

**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/Counter-Petitioner.

**MOTION TO STRIKE CERTAIN OF PETITIONER'S AFFIRMATIVE DEFENSES
AND REPLIES THAT ARE CONTRARY TO THE OCTOBER 10, 2016 ORDER
GRANTING EMCYTE CORP.'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Respondent/Counter-Petitioner, EMCYTE CORP., (“EmCyte”) by and through its undersigned counsel, and pursuant to this Court’s Order granting EmCyte’s Motion for Partial Summary Judgment signed October 10, 2016 (the “Order”), hereby moves this Court to strike certain affirmative defenses and replies asserted by Petitioner/Counter-Respondent, Emery Smith (“Smith” or “Petitioner”), that are contrary to the findings set forth in the Order. In support of its Motion, EmCyte alleges and states as follows:

1. EMCYTE CORP. (“EmCyte”), previously filed a Motion for Partial Summary Judgment on the Enforceability of the Shareholders’ Agreement (December 31, 2015), a Supplement thereto (August 29, 2016) and a Notice of Filing of Case Law in Support (September 16, 2016). Respondent/Counter-Petitioner, Patrick Pennie, joined in EmCyte’s Motion. Smith filed a Memorandum in Opposition to the Motion and an Affidavit in support on September 14, 2016. On September 19, 2016, this Court conducted a hearing and granted EmCyte’s Motion by

Order dated October 10, 2016. This Court found that Petitioner ratified the Shareholders' Agreement and that he was estopped or waived his ability to challenge the enforceability of the agreement. This legal conclusion was based on the undisputed fact that Petitioner was aware of the Shareholders' Agreement, accepted its benefits and caused Mr. Pennie to rely on its enforceability. This Court also found that whether or not Petitioner signed the executed Shareholders' Agreement – Smith claimed before this Court that he did not sign the agreement, but then changed his statement to claim that his signature was forged –is irrelevant given his subsequent ratification of the agreement and the acceptance of its benefits.

2. This Court further ordered that all of Petitioner's claims, defenses, and affirmative defenses that are contrary to the legal determination that the Shareholders' Agreement is enforceable between the parties were stricken.

3. Thereafter, Petitioner filed a petition for writ of certiorari with the Second District Court of Appeals ("2D DCA") seeking review of the partial summary judgment awarded to EmCyte. On March 17, 2017, the 2D DCA dismissed Petitioner's petition for writ of certiorari, thereby affirming EmCyte's partial summary judgment on the enforceability of the Shareholders' Agreement.

4. By granting EmCyte's Motion for Partial Summary Judgment against Smith, this Court determined that the terms and conditions of the Shareholders' Agreement dated July 1, 2010 (the "Shareholders' Agreement") were binding and enforceable by and between EmCyte, Patrick Pennie and Smith. The Court also specifically determined that all of Smith's claims, defenses and affirmative defenses that run contrary to the legal determination that the Shareholders' Agreement is enforceable should be stricken.

5. Petitioner's Affirmative Defenses number 2, 3, 4 and 5 are directly contrary to the legal determination that the Shareholders' Agreement is enforceable between the parties. In accordance with this Court's Order granting EmCyte's Motion for Partial Summary Judgment, these Affirmative Defenses must be stricken.

6. In addition, Petitioner's Affirmative Defense number 6 should be stricken to the extent it asserts a defense of "unclean hands" based on alleged "ultra vires" acts by Mr. Pennie. The acts of Mr. Pennie enumerated by Petitioner as constituting "ultra vires" acts are set forth in Amended Petition paragraph 59(a) through (p). However, the "ultra vires" acts complained of by Petitioner do not qualify as "ultra vires" acts according to the binding and enforceable Shareholders' Agreement. Therefore, this Affirmative Defense must be stricken.

7. Similarly, Petitioner's Reply to EmCyte's Affirmative Defense number 15 must be stricken because the "ultra vires" acts complained of by Petitioner to constitute "unclean hands and unrighteous, unconscientious and oppressive conduct" do not qualify as "ultra vires" acts according to the express terms of the Shareholders' Agreement.

WHEREFORE, EmCyte Corp. respectfully requests that this Court grant its Motion to Strike Petitioner's Affirmative Defense numbers 2, 3, 4, 5 and 6 and Petitioner's Reply to EmCyte's Affirmative Defense number 15, together with all other claims, defenses, affirmative defenses, and replies that are contrary to the legal determination that the Shareholders' Agreement is enforceable between the parties, and for such other equitable relief as this Court may allow.

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 24th day of March, 2017.

Respectfully Submitted,

GUNSTER, YOAKLEY & STEWART, P.A.
401 East Jackson Street
Suite 2500
Tampa, Florida 33602
Phone: (813) 222-6630
Fax: (813) 228-6739

By: s/ Kenneth G.M. Mather
KENNETH G.M. MATHER
Florida Bar #: 619647
Primary Email: KMather@gunster.com
Secondary Email: MWeaver@gunster.com
TKennedy@gunster.com
eservice@gunster.com