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7 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
8 COUNTY OF SAN DIEGO, NORTH DISTRICT
9

10
11 KEVIN CUMMINS,

12 Petitioner and Plaintiff,

13 v.

14 CITY OF ENCINITAS, and DOES 1-10,
15 Inclusive,

16 Respondents and Defendants
17

) CASE No. 37-2010-00058511-CU-PT-NC

) [Hon. William Dato, Dept. N-31]

) NOTICE OF MOTION AND MOTION TO
) STRIKE PORTIONS OF ANSWER TO
) VERIFIED PETITION FILED BY
) DEFENDANT AND RESPONDENT CITY
) OF ENCINITAS; MEMORANDUM OF
) POINTS AND AUTHORITIES IN
) SUPPORT; DECLARATION OF DENNIS A.
) WINSTON

) Hearing Date: February 10, 2011,

) Hearing Time: 1:30 p.m.

) Department: "N-31"
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20 **TO THE CLERK OF THE COURT, TO THE PARTIES AND THEIR**
21 **ATTORNEYS OF RECORD HEREIN:**

22 **PLEASE TAKE NOTICE** that that on February 10, 2011, at 1:30 p.m. in
23 Department "N-31" of the San Diego County Superior Court (North District), located at 325
24 S. Melrose, Vista, California, 92082, Petitioner and Plaintiff Kevin Cummins ("Petitioner" or
25 "Cummins") will move this Court for an order striking certain allegations in the Answer
26 ("Answer") To Verified Petition Filed By Respondent and Defendant City of Encinitas (the
27 "City") pursuant to *Code of Civil Procedure* §§ 435 and 436.
28

1 Specifically, Cummins seeks to have the following allegations in the City's Answer
2 stricken:

3 1. "As to the remaining allegations of this paragraph, Respondent denies
4 each and every allegation not heretofore expressly admitted."

5 (City's Answer, Paragraph No. 2 at 1:27-1.)

6 2. "As to Paragraph 6 of the Petition, Respondent has no information or
7 belief sufficient to enable it to answer the allegations contained therein and,
8 placing its denial on that ground, denies each and every allegation thereof."

9 (City's Answer, Paragraph No. 6 at 2:11-13.)

10 3. "As to Paragraph 7 of the Petition, Respondent has no information or
11 belief sufficient to enable it to answer the allegations contained therein and,
12 placing its denial on that ground, denies each and every allegation thereof."

13 (City's Answer, Paragraph No. 7 at 2:14-16.)

14 4. "As to Paragraph 8 of the Petition, Respondent denies each and every
15 allegation thereof." (City's Answer, Paragraph No. 8 at 2:17-18.)

16 5. "As to Paragraph 9 of the Petition, Respondent denies each and every
17 allegation thereof." (City's Answer, Paragraph No. 9 at 2:19-20.)

18 6. "As to Paragraph 10 of the Petition, Respondent denies each and every
19 allegation thereof." (City's Answer, Paragraph No. 10 at 2:21-22.)

20 7. "As to Paragraph 11 of the Petition, Respondent denies each and every
21 allegation thereof." (City's Answer, Paragraph No. 11 at 2:23-24.)

22 8. "As to Paragraph 13 of the Petition, Respondent denies each and every
23 allegation thereof." (City's Answer, Paragraph No. 13 at 3:1-2.)

24 9. "As to Paragraph 14 of the Petition, Respondent denies each and every
25 allegation thereof." (City's Answer, Paragraph No. 14 at 3:3-4.)

26 10. "As to Paragraph 15 of the Petition, Respondent denies each and every
27 allegation thereof." (City's Answer, Paragraph No. 15 at 3:5-6.)
28

1 11. "As to Paragraph 20 of the Petition, Respondent denies each and every
2 allegation thereof." (City's Answer, Paragraph No. 20 at 3:18-19.)

3
4 The basis for this motion is that the specified portions of the City's Answer contain
5 sham and evasive allegations of matters that are presumed to be within the actual or presumed
6 knowledge of the City and/or matters of public record. *5 Witkin, California Procedure (4th*
7 *Ed.) Pleading, §§ 993, 994 at 449-450; Oliver v. The Swiss Club Tell* (1963) 222 Cal. App.
8 2d 528; *Dobbins v. Hardister* (1966) 242 Cal. App. 2d 787; *Zenos v. Britten-Cook Land &*
9 *Livestock Company* (1925) 75 Cal. App. 299; *Transworld Systems, Inc. v. Rogan* (1989) 210
10 Cal. App. 3d 731.

11 In addition, the City had expressly denied entire paragraphs which contain specific
12 factual allegations which the City presumably knows to be true. *Code of Civil Procedure §*
13 *431.30(d); Williamson v. Clapper* (1948) 88 Cal. App. 2d 645.

14 The motion will be based upon this notice of motion and motion, the facts and records
15 in this case, and such other documents and oral argument as the Court may allow.

16
17 Dated: October _____, 2010

DENNIS A. WINSTON,
A PROFESSIONAL LAW CORPORATION

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21 By _____
22 Dennis A. Winston
23 Attorneys for Petitioner and Plaintiff
24 Kevin Cummins
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1 **1. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Petitioner and Plaintiff Kevin Cummins (“Cummins”) brings this motion to strike
3 portions of Respondent and Defendant City of Encinitas’ (“City”) Answer to Cummins’
4 Verified Petition for Writ of Mandate and Declaratory Relief (“Petition”) to stop the City
5 from jerking this Court and the parties around any further. For example, the City admits it is
6 a municipal corporation but denies that it is subject to the California Public Records Act
7 applicable *by law* to all cities in California (*Government Code § 6250, et seq.*, “CPRA”). The
8 City unqualifiedly denies that it received a demand for records then denies the authenticity of
9 the responses *from City employees* to the CPRA demand.

10 In eleven instances, the City denies (usually on lack of information and belief) verified
11 allegations as to matters which are presumably within its knowledge or matters of public
12 records. Such sham answers should be stricken. *Code of Civil Procedure §§ 436, 435; 5*
13 *Witkin, California Procedure (4th Ed.) Pleading, §§ 993, 994 at 449, 450; Dobbins v.*
14 *Hardister* (1966) 242 Cal. App.2d 787; *Zenos v. Britten-Cook Land & Livestock Company*
15 (1925) 75 Cal. App. 299; *Transworld Systems, Inc. v. Rogan* (1989) 210 Cal. App.3d 731;
16 *Oliver v. The Swiss Club Tell* (1963) 222 Cal. App. 2d 528.

17 **2. STATEMENT OF FACTS**

18 Petitioner Cummins here seeks public records from the City subject to the California
19 Public Records Act (*Government Code § 6250, et seq.*, the CPRA”) (Verified Petition, ¶¶ 6-
20 11.) Specifically, in June 2010, Cummins made a demand of the City for the following public
21 records:

- 22 * all draft(s) of the City’s street maintenance report produced by the City’s
- 23 current streets consultant and delivered to the city; and
- 24 * all correspondence with the streets consultant since the submission of its
- 25 draft report, including but not limited to the City’s requested edits and changes
- 26 to the draft report.

27
28 (Verified Petition, ¶ 6.)

1 Cummins' request for public records in connection with a street maintenance report
2 prepared by an independent consultant paid by the City to prepare the report for the City's use
3 prompted an exchange of correspondence between the City and Californians Aware
4 ("CalAware," a nonprofit public interest group which assisted Cummins in making his
5 request) in which:

6 CalAware clarified that what PETITIONER sought was referenced in the City
7 Operating Budget, on page 4-161, as the "Pavement Management Plan or
8 System" under "Major Work Projects: Engineering Services/Major Projects in
9 the Next two years, Number 15." In response to PETITIONER'S clarification
10 through CalAware, the City responded that the first document PETITIONER
11 was referred to by the City as the "Pavement Management Report."

12 (Verified Petition, ¶ 7.)

13 The City denied Cummins' request for the public records concerning the condition of
14 the streets, contending that disclosure of the consultant's report would disclose what the City
15 was thinking since the City took the report, called it a draft, and worked with the consultant to
16 make changes to the report that was ultimately the basis for street maintenance
17 recommendations to the City Council. (Verified Petition, ¶¶ 7-11, 16.) This action followed.

18 As established by the Declaration of Dennis A. Winston attached hereto, counsel for
19 Cummins requested a meet and confer as to Cummins' objections to the specific allegations in
20 the City's Answer. Mr. Greg Lusitana, Esq, on behalf of the City, called Winston and
21 reiterated that the City stood by its Answer and refused to discuss specific objections to it.

22 **3. THE SPECIFIED PARAGRAPHS OF THE CITY'S ANSWER SHOULD BE**
23 **STRICKEN**

24 *Code of Civil Procedure* § 436 provides, in pertinent part, "The court may, upon a
25 motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems
26 proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading."

27 As to the City's denials based upon a lack of information and belief (Answer,
28 Paragraph Nos. 6, 7), if the matter of a denial is within the party's actual knowledge, or by its

1 nature is presumed to be within his knowledge, a denial on information and belief or for lack
2 of either is a sham and evasive and may be stricken. *Dobbins v. Hardister* (1966) 242 Cal.
3 App. 2d 787, 791 (“[I]f the matter is within the defendant's actual knowledge or by its nature
4 is presumed to be within his knowledge, or if the defendant has the means of ascertaining
5 whether or not it is true, a denial on information and belief or for lack of either will be
6 deemed sham and evasive and may be stricken out or disregarded.”); *Zenos v. Britten-Cook*
7 *Land & Livestock Company* (1925) 75 Cal. App. 299, 304 (“When the facts alleged in a
8 verified complaint are presumptively within the knowledge of the defendant he must answer
9 positively and an answer upon information and belief only should be treated as an evasion and
10 an admission of the facts alleged in the complaint.”); *Oliver v. The Swiss Club Tell* (1963)
11 222 Cal. App. 2d 528, 539 (“*The Swiss Club Tell*” “[A] denial upon information and belief,
12 or for want of information or belief, of an alleged fact which may be ascertained from the
13 inspection of a public record within reach of a defendant is insufficient to raise an issue [.]”);
14 *Transworld Systems, Inc. v. Rogan* (1989) 210 Cal. App. 3d 731, 733 (“An unbroken chain
15 of California decisions holds that allegations relating to the contents of official records may
16 not be effectively placed in issue by a denial on information and belief.”); 5 *Witkin,*
17 *California Procedure (4th Ed.) Pleading, §§ 993,994 at 449-450.*

18 As to the City’s absolute denials to allegations which also appear to be true as a matter
19 of law (e.g., that the City is subject to the CPRA) or from the documents *from the City*, such
20 blanket denials amount to dissemblance and are improper. (Answer, Paragraph Nos. 2, 8, 9,
21 10, 11, 13, 14, 15 and 20.)

22 According to *Code of Civil Procedure § 431,30(d)*: “If the complaint is verified, ...the
23 denial of the allegations shall be made positively or according to the information and belief of
24 the defendant.” The importance of good faith answers that address the specific allegations in
25 a complaint, the court in *Williamson v. Clapper* (1948) 88 Cal. App. 2d 645, 647-648 (in
26 dealing with a general denial) explained:

27 **The verified answer of defendants admitted that plaintiffs and defendants**
28 **were residents of the county of Los Angeles, State of California, and then,**

1 **in complete disregard of the facts, denied all the other allegations of the**
2 **complaint....**We may observe that there appears to be a growing tendency in
3 the drafting of answers to deny generally the allegations of the complaint
4 **without distinguishing between those allegations which are**
5 **unquestionably true and those which it is desired in good faith to put in**
6 **issue....This practice is not sanctioned by law and is inexcusable.** It
7 renders it difficult, if not impossible, for the trial court to learn from the
8 pleadings what facts are really in issue. It renders it necessary for the plaintiff
9 to prove each material fact alleged or to gain an admission of its truth during
10 the trial. It also complicates the matter of preparation of findings, which are
11 required to cover all the material issues, and renders it difficult for a reviewing
12 court to determine from an examination of the pleadings and the findings
13 whether the latter are sufficient. The amendment of [*Code of Civil Procedure*
14 § 437], so as to permit verified denials to be made by reference to specific
15 paragraphs of the complaint **did not** dispense with the requirement of truth in
16 sworn statements or **permit a denial of the allegations of entire paragraphs,**
17 **all or some of the material allegations of which are known by the**
18 **defendant to be true. Irrespective of any question of willfully false**
19 **swearing, the loose practice of pleading which results in the incorporation**
20 **in the answer of known false denials is to be condemned.**¹

21 Here, in Answer Paragraph No. 2, the City admitted that it “exist[s] “pursuant to the
22 laws of the State of California” then denied that it was subject to the CPRA. The City’s
23 denial of its legal status as subject to the CPRA was improper. In *The Swiss Club Tell*, the
24 defendant could not deny its legal status based upon information and belief. *The Swiss Club*
25 *Tell*, 222 Cal. App. 2d at 540 (“[A] defendant ought to know whether or not it is an
26 unincorporated association. The rule precluding the use of nonpositive denials, where matters
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¹ Unless otherwise indicated, all emphasis supplied all internal quotation marks omitted.

1 are presumptively within the defendant's knowledge, has been applied to corporations as well
2 as to natural persons.”)

3 The allegation in the Petition that the City is subject to the CPRA is essential to the
4 claim for writ of mandate and declaratory relief based upon the City’s violation of the CPRA.
5 **Canfield v. Tobias** (1863) 21 Cal. 349, 350 (“[A] material allegation is defined to be one
6 which is essential to the claim, and cannot be stricken from the pleading without leaving it
7 insufficient”); **Four Star Electric, Inc. v. F & H Construction** (1992) 7 Cal. App. 4th 1375,
8 1382 (same citing **Canfield**). As a consequence, the allegation is not an improper conclusion
9 but an allegation of the City’s status and violation of the law. **Ley v. E. S. Babcock** (1931)
10 118 Cal. App. 525, 526.

11 In the City’s Answer Paragraph No. 6, the City denies it received Cummins’ demand
12 for public records. In Paragraph No. 8, the City denied the response to Cummins’ CPRA
13 demand sent by the City’s Associate Civil Engineer. In Paragraph No. 9, the City denied the
14 existence and authenticity of correspondence *sent by its City Attorney, Glenn Sabine*, in
15 response to Cummins’ CPRA demand. The City’s improper denials to what should be
16 undisputed facts continue in Paragraph Nos. 10, 11, 13, 15 and 20. These denials should be
17 stricken.

18 **4. CONCLUSION**

19 For the foregoing reasons, the specified paragraphs of the City’s Answer should be
20 stricken.

21 Dated: October ____, 2010

DENNIS A. WINSTON,
A PROFESSIONAL LAW CORPORATION

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25 By _____
26 Dennis A. Winston, Attorney for
27 Petitioner/Plaintiff Kevin Cummins
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1 **DECLARATION OF DENNIS A. WINSTON IN SUPPORT OF MOTION**

2 I, Dennis A. Winston, declare:

3 1. I am an attorney duly licensed to practice law before all of the courts of the
4 state of California, and this Court, and am the principal of DENNIS A. WINSTON, A
5 PROFESSIONAL LAW CORPORATION, counsel for Petitioner and Plaintiff Kevin
6 Cummins in the above-captioned action (“Action”). If called upon to testify I would and
7 could testify competently to the following facts, all of which are within my personal
8 knowledge except those facts stated upon information and belief as to which I believe them to
9 be true.

10
11 2. On or about October 15, 2010, I sent a letter to Glenn Sabine, Esq. whom I am
12 informed and believe is the City Attorney for the Respondent and Defendant City of Encinitas
13 (“City”) in this Action. Attached to my Declaration as Exhibit “A” and incorporated herein
14 by this reference as though set forth in full, is a true and correct copy of my October 15th letter
15 to Mr. Sabine.

16 3. In my October 15th Letter, I requested a meet and confer with Mr. Sabine as to
17 the adequacy and propriety of certain of the City’s averments in its Answer to the Verified
18 Petition For Writ of Mandate in this Action.

19
20 4. On October 20, 2010, I received a telephone call from a person who identified
21 himself as Greg Lusitana, speaking on behalf of Mr. Sabine as to my October 15th Letter.
22 During the phone call, Mr. Lusitana stated that the City stood by its Answer to the Petition. I
23 requested that Mr. Lusitana address the specific paragraphs of the City’s Answer and my
24 substantive objections with it.

