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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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY DEFENDANT DARRYL COTTON FOR ORDER THAT PLAINTIFF/CROSS-DEFENDANT LARRY GERACI'S INITIAL ANSWERS TO INTERROGATORIES BE DEEMED BINDING

Date: April 26, 2019
Time: 9:00 a.m.
Dept: C-73
Judge: The Hon. Joel R. Wohlfeil

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Defendant/Cross-complainant Darryl Cotton ("Cotton"), by and through undersigned counsel, hereby files this *Motion for Order that Initial Answers to Interrogatories be Deemed Binding* (the "Motion"). Cotton is the owner-of-record of 6176 Federal Blvd., San Diego, CA 92114 (the "Property"), which is the main subject of this dispute.

In March of 2017, Plaintiff Lawrence Geraci ("Geraci") filed this action alleging a three-sentence document, executed by Cotton and Geraci on November 2, 2016, is a fully integrated sales contract for Geraci's purchase of the Property (the "November Document").

However, there is a proverbial smoking gun in this action – an email sent by Geraci to Cotton, within hours of the execution of the November Document, in which Geraci specifically confirms the November Document is ***not*** a sales agreement at all (the "Confirmation Email"). Geraci and his counsel filed this action relying on the parol evidence rule (the "PER") to bar admission of the Confirmation Email (and other parol evidence) exposing Geraci's fraud (*i.e.*, misrepresenting the November Document, intended to be a receipt, as a sales agreement).

In November of 2017, Geraci provided verified Answers to Form Interrogatories (Set One), which *assumed* that the PER will bar the damning Confirmation Email as evidence in this action against him (the "November 2017 Answers").

In April of 2018, Cotton confronted Geraci for the ***first time*** with Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn., (2013) 55 Cal.4th 1169 ("Riverisland"), which overruled 75+ years of California case law specifically prohibiting the continued use of the PER as a shield by an individual to bar proof of his own fraud. In opposition, Geraci, in direct and complete contradiction of all his pleadings, discovery responses and submissions to this Court up until that point in time, alleged for the ***first time*** that Cotton had orally disavowed an interest in the Property on November 3, 2016 (the "Disavowment Allegation").

In November of 2018, in response to discovery requests propounded by Cotton, Geraci provided verified answers and responses alleging no pleading or discovery request in this action had previously required the disclosure of the Disavowment Allegation prior to April of 2018 (the "November 2018

Answers"). Geraci's November 2018 Answers are as categorical a contradiction of the September 2017 Answers as can be imagined.

The gravamen of this Motion is that "[w]ithout leave of court, a party may serve an amended answer to any interrogatory that contains information [1] ***subsequently discovered***, [2] ***inadvertently omitted***, [3] or ***mistakenly stated in the initial interrogatory***." Cal. Code Civ. Proc. § 2030.310(a) (emphasis added). The November 2018 Answers are a de facto sham pleading seeking to introduce new factual allegations that contain information that is not "subsequently discovered, inadvertently omitted, or mistakenly stated in the initial interrogatory." Id. This Court should bind Geraci to his original interrogatory answers and sanction Geraci and his counsel accordingly.

MATERIAL FACTUAL AND PROCEDURAL BACKGROUND

I. Negotiations for the Property.

"[I]n or around mid-2016, Geraci contacted Cotton and expressed his interest to Cotton in acquiring the Property if further investigation satisfied him that the Property might meet the requirements for [a Marijuana Outlet] site." Request for Judicial Notice ("RJN") Exhibit ("Ex.") 1 (Geraci Verified Answer to Cotton's Petition for Writ of Mandate) ¶ 13. "Geraci believed at that time that a limited number of properties located in San Diego City Council District 4 might potentially satisfy the CUP requirements for a [Marijuana Outlet]. Id. "Geraci and Cotton negotiated regarding the terms of the potential sale of the Property." Id. ¶ 14. "[O]n November 2, 2016, Geraci and Cotton met at Geraci's office[.]" Id. ¶ 17.

Neither party disputes they reached an agreement for the sale of the Property nor that they executed the November Document on November 2, 2016. However, Geraci alleges the November Document was executed intending it to be a sales agreement; Cotton alleges it was executed to memorialize his receipt of $10,000 in cash. The truth of the matter is clearly and unambiguously revealed by their communications at that point in time.

II. Undisputed Communications on November 2, 2016

On November 2, 2016, at 3:11 p.m., Geraci emailed Cotton a copy of the November Document, which states:

> Agreement between Larry Geraci or assignee and Darryl Cotton:

> Darryl Cotton has agreed to sell the property located at 6176 Federal Blvd, CA for a sum of $800,000.00 to Larry Geraci or assignee on the approval of a Marijuana Dispensary. (CUP for a dispensary) [¶] Ten Thousand dollars (cash) has been given in good faith earnest money to be applied to the sales price of $800,000.00 and to remain in effect until license is approved. Darryl Cotton has agreed to not enter into any other contacts [sic] on this property.

RJN Ex. 9 Ex. 2 (Cotton's Petition for Writ of Mandate), (November Document), Austin Dec Ex. 11 (email from Geraci)).

At 6:55 PM, Cotton replied to the same email as follows:

> Hi Larry, [¶] Thank you for meeting today. Since we executed 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 would simply acknowledge that here in a reply***.

RJN Ex. 9 (Exhibit 3 thereto (email from Cotton to Geraci)) (emphasis added).

At 9:13 p.m., Geraci replied: "***No no problem at all***" (*i.e.*, the Confirmation Email). Id.

III. Undisputed Communications on November 3, 2016

At 12:38 PM, Cotton called Geraci, who did not pick up. Austin Declaration ("Dec.") Ex. 12 (Cotton Phone Records).

At 12:40 PM, Geraci called Cotton back and they spoke for three minutes. Id.

At 1:41 PM, Cotton emailed Geraci:

> Larry, [¶] Per our phone call the name 151 AmeriMeds has not been taken nor has there been any business entity formed from it. If you see this as an opportunity to piggyback some of the work I've done and will continue to do as 151 Farmers with further opportunities as a potential franchise for your dispensary I'd like for you to consider that as the process evolves. [¶] We'll firm it up as you see fit.

Austin Dec. Ex. 13.

As reflected by the 1:41 PM email regarding the 12:40 PM call, Cotton was excited about the potential collaboration with Geraci and was hoping Geraci would brand the Marijuana Outlet at the Property as a 151 Farmers organization (151 Farmers is Cotton's nonprofit organization for political activism in support of medical marijuana and urban farming).

IV. Geraci's Judicial and Evidentiary Admissions BEFORE Being Confronted with Riverisland.

Geraci filed his Complaint relying on the PER to bar proof of his fraud (*i.e.*, the Confirmation Email), pursuant to Bank of America etc. Assn. v. Pendergrass (1935) 4 Cal.2d 258 (Pendergrass). "[U]nder Pendergrass, external evidence of promises inconsistent with the express terms of a written contract were not admissible, ***even to establish fraud***." IIG Wireless, Inc. v. Yi (2018) 22 Cal.App.5th 630, 641 (Yi) (emphasis added).

In Riverisland, the California Supreme Court overruled Pendergrass, stating: "[W]e conclude Pendergrass was an aberration… '***[I]t was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud.***'" Riverisland, supra, at 1182 (emphasis added). In other words, Geraci's reliance on the PER as a shield to prevent the proof of his fraud ceased being a valid legal litigation strategy four years prior to the filing of his Complaint.[1]

Any potential doubt as to Geraci's reliance on Pendergrass to effectuate a fraud via this Court is made explicitly clear by the juxtaposition of Geraci and his attorneys' judicial and evidentiary admissions ***before*** and ***after*** being confronted with Riverisland.

A. Geraci's Complaint and Cotton's Answer

On **March 21, 2017**, Geraci filed his Complaint alleging causes of action for (i) breach of contract, (ii) breach of the covenant of good faith and fair dealing, (iii) specific performance, and (iv) declaratory relief. RJN Ex. 3 (Geraci Complaint). All four causes of action are premised on the allegation the November Document is a fully integrated sales agreement. Materially, as alleged in the Complaint:

> 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…. [Compl. ¶ .]
>
> [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 [Cotton] is entitled to a 10% ownership interest in the [Property.] [Compl. ¶ .]

The Complaint does not allege the Disavowment Allegation. On **May 8, 2017**, Cotton filed his Answer including an affirmative defense for fraud. RJN Ex. 2 (Cotton's Answer to Geraci's Complaint).

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[1] See Julius Castle Restaurant, Inc. v. Payne (2013) 216 Cal.App.4th 1423, 1439-1440 ("Payne's alleged oral statements are thus directly at variance with the terms of the [written agreements]. Accordingly, we agree with defendants that the contested oral statements constitute parol evidence. However, the recent Supreme Court decision in Riverisland overruling [Pendergrass] establishes that the evidence is admissible under the statutory exception for fraud found in section 1856, subdivision (g).").

B. Cotton's Cross-Complaint; Geraci's Demurrer and Answer

On **August 25, 2017**, Cotton filed his operative Cross-complaint against Geraci and Rebecca Berry ("Berry"), Geraci's assistant and agent for the CUP application, alleging (i) breach of contract, (ii) intentional misrepresentation, (iii) negligent misrepresentation, (iv) false promise, and (v) declaratory relief. RJN Ex. 5 (Cotton's Second Amended Cross-Complaint). All of Cotton's causes of action are premised on the allegation the parties reached an oral joint venture agreement on November 2, 2016 (*i.e.*, the JVA) and the November Document is a receipt.

As set forth in Cotton's Complaint, Geraci would finance the acquisition of the CUP and, subject to the CUP being approved, Cotton's consideration in exchange for his contribution of the Property to the joint venture was: (a) $800,000; (b) a 10% equity position in the Marijuana Outlet; and (c) on a monthly basis, the greater of $10,000 or 10% of the net profits of the Marijuana Outlet. RJN Ex. 5 ¶ 14. If the CUP was not approved, Cotton would keep a $50,000 non-refundable deposit and the Property. The November Document was meant to memorialize his receipt of $10,000 in cash towards a $50,000 non-refundable deposit. As evidence that the parties entered into the joint venture, Cotton attached the Confirmation Email as an Exhibit to his Cross-complaint.

On **September 28, 2017**, Geraci filed a demurrer to Cotton's operative Cross-complaint. RJN Ex. 6. (Geraci's Demurrer to Cotton's Second Amended Cross-Complaint). On **October 23, 2017**, Cotton, through his former-counsel, filed an opposition arguing, *inter alia*, the Confirmation Email is evidence of the JVA and Cotton's bargained-for 10% equity position in the Marijuana Outlet. RJN Ex 7 (Cotton's Opposition to Geraci's Demurrer). On **October 27, 2017**, Geraci filed his Reply in which he summarized his reasons for why the Confirmation Email is not evidence of the JVA as alleged by Cotton:

> 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. Cotton's argument fails for a number of reasons: 1) the emails were not integrated into the [November Document]; 2) even if the November Emails were integrated into the [November Document], 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 [November Document] and therefore has not breached the contract itself nor the implied covenant of good faith and fair dealing.

RJN Ex 8 (Geraci's Reply to Cotton's Opposition to Demurrer). The reply does not allege the Disavowment Allegation.

On **November 20, 2017**, Geraci filed his Answer to Cotton's cross-complaint. RJN Ex. 4 (Geraci's Answer to Cotton's Second Amended Cross-Complaint). Geraci's Answer did not set forth fraud or mistake as an affirmative defense and it does not allege the Disavowment Allegation.[2]

C. Geraci and Berry's Discovery Answers and Responses in September of 2017

On **September 25, 2017**, Geraci provided his September 2017 Answers. Austin Dec. Ex. 1. Geraci's September 2017 Answers state the November Document is the only agreement pled in the parties' pleadings and to which there were no oral or written amendments or modifications. Id. at (50.1(a)-(f)). Furthermore, that no agreements alleged in the pleadings had their performance excused, was terminated by mutual agreement or release, or unenforceable. Id. at No. 50.3-50.5. The Disavowment Allegation was not alleged. [3]

D. Cotton's Verified Petition for Writ of Mandate and Geraci's Verified Answer[4]

On **October 6, 2017**, Cotton filed a Verified Petition for Alternative Writ of Mandate against the City, naming Geraci and Berry as real-parties-in-interest, demanding the City remove Berry from the CUP application on the Property (the "Petition"). RJN Ex. 9 (Verified Petition for Alternative Writ of Mandate). Cotton's Petition alleged the JVA and included the Confirmation Email in Exhibit 3 as evidence of the JVA. RJN Ex. 9 ¶18.

On **November 30, 2017**, Geraci filed a Verified Answer to Cotton's Petition. RJN Ex. 1 (the "Verified Answer"). Geraci's Verified Answer "admits that Exhibit 3 to the Verified Petition is a true and correct copy of certain emails exchanged between [Geraci and Cotton.]" RJN Ex. 1. However, the Verified Answer does not allege the Disavowment Allegation.

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[2] The Answer sets forth the following five affirmative defenses (i) failure to state a cause of action, (ii) statute of frauds, (iii) failure to state a cause of action for breach of an agreement to negotiate, (iv) waiver and (v) reservation of right to assert further defense. RJN Ex. 4.

[3] In addition to the Form Interrogatories, Cotton propounded Request for Production of Documents which Document Request No. 25 asks "All WRITINGS identified in YOUR response to COTTON'S concurrently served form interrogatories. Despite not producing any writing related to this request, Geraci later provides his phone records as proof of the Oral Disavowment in his opposition to Cotton's Motion to Expunge *Lis Pendens*.

[4] Cotton notes that this motion is the first time Geraci's Verified Answer filed in the related action initiated by Cotton is being presented to this Court (2017-0037675-CU-WM-CTL).

V. Geraci's Judicial and Evidentiary Admissions AFTER Being Confronted with Riverisland.

A. Geraci's April 2018 Declaration

On **April 9, 2018**, Geraci alleged for the first time the Disavowment Allegation. RJN Ex. 10 (Declaration of Larry Geraci in Opposition of Cotton's Motion to Expunge *Lis Pendens*). Specifically, Geraci's declaration alleges that (i) Cotton's Request for Confirmation Email is Cotton *pretending* that earlier that day they reached a joint-venture agreement and is, in fact, an attempt at renegotiating the agreement reflected in the November Document; (ii) Geraci sent the Confirmation Email by *mistake*; and (iii) Geraci called Cotton on November 3, 2016 and Cotton *orally* agreed there was no JVA and he was not entitled to the 10% equity position in the Marijuana Outlet promised to him by Geraci in the Confirmation Email (*i.e.*, the Disavowment Allegation). Id. at ¶10.

B. Geraci's Answers and Responses to Discovery Requests Propounded by Cotton in October of 2018.

In November of 2018, Geraci provided: Response to Request for Admission (Set One), Form Interrogatories (Set Two), Special Interrogatories (Set Two), Request for Production (Set Two). Austin Dec. Ex. 5, 8, 9, and 10, respectively.

Form Interrogatory 17.1 asks:

> Is your response to each request for admission served with these interrogatories an unqualified admission? If not, for each response that is not an unqualified admission: (a) state the number of the request; (b) state all facts upon which you base your response; (c) state the names, ADDRESSES, and telephone numbers of all PERSONS who have knowledge of those facts; and (d) identify all DOCUMENTS and other tangible things that support your response and state the name, ADDRESS, and telephone number of the PERSON who has each DOCUMENT or thing.

Austin Dec. Ex 8 at No. 17.1.

Request for Admission No. 22 and Geraci's response thereto is fully 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.

Ex. 5 at No. 22.

In response to Request for Admission No. 23, Geraci admits he has "no non-privileged emails or texts prior to April 9, 2018, referencing or describing the Disavowment Allegation."[5] Ex. 5 at No. 23.

LEGAL STANDARD

Without leave of court, a party may serve an amended answer to any interrogatory that contains information discovered subsequent to, inadvertently omitted from, or mistakenly stated in the initial answer to the interrogatory. Code Civ. Proc. § 2030.310(a). However, "[t]he 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." CCP § 2030.310(b).

"The Court ***shall*** grant a motion under CCP § 2030.310(b) if it determines that all of the following conditions are satisfied: (1) The initial failure of the responding party to answer the interrogatory correctly has substantially prejudiced the party who propounded the interrogatory[;] (2) The responding party has failed to show substantial justification for the initial answer to that interrogatory[;] (3) The prejudice to the propounding party cannot be cured either by a continuance to permit further discovery or by the use of the initial answer under Section 2030.410 [allowing the use of an interrogatory against a responding party to an interrogatory]." CCP § 2030.310(c).

ARGUMENT

I. The November 2018 Responses Substantially Prejudice Cotton

In Gordon v. Superior Court (1984) 161 Cal. App. 3d 157, the defendant admitted in interrogatories that its employee, Hayes, was acting in the course and scope of her employment when

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[5] Of note, in response to the aforementioned November 2018 discovery requests, and in other discovery responses no further explanation or any other documents that supports Geraci's Oral Disavowment allegation is provided in any of his answers. *See*, Declaration of Jacob P. Austin ("Austin Dec.") Exhibits No. 1-11.

she was involved in an automotive collision with the plaintiff. Id. at 160. The plaintiff moved to "establish that it was without substantial controversy that Hayes was acting within the course and scope of her employment at the time of the accident." Id. at 163. The defendant opposed the motion and moved to amend its discovery responses, offering evidence that the initial discovery responses had been given in error. Id. at 164. The Court of Appeal granted the plaintiff's petition for an extraordinary writ of mandate, holding the trial court erred in permitting the defendant to amend its interrogatory responses because the plaintiff had relied on the initial responses and so suffered prejudice. Id. at 168.

Here, as in Gordon, Cotton has relied on Geraci's pleadings and judicial and evidentiary admissions. However, more malicious than Gordon, Geraci and his counsel do not offer evidence that the original interrogatory answers were incorrectly provided in the first instance. Instead, they brazenly lie, undoubtedly relying on the Court's overburdened calendar, seeking to contradict their pleadings without leave of the Court.

In Universal Underwriters Ins. Co. v. Superior Court (1967) 250 Cal.App.2d 722, a party, 18 months after answering interrogatories, sought to reverse its position. Amended answers were filed without leave of court followed by a motion to modify the pretrial order to reflect the change. The moving party was denied leave to amend as there was no showing the original answer was erroneous.

Here, Geraci is seeking to amend his interrogatory answers to impermissibly include factual allegations to create affirmative defenses that should have been pled and disclosed via discovery. As in Universal, Geraci cannot show that the original discovery answers were erroneously provided.

II. Geraci Cannot Show Substantial Justification for Failing to Raise the Disavowment Allegation

"[T]he phrase 'substantial justification' has been understood to mean that a justification is clearly reasonable because it is well-grounded in both ***law*** and ***fact***." Doe v. United States Swimming, Inc. (2011) 200 CA4th 1424, 1434 (emphasis added). Here, Geraci's judicial and evidentiary admissions prior to being confronted by Riverisland dispositively negate the possibility that Geraci can establish substantial justification for his November 2018 Responses. As noted above, Geraci advanced three reasons in his November 2018 Responses for failing to previously raise the Disavowment Allegation:

A. "[N]o pleading filed with the Court required that disclosure as part of any affirmative factual showing[.]"

The Disavowment Allegation includes at least two claims: mistake and fraud. Geraci alleges he sent the Confirmation Email by mistake and Cotton, via this action, is in effect engaging in fraud by misrepresenting the November Document, intended to be a sales agreement, as a receipt.

"Where, through mistake, the contract does not reflect the mutual intention of the parties, 'such intention is to be regarded, and the erroneous parts of the writing disregarded.' (Civ. Code, § 1640.)" Thrifty Payless, Inc. v. The Americana at Brand, LLC (2013) 218 Cal.App.4th 1230, 1243 (Thrifty). "Mistake ***must*** be pleaded with some particularity so that there is 'a clear recitation of facts showing how, when and why the mistake occurred.' [Citation.]" Id. (emphasis added).

Similarly, "[e]very element of [a] fraud cause of action ***must*** be pleaded specifically, and the policy of liberal construction of the pleadings will not sustain a defective pleading. Thus, the plaintiff must plead the how, when, where, to whom, and by what means the representations were made." Id. at 1239 (citations and quotations omitted) (emphasis added). "A party who fails to plead affirmative defenses waives them." California Academy of Sciences v. County of Fresno (1987) 192 Cal.App.3d 1436, 1442.

Thus, either as part of a cause of action or an affirmative defense, Geraci was required to set forth with specificity at a minimum his allegations that: (i) he sent the Confirmation Email by mistake; (ii) he called Cotton on November 3, 2016; (iii) Cotton agreed with Geraci the Confirmation Email was sent by mistake; and (iv) Cotton orally released Geraci from his written obligation in the Confirmation Email to provide him a 10% equity position in the Marijuana Outlet.

Notably, Geraci's fifth affirmative defense in his Answer states the following: "[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. 4. (emphasis added). Thus, in November of 2017, Geraci negated the possibility that the Disavowment Allegation occurred a year before in November of 2016.

Lastly, Geraci's Verified Answer to Cotton's Petition is Geraci's unmitigated judicial admission he sent the Confirmation Email promising to reduce to writing in a "final agreement" Cotton's

bargained-for "10% equity position" in the Marijuana Outlet. "The admission of fact in a pleading is a 'judicial admission.'" Valerio v. Andrew Youngquist Construction (2002) 103 Cal.App.4th 1264, 1271. "'An admission in the pleadings is not treated procedurally as evidence,'" because "'it is fundamentally different from evidence: It is a *waiver of proof* of a fact by conceding its truth, and it has the effect of removing the matter from the issues. Under the doctrine of 'conclusiveness of pleadings,' a pleader is bound by well pleaded material allegations or ***by failure to deny well pleaded material allegations***.'" Id. (quoting 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 413, pp. 510–511) (emphasis added).

Thus, Geraci was required to plead the Disavowment Allegation with specificity, he waived it as an affirmative defense by failing to do so, and his Answer and Verified Answer (provided prior to being confronted with Riverisland) prohibit the introduction of his Disavowment Allegation without leave of the court. See Johnson v. Comptoir Franco-Belge D'Exportation Des Tubes D'Acier (1955) 135 Cal.App.2d 683, 688 ("It is elementary that a pleader is bound by his pleadings unless they are withdrawn by amendment."); Uhrich v. State Farm Fire & Casualty Co. (2003) 109 Cal.App.4th 598, 613 ("a judicial admission cannot be rebutted: It estops the maker.").

B. "[N]o discovery request had been served by Mr. Cotton requiring the disclosure of that information[.]"

"Discovery necessarily serves the function of 'testing the pleadings,' i.e., enabling a party to determine what his opponent's contentions are and what facts he relies upon to support his contentions. [Citations.]" Burke v. Superior Court of Sacramento County (1969) 71 Cal.2d 276, 281. "The duty to truthfully and fully respond [to interrogatory requests] has been described as follows, 'Parties must state the truth, the whole truth, and nothing but the truth in answering written interrogatories...'" Union Bank v. Superior Court (1995) 31 Cal.App.4th 573, 580, fn. 3. (quoting Guzman v. GM Corp. (1984) 154 Cal.App.3d 438, 442).

On September 25, 2017, Geraci provided his verified Answers to Form Interrogatories (Set One). Austin Dec. Ex. 3. Form Interrogatory 50.1(a) identifies the November Document as an agreement in the pleadings. Geraci's counsel verified there is no part of the agreement not in writing (50.1(b)); there are no documents evidencing any part of the agreement not in writing (50.1(c)); there are no documents modifying any part of the agreement (50.1(d)); there are no modifications not in writing to the agreement

(50.1(e)); and there are no documents evidencing any modification to the agreement not in writing (50.1(f)). Id.

In sum, in September of 2017, Geraci's verified answers clearly state there were no oral or written modifications to the November Document. Factually, a blatant lie given the Confirmation Email. Legally, had Pendergrass not been overruled, arguably an answer that could not be disproven because of the bar on parol evidence. See Yi, supra, at 641 ("[U]nder Pendergrass, external evidence of promises inconsistent with the express terms of a written contract were not admissible, even to establish fraud.").

However, if true in September of 2017, Geraci was required at the very least to disclose his allegations that (i) he sent the Confirmation Email by mistake thereby modifying the agreement reached and reflected in the November Document; (ii) he called Cotton on November 3, 2016 and explained he sent the Confirmation Email by mistake; (iii) Cotton's oral agreement the Confirmation Email was sent by mistake; (iv) Cotton's release and/or their mutual termination of the modification due to mistake; and (iv) his cell phone records as evidence he sent the Confirmation Email by mistake and the Disavowment Allegation.

Form Interrogatory 50.2 asks: "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." Geraci answered "No." However, Cotton alleged the JVA in his Cross-Complaint. Geraci was required to disclose, *inter alia*, Cotton's alleged breach of the oral agreement they reached on November 3, 2016 by which Cotton released Geraci from his written obligation to provide Cotton a 10% equity position in the Marijuana Outlet. Austin Dec. Ex. 1.

Form Interrogatory 50.3 asks: "Was performance of any agreement alleged in the pleadings excused? If so, identify each agreement excused and state why performance was excused." Geraci answered "No." However, Cotton alleged the JVA in his Cross-complaint. Geraci was required to disclose, *inter alia*, the Disavowment Allegation excusing him from his obligation under the Confirmation Email due to mistake and/or fraud. Id.

Form Interrogatory 50.4 asks: "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." Geraci answered "No." However,

Cotton alleged the JVA in his Cross-Complaint. Geraci was required to disclose, *inter alia*, the Disavowment Allegation as it terminated his obligation under the Confirmation Email due to mutual agreement and release. Id.

Form Interrogatory 50.5 asks: "Is any agreement alleged in the pleadings unenforceable? If so, identify each unenforceable agreement and state why it is unenforceable." Geraci answered "No." However, Cotton alleged the JVA in his Cross-Complaint. For the same reasons as above, Geraci was required to disclose he sent the Confirmation Email and explain it was unenforceable due to mistake, mutual termination, release and/or fraud. Id.

In sum, no matter how Geraci frames the Disavowment Allegation in opposition to this Motion, it was required to be disclosed in his September 2017 Answers.

C. *"[N]o deposition had been taken by Mr. Cotton of Mr. Geraci requiring the disclosure of that information."*

This argument reflects the lack of merit to this action. Geraci fails to justify why he would set forth his affirmative defenses in a deposition, but not to Form Interrogatories prepared by the California Judicial Council specifically requiring the disclosure of his affirmative defenses to agreements alleged in the pleadings.

III. The Prejudice to Cotton Cannot be Cured by further Discovery or Confronting Geraci with his Initial Discovery Responses

In Thoren v. Johnston & Washer, (1972) 29 Cal App 3d 270, where the trial court found that a plaintiff had *willfully* concealed the identity of a key witness, it refused to let that witness testify at the trial, although without this testimony a nonsuit resulted. On appeal, the court reasoned that a willfully false answer to an interrogatory was tantamount to not answering it all and warranted the equivalent of a terminating sanction. Id. at 275 ("Where necessary to accomplish the purposes of civil discovery, responses to interrogatories are binding upon the party responding.").

Here, as in Thoren, this Court can find that Geraci and Weinstein have willfully certified the November 2018 Responses knowing they contain false statements. The November 2018 Responses directly contradict their verifications of, *inter alia*, Geraci's Answer to Cotton's Cross-Complaint filed

on November 27, 2017 (RJN Ex. 4), Geraci's Verified Answer to Cotton's Petition filed on November 30, 2017 (RJN Ex. 1), and the September 2017 discovery responses (Austin Dec. Ex. 1, 3).

Unlimited and unambiguous admission in answer precludes plaintiff from presenting evidence on issue at trial. Fuentes v. Tucker (1947) 31 Cal. 2d 1, 5–8, 187 P.2d 752. Admission of evidence to prove facts not in issue is error. Fuentes v. Tucker (1947) 31 Cal. 2d 1, 4, 187 P.2d 752. Thus, neither additional discovery nor continuing this action and allowing Cotton to confront Geraci with his November 2017 Answers can cure the prejudice that Cotton has and will continue to suffer in having to defend against affirmative defenses not pled and already negated by undisputed facts and law.

IV. Sanctions pursuant to CCP §§ 2030.310(d), 2023.030 and the Court's Inherent Authority Are Just and Mandatory Because Geraci Cannot Prove he acted with Substantial Justification

"The court ***shall*** impose a monetary sanction... against any party, person, or attorney who unsuccessfully makes or 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***..." CCP § 2030.310(d) (emphasis added). For the reasons discussed above, Geraci and his attorneys cannot prove they acted with 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: ... making, without ***substantial justification***, an unmeritorious objection to discovery ... Other sanctionable discovery abuses include providing ***false discovery responses***[.]" Department of Forestry & Fire Protection v. Howell (2017) 18 Cal.App.5th 154, 191 (emphasis added). Pursuant to CCP § 2023.030, "the trial court may impose terminating sanctions as a first measure in extreme cases, or where the record shows lesser sanctions would be ineffective. [Citations.]" Id. at191-192.

In Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc. (2008) 163 Cal.App.4th 1093, the court affirmed plaintiff's motion for terminating sanctions and struck the defendant's answer and cross-complaint in a breach of contract action based on defendant's discovery violations. On appeal,

defendant argued terminating sanctions constituted an abuse of discretion because its discovery violations "did not prejudice [plaintiff's] ability to go to trial." Id. at 1105. The court disagreed, stating:

> A finding of prejudice to [plaintiff] is not difficult to discern. "'An important aspect of legitimate discovery from a defendant's point of view is the ascertainment, in advance of trial, of the specific components of plaintiff's case so that appropriate preparations can be made to meet them.'" (Juarez v. Boy Scouts of America, Inc. (2000) 81 Cal.App.4th 377, 389 [97 Cal. Rptr. 2d 12], quoting Karz v. Karl (1982) 137 Cal.App.3d 637, 650 [187 Cal. Rptr. 183].) A party cannot intelligently defend itself against affirmative defenses or damage claims when the other side's discovery responses consist of legal doubletalk and provide no useful information. Here, after numerous extensions of time and more than a year's worth of delay, [defendant] could still not provide an intelligible factual basis for their defenses and counterclaims. Prejudice is inherent in such tactics.

Id.

Here, Geraci's actions are objectively more malicious than those described in Liberty, which were found to warrant terminating sanctions based on the *absence* of a factual basis for their asserted defenses and counterclaims. In this action, Geraci is directly *contradicting* over a year of his judicial and evidentiary admissions to impermissibly introduce affirmative defenses of mistake and fraud. "Prejudice is inherent in such tactics." Id. And, even more so than in Liberty, warrants terminating sanctions.

CONCLUSION

There is and cannot be substantial justification for Geraci's September 2017 Answers, which are as categorical a contradiction of the November 2018 Answers as can be imagined. It is clear that Geraci filed his Complaint relying on Pendergrass to bar the Confirmation Email as evidence of his fraud. When confronted with Riverisland, realizing his legal justification was frivolous, he manufactured the Disavowment Allegation to prevent his cause of action being dismissed per the PER and exposing him and his counsel to a malicious prosecution action. See Casa Herrera, Inc. v. Beydoun (2004) 32 Cal.4th 336, 349 ("Accordingly, we hold that terminations based on the parol evidence rule are favorable for malicious prosecution purposes.").

Geraci and his counsels' actions reflect a disdain for the judiciary and undermine the integrity of the discovery process. The Court should bind Geraci to his September 2017 Answers, issue a terminating sanction, and award Cotton his attorney fees' and costs.

DATED: April 4 2019

THE LAW OFFICE OF JACOB AUSTIN

By_____
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