

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

FIRST CLUB MARKETING LLC;)	
)	
Plaintiff/Counterclaim Defendant;)	
)	
v.)	Case No. 1916-CV32558
)	
KANSAS CITY BARBEQUE SOCIETY)	Division: 11
)	
Defendant/Counterclaim Plaintiff/ Third Party Plaintiff/Counterclaim Defendant;)	
)	
v.)	
)	
RANDALL BOWMAN)	
)	
Third Party Defendant/Counterclaim Plaintiff)	

**REPLY IN SUPPORT OF FIRST CLUB
MARKETING LLC AND RANDALL BOWMAN'S
MOTION FOR SUMMARY JUDGMENT**

DATED: April 6, 2021

Respectfully Submitted,

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TABLE OF CONTENTS

INTRODUCTION.....	1
ARGUMENT.....	1
I. KCBS’S OPPOSITION BRIEF FAILS TO CITE FACTS THAT CREATE A DISPUTE OF MATERIAL FACTS SUFFICIENT TO RAISE AN ISSUE FOR THE JURY TO DECIDE.	1
II. FCM IS ENTITLED TO SUMMARY JUDGMENT ON ITS BREACH OF CONTRACT CLAIM BECAUSE THE CONTRACT IS ENFORCEABLE AND IS NOT VOID AS A MATTER OF LAW.	2
A. Fraud as a Defense to the Contract was never Pleaded as a Defense and Cannot be “Part of the Case.”.....	2
B. The Record does not Support the Essential Elements of Fraud.....	4
i. There was No Fraudulent Statement.....	4
1. First, KCBS alleges that in Bowman’s PowerPoint presentation, “Bowman claimed that only three marketing firms in the entire country - other than his own - could handle the needs of KCBS” KCBS Brief at 2; KCBS Brief at 5 (same).	5
2. KCBS Suggests that Bowman “Inflated” the “Bids” from the other Agencies. KCBS Brief at 5.	6
3. KCBS Claims that Sue McClure Testified that in her Marketing Experience a Company or Nonprofit would have Conducted a Marketing Search Differently. KCBS Brief at 6.	6
ii. There is No Evidence of Deception.	8
C. Other Reasons Supporting Summary Judgment on FCM’s breach of contract claim. .	10
III. FCM IS ENTITLED TO SUMMARY JUDGMENT ON KCBS’S BREACH OF CONTRACT CLAIM.	11

IV. BOWMAN IS ENTITLED TO SUMMARY JUDGMENT ON KCBS’S BREACH OF CONTRACT CLAIM AGAINST BOWMAN..... 12

 A. KCBS Provides No Evidence that Bowman Improperly Disclosed or Retained any “Confidential” Records..... 12

 B. Even if Bowman Possessed “Confidential” Documents, he was under a Duty to Preserve them..... 15

V. BOWMAN IS ENTITLED TO SUMMARY JUDGMENT ON KCBS’S BREACH OF FIDUCIARY DUTY CLAIM..... 16

 A. KCBS does not Provide Factual Support for its Breach of Fiduciary Duty Claim against Bowman..... 16

 B. KCBS’S New Facts Asserted in its Statement of Facts do not Support KCBS’S Breach of Fiduciary Duty Claim against Bowman. 17

VI. FCM AND BOWMAN ARE ENTITLED TO SUMMARY JUDGMENT ON TAMPERING..... 20

 A. KCBS’S Arguments that Bowman and FCM took Documents that were not in their Possession or Control and Took Documents After the Termination of the Agreement Fail.21

 B. FCM is Not a Person Under the Statute and Cannot be Liable under the MCTA. 22

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Anzaldua v. Ne. Ambulance & Fire Prot. Dist., 978 F. Supp. 2d 1016 (E.D. Mo. 2013) 20, 21

Birkenmeier v. Keller Biomedical, LLC, 312 S.W.3d 380 (Mo. App. E.D. 2010) 3

Bledsoe Plumbing & Heating, Inc. v. Eldorado Springs R-II School District, 189 S.W.3d 591 (Mo. App. S.D. 2006) 12

Brown v. Rollet Bros. Trucking Co., Inc., 291 S.W.3d 766 (Mo. App. E.D. 2009) 13

Century Fire Sprinklers, Inc. v. CNA/Transportation Insurance Co., 23 S.W.3d 874 (Mo. App. W.D. 2000)..... 3

Chouteau Auto Mart, Inc. v. First Bank of Mo., 148 S.W.3d 17 (Mo. App. W.D. 2004) 3

Ditto, Inc. v. Davids, 457 S.W.3d 1 (Mo. App. W.D. 2014) passim

Dorsch v. Family Medicine, Inc., 159 S.W.3d 424 (Mo. App. W.D. 2005)..... 5

Green v. City of St. Louis, 870 S.W.2d 794 (Mo. banc 1994) 3

Hadley v. Burton, 265 S.W.3d 361 (Mo. App. S.D. 2008)..... 12

Hyatt v. Trans World Airlines, Inc., 943 S.W.2d 292 (Mo. App. E.D. 1997) 5

Jones v. Landmark Leasing, Ltd., 957 S.W.2d 369 (Mo. App. E.D. 1997)..... 3

Levy v. Young Adult Institute, Inc., Case No. 13-cv-2861, 2015 WL 13745763 (S.D.N.Y. Oct. 9, 2015) 10, 11

McCargo v. Texas Roadhouse, Inc., Case No. 09-cv-02889, 2011 WL 1638992 (D. Colo. May 2, 2011) 15

Reese v. Ryan’s Family Steakhouses, Inc., 19 S.W.3d 749 (Mo. App. S.D. 2000) 12

Sip-Top, Inc. v. Ekco Group, Inc., 86 F.3d 827 (8th Cir. 1996) 13, 14

SMB Consulting and Investing, LLC v. Apple Valley Waste Service, Inc., Case No. 11-cv-0070, 2012 WL 13019007 (N.D.W.Va. Sept. 25, 2012) 15

State ex rel. Nixon v. Consumer Automotive Resources, Inc., 882 S.W.2d 717 (Mo. App. E.D. 1994) 3

State ex rel. Nixon v. Overmyer, 189 S.W.3d 711 (Mo. App. W.D. 2006) 12

<i>Stirling v. St. Louis Cty. Police Dep't</i> , Case No. 4:11-cv-01932, 2013 WL 2244638 (E.D. Mo. May 21, 2013).....	15
<i>Trigon Ins. Co. v. U.S.</i> , 204 F.R.D. 277 (E.D. Va. 2001).....	15
<i>Trotter's Corp. v. Ringleader Restaurants, Inc.</i> , 929 S.W.2d 935 (Mo. App. E.D. 1996) ...	4, 8, 10
<i>Vision-Ease Lens, Inc. v. Essilor Intern. SA</i> , 322 F. Supp. 2d 991 (D. Minn. 2004).....	13
<i>Weitzman v. Weitzman</i> , 156 S.W.2d 906 (Mo. 1941).....	5
<i>Wengert v. Thomas L. Meyer, Inc.</i> , 152 S.W.3d 379 (Mo. App. S.D. 2004).....	5
<i>Wilmes v. Consumers Oil Co. of Maryville</i> , 473 S.W.3d 705 (Mo. App. W.D. 2015).....	15
<i>Woods v. Boeing Co.</i> , Case No. 11-cv-2855, 2013 WL 5332620 (D.S.C. Sept. 23, 2013).....	15
Statutes	
Mo. Rev. Stat. § 569.010	20
Mo. Rev. Stat. § 537.117	16
Mo. Rev. Stat. § 562.056	23
Rules	
Mo. S. Ct. Rule 74.04(c).....	12
Other Authorities	
125 Am. Jur. Proof of Facts 3d 93	15

INTRODUCTION

In its opposition brief, KCBS relies heavily on an argument that the Agreement between FCM and KCBS (“the Agreement”) is void because FCM allegedly made deceptive statements prior to the Agreement’s execution. However, there is no evidence in the record that any untrue statement was ever made. Nor is there evidence that any board members were deceived. Further, KCBS concedes that, despite its concern of any alleged deception and after three votes by two different boards, KCBS chose to enter and re-affirm the Agreement and obtain the fruits of FCM’s labor. Nor can KCBS point to any evidence in support of any wrongdoing by FCM during the performance of the Agreement. In fact, all testifying board members testified that FCM did a great job performing marketing services for KCBS. Accordingly, KCBS has no evidence in support of a “with cause” termination, and KCBS’s termination of the agreement for cause was improper. Finally, there is no dispute in the record about the amount or nature of the outstanding invoices due and owing to FCM.

The case is a prime candidate for summary judgment because there are no disputed factual issues that bear on this Court’s decision on summary judgment. Moreover, KCBS, despite having the opportunity, fails to cite any record evidence to establish its claims and defenses. As a result, summary judgment is appropriate.

ARGUMENT

I. KCBS’S Opposition Brief Fails to Cite Facts that Create a Dispute of Material Facts Sufficient to Raise an Issue for the Jury to Decide.

KCBS’s opposition to summary judgment does not point to any disputes of material fact issues. Indeed, the vast majority of KCBS’s disputed facts cite no additional or counter facts to create a genuine factual dispute. Such denials are deemed an admission of the truth. *See* Rule 74.04(c)(2). KCBS mischaracterizes the record in these denials but cites no actual record evidence

to support these allegations. Indeed, in its statement of facts, KCBS only cites to six new facts which do not directly address FCM and Bowman's facts. Each of those factual citations is insufficient to create a material fact dispute.

II. FCM is Entitled to Summary Judgment on its Breach of Contract Claim because the Contract is Enforceable and is not Void as a Matter of Law.

With respect to FCM's breach of contract claim against KCBS, KCBS's sole basis for arguing against summary judgment is that the Agreement is void due to alleged fraud on the part of Randall Bowman. But KCBS's fraud defense fails for two primary legal reasons.

First, KCBS never raised fraud as an affirmative defense to the Agreement in its Answer or its Amended Answer to FCM's Petition. Instead, in its pleadings, KCBS unequivocally admitted the contract was enforceable. As a result, KCBS cannot rely on this defense.

Second, even if KCBS had pleaded fraud as a defense to the contract, the alleged factual basis for KCBS's defense does not state a claim for fraud and no reasonable jury could find in favor of KCBS. Indeed, KCBS has come forward with no evidence of an untrue statement or that any board member was misled or deceived – both are necessary components of a fraud defense.

A. Fraud as a Defense to the Contract was never Pleaded as a Defense and Cannot be "Part of the Case."

KCBS's Answer was crystal clear in admitting the validity of the contract. (Ex. 17, KCBS Amended Answer, Claims, and Counterclaims of KCBS ("KCBS Amended Answer"), p. 10 at ¶ 32 ("The Agreement is a valid and binding contract.")). And absent from KCBS'S Answer was any affirmative defense claiming fraud as a defense to the Agreement. Now however, KCBS changes its position after the close of discovery and solely relies on an unpleaded affirmative defense of fraud. KCBS may not do so in an attempt to defeat summary judgment.

A party must state a claim for fraud with particularity. *See* Rule 55.15.4; *Birkenmeier v. Keller Biomedical, LLC*, 312 S.W.3d 380, 389 (Mo. App. E.D. 2010). When a party does not plead an affirmative defense with particularity, then such defense is out of the case. *Ditto, Inc. v. Davids*, 457 S.W.3d 1, 17 (Mo. App. W.D. 2014). As such, the Court should grant summary judgment on FCM’s breach of contract claim because KCBS’S fraud defense is not in the case. *See Chouteau Auto Mart, Inc. v. First Bank of Mo.*, 148 S.W.3d 17, 26 (Mo. App. W.D. 2004) (holding that raising of an affirmative defense in summary judgment pleadings fails to satisfy Rule 55.08 and does not operate to amend an earlier filed answer); *Century Fire Sprinklers, Inc. v. CNA/Transportation Insurance Co.*, 23 S.W.3d 874, 879 (Mo. App. W.D. 2000) (rejecting unpleaded affirmative defense as a defense to summary judgment); *Jones v. Landmark Leasing, Ltd.*, 957 S.W.2d 369, 375-76 (Mo. App. E.D. 1997) (holding that references to facts supporting an affirmative defense in summary judgment pleadings cannot cure the failure to properly plead an affirmative defense in an answer); *State ex rel. Nixon v. Consumer Automotive Resources, Inc.*, 882 S.W.2d 717, 720–21 (Mo. App. E.D. 1994) (summary judgment was affirmed notwithstanding the defendant's assertion of an affirmative defense in its reply to the motion for summary judgment because the affirmative defense was not properly pled in the defendant's answer as required by Rule 55.08).

The court in *Ditto* held: “[t]he effect of a deficiently pled affirmative defense is the same as if no attempt is made to allege a defense—the matter is not properly pled. Issues not properly raised in an answer are not preserved for determination in a lawsuit.” *Ditto, Inc.*, 457 S.W.3d at 17 (citing *Green v. City of St. Louis*, 870 S.W.2d 794, 797 (Mo. banc 1994)). To put any question to rest, the *Ditto* Court further stated the: “unambiguous dictate of Rule 55.08 [is] that all applicable affirmative defenses be pled *in a responsive pleading* along with a short and plain

statement of the facts showing that the pleader is entitled to the defense.” *Id.* Here, just as in *Ditto*, KCBS did not plead fraudulent inducement as a defense to the Agreement and, therefore, it cannot be “an issue in the case.”

B. The Record does not Support the Essential Elements of Fraud.

But even if fraudulent inducement were “in the case” as an affirmative defense, the record cannot support a fraud claim. *See, e.g., Trotter's Corp. v. Ringleader Restaurants, Inc.*, 929 S.W.2d 935, 941 (Mo. App. E.D. 1996) (affirming the grant of summary judgment on fraudulent inducement counterclaim because “Defendants failed to establish each of the elements necessary to support their fraud claim.”).

Fraud requires a showing of the following elements: (1) that a material representation was made; (2) the representation was false when made; (3) the person or entity making the representation knew it was false; (4) the representation was made with the purpose to deceive the listener; (5) the listener was deceived; (6) the listener reasonably relied on the representation; and (7) the listener was damaged as a proximate result of the fraudulent misrepresentation. *Id.* at 939.

i. There was No Fraudulent Statement.

KCBS does not point to *any* record evidence upon which a reasonable jury could find that the essential elements of fraud are met. Instead, KCBS bases its defense on its characterization of a PowerPoint presentation sent to the KCBS Board by Randall Bowman. In support of its position, KCBS cites generally and without specification to Ex. 23 of FCM’s Statement of Facts. Exhibit 23 is an email with an attached PowerPoint presentation. There is no dispute that the PowerPoint was sent to the KCBS Board. There is no dispute over the exact language of the PowerPoint and the email transmitting it. *See* Ex. 23. The dispute is whether this PowerPoint can serve as the basis for a fraud defense. It cannot. KCBS’S defense fails as a matter of law because KCBS points to

no untrue statement in the PowerPoint. “Statements in a petition or a defense that the opposing party’s acts were “fraudulent,” without factual support, states a legal conclusion and does not satisfy Rule 55.15.” Particularity Required in All Averments of Fraud or Mistake, 31 Mo. Prac., Civil Rules Handbook R. 55.15 (2020-2021 ed.) (citing *Hyatt v. Trans World Airlines, Inc.*, 943 S.W.2d 292, 295 (Mo. App. E.D. 1997) and *Weitzman v. Weitzman*, 156 S.W.2d 906, 908 (Mo. 1941)). See also *Wengert v. Thomas L. Meyer, Inc.*, 152 S.W.3d 379, 382 (Mo. App. S.D. 2004) (stating fraud requires a false or untrue statement to be actionable); *Dorsch v. Family Medicine, Inc.*, 159 S.W.3d 424, 432-33 (Mo. App. W.D. 2005) (refusing to allow a claim for fraud to succeed where no evidence was presented that either of the two alleged misrepresentations were false).

In its brief, KCBS attempts to characterize the following three reasons as a basis for its fraud defense:

1. **First, KCBS alleges that in Bowman’s PowerPoint presentation, “Bowman claimed that only three marketing firms in the entire country - other than his own - could handle the needs of KCBS” KCBS Brief at 2; KCBS Brief at 5 (same).**

KCBS seriously mischaracterizes Bowman’s email. *Nowhere in the email or PowerPoint presentation does Bowman claim that there were only three marketing companies in the country that could do the work.* This alleged statement is simply absent. The PowerPoint specifically stated that Bowman was able to talk to three agencies and then provided information about them. See Ex. 23, at KCBS_015457-015464. KCBS cites no evidence that any of the information is untrue. Further, the email sending the PowerPoint was a “conversation starter” and never purported to be a full-fledged investigation into all possible marketing companies. See Ex. 8, Randall Bowman Affidavit (stating the email sent with information about FCM and other marketing companies was a “conversation starter”). KCBS provides no evidence to rebut this. Indeed, the board members who were deposed testified that they were aware of alternatives other than the three companies in

the PowerPoint. Mr. Peters testified he was aware of what KCBS could get from his personal experience with MMA (another marketing agency) as well as KCBS's previous dealings with MMA. Ex. 2, Deposition of Mike Peters, at 43:7-20; *id.*, at 76:10-18. Arlie Bragg testified that he considered not only the marketing firms in the PowerPoint but also KCBS's past experiences with MMA and Tiki Hut (another marketing agency) when making the decision to contract with FCM. Ex. 6, Deposition of Arlie Bragg, at 93:10-20. In addition, Bowman forwarded the KCBS Board all of the old marketing agreements from past KCBS marketing providers as part of his email information. Ex. 2, Deposition of Mike Peters, at 76:25-77:18. Plainly, KCBS cannot point to any false statement actually made by Bowman.

2. KCBS Suggests that Bowman "Inflated" the "Bids" from the other Agencies. KCBS Brief at 5.

KCBS argues in its briefing that Bowman inflated the information in the PowerPoint that he sent to the KCBS Board. KCBS cites no evidence in support of this statement, and the record is *completely devoid* of any evidence that the numbers or facts presented in the PowerPoint, or anywhere else, were incorrect or inflated. Again, KCBS's defense fails because there is simply no evidence of an untrue statement.

3. KCBS Claims that Sue McClure Testified that in her Marketing Experience a Company or Nonprofit would have Conducted a Marketing Search Differently. KCBS Brief at 6.

Sue McClure did not state that Bowman made a misrepresentation or otherwise did anything remotely sounding in fraud. Again, the record is devoid of any evidence that Bowman made a misrepresentation. Sue McClure did not offer an opinion regarding the formation of the Agreement, KCBS's Bylaws, the board's approval of the Agreement, or what actually happened – because she wasn't there. Ms. McClure's report demonstrates that, in her opinion as a marketing expert, the terms of the FCM contract were fair and reasonable. Ex. 26, at McClure_000063 ("The

agreement is fair and reasonable to both firms.”). Despite her opinion that the Agreement is fair and reasonable, KCBS choose not to ask her about her opinions in this case but rather asked about her personal experience in dealing with a large marketing company that dealt with nursing homes and retirement communities. In doing so, McClure testified that, in her experience with nursing homes and other large corporate entities, an RFP process was common, but she also testified that it does not always happen. *See e.g.*, Ex. 25, Deposition of Sue McClure, at 25:15-26:4 (stating in situations where the company knew the marketing services provider candidate well and knew their work quality, the company may choose to forego the RFP process); *id.* at 28:12-20 (answering affirmatively that marketing contracts do not always have to go through an RFP process); *id.* at 33:16-34:7 (stating that foregoing an RFP process would not be entirely unusual where the company was familiar with the candidate’s performance); *id.* at 35:6-36:1 (same).

KCBS wishes to take McClure’s testimony that RFP processes were used at corporations like Sprint and large nursing home companies to suggest KCBS should have performed an RFP. But McClure never testified – nor does she have an opinion – about whether KCBS was required to go through, or should have gone through, an RFP process. Indeed, KCBS comes forward with no evidence that KCBS *ever* issued an RFP for marketing in the past. The bylaws do not require an RFP process (*see generally* Ex. 16, KCBS Amended and Restated Bylaws), and there is no evidence that any previous marketing agencies who worked for KCBS ever went through an RFP process. KCBS also completely fails to cite any legal authority or otherwise explain how KCBS not performing an RFP is a basis for fraud. To be clear, Sue McClure never said that Bowman did anything wrong and never said that Bowman misrepresented anything. Therefore, Ms. McClure’s testimony cannot be the basis of a fraud defense.

In conclusion, KCBS's three attempts to support its fraud defense fail because there is no record evidence that Bowman said anything untrue. Therefore, even if the Court allowed KCBS to rely on a fraud defense without properly pleading it- *see* Section II(A), there is no evidence in the record to support this defense.

ii. There is No Evidence of Deception.

But even if the Court were to believe that Bowman made a misrepresentation (something completely lacking in the record), there is also a lack of any evidence that any board member was misled or deceived by the PowerPoint (or even claims to have been misled by Bowman). Missouri law requires that the alleged injured party actually be deceived in order to state a claim for fraud. *Trotters*, 929 S.W. 2d at 939. Indeed, not one witness stated that he or she felt misled or deceived by Bowman - let alone that he or she felt misled or deceived by Bowman's PowerPoint. This alone is fatal to KCBS's fraud defense.

The record, in contrast to KCBS'S unsupported theories, demonstrates that no witness says he or she was tricked, fooled, misled or anything of the sort by Bowman. *See e.g.* Ex. 3, Deposition of Mike Richter, at 89:5-7:

Q: Randall didn't dupe the board into this contract did he?

A: No.

Id. at 90:17-91:19:

Q: [] Now, Mr. Rutherford spent a little bit of time going through the PowerPoint with some references to other marketing agencies. Do you remember that?

A: Yes, sir.

Q: ... Randall didn't tell you and the board, these are the only marketing agencies that we could go get information from, did he?

A: Never.

Q: I mean, it was obvious that you could have asked for more information or gone and gotten more information for yourself. Would you agree with that?

A: I do, and, I mean, you – they – obviously there’s audios. There’s probably somewhere in one of those audios, I believe it was mentioned that we could go out and look for more.

Q: And Randall never said he completed an exhaustive analysis of every marketing opportunity out in the country, did he?

A: No.

Q: You felt, with your experience with what Randall was already doing for KCBS, your experience with other marketing agencies, that you had enough information to make a decision that was in the best interest of Kansas City Barbeque Society. Will you agree with that?

A: Yes.

Ex. 2, Deposition of Mike Peters, at 136:10-137:22:

Q: You don’t feel like he misled the board about his contract in any way, do you?

A: I do not.

Q: And we’ve talked about this potential conflict of Randall being on the board and also getting this contract, but that was out in the open with the board. You knew that he was on the board, you knew he was president of the board, and you knew that there was going to be a contract with First Club Marketing; true?

A: Correct.

Q: It’s not – he didn’t try to hide that fact from the board, did he?

A: No.

Q: There was – and having been on the board in the 2018 period, you had seen First Club Marketing and Randall’s work for KCBS; true?

A: True.

Q: And you'll agree that each and every board member who voted on that contract had an independent duty to do what was best for KCBS; correct?

A: True, correct.

Q: Anybody on the board could have asked questions of Mr. Bowman or First Club Marketing; correct?

A: Correct.

Q: Anybody on the board could have asked Mr. Bowman to provide more information; true?

A: True.

KCBS cites to no legal authority holding that a party may make a claim for fraud when there is no evidence that anyone was deceived. Indeed, Missouri law is crystal clear that there must be evidence that the party was "in fact, deceived." *Trotters*, 929 S.W. 2d at 939. For this reason alone, FCM is entitled to summary judgment on its breach of contract claim.

In summary, KCBS'S alleged affirmative defense of fraud was neither pleaded nor is there any evidence in the record that can support the critical elements of a fraud defense. As such, FCM is entitled to summary judgment on its breach of contract claim.

C. Other Reasons Supporting Summary Judgment on FCM's breach of contract claim.

KCBS makes no other arguments in its brief to suggest that the Agreement is otherwise unenforceable or that KCBS did not breach the Agreement. There is no dispute that the KCBS Bylaws permit a contract with a member of the board of directors (FCM SOF ¶ 5), that the Agreement was voted on three times by two different boards (FCM SOF ¶¶ 27, 42), and that KCBS's own legal counsel was present at the second and third votes (FCM SOF ¶ 43).

It is notable that KCBS completely ignores FCM's cited case law, including *Levy v. Young Adult Institute, Inc.*, Case No. 13-cv-2861, 2015 WL 13745763 (S.D.N.Y. Oct. 9, 2015). *Levy* is

the most analogous case to this matter. In *Levy*, the court held that a nonprofit may not unwind a contract after the contract was voted on simply because the board later takes the position that the contract was an excessive insider contract. *Id.* at 6. The same is true here. Just because the current KCBS board does not like the Agreement, that is not a legal defense or other excuse to stop paying under it. *See id.* The Court should grant summary judgment in favor of FCM on FCM's breach of contract claim.

III. FCM is Entitled to Summary Judgment on KCBS'S Breach of Contract Claim.

KCBS takes the position that the Agreement is not enforceable, but then goes on to sue FCM for breach of the same contract in the alternative. While KCBS is perhaps entitled to take such an inconsistent position, KCBS fails to address the arguments in FCM's brief stating why summary judgment is appropriate in favor of FCM on KCBS'S breach of contract claim.

In its opening brief, FCM argued that, among other things:

- KCBS was first to breach the contract (FCM Opening Brief at 10-11);
- The noncompete is inapplicable and unenforceable (FCM Opening Brief at 11-15);
- FCM has no evidence in the record that falls within one of the four articulated reasons in the contract authorizing termination of the agreement for cause (FCM Opening Brief at 8-11);
- There was no dishonest conduct in carrying out the contract (FCM Opening Brief at 15); and
- That accessing the shared Google drive does not constitute a breach under the agreement (FCM Opening Brief at 15-16).

KCBS does not oppose FCM's argument that the noncompete is unenforceable. KCBS does not oppose FCM's argument that accessing the Google Drive is a not a breach. And KCBS

does not oppose FCM’s argument that it breached the Agreement first. At a very minimum, the Court should rule that these issues are out of the case. That leaves KCBS’s sole argument relying on the “dishonesty” prong of the “for cause” provision. But read carefully, the alleged dishonesty (of which KCBS has no evidence of any dishonest statement) occurred *prior* to the Agreement’s execution, and therefore cannot be a basis for a breach by FCM because the alleged dishonesty must occur in the course and scope of performing the contract. *See* FCM Opening Brief at 8. KCBS does not attempt to address this argument in its brief. And KCBS makes no other arguments in support of its breach claim against FCM and cites no facts to counter FCM’s facts related to breach of contract. Under these circumstances, summary judgment in favor of FCM on KCBS’s breach of contract claim is required. *See Hadley v. Burton*, 265 S.W.3d 361, 372 (Mo. App. S.D. 2008) (stating that if there is no response provided to summary judgment arguments, the truth of those factual allegations in those arguments are admitted) (citing Mo. S. Ct. Rule 74.04(c)); *State ex rel. Nixon v. Overmyer*, 189 S.W.3d 711, 717 (Mo. App. W.D. 2006) (“... [A] failure to respond to a motion for summary judgment with specific facts showing genuine materials issues may have adverse consequences. The failure to respond results in an admission of the facts alleged.”) (citation omitted); *Bledsoe Plumbing & Heating, Inc. v. Eldorado Springs R-II School District*, 189 S.W.3d 591, 595 (Mo. App. S.D. 2006) (same); *Reese v. Ryan’s Family Steakhouses, Inc.*, 19 S.W.3d 749, 752 (Mo. App. S.D. 2000) (same).

IV. Bowman is Entitled to Summary Judgment on KCBS’S Breach of Contract Claim against Bowman.

A. KCBS Provides No Evidence that Bowman Improperly Disclosed or Retained any “Confidential” Records.

It is undisputed that KCBS bases its breach of contract claim against Bowman solely upon the confidentiality agreement that Bowman signed as a board member. *See* FCM Opening Brief at

16 and KCBS Brief at 10. But KCBS cites no facts sufficient to show a breach of the confidentiality agreement. To be clear, KCBS’S claim accuses Bowman of breaching the confidentiality agreement by receiving KCBS email sent to him at his “@kcbs.us” email address – *while his “@kcbs.us” email address was in service*. It is uncontested that during 2019, Bowman was serving as a board member (until he resigned) and continued to perform marketing services for KCBS until he was terminated in November 2019. It is uncontested that Bowman received emails at his “@kcbs.us” email address throughout 2019. It is uncontested that KCBS did not turn off Bowman’s “@kcbs.us” email after Bowman resigned from his board position (presumably because he was still servicing KCBS sponsors and performing work on behalf of KCBS). Bowman did not take and keep information or communications he was not entitled to have. The information he received he was entitled to have. This does not breach any terms of the confidentiality agreement. This is especially so when KCBS knew Bowman was using his KCBS email even after he resigned from the board.¹

Moreover, KCBS has come forward with no evidence – as it must – that any one of the emails in Bowman’s possession were “confidential” as defined under the terms of the agreement. On this point alone KCBS’s claim must fail. *See Brown v. Rollet Bros. Trucking Co., Inc.*, 291 S.W.3d 766, 776 (Mo. App. E.D. 2009) (finding that an employer bears the burden to prove confidentiality of documents and communications); *Vision-Ease Lens, Inc. v. Essilor Intern. SA*, 322 F. Supp. 2d 991, 994 (D. Minn. 2004) (to show a confidentiality agreement was breached, the

¹ *See* Ex. 27, KCBS_000125-000127 (Emails between KCBS Board and Bowman using Bowman’s “@kcbs.us” email address dated March 8, 11, and 12, 2019 discussing social media and marketing); Ex. 28, KCBS_000182-000185 (emails dated February 28, 2019 discussing social media and marketing using Bowman’s “@kcbs.us” email address); Ex. 29, KCBS_000801 (March 7, 2019 email between Bowman and then CEO Heath Hall about GAC Tour and Smithfield Pork sponsorship using Bowman’s “@kcbs.us” email address); Ex. 30, KCBS_003031-003032 (August 13, 2019 email from Kim Collier cc’ing Bowman directing any questions about a KCBS barbeque event be directed to Bowman using Bowman’s “@kcbs.us” email address); Ex. 31 KCBS_009754-009757 (August 26, 2019 emails with Emily Detwiler, Randall Bowman and others using Bowman’s “@kcbs.us” email address and discussing Bowman and Detwiler’s work to draft a press release about Emily Detwiler joining KCBS as CEO).

claimant must demonstrate that confidential information was used or divulged); *Sip-Top, Inc. v. Ekco Group, Inc.*, 86 F.3d 827, 830-31 (8th Cir. 1996) (same). Similarly, KCBS has not demonstrated that it did anything to ensure any emails remained confidential in nature and therefore waived any such argument. Moreover, KCBS fails to cite any evidence that that Bowman ever used any KCBS email for any non-KCBS-related purpose.

Finally, the confidentiality agreement allegedly requires any confidential documents to be “delivered” to KCBS after their return has been requested or after expiration of the board member’s service. But it *does not instruct a board member to delete his or her email inbox*. See e.g., Ex. 10. The confidentiality agreement is silent on what to do with emails – obviously emails cannot be “delivered.” See *id.* Thus, if Bowman had paper copies of emails that he did not return, that would arguably be a violation, but the record is devoid of any evidence of Bowman not returning any paper copies of confidential information. Thus, Bowman did nothing to breach this provision. One needs to look as far as the testimony of another former board member who was asked if he was still in possession of KCBS emails. Mr. Peters testified:

Q: Do you remember Mr. Rutherford asking you about – about whether you had e-mails relating to KCBS in your possession?

A: Yes.

Q: When you rolled off of the KCBS board, did you receive any written communication telling you, Hey, Mr. Peters, you need to make sure you go through your computer and delete any email that has anything to do with your board service?

A: I do not recall that at all.

Ex. 2, Deposition of Mike Peters, at 114:6-114:15.

This testimony demonstrates that KCBS never instructed or asked board members to go through and delete emails they received while on the board. The testimony also demonstrates that board members were not instructed to delete emails and did not have any understanding that KCBS or the confidentiality agreement required them to delete such emails.

B. Even if Bowman Possessed “Confidential” Documents, he was under a Duty to Preserve them.

The only record evidence is that Bowman preserved all emails upon anticipating litigation. Ex. 4, Deposition of Randall Bowman, at 110:13-21. The law is well-established that deleting emails after anticipating litigation would have been inappropriate. *See Wilmes v. Consumers Oil Co. of Maryville*, 473 S.W.3d 705, 718 (Mo. App. W.D. 2015) (parties in litigation have an affirmative duty to preserve evidence); *Stirling v. St. Louis Cty. Police Dep't*, No. 4:11-cv-01932, 2013 WL 2244638, at *1 (E.D. Mo. May 21, 2013) (“[a] party that anticipates litigation is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request”); 125 Am. Jur. Proof of Facts 3d 93 (originally published in 2012) (“[t]he duty to preserve e-mails has been held to attach when the relevant plaintiff ... anticipates litigation even though the plaintiff has not yet filed a complaint”).² It is undisputed that Bowman anticipated litigation as early as February 2019

² *See also SMB Consulting and Investing, LLC v. Apple Valley Waste Service, Inc.*, Case No. 11-cv-0070, 2012 WL 13019007, at *2 (N.D.W.Va. Sept. 25, 2012) (“It is well settled that a party has a duty to preserve evidence when the party ... should have known that the evidence may be relevant to future litigation”); *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 284 (E.D. Va. 2001) (a party’s duty to preserve evidence begins when litigation is anticipated); *McCargo v. Texas Roadhouse, Inc.*, No. 09-cv-02889, 2011 WL 1638992, at *3 (D. Colo. May 2, 2011) (“It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation. Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents.”); *Woods v. Boeing Co.*, Case No. 11-cv-2855, 2013 WL 5332620, at *3 (D.S.C. Sept. 23, 2013) (“The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation”) (citation omitted).

before he resigned from the Board. FCM SOF ¶ 56. Bowman was under a duty to preserve KCBS emails in his possession, custody, or control. Failure to preserve them would have been contrary to the well-established case law. On this point alone, Bowman is entitled to summary judgment.

Finally, there is no evidence of any harm to KCBS from KCBS'S allegation that FCM and Bowman retained emails. Indeed, Bowman has never used these emails in any way detrimental to KCBS, and KCBS cites no evidence otherwise. Bowman is entitled to summary judgment.

V. Bowman is Entitled to Summary Judgment on KCBS'S Breach of Fiduciary Duty Claim.

A. KCBS does not Provide Factual Support for its Breach of Fiduciary Duty Claim against Bowman.

In Bowman's opening brief, Bowman asserted that KCBS had no evidence of a breach of a fiduciary duty. KCBS'S summary judgment response confirms this. KCBS ignores the arguments made in Bowman's opening brief at pages 19-24. Indeed, in Bowman's opening brief, Bowman outlined all four pleaded allegations against him in KCBS's breach of fiduciary duty claim. *See* FCM Opening Brief at 19-24. KCBS did not address a single one of those theories. Instead, KCBS, without citing facts, states "there are serious factual questions surrounding the formation of the Marketing Agreement and whether it was fraudulently induced through a breach of Bowman's fiduciary duties to KCBS." KCBS Brief at 13. But KCBS does not cite any facts to support any fraud or deception at all. *See id.* at 12-13. And KCBS never pleaded that Bowman's presentation to the board was a breach of fiduciary duty.

Additionally, Bowman provides an additional independent reason why KCBS'S breach of fiduciary duty claim fails. *See e.g.*, FCM Opening Brief at 24-27 (providing that Bowman is immune from suit for the decisions made in relation to the hiring of Mike Peters and Heath Hall pursuant to Mo. Rev. Stat. § 537.117 and the business judgment rule). KCBS does not provide any

response to this position. For the reasons stated above in section, the Court must grant summary judgment.³

B. KCBS’S New Facts Asserted in its Statement of Facts do not Support KCBS’S Breach of Fiduciary Duty Claim against Bowman.

KCBS does not provide any factual support in its statement of facts for its fiduciary duty theories asserted in the pleadings. For the same reasons discussed above, KCBS cannot now rely on unpleaded theories. But KCBS attempts to avoid summary judgment by asserting new “facts” that do not support its claims. KCBS responds to FCM’s brief with three facts that, even if true, miss the mark and cannot support a breach of fiduciary duty claim because these facts fail to raise a genuine material fact dispute.

First, KCBS claims that Sue McClure’s testimony “demonstrates that Bowman put his own interests ahead of KCBS’s in procuring the Marketing Agreement.” KCBS Brief at 12. Yet Sue McClure never said anything to support this claim. Not even close. Her report demonstrates that, in her opinion as a marketing expert, the terms of the Agreement were fair and reasonable. Ex. 26, at McClure_000063 (“The agreement is fair and reasonable to both firms.”). *See also supra* Section II(B)(i)(3).

Second, KCBS claims that Arlie Bragg’s testimony supports a breach of fiduciary duty claim. He said nothing of the sort to support KCBS’S claim. Indeed, Bragg testified that:

- He does not believe Bowman acted untruthfully or that the PowerPoint and corresponding email were untruthful (Ex. 6, Deposition of Arlie Bragg, at 80:11-81:3);
- Bowman did not act deceptively and did not pressure anyone to contract with FCM (*id.*, at 92:12-92:22);

³ In Bowman’s opening brief, he argues that KCBS does not have standing to assert an excess benefit transaction. *See* Bowman Opening Brief at 22. KCBS does not respond to this argument in its briefing; therefore, KCBS cannot argue the Agreement was an excess benefit transaction.

- Bowman is trustworthy (*id.*, at 49:11-12);
- The Agreement was in KCBS’S best interest (*id.*, at 93:6-9);
- Randall Bowman was the best person for the job and Bragg still believes that today (*id.*, at 96:1-8);
- FCM did a good job, and he stands by the decision to hire them (*id.*, at 104:10-16); and
- No one was more qualified than Bowman (*id.*, at 106:6-9).

Thus, KCBS’S claim that Bragg’s testimony supports a breach of duty cannot make out facts sufficient to support a claim.

Third, KCBS’s assertion that the board lacked marketing experience is irrelevant. Any alleged lack of marketing experience by board members is not relevant to the question of whether KCBS can state facts that show Bowman breached his duty. Indeed, KCBS does not explain how board members’ experience impacts whether Bowman breached his duties. Nor does KCBS supply any factual support to show that there is any indication that Bowman’s superior knowledge somehow caused him to breach this duty. In any event, this “fact” is contrary to the testimony of the board members who testified:

- Ex. 6, Deposition of Arlie Bragg, at 34:13-17 (testifying that other members of the board had marketing experience to some degree);
- *Id.*, at 93:10-20 (Bragg considered not only the PowerPoint marketing firms but also KCBS’s past experiences with MMA and Tiki Hut when making the decision to contract with FCM).
- Ex. 2, Deposition of Mike Peters, at 113:8-13 (testifying that when Peters was sitting on the board and addressing the FCM Agreement, he had experience with “numerous other marketing agreements” with KCBS);

- Ex. 3, Deposition of Mike Richter, at 89:89:17 (Board member Mike Richter testifying about his experience with previous KCBS marketing contracts);
- *Id.*, at 91:13-19 (Richter’s experience with Bowman as well as other marketing agencies provided Richter with enough information to make a decision in the best interest of KCBS); and
- *Id.*, at 83:6-84:24 (Richter had significant experience reviewing government contracts as an employee of the Department of Justice).

But to put any question to rest, each of these individuals specifically testified that they did not believe Bowman breached any fiduciary duties or deceive the board:

- Ex. 3, Deposition of Mike Richter, at 88:21-89:7 (testifying that Randall Bowman did not “dupe” the KCBS Board of Directors into selecting the FCM contract);
- *Id.*, at 49:6-10 (testifying that voting in favor of the contract with FCM “would be one of the best decisions the board could make”);
- *Id.*, at 59:19-23 (the FCM deal was in the best interest of KCBS).
- Ex. 2, Deposition of Mike Peters, at 60:25-61:1 (testifying that Bowman always did what was best for KCBS);
- *Id.*, at 136:14-16 (testifying that Bowman did not mislead the board in any way);
- *Id.*, at 83-84 (the board made the best decision for what was right for KCBS).
- Ex. 6, Deposition of Arlie Bragg, at 80:11-81:3 (testifying he does not believe Bowman acted untruthfully); and
- *Id.*, at 92:12-92:22 (Bowman did not act deceptively and did not pressure anyone to contract with FCM).

In sum, KCBS says Bowman did something wrong but cites no facts that Bowman said anything untrue or misleading or that he in any way acted improperly or ran afoul of the Bylaws. Finally, KCBS cites to no authority suggesting that a board member breaches his or her fiduciary duties in failing to ensure a formal RFP process occurs (especially when RFPs are not required and were not used in past marketing contracts).

VI. FCM and Bowman are Entitled to Summary Judgment on Tampering.

KCBS first attempts to distinguish FCM and Bowman's cited case law but offers no law to support its reading of Missouri's tampering statute. KCBS's attempt to distinguish *Anzaldua* fails. In *Anzaldua v. Ne. Ambulance & Fire Prot. Dist.*, 978 F. Supp. 2d 1016, 1030–31 (E.D. Mo. 2013), the court addressed a similar issue in which the plaintiff provided his email password to a defendant while in a relationship. The defendant then accessed the plaintiff's email after the relationship ended. The court specifically held that because access had been previously provided, this could not state a claim for tampering under the MCTA. *Id.* Bowman's case is even stronger than the defendant in *Anzaldua* because the emails at issue here are emails which were sent to and received at Bowman's own KCBS email address that KCBS failed to turn off or restrict Bowman's access to. In fact, KCBS was aware that Bowman was still using his @kcbs emails. *See* fn 1, above. Moreover, there is no evidence that Bowman did anything improper with the emails. FCM SOF ¶ 54. They just resided on his system because they were sent to his email address. As such, KCBS cites no facts that fall under the definition of "tampering" which means to "to interfere with something improperly, to meddle with it, displace it, make unwarranted alterations in its existing condition, or to deprive, temporarily, the owner or possessor of that thing." Mo. Rev. Stat. § 569.010.

KCBS also fails to offer any authority suggesting that accessing a *shared* Google Drive – a drive that FCM had access to use – constitutes tampering. The record is undisputed that KCBS could have turned off access to its shared folders any time it wanted to. The record is undisputed that KCBS could have turned off access to Bowman’s KCBS emails at any time. But KCBS did neither. KCBS’s position is, that despite having provided access to the shared Google Drive and emails, FCM and Bowman violated the MCTA. This position is untenable, and KCBS cites no authority to support such an overreaching view of Missouri criminal law. *Cf. Anzaldua*, 978 F. Supp. 2d at 1030–31 (when the plaintiff had previously provided access to email password while in a romantic relationship with the defendant, the defendant’s post-relationship accessing of the email did not constitute an MCTA violation as a matter of law).

Perhaps recognizing that nothing Bowman or FCM did fit under the MCTA, KCBS argues that Bowman signed a confidentiality agreement which KCBS argues prohibited Bowman from accessing emails which he had authority to access. But KCBS’s argument proves FCM and Bowman’s point: while the allegations of wrongdoing could potentially fall under a contractual theory of liability, they do not belong under a criminal tampering statute. There is a significant distinction between a criminal act and an alleged breach of contract. Put differently, the fact that KCBS points to a contract when attempting to allege wrongdoing demonstrates that any issue that KCBS has is *contractual in nature* and not criminal. The Court should grant summary judgment in Favor of FCM and Bowman.

A. KCBS’S Arguments that Bowman and FCM took Documents that were not in their Possession or Control and Took Documents After the Termination of the Agreement Fail.

KCBS admits that Bowman’s “duty was to preserve potential evidence *within his own possession and control...*” KCBS Brief at 11. However, KCBS argues that Bowman did not have

a duty to preserve evidence that was also within KCBS's possession and control, and therefore preserving any emails that KCBS also had in its possession was improper. *Id.* at 11-12 (“KCBS had a duty to preserve potential evidence within its own possession or control, but Bowman was under no obligation to preserve potential evidence within KCBS's possession or control.”). KCBS cites no authority in support of its position, and KCBS's position flies in the face of well-established authority to the contrary providing for a duty to preserve evidence in anticipation of litigation. The law requires preservation regardless of whether the evidence may or may not be in the possession of another party. The single case KCBS cites does not stand for the proposition KCBS asserts – the case KCBS cites concerns *sanctions* related to allegations of spoliation of evidence – exactly what Bowman was trying to avoid by preserving such communications. The law is clear that parties have a duty to preserve evidence if litigation is anticipated, and there is no rule or requirement that parties may flout this obligation if they believe the evidence could exist in another location. In fact, the ramifications if such a rule existed would be nonsensical – parties could always delete emails because there is always another person (the sender or recipient) on the other side of an email.

Accordingly, KCBS'S argument is insufficient to create a genuine dispute of material fact.

B. FCM is Not a Person Under the Statute and Cannot be Liable under the MCTA.

Next, with respect to FCM, KCBS misreads the Missouri law requiring criminal statutes to be applied to people and not corporate entities. The MCTA is a criminal statute. It requires that the person liable under § 569.095 be “a person.” It is undisputed that FCM does not fall into one of the exceptions that would permit FCM to be considered a “person” under Missouri criminal law. Instead, KCBS argues that the civil statute § 537.525 permits KCBS to circumvent the elements of the criminal statute § 569.095. But KCBS cannot circumvent proving the elements of

§ 569.095 because civil liability under section 537.525 can only be established upon showing a person violated § 569.095. To show someone violated the criminal statute, KCBS must, among other things, prove that FCM is a person pursuant to § 569.095 – which it does not attempt to do. *See* Mo. Rev. Stat. § 562.056 (setting out the limited circumstances when a corporation may be guilty of a criminal offense). KCBS, therefore, cannot prove an essential element of its tampering claim against FCM, so summary judgment on KCBS’s tampering claim against FCM is proper.

CONCLUSION

For the reasons stated herein, First Club Marketing LLC and Randall Bowman respectfully request an order from the Court granting First Club Marketing LLC and Randall Bowman’s Motion for Summary Judgment and granting such other relief as the Court deems just and equitable under the circumstances. Specifically, FCM and Bowman request a ruling granting summary judgment:

- (1) in favor of FCM on FCM’s breach of contract claim and that KCBS be required to pay amounts due under the without cause termination provision, including unpaid bonuses, commissions, retainers and expenses;
- (2) in favor of FCM and Bowman on KCBS’s breach of contract counterclaim;
- (3) in favor of FCM and Bowman on KCBS’s tampering claim; and
- (4) In favor of Bowman on KCBS’s breach of fiduciary duty claim.

DATED: April 6, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April 2021, a true and correct copy of the foregoing filed with the Clerk of the Court using the electronic filing system, which will send notice of electronic filing to all counsel of record for this case.

/s/ Eric L. Dirks
Eric L. Dirks