

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CIVIL DIVISION**

EMERY SMITH,

CASE NO. 15-CA-001620

Petitioner/Counter-Respondent,

-v-

EMCYTE CORP.,

Respondent/Counter-Petitioner

And

PATRICK PENNIE,

Respondent.

_____ /

**SECOND SUPPLEMENT TO EMCYTE CORP.'S MOTION FOR
CONTEMPT AGAINST PETITIONER/COUNTER-RESPONDENT**

Respondent/Counter-Petitioner, EMCYTE CORP., (“EmCyte”) by and through its undersigned counsel, hereby submits its Second Supplement to its Motion for Contempt Against Petitioner/Counter-Respondent, Emery Smith, for Petitioner’s breach of this Court’s Order granting EmCyte’s Motion to Compel relating to its Request for Production of Documents and First Set of Interrogatories. In support, EmCyte alleges and states as follows:

PETITIONER’S 2010 AND 2011 PRODUCED TAX RETURNS

1) The principal malfeasance identified by EmCyte in its Motion for Contempt revolves around Petitioner’s non-production of income tax returns, or other income information, for the tax years 2014, 2015 and 2016. Petitioner’s refusal to produce his tax returns is directly tied to the second part of EmCyte’s Motion for Contempt, which is Petitioner’s failure to fully provide source documents concerning ownership in other companies. Without Petitioner’s tax returns, his ownership interests in other companies cannot be accurately determined and the full

breadth and scope of Petitioner's breaches of fiduciary duty and usurpation of corporate opportunities remain outstanding and unresolved.

2) The deposition of Janet Noack, the prior tax return preparer for Petitioner, EmCyte, and Patrick Pennie was conducted on February 15, 2017. Ms. Noack prepared tax returns for Petitioner for the tax years 2006 through 2011. During her deposition, Ms. Noack produced the filed copy of Petitioner's tax return for 2010 and it differed significantly from the 2010 tax return produced by Petitioner in response to EmCyte's discovery requests. In short, the 2010 tax return produced by Petitioner was not the full and complete tax return filed by Ms. Noack on Petitioner's behalf for the 2010 tax year. The reason for Petitioner's 2010 tax return being incomplete, redacted, or otherwise edited has not been explained or justified.

3) What Petitioner produced as being his 2010 tax return was approximately sixteen (16) pages of an unsigned, unstamped document. There is no reference to Ms. Noack or her accounting firm in the documents produced by Petitioner. In truth, the 2010 tax return prepared by Ms. Noack for Petitioner contained substantially more information and was considerably longer than what was produced by Petitioner. According to Ms. Noack, Petitioner made no effort to secure a copy of his actual 2010 or 2011 tax returns from Ms. Noack prior to his production of the partial information to EmCyte.

4) Further, Petitioner's production of his 2011 tax return also appears to be incomplete. Interestingly, Ms. Noack was unable to locate a copy of Petitioner's 2011 tax return on the day of her deposition, although the copy produced by Petitioner includes her accounting firm's stamp.

5) Ms. Noack did produce a communication from Emery Smith to her dated May 5, 2010 (from the e-mail account of mremerysmith@aol.com) wherein Mr. Smith stated “. . . I also am referring my business partner to you his name is Patrick Pennie (XXX) XXX-XXXX. You

may give him a call to introduce yourself. We will be switching out entire business over to you I fired our accountant yesterday:). AKA Emcyte Corporation. **Please keep my personal info confidential from them however because I do a lot of contract work I rather not share with them.**” (Emphasis Added, Phone number redacted, Spelling unaltered). See Attached Exhibit “A.”

6) The information that Petitioner directed Ms. Noack to keep confidential from Mr. Pennie was that Petitioner was secretly receiving consulting fees from a distributor of EmCyte, Exactech. This relationship was undisclosed to Mr. Pennie or EmCyte. Ms. Noack was aware of Petitioner’s desire to keep his financial relationship with Exactech hidden from Patrick Pennie and EmCyte and she followed his directive and failed to disclose this information to EmCyte or Patrick Pennie without regard for the consequences to Mr. Pennie or EmCyte.

7) Petitioner’s e-mail correspondence to Ms. Noack in May of 2010 directing her to hide information from Patrick Pennie and EmCyte is further confirmation of EmCyte’s allegations concerning Petitioner’s ongoing and continuing breaches of his fiduciary duties. While significant and material in and of itself, the e-mail offers some explanation why Petitioner would fail to produce his full 2010 and 2011 tax returns. Petitioner’s failure to produce his full 2010 and 2011 tax returns, in light of his secret actions, provides further justification for the discovery sanctions set forth and requested in EmCyte’s Motion for Contempt.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed through the Court's E-portal filing system and notice will be served electronically to all counsel of record on this 17th day of February, 2017.

Respectfully Submitted,

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Attorneys for Respondent/Counter-Petitioner, EmCyte Corp.

Janet Noack

From: mremerysmith@aol.com
Sent: Wednesday, May 05, 2010 3:54 PM
To: Janet Noack
Subject: Re: Taxes

Janet,

I have missed my quarterly distribution 1040ES for April next one is I think June 15th so I need to get together with you on this. I am out of town until Monday but please call me to set up and appointment and let me know what I need to bring. I also am referring my business partner to you his name is Patrick Pennie (239)850-1716. You may give him a call to introduce yourself. We will be switching out entire business over to you I fired our accountant yesterday:). AKA Emcyte Corporation. Please keep my personal info confidential from them however because I do a lot of contract work I rather not share with them.

Sincerely

Emery Smith

-----Original Message-----

From: Janet Noack <Janet@noackmitchellcpa.com>
To: mremerysmith <mremerysmith@aol.com>
Sent: Sat, Apr 10, 2010 5:03 pm
Subject: Taxes

Emery,

I do not see your 2009 mortgage interest for your home. Can you provide that to me please?

Thanks!



Janet A. Noack, CPA

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