

[attorney info redacted]
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Attorney for Defendants John Smith, and
Stan Moon

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
CENTRAL DISTRICT, MOSK COURTHOUSE — UNLIMITED**

SUE KIM

Plaintiff

vs.

JOHN SMITH, an individual;
STAN MOON, an individual; and
DOEs 1 to 10,

Defendants

Case Number: [redacted]
Dept.: [redacted]
Judge: [redacted]
Trial Date: [redacted]

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO EXPUNGE NOTICE
OF PENDENCY OF ACTION (LIS
PENDENS) AND TO CLAIM
ATTORNEY FEES AND COSTS
[CCP 405.30 et seq.]**

Hearing Date: _____
Hearing Time: _____

TO THE ABOVE-ENTITLED COURT AND ALL INTERESTED PARTIES HEREIN:

PLEASE TAKE NOTICE THAT on _____ at _____, or as soon thereafter as the matter may be heard, in Department "69" of the above-entitled Court, located at 111 North Hill Street, Los Angeles, California 90012, Defendants JOHN SMITH, and STAN MOON, (hereinafter collectively "**MOVING DEFENDANTS**"), will and hereby do move to expunge Notice of Pendency of Action (Lis Pendens) that was given in the above entitled action by Plaintiff SUE KIM and dated July 28, 2006, a true and correct copy of

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2 which is attached hereto as **Exhibit A**. MOVING DEFENDANTS additionally move to
3 claim attorney fees in the amount of \$3,500, and costs in the amount of \$47, which they have
4 expended and will expend bringing this motion. The motion is made on the grounds that the
5 underlying lawsuit is without merit because no contract exists as a basis for the suit, or,
6 alternatively, the Plaintiff cannot prevail on the First or Second Causes of Action pursuant to
7 any purported contract, and the Third Cause of Action does not state a real property claim.

8 The motion will be made pursuant to Code of Civil Procedure §§ 405.30, 405.31,
9 405.32 and 405.38. The motion is based upon this notice, the accompanying memorandum
10 of points and authorities, all pleadings and papers on file in the above-captioned action, and
11 other evidence that may be presented by MOVING DEFENDANTS prior to or at the hearing
12 on this motion to strike.

13
14 Dated: _____

[attorney name redacted]

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17 _____
Attorney for Defendants John Smith, and Stan
18 Moon

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2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 The Court should GRANT the motion for the following reasons.

4 **1. Factual Background**

5 This matter arises from discussions held (hereinafter the “**DISCUSSIONS**”) in late-
6 February, 2006, between Defendant John Smith (hereinafter “**SMITH**”) and one Tom Kim
7 (hereinafter “**TOM**”), who is the husband of Plaintiff Sue Kim (hereinafter “**PLAINTIFF**”),
8 in connection with TOM possibly purchasing real property (hereinafter the “**PROPERTY**”)
9 from SMITH, and in which Defendant STAN MOON (hereinafter “**MOON**”) acted as a
10 language interpreter and drafted a tentative written contract that was never executed by
11 PLAINTIFF or by TOM. PLAINTIFF and TOM operate a retail store on the PROPERTY
12 and are tenants of SMITH.

13 As supported by the Affidavit of John Smith (hereinafter the “**SMITH**
14 **AFFIDAVIT**”), from January, 2006, to the present, PLAINTIFF and TOM have been and
15 are tenants of SMITH on the PROPERTY, and their rent is \$3,600 per month. The
16 PROPERTY has a first mortgage loan of approximately \$700,000 by Bank of [redacted],
17 through its branch in [redacted], California (hereinafter “**BANK**”).

18 As supported by the SMITH AFFIDAVIT, the DISCUSSIONS commenced on or
19 about February 20, 2006, at TOM’s instance. TOM proposed to purchase the PROPERTY
20 for \$900,000, which price was generally agreeable to SMITH, by assuming the mortgage
21 loan and paying \$200,000 down in two payments: \$23,000 immediately and \$177,000 within
22 30 days. There was no discussion of utilizing an escrow. Instead, TOM pressured SMITH to
23 sign a quitclaim on the pretext that it would be needed by the BANK, but SMITH declined.

24 As supported by the SMITH AFFIDAVIT, sometime between February 20 and
25 February 26, 2006, TOM and SMITH went together to the BANK, where they were informed

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2 that the loan was assumable. The BANK provided TOM with the forms he would need to
3 submit for loan assumption, which would then need to be approved. After the trip to the
4 BANK, TOM again pressured SMITH to sign a quitclaim, but SMITH again declined.

5 As supported by the SMITH AFFIDAVIT and the MOON AFFIDAVIT, on or about
6 February 27, 2006, they went MOON, a Korean realtor, to help bridge the communication
7 gap. With MOON's interpreting, the DISCUSSIONS continued, but no agreement was ever
8 reached. MOON told them it was important that whatever agreement they negotiated should
9 be in writing. It was agreed that MOON would help by drafting such a writing and that TOM
10 would pay MOON for his help, but the terms of MOON's compensation were not discussed
11 or determined. The following terms were tentatively agreed upon in the DISCUSSIONS: (a)
12 TOM (not PLAINTIFF) would purchase the PROPERTY for \$900,000 from SMITH, (b) the
13 down payment would be \$200,000, of which \$23,000 was to be paid as an earnest money
14 deposit and of which the remaining \$177,000 was to be paid within 30 days, (c) TOM would
15 assume the existing first mortgage loan of \$700,000 from SMITH, (d) MOON would draft
16 the agreement, as he understood it, into writing for TOM and SMITH both to sign, (e) TOM
17 would pay MOON an unspecified amount for his help, and (f) MOON was not
18 "representing" either of them as a realtor, but was simply acting as a language interpreter and
19 helping them get the contemplated deal into writing utilizing a standard realty form. But the
20 following questions, essential to the deal, were never resolved in the DISCUSSIONS: (aa)
21 what would happen if TOM did not assume the mortgage loan, (bb) whether SMITH would
22 sign a quitclaim deed as repeatedly demanded by TOM in the DISCUSSIONS, but which
23 SMITH did not intend to do, (cc) whether an escrow would be opened for the transaction,
24 and if not, how fraud would be prevented, and (dd) what TOM would pay MOON for
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2 MOON's services. The quitclaim deed question was not discussed at their first meeting with
3 MOON. The DISCUSSIONS never produced any agreement for TOM or PLAINTIFF to
4 purchase the PROPERTY.

5 As supported by the SMITH AFFIDAVIT, on or about February 28, 2006, after the
6 initial meeting with MOON, and pursuant to the DISCUSSIONS, TOM demanded that
7 SMITH take \$23,000 in cash from him as a deposit before any agreement had been reached.
8 SMITH accepted the \$23,000 on the presumption that it was an indication of TOM's good-
9 faith intention to bring the DISCUSSIONS to an agreement.

10 As supported by the MOON AFFIDAVIT, on that same day, MOON drafted a
11 writing, pursuant to the DISCUSSIONS, which included the provision for an escrow, the
12 requirement that TOM qualify for assuming the bank loan, and a provision that the full down
13 payment of \$700,000 must be made by TOM no later than March 28, 2006. SMITH signed it
14 on the same day. TOM never signed it, nor did PLAINTIFF.

15 As supported by the SMITH AFFIDAVIT, throughout the 30-day period from about
16 February 28 to about March 28, 2006 (hereinafter the "**30-DAY PERIOD**"), TOM
17 repeatedly pressured SMITH (not in MOON's presence) to proceed with the quitclaim deed
18 idea, telling SMITH that he was having difficulty with the BANK because the BANK needed
19 the quitclaim deed for the loan assumption. SMITH continued to reject the quitclaim idea,
20 preferring an escrow. Also, in early March, 2006, during said 30-DAY PERIOD, SMITH
21 noted that PLAINTIFF and TOM had not paid rent either for February or March, 2006, and
22 SMITH asked TOM for the rent. TOM replied, "Why are you asking me for rent money? I
23 have money with you, don't I?" Accordingly, SMITH deducted the February and March
24 rents from the \$23,000 TOM had paid him. SMITH did the same for the April and May,
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2 2006, rents when they each became due but not otherwise paid. SMITH thereby reasonably
3 concluded that TOM intended for the said \$23,000 to be applied to rent, rather than to
4 purchase of the PROPERTY. As of May 6, 2006, TOM and PLAINTIFF had paid no other
5 rent money to SMITH for the months of February, March, April or May, 2006. On May 7,
6 2006, TOM tendered a check for \$10,800 to SMITH claiming it was for “rental payment” for
7 the preceding three months. SMITH informed TOM that SMITH was already applying the
8 \$23,000 for that rent, which rent was paid in full, and SMITH attempted to return the
9 \$10,800 check to TOM, but TOM refused to accept it. SMITH has retained the \$10,800
10 check without negotiating it.

11 As supported by the MOON AFFIDAVIT, MOON made numerous attempts during
12 the 30-DAY PERIOD to get TOM to sign the draft contract, or to negotiate another
13 resolution, but was unsuccessful because TOM repeatedly refused to sign. PLAINTIFF also
14 did not sign. MOON informed TOM that a contract to purchase real property must be in
15 writing, and if he did not sign the written contract, the DISCUSSIONS would amount to
16 nothing. TOM disliked the escrow provision. MOON then explained the importance of
17 having an escrow and that in addition to the written agreement, TOM would also have to sign
18 escrow instructions and loan documents. TOM became irate and replied disparagingly that
19 he did not need MOON, that MOON was “good for nothing,” that he would pay MOON
20 nothing. For his own protection, after the 30-DAY PERIOD, and with SMITH’s consent,
21 MOON destroyed the draft agreement to keep his hands clean. MOON was never paid for
22 his services.

23 As supported by the Affidavit of attorney [attorney name redacted] (hereinafter the
24 “**ATTORNEY AFFIDAVIT**”), and by **Exhibit B** attached hereto and referenced therein,
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2 pursuant to the failure of the DISCUSSIONS to produce an agreement, in June, 2006, TOM
3 made a second attempt to purchase the PROPERTY, this time offering the higher sum of
4 \$950,000, which offer was rejected by SMITH.

5 **2. PLAINTIFF Must Meet the Burden of Showing a Preponderance**
6 **of Evidence Supporting a Real Property Claim.**

7 The motion is to expunge a lis pendens. The proceeding is governed by Code of Civil
8 Procedure (hereinafter “CCP”) § 405.30, et seq. The plaintiff has the burden of proof.

9 “At any time after notice of pendency of action has been recorded, any
10 party, or any nonparty with an interest in the real property affected
11 thereby, may apply to the court in which the action is pending to
12 expunge the notice.... The claimant shall have the burden of proof
13 under Sections 405.31 and 405.32.” CCP § 405.30, emphasis added.

14 Specifically, the plaintiff must establish by a preponderance of evidence the probable
15 validity of the real property claim on which the notice of lis pendens is based.

16 “In proceedings under this chapter, the court shall order that the notice
17 be expunged if the court finds that the claimant has not established by
18 a preponderance of the evidence the probable validity of the real
19 property claim.” CCP § 405.32, emphasis added.

20 **3. The Court Should Expunge the Notice of Lis Pendens**
21 **Because No Contract Exists As a Basis for the Suit.**

22 The entire suit, including all three causes of action, rests on the alleged existence of a
23 contract to purchase the PROPERTY. Such contract does not exist.

24 Each of three alternative purported forms of “contract” (hereinafter “**THREE**
25 **PURPORTED CONTRACTS**”) might be asserted by PLAINTIFF, and each must fail. The
26 three are: (a) the “written agreement” alleged in Complaint ¶ 5, (b) the DISCUSSIONS, and
(c) the deposit receipt for the \$23,000, set forth as Exhibit A in the Complaint (hereinafter the
“**RECEIPT**”). None of the **THREE PURPORTED CONTRACTS** comprises a contract

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2 sufficient to support the suit. Each of the three is specifically considered in turn, followed by
3 general points applicable to all three.

4 **3.1. The “Written Agreement” Alleged in Complaint ¶ 5 Does Not Exist**

5 **3.1.1. PLAINTIFF Presents No Evidence of a “Written Agreement.”**

6 PLAINTIFF presents no evidence whatsoever of the “written agreement” alleged in
7 Complaint ¶ 5 to purchase the PROPERTY for \$900,000. No exhibit is attached to the
8 Complaint of such “written agreement.” The Complaint is not even verified.

9 While the allegation in Complaint ¶ 5 might be sufficient, *for pleading purposes*, to
10 survive a demurrer, it cannot support, *for evidentiary purposes*, the Court finding a
11 “preponderance of the evidence” as required by CCP § 405.32.

12 The “written agreement” alleged in Complaint ¶ 5 does not exist.

13 **3.1.2. PLAINTIFF Did Not Sign the Purported “Written Agreement.”**

14 SMITH made a good faith attempt to execute timely a written contract pursuant to
15 closing the transaction within 30-days. SMITH signed it. But, as supported by the MOON
16 AFFIDAVIT, TOM refused to sign it, and PLAINTIFF did not sign it either. Nor does the
17 Complaint anywhere allege it was signed by TOM or PLAINTIFF.

18 The “written agreement” alleged in Complaint ¶ 5 does not exist.

19 **3.2. The DISCUSSIONS Do Not Comprise an Enforceable Contract Because**
20 **PLAINTIFF Did Not Assent to the Intended Written**
21 **Agreement in the Manner Agreed Upon by the Parties.**

22 As alleged in Complaint ¶¶ 5-6 SMITH and TOM held DISCUSSIONS to purchase
23 the PROPERTY for \$900,000, and then went to MOON for finalizing the negotiation and
24 getting it into writing. The DISCUSSIONS provided, in term (b), set forth *ante*, that TOM
25 must pay the remaining \$177,000 within 30 days, in term (d), that TOM would assume the
existing first mortgage loan, and in term (h), that MOON would draft the agreement into

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2 writing for TOM and SMITH both to sign. MOON drafted the written agreement, which
3 SMITH signed. But TOM refused to sign it within the 30 days. TOM also failed to pay the
4 \$177,000 within 30 days. And TOM failed to submit the loan assumption papers to the
5 BANK within 30 days.

6 These facts conclusively show that the DISCUSSIONS never resulted in an
7 agreement. SMITH applied the \$23,000 earnest money to rent.

8 “It is well settled that, if the parties intend a reduction of their
9 proposed agreement to writing before it can be considered complete,
10 there is no contract until the formal agreement is signed [citations] ‘It
11 is a general rule, to which this case presents no exception, that, when it
12 is a part of the understanding between the parties that the terms of their
13 contract are to be reduced to writing, and signed by the parties, the
14 assent to its terms must be evidenced in the manner agreed upon, or it
15 does not become a binding obligation upon either.’” *Apablaza v.*
16 *Merritt & Co.* (1960) 176 Cal.App.2d 719 @ 729 [1 Cal.Rptr. 500],
17 emphasis added.

18 Here, the “manner agreed upon” for assent was that, within 30 days, both parties were
19 to sign the written purchase contract, that TOM was to submit the loan papers to the BANK,
20 and that TOM was to pay the \$177,000. The 30 days lapsed without TOM or PLAINTIFF
21 doing any of these things. The required assent was absent.

22 The DISCUSSIONS never became an agreement.

23 **3.3. The RECEIPT Is Inadequate as a Written Agreement 24 to Purchase Real Property Pursuant to the Statute of Frauds.**

25 The RECEIPT is insufficient as a contract to purchase real property. It includes no
26 date of execution, no date for completion of the transaction at the specified purchase price,
no details as to how the transaction is to be effectuated, no down payment amount, and, aside
from an illegible signature, no names of the parties. It is not evident on its face that the
RECEIPT is for the purchase of real property—it is drawn on an “invoice” form unrelated
thereto.

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2 Significantly, without a date by which the price must be paid, PLAINTIFF could hold
3 onto the RECEIPT for, say, ten years and then, when the property value has appreciated to,
4 say, \$1,700,000, claim she can purchase it for \$900,000 having made no mortgage payments
5 in the interim. And since the name of the purchaser is not on the RECEIPT, PLAINTIFF
6 could *sell* the it to someone else, who could, years later, make such a claim.

7 In California, the statute of frauds is codified at CC §1091, CC §1624, and CCP
8 §1971. CC §1624(a) provides:

9 “The following contracts are invalid, unless they, or some note or
10 memorandum thereof, are in writing and subscribed by the party to be
charged or by the party's agent:

11 (3) An agreement for the leasing for a longer period than one year,
12 or for the sale of real property, or of an interest therein;”
 [emphasis added]

13 The California Supreme Court has held that such a “memorandum” must meet certain
14 minimum requirements, which include the names of the parties and the date by when the
15 price must be paid:

16 “The written agreement pleaded and proved reads as follows:

17 ‘San Francisco, March 19, 1923.

18 ‘Received from Mr. Joseph Finn \$50. Deposit on three flats and four
19 stores located on Twenty-Fourth street. Known as Nos. 3257 to 3269-
20 Twenty-Fourth Street.

21 ‘Cost of property-\$11,500.

22 ‘Deposit to stand good until April 2, 1923.

23 ‘[Signed] Rose Goldstein.

24 ‘I accept above agreement.

25 ‘[Signed] Joseph T. Finn.’

26 The only serious question involved upon appeal is the sufficiency of
this memorandum. The trial court held it sufficient and gave judgment
for the plaintiff. We think it meets the test laid down in *Breckinridge v.*
Crocker, 78 Cal. 529, 535, 21 P. 179, 181, as follows:

 ‘But the memorandum must contain all the material elements of the
contract; that is, it must show who is the seller and who is the buyer,
what the price is and when it is to be paid, and must so describe the
land that it can be identified.’

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2 *Fritz v. Mills*, 170 Cal. 449, 150 P. 375, announces the same rule. In
3 the instant case, the buyer is the plaintiff and the seller the defendant;
4 the price is \$11,500; and the time of payment is April 2, 1923. The
5 land is described sufficiently for identification.

6 [¶¶]

7 “This conclusion meets the two attacks made by the appellant, i. e.,
8 that the memorandum is insufficient under the statute of frauds, and
9 that it is too vague and uncertain to be specifically enforced.”

10 *Finn v. Goldstein* (1927) 201 Cal. 605 [258 P. 85], emphasis added.

11 In contrast with the receipt set forth in *Finn*, which includes the names of the parties
12 and the date by when the price must be paid, the RECEIPT here lacks such information. It is
13 wholly inadequate as a written agreement to purchase real property pursuant to the statute of
14 frauds.

15 **3.4. Plaintiff’s Tender of “\$23,000” Was Deficient Because Plaintiff Intended a 16 Substantial Portion Thereof to Apply to Rent.**

17 Complaint ¶ 6 alleges that “The terms and conditions of the agreement provides [sic]
18 that the purchase price was payable by Plaintiff as follows: \$23,000.00 as a cash down
19 payment on acceptance of Plaintiff’s offer...” Complaint ¶ 7 alleges “In accordance with the
20 terms of the agreement, Plaintiff tendered a cash payment of \$23,000 to Defendant...”
21 However, as supported by the SMITH AFFIDAVIT, TOM confirmed, both in his words
22 (“Why are you asking me for rent money? I have money with you, don’t I?”) and in his
23 deeds (failure otherwise to pay rent for several months) that he, TOM, fully intended the
24 \$23,000, or a substantial portion thereof, to be credited to rent.

25 This is confirmed by TOM tendering a check for \$10,800 on May 7, 2006, which he
26 said was payment for rent on the preceding three months. Such rent would have been (as to
February) 90 days late. Most escrows close within 90 days. Yet Complaint ¶ 5 alleges “the
parties agreed to immediately open escrow.” If TOM had been serious about immediately
opening escrow, then *why did he let his rent slip 90 days into arrears?* The only reasonable

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2 explanation is that he intended to use the \$23,000 for rent. He might have changed his mind
3 in May, but by then SMITH had *already deducted the rent* from the \$23,000. Used as rent,
4 rather than toward the down payment, pursuant to *any* of the THREE PURPORTED
5 CONTRACTS, PLAINTIFF'S alleged payment of "\$23,000" was in fact far less, and it
6 declined with each passing month. This rendered each of the THREE PURPORTED
7 CONTRACTS, to the extent (*arguendo*) any of them ever existed, null and void.

8 **3.5. Plaintiff Made a Subsequent Offer at a Higher Price, thereby Admitting the**
9 **Nullity of Any Prior Agreement .**

10 As supported by the ATTORNEY AFFIDAVIT, two items of written evidence exist,
11 both signed by TOM in June, 2006, of a subsequent "new offer" to purchase the PROPERTY
12 for a higher price, which SMITH rejected. If any contract to purchase the PROPERTY for
13 \$900,000 were then in effect, what would be the purpose of the "new offer" to purchase it for
14 \$950,000? The only reasonable explanation is that none of the THREE PURPORTED
15 CONTRACTS, to the extent (*arguendo*) any had ever existed, was in effect at that time. If
16 none was in effect in June, 2006, then none was in effect when the Complaint was filed in
17 July, 2006, and none is in effect today.

18 Any agreement to purchase of the PROPERTY by PLAINTIFF made prior to receipt
19 of the "new offer" in June, 2006, does not exist today.

20
21 The "written agreement" alleged in Complaint ¶ 5 does not exist. The terms alleged
22 in Complaint ¶¶ 5-6 refer to the DISCUSSIONS, which never became an agreement. The
23 RECEIPT is inadequate for the purchase of real property. All THREE PURPORTED
24 CONTRACTS are void because the \$23,000 was applied substantially to rent, and because a
25 "new offer" was made in June, 2006.

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2 The entire suit, including all three causes of action therein, rest on the alleged
3 existence of a contract to purchase the PROPERTY. Pursuant to CCP § 405.32, the Court
4 should expunge the notice of lis pendens because no such contract exists.

5 **4. Alternatively, the Court Should Expunge the Notice of Lis**
6 **Pendens Because PLAINTIFF Cannot Prevail on the First or Second**
7 **Causes of Action, and the Third Does Not State a Real Property**
8 **Claim.**

9 As set forth *ante*, no contract for PLAINTIFF to purchase the PROPERTY exists. In
10 the alternative, assuming *arguendo* that an agreement does exist, plaintiff cannot prevail on
11 the First or Second Causes of Action, and the Third Cause of Action cannot support the
12 notice of lis pendens because it does not state a real property claim.

13 **4.1. Plaintiff Cannot Prevail on the**
14 **First Cause of Action for Specific Performance**

15 None of the THREE PURPORTED CONTRACTS comprises any contract on which
16 performance can be enforced. Each is discussed in turn.

17 **4.1.1. The Written Agreement Alleged in the Complaint Cannot Be Seen.**

18 Specific performance requires a contract whose terms can be ascertained by the court
19 from its instrument, and cannot depend upon the pleading:

20 ““To warrant specific performance... the court must be able to
21 ascertain the terms from the instrument itself and not be compelled to
22 determine them from the construction put upon the contract in the
23 pleading demanding enforcement. In other words, a complaint in
24 specific performance cannot supply deficiencies which cause the
25 contract to be nonenforceable in equity.””

26 *Patch v. Anderson* (1944) 66 Cal.App.2d 63 [151 P.2d 644], citing 23
California Jurisprudence 429, et seq.

Here, PLAINTIFF has presented an unverified pleading setting forth the terms of a
purported “written agreement” (Complaint ¶ 5), but fails to alleged it was signed and admits

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2 it was destroyed. No contract instrument is before the court for purposes of enforcement. It
3 is invisible and cannot be seen or read.

4 Specific performance cannot be enforced on the purported “written agreement.”

5 **4.1.2. The DISCUSSIONS Contemplated Execution of a Written Agreement but**
6 **Were Uncertain as to MOON’S Compensation.**

7 Specific performance cannot be enforced where certain terms were not yet agreed
8 upon, and the parties contemplated execution of such provisions.

9 “When a purported contract leaves certain terms to be agreed upon and
10 contemplates the execution of the provisions ultimately adopted, it is
11 not specifically enforceable.” *Dickey v. Pattison* (1949) 92 Cal.App.2d
12 659 @ 662 [207 P.2d 1081], citing *Patch v. Anderson* (1944) 66
13 Cal.App.2d 63 @ 65 [151 P.2d 644], emphasis added.

14 Here, SMITH and TOM agreed that TOM would pay MOON, but the amount and
15 terms of such payment were left uncertain. Ultimately, TOM and MOON were *unable to*
16 *agree* on MOON’s compensation, “he demanded additional fees and/or commissions from
17 Plaintiff” (Complaint ¶ 20).

18 Absent a definite agreement as to MOON’s compensation, the dispute between
19 MOON and TOM resulted in the destruction of the document (Complaint ¶ 20). This
20 uncertainty as to MOON’s compensation was *pivotal* in that it ultimately prevented the
21 DISCUSSIONS from being executed in writing.

22 “From the findings and the adopted evidence it is seen that the
23 purported agreement is shrouded in uncertainty.... Such indefiniteness
24 is a complete barrier to specific performance. [...¶...] Definiteness of
25 an agreement is the sine qua non of its enforceability.” *Dickey v.*
26 *Pattison, supra @ 65.*

The uncertainty as to MOON’s compensation is of no less consequence than the
uncertainty that would have resulted had the parties decided on a price of, say, approximately
\$900,000, give or take \$100,000. As alleged in the Complaint, TOM’s refusal to pay

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2 MOON, implies that MOON was demanding too much money from TOM (e.g. in
3 “commissions”—Complaint ¶ 20), which *effectively raised the price of the transaction for*
4 *TOM above his limit.* The DISCUSSIONS were therefore so uncertain as to the *overall*
5 *amount* TOM would have to pay that they cannot be enforced.

6 Specific performance cannot be enforced on the DISCUSSIONS.

7 **4.1.3. The RECEIPT Is Inadequate Pursuant to the Statute of Frauds.**

8 As set forth *ante*, the RECEIPT omits the names of the parties and the date by which
9 the purchase, at \$900,000, must be completed. As such, it is barred by the statute of frauds
10 and cannot be enforced.

11 “Plaintiffs sought specific performance of an agreement for the
12 purchase of real property, which agreement was evidenced by a
13 ‘Deposit Receipt.’ [¶¶... I]t is well settled that an agreement that is
incomplete, uncertain or indefinite in its material terms will not be
specifically enforced...” *Mills v. Skaggs* , 64 Cal.App.2d 656 @ 658.

14 Specific performance cannot be enforced on the RECEIPT.

15
16 Unable to enforce any of the THREE PURPORTED CONTRACTS, PLAINTIFF
17 cannot prevail on the First Cause of Action for specific enforcement.

18 **4.2. Plaintiff Cannot Prevail on the**
19 **Second Cause of Action for Breach of Agreement**

20 As set forth *ante*, none of the THREE PURPORTED CONTRACTS is sufficient for
21 specific enforcement—each is too incomplete and uncertain. Notwithstanding that a lesser
22 degree of certainty is required for breach of contract than for specific performance, each of
23 the THREE PURPORTED CONTRACTS is so uncertain it also fails as to breach of contract.
24 The following case, which is particularly on-point as to the uncertainty of MOON’s
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2 compensation, also applies to uncertainty as to what was written on the invisible (i.e.
3 destroyed) document, and as to the missing names and dates on the RECEIPT.

4 “Although a greater degree of certainty is required in a contract which
5 is sought to be specifically enforced, the general rule is that a
6 provision in a contract which leaves open the terms of payment for
7 future negotiation renders the contract incomplete and uncertain in one
8 of its material features and for that reason unenforceable in equity. (49
9 A.L.R. 1464 and cases cited.) In California the rule is the same and no
10 action will lie to enforce the performance of a contract or to recover
11 damages for its breach unless it is complete and certain.” *Avalon*
12 *Products v. Lentini* (1950) 98 Cal.App.2d 177 [219 P.2d 485], citing
13 *Talmadge v. Arrowhead Reservoir Co.*, 101 Cal. 367, 371 [35 P.
14 1000]; *Dillingham v. Dahlgren*, 52 Cal.App. 322, 329-30 [198 P. 832],
15 emphasis added.

16 Unable to prove sufficiency of any of the THREE PURPORTED CONTRACTS,
17 PLAINTIFF cannot prevail on the Second Cause of Action for breach of agreement .

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4.3. The Third Cause of Action for Intentional Interference with Contractual Relationship Cannot Support the Notice of Lis Pendens Because It Does Not State a Real Property Claim.

If a cause of action does not plead a real property claim, it cannot support the a notice of lis pendens.

“In proceedings under this chapter, the court shall order the notice expunged if the court finds that the pleading on which the notice is based does not contain a real property claim. The court shall not order an undertaking to be given as a condition of expunging the notice where the court finds the pleading does not contain a real property claim.” CCP § 405.31, emphasis added.

The third cause of action pleads for damages, in tort, against MOON in the amount of “the difference between the present market value of the Property and the purchase price of the Property...,” Complaint ¶ 22, plus “exemplary and punitive damages,” Complaint ¶ 23. This is not a real property claim. “‘Real property claim’ means the cause or causes of action in a pleading which would, if meritorious, affect ... title to, or the right to possession of, specific real property ...” CCP § 405.4. If the court were to find in favor of PLAINTIFF on

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2 the third cause of action, no real property would be affected. It therefore is not a real
3 property claim, and it cannot support the Notice of Lis Pendens.

4 **5. MOVING DEFENDANTS Are Entitled to Attorney Fees and Costs.**

5 Pursuant to any motion to expunge a notice of lis pendens, CCP § 405.38 provides,
6 “The court shall direct that the party prevailing on any motion under this chapter be awarded
7 the reasonable attorney's fees and costs of making or opposing the motion unless the court
8 finds that the other party acted with substantial justification or that other circumstances make
9 the imposition of attorney's fees and costs unjust.” (Emphasis added.)

10 As supported by the ATTORNEY AFFIDAVIT, MOVING DEFENDANTS have
11 expended and will expend attorney fees in the amount of \$3,500, and costs in the amount of
12 \$47, in bringing this motion. Therefore, the MOVING DEFENDANTS are entitled to
13 attorney fees in the amount of \$3,500, and costs in the amount of \$47.

14 **6. Conclusion.**

15 For the foregoing reasons, the moving defendants respectfully request that the Court
16 expunge the notice of lis pendens.

17 Dated: _____

[attorney name redacted]

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19 _____
20 Attorney for Defendants John Smith, and Stan
Moon

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AFFIDAVIT OF JOHN SMITH

3 I, John Smith, declare as follows:

4 I am a defendant in the above-entitled action. The following is based on my own
5 personal knowledge and if called to testify, I could, and would, testify competently thereto.

6 Plaintiff SUE KIM (hereinafter “**PLAINTIFF**”) and her husband, Tom KIM
7 (hereinafter “**TOM**”), are tenants on a property I own (hereinafter the “**PROPERTY**”)
8 which is described in ¶ 2 of the Complaint. They occupied the property in January, 2006,
9 and their rent is \$3,600 per month. The **PROPERTY** has a first mortgage loan of
10 approximately \$700,000 by Bank of the West, through its branch in Gardena, California
11 (hereinafter “**BANK**”).

12 On or about February 20, 2006, **TOM** approached me and offered to purchase the
13 **PROPERTY**. I was potentially interested. I was having a temporary cash flow problem and
14 was in need of immediate cash, and **TOM** knew this. We entered into discussions
15 (hereinafter “**DISCUSSIONS**”) about a potential purchase of the **PROPERTY**. **TOM**
16 proposed to purchase the **PROPERTY** for \$900,000, which price was generally agreeable to
17 me, by assuming the mortgage loan and paying \$200,000 down in two payments: \$23,000
18 immediately and \$177,000 within 30 days. There was no discussion of utilizing an escrow.

19 **TOM** pressured me to sign a quitclaim deed on the pretext that it would be needed by
20 the **BANK**, but I did not think that would be wise. Sometime between February 20 and
21 February 26, 2006, **TOM** and I went together to the **BANK**, where we were informed that the
22 loan was assumable. The **BANK** provided **TOM** with the forms he would need to submit for
23 loan assumption, which, of course, would then need to be approved by **BANK**. After the trip
24 to the **BANK**, **TOM** again pressured me to sign a quitclaim, but I again declined.

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2 We were having difficulty communicating because TOM is Korean and his English is
3 weak. On or about February 27, 2006, we went to see Defendant Stan Moon (hereinafter
4 “MOON”), a Korean realtor, to help bridge the communication gap. With MOON’s
5 interpreting, our DISCUSSIONS continued, but no agreement was ever reached. MOON
6 told us it was important that whatever agreement we negotiated should be in writing. It was
7 agreed that MOON would help us by drafting such a writing and that TOM would pay
8 MOON for his help, but the terms of MOON’s compensation were not discussed or
9 determined.

10 The following terms were tentatively agreed upon in the DISCUSSIONS: (a) TOM
11 (not PLAINTIFF) would purchase the PROPERTY for \$900,000 from me, (b) the down
12 payment would be \$200,000, of which \$23,000 was to be paid as an earnest money and of
13 which the remaining \$177,000 was to be paid within 30 days, (c) TOM would assume the
14 existing first mortgage loan of \$700,000 from me, (d) MOON would draft the agreement, as
15 he understood it, into writing for TOM and me both to sign, (e) TOM would pay MOON an
16 unspecified amount for his help, and (f) MOON was not “representing” either of us as a
17 realtor, but was simply acting as a language interpreter and helping us get the contemplated
18 deal into writing utilizing a standard realty form.

19 The following questions, essential to the deal, were never resolved in the
20 DISCUSSIONS: (aa) what would happen if TOM did not assume the mortgage loan, (bb)
21 whether I would sign a quitclaim deed as repeatedly demanded by TOM in the
22 DISCUSSIONS, but which I did not intend to do, (cc) whether an escrow would be opened
23 for the transaction, and (dd) what TOM would pay MOON for MOON’s services. The
24 quitclaim deed question was not discussed at our first meeting with MOON. The
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2 DISCUSSIONS never produced any agreement for TOM or PLAINTIFF to purchase the
3 PROPERTY.

4 On or about February 28, 2006, after the initial meeting with MOON, and pursuant to
5 the DISCUSSIONS, TOM demanded that I take \$23,000 in cash from him as a deposit
6 before any agreement had been reached. I accepted the \$23,000 on the presumption that it
7 was an indication of TOM's good-faith intention to bring the DISCUSSIONS to an
8 agreement. On the same day, MOON drafted a writing, pursuant to the DISCUSSIONS,
9 which included the provision for an escrow, the requirement that TOM qualify for assuming
10 the bank loan, and a provision that the full down payment of \$700,000 must be made by
11 TOM no later than March 28, 2006. I signed it later on the same day that I had received the
12 \$23,000. TOM never signed it, nor did PLAINTIFF.

13 Throughout the 30-day period from about February 28 to about March 28, 2006
14 (hereinafter the "**30-DAY PERIOD**"), TOM repeatedly pressured me (not in MOON's
15 presence) to proceed with his quitclaim deed idea, and he told me that he was having
16 difficulty with the BANK because the BANK needed the quitclaim deed for the loan
17 assumption. I continued to reject the quitclaim idea, preferring an escrow.

18 In early March, 2006, during the 30-DAY PERIOD, I noted that PLAINTIFF and
19 TOM had not paid rent either for February or March, 2006, and I asked TOM for the rent.
20 TOM replied, "Why are you asking me for rent money? I have money with you, don't I?"
21 Accordingly, I deducted the February and March rents from the \$23,000 TOM had paid him.
22 I did the same for the April and May, 2006, rents when they each became due but not
23 otherwise paid. I thereby reasonably concluded that TOM intended for the said \$23,000 to
24 be applied to rent, rather than to purchase of the PROPERTY. As of May 6, 2006, TOM and
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PLAINTIFF had paid no other rent money to me for the months of February, March, April or May, 2006. On May 7, 2006, TOM tendered a check for \$10,800 to me claiming it was for “rental payment” for the preceding three months. I informed TOM that I was already applying the \$23,000 for that rent, which rent was paid in full, and I attempted to return the \$10,800 check to TOM, but TOM refused to accept it. I have retained the \$10,800 check without negotiating it. TOM subsequently tendered two additional checks to me for \$3,600 each (on June 1, and July 1, 2006, respectively) which I have also retained without negotiating.

Also during the 30-DAY PERIOD, my cash flow problem cleared up, and I became less interested in selling the PROPERTY to TOM. I discontinued the DISCUSSIONS which had not yielded any agreement. After the 30-DAY PERIOD expired and TOM had not signed the draft agreement, I gave my permission to MOON to destroy it. I also contacted the BANK and was informed that neither TOM nor PLAINTIFF had submitted the loan assumption forms.

I never had any discussions with PLAINTIFF about purchasing the PROPERTY. The DISCUSSIONS were exclusively with TOM, and we never came to any agreement. A few months later, TOM began pressuring me to proceed with the deal, but I had no interest.

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

Dated: _____

John Smith

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2 **AFFIDAVIT OF STAN MOON**

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4 I, Stan Moon, declare as follows:

5 I am a defendant in the above-entitled action. The following is based on my own
6 personal knowledge and if called to testify, I could, and would, testify competently thereto.

7 On or about February 27, 2006, Defendant John Smith (hereinafter “**SMITH**”) and
8 Tom KIM (hereinafter “**TOM**”), who is the husband of Plaintiff SUE KIM (hereinafter
9 “**PLAINTIFF**”), walked into my office.

10 They told me they were discussing the possibility of TOM purchasing real property
11 from SMITH (hereinafter “**DISCUSSIONS**”) but were having difficulty communicating
12 because TOM’s English is weak. TOM and I are both Korean, so I was able to interpret, and
13 my knowledge of real estate proved useful.

14 Their DISCUSSIONS continued in my presence, with my interpretation helping to
15 clarify the communications. Since they had already found each other as prospective buyer
16 and seller, I informed them that I would not be representing either of them in my capacity as
17 a realtor. I also informed them that whatever agreement came out of the DISCUSSIONS
18 should be put into writing. It was agreed that I would help them with this by drafting an
19 agreement on a standard realty form for the two of them to sign. I expected to be paid for my
20 effort, and they informed me that TOM would pay me, but we never discussed or agreed on
21 the terms of my payment. I proceeded in the spirit of good faith.

22 It was evident from the DISCUSSIONS that they were contemplating a deal in which
23 TOM would purchase a property owned by SMITH (hereinafter the “**PROPERTY**”) for
24 \$900,000, by assuming its \$700,000 mortgage loan and paying \$200,000 down in two
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2 payments: \$23,000 immediately and \$177,000 within 30 days, and that the deal needed to be
3 completed within 30 days. I presumed an escrow would be utilized, and there was not any
4 discussion at our meeting to the contrary.

5 The next day, I drafted a purchase agreement, pursuant to the DISCUSSIONS, which,
6 in addition to the foregoing, included the provision for an escrow, the requirement that TOM
7 qualify for assuming the bank loan, and a provision that the full down payment of \$700,000
8 must be made by TOM no later than March 28, 2006. Later that day, SMITH came into my
9 office and signed it. He also informed me that TOM had just given him the \$23,000 for
10 which he had signed a receipt. I naturally presumed TOM was ready to sign.

11 However, when I went to visit TOM to obtain his signature and fair payment for my
12 services (which had not specifically been agreed upon), he refused. I informed TOM that a
13 contract to purchase real property must be in writing, and if he did not sign the written
14 contract, the DISCUSSIONS would amount to nothing. TOM disliked the escrow provision.
15 I then explained the importance of having an escrow and that in addition to the written
16 agreement, TOM would also have to sign escrow instructions and loan documents. TOM
17 became irate and replied disparagingly that he did not need me, that I was “good for
18 nothing,” that he would pay me nothing, and that I could get his daughter—a little girl—to
19 sign it instead. He also told me that he wanted SMITH to sign a quitclaim and that he (TOM)
20 had his own “escrow.” I was shocked by TOM’s despicable treatment of me, as well as his
21 apparent desire to somehow induce SMITH to sign a quitclaim without the protection of an
22 escrow.

23 Throughout the 30-day period from about February 28 to about March 28, 2006
24 (hereinafter the “**30-DAY PERIOD**”), I made numerous attempts to get TOM to sign the
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draft contract, or to negotiate another resolution, but was unsuccessful because TOM repeatedly refused to sign. PLAINTIFF also did not sign.

For my own protection, after the 30-DAY PERIOD, and with SMITH's consent, I destroyed the draft agreement to keep my hands clean from this dirty deal. Given the nefarious nature of TOM's business dealings, I did not want to find myself being "pressured" by TOM, at a later time, to let him sign the contract and "back date" his signature, thereby causing myself to abet the illegitimate execution of a contract.

I was never paid for my services. Instead, I got hit with this lawsuit. I am outraged.

Contrary to "interfering" with the deal, I was actively, and in good faith, endeavoring to help facilitate the deal, and the person who was obstructing it was TOM.

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

Dated: _____

Stan Moon

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2 **AFFIDAVIT OF ATTORNEY [ATTORNEY NAME**
3 **REDACTED]**

4 I, [attorney name redacted], declare as follows:
5

6 I am the attorney of record in the above-entitled action representing Defendants John
7 Smith (hereinafter “SMITH”), and Stan Moon (hereinafter “MOON”).

8 The following is based on my own personal knowledge and if called to testify, I
9 could, and would, testify competently thereto.

10 On July 20, 2006, I sent a letter to [attorney name redacted], attorney for the Plaintiff
11 SUE KIM (“PLAINTIFF”), in this matter, a true and correct copy of which is attached
12 hereto as **Exhibit B**. That letter contains, as attachments, copies of the other letters
13 mentioned herein.

14 Beginning in May, 2006, I was aware that demands were being made by my client
15 SMITH by Tom KIM (hereinafter “TOM”), who is the husband of PLAINTIFF, regarding a
16 property purchase from SMITH for \$900,000. I was also aware that PLAINTIFF was, back
17 then, represented by an attorney (not [attorney name redacted]).

18 On or about June _____, I received a telephone call from TOM who
19 wished to speak with me concerning said purchase. I informed TOM that I would be happy
20 to speak with his attorney, but could not speak directly with him unless he terminated
21 representation by the attorney.

22 On 6/15/2006, I received a letter from TOM indicating he had stopped his attorney
23 representation and requesting my help in negotiating the purchase of the same property for
24 the higher price of \$950,000 (see Exhibit B). On June 22, 2006, I received another letter
25 from TOM reiterating his “**new** offer” (bold and underlining in the original) of \$950,000 (see

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2 Exhibit B). I discussed this offer with SMITH, who decided to reject it. On the same day,
3 June 22, 2006, I sent TOM a letter explaining, *inter alia*, that the new offer was rejected (see
4 Exhibit B). Various other communications also occurred between my office and TOM
5 concerning rent payments, but are omitted herein in the interest of brevity.

6 My hourly rate is \$250.00. The attorney fees and costs are as follows:

7 Attorney fees at \$250 per hour:

8 This Motion (14 hours) \$3,500

9 Total attorney fees \$3,500

10 Costs:

11 This Motion \$40

12 L.A. County Recorder filing fee (to file the order) \$7

13 Total costs \$47

14 I declare under penalty of perjury that the foregoing is true and correct.

15 Dated: _____

16 _____
17 [attorney name redacted]

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EXHIBIT A
NOTICE OF PENDENCY OF ACTION (LIS PENDENS)

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EXHIBIT B

Letter from Attorney of 07/20/2006 with Attachments

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2 **PROOF OF SERVICE**

3 I, the undersigned, declare:

4 I am a citizen of the United States of America, am over the age of eighteen (18) years, and
5 am not a party to the within action. My business address is [redacted].

6 On _____, 2006, I caused to be served the following document(s): **DEFENDANTS’
7 NOTICE OF MOTION AND MOTION TO EXPUNGE NOTICE OF PENDENCY OF
8 ACTION (LIS PENDENS) AND TO CLAIM ATTORNEY FEES AND COSTS
9 [CCP 405.30 et seq.]**, on the parties involved addressed as follows:

10 [attorney name, address and fax number redacted]

11
12 XX BY MAIL: I caused each envelope, with postage fully prepaid, to be placed in the
13 United States mail at Los Angeles, California.

14 XX BY FACSIMILE: By use of facsimile machine telephone numbers listed above, I
15 served a copy of the within document on the above interested parties by facsimile.

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

18 Executed on _____, 2006, at _____, California,
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[attorney info redacted]
[attorney info redacted]
[attorney info redacted]
[attorney info redacted]

Attorney for Defendants John Smith, and
Stan Moon

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES**

CENTRAL DISTRICT, MOSK COURTHOUSE — UNLIMITED

SUE KIM
Plaintiff

vs.

JOHN SMITH, an individual;
STAN MOON, an individual; and
DOEs 1 to 10,
Defendants

Case Number: [redacted]
Dept.: [redacted]
Judge: [redacted]
Trial Date: [redacted]

**[PROPOSED] ORDER TO EXPUNGE
NOTICE OF PENDENCY OF ACTION
(LIS PENDENS)**

Hearing Date: _____
Hearing Time: _____

GOOD CAUSE HAVING BEEN SHOWN, IT IS ORDERED THAT:

(a) The NOTICE OF PENDENCY OF ACTION (LIS PENDENS) recorded in this

case against the real property located in Los Angeles County, State of
California, which is described as:

Lot [redacted], Tract No. [redacted], as per map recorded
in Book [redacted] of maps, page [redacted], in the office
of the County Recorder of said County,

is hereby expunged.

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(b) Plaintiff SUE KIM is ordered to pay attorney fees in the amount of \$3,500, and costs in the amount of \$47 to [redacted], attorney for Defendants JOHN SMITH and STAN MOON.

IT IS SO ORDERED.

Dated: _____

Judge (or Judicial Officer)