ROA 371
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

LARRY GERACI, an individual,

Plaintiff,

vs.

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

Defendants.

AND RELATED CROSS-ACTION.

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

NOTICE OF MOTION BY DEFENDANT/CROSS-COMPLAINANT DARRYL COTTON FOR ORDER THAT INITIAL ANSWERS TO INTERROGATORIES BE DEEMED BINDING AND FOR SANCTIONS

Date: February 1, 2019
Time: 9:00 a.m.
Dept: C-73
Judge: The Hon. Joel R. Wohlfeil

Complaint Filed: March 21, 2016
Trial Date: May 31, 2019

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Defendant/Cross-complainant Darryl Cotton ("Cotton"), by and through undersigned counsel, hereby files his *Motion for Order that Initial Answers to Interrogatories be Deemed Binding and for Sanctions* (the "Motion").

The origin of this action is a real estate contract dispute. The driver behind this litigation is the fact that the subject real property at issue here (the "Property"), of which Cotton is the owner-of-record, qualifies for a Conditional Use Permit ("CUP") with the City of San Diego (the "City") that would allow the operation of a Marijuana Outlet; a for-profit retail cannabis store (the "Business"). The Business is contemplated to be highly lucrative as the City has limited the number of CUP's that allow for-profit marijuana retail stores to a maximum of thirty-six.

On March 21, 2017, Plaintiff/Cross-defendant Larry Geraci ("Geraci") initiated this action against Cotton alleging that a three-sentence document executed by Cotton and Geraci on November 2, 2016 (the "November Document") is a final and integrated agreement for the sale of Cotton's real property (the "Property").[1] Geraci's Complaint neither sets forth a cause of action for fraud nor did it allege any facts that would support a cause of action for fraud.

On August 25, 2017, Cotton filed his operative Cross-complaint alleging the parties entered into an oral joint venture agreement (the "JVA") on November 2, 2016, and the November Document is a *receipt* for Cotton's acceptance of $10,000 in cash and that Geraci is fraudulently mispresenting the November Document as a final and fully integrated agreement for the sale of the Property. RJN Ex. 2.

On April 9, 2018, Geraci - over a year after filing multiple pleadings, responding to discovery, and filing numerous declarations opposing motions by Cotton alleging the JVA - submitted a declaration that for the ***first*** time alleged that on November 3, 2016: (i) he called Cotton and explained to him that he sent an email confirming he would provide Cotton an equity position in the Business by *mistake* (the "Confirmation Email"), (ii) that Cotton *orally* agreed the November Document is a final and integrated agreement, and (iii) that Cotton also *orally* agreed he was not entitled to the "10% equity position" in the Business as promised by Geraci in the Confirmation Email (the "Disavowment Allegation"). (ROA #170).

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[1] Request for Judicial Notice ("RJN"), Exhibit ("Ex.") 1 (Complaint)

Of great import is that Geraci's April 9, 2018 declaration was filed in opposition to Cotton's motion to expunge the lis pendens on the Property (the "LP Motion").[2] In the LP Motion, Cotton cited, for the **first** time in this action, to the recent seminal California Supreme Court case of Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn. (Riverisland) (2013) 55 Cal.4th 1169. Riverisland overturned 75 years of case law that prevented the use of parol evidence (such as oral or written statements) to contradict the terms of a written contract in fraud suits. Id. at 1182 ("We overrule Bank of America etc. Assn. v. Pendergrass, 4 Cal.2d 258, and its progeny, and reaffirm the venerable maxim stated in Ferguson v. Koch, [204 Cal. 342, 447]: '***[I]t was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud.***'") (emphasis added). In other words, Geraci's arguments prior to being confronted with Riverisland were not valid and he would not be able to use the Parol Evidence Rule ("PER") as a shield to bar the proof of his own fraud – the Confirmation Email and, *inter alia*, over four months of email and text communications between him and Cotton.

On November 8, 2018, Geraci provided verified responses to Requests for Admissions ("RFA") propounded by Cotton. The responses allege facts creating an affirmative defense of fraud (i.e., the Disavowment Allegation), which were neither pled in Geraci's Complaint, Demurrer or Answer. Furthermore, they contradict Geraci's previous discovery responses and numerous judicial and evidentiary admissions. As detailed below, the responses are an attempt to manufacture a triable issue of material fact and constitute a sham pleading. California Code of Civil Procedure ("CCP") § 2030.310 expressly permits the recipient of any amended interrogatory to move for a court order binding the responding party to the original answer.

Cotton also seeks sanctions pursuant to CCP §§ 2030.310(d). Notwithstanding Geraci's attempt to impermissibly amend the pleadings via his responses with an allegation of fraud, his responses to the RFAs are judicial admissions that demonstrate his actions are frivolous and intended to cause unnecessary delay. Where a Court finds a party acted without substantial justification and/or the variance between the positions in interrogatory responses is a deliberate effort to deceive, the Court has the power to impose monetary and terminating sanctions.

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[2] ROA # 170.

I. MATERIAL FACTUAL AND PROCEDURAL BACKGROUND PER GERACI'S JUDICIAL AND EVIDENTIARY ADMISSIONS.

A. Geraci's Complaint. On March 31, 2017, Geraci filed his Complaint alleging the November Document is a final and completely integrated agreement for the sale of the Property.[3] In his prayer for relief, Geraci seeks a declaration from the court that presupposes the November Document *is* a sales agreement and requests "a judicial determination of the terms and conditions of the written agreement[.]" RJN Ex. 1 at 6:1-2. Materially, as alleged in Geraci's Complaint:

(i) "On November 2, 2016, [Geraci] and [Cotton] entered into a written agreement for the purchase and sale of the [Property] on the terms and conditions stated therein." (RJN Ex. 1 at ¶7.);

(ii) "On or about November 2, 2016, [Geraci] paid to [Cotton] $10,000 good faith earnest money to be applied to the sales price of $800,000.00 and to remain in effect until the license, known as a Conditional Use Permit or CUP is approved, all in accordance with the terms and conditions of the written agreement." (RJN Ex. 1at ¶8.); and

(iii) "[Cotton] has anticipatorily breached the contract by stating that he will not perform the written agreement according to its terms. Among other things, [Cotton] has stated that, contrary to the written terms, the parties agreed to a down payment… of $50,000… [and] he is entitled to a 10% ownership interest" in the [Property]. (RJN Ex. 1 at ¶11, p.3:6-11.)

Geraci does not allege the Disavowment Allegation in his Complaint.

B. Geraci's First Discovery Responses. On September 25, 2017, Geraci provided verified answers to Form Interrogatories propounded by Cotton (the "First Discovery Responses"). (Exhibit 3 ("Ex.") of Declaration of Jacob Austin ("Dec. of Austin")). Materially, Geraci's answers to Form Interrogatories Set One Nos. 50.1 - 50.5 are the answers that Cotton seeks to bind Geraci to via this Motion. They are set forth verbatim below:

(i) **FORM INTERROGATORY NO. 50.1:**

For each agreement alleged in the pleadings:

(a) identify each DOCUMENT that is part of the agreement and for each state the name, ADDRESS, and telephone number of each PERSON who has the DOCUMENT;

(b) state each part of the agreement not in writing, the name, ADDRESS, and telephone number of each PERSON agreeing to that provision, and the date that part of the agreement was made;

(c) identify all DOCUMENTS that evidence any part of the agreement not

[3] RNJ Ex. 1 (Complaint) ¶ 7.

in writing and for each state the name, ADDRESS, and telephone number of each PERSON who has the DOCUMENT;

(d) identify all DOCUMENTS that are part of any modification to the agreement, and for each state the name, ADDRESS, and telephone number of each PERSON who has the DOCUMENT; (e) state each modification not in writing, the date, and the name, ADDRESS, and telephone number of each PERSON agreeing to the modification, and the date the modification was made;

(f) identify all DOCUMENTS that evidence any modification of the agreement not in writing and for each state the name, ADDRESS, and telephone number of each PERSON who has the DOCUMENT.

RESPONSE TO FORM INTERROGATORY NO. 50.1:

In responding to this Form Interrogatory, plaintiff assumes the interrogatory is referring to the agreement alleged by plaintiff, Larry Geraci, in his Complaint.

(a) Written agreement dated November 2, 2016, attached to the plaintiffs complaint. Both plaintiff and defendant have copies of the agreement.

(b) None.

(c) None.

(d) None.

(e) None.

(f) None.

(ii) **FORM INTERROGATORY NO. 50.2:**

Was there a breach of any agreement alleged in the pleadings? If so, for each breach describe and give the date of every act or omission that you claim is the breach of the agreement.

RESPONSE TO FORM INTERROGATORY NO. 50.2:

Yes.

Larry Geraci and Darryl Cotton signed an enforceable written agreement dated November 2, 2016. Pursuant to that agreement, Mr. Cotton agreed to sell the property to Mr. Geraci on the price terms stated therein and conditioned upon obtaining approval of a CUP. The written agreement also prohibits Mr. Cotton from selling the property to another party. Rebecca Berry, as agent for Mr. Geraci, and with Mr. Cotton's knowledge and written consent, applied for the CUP and approval of the CUP has been pursued diligently ever since and at Mr. Geraci's expense.

Mr. Cotton has anticipatorily breached the contract by denying his contractual obligation in the November 2, 2016, written agreement to convey the subject property to Mr. Geraci if and when approval is obtained of a CUP.

It appears from Mr. Cotton's document production that he has taken steps to do sell the subject property to another person and, possibly, has consummated such a sale. That would constitute a breach of the express term of the written agreement prohibiting Mr. Cotton from selling the property to another person.

Mr. Cotton has also breached the covenant of good faith and fair dealing implied in the November 2, 2016 written agreement by undertaking actions to interfere with the CUP application process and deny plaintiff the benefits of the agreement, including the following: Mr. Cotton has submitted a separate CUP Application which has or may interfere, delay or interrupt the processing of the pending CUP Application submitted by Ms. Berry in furtherance of Mr. Geraci's obligations under the written agreement.

(iii) **FORM INTERROGATORY NO. 50.3:**

Was performance of any agreement alleged in the pleadings excused? If so, identify each agreement excused and state why performance was excused.

RESPONSE TO FORM INTERROGATORY NO. 50.3:

No.

(iv) **FORM INTERROGATORY NO. 50.4:**

Was any agreement alleged in the pleadings terminated by mutual agreement, release, accord and satisfaction, or novation? If so, identify each agreement terminated, the date of termination, and the basis of the termination.

RESPONSE TO FORM INTERROGATORY NO. 50.4:

No.

(v) **FORM INTERROGATORY NO. 50.5:**

Is any agreement alleged in the pleadings unenforceable? If so, identify each unenforceable agreement and state why it is unenforceable.

RESPONSE TO FORM INTE[illegible]OGATORY NO. 50.5:

No.

Ex. 3 Dec of Austin. These form interrogatories clearly and indisputably required Geraci to disclose the Disavowment Allegation, he did not.

C. Geraci's Demurrer. On September 28, 2017, Geraci filed a demurrer to Cotton's operative cross-complaint (the "Demurrer"). RNJ Ex. 3. On October 27, 2017, Geraci filed his Reply, which, as it relates to the Disavowment Allegation and as summarized by Geraci, states:

> Cotton argues that the agreement between the parties is comprised of the November 2, 2016 written agreement (hereafter [the "November Document"]) and certain November emails (hereafter "November Emails") which were incorporated into that document and together evidence the basic terms of the agreement. (Opposition, 2:17-23.). Cotton's argument fails for a number of reasons: 1) the emails were not integrated into the Written Agreement; 2) even if the November Emails were integrated into the Written Agreement, they are not signed by Geraci, and therefore are barred by the statute of frauds; 3) the November Emails do not in and of themselves evidence an agreement between the parties; and 4) Geraci has done everything required of him under the Written Agreement and therefore has not breached the contract itself nor the implied covenant of good faith and fair dealing.

RJN Ex. 4 at 2:4-13. Neither in the Demurrer nor in his Reply does Geraci allege the Disavowment Allegation, despite explicitly and clearly arguing four different reasons for why the Confirmation Email is not proof of Geraci's fraud as alleged by Cotton.

D. Geraci's Answer. On November 20, 2017, Geraci filed his Answer to Cotton's Cross-complaint (the "Answer"). RNJ Ex. 7. Geraci answered with a general denial and set forth five affirmative defenses. Specifically, that:

> (i) Each of [Cotton's] purported causes of action against [Geraci] fails to state facts sufficient to constitute a cause of action against [Geraci].
>
> (ii) [Cotton's] purported first cause of action for breach of contract is barred by the Statute of Frauds[.]
>
> (iii) [Cotton's] purported first cause of action for breach of contract, to the extent it purports to state a cause of action for breach of an agreement to negotiate, fails to allege facts sufficient to state such a claim under *Copeland v. Baskin Robbins USA*, 96 Cal.App.4th 1251 (2002).
>
> (iv) [Cotton's] purported second cause of action for intentional misrepresentation is barred by the doctrine of waiver in that [Cotton] has accepted a substantial benefit in the form of the efforts and substantial expense undertaken by [Geraci] to apply for and obtain approval of a Conditional Use Permit.
>
> (v) [Geraci] currently has insufficient information upon which to form a belief as to the existence of additional and as yet unstated affirmative defenses. [Geraci] reserves the right to assert additional affirmative defenses in the event discovery discloses the existence of said affirmative defenses.

RJN Ex. 7 at 2:6 - 3:3. The Answer does not allege the Disavowment Allegation and specifically reserves the right to assert additional affirmative defenses ***in the event*** discovery discloses the existence of an affirmative defense. In other words, on November 20, 2017, Geraci was not aware of any facts that would support an affirmative defense of fraud and support his Disavowment Allegation, which, again, was raised for the first time on April 9, 2018 *after* he was confronted with Riverisland.

E. Geraci's February 2018 Declaration. On February 27, 2018, Geraci executed his Declaration of Larry Geraci in Support of Motion by Plaintiff/Cross-defendant Larry Geraci for a Preliminary Injunction or Other Order to Compel Access to the Subject Property for Soils Testing. RJN EX. 8 (the "February 2018 Declaration"). Materially, he reasserts his allegation that the November Document is a final and integrated agreement and that, without specifically referencing his own Confirmation Email or any other parol evidence, Cotton's request for written assurance of performance

was an attempt by Cotton to immediately get better terms. *Id.* at 4:12-13 ("After we signed the Nov 2nd Written Agreement for my purchase of the Property, Mr. Cotton immediately began attempts to renegotiate our deal for the purchase of the Property.").

Geraci does not allege the Disavowment Allegation in his February 2018 Declaration despite alleging facts that took place *before*, *during*, and *after* the time frame of the purported Disavowment Allegation.

F. Geraci's April 9, 2018 Declaration. On April 9, 2018, Geraci executed his Declaration of Larry Geraci in Opposition to Defendant Darryl Cotton's Motion to Expunge Lis Pendens. RJN Ex. 9 (the "April 2018 Declaration"). As noted above, in the LP Motion moving papers, Cotton cited to Riverisland and the principles articulated therein. In his April 2018 Declaration, Geraci admits for the first time in the action that he sent the Confirmation Email, but alleges he sent the Confirmation Email by *mistake*. Geraci's April 2018 Declaration is largely a self-serving declaration that is filled with unsupported and immaterial factual allegations in an attempt to create the specter of legitimacy by referencing and describing his relationships with established professionals in the San Diego community that specialize in acquiring Marijuana Outlet CUPs. Setting aside the vast majority of his self-serving statements in his declaration, the below are *undisputed* facts that Geraci sought to obfuscate after being confronted with Riverisland:

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

> Hi Larry, [¶] Thank you for meeting today. Since we examined the Purchase Agreement in your office for the sale price of the Property I just noticed the 10% equity position in the dispensary was not language added into that document. I just want to make sure that we're not missing that language in any ***final agreement*** as it is a factored element in my decision to sell the property. ***I'll be fine if you simply acknowledge that here in a reply***. [RJN Ex. 9 at 6:25 – 7:1 (emphasis added)];

(ii) I receive emails on my phone. It was after 9:00 p.m. in the evening that I glanced at my phone and read the first sentence, "Thank you for meeting today." And I responded from my phone "***No no problem at all.***" I was responding to his thanking me for the meeting. [RJN Ex. 9 at 7:3-5 (emphasis added)];

(iii) The next day I read the entire email and I telephoned Mr. Cotton.... During that telephone call I told Mr. Cotton that a 10% equity position in the dispensary was not part of our agreement... Mr. Cotton's response was to say something to the effect of "well, you don't get what you don't ask for." He was not upset and he commented further to the effect that things are "looking pretty good-we all should

make some money here." And that was the end of the discussion. [RJN Ex. 9 at 7:11-16.]

Summarized, Geraci's April 2018 Declaration admits that (i) Cotton requested written assurance of performance, i.e., Cotton would be provided a "10% equity position" in the Business in a "final agreement," (ii) Geraci clearly and unequivocally confirmed Cotton's request for written assurance of performance (i.e., the Confirmation Email), and (iii) alleges for the first time the Disavowment Allegation, which contradict his First Discovery Responses.

G. Deposition of Darryl Cotton. On May 14, 2018, Geraci took Cotton's videotaped deposition. At no point during the deposition did counsel for Geraci ask about or inquire in any way shape or form about any of the factual events alleged by Geraci in his Disavowment Allegation. Dec of Austin at ¶ 11.

H. Geraci's Second Discovery Responses. On November 8, 2018, Geraci verified his Responses to Requests for Admissions, Set One, propounded by Cotton (the "RFAs"). (Ex. 4 of Dec. of Austin). RFA No. 22 and Geraci's response thereto is set forth below:

REQUEST FOR ADMISSION NO. 22:

Admit that prior to YOUR April 9, 2018 declaration, no mention of the DISAVOWMENT ALLEGATION is made in any pleading, discovery request or any other DOCUMENTS YOU served and/or filed in this action.

RESPONSE TO REQUEST FOR ADMISSION NO. 22:

Objection: The request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence. (CCP § 2017.010.)

Notwithstanding and without waiving this objection, Responding Party responds as follows: Admitted that the so called "DISAVOWMENT ALLEGATION" was not made in any pleading or discovery response as it's disclosure was not called for prior to the time it was disclosed, in that a) no pleading filed with the Court required that disclosure as part of any affirmative factual showing; b) no discovery request had been served by Mr. Cotton requiring the disclosure of that information; and c) no deposition had been taken by Mr. Cotton of Mr. Geraci requiring the disclosure of that information.

(the "RFA Response No. 22"). RFA Response No. 22 clearly contradicts Geraci's prior judicial and evidentiary admissions for which there cannot be any substantial justification given the history of his own judicial and evidentiary admissions and the fact that the Disavowment Allegation was raised in opposition to Riverisland.

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II. ARGUMENT

A. The Court should deem Geraci's First Discovery Responses binding and strike the Disavowment Allegation and RFA Response No. 22 because Geraci's judicial and evidentiary admissions conclusively demonstrate that the Disavowment Allegation and RFA Response No. 22 lack substantial justification.

1. CCP § 2030.310(a) provides that: "Without leave of court, a party may serve an amended answer to any interrogatory that contains information [1] subsequently discovered, [2] inadvertently omitted, or [3] mistakenly stated in the initial interrogatory." The statute is clear; an amended answer may be served without leave of the court ***if*** the amendment meets one of the three prongs set forth in CCP § 2030.310(a). Here, the Disavowment Allegation consists of Geraci's contention that on November 3, 2016 Cotton disavowed an equity position in the Business. However, these facts were supposedly known to Geraci on November 3, 2016, he offers no explanation for why he waited from *November 3, 2016* until *April 9, 2018* before raising such a material fraud allegation. Furthermore, Geraci contends that no pleading or discovery request required its disclosure prior to his April 9, 2018 declaration. As the Disavowment Allegation and RFA Response No. 22 do not meet the criteria, Geraci cannot amend his interrogatory response without leave of the Court.

2. Pursuant to CCP § 2030.310(b), "a party who propounded an interrogatory to which an amended answer has been served may move for an order that the initial answer to that interrogatory be deemed binding on the responding party for the purpose of the pending action."

> To prevail on a motion to deem interrogatories binding, the moving party must establish three conditions. First, "[t]he initial failure of the responding party to answer the interrogatory correctly [must have] substantially prejudiced the party who propounded the interrogatory." [CCP § 2030.310(c)(1).] Second, the responding party must have "failed to show substantial justification for the initial answer to that interrogatory." [CCP § 2030.310(c)(2).] Finally, the prejudice to the propounding party must not be curable either by a continuance to permit further discovery or by the use of the initial answer. [CCP § 2030.310 (c)(3).]

People ex rel. Government Employees Ins. Co. v. Cruz (2016) 244 Cal.App.4th 1184, 1194.

(i) Substantial Prejudice. "Interrogatories expedite the resolution of lawsuits by detecting sham claims and defenses and may be employed to support a motion for summary judgment or a motion to specify those issues which are without substantial controversy. It is patently obvious ungrounded refusal to answer, prolonged delay and incorrect answers to interrogatories seriously inhibit the principal

aim of discovery procedures in general which is to assist counsel to prepare for trial." Guzman v. GM Corp. (1984) 154 Cal.App.3d 438, 442 (citations and quotations omitted).

Here, Geraci's Disavowment Allegation and RFA Response No. 22 are ungrounded as they are clearly contradicted by his own prior judicial and evidentiary admissions. Furthermore, the Disavowment Allegation constitutes a sham claim and defense and is barred because it alleges that Cotton committed fraud. "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. Thus, the policy of liberal construction of the pleadings will not ordinarily be invoked to sustain a pleading defective in any material respect. ***This particularity requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered.***" Lazar v. Superior Court, 12 Cal. 4th 631, 645 (1996) (citations and quotations omitted; emphasis added). The Disavowment Allegation accuses Cotton of fraud – that Cotton agreed the November Document is the final integrated agreement for the sale of the Property, but that he is now falsely representing the Confirmation Email as evidence of a fabricated oral agreement, i.e., the JVA. Thus, if the Disavowment Allegation were true, Geraci was required to plead fraud with specificity in his Complaint. He did not; his argument, per his own discovery responses, is factually devoid of *any* factual support Geraci states that there is no "non-privileged" written evidence referencing or describing the Disavowment Allegation. Ex. 4 Dec of Austin, RFP No. 23 Response. Additionally, the Oral Disavowment is barred as a matter of law for at least two reasons: (i) failing to plead with specificity the Disavowment Allegation in his Complaint and (ii) as a sham pleading.

If Geraci is not bound by his First Discovery Responses, then Cotton will be severely prejudiced in defending against a sham cause of action and affirmative defense based on factual allegations that are clearly contradicted by Geraci's previous judicial and evidentiary admissions.

(ii) Substantial Justification. Geraci has not, and cannot, show substantial justification for the Disavowment Allegation or his RFA Response No. 22. "'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. Substantial evidence is not synonymous with 'any' evidence. Instead, it is substantial proof of the essentials which the law requires. The focus is on the quality, rather than the quantity, of the evidence. Very little solid evidence may be 'substantial,' while a lot of extremely weak evidence might be 'insubstantial.'

Inferences may constitute substantial evidence. but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 654 (citations and quotations omitted).

Geraci's judicial and evidentiary admissions already establish that he cannot provide substantial justification for the Disavowment Allegation or RFA Response No. 22. As to the Disavowment Allegation, his arguments for substantial justification are already described in his RFA Response No. 22, which sets forth three reasons for why the Disavowment Allegation was not raised prior to the April 9, 2018 Declaration. All three reasons not only lack substantial justification, they are directly contradicted by Geraci's previous judicial and evidentiary admissions. First, RFA Response No. 22 states that "a) no pleading filed with the Court required that disclosure as part of any affirmative factual showing[.]" This is false. As discussed above, the Disavowment Allegation was required to be pled with specificity in Geraci's Complaint as it alleges Cotton is engaging in fraud.

Furthermore, Geraci admits in his responses to Cotton's Requests for Admissions that (i) he was "a licensed California real estate agent for over 20 years at the time of execution of the [November Document]" and he was "aware of the statute of frauds at the time of the execution of the [November Document]." Ex. 4 Dec. of Austin. Per the California Supreme Court case of Phillippe v. Shapell Indus. (1987) 43 Cal.3d 1247, "a licensed real estate broker or salesperson cannot assert equitable estoppel against a statute of frauds defense to an oral commission agreement that is subject to Civil Code § 1624(d) unless there is a showing of actual fraud by the party to be charged under the invalid oral agreement." Id. at 1264. Consequently, even assuming that Geraci had pled a cause of action or affirmative defense of fraud, given that he judicially admits that he has no witnesses, documents or evidence of the Disavowment Allegation, other than his own self-serving declaration, he would be barred as a matter of law from asserting equitable estoppel.

RFA Response No. 22 also argues that "b) no discovery request had been served by Mr. Cotton requiring the disclosure of that information[.]" This is also a false statement. Form Interrogatories Nos. 50.1 – 50.5 indisputably required Geraci to disclose the Disavowment Allegation. Geraci's initial responses are in accord with his Complaint and his pre-*Riverisland* position: the November Document is a final integrated agreement (No. 50.1(a)); there is no part of the agreement "not in writing" (No.

50.1(b)); there are no "DOCUMENTS that evidence any part of the agreement not in writing" (No. 50.1(c)); there are no "DOCUMENTS that are part of any modification to the agreement" (No. 50.1(d)); there are no "modification[s] not in writing" (No. 50.1(e)); and there are no "DOCUMENTS that evidence any modification of the agreement not in writing" (No. 50.1(f)).

Also, Geraci's responses to Form Interrogatories Nos. 50.1-50.5 cumulatively required, among other things, the disclosure of any agreements alleged in the pleadings which are not in writing, excused, terminated by mutual agreement, and/or unenforceable; thereby necessitating the disclosure of the Disavowment Allegation as alleged by Geraci. His responses make no mention of the Disavowment Allegation. Therefore, it is factually and legally impossible to reconcile Geraci's Disavowment Allegation and RFA Response No. 22 with his First Discovery Reponses and other judicial and evidentiary admissions. Or, in other words, Geraci's pre and post-*Riverisland* positions.

Lastly, Geraci argues that "c) no deposition had been taken by Mr. Cotton of Mr. Geraci requiring the disclosure of that information." Ex. 4 Dec. of Austin. This argument is a non-sequitur, the Disavowment Allegation should have been disclosed with specificity in his Complaint and via discovery as required per Form Interrogatories Nos. 50.1 – 50.5. Geraci's argument implies that the Disavowment Allegation would have been disclosed via a deposition, but that it is not responsive to any of Cotton's discovery requests. A factually and legally unsupported position. Also, it presupposes that the Disavowment Allegation, alleging fraud, did not have to be pled with specificity.

(iii) Discovery Continuance and Initial Answer Cannot Cure Prejudice.

The Disavowment Allegation is barred, *inter alia*, because Geraci failed to plead it with specificity in his Complaint. And, even if he had, it is barred by the SOF as he alleges Cotton *orally agreed* to release him from his written promise to provide him a 10% equity position. Furthermore, he is prevented from asserting equitable estoppel as an affirmative defense because he was a licensed real estate salesperson at the time of the execution of the November Document. Continuing discovery or allowing Cotton to confront Geraci with his initial answer does not cure the prejudice as the prejudice is in having to defend against a sham cause of action and defense.

4. Sanctions pursuant to CCP § 2023.030; the Court Must Impose Monetary Sanctions Absent Specified Findings.

The court must impose a monetary sanction under CCP § Section 2023.030 against any party, person, or attorney who unsuccessfully opposes a motion to deem binding an initial answer to an interrogatory, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. CCP §§ 2023.030(a), 2030.310(d).

For the reasons set forth above, Geraci cannot provide substantial justification for his Disavowment Allegation or RFA Response No. 22. Further, his own judicial admissions make it impossible for him to argue that other circumstances make the imposition of a sanction unjust; they are archetypes of a frivolous action. Cotton requests monetary sanctions in the amount of $6,720.00, and an order issuing an evidentiary sanction striking and/or barring Geraci's Disavowment Allegation and RFA Response No. 22 in this action. Given that Geraci not only lacked substantial justification in this matter, but it can reasonably be deduced that he made knowingly false statements, these sanctions are reasonable and appropriate.

B. Monetary sanctions are warranted in the instant matter as Geraci has acted without substantial justification.

CCP § 2023.030 permits the trial court to impose as sanctions against anyone who has engaged in a misuse of the discovery process monetary sanctions, issue sanctions, evidence sanctions, terminating sanctions, or contempt sanctions. CCP § 2023.010 provides that the following, among others, are misuses of the discovery process: (i) making, without substantial justification, an unmeritorious objection to discovery; and (ii) making an evasive response to discovery.

For the same reasons set forth above, Geraci has engaged in misuse of the discovery process and monetary sanctions are warranted: (i) RFA Response No. 22 makes, without substantial justification, an unmeritorious objection; Geraci objected on the grounds that the "request is neither relevant to the subject matter of the action nor reasonably calculated to lead to discovery of admissible evidence." Whether Geraci pled the Disavowment Allegation, required as it is an allegation of fraud, is directly relevant to the issue of whether Geraci manufactured the Disavowment Allegation in response to Riverisland; and (ii) RFA Response No. 22 is also an evasive response as it seeks to legitimize the Disavowment Allegation by alleging that prior discovery did not require it be provided, a legal conclusion Geraci consistently states, but for which he never provides facts or reasoning in support of during informal meet and confer efforts.

III. CONCLUSION

The Court should order Geraci's First Discovery Responses binding for at least three reasons:

First, the Disavowment Allegation and RFA Response No. 22 do not meet the criteria set forth in CCP § 2030.310(a) and, thus, bar Geraci from amending previous responses to interrogatories without leave of the Court.

Second, Cotton meets the three-prong criteria set forth in CCP § 2030.310(b) which requires that Geraci be bound to his First Discovery Responses: (1) the switch in position would create severe prejudice to Cotton as he would have to defend against a fraud claim, for which Geraci himself admits he has no supporting evidence, and it was required to be pled with specificity in his pleadings, which he did not; (2) Geraci cannot show any substantial justification to demonstrate his original responses were incorrect; and (3) neither further discovery nor use of the original answer as an evidentiary admission will overcome the resulting prejudice. The Disavowment Allegation is a de facto sham pleading that will needlessly and significantly increase the cost and attendant burdens of the instant litigation for Cotton.

Third, given the evolution of Geraci's judicial and evidentiary admissions throughout the course of the litigation as set forth above, there is only one reasonable conclusion that can be deduced: Geraci manufactured the Oral Disavowment in response to Riverisland and RFA Response No. 22 is simply a knowing and willful false statement.

In sum, there is no substantial justification to support the Disavowment Allegation or RFA Response No. 22 as Geraci's ***own*** judicial and evidentiary admissions demonstrate they are factually unsupported and legally barred by the PER and the SOF. Ultimately, the Disavowment Allegation and RFA Response No. 22 reflect Geraci and his attorneys' lack of regard for the resources and prestige of this Court. Without leave of the Court, and in clear contradiction of their prior judicial admissions, they brazenly seek to create a sham pleading without even *attempting* to justify their change in factual position. Instead, they directly contradict their assertions and pretend that such is ethical and just; the Court should order that Geraci be bound to his First Discovery Responses, strike or bar the Disavowment Allegation in this action, impose monetary sanctions and any other relief which the Court deems in the interest of justice.

DATED: January 9, 2019 THE LAW OFFICE OF JACOB AUSTIN

By _____
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