DISTRICT COURT, WELD COUNTY, COLORADO 901 9th Avenue, P.O. Box 2038, Greeley, CO 80632 (970) 475-2400	DATE FILED: March 1, 2017 4:22 PM CASE NUMBER: 2014CV30957
Plaintiffs: **Jose A. Miranda** and **Silvia Miranda** *v.* *Defendants:* **EWV, LLC**; **Keith Cowan**; and **Laurie Lechuga**	▲ COURT USE ONLY ▲ Case No. 2014 CV 30957 Division 4

Order on Plaintiff's Motion for Partial Summary Judgment

One of the plaintiffs, Jose Miranda, seeks partial summary judgment against two of the defendants: EWV, LLC and Keith Cowan. Miranda requests judgment in his favor as to his first and second claims for relief in the *Fourth Amended Complaint*, in the form of a declaration that the contract at issue here is void and unenforceable because it is either illegal; violates public policy; was based on an illusory promise, and thus lacked consideration; or was impossible for Miranda to perform. Miranda also seeks judgment in his favor on the defendants' counterclaims to enforce the contract.

In addition, Miranda requests judgment on his third and fourth claims for relief (for unjust enrichment and quantum meruit, respectively), and on his ninth claim for relief (for violations of the Colorado Consumer Protection Act (CCPA), based on deceptive trade practices).

I conclude that EWV's agreement required Miranda to engage in illegal acts because neither he nor EWV were permitted to remove mobile homes from EWV's property when the contract was formed. In the alternative, I conclude that the agreement was illusory and lacked valid consideration because EWV

promised to sell the mobile homes to Miranda, yet EWV admits that it did not have title to the mobile homes when the contract was formed. For either reason, the agreement is not enforceable. I therefore enter summary judgment in favor of Miranda on the parties' claims related to the contract.

But I conclude that Miranda has not met his burden to show that no genuine dispute of material facts exists as to his unjust enrichment and quantum meruit claims, and as to his claim based on the CCPA. I therefore deny Miranda's motion related to these claims.

SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate when the pleadings and supporting documentation show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Amos v. Aspen Alps 123, LLC*, 2012 CO 46, ¶ 13.

In evaluating whether summary judgment is appropriate, the court must give the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and must resolve any doubts about whether a triable issue of material fact exists against the moving party. *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 570 (Colo. 2008); *Krol v. CF & I Steel*, 2013 COA 32, ¶ 11. The moving party bears the initial burden of showing the absence of any genuine issue of material fact; once that burden is met, the nonmoving party has the burden to establish a triable issue of fact. *Westin Operator, LLC v. Groh*, 2015 CO 25, ¶ 20. A *material fact* is one that will affect the outcome of the case. *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 853 (Colo. App. 2007).

UNDISPUTED MATERIAL FACTS

These facts are either undisputed by the parties or are not reasonably subject to dispute:

In September 2013, a catastrophic flood of the South Platte River devastated property located near the river's banks in northern Colorado. EWV owned and operated a mobile home park near the river, located in the City of Evans. Over 150 mobile homes in the park were damaged or destroyed by the flood. Most, if not all, owners of the mobile homes abandoned their damaged property.

As part of its efforts to ensure that the city was cleaned up after the flood, Evans demanded that EWV come up with a plan to remove the damaged mobile homes on EWV's property. In October 2013, through its principal and managing member, Keith Cowan, EWV obtained a quote from a company called Professional Restoration for the demolition and removal of the mobile homes. The estimated cost to remove the mobiles homes—described as "Tier 1 from Colorado Department of Health" in the estimate—was $692,248. Cowan testified at his deposition that EWV decided not to retain Professional Restoration after receiving this estimate.

In December 2013, EWV initiated a lawsuit against the City of Evans. I take judicial notice of that court case, 2013CV31060, to which I was also assigned. In February 2014, EWV amended its complaint in the Evans litigation to bring an inverse condemnation claim. EWV also sought a declaratory judgment that Evans had improperly rendered EWV's mobile home park worthless by passing an ordinance after the flood that required EWV to make significant improvements to its property before it could reopen the park.

Then, in April 2014, Cowan took steps to place an advertisement on a website, Craigslist.com. According to an affidavit from Cowan (previously filed in this case), this advertisement read:

> FREE MOBILE HOMES FLOOD DAMAGE AS IS. WE HAVE LOTS OF SINGLE WIDE AND DOUBLE WIDE MOBILE HOMES FOR YOU TO PICK FROM! HOME MUST BE COMPLETELY REMOVED OFF PROPERTY AND ALL CONTENTS THAT ARE IN THE HOME.… THESE WILL NOT LAST[.] COME TAKE YOUR PICK OF THE HOMES. THESE ARE FREE HOMES WITH NO KIND OF WARRANTY AND ARE SOLD AS IS FLOOD DAMAGE[.] WHAT YOU DO WITH THE HOME AFTER YOU REMOVE IT FROM THE SITE IT IS UP TO YOU AND AT YOUR OWN RISK.

Ex. C to Cowan Affidavit, filed 4/30/15.

Plaintiff Jose Miranda responded to the Craigslist ad. On April 24, 2014, Miranda and EWV entered into a written agreement. In exchange for EWV selling the mobile homes to Miranda, by transferring all EWV's "right, title and interest" in those mobile homes, Miranda agreed to remove 64 mobile homes by no later than August 31, 2014. Miranda also agreed to indemnify, defend, and hold EWV harmless—and to pay EWV's removal costs—if he did not complete the removal of the 64 mobile homes by the deadline.

Cowan has admitted in his deposition in this case, however, that EWV did not have titles for the 64 mobile homes that formed the basis of the agreement with Miranda. And, a little more than a month after entering into the agreement with Miranda, EWV represented to the court in the Evans lawsuit that all but one of the mobile homes "have not been presently removed because EWV was prohibited by law from removing homes to which it did not hold title." *Pl.'s Resp. to Def.'s Mot. for Partial Summ. Judg.*, p. 3, ¶ 9, filed 5/30/14, in 13CV31060.

EWV's representation is included in a section labeled as EWV's statement of facts, and was further supported by declarations made by Cowan under oath in an attached affidavit. *See Affidavit of Keith Cowan*, ¶ 6, filed 5/30/14, in 13CV31060.

EWV also provided a copy of a memorandum from the City of Evans to the Federal Emergency Management Agency (FEMA), in which Evans expressed concerns about the situation on EWV's property. *Ex. 4*, filed 5/30/14, in 13CV31060. Evans identified a number of problems, including:

- The actual owner was responsible for removal of the mobile home. But because many owners had received money from FEMA and moved from the area, they were not aware that the costs should be borne by them, and likely would not have the money to pay for removal in any case.
- If EWV or Evans were to remove the homes, a Colorado state statute required that title be signed over by the home owner.
- EWV had no incentive to remove the homes because EWV would not be reimbursed under a grant program; EWV may not be able to rebuild; the removal costs were more than the value of the land; and Evans could not help EWV with the removal costs.

Id., p. 2.

EWV also represented to the court in the Evans litigation that it had "attempted to obtain permission from the State of Colorado for removal of the manufactured homes to which it does not hold title, but has been unsuccessful." *Id.* Supported by Cowan's affidavit, EWV represented that it had tried to obtain certificates of abandonment from the City of Evans "that would allow for the removal …, on three separate occasions," but Evans refused to provide "the

certificates necessary to allow [EWV] to legally disturb and remove the manufactured homes." *Id.* EWV further represented to the court that it had "entered into contracts for the removal of the homes *when legally possible*," and attached a copy of the agreement with Miranda that is at issue here. *Id.* (emphasis added).

In reliance on EWV's and Cowan's representations of fact, I denied the City of Evans' motion for partial summary. In support of my ruling, I noted:

> Through the affidavit of its managing member, Keith Cowan, EWV claims that it continues to cleanup [its mobile home park], but cannot cleanup a large portion of the manufactured homes because it does not hold title to those properties. EWV also claims that it has made efforts to obtain permission from the State of Colorado to remove these homes, but that Colorado requires EWV to first obtain certificates of abandonment from Evans—which EWV claims that Evans has refused to provide.

Order on Def.'s Mot. for Partial Summ. Judg., p. 4, entered 6/17/14, in 13CV31060.

Miranda did not remove all 64 mobile homes by the August 31 deadline. EWV seeks to enforce the provisions of the agreement with Miranda that require him to hold EWV harmless and to pay for the removal costs related to the mobile homes Miranda failed to remove by the deadline.

ANALYSIS

EWV's agreement with Miranda purported to sell the mobile homes, by conveying to Miranda through a quitclaim deed, all EWV's "right, title and interest" in the mobile homes. The agreement provides that the mobile homes are "sold, quitclaimed, conveyed, transferred and assigned to" Miranda "as is," "where is," and "with all faults." Having "sold" the mobile homes to Miranda, the agreement then required Miranda to remove what was now his purported,

personal property from EWV's property—or face the penalty of paying EWV for the cost of removing what had become Miranda's property.

Is this agreement enforceable? I conclude that it is not for two independent reasons. First, the agreement required Miranda to remove mobile homes that EWV has admitted could not be legally removed at the time the agreement was made. And, when the agreement was made, EWV had no idea when it would become legal for the homes to be removed. Second, because EWV has admitted that it did not hold title to the mobile homes when the agreement was made, and because EWV disclaimed any warranty of title, EWV's promise to convey its interest in the mobile homes to Miranda was an empty, illusory promise. Miranda did not receive what he bargained for; the agreement is therefore unenforceable for lack of consideration.

1. EWV's agreement with Miranda is void because it required Miranda to remove homes that could not be legally moved.

Miranda contends that the written agreement is void because it required him to remove mobile homes that EWV has acknowledged were illegal to remove. The defendants respond that, while EWV was prohibited by law from removing homes to which it did not hold title, Miranda was not. I am unpersuaded by this conclusory argument. Instead, I am persuaded that EWV has made judicial admissions that none of the mobile homes could be removed—including by Miranda—when the agreement was formed.

"A judicial admission is a formal, deliberate declaration which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute." *Kempter v. Hurd*, 713 P.2d 1274, 1279 (Colo. 1986). Judicial admissions are conclusive on the party making them. *Id.* Thus, a judicial admission "acts as

evidence against the party making it and may 'constitute the basis of a verdict.'" *People v. Bergerud*, 223 P.3d 686, 700 (Colo. 2010) (quoting *Gordon v. Benson*, 925 P.2d 775, 781 (Colo.1996)).

A party may make a judicial admission by making statements in a document filed with the court. *See, e.g., Boulder Plaza Residential, LLC v. Summit Flooring, LLC*, 198 P.3d 1213, 1216 (Colo. App. 2008) (concession in reply brief was a judicial admission); *Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir.1994) (statement by defense counsel in a footnote in a memorandum of law was a judicial admission); *City Nat'l Bank v. United States*, 907 F.2d 536, 544 (5th Cir. 1990) (statements in bank's brief were binding judicial admissions); *Young & Vann Supply Co. v. Gulf, Florida & Alabama Ry. Co.*, 5 F.2d 421, 423 (5th Cir. 1925) (court considered "statements in the brief as admissions of facts").

Cowan and EWV's counsel made representations of fact intended to be relied on by the court in the Evans litigation. Both Cowan's sworn statements and the statements made in documents filed by EWV's counsel were formal, deliberation declarations in a judicial proceeding and, therefore, constitute judicial admissions.

"Judicial estoppel is 'an equitable doctrine by which courts require parties to maintain a consistency of positions,' thereby 'preventing the parties from deliberately shifting positions to suit the exigencies of the moment.'" *People v. Shell*, 148 P.3d 162, 175 (Colo. 2006) (citation omitted). Judicial estoppel bars a claim when, in an intentional effort to mislead the court, a party takes a position in a proceeding that is totally inconsistent with a position he or she successfully took in an earlier, related proceeding. *Arko v. People*, 183 P.3d 555, 560 (Colo. 2008).

For judicial estoppel to apply, five conditions must be met: (1) the two positions must be taken by the same party (or parties in privity with each other); (2) the positions must be taken in the same or related proceedings involving the same party (or parties in privity with each other); (3) the party taking the positions must have been successful in maintaining the first position and must have received some benefit in the first proceeding; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent—the truth of one position must necessarily preclude the truth of the other. *Estate of Burford v. Burford*, 935 P.2d 943, 948 (Colo. 1997).

In the Evans litigation, EWV took the position it could not remove the mobile homes because it did not hold title to them. EWV also asserted that it first had to obtain certificates of abandonment from Evans, which Evans had refused to provide. EWV successfully maintained these positions and obtained a benefit when I denied Evans' motion for summary judgment in reliance on EWV's positions.

The defendants take the position here that EWV did have title to some of the mobile homes and that the homes could be removed without first obtaining a certificate of abandonment. So the defendants' position here is contrary to the one they took in the Evans litigation: that the mobile homes could not be legally removed because EWV did not hold title and no certificates of abandonment had been issued—as of May 30, 2014—more than a month after the agreement had been made with Miranda. The defendants' position here is totally inconsistent with the position that EWV took in the Evans litigation.

I conclude that this inconsistency is intended to mislead the court. When EWV made the representations in the Evans litigation, Cowan was fully aware

of the agreement with Miranda. EWV and its attorneys went so far as to provide a copy of the agreement with Miranda in the Evans litigation, while simultaneously representing that *none* of the mobile homes on EWV's property could be "legally disturbed" because of the lack of proper title and Evans' alleged improper refusal to issue certificates of abandonment. The defendants attempt to characterize their positions in the Evans litigation as propositions of law, rather than representations of fact. But I am not persuaded. Whether EWV had title to the mobile homes is a question of fact, as is whether Evans had issued certificates of abandonment. Based on these representations of fact, EWV contended in the Evans litigation that the agreement with Miranda could not be legally performed.

Thus, the doctrines of judicial admission and judicial estoppel apply here to prevent the defendants from shifting their positions to meet the exigencies of this case. Consequently, I reject the defendants' assertions that EWV actually *did* have title to the mobile homes and that Miranda theoretically *could* have removed the mobile homes from EWV's property as soon as the agreement was made.

Instead, the defendants are bound here by their judicial admissions that EWV did not hold title to the mobile homes and that the homes could not be legally removed from EWV's property without first obtaining certificates of abandonment from Evans. EWV is further bound by its judicial admission that, at least as of May 30, 2014, Evans had refused to provide EWV with the necessary certificates "to legally disturb the homes."

Also, nothing in EWV's agreement required Miranda to first obtain a certificate of abandonment before removing a mobile home from EWV's property. The agreement purported to transfer ownership of the mobile homes

to Miranda; it did not purport to grant Miranda the right to recover abandoned property located on EWV's premises after securing the legal right to do so. The defendants still insist here that all the mobile homes were abandoned, which contradicts their contention that EWV had title to some of the mobile homes. And while the defendants have submitted documents that show *Cowan* had title to some of the mobile homes, they have not produced any evidence that *EWV* actually had title to even one of the mobile homes covered by the agreement with Miranda.

I cannot tell if Cowan and EWV's lawyers were trying to mislead the court in the Evans litigation by asserting that EWV did not hold title to any of the mobile homes—knowing full well that Cowan did hold title to some of the homes. If so, that tactic has backfired. I will hold Cowan and EWV to their earlier position, which is that all the mobile homes[1] had been abandoned at the time that the agreement with Miranda was made, so that no one, including EWV, held title to the homes as of May 30, 2014.

An illegal contract is "a promise that is prohibited because the performance, formation, or object of the agreement is against the law." *Contract – Illegal Contract, Black's Law Dictionary* (10th ed. 2014); *see also* 17A Am. Jur. 2d *Contracts* § 223 (2015). Contracts in violation of statutory prohibitions are void. *E.g., Amedeus Corp. v. McAllister*, 232 P.3d 107, 109 (Colo. App. 2009). "In Colorado, courts generally will not enforce an illegal contract based upon the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction." *Guardian Title Agency, LLC v. Matrix Capital Bank*, 141 F. Supp. 2d 1277, 1281 (D. Colo. 2001) (citation omitted). "An agreement to do

[1] Except for one mobile home, which was not part of the agreement with Miranda.

an illegal act is itself illegal …. A contract that is illegal or in violation of the law is void, as is a contract that aids or assists any party in violating the law." *Contracts*, *supra,* § 223 (footnotes omitted).

"Where a transaction is in violation of the plain terms of a statute and where the parties know they are violating the law, the courts will leave the parties where they find them, and will not lend their aid to enforce the contract or grant relief to one of the parties because of a violation of the terms of such contract by the other." *Woodward v. Jacobs*, 541 P.2d 691, 692 (Colo. App. 1975) (quoting *Potter v. Swineheart*, 117 Colo. 23, 26, 184 P.2d 149, 151 (1947)). Courts will not only decline to enforce an illegal agreement, but will also not enforce any rights springing from those agreements. *Contracts*, *supra*, § 295; *Guardian Title*, 141 F. Supp. 2d at 1281 (applying the general principle under Colorado law that one who participates in a violation of the law cannot assert any right founded in or proceeding from an illegal transaction).

Thus, the question is whether EWV had an "illegal purpose" in contracting with Miranda to remove mobile homes from EWV's property. In light of EWV's judicial admissions that the mobile homes could not legally be removed at the time of the formation of the contract, I conclude that EWV had an illegal purpose: to circumvent the restrictions imposed by state law and the governmental authorities of Evans and FEMA. EWV's principal, Cowan, was fully aware of these restrictions when the contract with Miranda was formed. Both Cowan and EWV represented in the Evans litigation that the agreement with Miranda could not be legally performed at the time of its making.

EWV could not contract for Miranda to violate the law. And EWV did not require Miranda to first obtain a certificate of abandonment before removing mobile homes from its property for which EWV had not transferred title to

Miranda. I therefore conclude that the EWV's agreement with Miranda is void because it required Miranda to do what EWV has admitted would be an illegal act.

Further, § 38-29-106, C.R.S. 2014, requires that title to a manufactured home be transferred to the buyer in connection with any sale. In light of EWV's admission that it did not have title to the mobile homes at the time of the making of the agreement, the transfer of EWV's purported interest in those homes violated the statute. (And if EWV truly had title to the mobile homes, then § 38-29-112 would have required that title be formally transferred to Miranda; not simply transfer whatever right or interest that EWV might have in the homes through a quitclaim deed.) So even if EWV had not intended to circumvent the restrictions imposed by Evans, Colorado, and FEMA on removing the mobile homes affected by the flood, the agreement is still void because it violated the statutory requirements of § 38-29-106.

2. EWV's agreement with Miranda was illusory and lacked consideration.

As pointed out by Miranda, the agreement required significant performance from him, with substantial risk for non-performance. EWV now seeks $273,000 as damages for Miranda's non-performance. Meanwhile, EWV had no obligations—and no risk—under the agreement. EWV promised only to sell whatever interest it had in the mobile homes—but EWV has made judicial admissions that it did not hold title to the mobile homes and had been unable to obtain certificates of abandonment. So EWV sold nothing to Miranda, and in exchange, Miranda agreed to remove mobile homes from EWV's property that otherwise cost $273,000 to remove.

So the promise that EWV made to induce Miranda to enter into the contract was empty and illusory. An illusory promise is one that by its "terms make[s] performance entirely optional with the 'promisor.'" RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. e (1981). The term describes "words in promissory form that promise nothing," such as when "the promisor retains an unlimited right to decide later the nature or extent of his or her performance. This unlimited choice in effect destroys the promise and makes it illusory." *Flood v. ClearOne Communications, Inc.*, 618 F.3d 1110, 1119-20 (10th Cir. 2010) (quoting *Peirce v. Peirce*, 994 P.2d 193, 199 n.5 (Utah 2000), and R. Lord, 1 *Williston on Contracts* § 4:27, at 804-05 (4th ed. 2007)); *see also Sentinel Acceptance Corp. v. Colgate*, 162 Colo. 64, 67-68, 424 P.2d 380, 382 (1967) (where a seller agreed to pay an amount for each "qualified" demonstration, but whether a demonstration was "qualified" was entirely up to seller, the agreement was illusory).

EWV's promise was illusory because the agreement did not require EWV to take the steps necessary to transfer title to Miranda. EWV has made clear that, "[i]n agreeing to give away the mobile homes, EWV made 'no warranty of title' and 'disclaimed all express and implied warranties, including merchantability or fitness for a particular use purpose of any other warranty, express or implied.'" *Def.'s Mot. for Summ. Judg. on Pls.' Claim for Breach of Contract and on Def. EWV, LLC's Countercl.*, p. 5, filed 5/8/15. EWV disclaims any legally binding obligation to Miranda.

That means EWV retained the unlimited right to decide later the nature or extent of its performance under the contract, which renders EWV's promises illusory. And because the agreement was between Miranda and EWV, even if Cowan held title to some of the mobile homes, in light of EWV's disclaimers in the agreement, Miranda had no recourse to force EWV—or Cowan—to take

further action to transfer title to the mobile homes to him. The agreement leaves Miranda powerless to effectuate the purported sale of the mobile homes from EWV.

A party's promises are also illusory if that party does not give up anything of value and no rights are created that the other party did not already possess. *Bernhardt v. Hemphill*, 878 P.2d 107 (Colo. App. 1994) (time-share contracts between motel and owners of motel which purported to confer on owners the right to use motel accommodations that they already owned were "illusory" and were invalid; owners did not give up anything of value and no rights were created that owners did not already possess). An illusory promise is one that appears to be real, but in reality offers nothing: "Whereas a real promise can be consideration for a contract, an illusory promise cannot. If all the consideration given by one party to a contract consists of illusory promises, then the party has provided no consideration and cannot enforce the contract." *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litig.*, 835 F.3d 1195, 1209 (10th Cir. 2016).

So where a party does "not own any right, title, or interest in the subject properties it purported to convey," any deed executed by that party "is patently invalid and contains an illusory grant." *GMAC Mortgage Corp. v. PWI Grp.*, 155 P.3d 556, 557-58 (Colo. App. 2006) (where corporation did not own any right, title, or interest in the subject properties it purported to convey to the public trustee, its deed of trust constituted a spurious document pursuant to § 38–35–201(3), C.R.S. 2006). And "[w]here an illusory promise is made, that is, a promise merely in form, but in actuality not promising anything, it cannot serve as consideration. "R. Lord, 3 *Williston on Contracts* § 7:7 (4th ed. 2007).

As Cowan declared in an affidavit previously submitted in this case, "The entire relationship between Jose Miranda and EWV is based upon the Quit Claim Bill of Sale under which Mr. Miranda acquired EWV's legal interest in the abandoned mobile homes, free of charge, in exchange for Miranda's agreement to remove the mobile homes by August 31, 2014." *Affidavit of Keith Cowan*, ¶ 10, filed 4/30/15. But EWV had no interest in the mobile homes to convey to Miranda. And Miranda did not obtain EWV's illusory interests in the mobile homes "free of charge." Far from it: Miranda incurred the obligation to pay for EWV's substantial removal costs.

An agreement not supported by consideration is unenforceable. *Ireland v. Jacobs*, 114 Colo. 168, 174, 163 P.2d 203, 206 (1945). "Consideration may be defined as 'a benefit received or something given up as agreed upon between the parties.'" *Compass Bank v. Kone*, 134 P.3d 500, 502 (Colo. App. 2006) (quoting CJI-Civ. 4th 30:5 (1998)). Consideration may consist of (1) an act other than a promise; (2) a forbearance; or (3) the creation, modification, or destruction of a legal relation. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981). And, as pointed out by the defendants in their *Response*, "[c]onsideration is not to be measured in the light of the eventual success or failure under a contract but rather consideration is measured as of the time of making the contract." *W. Fed. Sav. & Loan Ass'n of Denver v. Nat'l Homes Corp.*, 445 P.2d 892, 897–98 (Colo. 1968).

When the agreement at issue here was made, it was not supported by consideration because EWV had no interest in the mobiles homes—so it gave up nothing and Miranda received nothing. EWV simply shifted the burden to remove the mobile homes to Miranda. The defendants try to rewrite the agreement by arguing that it granted Miranda the right to remove abandoned

mobile homes from EWV's property, and thus was supported by adequate consideration. But that is not what the actual language of the agreement says. Instead, EWV purported to *sell* the mobile homes to Miranda. And it was the *sale* of the mobile homes that was intended to be the consideration to induce Miranda to enter into the agreement. Miranda did not bargain to come onto EWV's property to remove mobile homes that were owned *by someone else*; he bargained to remove mobile homes that had been *sold* to him by EWV.

But since EWV had no right, interest, or title in the mobile homes at the time the contract was made, Miranda did not receive the consideration he bargained for. EWV did not agree to take any action or forbear from taking any action in exchange for Miranda's promises to perform. And because EWV did not hold title to the mobile homes, EWV was powerless to create a legal relationship between Miranda and the mobile homes when the agreement was made.

Consequently, the agreement that EWV reached with Miranda was illusory and lacked consideration, and is therefore unenforceable.

3. Miranda has not met his burden to show he is entitled to summary judgment on his claims for unjust enrichment, quantum meriut, and violation of the CCPA.

Miranda seeks summary judgment on his claim for unjust enrichment. To recover for unjust enrichment, Miranda must prove that, (1) at his expense, (2) the defendants received a benefit (3) under circumstances that would make it unjust for the defendants to retain the benefit without paying. *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1007 (Colo. 2008).

A "claim for unjust enrichment may not be asserted if there is a valid contract covering the subject matter of the alleged obligation to pay." *Jorgensen v. Colo. Rural Props., LLC*, 226 P.3d 1255, 1259 (Colo. App. 2010) (citing *Bedard v.*

Martin, 100 P.3d 584, 592 (Colo. App. 2004)). But, "[u]nder some circumstances, a party to an unenforceable express contract may recover under quantum meruit." *Dudding v. Norton Frickey & Associates*, 11 P.3d 441, 445 (Colo. 2000). Unjust enrichment and quantum meruit are equivalent theories for equitable relief. *See Jorgensen*, 226 P.3d at 1258; *see also* 26 Richard A. Lord, *Williston on Contracts* § 68:1, at 24 (4th ed. 2003) ("It has also been said that quantum meruit, quasi-contract, and an implied at law contract are equivalent terms for an equitable remedy.").

Because I have concluded that the agreement between EWV and Miranda is unenforceable, Miranda can validly assert a claim for unjust enrichment or quantum meruit. But, to be entitled to summary judgment, Miranda must show that the material facts in support of his claims are undisputed. While Miranda asserts in his motion that he expended nearly $200,000 in cleaning up EWV's property, he has not supported this assertion by affidavit or other admissible evidence. While it cannot be reasonably disputed that the defendants received a benefit from not having to remove the mobile homes and other debris that Miranda removed, a genuine dispute exists as to whether the circumstances here make it unjust for the defendants to retain that benefit without paying.

Miranda has therefore not met his burden to show that he is entitled to summary judgment on his claims for unjust enrichment and quantum meruit.

To prove a private cause of action for deceptive trade practices under the Colorado Consumer Protection Act (CCPA), a plaintiff must show, among other elements, that the challenged practice "significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property." *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 147 (Colo. 2003). This requirement means that "[w]hen a transaction is no more than a

private dispute, … 'it may be more difficult to show that the public has an interest in the subject matter....'" *Id.* at 150 (quoting *Hall v. Walter*, 969 P.2d 224, 238 (Colo.1998) (Scott, J., dissenting)). This element is critical to determining whether a plaintiff has standing to bring a claim under the CCPA. *See Anson v. Trujillo*, 56 P.3d 114, 118 (Colo. App. 2002).

In evaluating the public impact of an allegedly deceptive trade practice, three considerations are particularly relevant: (1) the number of consumers directly affected by the practice; (2) the relative sophistication and bargaining power of the consumers affected by the practice; and (3) evidence that the practice previously impacted other consumers or has significant potential to do so in the future. *Martinez v. Lewis*, 969 P.2d 213, 222 (Colo. 1998).

Miranda contends that the defendants made material misrepresentations by failing to disclose to him and the public at large that the trailers were "Tier 1 material" and were deemed non-habitable and slated for destruction. Miranda argues that these misrepresentations created a significant risk that the public would be adversely impacted as potential consumers of unsafe mobile homes. But a genuine dispute exists as to the nature and extent of the alleged misrepresentations and Miranda has not supported his allegations about the potential public impact by affidavit or other admissible evidence.

Miranda has therefore not met his burden to show that he is entitled to summary judgment on his CCPA claim.

ORDER

Accordingly, the *Plaintiff's Motion for Partial Summary Judgment* is GRANTED IN PART and DENIED IN PART.

Summary judgment enters in favor of Plaintiff Jose Miranda, and against all defendants, as to the plaintiffs' first and second claims for relief for declaratory

judgment. I hereby declare that the April 2014 agreement between EWV and Miranda is void and unenforceable.

Based on this declaration, summary judgment enters in favor of Plaintiff Jose Miranda, and against Defendant EWV, as to EWV's first counterclaim for relief; and in favor of Plaintiff Jose Miranda, and against all defendants, as to the defendants' second counterclaim for relief.

The *Motion* is denied as to Miranda's remaining requests for summary judgment on his third, fourth, and ninth claims for relief.

So Ordered:
March 1, 2017

BY THE COURT:

Todd Taylor
District Court Judge

DISTRICT COURT, WELD COUNTY, COLORADO 901 9th Avenue, P.O. Box 2038, Greeley, CO 80632 (970) 475-2400	DATE FILED: July 29, 2016 2:44 PM CASE NUMBER: 2014CV30957
Plaintiff: **Jose A. Miranda** *v.* *Defendant:* **EWV, LLC**	▲ COURT USE ONLY ▲ Case No. 2014 CV 30957 Division 4

Order on Plaintiff's Amended Motion for Sanctions Pursuant to C.R.C.P. 37

The plaintiff, Jose Miranda, seeks sanctions against the defendant, EWV, for (1) EWV's failure to produce a witness who could answer questions about designated topics at a C.R.C.P. 30(b)(6) deposition; and for (2) EWV's failure to produce an affidavit from its principal, Keith Cowan, which was filed in another case, and which is relevant to the parties' claims and defenses. EWV opposes both requests. This motion was addressed at the hearing held July 15, 2016.

After reviewing the court file and considering the parties' arguments, I am convinced that EWV should be sanctioned.

BACKGROUND

This case revolves around a catastrophic flood in September 2013, which caused devastation along the South Platte River in northern Colorado. EWV owned and operated a mobile home park in the City of Evans, near the banks of the South Platte River. Over 150 mobile homes in the park were damaged or destroyed by the flood. Because the mobile home owners had little motivation

to recover their damaged homes, and likely little financial resources, EWV was saddled with the obligation to remove the damaged mobile homes from its property—at a cost of hundreds of thousands of dollars.

To reduce its financial exposure, EWV came up with a plan to shift the financial risk for these cleanup costs. Believing that the mobile homes had been abandoned because of passing time, EWV offered the damaged mobile homes free to anyone who would remove them from EWV's property. To make the bargain even better for EWV, it required anyone who accepted the offer of a "free" mobile home to also indemnify EWV for the cost to remove the damaged mobile homes if EWV had to do it instead.

To broadcast this offer, EWV posted an internet advertisement. According to an affidavit from EWV's principal, Keith Cowan (submitted on April 30, 2015), the advertisement read:

> FREE MOBILE HOMES FLOOD DAMAGE AS IS. WE HAVE LOTS OF SINGLE WIDE AND DOUBLE WIDE MOBILE HOMES FOR YOU TO PICK FROM! HOME MUST BE COMPLETELY REMOVED OFF PROPERTY AND ALL CONTENTS THAT ARE IN THE HOME.… THESE WILL NOT LAST[.] COME TAKE YOUR PICK OF THE HOMES. THESE ARE FREE HOMES WITH NO KIND OF WARRANTY AND ARE SOLD AS IS FLOOD DAMAGE[.] WHAT YOU DO WITH THE HOME AFTER YOU REMOVE IT FROM THE SITE IT IS UP TO YOU AND AT YOUR OWN RISK.

Ex. C to Cowan Affidavit, filed 4/30/15.

It appears this ad was posted in April 2014. While it represents that EWV owned the mobile homes and had the authority to give them away for free, one of the disputes here is whether EWV had that authority. Of the 153 mobile homes on its property, none were owned by EWV before the flood. A dispute

also exists about whether EWV had the authority to give permission to remove the homes damaged in the flood from its property.

Jose Miranda was among the people who responded to the ad. On April 24, 2014, he contracted with EWV to remove 64 of the mobile homes. This agreement was reduced to writing in a "quitclaim bill of sale," and signed by Miranda and an employee of EWV. In exchange for obtaining EWV's "right, title and interest" in the mobile homes for "free," Miranda agreed to remove all the mobile homes by August 31, 2014. Also in exchange for EWV's interest in these "free" mobile homes—whatever that was—Miranda agreed to "indemnify, defend, and hold [EWV] harmless from … any … cost or expense resulting from … [Miranda's] failure to remove" the mobile homes by the deadline.

So, through the quitclaim bill of sale, EWV successfully shifted the risk for the cleanup costs on the listed mobile homes to Miranda. And all EWV had to promise in return was to give up whatever interest EWV had in those homes.

Miranda did not remove the mobile homes by August 31. With his parents, Miranda sued EWV and its principals on October 9, 2014. His parents and EWV's principals have since been dismissed. Miranda initially made several claims, including that EWV employees had improperly interfered with his ability to meet the removal deadline. Miranda also alleged that EWV and its agents had fraudulently misrepresented to him that the mobile homes could be remediated and used again as living space. Miranda alleged that the City of Evans had informed EWV and its agents that the mobile homes had to be disposed of—but that EWV failed to disclose this information to Miranda.

Relying on language in the quitclaim bill of sale, EWV moved to dismiss Miranda's claims based on pre-contract fraud. I converted that motion into a

motion for summary judgment. I then granted summary judgment based on the disclaimer language Miranda agreed to when he signed the quitclaim bill of sale. Miranda had specifically disclaimed any reliance "upon any statement or representation of any kind" made by EWV prior to signing the contract. Because of this provision, I concluded that Miranda could not prove that he had justifiably relied on any pre-contract statements, and thus could not prove one of the essential elements of his fraud claims.

And because the contract—the quitclaim bill of sale—imposed duties similar to those implicated in several Miranda's claims, I also applied the economic loss rule to conclude that his claims for fraud, civil theft, conversion, and civil conspiracy were barred.

In response to Miranda's claims, EWV brought a breach of contract counterclaim against Miranda seeking a judgment for over $270,000 for the expense it incurred when Miranda failed to remove the "free" mobile homes from EWV's property by the August 31 deadline.

EWV'S FAILURE TO PROVIDE DISCOVERY

1. The 30(b)(6) Deposition

As part of his effort to discover what evidence EWV has in support of its claims and defenses, Miranda served a notice for a deposition of EWV's corporate designee, under C.R.C.P. 30(b)(6). Miranda designated several topics, one of which was EWV's "advertising efforts to have the homes removed from the property." This topic relates to the internet advertisement, posted on "craigslist,"[1] in which EWV offered the mobile homes for free.

[1] According to Wikipedia, "Craigslist (styled craigslist) is a classified advertisements website with sections devoted to jobs, housing, personals, for sale, items wanted, services, community, gigs, résumés, and discussion forums." https://en.wikipedia.org/wiki/Craigslist (accessed 7/13/16).

EWV designated its principal, Keith Cowan, to answer all questions at the deposition. When asked about the craigslist ad, Cowan could not answer what date the ad was posted on craigslist, nor could he answer how long the advertisement was run on that website.

In the middle of questioning about this topic, EWV's counsel requested a break. After the break, Cowan was even more evasive about the craigslist ad:

> Q. (BY MR. NOVAK) We're back on the record. You're still under oath. Let's just --
>
> MR. SUGDEN: I think it would be helpful to go back and talk about the date of posting of the ad.
>
> MR. NOVAK: I understand.
>
> A. I don't remember the exact date.
>
> Q. (BY MR. NOVAK) Okay. Do you believe that this Craig's List ad was posted within a couple of months of the flood?
>
> MR. SUGDEN: Object to the form of the question. He testified he doesn't know the exact date of when it was posted.[2]
>
> MR. NOVAK: I didn't ask for an exact date. I asked around the time of the flood. He testified earlier -- you guys left, you come back, and you said let's go back. And I'm trying to go back, so I don't understand this objection. Are you instructing him not to answer?
>
> MR. SUGDEN: No.
>
> MR. NOVAK: Okay.
>
> MR. SUGDEN: I'm telling you his testimony is he does not remember the exact date it was posted.[3]
>
> Q. (BY MR. NOVAK) Do you remember testifying that you believe this was posted within couple of months of the flood?

[2] I note that counsel's objection is improper, which I will discuss in more detail.

[3] This is also an improper remark/objection.

A. I said at least a couple of months. I don't know.

Q. Okay. So you have no idea? This could have been run in September 2013 or April 2014? You just don't know?

A. It could be.

Q. Okay. So you have no idea?

A. I did not do it.

Q. Right. But you don't know when this was posted?

A. No, I do not.

Ex. B, *Dep. of Keith Cowan*, p. 28:22 – 30:22.

This testimony shows that Cowan was unprepared and unable to answer questions about a designated topic. At the July 15 hearing, EWV's counsel argued that Cowan was not being intentionally evasive; he just had not reviewed documents to refresh his recollection about this topic. In essence, EWV's counsel admitted that Cowan was unprepared and had not taken the necessary steps to answer questions about a designated topic.

Miranda also designated "all communications between EWV or anyone acting on EWV's behalf and any third party relating to the removal of the trailer homes from the Property." Miranda specifically wanted to know what communications EWV had with inspectors from the City of Evans:

Q. So you know that EWV communicated with the firemen. How often did EWV communicate with firemen?

A. I know that they came and said that the trash was building up.

Q. Okay. So that's one time? Any others?

A. I don't know.

Q. You don't know on behalf of EWV how often EWV communicated with --

A. I do not know how often.

Q. How often in this time period did EWV communicate with the City of Evans inspectors?

A. I don't know.

Q. Was it more than once?

A. I don't know.

Q. What was the name of the inspectors that EWV communicated with?

A. I don't know that.

Q. What was the name of the firemen EWV communicated with?

A. I don't know that either.

Id., p. 106:7 – 106:24. Cowan was also unprepared and unable to address this topic.

Throughout the deposition, Cowan indicated that a former employee, Laurie Lechuga, was the person who had handled the day-to-day operations of EWV during the term of the contract. But Cowan also testified that he had not spoken with Lechuga for over a year-and-a-half, meaning he had not tried to discover what information she had about the designated topics to be discussed at the deposition.

2. Cowan's Affidavit from the Evans Case

After Cowan's deposition, Miranda discovered that Cowan had submitted an affidavit in another case involving the City of Evans. EWV was the plaintiff in this other case, 2013CV31060. In the affidavit, Cowan declares under oath that, by May 30, 2014, (1) all but one of the manufactured homes "have not presently been removed because EWV was prohibited by law from removing

homes to which it did not hold title"; (2) "EWV has worked diligently to contact the owners of the manufactured homes and obtain as many titles as possible"; and (3) "EWV has attempted to obtain permission from the State of Colorado for removal of the manufactured homes to which it does not hold title, but has been unsuccessful."

The significance of these statements to this case is that they appear to be judicial admissions[4] by Cowan that, by the end of May 2014, EWV *did not hold title* to all but one of the mobile homes—which, presumably, would include the mobile homes promised to Miranda in April 2014—and that EWV was *prohibited by law* from removing these homes from its property, even it had given Miranda a deadline to remove them.

Cowan also declared in his affidavit that EWV had been directed by the State of Colorado to obtain certificates of abandonment from the City of Evans—so the manufactured homes could be removed—but that Evans had refused EWV's request on *three separate occasions*. Cowan declared that EWV could not "legally disturb and remove the manufactured homes." Cowan further declared that EWV had "entered into contracts for the removal of the homes as soon as legally possible."

To support this last statement, Cowan referred to *Exhibit 5*, attached to his affidavit. I was assigned to case no. 2013CV31060, and I take judicial notice of the court file. *Exhibit 5* contains a copy of the quitclaim bill of sale with Miranda. *Exhibit 5* also contains a copy of an estimate for removal from

[4] "A judicial admission is a formal, deliberate declaration which a party or counsel for the party makes in a judicial proceeding. Judicial admissions are conclusive on the party making them. Such admissions may be oral or written. Any fact may be the subject of a judicial admission. Parties, by way of judicial admissions, may stipulate away valuable rights." *Holiday Acres Prop. Owners Ass'n, Inc. v. Wise*, 998 P.2d 1106, 1110 (Colo. App. 2000), *as modified on denial of reh'g* (July 6, 2000).

Riverside Storage, dated April 15, 2014; a quitclaim bill of sale with Riverside Storage, signed May 20, 2014; and a quitclaim bill of sale with Ruben Gomez, signed May 20, 2014. Miranda's counsel confirmed at the July 15 hearing that he discovered Cowan's affidavit on his own after Cowan's deposition; EWV never provided copies of Cowan's affidavit, nor the attached documents, except for the quitclaim bill of sale involving Miranda.

Cowan's reference to these documents in his affidavit appears to be a judicial admission that the terms of these documents---including the quitclaim bill of sale with Miranda—could not be legally performed when the documents were signed. At the July 15 hearing, EWV's counsel tried to suggest that ¶ 11 of Cowan's affidavit is intended to convey that mobile homes could be removed as of May 30, 2014. But that reading is plainly contradicted by ¶ 11, in which Cowan declares that "EWV and the parties are now requesting the necessary [destruction] permits from Weld County"—which is an unambiguous indication that (1) the mobile homes could not be destroyed without a permit and (2) that these permits *would* be obtained, not that these permits had already been obtained.

And Cowan's statement also raises the question why Miranda would contract for the ownership of mobile homes that were required to be destroyed? Cowan declared in his affidavit that—because of the actions of the City of Evans—the only remedy available to EWV was to obtain *destruction permits* from Weld County. So Cowan's declarations appear to be judicial admissions that, at least by May 30, 2014, Miranda could not legally remove the mobile homes from EWV's property and that, instead, the mobile homes—the "personal property" described in the quitclaim bill of sale—had to be destroyed.

Without a doubt, EWV knew about Cowan's affidavit when this case was filed in October 2014. EWV's reason for not including the affidavit in its Rule 26 disclosures is because EWV decided that the affidavit was not relevant to Miranda's claims or to the allegations he made in the complaint. EWV argues that affidavit is not relevant because the "Plaintiff has *never* alleged or disclosed that lack title had anything to do with his removal of the mobile homes," and because the affidavit does not prove that "the Contract was illegal … [due to EWV's inability to] legally transfer titles to Mr. Miranda."

STANDARDS FOR RULING ON DISCOVERY VIOLATIONS

Rule 37 deals with discovery violations, and sets forth the specific procedures to be used depending on the nature of the violation.

1. Violations of C.R.C.P. 30(b)(6)

Under C.R.C.P. 37(d):

> If a … a person designated pursuant to C.R.C.P. Rules 30(b)(6) … to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice[,] … the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized by subparagraphs (A), (B), and (C) of subsection (b)(2) of this Rule.… In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.
>
> The failure to act described in this subsection may not be excused on the ground that the discovery sought is

> objectionable unless the party failing to act has previously filed a motion for a protective order as provided by C.R.C.P. 26(c).

When choosing a C.R.C.P. 30(b)(6) designee, a corporation has "'a duty to make a conscientious, good-faith effort to designate knowledgeable persons' and 'to prepare them to fully and unevasively answer questions about the designated subject matter.'" *D.R. Horton, Inc.-Denver v. D & S Landscaping, LLC*, 215 P.3d 1163, 1167 (Colo. App. 2008) (quoting *Starlight Int'l Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D.Kan. 1999)). So personal knowledge of a matter by the designee is not required; instead, the rule implicitly requires designated persons to review all matters known or reasonably available to the corporation. *Id.* The corporation should "prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition exhibits." *United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996) (*cited in D.R. Horton*).

A court may impose sanctions for failure to appear under C.R.C.P. 37(d) "when a corporation designates a deponent who appears but is unable to answer all the questions specified in the C.R.C.P. 30(b)(6) notice." *Mun. Subdistrict, N. Colorado Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701, 710 (Colo. 1999). Sanctions are appropriate because, when a corporation fails to designate the proper person, "the appearance is, for all practical purposes, no appearance at all." *Resolution Trust Corp. v. Southern Union Co.*, 985 F.2d 196, 197–98 (5th Cir. 1993). Allowing a company to designate a witness who is unprepared or not knowledgeable would simply defeat the purpose of the rule and "sandbag" the opposition. *D.R. Horton*, 215 P3d at 1168; *Taylor*, 166 F.R.D. at 362.

2. Violations of C.R.C.P. 26(a)(1)

Under the version of C.R.C.P. 26(a)(1) in effect when this case was filed, "a party shall, without awaiting a discovery request, provide to other parties the following information, whether or not supportive of the disclosing party's claims or defenses: … (B) a listing, together with a copy of … all documents … in the possession, custody or control of the party that are relevant to disputed facts alleged with particularity in the pleadings …."[5]

In relation to this mandatory disclosure requirement, C.R.C.P. 37(c)(1) provides:

> A party that without substantial justification fails to disclose information required by C.R.C.P. 26(a) or 26(e) shall not be permitted to present any evidence not so disclosed at trial or on a motion made pursuant to C.R.C.P. 56, unless such failure has not caused and will not cause significant harm, or such preclusion is disproportionate to that harm. The court, after holding a hearing if requested, may impose any other sanction proportionate to the harm, including any of the sanctions authorized in subsections (b)(2)(A), (b)(2)(B) and (b)(2)(C) of this Rule, and the payment of reasonable expenses including attorney fees caused by the failure.

ANALYSIS

1. EWV's violation of C.R.C.P. 30(b)(6)

C.R.C.P. 30(b)(6) "makes clear that a party is not permitted to undermine the beneficial purposes of the Rule by responding that no witness is available who personally has direct knowledge concerning the areas of inquiry." *Sprint Commc'ns Co., L.P. v. Theglobe.com, Inc.*, 236 F.R.D. 524, 528 (D. Kan. 2006) (*quoted*

[5] Under the current version of C.R.C.P. 26(a)(1)(B), the phrase, "relevant to disputed facts alleged with particularity in the pleadings," has been amended to read, "relevant to the claims and defenses of any party."

in D.R. Horton, 215 P.3d at 1168). By not preparing its designee to answer questions about the topics designated for the deposition, EWV improperly undermined the deposition and evaded its duty to provide discovery to Miranda.

Cowan repeatedly answered, "I don't know," when asked questions designed to elicit information that was reasonably within EWV's knowledge. If he had been properly prepared, Cowan should have been able to answer these questions. As one example, had Cowan examined the copy of the craigslist ad submitted with his affidavit in the other case with Evans, he could have answered questions about when the ad was run. His repeated answers of, "I don't know," is the functional equivalent to Cowan failing to appear for the deposition.

What is even more concerning is that EWV's counsel aided Cowan's attempts to play dumb. While Cowan was attempting to answer questions about the timing of the ad, EWV's lawyer asked for break, and when Cowan returned from meeting with the lawyer, Cowan claimed to know nothing about the ad. EWV's lawyer then prevented Miranda's lawyer from exploring Cowan's sudden memory loss by insisting on what Cowan would testify to.

This instance is not the only time that Cowan was coached by EWV's counsel during the deposition. Under C.R.C.P. 30(d)(1), "(1) Any objection during a deposition shall be stated concisely and in a *non-argumentative* and *non-suggestive* manner." (Emphasis added.) The portions of the deposition transcript I have been provided contain a number of instances in which EWV's counsel employed "speaking objections" to coach Cowan. "Speaking objections occur when the defending attorney actually engages in coaching the witness, attempting in the course of articulating the objection to direct the witness'[s]

attention to what the 'right' or 'correct' answer should be." *Applied Telematics, Inc. v. Sprint Corp.*, No. CIV.A. 94-CV-4603, 1995 WL 79237, at *1 (E.D. Pa. Feb. 22, 1995); *see also Specht v. Google, Inc.*, 268 F.R.D. 596, 598 (N.D. Ill. 2010) ("Objections that are argumentative or that suggest an answer to a witness are called "speaking objections" and are improper under [F.R.C.P.] 30(c)(2)."). When counsel for Miranda attempted to discover when the internet ad had been run on craigslist, EWV's counsel used a speaking objection to inform Cowan he should testify that he did not know when the ad was run.

Besides the improper use of speaking objections, Cowan appears to have decided that he did not need to answer a question whenever EWV's lawyer made an objection—even if the requested information was within Cowan's knowledge. One example is this exchange:

> Q. Okay. This advertisement is offering flood-damaged mobile homes for free, correct?
>
> A. Correct.
>
> Q. And the only condition is that no demo on site; is that correct?
>
> A. Yes.
>
> Q. The home must be completely removed off the property, correct?
>
> A. Correct.
>
> Q. All of the contents that are in the home must also be completely removed from the property?
>
> A. Correct.
>
> Q. Any other conditions?
>
> MR. SUGDEN: Object to the form of the question.
>
> A. Could you ask that again?

> Q. (BY MR. NOVAK) Sure. Were there – when you drafted this advertisement -- I just read off three conditions to a third party removing these homes.
>
> A. Um-hum.
>
> Q. Were there any other conditions that you intended to include in this advertisement for someone removing the mobile homes?
>
> MR. SUGDEN: Renew my objection.
>
> A. I don't know.

Ex. B, pp. 30:23 – 31:23.

But since Cowan had just testified that he "had a hand" in creating the ad, Cowan would surely know whether any other condition was intended to be included. While EWV's objection was not a speaking objection in this instance, Cowan took the cue from EWV's lawyer's objection and claimed ignorance—instead of answering a question that called for information reasonably within his knowledge.

These tactics frustrated the purpose of Cowan's deposition. Cowan was supposed to be prepared to answer questions about the designated topics, not offer repeated instances of "I don't know." The basic purpose of the rules of civil procedure is to provide a "just, speedy, and inexpensive determination of civil cases." C.R.C.P. 1(a). Instead, EWV's designee and its lawyer improperly evaded answering questions, resulting in further delay of this already-delayed case and wasting the plaintiff's financial resources.

I therefore conclude that EWV should be sanctioned under C.R.C.P. 37(d) for violating its obligations under C.R.C.P. 30(b)(6).

2. EWV's Violation of C.R.C.P. 26(a)

I also conclude that EWV should be sanctioned for violating its mandatory disclosure obligations under C.R.C.P. 26(a) when it failed to provide a copy of Cowan's affidavit submitted in the other case with Evans.

EWV contends that it did not violate the mandatory disclosure requirements of C.R.C.P. 26(a) because Cowan's affidavit is not relevant to the disputed facts particularly alleged in Miranda's complaint—at least not until recently. EWV contends that Miranda did not raise the issue of whether EWV had the authority to convey title to the mobile homes, and whether Miranda could legally perform his obligations under the quitclaim bill of sale, until sometime within the last couple of months.

But EWV's contention is contradicted by the record. In the original *Complaint* filed October 9, 2014, Miranda alleged in ¶ 28 that "neither of the Defendants [EWV, Cowan, or Lechuga] held legal title to some of the Miranda Mobile Homes. " This identical allegation is made in ¶ 29 of the *Amended Complaint* filed November 13, 2014, and in ¶ 35 of the *Second Amended Complaint* filed December 9. In answering this allegation, on November 26, 2014, the defendants neither admitted, nor denied the allegation,[6] but responded:

> As stated in the Quit Claim Bill of Sale, 'SELLER MAKES NO WARRANTY OF TITLE….' Defendant Keith Cowan held legal title to some of the mobile homes listed in the Quit Claim Bill of Sale which he transferred to Jose Miranda at the time of the agreement.

[6] *See* C.R.C.P. 8(d): "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

So EWV has been on notice since the beginning of this lawsuit that whether it possessed valid title to the mobile homes is a disputed fact.

EWV also brought a breach of contract counterclaim against Miranda in its *Answer* filed November 26. In replying to this counterclaim, Miranda included in his affirmative defenses: "The subject contract is void and unenforceable pursuant to Colorado law," and "The subject contract is void and unenforceable for lack of consideration." So EWV has been on notice that whether it had title to the mobile homes, and whether Miranda could legally remove them from EWV's property, is an issue relevant to Miranda's defense of EWV's counterclaim.

I therefore conclude that Cowan's affidavit is relevant and that EWV knew, or should have known , that it needed to be disclosed by EWV in its initial Rule 26(a) disclosures. Cowan's apparent judicial admissions—made several months before the dispute arose between Miranda and EWV—are relevant to specific allegations made by Miranda, and to Miranda's claims, EWV's counterclaims, and Miranda's affirmative defenses. The affidavit provides support for Miranda to argue that the quitclaim bill of sale is void because it contains an illusory promise and that the agreement is invalid for lack of consideration.

EWV therefore violated its obligation under C.R.C.P. 26(a) when it failed to disclose Cowan's affidavit. Had EWV complied with its discovery obligations, Miranda could have factored the affidavit into his decisions about whether to amend his claims and how best to prosecute his claims.

Consequently, I must decide what sanctions should be imposed to remedy EWV's discovery violations.

SANCTIONS

Besides ordering the offending party to pay the other party's reasonable expenses, including attorney fees, other possible sanctions are outlined in C.R.C.P. 37(b)(2), for both a party's failure to answer questions about designated topics at a C.R.C.P. 30(b)(6) deposition, and for a party's failure to provide the disclosures required by C.R.C.P. 26(a). Under C.R.C.P. 37(b)(2), these sanctions include:

> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

In applying this rule, the court should consider the full range of sanctions available and "impose the least severe sanction that will ensure there is full compliance with a court's discovery orders and is commensurate with the prejudice caused to the opposing party." *Pinkstaff v. Black & Decker (U.S.) Inc.*, 211 P.3d 698, 702 (Colo. 2009). The sanction imposed should also be "commensurate with the seriousness of the disobedient party's conduct." *Kwik Way Stores, Inc. v. Caldwell*, 745 P.2d 672, 677 (Colo. 1987).

Litigation-ending sanctions such as dismissal are generally disfavored and should be imposed "only in extreme circumstances." *Pinkstaff*, 211 P.3d at 703

(citation omitted). However, litigation-ending sanctions may be appropriate if the court makes a "specific finding of willful disobedience of the discovery rules, bad faith consisting of a flagrant disregard of a party's discovery obligations, or culpable fault consisting of at least gross negligence in failing to comply with those obligations." *Kwik Way*, 745 P.2d at 678.

Miranda requests that I dismiss EWV's counterclaim as a sanction, but I conclude that this litigation-ending sanction is disproportionate to the harm and prejudice caused by the discovery violations committed by EWV and its counsel.

Instead, after considering the full range of available sanctions, I conclude that the following sanctions are commensurate with the prejudice caused to Miranda and are sufficient to cure that harm:

For violating C.R.C.P. 30(b)(6) and frustrating Miranda's right to depose its designee, EWV is ordered to pay Miranda's reasonable attorney fees and costs associated with the deposition, beginning with preparing the notice through the filing of the motion for sanctions, and including the time Miranda's counsel spent preparing for and attending the deposition. To the extent that Cowan answered questions at the deposition, EWV will be bound by those answers.

For violating C.R.C.P. 26(a), I need to restore Miranda to the position he would have been in had EWV properly disclosed the Cowan affidavit. So I will give Miranda the opportunity amend his complaint based on the information in the affidavit, and then the opportunity to file dispositive motions. Miranda has 21 days from the date of this Order in which to amend his complaint. Should Miranda elect to amend his complaint, then he will also have the right to file dispositive motions based on his amended allegations and the Cowan affidavit. Because the goal is to restore Miranda to the position he should have been in

had EWV timely disclosed the affidavit—without unduly increasing Miranda's costs or rewarding EWV for withholding the affidavit—no further discovery shall be conducted by either party without the court's prior approval.

Miranda also has 21 days from the date of this Order to submit an affidavit of attorney fees and costs, with supporting documentation, and including any argument as to how the awarded fees and costs should be apportioned. EWV will have 14 days to respond, and Miranda 7 has days to reply.

So Ordered:
July 29, 2016

BY THE COURT:

Todd Taylor
District Court Judge

DISTRICT COURT, WELD COUNTY, COLORADO Court Address: 915 10th Street, Greeley, CO, 80632	DATE FILED: October 5, 2016 11:32 AM CASE NUMBER: 2014CV30957
Plaintiff(s) COLORADO MOBILE HOME MOVERS et al. v. **Defendant(s)** EWV LLC et al.	⚠ **COURT USE ONLY** ⚠ Case Number: 2014CV30957 Division: 4 Courtroom:

Order Regarding Defendant's Amended Motion to Reconsider

The Defendant's arguments in support of reconsideration are unpersuasive and the motion is DENIED.

The case of Averyt v. Walmart, Inc., 265 P.3d 456 (Colo. 2011), presents a different factual and procedural scenario than the one at issue here. In Ayert, the document at issue was created by a third party and was equally available to each side of the case. The document was used for cross-examination purposes. But the affidavit at issue here was created by the defendants and their lawyers; so it was not equally available to each side of the case. Instead, the defendant and defense counsel had the document in their "possession, custody, or control," as contemplated by C.R.C.P. 26(a)(1)(B). And the affidavit is relevant to more than cross-examination of a witness, as it relates to both the plaintiff's claims and potential defenses.

SO ORDERED.

Issue Date: 10/5/2016

TODD L TAYLOR
District Court Judge