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June 25, 2020

No.:	20-71813
D.C. No.:	3:20-cv-00656-BAS-DEB
Short Title:	Andrew Flores, et al v. USDC-CASD

Dear Petitioner/Counsel

A petition for writ of mandamus and/or prohibition has been received in the Clerk's Office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. Always indicate this docket number when corresponding with this office about your case.

If the U.S. Court of Appeals docket fee has not yet been paid, please make immediate arrangements to do so. If you wish to apply for in forma pauperis status, you must file a motion for permission to proceed in forma pauperis with this court.

Pursuant to FRAP Rule 21(b), no answer to a petition for writ of mandamus and/or prohibition may be filed unless ordered by the Court. If such an order is issued, the answer shall be filed by the respondents within the time fixed by the Court.

Pursuant to Circuit Rule 21-2, an application for writ of mandamus and/or prohibition shall not bear the name of the district court judge concerned. Rather, the appropriate district court shall be named as respondent.

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ATTENTION ALL PARTIES AND COUNSEL
PLEASE REVIEW PARTIES AND COUNSEL LISTING

We have opened this appeal/petition based on the information provided to us by the appellant/petitioner and/or the lower court or agency. EVERY attorney and unrepresented litigant receiving this notice MUST immediately review the caption and service list for this case and notify the Court of any corrections.

Failure to ensure that all parties and counsel are accurately listed on our docket, and that counsel are registered and admitted, may result in your inability to participate in and/or receive notice of filings in this case, and may also result in the waiver of claims or defenses.

PARTY LISTING:
Notify the Clerk immediately if you (as an unrepresented litigant) or your client(s) are not properly and accurately listed or identified as a party to the appeal/petition. To report an inaccurate identification of a party (including company names, substitution of government officials appearing only in their official capacity, or spelling errors), or to request that a party who is listed only by their lower court role (such as plaintiff/defendant/movant) be listed as a party to the appeal/petition as an appellee or respondent so that the party can appear in this Court and submit filings, contact the Help Desk at http://www.ca9.uscourts.gov/cmecf/feedback/ or send a letter to the Clerk. If you or your client were identified as a party to the appeal/petition in the notice of appeal/petition for review or representation statement and you believe this is in error, file a motion to dismiss as to those parties.

COUNSEL LISTING:
In addition to reviewing the caption with respect to your client(s) as discussed above, all counsel receiving this notice must also review the electronic notice of docket activity or the service list for the case to ensure that the correct counsel are

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NOTE that in criminal and habeas corpus appeals, trial counsel WILL remain as counsel of record on appeal until or unless they are relieved or replaced by Court order. *See* Ninth Circuit Rule 4-1.

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Every counsel listed on the docket must be admitted to practice before the Ninth Circuit AND registered for electronic filing in the Ninth Circuit in order to remain or appear on the docket as counsel of record. *See* Ninth Circuit Rules 25-5(a) and 46-1.2. These are two separate and independent requirements and doing one does not satisfy the other. If you are not registered and/or admitted, you MUST, within 7 days from receipt of this notice, register for electronic filing AND apply for admission, or be replaced by substitute counsel or otherwise withdraw from the case.

If you are not registered for electronic filing, you will not receive further notices of filings from the Court in this case, including important scheduling orders and orders requiring a response. Failure to respond to a Court order or otherwise meet an established deadline can result in the dismissal of the appeal/petition for failure to prosecute by the Clerk pursuant to Ninth Circuit Rule 42-1, or other action adverse to your client.

If you will be replaced by substitute counsel, new counsel should file a notice of appearance/substitution (no form or other attachment is required) and should note that they are replacing existing counsel. To withdraw without replacement, you must electronically file a notice or motion to withdraw as counsel from this appeal/petition and include your client's contact information.

To register for electronic filing, and for more information about Ninth Circuit CM/ECF, visit our website at http://www.ca9.uscourts.gov/cmecf/#section-registration.

To apply for admission, see the instructions and form application available on our website at https://www.ca9.uscourts.gov/attorneys/.

In the

United States Court of Appeals

For the

Ninth Circuit

IN RE ANDREW FLORES, an individual, AMY SHERLOCK, on her own behalf and on behalf of her minor children, T.S. and S.S., and JANE DOE, an individual,[1]

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

Respondent,

GINA M. AUSTIN, an individual, AUSTIN LEGAL GROUP APC, a California Corporation; JOEL R. WOHLFEIL, an individual; LAWRENCE ("LARRY") GERACI, an individual; TAX & FINANCIAL CENTER, INC., a California Corporation; REBECCA BERRY, an individual; JESSICA MCELFRESH, an individual; SALAM RAZUKI, an individual; NINUS MALAN, an individual; MICHAEL ROBERT WEINSTEIN, an individual; SCOTT TOOTHACRE, an individual; ELYSSA KULAS, an individual; RACHEL M. PRENDERGAST, an individual; FERRIS & BRITTON APC, a California Corporation; DAVID DEMIAN, an individual, ADAM C. WITT, an individual, RISHI S. BHATT, an individual, FINCH, THORTON, and BAIRD, a Limited Liability Partnership; JAMES D. CROSBY, an individual; ABHAY SCHWEITZER, an individual and dba TECHNE; JAMES (AKA JIM) BARTELL, an individual; BARTELL & ASSOCIATES, a California Corporation; MATTHEW WILLIAM SHAPIRO, an individual; MATTHEW W. SHAPIRO, APC, a California corporation; NATALIE TRANG-MY NGUYEN, an individual, AARON MAGAGNA, an individual; A-M INDUSTRIES, INC., a California Corporation; BRADFORD HARCOURT, an individual; ALAN CLAYBON, an individual; SHAWN MILLER, an individual; LOGAN STELLMACHER, an individual; EULENTHIAS DUANE ALEXANDER, an individual; BIANCA MARTINEZ; an individual; THE CITY OF SAN DIEGO, a municipality; 2018FMO, LLC, a California Limited Liability Company;

---

[1] Jane Doe's estate has withdrawn their consent for attorney-petitioner Andrew Flores to continue to represent her in the underlying manner as a result of the of the issuance of the order that is the subject of this writ.

FIROUZEH TIRANDAZI, an individual; STEPHEN G. CLINE, an individual; JOHN DOE, an individual; JOHN EK, an individual; THE EK FAMILY TRUST, 1994 Trust; DARRYL COTTON, an individual

Real Parties In Interest.

FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CASE NO. 20-CV-656-BAS-DEB

PETITION FOR WRIT OF MANDAMUS EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

RELIEF REQUESTED BY JULY 3, 2020

ANDREW FLORES,
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Petitioner *In Propria Persona*,
and counsel for Petitioners
Amy Sherlock and her minor
children T.S. and S.S.

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INTRODUCTION

Lawrence Geraci has been sued and sanctioned at least three times by the City of San Diego (the "City") for his owning/management of illegal marijuana dispensaries at his real properties. Consequently, pursuant to State of California (the "State") and City laws, regulations and public policies, Geraci cannot own a conditional use permit ("CUP") or license to operate a legal cannabis dispensary as a matter of law (the "Sanctions Issue").

Darryl Cotton is the owner-of-record of real property (the "Property") in the City that qualifies for a cannabis CUP. Geraci, in order to prevent Cotton from selling the Property to a third-party, fraudulently induced Cotton into entering an oral joint venture agreement and promised to provide Cotton, *inter alia*, a 10% equity position in the CUP as consideration for the Property (the "JVA"). However, Geraci could not actually honor the JVA because he could not own a cannabis CUP because of the Sanctions Issue.

To unlawfully circumvent the Sanctions Issue, Geraci submitted a CUP application at the Property using his secretary, Rebecca Berry, as a proxy (the "Berry Application"). In the Berry Application, in violation of applicable disclosure laws, regulations and the plain language of the City's CUP application forms that she certified she understood, Berry knowingly and falsely certified that she is the true and *sole* owner of the CUP being applied for (the "Berry Fraud" and, collectively with the Sanctions Issue, the "Illegality Issues").

Cotton discovered the Berry Fraud and demanded that Geraci reduce the JVA to writing. Geraci refused, Cotton then terminated the JVA with Geraci and entered into a written joint venture agreement with Richard Martin (petitioner-attorney Andrew Flores' predecessor in interest). The next day, Geraci's attorneys from the law firm of Ferris & Britton ("F&B") served Cotton with a sham action, *Cotton I*[2], and a recorded lis pendens on the Property (the "F&B Lis Pendens"). The *Cotton I* complaint denies the existence

[2] "*Cotton I*" means *Geraci v. Cotton*, San Diego Superior Court, Case No. 37-2017-00010073-CU-BC-22 CTL.

of the JVA and is predicated on the false allegation that a three-sentence document, executed as a *receipt* by Geraci and Cotton, is a *contract* for Geraci's purchase of the Property (the "November Document").

Demonstrating the favorable systemic judicial bias in favor of wealthy and white litigants and attorneys,[3] Geraci and his attorneys successfully tried *Cotton I* before Judge Joel R. Wohlfeil. The *Cotton I* judgment enforces an alleged contract (i) that cannot be a contract as a matter of law and (ii) whose object is Geraci's ownership of a cannabis CUP that he cannot own as a matter of law pursuant to the Berry Application because of the Illegality Issues. Axiomatically, the *Cotton I* judgment is void for being the instrument pursuant to which a criminal conspiracy was effectuated: "No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out." *Bassidji v. Goe*, 413 F.3d 928, 938 (9th Cir. 2005) (quoting *Lee On v. Long*, 37 Cal.2d 499, 234 P.2d 9, 11 (1951)).

Pursuant to FRCP 65(b), Petitioners filed an ex parte application in federal court seeking a temporary restraining order without notice ("TRO") to stop the enforcement of the *Cotton I* judgment to prevent the irreparable loss of third-party testimony and property (the cannabis CUP at issue in *Cotton I*) (the "Application"). Judge Bashant's order denied the Application because Petitioners purportedly failed to comply with FRCP 65(b) and did so without addressing the Illegality Issues or the evidence of violence and coercion taken to intimidate a witness from providing her testimony in *Cotton I* (the "Order") Exhibit No. 12.

As demonstrated below, Petitioners did comply with FRCP 65(b). However, *arguendo*, assuming Petitioners failed to comply with FRCP 65(b), Judge Bashant still

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[3] *See, gen.,* Kathleen Mahoney, *Judicial Bias: The Ongoing Challenge*, 2015 J. Disp. Resol. 43, 66 (2015); Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J. F. 406 (2017); Rachlinski, Jeffrey J., *et al.*, "*Does Unconscious Racial Bias Affect Trial Judges?*", 84 Notre Dame L. Rev. 1195, 1196 (2009) ("Justice is not blind. Researchers have found that black defendants fare worse in court than do their white counterparts."); Scarnecchia, Suellyn. "*Gender and Race Bias against Lawyers: A Classroom Response*." U. Mich. J. L. Reform 23 (1990).

had a duty *sua sponte* to address the illegality of the contract in the interest of the administration of justice. *California Pacific Bank v. Small Bus. Admin* ("*Pacific Bank*"), 557 F.2d 218, 223 (9th Cir. 1977) ("[O]ne cannot estop a party from asserting the illegality of a contract. The court has a ***duty*** *sua sponte* to raise the issue in the interest of the administration of justice.") (Emphasis added).

Corina Young is a third party with testimony damaging to Geraci in *Cotton I* whose testimony was repeatedly sought and subpoenaed. Young's testimony was never acquired and thus never presented to the jury in *Cotton I* for two reasons. First, Young was successfully threatened from providing her testimony by Aaron Magagna, a client of Gina M. Austin, who also acts as one of Geraci's attorneys who was responsible for the preparation and submission of the Berry Application. Magagna is also the individual who ultimately acquired the cannabis CUP that was the object of *Cotton I*. Second, Young was prevented from providing her testimony by her own attorney, Natalie Nguyen. Nguyen unilaterally canceled two deposition for Young and promised Cotton's counsel to provide Young's testimony before trial, but never provided it. Shortly before trial, Nguyen told Young it was "OK" to not provide her testimony "because it was too late for Cotton to do anything about it." Nguyen went to law school with Austin and were admitted to the California Bar on the same day. Young had been referred to Nguyen for defense in the *Cotton I* action by her own cannabis attorney, Matthew Shapiro, who is also an attorney of Magagna and someone who has a close professional relationship with Austin (often making special appearances for her).

The evidence presented to Judge Bashant, that Young was threatened and coerced from providing testimony, constitutes obstruction of justice and a fraud on the court (hereinafter, the "Obstruction of Justice Issue"). At the very least, Judge Bashant should have held a hearing to determine the veracity of the evidence provided or to clear up any confusion she may have had regarding same. Had the evidence in support of the Obstruction of Justice Issue been fabricated or misrepresented in any manner, then counsel for Petitioners should have been severely sanctioned for unjustifiably alleging

exigent circumstances. But his evidence and arguments should not have been ignored and left completely unaddressed given the gravity of the allegations of violence against an innocent third-party; particularly as the illegality of the contract is an incontrovertible fact that once judicially established makes the allegations of violence and witness tampering not just possible, but virtually certain given the relationships of the parties.

Judge Bashant's failure to even address the evidence of violence and unlawful coercion by an officer of the court against a witness not only *judicially ratifies* such abhorrent conduct as a litigation strategy, if not corrected via mandamus, it shall serve as eternal precedent to embolden unscrupulous attorneys and violent individuals in the future to collude to take similar action. Because of the temporal aspect of the relief requested, the very reason an ex parte TRO is possible without notice, this is not harmless error that can be remedied on remand even if the relief were subsequently granted by Judge Bashant.

QUESTIONS PRESENTED

1. Does the *Cotton I* judgment enforce an illegal contract?

2. Did Petitioners fail to comply with the requirements of FRCP 65(b) for the issuance of a TRO without notice to prevent the loss of property and the loss of third-party testimony?

3. Did Judge Bashant have an independent and *sua sponte* affirmative duty to address whether the *Cotton I* judgment is void because of the Illegality Issues and the Obstruction of Justice Issue?

STATEMENT OF THE CASE

Geraci is part of a small group of wealthy individuals and attorneys (the "Enterprise") in the City that have conspired to create an unlawful monopoly in the cannabis market (the "Antitrust Conspiracy"). The Enterprise includes attorneys from multiple law firms that are used to create the appearance of competition and legitimacy, while, in reality, *inter alia*, the attorneys conspire against some of their own non-Enterprise clients to ensure that virtually all cannabis CUPs in the City go to principals of the Enterprise. *Cotton I* was filed as an act in furtherance of the Antitrust Conspiracy.

Petitioners are all victims of the Antitrust Conspiracy. However, their individual cases must be made out with circumstantial evidence or facts that have not yet been judicially established. Proving that *Cotton I* was filed as a sham action by Geraci and his attorneys is prima facie evidence of the Antitrust Conspiracy. Judicially establishing as a matter of law that Geraci cannot own a cannabis CUP establishes liability against, *inter alia*, the City employees/attorneys who testified on Geraci's behalf or ratified the Berry Application with the Berry Fraud. *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir. 1996) ("We have found municipal liability on the basis of ratification when the officials involved adopted and expressly approved of the acts of others who caused the constitutional violation.").

ORAL ARGUMENT REQUESTED

Petitioners respectfully request oral argument. The Antitrust Conspiracy accuses multiple City officials and employees, highly ostensibly reputable professionals, and prominent private and government attorneys of being complicit in a cannabis pay-to-play scheme in the City. To date, nine judges[4] have failed to address, *inter alia*, the Sanctions Issue (except for Judge Wohlfeil who only did so post-trial and found the defense of illegality had been waived). Petitioners speculate that, in part, every judge that has failed to adjudicate the Sanctions Issue has done so because they assume the Antitrust Conspiracy is absurd and simply not possible.

Thus, the narrow focus of this petition. However, to the extent this Court wants to address the Antitrust Conspiracy or any other allegations set forth in Petitioners' complaint giving rise to this petition, or if any of Petitioners' adversaries produce or allege

[4] Judge Joel Wohlfeil and Judge Eddie C. Sturgeon in state court; Cotton filed two writs appealing Judge Wohlfeil's orders that were before Justices Richard D. Huffman, Joan Irion, William S. Dato, Judith D. McConnell, and Patricia D. Benke; and Cotton's federal actions have been before Judge Gonzalo P. Curiel (who recused himself after making several rulings), Judge Thomas J. Whelan (who also recused himself after receiving the case from Judge Curiel), and one is presently before Judge Cynthia A. Bashant (*Cotton v. Geraci et al*, 3:18-cv-00325-BAS-DEB).

evidence that purportedly negate the facts and arguments set forth herein (the record in *Cotton I* demonstrates that they have repeatedly and blatantly fabricated evidence and changed their judicial and evidentiary admissions without judicial consequence), Petitioners request an oral hearing to address any such concerns or alleged evidence.

STATEMENT OF FACTS

I. THE SANCTIONS ISSUE

1. On June 17, 2015, a Stipulated Judgement in *City of San Diego v. CCSquared Wellness Cooperative*, San Diego Superior Court Case No. Case No. 37-2015-00004430-CU-MC-CTL, was filed in which Geraci judicially admitted that: "The address where the Defendants were maintaining a marijuana dispensary business at all times relevant to this action is 3505 Fifth Ave, San Diego [the 'Geraci Property']." (Exhibit No. 1 (the "CCSquared Judgment") at ¶ 4 (emphasis added).)

2. "The [Geraci Property] is owned by JL 6th Avenue Property, LLC (JL)… Defendants GERACI and KACHA are members of JL and hereby certify they have authority to sign for and bind herein." (*Id*. at ¶¶ 4-5.)

3. Geraci and his co-defendants were jointly sanctioned as "civil penalties" the amount of $25,000. (*Id*. ¶ 17.)

II. NEGOTIATIONS FOR THE PROPERTY AND THE NOVEMBER DOCUMENT

Per Geraci's sworn declaration:

4. "In approximately September of 2015, I began lining up a team to assist in my efforts to develop and operate a [dispensary] in the [City]." (Exhibit No. 2 (Geraci Decl.), ¶ 2.)

5. "I hired… design professional, Abhay Schweitzer of TECHNE[,] a public affairs and public relations consultant with experience in the industry, Jim Bartell of Bartell & Associates. In addition, I hired a land use attorney, Gina Austin of Austin Legal Group." (*Id*.)

6. "In approximately June 2016, [I was introduced to the Property] as a potential site for acquisition and development for use and operation as a [dispensary]."

(*Id.* at ¶ 3.)

7. "[I]n approximately mid-July 2016… I expressed my interest to Mr. Cotton in acquiring his Property if our further investigation satisfied us that the Property might meet the requirements for [a dispensary] site." (*Id.*)

8. "On November 2, 2016, Mr. Cotton and I executed [the November Document.]" (*Id.* at ¶ 5.)

9. "After we signed the [November Document], Mr. Cotton immediately began attempts to renegotiate our deal for the purchase of the Property. This literally occurred the evening of the day he signed the [November Document]." (*Id.* at ¶ 10.)

10. "On November 2, 2016, at approximately 6:55 p.m., Mr. Cotton sent me an email, which stated:

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

(The "Request for Confirmation") (*Id.* at ¶ 10 (emphasis added).)

11. "I responded from my phone '***No no problem at all***.'" (The "Confirmation Email") (*Id.* (emphasis added).)

12. "The next day I read the entire email and I telephoned Mr. Cotton because the total purchase price I agreed to pay for the subject property was $800,000 and I had never agreed to provide him a 10% equity position in the dispensary as part of my purchase of the property." (*Id.*)

13. "Mr. Cotton's response was to say something to the effect of 'well, you don't get what you don't ask for.' He was not upset and he commented further to the effect that things are 'looking pretty good-we all should make some money here.' And that was the end of the discussion." (The "Disavowment Allegation") (*Id.*).

14. Geraci has no evidence other than his self-serving testimony that the Disavowment Allegation took place. (*See, gen., id*.)

III. THE BERRY FRAUD

15. On October 31, 2016, Berry submitted the Berry application to the City. The Berry Application included Form DS-318 (Ownership Disclosure Statement) and Form DS-3032 (General Application). (Exhibit No. 3. (Ownership Disclosure Statement) and Exhibit No. 4 (General Application).)

16. In the General Application, Berry certified the following to be true:

> I certify that I have read this application and state the above information is correct, and that I am the property owner, authorized agent of the property owner, or other person having a legal right, interest, or entitlement to the use of the property that is the subject of this application (Municipal Code Section 112.0102). I understand that the applicant is responsible for knowing and complying with the governing policies and regulations applicable to the proposed development or permit.

(Exhibit 4.)

17. The Ownership Disclosure Statement required Berry to provide a list that:

> … ***must*** include the names and addresses of ***all*** persons who have an interest in the property, ***recorded or otherwise***, and state the type of interest (*e.g.*, tenants who will benefit from the permit, ***all*** individuals who own the property).

(Exhibit 3) (emphasis added).

18. Berry did not disclose Geraci in any capacity in the Berry Application as required by the plain language of the Ownership Disclosure Statement. (*See id.*)

19. Berry testified at trial in *Cotton I* that the failure to disclose Geraci was purposeful and purportedly because Geraci was an Enrolled Agent with the IRS. Exhibit No. 5 (Cotton's Motion for New Trial (the "MNT")) at 26:19-27:5 (transcript of Berry's testimony at *Cotton I* trial attached as an exhibit to the MNT).

IV. THE OBSTRUCTION OF JUSTICE ISSUE

20. On January 21, 2019, Nguyen promised to provide Young's testimony confirming, *inter alia*, the Bartell Statement and Magagna's attempts at bribing and threatening her. Exhibit No. 6 (email chain between Nguyen to Jacob).

21. On June 12, 2019, after Nguyen failed to provide Young's testimony for almost give months, despite repeated requests that she do so, Jacob emailed Nguyen demanding she provide Young's promised testimony. (Jacob Decl. ¶ 11; Exhibit No. 6) (email correspondence between Nguyen and Jacob between January 1, 2019 and June 12, 2019 regarding Young's testimony).

a. The subpoena, served on Young on January 1, 2019, for deposition to be held on January 18, 2019 was unilaterally canceled by Nguyen and is attached to the Jacob Decl. as Exhibit 1.

b. The notice amending the subpoena for the date of the deposition, served on Young on February 26, 2019, was unilaterally canceled by Nguyen and is attached to the Jacob Decl. as Exhibit 2.

22. Nguyen never responded. (Jacob Decl. ¶ 12.)

23. The *Cotton I* trial was held without Young's testimony regarding Bartell or Magagna. (Jacob Decl. ¶ 12.)

V. THE MOTION FOR NEW TRIAL: THE WAIVER OF ILLEGALITY AS AN AFFIRMATIVE DEFENSE

24. On September 13, 2019, after judgement was entered in favor of Geraci in *Cotton I*, Cotton filed a motion for new trial arguing, *inter alia*, it is illegal for Geraci to own a cannabis CUP via the Berry Application. Exhibit No. 5 at 13:7-14:5 (MNT).

25. On September 23, 2019, Geraci filed an opposition to the MNT in which he argued, *inter alia*, that Cotton had waived the defense of illegality. *See* Exhibit No. 7 (Opp. to MNT) at 10:16-11:4 ("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.").

26. Cotton's Reply to the MNT pointed out that Cotton *factually* had not and

legally could not waive the defense of illegality. Exhibit No. 8 (Reply to MNT) at 3:1-4:20; *id*. at 3:9-13 ("The argument also ignores the well-established rule that 'even though the defendant in their pleading do not allege the defense of illegality if the evidence shows the facts from which the illegality appears it becomes "'the duty of the court *sua sponte* to refuse to entertain the action.'" *May v. Herron* (1954) 127 Cal.App.2d 707, 710 (quoting *Endicott v. Rosenthal* (1932) 216, Cal 721, 728.)").

27. On October 25, 2019, Judge Wohlfeil held a hearing on the MNT. The MNT hearing transcript reflects that Judge Wohlfeil incorrectly believed that the Illegality Issues had not previously been raised prior to the MNT and Weinstein's opposition argument that Cotton therefore had waived the defense of illegality. Exhibit No. 9 (MNT hearing transcript) at 3:1-7 ("THE COURT: […] Counsel, shouldn't this have been raised at some earlier point in time?").

28. At the hearing, specially appearing counsel for Cotton raised State and City statutes and regulations arguing Geraci could not own a cannabis CUP and doubly so pursuant to the Berry Application because of the Berry Fraud. (Exhibit No. 9 (MNT hearing transcript) at 3:13-21.

29. The minute order denying the MNT does not provide Judge Wohlfeil's reasoning, simply stating the MNT is denied. Exhibit No. 10 (minute order).

VI. THE APPLICATION AND ORDER

30. According to the state and federal websites with their respective biographies, Judge Wohlfeil and Judge Bashant both served on the San Diego Superior Court for approximately seven years before Judge Bashant was elevated to the federal court.

A. The Application

31. On April 3, 2020, Flores filed the underlying suit, including Judge Wohlfeil as a defendant, and the Application. Petitioners underlying suit includes a cause of action pursuant to 42 U.S.C. § 1986 for "NEGLECT TO PREVENT A WRONGFUL ACT."

32. In their Application, Petitioners were seeking, *inter alia*, (i) a TRO enjoining Magagna from selling/transferring the cannabis CUP pending a hearing on a preliminary

injunction; (ii) an order compelling Nguyen to appear at the preliminary injunction hearing to testify regarding her failure to provide Young's promised testimony; and (iii) an order compelling Young to appear at the hearing regarding her failure to provide her promised testimony.

33. In support of the Application, Flores provided a supporting declaration that includes the following declarations:

> (i) On June 30, 2019, the day before *Cotton I* trial started, Young called [Joe] Hurtado while I was present. Hurtado put the call on speakerphone and I informed Young that Jacob was trying to serve her with a subpoena to testify at *Cotton I* as her testimony was crucial to his case and that he never received the statement she promised to provide.
>
> (ii) Young stated that she had moved out of the City, could not be served and did not "want anything to do with Cotton or the litigation." I informed Young that her absconding was not going to end the case because regardless of the outcome of *Cotton I*, I would be filing my own lawsuit against the defendants named herein once I had finished conducting my due diligence and investigations. It was at that point that Young stated, *inter alia*, that my family and I should be fearful because Austin and Magagna were "dangerous."
>
> (iii) [On a phone call with Young,] Young broke down and began to explain that she had done nothing illegal and that it was her attorney Natalie Nguyen who told her not to provide her testimony and ignore the subpoena; that she was referred to Nguyen by attorney Matt Shapiro; and that Shapiro paid almost all of her fees due to Nguyen for her legal services.
>
> (iv) The owner of the [business operating a tire ship located at 6230 Federal Blvd, San Diego, CA 92114] would not provide me his name but did confirm that he was being "evicted." He requested he not be involved in any litigation.
>
> (v) I declare under penalty of perjury according to the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 3, 2020 at San Diego, California.

(*Flores v. Austin,* 3:20-cv-0656-BAS-DEB, Dock. No. 2 (TRO), Attachment 8 (Flores Decl.) at, respectively, ¶¶ 24, 25, 28, 31, and 42).)

34. In support of the Application, Petitioners also sought a Request for Judicial Notice of a declaration by Hurtado in *Cotton I* which authenticated the text messages between Hurtado and Young. In the text messages, Young confirms the Bartell Statement and the attempted bribe/threats by Magagna. (*Id.*, Dock. No. 3 (RJN), No. 19 (Hurtado Decl.); the Hurtado Decl. is attached hereto as Exhibit 11).

B. The Order

35. On April 20, 2020, Judge Bashant issued the Order. The total effect of the Order is to make Petitioners' case appear to be frivolous and counsel for Petitioners, Flores, to be professionally incompetent. (Exhibit No. 12.)

36. Specifically, the Order states that: (i) the Complaint filed by Petitioners is "confusing"; (ii) that Petitioners filed suit alleging a cause of action for "neglect to perform wrongful act"; (iii) that Young is a "defendant"; (iv) that Petitioners reasoning for seeking Young's testimony is "unclear"; and (v) that Flores failed to comply with FRCP 65(b) by not certifying in an "affidavit" the facts for why a TRO should issue without notice. (*Id.*)

37. The Order accuses Petitioners of making material factual statements that Petitioners did not make, is contradicted by the facts actually alleged and provided, and is legally contradicted insofar as a declaration is the equivalent of an affidavit if, as here, it meets the requirements of 28 U.S.C. § 1746.

38. As a result of Judge Bashant's Order, Jane Doe's estate withdrew their consent for Flores to proceed with her representation in the underlying action. (Flores Decl. ¶ 9.)

39. Jane was not married and is survived by her 87-year old mother and her two-year old son. (Flores Decl. ¶ 10.)

40. Jane's mother, as the representative of Jane's estate, withdrew its consent because she believes that Judge Bashant is motivated to cover-up Judge Wohlfeil's bias

and Flores is not professionally competent to expose Geraci if he must also expose the judiciaries as biased/incompetent. Throughout *Cotton I* Geraci's attorneys assassinated the character and integrity of Cotton, Cotton's attorneys, and supporters. Jane's mother does not want Jane's reputation to be maligned and she believes the Order reflects that Judge Bashant's priority is preventing the exposure of Judge Wohlfeil as a biased/corrupt judge. (Flores Decl. ¶ 11.)

ARGUMENT

I. APPLICABLE LAW

A. The *Bauman* Factors

In considering whether to grant a writ of mandamus, the Court is guided by the five factors identified in *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977):

(1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief;

(2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal;

(3) whether the district court's order is clearly erroneous as a matter of law;

(4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and

(5) whether the district court's order raises new and important problems or issues of first impression.

Perry v. Schwarzenegger, 591 F.3d 1147, 1156 (9th Cir. 2010) (citing *Bauman*, 557 F.2d at 654–55).

Not every factor need be present at once, and it is a rare case where all factors point in one direction or where every guideline is both relevant and applicable. *Hernandez v. Tanninen*, 604 F3d 1095, 1099 (9th Cir. 2010). As set forth below, Petitioners meet the first three of the five *Bauman* factors.

B. Material State and City Laws and Regulations[5]

i. *General City CUP Application Requirements*

Since August 1993, SDMC § 11.0401 has prohibited the furnishing of false or incomplete information in any application for any type of permit or CUP from the City. (*See* SDMC § 11.0401(b) ("No person willfully shall make a false statement or fail to report any material fact in any application for City license, permit, certificate, employment or other City action under the provisions of the [SDMC].").)

SDMC § 11.0402 provides that "[w]henever in [the SDMC] any act or omission is made unlawful, it shall include causing, permitting, aiding or abetting such act or omission."

SDMC § 121.0302(a) proves that: "It is unlawful for any person to maintain or use any premises in violation of any of the provisions of the Land Development Code, without a required permit, contrary to permit conditions, or without a required variance."

The Land Development Code consists of Chapters 11 through 14 of the SDMC (encompassing §§ 111.0101-1412.0113). (SDMC § 111.0101(a).)

The City's General Application for CUP applications requires - and cites SDMC § 112.0102 - that an applicant certify they are the owner, an agent of the owner, or a person having a legal right to the property on which the CUP application is filed on.

SDMC § 121.0311 states as follows: "Violations of the Land Development Code shall be treated as ***strict liability*** offenses regardless of intent." (Emphasis added.)

ii. *Cannabis CUP Application Requirements*[6]

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[5] For simplicity, Petitioners do not set forth all the numerous State and City laws and regulations that are violated by the Berry Application and the Berry Fraud.

[6] The Berry Application was originally a medical cannabis CUP application that was converted to a for-profit cannabis retail CUP application during the course of *Cotton I*. Throughout the Course of *Cotton I*, various cannabis laws and regulations at the State and City level were applicable to medical and non-medical applications that changed over time. For simplicity, Petitioners focus on the primary State statute that applied when the *Cotton I* judgement was issued, BPC § 26057.

SDMC § 42.1502 defines a "cannabis outlet" (i.e., a dispensary) as a "retail establishment operating with a Conditional Use Permit in accordance with… retailer licensing requirements contained in the California Business and Professions Code [("BPC")] sections governing *cannabis* and medical *cannabis*." (Emphasis in original.)

BPC § 26057 (Denial of Application) provides as follows:

> (a) The licensing authority ***shall deny*** an application if… the applicant… do[es] 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 or inability to comply with the provisions of this division, any rule or regulation adopted pursuant to this division…
>
> (3) Failure to provide information required by the licensing authority.
> ….
> (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 cannabis activities… in the three years immediately preceding the date the application is filed with the licensing authority.

BPC § 26057(a),(b)(1)(3)(7) (emphasis added).

II. THE *COTTON I* JUDGMENT ENFORCES AN ILLEGAL CONTRACT

"Whether a contract is illegal . . . is a question of law to be determined from the circumstances of each particular case." *Kashani v. Tsann Kuen China Enterprise Co.*, 118 Cal.App.4th 531, 540 (Cal. Ct. App. 2004) (citation and quotation omitted). A contract is unlawful and unenforceable if it is contrary to, in pertinent part, (1) an express provision of law; or (2) the policy of express law. Cal. Civ. Code §1667(1)-(2). For purposes of illegality, the "law" includes statutes, local ordinances, and administrative regulations issued pursuant to same. *Kashani*, 118 Cal.App.4th at 542. A contract made for the purpose of furthering any matter prohibited by law, or to aid or assist any party in the violation of the law, is void. *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109

(voiding a contract entered into for the purpose of avoiding state and federal income tax regulations).

The test for illegality is "whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant." *Id*. at 1109.

A. The Sanctions Issue

Geraci was sanctioned on June 17, 2015 in the CCSquared Judgment for "maintaining" an illegal dispensary at the Geraci Property. At trial in *Cotton I*, Geraci lied and said he has never operated a dispensary. Even assuming his judicial admissions in the Stipulated Judgment did not directly contradict his testimony, as a co-owner of JL he is still liable. "[A]s the owner of the [Geraci Property] where an illegal marijuana facility was operating, [Geraci is] strictly liable for the offense, regardless of his knowledge, intent, or active participation in the operation. [Citations.]" *City of San Diego v. Medrano*, D071111, at *7 (Cal. Ct. App. Aug. 2, 2017) (unpublished); *see People v. Superior Court of L.A. Cnty.*, 234 Cal.App.4th 1360, 1385 (Cal. Ct. App. 2015) ("[Party's] claim that he lacked knowledge that there was a marijuana facility on his property lacks merit as violation of [the Los Angeles Municipal Code] section 12.21A.1(a) is a strict liability offense.").

Pursuant to BPC § 26057(a),(b)(7), applicable to all cannabis CUP applications with the City (*see* SDMC § 42.1502), Geraci was barred from owning a cannabis CUP until June 18, 2018.

The Berry Application was submitted on October 31, 2016. Therefore, setting aside other arguments, because the November Document's object is Geraci's ownership of a cannabis CUP, which is illegal, it is void and unenforceable. *Consul Ltd. v. Solide Enterprises, Inc.*, 802 F.2d 1143, 1148 (9th Cir. 1986) ("A contract to perform acts barred by California's licensing statutes is illegal, void and unenforceable.").

B. The Berry Fraud

Geraci applied for a cannabis CUP at the Property via the Berry Application and the Berry Fraud. Berry's failure to disclose Geraci in the Berry Application:

(i) violates the plain and clear requirement set forth in the Ownership Disclosure Form requiring a list of all parties with an interest in the CUP or the Property (required pursuant to SDMC § 112.0102 as cited to in the Ownership Disclosure Form);

(ii) violates SDMC § 11.0401 (prohibiting willful false statements in CUP applications);

(iii) makes Berry and Geraci jointly liable pursuant to SDMC § 11.0402 (joint liability for aiding & abetting) for which there can be no excuse as the violations are treated as strict liability offenses regardless of intent pursuant to SDMC § 121.0311; and

(iv) violates BPC § 26057(b)(3) ("The applicant has failed to provide information required by the licensing authority."). *See* Cal. Code Regs. tit. 16 § 5003(b)(1) (defining "Owner" for purposes of cannabis applications as, *inter alia*, a "person with an aggregate ownership interest of 20 percent or more in the person applying for a license or a licensee").

In *Homami,* the court declined to enforce an oral contract that provided that a buyer of real property would pay interest secretly to the seller in order to allow the seller to avoid declaring interest income and thus to evade required taxes. *Homami* at 1104. In reaching its decision, the court identified a "group of cases… involv[ing] plaintiffs who have attempted to circumvent federal law. Generally, these cases arise where nonveterans seek to obtain government benefits and entitlements available to veterans only, either by setting up a strawman veteran or otherwise by falsifying documents." *Homami* at 1110.

Here, similarly, Geraci used his secretary Berry as a strawman, or rather a strawwoman, to unlawfully acquire a cannabis CUP that he could not own in his own name. And he did so via a fraudulent application that violated clearly applicable State and City laws and regulations requiring the disclosure of Geraci.

Therefore, even setting aside the Sanctions Issue, the *Cotton I* judgment is void because Geraci cannot own a cannabis permit via the Berry Application because of the

Berry Fraud. "To permit a recovery here on any theory would permit [Geraci] to benefit from his willful and deliberate flouting of [the] law[s] designed to promote the general public welfare." *Id*. at 1110 (quoting *May*, *supra*, at 712).

III. THE BAUMAN FACTORS APPLIED

A. Petitioners have no other means to obtain the necessary relief.

"The first *Bauman* factor highlights the need for mandamus to be used only when no other realistic alternative is (or was) available to a petitioner." *Cole v. U.S. Dist. Court For Dist. of Idaho*, 366 F.3d 813, 817 (9th Cir. 2004). Judge Bashant's denial of the Application is not an appealable order and, realistically, any type of reconsideration by Judge Bashant can reasonably and lawfully be considered futile. In *Exxon*, the United States Supreme Court said:

> We agree that "the Due Process Clause entitles a person to an impartial and disinterested tribunal," *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980), and that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Moreover, like the more stringent federal judges' disqualification statute, 28 U.S.C. § 455, ***the Constitution is concerned not only with actual bias but also with "the appearance of justice***." *Id.*

Exxon Corp. v. Heinze, 32 F.3d 1399, 1403 (9th Cir. 1994) (emphasis added).

A reasonable third-party could view the fact that Judge Bashant and Judge Wohlfeil worked together for approximately seven years in the San Diego Superior Court, coupled with the facts set forth below, to conclude Judge Bashant is biased because:

First, Petitioners did not file a cause of action for "neglect to perform wrongful act." Petitioners filed a cause of action pursuant to 42 U.S.C. § 1986 as set forth in the cover page of the Complaint for "NEGLECT TO PREVENT A WRONGFUL ACT."

Second, Judge Bashant refers to Young as a "defendant," Young is a "witness" who was threatened from providing her testimony in *Cotton I*. The Complaint and the Application describe in great detail the evolution of how Young came to be a literal "smoking gun" witness that was unlawfully threatened by Magagna and coerced by

Nguyen. Neither Petitioners nor any of Flores' attorney peers can begin to imagine a scenario in which a reasonable person, not even accounting for a judge with twenty years of experience being on the bench, could reach the conclusion that Young was anything other than a scared witness if they actually read the Complaint and the Application.

Third, the Order denies the Application because Petitioners' allegations are not specific facts made in an "affidavit."

Factually, as quoted directly above, the Flores declaration directly describes Young's statements and the actions taken against her. Flores provided, via the Request for Judicial Notice of Hurtado's declaration, the text messages between Hurtado and Young that reflect that Young is scared for her physical safety because, *inter alia*, Shapiro and Magagna know where she lives. Exhibit 11 at pg. 14 ("They know where I live!"). Furthermore, the Flores' declaration provided attorney Nguyen's emails and described how the owner of a business, at the real property at which the cannabis CUP was issued to Magagna, was in the process of being evicted. In sum, there is no factual basis for Judge Bashant's finding that Petitioners did not provide a factual basis for the relief requested due to history of violence and unlawful coercion against Young. *See Reno Air Racing Ass'n., Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006) ("There are a very narrow band of cases in which *ex parte* orders are proper because notice to the defendant would render fruitless the further prosecution of the action.' [Citation.]").

Legally, 28 U.S.C. § 1746 provides that an unsworn declaration is the legal equivalent of an affidavit so long as the declaration meets the requirements of 28 U.S.C. § 1746. *See Elliott v. QF Circa 37, LLC*, No. 16-cv-0288-BAS-AGS, at *11 (S.D. Cal. June 12, 2018) (Judge Bashant: "Section 1746 requires that an unsworn declaration executed within the United States include language that 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct,' as well as the date on which the declaration was executed."). The Flores declaration meets the statutory requirements. Thus, it was legal error for Judge Bashant to deny the Application on the grounds that Flores provided a declaration and not an affidavit.

Fourth, Judge Bashant's opinion that the Complaint is "confusing" and the reasoning in the Application is "unclear" cannot be reasonably be addressed as they are premised on the false factual premises that, *inter alia*, Petitioners filed suit against defendants for not committing a crime and that Young is a "defendant."

In sum, Judge Bashant's Order is based on alleged factual allegations not actually made by Petitioners, factually contradicted by the actual facts declared and evidence provided, and legally unsupported.

B. Petitioners will be irreparably damaged and prejudiced in a manner not correctable on appeal.

In regard to Magagna, Petitioners will be irreparably damaged if the cannabis CUP is transferred to a third-party bona fide purchaser. The Property with and without the cannabis CUP are two fundamentally different pieces of real property - the loss of the cannabis CUP at the Property is irreparable. *Park Vill. Aprt. v. Mortimer Howard Trust*, 636 F.3d 1150, 1159 (9th Cir. 2011) ("It is well-established that the loss of an interest in real property constitutes an irreparable injury.").

In regard to Young, Petitioners will be irreparably damaged if Young is prevented from testifying or committing perjury. *Ty Inc. v. Softbelly's, Inc.*, 517 F.3d 494, 498 (7th Cir. 2008) ("Trying improperly to influence a witness is fraud on the court and on the opposing party [and] routinely invoked in cases in which a judgment is sought to be set aside under Fed.R.Civ.P. 60(b)(3)…"). Young's testimony, if found by a jury to be true, proves that Magagna's acquisition of the cannabis CUP is not the unimpeded hand of the market, but rather Geraci and his attorneys' plan to mitigate their damages in anticipation of *Cotton I* being exposed as a sham.

C. Judge Bashant's Order is clearly erroneous as a matter of law.

"[T]he third factor—clear error—is a necessary prerequisite for the writ to issue. The clear error standard requires… a *firm conviction* that the district court misinterpreted the law or committed a *clear abuse of discretion*." *In re Perez*, 749 F.3d 849, 855 (9th Cir. 2014) (internal citations and quotations omitted; emphasis added).

As discussed above, it was clear error for Judge Bashant to find that Petitioners did not meet the requirements of FRCP 65(b).

However, assuming Petitioners are incorrect, Judge Bashant still had an independent duty *sua sponte* to address the issue of illegality. *California Pacific Bank, supra,* at 223. Judge Bashant did not have the discretion to ignore the evidence and arguments of illegality, a question of law, and her failure to do so is an abuse of discretion.

In *Nyhus*, the Court of Appeals said:

> [Defendant] did not itself formally advance a claim of illegality of the deferral agreement as a defense to the action. The issue of illegality was posed, not by [defendant] in either its answer or its motion for summary judgment, but by the court, *sua sponte*, during the hearing on the motion. [Plaintiff] registers a complaint on that score, but we think the court acted commendably in doing so. Invalidity of a contract offensive to public policy cannot be waived by the parties; it is a barrier which ***the court itself [is] bound to raise*** in the interests of the due administration of justice.

Nyhus v. Travel Management Corporation, 466 F.2d 440, 447 (D.C. Cir. 1972) (citations and quotations omitted; emphasis added).

The *Cotton I* judgment and the Order ratify the Illegality Issues and the acts of violence and unlawful coercion that make up the Obstruction of Justice Issue. *Danebo Lumber Co. v. Koutsky-Brennan-Vana Co.*, 182 F.2d 489, 495 (9th Cir. 1950) ("To deny a remedy to reclaim [property procured through an illegal contract] is to give effect to the illegal contract.").

The Ninth Circuit has held that it is "well settled that a judgment is void if the court that considered it… acted in a manner inconsistent with due process of law." *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985) (quotations and citations omitted). Judge Wohlfeil was presented with undisputed facts and controlling law that proved the defense of illegality factually had not and legally could not be waived. For purposes of this petition, it does not matter what Judge Wohlfeil's motivation was, he got it egregiously wrong and made the judiciary the instrument pursuant to which a criminal conspiracy was successfully effectuated. *Cf. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1645 (2018)

(quoting *Kaiser Steel Corp. v. Mullins*, 455 1U.S. 72, 77 (1982)) ("[A]uthorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract.").

"A void judgment is a legal nullity and a court considering a motion to vacate has ***no discretion*** in determining whether it should be set aside." *Watts*, 752 F.2d at 410 (emphasis added).

Petitioners filed the Complaint and the Application seeking to have the *Cotton I* judgment vacated for being void for enforcing an illegal contract because of the Illegality Issues and the Obstruction of Justice Issue. Judge Bashant had "no discretion" to fail to address the Illegality Issues/Obstruction of Justice Issue in the Application and her Order is the product of clear error. *Watts* at 410.

IV. PETITIONER-ATTORNEY FLORES

A. Laches and Service of the Petition

The doctrine of laches may bar mandamus review "if the petitioner slept upon his rights … and especially if the delay has been prejudicial to the other party, or to the rights of other persons." *Cheney v. United States Dist. Ct. for Dist. of Columbia*, 542 US 367, 379 (2004) (internal quotes and brackets omitted).

Flores did not want to file this petition. As described in the underlying Complaint, he did not want to even file the Complaint. Flores is a solo practitioner with no support staff. His practice is primarily criminal defense. Flores has never filed a federal complaint or a petition/appeal in either the State or Federal courts.

Flores attempted to engage counsel specialized in RICO, white collar, civil conspiracy, and/or antitrust issues to represent Petitioners. Petitioners faced two obstacles: lack of capital and, given the simplicity of the Illegality Issues, the perception that Judge Wohlfeil pretends to be confused by the Sanctions Issue and de facto allowed a jury to determine whether the November Document is an illegal contract. *See People v. Walker*, 32 Cal. App. 3d 897, 902 (1973) ("It is error to submit to a jury as a question of fact an issue that on the record was one of law. [Citations.] 'All questions of law . . . are

to be decided by the court.'[Citation.]"). And that Judge Bashant similarly refused to address the Illegality Issues / Obstruction of Justice Issue based on purported facts not alleged and law she knows does not apply.

No established, reputable firm wanted to make allegations of judicial bias and corruption. Flores did not "sleep" on Petitioners' rights and there can be no prejudice to individuals who have acquired a judgment and property in violation of the law through fraud and violence.

B. White Privilege / Systemic Judicial Bias

Plain statement by Petitioners' counsel: I am a U.S. born citizen of Mexican heritage, appearance and obvious surname. *Cotton I* can be simplistically, but accurately summarized as follows: Geraci is a white drug dealer that had his four white attorneys convince Judge Wohlfeil that it is not illegal for Geraci to own a cannabis CUP, despite the fact he had been sanctioned for operating illegal marijuana dispensaries, which he sought to acquire through a fraudulent application in the name of his white receptionist.

Nothing any future ruling, decision or judgment that can be issued in this or any related case will change what I know to be true: if I had ever argued that a black client of mine, who had been sanctioned for engaging in illegal cannabis sales, could get a regulated cannabis license via a fraudulent application submitted in the name of his secretary, the judge would check the law and I would be sanctioned and potentially lose my license to practice law.

It is White Privilege that allows Geraci's attorneys, and Geraci's attorneys' attorneys, to continue even now to argue that it is lawful for Geraci to own a cannabis CUP via the Berry Application without fear of serious judicial or legal consequence. And it is systemic judicial bias that allows Judge Wohlfeil (who is white) to take Geraci's attorneys at their word, but not even bother checking the clear applicable law when I argued that Geraci's attorneys were lying to him.

And it is the same judicial bias and privilege that allows Judge Bashant to so nonchalantly destroy my professional reputation by deriding my work product as

"confusing" and "unclear" based on statements she accuses me of making that I did not make and law she knows does not apply. I must continue to practice in this small legal community to provide for my family so I must endure the widespread indignity that Judge Bashant has subjected me to, but my decision to not take any further action does not mean her actions are lawful or ethical.

I am under no illusions as to myself or how I will be perceived by this Court, but I have read, believe in and respect the U.S. Constitution – it is offensive to me that Judge Wohlfeil and Judge Bashant stand in judgment before minority litigants and attorneys given their indisputable actions in this case.

The Order has paradigmatically changed the way I, and my attorney peers, view the integrity of judges and the fallibility of the judiciaries. It is sincerely appalling to think about how many other litigants have been deprived of their life, liberty or property because of the trust that judges place on personal relationships or what appears to be predetermined credibility determinations that they elevate above the objective application of law to facts.

I make this argument here as a public policy argument, knowing it is probable it will be disregarded and for which I will be further derided, but in the hopes that it may be heeded or at the very least one day provide evidentiary support for other victims of Geraci's unethical attorneys/conspirators and Judge Wohlfeil and Judge Bashant's bias.

CONCLUSION

It is impossible to understate the simplicity of this criminal conspiracy that was successfully effectuated via the state judiciary: Geraci hired Austin, Bartell and Schweitzer to submit the Berry Application with the Berry Fraud because of the Sanctions Issue. When the Berry Fraud was discovered by Cotton, Geraci had F&B file *Cotton I* as a sham and to record the F&B Lis Pendens to prevent the sale to Martin.

However, Cotton is a relentless and indomitable individual that never succumbed to illegal litigation tactics in and out of the courtroom. Thus, Geraci and his conspirators, had the cannabis CUP issued to Magagna, which, in turn, made it impossible for a

cannabis CUP to ever be issued at the Property. Thereby permanently mitigating their consequential damages. Perversely and fortuitously for Petitioners, but-for Magagna's threating of Young, and attorney Nguyen's unjustifiable failure as an officer of the court to provide Young's testimony, they probably would have gotten away with it.

Petitioners refuse to believe that justice will allow this Court to ratify Judge Wohlfeil and Judge Bashant's actions. Flores rushed to file a pro se like 173-page complaint that was a summary of his notes to prevent individuals from taking acts of violence against Geraci's attorneys. The filing of the Complaint accomplished that goal. The Order make such acts possible again.

If this Court fails to at least articulate why Geraci can lawfully own a cannabis CUP via the Berry Application, something Flores cannot do no matter how he convolutes the facts and law, it will be taken as a message from those without a legal background that the justice system has failed them and that justice, if it is to be achieved, must be taken at their own hands. Flores has met his ethical obligations by the filing of the Complaint and this petition.

PRAYER FOR RELIEF

Based on the foregoing, Petitioners respectfully request that this Court issue an order:

1. Vacating the *Cotton I* judgment as void for enforcing an illegal contract;
2. Vacate Judge Bashant's Order;
3. Direct the attendance of attorney Nguyen and Young at the hearing on this Petition without notice to adverse parties;[7]
4. To remand this case to the district court to proceed with the action consistent with the findings by this Court; and
5. Granting any other relief this Court may exercise in its discretion given the extraordinary circumstances that have led to the instant situation in which a

[7] Petitioners have not served adverse parties, except the trial court, with this petition because to do so is to the very relief grated to Petitioners and sought in the Application pursuant to FRCP 65(b). However, Petitioners will do so if directed by this Court.

criminal conspiracy and great harm to innocents has been effectuated *through* the State and Federal judiciaries.

Dated: June 25, 2020

Law Offices of Andrew Flores

By /s/ Andrew Flores
Plaintiff *In Propria Persona*, and
Attorney for Plaintiffs AMY SHERLOCK
and Minors T.S. and
S.S.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

I, Andrew Flores, Petitioner and counsel for petitioner, Amy Sherlock and her minor children, hereby certify that.

1. This brief complaint with the requirements of Fed. R. App. P. 21(d) and in all other respects complains with Fed. R. App. P. 32(c)(2), excluding the parts of the brief exempted by Fed. R. App. P. 23(a)(7)(B)(ii); and
2. This brief complaint with the typeface requirements of Fed. R. App. P. 32(a)(1)-(7) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

Dated: June 25, 2020

Law Offices of Andrew Flores

By /s/ Andrew Flores
Plaintiff *In Propria Persona*, and
Attorney for Plaintiffs
AMY SHERLOCK and Minors T.S. and S.S.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Petitioner notes there is not a related case pending before this Court however there is a related case pending before the United States District Court for the Southern District of California: *Cotton v. Geraci et al*, 3:18-cv-00325-BAS-DEB.

Dated: June 25, 2020

Law Offices of Andrew Flores

By /s/ Andrew Flores
Plaintiff *In Propria Persona*, and
Attorney for Plaintiffs
AMY SHERLOCK and Minors T.S. and S.S.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 15. Certificate of Service for Electronic Filing

Instructions for this form: http://www.ca9.uscourts.gov/forms/form15instructions.pdf

9th Cir. Case Number(s)

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Service on Case Participants Who Are Registered for Electronic Filing:

☐ I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

Service on Case Participants Who Are NOT Registered for Electronic Filing:

☒ I certify that I served the foregoing/attached document(s) on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants *(list each name and mailing/email address)*:

United States District Court for the Southern District of California
Atten: Hon. Cynthia A. Bashant
Edward J. Schwartz Building , United States Courthouse
221 West Broadway
Suite 4145
San Diego CA 92101

Description of Document(s) *(required for all documents)*:

Writ of Mandamus
Exhibits to Writ of Mandamus
Declaration of Andrew Flores
Declaration of Jacob Austin

Signature s/ Andrew Flores **Date** 6/24/2020

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

In the

United States Court of Appeals

For the

Ninth Circuit

IN RE ANDREW FLORES, an individual, AMY SHERLOCK, on her own behalf and on behalf of her minor children, T.S. and S.S.,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

Respondent,

GINA M. AUSTIN, an individual, AUSTIN LEGAL GROUP APC, a California Corporation; JOEL R. WOHLFEIL, an individual; LAWRENCE (AKA LARRY) GERACI, an individual; TAX & FINANCIAL CENTER, INC., a California Corporation; REBECCA BERRY, an individual; JESSICA MCELFRESH, an individual; SALAM RAZUKI, an individual; NINUS MALAN, an individual; MICHAEL ROBERT WEINSTEIN, an individual; SCOTT TOOTHACRE, an individual; ELYSSA KULAS, an individual; RACHEL M. PRENDERGAST, an individual; FERRIS & BRITTON APC, a California Corporation; DAVID DEMIAN, an individual, ADAM C. WITT, an individual, RISHI S. BHATT, an individual, FINCH, THORTON, and BAIRD, a Limited Liability Partnership; JAMES D. CROSBY, an individual; ABHAY SCHWEITZER, an individual and dba TECHNE; JAMES (AKA JIM) BARTELL, an individual; BARTELL & ASSOCIATES, a California Corporation; MATTHEW WILLIAM SHAPIRO, an individual; MATTHEW W. SHAPIRO, APC, a California corporation; NATALIE TRANG-MY NGUYEN, an individual, AARON MAGAGNA, an individual; A-M INDUSTRIES, INC., a California Corporation; BRADFORD HARCOURT, an individual; ALAN CLAYBON, an individual; SHAWN MILLER, an individual; LOGAN STELLMACHER, an individual; EULENTHIAS DUANE ALEXANDER, an individual; BIANCA MARTINEZ; an individual; THE CITY OF SAN DIEGO, a municipality; 2018FMO, LLC, a California Limited Liability Company; FIROUZEH TIRANDAZI, an individual;

STEPHEN G. CLINE, an individual; JOHN DOE, an individual; JOHN EK, an individual; THE EK FAMILY TRUST, 1994 Trust; DARRYL COTTON, an individual

Real Parties In Interest.

FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CASE NO. 20-CV-656-BAS-DEB

EXHIBITS TO PETITON FOR WRIT OF MANDAMUS

ANDREW FLORES,
945 4th Avenue, Suite 412
San Diego, CA 92101
Telephone: 619.256.1556
Facsimile: 619.274.8053
Andrew@FloresLegal.Pro

Petitioner *In Propria Persona*,
and attorney for Petitioners
Amy Sherlock and her minor
children T.S. and S.S.

EXHIBITS

1. City of San Diego v. CCSquared et al, 37-2014-00020897-CU-MC-CTL (Geraci Sanctions Case).
2. Geraci's Declaration in Opposition of Cottons Motion to Expunge Lis Pendens.
3. DSD Form-318 (Ownership Disclosure Statement).
4. DSD Form-3032 (General Application).
5. Motion for New Trial (*Cotton I, Geraci v. Cotton*, San Diego Superior Court, Case No. 37-2017-00010073-CU-BC-22 CTL.)
6. Emails between Attorney Nguyen and Attorney Jacob.
7. Geraci Opposition to Cotton's Motion for New Trial (*Cotton I*).
8. Cotton's Reply to Geraci's Opposition to Motion for New Trial (*Cotton I*).
9. Transcript from Motion for New Trial Hearing, October 29, 2019.
10. Denial of Motion for New Trial By Judge Wohlfeil.
11. Declaration of Joe Hurtado in Support of Application for Appointment of a Receiver.
12. Order Denying TRO April 20, 2020.

Exhibit 1

No Fee GC §6103

FILED
Clerk of the Superior Court
JUN 17 2015

FILED
Clerk of the Superior Court
JUN 17 2015
By: H. CHAVARIN, Deputy
'15 JUN 11 PM 1:07

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

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

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

///

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

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

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

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

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

5. The legal description of the PROPERTY is:

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

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

INJUNCTION

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

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

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

COMPLIANCE MEASURES

DEFENDANTS agree to do the following at the PROPERTY:

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

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

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

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

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

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

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

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

MONETARY RELIEF

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

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

///

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

ENFORCEMENT OF JUDGMENT

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

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

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

RETENTION OF JURISDICTION

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

RECORDATION OF JUDGMENT

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

KNOWLEDGE AND ENTRY OF JUDGMENT

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

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

IT IS SO STIPULATED.

Dated: June 11, 2015

JAN I. GOLDSMITH, City Attorney

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

Dated: 6-10, 2015

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

By
Jeffrey Kacha, General Partner

Dated: 6-10, 2015

Jeffrey Kacha, an individual

Dated: 6-8, 2015

Lawrence E. Geraci, aka Larry Geraci, an individual

///

Dated: 6/11/15, 2015

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

JUDGMENT

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

Dated: 6-17-16

JOHN S. MEYER
JUDGE OF THE SUPERIOR COURT

EXHIBIT 2

FERRIS & BRITTON
A Professional Corporation
Michael R. Weinstein (SBN 106464)
Scott H. Toothacre (SBN 146530)
501 West Broadway, Suite 1450
San Diego, California 92101
Telephone: (619) 233-3131
Fax: (619) 232-9316
mweinstein@ferrisbritton.com
stoothacre@fe1risbritton.com

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

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

LARRY GERACI, an individual,

Plaintiff,

v.

DARRYL COTTON, an individual; and DOES I through I0, inclusive,

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

v.

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

Cross-Defendants.

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

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

DECLARATION OF LARRY GERACI IN OPPOSITION TO DEFENDANT DARRYL COTTON'S MOTION TO EXPUNGE LIS PENDENS

[IMAGED FILE]

Hearing Date: April 13, 2018
Hearing Time: 9:00 a.m.

Filed: March 21, 2017
Trial Date: May II, 2018

I, Larry Geraci, declare:

1. I am an adult individual residing in the County of San Diego, State of California, and I am one of the real parties in interest in this action. I have personal knowledge of the foregoing facts and if called as a witness could and would so testify.

2. In approximately September of 2015, I began lining up a team to assist in my efforts to develop and operate a Medical Marijuana Consumer Cooperative (MMCC) business (aka a medical

marijuana dispensary) in San Diego County. At the time, I had not yet identified a property for the MMCC business. I hired a consultant, Neal Dutta of Apollo Realty, to help locate and identify potential property sites for the business. I hired a design professional, Abhay Schweitzer of TECHNE. I hired a public affairs and public relations consultant with experience in the industry, Jim Bartell of Bartell & Associates. In addition, I hired a land use attorney, Gina Austin of Austin Legal Group.

3. The search to identify potential locations for the business took some time, as there are a number of requirements that had to be met. For example: a) only four (4) MMCCs are allowed in a City Council District; b) MMCCs are not allowed within 1,000 feet of public parks, churches, child care centers, playgrounds, City libraries, minor-oriented facilities, other MMCCs, residential facilities, or schools; c) MMCCs are not allowed within 100 feet of a residential zone; and d) the zoning had to be proper as MMCC's are allowed only in certain zones. In approximately June 2016, Neal Dutta identified to me real property owned by Darryl Cotton located at 6176 Federal Blvd., City of San Diego, San Diego County, California, Assessor's Parcel No. 543-020-02-00 (the "Property") as a potential site for acquisition and development for use and operation as a MMCC. And in approximately mid-July 2016 Mr. Dutta put me in contact with Mr. Cotton and I expressed my interest to Mr. Cotton in acquiring his Property if our further investigation satisfied us that the Property might meet the requirements for an MMCC site.

4. For several months after the initial contact, my consultant, Jim Bartell, investigated issues related to whether the location might meet the requirements for an MMCC site, including zoning issues and issues related to meeting the required distances from certain types of facilities and residential areas. For example, the City had plans for street widening in the area that potentially impacted the ability of the Property to meet the required distances. Although none of these issues were resolved to a certainty, I determined that I was still interested in acquiring the Property.

5. Thereafter I approached Mr. Cotton to discuss the possibility of my purchase of the Property. Specifically, I was interested in purchasing the Property from Mr. Cotton contingent upon my obtaining approval of a Conditional Use Permit ("CUP") for use as a MMCC. As the purchaser, I was willing to bear the substantial expense of applying for and obtaining CUP approval and understood that if I did not obtain CUP approval then I would not close the purchase and I would lose my

investment. I was willing to pay a price for the Property based on what I anticipated it might be worth if I obtained CUP approval. Mr. Cotton told me that he was willing to make the purchase and sale conditional upon CUP approval because if the condition was satisfied he would be receiving a much higher price than the Property would be worth in the absence of its approval for use as a medical marijuana dispensary. We agreed on a down payment of $10,000.00 and a purchase price of $800,000.00. On November 2, 2016, Mr. Cotton and I executed a written purchase and sale agreement for my purchase of the Property from him on the terms and conditions stated in the agreement (hereafter the "Nov 2nd Written Agreement"). A true and correct copy of the Nov 2nd Written Agreement, which was executed before a notary, is attached as Exhibit 2 to Defendant and Cross-Defendant, Larry Geraci's Notice of Lodgment in Support of Opposition to Motion to Expunge Lis Pendens (hereafter the "Geraci NOL"). I tendered the $10,000 deposit to Mr. Cotton as acknowledged in the Nov 2nd Written Agreement.

6. In paragraph 5 of his supporting declaration, Darryl Cotton states:

> "On November 2, 2016, Geraci and I met at Geraci's office to negotiate the final terms of the sale of the Property. At the meeting, we reached an oral agreement on the material terms for the sale of the Property (the "November Agreement"). The November Agreement consisted of the following: If the CUP was approved, then Geraci would, inter alia, provide me: (i) a total purchase price of $800,000; (ii) a 10% equity stake in the MO; and (iii) a minimum monthly equity distribution of $10,000. If the CUP was denied, I would keep an agreed upon $50,000 non-refundable deposit ("NRD") and the transaction would not close. In other words, the issuance of a CUP at the Property was a condition precedent for closing on the sale of the Property and, if the CUP was denied, I would keep my Property and the $50,000 NRD."

Darryl Cotton and I did meet at my office on November 2, 2016, to negotiate the final terms of the sale of the Property and we reached an agreement on the final terms of the sale of the Property. That agreement was not oral. We put our agreement in writing in a simple and straightforward written

agreement that we both signed before a notary. (See paragraph 5, *supra*, Nov 2nd Written Agreement, Exhibit 2 to Geraci NOL.) The written agreement states in its entirety:

> **11/02/2016**
>
> **Agreement between Larry Geraci or assignee and Darryl Cotton:**
>
> **Darryl Cotton has agreed to sell the property located at 6176 Federal Blvd., CA for a sum of $800,000 to Larry Geraci or assignee on the approval of a Marijuana Dispensary. (CUP for a dispensary.)**
>
> **Ten Thousand dollars (cash) has been given in good faith earnest money to be applied to the sales price of $800,000.00 and to remain in effect until the license is approved. Darryl Cotton has agreed to not enter into any other contacts [sic] on this property.**
>
> **__/s/_____ Larry Geraci** **__/s/_____ Darryl Cotton**

I never agreed to pay Mr. Cotton a $50,000.00 non-refundable deposit. At the meeting, Mr. Cotton stated he would like a $50,000 non-refundable deposit. I said "no." Mr. Cotton then asked for a $10,000 non-refundable deposit and I said "ok" and that amount was put into the written agreement. After he signed the written agreement, I paid him the $10,000 cash as we had agreed. If I had agreed to pay Mr. Cotton a $50,000 deposit, it would have been a very simple thing to change "$10,000" to $50,000" in the agreement before we signed it.

I never agreed to pay Mr. Cotton a 10% equity stake in the marijuana dispensary. I never agreed to pay Mr. Cotton a minimum monthly equity distribution of $10,000. If I had agreed to pay Mr. Cotton a 10% equity stake in the marijuana dispensary and a minimum monthly equity distribution of $10,000, then it would have also been a simple thing to add a sentence or two to the agreement to say so.

What I did agree to was to pay Mr. Cotton a total purchase price of $800,000, with the balance of $790,000 due upon approval of a CUP. If the CUP was not approved, then he would keep the Property and the $10,000. So that is how the agreement was written.

7. In paragraph 6 of his supporting declaration, Darryl Cotton states:

> "At the November 2, 2016, meeting we reached the November Agreement, Geraci: (i) provided me with $10,000 in cash towards the NRD of $50,000, for which I executed a document to record my receipt thereof (the "Receipt"); (ii)

promised to have his attorney, Gina Austin ("Austin"), ***promptly*** reduce the oral November Agreement to written agreements for execution; and (iii) promised to not submit the CUP to the City until he paid me the balance of the NRD."

I did pay Mr. Cotton the $10,000 cash after we signed the Nov 2nd Written Agreement. As stated above, I never agreed to a $50,000 deposit and, if I had, it would have been a simple thing to state that in our written agreement.

Mr. Cotton refers to the written agreement (i.e., the Nov 2nd Written Agreement) as a "Receipt." Calling the Agreement a "Receipt" was never discussed. There would have been no need for a written agreement before a notary simply to document my payment to him of $10,000. In addition, had the intention been merely to document a written "Receipt" for the $10,000 payment, then we could have identified on the document that it was a "Receipt" and there would have been no need to put in all the material terms and conditions of the deal. Instead, the document is expressly called an "Agreement" because that is what we intended.

I did not promise to have attorney Gina Austin reduce the oral agreement to written agreements for execution. What we did discuss was that Mr. Cotton wanted to categorize or allocate the $800,000. At his request, I agreed to pay him for the property into two parts: $400,000 as payment for the property and $400,000 as payment for the relocation of his business. As this would benefit him for tax purposes but would not affect the total purchase price or any other terms and conditions of the purchase, I stated a willingness to later amend the agreement in that way.

I did not promise to delay submitting the CUP to the City until I paid the alleged $40,000 balance of the deposit. I agreed to pay a $10,000 deposit only. Also, we had previously discussed the long lead-time to obtain CUP approval and that we had already begun the application submittal process as discussed in paragraph 8 below.

8. Prior entering into the Nov 2nd Written Agreement, Darryl Cotton and I discussed the CUP application and approval process and that his consent as property owner would be needed to submit with the CUP application. I discussed with him that my assistant Rebecca Berry would act as my authorized agent to apply for the CUP on my behalf. Mr. Cotton agreed to Ms. Berry serving as

the Applicant on my behalf to attempt to obtain approval of a CUP for the operation of a MMCC or marijuana dispensary on the Property. On October 31, 2016, as owner of the Property, Mr. Cotton signed Form DS-318, the Ownership Disclosure Statement for a Conditional Use Permit, by which he acknowledged that an application for a permit (CUP) would be filed with the City of San Diego on the subject Property with the intent to record an encumbrance against the property. The Ownership Disclosure Statement was also signed by my authorized agent and employee, Rebecca Berry, who was serving as the CUP applicant on my behalf. A true and correct copy of the Ownership Disclosure Statement signed on October 31, 2016, by Darryl Cotton and Rebecca Berry is attached as Exhibit 1 to the Geraci NOL. Mr. Cotton provided that consent and authorization as we had discussed that approval of a CUP would be a condition of the purchase and sale of the Property.

9. As noted above, I had already put together my team for the MMCC project. My design professional, Abhay Schweitzer, and his firm, TECHNE, is and has been responsible for the design of the Project and the CUP application and approval process. Mr. Schweitzer was responsible for coordinating the efforts of the team to put together the CUP Application for the MMCC at the Property and Mr. Schweitzer has been and still is the principal person involved in dealings with the City of San Diego in connection with the CUP Application approval process. Mr. Schweitzer's declaration (Declaration of Abhay Schweitzer in Support of Opposition to Motion to Expunge Lis Pendens) has been submitted concurrently herewith and describes in greater detail the CUP Application submitted to the City of San Diego, which submission included the Ownership Disclosure Statement signed by Darryl Cotton and Rebecca Berry.

10. After we signed the Nov 2nd Written Agreement for my purchase of the Property, Mr. Cotton immediately began attempts to renegotiate our deal for the purchase of the Property. This literally occurred the evening of the day he signed the Nov 2nd Written Agreement.

On November 2, 2016, at approximately 6:55 p.m., Mr. Cotton sent me an email, which stated:

> Hi Larry,
>
> Thank you for meeting today. Since we examined the Purchase Agreement in your office for the sale price of the property I just noticed the 10% equity position in the dispensary was not language added into that document. I just want to make sure that we're not missing that language in any final agreement as it is a factored

> element in my decision to sell the property. I'll be fine if you simply acknowledge that here in a reply.

I receive my emails on my phone. It was after 9:00 p.m. in the evening that I glanced at my phone and read the first sentence, "Thank you for meeting with me today." And I responded from my phone "No no problem at all." I was responding to his thanking me for the meeting.

The next day I read the entire email and I telephoned Mr. Cotton because the total purchase price I agreed to pay for the subject property was $800,000 and I had never agreed to provide him a 10% equity position in the dispensary as part of my purchase of the property. I spoke with Mr. Cotton by telephone at approximately 12:40 p.m. for approximately 3-minutes. A true and correct copy of the Call Detail from my firm's telephone provider showing those two telephone calls is attached as Exhibit 3 to the Geraci NOL. During that telephone call I told Mr. Cotton that a 10% equity position in the dispensary was not part of our agreement as I had never agreed to pay him any other amounts above the $800,000 purchase price for the property. Mr. Cotton's response was to say something to the effect of "well, you don't get what you don't ask for." He was not upset and he commented further to the effect that things are "looking pretty good—we all should make some money here." And that was the end of the discussion.

11. To be clear, prior to signing the Nov 2nd Written Agreement, Mr. Cotton expressed a desire to participate in different ways in the *operation* of the future MMCC business at the Property. Mr. Cotton is a hydroponic grower and purported to have useful experience he could provide regarding the operation of such a business. Prior to signing the Nov 2nd Written Agreement we had preliminary discussions related to his desire to be involved in the *operation* of the business (not related to the purchase of the Property) and we discussed the *possibility* of compensation to him (e.g., a percentage of the net profits) in exchange for his providing various services to the business—but we never reached an agreement as to those matters related to the operation of my future MMCC business. Those discussions were not related to the purchase and sale of the Property, which we never agreed to amend or modify.

12. Beginning in or about mid-February 2017, and after the zoning issues had been resolved, Mr. Cotton began making increasing demands for compensation in connection with the sale. We were several months into the CUP application process which could potentially take many more months to

successfully complete (if it could be successfully completed and approval obtained) and I had already committed substantial resources to the project. I was very concerned that Mr. Cotton was going to interfere with the completion of that process to my detriment now that the zoning issues were resolved. I tried my best to discuss and work out with him some further compensation arrangement that was reasonable and avoid the risk he might try to "torpedo" the project and find another buyer. For example, on several successive occasions I had my attorney draft written agreements that contained terms that I that I believed I could live with and hoped would be sufficient to satisfy his demands for additional compensation, but Mr. Cotton would reject them as not satisfactory. Mr. Cotton continued to insist on, among other things, a 10% equity position, to which I was not willing to agree, as well as on minimum monthly distributions in amounts that I thought were unreasonable and to which I was unwilling to agree. Despite our back and forth communications during the period of approximately mid-February 2017 through approximately mid-March 2017, we were not able to re-negotiate terms for the purchase of the property to which we were both willing to agree. The Nov. 2nd Written Agreement was never amended or modified. Mr. Cotton emailed me that I was not living up to my agreement and I responded to him that he kept trying to change the deal. As a result, no re-negotiated written agreement regarding the purchase and sale of the property was ever signed by Mr. Cotton or me after we signed and agreed to the terms and conditions in the Nov 2d Written Agreement.

13. Ultimately, Mr. Cotton was extremely unhappy with my refusal to accede to his demands and the failure to reach agreement regarding his possible involvement with the *operation* of the business to be operated at the Property and my refusal to modify or amend the terms and conditions we agreed to in the Nov 2nd Written Agreement regarding my purchase from him of the Property. Mr. Cotton made clear that he had no intention of living up to and performing his obligations under the Agreement and affirmatively threatened to take action to halt the CUP application process.

14. Mr. Cotton thereafter made good on his threats. On the morning of March 21, 2017, Mr. Cotton had a conversation with Firouzeh Tirandazi at the City of San Diego, who was in charge of processing the CUP Application, regarding Mr. Cotton's interest in withdrawing the CUP Application. That discussion is confirmed in an 8:54 a.m. e-mail from Ms. Tirandazi to Mr. Cotton with a cc to

Rebecca Berry. A true and correct copy of that March 21, 2017, at 8:54 a.m. e-mail is attached as Exhibit 4 to the Geraci NOL.

15. That same day, March 21, 2017, at 3:18 p.m. Mr. Cotton emailed me, reinforcing that he would not honor the Nov 2nd Written Agreement. In his email he stated that I had no interest in his property and that "I will be entering into an agreement with a third party to sell my property and they will be taking on the potential costs associated with any litigation arising from this failed agreement with you. A true and correct copy of that March 21, 2017, at 3:18 p.m. e-mail is attached as Exhibit 5 to the Geraci NOL.

16. Four minutes later that same day, at 3:25 p.m., Mr. Cotton e-mailed Ms. Tirandazi at the City, with a cc to both me and Rebecca Berry, stating falsely to Ms. Tirandazi: "… the potential buyer, Larry Gerasi [sic] (cc'ed herein), and I have failed to finalize the purchase of my property. As of today, there are no third-parties that have any direct, indirect or contingent interests in my property. The application currently pending on my property should be denied because the applicants have no legal access to my property. A true and correct copy of that March 21, 2017, at 3:25 p.m. e-mail is attached as Exhibit 6 to the Geraci NOL. Mr. Cotton's email was false as we had a signed agreement for the purchase and sale of the Property – the Nov 2nd Written Agreement.

17. Fortunately, the City determined Mr. Cotton did not have the authority to withdraw the CUP application without the consent of the Applicant (Rebecca Berry, my authorized agent).

18. Due to Mr. Cotton's clearly stated intention to not perform his obligations under the written Agreement and in light of his affirmative steps taken to attempt to withdraw the CUP application, I went forward on March 21, 2017, with the filing of my lawsuit against Mr. Cotton to enforce the Nov 2nd Written Agreement.

19. Since the March 21, 2017 filing of my lawsuit, we have continued to diligently pursue our CUP Application and approval of the CUP. Despite Mr. Cotton's attempts to withdraw the CUP application, we have completed the initial phase of the CUP process whereby the City deemed the CUP application complete (although not yet approved) and determined it was located in an area with proper zoning. We have not yet reached the stage of a formal City hearing and there has been no final determination to approve the CUP. The current status of the CUP Application is set forth in the

Declaration of Abhay Schweitzer.

20. Mr. Cotton also has made good on the statement in his March 21, 2017, at 3:18 p.m. email (referenced in paragraph 15 above - see Exhibit 5 to the Geraci NOL) stating that he would be "entering into an agreement with a third party to sell my property and they will be taking on the potential costs associated with any litigation arising from this failed agreement with you. We have learned through documents produced in my lawsuit that well prior to March 21, 2017, Mr. Cotton had been negotiating with other potential buyers of the Property to see if he could get a better deal than he had agreed to with me. As of March 21, 2017, Cotton had already entered into a real estate purchase and sale agreement to sell the Property to another person, Richard John Martin II.

21. Although he entered into this alternate purchase agreement with Mr. Martin as early as March 21, 2017, to our knowledge in the nine (9) months since, neither Mr. Cotton nor Mr. Martin or other agent has submitted a separate CUP Application to the City for processing. During that time, we continued to process our CUP Application at great effort and expense.

22. During approximately the last 17 months, I have incurred substantial expenses in excess of $150,000 in pursuing the MMCC project and the related CUP application.

23. Finally, Mr. Cotton has asserted from the outset of his lawsuit and, again, in paragraph 16 of his supporting declaration, that he did not discover until March 16, 2017, that I had submitted the CUP Application back on October 31, 2016. That is a blatant lie. I kept Mr. Cotton apprised of the status of the CUP application and the problems we were encountering (e.g., an initial zoning issue) from the outset. Attached as Exhibit 7 is a true and correct copy of a text message Mr. Cotton sent me on November 16, 2016, in which he asks me, "Did they accept the CUP application?" Mr. Cotton was well aware at that time that we had already submitted the CUP application and were awaiting the City's completion of its initial review of the completeness of the application. Until the City deems the CUP application complete it does not proceed to the next step—the review of the CUP application.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 9th day of April, 2018.

LARRY GERACI

Exhibit 3

City of San Diego
Development Services
1222 First Ave., MS-302
San Diego, CA 92101
(619) 446-5000

Ownership Disclosure Statement

Approval Type: Check appropriate box for type of approval (s) requested: ☐ Neighborhood Use Permit ☐ Coastal Development Permit ☐ Neighborhood Development Permit ☐ Site Development Permit ☐ Planned Development Permit ☒ Conditional Use Permit ☐ Variance ☐ Tentative Map ☐ Vesting Tentative Map ☐ Map Waiver ☐ Land Use Plan Amendment • ☐ Other _____

Project Title | **Project No.** *For City Use Only*

Federal Blvd. MMCC

Project Address:

6176 Federal Blvd., San Diego, CA 92114

Part I - To be completed when property is held by Individual(s)

By signing the Ownership Disclosure Statement, the owner(s) acknowledge that an application for a permit, map or other matter, as identified above, will be filed with the City of San Diego on the subject property, with the intent to record an encumbrance against the property. Please list below the owner(s) and tenant(s) (if applicable) of the above referenced property. The list must include the names and addresses of all persons who have an interest in the property, recorded or otherwise, and state the type of property interest (e.g., tenants who will benefit from the permit, all individuals who own the property). A signature is required of at least one of the property owners. Attach additional pages if needed. A signature from the Assistant Executive Director of the San Diego Redevelopment Agency shall be required for all project parcels for which a Disposition and Development Agreement (DDA) has been approved / executed by the City Council. Note: The applicant is responsible for notifying the Project Manager of any changes in ownership during the time the application is being processed or considered. Changes in ownership are to be given to the Project Manager at least thirty days prior to any public hearing on the subject property. Failure to provide accurate and current ownership information could result in a delay in the hearing process.

Additional pages attached ☐ Yes ☒ No

Name of Individual (type or print):
Darryl Cotton
☒ Owner ☐ Tenant/Lessee ☐ Redevelopment Agency
Street Address:
6176 Federal Blvd
City/State/Zip:
San Diego Ca 92114
Phone No: (619) 954-4447 | Fax No:
Signature : | Date: 10-31-2016

Name of Individual (type or print):
Rebecca Berry
☐ Owner ☒ Tenant/Lessee ☐ Redevelopment Agency
Street Address:
5982 Gullstrand St
City/State/Zip:
San Diego / Ca / 92122
Phone No: 8589996882 | Fax No:
Signature : | Date: 10-31-2016

Name of Individual (type or print):
☐ Owner ☐ Tenant/Lessee ☐ Redevelopment Agency
Street Address:
City/State/Zip:
Phone No: | Fax No:
Signature : | Date:

Name of Individual (type or print):
☐ Owner ☐ Tenant/Lessee ☐ Redevelopment Agency
Street Address:
City/State/Zip:
Phone No: | Fax No:
Signature : | Date:

Exhibit 4

THE CITY OF SAN DIEGO

City of San Diego
Development Services
1222 First Ave., MS-302
San Diego, CA 92101
(619) 446-5000

General Application

FORM DS-3032 AUGUST 2013

Part I (Must be completed for all permits/approvals)

1. **Approval Type:** *Separate electrical, plumbing and/or mechanical permits are required for projects other than single-family residences or duplexes* ☐ Electrical/Plumbing/Mechanical ☐ Sign ☐ Structure ☐ Grading ☐ Public Right-of-Way; ☐ Subdivision ☐ Demolition/Removal ☐ Development Approval ☐ Vesting Tentative Map ☐ Tentative Map ☐ Map Waiver ☑ Other: CUP

2. Project Address/Location: *Include Building or Suite No.*	Project Title:	Project No.: *For City Use Only*
6176 Federal Blvd.	Federal Blvd. MMCC	520606
Legal Description: *(Lot, Block, Subdivision Name & Map Number)* TR#:2 001100 BLK 25*LOT 20 PER MAP 2121 IN* City/Muni/Twp: SAN DIEGO		Assessor's Parcel Number: 543-020-02

Existing Use: ☐ House/Duplex ☐ Condominium/Apartment/Townhouse ☑ Commercial/Non-Residential ☐ Vacant Land

Proposed Use: ☐ House/Duplex ☐ Condominium/Apartment/Townhouse ☑ Commercial/Non-Residential ☐ Vacant Land

Project Description:
The project consists of the construction of a new MMCC facility

3. **Property Owner/Lessee Tenant Name:** *Check one* ☐ Owner ☑ Lessee or Tenant — Telephone: — Fax:
Rebecca Berry

Address:	City:	State:	Zip Code:	E-mail Address:
5982 Gullstrand Street	San Diego	CA	92122	becky@tfcsd.net

4. **Permit Holder Name** - This is the property owner, person, or entity that is granted authority by the property owner to be responsible for scheduling inspections, receiving notices of failed inspections, permit expirations or revocation hearings, and who has the right to cancel the approval (in addition to the property owner). SDMC Section 113.0103.

Name: Rebecca Berry — Telephone: — Fax:

Address:	City:	State:	Zip Code:	E-mail Address:
5982 Gullstrand Street	San Diego	CA	92122	becky@tfcsd.net

5. **Licensed Design Professional** (if required): (check one) ☑ Architect ☐ Engineer — License No.: C-19371
Name: Michael R Morton AIA — Telephone: — Fax:

Address:	City:	State:	Zip Code:	E-mail Address:
3956 30th Street	San Diego	CA	92104	

6. **Historical Resources/Lead Hazard Prevention and Control (not required for roof mounted electric photovoltaic permits, deferred fire approvals, or completion of expired permit approvals)** -
a. Year constructed for all structures on project site: 1951
b. HRB Site # and/or historic district if property is designated or in a historic district (if none write N/A): N/A
c. Does the project include any permanent or temporary alterations or impacts to the exterior (cutting-patching-access-repair; roof repair or replacement, windows added-removed-repaired-replaced, etc)? ☑ Yes ☐ No
d. Does the project include any foundation repair, digging, trenching or other site work? ☑ Yes ☐ No

I certify that the information above is correct and accurate to the best of my knowledge. I understand that the project will be distributed/reviewed based on the information provided.

Print Name: Abhay Schweitzer — Signature: [signature] (agent) — Date: 10/28/2016

7. **Notice of Violation** - If you have received a Notice of Violation, Civil Penalty Notice and Order, or Stipulated Judgment, a copy must be provided at the time of project submittal. Is there an active code enforcement violation case on this site? ☐ No ☐ Yes, copy attached

8. **Applicant Name:** *Check one* ☐ Property Owner ☐ Authorized Agent of Property Owner ☑ Other Person per M.C. Section 112.0102 — Telephone: — Fax:
Rebecca Berry

Address:	City:	State:	Zip Code:	E-mail Address:
5982 Gullstrand Street	San Diego	CA	92122	becky@tfcsd.net

Applicant's Signature: I certify that I have read this application and state that the above information is correct, and that I am the property owner, authorized agent of the property owner, or other person having a legal right, interest, or entitlement to the use of the property that is the subject of this application (Municipal Code Section 112.0102). I understand that the applicant is responsible for knowing and complying with the governing policies and regulations applicable to the proposed development or permit. The City is not liable for any damages or loss resulting from the actual or alleged failure to inform the applicant of any applicable laws or regulations, including before or during final inspections. City approval of a permit application, including all related plans and documents, is not a grant of approval to violate any applicable policy or regulation, nor does it constitute a waiver by the City to pursue any remedy, which may be available to enforce and correct violations of the applicable policies and regulations. I authorize representatives of the city to enter the above-identified property for inspection purposes. I have the authority and grant City staff and advisory bodies the right to make copies of any plans or reports submitted for review and permit processing for the duration of this project.

Signature: Rebecca Berry — Date: 10/31/2016

F. Tirandazi
EXHIBIT NO. 3
3-14-19
L. Barrón, CSR

E3

Exhibit 5

TIFFANY & BOSCO P.A.
MEGAN E. LEES (SBN 277805)
mel@tblaw.com
MICHAEL A. WRAPP (SBN 304002)
maw@tblaw.com
EVAN P. SCHUBE (*Pro Hac Vice* AZ SBN 028849)
eps@tblaw.com
1455 Frazee Road, Suite 820
San Diego, CA 92108
Tel. (619) 501-3503

Attorneys for Defendant/Cross-Complainant Darryl Cotton

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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CASES

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

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

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

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

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

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

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

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

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

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

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

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

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

STATUTES

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

Code of Civil Procedure
§657(6)-(7)

Government Code

Senate Bills

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

San Diego Municipal Code

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

INTRODUCTION

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

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

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

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

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

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

ARGUMENT

A. STANDARD FOR MOTION FOR NEW TRIAL.

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

B. RELEVANT BACKGROUND.

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

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

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

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

State Marijuana Laws

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

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

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

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

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

Local Marijuana Laws

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

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

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

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

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

Failure to Disclose Ownership Interest and Geraci Judgments

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

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

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

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

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

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

Mr. Geraci's Objective Manifestations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

DATED this 13th day of September, 2019.

TIFFANY & BOSCO, P.A.

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

EXHIBIT A

DIRECT EXAMINATION OF LARRY GERACI
BY MICHAEL R. WEINSTEIN
(RT 58:18-19)

MR. WEINSTEIN: The plaintiffs call Larry Geraci.

THE COURT: All right. Good morning, Mr. Geraci.

Larry Geraci,

being called on behalf of the plaintiff, having been first duly sworn, testified as follows:

THE CLERK: Please state your full name and spell your first and last name for the record.

THE WITNESS: Larry Geraci. L-a-r-r-y G-e-r-a-c-i.

THE COURT: All right. Thank you very much.

Counsel, whenever you're ready, please begin your examination.

MR. WEINSTEIN: Thank you.

(Direct examination of Larry Geraci)

BY MR. WEINSTEIN:

Q Good morning, Mr. Geraci.

A Good morning.

Q How old are you?

A Fifty-eight.

Q And are you married?

A Widowed.

Q Do you have any children?

A Five.

Q What are their ages?

A 33, 28. I have 25, 19 and 12.

bought and sold real property?
A Yes, I have.
Q Have you served as your own real estate agent in connection with any of those transactions?
A No.
Q Okay. Do you know Rebecca Berry?
A Yes.
Q And you see her in this courtroom?
A Yes.
Q And who is Rebecca Berry?
A She's my administrator.
Q And how long has she worked for you?
A Fourteen years.
Q And you said she was an administrator. What's her role as an administrator?
A She's the front desk booking -- booking clients' appointments, administering the bills when they come in to the payables department. She's like the gatekeeper of everything that comes into the office.
Q Have you ever owned a medical marijuana dispensary?
A No, I haven't.
Q Have you ever operated or managed a medical marijuana dispensary?
A No, I haven't.
Q Have you ever told Darryl Cotton that you owned or managed a marijuana dispensary?
A No.

Q In connection with -- we'll get to it. But in connection with the transaction, the sale of -- the purchase and sale of his property, in connection with any communications with Mr. Cotton, did you indicate to him that you operated or owned multiple dispensaries?

A No, I didn't.

Q Did you talk to him about anybody within your team that managed or operated dispensaries?

A No, I didn't.

Q Okay. Now, when did you first have any communication with Darryl Cotton?

A About mid July.

Q And why did you contact -- first of all, what year?

A 2016.

Q Why did you contact Mr. Cotton or have communication with him in July of 2016?

A The team had identified a property on Federal Boulevard that may qualify for a dispensary.

Q Okay. And you mentioned the team. What was the team?

A Jim Bartell, Abhay Schweitzer, and Gina Austin.

Q And when did you form -- for what purposes was that team formed?

A They were going to facilitate to proceed to get the CUP on Mr. Cotton's property.

Q When did you first hire Mr. Bartell?

A In October of 2015.

Q Now, at that time, had you had any contact with Mr. Cotton?

A No, I didn't.

Q So why did you -- well, first of all, can you tell the jury who Mr. Bartell is, to your understanding.

A Mr. Bartell is a liaison lobbyist between myself and the City.

MR. WEINSTEIN: Okay. I'm going to show the witness a stipulated exhibit, Exhibit 1.

THE COURT: Any objection if Exhibit 20 is admitted, Counsel?

MR. AUSTIN: No.

MR. WEINSTEIN: Exhibit 1. It's Exhibit 1.

THE COURT: Exhibit 1?

MR. WEINSTEIN: Yes.

THE COURT: Oh, I'm sorry. Any objection to the admission of Exhibit 1?

MR. AUSTIN: No, your Honor.

THE COURT: Exhibit 1 will be admitted.

(Premarked Joint Exhibit 1, Letter of Agreement with Bartell & Associates dated 10/29/15, was admitted into evidence.)

BY MR. WEINSTEIN:

Q Mr. Geraci, there are books up there. If it's easier for you, there are books up there.

THE COURT: Counsel, they may have been moved. Do you want to approach?

MR. WEINSTEIN: If you need to look at the

DIRECT EXAMINATION OF REBECCA BERRY BY MICHAEL R. WEINSTEIN (RT 190:01-194:5)

MR. WEINSTEIN: Thank you.

(Direct examination of Rebecca Berry)

BY MR. WEINSTEIN:

Q Ms. Berry, are you -- first of all, let's talk about your education. Have you graduated from high school?

A Yes.

Q And when?

A 1967.

Q From where?

A Granite Hills High School.

Q And did you take college after that?

A Some college.

Q Where at?

A Grossmont College.

Q And when was that?

A 1968 and then 10 years later, I took classes probably in -- no. Fifteen years later. So --

Q Okay. And did you get a degree from Grossmont?

A No.

Q Okay. Other than attending Grossmont, have you attended any -- any schooling since you graduated from high school?

A Real estate and as the real estate broker ministerial training.

Q Okay. And let's take the latter first. Would you -- did you say ministerial training?

A Yes.

or broker with respect to the sale of -- the agreement to sell property that's the subject of this lawsuit?

A No.

Q Okay. Were you involved at all in the negotiation of -- of that agreement?

A No.

Q Do you know Darryl Cotton?

A No.

Q Have you -- when is the first time you ever saw him?

A Yesterday in the courtroom.

Q Okay. Have you ever spoken to him on the phone?

A No.

Q Have you ever seen him in the office?

A No.

Q Okay. Now, are you currently employed?

A Yes.

Q And by whom?

A Tax and Financial as the real estate broker and through my church as a teacher and counselor.

Q Okay. Let's focus on Tax and Financial.

How long have you worked at Tax and Financial Center?

A Almost 15 years.

Q And what's your current job position at Tax and Financial Center?

A I'm an assistant to Larry Geraci, and I manage

the office.

Q And how long have you been in that position?

A Almost 15 years.

Q So the entire time you've been there?

A Yes.

Q Now, in -- as you know, this case -- do you know -- do you understand this case involves an attempt to obtain a CUP conditional use permit to operate a dispensary at a property that Mr. Geraci was attempting to purchase?

A Yes.

Q Okay. Were you the applicant on that CUP application?

A Yes.

Q Okay. And as -- as the applicant -- as the applicant, did you understand that you were acting at all times as the agent for and on behalf of Mr. Geraci?

A Yes.

Q Why -- what was your understanding as to why you were the applicant on that CUP application?

A Mr. Geraci has a federal license, and we were afraid that it might affect it at some point.

Q What lines -- what federal license is that?

A He's an enrolled agent.

Q And did you have a discussion with him about the fact that there was a possibility or it was unknown whether him being an applicant on the property would affect his enrolled agent license?

A Yes.
Q All right. Were there any other reasons that you recall that you were the applicant -- chose to be the applicant on the project?
A No.
Q Were you willing and -- were you willing to be the applicant on the project as Mr. Geraci's agent?
A Yes.
Q Now, in connection with the CUP application project, were you involved at all in the communications with the City?
A Yes.
Q Okay. And what was your involvement in communications with the City?
A They -- I -- what I would do is if I got any information, I would simply direct it to Mr. Geraci or his team.
Q Okay.
A And then I made no decisions.
Q Okay. And so did you also have any communications with the team that Mr. Geraci had put together to pursue the CUP application?
A I had some interaction.
Q And -- and which members of the team do you recall having interaction with?
A Abhay.
Q That's Mr. Schweitzer?
A Mr. Schweitzer.

I, Margaret A. Smith, a Certified Shorthand Reporter, No. 9733, State of California, RPR, CRR, do hereby certify:

That I reported stenographically the proceedings held in the above-entitled cause; that my notes were thereafter transcribed with Computer-Aided Transcription; and the foregoing transcript, consisting of pages number from 1 to 215, inclusive, is a full, true and correct transcription of my shorthand notes taken during the proceeding had on July 3, 2019.

IN WITNESS WHEREOF, I have hereunto set my hand this 22nd day of July 2019.

_____

Margaret A. Smith, CSR No. 9733, RPR, CRR

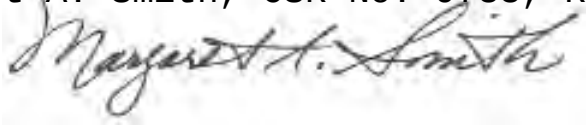

Exhibit 6

Fwd: Geraci v. Cotton [Deposition Subpoena - Corina Young]

From: Jake Austin (jpa@jacobaustinesq.com)

To: lorianne.hatmaker@yahoo.com

Date: Sunday, June 16, 2019, 12:43 PM PDT

Law Office of Jacob Austin
P.O. Box 231189
San Diego, CA 92193 USA
Phone: (619) 357-6850
Facsimile: (888) 357-8501

---------- Forwarded message ---------
From: **Jake Austin**<jpa@jacobaustinesq.com>
Date: Wed, Jun 12, 2019 at 6:45 PM
Subject: Re: Geraci v. Cotton [Deposition Subpoena - Corina Young]
To: Natalie T. Nguyen <natalie@nguyenlawcorp.com>

Ms. Nguyen,

Trial on the Geraci v. Cotton case in which your client, Corina Young, is a material witness is immediately impending and you have yet to deliver on any of the items we had previously agreed upon.

At this point in time it is too late to rely on you to uphold your promises without a proper demand. I need you to provide a declaration by end of week or I will have to file a motion for sanctions against you personally, and re-issue a subpoena.

Let me know by the end of the day Friday if you will provide the declaration requested or not so I can proceed accordingly.

Jacob

Law Office of Jacob Austin
P.O. Box 231189
San Diego, CA 92193 USA
Phone: (619) 357-6850
Facsimile: (888) 357-8501

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On Tue, May 28, 2019 at 10:20 AM Jake Austin <jpa@jacobaustinesq.com> wrote:

> Ms. Young's original deposition was scheduled for Jan. 18th and we agreed to your request that she provide a declaration instead. It has been over 4 months and we have yet to receive anything. Please provide an update.

Jacob
Law Office of Jacob Austin
P.O. Box 231189
San Diego, CA 92193 USA
Phone: (619) 357-6850
Facsimile: (888) 357-8501

On Fri, May 3, 2019 at 12:04 PM <natalie@nguyenlawcorp.com> wrote:

> Good morning Jake,
>
> Thanks for following up. Let me check and get back to you soon.
>
> Natalie
>
> Natalie T. Nguyen, Esq.
> **NGUYEN LAW CORPORATION**
> M: 2260 Avenida de la Playa | La Jolla, CA 92037
> T: 858-225-9208
> E: natalie@nguyenlawcorp.com
>
> **From:** Jake Austin <jpa@jacobaustinesq.com>
> **Sent:** Thursday, May 2, 2019 11:56 AM
> **To:** Natalie T. Nguyen <natalie@nguyenlawcorp.com>
> **Subject:** Re: Geraci v. Cotton [Deposition Subpoena - Corina Young]
>
> Please give me an update, this is important to my client's case.
>
> Jacob
> **Law Office of Jacob Austin**
> P.O. Box 231189
> San Diego, CA 92193 USA

Phone: (619) 357-6850

Facsimile: (888) 357-8501

On Tue, Apr 16, 2019 at 6:15 PM Jake Austin <jpa@jacobaustinesq.com> wrote:

> Hello Natalie,
>
> As you recall we have been trying to work out an affidavit or a deposition for three months now, can you kindly give me an update on Ms. Young?
>
> Jacob
>
> **Law Office of Jacob Austin**
>
> P.O. Box 231189
> San Diego, CA 92193 USA
>
> Phone: (619) 357-6850
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> Facsimile: (888) 357-8501
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>
> On Thu, Mar 7, 2019 at 1:45 PM <natalie@nguyenlawcorp.com> wrote:
>
> > Hi Jacob,
> >
> > Ms. Young is out of town on March 11 so she will not be able to attend the deposition as noticed. Our Objection to the Deposition Notice is attached.

Despite her limited availability, we maintain the intention to provide you with a written statement as previously agreed. I hope to have it ready sometime next week.

Best regards,

Natalie

Natalie T. Nguyen, Esq.

NGUYEN LAW CORPORATION

M: 2260 Avenida de la Playa | La Jolla, CA 92037

T: 858-225-9208

E: natalie@nguyenlawcorp.com

From: Jake Austin <jpa@jacobaustinesq.com>
Sent: Thursday, February 28, 2019 2:05 PM
To:natalie@nguyenlawcorp.com
Subject: Re: Geraci v. Cotton [Deposition Subpoena - Corina Young]

Hello,

I haven't heard from you for awhile so just so you know my office is generating a subpoena for a deposition. We hope we do not need a deposition so if you can provide an affidavit that would be greatly appreciated. Also can we agree to accept electronic service from one another moving forward?

Jacob

On Mon, Jan 21, 2019 at 3:09 PM <natalie@nguyenlawcorp.com> wrote:

> Hi Jacob,
>
> I closely reviewed the Declaration of Joe Hurtado and the text message exchange attached thereto. I also discussed your proposal:

"Thus, to simplify the matter, if Ms. Young can provide her sworn written testimony stating that all of the statements in the text messages were true or she believed them to be true when she said them, along with a description of the length and nature of her relationships with the parties identified in the text messages, we can forgo her deposition.

with Ms. Young and she's accepted the same. We will provide a sworn written testimony by Ms. Young as described above.

Best regards,

Natalie T. Nguyen, Esq.

NGUYEN LAW CORPORATION

M: 2260 Avenida de la Playa | La Jolla, CA 92037

T: 858-225-9208

E: natalie@nguyenlawcorp.com

From: Natalie T. Nguyen <natalie@nguyenlawcorp.com>
Sent: Thursday, January 17, 2019 5:23 PM
To: 'Jake Austin' <jpa@jacobaustinesq.com>
Subject: RE: Geraci v. Cotton [Deposition Subpoena - Corina Young]

Hi Jacob,

Thank you for taking the time to lay it all out for me. My grasp of this case is limited to the online register of action, the minute order to continue trial, and the deposition subpoena. However, I'm only representing a third-party witness so I see no reason to be embroiled in the case. Perhaps it's best this way.

I quickly scanned the attachment you sent, mostly the text message exchange. I gather there's some complicated history between the parties. In any event, I don't see an issue with a providing a sworn statement.

I intend to review your email and attachment more closely tomorrow and discuss your proposal with Mr. Young. I will reach back out to you after that.

Best regards,

Natalie

Natalie T. Nguyen, Esq.

NGUYEN LAW CORPORATION

M: 11440 West Bernardo Court, Suite 210 | San Diego, CA 92127

T: 858-225-9208

E: natalie@nguyenlawcorp.com

From: Jake Austin <jpa@jacobaustinesq.com>
Sent: Thursday, January 17, 2019 4:55 PM
To:natalie@nguyenlawcorp.com
Subject: Re: Geraci v. Cotton [Deposition Subpoena - Corina Young]

Hello Natalie,

This is an awkward situation, so I will be direct. Your client has repeatedly communicated that she is hostile to my client and will not provide her deposition to material matters that are crucial to my client. Thus, your unilateral decision to cancel the deposition because I did not respond with an alternative to her deposition is procedural improper and, in light of her long history of seeking to avoid being deposed, is suspect.

I can inform you that one of the parties on our side went through Stage III cancer and so we are aware of the challenges that dealing with cancer treatments takes on a patient and their loved ones. However, because of that, we also know that there will never be a "good" time in that context to be deposed.

I am not sure how deeply you are aware of the facts in this matter, so I will not assume you are purposefully being antagonistic and will not file a motion to compel your client's attendance and seek sanctions.

With that said, we understand your client is in a tough situation, which is what makes her testimony highly relevant and credible to our case. In your prior email you state that we can discuss "alternatives to her sitting for the deposition" and since it wasn't a request to reschedule, I have been racking my brain for an alternative to having her go through a deposition which I know could be tedious and stressful on its own. I also know that she may be hesitant to discuss certain subjects and may rely on the right against self-incrimination in some of her responses. I am not sure how familiar you are with the underlying case, but it is my belief that Ms. Young has not been involved in the acts that underline the causes of action and it is not my intention to name her in any lawsuit or anything to that effect.
To be specific, the facts which we hope to elicit from Ms.
Young have already been provided ***by*** her in her text messages with Mr. Hurtado. Attached hereto is a declaration from Mr. Hurtado that in turn has exhibits of text messages between him and Ms. Young regarding the subjects that we desire to depose Ms. Young on. The only additional facts we would want established, beyond those in her text messages, is a description of how long and how many interactions she has had with the parties at issue in this litigation and in the text messages.

What should be clear is that Ms. Young has known the parties associated with Mr. Geraci significantly longer and has established professional relationships with them, as opposed to the limited number of times she has met Mr. Cotton and Mr. Hurtado with whom she only had a couple of interactions with (setting aside
her communications related to not wanting to be involved in this litigation to Mr. Hurtado).

Thus, to simplify the matter, if Ms. Young can provide her sworn written testimony stating that all of the statements in the text messages were true or she believed them to be true when she said them, along with a description of the length and nature of her relationships with the parties identified in the text messages, we can forgo her deposition.

Please confirm if your client is willing to provide such sworn testimony. If not, please let me know if your client is available to be deposed any day next week between Wednesday through Friday.
Please note that the trial calendar requires us to file a motion for summary judgement on or before February 8, 2019. As you know, getting transcripts back and drafting an MSJ is time consuming, so, unfortunately, we are not in a position to push back her deposition for any prolong period of time.
Thus, if you cannot agree to providing her sworn testimony as described above, or having her deposition taken sometime next week, in the interests of my client's case, I will be forced to file an ex-parte application seeking to compel her deposition.

Lastly, again, my apologies for this direct and confrontational email. However, given Ms. Young's repeated statements, the nearing MSJ deadline, and the actions by the attorneys for Mr. Geraci, which I have already gone on record of stating and believing to be tantamount to fraud, I hope you can appreciate that I am attempting to manage this situation for Ms. Young as best as possible. The bottom line is that Ms. Young's

testimony provides damaging evidence against her own attorney and agents and I realize the uncomfortable position she is in.

I am open to alternatives and discussions, but Ms. Young's testimony is material and crucial. If you would like to discuss this issue further, I will make myself available to you.

Jacob

On Tue, Jan 15, 2019 at 1:05 PM <natalie@nguyenlawcorp.com> wrote:

> Hi Jacob,
>
> I left you a voicemail earlier and I do hope we can connect today. Our firm represents Corina Young, whose deposition you set for this Friday, January 18, 2019. Ms. Young is caring for a parent with brain cancer so she has very little time and a lot on her mind. Can we discuss alternatives to her sitting for the deposition on Friday?
>
> Best regards,
>
> Natalie
>
> Natalie T. Nguyen, Esq.
>
> **NGUYEN LAW CORPORATION**
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On Wed, Jan 16, 2019 at 3:39 PM <natalie@nguyenlawcorp.com> wrote:

> Hi Jacob,
>
> I did not receive a response from you. Please note that for the reasons set forth in my email below, Ms. Young is unable and will not attend the deposition you set for this Friday, January 18, 2019, at 10:00 am. Please kindly contact my office before setting another deposition date.
>
> Best regards,
>
> Natalie
>
> Natalie T. Nguyen, Esq.
>
> **NGUYEN LAW CORPORATION**
>
> M: 2260 Avenida de la Playa | La Jolla, CA 92037
>
> T: 858-225-9208
>
> E: natalie@nguyenlawcorp.com

From:natalie@nguyenlawcorp.com <natalie@nguyenlawcorp.com>
Sent: Tuesday, January 15, 2019 1:05 PM
To:JPA@jacobaustinesq.com
Subject: Geraci v. Cotton [Deposition Subpoena - Corina Young]
Importance: High

Hi Jacob,

I left you a voicemail earlier and I do hope we can connect today. Our firm represents Corina Young, whose deposition you set for this Friday, January 18, 2019. Ms. Young is caring for a

parent with brain cancer so she has very little time and a lot on her mind. Can we discuss alternatives to her sitting for the deposition on Friday?

Best regards,

Natalie

Natalie T. Nguyen, Esq.

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--

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Exhibit 7

Rec'd 9/26
20 Pages

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

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.)

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

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

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

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

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

---

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

III. ARGUMENT

A. MR. COTTON'S ILLEGALITY ARGUMENTS FAIL

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

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

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

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

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

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

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

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

The Court stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

FERRIS & BRITTON
A Professional Corporation

Dated: September 23, 2019

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

Exhibit 8

RA 681
13 Pages

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

LARRY GERACI, an individual,

Plaintiff,

vs.

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

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

vs.

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

Cross-Defendants.

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

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

REPLY IN SUPPORT OF MOTION FOR NEW TRIAL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. CONCLUSION

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

DATED this 30th day of September, 2019.

TIFFANY & BOSCO, P.A.

By: 

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

POS-050/EFS-050

ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NO: 28,849 NAME: Evan P. Schube, Esq. FIRM NAME: Tiffany & Bosco, P.A. STREET ADDRESS: 1455 Frazee Road, Suite 820 CITY: San Diego STATE: CA ZIP CODE: 92108 TELEPHONE NO: (619) 501-3503 FAX NO: E-MAIL ADDRESS: eps@tblaw.com ATTORNEY FOR (name): Defendant/Cross-Complainant Darryl Cotton	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego STREET ADDRESS: 330 West Broadway MAILING ADDRESS: 330 West Broadway CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: Central Division - Civil	CASE NUMBER 37-2017-00010073-CU-BC-CTL
PLAINTIFF/PETITIONER: LARRY GERACI DEFENDANT/RESPONDENT: DARRYL COTTON, et al.	JUDICIAL OFFICER The Honorable Joel R. Wohlfeil
PROOF OF ELECTRONIC SERVICE	DEPARTMENT C-73

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

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

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

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

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

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

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

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

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

Date: September 30, 2019

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

Yvette Brinkman
(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

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

PROOF OF ELECTRONIC SERVICE
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POS-050(P)/EFS-050(P)

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

ATTACHMENT TO PROOF OF ELECTRONIC SERVICE (PERSONS SERVED)

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

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

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

Exhibit 9

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO, CENTRAL DISTRICT

DEPARTMENT 73 HONORABLE JOEL R. WOHLFEIL, JUDGE

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

REPORTER'S CERTIFIED TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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

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

--000--

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

MR. WEINSTEIN: Good morning, Your Honor.

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

THE COURT: And Counsel?

MR. SCHUBE: Good morning, Your Honor.

Evan Schube on behalf of Mr. Cotton.

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

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

THE COURT: All right. Counsel?

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

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

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

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

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

MR. SCHUBE: Yes.

THE COURT: As a matter of law?

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

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

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

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

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

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

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

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

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

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

The information was not provided. And --

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

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

THE COURT: So it's akin to a jurisdictional

challenge?

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

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

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

THE COURT: Anything else, Counsel?

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

THE COURT: Thank you, very much.

MR. SCHUBE: Thank you, Your Honor.

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

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

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

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

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

MR. WEINSTEIN: Thank you, Your Honor.

MR. TOOTHACRE: Thank you, Your Honor.

(END OF PROCEEDING AT 9:23 AM)

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

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

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

ELIZABETH M. CESENA, CSR 12266
CERTIFIED SHORTHAND REPORTER

Exhibit 10

ROA 697
1 Page

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

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

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

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

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

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

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

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

Plaintiff to give notice of the Court's ruling.

EXHIBIT 11

Jacob P. Austin [SBN 290303]
The Law Office of Jacob Austin
1455 Frazee Road, #500
San Diego, CA 92118
Telephone: (619) 357-6850
Facsimile: (888) 357-8501
E-mail:JPA@JacobAustinEsq.com

Attorney for Defendant/Cross-Complainant DARRYL COTTON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

LARRY GERACI, an individual,

Plaintiff,

vs.

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

Defendants.

AND RELATED CROSS-ACTION.

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

DECLARATION OF JOE HURTADO IN SUPPORT OF *EX PARTE* APPLICATION FOR ORDERS APPOINTING A RECEIVER TO MANAGE THE CONDITIONAL USE PERMIT FOR DEFENDANT'S REAL PROPERTY; AND OTHER RELIEF

Date: June 14, 2018
Time: 8:30 a.m.
Dept: C-73
Judge: The Hon. Joel R. Wohlfeil

I, Joe Hurtado, declare as follows:

1. I am an individual over the age of 18 years, residing in the County of San Diego, and not a party to this action.

2. The facts contained in this declaration are true and correct of my own personal knowledge, except those facts which are stated upon information and belief; and, as to those facts, I believe them to be true. If called upon to do so, I could and would competently testify as to the truth of the facts stated herein.

3. I graduated from New York University School of Law in 2009.

4. Upon graduation, I clerked in the United States District Court in the Northern District of California for a year.

5. Upon completion of my clerkship, I joined the Mergers & Acquisitions group at Latham & Watkins in New York City as an Associate.

6. In 2013, I left the practice of law and joined the Corporate Strategy & Development department at UnitedHealth Group in Minneapolis as a Manager.

7. I left UnitedHealth Group in August of 2015, relocated to San Diego and enrolled in the Master of Science in Real Estate (MSRE) degree program at the University of San Diego. In my studies in the MSRE program, we discussed the effect that the legalization of medical cannabis was having on real property values in California.

8. Between late-2016 and early-2017, the following sequence of events took place: (i) Mr. Darryl Cotton informed me that he had entered into a conditional agreement for the sale of his real property located at 6176 Federal Boulevard, San Diego, California (the "Property") to Mr. Lawrence Geraci; (ii) Mr. Cotton told me that he expected Mr. Geraci would breach their agreement; (iii) Mr. Cotton asked that I help him to locate a new buyer for his Property; (iv) I confirmed with Mr. Geraci's attorney, Mrs. Gina Austin, that she was in the process of reducing to writing the agreement between Mr. Geraci and Mr. Cotton for the sale of the Property; (v) I entered into a contingent agreement with Mr. Richard Martin to facilitate his purchase of Mr. Cotton's Property in the event the transaction between Mr. Cotton and Mr. Geraci did not close as contemplated; and (vi) I brokered a deal between Mr. Cotton and Mr. Martin for the sale of Mr. Cotton's Property to Mr. Martin.

9. The day after the deal between Mr. Cotton and Mr. Martin had been reached on March 21, 2017, I was informed by Mr. Cotton that Mr. Geraci had served him with a lawsuit alleging a document executed in November of 2016 was the final written agreement for Mr. Cotton's Property (the "Geraci Litigation").

10. Throughout the course of the Geraci Litigation, the following sequence of events took place: (i) Mr. Cotton attempted to represent himself *pro se* in the Geraci Litigation; (ii) Mr. Cotton chose to no longer represent himself in the Geraci Litigation and asked that I help him finance and facilitate

his legal representation; (iii) I identified Attorney David S. Demian of Finch, Thornton & Baird for Mr. Cotton to interview to represent him in his legal matters; (iv) Attorney Demian undertook the representation of Mr. Cotton in various legal matters related to Mr. Cotton's Property; (v) Attorney Demian's representation of Mr. Cotton was terminated after I informed Mr. Cotton that Attorney Demian had failed to raise material evidence at a Court hearing at which I was present on December 7, 2017; and (vi) I facilitated Mr. Cotton's legal representation by Attorney Jacob Austin after Mr. Cotton's relationship with Attorney Demian was terminated.

11. On March 6, 2017, I attended a local event in San Diego for the kick-off of a new business center at which Mrs. Austin was the keynote speaker. Mr. Cotton had planned to attend the event to speak with Mrs. Austin regarding comments to the written agreements for the purchase of his Property by Mr. Geraci. However, Mr. Cotton could not make it and asked that I communicate so to Mrs. Austin.

12. At that point in time, after speaking with Mr. Cotton, I decided to attend the event because I was doubtful that Mr. Geraci would fail to live up to his end of the bargain. The deal Mr. Geraci had reached with Mr. Cotton was very favorable to him given the competition in San Diego for properties that qualified for CUPs with the City for cannabis related businesses.

13. My primary goal in attending the event was to speak with Ms. Austin to convey Mr. Cotton's message that he would not be attending and to personally confirm with Ms. Austin that a final agreement for the sale of Mr. Cotton's Property to Mr. Geraci had not been reached.

14. My conversation with Mrs. Austin was short, clear, direct, unambiguous and with no possibility for misinterpretation. Mrs. Austin acknowledged that she was working on the drafts for Mr. Geraci's purchase of Mr. Cotton's Property and that no final agreement had yet been executed.

15. I have reviewed some of Mrs. Austin's submissions to the Court on behalf of Mr. Geraci arguing that Mr. Cotton and Mr. Geraci entered into a final agreement for the Property in November of 2016. It is my belief that Mr. Geraci is falsely representing that document as the final agreement for the Property and that Mrs. Austin knows this is a false representation.

16. In January of 2018 I provided a supporting declaration for Mr. Cotton in which I noted I spoke with Ms. Austin at the event in March of 2017. This statement by itself is inconsequential to the Geraci Litigation. I had hoped, since prior to then I had not provided a declaration or been involved in

the litigation, that my declaration would let her know I was aware of her contradictory statements to the Court. And, consequently, she would inform Mr. Geraci about our conversation in March of 2017 which would lead to a material positive effect on the Geraci Litigation for Mr. Cotton (without me personally having to become involved).

17. I do not understand how Mrs. Austin can ethically reconcile her representations in March of 2017 and her arguments to the Court alleging facts that contradict her statements to me. Mr. Austin, counsel for Mr. Cotton, and I have spoken about the conversation I had with Ms. Austin in March of 2017 and information, such as the Metadata Evidence (as defined in Mr. Cotton's submissions to the Court), that reflect that Mrs. Austin is making false representations to the Court. Mr. Austin forwarded me an email from Mr. Weinstein in which Mr. Weinstein defends Ms. Austin by stating the following:

> Ms. Austin has made no misrepresentations to the court. No declaration signed under penalty of perjury by Gina Austin has been submitted as evidence to the Court in any proceeding in any of the two cases. She has appeared as counsel in the Writ of Mandate case and argued with me in opposition to Mr. Cotton's first ex parte application for issuance of a writ of mandate heard by Judge Sturgeon. That is it – legal argument.

Therefore, based on this email from Mr. Weinstein, it appears to me that Mr. Weinstein and Mrs. Austin believe they can make *legal arguments* to the Court that contain factual statements that they know to be false and not be in violation of any rules or codes of ethical conduct for attorneys. I believe this to be incorrect.

18. I have not previously provided my detailed testimony for the following reasons: (i) my professional and personal networks are conservative in nature and I did not want there to be a public record of my involvement in a cannabis related real estate transaction; (ii) I believed that the evidence presented by Mr. Cotton, especially the Confirmation Email and communications sent by Mr. Geraci to Mr. Cotton, is more than sufficient to prove his case and that my testimony would be unnecessary; (iii) Mr. Cotton is an intelligent, strong-willed and politically passionate individual; however, I did not want to be publicly associated with him because of his history related to his political activism for medical cannabis; (iv) the Court's orders in this action have repeatedly stated that Mr. Cotton is unlikely to prevail in this litigation and I have finite capital to allocate toward financing his legal defense (irrespective of the merits of his case); (v) on January 17, 2018, I was threatened by an individual, Mr. Shawn Miller, who told me that it would be in my "best interest" to use my influence with

Mr. Cotton to convince him to "settle with Geraci"; (v) Mr. Cotton has been the victim of an armed-robbery at his Property, reported to the police, that he believes occurred at the direction of Mr. Geraci; and (vi) Mr. Cotton, on a separate incident, showed me video of being accosted by an individual known as Logan who told Mr. Cotton that he should settle with Mr. Geraci for his own good.

19. The language used by Logan sounds similar me to that used by Mr. Miller, leading me to believe there is a reasonable possibility that these individuals were both sent by, or someone connected to, Mr. Geraci.

20. I am now providing my testimony at the request of Mr. Austin because I believe his legal arguments regarding the parol evidence rule are meritorious and that Mr. Cotton will prevail in this action as a matter of law.

21. Additionally, I am providing my testimony because on May 27, 2018 I was present at a meeting at which Ms. Corina Young described a meeting to Mr. Cotton and his attorney, Mr. Austin, that she had with Mr. Jim Bartell on or around October of 2017. She met with Mr. Bartell upon her attorney's recommendation, Mr. Matthew Shapiro, when she informed him that she was contemplating investing in Mr. Cotton's litigation against Mr. Geraci. Mr. Bartell informed her that he "owns" the CUP on Mr. Cotton's Property and he would be getting it denied "because everyone hates Darryl."

22. Ms. Young was attempting to defuse the situation between Mr. Cotton and a Mr. Aaron Magagna who had submitted a competing CUP within 1,000 feet of Mr. Cotton's Property and who appears to have numerous connections to Mr. Geraci.

23. Subsequent to the May 27, 2018, Ms. Young and I had several conversations in which she first attempted to argue on behalf of Mr. Magagna, until such time that Mr. Magagna attempted to coerce Ms. Young into changing her testimony regarding the meeting with Mr. Bartell and he offered her financial compensation for doing so. Attached hereto as **Exhibit A** are true and correct copies of my text messages with Ms. Young on June 1, 2018. I am breaching her confidence by providing them, but am doing so because I believe her testimony is required to prove Mr. Bartell's statements and that Mr. Shapiro and Mr. Magagna are closely connected to Mr. Bartell and Mrs. Austin, both of whom are agents of Mr. Geraci.

24. Upon information and belief, according to a statement from a third-party, Mr. Magagna is also currently represented by Mrs. Austin.

25. On June 4, 2018, Ms. Young hired independent counsel and stated she would not be providing any statements until her attorney reviewed the Geraci Litigation. Subsequent to June 4, 2018, Ms. Young communicated that she would neither confirm nor deny the statements in our text messages and, if subpoenaed, upon the advice of counsel, she would be invoke her right under the 5th Amendment to not self-incriminate herself.

26. Lastly, I wish to clearly state that I do ***not*** share, support or condone in any manner Mr. Cotton's beliefs regarding the various conspiracies he has alleged in his public filings regarding the Court, the City of San Diego or any of their respective employees.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 13, 2018.

JOE HURTADO

EXHIBIT A

Fri, 06/01/2018

Look, I don't know what to say because at the end of the day as discussed yiurr being put in a shitty situatiom and it benefits me. Anything i say is suspect. I'm sorry about Darryl and the situation. Talk to your attorney first about this before saying anything more to me or anyone. I just want you to know I can't NOT tell the truth. Jake has already sent emails and I have to provide my testimony to confirm what you said in front of him and darryl. And I'm sorry because although you told me about Aaron in confidence, under oath, I won't be able to lie about it. The whole situation has spiraled out of control.

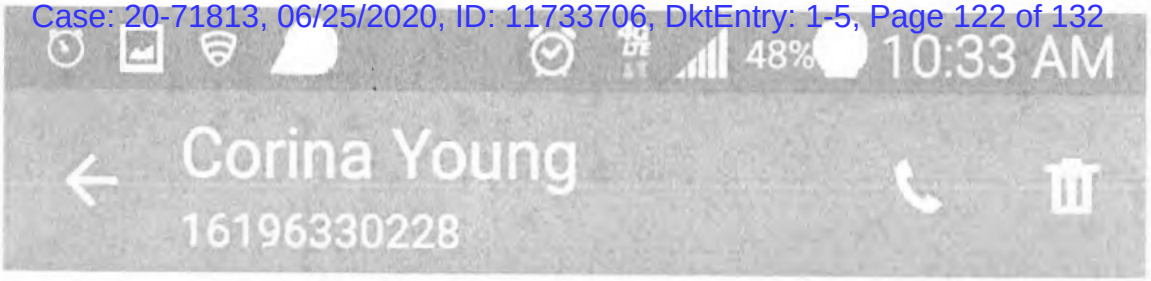
10:17 AM

I have no words.

10:23 AM

I will be getting an attorney. You are all opportunistic assholes.

Enter message



I will be getting an attorney. You are all opportunistic assholes.

10:31 AM

Matt, Cotton, Gina, Jacob... now you... it's so disgusting to disrupt and destroy people's lives. I'm fucking hiding from Cotton!!!

10:35 AM

Now things I told you in confidence... seriously? You know Jim is on my CUP.

10:37 AM

You know is jeopardizes my future and everything I have worked so hard for.

10:38 AM

I hate you

10:46 AM

And I never asked you to "not" tell the truth

Enter message

And I never asked you to "not" tell the truth

10:48 AM

I have not shared anything you have told me in confidence with Darryl. I don't trust him, he's literally been driven near insane because of this. But if this comes down to getting deposed and being on trial and I get asked about Aaron, which I will, I'm going to have to tell them what I know. Aaron pays Matt points for cannabis sold to unlicensed shops, he repeatedly told you that you were dreaming the Bartell meeting, he offered you money to somehow keep him out of this. Shapiro told

Enter message

I have not shared anything you have told me in confidence with Darryl. I don't trust him, he's literally been driven near insane because of this. But if this comes down to getting deposed and being on trial and I get asked about Aaron, which I will, I'm going to have to tell them what I know. Aaron pays Matt points for cannabis sold to unlicensed shops, he repeatedly told you that you were dreaming the Bartell meeting, he offered you money to somehow keep him out of this. Shapiro told you not to get an attorney. That is so unethical! Believe it or not, I have moved heaven and earth myself to not get involved. Gina told me in march of 2017 she was working on drafts for the property and I have NEVER provided my testimony on that because I don't want to be involved. I don't want to be a witness even though I have testimony that proves she's in on it. Darryl and Jacob have begged me for months to provide my testimony and I have not.

10:48 AM

Enter message

And I never asked you to "not" tell the truth

10:49 AM

I know. I'm not saying you did. I just meant that there is no situation where I cannot. I would stay out of it if I could. But that's not an option for me either now.

10:49 AM

I dont know what to believe anymore

10:51 AM

In this business everyone make points. Thanks not a big deal. I'm more bothered by the fact Matt literally knows every deal offer that I have had.

10:54 AM

I know. But it's not ethical for attorneys to facility cannabis transactions and get paid point for every deal. I know it's normal in the industry, but it's not ethical for

I know. But it's not ethical for attorneys to facility cannabis transactions and get paid point for every deal. I know it's normal in the industry, but it's not ethical for attorneys. That's why he's going to try to discredit you and say you're a pothead, to make it look like you have a bad memory or are a liar. When you talk to your attorney, he will confirm that Gerais lawsuit is fraudulent and matt's actions are unethical. And Aarons actions speak for themselves. Just tell everything to your attorney and follow his advice.

10:59 AM

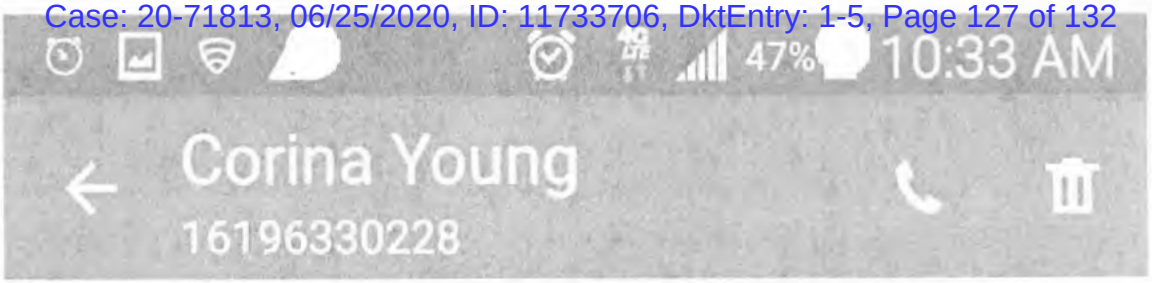
Matt can't use attorney client privileged information in any way against you. Have your attorney send him a letter explicitly stating as much.

11:00 AM

If I lose my La MESA CUP over any of this... I'm suing everyone

11:00 AM

Enter message



If this is true and what they are doing to Cotton is true..... What do you think they will do to us for simply telling the truth. Haven't you already gotten

11:41 AM

threats? What do you think will come next? These guys know where I live. THEY KNOW WHERE I LIVE! Matt has sat on my patio and discussed federal and all my

11:41 AM

deals... he inserted Gina and Bartel in my life ... as well as Aaron now that I think about it. All after I discussed federal with him. Is this all a random

11:41 AM

coincidence or is it all because of federal? I'm growing more and more concerned that these things are true. Is Matt saying I'm a pothead a big deal? He was

11:41 AM

Enter message

sitting next to me in from of Jim when I asked if I should invest. He said No. The whole point was to give them a list of properties to see if they were viable

11:41 AM

or not. We hired Jim. I wasn't medicated at the damn meeting either. The truth is the truth. By saying the truth... I stand to lose everything, I also can not

11:41 AM

lie under oath. I'd rather just not say anything at all. I wish you would continue to protect your family as well. It is apparent that it is every man for

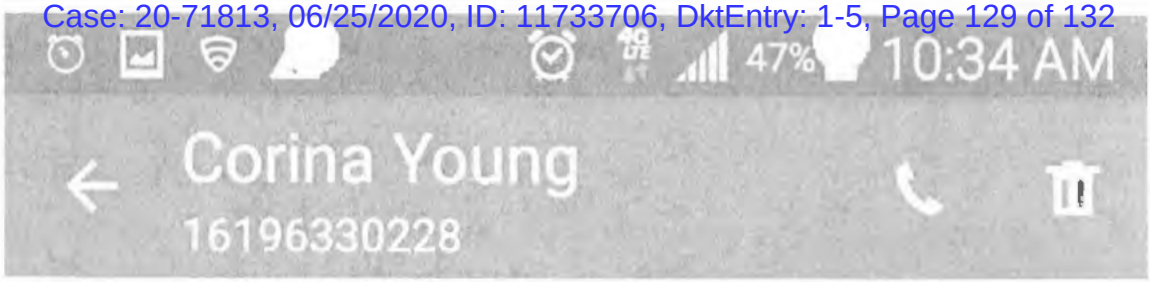
11:41 AM

himself right now. It's a lose lose for me all the way around.

11:41 AM

Corina. I know your upset and this is bad. Please meet your attorney as

Enter message



11:41 AM

Corina. I know your upset and this is bad. Please meet your attorney as soon possible and don't text me or anyone anymore, these text messages can get subpoenaed. This is important. I'm not an attorney and nothing you tell me is covered by privilege. Don't talk or text anyone until your attorney examines and understands the geraci v cotton case. What I still don't think you understand the complete import of, is that Bartell's comment shows bad faith and provides proof of a conspiracy. I know you had no idea that comment back then would stir up such a shit storm now. But I can't control Cotton and there is no way he will not drag you and me into this. I swear I wish I had not been there and heard you say that. But it puts us in a potentially adverserial position. DON'T TALK OR TEXT WITH ANYONE. Everyone has their own agenda, you need to look out for yourself.

11:51 AM

Enter message

EXHIBIT 12

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ANDREW FLORES, *et al.*,

Plaintiffs,

v.

GINA M. AUSTIN, *et al.*,

Defendants.

Case No. 20-cv-656-BAS-MDD

ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER

[ECF Nos. 2]

Plaintiffs Andrew Flores, Amy Sherlock, and Jane Doe filed a 173-page complaint against 38 defendants. (ECF No. 1.) They allege civil rights violations under 42 U.S.C. § 1983, make a "neglect to perform wrongful act" cause of action, and seek various forms of declaratory relief. The complaint is almost impossible to summarize due to its length and confusing nature.

Plaintiffs also filed a motion for temporary restraining order ("TRO"). (ECF No. 2-1.) Plaintiffs seek six forms of relief in the motion, including requests for orders to show cause, sanctions, and orders compelling various Defendants' appearances. The motion contains no support behind these latter requests; thus, the Court only analyzes the motion for temporary restraining order. Plaintiffs seek a TRO on their declaratory relief cause of action—that the judgment in *Larry Geraci*

v. Darryl Cotton, San Diego County Superior Court, Case No. 37-2017- 00010073-CU-BC-CTL (what Plaintiffs call "*Cotton I*") is void "pursuant to the equitable doctrine of a fraud on the court." (ECF No. 2-1, at 18.)

Pursuant to Federal Rule of Civil Procedure 65, the court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: "specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition;" and "the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b). Plaintiffs have not provided any Defendant notice of the motion for TRO, and the Rule 65(b) requirements have not been met. Instead, Plaintiffs claim in their notice of motion that "the granting of this Application without notice to defendants is appropriate in order to not allow [Defendant Aaron] Magagna time to consummate the sale of the District Four CUP or to allow defendants time to threaten, coerce or intimidate [Defendant Corina] Young from providing her testimony or into committing perjury." (ECF No. 2, at 3.) This reasoning is unclear, and in any event, these are not specific facts made in an affidavit, nor has Plaintiffs' attorney (who is Flores) certified in writing why notice should not be required. Thus, the Court **DENIES** the Motion for Temporary Restraining Order without prejudice. (ECF No. 2.)

IT IS SO ORDERED.

DATED: April 20, 2020

Cynthia Bashant
Hon. Cynthia Bashant
United States District Judge

In the

United States Court of Appeals

For the

Ninth Circuit

IN RE ANDREW FLORES, an individual, AMY SHERLOCK, on her own behalf and on behalf of her minor children, T.S. and S.S., and Jane Doe, and individual,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

Respondent,

GINA M. AUSTIN, an individual, AUSTIN LEGAL GROUP APC, a California Corporation; JOEL R. WOHLFEIL, an individual; LAWRENCE (AKA LARRY) GERACI, an individual; TAX & FINANCIAL CENTER, INC., a California Corporation; REBECCA BERRY, an individual; JESSICA MCELFRESH, an individual; SALAM RAZUKI, an individual; NINUS MALAN, an individual; MICHAEL ROBERT WEINSTEIN, an individual; SCOTT TOOTHACRE, an individual; ELYSSA KULAS, an individual; RACHEL M. PRENDERGAST, an individual; FERRIS & BRITTON APC, a California Corporation; DAVID DEMIAN, an individual, ADAM C. WITT, an individual, RISHI S. BHATT, an individual, FINCH, THORTON, and BAIRD, a Limited Liability Partnership; JAMES D. CROSBY, an individual; ABHAY SCHWEITZER, an individual and dba TECHNE; JAMES (AKA JIM) BARTELL, an individual; BARTELL & ASSOCIATES, a California Corporation; MATTHEW WILLIAM SHAPIRO, an individual; MATTHEW W. SHAPIRO, APC, a California corporation; NATALIE TRANG-MY NGUYEN, an individual, AARON MAGAGNA, an individual; A-M INDUSTRIES, INC., a California Corporation; BRADFORD HARCOURT, an individual; ALAN CLAYBON, an individual; SHAWN MILLER, an individual; LOGAN STELLMACHER, an individual; EULENTHIAS DUANE ALEXANDER, an individual; BIANCA MARTINEZ; an individual; THE CITY OF SAN DIEGO, a municipality; 2018FMO, LLC, a California Limited Liability Company; FIROUZEH TIRANDAZI, an individual; STEPHEN G. CLINE, an individual; JOHN DOE, an individual; JOHN EK, an individual; THE EK FAMILY TRUST, 1994 Trust;

Real Parties In Interest.

FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CASE NO. 20-CV-656-BAS-DEB

DECLARATION OF ANDREW FLORES, IN SUPPORT OF PETITIONER'S WRIT OF MANDATE

ANDREW FLORES,
945 4th Avenue, Suite 412
San Diego, CA 92101
Telephone: 619.256.1556
Facsimile: 619.274.8053
Andrew@FloresLegal.Pro

Petitioner *In Propria Persona*,
and attorney for Petitioners
Amy Sherlock and her minor
children T.S. and S.S.

I, ANDREW FLORES, declare:

1. I am over the age of eighteen years and am both a Plaintiff *Pro Per* and Attorney for Amy Sherlock, her minor children T.S. and S.S.

2. I am admitted to practice law in this jurisdiction, California Bar No. 272958, and before this court.

3. Plaintiffs, for the purposes of this lawsuit, waived any potential conflict and have agreed that there is no actual conflict at this time. This waiver by and between Plaintiffs at this point in time is not a direct or indirect waiver of any applicable privilege as to any third parties.

4. The facts set forth herein are true and correct as of my own personal knowledge.

5. This declaration is submitted in support of Petitioner's Writ of Mandate in the case captioned above.

6. In January 2020, I believed I was done preparing the complaint for the underlying action and intended to name Young as a co-conspirator of Geraci. I spoke with Young and was direct, informing her that by failing to provide her promised testimony she was effectively a co-conspirator of Geraci, and I would seek to have her held civilly liable. Further, that it was possible after the civil action was concluded, and factual findings had been made, that such could lead to criminal charges being filed against her.

7. Immediately, Young broke down and said she had done nothing illegal and that it was Nguyen's *unilateral* decision to not provide Young's testimony.

8. Additionally, Young alleged that (i) Nguyen was referred to her by Shapiro, (ii) Shapiro paid Nguyen's legal fees for representing Young, and (iii) Nguyen – in an email – told her that it was OK to "ignore" their obligation to provide Young's testimony because "it was too late for Cotton to do anything about it" (the "Young Allegations").

9. As the ***exclusive*** result of Respondent's Order, Jane Doe's estate withdrew its consent for my office to continue to represent Jane Doe in this action.

10. At the time of her death, Jane was not married and is survived by her 87-

year old mother and her two year old son.

11. Jane's mother, the representative of Jane's estate, withdrew its consent because she believes that Judge Bashant is motivated to cover-up Judge Wohlfeil's incompetence. Throughout *Cotton I*, Geraci's attorneys assassinated the character and integrity of Cotton, Cotton's attorneys and supporters. Jane's mother does not want Jane's reputation to be maligned and she believes the Order reflects that Judge Bashant cannot be trusted to apply the law impartially and would allow Geraci's attorneys to assassinate her character if such would help distract from Judge Wohlfeil's incompetence

I declare under penalty of perjury according to the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 23, 2020 at San Diego, California.

ANDREW FLORES

In the

United States Court of Appeals

For the

Ninth Circuit

IN RE ANDREW FLORES, an individual, AMY SHERLOCK, on her own behalf and on behalf of her minor children, T.S. and S.S., and Jane Doe, and individual,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

Respondent,

GINA M. AUSTIN, an individual, AUSTIN LEGAL GROUP APC, a California Corporation; JOEL R. WOHLFEIL, an individual; LAWRENCE (AKA LARRY) GERACI, an individual; TAX & FINANCIAL CENTER, INC., a California Corporation; REBECCA BERRY, an individual; JESSICA MCELFRESH, an individual; SALAM RAZUKI, an individual; NINUS MALAN, an individual; MICHAEL ROBERT WEINSTEIN, an individual; SCOTT TOOTHACRE, an individual; ELYSSA KULAS, an individual; RACHEL M. PRENDERGAST, an individual; FERRIS & BRITTON APC, a California Corporation; DAVID DEMIAN, an individual, ADAM C. WITT, an individual, RISHI S. BHATT, an individual, FINCH, THORTON, and BAIRD, a Limited Liability Partnership; JAMES D. CROSBY, an individual; ABHAY SCHWEITZER, an individual and dba TECHNE; JAMES (AKA JIM) BARTELL, an individual; BARTELL & ASSOCIATES, a California Corporation; MATTHEW WILLIAM SHAPIRO, an individual; MATTHEW W. SHAPIRO, APC, a California corporation; NATALIE TRANG-MY NGUYEN, an individual, AARON MAGAGNA, an individual; A-M INDUSTRIES, INC., a California Corporation; BRADFORD HARCOURT, an individual; ALAN CLAYBON, an individual; SHAWN MILLER, an individual; LOGAN STELLMACHER, an individual; EULENTHIAS DUANE ALEXANDER, an individual; BIANCA MARTINEZ; an individual; THE CITY OF SAN DIEGO, a municipality; 2018FMO, LLC, a California Limited Liability Company; FIROUZEH TIRANDAZI, an individual; STEPHEN G. CLINE, an individual; JOHN DOE, an individual; JOHN EK, an individual; DARRYL COTTON, an individual; THE EK FAMILY TRUST, 1994 Trust;

Real Parties In Interest.

FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CASE NO. 20-CV-656-BAS-DEB

DECLARATION OF JACOB AUSTIN, IN SUPPORT OF PETITIONER'S WRIT OF MANDATE

ANDREW FLORES,
945 4th Avenue, Suite 412
San Diego, CA 92101
Telephone: 619.256.1556
Facsimile: 619.274.8053
Andrew@FloresLegal.Pro

Petitioner *In Propria Persona*,
and attorney for Petitioners
Amy Sherlock and her minor
children T.S. and S.S.

///

///

I, JACOB AUSTIN, declare:

1. I am over the age of eighteen years.

2. I am an attorney duly licensed in the State of California with my primary place of business in San Diego County (SBN#290303).

3. The facts set forth herein are true and correct as of my own personal knowledge or belief.

4. This declaration is submitted in support of Writ of Mandamus by Andrew Flores.

5. I am the attorney of record for Mr. Darryl Cotton in the matter of *Geraci v. Cotton*, 37-2017-00010073 which was originally filed in March of 2017.

6. I was engaged on a limited basis to do research and file a motion to expunge the Lis Pendens put on 6176 Federal Blvd. San Diego, CA 92114 by Larry Geraci.

7. On or around May 27, 2018, Coring Young met with Joe Hurtado to discuss the investment proposal.

8. Jim Bartell, a political lobbyist told Young that he "owns" the Berry Application and that he was getting it denied with the City "because everyone hates Darryl" (the "Bartell Statement").

9. Young subsequently engaged Bartell for a cannabis application at a different location.

10. Cotton expressed his desire to sue Magagna as a co-conspirator of Geraci, to which Young responded by stating that she did not believe Magagna would engage in fraudulent conduct. Young met with Magagna and explained Cotton believed him to be a co-conspirator of Geraci.

11. Young hired attorney Natalie Nguyen who promised to provide Young's testimony confirming, *inter alia*, the Bartell Statement and Magagna's attempts at bribing and threatening her. Attached to Petitioner's Request for Writ of Mandamus as Ex. 3 is a true and correct copy of my email correspondence with Nguyen). Nguyen never

provided the promised testimony. On June 12, 2019, after Nguyen failed to provide Young's testimony for almost six months, despite repeated requests that she do so, I emailed Nguyen demanding she provide Young's promised testimony for the Cotton I trial that was scheduled to begin on July 3, 2019.

12. I subpoenaed Ms. Young for deposition on January 1, 2019 for a deposition to be held on January 18, 2019. Attached here as Exhibit 1 is the Subpoena.

13. On February 26, 2019 after Nguyen cancelled the deposition, promised to provide her client's written testimony, and never provided such I served a new Notice of Deposition on her office notifying her of my intent to depose her client on March 13, 2019 which is attached here as Exbibit 2.

14. Because Nguyen never responded the *Cotton I* trial was held without Young's testimony regarding Bartell or Magagna.

15. On July 11, 2019 I filed a motion for directed verdict and argued in found of Judge Wohlfeil that BPC § 26057(a), using the word "shall," mandates that the 6176 Application be denied and that the court would be allowing an action that seeks to enforce an illegal contract. Judge Wohlfeil denied the motion for a directed verdict with no explanation.

I declare under penalty of perjury according to the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 23, 2020 at San Diego, California.

Jacob P. Austin

Jacob Austin

Exhibit 1

SUBP-015

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Jacob P. Austin (SBN290303)
The Law Office of Jacob Austin
1455 Frazee Road #500
San Diego CA 92108
TELEPHONE NO.: (619) 357-6850 FAX NO. (Optional): (888) 357-8501
E-MAIL ADDRESS (Optional): JPA@JacobAustinEsq.com
ATTORNEY FOR (Name): Defendant/Cross-complainant Darryl Cotton

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego
STREET ADDRESS: 330 West Broadway
MAILING ADDRESS: 330 West Broadway
CITY AND ZIP CODE: San Diego 92101
BRANCH NAME: Hall of Justice

PLAINTIFF/ PETITIONER: Larry Geraci
DEFENDANT/ RESPONDENT: Darryl Cotton

DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE

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

THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of deponent, if known)*:
Corina Young 1390 Weers Street, El Cajon CA 92020

1. **YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:**

Date: January 18, 2019 Time: 10:00 A.M. Address:
7880 Broadway, Lemon Grove CA 91945

a. ☐ As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 2. (Code Civ. Proc., § 2025.230.)

b. ☑ This deposition will be recorded stenographically ☐ through the instant visual display of testimony and by ☐ audiotape ☑ videotape.

c. ☐ This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).

2. ☐ If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are as follows:

3. *At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition. Unless the court orders or you agree otherwise, if you are being deposed as an individual, the deposition must take place within 75 miles of your residence or within 150 miles of your residence if the deposition will be taken within the county of the court where the action is pending. The location of the deposition for all deponents is governed by Code of Civil Procedure section 2025.250.*

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF $500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: January 1, 2019

Jacob P. Austin
(TYPE OR PRINT NAME)

DocuSigned by:
Jacob Austin
91CE828CC38940E...
(SIGNATURE OF PERSON ISSUING SUBPOENA)

Attorney at Law
(TITLE)

(Proof of service on reverse)

SUBP-015

PLAINTIFF/PETITIONER: Larry Geraci DEFENDANT/RESPONDENT: Darryl Cotton	CASE NUMBER: 2017-00010073-CU-BC-CTL

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE

1. I served this *Deposition Subpoena for Personal Appearance* by personally delivering a copy to the person served as follows:
   a. Person served *(name)*: Corina Young
   b. Address where served: 1390 Weers Street, El Cajon CA 92020
   c. Date of delivery: January 2, 2019
   d. Time of delivery: 11:00 A.M.
   e. Witness fees and mileage both ways *(check one)*:
      (1) ☑ were paid. Amount: . . . . . $ 43.00
      (2) ☐ were not paid.
      (3) ☐ were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was *(specify)*: . . . . . $ _____
   f. Fee for service: . . . . . $ _____
2. I received this subpoena for service on *(date)*: January 2, 2019
3. Person serving:
   a. ☑ Not a registered California process server
   b. ☐ California sheriff or marshal
   c. ☐ Registered California process server
   d. ☐ Employee or independent contractor of a registered California process server
   e. ☐ Exempt from registration under Business and Professions Code section 22350(b)
   f. ☐ Registered professional photocopier
   g. ☐ Exempt from registration under Business and Professions Code section 22451
   h. Name, address, telephone number, and, if applicable, county of registration and number:

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

Date: January 2, 2019

▶ Tammy J. Thomas
(SIGNATURE)

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

Exhibit 2

Jacob P. Austin [SBN 290303]
The Law Office of Jacob Austin
P.O. Box 231189
San Diego, CA 92193
Telephone: (619) 357.6850
Facsimile: (888) 357.8501
Email: JPA@JacobAustinEsq.com

Attorney for Defendant/Cross-Complainant DARRYL COTTON

SUPERIOR COURT OF CALIFORNIA

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, and individual, REBECCA BERRY, an individual; and DOES 1 through 10, Inclusive,

Cross-Defendants.

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

NOTICE OF TAKING DEPOSITION OF CORINA YOUNG

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU AND EACH OF YOU will please take notice that Defendant/Cross-Complainant DARRYL COTTON will take the Deposition of witness CORINA YOUNG on MARCH 11, 2019 commencing at

10:00 a.m. at 7880 Broadway, Lemon Grove, California 91945 (619) 356-1556. upon oral examination before a Certified Shorthand Reporter. Said Deposition will continue from day to day, Saturdays, Sundays, and holidays excepted, until completed.

Pursuant to Code of Civil Procedure section 2025.220, Defendant/Cross-Complainant DARRYL COTTON gives notice of his intention to record the testimony via audiotape, videotape, and/or stenographic methods with instant display of testimony and reserves the right to use any videotaped portion of the Deposition testimony at Trial in this matter.

DATED: February 26, 2019

THE LAW OFFICE OF JACOB AUSTIN

By 

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