending the outcome of the instant state court action. In the second federal court lawsuit, the judge granted motions to dismiss and dismissed Mr. Cotton and Mr. Hurtado's complaint with prejudice.

United States District Court Southern District of California, Case No. 3:18-cv-00325-GPC-MDD. Named as Defendants in that Complaint were Larry Geraci, Rebecca Berry, Gina Austin, Austin Legal Group, Michael Weinstein, Scott H Toothacre, Ferris & Britton, and the City of San Diego. In that Complaint Mr. Cotton requested the federal court review the evidence and rulings of the State Court in the instant action. A true and correct copy of Mr. Cotton's federal court Complaint is attached hereto to Plaintiff/Cross-Defendants Notice of Lodgment in Support of Motions in Limine Nos. 1-15 ("NOL") as Exhibit 1 to NOL.

Mr. Cotton's federal Complaint asserts 20 causes of action as follows:

1) 42 U.S.C. SEC. 1983:4th Amend. Unlawful Seizure;
2) 42 U.S.C. SEC. 1983: 14th Amend. Due Process Violations;
3) Breach of Contract;
4) False Promise;
5) Breach of Implied Covenant of Good Faith and Fair Dealing;
6) Breach of Fiduciary Duty;
7) Fraud in the Inducement;
8) Fraud/Fraudulent Misrepresentation;
9) Trespass;
10) Slander of Title;
11) False Documents Liability;
12) Unjust Enrichment;
13) Intentional Interference With Prospective Economic Relations;
14) Negligent Interference with Prospective Economic Relations;
15) Intentional Infliction of Emotional Distress;
16) Negligent Infliction of Emotional Distress;
17) Conspiracy;
18) RICO;
19) Declaratory Relief; and
20) Injunctive Relief.

Along with the Complaint, Mr. Cotton requested the Federal Court stay the instant State Court action. The case was assigned to the Honorable Gonzalo P. Curiel. Judge Curiel denied the request to stay the State Court action. Instead, acting *sua sponte*, Judge Curiel stayed the Federal Court action pending resolution of the instant State Court action, noting that Mr. Cotton was "clearly forum shopping by asking [the federal] Court to review the evidence and rulings of the state court..." (A true and correct copy of Judge Curiel's Order is attached to the NOL as Exhibit 2 to NOL.)

**Cotton Second Federal Complaint (with Hurtado as Co-Plaintiff)**

Not to be dissuaded by Judge Curiel's comments regarding Mr. Cotton's attempts at forum shopping, on December 6, 2018, Attorney Jacob Austin filed a second Federal Court Complaint on

behalf of Mr. Cotton (and on behalf of Joseph Hurtado) in the United States District Court Southern District of California, Case Number 3:18-cv-02751-GPC-MDD. (A true and correct copy of Mr. Cotton's second Federal Court Complaint is attached as Exhibit 3 to NOL)

The named Plaintiffs in this second Federal Court Complaint are Darryl Cotton and Joe Hurtado (Mr. Cotton's litigation investor in the instant State Court action). The named Defendants are Larry Geraci, Rebecca Berry (Plaintiff and Cross-Defendants in the instant State Court action), Michael R. Weinstein, Scott H. Toothacre, Ferris & Britton APC (attorneys for Geraci and Berry in the instant state court action), Gina M. Austin, Austin Legal Group APC (a land use attorney retained by Geraci to provide advice regarding the Conditional Use Permit process), Sean Miller (an unknown individual whom Joe Hurtado claims threatened him and his family on behalf of Larry Geraci), Finch Thornton & Baird, David Demian and Adam Witt (Cotton's first attorneys in the instant State Court action).

Cotton and Hurtado seek over $5,000,000.00 in damages based on 5 causes of action as follows: 1) Fraud; 2) Abuse of Process; 3) RICO; 4) Civil Conspiracy; and 5) Legal Malpractice.

The gravamen of Cotton and Hurtado's fraud claim seems to be that Geraci filed the instant litigation stating that the November 2, 2016 agreement for the purchase of Cotton's property was the final agreement and that Geraci knows this statement to be false. (See second Federal Court Complaint, Exhibit 3 to NOL, at p. 11:26-12:6.)

The gravamen of Cotton and Hurtado's abuse of process claim is that Geraci, with the help of others, filed a frivolous lawsuit, filed a lis pendens on the property, filed motions, declarations, responsive pleadings, taken depositions, and generally maintained the lawsuit knowing it lacked probable cause at its filing and, as a result of Geraci's judicial admissions, was barred by the parol evidence rule and the statute of frauds. Further it is alleged that Geraci and his cohorts used this legal procedure to interfere in a contractual relationship and force the sale of the property to Geraci. (See second Federal Court Complaint, NOL Exhibit 3, at p. 12:13-18.)

The gravamen of Cotton and Hurtado's third cause of action for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), appears to be based on allegations that Geraci is the head of a vast criminal enterprise dealing in illegal marijuana operations who is attempting to

acquire a prohibited interest in a Marijuana Outlet via a proxy. Cotton and Hurtado allege that the goal of Geraci and his agent is to circumvent the applicable regulatory scheme (for obtaining a CUP for an MMCC) and thereby continue to run their criminal enterprise under the façade of a lawful and legitimate business. (See second Federal Court Complaint, NOL Exhibit 3, paras. 52 and 53 at p. 12:27-13:2.)

The gravamen of Cotton and Hurtado's civil conspiracy cause of action is that Defendants conspired to fraudulently deprive Plaintiffs of their interest in the Property and to unlawfully coerce and intimidate them into having Cotton settle the Geraci Litigation. It is alleged that all the named Defendants knew that Geraci did not have a lawful claim to the Property, yet he and they agreed, and took action, to effectuate the fraudulent scheme premised on the false allegation that the November Document was the final integrated agreement for the Property and in furtherance of the conspiracy, to unlawfully intimidate Plaintiffs.

The gravamen of Mr. Cotton and Mr. Hurtado's legal malpractice cause of action is that Mr. Cotton's first attorneys in the instant State Court action, Finch, Thornton & Baird, by and through Attorneys Demian and Witt, dismissed viable causes of action without discussing the strategy with Mr. Cotton beforehand.

On May 14, 2019, the Federal Court dismissed this second federal Complaint with prejudice, again noting that Mr. Cotton was forum shopping. (A true and correct copy of Judge Curiel's Order dismissing the second Federal Complaint with prejudice is attached at NOL Exhibit 4)

## III. LEGAL ARGUMENT

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

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

### B. The Evidence is Irrelevant to Any Issue in the Instant State Case

Mr. Cotton's operative Second Amended Cross-Complaint does not contain any allegations

1 related to the formation or operation of a conspiracy. "The pleadings are supposed to define the
2 issues to be tried." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter
3 Group 2012) ¶ 6:8, p. 6-2.)

4 It should be noted that Mr. Cotton's original Cross-Complaint filed in this action contained
5 some conspiracy allegations, albeit in a much narrower context than is being alleged in the Federal
6 Court action. However, "'[i]t is well established that an amendatory pleading supersedes the original
7 one, which ceases to perform any function as a pleading.'" (*Foreman & Clark Corp. v. Fallon,*
8 (1971) 3 Cal.3d 875, 884, quoting *Meyer v. State Board of Equalization* (1954) 42 Cal.2d 376, 384.)
9 Thus, an amended complaint supersedes all prior complaints. (*Grell v. Laci Le Beau Corp.* (1999)
10 73 Cal.App.4th 1300, 1307; *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 215; 1 Weil &
11 Brown, Cal. Practice Guide: Civil Procedure before Trial (The Rutter Group 2009) ¶ 6:704, p. 6-
12 177.) The amended complaint furnishes the sole basis for the cause of action, and the original
13 complaint ceases to have any effect either as a pleading or as a basis for judgment. (*Anmaco, Inc. v.*
14 *Bohlken* (1993) 123 Cal.App.4th 891, 901.)" As such, any evidence, examination, or argument or
15 other reference to an alleged clandestine criminal conspiracy is not at issue in the pleadings and thus
16 is wholly irrelevant and must be barred.

17 **C. The Evidence Is Inflammatory and Prejudicial and Should be Barred Under**
18 **Cal. Evid. Code § 352**

19 California Evidence Code Section 352 provides: "The court in its discretion may exclude
20 evidence if its probative value is substantially outweighed by the probability that its admission will
21 (a) necessitate undue consumption of time or (b) create substantial damage of undue prejudice, of
22 confusing the issues, or of misleading the jury. Clearly, Mr. Cotton and Mr. Hurtado's Federal
23 Complaints and the scurrilous allegations contained therein would create a substantial danger of
24 undue prejudice, confusing the issues and of misleading the jury. If such evidence were admitted it
25 would result in a multitude of mini-trials on evidence wholly unrelated to the instant action.

26 **IV. <u>CONCLUSION</u>**

27 Because the pleadings frame the issues in the case and Mr. Cotton's Second Amended Cross-
28 Complaint does not plead a conspiracy, any evidence, including the two Federal lawsuits, and of

any alleged conspiracy is irrelevant. Such evidence would also unduly confuse the jury, be unduly time-consuming and result in prejudice to Mr. Geraci's and Ms. Berry's character and reputation, and the evidence should be excluded.

FERRIS & BRITTON
A Professional Corporation

Dated: June 20, 2019

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

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

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| 10 LARRY GERACI, an individual,<br><br>11 Plaintiff,<br><br>12 v.<br><br>13 DARRYL COTTON, an individual; and DOES 1 14 through 10, inclusive,<br><br>15 Defendants. | Case No. 37-2017-00010073-CU-BC-CTL<br><br>Judge: Hon. Joel R. Wohlfeil<br>Dept.: C-73<br><br>**ORDER [PROPOSED] RE PLAINTIFF/CROSS-DEFENDANTS' MOTION IN LIMINE NO. 1 OF 15 TO EXCLUDE ANY EVIDENCE OF THE COTTON AND HURTADO FEDERAL COURT LAWSUITS** |
| 16 DARRYL COTTON, an individual,<br><br>17 Cross-Complainant,<br><br>18 v.<br><br>19 LARRY GERACI, an individual, REBECCA 20 BERRY, an individual, and DOES 1 THROUGH 10, INCLUSIVE,<br><br>21 Cross-Defendants. | **[MIL NO. 1 OF 15]**<br><br>**[IMAGED FILE]**<br><br>Complaint filed: March 21, 2017<br>Trial Date: June 28, 2019 |

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After considering all moving, opposition and reply papers, as well as the oral argument of counsel, **IT IS HEREBY ORDERED THAT** Plaintiff/Cross-Defendants' Motion in Limine No. 1 of 15 is [GRANTED/GRANTED WITHOUT PREJUDICE/DENIED/DENIED WITHOUT PREJUDICE]. [Any evidence, examination, argument or other reference to the Cotton and Hurtado Federal Court Lawsuits, is precluded, and all counsel are ordered to advise their clients and witnesses of the Court's Order.]

Dated: July __, 2019

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

# EXHIBIT E

AOA 596
3 pages

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 07/01/2019 TIME: 01:30:00 PM 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

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**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.

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1:31 p.m. This being the time set for Jury Trial in the above-entitled cause, having been trailed in this department, all parties and counsel appear as noted above and trial commences.

The Court hears argument by counsel on the filed Motions In Limine.

**Defendant DARRYL COTTON's Motion:**

No. 1 (# 551) – To exclude Plaintiff from offering in evidence, examination, argument or other reference to an alleged phone call in which Defendant disavows his alleged 10% equity interest in the marijuana business "Geraci's November 3rd Factual Allegations" – **DENIED.**

**Plaintiff LARRY GERACI's Motions:**

No. 1 (# 555) – To exclude Defendant's lawsuit filed in the USDC Case No. 3:18-cv-00325-GPC-MDD, and Defendant and Joe Hurtado's lawsuit filed in the USDC Case No. 3:18-cv-02751-GPC-MDD – **GRANTED.**

No. 2 (# 556) – To preclude any evidence, examination or reference to Darryl Cotton, Jacob Austin, or Joe Hurtado's personal attacks against Michael R. Weinstein, Scott H. Toothacre and Attorney Gina

Austin – **DENIED.**

No. 3 (# 557) – To preclude any evidence, examination argument or any other reference to Cotton's and Hurtado's allegations that the Court is biased – **GRANTED.**

No. 4 (# 558) – To preclude any evidence, examination, argument or other reference to Cotton's, Hurtado's and Attorney Jacob Austin's allegations that Mr. Geraci's case is frivolous and / or a malicious prosecution case, or was otherwise filed pursuant to a fraudulent scheme to acquire an MMCC business – **DENIED.**

No. 5 (# 559) – To preclude any evidence or reference to Corina Young's alleged conversation with Jim Bartell and any reference to Corina Young allegedly relaying the context of that conversation to Daryl Cotton, Jacob Austin, or Joe Hurtado and / or any evidence or argument concerning Mr. Cotton 's conspiracy theory – **DENIED.** Counsel directed to stay away from the word conspiracy.

No. 6 (# 560) – To exclude any and all evidence, examination, argument or other reference to allegations that Mr. Geraci was somehow behind a burglary of his 151 farms on June 10, 2017 – **GRANTED.**

No. 7 (# 561) – To preclude any evidence, examination, argument or other reference to Mr. Cotton and Mr. Hurtado's allegations that Mr. Geraci is somehow connected to Sean Miller, Logan Stulmacher and an individual known only as Duane, individuals whom they allege threatened Mr. Cotton and Mr. Hurtado to force a settlement of the instant action – **GRANTED.**

No. 8 (# 562) – To preclude any evidence, examination, argument or other reference to Mr. Cotton and Mr. Hurtado's allegations that Mr. Geraci "screwed some other guy, and the guy committed suicide and shot himself because he lost his life savings and everything" – **GRANTED.**

No. 9 (# 563) – To exclude any evidence, examination, argument or other reference to Mr. Cotton and Mr. Hurtado' s allegations that Mr. Geraci's prior settlement agreements bar him from obtaining a CUP or owning a business operating a dispensary pursuant to a CUP – **DEFERRED.** Counsel to stay away from prior settlement agreements. Defendant to lodge with Court any settlement agreement with the City by tomorrow.

No. 10 (# 564) – To preclude any evidence, examination, argument or other reference to Mr. Cotton and Mr. Hurtado's allegations that Mr. Bartell sexually harassed his former employee Bianca Martinez – **GRANTED.**

No. 11 (# 565) – To preclude any evidence, examination or reference to Cotton's and Hurtado's financial conditions allegedly resulting from this litigation – **GRANTED.**

No. 12 (# 566) – To preclude any evidence, examination, argument or other reference to an alleged Venture Agreement or JVA between Geraci and Cotton – **DENIED.**

No. 13 (# 567) – To preclude any evidence, examination or reference to Mr. Cotton's alleged heart attack and / or TIA and / or Mr. Cotton's alleged ongoing physical, mental and psychological damage which he attributes to the litigation – **GRANTED.**

No. 14 (# 568) – To preclude any evidence, examination, argument or other reference to Mr. Cotton and

Mr. Hurtado's lay opinions regarding the CUP process – **DENIED**. Lay opinion may be admissible. CACI 223.

No. 15 (# 569) – To preclude any evidence, examination or reference to Mr. Cotton's allegations that Mr. Geraci and Mr. Magagna conspired to have a competing CUP application approved and the allegation that Mr. Magagna threatened a witness on Mr. Geraci's behalf such that she refuses to testify in this matter – **DEFERRED**.

Defense counsel makes a motion to amend answer to add Anti-Trust Enterprise defense for conspiracy. Court hears oral argument. The motion to amend answer is denied.

Defense counsel makes a motion that the Court issue an order against Natalie Nguyen and Corina Young. The motion is denied.

3:00 p.m. Court is in recess.

3:15 p.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

The Court intends to pre-instruct on the following CACI jury instructions: 100, 101, 102, 106, 107, 111, 113, 114, 116, 200, 303, Special #1, 325, 335, 336, 1900, 1902 and 1903.

The Court explains departmental procedure with counsel.

Counsel will give mini opening statements.

Plaintiff makes a motion to exclude witnesses Natalie Nguyen and Bianca Martinez. The Court hears argument. The motion to exclude Natalie Nguyen as a lawyer is granted. The motion to exclude Bianca Martinez is denied.

Court will have the clerk email the jury instructions to counsel to review this evening.

3:55 p.m. Court is adjourned until 07/02/2019 at 09:00AM in Department 73.

# EXHIBIT F

FERRIS & BRITTON
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
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mweinstein@ferrisbritton.com
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Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and
Cross-Defendant REBECCA BERRY

**ELECTRONICALLY FILED**
Superior Court of California,
County of San Diego
**08/20/2019** at 03:27:00 PM
Clerk of the Superior Court
By E- Filing,Deputy Clerk

**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.

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DARRYL COTTON, an individual,

Cross-Complainant,

v.

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

Cross-Defendants.

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

Judge: Hon. Joel R. Wohlfeil
Dept.: C-73

**NOTICE OF ENTRY OF JUDGMENT**

**[IMAGED FILE]**

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

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

**PLEASE TAKE NOTICE** that, August 19, 2019, judgment was entered in the above-captioned cause. A conformed copy of said judgment is attached hereto and incorporated herein by reference as though fully set forth.

FERRIS & BRITTON
A Professional Corporation

Dated: August 20, 2019

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

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
08/19/2019 at 11:53:00 AM
Clerk of the Superior Court
By Jessica Pascual,Deputy Clerk

**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF SAN DIEGO, CENTRAL DIVISION**

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

///

1
# SPECIAL VERDICT FORM NO. 2

2 We, the Jury, in the above entitled action, find the following special verdict on the questions

3 submitted to us:

4 **Breach of Contract**

5

6 1. Did Cross-Complainant Darryl Cotton and Cross-Defendant Larry Geraci enter into an oral

7 contract to form a joint venture?

8 Answer: NO

9

10 **Fraud - Intentional Misrepresentation**

11

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

13 Answer: NO

14

15 **Fraud - False Promise**

16

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

18 transaction?

19 Answer: NO

20

21 **Fraud - Negligent Misrepresentation**

22

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

24 Answer: NO

25

26 Given the jury's responses, Question 25 regarding Cross-Complainant's damages became

27 inapplicable as a result of the jury's responses.

28 ///

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 A

**SUPERIOR COURT OF CALIFORNIA,**
**COUNTY OF SAN DIEGO**
**CENTRAL**

**MINUTE ORDER**

DATE: 07/03/2019 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

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**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 is present.

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8:55 a.m. This being the time previously set for further Jury trial in the above entitled cause, having been continued from July 2, 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 exhibits.

9:01 a.m. Court is in recess.

9:03 a.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above. The jurors are present except for juror no. 4.

An unreported sidebar conference is held. (6 minutes) Juror no. 4 arrives.

9:09 a.m. Attorney Weinstein presents opening statement on behalf of Plaintiff/Cross-Defendant Larry Geraci, et al.

9:55 a.m. Attorney Austin presents opening statement on behalf of Defendant/Cross-Complainant Darryl Cotton.

10:15 a.m. All jurors are admonished and excused for break and Court is in recess.

10:24 a.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, Plaintiff makes a Motion for Non-suit on the Cross-Complaint against Rebecca Berry. The Court hears oral argument. Motion for Non-Suit is denied as to Declaratory Relief claim. Motion for Non-Suit is granted as to Fraud claim.

10:30 a.m. Court is in recess.

10:31 a.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above. All jurors are present.

10:32 a.m. **LARRY GERACI** is sworn and examined by Attorney Weinstein on behalf of Plaintiff/Cross-Defendants, Larry Geraci, et al.

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

**1) Letter of Agreement with Bartell & Associates dated 10/29/15**
**5) Text Messages between Larry Geraci and Darryl Cotton from 7/21/16-5/8/17**
**8) Email to Larry Geraci from Darryl Cotton dated 9/21/16 with attached letter to Dale and Darryl Cotton from Kirk Ross, dated 9/21/16**
**9) Email to Larry Geraci from Darryl Cotton, dated 9/26/16**
**10) Draft Services Agreement Contract between Inda-Gro and GERL Investments, dated 9/24/16**
**14) Email to Larry Geraci and Neil Dutta from Abhay Schweitzer, dated 10/4/16**
**15) Email to Rebecca Berry from Abhay Schweitzer, dated 10/6/16**
**17) Email to Larry Geraci and Neil Dutta from Abhay Schweitzer, dated 10/18/16**
**18) Email thread between Neil Dutta from Abhay Schweitzer, dated 10/19/16**
**21) Email from Larry Geraci to Darryl Cotton, dated 10/24/16**
**30) City of San Diego Ownership Disclosure Statement signed, dated 10/31/16**
**38) Agreement between Larry Geraci or assignee and Darryl Cotton, dated 11/2/16**
**39) Excerpt from Jessica Newell Notary Book, dated 11/2/16**
**40) Email to Darryl Cotton from Larry Geraci attaching Nov. 2 Agreement, dated 11/2/16**
**41) Email from Darryl Cotton to Larry Geraci, dated 11/2/16**
**42) Email to Darryl Cotton from Larry Geraci, dated 11/2/16**

11:44 a.m. All jurors are admonished and excused for lunch and Court remains in session.

Outside the presence of the jury, Attorney Austin makes a Motion for Non-Suit on Breach of Contract claim against Darryl Cotton. The Court hears oral argument. Motion for Non-Suit is denied without prejudice.

11:50 a.m. Court is in recess.

1:19 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, Attorney Austin makes a Motion for Non-Suit. The Court hears argument. The Motion for Non-Suit is denied without prejudice as pre-mature. Court and counsel discuss scheduling.

1:25 p.m. Court is in recess.

1:33 p.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above. All jurors are present.

1:34 p.m. Larry Geraci, previously sworn, resumes the stand for further direct examination by Attorney Weinstein on behalf of Plaintiff/Cross-Defendants, Larry Geraci, et al.

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

**43) Email to Becky Berry from Abhay Schweitzer, dated 11/7/16 with attachment**
**44) Email to Darryl Cotton from Larry Geraci, dated 11/14/16**
**46) Authorization to view records, signed by Cotton, 11/15/16**
**59) Email to Darryl Cotton from Larry Geraci, dated 2/27/17**
**62) Email to Darryl Cotton from Larry Geraci, dated 3/2/17**
**63) Email to Larry Geraci from Darryl Cotton, dated 3/3/17**
**64) Email to Darryl Cotton from Larry Geraci, dated 3/7/17**
**69) Email to Larry Geraci from Darryl Cotton, dated 3/17/17 at 2:15 p.m.**
**72) Email to Larry Geraci from Darryl Cotton, dated 3/19/17 at 6:47 p.m.**
**137) Federal Blvd.- Summary of All Expense Payments, excel spreadsheet**

2:29 p.m. An unreported sidebar conference is held. (3 minutes)

2:36 p.m. Cross examination of Larry Geraci commences by Attorney Austin on behalf of Defendant/Cross-Complainant, Darryl Cotton.

2:53 p.m. All jurors are admonished and excused for break and Court is in recess.

3:08 p.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above. All jurors are present.

3:09 p.m. Larry Geraci is sworn and examined by Attorney Austin on behalf of Defendant/Cross-Complainant, Defendant.

3:47 p.m. Redirect examination of Larry Geraci commences by Attorney Weinstein on behalf of Plaintiff/Cross-Defendant, Larry Geraci, et al.

3:48 p.m. The witness is excused.

3:49 p.m. **REBECCA BERRY** is sworn and examined 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-Complainant:

**34) Forms submitted to City of San Diego dated 10/31/16; Form DS-3032 General Application dated 10/31/16**

4:00 p.m. Cross examination of Rebecca Berry commences by Attomey Austin on behalf of Defendant/Cross-complainant, Darryl Cotton.

4:15 p.m. The witness is excused.

4:16 p.m. All jurors are admonished and excused for the evening and Court remains in session.

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

4:22 p.m. Court is adjourned until 07/08/2019 at 09:00AM in Department 73.

# EXHIBIT B

ORIGINAL

FILED
Clerk of the Superior Court
JUL 16 2019
By: A. TAYLOR

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, CENTRAL DIVISION

| | |
|---|---|
| LARRY GERACI, Plaintiff, v. DARRYL COTTON, Defendant. | Case No. 37-2017-00010073-CU-BC-CTL |
| | SPECIAL VERDICT FORM NO. 1 |
| | Judge: Hon. Joel R. Wohlfeil |
| DARRYL COTTON, Cross-Complainant, v. LARRY GERACI, Cross-Defendant. | |

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?

✓ Yes ____ No

If your answer to question 1 is yes, answer question 2. If your answer to question 1 is no, answer no further questions, and have the presiding juror sign and date this form.

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

____ Yes ✓ No

If your answer to question 2 is yes, do not answer question 3 and answer question 4. If your answer to question 2 is no, answer question 3.

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

✓ Yes ____ No

If your answer to question 3 is yes, answer question 4. If your answer to question 3 is no, answer no further questions, and have the presiding juror sign and date this form.

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

____ Yes ✓ No

If your answer to question 4 is yes, do not answer question 5 and answer question 6. If your answer to question 4 is no, answer question 5.

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

✓ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If your answer to question 5 is no, answer no further questions, and have the presiding juror sign and date this form.

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

✓ Yes ____ No

or

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

✓ Yes ____ No

If your answer to either option for question 6 is yes, answer question 7. If your answer to both options is no, do not answer question 7 and answer question 8.

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

✓ Yes ____ No

If your answer to questions 4 or 5 is yes, please answer question 8.

**Breach of the Implied Covenant of Good Faith and Fair Dealing**

8. Did Defendant unfairly interfere with Plaintiff's right to receive the benefits of the contract?

✓ Yes ____No

If your answer to question 8 is yes, answer question 9. If your answer to question 8 is no, but your answer to question 7 is yes, do not answer question 9 and answer question 10. If your answers to questions 7 and 8 were not yes, answer no further questions, and have the presiding juror sign and date this form.

9. Was Plaintiff harmed by Defendant's interference?

✓ Yes ____No

If your answer to question 9 is yes, answer question 10. If your answer to question 9 is no, but your answer to question 7 is yes, answer question 10. If your answers to questions 7 and 9 were not yes, answer no further questions, and have the presiding juror sign and date this form.

10. What are Plaintiff's damages?

$ 260,109.28

Dated: 7/16/19

Signed: [signature]
Presiding Juror

After all verdict forms have been signed, notify the bailiff that you are ready to present your verdict in the courtroom.

# EXHIBIT C

ORIGINAL

FILED
Clerk of the Superior Court
JUL 16 2019
By: A. TAYLOR

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, CENTRAL DIVISION

| | |
|---|---|
| LARRY GERACI, Plaintiff, v. DARRYL COTTON, Defendant. | Case No. 37-2017-00010073-CU-BC-CTL<br>Judge: Hon. Joel R. Wohlfeil<br>SPECIAL VERDICT FORM NO. 2 |
| DARRYL COTTON, Cross-Complainant, v. LARRY GERACI, Cross-Defendant. | |

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?

____Yes    _✓_No

If your answer to question 1 is yes, answer question 2. If your answer to question 1 is no, do not answer questions 2 – 7 and answer question 8.

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

____Yes    ____No

If your answer to question 2 is yes, do not answer question 3 and answer question 4. If your answer to question 2 is no, answer question 3.

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

____Yes    ____No

If your answer to question 3 is yes, answer question 4. If your answer to question 3 is no, do not answer questions 4 – 7 and answer question 8.

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

____Yes    ____No

If your answer to question 4 is yes, do not answer question 5 and answer question 6. If your answer to question 4 is no, answer question 5.

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

___Yes ___No

If your answer to question 5 is yes, answer question 6. If your answer to question 5 is no, do not answer questions 6 – 7 and answer question 8.

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

___Yes ___No

or

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

___Yes ___No

If your answer to either option for question 6 is yes, answer question 7. If your answer to both options is no, do not answer question 7 and answer question 8.

7. Was Cross-Complainant harmed by Cross-Defendant's breach of contract?

___Yes ___No

Please answer question 8.

**Fraud - Intentional Misrepresentation**

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

____Yes  __✓_No

If your answer to question 8 is yes, answer question 9. If your answer to question 8 is no, do not answer questions 9 – 12 and answer question 13.

9. Did Cross-Defendant know that the representation was false, or did Cross-Defendant make the representation recklessly and without regard for its truth?

____Yes  ____No

If your answer to question 9 is yes, answer question 10. If your answer to question 9 is no, do not answer questions 10 – 12 and answer question 13.

10. Did Cross-Defendant intend that Cross-Complainant rely on the representation?

____Yes  ____No

If your answer to question 10 is yes, answer question 11. If your answer to question 10 is no, do not answer questions 11 – 12 and answer question 13.

11. Did Cross-Complainant reasonably rely on the representation?

____Yes  ____No

If your answer to question 11 is yes, answer question 12. If your answer to question 11 is no, do not answer question 12 and answer question 13.

12. Was Cross-Complainant's reliance on Cross-Defendant's representation a substantial factor in causing harm to Cross-Complainant?

____Yes ____No

Please answer question 13.

<u>Fraud - False Promise</u>

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

____Yes __✓__No

If your answer to question 13 is yes, answer question 14. If your answer to question 13 is no, do not answer questions 14 – 18 and answer question 19.

14. Did Cross-Defendant intend to perform this promise when Cross-Defendant made it?

____Yes ____No

If your answer to question 14 is no, answer question 15. If your answer to question 14 is yes, do not answer questions 15 – 18 and answer question 19.

1 15. Did Cross-Defendant intend that Cross-Complainant rely on this promise?

2

3 ____Yes ____No

4

5 If your answer to question 15 is yes, answer question 16. If your answer to question 15 is no, do

6 not answer questions 16 – 18 and answer question 19.

7

8 16. Did Cross-Complainant reasonably rely on this promise?

9

10 ____Yes ____No

11

12 If your answer to question 16 is yes, answer question 17. If your answer to question 16 is no, do

13 not answer questions 17 – 18 and answer question 19.

14

15 17. Did Cross-Defendant perform the promised act?

16

17 ____Yes ____No

18

19 If your answer to question 17 is no, answer question 18. If your answer to question 17 is yes, do

20 not answer question 18 and answer question 19.

21

22 18. Was Cross-Complainant's reliance on Cross-Defendant's promise a substantial factor in

23 causing harm to Cross-Complainant?

24

25 ____Yes ____No

26

27 Please answer question 19.

28

1 **Fraud - Negligent Misrepresentation**

2

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

4

5 ____Yes ✓ No

6

7 If your answer to question 19 is yes, answer question 20. If your answer to question 19 is no, do

8 not answer questions 20 – 24 but if your answer to questions 7, 12 or 18 is yes, answer question 25. If

9 your answers to questions 7, 12 and 18 were not yes, answer no further questions, and have the presiding

10 juror sign and date this form.

11

12 20. Did Cross-Defendant honestly believe that the representation was true when Cross-Defendant

13 made it?

14

15 ____Yes ____No

16

17 If your answer to question 20 is yes, answer question 21. If your answer to question 20 is no, do

18 not answer questions 21 – 24 but if your answer to questions 7, 12 or 18 is yes, answer question 25. If

19 your answers to questions 7, 12 and 18 were not yes, answer no further questions, and have the presiding

20 juror sign and date this form.

21

22 21. Did Cross-Defendant have reasonable grounds for believing the representation was true when

23 Cross-Defendant made it?

24

25 ____Yes ____No

26

27 If your answer to question 21 is yes, answer question 22. If your answer to question 21 is no, do

28 not answer questions 22 – 24 but if your answer to questions 7, 12 or 18 is yes, answer question 25. If

1 your answers to questions 7, 12 and 18 were not yes, answer no further questions, and have the presiding
2 juror sign and date this form.
3
4 22. Did Cross-Defendant intend that Cross-Complainant rely on the representation?
5
6 ____Yes ____No
7
8 If your answer to question 22 is yes, answer question 23. If your answer to question 22 is no, do
9 not answer questions 23 – 24 but if your answer to questions 7, 12 or 18 is yes, answer question 25. If
10 your answers to questions 7, 12 and 18 were not yes, answer no further questions, and have the presiding
11 juror sign and date this form.
12
13 23. Did Cross-Complainant reasonably rely on the representation?
14
15 ____Yes ____No
16
17 If your answer to question 23 is yes, answer question 24. If your answer to question 23 is no, do
18 not answer question 24 but if your answer to questions 7, 12 or 18 is yes, answer question 25. If your
19 answers to questions 7, 12 and 18 were not yes, answer no further questions, and have the presiding juror
20 sign and date this form.
21
22 24. Was Cross-Complainant's reliance on Cross-Defendant's representation a substantial factor
23 in causing harm to Cross-Complainant?
24
25 ____Yes ____No
26
27
28

If your answer to question 24 is yes, answer question 25. If your answer to question 24 is no, but if your answer to questions 7, 12 or 18 is yes, answer question 25. If your answers to questions 7, 12 and 18 were not yes, answer no further questions, and have the presiding juror sign and date this form.

25. What are Cross-Complainant's damages?

$ ____________

Dated: 7/16/19

Signed:
Presiding Juror

After all verdict forms have been signed, notify the bailiff that you are ready to present your verdict in the courtroom.

# EXHIBIT G

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**ELECTRONICALLY FILED**
Superior Court of California,
County of San Diego
**09/13/2019** at 11:55:00 PM
Clerk of the Superior Court
By Adam Beason,Deputy Clerk

**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: The Honorable Joel R. Wohlfeil
Dept.: C-73

**NOTICE OF MOTION AND MOTION FOR NEW TRIAL**

**Hearing Date: October 25, 2019**
**Time: 9:00 a.m.**
**Dept: C-73**
**Judge: The Hon. Joel R. Wohlfeil**

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

**TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL:**

**PLEASE TAKE NOTICE** that on October 25, 2019 or as soon thereafter as the matter can be heard in Department C-73 of the above-entitled Court, Defendant/Cross-Complainant DARRYL COTTON ("Cotton") will move this Court for a new trial or a finding that the alleged November 2, 2016 agreement is illegal and void.

///

This Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in support hereof, the record of trial and the pleadings and papers on file in this action, and upon such other oral and documentary evidence as may be presented at the hearing of this motion.

DATED: September 13, 2019 TIFFANY & BOSCO, P.A.

By______________________

EVAN P. SCHUBE
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**ELECTRONICALLY FILED**
Superior Court of California,
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**09/13/2019** at 11:55:00 PM
Clerk of the Superior Court
By Adam Beason,Deputy Clerk

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

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

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*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

[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

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[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])

<u>Failure to Disclose Ownership Interest and Geraci Judgments</u>

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

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[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

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

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

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

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

1 asserted privilege in discovery). Mr. Geraci has previously admitted that failure to disclose constitutes
2 "substantial prejudice." *Plaintiff Larry Geraci's Memorandum of Points and Authorities in Opposition*
3 *to Defendant Darryl Cotton's Motion to Expunge Lis Pendens* dated April 10, 2018 (ROA 179) at 4:7-
4 8. (Mr. Geraci claimed that Cotton's "refusal to participate in discovery has substantially prejudiced
5 Geraci and Berry in preparation of this case.").
6 Mr. Cotton propounded discovery seeking, among other things, documents and communications
7 by and between Mr. Geraci and Ms. Austin related to the purchase of the Property. (*See* **Exhibit I**
8 (Discovery Responses) at 13:1-13, 14:8-23.) No documents or communications were produced in
9 connection with the request based upon attorney-client privilege. Then, at trial, Mr. Geraci waived
10 privilege and he and Ms. Austin testified as to the very communications Mr. Cotton previously sought.
11 Mr. Geraci's use of the privilege as a shield and a sword violated Mr. Cotton's right to a fair and
12 impartial trial. One of the central arguments Mr. Cotton presented was that the parties agreed to draft a
13 final agreement. While Mr. Geraci's conduct was consistent with this argument, he and Ms. Austin
14 testified at trial that Mr. Geraci's request for draft agreements was purportedly the result of extortion.
15 The failure to disclose those documents constitutes, as Mr. Geraci previously admitted, substantial
16 prejudicial to Mr. Cotton because it prevented Mr. Cotton from cross-examining Mr. Geraci and
17 Ms. Austin on their inflammatory and prejudicial extortion allegations, as well as proving that the
18 alleged November 2, 2016 agreement was an agreement to agree. Mr. Geraci cannot be permitted to
19 "blow hot and cold."
20 **CONCLUSION**
21 For the reasons set forth herein, Mr. Cotton requests that the Court (i) find that the alleged
22 November 2, 2016 agreement is illegal and void; or (ii) order a new trial and enable Mr. Cotton to
23 conduct discovery related to the communications between Messrs. Geraci and Cotton.
24 DATED this 13th day of September, 2019.
25 TIFFANY & BOSCO, P.A.
26
27 By______________________________
28 EVAN P. SCHUBE
Attorneys for Defendant/Cross-Complainant
Darryl Cotton

# Exhibit H

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**ELECTRONICALLY FILED**
Superior Court of California,
County of San Diego
**09/23/2019** at 03:18:00 PM
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By Adriana Ive Anzalone,Deputy Clerk

**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

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## 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.)

1 which contained the accompanying documents in support of his motion.[3] Affidavits or declarations
2 filed too late may be disregarded. (See *Morris v. Purity Sausage Co.* (1934) 1 Cal.App.2d 120; *Lewith*
3 *v. Rehmke* (1935) 10 Cal.App.2d 97, 105; *Peterson v. Peterson* (1953) 121 Cal.App.2d 1, 9.)
4 As to the merits of his motion for new trial, Mr. Cotton's asserts three grounds:
5 First Mr. Cotton contends the November 2, 2016 agreement was illegal and void because Mr.
6 Geraci failed to disclose his interest in both the Property and the Conditional Use Permit ("CUP").
7 Mr. Cotton erroneously contends the agreement violates local law and policies, as well as state law.
8 The statutes upon which Mr. Cotton relies were not even in effect at the time the November 2, 2016
9 contract was entered.[4] Even if that is disregarded, the contract was otherwise legal as discussed *infra*.
10 Additionally, Mr. Cotton has waived the "illegality" argument for two reasons: (1) he never
11 raised illegality as an affirmative defense; and (2) with regard to the "illegality" argument, Attorney
12 Austin represented to the Court at the conclusion of evidence and in response to the Court's inquiries
13 if there were any other exhibits Mr. Austin wished to admit into evidence: "I'm willing to not argue
14 the matter if your Honor is inclined not to include it. We can just – forget about it." (Reporter's
15 Transcript herein after referred to as "RT") (Plaintiff/Cross-Defendants Notice of Lodgment in
16 Opposition to Motion for New Trial ("Plaintiff NOL") (RT, July 10, 2019, p. 69:15-72:26, Ex. 6 to
17 Plaintiff NOL)
18 Even assuming the illegality argument has not been waived, the argument that the November 2,
19 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.

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[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.)]

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

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

10 **II. <u>STANDARDS FOR NEW TRIAL MOTION BASED ON C.C.P. § 657(6)</u>**

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

13 In his Notice of Intent to Move for New Trial dated September 13, 2019, Mr. Cotton gave
14 notice that he was bring the motion pursuant to C.C.P. § 657(6) on the ground that "the verdict is
15 against the law." (ROA#656.) Yet in his brief, he asserts that his motion for new trial is made on the
16 grounds of "irregularity of proceedings" under C.C.P. § 657(1) and "against the law" under (C.C.P. §
17 657(7), *neither of which grounds were set forth in his Notice of Intention to Move for New Trial.*
18 (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
19 for new trial *on the grounds stated in the notice.* (C.C.P. §659.) It is well-established that a new trial
20 order "can be granted only on a ground specified in the motion." (*Malkasian v. Irwin* (1964) 61 Cal.2d
21 738, 745; *De Felice v. Tabor* (1957) 149 Cal.App.2d 273, 274.)

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

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

3 The statutory ground under C.C.P. §657(6) that the verdict is "against law" is of very limited
4 application. (*Tagney v. Hoy* (1968) 260 Cal.App.2d 372, citing *Kralyevich v.Magrini* (1959) 172
5 Cal.App.2d 784 ["A decision can be said to be 'against law' only: (1) where there is a failure to find
6 on a material issue; (2) where the findings are irreconcilable; and (3) where the evidence is insufficient
7 in law and without conflict in any material point.[6] C.C.P. § 657(6) is not a ground to have the court
8 reconsider its rulings. The "against law" ground applies only when the evidence is without conflict in
9 any material point and insufficient *as a matter of law* to support the verdict. (*McCown v. Spencer*
10 (1970) 8 Cal.App.3d 216, 229; see *Fergus v. Songer* (2007) 150 Cal.App.4th 552, 567-569 [finding
11 verdict was not "against law" because it was supported by substantial evidence]; *Marriage of Beilock*
12 (1978) 81 Cal.App.3d 713, 728.) C.C.P. § 657(6) does not cover errors that fall within the other
13 sections of C.C.P. § 657, such as § 657(7). (*O'Malley v. Carrick* (1922) 60 Cal.App. 48, 51)

14 **III. ARGUMENT**

15 **A. MR. COTTON'S ILLEGALITY ARGUMENTS FAIL**

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

17 Mr. Cotton failed to raise "illegality" as an affirmative defense in his Answer to Plaintiff's
18 Complaint (ROA#17). Normally, affirmative defenses not raised in the answer to complaint or cross-
19 complaint are waived. (E.g., *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758,
20 813.) As stated above, Mr. Cotton did not plead "illegality" as an affirmative defense; therefore, Mr.
21 Cotton cites *Lewis Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 146-148), for the proposition that
22 illegality can be raised "at any time." That is a correct statement of the law, however, that rule is not
23 unqualified. Two California Supreme Court cases decided after *Lewis & Queen – Fomco, Inc. v. Joe*
24 *Maggio, Inc.* (1961) 55 Cal.2d 162, and *Apra v. Aureguy* (1961) 55 Cal.2d 827 – both rejected post-
25
26
27
28

[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 corners 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,

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

7 During Mr. Austin's cross-examination of Firouzeh Tirandazi, a City Project Manager III (the
8 highest classification of Project Managers at the City of San Diego), he tried to get her to testify that
9 "anyone with an ownership or financial interest in a marijuana outlet is supposed to be disclosed to the
10 City." Ms. Tirandazi testified that they (the City) are only looking for the property owner and the
11 tenant/lessee. (RT, July 9, 2019, p. 112:23-28; Ex. 5 to Plaintiff NOL) Ms. Tirandazi was unfamiliar
12 with the California Business & Professions Code vis-à-vis the CUP application process. (RT, July 9,
13 2019, p. 113:1-5, Ex. 5 to Plaintiff NOL)

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

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

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

28 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*

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

2 As to the merits of the argument, Mr. Cotton has misrepresented the facts, circumstances and 3 the Minute Order issued by the Court in connection with the attorney-client privilege issues during 4 discovery and the waiver of those issues at trial.

5 Mr. Cotton claims there was a Court order prohibiting testimony on matters that Plaintiff 6 asserted attorney-client privilege. (Mr. Cotton's P's & A's, p. 14:26-28) In support of this contention, 7 Mr. Cotton Cites to the Court's Minute Order dated February 8, 2019 (ROA#455 at p. 3.) This 8 misrepresents what that Court Order states. It actually states:

9 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 10 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 11 provide at trial on the subject of the DISAVOWMANET ALLEGATION."

12 Cleary, the Court said it would hear and determine the scope of the testimony allowed; it did 13 not prohibit testimony as alleged by Mr. Cotton. Thereafter, Mr. Cotton's attorney drafted the Notice 14 of Ruling which only prevents Rebecca Berry from testifying on the matter of the disavowment 15 allegation. It does not bar any other witness from so testifying. (ROA# 455, p. 2.)

16 In addition, Mr. Cotton asserts that Mr. Geraci used the attorney-client privilege as a shield and 17 a sword, thereby violating Mr. Cotton's right to a fair and impartial trial. This argument fails on many 18 levels, and has otherwise been waived by Mr. Cotton's failure to object to either the documentary 19 evidence or the testimonial evidence.[7] In fact, Mr. Cotton's attorney conducted substantial 20 examination of witnesses on these very topics.

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

22 1. He never took the depositions of Mr. Geraci or Gina Austin for ascertain this 23 information from them;

24 2. In response to Mr. Cotton's requests for the production of all documents relating to the 25 purchase of the property drafted or revised by Gina Austin [RFPs Nos. 18, 19], Mr. Geraci objected on 26 the grounds of attorney-client privilege; however, in response to RFP 19, he added that ***"Responding***

27

28 [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. Heilman* (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: [signature]
Michael R. Weinstein
Scott H. Toothacre
Attorney for Plaintiff/Cross-Defendant LARRY GERACI and Cross-Defendant REBECCA BERRY

# EXHIBIT I

# GRAND JURY

County of San Diego
550 Corporate Center
550 W. C Street, Suite 860
San Diego, CA 92101-3513
619-236-2020 FAX 619-338-8127
http://www.sdcounty.ca.gov/grandjury

**Jonathan Vinoskey, Foreperson**


April 10th, 2024

Darryl Cotton

Re: Grand Jury Case #: 2023/2024-025

Dear Mr. Cotton,

Your Citizen's Complaint dated December 19th, 2023, has been reviewed by the 2023/2024 San Diego County Grand Jury. Since our term will expire very soon, there is insufficient time for this jury to complete a thorough investigation of your complaint.

Therefore, your complaint will be held over and referred to the incoming Grand Jury, being impaneled in July, for their consideration.

Sincerely,

JONATHAN VINOSKEY, Foreperson
2023/2024 San Diego County Grand Jury

# County of San Diego
# Grand Jury

## Citizen Complaint Form

San Diego County Grand Jury
550 Corporate Center
550 W C Street, Suite 860
San Diego, CA 92101-3518
619-236-2020 Fax 619-338-8127
Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 12/19/2023

1. **Who**: (Your Name) Darryl Cotton

Address 6176 Federal Blvd.

City, State, Zip Code San Diego, CA 92114

Telephone 619.954.4447

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

The City of San Diego adult-use cannabis applications and licenses have not been treated fairly and equitably. When I tried to investigate what I saw as preferential treatment of an application for the 6220 Federal Blvd. dispensary I reached out to my community planning group chair, Mr. Ken Malbrough, through an email. Within two days, Mr. Malbrough had spoken to someone in the Development Services Department or City Council and he responded to me that he would no longer accept any emails from me. I believe the City's behind the scenes handling of these applications are done on a pay-to-play basis, with significant input from attorneys Gina Austin, Jessica McElfresh, Cynthia Morgan-Reed and lobbyist James Bartell. Among othe things, such as violations of the Brown Act, the result of this scheme has been the construction and operation of a marijuana outlet that does not meet SDMC requirements for traffic flow safety as there was **never an engineered traffic analysis performed** based on the proposed use and high impact accidents on Federal Blvd @ Winnett Street are up over 3,000% since it's opening.

3. **When**: Date(s) of Incident 04/05/2018 to current

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

**06/11/2018 emails between myself and Ken Malbrough** after having spoken to DSD he ceases all communications with me.
**07/26/2018 my multi-party email to DSD** requesting information on the 6220 Federal CUP application.
**12/06/2018 Planning Commission Appeal Hearing @ page 31** Malbrough submits a blank Planning Group Distribution Form as proof there was a community planning group presentation, vote and approval.
**12/06/2018 Planning Commission Hearing Item 4 @ 2:17:09** where Robert Robinson speaks on behalf of the approval of 6220. Robert's Broadway Heights Community Planning Group does not even encompass the project at this location.
**12/06/2018 Planning Commission Hearing Item 4 @ 2:19:01** Ken Malbrough speaks on behalf of Encanto Neighborhood Planning Group's support of 6220 citing "when we approved that" does not support that with his signed vote Distribution Form.
**07/31/2019 My Story of Setbacks** shows, among other things, not one but two licensed child care facilities being located within 1,000 feet of the proposed dispensary.

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Darryl Cotton

It is a crime to report to the Grand Jury that a crime has been committed knowing the report to be false. Penal Code §148.5(d).

Digital versions of this print document can be found @ Justice4Amy.org in Litigation @ Section 13.

# County of San Diego
# Grand Jury

## Citizen Complaint Form

San Diego County Grand Jury
550 Corporate Center
550 W C Street, Suite 860
San Diego, CA 92101-3518
619-236-2020 Fax 619-338-8127
Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 12/18/2023

1. **Who**: (Your Name) Darryl Cotton

Address 6176 Federal Blvd.

City, State, Zip Code San Diego, CA 92114

Telephone 619.954.4447

2. **What**: Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

Since the passage of adult-use cannabis licensing the City of San Diego Development Services Department and Planning Commission have engaged in preferential treatment of certain applicants in a pay-to-play scheme that relies on certain lobbyists, attorneys and applicants who are often times not disclosed and rely on strawman applicants to acquire these licenses. This method of awarding licenses is unlawful and unfair to those competing for these limited number of licenses (4 per council district) when the process is rigged from the start. I have done a **DSD Steering Document** which is a deep dive review and analysis of all the licenses having been heard on appeal whereby key search words, often by the Planning Commissioners themselves, bemoan this exact situation.

3. **When**: Date(s) of Incident December 6, 2018

4. **Where**: Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

**On 12/06/2018, Planning Commission Minutes, Item No. 4, Commissioner Peerson** recuses herself from voting on the 6220 Federal Blvd. CUP due to a "financial conflict of interest." Her exact statement can be heard at **2:00:17 in the archived video** of that Hearing, Item No. 4.

There should be NO financial conflict of interest opportunity when it comes to awarding one of these licenses! Since this entire license application is clouded in pay-play-corruption by attorneys quite familiar and comfortable with these licensing agencies it should come as no surprise that they manipulate the system to have these CUPS awarded while making it appear the process is fair and transparent. Just one of the horrific end results of their slight of hand approvals can be seen by the **increased number** of major traffic accidents which have occurred since this license was granted.

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Darryl Cotton

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# County of San Diego
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Date 12/18/2023

1. **Who:** (Your Name) Darryl Cotton

Address 6176 Federal Blvd.

City, State, Zip Code San Diego, CA 92114

Telephone 619.954.4447

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

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County revenues from licensed cannabis sales are falling. While there are a number of factors that can legitimately support this **reduction in revenue,** what the government, and media, has failed to realize is that are certain licensees are reporting their sales through the use of a cloud based point of sale software, which allows back-door manipulation of the sales and inventory data that, in a cash based industry, fails to accurately report the actual sales whereby the correct tax amount is paid to the licensing agencies.

3. **When:** Date(s) of Incident 2023/2024

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

**POS Tax Fraud:** In consideration of these reported **1st QTR 23/24 Cannabis Tax Revenues,** I would like to submit the information I have under seal for further consideration.

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Darryl Cotton

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Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 12/18/2023

1. **Who:** (Your Name) Andrew Flores, Esq. SBN 272958

Address 427 C Street, Ste 220

City, State, Zip Code San Diego, CA 92101

Telephone 619.256.1556

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

I have been representing Ms. Amy Sherlock since 2020. The essence of her civil case revolves around her rights to her deceased husband, Michael "Biker" Sherlock's adult-use cannabis licenses which he acquired just months before his death. There should be no doubt that when licensing authorities are met with a legal authority that commands them to undertake a mandatory action by virtue of a "shall" directive, they do so. To assure myself that I was not somehow misinterpreting the law, I sent a letter to the Department of Cannabis ("DCC") seeking clarification on that language. Anyone reading this exchange can appreciate, there was no substantive response to my inquiry and I was ignored. As this goes to the application process, I find it critical that the actual owners are disclosed and those who don't qualify are not given licenses as it creates a threat to public health and welfare, if criminals are allowed to own these licenses.

3. **When:** Date(s) of Incident 2020 to current

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

01/10/2023 Flores letter to DCC and other parties regarding the illegal acquisition of adult-use cannabis licenses.

01/17/2023, DCC response

01/18/2023 Flores's reply letter

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Andrew Flores

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**Please Review Complaint Guidelines on Reverse Side**

Date 12/18/2023

1. **Who:** (Your Name) Amy Sherlock

Address 6176 Federal Blvd.

City, State, Zip Code San Diego, CA 92114

Telephone [redacted]

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

With the death of my husband, Michael "Biker" Sherlock on December 2, 2015 the adult-use cannabis permits at 8863-E Balboa Ave., Suite E San Diego, CA 92123, he had acquired in his name, was reappointed by Development Services Department staff, by Edith Gutierrez, Firouzeh Tirandazi and Travis Cleveland, in a strange and curious fashion (5 exchanges as shown below) to ultimately exclude me from any interest I had inherited as a result of Bikers death. However, in a **November 13, 2023 email** with Travis Cleveland, and cc'd to Lara Gates, City of San Diego Director of Cannabis, Travis acknowledges that the permit was indeed transferred to me, and there was no record of my ever having undergone a background check. Why? Because I not only didn't know the Permit had been transferred in my name, I was never advised I had to take a background check either!

3. **When:** Date(s) of Incident 2015-2017

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

On 06/17/2015, Project No. **368347,** at Page 18, DSD approves Mr. Michael "Biker" Sherlock, as original licensee.

On 03/17/2016, Project No. **467963,** Edith Gutierrez, DSD Project Manager creates a permit in my name.

On 03/17/2016, Project No. **368347,** Edith Gutierrez, DSD Project Manager transfers the permit to Brad Harcourt.

On 01/30/2017, Project No. **368347,** Firouzeh Tirandazi, DSD Project Manager transfers to permit to Ninus Malan.

On 02/27/2017, Project No. **538985,** Firouzeh Tirandazi, DSD Project Manager issues a 2nd year background check to Harcourt.

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Amy Sherlock

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# County of San Diego Grand Jury

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619-236-2020 Fax 619-338-8127
Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 12/18/2023

1. **Who:** (Your Name) Tiffany Knopf

Address [redacted]

City, State, Zip Code [redacted]

Telephone [redacted]

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

As a result of a divorce I'm currently involved in with my soon to be ex-husband Adam Knopf, I have discovered some things that warrant a look at, specifically for their illegality in the adult-use cannabis industry to which Adam is a licensee. I bring these things forth because it is only a result of my having the benefit of hindsight, and through the divorce proceedings, that I have come to the realization that my case is far bigger than a simple separation of community assets. It is a fraud of monumental proportions that involves theft of federal (PPP and SBA Funds), state and local revenues as a result of improper bookkeeping in a largely cash business. To be clear, I was not aware of his activities as his MO was to tell me very little and what he did tell me, for the most part, I've discovered are lies. With the help of his corrupt attorneys, such as Gina Austin and Tamara Leetham, as well as an unethical accountant in Justus Henkes they have blocked me and my attorney from the information we request in discovery that would reveal both his disclosed and undisclosed interests. It is in the interest of broader justice that I set forth the following.

3. **When:** Date(s) of Incident 2012 to current

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

The difficulty I have had in understanding just what I was entitled to from what interest I had in the Golden State Greens dispensary required lengthy and expensive battles which turned on not only what Adam and his counsel determined to having no interest, to what desperate financial straights GSG was in. The deposition of Justus Henkes, CFO/CPA was done with exhibits that served to provide us with a clear understanding that their books, their methods and the money that deemed due from a City of San Diego Tax Deficiency *(-$542K)* audit, was based on non-existent numbers that, for whatever reason, the City decided put them in a position to define the shortfalls associated with their sales. Please consider my **Steering Document** dated 11/18/23, in response to this deposition as well as my sworn **Affidavit** ISO Amy Sherlock and the business relationship her deceased husband, Michael "Biker" Sherlock had with Adam and decide for yourself if there was criminality taking place.

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Tiffany Knopf

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Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 12/19/2023

1. **Who:** (Your Name) Tiffany Knopf

Address [redacted]

City, State, Zip Code [redacted]

Telephone [redacted]

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

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Where my husband and licensee Adam Knopf would frequently make his cannabis industry business connections was through his relationship with Phil Rath, a lobbyist with PPR Solutions, Inc. As will be shown below, the relationships between Adam and all those parties listed on his lobbying form are at times involved in hiding Adam's interests in projects that should he be disclosed require those assets to be considered in our current divorce proceedings. Of note will be the questionable CUPs that have been issued where Golden State Greens (Our cannabis dispensary) is listed on the list of City licensed cannabis projects but in this case involves a property on 1215 Nutmeg Street where Aaron Magagna is the permittee. I would request that Rath Consulting be required to show his records under this Grand Jury subpoena authority since not only the clients list he represents begs those anwers but his having donated sums to Councilmember Stephen Whitburn has to be cleared of any wrongdoing as had been found with his previous Chief of Staff Jesus Cardenas and his Grassroots lobbying group where preferential permitting exists.

3. **When:** Date(s) of Incident 2023

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

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**2021 EC 601 City of San Diego Lobbying form** showing @ page 5, representing United Medical Marijuana Coalition both Adam and Aaron Magagna having reached $1,000 in contributions. Page 15 shows his fundraising for, among others, Councilmember Whitburn.
**11/08/2018 San Diego Reader,** Phil Rath sanctioned again for failing to reveal cash contributions.
**04/19/2023, City of San Diego Hearing Officer Report No. HO23-019.** We contend that this is an unbuildable project at this location and is used as an approved location, they can maintain the CUP for up to 3 years, tying up the 4 per district limit, until such time that Magagna and Knopf can submit at a different better location and dissolve that CUP without any competition.
**11/23/2023 Highly Questionable CUPS**-1215 Nutmeg-Adam Knopf and Aaron Magagna

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Tiffany Knopf

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Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 12/20/2023

1. **Who:** (Your Name) Jacob P. Austin, Esq. SBN 290303

Address PO Box 231189

City, State, Zip Code San Diego, CA 92193-1189

Telephone 619.357.6850

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

In my capacity in representing Darryl Cotton, I have come to realize that there is a pervasive attempt, by certain rogue attorneys, to see that some of their clients who are applying for, or have acquired, adult-use cannabis licenses within the City of San Diego, have done so by having those clients, who would not qualify if their identities were disclosed, use strawman applicants on their behalf to apply for and gain undisclosed ownership interests in those licenses. In the case of Corina Young, her counsel, Natalie Nguyen under the command and control of attorneys Gina Austin and Matt Shapiro, actively engaged in a game of keep-away to ignore a lawful subpoena and not provide Young's case dispositive testimony which would have exposed these practices. Accordingly, I do hereby support a Grand Jury be convened to investigate a growing mountain of evidence that supports these allegations that would prove a fraud amongst the court is being committed in the furtherance of these schemes.

3. **When:** Date(s) of Incident June 13, 2018 forward

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

**06/28/2019 Subpoena of Corina Young**

**01/16/2019 Emails between Young attorney Natalie Nguyen and Jacob Austin seeking Young's deposition.**

**10/28/2020 Young to Cotton email sharing Nguyen's confidential "bluffing" email communication that she no longer had to fear testifying and that her legal fees had been paid.**

**06/13/2018 Ex Parte Application with exhibit emails between attorneys Matt Shapiro and Jacob Austin.**

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Jacob Austin

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**Please Review Complaint Guidelines on Reverse Side**

Date 12/20/2023

1. **Who:** (Your Name) Corina Young

Address 6176 Federal Blvd.

City, State, Zip Code San Diego, CA 92114

Telephone [redacted]

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

During the June 12, 2015 City of San Diego Planning Commission Hearing on Item No. 8 it can be seen that two highly significant statements are being made as to the integrity of the CUP application process. The first statement comes from attorney David Demian and the second from Benjamin Zoback. What they are speaking about in general is how the process is being "gamed" and specifically how the 3452 Hancock Street MMCC was manipulated, by attorney Gina Austin, on behalf of her client, Adam Knopf, through the use of the CEQA process to put competing CUP applicants behind the 3452 CUP so that when considering both the maximum number of CUP's (4) in the council district and that some of the competing CUP's were within a 1,000 ft. radius which, once 3452 CUP was approved, their applications could not be considered. Considering that Adam benefited from this practice and Zoback literally apologizes during the Hearing for having filed a "frivolous" appeal, it MUST be determined who was behind this.

3. **When:** Date(s) of Incident June 6, 2015

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

**11/21/2014: SD Union Tribune, New Strategy Mars Pot Shop Approvals-Citing Atty. Jessica McElfresh**
**03/12/2015: City of San Diego Planning Commission, Minutes, Item No. 8, 3452 Hancock Street CUP Appeal**
**03/12/2015: Planning Commission, Item 8, Testimony of Benjamin Zoback @ 2:27:55**
**03/12/2015: Planning Commission, Item 8, Transcript of Atty. David Demian and Benjamin Zoback**

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Corina Young

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Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 12/20/2023

1. **Who:** (Your Name) Phillip Zamora

Address [redacted]

City, State, Zip Code [redacted]

Telephone [redacted]

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

Between January thru April 2017, I was the Director of Operations at a licensed cannabis dispensary located at 8863-E Balboa Avenue. I worked for the owners Mr. Ninus Malan and Mr. Salam Razuki. During that time I had numerous meetings with attorney Gina Austin, Razuki and Malan to discuss strategies that would contemplate the acquisition of more licenses both at the Balboa property and their property in Lemon Grove. It was represented to me that Austin, in her representation of some 5 wealthy parties, would create a monopoly enterprise in the adult-use cannabis market whereby there would be near zero competition to the enterprise. With that and what I know relative to the death of Michael "Biker" Sherlock not being a suicide, I do hereby support a Grand Jury be convened to investigate the growing evidence that supports the allegations being made against multiple parties, including attorney Gina Austin in furtherance of these licensing schemes.

3. **When:** Date(s) of Incident January thru April 2017

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

**07/26/2022 Reporters Transcript** of the Candid Chronicle Reporter Cara Anderson Interview of Phillip Zamora

**10/01/2018 Voice of San Diego** article regarding 8863 Balboa Avenue and how silent investors like Razuki subvert the system.

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Phillip Zamora

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Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 12/24/2023

1. **Who**: (Your Name) Darryl Cotton

Address 6176 Federal Blvd.

City, State, Zip Code San Diego, CA 92124

Telephone 619.954.4447

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

Chris Wlliams is a black man and owner of the **Candid Chronicle,** a nationally recognized web-based cannabis **publication,** with a long standing affinity for cannabis, the law surrounding its use and regulation and the social-equity opportunities it presents when it comes to the advances that historically have suppressed those of color from entering into the legal, adult-use cannabis arena through proper licensing and vetting of those able and willing to enter into that arena. I am one of those candidates. Williams engaged noted cannabis attorney Gina Austin for what was to be her representation of him in the pursuit of certain cannabis licenses. What we have come to find out about Austin, while representing Williams she was also representing other, more financially preferential applicants to her scheme to have representation and undisclosed interests in certain licensed cannabis entities within San Diego County. We request that a Grand Jury perform a full investigation of these violent, racist, unethical, and unlawful violations for criminal prosecution of what we know Austin and her government accomplices engage in.

3. **When**: Date(s) of Incident From 2016 forward

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

**01/28/2020 Declaration of Gina Austin I**SO of Proposed Intervenor KIM INVESTMENTS-3515 Harris St. Lemon Grove
**10/26/2017 Texts from Tiasha Brown,** SD Democratic Party **Black Caucus Chair,** soliciting bribe payment from me
**2022 City of Lemon Grove Year End Audit Report** showing accounting errors. This is just the tip of the iceberg.
**10/18/2020 SDUT: 8920 Broadway, Lemon Grove re CUP license** Gina Austin's opposition to Williams application.
**April 2023 East County Magazine reports an alleged bribe to Mayor Vasquez** to approve an adult-use CUP.
**May 2023 East County Magazine reports preferential adult-use licensing treatment** at 6691 Federal Blvd., LG
**02/16/2023 City of San Diego Social Equity Cannabis** funds are NOT going to legitimate applicants.
**05/11/18 WILLIAMS v ARAMBULA ET AL** Where Lemon Grove City Councilman Arambula beats Williams.

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Darryl Cotton

Digital versions of this print document can be found @ Justice4Amy.org in Litigation @ Section 13.

**Chris Williams**
**619.847.8264**

# County of San Diego Grand Jury

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**Please Review Complaint Guidelines on Reverse Side**

Date 12/24/2023

1. **Who:** (Your Name) Darryl Cotton

Address 6176 Federal Blvd.

City, State, Zip Code San Diego, CA 92124

Telephone 619.954.4447

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

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Prior to Prop 64 being voted on in 2016, Americans for Safe Access would, during the course of their normal weekly meetings, allow special guest speakers to spend the better part of an hour, extolling the virtues of passing Prop 64 as progressive cannabis law and regulation. ASA National and their local Chapter Chair, Terrie Best refused to take a position on Prop 64 as they claimed they only opined an medical cannabis related matters and Prop 64 was Adult-Use Recreational. Of course this was nonsense as it was the biggest thing to happen to medical marijuana since Prop 215 passed but further absurdity was on display when cannabis attorney Jessica McElfresh would speak about the importance of passing 64 and when I would bring up the actual language in 64 she would respond that this was not the place to talk about that but instead would have lunch with me to discuss it. I called her the next day and she said she would do lunch but it would cost $300/hour with a 2 hour minimum. McElfresh was using ASA to troll for new applicant clients and today, Terrie Best is attempting to rewrite history and deleting my reply in OB Rag would expose this for what it is. The height of hypocrisy and aiding and abetting crimes that McElfresh and Gina Austin are committing.

3. **When:** Date(s) of Incident From 2016 forward

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

**Americans for Safe Access** website-about-501C3
**ASA Local Chapters** - San Diego, Terrie Best, Chapter Chair
**12/21/2023 OB Rag, Roll Up for Cannabis Equity** by Terrie Best re social equity licensing, PPP and monopolies.
**12/23/2023 Cotton Reply** to the Article. Of note the reply shows "Awaiting Moderation." As can be seen in the comments, my comment was not allowed to post. Terrie Best knows what she and ASA did in furthering the adult-use licensing and regulation in CA and certainly within SD. My comment was not offensive. For Best to continue to suppress my 1st amendment rights and attempt to now wrap herself in the cloak of medical cannabis advocacy, in light of what they have done to get us here, is astoundingly arrogant and deceitful.

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Darryl Cotton

It is a crime to report to the Grand Jury that a crime has been committed knowing the report to be false. Penal Code §148.5(d).

Digital versions of this print document can be found @ Justice4Amy.org in Litigation @ Section 13.

# County of San Diego Grand Jury

## Citizen Complaint Form

San Diego County Grand Jury
550 Corporate Center
550 W C Street, Suite 860
San Diego, CA 92101-3518
619-236-2020 Fax 619-338-8127
Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 12/24/2023

1. **Who:** (Your Name) Darryl Cotton

Address 6176 Federal Blvd.

City, State, Zip Code San Diego, CA 92124

Telephone 619.954.4447

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

Prior to Prop 64 being voted on in 2016, Americans for Safe Access would, during the course of their normal weekly meetings, allow special guest speakers to spend the better part of an hour, extolling the virtues of passing Prop 64 as progressive cannabis law and regulation. ASA National and their local Chapter Chair, Terrie Best refused to take a position on Prop 64 as they claimed they only opined an medical cannabis related matters and Prop 64 was Adult-Use Recreational. Of course this was nonsense as it was the biggest thing to happen to medical marijuana since Prop 215 passed but further absurdity was on display when cannabis attorney Jessica McElfresh would speak about the importance of passing 64 and when I would bring up the actual language in 64 she would respond that this was not the place to talk about that but instead would have lunch with me to discuss it. I called her the next day and she said she would do lunch but it would cost $300/hour with a 2 hour minimum. McElfresh was using ASA to troll for new applicant clients and today, Terrie Best is attempting to rewrite history and deleting my reply in OB Rag would expose this for what it is. The height of hypocrisy and aiding and abetting crimes that McElfresh and Gina Austin are committing.

3. **When:** Date(s) of Incident From 2016 forward

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

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**Americans for Safe Access** website-about-501C3
**ASA Local Chapters** - San Diego, Terrie Best, Chapter Chair
**12/21/2023 OB Rag, Roll Up for Cannabis Equity** by Terrie Best re social equity licensing, PPP and monopolies.
**12/23/2023 Cotton Reply** to the Article. Of note the reply shows "Awaiting Moderation." As can be seen in the comments, my comment was not allowed to post. Terrie Best knows what she and ASA did in furthering the adult-use licensing and regulation in CA and certainly within SD. My comment was not offensive. For Best to continue to suppress my 1st amendment rights and attempt to now wrap herself in the cloak of medical cannabis advocacy, in light of what they have done to get us here, is astoundingly arrogant and deceitful.

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Darryl Cotton

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# County of San Diego Grand Jury

## Citizen Complaint Form

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550 Corporate Center
550 W C Street, Suite 860
San Diego, CA 92101-3518
619-236-2020 Fax 619-338-8127
Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 12/28/2023

1. **Who:** (Your Name) Amy Sherlock

Address 6176 Federal Blvd.

City, State, Zip Code San Diego, CA 92114

Telephone [redacted]

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

My husband, Michael "Biker" Sherlock, died on December 2, 2015. The medical examiner determined his cause of death to be a suicide. I was devastated by his death but felt that those professionals who would make this determination relied on the evidence they had before them to arrive at this determination. In 2020, I received information that suggested I might want to look into the cause of death because there would have been a motive to eliminate Biker from being the permittee on not one but two adult-use cannabis licenses he had successfully acquired just months before his death. I have since come to find, through 2 different 3rd party investigators, one of which, Scott Roder of the **Evidence-Room** a nationally recognized shooting scene team of experts, prepared a report with animations depicting what the physical evidence at the scene would have made it "100% inconsistent with a suicide." Mr. Roder is prepared to testify on behalf of his report and those actions or inactions that should have made the original cause of death murder as he has described it as a "staged scene."

3. **When:** Date(s) of Incident December 2015 thru current

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

**January 2020: Darryl Cotton and Amy Sherlock's** private messages re Biker's death may not be a suicide.
**November 30, 2022: The Armorous Report with Exhibits** finds that the COD, should have been ruled undetermined.
**December 27, 2023: The Evidence-Room Michael "Biker" Sherlock Video** death scene reconstruction animation.
**December 28, 2023: The Evidence-Room Michael "Biker" Sherlock COD Written Analysis and Report** finds, based strictly on physical evidence, the reported COD was 100% not consistent with suicide.
*Based on the evidence provided herein, I support a Grand Jury being convened to investigate my husbands, murder and the pay-to-play corruption in adult-use cannabis licensing that exists in the City of San Diego and provided motive to those who directly benefited from his death.*

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Amy Sherlock

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# County of San Diego
# Grand Jury

## Citizen Complaint Form

San Diego County Grand Jury
550 Corporate Center
550 W C Street, Suite 860
San Diego, CA 92101-3518
619-236-2020 Fax 619-338-8127
Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 1/11/2024

1. **Who:** (Your Name) Tiffany Knopf

Address [redacted]

City, State, Zip Code [redacted]

Telephone [redacted]

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This 8ox if you are using additional sheets for this question

Where my husband and licensee Adam Knopf applied for a cannabis license in the City of Pasadena, he represented that he had and ownership interest in the 8863-E Balboa dispensary which is currently in litigation with Amy Sherlock, the widow of Michael "Biker" Sherlock. Biker was the original permittee of 8863-E Balboa and Adam has, for the purposes of our divorce settlement denied having any interests in that entity but in CUP applications represents that he does have an ownership interest.

3. **When:** Date(s) of Incident March 27, 2019

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This 8ox if you are using additional sheets for this question

**March 27, 2019 Knopf/GSG Pasadena CUP Application stating ownership interests in the Balboa dispensary.**

See pages 1 and 20

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Tiffany Knopf

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# County of San Diego
# Grand Jury

## Citizen Complaint Form

San Diego County Grand Jury
550 Corporate Center
550 W C Street, Suite 860
San Diego, CA 92101-3518
619-236-2020 Fax 619-338-8127
Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 1/11/2024

1. **Who**: (Your Name) Amy Sherlock

Address 6176 Federal Blvd.

City, State, Zip Code San Diego, CA 92114

Telephone [redacted]

2. **What**: Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

I have been involved in civil litigation since April 2020 in both Federal and State court complaints that go to certain individuals engaged in unlawful activities in cannabis licensing, regulation and control. I have been consistently been set back by the courts with antiSLAPP Judgments. These judgments infringe upon my 1st Amendment rights to file these compalints and in the case of attorney Jessica McElfresh are supported with a criminal indictment, filed by then District Attorney Bonnie Dumanis against McElfresh, which specifically cited these activities. This was eventually settled under a Deferred Prosecution Agreement offered under the subsequent District Attorney, Summer Stephan and Deputy District Attorney Jorge Del Portillo, where McElfresh's criminal conduct continued during her 1 year probation period and continues to this day. I would like to present the evidence I have that supports my allegations, see the DPA set aside and the full complaint and list of charges pursued as not only was the DPA too lenient. McElfresh failed to abide by its terms and the courts are punishing me for having alleged these acts.

3. **When**: Date(s) of Incident May 23, 2017 thru current

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

**May 23, 2017, THE PEOPLE OF THE STATE OF CALIFORNIA v. JESSICA CLAIRE MCELFRESH ET AL**
**July 23, 2018, MeElfresh Deferred Prosecution Agreement**

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Amy Sherlock

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# County of San Diego
# Grand Jury

## Citizen Complaint Form

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550 Corporate Center
550 W C Street, Suite 860
San Diego, CA 92101-3518
619-236-2020 Fax 619-338-8127
Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 2/08/2024

1. **Who**: (Your Name) Tiffany Knopf

Address [redacted]

City, State, Zip Code [redacted]

Telephone [redacted]

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

I am undergoing discovery in a divorce proceedings with my husband, Adam Knopf and have reason to believe that Adam Knopf is not disclosing and has endeavored to discover those undisclosed interests within the City of San Diego. What I have come to discover is that there are over 30 months of missing minutes that would point to the licensing approval or denials by the city, some of which I believe would include Mr. Knopf's undisclosed assets.

3. **When:** Date(s) of Incident March 2022 through current

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

I do not have the requisite experience to flush out the myriad denials and shell companies that Mr. Knopf, his business partners and certain attorneys have banded together to withhold from our review those ownership documents. I am in support of a Grand Jury being convened to investigate what looks to be a situation where the City of San Diego has failed to keep those relevant records up to date and available on their website for all to see. I rely on this statement supported by a report I've created with coauthor Darryl Cotton that, through email communications contained within that Hearing Officer Report, have the city acknowledging the missing Hearing Officer Minutes, Hearing Officer Reports and Planning Commission Minutes that should not be missing, and would greatly aid in our identifying those assets.

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Tiffany Knopf

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# County of San Diego
# Grand Jury

## Citizen Complaint Form

San Diego County Grand Jury
550 Corporate Center
550 W C Street, Suite 860
San Diego, CA 92101-3518
619-236-2020 Fax 619-338-8127
Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 2/16/2024

1. **Who:** (Your Name) Amy Sherlock

Address 6176 Federal Blvd.

City, State, Zip Code San Diego, CA 92114

Telephone [redacted]

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

On February 6, 2024, I received a report from my Private Investigator what had met with defendant Duane Alexander. Mr. Alexander had requested this meeting in an attempt to share case dispositive information which would clearly show that, in addition to those defendants named in my civil complaint, there are other parties who actively and knowingly engaged in a conspiracy to defraud me of rights to property and licenses that my deceased husband, Biker, would have been rightfully mine had these acts not taken place. Within the PI Report it can be seen where a Conflict of Interest Waiver ("Waiver") was executed in the on May 9, 2017 with the document having been created by attorney William L. Miltner of MILTNER & MENCK, APC. My signature on that page is not mine. It is a forgery and attempts (email and phone call) by my attorney, Andrew Flores, to recover all client files from Mr. Miltner have been unresponsive. Until Alexander turned over these documents I had never even heard of MILTNER & MENCK or attorney William L. Miltner.

3. **When:** Date(s) of Incident May 9, 2017 thru current

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

2021/12/03: SHERLOCK ET AL v EULENTIAS DUANE ALEXANDER ET AL - Case No. 37-2021-00050889-CU-AT-CTL
2024/02/06 Private Investigator Report detailing meeting with Eulenthias Duane Alexander

2022: Form 1-A Stock Offering by Duane Alexander on behalf of Prime Harvest at $42,000,000
2022: Amended Form 1-A Stock Offering by Duane Alexander on behalf of Prime Harvest at $42,000,000
2023: Form 1-A Stock Offering by Duane Alexander on behalf of Prime Harvest at $42,000,000

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Amy Sherlock

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# County of San Diego Grand Jury

## Citizen Complaint Form

San Diego County Grand Jury
550 Corporate Center
550 W C Street, Suite 860
San Diego, CA 92101-3518
619-236-2020 Fax 619-338-8127
Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 2/19/2024

1. **Who:** (Your Name) Dina Goldberg

Address [redacted]

City, State, Zip Code [redacted]

Telephone [redacted]

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

I had been married to Eric Goldberg for 21 years. I had been the loving, devoted life, raising our children and supporting him as he built our business empire in a variety of businesses that ranged from real estate to licensed adult-use cannabis in San Diego and surrounding areas. I come forth now because as my divorce was finalized in June 2023, it has only been through the testimony of others, I have come to learn that Eric has been engaged in a sophisticated level of fraud in acquiring these licenses that his "success" has come at the expense of many others. By that I mean his professional relationships with attomey Gina Austin, James Bartell, Adam Knopf and Justus H. Henkes, CPA amongst others have worked together to take vast amounts of unreported cash, supposedly per Eric, all having come from their licensed dispensaries to pay off government officials to acquire more of the Conditional Use Permits in furtherance of their schemes. I have evidence of these events and would be willing to disclose them but will not do so unless I know that I will be protected and a Grand Jury will investigate these charges.

3. **When:** Date(s) of Incident 2015 through current

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

In their flying high arrogance and belief they are all above the law, James Bartell would constantly pressure me to engage in sexual relations with him. He would send me pictures of his genitalia. When Eric was apprised of Bartell's actions he did nothing. I believe that was because he and his partners in Far West were too dependent on Bartell to assure CUPS were granted. Eric would come consistently come home with tens of thousands of dollars in cash. He would show it off to our sons and regale in his riches. He had so much cash he resorted to burying it in walls and the backyard of our house. He told me this was necessary because cannabis was an all cash business and cash was necessary to pay off those people in DSD who would assure the licenses were granted. I also heard him celebrating a CUP issuance with Adam Knopf in phone calls where they whooped it up about who would be the "next official they'd have to pay off." **12/15/2016 Item 1** Planning Commission Hearing and Video testimony of Planning Commission mishandling and **conflicts by Slayer, Chipman and atty Ottilie from 12:40 - 21:06.**

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Dina Goldberg

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# County of San Diego
# Grand Jury

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San Diego, CA 92101-3518
619-236-2020 Fax 619-338-8127
Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 2/22/2024

1. **Who:** (Your Name) Tiffany Knopf

Address [redacted]

City, State, Zip Code [redacted]

Telephone [redacted]

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

I am undergoing discovery in divorce proceedings with my husband, Adam Knopf and have reason to believe that Adam is not disclosing certain assets and specifically adult-use cannabis CUP licenses that were acquired through preferential, pay-to-play relationships with government officials who control the award of such licenses within the City and County of San Diego as well as surrounding communities where these patterns can be established by those of us who had knowledge that contradicts the "official" narrative. What I will be addressing are the obvious errors in factual conclusion as it relates to those conflict of interest charges that existed with certain members of the SD Planning Commission, Santa Barbara, as well as applicants and attorneys for those applications as detailed in a **May 12, 2021 Investigative Report by the Sintra Group** on behalf of the City of Santa Barbara. This Report was done in response to a **March 12, 2021 article in the LA Magazine** which, no doubt as the threat of litigation loomed large, **caused the article to be retracted.** See also **SBPD Investigation** finding no evidence of wrongdoing.

3. **When:** Date(s) of Incident 2015 through current with the following items being addressed as my first hand knowledge of those events leading to the approval of GSG licenses and Anthony Wagners participation.

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

On or about March 2018 Adam flew to Santa Barbara with Micah Anderson on Micah's plane to have lunch in Santa Barbara with Anthony Wagner. Adam took a large amount of cash with him and returned later that same day. This was a few months before the 3516 CUP was awarded. I did not attend that trip. I did attend several other meetings with Adam in Santa Barbara re the CUP we were seeking in which Gina Austin and Abhay Schweitzer were there representing us. In the Sintra Report @ page 11, Anthony Wagner states that it's "purely coincidence" that Gina Austin represented GSG in Santa Barbara. That's not true. On **March 19, 2015, Item No 8,** Wagner was on the SD Planning Commission who approved our CUP application at 3452 Hancock Street. Gina Austin set up the Santa Barbara community meet and greet that **as this May 31, 2018 picture shows** those in attendance that upon information and belief included, among others, Adam Knopf, Gina Austin and Anthony Wagner. The Sintra Report downplayed Wagner's connections to Austin and Knopf to hide obvious conflict interests he actively had with GSG. The LA Magazine article had it right! It should never have been recanted and what was being reported revealed that. The Sintra Report had it wrong and was nothing more than a bought and paid for attempt to conceal these unlawful pay-to-play practices in plain sight.

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Tiffany Knopf

**February 26, 2022 NEWSHAWK Story**

**March 29, 2021 EdHat.com Op-Ed**

**June 11, 2021 Wagner's $4.6 MM Demand Letter**

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# County of San Diego
# Grand Jury

## Citizen Complaint Form

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550 Corporate Center
550 W C Street, Suite 860
San Diego, CA 92101-3518
619-236-2020 Fax 619-338-8127
Email: sdgrandjury@sdcounty.ca.gov

**Please Review Complaint Guidelines on Reverse Side**

Date 04/06/2024

1. **Who:** (Your Name) Amy Sherlock

Address 6176 Federal Blvd.

City, State, Zip Code San Diego, CA 92114

Telephone [redacted]

2. **What:** Subject of Complaint: Briefly state the nature of complaint and the action of what San Diego County department, section agency or official(s) that you believe was illegal or improper.

☐ Check This Box if you are using additional sheets for this question

This Complaint builds upon the information provided in my Grand Jury Complaint (GJC) of 12/18/2023 regarding 8863-E Balboa Avenue. What has come to my attention since having filed that GJC is that on January 15, 2016, 6 weeks after my husband, Michael "Biker" Sherlock was murdered, the City of San Diego billed a $7,066.42 invoice to my deceased husband to which it has been marked paid. Michael was the Responsible Financial Party (DA DS-3242) per the City of San Diego's Development Services Department (DSD) Conditional Use Permit (CUP) application. Who is acting on his behalf, after his death, to make any payments to DSD? Michael was AWARDED the 8863-E CUP 06/17/2015. Why is a dead man being billed and someone paying that amount for a CUP (368447) that had been awarded 7 months prior to this DSD invoice for a **PLANNING SUBDIVISION** deposit? And let us also not forget that this CUP reverted to me on 03/17/2016 which that whole mess can be seen in my GJC dated 12/18/2023.

3. **When:** Date(s) of Incident 2015-2017

4. **Where:** Names and addresses of other departments, agencies or officials involved in this complaint. Include dates/types of contact, i.e. phone, letter, personal.

☐ Check This Box if you are using additional sheets for this question

04/24/2014 DSD Project 368347 showing Michael Sherlock as DA-DS 3242 Financial Responsible Party.

01/15/2016 DSD Invoice 670106 Invoice Revenue for PLANNING SUBDIVISION in the amount of $7,066.42. Status PAID.

12/18/2023 Amy Sherlock Grand Jury Complaint citing DSD irregularities in the 8863-E CUP processing.

5. **Why/How:** Attach pertinent documents and correspondence with dates.

Print Name: Amy Sherlock

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Digital versions of this print document can be found @ Justice4Amy.org in Litigation @ Section 13.

# EXHIBIT J

Sent Certified Mail No: 7022 2410 0001 2590 0290

# THE STATE BAR OF CALIFORNIA
# CALIFORNIA ATTORNEY COMPLAINT FORM

Read instructions before filling in this form.

Please mail to: Office of Chief Trial Counsel / Intake Dept., State Bar of California
845 South Figueroa Street, Los Angeles, California 90017-2515

**(1) Your contact information:**

Your name: Amy Sherlock

Your address: 3750 Maxdale Drive

Your city, state & zip code: Prosper, TX 75078

Your email address: Amyjosherlock@gmail.com

Your telephone numbers:

*Home* NA *Work* NA *Cell* (619) 871-5403

**(2) Attorney's contact information:** Please provide the name, address and telephone number of the attorney(s) you are complaining about. (NOTE: If you are complaining about more than one attorney, please use a separate form or include on a separate sheet for each attorney the information requested in items #2 through #7.)

Attorney's name: William L. Miltner

Attorney's address: 402 W. Broadway, Suite 800

Attorney's city, state & zip code: San Diego, CA 92101

Attorney's telephone number: (619) 615-5333

Attorney's California bar license number: 139097

**(3)** Have you or a member of your family complained to the State Bar about this attorney previously?
Yes ☐ No ☒

**(4)** Did you employ the attorney? Yes ☐ No ☒

If "Yes," give the approximate date you employed the attorney and the amount, if any, paid to the attorney.

Date employed: NA Amount paid (if any): $ NA

If "No," what is your connection with the attorney(s)? Explain briefly.

On February 6, 2024 I was given a report from a private investigator my attorney, Andrew Flores had hired to see documents in a case Mr. Flores was representing me on. The PI met with the defendant in that related case and part of the documents he turned over were those that purported I had signed a Conflict of Interest Waiver, created by Miltner. That signature is a forgery.

My current counsel is Mr. Andrew Flores (SBN 272958)
427 C Street, Suite 220
San Diego, CA. 92101
619.356.1556
afloreslaw@gmail.com

**(5)** Include with this form (on a separate piece of paper) a statement of what the attorney(s) did or did not do that is the basis of your complaint. Please state the facts as you understand them. Do not include opinions or arguments. If you employed the attorney(s), state what you employed the attorney(s) to do. Sign and date each separate piece of paper. Additional information may be requested. (Attach copies of pertinent documents such as a copy of the fee agreement, cancelled checks or receipts, and relevant correspondence.)

**(6)** If your complaint is about a lawsuit, answer the following, if known:

a. Name of court (For example, Superior Court and name of the county)

Superior Court San Diego

b. Title of the suit (For example, Smith v. Jones)

SHERLOCK ET AL v GERACI ET AL

c. Case number of the suit 37-2021-0005089-CU-AT-CTL

d. Approximate date the suit was filed 12/03/2021

e. If you are not a party to this suit, what is your connection with it? Explain briefly.

I am co-plantiff party to the suit in which Duane Alexander is one the co-defendants. Please see EX-A in which Alexander shares information of a conspiracy that existed between the codefdendants and Miltner. Additional information has been provided in my attached statement.

**(7)** Size of law firm complained about:

- ☐ 1 Attorney
- ☒ 2 – 10 Attorneys
- ☐ 11 + Attorneys
- ☐ Government Attorney
- ☐ Unknown

**(8)** Translation Information:

If you require that the State Bar utilize formal translation services in order to process your complaint, it may delay our communications with you. Is someone available to provide translation assistance for you so that the State Bar may communicate with you in English?

Yes ☒ No ☐

If "no," state the language in which you need formal translation:

**Signature** */s/ Amy Sherlock* Date: 03/08/2024

**CA BAR Complaint Attachment (Per Section 5)**

Amy Sherlock Statement of Events re William L. Miltner, Esq. (SBN 139097)

I have been in litigation with multiple parties since December of 2021. One of the defendants in this matter is Mr. Duane Alexander. In January 2024, Mr. Alexander reached out to my attorney, Andrew Flores and requested a meeting with Flores so that he could provide me with information that would confirm the conspiracy that existed to deny me of my rights to my late husband, Michael "Biker" Sherlock the 2 each, adult-use cannabis licenses that he, as the permittee, had been awarded in the City and in the County of San Diego.

Flores did not want to take that meeting personally as he did not want to be a witness in his own case so he contracted that meeting to EG Associates (Private Investigations) to meet Alexander and provide a report that would document that meeting. (See that report @ **EX-A**)

Within that report we saw a Conflict-of-Interest Waiver ("Waiver") had been created on May 5, 2017, by Miltner in which, on May 9, 2017, there appears to be signatures of some of the defendants in my civil action, (SHERLOCK ET AL v. GERACI ET AL, Case No. 37-2021-0005089-CU-AT-CTL), as well as what is most certainly a forged signature of mine. Until Alexander provided me with that documentation, I had never even heard of Miltner. Of note, Miltner created this Waiver and while everyone else had an email address associated with their name, as can be seen in **EX-A @ pg 14,** I did not.

When I became aware my signature had been forged, I sent Flores an email requesting that this matter be researched through communication with Miltner. I also provided Flores with a copy of my May 9, 2017, calendar which offers proof I had not been at Miltner's office or had allotted any time on my calendar to have made that meeting.

Beginning on February 13, 2024, Flores had a series of phone calls and emails with Miltner that was meant to transfer any of Miltner's files of mine to Flores and to discover more about how the Waiver had been created and executed. I did not participate in any of those phone calls, but **EX-B** does provide a record of those emails.

On February 24, 2024, Miltner sends Flores a voice-to-text message that states "yeah, we don't have her file...I have unsigned things in the file. That are in the computer file...there is no physical file." Miltner was given to March 1, 2024, to cooperate and provide us with any of those files. He has never provided us with anything that his office retained, even in the computer files he admits to having. (See Voice-to Text Message @ **EX-C**)

With me being the notable exception, Miltner has done work for the parties on that Waiver **after May 9, 2017,** and at no time was I informed that these legal services were performed, purportedly on my behalf **(See EX-D)** Of note. both Anomar Management, LLC and RAB Services, LLC, are entities described in detail in **EX-A @ pages 11-13 to which Miltner even states at Page 11 "I don't have an email for Amy but I assume someone will be able to get it to her."**

I do hereby attest to the following information contained herein as being a true and correct statement from my knowledge of the events being described.

By: _/s/ Amy Sherlock_
Amy Sherlock
March 11, 2024

# Exhibit A

EG&Associates

**CASE No.**
**20240124-01**

7912 Shalamar Drive
El Cajon, CA 92021
619-743-1425 / 619-647-9720
California PI License: PI-27338

| | |
|---|---|
| Date: | February 6, 2024 |
| To: | Andrew Flores - Attorney |
| From: | Efrain Garcia |
| Plaintiff: | Amy Sherlock |
| Investigation Type: | Witness Interview |
| Date of Request: | January 24, 2024 |
| Date Assigned: | January 24, 2024 |
| Assigned: | Investigator, Michael Mercurio |

**WITNESS INTERVIEW**

The following information and Witness Interview Report is being provided to the client, Attorney Andrew Flores

## *Assignment*

This assignment was received on January 24, 2024, along with the necessary information to conduct an interview of witness, Eulenthius "Duane" Alexander and provide a thorough and detailed Witness Interview Report. The main task of this assignment is the collection of document evidence from Alexander. The provided information was reviewed and used as the criteria to conduct the interview:

Witness: Eulenthius "Duane" Alexander
Phone: (702) 350-9699

The interview was assigned to Investigator, Michael Mercurio. The following is his documentation of the assignment:

***Plaintiff Amy Sherlock Interview/Investigation***

## *Background*

*As per Attorney Andrew Flores' instructions the task is for an Investigator is to meet with a witness in Flores' Civil Court Filing identified as* ***Eulenthius "Duane" Alexander****. Alexander is in possession of copies/facsimiles of a document/s alleged to be fraudulently signed. Attorney Flores cannot accept this evidence directly from this witness without becoming a witness in his own Court Complaint Filing, thus requiring an independent person to act on his behalf in taking possession of the document(s). Questions of this witness about the alleged fraudulently signed document(s) may also take place.*

***Pre-Investigative Case Activity:*** *I was assigned the task by Efrain Garcia of E.G. & Associates Investigations on January 24, 2024. Efrain Garcia provided me with a verbal synopsis of the task to be performed and the objective to be accomplished as needed by Attorney Flores. Efrain Garcia was notified of my failed attempts to contact Attorney Flores. Later Garcia advised me to retry telephone contact with Attorney Flores. Upon doing so, I connected with him.*

*Attorney Flores explained he has filed a Civil Complaint action on behalf of his Client, Ms. Amy Sherlock. Atty. Flores explained that a witness identified as Eulenthius "Duane" Alexander has*

*come forward in this case who reports to be in possession of copies/facsimiles of document(s) supporting Flores' contention that acts of fraud were perpetrated against his client. Flores stated he could not offer to accept the document/s directly from this witness without becoming a witness in his own Civil Court action, and therefore needs an Investigator to meet with the witness and take possession of the document(s) and brief interview. In this way, the Investigator becomes an additional witness to the turnover of the alleged fraudulent document(s). An understanding was verbally agreed to between Atty. Flores and me that questioning about the document was permissible, however no questioning regarding the allegations contained within the Court Filing Case would take place. As well, the authenticity of the document/s is not to be made by the Investigator, just the acceptance of the document(s) from the witness and an interview of the witness as to the circumstances of the turnover of these documents would take place. We were both in agreement. Flores provided me with the witness' telephone number of (702) 350-9699 and no other information.*

*I telephoned witness Alexander twice on January 26, 2024, with no success. I left messages both times advising Alexander that I was acting on behalf of Attorney Andrew Flores and wished to set up a meeting. I offered that if Alexander were too busy, then to at least text me and I'd work around his schedule. I left my mobile number, but there was no reply. I contacted Efrain Garcia of E.G. & Associates and informed him I left two messages without success. Efrain Garcia made contact with Attorney Flores, who in turn called Mr. Alexander, then Garcia called me back to have me retry telephone contact with the witness. I complied and on January 29, 2024, and Mr. Alexander answered.*

***Investigative Activity - February 5, 2024, and Forward:** In my call to the witness, I informed Alexander I represented E.G. & Associates who had been retained by Attorney Andrew Flores to meet with him and take possession of the documents he possessed. I explained I would record the event, as I had only a couple of questions to ask him about his possession of the documents.*

*Alexander told me he wished to meet only in a public setting, preferably a coffee shop and could do so on either Friday, February 2, 2024, at noon or Monday, February 5, 2024, at noon. I agreed to call him Thursday, February 1, 2024, so we could firm up the meeting, Friday or push it to the following Monday, as well as set a location to meet. I called Alexander the morning of Thursday, February 1, 2024, and we mutually agreed to meet on Monday February 5, 2024, at noon because of the heavy rains expected on Thursday and Friday. I selected the Denny's Restaurant in Rancho Bernardo just off Hwy. 15 North, as it provided easy access, a quiet setting for recording, and is in a locale where neither one of us would likely be recognized. We agreed.*

*I arrived at Denny's Restaurant at about 11:30am that Monday. Roughly 15 minutes later, E. Alexander texted me that he had a late client and was running roughly one-half hour late. He asked if we could possibly meet at a coffee shop closer to his location. I told him that was possible and asked what he had in mind. I didn't get a reply for almost another one-half hour. Alexander texted that he wished to meet at the Coffee Bean Coffee Shop at Ruffin Road and Clairemont Mesa Boulevard. I replied this was fine and told him we'd instead meet at 1:00pm to allow me driving time.*

*I arrived at the Coffee Bean Coffee Shop a few minutes before 1:00pm. The witness arrived at about 1:20pm. This venue proved to be a poor choice, as there were only three tables inside and all were full of people and children talking loudly. Also, a stereo system played Hip Hop music loudly, with loud calls for coffee orders constantly. This wasn't conducive to recording any sort of conversation. After a lengthy wait for a table, Alexander and I sat at a table. I again explained to the witness that my only part in the lawsuit filed by Attorney Andrew Flores, is to take possession*

*of the documents that he is in possession of, and that I have no part in investigating any other matters contained within the lawsuit, including whether the documents themselves are fraudulent. The witness said he understood.*

*Witness Alexander" placed the documents on the table. He removed a paperclip that held the bundle together, separating three yellow pages of 8 ½" X 11" handwritten notes from another eleven similar sized pages of computer printouts. Before the witness began explaining the documents, I asked the following questions:*

### *Interview*

Q: Did you speak with Attorney Andrew Flores about all documents you have in your possession, and if so, are these documents the very same documents the Attorney is expecting? Are you withholding anything?

*A: Alexander replied that these are the documents he told Attorney Flores he had, and Flores is expecting them. He said he is not withholding any documents.*

Q: Are there any additional documents you did not mention to Attorney Flores, but are willing and able to provide to him?

*A: Alexander said these are all of them, but vowed if he were able to get his hands on more, he would turn them over. Alexander voiced vitriol toward **"Steve Lake"** who figures prominently in the Flores lawsuit.*

*Alexander then pointed to pages ten and eleven of the computer printout stack and said these signature pages from a legal document written by a law firm, contain a signature appearing to be that of the Plaintiff, Amy Sherlock, in Attorney Andrew Flores' lawsuit, and that he would testify in a court of law that the signature of Plaintiff Amy Sherlock on that document copy is fraudulent. The witness Alexander went on to say his handwritten notes name people, places and things in chronological order that show the signature couldn't possibly be that of Amy Sherlock. The witness Alexander began getting visibly angry, blaming "Steve" for the fraud, and saying he himself had been the victim of "Steve" and this is why he's cooperating with Attorney Flores. I changed the subject frequently, as Alexander easily became agitated when talking about "Steve", a business partner. I got the witness to concentrate only on discussing the documents. Within the eleven pages of computer printouts, were numerous emails Alexander took part in which shed more light on his contention that "Steve" was not "trustworthy, was manipulative and a liar" as Alexander put it.*

*E. Alexander pointed out the three yellow tablet sheets with his handwritten notes. He said the information contained on these three pages were facts, dates and occurrences Attorney Flores had asked him to memorialize. No questioning of these pages was undertaken, as they had to do with the facts Attorney Flores used in his court filing and were clearly outside the investigative realm set for EG & Associates by Attorney Andrew Flores. Our meeting lasted almost two hours before we parted ways.*

*Alexander's Notes:*

Introduced To Steve. Had County License For Sale
I Know of Balboa For Sale. But didn't Know
Steve owned it when Negotiating Ramona.

(1) He told Me He Was The Investor + ~~[illegible]~~
(2) -Brother Renny (3) Brother Had Past
Was partners In license (3) Would do a deal w/ Brothers partner
+ Sis + Brad on license @ 50% / 50%
(4) He Was looking out For His "Family" + Amy
The original Agreement Was Drafted by
~~[illegible]~~ Steve's. Attorney. As RAB
50% PH 50% RAB Renny
Amy
Brad

Steve As Investor Took landlord position. He didn't
Want His Name on Licence.
My Agreement w/ Steve Was Always If I gave
Him His $2mm Investment. That He would Walk
Away., + I would Recieve 25% of Any Moneys
Above $2mm When Sold.
· Signed lease With That language
- Agreement Was That I would put In $200K To Start
open business. I Ended up spending over $850K
@ loss First 5 Years.
- once Biz Started picking up, Renny wanted A check.
I Met w/ Steve, Renny + Brad To Explain $850K Negative
But When Biz Stabilized I put Renny on Payroll for $5K
Per Month.

IN WINTER 2021 BUSINESS WENT FROM MEDICAL TO RECREATIONAL.

AT THAT POINT I WANTED TO EXERCISE OUR AGREEMENT & PURCHASE THE PROPERTY.

AT THIS POINT STEVE SAID HE WOULD NOT HONOR HIS WORD @ 2MM BUT HE WOULD SELL @ $2.7.

- I FOUND AN INVESTOR TO DO $2.7 & MET W STEVE TO DISCUSS LAST DETAILS. + PAYMENT OF 25% WHICH I EXPECTED TO BE $175K.

(3) HE TOLD ME HE WOULD NOT HONOR 25%

(4) HE SAID BIKER PRE SIGNED AG. MY THOUGHTS...

(1) WHY IS HE TELLING ME THIS

(2) SOUND LIKE A LIE.. NOBODY WOULD DO THAT.

(3) TRYING TO CREATE NARRATIVE FALSE FA CALLED IN

(1) SISTER FILED LAWSUIT OR LAWSUIT WAS STILL PENDING.

- AT THIS POINT I CANCELLED THE PURCHASE AGREEMENT...

- SIMULTANEOUSLY, I HAD PURCHASE AG TO PURCHASE 50% - MADE $100K DEPOSIT. DID NOT MOVE FORWARD BECAUSE STEVE POST

AT SOME POINT PRIOR TO AGREEMENT I MET W PERRY A FEW TIMES TO DISCUSS DETAILS OF PA

(2) HE EXPRESSED THAT, HE WAS NOT PAYING AMY ANYTHING BECAUSE BIKER STOLE FROM THEM &

(1) BRAD "GAVE HIM" HIS PART OF THE BIZ @ WHICH

- I dont know exact details of all the things that went on. But I can say that it appeared that they went into full any position. Steve, Brad, Renny all shuffling the deck, for themselves. & using me as a pawn.

- ~~[illegible]~~ Winter 2023
  - Steve sold property
  - I deposite $200K Renny on $650K purchase Ag. Balance $450K

- After thinking about all the meetings & diffent stories they told over the years I decided to look @ old emails.. Then I remembered R.A.B & seen that attorney did not have any contact info therefore none of this was recieve by her, but her name was signed on RAB agreement.

<u>Lawsuit</u>

- To convoluted.. should remove conspiracy language & be direct towards Steve, Brad, & Renny.
- Renny should be named secondary to Steve. They were in cohoots the whole time.

*Alexander's Notes (Transcripts):* ***Transcription of Alexander's handwritten notes provided to Investigator Michael Mercurio, during their meeting of February 5, 2024 – Transcription has been verified by Investigator Efrain Garcia, for accuracy.***

***Page 1***

*Introduced to Steve. Had county license for sale.*

*I knew of Balboa for sale. But I didn't know*

*Steve owned it when negotiating Ramona.*

*He told me he was the investor and*

*2) Brother Renny*

*3) Brother had pact*

*Was partners in license 3) would do a deal w Brothers' partner*

*& sis and Brad on license @ 50%/ 50%*

*4) He was looking out for his family/Amy*

*The original agreement was drafted by*

*Steve's attorney as RAB*

*50% PH 50% RAB Renny*

*Amy*

*Brad*

*Steve as investor took landlord position. He didn't*

*Want his name on the license*

*My agreement w Steve was always if I gave*

*Him his $2mm investment that he would walk*

*Away..& I would receive 25% of any moneys*

*Above $2mm when sold*

*Signed lease with that language*

*Agreement was that I would put in $200K to start*

*Open the business. I ended up spending over $850K*

*@loss first 5 years.*

*Once business started picking up Renny wanted a check*

*I met w Steve Renny and Brad to explain $850K negative*

*But when biz stabilized I put Renny on payroll for $5K*

*Per month*

***Page 2***

*In winter 2021 business went from*

*Medical to recreational*

*At that point I wanted to exercise our agreement*

*+ purchase the property.*

*At this point Steve said he would not honor*

*His word @ $2mm but he would sell @$2.7mm*

*I found an investor to do $2.7mm*

*+ met w Steve to discuss last details*

*+ payment of 25% which I expected to*

*Be $175k.*

*2) He told me he would not honor the 25%*

*3) He said Biker pre signed ag (agreement?) My thoughts…*

> *1) Why is he telling me this*
>
> *2) Sounded like a lye (lie?) nobody would do that*
>
> *3) trying to create narrative in case I'm called in*

*1) Sister filed lawsuit or lawsuit was still*

*Pending*

*At this point I canceled the purchase agreement*

*Simultaneously, I had purchase ag to purchase*

*50%- made $100k deposit. Did not move forward because Steve past*

*At some point prior to this agreement I met with Renny*

*A few times to discuss details of PA*

*He expressed that he was not paying Amy*

*Anything because Biker stole from them +*

*1) Brad "gave him" his part of the % @ which*

***Page 3***

*I don't know exact details of all the*

*Things that went on but I can say*

*That it appears that they went into*

*Fuck Amy position. Steve Brad, Renny all*

*Shuffling for the deck for themselves*

*+ using me as a pawn*

*Winter 2023*

- *Steve sold property*
- *I deposit $200K Renny on $650K*

*Purchase Ag Balance $450K*

*After thinking about all the meetings +*

*Different stories they told over the years*

*I decided to look @ old emails*

*Then I remembered RAB + seen that*

*Attorney did not have Amy contact info*

*Therefore none of this was received by*

*Her, but her name was signed on RAB agreement.*

*Lawsuit*

*To convoluted. Should revive conspiracy language*

*+ be direct towards Steve, Brad and Renny*

*Renny should be named secondary to Steve.*

*They were in cohoots (cahoots) the whole time.*

***Emails Provided by Alexander:***

This message w/attachments (message) is intended solely for the use of the intended recipient(s) and may contain information that is privileged, confidential or proprietary. If you are not an intended recipient, please notify the sender at bradford@equitycapital.us and then please delete and destroy all copies and attachments, and be advised that any review or dissemination of, or the taking of any action in reliance on, the information contained in or attached to this message is prohibited.

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On Friday, May 5, 2017 3:52 PM, Bill Miltner <bill@miltnerlaw.com> wrote:

Steve, Duane, Bradford, Amy, and Renny,

Enclosed herein, please find the Conflict of Interest Waiver and Attorney Client Fee Agreement to be executed by everyone. I do not have an email for Amy, but I assume that someone will be able to get it to her. Please review the same and execute the same. If you have any questions at all, do not hesitate to call.

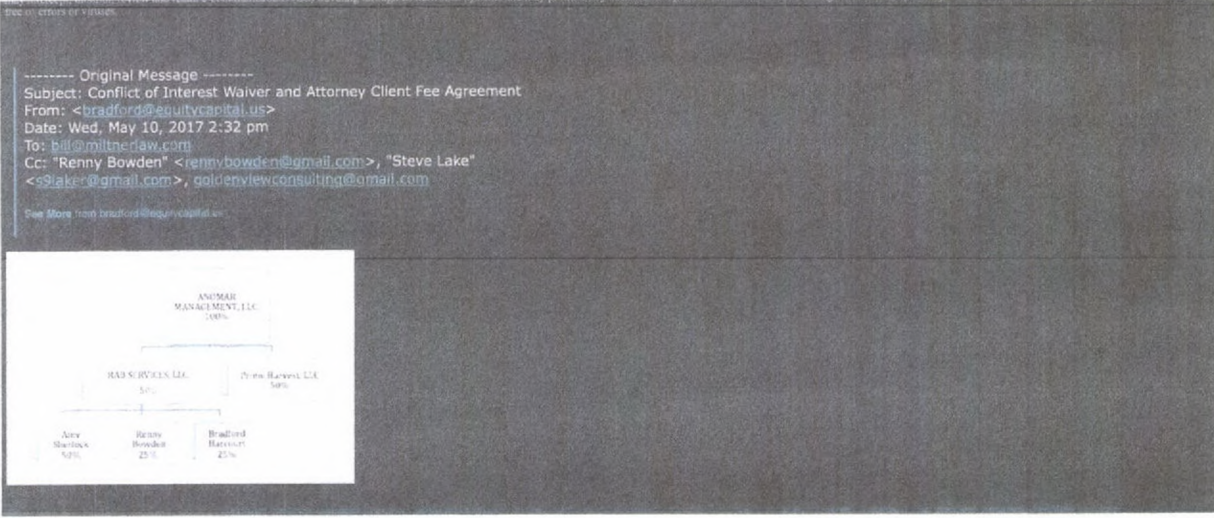
I look forward to working with all of you.

Thanks,

Bill

MILTNER
& MENCK, APC
William L. Miltner
Managing Partner
402 West Broadway, Suite 800
San Diego, CA 92101
(619) 615-5333
(619) 615-5334 facsimile
WWW.MILTNERLAW.COM

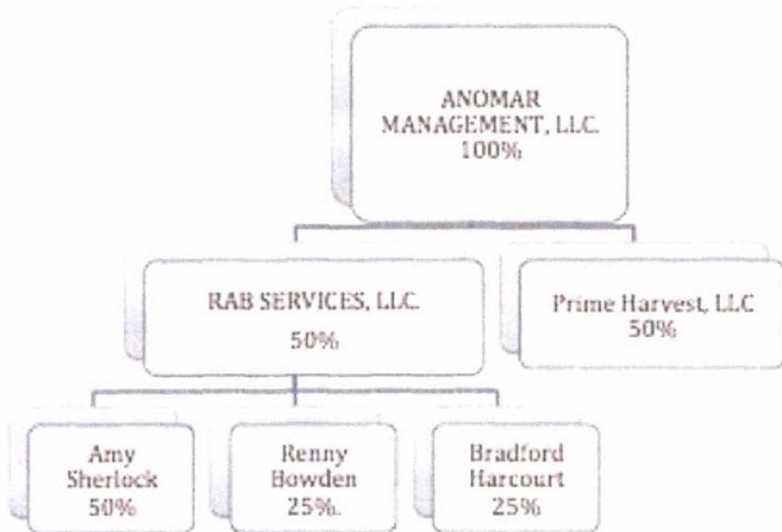
This electronic message contains information from the law firm of Miltner & Menck, APC, which may be confidential or protected by the attorney-client privilege and/or the work product doctrine and is intended solely for the use of the addressee listed above. If you are neither the intended recipient nor the employee or agent responsible for delivering this electronic message to the intended recipient, you are hereby notified that any disclosure, copying, distribution or the use of the content of this electronic message is strictly prohibited. If you have received this electronic message in error, please immediately notify us by replying to this message and delete the original message.



free of errors or viruses.

-------- Original Message --------
Subject: Conflict of Interest Waiver and Attorney Client Fee Agreement
From: <bradford@equitycapital.us>
Date: Wed, May 10, 2017 2:32 pm
To: bill@miltnerlaw.com
Cc: "Renny Bowden" <rennybowden@gmail.com>, "Steve Lake" <s9laker@gmail.com>, goldenviewconsulting@gmail.com

See More from bradford@equitycapital.us



**bradford@equitycapital.us**
RE: Conflict of Interest Waiver and Attorney Client Fee Agreement
To: bill@miltnerlaw.com, Cc: Renny Bowden, Steve Lake, Eulenthius Alexander

May 11, 2017 at 12:16 PM
Details

Siri found new contact info in this email: Bradford bradford@equitycapital.us

Bill,

Glad we were able to connect. I have attached the proposed structure for your review. ANOMAR and RAB, LLC's are the only entities that need to filed and operating agreements drawn up for. Prime Harvest is Duane's existing entity that he will be using to hold his interest in ANOMAR. Steve Lake has advised me that you have all the deal terms and necessary docs to draw up the management agreement. Take a look at the org chart and give me a call with any questions.

Best,

**Bradford T. Harcourt**
President & CEO

EQUITYCAPITAL

7938 Ivanhoe Avenue, Suite B
La Jolla, CA 92037

**Direct:** 858-220-0770 | **Fax:** 858-810-0301

bradford@equitycapital.us | www.equitycapital.us

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Drafts (589) Flagged
Save Account Offline

**bradford@equitycapital.us**
RE: Conflict of Interest Waiver and Attorney Client Fee Agreement
To: bill@miltnerlaw.com, Cc: Renny Bowden, Steve Lake, Eulenthius Alexander

May 15, 2017 at 3:37 PM
Details

Siri found new contact info in this email: Bradford bradford@equitycapital.us

Bill,

Please let me know if you will be able to jump on a call so we can get this ball moving forward. I will be leaving town Wednesday night for the remainder of the weekend for a weeding out of the county. Thank you!

Best,

**Bradford T. Harcourt**
President & CEO

EQUITYCAPITAL

7938 Ivanhoe Avenue, Suite B
La Jolla, CA 92037

**Direct:** 858-220-0770 | **Fax:** 858-810-0301

bradford@equitycapital.us | www.equitycapital.us

-------- Original Message --------
Subject: RE: Conflict of Interest Waiver and Attorney Client Fee Agreement
From: <bradford@equitycapital.us>
Date: Thu, May 11, 2017 12:18 pm
To: bill@miltnerlaw.com
Cc: "Renny Bowden" <rennybowden@gmail.com>, "Steve Lake" <[illegible]@gmail.com>, goldenviewconsulting@gmail.com

WILLIAM L. MILTNER
WALTER E. MENCK
ROBERT C. HARVEY
AUTUMN S. FRYE

# MILTNER & MENCK, APC

EMERALD PLAZA
402 W. Broadway
Suite 800
San Diego, CA 92101
(619) 615-5333
(619) 615-5334 Fax

WWW.MILTNERLAW.COM

May 5, 2017

***Sent Via Email***: **s9laker@gmail.com;**
Steve Lake

***Sent Via Email***: **rennybowden@gmail.com;**
Renny Bowden

***Sent Via Email***: **dalexander@gethichi.com**
Duane Alexander

Amy Sherlock

***Sent Via Email***: **bradford.harcourt@att.net**
Bradford Harcourt

**Re: Conflict of Interest Waiver**

Dear Steve, Renny, Duane, Amy, and Bradford,

You have asked us to represent both Steve Lake (hereafter Client A), Renny Bowden (hereafter Client B), Duane Alexander (hereafter Client C), Bradford Harcourt (hereafter Client D), and Amy Sherlock (hereafter Client E) to provide legal counsel in connection with a cannabis business venture, including assisting with forming entity structure of venture and general counsel regarding the same ("Subject Action"). As you are aware, our representation of Client A, B C, D, and E may create certain conflicts of interest, in that the interests and objectives of each client individually on certain issues related to the Subject Action are, or may become, inconsistent with the interests and objectives of the other.

Our representation of multiple interests has significant implications which you should consider. For example, rather than our vigorously asserting a single client's interest on an issue, there likely will be a balancing of interests between the parties represented. For example, there may be grounds to settle on behalf of one party, but not the other which may be sources for potential conflicts. Terms that are advantageous to one party are typically disadvantageous to the other party. Further, in the event of a dispute between you, we may be precluded from representing either of you without first obtaining the informed written consent of all concerned.

There are additional problems resulting from joint defense. In cases of joint representation, counsel must fully inform each client as to information obtained during the representation. Moreover, under California Evidence Code § 962 and California case law, in cases of joint representation there is no attorney-client privilege between or among the joint clients so that joint representation may result in a waiver of the attorney-client privilege with respect to the Subject Action.

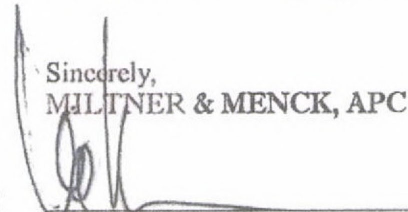
For these reasons, our normal practice in these circumstances is to represent only one party. However, you have advised us that neither of you wishes to seek other counsel in this matter at the

present time, and that you have decided that we should represent your multiple interests in connection with the Subject Action.

Accordingly, we request that you sign and return to us a copy of this letter acknowledging that you have been advised of the potential conflicts associated with your respective interests and that you nevertheless want us to represent you both in connection with the matters discussed above.

We stress that each of you remains completely free to seek other counsel at any time even if you decide to sign the consent set forth below. Should you have any questions concerning this letter or the consent, please discuss them with your own counsel before signing and returning the enclosed copy of this letter.

Sincerely,
MILTNER & MENCK, APC



By: ______________________
William L. Miltner, Esq.
Attorney at Miltner & Menck APC

**CONSENT**

Attorney has explained to both of the undersigned that there exist potential conflicting interests in the above-described matter and has informed both of us of the possible consequences of these conflicts. We also understand that we have the right to and have been encouraged to consult independent counsel before signing this consent.

Each of the undersigned nevertheless desires representation by Attorney to the extent described above and, therefore, consents and gives approval to such representation. Each of the undersigned further acknowledges that it has been apprised of the following California Rules of Professional Conduct Rule:

California Rules of Professional Conduct Rule 3-310, Avoiding the Representation of Adverse Interests:

"**(A)** For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;

(3) "Written" means any writing as defined in Evidence Code section 250.

**(B)** A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The member knows or reasonably should know that:

(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the member's representation; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

**(C)** A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

**(D)** A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

**(E)** A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

**(F)** A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law; or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public."

This letter will therefore confirm our understanding that:

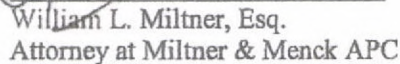
(1) You acknowledge Miltner & Menck's disclosure of the potential or actual conflicts of interest described herein;

(2) You, for yourself and any affiliates, assigns, successors or heirs, will not directly or indirectly seek to disqualify Miltner & Menck, or support such disqualification, or seek sanctions against Miltner & Menck, as a result of the potential or actual conflicts of interest that you have waived under this Agreement; and

(3) You have been fully informed regarding the legal implications of this consent and conflict waiver.

We request that you signify your informed written consent to the above by signing the Consent and Waiver of Rights set forth below and return this letter to us. We encourage you to seek the advice of independent legal counsel before signing this Consent and Waiver of Rights; and we emphasize that you remain completely free to consult with independent legal counsel at any time even if you decide to sign this Consent and Waiver of Rights.

Sincerely,
**MILTNER & MENCK, APC**

By: 

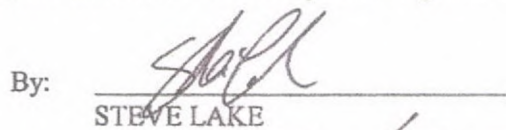
William L. Miltner, Esq.
Attorney at Miltner & Menck APC

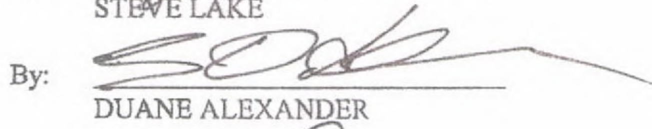
**CONSENT AND WAIVER OF RIGHTS**

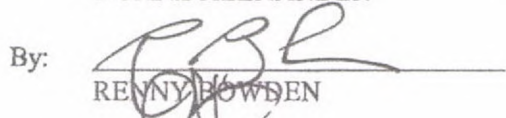
Steve Lake, Renny Bowden, and Duane Alexander acknowledge the foregoing letter and its written disclosure pursuant to Rule 3-310 of the California Rules of Professional Conduct and hereby consent and agree to the terms and conditions described therein, including that:

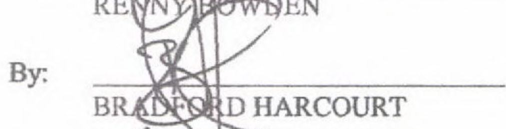
(1) I, for myself and any affiliates, assigns, successors or heirs, will not directly or indirectly seek to disqualify Miltner & Menck, or support such disqualification, or seek sanctions against Miltner & Menck, as a result of the potential or actual conflicts of interest that I have waived under this agreement; and

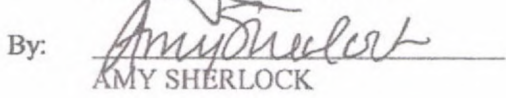
(2) I have been fully informed regarding the legal implications of this consent and conflict waiver, and of my right to seek independent legal advice concerning the implications of this Agreement, and that I have had a reasonable opportunity to consult with independent counsel before executing this Consent and Waiver of Rights, and that I do so voluntarily and of my own free will.

Dated: 5/9/17 By: 
STEVE LAKE

Dated: 05/9/17 By: 
DUANE ALEXANDER

Dated: 5/9/17 By: 
RENNY BOWDEN

Dated: 5/9/17 By: 
BRADFORD HARCOURT

Dated: 5/9/17 By: 
AMY SHERLOCK

### *Evidence*

***Handling of Evidence:*** *Later this same afternoon of February 5, 2024, I notified Attorney Flores that I was in possession of the documents, and scheduled to meet him the next day, February 6, 2024, at 11:00am in his law office. Immediately upon taking possession of the documents from Alexander, I placed them in a manila envelope and sealed the flap with tape, the self-adhesive feature, and the attached wire brad closure. Over the seal, I initialed and dated it to reflect the date and time I took possession. I kept the envelope in a locked safe overnight, removing it upon leaving my home to meet with Attorney Flores. No one other than myself had access to the documents at any time after I took possession from Alexander. I completed an Evidence Log, attaching half to the envelope, and the other half to have Attorney Flores sign when he took possession from me.*

*On February 6, 2024, I met with Attorney Andrew Flores Esq. at his downtown San Diego office. Debriefed him regarding the meeting with witness Eulenthius "Duane" Alexander and the documents. Attorney Flores didn't unseal the documents while I was there, so I gave him a rundown on the envelope enclosures and the answers Alexander gave me to my questions. Flores signed for the evidence. He thanked E.G. & Associates for the quick response to his requests, stating he may need further services on this case and would call when that time comes, and I departed.*

*****END OF REPORT*****

# Exhibit B

**Darryl Cotton <151darrylcotton@gmail.com>**

## Fwd: Amy Sherlock

**Amy Sherlock** <amyjosherlock@gmail.com> Thu, Mar 7, 2024 at 7:48 AM
To: Darryl Cotton <151darrylcotton@gmail.com>

Sent from my iPhone

Begin forwarded message:

> **From:** Darryl Cotton <indagrodarryl@gmail.com>
> **Date:** February 29, 2024 at 5:56:40 PM CST
> **To:** Andrew Flores <Afloreslaw@gmail.com>
> **Cc:** Amy Sherlock <amyjosherlock@gmail.com>, Joe Hurtado <j.hurtado1@gmail.com>
> **Subject: Re: Amy Sherlock**
>
> Andrew,
>
> This is weak production and I'm not buying his BS excuse. I would ask him for a copy of his firm's billings for any entity or individual that signed that waiver.
>
> Darryl Cotton
> 619.954.4447
> indagrodarryl@gmail.com
>
> **Confidentiality Notice**: The information contained in this email message is confidential and is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by email and delete the original message and all copies thereof. Thank you.
>
> On Thu, Feb 29, 2024 at 10:29 AM Andrew Flores <afloreslaw@gmail.com> wrote:
>
> > OK Amy,
> >
> > Here is what Miltner sent me. I have a feeling he's scared because I havent even reached out to him today. He sent this unprompted from his voicemail yesterday.
> >
> > Let me know what you all make of these documents.
> >
> > Sincerely
> >
> > Andrew
> >
> > ---------- Forwarded message ---------
> > From: **Bill Miltner** <Bill@miltnerlaw.com>
> > Date: Thu, Feb 29, 2024 at 10:13 AM
> > Subject: RE: Amy Sherlock
> > To: Andrew Flores <afloreslaw@gmail.com>



2022

Andrew,

As I advised you in our previous phone call, it is our firm's practice to not save physical files for more than 5 years. When we moved offices in 2022, we destroyed the majority of our older files, including Amy's. The representation of the group was in 2017, and it appears as though we were just retained to set up an LLC, which was nearly 7 years ago.

I was able to find unexecuted documents in our computer archives, but nothing that was executed. They are attached.

Thanks,

Bill

**Miltner**

**& Menck, APC**

William L. Miltner, Esq.

Managing Partner

402 West Broadway, Suite 960

San Diego, CA 92101

(619) 615-5333

(619) 615-5334 facsimile

WWW.MILTNERLAW.COM

This electronic message contains information from the law firm of Miltner & Menck, APC, which may be confidential or protected by the attorney-client privilege and/or the work product doctrine and is intended solely for the use of the addressee listed above. If you are neither the intended recipient nor the employee or agent responsible for delivering this electronic message to the intended recipient, you are hereby notified that any disclosure, copying, distribution or the use of the content of this electronic message is strictly prohibited. If you have received this electronic message in error, please immediately notify us by replying to this message and delete the original message.

**From:** Andrew Flores <afloreslaw@gmail.com>
**Sent:** Tuesday, February 27, 2024 12:22 PM
**To:** Bill Miltner <Bill@miltnerlaw.com>
**Subject:** Re: Amy Sherlock

Hello Bill,

I am reaching out one final time regarding my previous request. I must tell you that my client is considering filing a bar complaint against you. The primary reason being that she never signed this conflict waiver, believes it was a forgery, was never informed that you were retained to do any work on her behalf, and ultimately she believes these individuals used your services to defraud her and take an interest in these cannabis business ventures that rightly belonged to her based on her husband Micheal Sherlock's joint venture and his prior granting of conditional use permits to operate dispensaries in the City of San Diego and Ramona. It is her belief that had you verified her signature or verified that she was actually retaining your office to work on her behalf she would not be in this current predicament. Obviously this is not something that I ever want to be a part of however she is at her wits end and is looking for some answers. Please let me know if you would like to discuss this matter further, I can make myself available later in the week for a phone call. If I do not hear from you by Friday March 1, 2024, by close of business, I will assume you do not intend to respond.

Sincerely,

Andrew Flores

On Tue, Feb 20, 2024 at 8:42 AM Andrew Flores <afloreslaw@gmail.com> wrote:

> Hello Bill,
>
> Just circling back here to see if you were able to locate any files or documents related to this matter for Mrs. Sherlock. Please let me know at your earliest convenience.
>
> Sincerely,
>
> Andrew Flores
>
> On Tue, Feb 13, 2024 at 3:48 PM Andrew Flores <afloreslaw@gmail.com> wrote:
>
>> Hello Bill,
>>
>> Thank you for your call back today, much appreciated. Please find attached the conflict waiver we discussed.
>>
>> Sincerely,
>>
>> Andrew Flores
>>
>> On Tue, Feb 13, 2024 at 1:28 PM Andrew Flores <afloreslaw@gmail.com> wrote:



2024

Hello Mr. Miltner,

My name is Andrew Flores, I have been retained by Amy Sherlock. I believe you represented her in 2017 with respect to a cannabis business joint venture with Steve Lake, Duane Alexander, Bradford Harcourt, and Renny Bowden. She would like to request a copy of her file with your office. I can come personally to pick it up or if you can send it via email please let me know. Amy is cc'd on this email should you need additional authorization in writing please let me know and I can have her sign an authorization, but for this purpose I am facilitating her request to you directly. Thank you in advance.

Sincerely,

--

Andrew Flores

Attorney at Law

427 C Street, Suite 220

San Diego CA 92101

P. (619) 356-1556

F. (619) 274-8053

AndrewFloresLaw.com

afloreslaw@gmail.com

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--

Andrew Flores

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--
Andrew Flores
Attorney at Law
427 C Street, Suite 220
San Diego CA 92101
P. (619) 356-1556
F. (619) 274-8053
AndrewFloresLaw.com
afloreslaw@gmail.com

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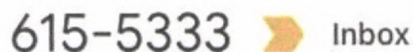
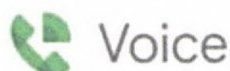
# Exhibit C

New voicemail from (619) 615-5333 Inbox



**Google Voice** 11:16 AM

to me




Andrew it's Bill Miller. I got your rather cryptic email yesterday and not very appreciative of the content of the same. But yeah, we don't have her file. I've got I'm happy you still have this thing signed because I didn't even we don't have that. I have unsigned things in the file. That are in the computer file, but there is no physical file. So give me a call back at your convenience. 619-615-533. Thanks.

PLAY MESSAGE

YOUR ACCOUNT HELP CENTER HELP FORUM


This email was sent to you because you indicated that you'd like to receive email notifications for voicemail. If you don't want to receive such emails in the future, please update your email notification settings.

Google

Google LLC

# Exhibit D

## Secretary of State
## Articles of Organization
Limited Liability Company (LLC)

**LLC-1**

201715310165

FILED DCX
Secretary of State
State of California

MAY 24 2017

**IMPORTANT — Read Instructions before completing this form.**

**Filing Fee** – $70.00

**Copy Fees** – First page $1.00; each attachment page $0.50; Certification Fee - $5.00

*Note:* LLCs may have to pay minimum $800 tax to the California Franchise Tax Board each year. For more information, go to *https://www.ftb.ca.gov.*

1CC

**This Space For Office Use Only**

**1. Limited Liability Company Name** (See Instructions – Must contain an LLC ending such as LLC or L.L.C. "LLC" will be added, if not included.)

RAB SERVICES, LLC

**2. Business Addresses**

| a. Initial Street Address of Designated Office in California - Do not enter a P.O. Box | City (no abbreviations) | State | Zip Code |
|---|---|---|---|
| 1210 Olive Street | Ramona | CA | 92065 |
| b. Initial Mailing Address of LLC, **if different than item 2a** | City (no abbreviations) | State | Zip Code |
| | | | |

**3. Service of Process** (Must provide either Individual OR Corporation.)

**INDIVIDUAL** – Complete Items 3a and 3b only. Must include agent's full name and California street address.

| a. California Agent's First Name (if agent is not a corporation) | Middle Name | Last Name | Suffix |
|---|---|---|---|
| William | L | Miltner | |

| b. Street Address (if agent is not a corporation) - **Do not enter a P.O. Box** | City (no abbreviations) | State | Zip Code |
|---|---|---|---|
| 402 W. Broadway, Suite 800 | San Diego | CA | 92101 |

**CORPORATION** – Complete Item 3c. Only include the name of the registered agent Corporation.

c. California Registered Corporate Agent's Name (if agent is a corporation) – Do not complete Item 3a or 3b

**4. Management** (Select **only** one box)

The LLC will be managed by:

☐ One Manager ☑ More than One Manager ☐ All LLC Member(s)

**5. Purpose Statement** (Do not alter Purpose Statement)

The purpose of the limited liability company is to engage in any lawful act or activity for which a limited liability company may be organized under the California Revised Uniform Limited Liability Company Act.

6. The Information contained herein, including in any attachments, is true and correct.

Organizer sign here

William Miltner
Print your name here

LLC-1 (REV 04/2017)

2017 California Secretary of State
www.sos.ca.gov/business/be

**Secretary of State**
**Statement of Information**
(Limited Liability Company)

**LLC-12**

17-A78613

# FILED

In the office of the Secretary of State of the State of California

SEP 28, 2017

**This Space For Office Use Only**

**IMPORTANT — Read instructions before completing this form.**

**Filing Fee – $20.00**

**Copy Fees –** First page $1.00; each attachment page $0.50; Certification Fee - $5.00 plus copy fees

**1. Limited Liability Company Name** (Enter the exact name of the LLC. If you registered in California using an alternate name, see instructions.)

RAB SERVICES, LLC

| 2. 12-Digit Secretary of State File Number | 3. State, Foreign Country or Place of Organization (only if formed outside of California) |
|---|---|
| 201715310165 | CALIFORNIA |

**4. Business Addresses**

| | City (no abbreviations) | State | Zip Code |
|---|---|---|---|
| a. Street Address of Principal Office - Do not list a P.O. Box<br>1210 Olive Street | Ramona | CA | 92065 |
| b. Mailing Address of LLC, **if different than Item 4a**<br>1210 Olive Street | Ramona | CA | 92065 |
| c. Street Address of **California** Office, if Item 4a is not in California - Do not list a P.O. Box<br>1210 Olive Street | Ramona | CA | 92065 |

**5. Manager(s) or Member(s)**

If no **managers** have been appointed or elected, provide the name and address of each **member**. At least one name **and** address must be listed. If the manager/member is an individual, complete Items 5a and 5c (leave Item 5b blank). If the manager/member is an entity, complete Items 5b and 5c (leave Item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and addresses on Form LLC-12A (see instructions).

| a. First Name, if an individual - Do not complete Item 5b | Middle Name | Last Name | Suffix |
|---|---|---|---|
| Renny | | Bowden | |

b. Entity Name - Do not complete Item 5a

| c. Address | City (no abbreviations) | State | Zip Code |
|---|---|---|---|
| 4732 Dunham Ct. | Del Mar | CA | 92130 |

**6. Service of Process** (Must provide either Individual **OR** Corporation.)

**INDIVIDUAL** – Complete Items 6a and 6b only. Must include agent's full name and California street address.

| a. California Agent's First Name (if agent is **not** a corporation) | Middle Name | Last Name | Suffix |
|---|---|---|---|
| William | L | Miltner | |

| b. Street Address (if agent is **not** a corporation) - **Do not enter a P.O. Box** | City (no abbreviations) | State | Zip Code |
|---|---|---|---|
| 402 W. Broadway, Suite 800 | San Diego | CA | 92101 |

**CORPORATION** – Complete Item 6c only. Only include the name of the registered agent Corporation.

c. California Registered Corporate Agent's Name (if agent is a corporation) – Do not complete Item 6a or 6b

**7. Type of Business**

a. Describe the type of business or services of the Limited Liability Company
Management Company

**8. Chief Executive Officer, if elected or appointed**

| a. First Name | Middle Name | Last Name | Suffix |
|---|---|---|---|
| | | | |

| b. Address | City (no abbreviations) | State | Zip Code |
|---|---|---|---|
| | | | |

**9. The Information contained herein, including any attachments, is true and correct.**

| 09/28/2017 | William L Miltner | Miltner & Menck | |
|---|---|---|---|
| Date | Type or Print Name of Person Completing the Form | Title | Signature |

**Return Address (Optional)** (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address. This information will become public when filed. SEE INSTRUCTIONS BEFORE COMPLETING.)

Name:

Company:

Address:

City/State/Zip:

## Secretary of State
## Articles of Organization
Limited Liability Company (LLC)

**LLC-1**

201715310159

IMPORTANT — Read Instructions before completing this form.

Filing Fee – $70.00

Copy Fees – First page $1.00; each attachment page $0.50; Certification Fee - $5.00

*Note:* LLCs may have to pay minimum $800 tax to the California Franchise Tax Board each year. For more information, go to *https://www.ftb.ca.gov.*

FILED DCX
Secretary of State
State of California
MAY 24 2017

1CC

This Space For Office Use Only

**1. Limited Liability Company Name** (See Instructions – Must contain an LLC ending such as LLC or L.L.C. "LLC" will be added, if not included.)

ANOMAR MANAGEMENT, LLC

**2. Business Addresses**

| a. Initial Street Address of Designated Office in California - Do not enter a P.O. Box | City (no abbreviations) | State | Zip Code |
|---|---|---|---|
| 1210 Olive Street | Ramona | CA | 92065 |
| b. Initial Mailing Address of LLC, if different than item 2a | City (no abbreviations) | State | Zip Code |
| | | | |

**3. Service of Process** (Must provide either Individual OR Corporation.)

INDIVIDUAL – Complete Items 3a and 3b only. Must include agent's full name and California street address.

| a. California Agent's First Name (if agent is not a corporation) | Middle Name | Last Name | Suffix |
|---|---|---|---|
| William | L | Miltner | |

| b. Street Address (if agent is not a corporation) - Do not enter a P.O. Box | City (no abbreviations) | State | Zip Code |
|---|---|---|---|
| 402 W. Broadway, Suite 800 | San Diego | CA | 92101 |

CORPORATION – Complete Item 3c. Only include the name of the registered agent Corporation.

c. California Registered Corporate Agent's Name (if agent is a corporation) – Do not complete Item 3a or 3b

**4. Management** (Select **only** one box)

The LLC will be managed by:

☐ One Manager ☑ More than One Manager ☐ All LLC Member(s)

**5. Purpose Statement** (Do not alter Purpose Statement)

The purpose of the limited liability company is to engage in any lawful act or activity for which a limited liability company may be organized under the California Revised Uniform Limited Liability Company Act.

6. The Information contained herein, including in any attachments, is true and correct.

Organizer sign here

William Miltner
Print your name here



2017 California Secretary of State
www.sos.ca.gov/business/be

## Secretary of State Statement of Information
(Limited Liability Company)

**LLC-12**

17-A78137

FILED

In the office of the Secretary of State of the State of California

SEP 27, 2017

**This Space For Office Use Only**

**IMPORTANT — Read instructions before completing this form.**

**Filing Fee – $20.00**

**Copy Fees –** First page $1.00; each attachment page $0.50; Certification Fee - $5.00 plus copy fees

**1. Limited Liability Company Name** (Enter the exact name of the LLC. If you registered in California using an alternate name, see instructions.)

ANOMAR MANAGEMENT, LLC

| 2. 12-Digit Secretary of State File Number | 3. State, Foreign Country or Place of Organization (only if formed outside of California) |
|---|---|
| 201715310159 | CALIFORNIA |

**4. Business Addresses**

| | City (no abbreviations) | State | Zip Code |
|---|---|---|---|
| a. Street Address of Principal Office - Do not list a P.O. Box<br>1210 OLIVE ST | RAMONA | CA | 92065 |
| b. Mailing Address of LLC, **if different than item 4a**<br>1210 OLIVE ST | RAMONA | CA | 92065 |
| c. Street Address of **California** Office, if Item 4a is not in California - Do not list a P.O. Box<br>1210 OLIVE ST | RAMONA | CA | 92065 |

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If no **managers** have been appointed or elected, provide the name and address of each **member**. At least one name **and** address must be listed. If the manager/member is an individual, complete Items 5a and 5c (leave Item 5b blank). If the manager/member is an entity, complete Items 5b and 5c (leave Item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and addresses on Form LLC-12A (see instructions).

| a. First Name, if an individual - Do not complete Item 5b | Middle Name | Last Name | Suffix |
|---|---|---|---|
| | | | |

b. Entity Name - Do not complete Item 5a
Prime Harvest, LLC

| c. Address | City (no abbreviations) | State | Zip Code |
|---|---|---|---|
| 2100 4th Avenue | San Diego | CA | 92101 |

**6. Service of Process** (Must provide either Individual **OR** Corporation.)

**INDIVIDUAL** – Complete Items 6a and 6b only. Must include agent's full name and California street address.

| a. California Agent's First Name (if agent is **not** a corporation) | Middle Name | Last Name | Suffix |
|---|---|---|---|
| William | L | Miltner | |

| b. Street Address (if agent is **not** a corporation) - **Do not enter a P.O. Box** | City (no abbreviations) | State | Zip Code |
|---|---|---|---|
| 402 W. Broadway, Suite 800 | San Diego | CA | 92101 |

**CORPORATION** – Complete Item 6c only. Only include the name of the registered agent Corporation.

c. California Registered Corporate Agent's Name (if agent is a corporation) – Do not complete Item 6a or 6b

**7. Type of Business**

a. Describe the type of business or services of the Limited Liability Company
Management Company

**8. Chief Executive Officer, if elected or appointed**

| a. First Name | Middle Name | Last Name | Suffix |
|---|---|---|---|
| | | | |

| b. Address | City (no abbreviations) | State | Zip Code |
|---|---|---|---|
| | | | |

**9. The Information contained herein, including any attachments, is true and correct.**

| 09/27/2017 | William L Miltner | Miltner & Menck | |
|---|---|---|---|
| Date | Type or Print Name of Person Completing the Form | Title | Signature |

**Return Address (Optional)** (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address. This information will become public when filed. SEE INSTRUCTIONS BEFORE COMPLETING.)

Name:

Company:

Address:

City/State/Zip:

# Attachment to Statement of Information (Limited Liability Company)

**LLC-12A Attachment**

17-A78137

This Space For Office Use Only

**A. Limited Liability Company Name**

ANOMAR MANAGEMENT, LLC

| **B. 12-Digit Secretary of State File Number** | **C. State or Place of Organization** (only if formed outside of California) |
|---|---|
| 201715310159 | CALIFORNIA |

**D. List of Additional Manager(s) or Member(s) -** If the manager/member is an individual, enter the individual's name and address. If the manager/member is an entity, enter the entity's name and address. Note: The LLC cannot serve as its own manager or member.

| First Name | Middle Name | Last Name | Suffix |
|---|---|---|---|
| | | | |
| Entity Name: RAB Services, LLC | | | |
| Address: 1210 Olive Street | City (no abbreviations): Ramona | State: CA | Zip Code: 92065 |

| First Name | Middle Name | Last Name | Suffix |
|---|---|---|---|
| | | | |
| Entity Name | | | |
| Address | City (no abbreviations) | State | Zip Code |

| First Name | Middle Name | Last Name | Suffix |
|---|---|---|---|
| | | | |
| Entity Name | | | |
| Address | City (no abbreviations) | State | Zip Code |

| First Name | Middle Name | Last Name | Suffix |
|---|---|---|---|
| | | | |
| Entity Name | | | |
| Address | City (no abbreviations) | State | Zip Code |

| First Name | Middle Name | Last Name | Suffix |
|---|---|---|---|
| | | | |
| Entity Name | | | |
| Address | City (no abbreviations) | State | Zip Code |

| First Name | Middle Name | Last Name | Suffix |
|---|---|---|---|
| | | | |
| Entity Name | | | |
| Address | City (no abbreviations) | State | Zip Code |

| First Name | Middle Name | Last Name | Suffix |
|---|---|---|---|
| | | | |
| Entity Name | | | |
| Address | City (no abbreviations) | State | Zip Code |

## Attachment to Statement of Information (Limited Liability Company)

**LLC-12A Attachment**

17-A78613

This Space For Office Use Only

**A. Limited Liability Company Name**

RAB SERVICES, LLC

| B. 12-Digit Secretary of State File Number | C. State or Place of Organization (only if formed outside of California) |
|---|---|
| 201715310165 | CALIFORNIA |

**D. List of Additional Manager(s) or Member(s)** - If the manager/member is an individual, enter the individual's name and address. If the manager/member is an entity, enter the entity's name and address. Note: The LLC cannot serve as its own manager or member.

| First Name | Middle Name | Last Name | Suffix |
|---|---|---|---|
| | | | |
| Entity Name: Equity Capital, LLC | | | |
| Address: 7938 Ivanhoe Avenue, Suite B | City (no abbreviations): La Jolla | State: CA | Zip Code: 92037 |
| First Name | Middle Name | Last Name | Suffix |
| Entity Name | | | |
| Address | City (no abbreviations) | State | Zip Code |
| First Name | Middle Name | Last Name | Suffix |
| Entity Name | | | |
| Address | City (no abbreviations) | State | Zip Code |
| First Name | Middle Name | Last Name | Suffix |
| Entity Name | | | |
| Address | City (no abbreviations) | State | Zip Code |
| First Name | Middle Name | Last Name | Suffix |
| Entity Name | | | |
| Address | City (no abbreviations) | State | Zip Code |
| First Name | Middle Name | Last Name | Suffix |
| Entity Name | | | |
| Address | City (no abbreviations) | State | Zip Code |
| First Name | Middle Name | Last Name | Suffix |
| Entity Name | | | |
| Address | City (no abbreviations) | State | Zip Code |

# EXHIBIT K

December 28, 2023

***Report of Investigation — Michael "Biker" Sherlock***

**Assignment:** Shooting Reconstruction

## Table of Content:

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## Materials Reviewed:

- Medical Examiner's Report[1]
- Crime Scene Photographs
- San Diego Regional Crime/Incident Report
- Medical Examiner's Investigative Report
- Medical Examiner's Autopsy Report
- Medical Examiner's Toxicology Report
- Litigation Documents found on the Justice for Amy website[2]

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[1] Original Medical Examiner's Report — https://www.justice4amy.org/wp-content/uploads/2023/02/12-03-2015_Michael-Sherlock-ME-Report.pdf

[2] Litigation Documents — https://www.justice4amy.org/posts/case/

## Case Details:

**Incident Date:** 12/03/2015

**Incident Location:** Tourmaline Surfing Park, N 32 48 20 W 117 15 47, La Jolla CA 92037[3], specifically Bird Rock Waterfront located at 400 Sea Ridge Dr, La Jolla, CA 92037[4]

**Involved Persons:**

Michael De Carlo "Biker" Sherlock
- Date of birth: 01/25/1968
- Date and time of death: 12/03/2015 at 6:34 am
- 47 year old, White Male
- Last seen alive: 12/2/2015 at 8:00 pm
- Found: December 3, 2015; 06:34 hours.

Steve Lake
- Brother-in-law of Michael Sherlock
- Sherlock's business partner
- Arrived at scene looking for Sherlock

Tad Hodges
- Original reporting party

Amy Sherlock
- Widow of Michael Sherlock
- Sister-in-law of Lake

Dr. Mark Cooper
- A child psychologist with no known specialty in neurology or CTE.
- Spoke with Amy, Sherlock and Amy's children, and Sherlock's family.
- Razuki Investments, 8863-E Property Owner.

## Summary:

The decedent was a 47 year old, married, White male who resided in San Diego with his wife and two minor children. The decedent was last seen by his wife on the evening of 12/2/2015 when he was upset and said he was going to the beach. On the morning of 12/3/2015, a surfer at Tourmaline Surfing Park saw the decedent seated on the rocky beach against the cliff. As he approached, he saw blood on his face and a gun at his left hip. The surfer called 9-1-1. San Diego Police Department and San Diego Fire Department engine 21 reposted to the scene and death was confirmed without intervention.

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[3] Map of Tourmaline Surfing Park — https://www.google.com/maps/place/Tourmaline+Surf+Park/@32.8045344,-117.2713906,15.01z/data=!4m10!1m2!2m1!1sTourmaline+Surfing+Park,+N+32+48+20+W+117+15+47,+La+Jolla+CA+92037!3m6!1s0x80dc0188b1087a41:0x3b22bdbb852c6906!8m2!3d32.8051352!4d-117.2622363!15sCkJUb3VybWFsaW5lIFN1cmZpbmcgUGFyaywgTiAzMiA0OCAyMCBXIDExNyAxNSA0NywgTGEgSm9sbGEgQ0EgOTIwMzeSAQViZWFjaOABAA!16s%2Fm%2F010hnf9x?entry=ttu

[4] Bird Rock Waterfront — https://www.google.com/maps/place/Bird+Rock+Waterfront/@32.8068555,-117.2678769,16.05z/data=!4m6!3m5!1s0x80dc01b2ad6c7dd5:0xe7bac3d6cbe62687!8m2!3d32.8079511!4d-117.266072!16s%2Fg%2F11h2nv7cxc?entry=ttu

Medical Examiner's jurisdiction invoked according to the California Government Code 27491: Death due to known or suspected suicide.

## San Diego Regional Crime/Incident Report

Crime Report completed by Eric Armstrong, San Diego Police Department, on 12/03/2015 at 07:34.

**Location & State of Body:**

Sherlock was found at the bottom of a staircase at the location. Sherlock was sitting North West of the staircase, on the coast line. Sherlock's feet were straight in front of him and his back was resting against the rock cliff. Sherlock's right hand was touching the ground beside him and his left hand was resting in his lap. Sherlock had dried blood on his face that originated from his nose and mouth. Sherlock also had dried blood inside his mouth. Both of Sherlock's eyes were open and his mouth was slightly open as well. Sherlock's extremities were stiff, and his person was pale.

**History & Background:**

Sherlock had no known physical health issues. Sherlock suffered from insomnia and depression. It was reported Sherlock had been "disorientated" for the last few days. Sherlock was "depressed about money issues" (according to Lake who made this comment to police) his family was having. However according to Amy Sherlock, Biker was more mentally preoccupied with the status of the CUP application that was taking a long time to being processed.

**Evidence / Property:**

I took photos of the scene as well as Sherlock's body. I recovered a black 9mm Sig Sauer handgun from the scene. The handgun was located beside of Sherlock's left hip. The barrel of the handgun was pointing upward, and resting against Sherlock's leg. The stock of the handgun was touching the ground. I later impounded the photos at the Northern Division Substation and the handgun at the Headquarters Property Room. Please see evidence collection below for barcode numbers. It is valuable to note that there is no signs of the tide reaching the body of the decedent or the firearm in any way.

| Item # | Description | Barcode # | Impound Location |
|---|---|---|---|
| 1 | Sig Sauer Handgun (SN# B246247) | 10559525 | Headquarters |
| 2 | Ammo, Magazine | 10559533 | Headquarters |
| 3 | Photo CD/DVD | | Northern Division |

**Firearm:**

9mm Sig Sauer handgun (SN# B246247).

I later confirmed the firearm was registered to Michael Sherlock. When I discovered the firearm, the safety was in an off position and there was a black magazine inserted into the stock of the gun. There was a single round inside the chamber of the firearm, and the magazine was empty. A

shell casing was not discovered at the scene. I later impounded the firearm, ammo, and magazine at the Headquarters Property Room. No gun shot residue testing was done on the decedent at the time of the autopsy by the Medical Examiner, even though the dependents hands were bagged at the crime scene.

**Witness Statements:**

Statement of Steve Lake (Witness):

- I spoke to Steve Lake in person at the scene, Steve Lake essentially told me the following:
- Lake is the brother-in-law of Sherlock and lives in Encinitas, CA. On 12/3/15, at 0630 hours, Lake received a call from Sherlock's wife, Amy Sherlock, stating Sherlock left his residence the night before, on 12/2/15, and had not returned. After speaking with Amy, Lake left his residence to search for Sherlock. Lake knew Sherlock frequently visited the shoreline at 400 Sea Ridge Dr. He first searched a park on the shore line, just north of 400 Sea Ridge Dr. Lake then drove down the coast and found Sherlock's vehicle (#6MG752) parked at the location.

Statement of Amy Sherlock (Witness):

- I spoke to Amy Sherlock in person at her residence, Amy Sherlock essentially told me the following:
- Amy Sherlock is married to Michael Sherlock and they have two children together. For the past few weeks, Sherlock has been depressed and suffering from insomnia. Amy Sherlock was attempting to get Michael Sherlock on medication for depression but had been unable. Sherlock lost a skateboarding business around 2 years ago and lost a major business deal about 2 weeks ago. Amy reported that recently Sherlock had made statements about needing to sell their house and cars to pay for bills.
- On 12/2/15, at 2000 hours, Michael Sherlock became very upset over their residence's sink breaking and a flat tire that occurred on Amy's work vehicle. Sherlock stated he needed some time to "clear his mind" and left the residence. Amy did not want him to leave, but was unable to convince Sherlock to stay. At 2230 hours, Sherlock had not returned to the residence and Amy went to asleep. Amy was not worried about Sherlock since only a few hours had passed. On 12/3/15, at 0615 hours, Amy woke up to discover Sherlock had not returned to the residence. Amy became worried, and went online to the "NBC San Diego" website. On the website, Amy read about a "suspicious death" at "Bird Rock" in La Jolla, CA. Amy knew Sherlock frequently visited this area. At 0630 hours, Amy called her brother-in-law, Steve Lake, to inform him of the situation. Lake stated he would drive around to look for Sherlock.

Statement of Tad Hodgson (Reporting Party/Witness)

- I spoke to Tad Hodgson in person at the scene, Tad Hodgson essentially told me the following:
- On 12/3/15, at 0640 hours, Hodgson was heading to the coast line, at 400 Sea Ridge Dr, to see what the surf would be like for the day. Hodgson made his way down the staircase, at the location, towards the coast line. When Hodgson reached the bottom of the staircase, he

saw a pair of legs sticking out from the cliff side. The legs were located North West of where he was standing. Hodgson initially did not think anything of this because frequently people sleep at this location. When Hodgson saw no movement from the pair of legs, he approached them. When Hodgson got closer, he discovered a white male, approximately 30-40 years old, wearing a black jacket and grey pants. Hodgson could see a black handgun lying on the ground, beside the left hip of the body. Hodgson also saw dried blood coming from the body's nose and mouth. Hodgson immediately left the scene to call the police.

- Hodgson did not have a cell phone on him, so he went back up the staircase at the location. At the top of the staircase, Hodgson made contact with another person, who called in the incident for him.

## Medical Examiner's Investigative Report

The County of San Diego's Office of Medical Examiner, Investigative Report completed by Sandy Joseph, Medical Examiner Investigator.

**Antemortem Events:**

On 12/3/2015 at 0812 hours, I obtained the following information from San Diego Police Officer Armstrong ID 7324 at the scene. On the morning of 12/3/2015, a surfer at Tourmaline Surfing Park, just south of Bird Rock was walking along the rocky beach to see surf conditions. As he rounded a small point, he saw the decedent seated against the cliff wearing street clothes. He walked closer as the tide was up and saw the decedent had blood around his face and a gun at his left hip. The surfer went up the beach access steps to the intersection Sea Ridge Drive and Linda Way and flagged down Tad Hodgson, who had just arrived to surf. Tad Hodgson used his cell phone to call 9-1-1. Officer Armstrong and San Diego Fire Department Engine #21 responded to the scene. Paramedic McCain confirmed death without intervention due to obvious fatal head trauma.

On 12/3/2015, I obtained the following information from the decedent's brother in law, Steve Lake at the decedent's home on. Steve stated he had spoken with the decedent on 12/2/2015 and "he was in a funk". Steve told the decedent he was coming over and they spent several hours together. During that time, the decedent had presented Steve with a list of problems. Steve said they were all little things but the decedent appeared to be overwhelmed. They talked about tackling the problems one by one until they were gone. The decedent never made any suicidal threats or appeared to be in any distress. When Steve left the decedent appeared better. On the morning of 12/3/2015, Steve's sister, Amy Sherlock, the decedent's wife called him and said the decedent had left around 2000 hours to go to the beach and he had not come home. Amy heard reports of a death at the beach and she asked Steve to go see if it was the decedent. This particular stretch of beach was sentimental to Amy and it was a known location to the decedent. Steve went to the location and saw the decedent's Ford Flex. He spoke with police and was advised of the death.

**Past Medical, Surgical, and Social History:**

On 12/3/2015, I obtained the following information from the decedent's wife, Amy Sherlock, at her home in San Diego. He had become increasingly depressed over business losses. The

decedent saw his primary care physician, Dr. Howard Williams of Scripps and was prescribed Ambien. They were trying to get him psychiatric help but no appointments were available until February 2016. The decedent did not smoke cigarettes or drink alcohol. He did smoke marijuana but had quit a few months ago. The decedent never made any threats or expressed any suicidal ideation. The decedent was in a BMX bicycle accident several years ago and his spleen was removed.

I obtained the following information from the office of Dr. Howard Williams, MD, the decedent's primary care physician. The decedent was seen on 3/9/2015 for an annual physical and to establish as a patient. History given was variety of injuries related to being a skateboarder, BMX rider and stuntman. The decedent had previous carpal tunnel surgery of both wrists, knee surgery and removal of his spleen three years previously. The decedent had a complaint of chronic back pain but was not on any medications at that time. On 11/12/2015, the decedent was seen for trouble sleeping and anxiety. He had lost his job and was sleeping poorly. His wife reported he snored very loudly and she had witnessed episodes of sleep apnea. The decedent stated he had a history of depression and took Wellbutrin for several years. He was diagnosed with sleep disturbance, obstructive sleep apnea, depression and back pain. He was started on Trazodone 50 mg tablets to be taken at bedtime.

**Scene Description:**
On 12/3/2015 at 0815 hours, I arrived at the scene. At the time of my arrival, the tide was going out and it was daylight. The area of the beach was comprised of large rocks overlying coarse sand. Some rocks were smooth and some were broken and had sharp edges. There were homes situated on the cliffs above the beach. There is a stairway leading from Sea Ridge Drive down to the beach which his frequented by surfers. There were seagulls on the beach and small crustaceans in proximity to the body. The decedent was seated with his back against the cliff at GPS Coordinates N 32 48 20 W 117 15 47. **There were a few small droplets of blood spatter north of the body**. A Sig Sauer 9mm semiautomatic handgun, serial number B246247 was against the decedent's left hip. The backstrap (back of the grip) was on the rocks and the magazine was partially ejected. There was one PMC 9mm Luger cartridge in magazine. There was rust on the weapon and the magazine. **No casing was found during a search of the scene.** The decedent's cell phone, wallet and keys were found in his pants pockets. The decedent's gray Ford Flex, California License Plate 6MP752 was parked on Linda Way. The vehicle was locked. The front seat appeared to be situated for someone of his reported height on the driver license of 5'10". The interior of the vehicle was very clean and neat. There was a crumpled white t-shirt in the rear of the vehicle and another shirt on a hanger. There was no blood inside the vehicle. There were no stains on the white t-shirt. The decedent's cell phone was fingerprint and password locked, however the notifications showed numerous missed phone calls and messages. The scene did not appear staged.

**Body Description:**
On 12/3/2015 at approximately 0825 hours, I viewed the body. The decedent was seated on the rocks with his legs extended straight in front of his body. His head was turned slightly to the right (North). His left hand was on his lap and his right hand was across rocks. There were a few small blood droplets North of the body. The decedent was wearing gray sweatpants, black hoodie zippered closed, red t-shirt and black lace shoes. There was a black ball cap was partially on and

behind left shoulder. There were numerous ants and sea roaches on the body. There was drying blood from the right side of his mouth. There was small blood spatter around his mouth and drying blood from his right nostril. There was a large blood clot in his mouth. There was a contusion on his right forehead. I palpated a possible defect in his mouth but could not view it due to clotted blood. There was crepitus of his head and a large depression on the occipital area of his head. There was no defect visible on the scalp. At 0845 hours, clean white paper protective bags were placed over his hands.

On 12/3/2015 at 0920 hours, 92M Transport personnel E. Arenas and Y. Andre placed the decedent in a clean, white pouch and blue tamper evident seal 4141517 was affixed to the pouch for transport to the Medical Examiner's Office.

**Identification:**
I identified the decedent from his California Driver License #B3811759.

## Medical Examiner's Autopsy Report

The County of San Diego's Office of Medical Examiner, Autopsy Report completed by Robert Stanley, M.D., Deputy Medical Examiner.

**Place of Death:** Tourmaline Surfacing Park, N 32 48 20 W 117 15 47.

**Date of Autopsy:** December 4, 2015; 09:15 hours.

**Cause of Death:** Penetrating Intra-oral Gunshot Wound

**Manner of Death:** Suicide

**Autopsy Summary:**

I. Penetrating intraoral gunshot wound:
   A. Entrance: oral cavity/posterior pharynx.
   B. Injury to: oral cavity, posterior pharynx, brainstem/upper cervical spinal cord, base of skull, and structures of posterior neck.
   C. Exit: none.
   **D. Recovered: partially deformed copper-colored jacketed bullet recovered from tissue of posterior aspect of neck.**
   E. Wound pathway: the wound pathway directed front-to-back and upward with no significant right/left deviation.
   F. Associated injuries: hemorrhage along wound path, subarachnoid hemorrhage greater at base and right side of brain, subdural hemorrhage (approximately 20 ml), linear fractures of anterior cranial fossae and right and left sides of posterior cranial fossa, contusions of inferior temporal lobes of brain, hemoaspiration, **fine oral stretch marks on right and left aspects of skin of lips, and multiple contusions and abrasions of lower lip.**

II. Other Injuries:

   A. **Abrasions and contusions of forehead, chin, posterior aspect of right hand, and right leg.**
III. No evidence of significant natural disease identified.
IV. Other findings:
   A. Extensive peritoneal adhesions and absent spleen status post remote splenectomy.
V. Toxicological testing not contributory.

**Penetrating Intraoral Gunshot Wound:**
In the oral cavity located midline is an entrance gunshot wound located approximately 9 inches below the top of the head. No obvious sot surrounds the wound. There is injury to the oral mucosa, tongue 1-3/4 x 1-1/2 inch stellate injury with soot surrounding the wound), soft palate to include uvula, posterior pharynx, clivus of base of skull, brainstem/upper spinal cord (transected), and soft tissue of posterior aspect of neck.

No exit wound is identified. A partially deformed copper-colored jacketed bullet is recovered from the soft tissue of the posterior aspect of the neck. The bullet pathway is directed front-to-back and upward with no significant right/left deviation. Associated with this gunshot wound is hemorrhage along the wound path, subarachnoid hemorrhage greater at the base and right side of the brain, subdural hemorrhage (approximately 20 ml), linear fractures of the anterior cranial fossae and right and left sides of the posterior cranial fossa, contusions of the inferior temporal lobes of the brain, hemoaspiration, fine oral stretch marks on right and left aspects of skin of lips, and multiple contusions and abrasions of the lower lip.

**Minor Injuries:**
**A 1 x 1 inch red abrasion is on the right forehead, just above the lateral aspect of the right eyebrow. A 1/16 inch round abrasion is on the chin region. Multiple abrasions are on the posterior aspect of the right hand and digits of the right hand. A 1 x 1 inch faint red-pink contusion is on the anterolateral aspect of the distal right leg.**

## Medical Examiner's Toxicology Report

The County of San Diego's Office of Medical Examiner, Toxicology Report completed by Robert Stanley, M.D., Iain M. McIntry, Ph.D., Amber Trochta, Toxicologist II.

**Specimens Received:** Central Blood, Gastric, Liver, Peripheral Blood 1, Peripheral Blood 2, Vitreous

**Date Specimens Received:** 12/07/2015

The tests of Alcohol Analysis (GC/FID-Headspace) and Drugs of Abuse Screen (ELISA) were completed and all of the results indicated "Not Detected."

## **EVIDENCE ROOM Opinions and Findings:**

Based on our review of the physical evidence at this time regarding the death of Mr. Michael De Carlo "Biker" Sherlock, the following evidence is 100% **inconsistent with a self inflicted GSW** and **suicide**:

1. Abrasion on decedent and blood evidence:
   - A. The abrasion on his forehead top right area couldn't be caused as a result of GSW and could only have been caused from a manufactured object with a right edge ~1.5x2 right angle square/rectangle, which matches the dimensions of the bottom of the magazine clip documented to be the murder weapon and found at the scene.
   - B. There is blood on the bottom portion of the magazine clip which we would not expect to be deposited by the GSW. That blood was deposited by way of transfer stain resulting from a the blunt force impact to his forehead.

2. Furthermore, Mr. Sherlock was actively bleeding at the time the crime scene photographs were taken is the final resting position. Which means the wound to the head happened a very short time before the GSW.

3. Based on Autopsy report and associated photo's the GSW first penetrated through tongue, so the barrel of the gun being 3-4 inches into the mouth which could cause gagging, and not consistent with self inflicted GSW. Meaning that he could have been conscious enough to attempt to be push the barrel out with with his tongue. As a reflex.

4. Evidence at scene of gravity blood droplets approximately 6-10 feet away from his body can mean that Sherlock was in that area and was already bleeding "pistol whipped". The location of the gravity blood droplets indicates the area in which the "pistol whipping" occurred to make Sherlock to be incapacitated enough to be shot and killed, resulting in him being then found in final resting.
   - A. There was blood found on the bottom of the firearm's magazine

5. The depression on the back of the decedents head could be linked to being struck on the head, causing him to fall forwards.

A. This fall could have caused the injures on his right hand and the inside thumb part of his palm that were documented in the Medical Examiners report.

B. This fall could have been when the transfer of sand and other debris from the ground was picked up on the clothing of the decedent.

6. The position of the weapon between is hip and elbow is not where we would expect the weapon to be if he was seated during a self inflicted GSW.

   A. It is valuable to note that the decedent was right handed, and the gun was found NEAREST his left hand.

7. At this time based on over all trauma from the muzzle to bullet, the injuries are not consistent with a SELF INFLICTED GSW because it severed his spine at the level of his neck; there was a slight upwards trajectory of the projectile, but not upwards enough to penetrate the dependents brain. BUT PENETRATED his tongue through the throat and into back of neck.

   A. A self inflicted GSW would have resulted in an SEVERE upward projectile trajectory INTO the brain, because the projectile severed the decedents spin and not his skull, this IS NOT CONSISTENT WITH self inflicted.

8. Furthermore evidence SUGGESTS that the gun was forcibly inserted and sideways intramurally with the left side of the gun facing up and right facing down. Confirmed by;

   A. The distance between the two lower lip injuries that were documented are consistent with the gun being placed sideways in the decedents mouth.

   B. The blood on the left side, and only left, of the firearm documented indicates that the left side of the firearm was faced up. This can be seen on the firearm that was found at the scene of the crime. The blood on the firearm shows that the left side of the firearm was facing up towards the decedent and the right side of the firearm facing down, this can be determined because there was no blood on the right side of the firearm.

9. Sand present on both the front side of the decedents clothing and on and inside the firearm.

   A. It is clear that the firearm was fired after it came into contact with sand due to the scrap marks that were documented in the photographs of the scene, consistent with the firearm scraping against the sand that was found on the firearm.

   B. There was sand and dirt found on the front side of the decedents clothing, this indicates that at some point he was face down on the ground. The sand/ dirt would have transferred from the ground and attach to the front of the decedent's clothing.

**Final Thoughts:**

*The evidence that strongly suggest that this crime scene was staged;*

- *No ejected shell casing recovered. This is the most obvious in that based on the normal operation of this gun, and any expected positioning of the gun, being discharged intra-orally, would confirm that this location should be easily found within 4 to 6 feet of the body.*
- *Blunt force trauma to the forehead.*
- *Position of the gun when recovered.*
- *Overall appearance of Mr. Sherlock is that he was roughed up or in a fight or scuffle of a substantial manner prior to the gunshot wound taking place*
- *Body position is not in a consistent position with a stationary individual.*

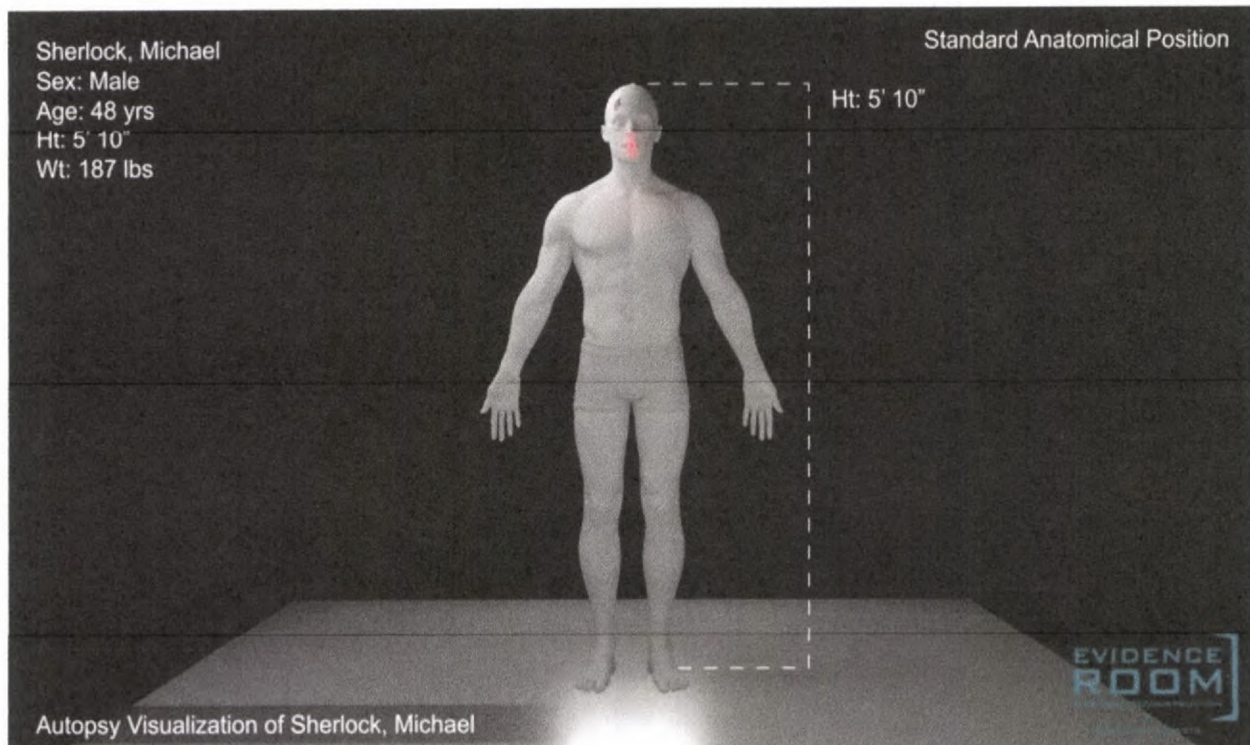
*Commenting specifically on the quality and scope of the police investigation, I have the following comments. At best they did a cursory research analysis of the evidence, heavily relying upon confirmation bias for the path of least resistance.*

*I reserve the right to modify these opinions should additional information be made available for review.*

These opinions are to a degree of scientific certainty and are demonstrated visually in the forensic animations linked below.

## Evidence Room Reconstruction Animations & Links:

### Exhibit 1 - Autopsy Visual[5]




The above animations is an autopsy visual that shows the anatomical depiction of Michael Sherlock. The video begins with showing Sherlock's sex, age, height, and weight. Following, the visual of a penetrating intra-oral gunshot wound is shown with no exit wound being identified as according to the medical examiner's report. The abrasions located on Sherlock's head are indicated and matched up to a photo taken by the medical examiner. Marks on both of Sherlock's hands are highlighted and matched up to photos taken by the medical examiner. A contusion on the anterolateral aspect of the distal right leg is shown.

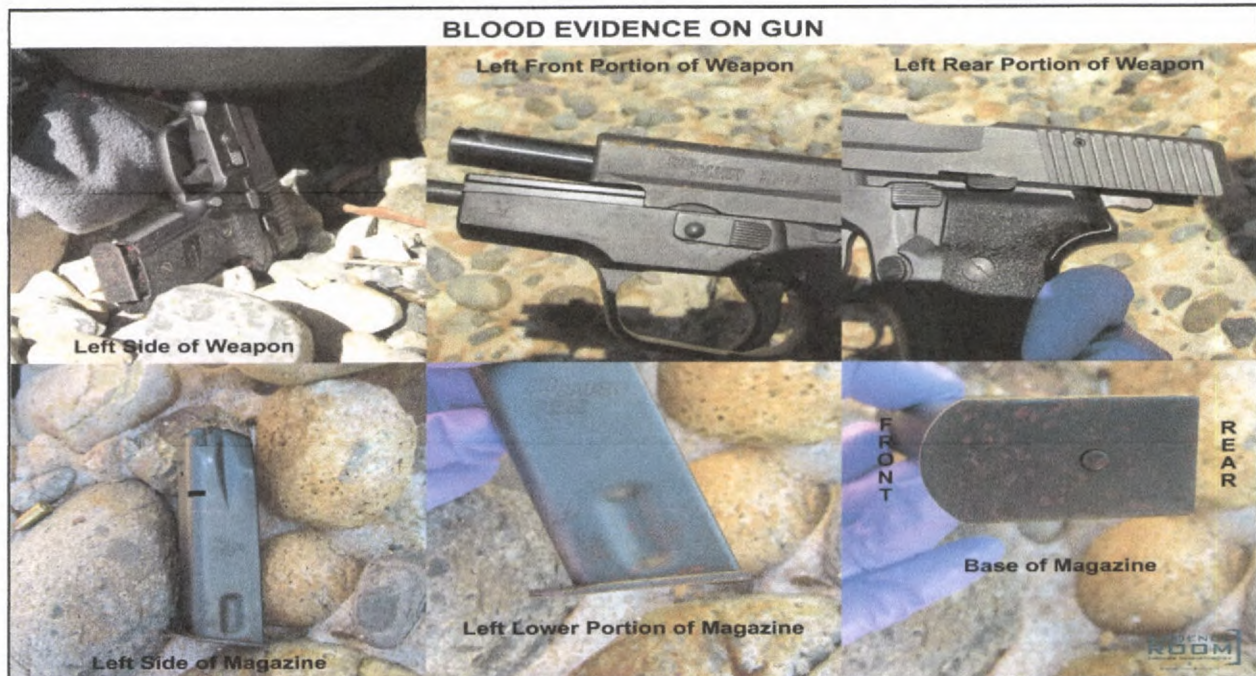
[5] Exhibit 1 - Autopsy Visual — https://www.dropbox.com/scl/fi/9ou2og2r60e1pcb6em3pw/Exh-1_Autopsy-Visual.mp4?rlkey=17j0gwgivh2n7n5b33jzrums7&dl=0

## Michael "Biker" Sherlock Reconstruction[6]

The above animation is a visual reconstruction of what happened on the morning of December 3rd, 2015. The animation begins with Michael "Biker" Sherlock on the beach with two unknown assailants. The two assailants started to hit Sherlock, there is evidence of blunt force trauma on his upper right forehead which is consistent with the base of the magazine of the firearm (pistol whip) leaving an abrasion that is noted by the medical examiner. The plausible position of weapon when the firearm was discharged was angled with the left side of the firearm facing upwards, which caused teeth fractures and a lower lip abrasion both of these being evidence of forcible intra-oral trauma. The gunshot wound to the back of the throat is inconsistent with a self-inflicted gunshot wound, due to the trajectory of the path and the impact into his spinal cord. The contusion on his leg is consistent with being kicked or tripped. The dirt that is located on the front of his clothing is consistent with Sherlock being facedown on the ground at some point of the altercation.

[6] Sherlock Reconstruction —https://www.dropbox.com/scl/fi/fkwhvwb2s5ptg59aov0kr/SHERLOCK_RECON_122623.mp4?rlkey=cj2rbnzqerbqkza0ipgcra2mv&dl=0

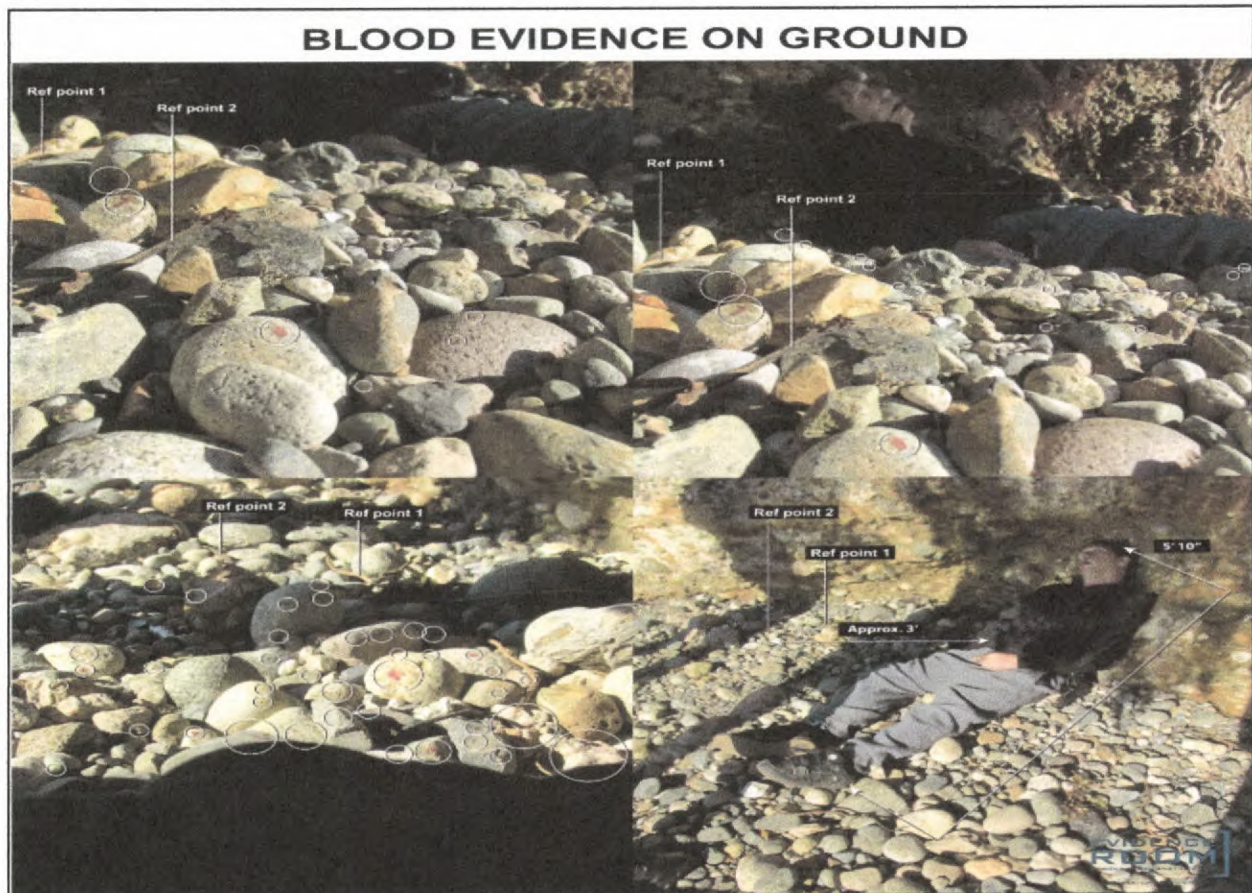
## Blood Evidence on Gun[7]




There was blood found on the left side of the gun and not the right side of the gun indicating that it was a place in his mouth horizontally. Additionally, there was blood on the base of the magazine which is consistent in shape and and size and then blood on it which would indicate that was the area of the gun that impacted his left front forehead.

[7] Blood Evidence on Gun — https://www.dropbox.com/scl/fi/ri28lax8gwkf3rtrrs8my/Blood-Evidence_Gun.jpg?rlkey=ehl1q5ib9vc264bdu05py517r&dl=0

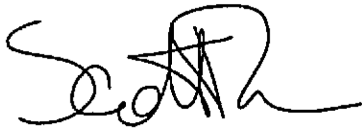
## Blood Evidence on Ground[8]




The blood evidence that was found on the ground was documented by police officers at the scene. The blood that was found was used to determine how the events took place before Sherlock was in his final resting place.

[8] Blood Evidence on Ground — https://www.dropbox.com/scl/fi/avexta6m3aw4d5bm0iz09/Blood-Evidence_Ground.jpg?rlkey=1q111yvc55494o9gjm6cyy7wf&dl=0

Sincerely,



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