

**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.

**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 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:

STATEMENT OF RELEVANT FACTS

A) Order Granting EmCyte’s Motion to Compel.

1) On September 29, 2016, Magistrate Bocelli conducted a hearing on EmCyte’s Omnibus Motion to Compel Discovery Responses (July 15, 2016) and Supplement to its Omnibus Motion to Compel Discovery Responses (September 12, 2016).

2) After review of the pleadings, and following arguments of counsel, Magistrate Bocelli:

- a. Granted EmCyte's Omnibus Motion as to Interrogatory No. 7 and directed Petitioner to answer within twenty (20) days of the Order adopting the Report and Recommendation. Petitioner was directed to comply with Rule 1.340(c), Florida Rules of Civil Procedure if he elected to respond by relying upon the production of records;
- b. Granted in part and denied in part EmCyte's Omnibus Motion as to Request for Production of Documents No. 6 by narrowing the Request to documents reflecting the nature of the agreement (i.e., the source documents) for Petitioner's ownership interest in any entity since January of 2010 and directing Petitioner to file an amended response and to produce all documents responsive to the request within twenty (20) days of the Order adopting the Report and Recommendation;
- c. Granted EmCyte's Omnibus Motion as to Requests for Production Nos. 2, 3, 4, 7, 8, 11, 13 and 15 and directed Petitioner to file an amended response within twenty (20) days of the Order adopting the Report and Recommendation clarifying whether any documents were withheld from production at the time of the original response.

3) The Report and Recommendation was signed by Magistrate Bocelli on November 14, 2016. The Report and Recommendation was approved by Order of Judge Laboda on December 1, 2016.

B) Petitioner's Responses to Interrogatory No. 7 and Request for Production No. 7.

4) EmCyte's Interrogatory No. 7 required Petitioner to identify all income that he had received from whatever source from January 1, 2010, through the present. ("Interrogatory No. 7). Petitioner initially objected to Interrogatory No. 7 stating that the Interrogatory "... is overly broad, is not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is irrelevant and protected from disclosure under Article I, Section 23 of the Florida Constitution" ("Petitioner's Response"). At the time of his response, Petitioner produced no information or documents in response to Interrogatory No. 7.

5) EmCyte's Request for Production of Documents No. 7 requested all tax returns filed by Petitioner, or on his behalf, or as to any entity in which he has or had owned an interest

since January 2010. (“Request No. 7”). Petitioner objected to Request No. 7 as being “overly broad, is not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is irrelevant and is protected from disclosure under Article I, Section 23 of the Florida Constitution ... **SMITH neither possesses nor controls tax returns for entities in which he had ownership after January 1, 2010.**” (Emphasis Added).

6) At the September 29, 2016 hearing on EmCyte’s Motion to Compel, counsel for Petitioner (Mr. Alvarez) represented to the Court that “. . . in fact Mr. Smith stands by his answers to the interrogatories.” See Attached Exhibit “A” page 23, lines 1-2. Mr. Alvarez went so far as to state unequivocally that “[I]f the court looks to how Mr. Smith actually responded to the seven requests for production, that seventh request for production was for tax returns. And in response to that, he said, **I will provide you with my tax returns, which would, in fact, show his source of income** if the parties entered into a confidentiality agreement.” (Emphasis Added). See Attached Exhibit “A” page 28, lines 21-25 and page 29, lines 1-2.

7) On behalf of Petitioner, Mr. Alvarez vehemently argued that the production of tax returns by Mr. Smith should be sufficient for responding to Interrogatory No. 7. The Court repeatedly admonished Mr. Alvarez that if Mr. Smith intended to answer Interrogatory No. 7 by producing records, tax returns or otherwise, then he must comply with Rule 1.340(c) of the Rules of Civil Procedure, as the following exchanges demonstrate:

Mr. Alvarez: To the -- yes, the objection isn’t withdrawn due to the overbreadth, **but to the extent his actual tax returns are satisfactory as they seemingly would be on the subject of his income. It seems that would then become moot once those materials are produced.**

The Court: **But don’t you have to say in the response that you’re going to produce these records and the answer to your question is in the record and the burden of determining the answer is equal for both parties? Rule 1.340 has a specific subsection about what you have to do if you want to rely upon records.**

Mr. Alvarez: **Right.**

The Court: And I don't see that in your answer.

Mr. Alvarez: And it's correct, that's not in there. Instead, it's the general objection or, I should say, the objection that covers all fronts of overbreadth, not reasonably calculated, and so forth. The – **he's willing to provide the tax returns, which are in response to request number seven. So it's not a -matter of him not-him refusing.** It's simply asking for the assurance in the form of a confidentiality agreement. (Emphasis Added).

Page 29, lines 20-25 and page 30, lines 1-18.

Mr. Alvarez: It's the notion of all income from whatever source. He could have scratched off a winning lottery ticket and technically that's declared. He has to show proof of the lottery ticket. **He will provide his tax returns, which should be inclusive of the income. There's no problem with the time frame of January 1st, 2010, until today because, of course, the allegation are his usurpation continues to today. So I don't want to have some supplementary requests made.** (Emphasis Added).

The Court: Thank you. On that one, Mr. Mather, **if the request is amended to say we're producing the records and the records show the information and that includes tax returns from 2010 to the present, does that satisfy in your mind the request-or interrogatory number seven?** (Emphasis Added).

Mr. Mather: Your Honor, if the response is that these are all of the records that are responsive to this as the court pointed out, that's one thing. We know that Mr. Smith has a history of tax issues and **I don't know that his tax returns have been filed. I – they may be. They may not be, but I don't want to walk out of here today knowing that he has had a history of tax issues and agree somehow that his production of tax returns answers this. I think that as the court said Mr. Alvarez needs to say, "Here are all of the documents that are responsive to this request," because while he's trying to parse ownership this goes to income from every source and his fiduciary duties relate to consulting work, and anything that he's doing is in violation of those duties. So . . .** (Emphasis Added).

Page 31, lines 5-25; page 32, lines 1-11.

The Court: Okay. So as to interrogatory number seven I'm going to grant the motion and allow the plaintiff, I guess it would be, to file an amended response because I'm not hearing any objection because you've admitted the scope is – the time scope is sufficient. I know you're saying that any income that may be overbroad, but I think it is relevant to the issues, which would include income

from consultation or ownership or any version of an interest in these other companies. So – and **Mr. Alvarez is representing that he is willing to produce those tax returns for the requested time period** subject to a confidentiality agreement. (Emphasis Added).

Page 32, lines 15-25, page 33, lines 1-2.

The Court: . . . **So to the extent that the plaintiff wants to rely upon records, that answer needs to comply with subsection C of 1.340, the Rules of Civil Procedure** that says that when the answer may be derived or ascertained from the records of the parties and then the interrogatory is directed or from an examination audit, etc, etc, of those records or a summary – and I’m paraphrasing, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory after the party to whom it is directed and answer to the interrogatory specifying the records from which the answer may be derived or ascertain and offering to give the party serving the interrogatory a reasonable opportunity to examine and audit or inspect the records and to make copies, compilation, abstract, or summaries is a sufficient answer.

So that’s what you have to put in your answer. These are the specific documents. I will make them available. The burden of ascertaining the answer is equal for both parties. So if you can comply with that, then Mr. Smith is certainly permitted to do so.

If there’s a dispute as to whether there is income that’s not disclosed in the tax returns, then that would have to be brought back to the court upon a separate motion. **But I think if Mr. Smith is willing [to] answer in a sworn interrogatory that this is everything, the court has to accept that unless there’s some other motion to bring the matter back before the court.** (Emphasis Added).

Page 33, line 25, page 34, lines 1-25, page 35, lines 1-4.

8) However, at the same time that Mr. Alvarez was directing the Court’s attention to Petitioner’s tax returns as being the full and complete answer to EmCyte’s discovery requests on these core issues, the truth was that Petitioner had not filed his tax returns for either of the 2014 or 2015 tax years. See Attached Exhibit “A” and “B.” In fact, as to the 2014 tax year, Petitioner hadn’t even bothered to file an extension for his Federal tax return filing obligation. It is for Petitioner and his counsel to answer whether Mr. Alvarez knew his client had no intention of producing the tax returns at the time he made these arguments and representations, whether Mr. Alvarez failed to conduct even the slightest bit of due diligence before making these arguments

and representations, or whether Petitioner had been untruthful with his own counsel. Whichever answer it is, ongoing and continuing malfeasance on the part of Petitioner is established without qualification, or justification. For representations to the Court and to opposing counsel that are so wholly intended to obfuscate and mislead, the most severe punishment must be imposed upon Petitioner.

9) Even standing alone, Petitioner's Amended Answer to EmCyte's Interrogatory No. 7 was wholly deficient and violative of the Report and Recommendation and Order. After identifying several entities in which Petitioner "recalls" receiving income since 2010, Petitioner states that "[A]dditional information about the income received by SMITH **can be easily derived or ascertained from his federal tax returns, as produced separately and confidentially in response** to the requests of EMCYTE CORP. for production." (Emphasis Added). This Amended Answer apparently is intended to reference Petitioner's response to EmCyte's Request for Production of Documents No. 7, which requests all of Petitioner's tax returns since 2010. However, the response to Request for Production of Documents No. 7 also violates the directives of the Report and Recommendation and Order approving it because Petitioner had not filed tax returns for the tax years 2014 and 2015 and only produced an unsigned copy of a 2010 tax return.

10) In response to EmCyte's Interrogatory No. 7 and Request for Production of Documents No. 7, Petitioner produced documents which he stamped as ES122116-096 to 167.

The documents referred to by Petitioner included only the following:

- a. Emery Smith's **unsigned** tax return form for 2010;
- b. Emery Smith's tax return prepared by Janet Noack for 2011;
- c. Emery Smith's tax return prepared by Eric Belisle for 2012;
- d. Emery Smith's tax return prepared by Joel S. Miller for 2013.

Without explanation or justification, Petitioner wholly failed to provide any information whatsoever as to his income from 2014, 2015 and 2016 tax years. Not only did Petitioner fail to provide tax returns for these years, in direct contravention to the representations made by Mr. Alvarez repeatedly to Magistrate Bocelli, but he failed to provide any other information as to his income for those years.

11) After being directed to fully and completely respond to Interrogatory No. 7, which is substantially similar to Request for Production No. 7, and after being repeatedly advised by the Court to comply with the requirements of Rule 1.340(c), Petitioner not only disobeyed the orders of this Court but has wholly failed to provide ANY information as to his income for the tax years 2014, 2015 and 2016. Petitioner's actions are a knowing and intentional disregard for the authority of this Court and a disdain for the obligations imposed upon him as a litigant. Petitioner's callous disregard for the Court and the parties was clearly exhibited by his counsel's repeated arguments that the only relevant information was Petitioner's tax returns, which he freely offered up at the September 29, 2016 hearing, but then ultimately failed to produce the same.

12) Consequently, and in violation of this Court's orders granting EmCyte's Motion to Compel, Petitioner has willfully refused to answer Interrogatory No. 7 and Request for Production No. 7, as well as any other discovery requests wherein Petitioner purported to rely upon or provide his tax returns. As the issues surrounding Petitioner's income go straight to the heart of this dispute, and Petitioner is intent on playing expensive, time consuming games with this Court and the parties, only the most severe penalty of imposition of the ultimate sanction will suffice.

C) **Petitioner's Response to EmCyte's Request for Production No. 6.**

13) EmCyte's Request for Production of Documents No. 6 asked for "[A]ll documents relating to your (Petitioner) ownership interest in any entity between January 2010 and the present." ("Request No. 6") Petitioner initially objected, claiming Request No. 6 to be "overly broad, is not reasonably calculated to lead to the discovery of admissible evidence and threatens to oppress and unduly burden SMITH."

14) Petitioner's pattern of misrepresentations to this Court and to opposing parties was reflected in his identification of his business relationships previously in his verified response to EmCyte's Interrogatory No. 6. In Interrogatory No. 6, Petitioner was asked to "[I]dentify all entities in which you owned an interest in during the period commencing January 1, 2010, through the present." Petitioner stated that he owned interests in only the following entities after January 1, 2010: (a) EMCYTE CORP.; (b) Perfusion Partners & Associates, Inc.; (c) EmCyte Group, LLC; (d) Gian Biologics, LLC; (e) Bio Healix Research, LLC; (f) Ultra Intelligence Corporation, LLC; (g) CELLF Cure, Inc.; (h) Hydro Healix, Inc.; (i) The Human Cure Foundation, Inc.; and (j) LifeForm Healing Research, LLC.

15) However, Petitioner's LinkedIn webpage discloses his claimed ownership or participation in the following entities which were **NOT** included in his verified Interrogatory responses: (1) Gian Medical Ltd.; (2) Bakhtar Technologies, LLC; (3) XMS Research Laboratories; (4) Luminec Corp.; (5) Amnion Animal Science Corp; (6) Exactech; (7) CSETI; and (8) National Veterans Rights Association. Exactech is a customer and client of EmCyte.

16) Petitioner's "resume" identifies his claimed ownership or participation in the following entities which were **NOT** disclosed in **either** his verified Interrogatory responses or his LinkedIn webpage: (1) CardioGenesis Corp; (2) Animal Cure Foundation; (3) Canine

Regenerative Therapies; (4) Electro Healix Research, LLC; and (5) Aqua Healix Research LLC.

17) Additionally, Petitioner failed to disclose his ownership interest or participation in A2Mcyte or A2M Bio in his verified Interrogatory responses. In his Amended Answer to Interrogatory No. 7, Petitioner identified yet another entity, Pilgrim Operations, Inc., which had never been disclosed previously, and he finally admitted receiving “consulting fees” from A2Mcyte, LLC in 2016.

18) Against this backdrop of false and misleading representations by Petitioner as to his involvement in other business enterprises, Petitioner sought to perpetuate his secret activities by trying to narrow the scope of the inquiry under Request No. 6 by representing to the Court that sufficient information would be provided through Petitioner supplying his tax returns. However, as we now know, **Petitioner never had any intention of providing his tax returns for the years 2014, 2015 and 2016 because such returns did not even exist at the time he promised to provide them.** Petitioner and his counsel either knew, or should have known of the non-existence of Petitioner’s tax returns when the following discourse was conducted during the September 29, 2016 hearing:

Mr. Alvarez: . . . Again, **Mr. Smith has shown a willingness to provide his tax returns.** Now, in light of his task having largely amend his response to interrogatory number seven it seems to cover the same ground within a fair scope. (Emphasis Added).

Page 38, lines 23-25; page 39, lines 1-2.

Mr. Mather: The basis for where he’s getting revenue from, what is the basis, what is the base document, what is the trans –

The Court: And I think the intent is that the document evidencing the agreement for his ownership interest. Is that – does that accurately reflect what that is?

Mr. Mather: What reflects his ownership, his equity interest, the source document. I certainly understand –

The Court: I think the source document is probably a good way to term – use the terminology so as to any ownership interest.

Now, if you want to get documentation regarding consulting agreements or other types of interest, I think that you have to serve a new discovery request because as worded request six doesn't encompass that.

Mr. Mather: I understand.

The Court: So six will be a motion to compel granted in part, denied in part as narrowed – the objection is granted in part and denied in part as narrowed to documents reflecting the nature of the agreement for ownership interest in those companies. And I don't think the time frame was at issue. It was just the scope; is that correct Mr. Alvarez?

Mr. Alvarez: Correct.

Page 43, lines 15-25; page 44, lines 1-15.

Mr. Mather: Seven is tax returns, which we've covered. Eight, all financial statements prepared by you.

Page 49, lines 8-10.

The Court: You agree. All right.

So that will be my ruling on all of – the 2, 3, 4, 7, 8, 11, 13, 15. You need to amend the response just to clarify that there are no documents being withheld based upon the general objections that you asserted.

Page 50, lines 11-15.

19) Despite the representations made by Mr. Alvarez at the hearing and this Court's order granting EmCyte's Motion to Compel Petitioner to produce source documents, Petitioner responded as follows: "All documents which were not produced previously by one or both Respondents (sic?) and which reflect the nature of any agreement (i.e. source documents) for Smith's ownership interest in any entity since January of 2010 are now produced to EmCyte." While this response appears to have no readily ascertainable meaning or usefulness, the

documents referenced by Petitioner (ES122116-001 to 095) omit any information whatsoever on Gian Biologics and Ultra Intelligence, entities which he admitted that he owned interests in previously. However, Petitioner wholly and completely refused to provide any information on the multitude of entities that he identified on his LinkedIn page or on his resume' Despite acknowledging income in 2016 from A2Mcyte, LLC, Petitioner has provided no information of any type.

20) EmCyte's Request No. 6 is related to Request No. 7 and Interrogatory No. 7 in that Petitioner remains elusive in terms of identifying the full range of business enterprises in which he has been engaged while he was an owner, officer and director of EmCyte. By refusing to answer Requests Nos. 6 and 7 and Interrogatory No. 7, Petitioner is continuing to maintain secrecy over his business dealings, especially during the years 2014, 2015 and 2016, although now he is in violation of this Court's Orders.

ARGUMENTS

Petitioner's secret involvement with, and profiting from undisclosed entities constitute many of the core issues of this dispute. Petitioner provided false answers to Respondent's discovery requests pertaining to his involvement in, or ownership in other entities. Based upon information obtained, many times over Petitioner's vehement objections and interference, EmCyte has been able to determine that Petitioner owned interests in businesses that compete with EmCyte and Petitioner converted assets of EmCyte, including business opportunities, to his personal gain – to the detriment of EmCyte.

However, the full extent of Petitioner's competing business activities, the personal gain to him and the detriment to EmCyte has been concealed from the parties and this Court. Despite the Court granting EmCyte's Motion to Compel, the net result is that Petitioner has disclosed

virtually NO information on his financial activities for the years, 2014, 2015 and 2016, which are, of course, the principal periods of time at issue.

The absurdity of Petitioner's actions in this case, as well as the intentional prejudice caused to EmCyte is exemplified by Petitioner's opposition to EmCyte's Motion for Partial Summary Judgment on Count I (Accounting), Count IV (Usurpation of Corporate Opportunities), Count V (Breach of Fiduciary Duty), and Count VI (Breach of the Covenants of Good Faith and Fair Dealing). Petitioner's principal opposition to EmCyte's Motion was based upon claims that material disputed facts existed as to these claims. These claims against Petitioner are based upon Petitioner's secret profit taking from other business enterprises. So, in essence, Petitioner's position was that EmCyte's Motion for Partial Summary Judgment was inappropriate because material fact issues exist, but Petitioner refuses to disclose just what those facts are.

In sum, the facts support the imposition of discovery sanctions either under Rule 1.380(b)(2) or under the precedents of fraud on the Court. Petitioner's prior actions in this case resulted in the granting of EmCyte's Motion to Compel. Petitioner's ongoing and continuing disobedience justifies the imposition of an appropriate discovery sanction. In addition to delaying the advancement of this case, Petitioner's misrepresentations to the Court concerning the existence and sufficiency of his tax returns means that EmCyte's discovery as to third parties, or Petitioner, cannot efficiently progress. The harm and prejudice to EmCyte is tremendous. Moreover, Petitioner's actions throughout this process have been undeniably willful and malicious.

By and through Petitioner's own actions, he has "sentiently set in motion an unconscionable scheme calculated to interfere with the judicial system's ability to impartially

adjudicate this matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense.” Ramey v. Haverty Furniture Companies, Inc., 993 So.2d 1014, 1018 (Fla. 2nd DCA 2008). By misrepresenting his ownership interests and then misrepresenting that his financial interests would be fully disclosed by tax returns, which he knew didn't exist, Petitioner “intended to obfuscate the truth.” Piunno v. R.F. Concrete Constr., Inc., 904 So.2d 658 (Fla. 4th DCA 2005).

The culmination of Petitioner's actions places this inquiry at the level of “fraud, pretense, collusion or similar wrongdoing” necessary to justify an ultimate sanction.” Morgan v. Campbell, 816 So.2d 251, 253 (Fla. 2nd DCA 2002). A single piece of false evidence is sufficient to justify a dismissal, or a striking of pleadings when germane to the core elements of the case. See, Andrews v. Palmas De Majorca Condominium, 898 So.2d 1066 (Fla. 5th DCA 2005).

Rule 1.380(b)(2) identifies the potential sanctions for discovery violations. These include:

- 1) exclusions of evidence;
- 2) establish facts as admitted;
- 3) dismiss claims;
- 4) enter a default; and
- 5) contempt.

See, Joseph S. Arrigo Motor Co., Inc. v. Lasserre, 676 So.2d 396, 397 (Fla. 1st DCA 1996).

While a discovery sanction must be commensurate with the offense, a willful failure to comply with a discovery order can result in a dismissal or a default being entered as a sanction. See, Drakeford v. Barnett Bank of Tampa, 694 So.2d 822, 824 (Fla. 2nd DCA 1997); Hoffman v. Hoffman, 718 So.2d 371 (Fla. 4th DCA 1998).

While dismissal or entry of a default is a severe sanction to be sparingly used, the establishment of the Kozel factors will justify such remedies. The Kozel factors are:

- 1) was an attorney's disobedience willful or deliberate, or the result of negligence or inexperience;
- 2) was the attorney previously sanctioned;
- 3) was the client personally involved;
- 4) was the adverse party prejudiced;
- 5) was there reasonable justification offered for violation of the court order;
- 6) did the delay caused by the failure to obey court orders create significant problems of judicial administration.

See, Kozel v. Ostendorf, 629 So.2d 817, 818 (Fla. 1993).

The Kozel factors are directly applicable to Petitioner's actions and conduct in this dispute in relation to his secret profit taking, usurpation, breach of fiduciary duty, breach of the implied covenants of good faith and fair dealing.

Accordingly, EmCyte seeks an order of this Court striking Petitioner's pleadings and dismissing his claims or, in the alternative, establishing the underlying facts relating to EmCyte's claims as true and excluding any evidence of Petitioner to the contrary.

CERTIFICATE OF GOOD FAITH CONFERENCE

In accordance with Administrative Order 2.20, Attachment A, Section IV(E)(5), the undersigned attorneys hereby certify that they communicated a desire to schedule a conference with opposing counsel in a good faith effort to resolve the issues raised herein, but opposing counsel is unavailable until Tuesday February 14, 2017. The Motion is being filed today in order for it to be heard by the Court in conjunction with other matters presently set for hearing in this case on February 24, 2017 in the event that a resolution is not reached. The parties will attempt to resolve the issues raised herein during the phone conference scheduled for February 14, 2017, but due to the short time frames involved, it is necessary to file this motion today.

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 10th day of February, 2017.

Respectfully Submitted,

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