By order of the court, **GRANTED** ***Judge PERRY B. INOS***

FOR PUBLICATION

IN THE SUPERIOR COURT OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN TAEK HWANG, **Plaintiff,** **v.** **WOO YOUNG LEE and EASTERN HOPE CORPORATION,** **Defendants.**	**CIVIL ACTION NO. 08-0007** **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COUNT I (FRAUD)**

THIS MATTER CAME FOR HEARING on October 8, 2009. Rexford C. Kosack appeared on behalf of plaintiff In Taek Hwang ("Plaintiff"). Joaquin Dlg. Torres appeared on behalf of defendants Woo Young Lee ("Lee") and Eastern Hope Corporation ("Eastern Hope") (collectively, "Defendants").

I. FACTUAL AND PROCEDURAL BACKGROUND

This case springs from a contract in which Plaintiff agreed to pay defendant Eastern Hope $55,000.00 per month for the right to manage two restaurants, Keeraku and Rakuen, located in Garapan, Saipan. Defendant Lee owns 95% of the shares of Eastern Hope and is the corporation's President. In negotiating the management fee, Lee, acting on behalf of himself and Eastern Hope, represented that the restaurants earned an average net profit of $55,000.00 per month for the years 2000, 2001 and 2002. Lee also represented that these numbers were low because they included the cost of free meals given to the restaurants' staff and various guests. On the basis of these representations, Plaintiff agreed to pay Eastern Hope $55,000.00 per month for the right to manage the restaurants for three years beginning on October 1, 2003. The First Amended Complaint ("FAC") asserts six causes

of action against Defendants including fraud, breach of fiduciary duty, breach of three contracts, and restitution. In the present motion, Plaintiff only seeks summary judgment regarding Defendants' liability for Count I, Fraud, leaving the issue of damages for trial. Plaintiff seeks summary judgement on Counts II and III, and Counts IV and V, in separate motions.

II. STANDARD

Summary Judgment is appropriate where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Com. R. Civ. P. 56(c). In bringing a summary judgment motion, the "moving party bears the 'initial and ultimate' burden of establishing its entitlement to summary judgment." *Santos v. Santos*, 4 N.M.I. 206, 210 (1995) (*citing Lopez v. Corporacion Azucarera de Puerto Rico*, 938 F.2d 1510, 1516 (1st Cir. 1991)).

Where the party moving for summary judgment bears the ultimate burden of proof at trial, they must produce affirmative evidence establishing the undisputed material facts to satisfy each element of the cause of action. Where the party moving for summary judgment does not bear the ultimate burden of proof at trial, the moving party may demonstrate its entitlement to summary judgment either by showing an absence of evidentiary support in the nonmoving party's case or by showing that the undisputed facts disprove a necessary element of a claim against them or satisfy each element of an affirmative defense. *See generally, Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In bringing a "defensive" motion for summary judgment, a moving party may satisfy its initial burden by either submitting evidence (affidavits or otherwise) to demonstrate its entitlement or it may merely pinpoint the nonmoving party's lack of evidence. *Id.*

Once the moving party meets its initial burden, the burden shifts to the opponent to show that a genuine issue of material fact exists to survive summary judgment. *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172, 176 (1990). In opposing a motion for summary judgment, the nonmoving party may not rest simply upon mere allegations or denials of the moving party's pleading, but must "set forth specific facts showing that there is a genuine issue for trial." Com. R. Civ. P. 56(e); *Eurotex (Saipan), Inc. v. Muna*, 4 N.M.I. 280, 284-85 (1995). "The party opposing summary judgment does not have a duty to present evidence in opposition to a motion under Rule 56 in all circumstances, however. [T]hat obligation does not exist when . . . the matters presented fail to foreclose the possibility of a factual

dispute . . . ." 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2727 (2d ed. 1998) (interpreting Federal Rules of Civil Procedure after which the Commonwealth Rules are modeled). When the party opposing the motion does not offer counter-affidavits or other evidentiary material showing that a genuine issue of material fact remains, or does not show a good reason, in accordance with Rule 56(f), why he is unable to present facts in opposition to the motion, judgment must be entered against him. *Id.* In considering a motion for summary judgment, the trial court must review the evidence and inferences drawn therefrom in light most favorable to the non-moving party. *Estate of Mendiola v. Mendiola*, 2 N.M.I. 233, 240 (1991).

III. DISCUSSION

A. Plaintiff Has Presented Evidence Establishing the Undisputed Material Facts to Satisfy Each Element of Fraud.

In Count I of the FAC, Plaintiff alleges that Lee, acting on behalf of himself and Eastern Hope, fraudulently misrepresented the average net profits of the two restaurants, Keeraku and Rakuen, to induce Plaintiff to pay a $55,000.00 monthly management fee. Plaintiff has carried his initial burden of presenting affirmative evidence establishing the undisputed facts to satisfy each element of a claim for fraud against Defendants. The elements of fraud are: (1) misrepresentation, (2) knowledge of falsity (scienter), (3) for the purpose of inducing another to act based upon the misrepresentation, (4) justifiable reliance, and (5) resulting damage. RESTATEMENT (SECOND) OF TORTS § 525 (1977).

1. *Misrepresentation*

   a. *Lee Represented that the Two Restaurants Earned an Average Net Profit of $55,000.00 per Month for the Years 2000, 2001 and 2002.*

It is undisputed that, in negotiating the management contract with Plaintiff, Lee represented that the two restaurants earned an average net profit of approximately $55,000.00 per month for the years 2000, 2001 and 2002. In fact, Lee made this representation twice. First, Lee verbally told Diane Kim ("Kim"), who represented Lee in the negotiations with Plaintiff, that the average net profits for the restaurants was $55,000.00 per month for the years 2000, 2001 and 2002. (Defs.' Opp. to Pl.'s Mot. for Summ. J. on Ct. I at 2.) Second, Lee showed Kim a spreadsheet titled "Sales and Profit Analysis" indicating that the restaurants earned an average net profit of $55,000.00 per month for the years 2000,

2001 and 2002.[1] (*Id.*) During the negotiations with Plaintiff, Kim provided the spreadsheet to Plaintiff and reassured him that it was accurate. Kim also informed Plaintiff that he would be able to make greater profits than those reflected on the spreadsheet because the spreadsheet did not account for the fact that Eastern Hope had given free meals to the staff and certain guests in 2000, 2001 and 2002.

b. *Defendants Admitted The Representation Was False by Operation of Law*.

Defendants admitted that Lee's representation concerning the average net profits of the restaurants was false by operation of law. Paragraphs 15 and 16 of the FAC state the following:

> 15. In negotiating the price for the management contract, Lee, acting on behalf of himself and Eastern Hope, caused to be represented to Hwang that during 2000, 2001, and 2002, Eastern Hope had had an average net profit of about $55,000 per month in operating the two restaurants.
>
> 16. This verbal representation was false. The net profits were less than represented.

(FAC ¶¶ 15-16.) In their First Amended Answer ("FAA"), Defendants admit paragraph 15 and do not admit or deny paragraph 16. (FAA ¶ 1-3.) Under Com. R. Civ. P. 8(d), "[a]verments 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." Because a responsive pleading was required for paragraph 16 and Defendants did not admit or deny it, Defendants admitted the averments of paragraph 16 by operation of law.

Enforcing Com. R. Civ. P. 8(d) in this case is supported by our Supreme Court's ruling in *Manglona v. Kaipat*, 3 N.M.I. 322 (1992), *superseded by statute on other grounds as expressed in In re Estate of Roberto*, 2004 MP 7. In *Kaipat*, the defendants challenged the final judgment of the Superior Court quieting title to certain property in favor of the plaintiff. *Id.* at 325. The Superior Court held that the deed of gift vested sole title to the property to the plaintiff where the deed of gift attempted to convey the property to the plaintiff and a co-grantee who could not take because of the land alienation restriction under Article XII. *Id.* at 326. The Supreme Court held that the deed of gift created a tenancy in common between the co-grantees, but voided the one-half interest belonging to

---

[1] The spreadsheet is attached to Plaintiff's Memorandum in Support of Motion for Summary Judgment on Count I (Fraud), although it is not marked as an exhibit to the Memorandum. The spreadsheet is marked as "Exhibit Z" in the upper right corner, however, because it was marked as such in Lee's deposition.

the grantee who could not take. *Id.* One of the issues on appeal was whether the Superior Court erred in admitting a copy of the deed attached to the complaint despite the defendants' objections that it was not an original, not a certified copy, and not a compared copy. *Id.* at 338-39. The Supreme Court agreed with the Superior Court's admission of the deed on the ground that, in their answer, the defendants did not deny that the copy represented the actual deed of gift. *Id.* at 339. The court explained that "[u]nder our Rules of Civil Procedure, allegations of a complaint which are not denied by the opposing party are deemed admitted. Rule (8)(d), Com. R. Civ. P." *Id.*

Federal case law also illustrates that Rule 8(d) is properly applied even when it establishes an element of a cause of action that the defendant later seeks to dispute.[2] *Lockwood v. Wolf Corporation*, 629 F.2d 598, 603, 611 (9th Cir. 1980) (summary judgment affirmed where appellant failed to deny a nonpayment allegation that was an element of appellee's claim to enforce a settlement agreement and recover an acknowledged debt); *Legal Aid Society v. Brennan*, 608 F.2d 1319, 1334 (9th Cir. 1979) (summary judgment affirmed where uncontradicted allegations of the complaint helped establish court's finding that minority appellees had standing to sue federal officials for failure to develop and implement compliant affirmative action programs); *Shakman v. Democratic Organization of Cook County*, 533 F.2d 344, 352 (7th Cir. 1976) (order affirmed where respondents' failure to deny actual knowledge of a judgment was deemed an admission of such knowledge, satisfying a crucial element in a contempt proceeding); *City of Montgomery v. Gilmore*, 277 F.2d 364 (5th Cir. 1960) (defendants deemed to have admitted a custom or policy of racial segregation in city parks when allegation of policy, practice, and custom of denying African-Americans admission to and use of park was answered only by statement that the city parks have been closed to all persons), *overruled on other grounds by United States v. Jefferson Cty. Bd. of Educ.*, 380 F.2d 385 (5th Cir. La. 1967); *Fontes v. Porter*, 156 F.2d 956, 957 (9th Cir. 1946) (in a suit for violation of the Emergency Price Control Act, plaintiff's

[2] Where CNMI case law has not addressed an issue of law, the Court applies "the rules of common law, as expressed in the restatements of law . . . [and] as generally understood and applied in the United States . . . ." 7 CMC § 3401; *Ito v. Macro Energy, Inc.*, 4 N.M.I. 46, 55 (1993). In particular, Commonwealth courts look to interpretations of the Federal Rules of Civil Procedure in interpreting the Commonwealth Rules of Civil Procedure because the Commonwealth Rules are modeled after the Federal Rules.

allegation that tools were purchased for use in "trade or business" deemed admitted under Rule 8(d) because not denied in answer).

Defendants argue that their failure to deny paragraph 16 was inadvertent and that case law suggests that an inadvertent omission may be overlooked. Defendants first cite *Geary v. Sullivan County Socy. for Prevention of Cruelty to Animals*, 2006 NY Slip Op 4497 (N.Y. App. Div. 3d Dep't 2006). In *Geary*, the plaintiffs sued to recover a horse and sought damages. (*Id.*) The plaintiffs filed a motion for summary judgment based on admissions resulting from the defendants' failure to respond to certain allegations of the complaint. The court denied the plaintiffs' motion because, although the defendants failed to respond to all paragraphs of the 38-paragraph complaint, the defendants only received a 21-paragraph complaint, their failure to respond to one of those paragraphs was inadvertent, and the parties submitted contradictory versions of the events giving rise to the suit. On appeal, the Supreme Court of New York affirmed the order denying the plaintiffs' motion for summary judgment because the plaintiffs consented to letting the defendants file an amended answer during oral argument.

In *Cazenovia College v. Patterson*, 45 A.D.2d 501 (N.Y. App. Div. 3d Dep't 1974), a college sued the father of a student on a contract to recover the balance of his daughter's tuition after his daughter failed to matriculate. *Id.* at 502. The trial court granted summary judgment in favor of the college. *Id.* The appellate court reversed and held that the circumstances under which the daughter's withdrawal from the college prior to the second of two deadlines for notice of withdrawal raised factual issues requiring a trial. *Id.* at 503. In its opinion, the appellate court noted that, statutorily, certain omissions in the father's answer would normally be deemed admitted. *Id.* at 503-04. The court deemed the admissions "amended," however, because the omissions were inadvertent, the issue raised by the admissions was at the heart of the controversy, and the admissions were completely contrary to the defendant's pleadings. *Id.* at 504.

In this case, the special treatment given to the parties by the New York courts in *Geary* and *Cazenovia Collage* is not warranted. Although Defendants' attorney stated at the oral argument that the Defendants' failure to respond to paragraph 16 of the Complaint was merely an inadvertent error, the admission is not completely contrary to Defendants' pleadings, and, as will be discussed below, Defendants have not shown that there is any genuine issue of material fact requiring a trial.

2. *Knowledge of Falsity (Scienter)*

a. *Lee Knew that the Spreadsheet Did Not Account for the Free Meals.*

Plaintiff presented evidence that Lee knew the spreadsheet did not account for the cost of the free meals given to the restaurants' staff and guests even though, during the negotiations, he caused Plaintiff to believe that it did. In his deposition, Lee states that the spreadsheet was prepared by Mr. Sin. (Lee Deposition, TR 130, ll. 2-12.) Lee also states that when he first saw the spreadsheet, he told Mr. Sin that the net profit was too small and that Mr. Sin should subtract the cost of free meals given to the restaurants' staff and guests. (*Id.*, TR 131, ll. 3-25; 132, l.1.) Lee verifies in his deposition that the spreadsheet was then modified to subtract the cost of the free meals. (*Id.*, TR 366, ll. 2-6.) Although Mr. Sin subtracted the cost of the free meals, Lee states in his deposition that he told Kim that the spreadsheet still included the cost of the free meals. (*Id.*, TR 368, ll. 11-25.) Lee admits he told Kim that the actual profits were therefore higher than reflected on the spreadsheet. (*Id.*, TR 366, ll. 23-25.) Plaintiff submitted a declaration indicating that Kim communicated all of this information to him in negotiating the management contract and setting the management fee at $55,000.00 per month. (Hwang Decl. at 1.)

b. *Lee Knew that He Did Not Know Whether the Spreadsheet Was Accurate.*

Another form of scienter is when one "does not have the confidence in the accuracy of his representation that he states or implies. RESTATEMENT (SECOND) OF TORTS § 526(b) (1977). In other words, it is not necessary for a maker to believe his representation is false, "[i]t is enough that [he is] conscious that he has neither knowledge nor belief in the existence of the matter he chooses to assert [] as a fact." *Id.*, Comment on clause (b). Lee stated in his deposition that when he gave the spreadsheet to Kim, he did not know if the numbers were correct because he did not prepare the spreadsheet himself. *Id.*, TR, 130, ll. 2-12. Nevertheless, Lee assured Kim that the spreadsheet accurately reflected the average net profits of the restaurants for the years 2000, 2001 and 2002. Thus, even if Lee did not believe his representation was false, he knew that he did not know for certain whether the spreadsheet was accurate, satisfying the second element of Plaintiff's fraud claim.

Moreover, Plaintiff also presented the deposition testimony of Eun Ae Lee, Lee's daughter, who testified for Eastern Hope in a deposition conducted pursuant Com. R. Civ. P. 30(b)(6). In her

deposition, Eun Ae Lee states, in reference to the spreadsheet, that "somebody made this up" and that the statistics contained in the spreadsheet were "fabricated." (Eun Ae Lee Deposition, TR 81, ll. 24-25; TR 82, l. 2.) In fact, Eun Ae Lee states that the spreadsheet is "laughable." (*Id.*, TR 82, l. 4). This is because many of the percentages contained in the spreadsheet, such as those in the column titled "Cost of Sale" are the same from year to year. (Pl.'s Mem. Supp. Mot. for Summ. J. on Ct. I (spreadsheet not marked as an exhibit but still attached).) In reference to the figures in the spreadsheet, Eun Ae Lee explains that "[t]here's no way that this is possible. It's normal when it changes every year." (Eun Ae Lee Deposition, TR 82, ll. 11-17.) Thus, Eastern Hope, speaking through Eun Ae Lee, admitted in its deposition testimony that the spreadsheet statistics were fabricated and not accurate.

3. *Intent to Induce Plaintiff to Act Upon the Misrepresentation*

Plaintiff presented evidence that Lee intended to induce Plaintiff to act upon his representation concerning the average net profits of the restaurants in 2000, 2001 and 2002. According to Lee's deposition, Lee verbally told Kim, who was representing Eastern Hope in the negotiations with Plaintiff, that the average net profit for the restaurants was $55,000.00 per month for 2000, 2001 and 2002. (Lee Deposition, TR 366, ll. 16-17.) Lee presented the same information to Kim in writing by giving her the "Sales and Profit Analysis" spreadsheet. (*Id.*, TR 366, ll. 16022.) Kim (also known as Lee Hye Sook) testified in her deposition that she represented Lee when interacting with Plaintiff. (Sook Deposition, TR 10, ll. 9-13.)[3] Critically, Lee states that the $55,000.00 per month management fee was agreed upon based on the numbers in the spreadsheet. (Lee's Deposition, TR 365, ll. 12-20.) Thus, it is logical to infer that Lee represented that the average net profits of the restaurants was $55,000.00 per month for the years 2000, 2001 and 2002 to induce Plaintiff to pay at least that amount for the management fee when Plaintiff began operating the restaurant in 2003.

4. Justifiable Reliance

For Defendants to be liable for fraud, Plaintiff must have relied on the misrepresentation and the reliance must have been justifiable. RESTATEMENT (SECOND) OF TORTS § 537 (1977). Plaintiff

[3] Excerpts of Kim's Deposition testimony are attached to Plaintiff's Memorandum in Support of Motion for Summary Judgment on Count I (Fraud) although the excerpts are not marked as an exhibit.

claims that he relied on the statistics in the spreadsheet and Kim's assurance that the spreadsheet was accurate in agreeing to pay the $55,000.00 per month management fee. (Hwang Decl. at 1.) The question is therefore whether Plaintiff's reliance was justifiable. According to the Restatement, the recipient of a material representation of fact is entitled to assume that the representation is honestly made, unless its falsity is obvious to his senses, or he has reason to know of facts that would make his reliance unreasonable. RESTATEMENT (SECOND) OF TORTS § 541A, cmt. a (1977). Lee's representation was material because it was the basis of Plaintiff agreeing to pay the $55,000.00 per month management fee. *See* RESTATEMENT (SECOND) OF TORTS § 538(2)(b) (1977). Furthermore, Plaintiff was entitled to rely on the representation because the falsity of the statistics was not obvious to him and he did not have a reason to know of facts making his reliance unreasonable. It does not make sense that Plaintiff would agree to pay $55,000.00 per month if he knew facts indicating he would not be able to make at least that much by operating the two restaurants, as indicated by the spreadsheet. Moreover, the spreadsheet appears to be legitimate because it contains 132 cells of statistics showing, year by year, the restaurants' sales, cost of sales, labor costs, other costs, net profits, percentage of the gross that the costs and profit represented, and the average monthly profit. Plaintiff was therefore justified in relying on the spreadsheet and Kim's verbal representation that the spreadsheet was accurate. Plaintiff had no duty to investigate further. *See* RESTATEMENT (SECOND) OF TORTS § 541A, cmt. a (1977).

5. Damages

Plaintiff only moves for summary judgment regarding Defendants' liability for fraud leaving the issue of damages for trial. Nevertheless, Plaintiff argues that Lee's representation caused his damages. (Pl.'s Mem. Supp. Mot. for Summ. J. on Ct. I at 10.) Plaintiff contends that, because the monthly net profits of the restaurant were less than represented, he paid a higher management fee to Eastern Hope than he would have if the monthly net profits had been accurately represented. (Pl.'s Mem. Supp. Mot. for Summ. J. on Ct. I at 10.) Lee's misrepresentation therefore caused Plaintiff to pay the $55,000.00 per month management fee.

B. Defendants Have Not Shown There Is a Genuine Issue of Material Fact for Trial.

Defendants argue that Plaintiff is not entitled to summary judgment because Lee's representation concerning the average net profits of the restaurants was accurate. (Defs.' Opp. to Pl.'s

Mot. for Summ. J. on Ct. I at 2.) Specifically, Defendants assert that they "accurately represented the net profits when Defendant Lee included the free meals in the net profits and explained inasmuch to Diane Kim. (*Id.* at 2.) Thus, Defendants assert that "a genuine issue of material fact exists on whether misrepresentation occurred." (*Id.* at 1-2.) Defendants have not shown that there is a genuine issue of material fact for trial for several reasons, however. First, as discussed above, Defendants already admitted that their representation was false by operation of law when they failed to deny paragraph 16 of the FAC. Furthermore, Eastern Hope admitted that the spreadsheet was not accurate, and was in fact "laughable," through the deposition testimony of Eun Ae Lee. (Eun Ae Lee Deposition, TR 82, l. 4.) Finally, Defendants have not provided specific facts supported by evidence or affidavits sufficient to indicate that a genuine issue of material fact exists for trial. As the Court has already analyzed Defendants' admissions, above, the Court will only address Defendants' failure to provide specific facts supported by evidence or affidavits here.

Under Com. R. Civ. P. 56(e), once the party moving for summary judgment shifts the burden, the adverse party "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Com. R. Civ. P. 56(e). As outlined above, Plaintiffs shifted the burden to Defendants by presenting evidence establishing the undisputed material facts to satisfy each element of Defendants' liability for fraud. Accordingly, Defendants must, by affidavits or as otherwise permitted by Com. R. Civ. P. 56, set forth specific facts showing there is a genuine issue for trial. Defendants' statements in their Opposition Memorandum that they "did not misrepresent the net profit[,]" that they "accurately represented the net profits[,]" and that they "knew that the net profit was accurate as reflected in Exhibit Z" are merely conclusory remarks without any supporting evidence or affidavits. (Defs.' Opp. to Pl.'s Mot. for Summ. J. on Ct. I at 1-2.) As such, they do nothing to assist Defendants in showing that a genuine issue of material fact exists for trial. *See Riley v. Public School System*, 4 N.M.I. 85, 89 (1994); *see also Celotex* 477 U.S. at 323-24 ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . . .").

The only evidence provided by Defendants in support of their Opposition Memorandum is a

Declaration by Lee. In his Declaration, Lee mainly repeats statements from his deposition, although he adds at the end of the Declaration that "[t]he companies were indeed making a profit as stated in Exhibit Z." (Lee Decl. ¶ 5.) This last statement directly contradicts Lee's deposition testimony. Specifically, during his deposition on September 4, 2008, the following exchange took place:

> Q So this document called Sales and Profit Analysis appears to be the document you would have shown to Diane to indicate to her that the average net profit is $55,000; is that correct?
>
> A Yes, it seems that way.
>
> Q And are these statistics on here, are they accurate?
>
> A That I don't know, because I didn't do this myself.
>
> Q Who did this for you?
>
> A At the time, I think Mr. Sin did it.

(Lee Deposition, TR 130, ll. 2-12.) Thus, Lee as a deponent claimed he did not have personal knowledge concerning the accuracy of the statistics, yet Lee as a declarant claims to know that the statistics are accurate.

Plaintiff cites *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975) to support the proposition that a party may not defeat a motion for summary judgment with affidavits that contradict former deposition testimony where the contradiction is a "sham." (Pl.'s Reply Mem. Supp. Mot. for Summ. J. on Ct. I at 11.) In *Radobenko*, the plaintiff sued a corporation for breach of contract, fraud, breach of fiduciary duty and other wrongful acts. *Id.* at 541. The trial court granted summary judgment in favor of the corporation because the plaintiff's deposition testimony showed that he had no case, despite the fact that the plaintiff submitted a sworn statement contradicting his prior deposition testimony and purportedly creating genuine issues of material fact for trial. The Ninth Circuit affirmed the order granting summary judgment and held that "the issues of fact created by [the plaintiff] are not issues which the Court could reasonably characterize as genuine; rather, they are sham issues which should not subject the defendants to the burden of a trial." *Id.* at 544.

The Ninth Circuit has reexamined the *Radobenko* case, however, and has suggested a more cautionary approach. In *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262 (9th Cir. 1991), the plaintiffs sued their insurance company under a bond issued to cover losses resulting from certain acts covered

by "employees." *Id.* at 263. The central issue was whether a pension benefits plan qualified as a "plan" under ERISA. The plan would not qualify if the only beneficiaries were the company's owners. Although one owner stated in a deposition that he and his co-owner were the only beneficiaries, he later claimed in an affidavit that he had erred in his deposition and that another employee was also a beneficiary. *Id.* at 264. The owner explained that he did not handle the day-to-day administration of the plan and that he had discovered the other employee's status as a beneficiary upon reviewing records in the possession of the plan administrator. *Id.* The trial court rejected the owner's affidavit and granted summary judgment in favor of the insurance company. *Id.* at 265-65. In reversing the grant of summary judgment, the Ninth Circuit noted that the *Radobenko* court was concerned with "sham" testimony that flatly contradicts earlier testimony in an attempt to "create" an issue of fact and avoid summary judgment. *Id.* at 267. The Kennedy court held that "before applying the *Radobenko* sanction, the district court must make a factual determination that the contradiction was actually a 'sham.'" *Id.*

In accordance with the standard expressed in *Kennedy*, the Court finds that Lee's contradictory statement in his declaration is a sham. Not only did Lee state in his deposition that he had no personal knowledge of whether the statistics were accurate, he also does not offer any explanation for the apparent contradiction. Furthermore, in his deposition, Lee stated facts indicating that he knew for certain that the statistics in the spreadsheet were not accurate. He stated that he asked Mr. Sin to back out the cost of the meals given to staff and guests from the spreadsheet, then explained to Kim that the spreadsheet still contained those costs so that the actual profits would be higher than those reflected in the spreadsheet. This information was passed onto Plaintiff by Kim and became part of the basis of Plaintiff's agreement to pay Eastern Hope the $55,000.00 per month management fee.

IV. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Plaintiff's motion for summary judgment with regard to Defendants' liability for Count I, Fraud.

So ORDERED this 8th day March, 2010.

/s/
PERRY B. INOS, Associate Judge