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ATTORNEYS FOR: Defendant and Cross-Complainant RANDY CAMPBELL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA BARBARA

ANACAPA DIVISION

MARIANNE PARTRIDGE,

Plaintiff,

v.

RANDY CAMPBELL, and DOES 1 through 40, inclusive,

Defendants.

RANDY CAMPBELL,

Cross-Complainant,

v.

MARIANNE PARTRIDGE; JOSEPH L. COLE, and ROES 1 through 50, inclusive

Cross-Defendant

CASE NO.: 1341942

RANDY CAMPBELL'S TRIAL BRIEF

[Assigned for all purposes to the Honorable Denise de Bellefeuille]

Date: August 1, 2011
Time: 9:00 a.m.
Dept: 6

Defendant and Cross-Complainant, RANDY CAMPBELL, respectfully submits the following Trial Brief.

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I.

INTRODUCTION

Randy Campbell formed the Independent 25 years ago and has contributed greatly to its success. Partridge seeks a draconian remedy which is unsupported by any competent authority- force an unwilling shareholder to give up his shares when: (1) a 3rd party submits a nonbinding proposal; (2) Partridge initially deceived Campbell into believing her rights of first refusal were not triggered; and (3) Partridge secretively enlists the help of Campbell's former attorney in financing and orchestrating the "hostile takeover." Under these circumstances, the law and equity dictate that Partridge's claim for specific performance, as well as her other claims, must fail.

When a non-binding proposal came in to purchase ***all of the shares*** of the Independent, Campbell indicated his tentative willingness to vote his shares to sell the paper. Plaintiff and the other shareholders informed Campbell that since the proposal was not binding, the provisions of the buy/sell agreement regarding the right of first refusal were not triggered. However, at the same time, Plaintiff and the other minority shareholders secretly arranged for a third person to put up the money to purchase Campbell's shares. Even more egregious, the third person was JOSEPH COLE, who was Campbell's former attorney in a heated dispute against Partridge. Plaintiff did not, and does not, have the right to purchase Campbell's shares. Moreover, her secretive actions violated her fiduciary duty.

II.

PROCEDURAL HISTORY

Plaintiff MARIANNE PARTRIDGE ("Partridge") filed her complaint on February 11, 2010 which contains three causes of action, one of which is for Specific Performance. On March 12, 2010, Defendant RANDY CAMPBELL ("Campbell") filed an answer and a cross-complaint against Partridge, alleging causes of action for Breach of Fiduciary Duty, Breach of the Covenant of Good Faith and Fair Dealing, and Breach of Contract. During discovery, Campbell learned

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for the first time that his former lawyer, Cross-Defendant JOSEPH COLE ("Cole") was funding Partridge's attempted purchase of Campbell's shares. After this discovery, Campbell filed a motion for leave to file an amended cross-complaint, which added Cole as a defendant. Partridge opposed the motion, but the court granted it on November 4, 2010.

Cole responded to the cross-complaint by filing an anti-SLAPP motion on December 15, 2010, alleging his breach of fiduciary duty to Campbell was protected speech. This court denied Cole's anti-SLAPP motion on January 13, 2011, and entered its order on February 10, 2011. However, Cole appealed this court's ruling, and the action against Cole is stayed pending appeal. The parties have stipulated to have this matter tried by the court.

III.

FACTS

A. Formation of the Santa Barbara Independent

In 1986, Campbell and Richard Grand-Jean ("Grand-Jean") founded the Santa Barbara Independent, Inc. ("the Independent"). Campbell and Grand-Jean entered an Agreement for the Formation of Newspaper Company on November 17, 1986 (the "Formation Agreement"). The Formation Agreement, among other things, required that two-thirds of the outstanding shares of the Independent were needed in order to sell or transfer the stock of the Independent.

A month later, Campbell and Grand-Jean entered into a Stock Purchase and Buy-Sell Agreement dated December 22, 1986 ("the Buy-Sell Agreement"). The Buy-Sell Agreement provided for the issuance of 1,530 shares to Campbell by the Independent, and the issuance of 1,470 shares to Grand-Jean. With the issuance of the shares to him, Campbell became the owner of 51% of all the issued shares. Section I(B)(5) of the Buy-Sell Agreement provides that a shareholder cannot transfer any shares without first providing a detailed statement of the circumstances and the material terms of the proposed disposition.

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B. The Southland Proposal

On November 4, 2009, Southland Publishing, Inc. ("Southland") drafted a proposal ("the Southland Proposal") for Southland to purchase "100% of the outstanding stock of the Santa Barbara Independent." The Southland Proposal contained a total purchase price of $2,700,000. It also contained the following statement: "***Note that this proposal is not a binding offer as Southland Publishing shall be entitled to conduct due diligence, and material terms are not herein included in this proposal.***"

In addition, the Southland Proposal contained a "True-Up of Cash, Receivables and Current Payables" provision. This provision provided that if the Independent's net cash, receivables and payables 11 months after closing exceeded $700,000, then the excess amount would be paid to the shareholders. Thus, the exact purchase price could not be ascertained until 11 months after closing. Moreover, it was uncertain as to how the "Net Cash, Receivables, and Payables" would be calculated.

On November 11, 2009, Campbell met with Partridge to discuss the Southland Proposal. Campbell explained Southland's interest in purchasing the Independent resulted from knowledge of the company and Campbell's long time management and leadership. Partridge wondered what her role would be with Southland. Campbell told Partridge he was uncertain as no specific terms for his employment were pending, and those determinations would be offered by Southland.

On or about November 10, 2009, Campbell forwarded the Southland Proposal to all shareholders. Campbell notified the shareholders that he planned to accept the proposal to purchase all shares of the Independent. Campbell also notified the shareholders of his intent to sell all of his shares to Southland "for their terms outlined in their offer sheet." Campbell also provided the shareholders with an "Offering Notice," which again notified the shareholders Campbell intended to sell his shares to Southland. The Offering Notice indicated that "payment terms and the mechanics of the "True-Up" of cash, receivables, and payables are also detailed in the Southland offer." Because the Southland Proposal was to purchase all of the Independent

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shares, Campbell's notice of his intention to sell his shares was, in effect, a notice of his intention to vote his 51% shares in favor of selling to Southland.

C. The Independent's Buy-Sell Agreement

The Independent's Buy-Sell Agreement provides that no shareholder may transfer his/her shares without obtaining the written consent of all of the shareholders, unless certain procedures in the Buy-Sell Agreement are followed. The offering shareholder is required to comply with certain notice requirements and, if the offering shareholder fails to comply, then any purported transfer without such compliance is void.

The offering shareholder is also required to first name the proposed transferees including all persons who may be expected to acquire any interest in any shares in the proposed transfer. The notice is required to name the price per noticed share, the payment terms and any other material terms or conditions of the proposed transfer. The offering shareholder may withdraw the notice and the offer to sell the noticed shares at any time prior to full compliance with the procedures required to exercise the option to purchase as provided in the Buy-Sell Agreement.

There was considerable confusion among the Independent's shareholders and disagreement among them regarding the effect of the Southland proposal. The Southland Proposal did not contain all material terms of the proposed transfer, as it indicated "material terms are not herein included." As such, the purported transfer of Campbell's shares, by definition, could not and did not trigger any right of first refusal held by the Independent or any individual shareholder of the Independent. Moreover, had no shareholder exercised his/her option, Campbell still would be unable to sell his shares to Southland (even if he wanted to) because the Southland proposal was not to purchase Campbell's shares, but **all** of the Independent's shares. More important, the Southland proposal was just that, a proposal but not a binding offer.

Section I.(B)(2) and other provisions of the Buy-Sell Agreement require that each shareholder who acquires shares pursuant to the Buy-Sell Agreement must do so with his or her

own funds. As set forth below, Partridge never possessed her own funds to purchase Campbell's shares. She borrowed the money from Campbell's former attorney, Joseph Cole, who was to receive most if not all of Campbell's shares.

D. Correspondence Prior to the Board Meeting of November 23, 2009

In response to Campbell's Offering Notice, Richard Parker ("Parker"), one of the minority shareholders of the Independent, sent Campbell correspondence dated November 17, 2009. Parker's correspondence indicated that he, Grand-Jean, and Partridge retained Price, Postel & Parma as counsel, which law firm advised the three shareholders as follows:

a. The Southland Proposal was not a binding offer.

b. Until there is a binding offer, "no clock is running on our need to respond."

c. For any such clock to start running, Southland would need to make a binding offer, "prior to which he would presumably want to do due diligence."

d. The three minority shareholders, including Partridge, were agreeable to Southland performing its due diligence.

e. Only after Southland submitted a binding offer and all material terms were disclosed in writing, it would be the Independent's Board of Directors responsibility to consider the offer.

f. If the Board voted to reject the future Southland offer, the minority shareholders would then have the right to match Southland's binding offer.

In the same notice, the minority shareholders indicated that their attorneys, Price Postel & Parma, forwarded the Southland Proposal and Campbell's Offering Notice to the Independent's corporate attorney. On November 19, 2009, Parker sent an email to all shareholders, which stated the following:

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a. Parker was interested in consideration of "this proposal to make an offer- which is not an offer- and your expressed, but very contingent, determination to sell your shares."

b. Parker requested that the Independent's counsel advise the Board of Directors in this matter.

Later that day, Grand-Jean sent an email to the Corporations' attorney which stated that the letter Campbell received "is explicitly not an offer but (my reading) a proposal that an offer may be forthcoming after due diligence on terms yet to be determined." This email was forwarded to all shareholders as well as Partridge's attorney.

On Sunday, November 22, 2009, Partridge sent an email to Campbell and the other shareholders indicating they are able to meet the following day at 11:00 a.m. Later that day, Campbell sent to all board members the itinerary for the board meeting, which included discussion regarding the Southland proposal to purchase and the board determinations and vote. The itinerary did not include any mention of discussing Campbell's intention to sell his shares.

E. The Board Meeting of November 23, 2009

Before the Board meeting of November 23, 2009, even commenced, Plaintiff showed up with her attorney and handed Campbell two documents. The first was a letter from her lawyer enclosing Plaintiff's "exercise of option under the Buy-Sell Agreement." The second was a document signed by Plaintiff and dated November 23, 2009. The document stated that Plaintiff was exercising her option under the Buy-Sell Agreement to purchase all of Campbell's shares.

The board of directors meeting then commenced, with Grand-Jean and Parker appearing by telephone and Campbell and Plaintiff appearing in person. The Independent's attorney also appeared by telephone.

At the meeting, the Board conducted usual business. The next matter addressed concerned the opinion of the Independent's corporate attorney. The corporate counsel was asked to opine on the enforceability of the Southland Proposal. The corporate attorney gave his

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opinion that neither the Southland Proposal, nor any action by the Board to act upon the Southland Proposal, would be legally binding. The attorney also outlined for the benefit of the Board the various procedures of the Buy-Sell Agreement and timelines associated therewith.

Thereafter, Campbell explained to the other shareholders, as he had previously explained to Plaintiff, the Southland Proposal was based on its longtime observation of the operations of the Independent and Campbell's management of the company. The Board then rejected the Southland Proposal, and Campbell informed the Board that he was not interested in the Southland Proposal unless some of the terms and conditions were clarified and/or changed. Campbell informed the Board that he was going to talk to Southland about the cash terms of the Southland Proposal. Specifically, Campbell wanted to convince Southland to agree to provide more upfront money. Campbell informed the Board he would request Southland to provide the Independent with the terms of Campbell's anticipated employment contract. Shareholder Richard Parker even commented at the Board meeting that additional information from Southland would better assist him in evaluating the Southland Proposal.

Plaintiff, as the Secretary, is charged with the obligation to accurately record and draft the minutes of the board of directors' meeting. Section 9 of Article III of the Independent's Bylaws provides that the Secretary "shall keep, or cause to be kept, a book of minutes at the principal office or such other place as the Board of Directors may order, of all meetings of Directors and Shareholders" and the proceedings of the meetings.

In the past, Plaintiff has prepared the minutes of the Board and Shareholders meetings when requested. Campbell, as President of the Board of Directors, requested Plaintiff prepare the minutes. He also set up a meeting to occur on November 24, 2009, to go over the meeting notes and prepare the proper notices for shareholders. Plaintiff refused to draft the minutes of the Board meeting of November 23, 2009, and send them to Campbell. However, behind the scenes she sought the input of Cole on the drafting of the minutes. It was not until discovery was conducted that Campbell learned Partridge had circulated draft minutes which materially

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misrepresented what actually transpired at the board meeting. At or near the time of the Board meeting, Campbell prepared his own notes of the meeting, which accurately reflected the events as they occurred.

Campbell believes that Partridge refused to draft the minutes and sent them to Campbell because, if they were accurately drafted, they would defeat her claim that she has the right to purchase Campbell's shares. Instead, Partridge engaged in purportedly preparing Independent documents which omit material matters which occurred at the Board meeting, yet prepared documents for her own benefit which support her position.

F. Events Subsequent to the Board Meeting of November 23, 2009

After the Board meeting, Campbell contacted Southland to further discuss its proposal. On November 24, 2009 (one day after the Board meeting), Campbell met with Partridge and discussed his follow up with Southland after the Board meeting and the preparation of the notices which would be sent to Shareholders. Campbell informed Plaintiff that Southland had agreed to revise its proposal by including an employment contract and more cash upfront.

Also after the Board meeting, Plaintiff sent a notice dated November 23, 2009, which incorrectly stated that the Independent voted not to purchase all or any portion of the Noticed Shares ***offered by Campbell***. In fact, the Independent voted not to accept the terms of the ***Southland Proposal***.

Ignoring Campbell's clear direction and ignoring what transpired at the Board meeting, Partridge prepared a document which was dated November 23, 2009, and was directed to the Independent's shareholders. This document purported to notify the shareholders that the Board of Directors met to consider Campbell's Offering Notice and the Southland Proposal to purchase 100% of the Independent's shares. The document also indicated that the Independent voted not to purchase all or any portion of the "Noticed Shares offered by Randy Campbell." This statement is not accurate, as the Board of Directors met and considered only Southland's Proposal to purchase the entire Independent, a proposal which the Independent Board declined.

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On December 2, 2009, Campbell again reminded the shareholders in an email that the Board directed Campbell to contact Southland to further discuss its proposal. On December 2, 2009, Campbell provided all shareholders with a revised proposal from Southland dated November 30, 2009 ("the Revised Proposal"). The Revised Proposal contained terms more favorable to the Independent shareholders regarding payment for the shares. It also included an outline of an employment agreement proposed for Campbell as discussed at the Board meeting on November 23, 2009.

Plaintiff's disregard of what transpired at the Board meeting of November 23, 2009, continued with a letter from her attorney to Campbell dated December 8, 2009. The letter was from the same law firm which previously advised the minority shareholders that there was no binding offer; thus, no clock was running for the shareholders to respond. In an unexplained about face, Plaintiff's attorneys' letter indicated the direct opposite position- that Plaintiff's purported acceptance of Campbell's purported offer to sell his shares was an enforceable contract.

Though he heard from Plaintiff's counsel, Campbell did not receive a response from the other minority shareholders regarding the Revised Proposal. Therefore, on December 21, 2009, Campbell emailed all shareholders requesting that Grand-Jean and Parker respond as to how to proceed with the Revised Proposal. Campbell suggested another Board meeting to discuss these matters. Campbell received a one sentence response from Grand-Jean that he and Richard Parker communicated with Partridge as to their response, at least ten days earlier.

Unbeknownst to Campbell prior to December 22, 2009, Richard Parker apparently executed a document on December 11, 2009, which was addressed to the Secretary and the Board of the Independent ("Parker's Notice"). In Parker's Notice, Parker purported to exercise his option to purchase up to 270 shares of Campbell's 1,530 shares "at the price and on the terms stated in his November 10, 2009 Offering Notice or as otherwise determined in accordance with the Buy-Sell Agreement." Also unbeknownst to Campbell prior to December 22, 2009, Grand-

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Jean emailed Plaintiff on December 18, 2009, which informed Plaintiff that Grand-Jean did not intend to purchase any shares.

On December 22, 2009, Plaintiff provided Campbell with a document entitled "Santa Barbara Independent Inc., Notice of Secretary." This notice contained false and misleading statements, as well as omitted material events relating to the Southland Proposal. For instance, the notice claimed the Board voted not to exercise its option to purchase Campbell's shares. In fact, the Board actually rejected Southland's Proposal. Absent from all notices from Partridge after the Board meeting is any reference whatsoever to the Southland Proposal and Revised Proposal.

Partridge carefully and selectively chose what information was contained in "notices" she prepared purportedly on "behalf" of the Independent. She also kept from Campbell information vital in the transactions. The throttling of information by Partridge was designed to bolster her position, with total disregard to her duties to the Independent.

Perhaps realizing that her purported acceptance of Campbell's purported offer to sell his shares was defective, Partridge again sent another "Notice of Secretary" dated December 29, 2009. For the first time, Partridge included in her self-serving notice that her acceptance was subject to the "true-up" of cash, which was contained in the Southland Proposal. However, this belated attempt to accept Campbell's "offer" (which was not an offer) was beyond the time period in which Plaintiff was required to exercise her right of first refusal, and was weeks after Campbell had withdrawn his support of the first Southland Proposal.

Partridge, through her counsel, refused to even discuss the Revised Proposal from Southland. Instead, she continued to insist that she was entitled to purchase Campbell's shares, and continued to draft notices which did not reflect the true events as they actually occurred. Expert testimony at trial will reveal that Partridge's refusal to explore increasing the amount of the initial Southland Proposal violated her fiduciary duty as a director to the Independent.

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G. THE INVOLVEMENT OF CAMPBELL'S FORMER ATTORNEY JOSEPH COLE

Discovery in this action has revealed, much to Campbell's utter surprise, that all of the shareholders (other than Campbell) were, prior to the board meeting on November 22, 2009, aware of Partridge's involvement with Mr. Cole. The plan, kept secret from Campbell, was for Mr. Cole to lend over $1,000,000 to Partridge in her attempt to wrestle control of Campbell's share. In return, Mr. Cole would be issued all or most of the shares Partridge hoped to obtain from Campbell. Particularly egregious is the fact that ***Mr. Cole, an attorney, had previously represented Campbell in a similar matter against Plaintiff.*** Mr. Cole obtained confidential information from Campbell, yet he participated in the effort to force Campbell to sell his shares.

In 1996 throughout 1998, the Santa Barbara Independent, Inc. owned and published a second paper in Ventura, called the Ventura Independent. The ownership interests in the Ventura Independent were exactly the same ownership interest in the Santa Barbara Independent. That is, Campbell owned 51% of the shares of both papers, and Partridge owned her 16 1/3% interest in both papers. Both papers' business operations were centralized in one Santa Barbara office, and the Ventura Independent's operation was overseen and directed by the Santa Barbara Independent.

In 1997, a dispute arose between the other three minority shareholders (Partridge, Parker, and Grand-Jean) on one hand and Campbell on the other hand. The dispute involved whether the four shareholders should continue to publish the Ventura Independent. Campbell wanted to continue to publish the Ventura paper, and the other shareholders wished to cease operations. In Campbell's efforts to continue the publication of the Ventura paper, he retained attorney Cole to advise and represent him.

Cole accepted the legal representation of Campbell. During the representation, Campbell provided Cole confidential information regarding his thoughts, strategies, theories on litigation, and opinions of the other shareholders. Cole gave legal advice to Campbell regarding how

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Campbell should proceed in attempting to gain control over the Ventura Independent. This included advice regarding rights of first refusal contained in the Ventura Independent's shareholders agreement, which is substantially similar to the Santa Barbara Independent's Buy-Sell Agreement. In his representation of Campbell, Cole provided Campbell with a memorandum which set forth and explained rights of first refusal, or preemptive rights. This memorandum will be introduced at trial.

The dispute between the other shareholders and Campbell escalated and required significant involvement of the parties' attorneys. Attorney Cole billed Campbell over $20,000 for his work representing Campbell regarding the Ventura Independent in 1997. The other shareholders retained counsel as well. The dispute involved, among other things, the interpretation of the shareholders' agreement, which is substantially similar to the Buy-Sell Agreement which is central to the litigation now before the Court.

After the feud was resolved, Cole was retained by the Santa Barbara Independent to represent the shareholders in a proposed sale to Stern Publishing in New York. Cole notified the other shareholders that he would continue to represent Campbell and his wife, Jan Campbell. In addition to Cole's representation of Campbell specifically against Partridge and the other shareholders, Cole provided legal assistance to the Santa Barbara Independent on occasion on various matters.

As stated earlier, the Southland Proposal was dated November 4, 2009, and was presented to Campbell by Southland. Beginning in mid-November 2009, and without ever informing Campbell, Cole engaged in a series of actions which were directly adverse to Campbell's interest. Unbeknownst to Campbell, Cole orchestrated a calculated attempt to wrestle Campbell's shares away from him. Without Campbell's knowledge, Cole met with Partridge before the November 23, 2009, board meeting ("Board Meeting") and the two agreed Cole would loan money to Partridge to enable her to buy Campbell's shares, and then

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immediately transfer the shares to Cole. In essence, Cole used Partridge in an attempt to purchase Campbell's shares without first informing Campbell of his intentions.

Prior to the Board Meeting, Cole was aware that the minority shareholders had informed Campbell that their position was that the Buy-Sell Agreement's provisions were not triggered by the Southland Proposal. Despite this knowledge, Cole participated in a plan to unfairly surprise Campbell by having Partridge purportedly exercise her purported right of first refusal to purchase Campbell's shares. Cole participated in a conference call prior to the Board Meeting with all shareholders except Campbell. The purpose of the meeting was for Cole to advise the shareholders what they should say and do at the Board Meeting.

Emails to be introduced at trial reveal that Cole participated in drafting the very same notice Partridge presented to Campbell at the Board Meeting which purportedly exercised her right to purchase Campbell's shares. Emails also reveal that Cole represented Partridge and the other shareholders by doing the following:

a. Cole advised Mr. Parker (a minority shareholder) whether the board could act at the November 22, 2009 Board Meeting.

b. Cole participated in drafting Partridge's purported exercise of option to purchase Campbell's shares.

c. Cole ensured that Partridge properly mailed her purported exercise of her right to the other shareholders.

d. Cole advised Partridge that she, as Secretary, will have to "notice the closing before Randy responds."

e. Cole drafted an updated buy-sell agreement for the Santa Barbara Independent.

f. Cole drafted for Partridge a notice concerning her attempted purchase of Campbell's shares.

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g. Cole advised Partridge that the notice he drafted should "go out tomorrow under the Buy-Sell Agreement."

h. Cole drafted a Notice of Secretary setting forth the purported closing date of the transfer of his shares to Partridge.

i. Cole drafted new agreements between the shareholders of the Santa Barbara Independent.

Cole participated in drafting notices, purportedly from the Independent's secretary (Partridge), as to the status of Campbell's shares. These notices incorrectly reflected how the events actually unfolded. The inaccuracies in the notices were drafted and/or approved by Cole in order to support Partridge's asserted position that she was entitled to purchase Campbell's shares.

In anticipation that Campbell would be forced to transfer his shares to Partridge, Cole drafted a new buy-sell agreement and term sheet. The term sheet reflected that Cole's anticipated purchase of Campbell's shares from Partridge, Cole's employment as publisher (Campbell's current position) of the Independent, and Cole's overall involvement in the Independent. Cole and Partridge agreed that immediately upon Campbell's transfer of shares to Partridge, they would be transferred to Cole and Cole's loan to Partridge would be forgiven. This information was also shared with the other minority shareholders.

Cole has orchestrated, directed, and facilitated the attempted forced takeover of Campbell's shares against Campbell's wishes. It was only after Partridge was forced to turn over documents that Campbell discovered Cole's involvement in this dispute.

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IV.

LEGAL ANALYSIS

A. CAMPBELL'S NOTICE DID NOT TRIGGER THE BUY/SELL AGREEMENT

Partridge claims that Campbell's "Offering Notice" triggered the right of the corporation and, eventually Partridge, to purchase Campbell's shares. It did not. A shareholder may not transfer his or her shares under the BSA unless the offering shareholder gives notice of the intention to transfer the shares and unless the offering shareholder complies with Article III of the BSA. (BSA, §III(A)(1), first paragraph). Moreover, the offering shareholder's notice ("Notice") must comply with the following requirements contained in section III(A)(1), second paragraph:

(1) The Notice shall name the proposed transferee or transferees (including all persons who may be expected to acquire any interest in any Shares in the proposed transfer);

(2) The Notice shall name the number of Shares to be transferred ("Noticed Shares");

(3) The Notice shall name the price per Noticed Share;

(4) The Notice shall name the payment terms;

(5) **The Notice shall name other material terms or conditions of the proposed transfer**.

Because Campbell's "Notice" did not (and could not) comply with the above requirements, the rights of the corporation and the other shareholders to purchase Campbell's shares were never triggered. That is, "any purported transfer without such compliance shall be void." (BSA, §III(A)(1), first paragraph).

First, Campbell's Notice did not name the payment terms or other ***material terms or conditions of the proposed transfer***. It couldn't because the Southland Proposal did not. In fact, the Southland Proposal clearly stated that "***material terms are not herein included in this proposal.***" Without these material terms, Campbell's Notice never could have triggered the

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rights under the BSA. The material terms were to be included, if ever, in a future offer from Southland after it conducted its due diligence. If the corporation and all shareholders of the Independent passed on Campbell's Notice, he would not be able to transfer his shares to Southland because the material terms of the transfer were never agreed upon. In short, Campbell could not force the sale of his shares to Southland because, as the Southland Proposal put it, "this Proposal is not a binding offer." If Campbell could not force Southland to purchase his shares, and if Southland could not force Campbell to sell his shares because of the omission of material terms of the agreement, then Partridge cannot force the sale of Campbell's shares because material terms are likewise omitted.

The tentative, non-binding nature of the Southland Proposal precludes the formation of any agreement between Partridge and Campbell which can serve as the basis for a specific performance action. Although the terms of a contract need not be stated in the minutest details, it is requisite to enforceability that it must evidence a meeting of the minds upon the essential features of the agreement, and that the scope of the duty and limits of acceptable performance be at least sufficiently defined to provide a rational basis for the assessment of damages. Ellis v. Klaff (1950) 96 Cal.App.2d 471, 478. Where the parties assume to make a contract in which one's promise is the consideration for the promise by the other, the promises must be mutual. To be obligatory on either party, the contract must be mutual and reciprocal in its obligations. One who promises to do a thing only if it pleases him, is not bound to perform. Central Oil Co. v. Southern Refining Co. (1908) 154 Cal. 165. Where a contract imposes no definite obligation on one party to perform, it lacks mutuality of obligation. It is elementary that where performance is optional with one of the parties no enforceable obligation exists. This type of promise is illusory and does not result in a binding agreement even if unconditionally accepted. Lawrence Block Co. v. Palston (1954) 123 Cal.App.2d 300, 308.

Moreover, a right of first refusal, that is, a preemptive right to purchase property on the terms and conditions of ***an offer*** to purchase by a third person becomes an option of sorts ***after a***

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bona fide offer to purchase has been made to the owner by a third person. C. Robert Nattress & Associates v. Cidco (1986) 184 Cal.App.3d 55, 66 (citations omitted)(emphasis added).

Preemptive rights have also been described as follows:

> A right of first refusal, also called a preemptive right (7 Miller & Starr, Cal. Real Estate (3d ed.2004) § 19:136, p. 421), is "the 'conditional right to acquire ... property, depending on the [owner's] willingness to sell.' [Citation.] The holder of the right merely has the preference to purchase the property over other purchasers if the owner of the property 'elects to sell the property.' [Citation.] ***The right does not become an option to purchase until the owner of the property voluntarily decides to sell the property and receives a bona fide offer to purchase it from a third party.*** [Citations.] Normally, the right is enforceable against third persons entering into a contract to buy the property with notice of the holder's right." (*Campbell v. Alger* (1999) 71 Cal.App.4th 200, 206-207, 83 Cal.Rptr.2d 696.) The contract terms dictate the particular circumstances that will trigger the right. (*Id.* at p. 207, 83 Cal.Rptr.2d 696.) Accordingly, the question presented is primarily one of contract interpretation.

Hartzheim v. Valley Land & Cattle Co (2007) 153 Cal.App.4th 383, 389.

The price and terms of a right of first refusal become definite and ascertainable upon the occurrence of a bona fide offer by a third person, which is sufficient to make the preemptive right definite and enforceable at that time. 7 Miller and Star §19:138, citing Moreno v. Blinn (1947) 81 Cal.App.28 852, 856. ***Specific performance cannot be granted unless the terms of the contract are sufficiently definite for the court to know what to enforce.*** Civ. Code §3390(5); Buckmaster v. Bertram (1921) 186 Cal.673, 676. In order for it to be enforceable it must be definite and certain in its terms and he who demands specific performance must establish by clear and satisfactory proof the existence of the contract alleged. ***If the things mentioned in the agreement are the subject of future ascertainment then the agreement is not final but is indefinite and uncertain in its terms and cannot be enforced in equity.*** Store Properties v. Neal (1945) 72 Cal.App.2d 112, 116.

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Here, the terms of the "contract" between Campbell and Partridge were not "sufficiently definite" because it explicitly stated that material terms were not included therein. Partridge could not effectively match the terms of the Southland Proposal because it was not a "bona fide offer." Also, Southland had the right to change the proposal after due diligence. Because the Southland Proposal was not an offer and did not contain material provisions of a bona fide offer, Campbell's notice of the Southland Proposal could not have triggered the buy/sell rights. The Southland Proposal was not a contract, but a preliminary indication that Southland was interested in purchasing all of the shares of the Independent. Where a contract appears to be a preliminary agreement "embodying only the spirit of a contemplated supplementary contract ... and it is perfectly clear ... that the minds of the parties never met upon the details" then it is not enforceable. Store Properties v. Neal (1945) 72 Cal.App.2d 112, 116. Also, if a writing is viewed as the consummation of the negotiations there is no contract until the written draft is finally signed. Id.

The court's ruling in Addiego v. Hill (1968) 268 Cal.App.2d 280, supports Campbell's position that because the Southland Proposal omitted material terms of any offer, the buy/sell rights and timelines were not triggered. In Addiego, the majority shareholder noticed the minority shareholder that he received an offer that he had accepted. The minority shareholder had 30 days to match the offer. The majority shareholder described the ***offer***, but all of the details were not included in his initial notice. The minority shareholder requested more, definitive details of the offer. These details were produced by the majority shareholder, but they were produced more than 30 days after his initial notice of his intention to accept the offer. The

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minority shareholder than immediately accepted the majority's offer after the details of the 3rd party offer were provided.

The majority shareholder argued that because the minority shareholder's acceptance was beyond 30 days after his initial notice, the minority shareholder did not have the right to accept. The court disagreed, and held that the initial offer lacked sufficient details to trigger the buy/sell rights and timelines of the parties. The court found that the majority shareholder's initial notice was finalized and made sufficiently specific only by defendants' inclusion of the 3rd party's offer which contained all of the terms. The court held:

> In view of the generality in the terms of sale contained in defendants' notice of January 30, it was reasonable for plaintiffs to request the precise terms they were called upon to meet. These were furnished them by defendants on March 6, in the form of Johnson's offering letter. ***The specific terms contained therein clearly illustrate the inadequacy of the initial notice of January 30. Plaintiffs had a right under the preemption agreement to be given notice with sufficient specificity upon which to base an acceptance***. The transmission of the Johnson letter on March 6 afforded the necessary details of defendants' proposed sale and completed the notice required. Id. at 287-288.

Just like in Addiego, the Southland Proposal was inadequate notice to the shareholders because it did not contain material terms and it was not binding. The initial Southland Proposal even stated that material terms were not included in the proposal. The parties realized the inadequacy of the Southland Proposal when they agreed that Campbell would go back to Southland to firm up the proposal and obtain more of the material terms.

Even more, Partridge and her fellow shareholders admitted that Campbell's notice was insufficient to trigger the buy/sell rights and obligations because the Southland Proposal was not binding and did not contain material terms. Richard Parker emailed all shareholders, including

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Partridge, and said that the minority shareholders (including Partridge) retained Price, Postel, and Parma and were advised "there is no binding offer here from Mr. Flannery and/or his company, and until there is such an offer, no clock is running on our need to respond..." Mr. Parker later emailed all shareholders and said that he was "interested in a fair and straightforward consideration of this proposal to make an offer, which is not an offer, and your expressed, but very contingent, determination to sell your shares."

In addition, Partridge's purported acceptance of Campbell's notice to sell his shares does not even match the few terms actually contained in the Southland Proposal. That is, the Southland Proposal contained a "True-Up of Cash, Receivables, and Current Payables. This provision could have proven quite lucrative based upon the Independent's financial condition over the subsequent 11 months. However, Partridge did not and could not have matched this because it was not known what this True-Up would amount to. In fact, Partridge alleges that she was ready, willing, and able to close on January 12, 2010. She uses as evidence the fact that her attorney's trust account contained the $1,377,000 on the date of closing. But it did not contain any mention of how Campbell would be compensated for the True-Up provision. The reason? She couldn't. The Southland Proposal contained a proposal for True-Up affecting the entire Independent, which was incapable of being separated among the shareholders.

B. THE PURPOSE OF BUY SELL AGREEMENTS IN SMALL CORPORATIONS

Ignored by Partridge is the purpose behind buy/sell agreements in closely held corporations. The California Supreme Court has described buy/sell agreements as follows:

> A [BSA] is a contract by which the stockholders of a closely held corporation ... seek to maintain control over the ownership and management of their business by restricting the transfer of its shares. They typical [BSA] provides for the mandatory or optional repurchase of a stockholder's shares by the corporation or

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> by the other stockholders upon the occurrence of a certain event; the most common of the events that can trigger the repurchase are the stockholder's death or, if he is also an employee, his retirement or the voluntary or involuntary termination of his employment. [Citations.] ... Although the agreement often serves multiple purposes, ***its principal objective is to permit the original owners of the corporation to retain control over the identity of their business associates***; a secondary purpose is to protect the investment of the departing (or the estate of the departed) shareholder by facilitating the valuation and sale of an interest that might otherwise have no ready market." Stephenson v. Drever (1997) 16 Cal.4th 1167, 1173 (emphasis added).

The courts will also look to other principles in deciding whether an action triggers the buy/sell rights and obligations.

- Whether the action jeopardized the closely held nature of the corporation. Tu-Vu Drive-In Corp. v. Ashkins, (1964) 61 Cal.2d 283, 287.
- Whether the action impairs the remaining shareholders' ability to retain control over the identity of their business associates. *See* Stephenson v. Drever (1997) 16 Cal.4th 1167, 1173.
- Whether the action brought an "unwanted intrusions by outsiders," or otherwise disturbed the "integrity of the functioning entity." Tu-Vu Drive-In Corp. v. Ashkins, *supra,* 61 Cal.2d at 287.

Considering all of the factors listed above, it is clear that Campbell's notice did not and could not trigger the buy/sell rights and responsibilities. Campbell's notice never put the closely held nature of the Independent in jeopardy. Since there was never a binding offer, neither Campbell nor Southland could force a sale based upon the Southland Proposal. Moreover, Campbell's notice never impaired the remaining shareholders' ability to retain control over the identity of their business associates. There never was a threat of Southland becoming a shareholder based upon Campbell's notice. Perhaps the remaining shareholders' interest would

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be threatened, but only after negotiations with Southland and due diligence investigation and a binding offer was made. Finally, Campbell's notice never came close to brining "unwanted intrusions by outsiders." Campbell's notice was the first step in negotiations with Southland. Partridge's pouncing on this first step and attempting to turn it into an enforceable contract demonstrates her bad faith not only to Campbell, but to the rest of the Independent's shareholders.

C. PARTRIDGE VIOLATED THE BUY/SELL AGREEMENT BECAUSE SHE ATTEMPTED TO PURCHASE THE SHARES WITH BORROWED MONEY AND CONCEALED THE NATURE OF THE TRANSACTION

The Independent's Buy-Sell Agreement ("BSA") mandates that each shareholder purchase his/her shares with his or her own funds and that each shareholder is prepared to hold such shares for an indefinite period. Nonetheless, Partridge never had her own funds to purchase Campbell's shares. This fact alone mandates that Campbell should not be forced to transfer his shares to Partridge.

Numerous provisions set forth in the BSA make it clear that both Partridge and Cole's actions were subject to the BSA provisions limiting the transfer of shares. For instance, the BSA provides that all representations and warranties contained in the BSA survive the consummation of the transactions contemplated in the agreement. BSA, §I(C). Moreover, the covenants, conditions and restrictions contained in the BSA run with all "shares now or hereafter owned by any shareholder at any time, directly or indirectly, whether the same have been issued or not, and none of such shares shall be sold, transferred, encumbered, pledged, or hypothecated, given as a gift or otherwise disposed of or alienated in any way by any person except in accordance with this Agreement." BSA, §V(D). Each shareholder agreed to prevent any disposition otherwise than strictly in accordance with the BSA." Id.

More restrictions are contained in the BSA. All shareholders agreed that they would cause the officers to refuse to issue or deliver new certificates where the purchaser, assignee,

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pledge, or donee or other transferee acquired ***shares otherwise than strictly in accordance with the BSA***. Id. (emphasis added). Also, the BSA "shall be binding on any person who acquires any interest in any shares, whether or not in accordance with this Agreement." BSA, §V(F).

Thus, there should be no question that all of the provisions of the BSA governed the conduct of Partridge and Cole. However, Partridge breached the BSA by attempting to purchase Campbell's shares with Cole's money and for Cole's benefit. Below are the provisions that Partridge breached in this regard.

1. "Each shareholder is acquiring shares pursuant to this Agreement with his or her own funds." BSA, §I(B)(2). [Partridge breached this by borrowing money from Cole and attempting to use the borrowed funds to purchase shares].

2. "Such shares are being purchased for his or her own account, not as a nominee or agent." BSA, §I(B)(2). [This is the most egregious breach. Regardless of how Partridge and Cole attempt to portray their scheme, the reality is that Partridge attempted to purchase Campbell's shares for Cole. Documents drafted by Cole indicate their intent].

3. "No one else has any interest, beneficial or otherwise, in any of such shares. Such shareholder is not obligated to transfer any shares to anyone else nor has any agreements or understandings to do so. BSA, I(B)(2). [Cole had an interest in the shares Partridge attempted to purchase from Campbell. Had the transaction occurred, Cole would have been transferred some or all of Campbell's shares. Partridge, Cole, and the other minority shareholders had an understanding as to Cole's purchase of Campbell's shares, as will be proven at trial].

4. "Such shareholder is purchasing such shares for investment for an indefinite period and not with a view to the sale or distribution of any shares, by public or private sale or other disposition, and has no intention of selling, granting any participation in or otherwise distributing or disposing of any shares." BSA, §I(B)(2).

Both Partridge and Cole's attempted explanation as to the nature of their agreement regarding Campbell's shares is so intentionally vague to make it entirely unbelievable. Cole

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supposedly loaned Partridge over $1,000,000 without any agreement on how it would be repaid, no agreement as to interest, and no agreement as to the transfer of shares? While, at the same time, Cole drafted several agreements which solidified the transfer of Campbell's shares to Cole once Partridge took possession of them.

Partridge also violated California law by failing to disclose the facts behind her potential purchase of Campbell's shares. It is unlawful for any person to offer or buy a security in California by means of a communication that includes "an untrue statement of a material fact or omits to state a material fact necessary to make the statement not misleading." Corp. Code §25401. Partridge's purported acceptance that "I hereby exercise my option under the Buy-Sell Agreement to purchase all" of Campbell's shares is patently misleading because she was attempting to purchase the shares for Cole, all in violation of the BSA agreement. Moreover, when confronted by Campbell as to where the money was coming from and the full nature of the transaction, Partridge was deliberately evasive and intentionally concealed material information which was crucial for Campbell. This conduct was at least misleading and at most fraud.

D. CAMPBELL WITHDREW HIS NOTICE AT THE BOARD MEETING

To the extent that Campbell's notice actually triggered any buy/sell rights, Campbell withdrew his notice at the Board Meeting of November 23, 2009. During the discussion at the Board Meeting about the Southland Proposal, Campbell stated that he intended to go back to Southland and attempt to get an increased price for the shares, along with more money on the "True-Up." Richard Parker agreed with this approach and actually commented that Campbell's additional efforts will help him evaluate whether he wanted to sell his shares to Southland in the future. Partridge's own notes of the meeting reflect that Campbell was going to approach Southland to sweeten the proposal. However, when she (along with the assistance of Attorney Cole who was not even present at the Board Meeting) typed the minutes, the reference of going

back to Southland was notably omitted. Partridge did not want to include in the meeting the fact that Campbell withdrew any notice to sell his shares by informing the board he was going back to Southland to sweeten the deal.

E. PARTRIDGE'S INABILITY TO CLOSE

Another reason the transfer of shares could not have occurred is because Partridge was not able to close the transfer of the shares on the date she set for closing, which was January 12, 2010. Under section I(B)(5), each shareholder agreed that he or she would not encumber, transfer, or receive any interest any shares ***unless and until prior to any proposed transfer***, one of the two following events occurred:

(i) a registration statement on Form S-1 was completed [which it was not] or;

(ii) (a) the shareholder first furnished the Company with a detailed statement of the circumstances of the proposed disposition; (b) the shareholder furnished the Company with an opinion of counsel to the effect that such disposition will not require registration of such shares under the securities law; and (c) counsel for the Company advised the shareholders that the proposed transfer did not require registration under the securities law.

Prior to the date set for closing, a registration statement on Form S-1 was never completed or presented to the Company. Moreover, Partridge failed to "provide a detailed statement of the circumstances of the proposed disposition" of Campbell's shares. She did the opposite by intentionally concealing the fact that Cole was the real purchaser of Campbell's shares. Also, there never was an opinion by the Independent's counsel that the proposed transaction did not require registration under securities law. As such, the closing on January 12, 2010, could not have occurred according to the terms of the BSA. While Partridge may have been ready and willing, she was never able to close the transaction. Therefore, specific performance must be denied.

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F. PARTRIDGE'S SPECIFIC PERFORMANCE CLAIM FAILS BECAUSE OF HER INABILITY TO PERFORM

Partridge is not entitled to specific performance for several reasons. Buy-sell agreements, like other contractual relationships, may be the subject of an action for specific performance when the prerequisites for obtaining this equitable remedy are present. The rules governing specific performance of contracts generally apply to buy-sell agreements. See 13 Witkin, Summary of California Law, *Equity* §§24-70 (10th ed. 2005); California Law of Contracts §§11.7-11.39 (Cal CEB 2007).

In general, specific performance of a contract may be ordered whenever the terms of the contract are sufficiently definite and certain for enforcement. As set forth above, the terms of the contract clearly omitted several material terms. The requirement of certainty is stricter in an action for specific performance than in an action for damages. Byrne v. Laura (1997) 52 Cal.App.4th 1054, 1066. Specific Performance can be compelled only if there is adequate consideration, the requested performance is substantially similar to the contract terms, there is a mutuality of remedy, and the plaintiff's legal remedy is not adequate at law. Blackburn v Charnley (2004) 117 CA4th 758, 766.

In this case, Partridge cannot compel specific performance because her own performance (i.e., payment of money to Campbell) is entirely dependent on a third party (i.e., Cole). ***If specific performance is dependent upon the action of a third person, it will not be performed.*** Civ. Code §3390(4). That is, if a party's performance depends on the approval or consent of a person who is not a party to the contract and who is free to grant or withhold consent, specific performance will not be decreed. Casady v Modern Metal Spinning & Mfg. Co. (1961) 188

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Cal.App.2d 728, 731. Cole admitted in his deposition that if he was "not satisfied with what the number turns out to be, then I don't have to fund" the loan to Partridge. Thus, Partridge's ability to perform her part of the Buy-Sell is entirely dependent on whether Cole wishes to purchase the shares. As such, specific performance is not available to her.

Furthermore, Partridge is not entitled to specific performance because there is inadequate security for her performance. That is, Partridge does not now have her own money to purchase Campbell's shares, and she never did. Specific performance will only be compelled if it is otherwise appropriate and "the agreed counterperformance has been substantially performed or its concurrent or future performance is assured; or if the court deems necessary, the agreed counterperformance can be secured to the satisfaction of the court. Civ. Code §3386(b). In other words, before this court can compel specific performance, it must be satisfied that Partridge's payment of $1,377,000 plus the True-Up payments is assured. However, Partridge does not have the money. The money that is being used in the attempted purchase of Campbell's shares has been returned to Cole. Under and agreement between Cole and Partridge, Cole is ***not*** required to lend Partridge the money to purchase the shares. The situation could arise where, after he conducts his due diligence, Cole decides he does not want to fund the purchase of shares. But, if the court orders Campbell to transfer his shares and Cole refuses to fund, Partridge cannot perform (i.e. pay the money) because she does not have it. Thus, Partridge's performance is not assured and, in fact, is in serious doubt. The only security is the $250,000 undertaking required by this court as a condition for the issuance of the preliminary injunction. Campbell sought security of $2 million, but Partridge opposed the amount. Had that amount been posted, there would be adequate security.

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In addition, specific performance will not be compelled when there is an agreement to perform an act which the party has no power to lawfully perform when required to do so. Civ. Code §3390(3). This section bars specific performance where a party cannot perform ***at the time of the trial***. *See* Stevens Group Fund IV v. Sobrato Dev. Co. (1991) 1 Cal.App.4th 886, 894; 13 Witkin, Summary of California Law, Equity §47. In fact, ***a court will not compel specific performance of the sale of closely held stock if the plaintiff cannot demonstrate she has the ability to pay for the shares***. Stanchfield v. Hamer Toyota, Inc. (1995) 37 Cal.App.4th 1495, 1505 (testimony at trial established plaintiff seeking specific performance "had neither the personal assets nor the ability to obtain the commercial financing necessary to conclude the stock transaction. Having failed to meet his burden of proof below, he is precluded from successfully challenging the trial court's determination" of denying specific performance.").

G. EQUITY DICTATES THE DENIAL OF SPECIFIC PERFORMANCE BASED UPON PARTRIDGE'S CONDUCT

Because it is an equitable remedy, specific performance will not be granted as a matter of absolute right. It is within the sound discretion of the court, and will only be given in accordance with established principles of equity and in reference to the facts of the particular case. Maron v Howard (1968) 258 Cal.App.2d 473, 488; Pasqualetti v Galbraith (1962) 200 Cal.App.2d 378. This equitable principles have been codified under California law. *See* Civ. Code §§3366-3395. Because specific performance is an equitable remedy, the equitable defenses (*e.g.*, unclean hands, laches) are available in actions for specific performance and the maxims of equity apply. *See* Civ.Code §§3509-3548. Also, specific performance cannot be enforced if the assent of the party to a contract was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract." Civ. Code

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§3391. Partridge ostensibly obtained assent by concealing the nature of the transaction and by her attempted circumvention of the Buy-Sell Agreement.

A party to an action for specific performance who is guilty of wrongful conduct with respect to the buy-sell agreement may be barred from obtaining the aid of equity to enforce the agreement. Courts have gleaned a three-pronged test to determine the effect to be given to the plaintiff's unclean hands conduct. Whether the particular misconduct is a bar to the alleged claim for relief depends on (1) analogous case law, (2) the nature of the misconduct, and (3) the relationship of the misconduct to the claimed injuries. Jay Bharat Developers, Inc. v Minidis (2008) 167 Cal.App.4th 437 (*citing* Kendall-Jackson Winery, Ltd. v Superior Court (1999) 76 CA4th 970, 979). Here, Partridge's misconduct is directly related to her cause of action for specific performance.

There was not and could not have been a binding agreement between Campbell and Partridge because there was no binding agreement between Campbell and Southland. Still, even if a binding contract existed (which it did not), the defense of unclean hands precludes Partridge from prevailing. The defense of unclean hands basically admits the facts asserted by the complaining party, *i.e.,* the existence of a binding agreement, but seeks to avoid performance because of the other party's wrongful conduct. See 13 Witkin, Summary of California Law, *Equity* §§9-15 (10th ed 2005). Moreover, the granting of specific performance, like other equitable remedies, is within the court's sound discretion and is not a matter of right. Petersen v Hartell (1985) 40 Cal.3d 102, 110; Pasqualetti v Galbraith (1962) 200 Cal.App.2d 378, 382.

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The evidence to be presented at trial will reveal a secret and calculated move by Partridge and Cole to trap Campbell to sell his shares. This "Gotcha!" style tactic cannot be condoned and should not serve as a basis for affording Partridge the equitable remedy of specific performance.

H. PARTRIDGE BREACHED HER FIDUCIARY DUTY

A director of a corporation bears a fiduciary relationship with the corporation's shareholders. Tenzer v. Superscope, Inc. (1985) 39 Cal.3d 18. In dealings involving the corporation, it is incumbent on a director "not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein." Id. at 32. Partridge's actions in submitting a proposed acceptance of Campbell's notice even before the corporation discussed the Southland Proposal was neither fair to the corporation nor its individual shareholders.

Partridge breached her fiduciary duty as a director in other ways. A shareholder who is induced to enter into a purchase agreement or to sell his or her shares by material misrepresentations (either misstatements or omissions) may be able to recover under common law principles of liability from everyone who participated in or benefited from the misrepresentations, including directors. 17 CFR 240.10b-5; Corp C §25504. Also, directors may be held liable in connection with a buy-sell agreement for failing to act in the best interests of the corporation. Liability is based on the breach of the fiduciary duty owed by directors to the corporation. See Burt v Irvine Co. (1965) 237 Cal.App. 2d 828; Remillard Brick Co. v Remillard-Dandini Co. (1952) 109 Cal.App.2d 405.

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Partridge completely ignored her duties to the corporation when she attempted to purchase Campbell's shares without first having the Independent attempt to negotiate with Southland to increase the offer. Had she done so, the Southland Proposal would have more favorable to the Independent's shareholders. Moreover, Partridge has allowed numerous non-shareholders and non-directors to rifle through sensitive financial information of the Independent without first notifying the other directors and shareholders. These persons include Joseph Cole, Eldon Shiffman, and others.

I. GRANTING SPECIFIC PERFORMANCE WOULD CONDONE ATTORNEY (COLE'S) MISCONDUCT

Campbell has brought a cross-complaint against his former attorney Cole based upon his actions in orchestrating the attempted hostile takeover of his former client's shares. Cole incredulously claimed that his breach of a fiduciary duty to his former client is protected by free speech. Not surprisingly, this argument failed and his anti-SLAPP motion was denied. He appealed this court's ruling and the matter is stayed against Cole pending appeal. Nevertheless, the extent and nature of Cole's involvement is directly relevant to this case. Moreover, Cole's reliability as a witness will be severely tested based upon his statements made under oath in this case and declarations he submitted. In fact, his reliability as a witness was previously criticized by an arbitrator in another reported case, Parker v. McCaw (2005) 125 Cal.App.4th 1494. The appellate court in that case noted that the arbitrator found that Cole "did not testify forthrightly." Id. at 1503. Whether that will be true in this case remains to be seen.

Cole's actions are directly relevant to this case because if specific performance were awarded, it would condone the tortuous behavior of Cole. "The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity - *uberrima fides*. Cox v. Delmas (1893) 99 Cal. 104; Barbara A. v. John G. (1983) 145 Cal.App.3d 369, 383. *Uberrima fides* means "the most abundant good faith;

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absolute and perfect candor or openness and honesty; the absence of any concealment of deception, however slight." Black's Law Dict. (Rev. 4th ed. 1968) p. 1690. This fiduciary relationship imposes on the attorney the duty to maintain the confidence and preserve the secrets of the client. It is also the duty of an attorney to protect his or her client in every possible way, and it is a violation of that duty to assume a position adverse or antagonistic to the client without the client's free and intelligent consent given after full knowledge of all the facts and circumstances. Anderson v. Eaton (1931) 211 Cal. 113. Moreover, "***a member of the State Bar should not under any circumstances attempt to deceive another person***." Barbara A. v. John G. 145 (1983) Cal.App.3d 369, 383.

By engaging in the scheme to trap Campbell, Cole took an interest adverse to Campbell. An attorney's employment is "adverse" to a former client if it is "unfavorable" or "opposed to" the interest of the former client. David Welch Co. v. Erskine & Tulley (1988) 203 Cal.App.3d 884, 891. "The acquisition by an attorney of business clientele of a former client operates to the economic advantage of the attorney and unfavorably upon the former client." (David Welch, supra, at 891.) One court has held that an attorney who prepared proposals designed to undercut the former client's business relationships as the acquisition of a pecuniary interest adverse to the former client. Id. That is what Cole did here.

Cole's actions also violated his duty of confidentiality to Campbell, a duty which "is a fundamental, basic duty of an attorney, one that survives the termination of the representation." Bus. & Prof. Code § 6068(e); People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135, 1146; David Welch Co. v. Erskine & Tully (1988) 203 Cal.App.3d 884, 891.

To protect the confidentiality of the attorney-client relationship, the State Bar Rules of Professional Conduct, rule 3-310 (rule 3-310) prohibits attorneys from accepting, without the client's informed written consent, "employment adverse to the client or former client where, by reason of the representation of the client or former client, the [attorney] has obtained confidential

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information material to the employment." (Rule 3-310(E); Flatt v. Superior Court (1994) 9 Cal.4th 275, 283-284. In addition, where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires that the attorney be disqualified from the second representation. People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135, 1146.

Thus, Rule 3-310(E) and case law forbid an attorney from acting adversely to a former client when doing so would put at risk the former client's confidential information. Actual disclosure is not required. Rather, an attorney should not even open up to the mere temptation of violating the duty of confidentiality. Anderson v. Eaton (1930) 211 Cal. 113, 117. "The actual use or misuse of confidential information is not determinative; it is the possibility of the breach of confidence which controls." David Welch Co. v. Erskine & Tulley (1988) 203 Cal.App.3d 884, 891. The former attorney need not disclose the very confidential information the client seeks to protect. Farris v. Fireman's Fund Ins. Co. (2004) 119 Cal.App.4th 671, 683 & n.10.

At issue in 1997 was the issuance of additional shares of the Ventura Independent without giving the other shareholders notice and the opportunity in advance to purchase a portion of the additional shares, as required by the shareholders agreement. This is the same issue involved in this case. The only difference is Cole is on the other side this time around. Once an attorney accepts a representation in which confidences disclosed by a former client may benefit the new client due to the relationship between the new matter and the old, he or she has breached a duty of loyalty." Benasra v. Mitchell Silberberg & Knupp LLP (2004) 123 Cal.App.4th 1179, 1189. This is what Cole did.

J. CAMPBELL'S DAMAGES

Campbell has incurred costs and attorneys' fees in defending this action brought by Partridge. Evidence will be presented which demonstrates the lawsuit was not filed because it had merit, but it was brought "for strategic reasons." Partridge's hope was to escalate the

litigation, using Cole's money, in an effort to force Campbell to relent. The strategy did not work, and now Partridge is responsible for the payment of Campbell's cost and fees. Under the BSA agreement, the attorneys fees and costs incurred by the prevailing party are mandated. BSA, §V(S).

Dated: July 22, 2011.

GRIFFITH & THORNBURGH, LLP

By: _____
John R. Rydell II
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Attorneys for RANDY CAMPBELL

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

I am employed by the law firm of GRIFFITH & THORNBURGH, LLP in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action. My business address is 8 East Figueroa St., #300, Santa Barbara, California 93101.

On July 22, 2011, I served the foregoing document described as **RANDY CAMPBELL'S TRIAL BRIEF** on the parties and/or interested persons in this action by placing [ ] the original [ ] a true copy thereof in sealed envelopes, addressed as indicated on the attached list, or as otherwise indicated below.

[x] **BY MAIL**

[**X**] I deposited such envelopes in this firm's mailing system. I am readily familiar with my employer's practice for collection and processing of correspondence for mailing with the U.S. Postal Service. Under that practice, correspondence or documents served as above indicated would be deposited for first class delivery, postage fully prepaid, with the U.S. Postal Service on that same day in the ordinary course of business.

[x] BY PERSONAL SERVICE

I caused to be hand delivered copies of the foregoing documents to Tim Trager, Esq., attorney for MARIANNE PARTRIDGE, at our around 3:00 p.m. at 8 E. Figueroa St., 3rd Floor, Santa Barbara, California.

SEE ATTACHED SERVICE LIST

[ ] **BY E-MAIL**

E-mailed the above referenced pleading to the offices of the addressee(s).

[ ] **BY OVERNIGHT DELIVERY SERVICE**

I deposited true copies of the foregoing document in:

[ ] the United States mail at Santa Barbara, California, for Express Mail delivery, in a sealed envelope, addressed as indicated on the attached mailing list, with Express Mail postage thereon fully prepaid.

[ ] a box or other facility in Santa Barbara, California, regularly maintained by FEDEX-KINKOS in an envelope or package designated by FEDEX-KINKOS, addressed as indicated on the attached mailing list, with delivery fees paid or provided for.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed on July 22, 2011, at Santa Barbara, California.

Rachel Robledo

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Marianne Partridge v. Randy Campbell
Santa Barbara Superior Court
Case No. CV 1341942

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