

No. 22-56077

**In the United States Court of
Appeals for the Ninth Circuit**

DARRYL COTTON, individually,
Plaintiff and Appellant,

v.

GINA M. AUSTIN, individually, JESSICA CLAIRE McELFRESH,
individually, and DAVID S. DEMIAN, individually,
Defendants and Appellees.

Appeal from the United States District Court
for the Southern District of California
Case No. 3:18-cv-00325-JO-DEB
The Honorable District Judge Jinsook Ohta

**DECLARATION OF DARRYL COTTON IN SUPPORT OF
APPELLANTS OPPOSITION TO MOTIONS TO DISMISS
APPEAL FOR LACK OF JURISDICTION BY REPONDENTS
JESSICA CLAIRE MCELFRSH**

Darryl Cotton, Appellant, *Pro Se*
6176 Federal Boulevard
San Diego, California 92114
Telephone: 619.954.4447
151DarrylCotton@gmail.com

1. This declaration is limited to the sole facts and beliefs set forth herein. There are related and material facts that are not being set forth and their omission cannot be deemed an admission of their non-existence.
2. On December 26, 2022, I had a heart attack and was admitted to Grossmont Hospital for three days. My heart attack was stress induced.
3. Attorney Jessica McElfresh was engaged to represent me in *Larry Geraci v. Darryl Cotton*, Superior Court of California, County of San Diego 37-2017-00010073-CU-BC-CTL.
4. I was charged and paid for attorney's McElfresh reviewing, consulting and engaging on my matter.
5. On November 2, 2016, Lawrence Geraci and I reached an oral joint venture agreement that included the sale of my real property to Geraci and, inter alia, a 10% equity position for me at the dispensary contemplated to be operated at the property. The agreement was subject to the approval of a cannabis permit by the City of San Diego issued to Geraci.
6. David Demian of Finch, Thornton & Baird (FTB), among others, represented me in *Larry Geraci v. Darryl Cotton*, Superior Court of

California, County of San Diego 37-2017-00010073-CU-BC-CTL (*"Cotton I"*) and *Cotton v. City of San Diego*, Superior Court of California, County of San Diego, 37-2017-00037675-CU-WM-CTL (*"Cotton II"*).

7. Demian never disclosed that FTB had shared clients with Geraci's business, Tax & Financial Center, Inc. Cotton discovered this when a junior associate of FTB, Adam Witt, told Cotton this at a meeting while waiting for Demian and told Cotton he had just overheard Demian and another partner at FTB discussing it.
8. Demian amended Cotton's complaint and removed the allegations and causes of action that Geraci and Rebecca Berry conspired to unlawfully acquire a cannabis permit from the City of San Diego in the name of Berry.
9. Demian repeatedly attempted to have me declare that I had a principal-agent relationship with Berry and was responsible for having Austin submit the Berry Application in the name of Berry via the Strawman Practice.
10. During the course of this matter I have been represented by attorneys Jacob Austin, Andrew Flores, JoEllen Plaskett, and the law firm of Tiffany & Bosco. Cotton cannot acquire counsel to represent him and has been turned down NOT because of the merits of his case, but because of the judicial bias aspect of his case and the how many defendant attorneys are liable. As has

been repeatedly stated to Cotton, it is not “good business” to expose judicial bias or sue other attorneys. Most recently, the law firms of Sheppard Mullin, Latham & Watkins refused to represent Cotton and did not deny their representation on the merits.

11. Cotton has made the judicial bias and illegality arguments for years before the state and federal courts. No state or federal court has ever explained by Judge Wohlfeil’s bias statements are not bias or why Geraci can own a cannabis business in the name Berry in violation of California’s cannabis licensing policies and statutes.

12. Once Cotton is successful in having the judgments declared void and allegations of judicial bias do not need to be made, the law firm of Tiffany & Bosco will represent him in his cases.

13. McElfresh never disclosed to Cotton that she had shared clients with attorney Gina Austin.

14. McElfresh represented Geraci before the City of San Diego to further the application for a cannabis permit to be issued that Austin submitted for him in the name of his secretary Rebecca Berry.

15. Attached hereto as Exhibit A is a true and correct copy of a bill from McElfresh to Geraci provided by Geraci in the *Cotton I* litigation.

16. AT NO POINT HAS ANY STATE OR FEDERAL JUDGE ADDRESSED GERACI AND HIS ATTORNEYS' OWN JUDICIAL ADMISSIONS THAT ATTORNEY AUSTIN FILED AN APPLICATION FOR A CANNABIS PERMIT SO GERACI COULD ENGAGE IN COMMERCIAL CANNABIS ACTIVITIES IN THE NAME OF AGENTS/STRAWOMAN (BERRY) AND HOW SUCH DOES NOT CONSTITUTE ENGAGING IN UNLICENSED COMMERCIAL CANNABIS ACTIVITY.

17. Attached hereto as Exhibit B is a true and correct copy of Lawrence Geraci's opposition to my motion for new trial filed in *Cotton I*.

I declare under penalty of perjury under the laws of the States of California that the foregoing is true and correct, and that this declaration was executed on January 3, 2023.

Respectfully submitted,

By: /s/ Darryl Cotton

Darryl Cotton, Appellant, *Pro Se*

EXHIBIT A

McElfresh Law

Date	Check #	Amount
12.10.18	4514	1,245.00

1,245.00

Court's Ex. **142**

Case # 37-2017-00010073-CU-BC-CTL

Rec'd _____

Dept. **C-73** Clk. _____

McElfresh Law, Inc.
646 Valley Avenue
Suite C2
Solana Beach, California 92075
Phone: 858-756-7107
[Click Here To Pay This Invoice Using Credit Card](#)

INVOICE

Date: 12/06/2018
Invoice #: 747
Matter: Land Use
File #:

Bill To:
Larry Geraci
5402 Ruffin Road
Suite 200
San Diego, CA

Due Date: 01/05/2019

Payments received after 12/06/2018 are not reflected in this statement.

Professional Services

Date		Details	Hours	Rate	Amount
12/05/2018	JCM	Discussion with Schweitzer regarding tomorrow's appeal; review of letter and PC report	1.00	\$350.00	\$350.00
12/06/2018	JCM	Attendance at Planning Commission hearing for appeal	2.50	\$350.00	\$875.00
For professional services rendered			3.50		\$1,225.00

Additional Charges

Date		Details	Quantity	Rate	Amount
12/06/2018	JCM	Parking for hearing	1	\$20.00	\$20.00
Total additional charges					\$20.00

Invoice Amount **\$1,245.00**



LST Investments LLC: Account Activity Transaction Details

Check number: 00000004514

Post date: 12/17/2018

Amount: -1,245.00

Type: Check

Description: Check

Merchant name: Check

Transaction category: Cash, Checks & Misc: Checks

LST INVESTMENTS LLC 5402 RUFFIN RD STE 200 SAN DIEGO, CA 92123-1301		4514 11-29/1210 CA 81428
Date <u>12-10-18</u>		
Pay to the Order of <u>McElfresh Law, Inc</u>	\$ <u>1245.00</u>	
<u>Twelve hundred forty five and 00/100</u> Dollars		
Bank of America		
ACH RT 121000358		
For <u>Inv 747</u>	<u>[Signature]</u>	
⑆121000358⑆ 001132674480⑆4514		

EXHIBIT B

1 FERRIS & BRITTON
A Professional Corporation
2 Michael R. Weinstein (SBN 106464)
Scott H. Toothacre (SBN 146530)
3 501 West Broadway, Suite 1450
San Diego, California 92101
4 Telephone: (619) 233-3131
Fax: (619) 232-9316
5 mweinstein@ferrisbritton.com
stoothacre@ferrisbritton.com
6

7 Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and
Cross-Defendant REBECCA BERRY
8

9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF SAN DIEGO, HALL OF JUSTICE**

11 LARRY GERACI, an individual,

12 Plaintiff,

13 v.
14

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

16 Defendants.
17

18
19 AND RELATED CROSS-ACTION
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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

09/23/2019 at 03:18:00 PM

Clerk of the Superior Court
By Adriana Iye Anzalone, Deputy Clerk

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

Judge: Hon. Joel R. Wohlfeil

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

[IMAGED FILE]

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

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

TABLE OF CONTENTS

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

TABLE OF AUTHORITIES

PAGE(S)

CASES

<i>A&M Records, Inc. v. Heilman</i> (1977) 75 Cal.App.3d 554.....	19, 20
<i>Apra v. Aureguy</i> (1961) 55 Cal.2d 827.....	10
<i>Bristow v. Ferguson</i> (1981) 121 Cal.App.3d 823.....	11
<i>Cassim v. Allstate Ins. Co.</i> (2004)33 Cal.4 th 780.....	16
<i>Chodosh v. Palm Beach Park Association</i> 2018 WL 6599824.....	11
<i>Coombs v. Hibberd</i> (1872) 43 Cal. 452.....	20
<i>De Felice v. Tabor</i> (1957) 149 Cal.App.2d 273.....	9
<i>Fergus v. Songer</i> (2007) 150 Cal.App.4 th 552.....	10
<i>Fomco, Inc. v. Joe Maggio, Inc.</i> (1961) 55 Cal.2d 162.....	10
<i>Hernandez v. County of Los Angeles</i> (2014) 226 Cal.App.4 th 1599.....	17
<i>Hoffman-Haag v. Transamerica Ins. Co.</i> (1991) 1 Cal.App.4 th 10.....	15
<i>Horn v. Atchison, T. & S.F.Ry. Co.</i> (1964) 61 Cal.2d 602.....	6, 12
<i>Kralyevich v. Magrini</i> (1959) 172 Cal.App.2d 784.....	10
<i>Lewis Queen v. N.M. Ball Sons</i> (1957) 48 Cal.2d 141.....	10

TABLE OF AUTHORITIES-Continued

PAGE(S)

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

///

TABLE OF AUTHORITIES-Continued

PAGE(S)

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

STATUTES

Business & Professions Code

Section 26000.....	14
Section 26001(y).....	14
Section 26501.....	12
Section 26057.....	11, 13
Section 26057(b).....	13, 14
Section 26057(b)(7).....	18

Code of Civil Procedure

Section 569.....	9, 17
Section 657(1).....	9, 17
Section 657(5).....	9
Section 657(6).....	9, 10, 17
Section 657(7).....	9, 10, 17

Evidence Code

Section 352.....	12
------------------	----

California Constitution

Art. VI, §13.....	
-------------------	--

OTHER

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

4 **I. INTRODUCTION/SUMMARY OF ARGUMENT**

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

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

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19
20 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
21 his cross-complaint. (See Special Verdict Form, ROA# 636.) Mr. Cotton does not challenge the jury verdict nor seek a
22 new trial in connection with his cross-claims; his memorandum of points and authorities in support of his new trial motion
23 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.

24 ² Mr. Cotton's counsel, Jacob Austin, did not raise an objection to the admission of any exhibits or the examination with
25 regard to any exhibits. Attorney Austin only made two objections throughout the trial, neither of which have any impact on
26 the pending motion. "In an appeal ... from a judgment after denial of a motion for new trial, the failure of ... counsel to
27 object or except may be treated as a waiver of the error." (5 Witkin, Cal. Procedure (1983 pocket sup.) Attack on Judgment
28 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. Rehmk* (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

21 ³ Mr. Cotton's Errata claims that "[d]ue to a clerical error, an incomplete draft of the Memorandum of Points and
22 Authorities in Support of the Motion for New Trial was uploaded for electronic filing and service instead of the true final
23 copy and, as such, the table of Authorities in the draft was incomplete, the document was not executed and the exhibits
24 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.

25 ⁴ In making his illegality argument, Mr. Cotton cites to B&P Code §§ 26000 (Effective June 27, 2017); 26055 (Effective
26 July 2019); and 26057(a) (Effective January 1, 2019). The contract in question was entered November 2, 2016. The
27 general rule that judicial decisions are given retroactive effect is basic in our legal tradition. In *Evangelatos v. Superior*
28 *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.

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

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

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

27
28 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. STANDARDS FOR NEW TRIAL MOTION BASED ON C.C.P. § 657(6)**

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 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
27 establish findings that are irreconcilable. Mr. Cotton further did not establish that the evidence is insufficient in law and
28 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.

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

5 At trial the “illegality” issue appears to have first come up in response to questions being posed
6 by Attorney Austin in his examination of witnesses. Attorney Weinstein argued Attorney Austin was
7 asking questions of witnesses which implied it was illegal for Mr. Geraci to operate a legally permitted
8 dispensary. Attorney Weinstein pointed out, and the Court agreed, that the two civil judgments on
9 their face did not bar Mr. Geraci from operating a legally permitted dispensary. (RT, July 9, 2019, p.
10 120:20-121:24, Ex. 5 to Plaintiff NOL) Attorney Weinstein went on to argue that Business &
11 Professions Code Section 26057 was *permissive* and not mandatory and that it dealt with state
12 licenses, not a City CUP. The Court was troubled by the fact that Attorney Austin had not filed a trial
13 brief addressing this issue, nor had Attorney Austin filed any memorandum of points and authorities
14 on the issue. The Court concluded: “So for the time being, I’m tending to agree with the plaintiff’s
15 side without the defense having given me something I can look at and absorb.” (RT, July 9, 2019, p.
16 120:20-123:6, Ex. 5 to Plaintiff NOL)

17 Later that day, Attorney Austin called Joe Hurtado to the stand. Joe Hurtado had a vested
18 interest in the case as he was financing Mr. Cotton’s litigation expenses and attorneys’ fees. (RT July
19 9, 2019, p. 150:13-18, Ex. 5 to Plaintiff NOL) Attorney Austin improperly attempted to elicit expert
20 testimony from Joe Hurtado, that it was his opinion that Mr. Geraci did not qualify for a CUP under
21 the Business & Professions Code. (RT, July 9, 2019, 151:22-28, Ex. 5 to Plaintiff NOL) During
22 Attorney Austin’s examination of Mr. Hurtado, the Court initiated a side-bar at which Mr. Hurtado’s
23 proposed testimony was discussed. The Court permitted Mr. Hurtado to testify to hearsay
24 conversations with Gina Austin and hearsay conversations with anyone else on Mr. Geraci’s team. At
25 the conclusion of Mr. Hurtado’s testimony, and after excusing the jury, the Court permitted the parties
26 to make a record of that side bar. (RT, July 9, 2019, p. 155:8-158:18, Ex. 5 to Plaintiff NOL) The
27 Court expressed to Attorney Austin that to the extent Mr. Hurtado wanted to express legal opinions, he
28 was not going to permit such testimony. In response, Attorney Austin admitted that “perhaps Mr.

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

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

10 The Court stated:

11 Putting aside whether the probative value is substantially outweighed by undue prejudice
12 or any other of the 352 factors including but not limited to cumulativeness, as I read these
13 judgments, Mr. Geraci is not barred from trying to obtain whatever permission he would
14 need or anybody would need from operating a marijuana dispensary. And I thought that
was your theory at one point.

15 And if that were your theory, I'm not seeing anything, well, inside the four corners of
16 these judgments that prohibit Mr. Geraci from, for example, doing the deal that he had
proposed to do with Mr. Cotton.

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

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

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

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

5 The stipulated judgments on their face permit Mr. Geraci to apply for a CUP. In Case Number
6 37-2014-00020897-CU-MC-CTL, paragraph 8a enjoins Mr. Geraci from “Keeping, maintaining,
7 operating, or allowing the operation of an *unpermitted marijuana dispensary ...*”. (Italics, Bold
8 Added.) Paragraph 8(b) specifically sates “*Defendants shall not be barred in the future from any*
9 *legal and permitted use of the PROPERTY.*” (Italics, Bold Added.)

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

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

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

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

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

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

8 In this case, the CUP is not a state license. Even if this statute were to apply to a CUP, the
9 permissive nature of the authority would not *require* the denial of a CUP license because it is up to the
10 discretion of the licensing authority to make such a decision based on the conditions provided in
11 section 26057(b). (Cal. Bus. & Prof. Code § 26057(b).) In addition, attorney Gina Austin testified at
12 trial the statute would not prevent Mr. Geraci from obtaining a CUP. (RT, July 8, 2019, p. 55:12-
13 57:21, Ex. 4 to Plaintiff NOL)

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

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

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

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

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

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

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

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

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

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

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

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

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

18 In support of his argument, Mr. Cotton argues that Mr. Geraci had draft "final" agreements
19 prepared and circulated by Attorney Gina Austin, and therefore, the argument goes, the November 2,
20 2016 Agreement could not have been the final agreement between the parties. This argument simply
21 ignores the testimony of Larry Geraci that he felt he was being extorted by Mr. Cotton and did not
22 want to lose all of the money he had invested in the project and therefore he instructed his attorney,
23 Gina Austin to draft some agreements, attempting to negotiate some terms that Mr. Cotton might be
24 happy with. Those draft agreements were prepared by Gina Austin's office and forwarded to Mr.
25 Cotton. (Trial Exhibit 59, 62, Ex. 7 to Plaintiff NOL; RT July 3, 2019, 129:22-133:27, Ex. 4 to NOL)
26 Mr. Cotton refused to accept those terms and no new agreement was reached. Mr. Geraci became fed-
27 up and filed the instant lawsuit to protect his investment based on the November 2, 2016 written
28 agreement the parties had entered into.

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

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

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

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

23 Alternatively, erroneous evidentiary rulings (admitting or excluding evidence may be
24 challenged under C.C.P. §657(7) as an "Error in law, occurring at the trial and excepted to by the party
25 making the application." Mr. Cotton has *not* moved for a new trial based on either C.C.P. § 657(1) or
26 C.C.P. §657(7). Instead, in his Notice of Intent to Move for New Trial (p. 2:8-11), Mr. Cotton has
27 sought a new trial on the sole ground that the verdict is "against law" pursuant to C.C.P. § 657(6). A
28 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.
10 29 are SUSTAINED; however, the scope of the request appears to seek relevant
11 documents. Given Plaintiff's election to assert the privilege and/or doctrine in discovery,
the Court will **HEAR** on the scope of the testimony Plaintiff will be not be permitted to
provide at trial on the subject of the DISAVOWMANET ALLEGATION."

12 Clearly, 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.)

1 *Party has produced previously all responsive documents drafted by Ms. Austin or persons employed*
2 *in her law firm.”*

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

10 4. Larry Geraci testified regarding these exhibits and the surrounding circumstances. Mr.
11 Cotton’s attorney noted he had no objection to the admission of those exhibits (RT July 3, 2019, pp.
12 130:18-26; 132:2-7, Ex. 3 to Plaintiff NOL) and he did not object to the testimony.

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

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

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

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

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

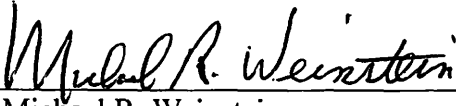
4 First and foremost, this case does not involve a situation where a party claims the 5th
5 Amendment privilege against self-incrimination and then waives it at trial, so the *A & M Records* case
6 has no application to the case at bar. The Court held that a litigant cannot assert his constitutional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

16 **IV. CONCLUSION**

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

23 FERRIS & BRITTON
24 A Professional Corporation

25
26 Dated: September 23, 2019

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