No. 69115-5-I

COURT OF APPEALS, DIVISION I
FOR THE STATE OF WASHINGTON

REBECCA LAMONTE,

Appellant,

v.

THE ESTATE OF SHERMAN LLOYD COOK, JR. and RICHARD WESTERFIELD and JANE DOE WESTERFIELD, husband and wife and the marital community composed thereof,

Respondents.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. The Court Reversibly Erred In Granting Reconsideration And Applying A Lower Prejudice Test, Inapplicable At Trial. 1

1. Summary. 1

2. Standard of Review. 2

3. Westerfield Did Not Meet His Burden On Prejudice. 3

4. Westerfield's "Errors" Cannot Be Reviewed. 6

B. The Court Erred In Refusing Use Of Cook's Admissions. 6

1. Procedure. 7

2. Admitting Party May Not Contradict RFAs. 10

3. Surprise Removal Of Admissions Is Prejudice. 11

4. Joint and Several Liability; Apportionment. 12

5. Cook's RFAs Were Conclusively-Established Facts 15

C. Withdrawal During Trial Disregarded Prejudicial Reliance. 19

D. The Court Had No Authority To Grant Reconsideration. 23

E. Lamonte Did Not Waive Reliance. 24

TABLE OF AUTHORITIES

Cases

Airco Indus. Gasses, Inc. v. Teamsters Health & Welfare Pension Fund, 850 F.2d 1028 (3d Cir. 1988) 10

Am. Gen. Life & Accident Ins. Co. v. Findley, 2013 U.S. Dist. LEXIS 41644 (C.D. Cal. Mar. 15, 2013) 5, 20, App.II-02

American Auto. Ass'n v. AAA Legal Clinic of Jefferson Crooke, P.C., 930 F.2d 1117 (5th Cir. 1991) 2, 10, 11

Anderson v Akzo Nobel Coatings, 172 Wn.2d 593, 260 P.3d 857 (2011) 6, 21, 25

Bird v. Best Plumbing Grp., LLC, 175 Wn.2d 756, 287 P.3d 551 (2012) 12

Branch Banking & Trust Co. v. Deutz-Allis Corp., 120 F.R.D. 655 (E.D.N.C. 1988) 5

Buchanan v. Neighbors Van Lines, No. CV 10-6206 PSG, 2011 U.S. Dist. LEXIS 121423 (C.D. Cal. Oct. 20, 2011) 19

Chicago Dist. Council Of Carpenters Pension Fund v. P.M.Q.T., Inc., 169 F.R.D. 336 (N.D. Ill. 1996) 10

Coleman v. Altman, 7 Wn. App. 80, 497 P.2d 1338 (1972) 22

Conlon v. United States, 474 F.3d 616 (9th Cir. 2007) ..... passim

Cook v. Allstate Ins. Co., 337 F.Supp.2d 1206 (C.D. Cal. 2004) 10

Cox v. Spangler, 141 Wn.2d 431, 5 P.3d 1265 (2000) 12

Falk v. Keene Corp., 113 Wn.2d 645, 782 P.2d 974 (1989) 14

Fishburn v. Pierce County Planning & Land Servs. Dept., 161 Wn.App. 452, 250 P.3d 146, *review denied,* 172 Wn.2d 1012 (2011) 4

Haile v. Santa Rosa Mem. Hosp., No. C-08-04149 MMC (EDL), 2009 U.S. Dist. LEXIS 122589 (N.D. Cal. Dec. 17, 2009) 19, App.II-17

Haywood v. Aranda, 143 Wn.2d 231, 19 P.3d 406 (2001) 23

In re Estate of Miller, 134 Wn. App. 885, 143 P.2d 315 (2006) 15

In re Fisherman's Wharf Fillet, Inc., 83 F.Supp.2d 651 (E.D. Va.1999) 5, 19

In re Marriage of Farmer, 172 Wn.2d 616, 259 P.3d 256 (2011) 2

J & J Sports Productions, Inc. v. Mumford, No. CIV.A. DKC 10-2967, 2012 U.S. Dist. LEXIS 55836 (D.Md. Apr. 20, 2012) 19, App.II-20

Jeslow v. Duncan, 125 Wash. 492, 216 P. 868 (1923) 16

Mangan v. Broderick and Bascom Rope Co., 351 F.2d 24 (7th Cir. 1965) 24

Melby v. Hawkins Pontiac, 13 Wn. App. 745 (1975) 22

Nichols v. Lackie, 58 Wn.App. 904, 795 P.2d 722 (1990) 3

Perez v. Miami-Dade County, 297 F.3d 1255 (11th Cir. 2002) 23

Phillips Bldg. Co. v. An, 81 Wn. App. 696, 915 P.2d 1146 (1996) 6, 13

Precision Franchising, LLC v. Gatej, No. 1:12cv158, 2012 U.S. Dist. LEXIS 175450 (E.D.Va. Dec. 11, 2012) 5, 11, 18, 19, App.II-25

Puerto Rico v. S.S. Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980) 11

Queen City Farms v. Cent. Nat'l Ins. Co., 126 Wn.2d 50, 882 P.2d 703 (1994) 14

Reg'l Care Servs. Corp. v. Companion Life Ins. Co., 869 F.Supp.2d 1079 (D.Ariz. 2012) 19, 23

Retamco Operating, Inc. v. Carone, 267 Fed. Appx. 625 (9th Cir. 2008) 15, App.II-32

Santos v. Dean, 96 Wn.App. 849, 982 P.2d 632 (1999) 2, 3, 22

Saroyan Lumber Co., Inc. v. El & El Wood Prds. Corp., 126 Fed. Appx. 371 (9th Cir. Mar. 11, 2005) 19, App.II-34

Scott v. Greenville Hous. Auth., 353 S.C. 639, 579 S.E.2d 151 (Ct. App. 2003) 24

SEC v. Global Express Capital Real Estate Inv. Fund, 289 Fed. Appx. 183 (9th Cir. 2008) 5, 19, App.II-36

Sommerville v. Dobson, No. 4:10CV67, 2011 U.S.Dist. LEXIS 156380 (E.D. Va. Mar. 8, 2011) 19, App.II-41

State v. Barker, 162 Wn. App. 858, 256 P.3d 463 (2011) 4

State v. Sims, 171 Wn.2d 436, 256 P.3d 285 (2011) 6

Switchmusic.com, Inc. v. U.S. Music Corp., 416 F.Supp.2d 812 (C.D. Cal. 2006) 17

T. Rowe Price Small-Cap Fund v. Oppenheimer & Co., 174 F.R.D. 38 (S.D.N.Y. 1997) 10

Talley v. United States, 990 F.2d 695 (1st Cir. 1993) 2

Thompson v. King Feed & Nutrition Serv., 153 Wn.2d 447, 105 P.3d 378 (2006) 5, 23

Underberg v. United States, 362 F.Supp.2d 1278 (D.N.M. 2005) 15

United States v. Kasuboski, 834 F.2d 1345 (7th Cir. 1987) 24

United States v. Pearson, 2012 U.S. Dist. LEXIS 36189 (D. Del. Mar. 19, 2012) 21, App.II-51

W.L.Reid Co. v. M-B Contracting Co., 46 Wn.2d 784, 285 P.2d 121 (1955) 9

Statutes

RCW 4.22.070 12

RCW 4.22.070(1)(b) 12

Rules

CR 36 ..... passim

ER 103(a)(1) 23

ER 801(d)(2) 15, 16

Fed.R.Civ.P. 36 ..... passim

RAP 2.4(a) 5

RAP 5.1(d) 5

RAP 10.3(a)(6) 3

Other Authorities

8A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* 2264 (2d ed. 1994) 18

A. The Court Reversibly Erred In Granting Reconsideration And Applying A Lower Prejudice Test, Inapplicable At Trial.

1. Summary. Rebecca LaMonte came to trial with facts from the two defendant drivers—Westerfield and Cook— which they provided at the accident, showing that Westerfield hit Cook into LaMonte.[1] CP314-15. Cook admitted these facts in response to Requests for Admission. Westerfield admitted these facts by default under the clear terms of CR 36. But because of the court's rulings during trial removing theses admitted facts, LaMonte was forced to present a totally different theory of her case: that Cook hit LaMonte, then Westerfield hit Cook into LaMonte. And the court's rulings during trial allowed Westerfield to present testimony contradicting Cook's and Westerfield's admissions, claiming he did not hit Cook into LaMonte and could not be liable to her. Because Cook was deceased and his admissions were effectively withdrawn, the rulings suddenly impaired LaMonte's ability to respond to Westerfield's theory which contradicted both defendants' admissions.

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[1] Cook handwrote in his statement to the police: "I was making a[n] emergency stop... The car behind me [Westerfield] hit my car. I hit the car in front of me." CP315. In RFA 13, Cook admitted, "because Richard Westerfield's vehicle collided with your vehicle, your vehicle collided with the rear end of Rebecca LaMonte's vehicle". CP321. Westerfield handwrote in his police statement that he "impacted Volvo [Cook] from rear." CP314. His RFA 14 said "...**because** your vehicle collided with Sherman Cook's vehicle, Sherman Cook's vehicle collided with the rear end of Rebecca LaMonte's vehicle". CP15. Westerfield's argument ignores that on the facts of the accident, the RFAs were totally consistent with the police statements.

2. Standard of Review. A court's failure to consider the two factors for withdrawal of admissions under CR 36(b)[2] constitutes an abuse of discretion. *Conlon v. United States,* 474 F.3d 616, 625 (9th Cir. 2007).[3] Any discretion the court possessed had to be "exercised within the bounds of [Rule 36's] two-part test". At issue here is the court's failure to apply the proper, strict standard for the second factor—"the party that obtained the admissions must not be prejudiced in its presentation of the case by their withdrawal"[4]—when the admitting party moves to withdraw admissions **during trial**. A court abuses its discretion in applying a legally erroneous standard. *In re Marriage of Farmer,* 172 Wn.2d 616, 625, 259 P.3d 256 (2011).[5]

The trial court's suite of rulings withdrawing both Cook's and Westerfield's admissions (RFAs) and admitting contradictory evidence constituted legal error and multiple abuses of discretion: the court had no valid basis for withdrawing Cook's conclusively and affirmatively admitted RFAs, and no valid basis for granting reconsideration of the April 20, 2012 order deeming Westerfield's RFAs admitted, after the time

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[2] (1) Does withdrawal serve presentation of the merits? (2) will withdrawal prejudice the opposing party? *Santos v. Dean,* 96 Wn.App. 849, 858-59, 982 P.2d 632 (1999).
[3] Washington follows federal law on Rule 36. *Santos,* at 859.
[4] *American Auto. Ass'n v. AAA Legal Clinic of Jefferson Crooke, P.C.,* 930 F.2d 1117, 1119 (5th Cir. 1991).
[5] *See Talley v. United States*, 990 F.2d 695, 698 (1st Cir.1993)(admissions are documents; the court's construction of them is reviewed de novo).

for reconsideration had passed. On the merits of Westerfield's second motion to withdraw his deemed-admitted RFAs, the trial court erred (abused its discretion) by applying a lower prejudice standard under CR 36(b) than that required for withdrawal of admissions during trial. *See, e.g., Santos v. Dean*, 96 Wn.App. 849, 860-61, 982 P.2d 632 (1999) (noting stricter prejudice test "where the extension was requested at trial or at the brink of trial" (at 861), and where opponent "demonstrated that they gave up discovery opportunities in reliance on defendant's failure to answer the requests for admissions in a timely manner" (860)). The court then allowed Westerfield to introduce evidence contradicting and undermining the admissions. This is reversible error. *Nichols v. Lackie,* 58 Wn.App. 904, 907, 795 P.2d 722 (1990).

3. Westerfield Did Not Meet His Burden On Prejudice. It is important to note that **Westerfield**, not LaMonte, had the burden on his belated motion for reconsideration of his request to withdraw his admissions (his second request to withdraw—this time during trial). Westerfield never moved to withdraw or preclude **Cook's** admissions as inadmissible against him; the court (Judge Lum) removed them sua sponte after LaMonte presented them the second day of trial. RP5-15; 5-16.[6] And

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[6] **Westerfield misrepresents that LaMonte submitted a brief on Cook's RFAs on May 12, two days before trial, Resp. Br. 20, but he misreads the date stamp, which states "May 16" 2012.**

Westerfield never met his burden of showing LaMonte would not be prejudiced by withdrawing admissions during trial.

Contrary to Westerfield's argument, Judge McCullough found LaMonte prejudicially relied on the RFAs, **rejecting** Westerfield's argument that LaMonte could not show reliance, RP4-20, 5:32-6:19,[7] 15:6-16:11, **accepting** LaMonte's demonstration of prejudice, *id.* 13:13-20, **rejecting** Westerfield's excuse for his failure to respond (i.e., though Westerfield conceded he might have been served, he claimed his lawyer did not receive the RFAs),[8] and **rejecting** the assertion that LaMonte waived reliance.[9] *Id.* 7:4-10 (holding time delay had to do with *Frye* issue and other matters), 8:1-4 (rejecting lawyer's alleged non-receipt). The court explicitly carved out RFAs that admitted liability or made legal conclusions, ruling that the remaining admissions were conclusively-established facts as to how the accident occurred. *Id.* 6:20-7:3; 19:10-

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[7] The court asked LaMonte about reliance, whether "over the course of the 12 years, you've done a lot?" The court accepted that "the actual underlying facts have not changed". *Id.* 6:6-20; 12:22-13:20 (13:2-4: RFAs "based on the initial facts that have not changed.").

[8] *Id.* 8:5-12, 9:16-18; 10:17-11:12; 14:2-15:9. The court asked whether even though Westerfield might have been served, because he "may not have gotten [the RFAs] to [his lawyer], you didn't have notice?" Westerfield's lawyer agreed, "Correct". *Id.* The court rejected this excuse. On appeal, without citation to authority, Westerfield claims a "dispute about whether the Declaration of Service is correct." Resp. Br.,8,n.3. There is no dispute. LaMonte established proof of service. CP22. Westerfield did not challenge service. The Court will not consider arguments not supported by citation to legal authority. *Fishburn v. Pierce Cy. Planning & Land Servs. Dept.,* 161 Wn.App. 452, 468 , 250 P.3d 146, *rev. denied,* 172 Wn.2d 1012 (2011); RAP 10.3(a)(6). *See also* RAP 2.5(a); *Fishburn,* at 457 n.2 (may refuse to review claim not raised in the trial court).

[9] *Id.* 5:14-17.

20:6. These are precisely the type of facts RFAs are designed to resolve. *E.g., Conlon,* 474 F.3d at 622. But **during** trial, the court (Judge Lum) failed to apply the stricter prejudice test (second prong), giving in to a bias toward presentation of the merits (first prong).[10]

"[T]he prejudice to a party rises the longer and more the party has relied on the admissions. 'With the passage of time and as each moment for response to a pleading slipped by, [a party's] burden for withdrawal of the deemed admissions is raised and the prejudice to the [relying party] is increased.'" *Precision Franchising, LLC v. Gatej,* No. 1:12cv158, 2012 U.S. Dist. LEXIS 175450, at *17-20 (E.D.Va. Dec. 11, 2012).[11]

Contrary to Westerfield's contention, the standard under CR 36(b) does not in any way "mandate" the court's ruling precluding use of the admissions. Resp. Br., 28. Even when the moving party can satisfy the two-pronged test (which Westerfield did not do), the court still may deny a motion to withdraw. *Conlon,* 474 F.3d at 622 (rule is "not mandatory"), 624; *American Gen. Life & Accident Ins. Co. v. Findley*, 2013 U.S.Dist. LEXIS 41644, at *12 (C.D. Cal. Mar. 15, 2013).[12]

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[10] Serving RFAs with the summons and complaint is proper. *Thompson v. King Feed & Nutrition Serv.,* 153 Wn.2d 447, 462, 105 P.3d 378 (2006).

[11] (Quoting *In re Fisherman's Wharf Fillet, Inc.,* 83 F.Supp.2d 651, 661 (E.D.Va. 1999)); *Branch Banking & Trust Co. v. Deutz-Allis Corp.,* 120 F.R.D. 655, 659 (E.D.N.C. 1988)(due diligence required because of prejudice from withdrawal).

[12] Citing, *e.g., SEC v. Global Express Capital Real Estate Inv. Fund,* 289 Fed. Appx. 183, 191 (9th Cir. 2008)(court "may allow withdrawal, but is not required to do so"; even if unresponsive party satisfied test, court would affirm denial of motion to withdraw).

4. Westerfield's "Errors" Cannot Be Reviewed. The Court may not address Westerfield's lengthy discussion of the admission of causation evidence regarding fibromyalgia or the instructional issue alleged by Westerfield because Westerfield did not cross appeal.[13]

B. The Court Erred In Refusing Use Of Cook's Admissions.

The initial error at trial was the court's decision to exclude co-defendant Cook's RFAs. This error not only set the tone for the ensuing improper rulings, it severely prejudiced LaMonte from the outset by essentially gutting her case-in-chief on liability, which was based on the facts of the accident admitted by Cook on May 8, 2000 (CP316-25), also admitted by Westerfield's failure to respond about the same time as Cook signed his admissions; and which LaMonte relied on from that time until the court removed them during trial. This initial decision created a void in LaMonte's evidence of the accident and suddenly shifted the burden of apportioning fault from Cook to LaMonte, but without Cook there to testify (he had died) and without his conclusively-established admissions, binding against him. The court's error in prohibiting LaMonte from

[13]"[A] notice of a cross appeal is essential if the respondent seeks affirmative relief as distinguished from the urging of additional grounds for affirmance." *Phillips Bldg. Co. v. An*, 81 Wn.App. 696, 700 n.3, 915 P.2d 1146 (1996); RAP 2.4(a), RAP 5.1(d); *State v. Sims,* 171 Wn.2d 436, 442-43, 256 P.3d 285 (2011).The allegation that the court erred in permitting fibromyalgia evidence was firmly resolved in *Anderson v Akzo Nobel Coatings,* 172 Wn.2d 593, 260 P.3d 857 (2011). Westerfield also attempts to reargue the evidence and matters decided against him (*e.g.,*Resp.Br.,5), but these are irrelevant here.

mentioning, at a minimum, Cook's RFAs during opening statement, forced LaMonte to make an untenable choice regarding how to present the facts of the accident.

1. Procedure. Appendix I provides a timeline for this case. Cook signed RFAs on May 8, 2000, admitting that ***because*** Westerfield's vehicle collided with Cook's vehicle, Cook hit LaMonte. CP316-25; CP 321 (RFAs 12-13). LaMonte settled with Cook on May 3, 2001. CP90. Cook died on July 19, 2004. CP1943. On April 20, 2012, Cook's Estate was substituted as a defendant party, CP2022-23, and judgment was entered against Cook. CP100 (April 20, 2012). Cook remained on the Special Verdict form for purposes of allocating fault among the two potential tortfeasors in this case–defendant Westerfield, who rear-ended defendant Cook, pushing him into plaintiff LaMonte, who was not at fault. CP145-46.[14]

The issue of Cook's RFAs came up on May 15, 2012, the second day of trial. RP 5-15, 19-21. The trial court asked for additional authority on whether Cook's RFAs conclusively establishing the admitted facts of the accident were binding on Westerfield. *Id.* 20-21. LaMonte submitted a

[14]The jury never reached the question of allocating fault because they determined that Westerfield, although he negligently hit Cook, did not push Cook into LaMonte, and so did not cause her injuries and damages. The jury made this determination based on the improper withdrawal of all admissions, and the erroneous admission of contradictory expert evidence and contradictory deposition testimony from Cook.

brief on this issue the next day, May 16. CP126-30. Westerfield did not respond.[15] On May 16, 2012, the court voiced its belief that Cook's RFAs were a form of rebuttal to Westerfield's defense against Cook's attempt to allocate fault, and that this would improperly anticipate Westerfield's defense. RP5-16, 10:23-13:4, 16:23-17:11. The court ignored that the RFAs were a critical part of LaMonte's case-in-chief,[16] and precluded LaMonte from using them in opening, ruling they were impeachment evidence for rebuttal only. *Id.* 17:12-20:21. This surprise ruling effectively shifted Cook's burden of proof on allocation to LaMonte, while simultaneously removing Cook's (and LaMonte's) evidence for that allocation.

Cook's RFAs established the facts of how the accident occurred, which were the facts of LaMonte's case-in-chief as both Cook and Westerfield had stated to the police at the scene of the accident. CP314-15. They were conclusively established by Cook's admissions, and relied on by LaMonte and her experts throughout the proceedings. *See* fn. 1. Cook's admissions were binding on him. If Cook had been present at trial, LaMonte would have been fully entitled to present Cook's admissions against him, and Cook would not have been allowed to testify contrary to them. While Westerfield would not be bound by Cook's admissions, Cook

[15] LaMonte also submitted a brief on Cook's RFAs on May 29, 2012. CP139-44.
[16] CP104-05 (Pl's Trial Brief); CP126-29.

would be, and no authority would allow Westerfield to present Cook's deposition to undermine his admissions.

Without Cook or his admissions, it fell to LaMonte to come up with proof that Westerfield hit Cook into LaMonte, during trial, long after discovery had closed. Because Cook was dead, LaMonte could not call him to rebut Westerfield's assertions and claims regarding who caused the accident or what happened to Cook's vehicle. CP140, 142. She could only rely on prior written statements and Cook's admissions. CP331. This is the type of prejudice the courts contemplate under Rule 36. *Id.*; Opening Br., 36.

Allowing LaMonte to show the jury Cook's admissions in a demonstrative exhibit did not cure the prejudice, nor did showing the police statements to the jury. The admissions at least should have gone to the jury in a jury instruction. CP2235-36. *See also* fn. 23. When presented the Court should not have required Plaintiff counsel to say the admissions were not from Westerfield. RP5-31, 15:8-14. Nothing cured the harm resulting from the rulings that began with the court's refusal to allow Cook's admissions in LaMonte's case-in-chief, followed by allowing Cook's contradictory deposition testimony, as well as Lewis's and Westerfield's contradictory testimony. These errors completely eroded the

intended conclusive effect of the admissions, and were far from harmless.[17]

2. Admitting Party May Not Contradict RFAs. The cases prohibiting contrary evidence by the admitting party are legion. If not withdrawn or amended, admissions "cannot be rebutted by contrary testimony or ignored by the ... court simply because it finds the evidence presented by the party against whom the admission operates more credible." *American Auto. Ass'n v AAA Legal Clinic of Jefferson Crooke, P.C.,* 930 F2d 1117, 1120 (5th Cir. 1991);[18] *Airco Indus. Gasses, Inc. v. Teamsters Health & Welfare Pension Fund,* 850 F.2d 1028, 1036-37 (3d Cir. 1988)("unassailable statement of fact"); Opening Br., 28-31. The court has no discretion to reexamine facts once deemed admitted. *Chicago Dist. Council Of Carpenters Pension Fund v. P.M.Q.T., Inc.,* 169 F.R.D. 336, 341 (N.D. Ill. 1996).

"Rule 36 responses become, in effect, sworn evidence that is binding upon the respondent at trial." *T. Rowe Price Small-Cap Fund v.*

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[17] *W.L.Reid Co. v. M-B Contracting Co.,* 46 Wn.2d 784, 285 P.2d 121 (1955) is distinguishable: the error here did "materially affect the merits of the controversy" by allowing Westerfield to dispute the conclusively-established fact, admitted by Cook, that his car pushed Cook's into LaMonte's--through his expert, his own testimony, and Cook's deposition testimony. Even if Westerfield had satisfied the test, properly moved to reconsider and **his** RFAs were withdrawn, **Cook's admissions** should not have been undermined by Cook's deposition testimony where he failed to recall after medical events known to affect memory.

[18] *Cook v. Allstate Ins. Co.,* 337 F.Supp.2d 1206, 1210 (C.D. Cal.2004); *999 v. C.I.T. Corp.*, 776 F.2d 866, 869-70 (9th Cir.1985)(inconsistent evidence properly excluded.").

Oppenheimer & Co., 174 F.R.D. 38, 44 (S.D.N.Y. 1997). "In form and in substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party." *Brook Village North Assocs. v. General Elec. Co.,* 686 F.2d 66, 71 (1st Cir. 1982).[19] The admissions by both Cook and Westerfield were unassailable facts, binding on each admitting party, which LaMonte relied on since the beginning of the case, which she should have been able to present in opening, and which should have been provided to the jury in instructions[20] as well as the jury room. Their withdrawal was reversible error, not cured by demonstrative exhibits.[21]

3. Surprise Removal Of Admissions Is Prejudice. The "sudden need to obtain evidence" for voided admissions that Westerfield hit Cook into LaMonte--caused by the court's unauthorized, sua sponte removal of Cook's admissions at the beginning of trial--is exactly the type of prejudice that precludes withdrawing conclusively-established admissions. *American Auto. Ass'n*, 930 F.2d at 1120; *Precision Franchising, LLC v. Gatej,* 2012 U.S.Dist. LEXIS 175450, at *17 (E.D. Va. Dec. 12, 2012). "The prejudice contemplated by 36(b) ... relates to the difficulty a party may face in proving its case, for example by the unavailability of key

[19] Quoting Fed.R.Civ.P. 36 Advisory Committee Note on 1970 Amendment.
[20] CP2235-36 (LaMonte's Prop. No. 17).
[21] Westerfield implies (Resp.Br.23) the police statements(Exs.125, 127) were presented to the jury. They were illustrative exhibits only. CP2323 (Exhibit List).

witnesses in light of the delay." *Brook Village,* at 70; *999 v. C.I.T. Corp.,* 776 F.2d 866, 869 (9th Cir. 1985)(prejudice when motion not made until the middle of trial, plaintiff had nearly rested case and relied heavily on admission); *Puerto Rico v. S.S. Zoe Colocotroni,* 628 F.2d 652, 665-66 (1st Cir. 1980)(plaintiffs' trial preparation was materially prejudiced when defendants initially admitted liability, lured plaintiffs into false sense liability was resolved, caused plaintiffs to cancel depositions, and then recanted admissions; whether or not this was deliberate, defendants "gained a considerable strategic advantage by their misrepresentations"; defendants' pleadings struck). Westerfield gained an enormous tactical advantage by the court's in-trial withdrawal of both Cook's and his own admissions from the facts of the case: Cook was gone, his contradictory deposition was admitted, and Westerfield faced Cook's much-weakened apportionment case, which LaMonte suddenly had the burden of proving.

4. Joint and Several Liability; Apportionment. The Washington Supreme Court has confirmed that a covenant not to sue and judgment, such as the one LaMonte and Cook entered, CP90, "**does not release a tortfeasor [Cook] from liability;** it is simply an agreement to seek recovery only from a specific asset—the proceeds of the insurance policy and the rights owed by the insurer to the insured." *Bird v. Best Plumbing*

Grp., LLC, 175 Wn.2d 756, 764-65, 287 P.3d 551 (2012) (emphasis added; internal quotations and citations omitted).

Cook was never released under RCW 4.22.070. Cook was a "defendant against whom judgment was entered" under RCW 4.22.070(1)(b), and co-defendants Cook and Westerfield were jointly and severally liable for the sum of their proportionate shares of LaMonte's harm. *Cox v. Spangler,* 141 Wn.2d 431, 443, 5 P.3d 1265 (2000). Once LaMonte proved each tortfeasor was negligent and caused damage to her, "the burden of proving allocation of those damages among themselves is upon the defendants; if the jury find[s] that the harm is indivisible, then the defendants are jointly and severally liable for the entire harm." *Id.* The court so instructed the jury.[22] It was undisputed that Cook hit LaMonte, causing damage and injuries.

This meant Cook (now LaMonte) had the burden of proving Westerfield was at fault, and Westerfield had the burden of proving Cook was at fault. Because Cook's RFAs conclusively established that Westerfield hit him into LaMonte, and Cook would have so testified, without Westerfield's admissions, LaMonte had the burden of establishing

[22] "Where the negligent conduct of two or more entities [has] combined to bring about harm" and one of them "seeks to limit his liability by apportioning harm, the burden of apportionment is upon each entity. CP2306 (Inst.19).Since Westerfield did not cross-appeal, the Court cannot review his alleged "error" in No.19. Resp. Br., 48-50. *E.g., Phillips Bldg. Co. v. An,* 81 Wn. App. 696, 700 n.3, 915 P.2d 1146 (1996).

that Westerfield was negligent, as well as disproving or eliminating Westerfield's unsupported[23] theory that he did not hit Cook into LaMonte.

The court also instructed the jury that Cook's RFAs were admitted for the limited purpose of forming the basis of experts' opinions, and that they were binding on Cook but not binding on Westerfield, CP2307 (Inst. 20), but refused LaMonte's instruction containing the conclusively-established RFAs which were binding on Cook. CP2235-36. But Cook's RFAs were critical to his own burden of proving apportionment, now LaMonte's burden. Westerfield, who was jointly and severally liable for indivisible harm, should not have been permitted to avoid liability by keeping Cook's admission that Westerfield hit Cook into LaMonte out of LaMonte's and Cook's case, and contradicting Cook's admissions with Cook's deposition testimony. Instead, Cook's RFAs should have been admitted in LaMonte's case-in-chief and to support Cook's burden of allocating fault. Even if Westerfield's admissions could have been properly reconsidered and withdrawn (which they could not), Cook's RFAs were always for the jury to take to the jury room and weigh against Westerfield's evidence. Westerfield received a limiting instruction,

[23] The HVE theory generated by Lewis was new (January 2012) and failed to take into account the conclusively-established facts of the accident in the police statements and admissions. RP 6-4, 74-78. This theory came out while the motion to deem the admissions admitted was filed, with argument and decision pending.

CP2307.[24] The court improperly took away that right in opening statement, by refusing to admit Cook's conclusively-established facts as proof regarding Cook's role in the accident, refusing to instruct the jury on Cook's admitted role in the accident, ruling the LaMonte had "opened the door" to Cook's contradictory and confusing recantation of his admission in his depositions, and allowing Westerfield to introduce those depositions. This was reversible, prejudicial error that affected LaMonte's entire liability case.

5. Cook's RFAs Were Conclusively-Established Facts. There is no doubt that Cook's admissions were admissible against **him**, and not hearsay (as Westerfield argues). "When offered by the adverse party, answers to interrogatories and **requests for admission usually are not considered hearsay** insofar as they fall under the exception for admissions by a party opponent" *Underberg v. United States*, 362 F.Supp.2d 1278, 1283 (D.N.M. 2005)(emphasis added). In *Retamco*

[24] In addition to refusing to give her proposed instruction on admissions, CP2235-36, to which LaMonte assigned error, it was improper to label Cook as a "non-party" in Inst. No. 18, CP2305, No. 20, CP2307, and the Special Verdict Form, CP145-46. LaMonte's proposed verdict, CP2246-47, and proposed instructions, CP2230, 2234, listed Cook as a "defendant." The Court's instructions were based on the April 20, 2012 order dismissing Cook. CP101-02. This Court has ample grounds to reverse on the bases presented; but if necessary or supportive of reversal, LaMonte asks the Court to review dismissal of Cook on April 20, 2012, and improperly labeling him a non-party. In some circumstances this Court will review an erroneous jury instruction or verdict form, since the "appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision." *Falk v. Keene Corp.,* 113 Wn.2d 645, 658-59, 782 P.2d 974 (1989)("Falk's position was that his proposed instruction corrected stated the law ... and that an instruction in the terms of the statute did not. This issue is properly before us"); *Queen City Farms v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 63, 882 P.2d 703 (1994).

Operating, Inc. v. Carone, 267 Fed. Appx. 625, 627 (9th Cir. 2008), the Ninth Circuit held that, "because deemed admissions offered by a plaintiff against a defendant, pursuant to Fed.R.Civ.P. 36, are the defendant's own statements and **are non-hearsay** under 801(d)(2)(A)," the defendant's statements could be used against him to establish a conspiracy. (Emphasis added.) Westerfield admits this. Resp. Br., 35. And this Court has clearly so held, as in *In re Estate of Miller*, 134 Wn.App. 885, 894, 143 P.2d 315 (2006), where the court stated, "the deceased is a party to this lawsuit and his admissions are not inadmissible hearsay pursuant to ER 801(d)(2)."

Westerfield contends Cook was not a party at trial, that ER 801(d)(2) does not apply. To the contrary, and as the court recognized, RP5-16, 13:25-14:1, Cook was a defendant when he admitted to the facts of the accident; he was a defendant against whom judgment was entered. CP100. The admissions LaMonte offered against him should have been presented to the jury in instructions and given to them for deliberations.

Westerfield relies heavily on the 1923 case of *Jeslow v. Duncan,* 125 Wash. 492, 493, 216 P. 868 (1923), long before tort reform and issues of apportionment under RCW 4.22. In that automobile accident case, the court held co-defendant Richard Duncan's statement that his brother defendant Melville Duncan was a "very reckless driver" did not bind the real culprit, Melville, and "went out of the case" when Richard was

dismissed as having nothing to do with the car in the accident. *Id.* at 492-93. But unlike *Jeslow,* in this case involving **two** tortfeasor drivers, Cook had something to do with the accident: it is undisputed that Cook hit LaMonte, and there is a judgment against him for that fault. Westerfield gained a huge tactical advantage in removing the "unassailable fact" that he hit Cook into LaMonte, and being able to prove that if anyone was at fault, it was Cook **and not Westerfield**. In fact, Westerfield argued no accident occurred involving him and LaMonte, and he did not hit Cook into LaMonte. RP6-8, *e.g.,* 8:13-17;[25] 15:4-7; 17-18:1-8.[26]

The trial court erroneously accepted Westerfield's contention that Cook's RFAs were "not technically an admission of party opponent [under ER 801(d)(2)], because there's some... offensive use against" Westerfield. RP 5-30, 26:5-8. Even Westerfield received a limiting instruction that remedied this concern. And as discussed LaMonte needed Cook's admissions as they were central to her theory and proof that Westerfield pushed Cook into LaMonte.

The court effectively allowed Westerfield to circumvent the conclusive effect of co-defendant Cook's admissions by the circuitous route of precluding LaMonte from using them in opening (essentially withdrawing them), labeling them as hearsay, and permitting them only in

[25] ("[B]ased on this evidence, you'd have to decide the accident didn't happen.")
[26] (If there was an accident, "I don't think he was negligent at all.")

a demonstrative exhibit (as the bases for expert opinion). The court required LaMonte to tell the jury they were Cook's admissions, not Westerfield's, RP5-31, 15:8-14, which constituted a prejudicial comment on the weight of the admissions. The court allowed Cook's confusing and conflicting deposition testimony based on the faulty reasoning that LaMonte had "opened the door", when she had done no such thing. *See Switchmusic.com, Inc. v. U.S. Music Corp.*, 416 F.Supp.2d 812, 817 (C.D. Cal. 2006)(consequences of noncompliance with Rule 36 could not be circumvented by introducing evidence contradicting default admissions). And the court instructed the jury Cook's admissions were not binding on Westerfield. All of this improperly told the jury to place no weight at all on the facts in Cook's admissions in deciding whether Westerfield was negligent.

Westerfield argues that Cook's interrogatory answers did not adopt the version of events in the RFAs. But Cook's admissions were binding on him regardless of his interrogatory answers. Westerfield cites no authority to the contrary.[27] Nor does any authority allow Westerfield to challenge Cook's admission with Cook's own deposition testimony, and

[27] *Cf. Mangan v. Broderick and Bascom Rope Co.*, 351 F.2d 24, 28 (7th Cir. 1965) (unanswered requests are not abandoned by the subsequent filing of interrogatories addressed to the same subject); *United States v. Kasuboski*, 834 F.2d 1345, 1349 (7th Cir. 1987).

Westerfield cites none. The cascade of errors that ensued were individually and cumulatively reversible prejudicial error.[28]

C. Withdrawal <u>During Trial</u> Disregarded Prejudicial Reliance.

Contrary to Westerfield's primary response, the real issue is not waiver (which did not occur, as explained below); it is prejudice to LaMonte "stemming from reliance on the binding effect of the admission". 8A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* 2264 (2d ed. 1994). In *Precision Franchising, LLC v. Gatej,* No. 1:12cv158, 2012 U.S. Dist. LEXIS 175450, at *17-18 (E.D. Va. Dec. 11, 2012), the court catalogued "the following factors indicat[ing] that a withdrawal of admissions would result in sufficient prejudice to a relying party":

> [A] number of months had passed after the deadline to respond to requests for admissions; it was near or after the close of discovery; the relying party had foregone some discovery based on the admissions; the opposing party repeatedly had failed to respond to discovery requests or communications; and/or the opposing party had received some notice from the relying party or the court of the consequences of failing to respond to discovery requests.

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[28] It was reversible error to: withdraw Cook's admissions from use in opening statement; to rule that presenting Cook's admissions to Westerfield's expert, Lewis opened the door to Cook's deposition testimony regarding locations of the vehicles after the accident, RP 6-6, 9:17-11:24, or anything else; to allow Westerfield to play Cook's deposition, in which he undermined the effectiveness of the admission by saying he did not remember anything, since Cook **admitted** the sequence of the accident in RFAs 12-13 in 2000; to refuse LaMonte's instruction containing Cook's admissions, CP2235; to allow Cook's admissions only as demonstrative; and to allow Westerfield's closing argument contradicting his RFAs.

The court cited several examples in which courts found prejudicial reliance (*id.* at *18-20).[29] *See also Reg'l Care Servs. Corp. v. Companion Life Ins. Co.,* 869 F.Supp.2d 1079, 1084 (D.Ariz. 2012)(defendant bound by admission which it never moved to withdraw; "it is highly unlikely the Court would grant a motion to withdraw the admission now in view of the procedural posture of this case, i.e., discovery closed ... nearly five months ago, and dispositive motions have been pending for months"; defendant waited until after discovery closed to raise the issue; "Plaintiffs relied on the admission for several months, through the discovery and dispositive motion cut-off dates, with no indication that Companion intended to file a motion to withdraw"); *American Gen. Life & Accident Ins. Co. v. Findley*, 2013 U.S.Dist. LEXIS 41644, at *14-16 (C.D. Cal. Mar. 15, 2013)(pro se party's default admissions not withdrawn where opposing party relied on deemed admissions for at least four months, during discovery period and in filing summary judgment motion by

[29] *E.g., Sommerville v. Dobson*, No. 4:10CV67, 2011 U.S.Dist.LEXIS 156380, at *13-18 (E.D.Va. Mar. 8, 2011)(Somerville claimed he never received RFAs; discovery closed, delay in seeking withdrawal); *Buchanan v. Neighbors Van Lines,* No. CV10-6206 PSG, 2011 U.S.Dist. EXIS 121423, at *32-35 (C.D.Cal. Oct. 20, 2011)(11 weeks' reliance); *Haile v. Santa Rosa Mem. Hosp.,* No. C-08-04149, 2009 U.S.Dist.LEXIS 122589, at *7-9 (N.D.Cal. Dec. 17, 2009)(lack of discovery, reliance for months); *Conlon,* at 624-25 (2-1/2 months' reliance; discovery foregone; motion to withdraw decided 8 days from trial); *J&J Sports Prods., Inc. v. Mumford,* No. CIV.A. DKC 10-2967, 2012 U.S.Dist.LEXIS 55836, at *7-10 (D.Md. Apr. 20, 2012); *Precision Franchising*, at *20-23 (E.D. Va. Dec. 11, 2012)(over 3 months); *SEC v. Global Express Cap. Real Estate Inv. Fund, I, LLC,* 289 Fed. Appx. 183, 191 (9th Cir. Aug. 7, 2008); *Saroyan Lumber Co., Inc. v. El & El Wood Prds. Corp.,* 126 Fed. Appx. 371, 372 (9th Cir. Mar. 11, 2005).

dispositive motion cut-off date; no indication admitting party intended to seek permission to withdraw admissions; no good cause for failure to respond or seek timely leave to withdraw; though admitting party claimed she "never received the requests for admission", relying party filed proof of service, and unresponsive party provided no admissible evidence that they were not received).

The circumstances in this case show overwhelming prejudice—12 years, more than the months or weeks in the above cases—from withdrawal of RFAs at trial. The court ignored this. Contrary to Westerfield's characterization, the minimal discovery on liability[30] depended entirely on the facts of the 2000 RFAs.[31] But that discovery was seriously challenged when Westerfield's new accident reconstructionist Lewis (retained January 2012,[32] RP6-4, 41:1, only 5 months before trial)

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[30] Rogs in 2000, depositions of Westerfield (11/2/01) and Cook (5/3/01 & 12/26/01), LaMonte; and report from (1) Westerfield's expert Chapman (12/11/01); Chapman's deposition 1/10/02, CP453-65; (2) LaMonte's expert Jorgensen's report (1/29/02), CP46-49. Jorgensen relied on police statements, identical to the RFA facts. *See* n.1. In contrast, Westerfield's expert Lewis had never taken into account Cook's admissions and was not asked to simulate Westerfield hitting Cook into LaMonte, RP 6-4, 74:18-22 ("did not do simulation in which Westerfield hit Cook into LaMonte) 76:19-77:14 to 78:15 ("I wasn't asked to do that").

[31] Regarding Westerfield's accusation that LaMonte did not mention RFAs before 3/12: "Since Rule 36 is self-executing, the party relying on an admission by default need do nothing to establish the admission." *United States v. Pearson*, 2012 U.S.Dist. LEXIS 36189 (D.Del. Mar. 19, 2012).

[32] After *Anderson v. Akzo* issued in September 2011, on **October 24, 2011,** a new trial date was set less than 7 months later, **May 14, 2012**, with discovery cutoff 5 months later, **March 26, 2012.** CP1900. Almost all continuances were due to the *Frye* issue; several requested by Westerfield, *e.g.,* CP1291-93 (6/07), CP1308-14 (7/08), CP1494-97(10/3/11)-LaMonte opposed, CP1504-05 (10/17/11).

disclosed the new HVE (human vehicle environment) analysis, creating the need for LaMonte to respond to this method, and the need for additional discovery before the March 26, 2012 cutoff date. Opening Br., 8. LaMonte moved to deem the RFAs admitted before the discovery cutoff. CP1-22. Then, awaiting the court's ruling, the parties deposed the new experts on March 26 and April 4-5, 2012. Opening Br., 9. But it was not until after these depositions, on April 20, 2012, that the court deemed Westerfield's RFAs admitted. CP371-75. LaMonte should not be forced to forego reliance on longstanding admissions because she engaged in depositions of new experts to respond to Westerfield's new theory contradicting those admissions, while awaiting a ruling on a motion that Rule 36 does not even require her to make.

Westerfield argues "[t]his is not the prejudice contemplated by the standard under Rule 36(b)". Resp. Br., 28. He relies on a mischaracterization of *Coleman v. Altman,* 7 Wn.App. 80, 85, 497 P.2d 1338 (1972), where CR 36 was "disregarded". *Melby v. Hawkins Pontiac,* 13 Wn. App. 745, 748 (1975).[33] In *Coleman,*the unanswered admission plaintiffs sought to rely on **contradicted** the undisputed testimony; the central dispute was over another issue. *Id.* at 85. Plaintiffs did not rely on

[33] (Also rejecting arguments that plaintiffs induced failure to respond, or waived reliance.) Without proof, Westerfield implies LaMonte lured him into failing to respond to RFAs. But CR 36 places the burden on Westerfield to respond or move to withdraw.

the admission and were not prejudiced. *Id.* at 85. But LaMonte did rely on all the admissions and was severely prejudiced.

D. The Court Had No Authority To Grant Reconsideration. Westerfield contends Judge Lum had the authority to reconsider and vacate Judge McCullough's order deeming the RFAs admitted, claiming the order was a pretrial ruling on admissibility of evidence, not binding on the trial judge. Westerfield's authorities do not address CR 36 and thus do not apply to Judge McCullough's decision, Judge Lum's at-trial reconsideration or his other rulings on RFAs. No case holds that a court can withdraw admissions without following Rule 36's precepts. Westerfield cites *Santos v. Dean,* 96 Wn. App. 849, 982 P.2d 632 (1999) and *Thompson v. King Feed & Nutrition,* 153 Wn.2d 447, 105 P.3d 378 (2005), neither of which involves an unauthorized second motion to withdraw admissions at trial or the applicable rigorous prejudice test he failed to meet.

Westerfield relies on *Perez v. Miami-Dade Cy.,* 297 F.3d 1255, 1268 (11th Cir. 2002), where the court found no prejudice because Perez relied on the admissions for **only six days**. *Reg'l Care Servs. Corp. v. Companion Life Ins. Co.*, 869 F. Supp. 2d 1079, 1084 (D. Ariz. 2012); *Conlon v. United States*, 474 F.3d 616, 623-24 (9th Cir. 2007). The circumstances are completely different here.

E. Lamonte Did Not Waive Reliance. Westerfield claims LaMonte waived any right to use his RFAs by failing to object to his "defense" while participating in discovery and proceedings. For this proposition, he cites ER 103(a)(1) (evidentiary objections), and *Haywood v. Aranda,* 143 Wn.2d 231, 19 P.3d 406 (2001), a case involving common law waiver. These authorities have no bearing on the issues here, which must be reviewed under the specific law concerning Rule 36 admissions. Rather, as many courts have held, including *Brook Village North Assocs. v. General Elec. Co.*, 686 F.2d 66, 70-73 (1st Cir. 1982), discovery and ongoing development of the theories and case do not constitute waiver of the right to rely on admissions, whether or not by default:

> [P]roof of a plaintiff's case may involve establishing a number of facts, some of which will be controlled by admissions and some of which will not. The party who obtains the admissions by default may be unsure what other facts must be established for him to prevail.... [T]he waiver rule ... would either discourage parties from introducing additional evidence or would completely vitiate the conclusive effect of admissions by default obtained under the Rule.

Id. at 71- 72; Opening Br., 38. "Although there may be some overlap in the information requested in the various forms of discovery, parties are not allowed to pick and choose when to respond based on their own determination of whether they have previously answered the questions presented." *United States v. Kasuboski,* 834 F.2d 1345, 1349 (7th Cir. 1987). *See also Mangan v. Broderick and Bascom Rope Co.,* 351 F.2d 24,

28 (7th Cir. 1965)(unanswered requests not abandoned by subsequent interrogatories). Nor does a party's "participation in depositions ... excuse his failure to respond to the request for admissions." *Kasuboski,* at 1349.

LaMonte never waived the right to introduce in her case (including opening) Cook's RFAs, at a minimum. Contrary to Westerfield's mischaracterization, it was the *Frye* issue concerning causation of LaMonte's fibromyalgia, centering on LaMonte's injuries, which was the focus of all activity from February 12, 2002, when Judge Hall excluded fibromyalgia causation evidence, CP60-63, until the 2012 *Anderson* decision. CP68-69; App. I. Judge McCullough agreed. RP4-20, 7:4-10. LaMonte's conduct throughout this case did not waive the right to rely on Westerfield's or Cook's admissions or any other evidence, even if it overlapped with the admissions: not by relying on the RFAs by discovery, the stay due to appellate litigation of legal issues on causation of fibromyalgia, and certainly not by depositions while waiting for a ruling on her motion to deem the RFAs admitted. LaMonte respectfully requests reversal and remand for a new trial.

DATED: June 7, 2013.

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APPENDIX I
TIMELINE

DATE	Description	CP, RP, Docket No.
May 30, 1997	LaMonte is rear-ended by Cook, who is pushed into LaMonte by Westerfield. Westerfield and Cook give contemporaneous statements to police. **Cook tells police: "...Making an emergency stop. The car behind me [Westerfield] hit my car. I hit the car in front of me [LaMonte]."** Westerfield tells police that he "**impacted Volvo [Cook] from rear."**	CP315 CP314
March 7, 2000	LaMonte files her lawsuit against Cook and Westerfield.	CP378

DATE	Description	CP, RP, Docket No.
April 8, 2000	LaMonte serves Complaint on Westerfield. LaMonte also serves Interrogatories, RFPs, and RFAs on Westerfield with Complaint, as shown in filed Declaration of Service (CP22; **RFAs explicitly listed in Declaration of Service).** RFAs are based on facts of accident as set forth in Westerfield's police statement. LaMonte serves Cook with Complaint, Interrogatories, RFPs, and RFAs . RFAs are based on facts of accident as set forth in Cook's police statement.	CP 22
May 4, 2000	Westerfield files Answer to Complaint.	CP69-71
May, 8, 2000	Westerfield responds to Rogs and RFPs, but not RFAs.	CP66, 71
May 8, 2000	**Cook** responds to Rogs, RFPs, RFAs, **admitting his "vehicle [Volvo] collided with the rear end of Rebecca LaMonte's vehicle"**, RFA12; and **"because Richard Westerfield's vehicle collided with your vehicle, your vehicle collided with the rear end of Rebecca LaMonte's vehicle"**, RFA13.	CP 316-325 CP321

DATE	Description	CP, RP, Docket No.
May 9, 2000	Time for responding to RFAs past; Westerfield's RFAs become conclusively-established unless he moves to withdraw or amend and court grants such motion. In RFA 14 Westerfield admits **"because your vehicle collided with Sherman Cook's vehicle, Sherman Cook's vehicle collided with the rear end of Rebecca LaMonte's vehicle"**	CP15
Jan 10, 2001	Judge Lum recuses himself (practiced with Umlauf who was Cook's counsel)	Trial Court Dkt. #14
May 3, 2001	Cook is deposed (video)	
January 10, 2002	Westerfield's accident reconstruction expert Richard Chapman is deposed.	
January 29, 2002	LaMonte's accident reconstruction expert Bryan Jorgenson provides report.	
February 12, 2002	Judge Hall assigned to the case.	Dkt. # 87
February 21, 2002	Judge Hall grants Westerfield's motion to exclude evidence of causation of fibromyalgia under *Frye,* halting proceedings.	CP 60-63
October 29, 2002	Wash. Supreme Court denies discretionary review of Judge Hall's decision.	CP1246

DATE	Description	CP, RP, Docket No.
September 22, 2004	In another case, *Grant v. Boccia,* Yakima County Superior Court grants motion to exclude fibromyalgia causation evidence; plaintiff Grant appeals.	
February 25, 2005	Parties in *LaMonte* stipulate to stay; **no work on liability while *Frye* issue pending.**	CP1274-75
March 28, 2006; published June 6,2006	*Grant v. Boccia,* 133 Wn. App. 176, 137 P.3d 20 (2006), affirming lower court's exclusion of FM evidence.	
June 2, 2006	*LaMonte* case stayed. **No work on liability while *Frye* issue pending.**	CP1285-87
March 7, 2007	Wash. Supreme Court denies review in *Grant v. Boccia,* 159 Wn.2d 1014 (2007).	
October 30, 2008	Judge McDermott grants LaMonte's motion for *Frye* hearing.	CP1320-22
February 23 & 27, 2009	Judge McDermott holds *Frye* hearing with live expert testimony.	
May 9, 2009	Judge McDermott grants LaMonte's motion permitting evidence that the collision caused LaMonte to develop fibromyalgia.	CP 1477-1490

DATE	Description	CP, RP, Docket No.
	LaMonte case stayed while *Anderson v. Akzo Nobel Coatings Case* on review in Washington Supreme Court involving *Frye* medical causation. **No work on liability while *Frye* issue pending.**	
Sept. 8, 2011	*Anderson v. Akzo Nobel Coatings,* 172 Wn.2d 593, 260 P.3d 857 (2011) decided, permitting fibromyalgia causation evidence, clarifying applicability of *Frye* to medical causation opinions: medical causation opinions can be based on expert's training and experience, if qualified and testimony is helpful to the jury. " I]f the science and methods are widely accepted in the relevant scientific community, the evidence is admissible under *Frye*, without separately requiring widespread acceptance of the plaintiff's theory of causation." *Id.* at 609 -10.	
October 24, 2011	Westerfield moves to add witnesses to replace his liability and causation experts, and for new trial date. Motion granted **Trial set for May 14, 2012**	CP1900.

DATE	Description	CP, RP, Docket No.
January 2012	Westerfield replaces deceased accident reconstruction expert Chapman with new expert Lewis, disclosing that Lewis would use new accident reconstruction software known as HVE (human vehicle environment) —new to the case and to LaMonte.	*See* RP6-4-12, at 41
January 24, 2012	LaMonte discloses accident reconstruction expert Bruington , who is familiar with HVE software.	CP 208-210
March 14, 2012	LaMonte files Motion To Deem Requests For Admission propounded to Westerfield admitted, noting motion for **March 22, 2012.**	CP 1-22
March 22, 2012	**No ruling on Motion to Deem RFAs Admitted.**	
March 26, 2012	**No ruling on Motion to Deem RFAs Admitted.** Westerfield deposes LaMonte's expert Bruington.	
April 4, 2012	**No ruling on Motion to Deem RFAs Admitted.** Westerfield finishes Bruington's deposition	

DATE	Description	CP, RP, Docket No.
April 5, 2012	**No ruling on Motion to Deem RFAs Admitted.** LaMonte deposes Westerfield's new expert Lewis.	
April 20, 2012	Judge McCullough hears Motion To Deem RFAs Admitted; **grants motion with respect to facts of collision**, withdraws RFAs containing conclusions regarding fibromyalgia and liability.	CP371-375
April 30, 2012	Deadline to move for reconsideration of Order Granting Motion to Deem RFAs Admitted passes. Westerfield does not move for reconsideration.	
May 7, 2012	Westerfield files Motion To Withdraw Deemed Admitted RFAs (actually for reconsideration). Westerfield files Motion in Limine Re: RFAs to Westerfield (actually for reconsideration).	CP 153-213 CP214-17
May 10, 2012	Trial reassigned from Judge McCullough to Judge Lum.	Dkt. No. 293
May 14, 2012	**Trial begins**—No ruling on Westerfield's motions in limine or to withdraw RFAs (actually for reconsideration).	

DATE	Description	CP, RP, Docket No.
May 15, 2012	No ruling on Westerfield's motions regarding RFAs. Court discusses use of Cook's admissions with parties; calls for additional briefing.	 RP5-15, 19-21
May 16, 2012	LaMonte submits brief on use of Cook's admissions. **No ruling on Westerfield's motions regarding RFAs.** Court rules LaMonte may not use Cook's RFAs in her opening statement, though Cook's RFAs are binding on Cook and never withdrawn. (Nor have Westerfield's RFAs been withdrawn.)	CP126-30. *See also* CP139-44. RP5-16, 10-13, 16-21.
May 30, 2012	**No ruling on Westerfield's motions regarding RFAs.** Court considers allowing Cook's RFAs as basis for expert testimony.	
May 31, 2012	**No ruling on Westerfield's motions regarding RFAs.** LaMonte presents accident reconstruction experts Bruington and Jorgenson.	

DATE	Description	CP, RP, Docket No.
June 4, 2012	Westerfield discloses, for the first time, collision damage photographs, with pretrial exhibits.	RP 6-4, at 28-29:16-18 (LaMonte's objection to Ex. D-65, Volvo rear: "I have never seen this, and I was never provided this.")
June 4, 2012	Court allows Westerfield to testify contrary to his deemed admitted RFAs, effectively withdrawing his RFAs.	RP6-4, 138-45
June 4, 2012	Court allows Westerfield's expert Lewis to testify contrary to RFAs, effectively withdrawing his RFAs.	RP6-4, 4-129
June 6, 2012	**Court rules that Westerfield may show jury Cook deposition in which Cook contradicts his RFAs, though RFAs are binding on Cook.**	RP6-6, 9-11 Deposition at RP 6-6, 26-50.
June 8, 2012	**Closing Argument:** Westerfield argues **no accident occurred involving him and LaMonte,** and he did not hit Cook into LaMonte, contrary to deemed-admitted RFAs of both Cook and Westerfield.	RP6-8, *e.g.,* 8:13-17; 15:4-7; 17-18:1-8.
June 8, 2012	**Jury Verdict for Westerfield:** No accident, no injury caused by Westerfield.	CP145-46

APPENDIX II

NON-WASHINGTON NON-REPORTED AUTHORITIES (GR 14.1)

Am. Gen. Life & Accident Ins. Co. v. Findley, 2013 U.S. Dist. LEXIS 41644 (C.D. Cal. Mar. 15, 2013)

Haile v. Santa Rosa Mem. Hosp., No. C-08-04149 MMC (EDL), 2009 U.S. Dist. LEXIS 122589 (N.D. Cal. Dec. 17, 2009)

J & J Sports Productions, Inc. v. Mumford, No. CIV.A. DKC 10-2967, 2012 U.S. Dist. LEXIS 55836 (D.Md. Apr. 20, 2012)

Precision Franchising, LLC v. Gatej, No. 1:12cv158, 2012 U.S. Dist. LEXIS 175450 (E.D.Va. Dec. 11, 2012)

Retamco Operating, Inc. v. Carone, 267 Fed. Appx. 625 (9th Cir. 2008)

Saroyan Lumber Co., Inc. v. El & El Wood Prds. Corp., 126 Fed. Appx. 371 (9th Cir. Mar. 11, 2005)

SEC v. Global Express Capital Real Estate Inv. Fund, 289 Fed. Appx. 183 (9th Cir. 2008)

Sommerville v. Dobson, No. 4:10CV67, 2011 U.S.Dist. LEXIS 156380 (E.D. Va. Mar. 8, 2011)

United States v. Pearson, 2012 U.S. Dist. LEXIS 36189 (D. Del. Mar. 19, 2012)

AMERICAN GENERAL LIFE AND ACCIDENT INSURANCE COMPANY, Plaintiff, vs. CHARLES R. FINDLEY, an individual, SANDRA FINDLEY, an individual, and DOES 1-10, inclusive, Defendants.

CASE NO. CV 12-01753 MMM (PSWx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2013 U.S. Dist. LEXIS 41644

March 15, 2013, Decided
March 15, 2013, Filed

PRIOR HISTORY: *Am. Gen. Life & Accident Ins. Co. v. Findley, 2012 U.S. Dist. LEXIS 67874 (C.D. Cal., May 15, 2012)*

COUNSEL: [*1] For American General Life and Accident Insurance Company, Plaintiff: Daniel W Maguire, Joseph P Buchman, Burke Williams and Sorensen LLP, Los Angeles, CA.

Sandra Findley, an individual, Defendant, Pro se, Long Beach, CA.

JUDGES: MARGARET M. MORROW, UNITED STATES DISTRICT JUDGE.

OPINION BY: MARGARET M. MORROW

OPINION

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff American General Life and Accident Insurance Company ("AGLA") filed this action against Charles Findley and Sandra Hazzard-Findley ("Hazzard-Findley") on March 1, 2012. [1] While Hazzard-Findley filed a responsive pleading, Charles Findley did not, and the court entered default judgment against him on July 6, 2012. [2] On November 5, 2012, AGLA filed a motion for summary judgment against Hazzard-Findley. [3] Hazzard-Findley opposes the motion. [4]

1 Complaint, Docket No. 1 (Mar. 1, 2012).

2 Order Granting Plaintiff's Motion for Entry of Default Judgment, Docket No. 23 (July 6, 2012).

3 Motion for Summary Judgment ("Motion"), Docket No. 43 (Nov. 5, 2012); see also Reply to Opposition to Motion for Summary Judgment ("Reply"), Docket No. 53 (Feb. 15, 2013).

4 Opposition to Motion for Summary Judgment ("Opp"), Docket No. 49 (Feb. [*2] 5, 2013).

I. BACKGROUND

A. AGLA's Requests For Judicial Notice

AGLA submitted a request for judicial notice with its motion for summary judgment, [5] and subsequently filed a supplemental request for judicial notice. [6] Hazzard-Findley has not opposed AGLA's requests. AGLA asks that the court take judicial notice of documents filed in Hazzard-Findley's Chapter 7 bankruptcy case, *In re Sandra D. Hazzard-Findley*, Case No. 2:12-bk-26346-RK -- i.e., the bankruptcy petition, schedules of assets and liability, and statement of financial affairs filed by Hazzard-Findley; the "Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines" filed by the clerk; and the "Discharge of Debtor" filed by the clerk. [7] AGLA also asks that the court take judicial notice of its motion for relief from the automatic stay under *11 U.S.C. § 362*, as well as the bankruptcy court's order granting that motion. [8]

5 Request for Judicial Notice in Support of Motion for Summary Judgment ("RJN"), Docket No. 43-8 (Nov. 5, 2012).

6 Supplemental Request for Judicial Notice ("Supp. RJN"), Docket No. 48-1 (Feb. 1, 2013).
7 RJN, ¶¶ 1-3.
8 Supp. RJN, ¶¶ 4-5.

Under *Rule 201 of the Federal Rules of Evidence*, the court can take judicial [*3] notice of a "fact [that is] not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *FED.R.EVID. 201(b)*; see also *Lyon v. Gila River Indian Community, 626 F.3d 1059, 1075 (9th Cir. 2010)* ("Courts may take judicial notice of facts whose existence is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

Court filings and other matters of public record are proper subjects of judicial notice. *Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n. 6 (9th Cir. 2006)*. As court documents are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," documents filed in Hazzard-Findley's bankruptcy proceedings can be judicially noticed under *Rule 201*. See *United States ex rel Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)* (a court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those [*4] proceedings have a direct relation to matters at issue," quoting *St. Louis Baptist Temple, Inc. v. FDIC, 605 F.2d 1169, 1172 (10th Cir. 1979))*; *Retired Employees Ass'n of Orange County, Inc. v. County of Orange, 632 F.Supp.2d 983, 985 (C.D. Cal. 2009)* (taking judicial notice of a bankruptcy court order under *Rule 201*); *Rosal v. First Fed. Bank of California, 671 F.Supp.2d 1111, 1120-21 (N.D. Cal. 2009)* (taking judicial notice of plaintiff's bankruptcy petition, an order granting a motion for relief from the automatic stay, and the bankruptcy court's order of dismissal).

The documents that can be judicially noticed indicate that Hazzard-Findley filed a bankruptcy petition on May 9, 2012. She did not include AGLA's claim on her list of creditors, schedules of assets and liabilities, or statement of financial affairs. The deadline for Hazzard-Findley's creditors to file an action to determine the nondischargeability of a debt was August 10, 2012. It is undisputed that AGLA did not receive notice of Hazzard-Findley's bankruptcy until Charles Findley mentioned it during his debtor examination on October 24, 2012. [9]

9 See Statement of Genuine Issues in Opposition to Motion for Summary Judgment [*5] ("Statement of Genuine Issues"), Docket No. 50 (Feb. 5, 2013), ¶¶ 21-23.

B. AGLA's Requests for Admissions

On July 31, 2012, AGLA mailed Hazzard-Findley a set of requests for admissions. [10] Hazzard-Findley did not respond to the requests. [11] AGLA asserts, therefore, that the court should deem her failure to respond as an admission of the various requests. [12]

10 Declaration of Daniel W. Maguire ("Maguire Decl."), Docket No. 43-6 (Nov. 5, 2012), ¶ 3.
11 *Id.*, ¶ 4.
12 Motion at 5.

Pursuant to *Rule 36 of the Federal Rules of Civil Procedure*, "[a] matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party." *FED.R.CIV.PROC. 36(a)(3)*. An additional three days are allowed for responses where the Requests for Admission are served by mail. *FED.R.CIV.PROC. 6(d)*; *FED.R.CIV.PROC. 5(b)(2)(C)*. A matter admitted under *Rule 36* is "conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." *FED.R.CIV.PROC. 36(b)*; *Tillamook Country Smoker, Inc. v. Tillamook Cnty. Creamery Ass'n, 465 F.3d 1102, 1111-12 (9th Cir. 2006)*; [*6] *999 v. C.I.T. Corp., 776 F.2d 866, 869-70 (9th Cir. 1985)*. The rule is self-executing, and the Court cannot ignore the admissions in considering the parties' motions for summary judgment unless it first grants a motion to waive or amend. *Page v. Hense, No. 1:10-cv-01186-AWI-SKO, 2013 U.S. Dist. LEXIS 6103, 2013 WL 164224, *7 (E.D. Cal. Jan. 15, 2013)* (citing *Tillamook Country Smoker, Inc., 465 F.3d at 1112*); see also *Bretana v. Int'l Collection Corp., No. C07-05934 JF, 2008 U.S. Dist. LEXIS 96483, 2008 WL 4948446, *1 (N.D. Cal. Nov. 12, 2008)* ("Under *Fed.R.Civ.P. 36(a)(3)*, the failure to timely respond to those RFAs resulted in automatic admission of the matters requested").

Once a matter has been deemed admitted under *Rule 36*, even by default, the court may not consider evidence that is inconsistent with the admission. See *999, 776 F.2d at 869-70*; *Cook v. Allstate Ins. Co., 337 F.Supp.2d 1206, 1210 (C.D. Cal. 2004)* ("An admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible," citing *Am. Auto Ass'n v. AAA Legal Clinic, 930 F.2d 1117, 1120 (5th Cir. 1991))*. See also *Am. Auto Ass'n, 930 F.2d at 1120* [*7] ("This conclusive effect applies equally to those admis-

sions made affirmatively and those established by default, even if the matters admitted relate to material facts that defeat a party's claim" (footnotes omitted)); *Castiglione v. U.S. Life Ins. Co., 262 F.Supp.2d 1025, 1030 (D. Ariz. 2003)*. A summary judgment motion can be based upon deemed admissions. See *O'Campo v. Hardisty, 262 F.2d 621, 623-24 (9th Cir. 1958)* (affirming the entry of summary judgment based on unanswered requests for admissions).

"A trial judge has discretion[, however,] to permit a late response to a request for admissions made pursuant to *Rule 36 F.R.Civ.P.*, and thus relieve a party of apparent default." *French v. United States, 416 F.2d 1149, 1152 (9th Cir. 1968)*. "The court has the ability to withdraw or amend the admissions, but only upon motion by the responding party." *Andreozzi v. Cal. Dep't of Corrections, No. CIV S-09-1192-JAM-CMK-P, 2012 U.S. Dist. LEXIS 30210, 2012 WL 761380, *2 (E.D. Cal. Mar. 7, 2012)*. Under *Rule 36(b)*, the court's discretion to grant withdrawal or amendment of *Rule 36* admissions is governed by a two-part test: (1) whether the presentation of the merits is subserved by withdrawal or amendment; and (2) whether [*8] the party that obtained the admissions will be prejudiced in its presentation of the case if withdrawal or amendment is granted. *Conlon v. United States, 474 F.3d 616, 625 (9th Cir. 2007)* (district court must consider both factors in deciding a motion to withdraw or amend).

Hazzard-Findley asserts that she first became aware of the requests for admission when AGLA served its motion for summary judgment on November 5, 2012. [13] She has not, however, filed a motion seeking to withdraw her admissions under *Rule 36(b)*, or sought leave to file late responses, despite the fact that she admits she has known of them for at least four months. Even had a motion to withdraw the admissions been filed, however, it is unlikely the court would have granted it.

13 Opp at 3.

As respects the first of the *Conlon* factors, it is clear that withdrawal of the admissions would promote presentation of the merits of the case. The admissions go directly to the ultimate issues to be decided. They include, for example, admissions that Hazzard-Findley made knowing misrepresentations to AGLA in claims for accident benefits regarding purported injuries, with the intent of deceiving AGLA. [14] The scope of the admissions [*9] would conclusively determine dispositive issues in AGLA's case against Hazzard-Findley and bypass adjudication on the merits. If the admissions are not withdrawn, Hazzard-Findley will be precluded from presenting evidence related to her defenses, as the court will likely be required to grant summary judgment in favor of AGLA. By contrast, allowing Hazzard-Findley to withdraw the admissions would permit her to present a defense against AGLA's claims. See *Conlon, 474 F.3d at 622* (because the admissions established that the issuance of a warrant, plaintiff's arrest and his incarceration were not caused by the negligent or wrongful acts or omissions of United States employees, upholding the admissions eliminated any need for a presentation on the merits); *Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995)* ("the first prong of the test in *Rule 36(b)* is satisfied here because withdrawal of the admissions would certainly facilitate a presentation of the merits of Hadley's case" because the deemed admissions would have determined ultimate issues in the case).

14 See, e.g., Maguire Decl., Exh. 1 ("Admissions"), at 11-12.

Looking at the second factor, however, AGLA would be prejudiced [*10] if Hazzard-Findley were permitted to withdraw the admissions at this late date. "The prejudice contemplated by *Rule 36(b)* is not simply that the party who obtained the admission will now have to convince the factfinder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously deemed admitted." *Conlon, 474 F.3d at 622* (quoting *Hadley, 45 F.3d at 1348* (internal citation omitted)). In *Conlon*, the court concluded that the party seeking to withdraw admissions had demonstrated a lack of prejudice to his opponent, in part because the government relied on the deemed admissions in deciding not to take additional discovery and in filing a dispositive motion, with no indication that the plaintiff intended to seek relief from the admissions, and plaintiff's motion to withdraw the admissions was not decided until eight days before trial. See *id. at 623-24*.

Similarly, in this case, it appears that AGLA has relied on the deemed admissions for at least four months, during the discovery period and in filing a motion for summary judgment [*11] to be heard by the dispositive motion hearing cut-off date. As in *Conlon*, there was no indication throughout this period that Hazzard-Findley intended to seek permission to withdraw the admissions. Other courts have found prejudice justifying the denial of a motion to withdraw admissions under such circumstances. See *Buchanan v. Neighbors Van Lines, No. CV 10-6206 PSG, 2011 U.S. Dist. LEXIS 121423, 2011 WL 5005769, *12 (C.D. Cal. Oct. 20, 2011)* ("Plaintiff has relied on the deemed admissions for 11 weeks, including through the close of fact discovery. . . . Accordingly, the Court finds Plaintiff will be prejudiced by Golden Hand's belated attempt to amend its admissions and denies Golden Hand's motion"); *Haile v. Santa Rosa Mem. Hosp., No. C-08-04149 MMC (EDL), 2009 U.S. Dist.*

*LEXIS 122589, 2009 WL 5088736, *3 (N.D. Cal. Dec. 17, 2009)* ("Defendant suffered prejudice not only based on a lack of discovery, but because of its reliance for several months through the discovery cutoff date on the deemed admissions, with no indication that Plaintiff would seek relief under *Rule 36(b)*"); see also *SEC v. Global Express Capital Real Estate Inv. Fund, I, LLC, 289 Fed. Appx. 183, 191 (9th Cir. Aug. 7, 2008)* (Unpub. Disp.) ("Because Reese filed her motion [*12] for withdrawal . . . more than three months after written discovery had closed . . . the SEC may have succeeded in establishing that it would have been prejudiced by the withdrawal"); *Saroyan Lumber Co., Inc. v. El & El Wood Prds. Corp., 126 Fed. Appx. 371, 372 (9th Cir. Mar. 11, 2005)* (Unpub. Disp.) (district court did not abuse its discretion in denying motion to withdraw admissions, where plaintiff "did not seek to withdraw the deemed admissions until the discovery cut-off had passed and defendants were unable to conduct discovery on the facts deemed admitted").

Even if Hazzard-Findley had filed a motion to withdraw the admissions and even had the court concluded that both prongs of the *Rule 36(b)* test could be met at this late date, however, whether to allow Hazzard-Findley to withdraw the admissions would still be a matter within the court's discretion. *Conlon, 474 F.3d at 624* ("We have not previously opined on whether *Rule 36(b)* requires a district court to grant relief when the moving party can satisfy the two-pronged test. We hold that it does not. The text of *Rule 36(b)* is permissive"). Among the factors the court properly takes into account in evaluating whether to exercise [*13] its discretion to permit withdrawal is whether the party who made the admissions can show good cause for her failure to respond to the admissions and for her failure to seek their withdrawal in a timely manner. See *Andreozzi, 2012 U.S. Dist. LEXIS 30210, 2012 WL 761380 at *2* ("Even if plaintiff were to file such a motion at this late day, . . . he would have to not only allege good cause for failing to respond to the request for admissions, but also show good cause for not requesting assistance from the court in a timely manner pursuant to *Rule 36(b)*"). See *Conlon, 474 F.3d at 624-25* (in deciding whether to exercise its discretion to permit withdrawal, the court can consider "other factors, including whether the moving party can show good cause for the delay"); see also *Global Express Capital Real Estate Inv. Fund I, 289 Fed. Appx. at 191* ("Even if Reese had satisfied both prongs of the 36(b) test, we would affirm the district court's denial of her motion to withdraw. The district court found that Reese did not have good cause for delay, and that her delay was part of her manipulative approach to the litigation and her abuse of the privilege against self-incrimination. The district court did not abuse its discretion [*14] in denying Reese's motion to withdraw her admissions"); *California Sportfishing Protection Alliance v. Callaway, No. 2:10-cv-1801 GEB GGH PS, 2012 U.S. Dist. LEXIS 75703, 2012 WL 1969206, *3 (E.D. Cal. May 31, 2012)* (noting that *Rule 36(b)* is permissive and that among the factors the district court can consider in exercising its discretion is "whether the moving party can show good cause for the delay"); *North American Lubricants Co. v. Terry, No. CIV S-11-1284 KJM GGH, 2012 U.S. Dist. LEXIS 4477, 2012 WL 113788, *3 (E.D. Cal. Jan. 13, 2012)* (same); *United States v. $24,059.00 in U.S. Currency, No. CV06-2100-PHX-MHM, 2008 U.S. Dist. LEXIS 6618, 2008 WL 249080, *8 (D. Ariz. Jan. 28, 2008)* ("Claimant has not shown good cause for the delay in responding to the Government's request for admissions. . . . [T]he Court will exercise its discretion under *Rule 36(b)* and deny Claimant's motion to withdraw or amend the matters admitted under *Rule 36(a)*").

Hazzard-Findley has not shown that there is good cause for her failure to respond to AGLA's requests for admission, or for her failure to seek timely leave to withdraw the admissions. Although Hazzard-Findley contends she never received the requests for admission and learned of them only when AGLA filed a motion for summary judgment, [*15] AGLA has filed proof that it served the requests for admission by mailing them to Hazzard-Findley at her address of record. [15] Hazzard-Findley adduces no admissible evidence that they were not received. Her declaration does not even mention her non-receipt of the RFAs or any reason for her failure to respond to the requests. While Hazzard-Findley is proceeding *pro se, pro se* plaintiffs are expected to follow the Federal Rules of Civil Procedure. See *Andreozzi, 2012 U.S. Dist. LEXIS 30210, 2012 WL 761380 at *2 n. 1* (citing *Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995)* ("Although Ghazali contends that he did not receive a copy of the motion to dismiss, the record indicates that Ghazali received notice pursuant to *Fed.R.Civ.P. 5(b)*. Moreover, Ghazali was given ample time to respond. . . . [P]ro se litigants are bound by the rules of procedure, Ghazali did not follow them, and his case was properly dismissed," citing *King v. Atiyeh, 814 F.2d 565, 567 (9th Cir.1987)*)); see also *Wyatt v. Zanchi, No. 1:09-cv-01242-BAM PC, 2011 U.S. Dist. LEXIS 133981, 2011 WL 5838438, *3 (E.D. Cal. Nov. 21, 2011)* (plaintiff failed to show good cause for the granting of his motion to withdraw admissions because his "conduct in completely failing to respond to Defendants['] [*16] discovery requests and attempt to meet and confer" demonstrated lack of due diligence, citing *Conlon, 474 F.3d at 625*). Hazzard-Findley also asserts that, even if she received the requests, she would not have been able to respond because she was recuperating from surgery at her daughter's house at the time they were served and was taking prescribed painkillers. [16] She does not, however, adduce any evidence supporting this contention.

Although Hazzard-Findley cites the declaration of "Marquetra Hazzard" as proof that she was staying at her daughter's house when the requests for admission were delivered, [17] she did not file the declaration of Marquetra Hazzard. Hazzard-Findley's own declaration does not mention her non-receipt of the requests for admission or her recuperation from surgery at her daughter's house. There is consequently no admissible evidence supporting the factual assertions she makes in her opposition concerning her inability to respond to the requests.

15 Maguire Decl., Exh. 1.
16 Opp. at 3 (citing Declaration of Marquetra Hazzard, ¶ 3).
17 *Id.*

Hazzard-Findley's account of her temporary stay at her daughter's house also does not explain why she did not receive and could not [*17] have responded to the requests for admission upon return to her own residence. The hospital discharge papers that Hazzard-Findley proffers indicate that she was discharged to return to work on August 6. [18] The requests for admission were served on July 31; this indicates that Hazzard-Findley had time to respond to them before the thirty-day deadline. The fact that Hazzard-Findley was prescribed oxycodone and hydrocodone when discharged from the hospital in late June does not demonstrate that she was still taking the drugs in late July and August -- and therefore unable to timely respond to the RFAs -- particularly given that she was released to return to work in August. [19]

18 Hazzard-Findley Decl., Exh. 1.
19 *Id.*

Because Hazzard-Findley has not shown good cause for her failure timely to respond to AGLA's requests for admission, because she has not filed a motion to withdraw or amend the admissions, and because, even had she filed such a motion, the court would likely deny it due to the prejudice AGLA would suffer, the court deems the requests admitted for purposes of deciding AGLA's summary judgment motion. [20]

20 See Maguire Decl., Exh. 1 ("Admissions"). At the hearing, Hazzard-Findley argued [*18] she was unaware she had to file a motion to withdraw the admissions. Hazzard-Findley did not, however, address the court's reasons for finding that she had not demonstrated good cause for her failure timely to respond to the requests for admission. Although she had an opportunity to address those reasons, and otherwise to comment on the tentative order, which the court provided to her prior to the hearing, Hazzard-Findley did not explain why she was unable to respond to the requests for admission after she was released by her doctor to return to work. She also failed to explain why she proffered no admissible evidence (such as her declaration or the declaration of "Marquetra Hazzard") as proof that she did not receive the requests for admission and that she recuperated at her daughter's house. Because Hazzard-Findley did not address the points set forth above concerning her failure to show good cause for untimely responding to the requests for admissions, the court concludes that it would have denied any motion to withdraw the requests even had one been filed.

C. Factual Background

On April 26, 2010, AGLA received Hazzard-Findley's signed application for an accident insurance policy. [*19] [21] On the basis of that application, AGLA issued an accident policy to Hazzard-Findley effective May 3, 2010. [22] On May 14, 2010, AGLA received a claim for accident benefits on behalf of and purportedly submitted by Hazzard-Findley. [23] The claim stated that Hazzard-Findley had sustained accidental injury resulting in the loss of her right arm and her right eye after a firework exploded in her hand. [24] The claim was accompanied by a Physician's Statement certifying Hazzard-Findley's loss of her right arm and right eye, together with itemized bills for services allegedly provided at Kaiser Hospital in Harbor City, California. [25]

21 Separate Statement of Uncontroverted Facts and Conclusions of Law ("Statement of Facts"), Docket No. 43-1 (Nov. 5, 2012), ¶ 1; Thackxton Decl., ¶ 4; *id.*, Exh. 1 (application).
22 Statement of Facts, ¶ 2; Thackxton Decl., ¶ 5; *id.*, Exh. 2 (accident policy).
23 Statement of Facts, ¶ 3; Thackxton Decl., ¶ 6; *id.*, Exh. 3 (claim).
24 *Id.*
25 Statement of Facts, ¶ 5; Thackxton Decl., ¶ 8; *id.*, Exhs. 3-7.

In response to the claim, AGLA made four payments to Hazzard-Findley:

- o 5/27/2010: $90,000 [26]
- o 5/27/2010: $60,000 [27]
- o 5/27/2010: $9,300 [28]
- o 5/28/2010: $30,000 [29]

26 Statement [*20] of Facts, ¶ 7; Thackxton Decl., ¶ 10; *id.* Exh. 4
27 Statement of Facts, ¶ 7; Thackxton Decl., ¶ 10; *id.* Exh. 5
28 Statement of Facts, ¶ 7; Thackxton Decl., ¶ 10; *id.* Exh. 6
29 Statement of Facts, ¶ 7; Thackxton Decl., ¶ 10; *id.* Exh. 7

It is undisputed that Hazzard-Findley was never injured in a fireworks accident. [30] Hazzard-Findley does not dispute that AGLA received an application in her name for an insurance policy; that AGLA issued a policy; and that AGLA received a claim for benefits falsely asserting that she had lost an arm and an eye. Indeed, she has submitted with her opposition many of the same documents AGLA proffers in support of the motion. [31] Hazzard-Findley denies, however, that she personally signed the application for insurance or submitted the claim for benefits and accompanying documentation. [32] She also denies that she received, endorsed, or negotiated any checks from AGLA. [33] Instead, she asserts that she is the victim of identity theft by her former husband and co-defendant, Charles Findley, who forged her signature on the relevant documents. [34]

30 Statement of Genuine Issues, ¶11.
31 See Hazzard-Findley Decl., Exh 4.
32 Statement of Genuine Issues.
33 Hazzard Findley Decl., [*21] ¶ 7.
34 *Id.*, ¶ 12.

II. DISCUSSION

A. Standard Governing Motions for Summary Judgment

A motion for summary judgment must be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *FED.R.CIV.PROC. 56.* A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. See *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).* Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue as to which the nonmoving party will have the burden of proof, however, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. See *id.* If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in *Rule 56,* [*22] "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); FED.R.CIV.PROC. 56(e)(2).* Evidence presented by the parties at the summary judgment stage must be admissible. *FED.R.CIV.PROC. 56(e)(1).* In reviewing the record, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most favorable to the nonmoving party. See *T.W. Electric Service, Inc. v. Pacific Electric Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987).*

B. Whether AGLA's Claims Have Been Discharged Through Hazzard-Findley's Bankruptcy

Pursuant to *11 U.S.C. § 523(a)(3)(B),* a debt for money obtained by fraud is not discharged where the debtor fails to schedule or list the debt in time to permit "timely filing of a proof of claim and timely request for a determination of dischargeability of the debt, unless the creditor had notice or actual knowledge of the case in time for such timely filing and request."

AGLA asserts that any debt incurred by Hazzard-Findley in this action was not discharged by her Chapter 7 bankruptcy because its claims are based on allegations of fraud, and because [*23] Hazzard-Findley failed to schedule or list the claims or otherwise alert AGLA to her bankruptcy filing. Hazzard-Findley does not appear to dispute AGLA's contention that any liability arising from this action was not discharged by her bankruptcy. Indeed, she concedes that she did not schedule or list the debt, a fact that is corroborated by the judicially noticeable documents. [35] She also does not dispute AGLA assertion that it did not receive notice of her bankruptcy proceeding until October 24, 2012. [36] The court concludes, therefore, that AGLA's claims have not been discharged through Hazzard-Findley's bankruptcy. See *DISH Network, LLC v. Sonicview USA, Inc., Civil No. 09-cv-1553-L (WVG), 2012 U.S. Dist. LEXIS 75663, 2012 WL 1965279, *12 (S.D. Cal. May 31, 2012);* see also *In re Beezley, 994 F.2d 1433 (9th Cir. 1993)* (" If the debt is of a type covered by *11 U.S.C. § 523(a)(3)(B)* [i.e., for fraud], it has not been discharged, and is non-dischargeable"); *id. at 1435-36* (O'Scannlian, J., concurring) ("The difference between subparagraphs (A) and (B) reflects the different rights enjoyed by and requirements imposed upon different kinds of creditors. For most creditors, the fundamental right enjoyed in bankruptcy [*24] is to file a claim, since this is the sine qua non of participating in any distribution of the estate's assets. *Section 523(a)(3)(A)* safeguards this right by excepting from discharge debts owed to creditors who did not know

about the case in time to file a claim. By contrast, for creditors holding intentional tort claims the salient rights are not only to file a claim but also to secure an adjudication of nondischargeability. Thus, *section 523(a)(3)(B)* excepts intentional tort debts from discharge notwithstanding the creditor's failure to file a timely complaint under *section 523(c)* if the creditor did not know about the case in time to file such a complaint (even if it was able to file a timely proof of claim)); see also *id. at 1437* ("As noted above, *section 523(a)(3)(B)* provides that, if the debt flows from an intentional tort . . . the debtor's failure to schedule in time to provide notice to the creditor of the need to seek an adjudication of dischargeability is conclusive (at least in the absence of actual knowledge of the bankruptcy on the part of the creditor). The debt is not discharged. 'Scheduling makes no difference to outcome. . . .'").

35 See Statement of Genuine Issues, [*25] ¶¶ 21-23; see also RJN, Exhs. 1-3.
36 Statement of Genuine Issues, ¶ 23.

C. Whether Hazzard-Findley Is Liable for Fraud

In California, fraud claims have five elements: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Small v. Fritz Cos., Inc., 30 Cal.4th 167, 173, 132 Cal. Rptr. 2d 490, 65 P.3d 1255 (2003)*; see also *City Solutions Inc. v. Clear Channel Communications, Inc., 365 F.3d 835, 839 (9th Cir. 2004).*

Hazzard-Findley's admissions and the evidence that AGLA has independently adduced in support of its motion for summary judgment establish all of the elements of AGLA's fraud claim. Both parties proffer Hazzard-Findley's claim for accident benefits, which states that a fireworks explosion resulted in the "complete loss" of her upper right limb and a vision loss in her right eye. [37] Hazzard-Findley admitted that she submitted the claim to AGLA even though she did not suffer the injuries described in it. [38] This evidence demonstrates that Hazzard-Findley made misrepresentations to AGLA. [39]

37 Hazzard-Findley Decl., Exh. 4; Thackxton Decl., Exh. 3. The claims [*26] appear to be consistent.
38 Admissions at 4. She also admitted that she forged the signature of the doctor that purportedly treated her. (*Id.* at 5.)
39 Although in her declaration Hazzard-Findley denies that she was the individual who submitted the claim to AGLA, and asserts instead that her ex-husband, Charles Findley, submitted the claim, the court disregards the declaration to the extent it contradicts Hazzard-Findley's admissions. As noted, matters deemed admitted under *Rule 36* are conclusively established and the court cannot consider evidence that is inconsistent with the admissions. See *999, 776 F.2d at 869-70*; *Cook, 337 F.Supp.2d at 1210.*

Hazzard-Findley also admitted that she "knowingly" and "willfully" made the representations regarding her purported injuries "with the intent of deceiving AGLA as to [her] alleged injuries" and as support for her claim for benefits. [40] She also admitted that she supplied fraudulent information about the purported injuries "with the knowledge that AGLA would rely upon it to pay benefits under [her] policy." [41] These admissions conclusively establish that Hazzard-Findley made misrepresentations to AGLA knowingly and with intent to defraud.

40 Admissions at 9-10.
41 *Id.*

It [*27] is an uncontroverted fact that AGLA made payments in response to the fraudulent claim for benefits. Hazzard-Findley's declaration includes no statements to the contrary. AGLA, for its part, has adduced evidence that it made payments to Hazzard-Findley. [42] Specifically, it has proffered copies of checks made payable to Hazzard-Findley. [43] Hazzard-Findley admitted that she received, endorsed, and negotiated the checks. [44] She also admitted, moreover, that AGLA justifiably relied on the information in her claim in deciding to pay benefits under the policy. [45] Hazzard-Findley admitted that there was no reason that AGLA should have suspected that the information she submitted in support of her claim was false, misleading, or untrue. [46] This evidence establishes that AGLA justifiably relied on Hazzard-Findley's misrepresentations, and also established that it was damaged as a result. Because the evidence in the record establishes all of the elements of fraud, the court grants summary judgment in AGLA's favor on its fraud claim. [47]

42 Thackxton Decl., ¶ 10; *id.*, Exhs. 4-7.
43 *Id.*
44 Admissions at 8-9. In her declaration, Hazzard-Findley asserts that she did not receive the benefits checks AGLA [*28] issued. (Hazzard-Findley Decl.,¶ 7.) For the reasons stated, however, the court must disregard this statement because it is contrary to the deemed admissions. (See *supra*, note 39.)
45 Admissions at 10.
46 *Id.*
47 At the hearing, Hazzard-Findley argued that the accident claim and proof of loss were so ob-

viously fraudulent that AGLA should have investigated further before making benefits payments. She asserted she should not be held liable for AGLA's negligence. A plaintiff's contributory negligence is no defense to an intentional tort like fraud, however. See *Godfrey v. Steinpress, 128 Cal.App.3d 154, 176, 180 Cal. Rptr. 95 (1982)* ("Steinpress cites no authority supporting his theory of contributory negligence as a defense to damages for . . . fraud by concealment. . . . We do not see how contributory negligence could have any application to fraud by concealment"); *Anderson v. Thacher, 76 Cal. App. 2d 50, 70, 172 P.2d 533 (1946)* ("When the misrepresentations are intentional rather than negligent plaintiff's negligence in failing to discover the falsity thereof is no defense," citing *Seeger v .Odell, 18 Cal.2d 409, 414, 115 P.2d 977 (1941))*. Hazzard-Findley's admissions, in conjunction with the evidence adduced by AGLA, establish that she [*29] committed the intentional tort of fraud.

D. Whether AGLA Is Entitled to Rescind the Policy

The parties are in agreement that an insured's concealment or misstatement of material facts in a claim for policy benefits entitles the insurer to void the insurance contract, [48] citing *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co., 156 Cal.App.4th 1259, 1270, 67 Cal. Rptr. 3d 917 (2007)* and *Cummings v. Fire Ins. Exchange, 202 Cal.App.3d 1407, 1419, 249 Cal. Rptr. 568 (1988)*. The parties' reliance on *LA Sound* is misplaced. *LA Sound* addressed the effect of an insured's concealment or misstatement of material facts in an *application* for policy benefits. See *Cummings, 202 Cal.App.3d at 1415 n. 7* (distinguishing between fraud on an application and fraud in a claim). The parties are nonetheless correct that an insurance contract can be rescinded based on fraudulent representations in a claim for insurance benefits.

48 See Motion at 7; Opp. at 4.

Typically, the "fraud and concealment" clause of an insurance contract provides that a fraudulent claim will void the policy. *Id.*; see also, e.g., *Ruffin Road Venture Lot IV v. Travelers Property Cas. Co. of America, No. 10-CV-11-JM, 2011 U.S. Dist. LEXIS 66095, 2011 WL 2463291, *10 n. 6 (S.D. Cal. June 20, 2011)*; *Winding v. Allstate Ins. Co., No. 2:09-cv-03526 KJM KJN, 2011 U.S. Dist. LEXIS 126257, 2011 WL 5241274, *16 (E.D. Cal. Nov. 1, 2011)* [*30] (citing *Ram v. Infinity Select Ins., 807 F. Supp. 2d 843, 2011 WL 3240475, *8 (N.D. Cal. July 29, 2011)* ("A fraud and concealment provision in an insurance contract will generally void the policy where an insured attempts to defraud the insurer")). AGLA has not cited such a clause in Hazzard-Findley's insurance policy, however, and the court has located none. [49]

49 See generally Thackxton Decl., Exh. 2.

Even in the absence of such a provision, however, the intentional concealment or misrepresentation of a material fact in an insurance claim can provide a basis for rescinding a policy under the California Insurance Code. Insurance Code *§ 331* provides: "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance." *CAL. INS. CODE § 331. Section 359* states: "If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false." *CAL. INS. CODE § 359.* Courts have held that these statutes apply to post-application representations made in benefits [*31] claims as well as to representations made in policy applications. See *Twin City Fire Ins. Co., Inc. v. Mitsubishi Motor Credit of America, Inc., No. SACV 04-00043 CAS, 2006 U.S. Dist. LEXIS 97165, 2006 WL 5164189, *11 (C.D. Cal. Aug. 15, 2006)* ("MMCA contends that, as a matter of law, post-issuance misrepresentations cannot provide the basis for a rescission claim . . . . The court disagrees"); *Mitchell v. United Nat. Ins. Co., 127 Cal.App.4th 457, 473, 25 Cal. Rptr. 3d 627 (2005)* ("Both Insurance Code *sections 331* and *359* . . . apply to misrepresentations made at any time . . . [and] allow[ ] the insurer to rescind the policy in the event of a negligent or unintentional misrepresentation").

For the reasons stated in its discussion of AGLA's fraud claim, the court concludes that the admissible evidence demonstrates that Hazzard-Findley made misrepresentations to AGLA in a claim for benefits. The insurance contract between Hazzard-Findley and AGLA may therefore be rescinded pursuant to Insurance Code *§ 359*. For this reason, the court grants summary judgment in AGLA's favor on its claim for rescission of Policy No. 125751532, issued to Sandra Findley. See *Commercial Union Ins. Cos. v. Greene*, No. CV 97-0393 SVW, 1998 WL 1661425, *2 (C.D. Cal. Sept. 25, 1998) [*32] ("the intentional concealment or misstatement of material facts in a claim entitles the insurer to void the contract").

E. Whether Hazzard-Findley Breached the Contract with AGLA

The elements of a breach of contract claim under California law are: (1) the existence of a valid contract; (2) plaintiff's performance or excuse for failure to perform; (3) defendant's breach; and (4) damages. *McKell v. Washington Mut., Inc., 142 Cal.App.4th 1457, 1489, 49 Cal. Rptr. 3d 227 (2006)*; see also *Landstar Ranger, Inc.*

v. Parth Enterprises, Inc., 725 F.Supp.2d 916, 920 (C.D. Cal. 2010).

California law requires that four elements be present before a valid contract is formed: (1) parties capable of contracting; (2) their mutual consent; (3) a lawful object; and (4) sufficient consideration. *Tenet Healthsystem Desert, Inc. v. Fortis Ins. Co., Inc., 520 F.Supp.2d 1184, 1193 (C.D. Cal. 2007)* (citing *CAL. CIV. CODE §§ 1550, 1565*). See also *RESTATEMENT (SECOND) OF CONTRACTS § 17* ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration"). "Contract formation . . . requires that the parties[ ] reach mutual assent or consent on definite or complete terms. [*33] . . . Mutual assent is accomplished when a specific offer is communicated to the offeree, and an acceptance is subsequently communicated to the offeror." *Netbula, LLC v. BindView Development Corp., 516 F.Supp.2d 1137, 1155 (N.D. Cal. 2007)* (citations omitted).

Hazzard-Findley admitted that she applied to AGLA for an insurance policy. [50] The parties have both proffered copies of Hazzard-Findley's application for insurance. [51] Hazzard-Findley admitted that the copy of her application submitted by AGLA is a true and correct copy. [52] She also admitted that she signed the application. [53] AGLA has adduced uncontroverted evidence that it issued a policy that insured Hazzard-Findley in response to her application. [54] The policy states that it is a legal contract between AGLA and Hazzard-Findley for the provision of accident insurance. [55] It also states that Hazzard-Findley had the right to return the policy within ten days to void the contract. [56] There is no evidence that Hazzard-Findley did so. The policy provides for the payment of premiums by Hazzard-Findley to AGLA for accident insurance. [57] The record thus establishes that parties capable of contracting (AGLA and Hazzard-Findley) consented [*34] to a lawful object (the provision of accident insurance) for sufficient consideration (the payment of premiums). The court finds, therefore, that a valid contract existed between the parties.

50 Admissions at 2. In her declaration, Hazzard-Findley denies applying for an insurance policy, and contends her husband signed the application. (Hazzard Findley Decl., ¶ 4.) For the reasons stated, however, the court disregards the declaration to the extent it contradicts the requests for admission deemed admitted pursuant to *Rule 36*. (See *supra*, note 39.)

51 Thackxton Decl., 1; Hazzard-Findley Decl. Exh. 3. The parties' copies of the application appear to be consistent.

52 Admissions at 2.

53 *Id.* at 3.

54 Thackxton Decl., Exh. 2.

55 *Id.* at 1.

56 *Id.*

57 *Id.*

Based on the evidence and admissions cited in the court's discussion of AGLA's fraud claim, the court finds that AGLA paid Hazzard-Findley benefits on receipt of her fraudulent claim. AGLA thus performed under the insurance contract. [58]

58 See *id.* ("The company agrees to pay the Benefits described in this policy").

AGLA asserts that Hazzard-Findley breached the contract by submitting a claim for accidental injury without having sustained one. It does not, however, [*35] identify the specific provision of the contract Hazzard-Findley breached. Although AGLA suggests in general terms that Hazzard-Findley breached "a provision which obligated her not to provide a false or fraudulent claim for the payment of a loss," [59] its complaint, its motion for summary judgment and its statement of uncontroverted facts do not cite the specific provision allegedly breached or identifies the location of the provision in the insurance contract. As noted in its discussion of AGLA's rescission claim, the court did not locate a "fraud and concealment" clause in its review of the insurance policy. Because the evidence does not establish the existence of "a provision which obligated [Hazzard-Findley] not to provide a false or fraudulent claim for the payment of a loss," the court denies AGLA's motion for summary judgment on its breach of contract claim to the extent it relies on Hazzard-Findley's breach of such a provision. [60]

59 See Complaint, ¶ 51 ("Sandra Findley specifically acknowledged that her claim was submitted under a provision which obligated her not to provide a false or fraudulent claim for the payment of a loss").

60 Hazzard-Findley's fraudulent conduct likely [*36] breached the covenant of good faith and fair dealing implied in the insurance contract. See *Kransco v. American Empire Surplus Lines Ins. Co., 23 Cal.4th 390, 400-02, 97 Cal. Rptr. 2d 151, 2 P.3d 1 (2000)* (noting that the "duty of good faith and fair dealing in an insurance policy is a two-way street, running from the insured to his insurer as well as vice versa"); *Orient Handel v. United States Fid. & Guar. Co., 192 Cal.App.3d 684, 696-97, 237 Cal. Rptr. 667 (1987)* (suggesting that a claim for breach of the implied covenant would lie against an insured who submitted a false or fraudulent insurance claim); H. Walter Croskey, et al., CALIFORNIA

PRACTICE GUIDE: INSURANCE LITIGATION §§ 12:120, 12:123 (2012). See also *Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546 (1st Cir. 1994)* (stating that submission of a fraudulent insurance claim was so "fundamental [a breach that it was] a bar to the assertion of any further rights under the contract by the party guilty of the breach. This is a basic rule of contract law. It applies to insurance contracts as well as other contracts," citing E. Allan Farnsworth, CONTRACTS 632-38 (2d ed. 1990)); *RW Power Partners, L.P. v. Virginia Elec. and Power Co., 899 F.Supp. 1490, 1496 (E.D. Va. 1995)* ("a [*37] material breach is one that goes "to the root of the contract." In other words, a material breach 'deprive [s] the injured party of the benefit that the party justifiably expected from the exchange.' Conversely, a breach that does not undermine the fundamental expectations of the parties cannot be the basis for cancellation," citing FARNSWORTH ON CONTRACTS, Material Breach and Suspension, § 8.16). AGLA did not plead a claim for breach of the implied covenant, however.

AGLA's allegations also suggest that Hazzard-Findley breached the notice of loss and proof of loss provisions in the insurance contract. AGLA alleges that the policy "requires the insured to provide timely, written notice of loss and written proof of loss." [61] Although AGLA's complaint does not specifically allege that Hazzard-Findley breached these contractual requirements, it does assert that Hazzard-Findley submitted a fraudulent claim "pursuant to the written Notice of Loss and written Proof of Loss obligations she had under the Policy." [62]

61 Complaint, ¶ 39.
62 *Id.*, ¶ 50.

AGLA's statement of uncontroverted facts in support of its motion for summary judgment does not reference a notice of loss/proof of loss term in the [*38] policy; indeed, it does not mention Hazzard-Findley's breach of such a provision. AGLA's memorandum of points and authorities also fails to identify with specificity a notice of loss or proof of loss provision that Hazzard-Findley breached. To the extent AGLA's motion for summary judgment on its breach of contract claim is based on a notice of loss/proof of loss provision, therefore, the court could deny it for this reason alone. [63] See *Celotex, 477 U.S. at 323* (the burden is on the movant to "identify[ ] those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact"). Cf. *Coppes v. Wachovia, No. 2:10-cv-01689-GEB-DAD, 2011 U.S. Dist. LEXIS 42061, 2011 WL 1402878, *6 (E.D. Cal. Apr. 13, 2011)* ("Plaintiff's claim for breach of contract . . . contains no allegation specifying what terms of the contract Wachovia breached or how Wachovia breached the contract. . . . Therefore, Plaintiff's breach of contract claim is dismissed").

63 AGLA's complaint also alleges that the insurance policy required that Hazzard-Findley cooperate with it in any investigation of a claim under the policy, citing the following provision:

> "You and/or any other person claiming benefits [*39] under this Policy shall cooperate with Us and Our investigation of a claim under this Policy by providing assistance including, but not limited to, the completion and submission to Us of any questionnaire or authorization form needed, in Our opinion, to conduct such investigation." (*Id.* ¶ 12.)

This language is included in the policy AGLA proffered in support of its motion for summary judgment. Although AGLA identifies the contract term as a "relevant provision" in its complaint, it does not specifically allege that Hazzard-Findley failed to cooperate in its investigation of the claim or that she otherwise breached this provision. Nor does it argue, in its motion for summary judgment, that Hazzard-Findley failed to cooperate in the investigation of her claim or otherwise. AGLA's statement of facts does not assert that Hazzard-Findley breached the cooperation provision, nor does it identify the evidence that demonstrates she did. While intuitively it might seem that submission of a fraudulent claim violates an insured's duty to cooperate, see, e.g., *Great American Ins. Co. v. Chang, No. 12-00833-SC, 2012 U.S. Dist. LEXIS 120703, 2012 WL 3660005, *2 (N.D. Cal. Aug. 24, 2012)* (concluding that an insurer had adequately [*40] alleged that defendants breached the cooperation clause in an insurance policy by fabricating a defense obligation on the part of the insurer); see also *P&B Autobody, 43 F.3d at 1570* (stating that an attempt to defraud the insurer is a violation of the policy's cooperation clause, citing *Airway Underwriters v. Perry, 362 Mass. 164, 284 N.E.2d 604 (1972))*, AGLA does not mention the cooperation clause in its motion, and does not demonstrate that submission of a fraudulent claim -- which is the act that commences an investigation -- by itself breaches a cooperation clause that

requires post-claim submission cooperation with the insurer's investigation if the insurer seeks no post-claim information from the insured. In *Chang*, for example, it appears that the conduct the court found adequate to state a breach of the cooperation clause claim post-dated its tender of a claim to the insurer. See *Chang, 2012 U.S. Dist. LEXIS 120703, 2012 WL 3660005 at *2*. Consequently, the court declines to enter summary judgment for AGLA on its breach of contract claim based on a theory only tangentially raised in its complaint, and not argued in its motion.

Even were the court to rely on its own review of the insurance contract, it is not clear that the [*41] notice of claim and proof of loss provisions included therein would support AGLA's breach of contract claim against Hazzard-Findley. The policy's notice of claim provision states: "You must give us written notice of loss within 60 days after a covered loss is incurred or as soon thereafter as possible." [64] The proof of loss provision states: "You must give us written proof of loss within 90 days after the date of loss." [65] Neither provision includes a "fraud or concealment" clause. The plain language of the provisions does not trigger any obligation on the part of the insured in the absence of an actual, covered loss. [66] The provisions outline, rather, the steps the insured must follow before the insurer's obligation to pay benefits is triggered. AGLA has cited no authority indicating that the court should find that the notice of claim and proof of loss provisions are breached by the submission of a fraudulent claim, and in the absence of such authority, the court declines to make such a finding.

64 Thackxton Decl., Exh. 2 at 10.

65 *Id.*

66 Compare *Twin City, 2006 U.S. Dist. LEXIS 97165, 2006 WL 5164189 at *9* (denying motion to dismiss breach of contact claim based on insured's failure to timely report a loss, as required [*42] by notice provision in insurance contract, where the loss actually occurred).

For all of these reasons, the court concludes that AGLA has failed to meet its burden of adducing evidence that Hazzard-Findley breached an express term of the insurance contract. Because it has not identified a contract term that Hazzard-Findley breached, the court denies AGLA's motion for summary judgment on its breach of contract claim. Cf. *Zepeda v. PayPal, 777 F.Supp.2d 1215, 1220 (N.D. Cal. 2011)* ("Plaintiffs also allege that PayPal breached the express terms of the user agreement. . . . This argument also is unpersuasive, as Plaintiffs do not identify a provision in the user agreement that imposes an affirmative duty on PayPal").

Finally, the court notes that AGLA's breach of contract claim is based on the same conduct, and seeks the same damages, as its fraud claim. If AGLA prevailed on its breach of contract claim, therefore, the court would have to ensure that there was no double recovery on two different claims for the same injury. See *Great Am. Ins. Co. v. Wexler Ins. Agency, No. CV97-9397 MMM, 2000 U.S. Dist. LEXIS 6592, 2000 WL 290380, *19 (C.D. Cal. Feb. 18, 2000)* ("Because this recovery is duplicative of that on the breach [*43] of contract claim, the court will make a single award of compensatory damages," citing *People v. Chevron Corp., 872 F.2d 1410, 1414 (9th Cir. 1989)* ("On remand, . . . the district court should take all necessary steps to ensure that the plaintiff is not permitted double recovery for what are essentially two different claims for the same injury")); see also *Diversified Graphics Ltd. v. Groves, 868 F.2d 293, 295 (8th Cir. 1989)* ("In instances where a party's claims are simply alternative theories seeking relief for the same injury, that party is not entitled to a separate compensatory damage award under each legal theory. On the contrary, he is entitled only to one compensatory damage award if liability is found on any or all of the theories involved" (internal quotations omitted)); *Walker v. Signal Cos., Inc., 84 Cal.App.3d 982, 996, 149 Cal. Rptr. 119 (1978)* ("When we search the record for some factual basis for the judgment based on fraud, we are unable to find any item not otherwise included within the compensatory award for breach of contract. Only one compensatory award for damages in favor of the plaintiffs is proper and, accordingly, we modify the judgment"). [67]

67 Courts have applied California's [*44] economic loss rule to bar fraud claims where "the damages plaintiffs seek are the same economic losses [as those] arising from [an] alleged breach of contract." *Foster Poultry Farms v. Alkar Rapidpak MP Equipment, Inc., 868 F.Supp.2d 983, 991-92 (E.D. Cal. 2012)* (citing *Multifamily Captive Group, LLC v. Assurance Risk Managers, Inc., 629 F.Supp.2d 1135, 1146 (E.D.Cal. 2009))*; see also *Alvarado Orthopedic Research, L.P. v. Linvatec Corp., No. 11-CV-246-IEG (RBB), 2011 U.S. Dist. LEXIS 94142, 2011 WL 3703192, *3 (S.D. Cal. Aug. 23, 2011))*. The court need not determine whether the economic loss rule precludes AGLA's fraud claim because it finds that AGLA has failed to adduce evidence establishing a breach of contract.

The court therefore denies AGLA's motion for summary judgment on its breach of contract claim.

F. Whether AGLA Is Entitled to Restitution from Hazzard-Findley

AGLA's tenth cause of action asserts a claim for restitution. Under California law, there is no stand-alone cause of action for restitution. *In re iPhone App. Litig., 844 F.Supp.2d 1040, 1075 (N.D. Cal. 2012)* ("California does not recognize a cause of action for restitution"); *Munoz v. MacMillan, 195 Cal.App.4th 648, 661, 124 Cal. Rptr. 3d 664 (2011)* ("There is no freestanding [*45] cause of action for 'restitution' in California"). Rather, restitution is a form of equitable relief that the court can grant on various legal theories. *Robinson v. HSBC Bank USA, 732 F.Supp.2d 976, 987 (N.D. Cal. 2010)* ("There is no cause of action for restitution, but there are various causes of action that give rise to restitution as a remedy").

"Restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason." *McBride v. Boughton, 123 Cal.App.4th 379, 389, 20 Cal. Rptr. 3d 115 (2004)* (citing 3 B. Witkin, CAL. PROCEDURE, Actions, §§ 148-150, pp. 218-220 (4th ed. 1996); 1 B. Witkin, SUMMARY OF CAL. LAW, Contracts, §§ 112, 118, pp. 137-138, 142-144) (9th ed. 1987)). Restitution may also be awarded where the defendant obtained a benefit from the plaintiff by fraud. *Id.* AGLA's claim for restitution appears to be based on a quasi-contract theory. [68] A quasi-contract theory supports a restitutionary remedy "when an unjust enrichment has occurred. Often called quantum meruit, it applies '[w]here one obtains a benefit which he may not justly retain. . . . [It] is an obligation created by [*46] the law without regard to the intention of the parties, . . . designed to restore the aggrieved party to his former position by return of the thing or its equivalent in money." *McBride, 123 Cal.App.4th at 388 n. 6* (citing 1 B. Witkin, SUMMARY OF CAL. LAW, Contracts, § 91, p. 122).

68 See Complaint, ¶¶ 99-101.

It is a "general principle of equity" that a court will not award equitable relief such as restitution when a plaintiff's remedies at law are adequate. *Collins v. eMachines, Inc., 202 Cal. App. 4th 249, 260, 134 Cal. Rptr. 3d 588 (2011)*; see also *Stationary Engineers Local 39 Health & Welfare Trust Fund v. Philip Morris, Inc., No. C-97-01519 DLJ, 1998 U.S. Dist. LEXIS 8302, 1998 WL 476265, *18 (N.D. Cal. Apr. 30, 1998)* ("It is a basic doctrine of jurisprudence that an equitable action is barred where there is an adequate remedy at law against the same person from whom relief in equity is sought"). AGLA's quantum meruit/restitution claim seeks return of the $189,300 in benefits it paid to Hazzard-Findley as a result of her fraudulent claim. [69] AGLA's fraud claim seeks the same $189,300 as damages. [70] The restitution AGLA seeks is thus the "same measure of relief that [it] advance[s] for [its] fraud cause of action." *Id.* ("Although packaged [*47] as a restitution and unjust enrichment claim, the remedy plaintiffs seek is an alternative measure of legal damages. It is the same measure of relief that plaintiffs advance for their fraud cause of action").

69 *Id.*

70 See *id.*, ¶ 93 (claiming $189,300 in damages); see also Motion at 7 (same).

Because the court concludes that AGLA is entitled to summary judgment on its fraud claim, AGLA cannot show that it has no adequate remedy at law to recover the $189,300 from Hazzard-Findley. The court therefore denies AGLA's motion for summary judgment on its restitution claim. See *Bd. of Trustees of the Laborers Pension Trust Fund for N. Cal. v. Pastran, No. C 09-05979 WHA, 2010 U.S. Dist. LEXIS 106180, 2010 WL 3789836, *3 (N.D. Cal. Sept. 27, 2010)* (denying to award restitution where plaintiff "more than sufficiently demonstrated its entitlement to the full relief requested under its claims for fraud, conversion, and equitable restitution under ERISA"); *Philip Morris, 1998 U.S. Dist. LEXIS 8302, 1998 WL 476265 at *18* ("Because plaintiffs may be able to state claims for fraud and misrepresentation and negligent breach of intentional duty, plaintiffs cannot show that there is no adequate remedy at law," citing *Mort v. United States, 86 F.3d 890 (9th Cir. 1996))*; [*48] *Collins, 202 Cal.App.4th at 260* ("In light of the adequate legal remedies, we conclude the complaint does not state a claim for restitution based on unjust enrichment").

G. Whether AGLA Is Entitled to Punitive Damages

Under California law, a plaintiff may obtain punitive damages if it demonstrates "by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice[.]" *CAL. CIV. CODE § 3294(a)*; see also *Compass Bank v. Petersen, 886 F. Supp. 2d 1186, 2012 WL 3306613, *8 (C.D. Cal. Aug. 10, 2012)* (finding that plaintiff was entitled to recover punitive damages, where it proved that it was entitled to summary judgment on its fraud claim and defendants acted with intent to defraud).

The purpose of punitive damages is "a purely public one." *Adams v. Murakami, 54 Cal.3d 105, 110, 284 Cal. Rptr. 318, 813 P.2d 1348 (1991)*. As the California Supreme Court has stated:

> "The public's goal is to punish wrongdoing and thereby to protect itself from future misconduct, either by the same defendant or other potential wrongdoers. The essential question therefore in every case must be whether the amount of

damages awarded substantially serves the societal interest." *Id.*

To [*49] assess the amount of punitive damages that is appropriate in a given case, the court considers the nature of the defendant's wrongdoing, the amount of compensatory damages, and the wealth of the particular defendant. "The function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." *Id.* (citing *Neal v. Farmers Ins. Exchange, 21 Cal.3d 910, 928, 148 Cal. Rptr. 389, 582 P.2d 980 (1978))*. A reasonable punitive damages award should reflect the degree of reprehensibility of the defendant's conduct, the ratio between the actual harm suffered by the plaintiff and the amount of punitive damages, and the amount of civil penalties that might be imposed in comparable cases. *State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419-27, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)*.

AGLA asserts that it is entitled to punitive damages because Hazzard-Findley engaged in fraud. For the reasons stated in the court's discussion of AGLA's fraud claim, AGLA has demonstrated by clear and convincing evidence that Hazzard-Findley acted fraudulently. Certainly, the public has an interest in deterring insurance fraud. The court therefore enters [*50] summary judgment in AGLA's favor on its prayer for punitive damages.

AGLA requests that the court award $500,000 in punitive damages. Taking into account Hazzard-Findley's financial position, the nature of her conduct, and the harm AGLA suffered, the court finds the punitive damages award requested by AGLA is excessive.

Hazzard-Findley's fraudulent conduct was solely economic and did not involve a vulnerable victim. She did not act with indifference to or in reckless disregard of the health or safety of others, and there is no evidence that this was anything but an isolated incident. Although her actions "merit[ ] no praise," the court finds that "a modest punishment" will satisfy the objective of punishing the reprehensibility of her conduct. See *Jet Source Charter, Inc. v. Doherty, 148 Cal.App.4th 1, 9, 55 Cal. Rptr. 3d 176 (2007)* (quoting *Campbell, 538 U.S. at 419-20* ("While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further")).

A smaller amount will also adequately satisfy the goals [*51] to be achieved by a punitive damages award in light of Hazzard-Findley's financial state. AGLA has proffered evidence of Hazzard-Findley's bankruptcy filing, which demonstrates that she is a person of modest means. The documents reflect that Hazzard-Findley's net worth is zero or close to zero. An award of punitive damages should be proportional to the defendant's ability to pay. See *Adams, 54 Cal.3d at 110* (an award can be "so disproportionate to the defendant's ability to pay that the award is excessive for that reason alone"); *Egan v. Mutual of Omaha Ins. Co., 24 Cal.3d 809, 824, 169 Cal. Rptr. 691, 620 P.2d 141 (1979)* (rejecting a punitive damages award that exceeded more than two and one-half months of a defendant's annual net income); *Zhadan v. Downtown L.A. Motors, 66 Cal.App.3d 481, 500, 136 Cal. Rptr. 132 (1976)* (rejecting a punitive damages award that exceeded more than one-third of a defendant's net worth); *Merlo v. Standard Life & Accident Ins. Co., 59 Cal.App.3d 5, 18, 130 Cal. Rptr. 416 (1976)* (rejecting a punitive damages award that constituted almost one-third of a defendant's net worth). It is a fundamental principle that punitive damages must not be so large that they destroy the defendant. *Rufo v. Simpson, 86 Cal.App.4th 573, 620, 103 Cal. Rptr. 2d 492 (2001)*.

The [*52] documents that AGLA has submitted indicate that Hazzard-Findley has no assets and earns roughly $3,000 in monthly income. [71] As a consequence, the court finds that a punitive damages award of $6,000 is appropriate. This amount is proportional to Hazzard-Findley's ability to pay. Given her financial state, punitive damages in this amount, combined with a compensatory damages award of $189,300 and substantial interest on the judgment, will be sufficient to punish Hazzard-Findley's behavior and deter others from committing similar acts in the future. Cf. *Craigslist, Inc. v. Mesiab, No. C 08-05064 CW, 2010 U.S. Dist. LEXIS 134411, 2010 WL 5300883, *14 (N.D. Cal. Nov. 15, 2010)* (concluding, in a case where defendant claimed that he had zero net worth, a punitive damages award was unnecessary because compensatory damages were sufficient to punish defendant and deter similar conduct); *Eldorado Stone, LLC v. Renaissance Stone, Inc., No. 04cv2562 JM(CAB), 2007 U.S. Dist. LEXIS 60885, 2007 WL 2403572, *4 (S.D. Cal. Aug. 20, 2007)* (denying a motion for punitive damages in light of a defendant's negative net worth). Accordingly, the court awards AGLA punitive damages of $6,000.

71 See RJN, Exh. 1.

H. Whether AGLA Is Entitled to Interest on the Judgment

1. [*53] Whether AGLA Is Entitled to Prejudgment Interest

AGLA additionally seeks prejudgment interest on the damages awarded under *California Civil Code § 3287(a)*. Under this statute, "[e]very person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt." *Evanston Ins. Co. v. OEA, Inc., 566 F.3d 915, 920 (9th Cir. 2009)*. California has set the applicable rate of annual interest at 10 percent per annum where the basis for recovery is contractual in nature. See *CAL. CIV. CODE § 3289(b)* ("If a contract entered into after January 1, 1986 does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach"). Where the basis for recovery is tort damages, however, courts have applied an interest rate of 7 percent per annum. *Family Tree Farms, LLC v. Alfa Quality Produce, Inc., No. 1:08-cv-00481-AWI-SMS, 2009 U.S. Dist. LEXIS 16940, 2009 WL 565568, *9 (E.D. Cal. Mar. 5, 2009)* ("[B]ecause there [*54] is no legislative act specifying the rate of prejudgment interest for a fraud claim, the rate set forth in *Cal. Const., art. XV, § 1*, of seven per cent per annum, is applicable to the award of tort damages. . . . Plaintiff has not established entitlement to prejudgment interest of ten per cent on the tort claims"); *Children's Hospital and Medical Center v. Bonta, 97 Cal. App. 4th 740, 775, 118 Cal. Rptr. 2d 629 (2002)*, cert. denied, *537 U.S. 1160, 123 S. Ct. 977, 154 L. Ed. 2d 895 (2003)*.

"Damages are deemed certain or capable of being made certain within the provisions of *subdivision (a) of section 3287* where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage." *U.S. Fidelity & Guar. Co. v. Lee Investments, LLC, No. CV-F-99-5583 OWW, 2009 U.S. Dist. LEXIS 72366, 2009 WL 2423748, *19 (E.D. Cal. Aug. 5, 2009)* (quoting *Esgro Central, Inc. v. General Ins. Co., 20 Cal.App.3d 1054, 1060, 98 Cal. Rptr. 153 (1971))*; see also *Evanston, 566 F.3d at 921* ("It is clear that . . . *[§ 3287(a)]* requires that the amount [of damages] must be vested, not that the legal entitlement to that amount be vested"). *Section 3287(a)* does not authorize prejudgment interest [*55] where the amount of damage, as opposed to the determination of liability, "depends upon a judicial determination based upon conflicting evidence and it is not ascertainable from truthful data supplied by the claimant to his debtor." *U.S. Fidelity & Guar. Co., 2009 U.S. Dist. LEXIS 72366, 2009 WL 2423748 at *19* (quoting *Bonta, 97 Cal.App.4th at 774*).

Here, there is and has been no dispute concerning the basis for computation of damages. It has been clear that the damages claimed are the amount of benefits AGLA paid under Hazzard-Findley's insurance policy in response to the fraudulent claim. The parties' dispute has centered on the issue of liability: Hazzard-Findley has asserted that Charles Findley is liable for the damage, while AGLA has asserted that she is liable. Because the $189,300 in damages AGLA incurred were "certain or capable of being made certain" on the date that AGLA made its last payment to Hazzard-Findley, AGLA is entitled to prejudgment interest at the rate of 7 percent per annum beginning from that date. Applying a 7 percent annual rate of interest from May 28, 2010 until the date of this order yields $36,652.27 in prejudgment interest. [72]

72 See Thackxton Decl., ¶ 10 (identifying the last payment [*56] date as May 28, 2010); *id.*, Exh. 7 (check dated May 28, 2010). The court calculates this amount as follows: $189,300 x .07 x 2.766 years.

2. Whether AGLA Is Entitled to Post-Judgment Interest

AGLA also seeks post-judgment interest. Under *28 U.S.C. § 1961(a)*, interest "shall be allowed on any money judgment in a civil case recovered in a district court." See also *Air Separation, Inc. v. Underwriters at Lloyd's of London, 45 F.3d 288, 290 (9th Cir.1995)* ("Under the provisions of *28 U.S.C. § 1961*, postjudgment interest on a district court judgment is mandatory," citing *Perkins v. Standard Oil Co., 487 F.2d 672, 674 (9th Cir.1973))*. The post-judgment interest rate is set "at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding . . . the date of the judgment." *28 U.S.C. § 1961(a)*. Accordingly, the court will award post-judgment interest at 0.15% per year.

III. CONCLUSION

For the reasons stated, AGLA's motion for summary judgment is granted. The court will enter judgment awarding compensatory damages of $189,300, $6,000 in punitive damages, and $36,652.27 in prejudgment [*57] interest. The court grants AGLA's prayer for post-judgment interest at 0.15% per year.

DATED: March 15, 2013

/s/ Margaret M. Morrow

MARGARET M. MORROW

UNITED STATES DISTRICT JUDGE

TSEGAI HAILE, Plaintiff, v. SANTA ROSA MEMORIAL HOSPITAL, Defendant.

No. C-08-04149 MMC (EDL)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 122589; 75 Fed. R. Serv. 3d (Callaghan) 592

December 17, 2009, Decided
December 17, 2009, Filed

SUBSEQUENT HISTORY: Costs and fees proceeding at, Motion denied by *Haile v. Santa Rosa Mem. Hosp., 2011 U.S. Dist. LEXIS 25032 (N.D. Cal., Mar. 1, 2011)*

PRIOR HISTORY: *Haile v. Santa Rosa Mem. Hosp., 2009 U.S. Dist. LEXIS 31922 (N.D. Cal., Apr. 15, 2009)*

COUNSEL: [*1] For Tsegai Haile, Plaintiff: David M. Poore, LEAD ATTORNEY, Kahn Brown & Poore LLP, Petaluma, CA.

For Santa Rosa Memorial Hospital, Defendant: Christopher Gary Ward, Foley & Lardner LLP, Los Angeles, CA; Kevin Francis Woodall, Foley & Lardner LLP, San Francisco, CA.

JUDGES: ELIZABETH D. LAPORTE, United States Magistrate Judge.

OPINION BY: ELIZABETH D. LAPORTE

OPINION

ORDER DENYING PLAINTIFF'S MOTION TO HAVE ADMISSIONS WITHDRAW OR AMENDED

On September 15, 2009, Plaintiff filed a letter seeking to modify the Court's September 1, 2009 discovery order, arguing that the Court erred in granting Defendant's request that the matters contained in Requests for Admissions were deemed admitted pursuant to *Federal Rule of Civil Procedure 36(a)(3). See* Sept. 1, 2009 Order at 2. On September 16, 2009, Defendant filed a response to Plaintiff's September 15, 2009 letter. On September 22, 2009, the Court issued an order denying Plaintiff's request for modification of the September 1, 2009 Order, stating that:

> The Court carefully reviewed the proposed order submitted by Defendant following the August 25, 2009 hearing before signing it. Although the Court did not hear oral argument on the issue of the Requests for Admission, the issue [*2] was briefed, and the Order correctly reflects the automatic operation of *Federal Rule of Civil Procedure 36(a)(3). See Fed. R. Civ. P. 36(a)(3)* ("A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney."). In this case, because Plaintiff did not serve responses to Defendant's Requests for Admission when they were due, the Requests were deemed admitted. Plaintiff's recourse is to move to have the admissions withdrawn or amended pursuant to *Federal Rule of Civil Procedure 36(b).*

See Sept. 1, 2009 Order at 1-2. Thereafter, on October 22, 2009, Plaintiff filed this Motion to Have Admissions Deemed Withdrawn or Amended. The motion was fully briefed and the Court held a hearing on December 1, 2009. For the reasons stated at the hearing and in this Order, Plaintiff's Motion is denied.

Discussion

If a party does not respond to Requests for Admission, the Requests are deemed admitted. *See Fed. R. Civ.*

P. 36(a)(3). A matter that is admitted under this Rule is conclusively established unless the court permits the admission [*3] to be withdrawn or amended. *See Fed. R. Civ. P. 36(b)* ("Pursuant to *Rule 16(e)*, the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits.").

Rule 36(b) is permissive, and a district court's ruling under the Rule is reviewed for abuse of discretion. *See Conlon v. United States, 474 F.3d 616, 621 (9th Cir. 2007)*; *see also 999 v. C.I.T. Corp., 776 F.2d 866, 869 (9th Cir. 1985)*. Even if the two prongs of *Rule 36(b)* are satisfied, a court may still deny relief. *See id. at 624* ("Therefore, when a district court finds that the merits of the action will be subserved and the nonmoving party will not be prejudiced, it 'may' allow withdrawal, but is not required to do so under the text of *Rule 36(b)*."). Specifically, ". . . in deciding whether to exercise its discretion when the moving party has met the two-pronged test of *Rule 36(b)*, the district court may consider other factors, including whether the moving party can show good cause for the delay and whether the moving party appears to have a strong case on the [*4] merits." *See id. at 625*.

Presentation of the merits

"'The first half of the test in *Rule 36(b)* is satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case.'" *Conlon, 474 F.3d at 621* (quoting *Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995))*. In *Conlon*, the plaintiff alleged that the Parole Commission was negligent in issuing a warrant for his arrest which resulted in his incarceration. *See id. at 619*. The plaintiff failed to respond to Requests for Admission even though the government communicated with him about the consequences of failing to do so. *See id. at 619-20*. The Requests at issue included that the "issuance of the warrant was not caused by any negligent or wrongful act," that the "arrest was not caused by any negligent or wrongful act, and that "no portion of incarceration was caused by any negligent or wrongful act." *See id. at 620*. The *Conlon* court found that Plaintiff satisfied the first prong of the *Rule 36(b)* analysis because the government had relied on the deemed admissions in its motion for summary judgment, which was granted. *See id. at 622*. The deemed admissions eliminated any need for presentation on [*5] the merits because by operation of *Rule 36*, the plaintiff had admitted that "neither the issuance of the warrant, his arrest or subsequent incarceration were caused by the negligent or wrongful acts of the defendant." *See id.*

Here, Plaintiff has not met the first prong of the *Conlon* test. Plaintiff argues that "the deemed admissions would result in terminating sanctions against plaintiff as to most of his discrimination, harassment and related claims on the statute of limitations grounds." Mot. at 5. For example, Request for Admission number 25 asks Plaintiff to admit that the "continued subjecting of you to discrimination, harassment, retaliation and unequal treatment in response to your complaints as stated in Paragraph 21 of your Complaint occurred prior to December 26, 2005." *See* Ward Decl. Ex. A. Plaintiff argues that if this Request is deemed admitted, there would be little need for presentation of the case on its merits, and it is also inaccurate because the termination took place months after that. *See* Reply at 4-5. However, the Requests reflect the allegations in Plaintiff's complaint. In addition, the Requests do not relate to Plaintiff's termination, so he would not be precluded [*6] from presentation of evidence regarding the merits of his claim that he was unlawfully terminated. Moreover, Plaintiff partially defeated Defendant's Motion for Summary Judgment on the grounds that there were triable issues of fact as to whether Plaintiff should be equitably excused from failing to timely initiate this action. Those equitable arguments may still be presented at trial even if the Requests are deemed admitted. Defendants stated in their opposition and at the hearing that they will not seek an *in limine* order barring Plaintiff from presenting evidence relating to the timeframe of his allegations as a result of his admissions. *See* Opp. at n. 3. Under these circumstances, the deemed admissions will not "practically eliminate any presentation on the merits" of Plaintiff's claims.

Prejudice

Under the second prong of the *Conlon* test, the party relying on the deemed admission has the burden of proving prejudice: "The prejudice contemplated by *Rule 36(b)* is not simply that the party who obtained the admission will now have to convince the factfinder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key [*7] witnesses, because of the sudden need to obtain evidence with respect to the questions previously deemed admitted." *Conlon, 474 F.3d at 622* (quoting *Hadley, 45 F.3d at 1348*) (internal citation omitted). In *Conlon*, the prejudice prong was met, even though it was a close question, because the government relied on the deemed admissions for two and one-half months, through discovery and dispositive motion cutoff dates, with no indication that the plaintiff intended to seek relief from those admissions. *See id. at 624*. Further, only eight days remained until trial when the district court issued its order denying the motion for relief. *See id.* With trial imminent, the government relied heavily on

the admissions and conducted none of the discovery it otherwise would have to prove its case, and therefore, would have been prejudiced by granting the plaintiff's relief. *See id.*

Here, it is also a close question as to whether withdrawal of the deemed admissions would prejudice Defendant. Rather than provide any specific examples, Defendant states generally that "due to the information Plaintiff admitted in response to its RFAs, SRMH did not pursue certain avenues of discovery or seek to confirm [*8] from other witnesses the timing of certain allegations because it understood those facts to already be definitely established." Opp. at 8. However, the Ninth Circuit has been "reluctant to conclude that a lack of discovery, without more, constitutes prejudice," because "prejudice must relate to the difficulty a party may face in proving its case at trial." *Conlon, 474 F.3d at 624.* However, this case, like *Conlon*, involves more than a simple failure to comply with deadlines. Here, Plaintiff's responses to the Requests for Admissions were due in February 2009, and when Plaintiff did not respond, the Requests were automatically deemed admitted pursuant to *Rule 36(a)(3)*. Thereafter, Defendant would have been reasonable to rely on those admissions for almost four months through the June 26, 2009 discovery cutoff date. There has been no showing that Plaintiff informed Defendant during that time that Plaintiff would seek relief from the deemed admissions. Moreover, Plaintiff delayed filing the current motion for approximately thirty days after the Court's September 22, 2009 Order informing him of the option to seek relief under *Rule 36(b)*. Accordingly, Defendant suffered prejudice not only [*9] based on a lack of discovery, but because of its reliance for several months through the discovery cutoff date on the deemed admissions, with no indication that Plaintiff would seek relief under *Rule 36(b)*.

Other factors

In *Conlon*, even though the two prongs of *Rule 36(b)* were met, the court denied the motion for relief from deemed admissions. The court considered whether the plaintiff had good cause for his dilatory conduct and concluded that even though the plaintiff stated that he was out of touch with his lawyer during part of the time for answering the Requests for Admission, there was no showing of any serious medical condition or other emergency that illustrated the need for the relief from the deemed admissions. *See Conlon, 474 F.3d at 625.* The court determined that the government did not use the Requests for Admission to gain an unfair tactical advantage; the Requests for Admission were served well before the discovery cutoff date. *See id.* Further, the plaintiff had fair warning of the consequences of his noncompliance. *See id.*

Here, Plaintiff has not shown that he had good cause for his dilatory conduct, and there has been no showing that Defendant used the Requests for Admission [*10] to obtain an unfair advantage. Plaintiff's responses to the Requests for Admission were due in February 2009 after Defendant granted a two-week extension. Plaintiff's counsel states that his father fell gravely ill on May 22, 2009, which understandably necessitated counsel's temporary absence thereafter from his law practice to assist his family, but does not address the earlier period. Plaintiff also argues that from February 2009 through the onset of his father's illness, he could not respond to discovery due to the briefing schedule for Defendant's summary judgment motion. As the Court has previously stated, however, the summary judgment briefing schedule did not excuse untimely responses to discovery. Moreover, even if it did, Plaintiff could have responded to the Requests between February 21 and March 10, 2009 when Defendants were preparing their reply to the motion, or between March 25, 2009, when Plaintiff filed his surreply to Defendant's summary judgment motion, and May 22, 2009 when Plaintiff's father became ill. Further, as described above, Plaintiff's counsel delayed in bringing the current motion for thirty days after the Court's September 22, 2009 Order, despite having [*11] notice of this issue that was briefed in Defendant's July 2009 motion to compel. These other factors weigh against granting Plaintiff the relief he seeks.

Conclusion

Accordingly, Plaintiffs Motion to Have Admissions Deemed Withdrawn or Amended is denied.

IT IS SO ORDERED.

Dated: December 17, 2009

/s/ Elizabeth D. Laporte

ELIZABETH D. LAPORTE

United States Magistrate Judge

1120KM

J & J SPORTS PRODUCTIONS, INC. v. ARNELL T. MUMFORD, et al.

Civil Action No. DKC 10-2967

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

2012 U.S. Dist. LEXIS 55836

April 20, 2012, Filed

SUBSEQUENT HISTORY: Costs and fees proceeding at, Request denied by *J & J Sports Prods. v. Mumford, 2012 U.S. Dist. LEXIS 173357 (D. Md., Dec. 6, 2012)*

PRIOR HISTORY: *J & J Sports Prods. v. Mumford, 2011 U.S. Dist. LEXIS 47606 (D. Md., May 3, 2011)*

COUNSEL: [*1] For J & J Sports Productions, Inc., as Broadcast Licensee of the May 1, 2010, Mayweather/Mosley Broadcast, Plaintiff: Wayne D Lonstein, Lonstein Law Office PC, Ellenville, NY.

For Arnell T Mumford, Individually, and as officer, director, shareholder, and/or principal of Half Time Sports & Entertainment, Inc. d/b/a Half Time Sports & Entertainment, Half Time Sports & Entertainment, Inc., doing business as Half Time Sports & Entertainment, Defendants: Evan V Goitein, LEAD ATTORNEY, Law Offices of Evan V Goitein LLC, Bethesda, MD.

JUDGES: DEBORAH K. CHASANOW, United States District Judge.

OPINION BY: DEBORAH K. CHASANOW

OPINION

MEMORANDUM OPINION

Presently pending and ready for resolution in this piracy action is a motion for summary judgment filed by Plaintiff J & J Sports Productions, Inc. ("J & J Sports"). (ECF No. 27). The issues are fully briefed and the court now rules pursuant to *Local Rule 105.6*, no hearing being deemed necessary. For the reasons that follow, the motion will be granted.

I. Background

A. Factual Background

The following facts are uncontested. J & J Sports held the distribution rights to the broadcast of the May 1, 2010, Mayweather/Mosley professional boxing match ("the Broadcast"). (ECF No. 27-1, [*2] Gagliardi Decl., ¶ 3). Its license covered the state of Maryland, and it sublicensed the Broadcast to commercial establishments for a fee. (*Id.*). Defendants Arnell T. Mumford and Half Time Sports & Entertainment, Inc. ("Half Time Sports"), [1] did not purchase a license for this event. (*Id.* ¶ 5).

1 According to the complaint, the "exact nature" of Half Time Sports as a business entity is unknown. (ECF No. 1 ¶ 12). Mr. Mumford is described as "the individual with supervisory capacity and control over the activities" at Half Time Sports on May 1, 2010. (*Id.* ¶ 9).

Based on prior experience and research, J & J Sports suspected that its broadcasts of sporting events were being pirated for commercial use by establishments throughout the country. (*Id.* ¶ 7). As a result, J & J Sports hired auditors to canvass and identify non-subscribing establishments during its broadcasts. (*Id.* ¶¶ 9-10). On May 1, 2010, one such auditor went to Half Time Sports and observed the Broadcast on several of Half Time Sports's televisions and saw roughly fifty patrons viewing the televisions. (ECF No. 27-2, Lonstein Decl., at 53-56). [2]

2 Because the Lonstein declaration contains several different attachments that are [*3] each independently paginated, the page numbers cited are those provided by the ECF system.

B. Procedural Background

J & J Sports commenced this action on October 21, 2010, alleging willful violations of *47 U.S.C. § 553* and *§ 605* for showing the Broadcast. (ECF No. 1). Count One of the complaint alleges that Defendants used an illegal satellite receiver to intercept J & J Sports's signal or broadcast, violating *§ 605*. Count Two alleges, in the alternative, that Defendants intercepted J & J Sports's signal or broadcast via cable system, violating *§ 553*.

When Defendants did not initially respond to the complaint, J & J Sports filed a Notice of Intention to Move for Default on December 9, 2010. (ECF No. 6). Mr. Mumford then filed a *pro se* answer on December 13, 2010. (ECF No. 7). That answer was accepted by the court on behalf of Mr. Mumford only and not on behalf of Half Time Sports, as corporations must be represented by an attorney pursuant to *Local Rule 101.1.a.* (ECF No. 8). On January 21, 2011, J & J Sports formally moved for entry of default as to Half Time Sports (ECF No. 9), and Half Time Sports's default was subsequently entered on March 11, 2011 (ECF No. 10). On April 12, 2011, [*4] attorney Evan Goitein entered his appearance on behalf of all Defendants. (ECF No. 13). Upon Defendants' motion (ECF No. 14), the court set aside Half Time Sports's default (ECF Nos. 16, 17). On June 2, 2011, Half Time Sports filed an answer. (ECF No. 18).

On October 24, 2011, J & J Sports filed the present motion for summary judgment on the issue of Defendants' liability. (ECF No. 27). [3] Defendants responded on November 10, 2011. (ECF No. 28). J & J Sports replied on November 16, 2011. (ECF No. 29).

3 Although the motion seeks summary judgment "in its entirety" (ECF No. 27, at 1), the accompanying memorandum of law states that J & J Sports seeks summary judgment "as to liability" against Defendants (ECF No. 27-4, at 10).

II. Standard of Review

A court may enter summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fed.R.Civ.P. 56(a)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *Emmett v. Johnson, 532 F.3d 291, 297 (4th Cir. 2008)*. Summary judgment is inappropriate if any material factual issue "may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; [*5] *JKC Holding Co. LLC v. Wash. Sports Ventures, Inc., 264 F.3d 459, 465 (4th Cir. 2001)*.

The party moving for summary judgment has the initial burden to demonstrate that there is no genuine dispute of material fact and that the movant is entitled to judgment as a matter of law. In asserting that there is no genuine dispute of fact, a moving party must cite to materials in the record or show that the fact cannot be genuinely disputed. For instance, a moving party may assert that the opposing party cannot produce admissible evidence to support a fact on which that adverse party will have the burden of proof. Thereafter, a party may "object that the material cited [by the other party] cannot be presented in a form that would be admissible in evidence." *Fed.R.Civ.P. 56(c)(2)*. In the face of such an objection, "[t]he burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated." *Fed.R.Civ.P. 56(c)(2)* advisory committee notes (2010 amendment).

"A party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of [his] pleadings,' but rather must 'set forth specific facts [*6] showing that there is a genuine issue for trial.'" *Bouchat v. Balt. Ravens Football Club, Inc., 346 F.3d 514, 522 (4th Cir. 2003)* (quoting former *Fed.R.Civ.P. 56(e)*). "A mere scintilla of proof . . . will not suffice to prevent summary judgment." *Peters v. Jenney, 327 F.3d 307, 314 (4th Cir. 2003)*. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby, 477 U.S. at 249-50* (citations omitted). At the same time, the court must construe the facts that are presented in the light most favorable to the party opposing the motion. *See Scott v. Harris, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*; *Emmett, 532 F.3d at 297*.

III. Analysis

J & J Sports contends that it is entitled to summary judgment as to liability because "Defendants have admitted by default that they willfully violated *47 U.S.C. § 553* and *§ 605* by exhibiting without authorization the Mayweather/Mosley boxing program in violation of the exclusive rights of Plaintiff, who is the sole lawful possessor of the rights to distribute said program." (ECF No. 27-4, at 13). Though J & J Sports ostensibly asserts entitlement to summary judgment on both Counts One and Two, its motion advances a [*7] substantive argument as to Count One only, the *§ 605* claim. (*See* ECF No. 27-4, at 14-18). [4] In response, Defendants merely contest J & J Sports's reliance on their default admissions to support the motion, but they do not otherwise contest the facts presented by J & J Sports. (ECF No. 28-1).

4 The complaint recognizes that J & J Sports can ultimately only recover damages under one of the counts, not both. (*See* ECF No. 1 ¶ 33). Indeed, as a court in this district observed, liability under *§ 605* and *§ 553* is mutually exclusive. *J & J Sports Prods. v. MayrealII, LLC, 849 F. Supp.*

*2d 586, 2012 U.S. Dist. LEXIS 11916, 2012 WL 346649, at *2 (D. Md. 2012).*

A. Admissions by Default

Federal Rule of Civil Procedure 36 governs requests for admissions. It provides that "[a] matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney." *Fed.R.Civ.P. 36(a)(3).* Moreover, unanswered requests for admission can serve as the basis for summary judgment. *Vales v. Preciado, 809 F.Supp.2d 422, 426 (D.Md. 2011)* ("'[U]nanswered requests for admissions may properly [*8] serve as a basis for summary judgment and with a failure to make a timely response, the truth of the matter contained in the request for admission is conclusively established and may serve as the basis for the court's consideration of a motion for summary judgment.'" (quoting *Donovan v. Porter, 584 F.Supp. 202, 207-08 (D.Md. 1984))*; *see also Batson v. Porter, 154 F.2d 566, 568 (4th Cir. 1946)* (holding that unanswered requests for admissions are admitted and may support summary judgment, "unless a sworn statement is filed in which they are specifically denied or specific reasons are given why they cannot be truthfully admitted or denied"). In *Vales*, because the defendant failed to respond to the plaintiff's request for admissions, to object, to seek an extension of time to respond, to ask to rescind the admissions, or to challenge the admissions on summary judgment, the admissions were deemed admitted for purposes of assessing the summary judgment motion. *Vales, 809 F.Supp.2d at 427.*

Similarly, here, Defendants have not responded to J & J Sports's requests for admission, raised any objections, sought an extension of time to answer them, or challenged them with contrary evidence on summary [*9] judgment. [5] Instead, Defendants merely argue that "it does not further the interests of justice to automatically determine all the issues in a lawsuit and enter summary judgment against a party because a deadline is missed." (ECF No. 28-1, at 2). To that end, they argue, somewhat ineloquently, that their admissions should be withdrawn. (*Id.*).

5 According to J & J Sports, on April 13, 2011, it served requests for admissions on Mr. Mumford, and on August 25, 2011, it served requests for admissions on Half Time Sports. (ECF No. 27-4, at 3-4). To date, Defendants have not responded to the requests. Defendants do not dispute this history.

"A matter admitted under [*Rule 36*] is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." *Fed.R.Civ.P. 36(b).* With some exceptions, "the court may permit withdrawal or amendment if it would promote presentation on the merits of the action, and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits." *Id.* "The court has considerable discretion over the withdrawal of admissions once they have been made." *Kress v. Food Emp'rs Labor Relations Ass'n, 285 F.Supp.2d 678, 681 (D.Md. 2003)* [*10] (internal quotations omitted).

Neither prong of *Rule 36(b)*, however, weighs in favor of withdrawal of Defendants' admissions. The first prong -- promoting presentation of the case on the merits -- contemplates "facilitat[ing] the development of the case in reaching the truth." *McClanahan v. Aetna Life Ins. Co., 144 F.R.D. 316, 320 (W.D.Va. 1992).* Here, not only have Defendants ignored J & J Sports's requests for admissions, they have apparently failed altogether to respond to any of J & J Sports's requests for discovery. (ECF No. 27-4, at 5). [6] Thus, presentation on the merits is not an option.

6 Discovery originally closed per the court's scheduling order on July 27, 2011. (ECF No. 11). That deadline was extended by two months to September 27, 2011. (ECF No. 24).

The second prong -- prejudice to the requesting party -- contemplates "the difficulty the party opposing the motion to withdraw will face as a result of the sudden need to obtain evidence to prove the matter it had previously relied upon as answered." *McClanahan, 144 F.R.D. at 320.* For example, although the inability to rely on default admissions for summary judgment purposes is not in and of itself considered prejudicial to the [*11] requesting party under *Rule 36(b)*, *see Conlon v. United States, 474 F.3d 616, 624 (9th Cir. 2007)*, where a party reasonably foregoes pursuing discovery by relying upon default admissions and then uses those admissions as a basis for summary judgment, withdrawal of the admissions may be prejudicial, *see id.* (holding that a party who "relied on the admissions for a total of two and a half months, through the discovery and dispositive motion cut-off dates, with no indication that [the unresponsive party] intended to file a motion to withdraw his admissions" would be prejudiced if it were prohibited from using the default admissions on summary judgment). As one district court in the Fourth Circuit has explained:

> When a party directs its resources, fiscal, physical and otherwise, to those issues it reasonably believes are the only ones left to be resolved, an abrupt change in the status of the litigation occasioned

> by motion of opposing counsel, which had it occurred early on would likely have effected a distinctly different allocation of resources, should only be allowed upon a showing that the *Rule 36(b)* test is met by clear and convincing evidence.

Branch Banking & Trust Co. v. Deutz-Allis Corp., 120 F.R.D. 655, 659 (E.D.N.C. 1988).

In [*12] this case, though it was not obligated to, on August 25, 2011, and October 13, 2011, J & J Sports put Mr. Mumford and Half Time Sports, respectively, on notice that it considered its requests for admission deemed admitted and that it would likely rely on those admissions for motions practice. (*See* ECF Nos. 23, 26). In fact, in its September 26, 2011, status report to the court, J & J Sports also noted that it specifically intended to move for summary judgment. (ECF No. 25). Mr. Mumford was on notice for at least two months about the focus of J & J Sports's discovery efforts, but did not indicate any intent to move to withdraw his admissions. Half Time Sports likewise stayed silent despite J & J Sports's diligence. It therefore was not unreasonable for J & J Sports to rely on Defendants' default admissions in conducting its discovery strategy. Especially given that discovery has closed and Defendants have failed to produce any materials, to permit Defendants to withdraw their admissions now would certainly prejudice J & J Sports as it would have no alternative evidence with which to develop its case. Taken together, these factors militate against withdrawal of Defendants' default admissions.

Defendants' [*13] reliance on *Union Pacific Railroad Co. v. Baltimore & Annapolis Railroad Co., No. SKG-08-2685, 2009 U.S. Dist. LEXIS 99864, 2009 WL 3633349 (D.Md. Oct. 27, 2009)*, in which a party's default admissions were withdrawn, is misplaced. Unlike in the present case, the parties in *Union Pacific* were in constant contact about discovery, and the defendant ultimately responded to the plaintiff's requests for admission, albeit one month late. *2009 U.S. Dist. LEXIS 99864, [WL] at *2*. Furthermore, when the plaintiff subsequently filed a motion for summary judgment, relying in part on the default admissions instead of the tardy admissions, the defendant affirmatively moved to withdraw and replace the default admissions with the tardy admissions. *2009 U.S. Dist. LEXIS 99864, [WL] at *2-3*. Thus, in contrast to the instant situation, the withdrawal of the default admissions in *Union Pacific* enabled a decision of that case on the merits, and the plaintiff did not suffer prejudice. [7]

7 Defendants' brief mention of *United States v. Turk, 139 F.R.D. 615 (D.Md. 1991)*, which also permitted withdrawal of a party's default admissions, is similarly unavailing. Unlike here, in *Turk*, the defendant was *pro se*, and "vigorously denie[d] the claims against him." *Id. at 617*. The court allowed the defendant [*14] to withdraw his default admissions because there was a possible genuine issue of material fact and because, ultimately, it was "reluctant to use *Rule 36* procedures as a snare for this unwary *pro se* defendant." *Id. at 618*.

In sum, the requirements for withdrawal of default admissions under *Rule 36(b)* are not met here, and the admissions contained in J & J Sports's unanswered requests for admission are deemed admitted for the purposes of summary judgment.

B. Summary Judgment

As noted above, J & J Sports seeks summary judgment as to liability for Defendants' alleged violation of *47 U.S.C. § 605(a)*. That statute reads, in relevant part:

> No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

47 U.S.C. § 605(a). Thus, to prove a violation of *§ 605(a)*, J & J Sports must show [*15] that Defendants, without authorization, received and divulged the Broadcast. *See That's Entm't, Inc. v. J.P.T., Inc., 843 F.Supp. 995, 999 (D.Md. 1993)* (finding a violation of *§ 605* by the defendants' "unlawful interception and receipt of the [transmission] and by their unauthorized broadcast of that transmission to [their] patrons"); *see also J & J Sports Prods. v. Centro Celvesera La Zaona, LLC, No. 5:11-CV-00069-BR, 2011 U.S. Dist. LEXIS 126110, 2011 WL 5191576, at *1 (E.D.N.C. Nov. 1, 2011)* (stating that "*§ 605* prohibits the unauthorized interception and broadcast of satellite transmissions").

Here, the proffered default admissions establish that Mr. Mumford, in his individual capacity, violated *§ 605*. First, Mr. Mumford has admitted that "he had the capa-

bility of receiving . . . satellite television broadcasts on May 1, 2010." (ECF No. 27-2, Lonstein Decl., at 14 (Pl.'s Req. for Admis. No. 9)). Second, he has admitted that he "did, in fact, exhibit a portion of the broadcast of the May 1, 2010, Mayweather/Mosley Program, and/or any of its undercard programs." (*Id.* (Pl.'s Req. for Admis. No. 13)). Third, he has admitted that he "was not authorized by Plaintiff to exhibit the broadcast of the May 1, 2010, [*16] Mayweather/Mosley Program, and/or any of its undercard programs in the establishment known as Half Time Sports & Entertainment on May 1, 2010." (*Id.* at 13 (Pl.'s Req. for Admis. No. 3)). Finally, he has admitted that he "received a financial benefit from the operations of [Half Time Sports] on May 1, 2010." (*Id.* (Pl.'s Req. for Admis. No. 4). Thus, J & J Sports has met its evidentiary burden and shown that Mr. Mumford illegally received and divulged the Broadcast. As Defendants have not adduced any evidence, summary judgment is warranted in favor of J & J Sports as to Mr. Mumford's liability under *§ 605*.

Similarly, through the default admissions, J & J Sports has established that Half Time Sports directly violated *§ 605*. Half Time Sports has admitted that it "had the capability of receiving . . . satellite television broadcasts on May 1, 2010." (*Id.* at 34 (Pl.'s Req. for Admis. No. 9)). In addition, it has admitted that it "did, in fact, exhibit a portion of the broadcast of the May 1, 2010 Mayweather/Mosley Program, and/or any of its undercard programs." (*Id.* (Pl.'s Req. for Admis. No. 13)). It has admitted that it "was not authorized by Plaintiff to exhibit any portion of the broadcast [*17] of the May 1, 2010, Mayweather/Mosley Program, and/or any of its undercard programs." (*Id.* at 35 (Pl.'s Req. for Admis. No. 16)). And, it has admitted that it "received direct financial benefit from the occurrences . . . on May 1, 2010." (*Id.* (Pl.'s Req. for Admis. No. 21). Thus, as it did with Mr. Mumford, J & J Sports has put forth sufficient evidence to show that Half Time Sports illegally received and divulged the Broadcast. [8] Without evidence to the contrary, J & J Sports's motion for summary judgment must accordingly be granted as to Half Time Sports's liability.

8 J & J Sports has also attached other evidence that further shows Half Time Sports's liability. The affidavit of Jonathan Martin and its accompanying video show that Half Time Sports received and divulged the Broadcast by displaying it on eight televisions to roughly fifty patrons. (ECF No. 27-2, at 53-56). The affidavit of Joseph Gagliardi, president of J & J Sports, shows that Half Time Sports was not authorized to exhibit the Broadcast. (ECF No. 27-1 ¶ 11).

IV. Conclusion

For the foregoing reasons, Plaintiff's motion for summary judgment will be granted. A separate order will follow.

/s/ DEBORAH K. CHASANOW

United States [*18] District Judge

PRECISION FRANCHISING, LLC, Plaintiff, v. CATALIN GATEJ, Defendant.

1:12cv158 (JCC/TCB)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

2012 U.S. Dist. LEXIS 175450

December 11, 2012, Decided
December 11, 2012, Filed

PRIOR HISTORY: *Precision Franchising, LLC v. Gatej, 2012 U.S. Dist. LEXIS 72075 (E.D. Va., May 23, 2012)*

COUNSEL: [*1] For Precision Franchising LLC, Plaintiff: Constantinos George Panagopoulos, Ballard Spahr LLP (DC), Washington, DC.

Catalin N. Gatej, Defendant, Pro se, Methuen, MA.

JUDGES: James C. Cacheris, UNITED STATES DISTRICT COURT JUDGE.

OPINION BY: James C. Cacheris

OPINION

MEMORANDUM OPINION

This matter is before the Court on Plaintiff Precision Franchising LLC's ("Plaintiff" or "Precision Franchising") Motion for Summary Judgment (the "Motion"). [Dkt. 56.] For the following reasons, the Court will grant Plaintiff's Motion.

I. Background

This case involves the alleged breach of a Franchise Agreement.

A. Factual Background

Plaintiff Precision Franchising, LLC ("Plaintiff" or "Precision Franchising") is a Virginia limited liability company with its principal place of business in Leesburg, Virginia. (Compl. [Dkt. 1] ¶ 1.) Precision Franchising is the licensor of the Precision Tune Auto Care® system and has licensed others to operate automotive service businesses identified with the Precision Tune Auto Care® service mark and other marks and logos designated as part of the Precision Tune Auto Care® system (the "Marks"). (Compl. ¶ 6.) The Marks are registered with the United States Patent and Trademark Office. (Compl. ¶¶ 7-8.) Precision [*2] Franchising also alleges that it has acquired common law rights with respect to the Marks and to trade dress common to Precision Franchising locations. (Compl. ¶ 9.) Further, Precision Franchising has allegedly provided trade secrets to franchisees, including manuals and software, which are required to be returned at the end of the franchise term. (Compl. ¶ 11.)

Gatej, a citizen of Massachusetts, is party to a Franchise Agreement (the "Agreement") which requires the operation of a Precision Tune Auto Care® Center (the "Center") in Tyngsborough, Massachusetts. (Compl. ¶ 12; Sec. 1.1, Agreement, Ex. A to Pl. Mem. [56-2].) The term of the Agreement was extended to June 6, 2015 pursuant to a renewal letter dated April 11, 2005. (Compl. ¶ 12; Letter Agreement, Ex. B to Pl. Mem. [Dkt. 56-2].) The Agreement provides that Gatej would be in default if he "without Franchisor's prior written consent, ceases to operate." (Agreement § 14.2.2.) The Agreement requires Gatej to pay Precision Franchising an operating fee equal to 7.5 percent of weekly gross sales. (Compl. ¶ 13; Agreement § 3.2.) The Agreement also requires Gatej to pay Precision Franchising or its designee or to spend as directed by [*3] Precision Franchising an advertising fee equal to 9 percent of weekly gross sales. (Compl. ¶ 14; Agreement §§ 3.3, 12.1.) Gatej was directed to pay 1.5 percent of weekly gross sales to Precision Franchising and to spend the remaining amount on

advertising for Precision Franchising's benefit. (Compl. ¶ 14; Agreement §§ 3.3, 12.1; Pl. Mem. ¶ 5.)

The Agreement prohibits the transfer of substantially all of the assets of the Center without Precision Franchising's prior consent and payment of a fee. (Compl. ¶ 15; Agreement § 15.1.) The Agreement also requires that Precision Franchising be given a right of first refusal prior to any such transfer. (Compl. ¶ 16; Agreement § 15.4.) Lastly, under the terms of the Agreement, Defendant agreed to pay Precision Franchising its reasonable attorneys' fees and costs in the event of breach. (Compl. ¶ 17; Agreement § 16.2.)

Precision Franchising alleges that Gatej breached the Agreement by failing to spend the required amounts in advertising. (Compl. ¶ 19; Falconi Decl. at ¶ 5, Exs. D-E to Pl. Mem. [56-1, 56-2].) According to Precision Franchising, this amount is no less than $64,980. (*Id.*) Gatej also allegedly breached the Agreement by prematurely ceasing [*4] operation of the Center on or about December 25, 2011, and transferring all or substantially all of its assets to a third party who is not operating the Center as a Precision Tune Auto Care® Center. (Compl. ¶ 20; Falconi Decl. ¶ 6.) Precision Franchising calculates that it has suffered no less than $83,511 in lost profits as a result of this premature cessation of operations. (Falconi Decl. ¶ 6, Ex. F to Pl. Mem. [Dkt. 56-1].) As a result, Precision Franchising calculates that it has suffered no less than $148,491 in total damages.

B. Procedural Background

On February 16, 2012, Plaintiff filed its Complaint in this Court. [Dkt. 1.] In its Complaint, Plaintiff brought a sole claim of breach of contract, on which it sought damages of no less than $141,821.37 and attorneys' fees and costs. Defendant failed to submit his Answer by the required date of March 14, 2012. [Dkt. 2.] As a result, on March 19, 2012, Plaintiff moved for Entry of Default against Defendant. [Dkt. 5.] Defendant filed his opposition to that motion the same day [Dkt. 10], and also filed a Motion for Request of Additional Time to Respond to Complaint and for Other Relief on March 25, 2012 [Dkt. 15]. On March 27, 2012, [*5] the Court granted Defendant leave to file a late response to the Complaint. [Dkt. 18.] Defendant filed his Answer on April 6, 2012. [Dkt. 19.] Then, on April 12, 2012, Defendant filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction [Dkt. 20] and a Motion to Dismiss for Failure to State a Claim [Dkt. 22]. The Court treated Defendant's motions to dismiss as motions for judgment on the pleadings under *Rule 12(c)* because they were made after Defendant had filed his Answer, and denied these motions on May 23, 2012. [Dkt. 34-35.]

On May 30, 2012, Defendant's attorneys filed a motion to withdraw, which this Court granted. [Dkt. 36-37.] Defendant has been *pro se* for the remainder of this litigation.

For the purposes of the current motion, certain points about the procedural history of discovery in this case are worth noting. On June 21, 2012, Plaintiff served its First Requests for Admission, First Set of Interrogatories, and First Set of Document Requests on Defendant. (Pl. Mem. [Dkt. 56] ¶ 15.) The parties mutually agreed to an extended deadline of August 28, 2012 for Defendant's discovery responses. (Pl. Mem. Motion to Compel [Dkt. 43] at 2; Def. Motion to Continue the Pre-Trial Conference [Dkt. 50] at 1.) [*6] Defendant, however, did not provide any responses at that time. On September 4, 2012, this Court issued a Scheduling Order in which the Court set a *Fed. R. Civ. P. 16(b)* Pretrial Conference for October 10, 2012 and Final Pretrial Conference for December 20, 2012, and ordered that the parties confer pursuant to *Rule 26(f)* prior to the Pretrial Conference, that they file proposed discovery plans by October 3, 2012, and that discovery would close by December 14, 2012. [Dkt. 41.]

On September 13, 2012, Plaintiff filed a motion to compel responses to its discovery requests. [Dkt. 42-43.] Defendant did not file an opposition and did not attend the September 28, 2012 hearing on the Motion to Compel. [Dkt. 48.] On September 28, 2012, the Court granted Plaintiff's Motion to Compel, ordered that Defendant must make complete discovery responses by October 12, 2012, and warned Defendant that failure to comply with this Order could result in sanctions including default judgment. [Dkt. 49.] Defendant did not provide any discovery responses by this court-ordered deadline. (Pl. Mem. [Dkt. 56] ¶ 18.)

On September 27, 2012, Defendant filed a Motion to Continue the Pre-Trial Conference, requesting the [*7] conference be moved from October 10, 2012 to at least six months after Defendant's knee replacement surgery scheduled for October 31, 2012. [Dkt. 50.] On October 9, 2012, this Court granted the motion, rescheduling the pretrial conference to October 24, 2012 and ordering that Defendant could attend the conference telephonically. [Dkt. 53.]

On October 3, 2012, Plaintiff filed its own proposed discovery plan, noting that it had tried unsuccessfully to confer with Defendant in order to file a joint proposed *Rule 26(f)* discovery plan. [Dkt. 51.] On October 24, 2012, this Court held the rescheduled *Rule 16(b)* Pretrial Conference, with counsel for Plaintiff appearing in person and Defendant attending telephonically. [Dkt. 54.] During that conference, Defendant was verbally admonished by Magistrate Judge Buchanan to comply with the

outstanding discovery requests. (Pl. Mem. [Dkt. 56] ¶ 18.) The Court also approved Plaintiff's proposed discovery plan. [Dkt. 54-55.] Following the conference, on October 25, 2012, Defendant filed his responses to Plaintiff's First Requests for Admission, First Set of Interrogatories, and First Set of Document Requests. (Tepper Decl. Exs. H-J [Dkt. 56-1].)

On November [*8] 13, 2012, Plaintiff filed a Motion for Summary Judgment (the "Motion") and a memorandum in support. [Dkt. 56.] Plaintiff included a proper *Roseboro* notice in that motion warning Defendant that the Court could grant judgment to Plaintiff on the basis of its Motion if he did not file a response. [*Id.* at 1.] Defendant did not file an opposition brief.

Plaintiff's unopposed Motion is before the Court.

II. Standard of Review

Summary judgment is appropriate only if the record shows that "there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Evans v. Techs. Apps. & Serv. Co., 80 F.3d 954, 958-59 (4th Cir. 1996)* (citations omitted). The party seeking summary judgment has the initial burden of showing the absence of a material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson, 477 U.S. at 248*.

Once a motion for summary judgment is properly made and supported, the opposing party must come [*9] forward and show that a genuine dispute exists. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. The party opposing summary judgment may not rest upon mere allegations or denials. Rather, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson, 477 U.S. at 250* (quotation omitted).

Unsupported speculation is not enough to withstand a motion for summary judgment. *See Ash v. United Parcel Serv., Inc., 800 F.2d 409, 411-12 (4th Cir. 1986)*. Summary judgment is appropriate when, after discovery, a party has failed to make a "showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, 477 U.S. at 322*. In reviewing the record on summary judgment, the court "must draw any inferences in the light most favorable to the non-movant" and "determine whether the record taken as a whole could lead a reasonable trier of fact to find for the non-movant." *Brock v. Entre Computer Ctrs., Inc., 933 F.2d 1253, 1259 (4th Cir. 1991)* (citations omitted).

III. Analysis

Plaintiff asserts two arguments for why it is [*10] entitled to summary judgment on its breach of contract claim. First, Plaintiff argues that Defendant has admitted -- via his failure to timely deny Plaintiff's Requests for Admission -- that he breached the Agreement by failing to expend required funds on advertising during the last five years and by prematurely terminating the agreement by ceasing to operate the franchise auto center, resulting in a total of at least $148,491 of damages. (Pl. Mem. at 1.) Plaintiff asserts that summary judgment is appropriate based on the uncontroverted facts established by these admissions, Plaintiff's other evidence, and Defendant's sole produced document, a chart of advertising expenses. (*Id.* at 7-11.) Second, Plaintiff argues that Defendant is in contempt of this Court's September 28, 2012 Order to provide complete discovery responses to Plaintiff's outstanding requests by October 12, 2012. (*Id.* at 1, 9-10.) Plaintiff claims that Defendant has not fully provided responses and that the limited responses which were provided are primarily objections, not appropriate substantive responses. (*Id.* at 10.) As a result, Plaintiff argues that summary judgment is an appropriate sanction, especially given Defendant's [*11] other repeated abuses and this Court's explicit warning that his failure to comply could result in it rendering judgment against him. (*Id.*)

A. Requests for Admission

As an initial matter, the Court must determine whether Plaintiff's Requests for Admissions are deemed admitted under *Federal Rule of Civil Procedure 36* when Defendant failed to timely respond to the requests and then, despite not filing a motion for an extension of time or a motion to withdraw or amend any deemed admissions, filed his response almost two months later than the parties' agreed upon extended deadline. *Rule 36* states that:

> A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under *Rule 29* or be ordered by the court.

Fed. R. Civ. Pro. 36(a)(3). As other courts have noted, the "sanction for failure to respond to a request for admission is self executing." *Hill v. Laury, No. 3:06CV79, 2006 U.S. Dist. LEXIS 65151, 2006 WL 2631796 (E.D. Va. Sept. 13, 2006)*; *see also Layton v. Int'l Ass'n of Machinists & Aerospace Workers, 285 F. App'x 340, 341 (9th Cir. 2008)*. [*12] "[O]nce a matter that is properly subject of an admission under *Rule 36* has been admitted during discovery, the district court is not free to disregard that admission." *Adventis, Inc. v. Consol. Prop. Holdings, Inc., 124 F. App'x 169, 173 (4th Cir. 2005)*. Matters admitted under *Rule 36* are "conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." *Fed. R. Civ. P. 36(b)* (emphasis added). "This conclusive effect applies equally to those admissions made affirmatively and those established by default, even if the matters admitted relate to material facts that defeat a party's claim." *Am. Auto. Ass'n (Inc.) v. AAA Legal Clinic of Jefferson Crooke, P.C., 930 F.2d 1117, 1120-21 (5th Cir. 1991)*.

In addition, *Rule 36* limits the district court's discretion regarding the withdrawal or amendment of admissions. "Once made, an admission may be withdrawn only if: a) the withdrawal would promote the presentation of the merits of the action, and b) allowing the withdrawal would not prejudice the party that obtained the admission." *Adventis, 124 F. App'x at 173* (citing *Fed. R. Civ. P. 36(b)* ("[T]he court may permit withdrawal or amendment if it would promote [*13] the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits.")).

In this case, Defendant failed to respond to Plaintiff's Requests for Admission by the August 28, 2012 extended deadline. (Pl. Mem. Motion to Compel [Dkt. 43] at 2; Def. Motion to Continue the Pre-Trial Conference [Dkt. 50] at 1.) As a result, Plaintiff's Requests for Admissions automatically were admitted at that time. In addition, Defendant did not file a motion for an extension of time to respond or a motion to withdraw the deemed admissions and to file an untimely response. Defendant did, however, file an untimely response to Plaintiff's Requests for Admissions on October 25, 2012. (Ex. H to Pl. Mem. [Dkt. 56-1].) In *Metpath, Inc. v. Modern Medicine*, the Fourth Circuit approved of the position taken by a number of other circuit courts that "a late response was the equivalent of a motion to withdraw or amend a response, and that amendment could be allowed when the opposing party suffered no prejudice by the amendment." *934 F.2d 319* [published in full-text format at *1991 U.S. App. LEXIS 10796 at *6*] (4th Cir. 1991) (citing *Gutting v. Falstaff Brewing Corp., 710 F.2d 1309, 1312 (8th Cir. 1983)*; [*14] *Moosman v. Joseph P. Blitz, Inc., 358 F.2d 686, 688 (2d Cir. 1966)*; *French v. United States, 416 F.2d 1149, 1152 (9th Cir. 1968))*. As a result, the Court will treat Defendant's untimely response as a motion to withdraw or amend his deemed admissions. As such, the Court must consider the *Rule 36(b)* discretionary factors to determine whether to accept or disregard Defendant's untimely response. *See Bailey v. Christian Broad. Network, 11-2348, 483 Fed. Appx. 808, 2012 U.S. App. LEXIS 12249, 2012 WL 2161643, at *1 (4th Cir. June 15, 2012)* (holding that the "*Rule 36(b)* factors were integral to the court's determination" of whether to allow a party's untimely response to requests for admissions); *Gutting, 710 F.2d at 1313*.

Based on the following analysis of the *Rule 36(b)* factors, the Court concludes that it will not permit Defendant to withdraw his deemed admissions and substitute his untimely responses. While conducting this assessment, it is important to reiterate that "there is 'absolutely no right to withdraw admissions' and 'withdrawal is at the discretion of the court.'" *Adventis, Inc. v. Big Lots Stores, Inc., No. 7:02CV00611, 2006 U.S. Dist. LEXIS 68332, 2006 WL 2631760, at *2 (W.D. Va. Sept. 11, 2006)* (quoting *In re Fisherman's Wharf Fillet, Inc., 83 F.Supp.2d 651 (E.D. Va. 1999))*. [*15] "[T]he decision to allow a party to withdraw its admissions is quintessentially an equitable one, balancing the rights to a full trial on the merits, including the presentation of all relevant evidence, with the necessity of justified reliance by parties on pre-trial procedures and finality as to issues deemed no longer in dispute." *Id.* (quoting *McClanahan v. Aetna Life Ins. Co., 144 F.R.D. 316, 320 (W.D.Va.1992))*.

The first factor, the presentation of the merits factor, does weigh in favor of allowing Defendant to change his admissions. In assessing whether withdrawal and amendment would promote the presentation of the merits of the action, courts look at whether the proposed amendments "will facilitate the development of the case in reaching the truth, as in those cases where a party's admission[s] are inadvertently made." *McClanahan, 144 F.R.D. at 320* (quoting 4A Jeremy C. Moore et al., Moore's Federal Practice para. 36.08 (2d ed. 1992)); *see also Adventis, 2006 U.S. Dist. LEXIS 68332, 2006 WL 2631760, at *2* (reviewing cases). Courts have found that this prong is met when, as here, the deemed admissions effectively resolve the case and thus upholding the admissions would eliminate any need for a presentation [*16] on the merits. *See e.g. Conlon v. U.S., 474 F.3d 616, 622 (9th Cir. 2007)*; *FDIC v. Prusia, 18 F.3d 637, 640 (8th Cir. 1994)*. In the instant case, as in *Conlon*, the moving party has filed its summary judgment motion based substantially on Defendant's deemed admissions. (*See* Pl. Mem. at 1.) The deemed admissions completely resolve Plaintiff's claim for future lost profits from Defendant's premature cessation of operating the franchise.

The admissions establish that the franchise agreement continued to June 6, 2015, that Defendant knew premature abandonment of the franchise would give rise to a contract claim for future lost profits, and that this premature cessation of operation resulted in at least $86,765.40. (Ex. E to Pl. Mem. [Dkt. 56-1].) The deemed admissions also resolve that "Defendant has failed to expend the requisite amounts in advertising under the Franchise Agreement." (Ex. E ¶¶ 3-5, 12-14.) As a result, upholding these deemed admissions would eliminate a need for presentation on the merits of Plaintiff's claim. The first *Rule 36(b)* factor therefore supports allowing Defendant to withdraw and amend his deemed admissions with his untimely filed admissions.

The second prong [*17] (prejudice to the party relying on the admissions), however, weighs against allowing Defendant to change his admissions. In analyzing this factor, courts consider "the difficulty the party opposing the motion to withdraw will face as a result of the sudden need to obtain evidence to prove the matter it had previously relied upon as answered." *J & J Sports Productions, Inc. v. Mumford, No. CIV.A. DKC 10-2967, 2012 U.S. Dist. LEXIS 55836, 2012 WL 1409588, at *4 (D. Md. Apr. 20, 2012)* (quoting *McClanahan, 144 F.R.D. at 320*). A party's reliance on deemed admissions in preparing a summary judgment motion is not sufficient alone to constitute the requisite prejudice under *Rule 36(b). See Conlon, 474 F.3d at 623-24* (collecting cases); *Mumford, 2012 U.S. Dist. LEXIS 55836, 2012 WL 1409588, at *4*. However, the prejudice to a party rises the longer and more the party has relied on the admissions. "With the passage of time and as each moment for response to a pleading slipped by, [a party's] burden for withdrawal of the deemed admissions is raised and the prejudice to the [relying party] is increased." *In re Fisherman's Wharf Fillet, Inc., 83 F. Supp. 2d 651, 661 (E.D. Va. 1999).*

As a result, courts have found that the following factors indicated that [*18] a withdrawal of admissions would result in sufficient prejudice to a relying party: a number of months had passed after the deadline to respond to requests for admissions; it was near or after the close of discovery; the relying party had foregone some discovery based on the admissions; the opposing party repeatedly had failed to respond to discovery requests or communications; and / or the opposing party had received some notice from the relying party or the court of the consequences of failing to respond to discovery requests. *See Conlon, 474 F.3d at 624-25* (upholding district court's finding of prejudice where party seeking to use default admissions on summary judgment had "relied on the admissions for a total of two and a half months, through the discovery and dispositive motion cut-off dates, with no indication that [the unresponsive party] intended to file a motion to withdraw his admissions," relying party had foregone some discovery in reliance on the deemed admissions, and unresponsive party "had fair warning of the consequences of his noncompliance"); *Metpath, 934 F.2d at *1, *3* [published in full-text format at *1991 U.S. App. LEXIS 10796 at *6-7*] (upholding district court's finding of prejudice where party provided untimely responses to requests [*19] for admission over a month past the deadline, its "efforts to comply with *Rule 36* were minimal at best," and requiring relying party to obtain evidence to prove deemed admissions would result in further delay); *Mumford, 2012 U.S. Dist. LEXIS 55836, 2012 WL 1409588, at *4* (holding that where a party relied on deemed admissions for months past the response deadline, *pro se* opposing party had at least two months of notice about the implications of failing to respond, and discovery had closed, relying party would be prejudiced if deemed admissions were withdrawn and it could not use them on summary judgment); *Sommerville v. Dobson, No. 4:10CV67, 2011 U.S. Dist. LEXIS 156380, 2011 WL 9160525, at *3-4 (E.D. Va. Mar. 8, 2011)* (finding prejudice where relying party proceeded with discovery under the assumption that the unanswered admissions were admitted, discovery was closed, opposing party significantly delayed in seeking withdrawal, and relying party relied on deemed admissions in crafting its summary judgment motion); *In re Fisherman's Wharf Fillet, Inc., 83 F. Supp. 2d at 661 &* n.12 (finding relying party would be prejudiced by withdrawal where opposing party repeatedly was unavailable or unresponsive throughout discovery, opposing party received [*20] notice by the court and relying party about its delinquency in answering discovery, opposing party significantly delayed in seeking withdrawal, and relying party explicitly relied on deemed admissions in its summary judgment motion).

The Court finds that all of these pertinent factors are present in the instant case and therefore concludes that allowing Defendant to withdraw and amend his deemed admissions with his untimely responses would result in prejudice to Plaintiff. First, Defendant did not submit his untimely response to Plaintiff's Requests for Admission until October 24, 2012, over three months past the original deadline to respond and over two months beyond the extended deadline which Plaintiff granted Defendant upon his request. (Pl. Mem. at 5; Ex. H. to Pl. Mem.)

Second, this significant delay is part of a larger pattern of general unresponsiveness and repeated delinquency by Defendant during the overall discovery process and litigation. At the very beginning of this litigation, Defendant filed his Answer late. (Pl. Mem. at 5; Dkt. 2, 18-19.) Defendant failed to comply with the Court's September 4, 2012, Scheduling Order that prior to the pretrial conference, the parties [*21] must meet

and confer pursuant to *Rule 26(f)* and file proposed discovery plans. [Dkt. 41, 51.] Defendant did not respond to Plaintiff's attempts to contact him and comply with this order, resulting in Plaintiff submitting its own proposed discovery plan and in the Court adopting this plan at the pretrial conference. [Dkt. 51, 54-55.] Defendant also failed to meet the original or extended deadline to respond to the other outstanding discovery requests (Plaintiff's interrogatories and document requests) in addition to the requests for admissions. (Pl. Mem. at 5-6; Pl. Mem. Motion to Compel [Dkt. 43] at 2; Dkt. 42-43.) Defendant's delinquency in discovery continued even after this Court granted Plaintiff's Motion to Compel and ordered that Defendant make complete discovery responses by October 12, 2012. [Dkt. 48-49; Pl. Mem. at 6.) Moreover, although Defendant finally submitted some responses to Plaintiff's pending discovery requests the day following the pretrial conference after being admonished by Magistrate Judge Buchanan, the responses submitted are not fully complete. (Pl. Mem. at 6; Ex. H-J to Pl. Mem.) For example, Defendant submitted only a single document -- a short, minimally [*22] detailed chart of advertising expenses -- in response to Plaintiff's 13 document requests. (*Compare* Ex. G to Pl. Mem. *with* Ex. J to Pl. Mem.) In particular, Defendant failed to produce income tax returns, receipts or other proof of the claimed advertising expenditures, or any documents relating to the sale of the franchise's premises. (*Id.*) As a result, Defendant still is not in full compliance with this Court's order that he provide complete discovery responses.

Third, at this point, discovery is nearly over as it is set to end on December 14, 2012 pursuant to the Court's September 4, 2012 Scheduling Order, only few days after the issuance of this opinion. [Dkt. 41.] Fourth, Defendant has had notice of the potential consequences of failing to respond to discovery requests since the Court's September 28, 2012, Order which "warned [him] that failure to comply with this order may result in sanctions, including default judgment." [Dkt. 49.] As a result, the Court concludes that Plaintiff reasonably relied on Defendant's deemed admissions in determining how to pursue discovery and summary judgment and therefore would be prejudiced if it could not rely on them here. Accordingly, the Court [*23] finds that Defendant has not met the *Rule 36(b)* test for withdrawal and thus the Court will not permit him to substitute his untimely responses for his deemed admissions.

Like other courts before it, this Court acknowledges the harshness of such a conclusion given that, as here, the failure to respond timely to admissions "can effectively deprive a party of the opportunity to contest the merits of a case." *Hill, 2006 U.S. Dist. LEXIS 65151, 2006 WL 2631796, at *3.* "The result, however, is necessary to insure the orderly disposition of cases for which parties to a lawsuit must comply with the rules of procedure." *Id.* As observed by the Advisory Notes to *Rule 36,* "[u]nless the party securing an admission can depend on its binding effect" except if withdrawn by the opposing party upon a showing of meeting both *Rule 36(b)* factors, then the relying party "cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated." Notes of Advisory Committee on Rules - 1970 Amendment, *Fed. R. Civ. P. 36.*

B. Summary Judgment

Given the Court's conclusions that Plaintiff's Requests for Admissions are conclusively established, the Court finds that [*24] summary judgment is appropriate based on the deemed admissions as well as other undisputed evidence provided by Plaintiff. [1] It is well-established that matters deemed admitted by default "may constitute the basis for a court's favorable consideration for summary judgment." *Hill, 2006 U.S. Dist. LEXIS 65151, 2006 WL 2631796, at *2; see also Adventis, 124 Fed. App'x at 173* ("*Rule 36* admissions are *conclusive* for purposes of the litigation and are sufficient to support summary judgment.") (quoting *Langer v. Monarch Life Ins. Co., 966 F.2d 786, 803 (3d Cir. 1992); Mumford, 2012 U.S. Dist. LEXIS 55836, 2012 WL 1409588, at *3.*

1 Because the Court will grant summary judgment for these reasons, the Court will not address separately Plaintiff's argument that summary judgment should be granted as a sanction for Defendant's failure to comply with this Court's September 28, 2012 Order to provide complete discovery responses by October 12, 2012. (Pl. Mem. at 9-11.)

In order to recover for breach of contract, a plaintiff must show: "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Filak v. George, 267 Va. 612, 594 S.E. 2d 610, 614 (Va. 2004).* [*25] [2] First, the undisputed facts show that Defendant was legally obligated to operate a franchise business through June 6, 2015, to pay an operating fee of 7.5 percent of weekly gross sales, and to pay an advertising fee of 9 percent of weekly gross sales or expend a portion of such on advertising. By the plain terms of the Franchise Agreement ("the Agreement") and Letter Agreement and by Defendant's default admissions, Defendant entered into the Franchise Agreement to "operate an automotive service business" for a term extending to June 6, 2015. (Agreement § 1.1.; Letter Agreement; Ex. E ¶¶ 12-14.)

The Agreement also sets out Defendant's obligation to pay the operating fee and expend the advertising fee. (Agreement §§ 3.2, 3.3.) Second, it is undisputed based on the default admissions that Plaintiff "has fully performed its obligations under the Franchise Agreement." (Ex. E. ¶ 1-2.)

2 As noted in this Court's earlier opinion on Defendant's motions to dismiss, the Court applies Virginia law. (*See* Mem. Op. [Dkt. 34] at 13 n.4.)

Third, it is uncontroverted that Defendant breached these obligations based on the default admissions which confirm that "Defendant knew that premature abandonment [*26] of the center would give rise to a contract claim against him for future lost profits," that there was "premature cessation of operations of Precision Tune automotive service center in December of 2011," and that "Defendant has failed to expend the requisite amounts in advertising under the Franchise Agreement." (*Id.* ¶¶ 3-5, 12-14.) Plaintiff has also submitted clear evidence of Defendant's insufficient expenditure on advertising via a gross sales report documenting Defendant's revenue for the 2007-11 period, a chart produced by Defendant in discovery indicating his advertising expenditures during that period, and a calculation of the shortfall between the amount expended and the amount required to be spent on advertising from February 16, 2007 through 2011. [3] (*See* Falconi Decl. ¶ 5, Pl. Mem.; Exs. C, D to Pl. Mem.)

3 The statute of limitations for contracts in writing is five years. *Va. Code. § 8.01-246(2).* Plaintiff filed its Complaint on February 16, 2012. [Dkt. 1.]

Fourth, it is undisputed that Defendant's breaches resulted in no less than $148,491 of damages to Plaintiff. This total amount includes $64,980 in advertising expenditures that Defendant failed to properly expend from [*27] the period of February 16, 2007 through 2011, as established by the gross sales report, chart of advertising expenditures, and corresponding shortfall calculation discussed above. (*Id.*) This total amount also includes $83,511 in lost profits resulting from Defendant's premature cessation of operation in December of 2011, as admitted by default by Defendant and supported by Plaintiff's calculations in Robert Falconi's declaration and supporting documentation of average weekly sales. (Exs. C, E ¶ 5; Falconi Decl. ¶ 6, Pl. Mem.)

Based on the review of the evidence above, the Court concludes that there are no genuine issues of material fact regarding any of the elements of Plaintiff's breach of contract claim, and that the undisputed facts entitle Plaintiff to judgment as a matter of law. Accordingly, the Court finds that Plaintiff has met its burden for summary judgment.

The terms of the Franchise Agreement provide for an award of "all costs and expenses, including reasonable legal and accounting fees, incurred by Franchisor in connection with obtaining damages or injunctive or other relief for the enforcement of any provisions of this Agreement." (Agreement ¶ 16.2.) The Court will order [*28] Plaintiff to submit a petition for reasonable attorneys' fees, as the party requesting fees bears the burden of demonstrating the reasonableness of the fees it seeks to recover. *Plyler v. Evatt, 902 F.2d 273, 277 (4th Cir. 1990)*; *Cook v. Andrews, 7 F.Supp.2d 733, 736 (E.D. Va. 1998)*. Plaintiff's petition shall include a breakdown of hours billed and other information relevant to the factors set forth in *Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978)*, and other applicable law.

IV. Conclusion

For the foregoing reasons, the Court will grant Plaintiff's Motion.

An appropriate Order will issue.

/s/ James C. Cacheris

UNITED STATES DISTRICT COURT JUDGE

December 11, 2012
Alexandria, Virginia

RETAMCO OPERATING, INC., Plaintiff - Appellee, v. RICHARD CARONE, Defendant - Appellant.

No. 06-55598

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

267 Fed. Appx. 625; 2008 U.S. App. LEXIS 3981

December 3, 2007, Argued and Submitted, Pasadena, California
February 20, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Central District of California. D.C. No. CV-04-02997-CBM. Consuelo B. Marshall, Chief District Judge, Presiding.

Paradigm Oil, Inc. v. Retamco Operating, Inc., 242 S.W.3d 67, 2007 Tex. App. LEXIS 6926 (Tex. App. San Antonio, 2007)

DISPOSITION: AFFIRMED in part REVERSED in part, and REMANDED. The parties shall bear their own costs on appeal.

COUNSEL: For RETAMCO OPERATING, INC., Plaintiff - Appellee: Kenneth L. Moes, ARCHBALD AND SPRAY, Santa Barbara, CA; James L. Drought, Esq., Calhoun Bobbitt, Esq., DROUGHT DROUGHT & BOBBITT, San Antonio, TX.

For RICHARD CARONE, Defendant - Appellant: David E.R. Woolley, Esq., DAVID E.R. WOOLLEY LAW OFFICES, Los Angeles, CA; Laura A. Slocumb, Esq., Thomasville, GA; John M. Castillo, Esq., STUMPH CRADDOCK MASSEY & FARRIMOND, San Antonio, TX; Larry Rothman, Esq., LARRY ROTHMAN & ASSOCIATES, Orange CA.

JUDGES: Before: PREGERSON, NOONAN, and TROTT, Circuit Judges.

OPINION

[*626] MEMORANDUM *

* This disposition is not appropriate for publication and is not precedent except as provided by *9th Cir. R. 36-3.*

Before: PREGERSON, NOONAN, and TROTT, Circuit Judges.

Richard Carone appeals the district court's decision to grant summary judgment on the issues of liability and damages in favor of Retamco Operating, Inc. He appeals also the district court's denial of his post-judgment [**2] motions.

We review de novo a district court's decision to grant summary judgment. *Qwest Commc'ns, Inc. v. City of Berkeley, 433 F.3d 1253, 1256 (9th Cir. 2006).* We review for abuse of discretion a district court's decision to deny a motion to amend a judgment filed pursuant to *Rule 59(e). McQuillion v. Duncan, 342 F.3d 1012, 1014 (9th Cir. 2003).*

1. Issue Preclusion

We review de novo the applicability of issue preclusion. *Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 993 (9th Cir. 2001).* The Full Faith and Credit statute, *28 U.S.C. § 1738,* requires a federal court to apply a state court judgment to the full and same extent as the rendering state would apply it. In Texas, issue preclusion applies when an issue decided in the first action is actually litigated, essential to the prior judgment, and identical to an issue in a pending action. *Tex. Dep't of Pub. Safety v. Petta, 44 S.W.3d 575, 579 (Tex. 2001).*

Retamco's Texas state court complaint pled only alter ego as a theory of liability, whereas the complaint here pleads "sham to perpetrate a fraud" and "illegal purpose" sufficient to support those theories of liability

under Texas' "fair notice" pleading standard. See *Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 898 (Tex. 2000)*. [**3] [1] Texas theories of corporate disregard, "sham to perpetrate a fraud" and "illegal purpose", are separate and distinct from alter ego. *Pan Eastern Exploration Co. v. Hufo Oils, 855 F.2d 1106, 1132-33 (5th Cir. 1988), superseded on other grounds by TEX. BUS. ORGS. CODE ANN. § 21.223(a)(2)* (Vernon 2007) [2]; [*627] *Fid. & Deposit Co. of Md. v. Commercial Cas. Consultants, Inc., 976 F.2d 272, 274-75 (5th Cir. 1992)*. Thus, although the Texas Court adjudged that Carone was not the alter ego of various corporations, issue preclusion does not bar claims of derivative liability against Carone based on theories of corporate disregard not litigated: (1) alter ego theory as to all corporations except Paradigm, Pacific Operators, and Pacific Texas, and (2) "sham to perpetrate a fraud", and (3) "illegal purpose" theories as to the rest.

1 Review of the relevant statute and Texas Supreme Court precedent demonstrate "sham to perpetrate a fraud" and "illegal purpose" are viable theories in Texas. See *Willis v. Donnelly, 199 S.W.3d 262, 272-73 (Tex. 2006)*; *TEX. BUS. ORGS. CODE ANN. § 21.223(a)(2)* (Vernon 2007).

2 Appellant takes issue with the "superceded on other grounds" language. However, the Texas Code did not [**4] alter the distinct theories of corporate disregard, it only limited their application. See *TEX. BUS. ORGS. CODE ANN. § 21.223(a) & (b)* (Vernon 2007).

2. Erie Doctrine

In a diversity action we review de novo a district court's decision to apply federal law. *Torre v. Brickey, 278 F.3d 917, 919 (9th Cir. 2002)*. Under the Erie doctrine, federal courts apply state substantive law and federal procedural law unless the outcome-determinative analysis under the "twin aims of Erie" dictate a different result. *Hanna v. Plumer, 380 U.S. 460, 468, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)*. Given the facts here, there is little chance of forum shopping and there is no inequitable administration of the laws. As a result, federal law applies.

Because federal law applies, a decision whether to vacate the judgment pursuant to *Rule 60(b)* or withdraw admissions pursuant to *Rule 36* is reviewed only for abuse of discretion. *Jeff D. v. Kempthorne, 365 F.3d 844, 850 (9th Cir. 2004)*; *Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995)*.

The district court did not abuse its discretion in declining to vacate judgment or in declining to withdraw or amend Appellant's deemed admissions because of the rampant discovery abuse in the California litigation [**5] attributable to Appellant. Furthermore, the district court did not abuse its discretion in finding Appellant's attorney's declaration disingenuous.

3. Timeliness and Hearsay

We review de novo the district court's application of the hearsay rules. *United States v. Alvarez, 358 F.3d 1194, 1214 (9th Cir. 2004)*. We review de novo the district court's application of the Federal Rules of Civil Procedure. *Guerrero v. RJM Acquisitions LLC, 499 F.3d 926, 932 (9th Cir. 2007)*. Because the federal rules accommodate discovery deadlines that fall on a Sunday, the Third Request for Admissions was timely. See *FED. R. CIV. P. 6(a)*. Additionally, because deemed admissions resulting under *FED. R. CIV. P. 36* are "conclusively established unless the court on motions permits withdrawal or amendment of the admission," there is no distinction between admissions made expressly and admissions made by default. See *Fed. R. Civ. P. 36*; see e.g., *W. Horizontal Drilling, Inc. v. Jonnet Energy Corp., 11 F.3d 65, 70 (5th Cir. 1994)*. Finally, because deemed admissions offered by a plaintiff against a defendant, pursuant to *FED. R. CIV. P. 36*, are the defendant's own statements and are non-hearsay under *801(d)(2)(A)*, [**6] Appellant's statements can be used against him to establish a conspiracy.

4. Damages

The Fourth District Court of Appeals in Texas reversed and remanded the state court damages award that was adopted by the district court. See *Paradigm Oil, Inc. v. Retamco Operating, Inc., No. 04-06-00108-CV, 242 S.W.3d 67, 2007 Tex. App. LEXIS 6926, 2007 WL 2427993 (Tex. App. 2007)*. Accordingly, all issues related to damages must be reversed and remanded to the district court for further determination.

AFFIRMED in part **REVERSED** in part, and **REMANDED.** The parties shall bear their own costs on appeal.

SAROYAN LUMBER COMPANY, INC., Plaintiff - Appellant, v. EL & EL WOOD PRODUCTS CORPORATION, a California Corporation; CATHY VIDAS, an individual; LENSKE LENSKE & ABRAMSON, a law corporation; STEPHEN A. LENSKE, an individual, Defendants - Appellees.

No. 03-56168

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

126 Fed. Appx. 371; *2005 U.S. App. LEXIS 4154*

March 9, 2005, Submitted, Pasadena, California**

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

March 11, 2005, Filed

NOTICE: [**1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Central District of California. D.C. No. CV-01-07748-NM(AJWx). Harry L. Hupp, District Judge, Presiding.

DISPOSITION: Affirmed.

COUNSEL: For SAROYAN LUMBER COMPANY, INC., Plaintiff - Appellant: Andrew M. Rosenfeld, Esq., ANDREW M. ROSENFELD LAW OFFICES, Torrance, CA; Curtis A. Westfall, Esq., WESTFALL & ASSOCIATES, Los Angeles, CA.

For EL & EL PRODUCTS CORPORATION, A CALIFORNIA CORPORATION, CATHY VIDAS, AN INDIVIDUAL, Defendant - Appellees: Marjorie A. Marenus, Esq., MARJORIE A. MARENUS LAW OFFICES, Sherman Oaks, CA.

For LENSKE LENSKE & ABRAMSON, A LAW CORPORATION, STEPHEN A. LENSKE, AN INDIVIDUAL, Defendant - Appellees: William J. Rea, LEWIS BRISBOIS BISGAARD & SMITH, LLP, Los Angeles, CA.

JUDGES: Before: BRUNETTI, SILVERMAN, and TALLMAN, Circuit Judges.

OPINION

[*372] MEMORANDUM *

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *Ninth Circuit Rule 36-3*.

[**2] Saroyan Lumber Company, Inc., appeals the denial of Saroyan's motion to withdraw admissions and the grant of defendants' motion for summary judgment. Saroyan's admissions were deemed as such by operation of law when Saroyan failed to timely respond to defendants' request for admissions. *Fed. R. Civ. P. 36(a)*. Saroyan did not move to withdraw the deemed admissions until after the discovery cut-off date and after defendants filed their motion for summary judgment. Saroyan's motion was filed the same day as, and was the primary basis for, its opposition to summary judgment.

Saroyan makes only two contentions on appeal. First, Saroyan contends that the district court abused its discretion in denying Saroyan's motion to withdraw admissions because presentation of the merits of the action would be subserved and defendants would suffer no prejudice from the withdrawal. *Fed. R. Civ. P. 36(b)*. The district court found that the first prong is satisfied here but that withdrawal would prejudice the defendants. "The

prejudice contemplated by *Rule 36(b)* '. . . relates to the difficulty a party may face in proving its [**3] case, e.g., . . . because of the sudden need to obtain evidence' with respect to the questions previously deemed admitted." *Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995)* (citation omitted). Here, Saroyan did not seek to withdraw the deemed admissions until the discovery cut-off had passed and defendants were unable to conduct discovery on the facts deemed admitted. We find no abuse of discretion.

Second, Saroyan contends that the district court should not have considered defendants' motion for summary judgment because defendants filed the motion one day after the motion cut-off date. District courts have broad discretion in managing their dockets and enforcing their scheduling orders. *Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607 (9th Cir. 1992). See also Coursen v. A.H. Robins Co., 764 F.2d 1329, 1340 (9th Cir. 1985).* Although defendants' motion was date stamped, it is unclear whether the district court was actually aware that the motion was filed one day after the motion cut-off date. Nevertheless, we cannot say that the district court committed an abuse of discretion in considering defendants' untimely motion [**4] when Saroyan itself failed to raise the issue of untimeliness to the district court. Moreover, the district court could have declined to strictly enforce the scheduling order based on the facts that defendants served the motion and attempted to file it by the motion cut-off date and it was filed the next day. The defendants also present a colorable argument that the motion cut-off date was no longer operable. The parties had not yet had their [*373] initial meeting with the settlement officer, which appears to have been a condition precedent to the filing of summary judgment motions under the scheduling order. For each of these reasons, we find that the district court did not abuse its discretion by considering defendants' motion for summary judgment. *See Qualls v. Blue Cross of Cal., Inc., 22 F.3d 839, 842 n.2 (9th Cir. 1994).*

Saroyan has not raised any issue with respect to the merits of summary judgment. The parties agree that summary judgment is required if the deemed admissions are not withdrawn and that summary judgment must be denied if the admissions are withdrawn. Having determined that the district court did not abuse its discretion in considering defendants' motion [**5] for summary judgment or in denying Saroyan's motion to withdraw the admissions, we affirm the district court's grant of summary judgment.

AFFIRMED.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff - Appellee, v. GLOBAL EXPRESS CAPITAL REAL ESTATE INVESTMENT FUND, I, LLC GLOBAL EXPRESS CAPITAL MORTGAGE CORP.; GLOBAL EXPRESS SECURITIES, INC., Defendants, DAWN M. REESE, Defendant, and CONNIE FARRIS, Defendant - Appellant. SECURITIES AND EXCHANGE COMMISSION, Plaintiff - Appellee, v. GLOBAL EXPRESS CAPITAL REAL ESTATE INVESTMENT FUND, I, LLC GLOBAL EXPRESS CAPITAL MORTGAGE CORP.; GLOBAL EXPRESS SECURITIES, INC.; CONNIE FARRIS, Defendants, and DAWN M. REESE, Defendant - Appellant.

No. 06-15940, No. 06-16659

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

289 Fed. Appx. 183; 2008 U.S. App. LEXIS 16992

March 12, 2008, Argued and Submitted, Phoenix, Arizona
August 7, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Findings of fact/conclusions of law at *SEC v. Global Express Capital Real Estate Inv. Fund I, LLC, 2010 U.S. Dist. LEXIS 132231 (D. Nev., Nov. 30, 2010)*

PRIOR HISTORY: [**1]
Appeal from the United States District Court for the District of Nevada. D.C. No. CV-03-01514-KJD. Kent J. Dawson, District Judge, Presiding.
SEC v. Global Express Capital Real Estate Inv. Fund I, LLC, 2006 U.S. Dist. LEXIS 96477 (D. Nev., Mar. 28, 2006)

DISPOSITION: AFFIRMED IN PART; REVERSED and REMANDED IN PART.

COUNSEL: For SECURITIES AND EXCHANGE COMMISSION, Plaintiff - Appellee: Allan A. Capute, Esquire, Attorney, Jacob H. Stillman, Esquire, Attorney, SEC - SECURITIES & EXCHANGE COMMISSION, Washington, DC.

For CONNIE FARRIS, Defendant - Appellant: Richard A. Schonfeld, Esquire, Attorney, GOODMAN & CHESNOFF, Las Vegas, NV.

JUDGES: Before: HAWKINS, THOMAS, and CLIFTON, Circuit Judges.

OPINION

[*186] MEMORANDUM *

* This disposition is not appropriate for publication and is not precedent except as provided by *9th Cir. R. 36-3.*

Before: HAWKINS, THOMAS, and CLIFTON, Circuit Judges.

Connie S. Farris and Dawn M. Reese appeal the district court's grant of summary judgment in favor of the Securities and Exchange Commission ("SEC"), the remedies ordered by the court, and the court's disposition of several additional motions.

I

The district court properly granted summary judgment against Farris, holding that she had violated section 17(a) of the Securities Act of 1933, *15 U.S.C. § 77q(a)*; section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), [**2] *15 U.S.C. § 78j(b)*; and *Rule 10b-5* thereunder, *17 C.F.R. § 240.10b-5*, in the sale of

Global Express Capital Real Estate Investment Fund I, LLC ("Global Capital") securities.

In order to prove securities fraud under *section 17(a)*, *section 10(b)*, and *Rule 10b-5*, the SEC must first establish that the defendants made a material misstatement or omission in connection with the offer or sale of a security. *Basic Inc. v. Levinson, 485 U.S. 224, 231, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988)*. A defendant may violate these provisions by making a statement and failing to include facts that would be necessary to make the statement not misleading. *SEC v. Fehn, 97 F.3d 1276, 1290 n.12 (9th Cir. 1996)*. A publication may be misleading, even where every sentence is individually accurate and truthful, if the overall effect is deceptive. *See In re Convergent Techs. Sec. Lit., 948 F.2d 507, 512 (9th Cir. 1991)*; *SEC v. C.R. Richmond & Co., 565 F.2d 1101, 1106-07 (9th Cir. 1977)*.

An omitted fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976), quoted in Basic, 485 U.S. at 231* (applying *TSC* in *Rule 10b-5* [**3] context). "[T]he standard . . . [requires] a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." *TSC, 426 U.S. at 449*. The materiality of misstatements and omissions "relating to financial condition, solvency and profitability is not subject to serious [*187] challenge." *SEC v. Murphy, 626 F.2d 633, 653 (9th Cir. 1980)*.

There is no dispute that investors in Global Capital securities were materially misled, as the district court properly concluded. Investors were given offering materials including a prospectus. The initial offering materials explicitly stated that Global Capital was prohibited from investing in delinquent loans. Although the prospectus was amended to allow investment in delinquent loans, investors were never affirmatively warned that a majority of the loans and deeds of trust accepted, purchased, or funded by Global Capital were non-performing. The offering materials represented that investors would receive a return on their investment in the form of monthly distributions derived from interest and fees earned by Global Capital on its loans and assets. [**4] The offering materials did not disclose that any other funding sources would be used to pay monthly returns. The monthly returns actually paid to investors were composed of "capital contributions" made by Farris, and of proceeds from the Global Capital offering and from sales of Global Capital assets. This money was funneled through Global Capital's loan servicing provider to create the impression that it was interest income. The misstatements and omissions created the false impression that Global Capital was profitable, an impression that would have assumed significance in the deliberations of any reasonable investor. The district court properly concluded that Farris was personally responsible for making the misleading statements by conveying the information to potential investors and to the SEC.

Violations of *section 17(a)(1)*, *section 10(b)*, and *Rule 10b-5* also require a showing of scienter. *Aaron v. SEC, 446 U.S. 680, 691, 697, 100 S. Ct. 1945, 64 L. Ed. 2d 611 (1980)*. A showing of recklessness establishes the element of scienter. *Vernazza v. SEC, 327 F.3d 851, 860 (9th Cir. 2003)*; *Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990)* (en banc). Evidence establishes that Farris controlled the Global [**5] Capital fund manager, and that she decided which loans to accept into Global Capital. She therefore knew that non-performing loans were purchased by or accepted into Global Capital. Farris was responsible for determining the monthly rate of return to investors, and knew that the monthly returns came from sources other than interest payments. Farris instructed her employees not to keep detailed records of the disbursement of funds generated by the sale of Global Capital assets. Farris also certified the accuracy of the periodic reports filed with the SEC, expressly acknowledging that she had read them. Farris was thus reckless about whether the information available about Global Capital accurately reflected the financial health and management of Global Capital. The district court's grant of summary judgment on this issue was based on more than an adverse inference drawn from Farris's invocation of her *Fifth Amendment* privilege against self-incrimination. *See SEC v. Colello, 139 F.3d 674, 677 (9th Cir. 1998)*. There is no genuine issue of fact as to whether Farris had the requisite scienter. The district court properly granted summary judgment against Farris.

II

The district court also [**6] properly held Farris liable for aiding and abetting Global Capital's violations of the reporting requirements of *Section 15(d)* of the Exchange Act and *Rules 12b-20* and *15d-13* thereunder. *Section 15(d)* provides that securities issuers that have filed registration statements with the SEC "shall file with the Commission . . . such supplementary [*188] and periodic information, documents, and reports as may be required . . . ." *15 U.S.C. § 78o(d)*. "*Rule 15d-13* implements *section 15(d)*'s disclosure provision by requiring issuers to file quarterly 10-Q reports." *Fehn, 97 F.3d at 1289*; *see also 17 C.F.R. § 240.15d-13*. *Rule 12b-20* requires that, in addition to information explicitly required by other securities regulations, "there shall be added such further material information, if any, as may be necessary to make the required statements, in light of the circum-

stances under which they are made not misleading." *17 C.F.R. § 240.12b-20.*

The elements of aiding and abetting a violation under *section 15(d)* are (1) the existence of an independent primary violation, (2) actual knowledge by the alleged aider and abettor of the independent primary violation and of her own role in furthering it, and (3) "substantial [**7] assistance" in the commission of the violation. *Ponce v. SEC, 345 F.3d 722, 737 (9th Cir. 2003); Fehn, 97 F.3d at 1288.*

Global Securities violated *section 15(d)* and *Rules 12b-20* and *15d-13* by falsely reporting interest income in 10-Q reports that it had not in fact received. Global Securities also violated the reporting requirements by failing to disclose that Global Securities used new investor money, capital contributions from the Global Securities Manager, and other Global Securities assets to pay monthly investor returns, and by failing to disclose that Global Securities assets were being used to pay the expenses of other Global entities. Farris substantially assisted Global Securities' violations by reviewing, approving, and certifying the Global Securities' misleading public filings. *See Fehn, 97 F.3d at 1293-94.* Farris had actual knowledge of the primary violation and of her role in furthering it. There is no material factual dispute about any of these matters, and the district court properly granted summary judgment against Farris as an aider and abetter.

III

The district court properly concluded that Reese was personally responsible for making the misleading statements by conveying [**8] the information to potential investors or to the SEC. However, a genuine issue of material fact exists as to whether Reese acted with the requisite scienter. Reese testified that she was the President of Global Securities in title only, and characterized herself as a salesperson who was unaware of the investments in and distributions from Global Securities. Reese argued that although she attracted investors to Global Securities, she relied on a prospectus that had been prepared by others. Reese claimed she was aware that Global Securities had accepted numerous non-performing loans, and was aware of the rates of return that were being paid to investors. This testimony, coupled with support from the records, is sufficient to raise a genuine issue of material fact concerning scienter. Therefore, the district court erred in granting summary judgment against Reese for securities fraud.

IV

The district court enjoined Farris and Reese from future violations of the securities laws, held them jointly and severally liable for disgorging over $ 23 million, ordered them to pay civil penalties of $ 120,000 each, and barred Farris from serving as an officer or director of a public company in the future. [**9] Because we have reversed the judgment entered against Reese, we must also vacate the remedies imposed on her.

We review the district court's determination of appropriate remedies against [*189] Farris under the deferential abuse of discretion standard. *See SEC v. First Pacific Bancorp, 142 F.3d 1186, 1190 (9th Cir. 1998)* (officer and director bar); *Fehn, 97 F.3d at 1295* (injunction); *SEC v. Clark, 915 F.2d 439, 453 (9th Cir. 1990)* (disgorgement).

A

To obtain a permanent injunction, the SEC has the burden of showing there is a reasonable likelihood that the defendants will violate the securities laws in the future. *Fehn, 97 F.3d at 1295.* In predicting the likelihood of future violations, a court must assess the totality of the circumstances, and consider such factors as

> (1) the degree of scienter involved; (2) the isolated or recurrent nature of the infraction; (3) the defendant's recognition of the wrongful nature of [her] conduct; (4) the likelihood, because of the defendant's professional occupation, that future violations might occur; and (5) the sincerity of the defendant's assurances against future violations.

Id. at 1295-96.

In issuing a permanent injunction against Farris, the district court [**10] took into account the totality of the circumstances. The court noted that Farris acted with the "highest degree of scienter" in keeping the investment scheme alive for over a year, despite knowing that Global Capital's assets were non-performing and that the interest generated was insufficient to cover the monthly returns. The court also noted that Farris never acknowledged her wrongful conduct or provided assurances against future violations. The court characterized the violation as "egregious and recurring." Other factors, such as the fact that Farris controls multiple entities engaged in activities similar to those engaged in by Global Capital, support the court's conclusion. The district court did not abuse its discretion in issuing a permanent injunction against Farris.

B

Third tier civil penalties are appropriate when the defendant's violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory

requirement" and "such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." *15 U.S.C. §§ 77t(d)(2)(C), 78u(d)(3)(B)(iii)*. Because Farris committed securities fraud, she [**11] satisfied the fraud requirement for third tier civil penalties. Because Global Capital operated like a Ponzi scheme -- using the money provided by new investors to create returns for the original investors -- it created a significant risk of substantial loss to the individuals who had invested $ 48 million in Global Capital. The district court did not abuse its discretion in ordering Farris to pay maximum civil penalties.

C

A court may bar a person from serving as an officer or director of a public reporting company if the person committed a scienter-based fraud violation and the person's conduct demonstrates unfitness to serve as an officer or director. *15 U.S.C. §§ 77t(e), 78u(d)(2)*. Factors a court may consider in determining whether to order the bar include "(1) the egregiousness of the underlying ... violation, (2) the defendant's 'repeat offender' status, (3) the defendant's role or position when she engaged in the fraud, (4) the defendant's degree of scienter, (5) the defendant's economic stake in the violation, and (6) the likelihood that misconduct will recur." *First Pac., 142 F.3d at 1193* (some internal quotation marks omitted).

[*190] The district court noted that Farris violated the [**12] securities laws over an extended period of time, that she was principal, owner, and manager of each of the entity defendants and violated her duty to fund investors, that she acted with a high level of scienter, that she profited from her fraud by diverting millions of dollars to entities that she controlled, and that she sought to escape responsibility by blaming others. The district court did not abuse its discretion in concluding that Farris's fraudulent conduct demonstrated that she was unfit to be an officer or director of a public company.

D

"The district court has broad equity powers to order the disgorgement of 'ill-gotten gains' obtained through the violation of the securities laws. *First Pac., 142 F.3d at 1191*. Maintaining a fraudulent scheme so that one may continue to reap the benefit of hundreds of thousands of dollars of salaries and commissions is enough to support a disgorgement order. *Id. at 1192*. The district court is not required to trace every dollar fraudulently retained; the disgorgement amount must only be a reasonable approximation of the profits causally connected to the violation. *Id. at 1193 n.6*. We have held, however, that it is improper to order a party to [**13] disgorge an amount ten times the unjust enrichment actually retained by the party. *Hateley v. SEC, 8 F.3d 653, 656 (9th Cir. 1993)*. We have held that disgorgement of gross proceeds of an offering is appropriate when defendants controlled the entities that received the ill-gotten gains, even if defendants personally received only a fraction of the total offering proceeds, but we have done so only where the defendants were held jointly and severally liable with the corporations that profited directly from the offering. *First Pac., 142 F.3d at 1192*.

The disgorgement amount ordered by the district court was calculated by adding all of the amounts received in cash by Global Capital and the Global Capital Manager from the sale of Global Capital units, interest income on loans, repayments of loan principal, and sales of real property. Farris was given no credit for amounts that were expended to satisfy legitimate Global Capital debts, nor was she given credit for value that remained in Global Capital and placed in receivership. Most of the funds included in the disgorgement order were not controlled by Farris directly, but by the Global entities. Although Farris had considerable control over [**14] the Global entities, the funds retained by the entities cannot be considered her personal ill-gotten gains. Because Farris was not held jointly and severally liable for these amounts with the Global entities, we remand to the district court for a new calculation of the disgorgement amount.

V

Farris and Reese also appeal the district court's denial of a motion to stay discovery, denial of a motion to withdraw admissions, denial of a motion to recuse Judge Dawson, and failure to rule on a motion to compel discovery.

A

We review the district court's ruling on a party's request to stay proceedings for abuse of discretion. *Fed. Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir. 1989)*. Absent a showing of substantial prejudice to the rights of the parties involved, the Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings. *Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th Cir. 1995)*. In determining [*191] whether to stay civil proceedings in the face of parallel criminal proceedings, a court must consider the particular circumstances and competing interests involved, and should consider (1) the extent to which the defendant's [**15] *Fifth Amendment* rights are implicated, (2) the interest of the plaintiffs in proceeding expeditiously, (3) the burden the proceedings may impose on the defendants, (4) the convenience of the court and the efficient use of judicial resources, (5) the interests of persons not parties to the civil litigation, and (6) the interest of the public in the pending civil and criminal litigation. *Id. at 324-25*. The case for staying

civil proceedings is weak when no indictment has been returned. *Molinaro, 889 F.2d at 903.*

The magistrate judge correctly balanced Farris's *Fifth Amendment* interests against the other factors and reasoned that a stay of the proceedings would be prejudicial to the SEC, frustrate the work of the receiver, and lead to an inefficient use of the court's resources. In light of the fact that no criminal charges had been filed against Farris at the time she moved for a stay (nor were criminal charges ever filed), this conclusion was appropriate.

B

We review the district court's decision not to allow a party to withdraw or amend *Rule 36* admissions for abuse of discretion. *Conlon v. United States, 474 F.3d 616, 621 (9th Cir. 2007).* A court may permit the withdrawal of admissions [**16] when the presentation on the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal will prejudice that party in maintaining the action on the merits. *Fed. R. Civ. P. 36(b).* Where the moving party has satisfied both prongs of the *Rule 36(b)* test, the district court may allow withdrawal, but is not required to do so. *Conlon, 474 F.3d at 625.* The district court may consider other factors, such as whether the moving party can show good cause for the delay. *Id.*

The first prong of the *36(b)* analysis "is satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case." *Conlon, 474 F.3d at 622* (internal quotation marks omitted). Because Reese's admissions closely tracked the allegations in the SEC complaint, the first prong is satisfied.

The SEC had the burden of proving that the withdrawal of Reese's admissions would prejudice it in maintaining the case on the merits. *Id.* Because Reese filed her motion for withdrawal almost two months after the SEC's motion for summary judgment, more than three months after written discovery had closed, and near the time that deposition [**17] discovery closed, the SEC may have succeeded in establishing that it would have been prejudiced by the withdrawal. *Id. at 624.* Even if Reese had satisfied both prongs of the *36(b)* test, we would affirm the district court's denial of her motion to withdraw. The district court found that Reese did not have good cause for delay, and that her delay was part of her manipulative approach to the litigation and her abuse of the privilege against self-incrimination. The district court did not abuse its discretion in denying Reese's motion to withdraw her admissions.

C

We review the district court's denial of a motion for recusal for abuse of discretion. *Yagman v. Republic Ins., 987 F.2d 622, 626 (9th Cir. 1993).* Under *28 U.S.C. § 455*, a judge must recuse himself where "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably [*192] be questioned." *Id. at 626* (internal quotation marks omitted). Recusal motions must be lodged in a timely fashion. *Preston v. United States, 923 F.2d 731, 732-33 (9th Cir. 1991).* Farris's recusal motion, filed after twenty-three months of active litigation, was untimely. *Id. at 733* (filing a recusal motion eighteen [**18] months after a case is set before a particular judge, and shortly after the judge has denied the party's request to extend discovery, should usually be considered untimely). In addition, Farris failed to explain how Judge Dawson was connected to any party with an interest in the case. *See id. at 735* (for recusal to be appropriate, party must have some interest in the case). The district court did not abuse its discretion in denying Farris's recusal motion.

D

A district court's failure to rule on a motion to compel discovery is a failure to exercise discretion, and as such is reviewed de novo. *Garrett v. City of San Francisco, 818 F.2d 1515, 1518 n.3 (9th Cir. 1987).* The testimony Farris sought -- about the industry custom of advertising a fixed rate of return -- was irrelevant to the district court's ruling on securities fraud. The district court based its ruling on multiple misstatements regarding Global Capital's operation and financial stability, not on promises of a fixed rate of return. Had Farris been able to establish an industry custom of advertising a fixed rate of return, summary judgment would have been equally appropriate. The district court did not commit reversible error [**19] when it failed to rule on Farris's motion to compel testimony.

VI

For the foregoing reasons, we reverse the district court's grant of summary judgment with respect to Reese, and we remand to the district court for recalculation of Farris's disgorgement figure. In all other respects, we affirm the district court.

AFFIRMED IN PART; REVERSED and **REMANDED IN PART.**

Each party shall bear its own costs on appeal.

WILLIAM SOMMERVILLE, Plaintiff, v. OFFICER JUDY DOBSON, and LIEUTENANT JAMES LEDBETTER, Defendants.

Civil Action No. 4:10cv67

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NEWPORT NEWS DIVISION

2011 U.S. Dist. LEXIS 156380

March 8, 2011, Decided
March 8, 2011, Filed

SUBSEQUENT HISTORY: Affirmed by *Sommerville v. Dobson, 452 Fed. Appx. 402, 2011 U.S. App. LEXIS 22366 (4th Cir. Va., 2011)*

COUNSEL: [*1] For William Sommerville, Plaintiff: Gregory William Klein, Todd Michael Gaynor, Taylor & Walker PC, Norfolk, VA.

For Officer Jody Dobson, Defendant: Paul Kugelman, Jr., LEAD ATTORNEY, Office of the Attorney General, Richmond, VA.

For Lieutenant James Ledbetter, Defendant: Jeff Wayne Rosen, LEAD ATTORNEY, Pender & Coward PC, Virginia Beach, VA.

JUDGES: Jerome B. Friedman, SENIOR UNITED STATES DISTRICT JUDGE.

OPINION BY: Jerome B. Friedman

OPINION

OPINION AND ORDER

This matter is currently before the court on plaintiff's motion to file late responses to defendant Dobson's requests for admission, and defendants' motions for summary judgment. As an initial matter, the court acknowledges that this Opinion is being issued after the parties' final pretrial conference, and only one week before trial. However, the court also notes that the defendants' motions for summary judgment and plaintiff's motion to file late responses were fully briefed and referred to chambers on February 23, 2011, and February 25, 2011, respectively. Because of the impact of plaintiff's motion on the motions for summary judgment, the court found it necessary to postpone its consideration of the summary judgment motions until plaintiff's motion was [*2] ripe. However, once all motions were fully briefed, the court focused its efforts on resolving these matters as quickly as possible.

Upon considering the record and the briefs submitted with the instant motions, the court finds that oral argument is unnecessary because the facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. For the reasons set forth below, the court **DENIES** plaintiff's motion to file late responses, and **GRANTS** defendants' motions for summary judgment.

I. Factual and Procedural Background[1]

1 In summarizing the facts of this case, the court must resolve all disputed factual issues in Sommerville's favor. See *Rogers v. Pendleton, 249 F.3d 279, 283-84 (4th Cir. 2001)* (citing *Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994))*.

Plaintiff William Sommerville ("Sommerville") resides on 14.2 acres in Gloucester, Virginia. Sommerville's property is surrounded by trees and is only accessible by way of Route 615. The front of Sommerville's home faces Route 615, thereby concealing the area behind his home from passersby.

On May 31, 2008, Sommerville hosted a party featuring live music performed on a wooden stage [*3] behind Sommerville's home. Sommerville provided food and non-alcoholic beverages for his guests, and did not sell or otherwise distribute alcohol to anyone attending

the party. Sommerville advertised the party on his MySpace page and by "word-of-mouth." In addition, the bands who played at the party referred their fans to the invitation posted on Sommerville's MySpace page. On the day of the party, the front of Sommerville's property, which borders Route 615, was roped off with rope and yellow caution tape. [2] Sommerville left two openings in the tape so guests could enter the party. The bands and guests with campers and recreational vehicles entered through one opening, while all other guests parked in a field adjacent to Sommerville's property and entered through the other opening on foot. [3] Ron Day, Sommerville's cousin, monitored guests as they parked and entered the party. While no tickets or written invitations were issued for the party, Sommerville and other individuals walked around the property to make sure that only Sommerville's friends and the bands' fans were in attendance.

2 Sommerville roped off the front of his property to protect his drain field and septic system from [*4] vehicular traffic. See Ledbetter Br. in Supp. Ex. 2, Sommerville Dep. 36:6-36:22.

3 Aside from a sign reading "Staff Access" posted nearby one of the entrances, no "No Trespassing" or other signs were posted on Sommerville's property.

At approximately 9:00 p.m., the Gloucester County Sheriff's Office 911 dispatcher received a noise complaint from someone claiming to live approximately one mile from Sommerville's property. Shortly thereafter, the dispatcher notified defendant Lieutenant James Ledbetter (Ledbetter) of the complaint. Ledbetter proceeded towards Sommerville's property and met with four other Gloucester County sheriff's deputies at a gas station near Sommerville's property. Once there, Ledbetter received a tip of underage drinking at Sommerville's property. Ledbetter then contacted defendant Officer Judy Dobson, a Virginia Alcoholic Beverage Control Board ("ABC") agent, and informed her of the underage drinking tip. [4] Roughly thirty minutes later, Dobson arrived at the gas station, and it was decided that she would proceed to Sommerville's property to investigate the report of underage drinking.

4 Sommerville contends that Ledbetter never received a tip of underage drinking [*5] from the public. According to Sommerville, the "tip" was generated by Ledbetter or another officer. However, aside from his observation that the police dispatch report does not mention the tip, Sommerville fails to provide any evidence supporting his contention that Ledbetter never received a tip of underage drinking at Sommerville's property. Regardless, it is important to note that Sommerville does not contest the fact that Ledbetter contacted Dobson and informed her that he had received a tip of underage drinking.

Dobson arrived at Sommerville's property in an unmarked police car at approximately 10:00 p.m. Upon arriving, Dobson noticed that there were approximately fifty cars parked in the area, some of which "displayed characteristics of younger drivers." [5] After parking and exiting her vehicle, Dobson encountered Ron Day and asked him who was hosting the party. Day informed her that it was Sommerville's party, and told her "when you go in, somebody will greet you," or words to that effect. [6] Upon entering Sommerville's property, Dobson observed a young man she believed to be under twenty-one years of age drinking from a beer bottle. [7] Dobson called Ledbetter, informed him she [*6] had identified an underage drinker, and asked him to come to the property. Moments later, Ledbetter and the other deputies entered Sommerville's property through the trees. [8] After the deputies arrived, Dobson approached the young man she observed drinking from a beer bottle, identified herself as an ABC special agent, and asked to see his identification. The young man complied, produced identification that confirmed he was eighteen years old at the time, admitted to drinking a beer, and stated that he heard about the party from his high school classmates. Dobson then issued him a summons for underage drinking under *Virginia Code Section 4.1-305*.

5 See Dobson Br. in Supp. Ex. G, at ¶ 6.

6 Dobson's First Set of Requests for Admission plainly state that Ron Day told Dobson "'when you go in, somebody will greet you,' or words to that effect." (Dobson Br. in Supp. Ex. A, at p. 1, ¶ 2.) Dobson's requests further state that Day knew Dobson was a law enforcement officer and "acted with William Sommerville's authority to grant or deny permission to enter the premises." (Id. at p.1, ¶ 1, p. 2, ¶ 14.) Moreover, Dobson's requests further provide that Day "did not, in any manner, communicate to Agent [*7] Dobson that she was not allowed to enter the premises." (Id. at p. 2, ¶ 5.) As discussed in part III.A, Dobson's requests are deemed admitted due to plaintiff's failure to respond to them. Accordingly, the matters contained in the requests are conclusively established and cannot be rebutted by contrary testimony. See *Adventis, Inc. v. Consolidated Property Holdings, Inc., 124 Fed. Appx. 169, 173 (4th Cir. 2005)* (unpublished opinion) (noting the conclusive effect of an admission under *Federal Rule of Civil Procedure 36(b)*); *Armour v. Knowles, 512 F.3d 147, 154 (5th Cir. 2007)* (observing that "an admission that is not withdrawn

or amended cannot be rebutted by contrary testimony.").

7 Dobson maintains that the young man was standing approximately twenty feet from the front porch as the time she approached him. Sommerville, however, contends that the young man was standing near the wooden stage behind his home when Dobson approached. As previously stated, at this stage in the proceedings, the court must resolve all factual disputes in Sommerville's favor. *Rogers, 249 F.3d at 283-84.* Accordingly, for the purposes of this Opinion and Order, the court will assume that the young man was standing [*8] behind Sommerville's home when observed by Dobson.

8 According to two affidavits provided by Sommerville, the deputies "stormed onto the property" and "began yelling and screaming at Sommerville's guests and demanded all attendees leave immediately. One police officer climbed onto the stage ... and told all guests to leave the premises immediately." (Sommerville Br. in Opp. Ex. 2, at p. 2 ¶¶ 7-10, Ex. 3, at p. 2 ¶¶ 7-10.)

Upon entering the property, Ledbetter and another deputy immediately sought out Dobson, who instructed them to find Sommerville. Ledbetter and the deputy located Sommerville, and informed him that they were responding to noise and alcohol complaints. Sommerville provided his identification and confirmed that he owned the property. Ledbetter instructed Sommerville to follow him and led Sommerville to Dobson, who was still speaking with the young man she observed drinking a beer. When Sommerville arrived, Dobson identified herself as an ABC agent, and Sommerville informed her that he did not provide alcohol to anyone attending the party. However, Sommerville did confirm that he organized the party and advertised it on his MySpace page. Dobson asked Sommerville if he knew [*9] the young man she had observed drinking a beer. Sommerville stated that he did not, and denied providing any alcohol to the young man or having any knowledge that he was consuming alcohol. Dobson then issued Sommerville a citation and summons for aiding and abetting a person under the age of twenty-one years with possession and consumption of alcohol in violation of *Virginia Code Section 4.1-323.* [9] Sommerville initially refused to sign the summons, and only agreed to do so after Dobson informed him that he would be arrested if he did not sign it. Once Sommerville signed the summons, Dobson and Ledbetter left his property. Nearly one year later, Sommerville appeared in Gloucester General District Court and was acquitted of violating *Virginia Code Section 4.1-323.*

9 *Virginia Code Section 4.1-323* provides as follows: "No person shall attempt to do any of the things prohibited by this title or to aid or abet another in doing, or attempting to do, any of the things prohibited by this title." The young man Dobson observed consuming a beer was cited for violating *Virginia Code Section 4.1-305*, which prohibits the possession or consumption of alcohol by individuals under twenty-one years of [*10] age. See *Va. Code Ann. § 4.1-305.*

On May 27, 2010, Sommerville filed the instant complaint alleging that Dobson and Ledbetter violated his right "to be secure in his own home and on his property, to be free from unreasonable searches, to be free from unreasonable seizures, to be [free] from unreasonable and false imprisonments, to be free from unreasonable assaults and to be free from unreasonable and malicious and false prosecutions, all in violation of Title *42 U.S.C. Section 1983* and the *Bill of Rights* and the *Fourteenth Amendment to the United States Constitution*, as well as the Constitution of Virginia." (Compl. ¶ 27.) Thereafter, Dobson and Ledbetter filed independent motions to dismiss. In response, the court issued an order finding that the complaint's allegations were sufficient to support *§ 1983* claims against both Dobson and Ledbetter for violating Sommerville's *Fourth Amendment* rights. [10]

10 In its order, the court construed the complaint's stated cause of action as an attempt to assert *§ 1983* claims based solely upon the violation of Sommerville's *Fourth Amendment* rights. Accordingly, the court dismissed the complaint to the extent that it attempted to state a claim under [*11] Virginia law or other portions of the United States Constitution.

On February 7, 2011, Ledbetter and Dobson filed independent motions for summary judgment. On February 22, 2011, Sommerville filed a motion to file late responses to Dobson's requests for admission. These matters are now ripe for consideration, as all necessary briefs have been filed with the court.

II. Standard of Review

Summary judgment is appropriate if the court determines that there are no genuine disputes as to the material facts and the moving party is entitled to judgement as a matter of law. *Fed. R. Civ. P. 56.* A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).* A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. When considering a summary judgment motion, the court must "view the facts and draw all reasonable inferences in the light most favorable

to the nonmoving party." *Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994)* (citing *Anderson, 477 U.S. at 248*).

The party seeking summary judgment bears the initial burden of showing the [*12] absence of a genuine issue of material fact and demonstrating that the party is entitled to judgment as a matter of law. *Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 185 (4th Cir. 2005)*. However, once the moving party has "submitted sufficient evidence to support its request for summary judgment, the burden shifts to the nonmoving party to show that there are genuine issues of material fact." *Emmett v. Johnson, 532 F.3d 291, 297 (4th Cir. 2008)*. "Conclusory statements, without specific evidentiary support, are insufficient to oppose a properly supported motion for summary judgment." *Ware v. James City County, Virginia, 652 F. Supp. 2d 693, 701 (E.D. Va. 2009)* (citing *Causey v. Balog, 162 F.3d 795, 802 (4th Cir. 1998))*. Moreover, a "mere scintilla of evidence supporting [the nonmoving party's] case is insufficient" to overcome an otherwise meritorious summary judgment motion. *Shaw, 13 F.3d at 798*.

III. Analysis

A. Plaintiff's Motion to File Late Responses

The court must first address Sommerville's motion seeking leave to amend or file late responses to Dobson's requests for admission. [11] *Rule 36 of the Federal Rules of Civil Procedure* permits a party to serve any other party with [*13] a written request to admit certain factual matters or the application of law to fact. *Fed. R. Civ. P. 36(a)(1)*. If the party to whom the request is directed fails to respond or object within thirty days, the matter that is the subject of the request is deemed admitted. *Fed. R. Civ. P. 36(a)(3)*. Once a matter is admitted under *Rule 36*, it is "conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." *Fed. R. Civ. P. 36(b)* (emphasis added). [12] "Once made, an admission may be withdrawn only if: a) the withdrawal would promote the presentation of the merits of the action, and b) allowing the withdrawal would not prejudice the party that obtained the admission." *Adventis, 124 Fed. Appx. at 173* (citing *Rule 36(b)*). "Thus, once a matter that is properly subject of an admission under *Rule 36* has been admitted during discovery, the district court is not free to disregard that admission." Id. (citing *Langer v. Monarch Life Ins. Co., 966 F.2d 786, 803 (3rd Cir. 1992)* ("*Rule 36* admissions are *conclusive* for purposes of the litigation and are sufficient to support summary judgment.") (emphasis in original)). [13]

11 In addressing this motion, the court [*14] relies on the first brief in opposition submitted by Dobson. Therefore, the court need not address Dobson's subsequently filed motion seeking leave to file a substituted brief in opposition. Furthermore, the court notes that while plaintiff's motion clearly references "amending" his response to Dobson's requests, it is impossible to amend a response that was never submitted. Accordingly, the court views plaintiff's motion solely as a request to submit a late response to Dobson's requests for admission.

12 See also *Adventis, 124 Fed. Appx. at 172* (commenting upon the conclusive nature of *Rule 36* admissions and noting that the purpose of admissions under *Rule 36* is to "narrow the array of issues before the court, and thus expedite both the discovery process and the resolution of the litigation.")

13 The court notes that Sommerville goes to great lengths to point out the discrepancies between Day's testimony and Dobson's admissions. Indeed, in *Williams v. Howard Johnson's Inc. of Washington, 323 F.2d 102, 107 n.9 (4th Cir. 1963)*, the Fourth Circuit noted that "admissions in answer to a request from the other party stand in the same relation to the case as sworn testimony." However, since Williams, [*15] *Rule 36* was amended to note the "conclusiveness" of an admission, and several courts have recognized that once admitted, a matter is conclusively established for the purposes of the litigation. See *Adventis, 124 Fed. Appx. at 173* (noting that once admitted, a matter is conclusively established and cannot be disregarded by the district court); *Armour, 512 F.3d at 154* (observing that "an admission that is not withdrawn or amended cannot be rebutted by contrary testimony.").

Here, Dobson served her First Set of Requests for Admission on Sommerville on October 5, 2010, and Sommerville failed to respond. [14] In the instant motion, Sommerville argues that these admissions should be withdrawn and that he should be permitted to file late responses to Dobson's requests. [15] However, due to the prejudice to Dobson that would result, the court disagrees. [16] Discovery in this matter is now closed. As previously noted, Dobson served her requests for admission on October 5, 2010. After Sommerville failed to respond, Dobson proceeded with discovery under the proper assumption that the matters included in the requests were admitted. In addition, Dobson's motion for summary judgment was briefed at the [*16] time Sommerville submitted the instant motion. [17] Accordingly, Sommerville's motion to file late responses to Dobson's First Set of Requests for Admission is denied. [18]

14 The court finds Sommerville's argument that he never received Dobson's First Set of Requests for Admission unpersuasive. The certificate of service attached to the requests clearly states that the requests were mailed to plaintiff's counsel on October 5, 2010. (Dobson, Br. in Supp. Ex. A, at p. 4.) Furthermore, the requests were sent under the same cover letter as Dobson's First Set of Requests for Production and First Set of Interrogatories, each of which Sommerville responded to. (Id. at Ex. B, p. 1, 3-4.) Finally, it is interesting to note that although plaintiff's counsel claims to have not received the requests for admission, he does not claim to have contacted defense counsel to inquire about the requests upon receiving the aforementioned cover letter, which clearly references the requests.

15 Sommerville also argues that Dobson's requests for admission were improper because they asked Sommerville to admit or deny facts known to Ron Day, a third party. In support of this argument, Sommerville cites *T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co. Inc., 174 F.R.D. 38 (S.D.N.Y. 1997).* [*17] In T. Rowe Price, the court simply found that *Rule 36*'s reasonable inquiry requirement did not compel a party to rely on the deposition testimony of individuals adverse to that party when answering requests for admission. *T. Rowe Price, 174 F.R.D. at 44.* The court did not in any way imply that requests pertaining to matters within the knowledge of a third party were *per se* improper under *Rule 36.* To the contrary, *Rule 36* specifically states that a party may seek the admission of the truth of any matters within the general scope of discovery. See *Fed. R. Civ. P. 36(a)(1)* (referencing the general discovery provisions of *Fed. R. Civ. P. 26(b)(1)*). Thus, the mere fact that Dobson's requests sought the admission of matters known to Ron Day does not render those requests improper under *Rule 36.*

16 The court acknowledges that the denial of plaintiff's motion will undoubtedly cause plaintiff to suffer prejudice. However, given that plaintiff's potential prejudice is of his own doing, the court concludes that the prejudice suffered by Dobson outweighs that potentially suffered by plaintiff.

17 Dobson filed her brief in support of her motion for summary judgment on February 7, 2011. Although Dobson's [*18] brief clearly notes Sommerville's failure to respond to her requests for admission, Sommerville waited until February 22, 2010 to file the instant motion. See Dobson, Br. in Supp. at p. 4 n.2 (discussing *Rule 36* and Sommerville's failure to respond to Dobson's requests for admission).

18 Contrary to Sommerville's assertion, the court cannot simply disregard Dobson's requests for admission when analyzing the pending motions for summary judgment. See Sommerville Rebuttal Br. at p. 4. As previously noted, matters admitted under *Rule 36* are conclusively established and may not be disregarded by the court. *Adventis, 124 Fed. Appx. at 173.* Furthermore, Dobson clearly relied upon the admissions when crafting her argument in support of summary judgment. See Dobson, Br. in Supp. at p. 4 n.2. Thus, if the court were to grant Sommerville's motion, it would also be necessary to permit the defendants to rebrief their motions for summary judgment, and perhaps reopen discovery.

B. Defendants' Motions for Summary Judgment

This action, in its present form, features three claims against the defendants under *42 U.S.C. § 1983.* Specifically, Sommerville alleges that Dobson and Ledbetter violated his *Fourth Amendment* [*19] right to be free of unreasonable searches and seizures by entering his property, questioning him, and issuing him a citation and summons without a warrant or probable cause, and in the absence of exigent circumstances. [19] In moving for summary judgment, Dobson and Ledbetter argue that their actions were not unreasonable within the meaning of the *Fourth Amendment*, and that they are entitled to qualified immunity.

19 The *Fourth Amendment* protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *U.S. Const. amend. IV.* "This guarantee contemplates distinct protections against unreasonable searches and unreasonable seizures." *United States v. Rumley, 588 F.3d 202, 205 (4th Cir. 2009)* (citing *Horton v. California, 496 U.S. 128, 133, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990)* ("A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property.")).

Qualified immunity protects government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable [*20] person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).* "The qualified immunity inquiry recognizes that reasonable mistakes may be made regarding the legal parameters of particular government

conduct." *Ware v. James City County, Virginia, 652 F. Supp. 2d 693, 701 (E.D. Va. 2009)* (citing *Saucier v. Katz, 533 U.S. 194, 205, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001))*. "Thus, 'all but the plainly incompetent or those who knowingly violate the law' are protected by qualified immunity." Id. (quoting *Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986))*.

To determine whether an officer is protected by qualified immunity, the court must assess whether the facts make out a violation of a constitutional right; and if so, whether the constitutional right in question was clearly established at the time of the violation. *Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808, 815-16, 172 L. Ed. 2d 565 (2009)* (noting that while it is often proper to consider these two factors in sequence, a court may, in its discretion, begin with an analysis of whether the constitutional right allegedly violated was clearly established). Thus, an officer asserting the defense of qualified immunity is entitled to summary judgment if "there was no violation of a constitutional [*21] right or the right at issue was not clearly established at the time of the alleged misconduct." *Ware, 652 F. Supp. 2d 693, 702* (citing *Henry v. Purnell, 501 F.3d 374, 377 (4th Cir. 2007))*.

When analyzing whether the constitutional right in question was clearly established, the court must consider "the specific factual context of the case." Id. (citing *Saucier, 533 U.S. at 201*). "[A] right may be deemed clearly established even if there is no prior decision addressing the precise conduct at issue, so long as its illegality would have been evident to a reasonable officer based on existing caselaw." *Rogers v. Pendleton, 249 F.3d 279, 290 (4th Cir. 2001)*. "Therefore, the court must assess whether the officer's conduct was reasonable under the circumstances known to that officer." *Ware, 652 F. Supp. 2d at 702* (citing *Pearson, 129 S.Ct. at 815*).

While the qualified immunity determination should normally be made at the summary judgment stage, it does not "override the ordinary rules applicable to summary judgment proceedings." *Schultz v. Braga, 455 F.3d 470, 476 (4th Cir. 2006)*. "Whether the alleged violation 'actually occurred . . . may or may not be . . . subject to determination as a matter [*22] of law' at the summary judgment stage." *Ware, 652 F. Supp. 2d at 702* (quoting *Pritchett v. Alford, 973 F.2d 307, 314 (4th Cir. 1992))*. "If there are genuine issues of [material] fact respecting the officer's conduct . . . summary judgment is not appropriate, and the issue must be reserved for trial." *Pritchett, 973 F.2d at 314*.

With these principles in mind, the court will address the merits of the defendants' motions for summary judgment as to each of Sommerville's claims.

1. Unreasonable Search

For *Fourth Amendment* purposes, "a 'search' occurs when an expectation of privacy that society is prepared to consider as reasonable is infringed." *United States v. Breza, 308 F.3d 430, 433 (4th Cir. 2002)* (citing *United States v. Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984))*. Because an individual ordinarily possess the highest expectation of privacy within the curtilage of his home, that area is typically entitled to the same *Fourth Amendment* protections as the home itself. See *Rogers, 249 F.3d at 287* (citing *Oliver v. United States, 466 U.S. 170, 180, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984))*. [20] "This does not mean, however, that limits on access to the home and the curtilage are equivalent." *Edens v. Kennedy, 112 Fed. Appx. 870, 875 (4th Cir. 2004)* [*23] (unpublished opinion). "Access to the home is strictly forbidden in the absence of a warrant or exigent circumstances." Id. (citing *Payton v. New York, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980))*. In contrast, the Fourth Circuit has routinely held that police officers investigating a complaint may enter the curtilage of the home to speak with the home's owner or inhabitants. See *Pena v. Porter, 316 Fed. Appx. 303, 313 (4th Cir. 2009)* (unpublished opinion); *Edens, 112 Fed. Appx. at 874-75*; *Rogers, 249 F.3d at 287, 294*; *Alvarez v. Montgomery County, 147 F.3d 354, 357-58 (4th Cir. 1998)*. [21] Moreover, the Fourth Circuit has found that it is not unreasonable for investigating officers to "enter the backyard when circumstances indicate they might find the homeowner there." *Alvarez, 147 F.3d at 359*; see also *United States v. Bradshaw, 490 F.2d 1097, 1100 (4th Cir. 1974)* (holding that federal agents did not act unreasonably within the meaning of the *Fourth Amendment* when entering the defendant's backyard in an effort to contact him). That being said, once officers enter the curtilage to seek out a homeowner, they may not conduct a general search of the premises or otherwise engage in conduct that exceeds their [*24] legitimate purpose for being there. *Rogers, 249 F.3d at 289-90*; *Alvarez, 147 F.3d at 358-59*.

20 In contrast, an individual has no reasonable expectation of privacy in open fields. *Oliver, 466 U.S. at 180-81*. Accordingly, the protections of the *Fourth Amendment* are limited to the home and the curtilage of the home and do not extend to open fields. Id. When considering the boundaries of the curtilage of a home, a court must consider '"the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.'" *United States v. Vankesteren, 553 F.3d 286, 289 (4th*

Cir. 2009) (quoting *United States v. Dunn, 480 U.S. 294, 301, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987))*.

21 A homeowner may prevent officers from entering the curtilage of his home by "sealing the property around his home and posting "No Trespassing" signs. [I]n the absence of a warrant or exigent circumstances, a police officer may not lawfully breach a locked enclosure around the curtilage." *Edens, 112 Fed. Appx. at 875*. Here, Sommerville roped off the front of his [*25] yard with rope and yellow caution tape to prevent his guests from damaging his septic system and drain field. Furthermore, there were no "No Trespassing" signs posted on his property. Thus, it is clear that Sommerville did not take sufficient steps to preclude officers from entering the curtilage of his home for a legitimate law enforcement purpose unconnected with a general search of his property. See *Edens, 112 Fed. Appx. at 875*; *Alvarez, 147 F.3d at 358-59*.

In the present case, Sommerville appears to premise his unreasonable search claim on Dobson's and Ledbetter's entry onto his property, and Dobson's subsequent discovery of a young man consuming alcohol in Sommerville's backyard. In support of their motions for summary judgment, Dobson and Ledbetter maintain that their entry onto Sommerville's property was reasonable under the *Fourth Amendment*. Given the different set of circumstances under which Dobson and Ledbetter entered Sommerville's property, the court will consider the merits of each defendants' argument as to their entry independently. [22]

22 As an aside, it should be noted that it is questionable whether Sommerville even had a reasonable expectation of privacy in the area [*26] of his property entered by Dobson and Ledbetter. As noted previously, the protections of the *Fourth Amendment* are limited to the curtilage of the home and do not extend to open fields. *Oliver, 466 U.S. at 180-81*. When considering the boundaries of the curtilage of a home, a court must consider "'the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.'" *Vankesteren, 553 F.3d at 289* (quoting *Dunn, 480 U.S. at 301*). Here, while it appears Sommerville's guests were indeed congregating near the back of his home, there is no indication in the record that that area was enclosed in any manner, or that Sommerville had taken any steps to protect the area from observation by passersby.

i. Dobson's Search of Sommerville's Property

It is well established that "'the touchstone of the *Fourth Amendment* is reasonableness.'" *United States v. Coleman, 588 F.3d 816, 819 (4th Cir. 2009)* (quoting *Florida v. Jimeno, 500 U.S. 248, 250, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1967))*. Therefore, searches conducted pursuant to consent [*27] are permissible under the *Fourth Amendment* because "'it is no doubt reasonable for the police to conduct a search once they have been permitted to do so.'" Id. Here, when Dobson arrived at Sommerville's property, she first encountered Ron Day, who told her "'when you go in, somebody will greet you,' or words to that effect." (Dobson Br. in Supp. Ex. A, at p.1 ¶ 2.) At the time, Day knew that Dobson was a law enforcement officer and he "acted with . . . Sommerville's authority to grant or deny permission to enter the premises." (Id. at p.1, ¶ 1, p.2, ¶ 4.) Moreover, Day "did not, any manner, communicate to Agent Dobson that she was not allowed to enter the premises." (Id. at p. 2, ¶ 5.) Once Dobson entered the premises, the first group of people she came into contact with included the young man she observed drinking alcohol. Accordingly, Dobson did not violate Sommerville's constitutional rights, and she is therefore entitled to qualified immunity under the first prong of the qualified immunity test.

Even assuming that Dobson's conduct did violate Sommerville's *Fourth Amendment* rights, she would nevertheless be entitled to qualified immunity under the second prong of the qualified immunity [*28] test. When analyzing whether a constitutional right was clearly established, the court must consider "the specific factual context of the case" and "assess whether the officer's conduct was reasonable under the circumstances known to that officer." *Ware, 652 F. Supp. 2d at 702* (citing *Saucier, 533 U.S. at 201*; *Pearson, 129 S.Ct. at 815*). As previously discussed, Dobson went to Sommerville's property to investigate a tip of underage drinking. Once she arrived, she was permitted to enter the property. Upon entering the property, she observed an individual appearing to be less than twenty-one years of age drinking from a beer bottle. Given these facts, and in light of the law pertaining to unreasonable seizures discussed above, the court cannot conclude that Dobson "knowingly violated the law" or acted in a "plainly incompetent" manner. [23] Accordingly, she is entitled to qualified immunity as to Sommerville's unreasonable search claim. As a result, Dobson's summary judgment motion with respect to this claim must be granted.

23 It is important to note that Sommerville has not alleged, or produced any evidence indicating

that he ever asked Dobson to leave his property, or challenged her presence [*29] on his property.

ii. Ledbetter's Search of Sommerville's Property

Officers may enter the curtilage of the home if they have a legitimate reason for doing so "unconnected with a search of such premises . . . ." *Alvarez, 147 F.3d at 358* (citing *Bradshaw, 490 F.2d at 1100*). In this case, Ledbetter was dispatched to Sommerville's property on a noise complaint. After he received word from Dobson that an individual under the age of twenty-one was consuming alcohol on the premises, Ledbetter proceeded to enter Sommerville's property. Upon entering, he sought out Sommerville, the property owner, and informed Sommerville that he was there due to noise and underage drinking complaints. Ledbetter then led Sommerville to Dobson. After Dobson issued Sommerville a citation, Ledbetter exited Sommerville's property. Significantly, there is no evidence in the record indicating that Ledbetter ever performed a general search of Sommerville's property. Instead, he entered the property, located Sommerville, and led him to Dobson. Consequently, Ledbetter is entitled to qualified immunity because his entry onto Sommerville's property did not violate Sommerville's constitutional rights.

Furthermore, even if [*30] Ledbetter's entry onto Sommerville's property did violate Sommerville's constitutional right to be free of unreasonable searches, he is nevertheless entitled to qualified immunity because that right was not clearly established at the time Ledbetter entered Sommerville's property. In Alvarez, the Fourth Circuit found it reasonable for officers responding to a 911 call complaining of an underage drinking party to enter a homeowner's backyard when "circumstances indicated they might find the homeowner there." *Alvarez, 147 F.3d 354, 359.* [24] Similarly, in Rogers, the Fourth Circuit concluded that officers investigating noise complaints reasonably entered the curtilage of a home to speak with the owner; and only violated the owner's constitutional rights when they "persist[ed], in the face of a request to leave by the owner of the property, in a comprehensive search for sound equipment, underage drinkers and persons who might cause a noise violation to recur. . . ." *Rogers, 249 F.3d at 294, 289.* [25] More recently, the Fourth Circuit held in Edens that an officer responding to an anonymous tip regarding marijuana plants who entered a homeowner's yard through a four foot gap between the fence [*31] surrounding the home and the woods was entitled to qualified immunity under the "knock and talk" rule discussed in Alvarez. *Edens, 112 Fed. Appx. at 872-73, 875-76.* [26]

24 In Alvarez, the court also noted that the officers' questioning of an individual they believed to be under the age of twenty-one and consuming alcohol did not exceed their "legitimate purpose for being there." *Alvarez, 147 F.3d at 358-59.*

25 Again, it should be noted that Sommerville has not alleged, or produced any evidence indicating that he asked Ledbetter to leave his property.

26 The homeowner in Edens argued that the officer's entry onto his property was unlawful solely because the officer's underlying purpose was to search the curtilage of his home. *Edens, 112 Fed. Appx. at 874.* In rejecting this argument, the Fourth Circuit noted that the officer's purpose was "irrelevant" since the homeowner could not produce any evidence that the officer actually conducted a general search of the curtilage. Id. The court further concluded that the officer's authority to enter the curtilage in search of the homeowner "was not impaired by his receipt of a tip stating that there might be evidence of criminal activity behind [the [*32] homeowner's] house." Id.

In light of the cases discussed above, the court is compelled to find that the "contours of the right" allegedly violated by Ledbetter were not "sufficiently clear that a reasonable [officer] would understand that what he [was] doing violat[ed] that right." *Taylor v. Waters, 81 F.3d 429, 434 (4th Cir. 1996).* Accordingly, because Ledbetter satisfies both prongs of the qualified immunity analysis, his motions for summary judgment as to Sommerville's unreasonable search claim must be granted.

2. Unreasonable Seizure

An individual is seized for the purposes of the *Fourth Amendment* when an officer, "'by means of physical force or show of authority, terminates or restrains his freedom of movement, through means intentionally applied.'" *Henry v. Purnell, 501 F.3d 374, 380 (4th Cir. 2007)* (quoting *Brendlin v. California, 551 U.S. 249, 254, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007))*; see also *United States v. Sullivan, 138 F.3d 126, 130 (4th Cir. 1998).* "[W]hen an individual's submission to a show of governmental authority takes the form of passive acquiescence," a seizure occurs if, "in [*33] view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *Brendlin, 551 U.S. at 254.* Stated another way, a court considering whether a seizure has occurred should determine whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." Id.

Subject to limited exceptions, a seizure is reasonable under the *Fourth Amendment* only if based on probable cause. *Wilson v. Kittoe, 337 F.3d 392, 398 (4th Cir. 2003)*; *Rogers, 249 F.3d at 279* (citing *Dunaway v. New York, 442 U.S. 200, 213, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979))*. Probable cause exists when the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person . . . in the circumstances shown, [to conclude] that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo, 443 U.S. 31, 37, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979)*; see also *Rogers, 249 F.3d at 290*. Hence, "[w]hether probable cause exists in a particular situation . . . always turns on two factors in combination: the suspect's conduct as known to the officer[s], and the contours of the offense thought to be committed by that conduct." *Pritchett, 973 F.2d at 314*. [*34] "Although probable cause demands 'more than mere suspicion,... evidence sufficient to convict is not required.'" *Ware, 652 F. Supp. 2d at 703* (quoting *Taylor v. Waters, 81 F.3d 429, 433 (4th Cir. 1996))*.

Here, Sommerville's unreasonable seizure claim is presumably based on his interactions with Dobson and Ledbetter once they entered his property. Specifically, Ledbetter approached Sommerville, instructed Sommerville to follow him, and led Sommerville to Dobson. Dobson then questioned Sommerville in the presence of Ledbetter and issued him a citation and summons for violating *Virginia Code Section 4.1-323*. Contrary to Sommerville's assertions, this conduct did not violate his constitutional rights because, as discussed below, Dobson's and Ledbetter's actions were supported by probable cause. [27]

27 Because Dobson's and Ledbetter's actions were supported by probable cause, the court finds it unnecessary to address Ledbetter's argument that his interactions with Sommerville did not amount to a seizure for *Fourth Amendment* purposes. Similarly, it is unnecessary for the court to address whether the issuance of a summons, in and of itself, constitutes a seizure under the *Fourth Amendment*. See [*35] *Burrell, 395 F.3d at 514 n.6* (declining to answer the question of whether a summons constitutes a *Fourth Amendment* seizure upon determining that the relevant officers possessed probable cause to issue the summons). Finally, the court notes that while the parties appear to center their discussion on probable cause, the law permits an officer to detain an individual for investigative purposes if doing so is supported "'by reasonable and articulable suspicion that the person seized is engaged in criminal activity.'" *United States v. Foster, 634 F.3d 243, 246 (4th Cir. 2011)* (published opinion) (citing *Reid v. Georgia, 448 U.S. 438, 440, 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980))*. Here, Sommerville's initial interactions with Ledbetter and Dobson equate to an investigative detention. However, because such a detention requires a showing that is less burdensome than probable cause, the court need not address whether Ledbetter's and Dobson's actions were supported by a "reasonable and articulable suspicion." Id.

As an initial matter, the court must address Sommerville's argument that Dobson and Ledbetter are not entitled to summary judgment because their seizure of Sommerville followed Dobson's and Ledbetter's unlawful [*36] entry into Sommerville's backyard. This is, in essence, an argument that Dobson and Ledbetter are precluded from relying on any probable cause that may have developed following their allegedly unlawful entry onto Sommerville's property because such probable cause would be "fruit of the poisonous tree." In addressing similar arguments, many courts have noted that "the fruit of the poisonous tree doctrine is not available to assist a *§ 1983* claimant." *Townes v. City of New York, 176 F.3d 138, 148-49 (2d Cir. 1999)*; see also *Jenkins v. City of New York, 478 F.3d 76, 91 n.16 (2d Cir. 2007)*; *Hector v. Watt, 235 F.3d 154, 157 (3d Cir. 2000)*; *Ware, 652 F. Supp. 2d at 705-06*; *Nixon v. Applegate, No. 2:06-2560, 2008 U.S. Dist. LEXIS 13016, 2008 WL 471677 (D.S.C. Feb. 19, 2008)*; *Padilla v. Miller, 143 F. Supp. 2d 479, 492 (M.D. Pa. 2001)*. Therefore, whether Dobson's and Ledbetter's entry onto Sommerville's property was lawful is irrelevant to the question of whether Dobson and Ledbetter are entitled to summary judgment on Sommerville's unreasonable seizure claim. The answer to that question depends solely upon whether Sommerville's alleged seizure was supported by probable cause.

Dobson cited Sommerville for violating *Virginia Code Section 4.1-323*, [*37] which provides as follows: "no person shall attempt to do any of the things prohibited by this title or to aid or abet another in doing, or attempting to do, any of the things prohibited by this title." Elsewhere in Title 4 of the Virginia Code, the possession or consumption of alcohol by individuals under twenty-one years of age is prohibited. *Va. Code Ann. § 4.1-305*. It is undisputed that Ledbetter informed Dobson that he had received a tip of underage drinking at Sommerville's property. When Dobson arrived, she observed nearly fifty cars parked near Sommerville's property, some of which displayed characteristics of younger drivers. Upon entering Sommerville's property, Dobson observed an individual who appeared to be under the age of twenty-one drinking from a beer bottle. When Dobson questioned the individual, he confirmed that he was under the age of twenty-one and had consumed alcohol. He also informed Dobson that he had heard about the party

from his high school classmates. After talking with this individual, Dobson spoke with Sommerville, who denied providing anyone with alcohol, but confirmed that he organized the party and advertised it on MySpace. In light of these circumstances, [*38] it is evident that any alleged seizure of Sommerville by Dobson was supported by probable cause; therefore, Dobson is entitled to qualified immunity under the first prong of the qualified immunity analysis. [28]

28 Once again, it is important to note that while probable cause requires "more than mere suspicion ... evidence sufficient to convict is not required." *Taylor, 81 F.3d at 433.*

Turning to Ledbetter, it is undisputed that Dobson called and informed him that she had observed someone under twenty-one consuming alcohol on Sommerville's property. Once Ledbetter arrived, he was instructed by Dobson to locate Sommerville, whom she identified as the owner of the property. As a result, he too is entitled to qualified immunity under the first prong of the qualified immunity analysis. [29]

29 With respect to the summons issued to Sommerville by Dobson, it should be noted that, given the absence of contrary evidence, Ledbetter was entitled to rely on Dobson's determination of probable cause. See *Ware, 652 F. Supp. 2d at 703* (noting that secondary units arriving on the scene were entitled to rely on the responding officer's determination that there was probable cause to make an arrest); *Wilson v. Kittoe, 229 F. Supp. 2d 520, 537-38 (W.D. Va. 2002)* [*39] (noting that a reasonable officer who arrives on the scene would defer to another officer's explanation of the events that transpired before his or her arrival), *aff'd, 337 F.3d 392 (4th Cir. 2003).*

Furthermore, even if Dobson and Ledbetter were found to have violated Sommerville's right to be free of unreasonable seizures, they would still be entitled to qualified immunity under the second prong of the test. As previously mentioned, whether a constitutional right was clearly established at the time it was violated depends upon "the specific factual context of the case." *Ware, 652 F. Supp. 2d at 702* (citing *Saucier, 533 U.S. at 201*). Moreover, it must be the case that the "contours of the right [were] sufficiently clear that a reasonable [officer] would understand that what he [was] doing violat[ed] that right." *Taylor, 81 F.3d at 434.* (stating that while "the right to be free from seizures not founded upon probable cause was well established prior to" the relevant arrest, "defining the applicable right at that level of generality [was] not proper"). Here, given the court's discussion of the law applicable to seizures under the *Fourth Amendment*, it cannot be said that at the time Dobson [*40] and Ledbetter interacted with Sommerville, it was clearly established that seizing an individual based on a similar set of facts and circumstances would violate that individual's *Fourth Amendment* rights.

For the reasons stated above, Dobson and Ledbetter are entitled to summary judgment on Sommerville's unreasonable seizure claim.

3. Malicious Prosecution

As noted by each defendant, a malicious prosecution claim brought under *§ 1983* is not an independent cause of action. *Lambert v. Williams, 223 F.3d 257, 261-62 (4th Cir. 2000).* Rather, a "malicious prosecution claim under *§ 1983* is properly understood as a *Fourth Amendment* claim for unreasonable seizure which incorporates certain elements of the common law tort." *Burrell v. Virginia, 395 F.3d 508, 514 (4th Cir. 2005).* Thus, in order "to state a *section 1983* malicious prosecution claim for a seizure violative of the *Fourth Amendment*," a plaintiff must allege that the defendant seized him "pursuant to legal process that was not supported by probable cause and that the [resulting] criminal proceedings ... terminated in [his] favor." Id. (citing *Brooks v. City of Winston-Salem, 85 F.3d 178, 183-84 (4th Cir. 1996)).* Stated another way, a [*41] plaintiff "must demonstrate both an unreasonable seizure and a favorable termination of the criminal proceeding flowing from the seizure." *Snider v. Seung Lee, 584 F.3d 193, 199 (4th Cir. 2009).*

Here, as discussed above, Dobson's and Ledbetter's interactions with Sommerville did not amount to a seizure violative of the *Fourth Amendment.* Accordingly, Dobson and Ledbetter are entitled to summary judgment on this claim as well.

IV. Conclusion

For the reasons discussed above, plaintiff's motion to file late responses to defendant Dobson's requests for admission is **DENIED**, and defendants' motions for summary judgment are **GRANTED.**

The Clerk is **REQUESTED** to mail copies of this Opinion to all counsel of record.

It is so **ORDERED.**

/s/ Jerome B. Friedman

Jerome B. Friedman

SENIOR UNITED STATES DISTRICT JUDGE

Norfolk, Va.
March 8, 2011

UNITED STATES OF AMERICA, Plaintiff, v. JEFFRY S. PEARSON, Defendant.

C. A. No.: 10-442-LPS/MPT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

2012 U.S. Dist. LEXIS 36189

March 19, 2012, Decided

SUBSEQUENT HISTORY: Adopted by, Summary judgment granted by, Objection overruled by, Judgment entered by *United States v. Pearson, 2012 U.S. Dist. LEXIS 111733 (D. Del., Aug. 7, 2012)*

COUNSEL: [*1] For USA, Plaintiff: Patricia C. Hannigan, LEAD ATTORNEY, U.S. Attorney's Office, Wilmington, DE.

Jeffry S. Pearson, Defendant, Pro se, Wilmington, DE.

JUDGES: Mary Pat Thynge, United States Magistrate Judge.

OPINION BY: Mary Pat Thynge

OPINION

REPORT AND RECOMMENDATION

I. Introduction

Plaintiff United States ("Government") initiated this action seeking judgment against pro se defendant Jeffry Pearson ("Pearson"), in the amount of $93,444.28 for student loans and interest payments on which Pearson allegedly defaulted. [1]

1 D.I. 1.

Pearson answered denying all allegations by the Government, and asserted affirmative defenses. [2] The Government moved for summary judgment in its favor. [3] Pearson filed an objection to the Government's motion, requesting the court deny the motion as being filed in violation of the scheduling order. [4] He further requests, in the alternative, additional time to respond to the motion on the merits. [5]

2 D.I. 5. Pearson asserted the following affirmative defenses: 1. Claims are barred in whole or in part by the defense of payment; 2. Claims are barred in whole or in part by the provisions of any promissory notes allegedly signed by defendant; 3. Claims for interest and/or collection fees are barred or [*2] limited by statute; and 4. Claims are barred in whole or in part by the provisions of a forbearance believed to have been granted to defendant.

3 D.I. 13.

4 D.I. 14.

5 D.I. 14.

II. Background

A. Procedural History

On May 27, 2010, the Government filed a complaint seeking judgment against Pearson for student loans and interest payments totaling $ 93,444.28, as well as prejudgment interest accruing from April 10, 2010 until the loans are paid in full, plus post judgment interest, costs and other proper relief. On August 18, 2010, Pearson denied all allegations, and raised the affirmative defenses previously noted herein.

On September 27, 2010, the Government served its disclosures under to *FED. R. CIV. P. 26.* Pearson failed to provide his disclosures. Thereafter, the Government served requests for admission, interrogatories, and requests for production of documents on December 10, 2010. [6]

6 D.I. 12 at 1.

By the expiration of the thirty day time period to respond to written discovery, Pearson had failed to answer any of the Government's propounded discovery. On January 28, 2011, the Government notified Pearson, that his failure to respond to its requests for admission meant all matters asserted therein [*3] were admitted, and also asked him to stipulate to entry of judgment in its favor. Again, Pearson never responded.

The Government moved for summary judgment on September 7, 2011. Pearson objected to the Government's motion asserting the motion violated paragraph 7 of the Scheduling Order which provides for case dispositive motions to be filed by April 15, 2011, a date from which the Government did not seek an extension. Pearson asks the court to disallow the Government's motion, or alternatively, requests additional time to respond on the merits.

B. Factual History

Pearson, an attorney representing himself, executed a promissory note on August 5, 1982 to secure a $600 loan at 5% interest per annum under the federally funded National Defense/Direct Student Loan program. [7] After demanding payment of the loan pursuant to terms of the note, the Institution declared the loan in default on or about November 11, 1987. According to a certification from the federal Department of Education ("Department"), the total debt due on this loan was $656.60 as of April 12, 2010.

7 This program is authorized under *Title IV-E of the Higher Education Act of 1965*, as amended. Virginia Polytechnic Institute and [*4] State University (the "Institute") administered the loan.

On May 15, 2000, Pearson executed a second promissory note to secure a Direct Consolidated Loan from the Department. The Department distributed two payments of $34,043.63 and $23,843.18, on June 5, 2000 at an 8% annual interest rate. The Department subsequently demanded payment, and on November 10, 2008, declared the obligation in default. A certification from the Department confirms the amount due on this loan was $92,787.58 as of April 12, 2010.

Accordingly, Pearson owes a combined total amount of $93,444.28 for defaulting on both loans. [8]

8 D.I. 1, Ex. A and B.

III. Analysis

A. Legal Standard

Motion for Summary Judgment

Summary Judgment is appropriate if the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law." [9] Once there has been adequate time for discovery, *Rule 56(c)* mandates judgment against the party who "fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [10] [*5] When a party fails to make such a showing, "there can be no 'genuine issue as to any material fact' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." [11] The moving party is therefore entitled to judgment as a matter of law because "the nonmoving party has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof." [12] A dispute of material fact exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." [13]

9 *FED. R. CIV. P. 56(c)(2).*
10 *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).*
11 *Id. at 323.*
12 *Id.*
13 *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).*

The moving party bears the initial burden of identifying portions of the record which demonstrate the absence of a genuine issue of material fact. [14] However, a party may move for summary judgment with or without supporting affidavits. [15] Therefore, "the burden on the moving party may be discharged by 'showing' - that is, pointing out to the district court - that there is an absence of evidence supporting the nonmoving [*6] party's case." [16]

14 *Celotex, 477 U.S. at 323.*
15 *Id.*
16 *Id. at 325.*

If the moving party has demonstrated an absence of material fact, the nonmoving party must then "come forward with specific facts showing that there is a genuine issue for trial." [17] If the nonmoving party bears the burden of proof at trial, he "must go beyond the pleadings in order to survive a motion for summary judgment." [18] That party "may not rest upon the mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." [19] At the summary judgment stage, the court is not to "weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." [20] Further, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." [21] The threshold inquiry, therefore, is "determining whether there is a need for trial - whether, in other words, there are any genuine factual issues that properly can be resolved only

by a finder of fact because they may reasonably be resolved in favor of either party." [22]

17 *FED. R. CIV. P. 56(c).*
18 *Yeager's Fuel v. Pennsylvania Power & Light Co., 22 F.3d 1260, 1273 (3d Cir. 1994).*
19 *Anderson, 477 U.S. at 248.*
20 *Id. at 249.*
21 *Id.*
22 *Id. at 250.*

B. [*7] Position of the Parties.

Pearson's answer denies all allegations asserted by the Government, raised a number of affirmative defenses, and requests the court dismiss the complaint. In response to the Government's motion for summary judgment, Pearson avers the motion is untimely under the Scheduling Order because the Government filed its motion almost five months after the deadline and never requested an extension. According to Pearson, the Government provided no explanation for its noncompliance. As a result, he requests the motion be disallowed, or alternatively, additional time to respond to the motion on the merits.

The Government contends by failing to respond to its requests for admission, Pearson has admitted he defaulted on loans, and summary judgment should be granted because there are no disputed material facts on the record.

C. Effect of Failure to Respond to Requests for Admission.

Pursuant to *Rule 36*, a party may serve a written request upon another party for admission of the truth of any matters relating to facts, the application of law to fact, or opinions about either. [23] Moreover, *Rule 36(a)(3)* states "[a] matter is admitted unless, within 30 days after being served, the [*8] party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney." Regardless of the potential harshness of the result for failing to respond to *Rule 36* discovery, the conclusive effect of requests for admission applies equally to those admissions made affirmatively and those established by default as a result of a party's neglect to respond. [24] The Third Circuit has held such admissions under *Rule 36* are sufficient to support entry of summary judgment. [25] Since *Rule 36* is self-executing, the party relying on an admission by default need do nothing to establish the admission. [26]

23 *FED. R. CIV. P. 36(a)(1)(A).*
24 *Am. Auto. Ass'n, Inc., v. AAA Legal Clinic of Jefferson Crooke, P.C., 930 F.2d 1117, 1120 (5th Cir. 1991).*
25 *Anchorage Associates v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 178 (3d Cir. 1990); See also Lucas v. Higher Education Assistance Found.,124 B.R. 57, 58 (Bankr. N.D. Oh. 1991)* (failure to respond to request for admission allows entry of summary judgment if facts deemed admitted are dispositive).
26 *Drennen v. Sentinel Real Estate Corp., CV-04-0802-PHX-DGC, 2005 U.S. Dist. LEXIS 32505, 2005 WL 3369466, *1 (D. Ariz. Dec. 9 2005)*

The [*9] Government served requests for admission on Pearson on December 10, 2010. Pearson failed to respond to the requests. Subsequently, on January 28, 2011, the Government informed Pearson by letter, that by failing to respond he had admitted all matters asserted in the requests. Pearson never commented, objected, disagreed or responded to the Government's position.

Pearson's repeated failure to respond to any discovery propounded by the Government, in particular, its requests for admission, conclusively establishes the Government's claim. Specifically, by not responding to the requests for admission, he has admitted to defaulting on the loans in the manner and amount alleged in the complaint.

D. Applicability of *Rule 36 (b)*

Under *Rule 36(b)*, any matter admitted is conclusively established unless the court, on motion, permits the admission to be withdraw or amended. [27] *Rule 36(b)* sets forth a party's process for relief from an admission. [28] Because the language of the rule is permissive, the court is not required, but rather has discretion, to provide relief from the effects of *Rule 36(a)(3)*. [29] The court may grant relief in cases of default if the requests are manifestly improper, [30] or are [*10] intentionally used to gain an unfair advantage, and thereby cause a party to admit essential elements of a claim or defense. [31] A request for admission is improper if it requests admissions of law. [32]

27 *FED. R. CIV. P. 36(b).*
28 *Drennen, 2005 U.S. Dist. LEXIS 32505, 2005 WL 3369466 at *1; see also United States v. Kasuboski, 834 F. 2d 1345, 1350 (7th Cir. 1987)* (the proper procedural vehicle to attempt to withdraw admission is through a motion under *rule 36(b)*).
29 *Lucas, 124 B.R. at 58.*
30 *Williams v. Krieger, 61 F.R.D. 142, 144 (S.D. N.Y. 1973).*

31 *Perez v. Miami-Dade County, 297 F.3d 1255, 1268 (11th Cir. 2002).*
32 *Williams, 61 F.R.D. at 144.*

Pearson could have sought relief by filing a *Rule 36(b)* motion to amend or withdraw his admissions. No such motion was filed, nor has he requested leave to file such a motion. The only leave requested by him is additional time to file a brief. That request suggests he intends to ignore his admissions and dispute the Government's facts established by his failure to respond to its discovery-in other words, circumvent his obligations to appropriately respond to the Government's outstanding discovery.

In determining whether relief from *Rule 36(a)* is appropriate, a court considers whether [*11] the party seeking relief has a reasonable excuse and must assess prejudice to the opposing party, [33] and whether the presentation of the merits will be aided. [34] Even considering those factors, no relief from the effect of *Rule 36* is warranted. Pearson has provided no excuse for failing to respond to any discovery propounded by the Government, nor has he ever requested relief from the court in that regard. His solution, filing a brief on the merits, prejudices the Government by denying it the information sought in its outstanding discovery as well as any additional discovery, such as depositions, that could reasonably flow from his original responses. [35] Further briefing is unnecessary since the relevant facts have been admitted.

33 *Brust v. Industrial Bank of Commerce, 18 F.R.D. 90, 91 (S.D. N.Y. 1955); Melody Tours, Inc. v. Granville Market Letter, Inc., 413 So.2d 450, 451 (Fla. Dist. Ct. App. 5th Dist. 1982); Coolik v. Hawk, 133 Ga. App. 626, 212 S.E.2d 7, 8 (1974).*
34 *In re S.W. Bach & Co., 09-01278(MG), 2010 Bankr. LEXIS 464, 2010 WL 681000, *2 (Bankr. S.D.N.Y Feb. 24, 2010).*
35 *See* D.I. 6. Under the Scheduling Order, all discovery was to be completed by March 31, 2011.

Moreover, the Government's requests for admissions were [*12] not manifestly improper. As evidenced by exhibit 1 to the Government's opening brief, [36] the requests were for admissions of facts, addressed matters separately stated, and did not request admissions of law. In separate requests, Pearson was asked to admit or deny that he executed a promissary note in August 1982 to secure loans from the Institute totaling $600 at 5% per annum; the Institution made the loans to the him; those loans were made under the federally-funded National Defense/Direct Student loan program; his payment obligation for the Institute's loans was declared in default as a result of his failure to pay consistent with the terms of the note; he later executed another promissory note around May 15, 2000 securing a loan from the Department; this loan was disbursed two amounts, $34,043.63 and $23,843.18 at 8% per annum; and he defaulted on his payment obligation on the subsequent loan on or about November 10, 2008. Such requests are consistent with *Rule 36(a)(1).*

36 D.I. 12.

Within the thirty day period following the service of those requests, Pearson was required to admit or deny or state in detail why he could not truthfully admit or deny each request, with any denial required [*13] to "fairly respond to the substance of the matter." [37] Further Pearson was also obligated in good faith to admit in part and deny in part in when his response was qualified.

37 *FED. R. CIV. P. 36(a)(4).*

The two-fold purpose of *Rule 36*, designed to reduce trial time, is facilitating proof regarding those issues that cannot be eliminated and narrowing issues that can be eliminated. [38] Pearson's conduct and proposed approach contravenes those objectives.

38 *Rule 36*, ADVISORY NOTES.

Pearson failed to timely respond to the requests for admission or seek relief pursuant to the Federal Rules of Civil Procedure to excuse his delinquency. Therefore, the requests are admitted. [39] Since Pearson admitted the relevant facts proving the Government's case, no genuine issue of material fact exists. Thus, no factual issue remains for trial, and judgment is warranted against him for his default on the loans along with the accumulated and accruing interest until full payment is made.

39 *See Lewis v. Williams, C.A. No. 05-013-GMS, 2010 U.S. Dist. LEXIS 65194, 2010 WL 2640188, *3 (D.Del. June 30, 2010).*

E. Pearson's Status as a Pro Se Litigant.

Historically, courts have noted that "[a] pro se complainant . . . must be held to less stringent [*14] standards than formal pleadings drafted by lawyers." [40] However, a pro se litigant, who is also an attorney, is not afforded the latitude ordinarily accorded to the typical pro se claimant. [41] "If clients may be held liable for their attorney's failure to meet deadlines and comport procedurally, then an attorney representing [himself] should similarly be held accountable for missing deadlines." [42] Proceeding as a pro se litigant does not give a party the right to "flagrantly disregard the Federal Rules of Civil Procedure in an effort to manipulate rulings in his favor." [43]

40 *Ning Ye v. Holder, 644 F. Supp. 2d 112, 116 (D. D.C. 2009)* (quoting *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007).*

41 *Ning Ye, 644 F. Supp. 2d at 116.*

42 *In re Morgan, No. 09-16188, 2010 Bankr. LEXIS 2060, 2010 WL 2594823, *3 (Bankr. S.D.Fla. June 17, 2010).*

43 *Lewis, 2010 U.S. Dist. LEXIS 65194, 2010 WL 2640188 at *3.*

Although Pearson is proceeding pro se, he is not entitled to the same leniency afforded non-lawyer pro se litigants. As an attorney, he is subject to a higher standard, and has provided no basis for his failures to abide by the court's scheduling order, the Federal Rules of Civil Procedure or this court's local rules before the threat of possible dismissal through [*15] the Government's motion. His past behavior demonstrates a choice to essentially ignore this matter, absent filing an answer and purported response to the Government's motion for summary judgment; thus, his eleventh hour argument is disingenuous, particularly in light of his own dilatory conduct.

IV. Order and Recommended Disposition

For the reasons stated herein, this court recommends that:

(1) Pearson's request (D.I. 14) to dismiss the Government's motion for summary judgment or for additional time to respond to that motion be denied.

(2) The Government's motion for summary judgment (D.I.13) be granted, including entry of judgment against Pearson in the amount of $93,444.28 for principal and interest on the defaulted loans, plus additional prejudgment interest accruing from April 12, 2010 until judgment is paid, plus post judgment interest at the legal rate and costs.

This Report and Recommendation is filed pursuant to *28 U.S.C. § 636(b)(1)(B)*, *FED. R. CIV. P. 72(b)(1)*, and D. DEL. LR 72.1. The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Report and Recommendation. [44] The objections and responses to the objections [*16] are limited to ten (10) pages each.

44 *FED. R. CIV. P. 72(b).*

The parties are directed to the Court's standing Order in Pro Se matters for Objections filed under *Fed. R. Civ. P. 72*, dated November 16, 2009, a copy of which is available on the Court's website, www.ded.uscourts.gov.

Date: March 19, 2012

/s/ Mary Pat Thynge

United States Magistrate Judge

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

REBECCA LAMONTE, **Appellant,** **v.** **THE ESTATE OF SHERMAN LLOYD COOK, JR. and RICHARD WESTERFIELD and JANE DOE WESTERFIELD, husband and wife and the marital community composed thereof,** **Respondents.**	**NO. 69115-5-I** CERTIFICATE OF SERVICE OF APPELLANT'S REPLY BRIEF

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein. On June 6, 2013, I caused to be served, via messenger service, a copy of Appellant's Reply Brief on the following counsel of record: David Hansen and William A. Olson, Aiken St. Louis & Siljeg, 1200 Norton Building, 801 Second Avenue, Seattle, WA 98104.

DATED this 6th day of April, 2013.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUN -7 PM 3:38

Julia Busko

Julia Busko,
Paralegal to Steven P. Krafchick