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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
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10 9826 LFRCA, LLC,

11 Plaintiff,

12 v.

13 RORBERT A. HURWITZ, et al.,

14 Defendants.

Case No.: 3:13-cv-01042-L-JMA

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION [Doc. 107] IN LIMINE**

15 ROBERT A HURWITZ, et al.,

16 Third Party Plaintiffs,

17 v.

18 DONALD A BURNS,

19 Third Party Defendant.  
20

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22 Pending before the Court is Plaintiff 9826 LFRCA, LLC's motion in limine. At  
23 the final pretrial conference, the Court established a two round schedule for motions in  
24 limine. In the first round, the Court granted Plaintiff leave to file a motion in limine on  
25 the issue of whether *Jue v. Smiser*, 23 Cal. App. 4th 312 (1994) precludes Defendants  
26 from offering evidence regarding post contract execution activity for the purpose of  
27 establishing justifiable reliance. The Court ordered that all other issues shall wait until  
28 the second round, which is not set for briefing and hearing until February 2018. In their

1 briefing on the first round, the parties discuss a number of issues the Court did not grant  
2 them leave to raise at this time. For purposes of efficiency, the Court reaches only two  
3 issues with this order: (1) whether Defendants may offer evidence regarding post contract  
4 execution activity for the purpose of negating the element of justifiable reliance and (2)  
5 whether Defendants’ proffered evidence that Plaintiff failed to mitigate damages is  
6 relevant.

7       Regarding the first issue, there appears to be no disagreement between the parties  
8 as to the fact that the temporal focus for justifiable reliance is time of contract execution.  
9 *Jue*, 23 Cal. App. 4th at 313 (holding “a purchaser of real property who learns of  
10 potential material misrepresentations about the property after execution of a purchase  
11 agreement-but before consummation of the sale-[may] close escrow and sue for  
12 damages.”) From this, it clearly follows that evidence of anything Mr. Burns learned  
13 after contract execution has no relevance as to the issue of reasonable reliance and  
14 therefore cannot be offered for this specific purpose. This holding does not, however,  
15 prevent Defendants from offering otherwise admissible evidence of post contract  
16 execution activity for other purposes.

17       As to the second issue, it is hornbook law that a plaintiff cannot recover damages  
18 in tort or for breach of contract to the extent a defendant proves the plaintiff could have  
19 mitigated damages by undertaking reasonable avoidance measures. *Shaffer v. Debbas*, 17  
20 Cal. App. 4th 33, 41 (1993). At trial Defendants will contend that, even if Plaintiff  
21 prevails on its claims, it is not entitled to a recovery (or entitled to less of a recovery)  
22 because Hurwitz offered Burns an opportunity to quickly flip the property at a near \$1  
23 million profit. More specifically, Defendants have submitted an email Hurwitz sent  
24 shortly after close of escrow to Burns’ attorney in which Hurwitz offered to connect  
25 Burns to a Saudi Arabian buyer who appeared eager to pay up to \$15 million in cash for  
26 the property. (Dec. 30 Email [Doc. 108-3 Ex. L].) It seems that Burns ignored the offer.

27       In its reply brief, Plaintiff argues in rather conclusory fashion that any damage  
28 mitigation evidence is irrelevant because there was no practical way for Plaintiff to

1 mitigate its damages. The Court disagrees. Plaintiff alleges it sustained damages of  
2 about \$1 million by overpaying for the property under the false belief that it featured  
3 private beach access. (Compl. [Doc. 1].) Defendant's proffered evidence is therefore  
4 highly relevant because it tends to show that Plaintiff may have failed to take advantage  
5 of an opportunity to easily recover nearly the entire amount of alleged overpayment.  
6 Accordingly, the Court will not exclude this evidence on the grounds of it not being  
7 relevant.

8 For the foregoing reason, the Court **GRANTS IN PART** and **DENIES IN PART**  
9 Plaintiff's motion as follows:

- 10 • Defendant may not introduce evidence of post contract execution activity for the  
11 specific purpose of negating Plaintiff's claim of justifiable reliance.
- 12 • Defendant's proffered evidence regarding Plaintiff's alleged failure to mitigate  
13 damages is relevant.

14 **IT IS SO ORDERED.**

15 Dated: October 20, 2017

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17 Hon. M. James Lorenz  
18 United States District Judge