

LEWIS BRISBOIS BISGAARD & SMITH LLP

CORINNE C. BERTSCHE, SB# 174939

E-Mail: Corinne.Bertsche@lewisbrisbois.com

DAVID M. FLORENCE, SB# 242857

E-Mail: David.Florence@lewisbrisbois.com

550 West C Street, Suite 1700

San Diego, California 92101

Telephone: 619.233.1006

Facsimile: 619.233.8627

Attorneys for Defendant

DAVID S. DEMIAN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,

Plaintiff,

vs.

GINA M. AUSTIN, an individual;
JESSICA MCELFFRESH, an individual;
DAVID S. DEMIAN, an individual;
and DOES 1-50, inclusive,

Defendants.

Case No. 3:18-cv-00325-TWR-DEB

**DEFENDANT DAVID S. DEMIAN'S
NOTICE OF MOTION AND
MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED
COMPLAINT**

[Filed Concurrently with Memorandum
of Points and Authorities, Declaration
of Corinne C. Bertsche and [Proposed]
Order]

Date: March 16, 2022

Time: 1:30 p.m.

Judge: The Hon. Todd W. Robinson

Ctrm.: 3A

Trial Date: None Set

**[NO ORAL ARGUMENT
REQUESTED]**

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

PLEASE TAKE NOTICE that on March 16, 2022, at 1:30 p.m., or as soon
thereafter as the matter can be heard in Courtroom 3A, of the above-entitled United
States Courthouse, located at 333 West Broadway, Suite 420, San Diego, CA 92101,
Defendant DAVID S. DEMIAN ("Demian or "Defendant"), will move the Court for

1 an Order dismissing Plaintiff's causes of action in Plaintiff DARRYL COTTON's
2 ("Plaintiff") Second Amended Complaint, with prejudice, pursuant to Federal Rule
3 of Civil Procedure 12(b)(6) on the following grounds:

4 The second amended complaint does not state a claim upon which relief may
5 be granted against Demian and fails to plead any facts or allegations against Demian
6 with the requisite particularity required by the Federal Rules of Civil Procedure, and
7 should therefore be dismissed with prejudice pursuant to FRCP 12(b)(6).

8 This Motion is based upon this Notice of Motion and Motion, the
9 concurrently filed Memorandum of Points and Authorities, Declaration of Corinne
10 Bertsche and documents which this Court is requested to take judicial notice, the
11 Proposed Order, all pleadings, papers, and records on file in this action, and such
12 other matters as may be presented at or before the hearing of the Motion.

13
14 DATED: December 6, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

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16
17 By: s/ Corinne C. Bertsche

18 CORINNE C. BERTSCHE
19 Attorneys for Defendant DAVID S.
20 DEMIAN
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LEWIS BRISBOIS BISGAARD & SMITH LLP

CORINNE C. BERTSCHE, SB# 174939

E-Mail: Corinne.Bertsche@lewisbrisbois.com

DAVID M. FLORENCE, SB# 242857

E-Mail: David.Florence@lewisbrisbois.com

550 West C Street, Suite 1700

San Diego, California 92101

Telephone: 619.233.1006

Facsimile: 619.233.8627

Attorneys for Defendant

DAVID S. DEMIAN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,

Plaintiff,

vs.

GINA M. AUSTIN, an individual;
JESSICA MCELFRISH, an individual;
DAVID S. DEMIAN, an individual;
and DOES 1-50, inclusive,

Defendants.

Case No. 3:18-cv-00325-TWR-DEB

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF DEFENDANT DAVID S.
DEMIAN'S MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED
COMPLAINT**

[Filed Concurrently with Notice of
Motion to Dismiss, Declaration of
Corinne C. Bertsche and [Proposed]
Order]

Date: March 16, 2022

Time: 1:30 p.m.

Judge: The Hon. Todd W. Robinson

Ctrm.: 3A

Trial Date: None Set

**[NO ORAL ARGUMENT
REQUESTED]**

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action arises from Plaintiff Daryl Cotton's ("Plaintiff") breach of contract lawsuit against defendant Larry Geraci ("Geraci") in Superior Court (*Larry Geraci v. Darryl Cotton*, Superior Court of California, County of San Diego 37-2017-00010073-CU-BC-CTL ("Cotton I"). The Second Amended Complaint ("SAC") is Plaintiff's latest attempt to re-litigate issues that have already been presented in the state court action and resolved via judgment.

Plaintiff previously filed a First Amended Complaint ("FAC") on May 13, 2020 adding David Demian ("Demian") as a defendant in this action. Demian had briefly represented Plaintiff in *Cotton I* and withdrew as counsel early in the litigation. Subsequently, Cotton proceeded with the litigation represented by other counsel. The action was tried before a jury and resulted in a judgment in favor of Geraci in August 2019, which was affirmed on appeal. [SAC ¶¶ 81-82; Decl. Bertsche ¶¶ 2-3.] Plaintiff's previous FAC brought causes of action against Geraci, Geraci's counsel, and the judges who previously presided over the *Cotton I* litigation and this action, claiming the *Cotton I* judgment was erroneous and procured by "fraud" and "judicial bias." Plaintiff's FAC against Demian alleged claims for Declaratory Relief and Punitive Damages. Demian previously filed a motion to dismiss those claims, which this court granted.

Plaintiff now presents a SAC against defendants Gina Austin, Jessica Mcelfresh and David Demian, alleging two causes of action for violation of 42 U.S.C. § 1983 and 42 U.S.C. § 1985 against each defendant. Plaintiff's causes of action have no merit.

Plaintiff's first cause of action for violation of 42 U.S.C. § 1983 fails as a matter of law because Demian, as a private individual, was not a state actor nor was acting under the color of the law. Plaintiff's first cause of action also does not

1 present any direct allegations against Demian.

2 Plaintiff's second cause of action for violation of 42 U.S.C § 1985 also fails
3 as a matter of law. Plaintiff's second cause of action also does not contain any
4 allegations against Demian. Plaintiff also cannot allege that Demian in any way
5 prohibited witnesses from testifying and denied Plaintiff access to judicial
6 proceedings as Demian has not been involved with Plaintiff's case since 2017, prior
7 to trial and judgment.

8 For these reasons and for the reasons set forth in more detail below, Demian
9 respectfully requests this court grant this motion with prejudice and without leave to
10 amend.

11 **II. FACTUAL AND PROCEDURAL BACKGROUND**

12 **A. Underlying State Court Action**

13 On March 21, 2017, Geraci filed a complaint in San Diego Superior Court
14 against Cotton (*Cotton I*) for breach of contract arising out of Geraci's alleged
15 purchase of Cotton's real property. Cotton filed a cross-complaint against Geraci
16 and Berry for fraud and breach of contract as to an alleged oral joint venture
17 agreement with Geraci to develop a cannabis dispensary on the property, among
18 other causes of action. [SAC ¶¶ 40- 43, 53.] Demian and his firm, Finch Thornton &
19 Baird LLP ("FTB") represented Plaintiff in the *Cotton I* lawsuit. [SAC ¶ 57.]
20 However, as of December 2017, Demian and FTB no longer represented Plaintiff.
21 [SAC ¶ 63.]

22 Unhappy with adverse rulings in the state court action, Plaintiff initially filed
23 the present lawsuit on February 9, 2019 while *Cotton I* was still pending. [Dkt. No.
24 1.] The court *sua sponte* stayed the present action, pending resolution of plaintiff's
25 state court action.

26 However, in August 2019, following a jury trial in *Cotton I*, where Cotton
27 was represented by other counsel, judgment was entered in favor of Geraci and
28 against Plaintiff finding that the parties had entered into a fully integrated purchase

1 contract. [SAC ¶¶ 81-82; Decl. Bertsche, ¶ 2.] Cotton filed an appeal of the judgment,
 2 which was subsequently dismissed and remittitur issued. [Decl. Bertsche, ¶ 3.] This
 3 Court then lifted the stay of this action and ordered that defendants be served with
 4 any summons or pleadings. [Dkt. 8, 11.] Plaintiff thereafter filed a First Amended
 5 Complaint on May 13, 2020, adding Demian as a defendant and asserting claims for
 6 Declaratory Relief and Punitive damages. However, this Court granted Demian's
 7 motion to dismiss Plaintiff's FAC against Demian on October 22, 2021, with 30
 8 days leave to amend. [Dkt. 96.]

9 On November 22, 2021, Plaintiff filed his Second Amended Complaint¹
 10 against defendants David S. Demian, Gian M. Austin, and Jessica McElfresh,
 11 alleging two different causes of action, namely, violations of 42 U.S.C. § 1983 and
 12 42 U.S.C. § 1985.

13 **B. Plaintiff's Second Amended Complaint.**

14 Plaintiff's SAC alleges violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985.
 15 In support of his first cause of action for violation of 42 U.S.C. § 1983, Plaintiff
 16 alleges that "FTB" failed to disclose prior relationships with Geraci, purposefully
 17 amended Plaintiff's pleadings to sabotage his case, sought to have Plaintiff admit
 18 facts they knew not to be true, among other allegations. [SAC ¶¶ 166-170.]

19 Plaintiff alleges no specific allegations against Demian or "FTB" in his
 20 second cause of action for violation of 42 U.S.C. § 1985.

21 **III. PLAINTIFF'S SECOND AMENDED COMPLAINT FAILS TO STATE** 22 **A CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

23 **A. Legal Standards for a 12(b)(6) Motion**

24 A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a
 25 plaintiff's claims. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Dismissal pursuant
 26

27 ¹ Plaintiff titles his amended pleading "Complaint for: 1. Deprivation of Civil Rights
 28 (42 U.S.C. § 1983); 2. Deprivation of Civil Rights (42 U.S.C. § 1985).

to Rule 12(b)(6) is proper when the Complaint fails to allege sufficient facts to support a cognizable legal theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In order to plead a cause of action, a Complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), citing *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 570 (2007). The reviewing court must accept all well-pleaded facts as true, and in the light most favorable to the non-moving party. *Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002). However, pleadings that are mere conclusions “are not entitled to the assumption of truth.” *Iqbal*, 550 U.S. at 679, 686. As the Supreme Court explains, “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (citations omitted). A case will not be allowed to proceed absent “a Complaint with enough factual matter (taken as true) to suggest the required element.” *Bell Atlantic*, 550 U.S. at 556.

B. Plaintiff’s First Cause of Action for Violation of 42 U.S.C. § 1983 Fails to Assert a Viable Claim Since Demian is Not a State Actor.

Plaintiff’s first cause action improperly alleges Demian violated 42 U.S.C., § 1983. “To state a claim under § 1983, a plaintiff must: (1) allege the violation of a right secured by the Constitution and laws of the United States; and (2) *show that the alleged deprivation was committed by a person acting under color of state law.*” *Naffe v. Frey*, 789 F.3d 1030, 1035-1036 (9th Cir. 2015)(emphasis added); quoting *West v. Atkins*, 487 U.S. 42, 48 (1988); *Tsao v. Desert Palace, Inc.*, 698 F.3d 11238, 1139 (9th Cir. 2012).

To be deemed to act under the color of state law in a § 1983 action requires that the defendant “exercised power ‘possessed by virtue of state law and made

1 possible only because the wrongdoer is clothed with the authority of state law.”
 2 *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S.
 3 299, 326 (1941)). In determining whether the actions of a private actor amount to a
 4 deprivation of rights under the color of state law, courts employ a two-part test.
 5 *Sutton v. Providence St. Joseph Med. Cir.*, 12 F.3d 826, 835 (9th Cir. 1999) (citing
 6 *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)); *Florer v. Congregation*
 7 *Pidyon Shevuyim N.A.*, 639 F.3d 916, 922 (9th Cir. 2003). Under the first part of the
 8 test, “the deprivation must result from governmental policy.” *Sutton*, 192 F.3d at
 9 835. Under the second part, “the party charged with the deprivation must be a
 10 person who may be fairly said to be a state actor.” *Id.* (quoting *Lugar*, 457 U.S. at
 11 937). Both parts of the test must be satisfied for there to be state action. *Collins v.*
 12 *Womancare*, 878 F.2d 1145, 1151 (9th Cir. 1989).

13 “When addressing whether a private party acted under color of law, we
 14 therefore start with the presumption that private conduct does not constitute
 15 governmental action.” *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835
 16 (9th Cir. 1999). (Emphasis added.) The actions of private individuals and entities
 17 not affiliated with state or municipal government generally do not involve action
 18 under color of state law. (See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156, 98 S.
 19 Ct. 1729, 56 L. Ed. 2d 185 (1978) [private person may be subjected to liability
 20 under Section 1983 only when he does so under color of law, i.e., that he both acted
 21 under color of law and that his actions were properly attributable to government].
 22 For conduct by private parties to be under color of state law, it must be “fairly
 23 attributable to the State.” *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct.
 24 2744, 73 L. Ed. 2d 482 (1982) Merely complaining to the police [or other
 25 government agency] does not convert a private party into a state actor. (See *Rivera*
 26 *v. Green*, 775 F.2d 1381, 1382-84 (9th Cir. 1985), *cert. denied*, 475 U.S. 1128, 90 L.
 27 Ed. 2d 198, 106 S. Ct. 1656 (1986). Additionally, providing allegedly false
 28 information to the police [or other government agency] does not transform a private

1 individual into a state actor. (See *Daniel v. Ferguson*, 839 F.2d 1124, 1130 (5th Cir.
 2 1988); *Gilbert v. Feld*, 788 F. Supp. 854, 859-60 (E.D. Pa. 1992) [providing district
 3 attorney with false and misleading information in order to instigate criminal charges
 4 against plaintiff does not expose private parties to Section 1983 liability]. Further, a
 5 bare allegation against a private party of a "joint action" with the State will not
 6 survive a motion to dismiss because a plaintiff must allege facts showing the private
 7 defendant acted under color of state law. *DeGrassi v. City of Glendora*, 207 F.3d
 8 636, 647 (9th Cir. 2000).)

9 Here, the Second Amended Complaint fails to allege any supporting facts to
 10 show that Demian is a state actor or that he acted under the color of state law, nor
 11 can Plaintiff. In fact, Plaintiff's first cause of action for violation of § 1983 only
 12 references Demian's firm, Finch Thornton & Baird ("FTB"), not Demian
 13 specifically. Accordingly, Plaintiff's first cause of action does not present an actual
 14 case or present controversy between Plaintiff and Demian. Nevertheless, even the
 15 allegations against FTB are insufficient to give rise to an actionable cause of action
 16 under § 1983. In his first cause of action, Plaintiff merely alleges that FTB failed to
 17 disclose prior relationships and sought to sabotage Plaintiff's case. [See, e.g., SAC
 18 ¶¶ 166-170.] Yet, those facts still do not demonstrate how either Demian or FTB
 19 were state actors or acted under the color of the law. There are no facts that the State
 20 directed Demian to do any type of action nor are there any facts to establish State
 21 compulsion. "The state compulsion test requires that a State, or political subdivision
 22 thereof, exercise such coercive power over the private actor to take a particular
 23 action that the choice was really the state's and not the private actor's" *Sanders v.*
 24 *Prentice-Hall Corp. Sys.*, 969 F.Supp.481, 485.

25 Plaintiff's first cause of action for violation of U.S.C., § 1983 thus fails as a
 26 matter of law. Demian, a private individual acting as an attorney in a civil action,
 27 clearly is not a State actor and he did not under the color of State law.

28 ///

C. Plaintiff's Second Cause of Action for Violation of 42 U.S.C. § 1985 Fails to Assert a Viable Claim Against Demian

Plaintiff's second cause of action asserts a violation of 42 U.S.C., § 1985, yet fails to identify which subsection of § 1985 he complains of. Based on Plaintiff's claims that there was attempted bribery and conspiracy among all defendants to convince Young not to testify to this Court [SAC ¶¶ 188-189], Plaintiff's second cause of action must fall within the second clause of § 1985 ("§ 1985(2)").

§ 1985(2) itself contains two clauses that give rise to separate causes of action. The first concerns access to federal courts, which Plaintiff alleges here. To state a claim based on the first clause of § 1985(2), a plaintiff must allege: (1) a conspiracy between two or more persons; (2) to deter a party of witness by force, intimidation or threat, from attending federal court or testifying freely, fully and truthfully in any matter pending therein; (3) which has resulted in injury to the party. *David v. United States*, 820 F.2d 1038, 1040 (9th Cir. 1987). Although a plaintiff need not suffer monetary damages, he must show that the conspiracy hampered the party's ability to present an effective case in federal court *Rutledge v. Arizona Board of Regents*, 859 F.2d 732, 735 (9th Cir. 1987.)

Plaintiff's second cause of action against Demian is fatally deficient for a number of reasons. First, Plaintiff's second cause of action contains no specific allegations as to Demian, including how Demian acted in concert with the other defendants to prevent Young from testifying in front of this Court. Rather, Plaintiff's second cause of action contains a conclusory allegation that "the acts taken by defendants, as jointly liable as coconspirators and/or joint tortfeasors, include the attempted bribery and threats against Young to prevent her from testifying in this federal court." [SAC ¶ 189.] Moreover, Cotton's allegations do not implicate Demian at all, but state that "As detailed above, Young has communicated that she will not testify before this Court because of the attempted bribe and threats by Magagna." [SAC ¶ 188.]

Any attempt by Plaintiff to amend his complaint and this cause of action would be futile. Page 16 of Plaintiff's complaint sheds light on the chronology of events involving Young's testifying and Plaintiff's claims of obstruction. Notably, none of the allegations involve Demian, who had not been involved or represented Plaintiff as his attorney for over a year prior to these alleged events. Indeed, Plaintiff alleges to have begun trying to take Young's deposition on January 1, 2019, which was cancelled by Young's attorney, Nguyen. (SAC ¶ 138-141.) Cotton further alleges that on June 30, 2019, the day before the trial in *Cotton I* was to begin, Cotton's attorney, Flores, spoke with Young, who said she moved out of the City, would not testify and did not want anything to do with Cotton or *Cotton I*. (SAC ¶ 142.) Cotton also alleges that Young indicated "that it was Nguyen who had unilaterally decided not to provide her testimony..." (SAC ¶ 145.) There are not only no factual allegations supporting a conspiracy to prevent Young from providing sworn testimony in *Cotton I*, the factual allegations clearly show that Demian was not involved. Demian had stopped representing Cotton as of December 2017, and played no role in any purported conspiracy to prevent Young from testifying in *Cotton I*.

Additionally, and notwithstanding the aforementioned, Plaintiff has also failed to plead the requisite facts to support a claim for violation of § 1985(2). Plaintiff alleges no facts supporting his damages or demonstrating how he was deprived of the right to present his case.

Accordingly, Plaintiff's second cause of action for violation of § 1985 fails as a matter of law.

D. Plaintiff is Not Entitled to Leave to Amend

Leave to amend is not proper if any of the following four factors are present: bad faith, undue delay, prejudice to the opposing party, and/or futility. *Serra v. Lappin*, 600 F.3d 1191, 1200 (9th Cir. 2010); *Tracht Gut, LLC v. L.A. County Treasurer & Tax Collector*, 836 F.3d 1146, 1152 (9th Cir. 2016); *Stone v. Baum*,

1 409 F. Supp. 2d 1164, 1175 (Ariz. Dist. 2005). Much like his previous complaint,
2 Plaintiff's SAC is clearly brought in bad faith and is a futile and improper attempt to
3 relitigate the underlying state court action, and fails to assert any cognizable causes
4 of action against Demian that could plausibly be amended.

5 Demian thus respectfully requests this court dismiss Plaintiff's claims against
6 him with prejudice and without leave to amend.

7 **IV. CONCLUSION**

8 For the foregoing reasons, defendant David Demian respectfully requests this
9 Court grant his motion to dismiss for failure to state a claim.

10
11 DATED: December 6, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

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14 By: s/ Corinne C. Bertsche

CORINNE C. BERTSCHE

Attorneys for Defendant DAVID S.
DEMIAN

LEWIS BRISBOIS BISGAARD & SMITH LLP
 CORINNE C. BERTSCHE, SB# 174939
 E-Mail: Corinne.Bertsche@lewisbrisbois.com
 DAVID M. FLORENCE, SB# 242857
 E-Mail: David.Florence@lewisbrisbois.com
 550 West C Street, Suite 1700
 San Diego, California 92101
 Telephone: 619.233.1006
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Attorneys for Defendant DAVID
 DEMIAN

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,
 Plaintiff,
 vs.

CYNTHIA BASHANT, an individual;
 JOEL WOHLFEIL, an individual;
 LARRY GERACI, an individual;
 REBECCA BERRY, an individual;
 GINA AUSTIN, an individual;
 MICHAEL WEINSTEIN, an
 individual; JESSICA MCELFRISH, an
 individual; and DAVID DEMIAN, an
 individual,

Defendants.

CASE NO. 3:18-cv-00325-TWR-DEB

**DECLARATION OF CORINNE C.
 BERTSCHE IN SUPPORT OF
 DEFENDANT DAVID DEMIAN'S
 MOTION TO DISMISS
 PLAINTIFF'S SECOND AMENDED
 COMPLAINT PURSUANT TO
 FRCP 12 (b)(6)**

Judge: The Hon. Todd W. Robinson
 Date: March 16, 2022
 Time: 1:30 p.m.
 Crtrm.: 3A (Schwartz)

**[NO ORAL ARGUMENT
 REQUESTED]**

I, Corinne C. Bertsche, do declare as follows:

1. I am an attorney at law, duly licensed to practice in all Courts in the State of California. I am a partner with the law offices of Lewis Brisbois Bisgaard & Smith, LLP, and competent to make this declaration. I have personal knowledge of the following facts, and if called as a witness to do so, could and would testify competently as follows.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Judgment on Jury Verdict, filed on August 19, 2019 in *Cotton I*, San Diego Superior Court

4877-2957-1077.1

Case No. 3:18-cv-00325-TWR-DEB

DECLARATION OF CORINNE C. BERTSCHE IN SUPPORT OF DEFENDANT DAVID S. DEMIAN'S MOTION TO DISMISS PLAINTIFF'S SAC PURSUANT TO FRCP 12 (b)(6)

1 Case No. 37-2017-00010073-CU-BC-CTL, *Geraci v. Cotton*, to which this Court is
2 requested to take Judicial Notice.

3 3. Attached hereto as Exhibit 2 is a true and correct copy of the Remittitur
4 filed in *Cotton I* on May 14, 2020, Fourth District Court of Appeal, Division One
5 Case No. D077081, San Diego Superior Court Case No. 37-2017-00010073-CU-
6 BC-CTL, *Geraci v. Cotton*, to which this Court is requested to take Judicial Notice.

7 I declare the following under penalty of perjury under the laws of the State of
8 California and the United States of America. Given this 6th day of December 2021
9 in San Diego, California.

10
11 DATED: December 6, 2021 LEWIS BRISBOIS BISGAARD & SMITH LLP

12
13
14 By: s/ Corinne C. Bertsche
15 CORINNE C. BERTSCHE
16 Attorneys for Defendant DAVID DEMIAN
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Exhibit “1”

Exhibit “1”

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

08/19/2019 at 11:53:00 AM
Clerk of the Superior Court
By Jessica Pascual, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, CENTRAL DIVISION

LARRY GERACI, an individual,

Plaintiff,

v.

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

Defendants.

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

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

JUDGMENT ON JURY VERDICT
[PROPOSED BY PLAINTIFF/CROSS-
DEFENDANTS]

DARRYL COTTON, an individual,

Cross-Complainant,

v.

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

Cross-Defendants.

[IMAGED FILE]

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

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

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

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

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

12 **SPECIAL VERDICT FORM NO. 1**

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

15
16 **Breach of Contract**

17
18 1. Did Plaintiff Larry Geraci and Defendant Darryl Cotton enter into the November 2, 2016
19 written contract?

20 Answer: YES

21
22 2. Did Plaintiff do all, or substantially all, of the significant things that the contract required him
23 to do?

24 Answer: NO

25
26 3. Was Plaintiff excused from having to do all, or substantially all, of the significant things that
27 the contract required him to do?

28 Answer: YES

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

2 Answer: NO

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

5 Answer: YES

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

8 Answer: YES

9 or

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

11 Answer: YES

12
13 7. Was Plaintiff harmed by Defendant's breach of contract?

14 Answer: YES

15
16 **Breach of the Implied Covenant of Good Faith and Fair Dealing**

17
18 8. Did Defendant unfairly interfere with Plaintiffs right to receive the benefits of the contract?

19 Answer: YES

20
21 9. Was Plaintiff harmed by Defendant's interference?

22 Answer: YES

23
24 10. What are Plaintiffs damages?

25 Answer: \$ 260,109.28

26
27 A true and correct copy of Special Verdict Form No. 1 is attached hereto as Exhibit "B."

28 ///

SPECIAL VERDICT FORM NO. 2

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

Breach of Contract

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

Answer: NO

Fraud - Intentional Misrepresentation

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

Answer: NO

Fraud - False Promise

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

Answer: NO

Fraud - Negligent Misrepresentation

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

Answer: NO

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

///

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

2
3 **NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:**

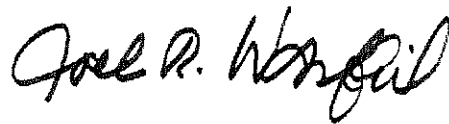
4 1. That Plaintiff LARRY GERACI have and recover from Defendant DARRYL COTTON
5 the sum of \$260,109.28, with interest thereon at ten percent (10%) per annum from the date of entry of
6 this judgment until paid, together with costs of suit in the amount of \$ 33,612.16 added 10/1/19
7 *at*

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

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

12 **IT IS SO ORDERED.**

13
14 Dated: 8-19, 2019



15 Hon. Joel R. Wohlfeil
16 JUDGE OF THE SUPERIOR COURT

17 Judge Joel R. Wohlfeil
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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

24 Signed: [Signature]
Presiding Juror

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?

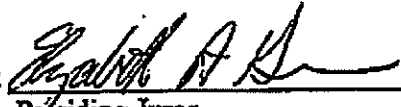
24
25 ☐ Yes ☐ No

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
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Exhibit “2”

Exhibit “2”

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

FILED
Clerk of the Superior Court

MAY 14 2020

By: S. Ochoa, Deputy

San Diego County Superior Court - Main
P.O. Box 120128
San Diego, CA 92112

RE: LARRY GERACI,
Plaintiff, Cross-defendant and Respondent,
v.
DARRYL COTTON,
Defendant, Cross-complainant and Appellant.
D077081
San Diego County Super. Ct. No. 37-2017-00010073-CU-BC-CTL

*** * * REMITTITUR * * ***

I, Kevin J. Lane, Clerk of the Court of Appeal of the State of California, for the Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above-entitled case on February 11, 2020, and that this opinion or decision has now become final.

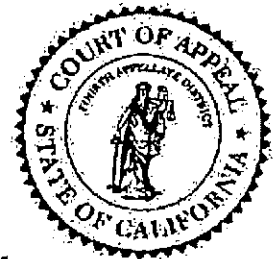
_____ Appellant X Respondent to recover costs.
_____ Each party to bear own costs.
_____ Other (See Below)

5/14/20

Witness my hand and the seal of the Court affixed this

KEVIN J. LANE, Clerk

By: Jonathan Newton, Deputy Clerk



cc: All Parties (Copy of remittitur only, Cal. Rules of Court, rule 8.272(d).)

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

Court of Appeal
Fourth Appellate District

FILED ELECTRONICALLY
02/11/2020

Kevin J. Lane, Clerk
By: Jonathan Newton

LARRY GERACI,
Plaintiff, Cross-defendant and Respondent,

v.

DARRYL COTTON,
Defendant, Cross-complainant and Appellant.

D077081

San Diego County Super. Ct. No. 37-2017-00010073-CU-BC-CTL

THE COURT:

Pursuant to California Rules of Court, rule 8.140, the appeal filed November 21, 2019, is DISMISSED for appellant's failure to timely designate the record (Cal. Rules of Court, rule 8.121(a)) and because appellant did not timely deposit costs for preparing the record on appeal (Cal. Rules of Court, rules 8.122(c), 8.130(b), 8.140).

MCCONNELL

Presiding Justice


cc: Clerk of the San Diego County Superior Court
All Parties

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS my hand and the Seal of this Court.

02/11/2020

KEVIN J. LANE, CLERK
By: *Jonathan Newton*
Deputy Clerk



LEWIS BRISBOIS BISGAARD & SMITH LLP
CORINNE C. BERTSCHE, SB# 174939
E-Mail: Corinne.Bertsche@lewisbrisbois.com
DAVID M. FLORENCE, SB# 242857
E-Mail: David.Florence@lewisbrisbois.com
550 West C Street, Suite 1700
San Diego, California 92101
Telephone: 619.233.1006
Facsimile: 619.233.8627

Attorneys for Defendant DAVID
DEMIAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,
Plaintiff,
vs.

GINA M. AUSTIN, an individual;
JESSICA MCELFRISH, an individual;
DAVID S. DEMIAN, an individual;
and DOES 1-50, inclusive,
Defendants.

CASE NO. 3:18-cv-00325-TWR-DEB
**PROOF OF SERVICE RE: DAVID
DEMIAN'S MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED
COMPLAINT PURSUANT TO
FRCP 12 (b)(6)**

Date: March 16, 2022
Time: 1:30 p.m.
Judge: The Hon. Todd W. Robinson
Crtrm.: 3A

At the time of service, I was over 18 years of age and not a party to the action. My business address is 550 West C Street, Suite 1700, San Diego, CA 92101. I am employed in the office of a member of the bar of this Court at whose direction the service was made.

On December 6, 2021, I served the following document(s):

1. **DEFENDANT DAVID S. DEMIAN'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO FRCP 12 (b)(6)**
2. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT DAVID S. DEMIAN'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO**

FRCP 12 (b)(6)
3. DECLARATION OF CORINNE C. BERTSCHE IN SUPPORT OF
DEFENDANT DAVID DEMIAN'S MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO
FRCP 12 (b)(6)
4. [PROPOSED] ORDER GRANTING DEFENDANT DAVID S.
DEMIAN'S MOTION TO DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT PURSUANT TO FRCP 12 (b)(6)

I served the documents on the following persons at the following addresses
(including fax numbers and e-mail addresses, if applicable):

Darryl Cotton (Plaintiff in Pro Per)
6176 Federal Blvd.
San Diego, CA 92114
(619) 954-4447

The documents were served by the following means:

☒ (BY U.S. MAIL) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and:

☒ Placed the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

Additionally, I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

SEE ATTACHED SERVICE LIST

The documents were served by the following means:

☒ (BY COURT'S CM/ECF SYSTEM) Pursuant to Local Rule, I electronically filed the documents with the Clerk of the Court using the CM/ECF system, which sent notification of that filing to the persons listed above.

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

1 Executed on **December 6, 2021**, at San Diego, California.

2 

3
4 Kelly Cano

5
6
7
8
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Darryl Cotton v. Cynthia Bashant, et al.
Case No. 3:18-cv-00325-TWR-DEB

Julia Dalzell
11622 El Camino Real, Suite 300
San Diego, CA 92130
Tel: (858) 755-8500
jdalzell@pettitkohn.com

*Attorney for Defendants, Gina Austin
and Austin Legal Group*

Gregory Brian Emdee
Kjar McKenna & Stockalper
841 Apollo Street, Suite 100
El Segundo, CA 90245
Tel: (424) 217-3026
gemdee@kmslegal.com

*Attorney for Defendant, Michael
Weinstein*

Carmela E. Duke
Superior Court of California, City of San
Diego
1100 Union Street
San Diego, CA 92101
Tel: (619) 844-2382
carmela.duke@sdcourt.ca.gov

Attorney for Defendant, Joel Wohfeil

Laura Stewart, Esq.
W|M|F
WALSH MCKEAN FURCOLO LLP
550 West C Street, Suite 950
San Diego CA 92101
(619) 232-8486; Fax (619) 232-2691
lstewart@wmflp.com

Attorneys for Defendant, Jessica McElfresh

1 Douglas A Pettit
2 Pettit Kohn Ingrassia & Lutz PC
3 11622 El Camino Real
4 Suite 300
5 San Diego, CA 92130
6 (858)755-8500
7 Fax: (858)755-8504
8 Email: DPettit@PettitKohn.com

9 *Attorney for Defendant, Gina Austin*