

EXHIBIT 13

NOA 615
13 pages

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FILED
Clerk of the Superior Court

JUL 11 2019

By: A. TAYLOR

Attorney for Defendant/Cross-Complainant DARRYL COTTON

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO**

LARRY GERACI, an individual,

Plaintiff,

vs.

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

Defendants.

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF DARRYL
COTTON'S MOTION FOR DIRECTED
VERDICT**

Date: July 11, 2019

Time: 10:30 a.m.

Dept: C-73

Judge: The Hon. Joel R. Wohlfeil

AND RELATED CROSS-ACTION.

MEMORANDUM OF POINTS AND AUTHORITIES

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

INTRODUCTION

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

1 Defendant and Cross-Complainant Darryl Cotton ("Defendant"). Plaintiff alleges in this action that
 2 Defendant breached the terms of a purchase and sale agreement. In his complaint ("Complaint"),
 3 Plaintiff presented his case to the jury, and failed to present sufficient evidence to support a jury
 4 finding in his favor on the following causes of action:

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

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

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

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

18 LEGAL ANALYSIS

19 Defendant moves for a directed verdict on claims asserted by Plaintiff because the claims
 20 because Plaintiff has failed to introduce evidence of sufficient substantiality to support a jury verdict.
 21 Defendant is entitled to a directed verdict on these claims because CCP § 630 authorizes a directed
 22 verdict on issues in a case.
 23

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

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

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

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

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

a. GERACI HAS FAILED TO PROVE THAT THE NOVEMBER DOCUMENT IS A FULLY INTEGRATED CONTRACT.

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

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

4 Q. PARENTHESES, CUP FOR A DISPENSARY, CLOSE PARENS. DID YOU
5 HAVE A DISCUSSION WITH MR. COTTON ABOUT THAT LANGES AT THE
6 TIME YOU DRAFTED THE –THE TWO OF YOU DRAFTED THE AGREEMENT.

7 A. YES. IT WAS UNDERSTOOD THAT ON THE APPROVAL OF THE
8 MARIJUAAN DISPENSAY THAT, YOU KNO, I'D BE BEARING THE COSE, AND
9 WE NEED TO GET APPROVAL TO COMPLETE THE ACTUAL PRUCHASE FOR
10 THE PROPERTY.

11 Q. OKAY. WHEN YOU SAID IT WAS UNDERSTOOD, WHAT WAS SAID? I
12 MEAN, HOW DDI YOU HAVE THAT UNDERSTANDING?

13 A. AS I WAS TYPING, I SAID, AND I WILL, OF COURSE, BE PAYING FOR
14 THE—THE PROCESS TO GET CUP.

15 (ROUGH REPORTERS TRANSCRIPT GERCI v. COTTON JULY 3, 2017 AT 93:9-
16 19)(Emphasis added)

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

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

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

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

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

3 At 6:55 p.m., Mr. Cotton replied to that email as follows:

4 Hi Larry, [¶] Thank you for meeting today. Since we executed the Purchase Agreement in
5 your office for the sale price of the property I just noticed the 10% equity position in the
6 dispensary was not language added into that document. *I just want to make sure that we're
7 not missing that language in any final agreement as it is a factored element in my
8 decision to sell the property, I'll be fine if you would simply acknowledge that here in a
9 reply.*

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

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

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

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

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

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

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

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

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

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

11 CONCLUSION

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

14 Respectfully submitted,

15
 16 DATED: July 11, 2019

17 THE LAW OFFICE OF JACOB AUSTIN

18
 19 By 

20 JACOB P. AUSTIN

21 Attorney for Defendant/Cross-Complainant

22 DARRYL COTTON
 23
 24
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 28

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26045.

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

Chapter 5. Licensing

26050.

(a) The license classification pursuant to this division shall, at a minimum, be as follows:

- (1) Type 1 - Cultivation; Specialty outdoor; Small.
- (2) Type 1A - Cultivation; Specialty indoor; Small.
- (3) Type 1B - Cultivation; Specialty mixed-light; Small.
- (4) Type 2 - Cultivation; Outdoor; Small.
- (5) Type 2A - Cultivation; Indoor; Small.
- (6) Type 2B - Cultivation; Mixed-light; Small.
- (7) Type 3 - Cultivation; Outdoor; Medium.
- (8) Type 3A - Cultivation; Indoor; Medium.
- (9) Type 3B - Cultivation; Mixed-light; Medium.
- (10) Type 4 - Cultivation; Nursery.
- (11) Type 5 - Cultivation; Outdoor; Large.
- (12) Type 5A - Cultivation; Indoor; Large.
- (13) Type 5B - Cultivation; Mixed-light; Large.
- (14) Type 6 - Manufacturer 1.
- (15) Type 7 - Manufacturer 2.
- (16) Type 8 - Testing.
- (17) Type 10 - Retailer.
- (18) Type 11 - Distributor.
- (19) Type 12 - Microbusiness.

(b) All licenses issued under this division shall bear a clear designation indicating that the license is for commercial marijuana activity as distinct from commercial medical cannabis activity licensed under Chapter 3.5 (commencing with Section 19300) of Division 8. Examples of such a designation include, but are not limited to, "Type 1 - Nonmedical," or "Type 1 NM."

(c) A license issued pursuant to this division shall be valid for 12 months from the date of issuance. The license may be renewed annually.

(d) Each licensing authority shall establish procedures for the issuance and renewal of licenses.

(e) Notwithstanding subdivision (c), a licensing authority may issue a temporary license for a period of less than 12 months. This subdivision shall cease to be operative on January 1, 2019.

26051.

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

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

- (1) Allow unreasonable restraints on competition by creation or maintenance of unlawful monopoly power;
 - (2) Perpetuate the presence of an illegal market for marijuana or marijuana products in the state or out of the state;
 - (3) Encourage underage use or adult abuse of marijuana or marijuana products, or illegal diversion of marijuana or marijuana products out of the state;
 - (4) Result in an excessive concentration of licensees in a given city, county, or both;
 - (5) Present an unreasonable risk of minors being exposed to marijuana or marijuana products; or
 - (6) Result in violations of any environmental protection laws.
- (b) A licensing authority may deny a license or renewal of a license based upon the considerations in subdivision (a).
- (c) For purposes of this section, "excessive concentration" means when the premises for a retail license, microbusiness license, or a license issued under Section 26070.5 is located in an area where either of the following conditions exist:
- (1) The ratio of a licensee to population in the census tract or census division in which the applicant premises are located exceeds the ratio of licensees to population in the county in which the applicant premises are located, unless denial of the application would unduly limit the development of the legal market so as to perpetuate the illegal market for marijuana or marijuana products.
 - (2) The ratio of retail licenses, microbusiness licenses, or licenses under Section 26070.5 to population in the census tract, division or jurisdiction exceeds that allowable by local ordinance adopted under Section 26200.

26052.

- (a) No licensee shall perform any of the following acts, or permit any such acts to be performed by any employee, agent, or contractor of such licensee:
- (1) Make any contract in restraint of trade in violation of Section 16600;
 - (2) Form a trust or other prohibited organization in restraint of trade in violation of Section 16720;
 - (3) Make a sale or contract for the sale of marijuana or marijuana products, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the consumer or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of such seller, where the effect of such sale, contract, condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce;
 - (4) Sell any marijuana or marijuana products at less than cost for the purpose of injuring competitors, destroying competition, or misleading or deceiving purchasers or prospective purchasers;

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- (5) Discriminate between different sections, communities, or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this state, by selling or furnishing marijuana or marijuana products at a lower price in one section, community, or city or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another, for the purpose of injuring competitors or destroying competition; or
- (6) Sell any marijuana or marijuana products at less than the cost thereof to such vendor, or to give away any article or product for the purpose of injuring competitors or destroying competition.
- (b) Any person who, either as director, officer or agent of any firm or corporation, or as agent of any person, violates the provisions of this chapter, assists or aids, directly or indirectly, in such violation is responsible therefor equally with the person, firm or corporation for which such person acts.
- (c) A licensing authority may enforce this section by appropriate regulation.
- (d) Any person or trade association may bring an action to enjoin and restrain any violation of this section for the recovery of damages.

26053.

- (a) The bureau and licensing authorities may issue licenses under this division to persons or entities that hold licenses under Chapter 3.5(commencing with Section 19300) of Division 8.
- (b) Notwithstanding subdivision (a), person or entity that holds a state testing license under this division or Chapter 3.5(commencing with Section 19300) of Division 8 is prohibited from licensure for any other activity, except testing, as authorized under this division.
- (c) Except as provided in subdivision (b), a person or entity may apply for and be issued more than one license under this division.

26054.

- (a) A licensee shall not also be licensed as a retailer of alcoholic beverages under Division 9 (commencing with Section 23000) or of tobacco products.
- (b) No licensee under this division shall be located within a 600-foot radius of a school providing instruction in kindergarten or any grades 1 through 12, day care center, or youth center that is in existence at the time the license is issued, unless a licensing authority or a local jurisdiction specifies a different radius. The distance specified in this section shall be measured in the same manner as provided in paragraph (c) of Section 11362. 768 of the Health and Safety Code unless otherwise provided by law.
- (c) It shall be lawful under state and local law, and shall not be a violation of state or local law, for a business engaged in the manufacture of marijuana accessories to possess, transport, purchase or otherwise obtain small amounts of marijuana or marijuana products as necessary to conduct research and development related to such marijuana accessories, provided such marijuana and marijuana products are obtained from a person or entity licensed under this division or Chapter 3.5 (commencing with Section 19300) of Division 8 permitted to provide or deliver such marijuana or marijuana products.

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26054.1

- (a) No licensing authority shall issue or renew a license to any person that cannot demonstrate continuous California residency from or before January 1, 2015. In the case of an applicant or licensee that is an entity, the entity shall not be considered a resident if any person controlling the entity cannot demonstrate continuous California residency from and before January 1, 2015.
- (b) Subdivision (a) shall cease to be operable on December 31, 2019 unless reenacted prior thereto by the Legislature.

26054.2

- (a) A licensing authority shall give priority in issuing licenses under this division to applicants that can demonstrate to the authority's satisfaction that the applicant operated in compliance with the Compassionate Use Act and its implementing laws before September 1, 2016, or currently operates in compliance with Chapter 3.5(commencing with Section 19300) of Division 8.
- (b) The bureau shall request that local jurisdictions identify for the bureau potential applicants for licensure based on the applicants' prior operation in the local jurisdiction in compliance with state law, including the Compassionate Use Act and its implementing laws, and any applicable local laws. The bureau shall make the requested information available to licensing authorities.
- (c) In addition to or in lieu of the information described in subdivision (b), an applicant may furnish other evidence to demonstrate operation in compliance with the Compassionate Use Act or Chapter 3.5 (commencing with Section 19300) of Division 8. The bureau and licensing authorities may accept such evidence to demonstrate eligibility for the priority provided for in subdivision (a).
- (d) This section shall cease to be operable on December 31, 2019 unless otherwise provided by law.

26055.

- (a) Licensing authorities may issue state licenses only to qualified applicants.
- (b) Revocation of a state license issued under this division shall terminate the ability of the licensee to operate within California until the licensing authority reinstates or reissues the state license.
- (c) Separate licenses shall be issued for each of the premises of any licensee having more than one location, except as otherwise authorized by law or regulation.
- (d) After issuance or transfer of a license, no licensee shall change or alter the premises in a manner which materially or substantially alters the premises, the usage of the premises, or the mode or character of business operation conducted from the premises, from the plan contained in the diagram on file with the application, unless and until prior written assent of the licensing authority or bureau has been obtained. For purposes of this section, material or

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substantial physical changes of the premises, or in the usage of the premises, shall include, but not be

limited to, a substantial increase or decrease in the total area of the licensed premises previously diagrammed, or any other physical modification resulting in substantial change in the mode or character of business operation.

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

26056.

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

- (a) Notwithstanding paragraph (2) of subdivision (a) of Section 19322, an applicant need not provide documentation that the applicant has obtained a license, permit or other authorization to operate from the local jurisdiction in which the applicant seeks to operate;
- (b) An application for a license under this division shall include evidence that the proposed location meets the restriction in subdivision (b) of Section 26054; and
- (c) For applicants seeking licensure to cultivate, distribute, or manufacture nonmedical marijuana or marijuana products, the application shall also include a detailed description of the applicant's operating procedures for all of the following, as required by the licensing authority:
 - (1) Cultivation.
 - (2) Extraction and infusion methods.
 - (3) The transportation process.
 - (4) The inventory process.
 - (5) Quality control procedures.
 - (6) The source or sources of water the applicant will use for the licensed activities, including a certification that the applicant may use that water legally under state law.
- (d) The applicant shall provide a complete detailed diagram of the proposed premises wherein the license privileges will be exercised, with sufficient particularity to enable ready determination of the bounds of the premises, showing all boundaries, dimensions, entrances and exits, interior partitions, walls, rooms, and common or shared entryways, and include a brief statement or description of the principal activity to be conducted therein, and, for licenses permitting cultivation, measurements of the planned canopy including aggregate square footage and individual square footage of separate cultivation areas, if any.

26056.5.

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

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with regulations, including but not limited to, the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code), the California Endangered Species Act (Chapter 1.5 (commencing with Section 2050), lake or streambed alteration agreements (Chapter 6 (commencing with Section 1600), the Clean Water Act (33 U.S.C. Sec 1251 et seq.), the Porter-Cologne Water Quality Control Act (Division 7 commencing with Section 13000) of the Water Code), timber production zones, wastewater discharge requirements, and any permit or right necessary to divert water.

26057.

- (a) The licensing authority shall deny an application if either the applicant, or the premises for which a state license is applied, do not qualify for licensure under this division.
- (b) The licensing authority may deny the application for licensure or renewal of a state license if Any of the following conditions apply:
 - (1) Failure to comply with the provisions of this division, any rule or regulation adopted pursuant to this division, or any requirement imposed to protect natural resources, including, but not limited to, protections for instream flow and water quality.
 - (2) Conduct that constitutes grounds for denial of licensure under Chapter 2 (commencing with Section 480) of Division 1.5, except as otherwise specified in this section and Section 26059.
 - (3) Failure to provide information required by the licensing authority.
 - (4) The applicant or licensee has been convicted of an offense that is substantially related to the qualifications, functions, or duties of the business or profession for which the application is made, except that if the licensing authority determines that the applicant or licensee is otherwise suitable to be issued a license, and granting the license would not compromise public safety, the licensing authority shall conduct a thorough review of the nature of the crime, conviction, circumstances, and evidence of rehabilitation of the applicant, and shall evaluate the suitability of the applicant or licensee to be issued a license based on the evidence found through the review. In determining which offenses are substantially related to the qualifications, functions, or duties of the business or profession for which the application is made, the licensing authority shall include, but not be limited to, the following:
 - (A) A violent felony conviction, as specified in subdivision (c) of Section 667.5 of the Penal Code.
 - (B) A serious felony conviction, as specified in subdivision (c) of Section 1192.7 of the Penal Code.
 - (C) A felony conviction involving fraud, deceit, or embezzlement.
 - (D) A felony conviction for hiring, employing, or using a minor in transporting, carrying, selling, giving away, preparing for sale, or peddling, any controlled substance to a minor; or selling, offering to sell, furnishing, offering to furnish, administering, or giving any controlled substance to a minor.
 - (E) A felony conviction for drug trafficking with enhancements pursuant to Sections 11370.4 or 11379.8.

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- (5) Except as provided in subparagraphs (D) and (E) of paragraph (4) and notwithstanding Chapter 2 (commencing with Section 480) of Division 1.5, a prior conviction, where the sentence, including any term of probation, incarceration, or supervised release, is completed, for possession of, possession for sale, sale, manufacture, transportation, or cultivation of a controlled substance is not considered substantially related, and shall not be the sole ground for denial of a license. Conviction for any controlled substance felony subsequent to licensure shall be grounds for revocation of a license or denial of the renewal of a license.
- (6) The applicant, or any of its officers, directors, or owners, has been subject to fines or penalties for cultivation or production of a controlled substance on public or private lands pursuant to Sections 12025 or 12025.1 of the Fish and Game Code.
- (7) The applicant, or any of its officers, directors, or owners, has been sanctioned by a licensing authority or a city, county, or city and county for unauthorized commercial marijuana activities or commercial medical cannabis activities, has had a license revoked under this division or Chapter 3.5 (commencing with Section 19300) of Division 8 in the three years immediately preceding the date the application is filed with the licensing authority, or has been sanctioned under Sections 12025 or 12025.1 of the Fish and Game Code.
- (8) Failure to obtain and maintain a valid seller's permit required pursuant to Part 1 (commencing with Section 6001) of Division 2 of the Revenue and Taxation Code.
- (9) Any other condition specified in law.

26058.

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

26059.

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

- (a) A conviction or act that is substantially related to the qualifications, functions, or duties of the business or profession for which the application is made for which the applicant or licensee has obtained a certificate of rehabilitation pursuant to Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.
- (b) A conviction that was subsequently dismissed pursuant to Sections 1203.4, 1203.4a, or 1203.41 of the Penal Code or any other provision allowing for dismissal of a conviction.

Chapter 6. Licensed Cultivation Sites

26060.

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

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EXHIBIT 14

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 07/10/2019

TIME: 09:00:00 AM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Andrea Taylor

REPORTER/ERM: Margaret Smith CSR# 9733

BAILIFF/COURT ATTENDANT: R. Camberos

CASE NO: **37-2017-00010073-CU-BC-CTL** CASE INIT.DATE: 03/21/2017

CASE TITLE: **Larry Geraci vs Darryl Cotton [Imaged]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

EVENT TYPE: Civil Jury Trial

APPEARANCES

Michael R Weinstein, counsel, present for Respondent on Appeal, Cross - Defendant, Cross - Complainant, Plaintiff(s).

Scott H Toothacre, counsel, present for Respondent on Appeal, Cross - Defendant, Cross - Complainant, Plaintiff(s).

Jacob Austin, counsel, present for Defendant, Cross - Complainant, Appellant(s).

Darryl Cotton, Defendant is present.

Larry Geraci, Plaintiff is present.

Rebecca Berry, Cross - Defendant, not present.

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

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

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

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

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

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

CASE TITLE: Larry Geraci vs Darryl Cotton [Imaged]

CASE NO: 37-2017-00010073-CU-BC-CTL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CASE TITLE: Larry Geraci vs Darryl Cotton [Imaged]

CASE NO: 37-2017-00010073-CU-BC-CTL

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

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

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

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

Court and counsel go over jury instructions.

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

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

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

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

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

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

1 page

MINUTE ORDER

DATE: 07/11/2019

TIME: 10:30:00 AM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Andrea Taylor

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: R. Camberos

CASE NO: **37-2017-00010073-CU-BC-CTL** CASE INIT.DATE: 03/21/2017

CASE TITLE: **Larry Geraci vs Darryl Cotton [Imaged]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

EVENT TYPE: Civil Jury Trial

APPEARANCES

Michael R Weinstein, counsel, present for Respondent on Appeal, Cross - Defendant, Cross - Complainant, Plaintiff(s).

Jacob Austin, counsel, present for Defendant, Cross - Complainant, Appellant(s).

Darryl Cotton, Defendant is present.

Elyssa Kulas, counsel appears on behalf of the Plaintiff.

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

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

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

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

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

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

EXHIBIT 15

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
08/09/2019 at 04:09:00 PM
Clerk of the Superior Court
By Jessica Pascual, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, CENTRAL DIVISION

LARRY GERACI, an individual,

Plaintiff,

v.

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

Defendants.

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

Judge: The Honorable Joel R. Wohlfeil
Dept: C-73

JUDGMENT ON JURY VERDICT
[PROPOSED]

DARRYL COTTON, an individual,

Cross-Complainant,

v.

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

Cross-Defendants.

[IMAGED FILE]

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

This action arises out of a contract dispute between Plaintiff Larry Geraci ("Plaintiff") and Defendant and Cross-Complainant Darryl Cotton ("Defendant"). Plaintiff alleges in this action that Defendant breached the terms of a purchase and sale agreement.

This case came on regularly for jury trial on June 28, 2019 and continued 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

1 Plaintiff and Cross-Defendant LARRY GERACI and Cross-Defendant REBECCA BERRY, and
 2 Jacob P. Austin of THE LAW OFFICE OF JACOB AUSTIN appeared for Defendant and Cross-
 3 Complainant DARRYL COTTON.

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

6 Prior to commencement of and during the trial in this action, this Court made certain rulings and
 7 findings at the hearings on the parties' in limine and other integral trial-related motions regarding the
 8 nature and scope of certain issues, evidence and testimony permitted to be presented and excluded from
 9 presentation to the jury for consideration in reaching its verdict. As material to this Judgment and action,
 10 the Court found:

11 1. The November 2, 2016 written document is a fully integrated sales contract as alleged by
 12 Plaintiff in his Complaint.

13 2. Plaintiff's testimony and evidence at trial neither constitute legal affirmative defenses of
 14 mistake or fraud nor contradict his judicial admissions in his Answer to Defendant's Cross-Complaint.

15 3. Plaintiff is not barred by law pursuant to the California Business and Professions Code,
 16 Division 10 (Cannabis), Chapter 5 (Licensing), § 26057 (Denial of Application) from owning a Marijuana
 17 Outlet conditional use permit issued by the City of San Diego.

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

23 At the conclusion of trial after having heard the evidence, testimony and closing arguments by
 24 the parties' counsel, the jury was duly instructed by the Court and the cause was submitted to the jury
 25 with directions to return a verdict on special issues on two special verdict forms. Following deliberations,
 26 the jury returned into court with the following two special verdicts:

27 ///

28 ///

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?

1 Answer: YES

2
3 7. Was Plaintiff harmed by Defendant's breach of contract?

4 Answer: YES

5
6 **Breach of the Implied Covenant of Good Faith and Fair Dealing**

7
8 8. Did Defendant unfairly interfere with Plaintiffs right to receive the benefits of the contract?

9 Answer: YES

10
11 9. Was Plaintiff harmed by Defendant's interference?

12 Answer: YES

13
14 10. What are Plaintiffs damages?

15 Answer: \$260,109.28

16
17 A true and correct copy of Special Verdict Form No. 1 is attached hereto as Exhibit B.

18
19 **SPECIAL VERDICT FORM NO. 2**

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

22
23 **Breach of Contract**

24
25 1. Did Cross-Complainant Darryl Cotton and Cross-Defendant Larry Geraci enter into an oral
26 contract to form a joint venture?

27 Answer: NO

Fraud - Intentional Misrepresentation

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

Answer: NO

Fraud - False Promise

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

Answer: NO

Fraud - Negligent Misrepresentation

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

Answer: NO

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

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 shall 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 the entire amount of the judgment plus interest are paid in full, together with costs of suit in the amount of \$_____;

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

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

3
4 **IT IS SO ORDERED.**

5
6 DATED: _____

ORDER DENIED

THE HONORABLE JOEL R. WOHLFEIL
Judge of the Superior Court

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

EVENT TYPE: Civil Jury Trial

APPEARANCES

Michael R Weinstein, counsel, present for Respondent on Appeal, Cross - Defendant, Cross - Complainant, Plaintiff(s).
Scott H Toothacre, counsel, present for Respondent on Appeal, Cross - Defendant, Cross - Complainant, Plaintiff(s).
Jacob Austin, counsel, present for Defendant, Cross - Complainant, Appellant(s).
Darryl Cotton, Defendant is present.
Larry Geraci, Plaintiff is present.
Rebecca Berry, Cross - Defendant is present.

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.

CASE TITLE: Larry Geraci vs Darryl Cotton [Imaged]

CASE NO: 37-2017-00010073-CU-BC-CTL

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.

CASE TITLE: Larry Geraci vs Darryl Cotton [Imaged]

CASE NO: 37-2017-00010073-CU-BC-CTL

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

CASE TITLE: Larry Geraci vs Darryl Cotton [Imaged]

CASE NO: 37-2017-00010073-CU-BC-CTL

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 Attorney 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?

1
2 ☒ Yes ☐ No
3

4 If your answer to question 1 is yes, answer question 2. If your answer to question 1 is no, answer
5 no further questions, and have the presiding juror sign and date this form.
6

7 2. Did Plaintiff do all, or substantially all, of the significant things that the contract required him
8 to do?
9

10 ☐ Yes ☒ No
11

12 If your answer to question 2 is yes, do not answer question 3 and answer question 4. If your
13 answer to question 2 is no, answer question 3.
14

15 3. Was Plaintiff excused from having to do all, or substantially all, of the significant things that
16 the contract required him to do?
17

18 ☒ Yes ☐ No
19

20 If your answer to question 3 is yes, answer question 4. If your answer to question 3 is no, answer
21 no further questions, and have the presiding juror sign and date this form.
22

23 4. Did all the condition(s) that were required for Defendant's performance occur?
24

25 ☐ Yes ☒ No
26

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

1
2 5. Was the required condition(s) that did not occur excused?

3
4 ☒ Yes ☐ No

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

8
9 6. Did Defendant fail to do something that the contract required him to do?

10
11 ☒ Yes ☐ No

12
13 or

14
15 Did Defendant do something that the contract prohibited him from doing?

16
17 ☒ Yes ☐ No

18
19 If your answer to either option for question 6 is yes, answer question 7. If your answer to both
20 options is no, do not answer question 7 and answer question 8.

21
22 7. Was Plaintiff harmed by Defendant's breach of contract?

23
24 ☒ Yes ☐ No

25
26 If your answer to questions 4 or 5 is yes, please answer question 8.

27
28 **Breach of the Implied Covenant of Good Faith and Fair Dealing**

1
2 8. Did Defendant unfairly interfere with Plaintiff's right to receive the benefits of the contract?

3
4 ☒ Yes ☐ No

5
6 If your answer to question 8 is yes, answer question 9. If your answer to question 8 is no, but
7 your answer to question 7 is yes, do not answer question 9 and answer question 10. If your answers to
8 questions 7 and 8 were not yes, answer no further questions, and have the presiding juror sign and date
9 this form.

10
11 9. Was Plaintiff harmed by Defendant's interference?

12
13 ☒ Yes ☐ No

14
15 If your answer to question 9 is yes, answer question 10. If your answer to question 9 is no, but
16 your answer to question 7 is yes, answer question 10. If your answers to questions 7 and 9 were not yes,
17 answer no further questions, and have the presiding juror sign and date this form.

18
19 10. What are Plaintiff's damages?

20
21 \$ 260,109.28

22
23 Dated: 7/16/19

Signed: [Signature]

Presiding Juror

24
25
26 After all verdict forms have been signed, notify the bailiff that you are ready to present your
27 verdict in the courtroom.
28

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

Judge: Hon. Joel R. Wohlfeil

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

3
4 ☐ Yes ☒ No

5
6 If your answer to question 1 is yes, answer question 2. If your answer to question 1 is no, do not
7 answer questions 2 – 7 and answer question 8.

8
9 2. Did Cross-Complainant do all, or substantially all, of the significant things that the contract
10 required him to do?

11
12 ☐ Yes ☐ No

13
14 If your answer to question 2 is yes, do not answer question 3 and answer question 4. If your
15 answer to question 2 is no, answer question 3.

16
17 3. Was Cross-Complainant excused from having to do all, or substantially all, of the significant
18 things that the contract required him to do?

19
20 ☐ Yes ☐ No

21
22 If your answer to question 3 is yes, answer question 4. If your answer to question 3 is no, do not
23 answer questions 4 – 7 and answer question 8.

24
25 4. Did all the condition(s) that were required for Cross-Defendant's performance occur?

26
27 ☐ Yes ☐ No

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

3
4 5. Was the required condition(s) that did not occur excused?

5
6 ☐ Yes ☐ No

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

10
11 6. Did Cross-Defendant fail to do something that the contract required him to do?

12
13 ☐ Yes ☐ No

14
15 or

16
17 Did Cross-Defendant do something that the contract prohibited him from doing?

18
19 ☐ Yes ☐ No

20
21 If your answer to either option for question 6 is yes, answer question 7. If your answer to both
22 options is no, do not answer question 7 and answer question 8.

23
24 7. Was Cross-Complainant harmed by Cross-Defendant's breach of contract?

25
26 ☐ Yes ☐ No

27
28 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

1
2 If your answer to question 11 is yes, answer question 12. If your answer to question 11 is no, do
3 not answer question 12 and answer question 13.
4

5 12. Was Cross-Complainant's reliance on Cross-Defendant's representation a substantial factor
6 in causing harm to Cross-Complainant?
7

8 ☐ Yes ☐ No
9

10 Please answer question 13.
11

12 **Fraud - False Promise**
13

14 13. Did Cross-Defendant make a promise to Cross-Complainant that was important to the
15 transaction?
16

17 ☐ Yes ☒ No
18

19 If your answer to question 13 is yes, answer question 14. If your answer to question 13 is no, do
20 not answer questions 14 – 18 and answer question 19.
21

22 14. Did Cross-Defendant intend to perform this promise when Cross-Defendant made it?
23

24 ☐ Yes ☐ No
25

26 If your answer to question 14 is no, answer question 15. If your answer to question 14 is yes, do
27 not answer questions 15 – 18 and answer question 19.
28

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

Fraud - Negligent Misrepresentation

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

☐ Yes ☒ No

If your answer to question 19 is yes, answer question 20. If your answer to question 19 is no, do not answer questions 20 – 24 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.

20. Did Cross-Defendant honestly believe that the representation was true when Cross-Defendant made it?

☐ Yes ☐ No

If your answer to question 20 is yes, answer question 21. If your answer to question 20 is no, do not answer questions 21 – 24 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.

21. Did Cross-Defendant have reasonable grounds for believing the representation was true when Cross-Defendant made it?

☐ Yes ☐ No

If your answer to question 21 is yes, answer question 22. If your answer to question 21 is no, do 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

1 If your answer to question 24 is yes, answer question 25. If your answer to question 24 is no, but
2 if your answer to questions 7, 12 or 18 is yes, answer question 25. If your answers to questions 7, 12 and
3 18 were not yes, answer no further questions, and have the presiding juror sign and date this form.
4

5 25. What are Cross-Complainant's damages?
6

7 \$ _____
8
9

10
11 Dated: 7/16/19
12

Signed: 
Presiding Juror

13 After all verdict forms have been signed, notify the bailiff that you are ready to present your verdict in
14 the courtroom.
15
16
17
18
19
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21
22
23
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27
28

EXHIBIT 16

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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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR NEW TRIAL**

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

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TABLE OF AUTHORITIES

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STATUTES

Business & Professions Code

Section 19323(a)
 Section 19323(b)(8)
 Section 19324

Civil Code

Code of Civil Procedure

§657(6)-(7)

Government Code

1 **Senate Bills**

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

3 **San Diego Municipal Code**

4 Ordinance 20356

5 §27.3501

6 §27.3510

7 §27.3563

8 §112.0102(b)

9 §112.0102(c)

10 §112.0501(c)

11 §126.0303

12 §126.303(a)

13 §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 Property¹ 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

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 of reference and expedient access.

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

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

5 On November 8, 2016, the voters of California approved Proposition 64, the Control, Regulate,
 6 and Tax Adult Use of Marijuana Act (“AUMA”). (Control, Regulate, and Tax Adult Use Of Marijuana
 7 Act, 2016 Cal. Legis. Serv. Prop. 64 (hereinafter cited as “Prop. 64”).) The purpose and intent of
 8 AUMA was to: (i) strictly control the cultivation and sale of marijuana “through a system of state
 9 licensing, regulation, and enforcement; (ii) allow local governments to enforce state laws and
 10 regulations; and (iii) bring marijuana into a regulated and legitimate market to create a transparent and
 11 accountable system. (Prop. 64 at §§ 2, 3.) In order to create more legitimacy and transparency, among
 12 other things, AUMA requires the disclosure of all persons who have an interest in the license. (*Id.* at
 13 § 6.1 (adding §§ 26001(a) (providing broad definition of applicant), 26055(a) (licensing authorities may
 14 issue state licenses only to qualified applicants), and 26057 (prohibiting certain applicants from
 15 obtaining a license).)

16 Local Marijuana Laws

17 After the enactment of the MMPA, the City adopted Ordinance No. 20356 (“Ordinance 20356”).
 18 Pursuant to Ordinance 20356, a CUP is required to operate an MMCC. (*See id.* at § 126.0303(a);
 19 § 141.0614.) In February 2017, the City adopted Ordinance No. 20793, which requires a conditional
 20 use permit for a marijuana outlet. (Ordinance No. 20793) at p. 4 (§ 126.0303).) The approval of a CUP
 21 is governed by Process Three, which requires approval by a hearing officer and allows the hearing
 22 officer’s decision to be appealed to the Planning Commission. SDMC § 112.0501 (providing overview
 23 of Process Three).

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

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

3 The first reason for the disclosure requirements is conflict of interest laws. (RT July 8, 2019 at
4 33:10-34:1, the relevant excerpts of which are attached hereto as **Exhibit E**;⁵ *see also* SDMC § 27.3563
5 (prohibiting conflicts of interest).) The City’s ethics ordinances (collectively, the “Ethics Ordinances”)
6 were adopted “to embrace clear and unequivocal standards of disclosure and transparency in government
7 so as to avoid conflicts of interest.” SDMC § 27.3501. The Ethics Ordinances require, among others,
8 that a City official disclose his or her economic interests. *Id.* at § 27.3510. The Ethics Ordinances make
9 it unlawful for any city official to make a municipal decision in which he or she knows, or has reason to
10 know, that they have a disqualifying financial interest. *Id.* at § 27.3561; *see also id.* at §§ 27.3562-63.
11 The Ethics Ordinance applies to hearing officers who make decisions on CUP applications. SDMC
12 § 27.3503 (*see* definitions of “City Official” and “High Level Filer,” the latter includes, by cross-
13 reference to Govt. Code § 87200, hearing officers).

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

20 Failure to Disclose Ownership Interest and Geraci Judgments

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

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

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

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

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

26 Mr. Geraci’s Objective Manifestations

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

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

7 Mr. Geraci then caused certain draft agreements to be exchanged with Cotton. (*See* TE 59 and
 8 62, true and correct copies of which are attached hereto as **Exhibits L and M**, respectively, and
 9 incorporated herein by this reference.) The draft agreements did not state they were amending a prior
 10 agreement for the purchase of the property, did not reference a prior agreement, and the “Date of
 11 Agreement” was “[t]he latest date of execution of the Seller or the Buyer, as indicated on the signature
 12 page.” (*See e.g.*, **Exhibit L** at 059-003.) The draft agreements included terms that were not included in
 13 the November 2, 2016 document, and provide no indication or reference to the alleged November 2,
 14 2016 agreement. (*See id.*) And none of the documents or communications produced by Mr. Geraci ever
 15 referenced extortion, which was never raised during the course of discovery.

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

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

26 _____
 27 ⁷ “Extortion” is defined as the “...obtaining of property or other consideration from another, with his or her consent, or the
 28 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.

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

2 The Court has a duty to, *sua sponte*, refuse to entertain an action that seeks to enforce an illegal
 3 contract. *May v. Herron*, (1954) 127 Cal.App.2d 707, 710-12 (internal citations and quotations omitted)
 4 (voiding contract where plaintiff sought to recover balance due on contract, which recovery would have
 5 allowed plaintiff to “benefit from his willful and deliberate flouting of a law designed to promote the
 6 general public welfare”). “Whether a contract is illegal ... is a question of law to be determined from
 7 the circumstances of each particular case.” *Kashani v. Tsann Kuen China Enterprise Co.* (2004) 118
 8 Cal. App. 4th 531, 540; *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, 838.
 9 A contract is unlawful and unenforceable if it is contrary to, in pertinent part, (1) an express provision
 10 of law; or (2) the policy of express law. Cal. Civ. Code § 1667(1)-(3); *Kashani, supra*, at 541 (contract
 11 must have a lawful object to be enforceable). For purposes of illegality, the “law” includes statutes,
 12 local ordinances, and administrative regulations issues pursuant to the same. *Id.* at 542. “All contracts
 13 which have for their object, *directly or indirectly*, to exempt anyone from responsibility for his own ...
 14 violation of law, whether willful or negligent, are against the policy of the law.” Cal. Civ. Code § 1668
 15 (emphasis added). A contract made for the purpose of furthering any matter prohibited by law, or to aid
 16 or assist any party in the violation of the law, is void. *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104,
 17 1109 (voiding a contract entered into for the purpose of avoiding state and federal income tax
 18 regulations). As summarized in *Yoo v. Jho* (2007) 147 Cal.App.4th 1249:

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

23 *Id.* at 1255 (internal citations and quotations omitted); *see also Kashani, supra*, at 179; Cal. Civ. Code
 24 §§ 1550, 1608. “The test as to whether a demand connected with an illegal transaction is capable of
 25 being enforced is whether the claimant requires the aid of an illegal transaction to establish his case.”
 26 *Brenner v. Haley* (1960) 185 Cal.App.2d 183, 287.

27 *May* is instructive. In *May*, the Newmans and May entered into a contract whereby May agreed
 28 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

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

7 Mr. Geraci, like May, violated local laws in pursuit of his performance under the alleged
 8 November 2, 2016 agreement. On October 31, 2016, Mr. Geraci caused to be filed with the City a CUP
 9 application which failed to disclose his ownership interest in the Property, the CUP, or the Geraci
 10 Judgments, despite the City's requirement that each of the foregoing be disclosed. (*See Exhibit H* at
 11 034-001 (§ 7 requires disclosure of Geraci Judgments), *id.* at 034-004 (requires disclosure of all persons
 12 with an interest in the Property and CUP); SDMC § 112.0102(b) (application shall be made on forms
 13 provided by city manager and shall be accompanied by all the information required by the same); SDMC
 14 § 112.0102(c) (information requested on forms updated "to comply with revisions to local, state, or
 15 federal law, regulation, or policy).

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

24 The alleged November 2, 2016 agreement also violates the policy of express law in the form of
 25 the CUP requirements and AUMA.⁸ The policy of the SDMC is disclosure and transparency in
 26

27 ⁸ Although AUMA was adopted days after the alleged November 2, 2016 agreement, pursuant to Ordinance No. O-20793,
 28 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.

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

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

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

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

26 Only two conclusions could have been reached if the appropriate objective standard had been
 27 applied to both Mr. Cotton and Mr. Geraci. The first possible conclusion is that the alleged November 2,
 28 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 17

Row 676
20 pages

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Superior Court of California,
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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, HALL OF JUSTICE**

LARRY GERACI, an individual,

Plaintiff,

v.

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

Defendants.

AND RELATED CROSS-ACTION

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

Judge: Hon. Joel R. Wohlfeil

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

[IMAGED FILE]

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

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

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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"

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. Rehmkne* (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
 20

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
 25 Errata is dated, *September 15, 2019*, (2 days *after* the papers were filed and served) which belies Mr. Cotton's claim that
 26 the motion was complete, filed and served in a timely manner and that the failure to transmit the signature page and
 27 accompanying documents was a "clerical error. Indeed, it suggests Mr. Cotton's filing was untimely.

28 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.

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.

26
 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.)

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

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

III. ARGUMENT

A. MR. COTTON’S ILLEGALITY ARGUMENTS FAIL

1. Mr. Cotton Has Waived and Abandoned the “Illegality” Argument

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

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.

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.

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 states “*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

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.

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.
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 Dated: September 23, 2019

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

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).)

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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.

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.
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 Dated: September 23, 2019

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