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SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

DANIEL RAFALIAN, **Plaintiff,** **vs.** **PAINLESS PRODUCTIONS, INC., a California corporation; and DOES 1 through 10, inclusive,** **Defendant.**	Case No.: BC 391245 **PLAINTIFF DANIEL RAFALIAN'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S DEMURRER TO FIRST AMENDED COMPLAINT** **[Unlimited Civil Case]**

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Plaintiff DANIEL RAFALIAN hereby submits the following memorandum of points and authorities in opposition to defendant Painless Productions, Inc.'s Demurrer to the First Amended Complaint ("FAC").

I. INTRODUCTION

Defendant demurs on three bases: First, it alleges that the Complaint is barred by the statute of limitations. As set forth more fully below, the case is not barred by the statute of limitations because the breach sued upon did not occur until the Defendant vacated the premises on November 2, 2007. Secondly, in regard to the Parol Evidence Rule, the only document to be interpreted is Exhibit 2, dated January 14, 2003, not the allegedly integrated Master Lease Exhibit 1 dated August 8, 2000. Parol evidence is admissible to interpret Exhibit 2 because it is an incomplete writing and the Parol Evidence Rule does not bar evidence of terms, which are not covered in the agreement or consistent with the agreement. *Bowman v. Santa Clara* (1957) 153 Cal.2d 707, 711-712; *Masterson v. Sine* 68 (1968) Cal.2d 222, 226-228. Third, the issue of laches is a question of fact, which cannot be decided on demurrer.

Finally, it should be noted that the demurrer relates only to the damages claimed in paragraph 8(d) of the First Amended Complaint ("FAC") in the amount of 386,226.78. No argument is made that there is a statute of limitations or statute of frauds defense in regard to the damages claimed in paragraph 8(a)-(c). Thus, if the demurrer is granted it can only relate to the allegations made in paragraph 8(d) of the Complaint. In point of fact, Defendant's motion should have been brought as a motion to strike.

II. THE CASE IS NOT BARRED BY THE STATUTE OF LIMITATIONS

Two documents are attached as exhibits to the Complaint. Exhibit 1 is the detailed Master Lease requiring periodic payments of rent. It may be an integrated document but this is irrelevant.

The Plaintiff alleges in paragraph 8(d) of the Complaint, "Plaintiff has been

damaged in said sum because defendant received a discount only upon its agreement that it would remain on the premises during the full term of the Lease." Thus, the breach occurred only when the Defendant vacated the premises on November 2, 2007. Complaint ¶6, LL. 27-p.3, L.1.

According to the Complaint, which was must be accepted as true by the court for purposes of a demurrer, the breach occurred on November 2, 2007. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604 (facts in complaint must be accepted as true on demurrer). The date of each prior payment of rent is irrelevant because until the date the breach occurred, Plaintiff had no right to sue the Defendant for additional rent. The amount owed was not due until the Defendant had breached his agreement by leaving. Assuming Plaintiff's worst scenario, that the breach was based on an oral contract, the statute of limitations would not have run until November 2, 2009.

III. THE PAROL EVIDENCE RULE DOES NOT BAR A NOT INCONSISTENT ADDITIONAL ORAL AGREEMENT

The Defendant confuses Plaintiff's cause of action. We are not suing for a direct breach of the Master Lease, dated August 8, 2000, which may or may not be integrated.

Civil Code of Procedure section 1856(a) states:

> "[t]erms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement."

What we are claiming is that Exhibit 2, negotiated many months after the Lease, is ambiguous and certainly not integrated. *See CCP* § 185(a), (d) and *Masterson v. Sine supra*, at 225 (writing only completely integrated if it is final and complete expression of the parties' agreement). Therefore, it is not a prior or contemporaneous agreement, but a subsequent and ambiguous agreement. Accordingly, the Parol Evidence Rule does not apply by its terms to Exhibit 2.

Exhibit 2, a short letter, discusses three separate topics. One, the back payments by Defendant owed on the Lease. Two, the rent modification. And three, the dismissal of the lawsuit against Defendant to be dismissed without prejudice. Even the Defendant believed the document was ambiguous. He wrote: ". . . I was ***confused*** about some of the items and wanted to see if I was understanding what you said correctly." (Emphasis added). We believe we are entitled to provide parol evidence to construe Exhibit 2 to show that the parties meant to memorialize the concept that if Plaintiff agreed to the reduction of rent the Defendant would stay for the full term of the Lease. Complaint ¶8(d). Or alternatively, that the parties entered into an oral agreement not inconsistent with Exhibit 2 to that effect.

> "When the parties have not incorporated into an instrument all of the terms of their contract, evidence is admissible to prove the existence of a *separate oral agreement* as to any matter on which the document is silent and which is not inconsistent with its terms. *American Industrial Sales Corp. v. Airscope, Inc.* (1955) 44 C2d. 393, 397 (emphasis added).

In fact, "[c]ollateral oral agreements are most often held admissible when the written agreement is silent on whatever term or condition is sought to be established by the collateral oral agreement." Weil & Brown, CAL. PRAC. GUIDE: CIV. PRO BEFORE TRIAL § 8:3147 (The Rutter Group 2008).

Because we are dealing with an ambiguous short letter agreement, we are entitled to produce evidence to the trier of fact as to the meaning of that document or to the existence of a not inconsistent collateral oral agreement. *W.E. Heller Western v. Tecrim Corp.* (1987) 196 Cal.App.3d 149, 158; *Heston v. Farmers Ins. Group* (1984) 160 Cal.App.3d 402, 412 (extrinsic evidence admissible to explain ambiguity or aid in interpretation of ambiguous writing). For this reason, Exhibit 2 cannot be interpreted without the introduction of testimony or other documentary evidence, which can only be produced at the time of a summary judgment hearing or at trial. Therefore, if the demurrer is granted the Plaintiff will be denied the opportunity to put on such evidence.

Obviously, the court cannot construe what the parties had in mind by reference to the bare-bone and ambiguous Exhibit 2.

IV. THE ISSUE OF LACHES CANNOT BE DECIDED ON DEMURRER

The existence of laches is a question of fact, which cannot be decided not demurrer. However, it seems obvious that Plaintiff could not have brought the instant action until Defendant vacated premises on November 2, 2007.

If, however, the court is inclined to agree with Defendants various arguments, Plaintiff should be allowed to amend the pleadings, given that liberality in permitting amendment is the rule. *CCP* § 452; *Stevens v. Sup. Ct.* (1999) 75 Cal.App.4th 594, 601.

V. CONCLUSION

Based on the foregoing, this court should deny Defendant's demurrer in its entirety.

Dated: October 4, 2008

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