IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-03016-RBJ-MDB

DAVID JOSHUA BARTCH,

Plaintiff,

v.

MACKIE A. BARCH and
TRELLIS HOLDINGS MARYLAND, INC.

Defendants.

PLAINTIFF'S MOTION FOR SANCTIONS (ATTORNEY FEES, COSTS, AND ADVERSE INFERENCE) FOR DEFENDANTS' SPOLIATION OF EVIDENCE

Through a third-party subpoena, Plaintiff recently learned that, earlier this year, Defendants Mackie Barch and Trellis Holdings Maryland, Inc. purposefully caused evidence to be altered, and withheld damaging documents, to deceive Plaintiff and delay Plaintiff's judgment enforcement efforts. What is more, after procuring and using falsified documents to claim that market conditions preclude them from monetizing their most valuable asset – the equity in Culta, LLC that was at issue in this lawsuit – to pay the Court's judgment, Defendants began taking steps to use the equity to raise $2.1 million for purposes ***other than*** satisfying the Court's judgment.

As shown below, Mackie's discovery misconduct is indisputable, as is the prejudice Plaintiff suffered as a result. Plaintiff accordingly is entitled to, and hereby seeks, an award of monetary sanctions for Plaintiff's costs and fees incurred because of the misconduct, and an inference, applicable to, for example, the pending proceedings on Plaintiff's contemporaneously filed motion pursuant to C.R.C.P. 69(g), that Defendants'

protestations that the market prevents them from applying their assets towards satisfaction of the judgment are untrue.

RELEVANT BACKGROUND

The Judgment

After a bench trial in July 2022, the Court found in favor of Plaintiff on his claim of breach of contract. ECF No. 175. Because it found that (a) Defendants breached an agreement to deliver to Plaintiff half the equity they acquired in Culta and (b) the value of Defendants' equity was $12.8 million, the Court awarded Plaintiff $6.4 million in damages. *Id.* at 9-11. The Court later amended its judgment to clarify the amount of post-judgment interest and to award costs. ECF Nos. 176, 188, 194.

To date, neither Mackie nor Trellis has voluntarily paid any part of the judgment. The only amounts Plaintiff have received have come pursuant to a writ of wage garnishment issued by the District of Maryland to Culta attaching a portion of Mackie's monthly wages. These payments total $8,185.57 as of this filing. *See* Ex.1 to Plaintiff's Motion Pursuant to C.R.C.P. 69(g).[1]

Mackie Procures False Evidence to Claim No Market Exists for Culta's Equity and Withholds Damaging Evidence from Plaintiff

According to Defendants' Rule 69 discovery responses, Defendants' equity in Culta, which is held by Trellis, is their only asset of sufficient value to satisfy the judgment in full. *See, e.g.*, Ex. 2, Mackie's Interrog. Ans. 7, 9 (disclosing few personal assets other than real estate that is encumbered for more than its estimated value); Ex. 3, Trellis's

[1] To avoid duplication, citations to numbered exhibits refer to the numbered exhibits to Plaintiff's motion pursuant to C.R.C.P. 69(g), ECF No. 202, filed contemporaneously with this motion. Additional materials attached to this Motion (but not to the Rule 69(g) motion) are referred to by lettered exhibit.

Interrog. Ans. 9 & 16 (disclosing as Trellis's only assets other than the Culta equity a cell phone and a vehicle).

In early November 2022, Defendants told Plaintiff that they had engaged the firm Lineage Merchant Partners ("Lineage") to help Defendants find investors for "a Financing Transaction or a Sale Transaction" using Defendants' Culta equity to raise funds. Ex. 4 (the "Lineage engagement letter"). They did so purportedly to demonstrate that Defendants were engaging in a good faith effort to pay the judgment. In interrogatory responses dated December 5, 2022, Mackie represented that Lineage "is going to market during the week of December 4, 2022." Ex. 3, Interrog. Ans. No. 24.

As year-end approached, however, Defendants had neither paid Plaintiff anything nor, despite requests seeking them, produced any document showing that Defendants were taking concrete steps to do so, except for the Lineage engagement letter, which by then was almost two months old. *See* Ex. A, RFP 18 (requesting documents relating to any actual or proposed transaction in Trellis's Culta equity); Ex. B, RFP 6 (same).

In meet-and-confer communications on December 28, 2022, Plaintiff's counsel again requested documents confirming Defendants' representations that they were trying to pay the judgment. Ex. 5. Plaintiff's counsel wrote:

> As I've said before, we have no desire to drag Mackie before Judge Jackson if we receive proof that Mackie and his team is making best efforts to finance payment of the judgment. As I know you already know, however, we need the documents to see that, not mere words.

Id. Defendants' counsel said it might be difficult for him to connect with Mackie that last week of the year. *Id.*

On the parties' first meet-and-confer call after the New Year's holiday, on January 5, 2023, Defendants shocked Plaintiff by stating that, not only had Lineage not gone to

market to raise funds using Defendants' Culta equity, as Defendants' interrogatory responses told Plaintiff it was going to do, but Lineage had ceased its efforts on Defendants' behalf entirely because the market for cannabis equities would not support a funding transaction. Schwartz Declaration In Support of Plaintiff's Motion Pursuant to C.R.C.P. 69(g), ECF No. 202-1, ¶ 6. Defendants' counsel told Plaintiff that Lineage's advice was documented in an email to Mackie that he would produce after the call. *Id.* ¶ 7. A few hours later, Defendants produced this email from Lineage's Brooke Hayes, which Mackie had received the same morning:

> **From:** Brooke Hayes <brooke@lineagemerchantpartners.com>
> **Subject: Trellis capital raise**
> **Date:** January 5, 2023 at 9:12:33 AM EST
> **To:** Mackie Barch <mackiebarch@gmail.com>
> **Cc:** "Michael Hennessy" <michael@lineagemerchantpartners.com>
>
> Mackie,
>
> As discussed, the market to raise equity for cannabis took a turn for the worse in December 2022. See attached charts for some of the key trends. To that end, we recommend postponing your capital raise until the cannabis market gets some momentum. We hope that will happen over the next couple of quarters.
>
> Brooke

Ex. 6.

In a January 27, 2023 meet-and-confer letter detailing deficiencies in Defendants' Rule 69 discovery responses, Plaintiff explained to Defendants that discovery as to their efforts to satisfy the judgment was "relevant to, among other things, Plaintiff's entitlement to relief, and the scope of any such relief that Plaintiff may seek, from Judge Jackson pursuant to Colorado Rule of Civil Procedure 69(g)." Ex. 7 at 1-2. The letter noted that the only information Defendants had produced about their efforts to pay the judgment were (1) the Lineage engagement letter; (2) an interrogatory response saying Lineage

was going to market the week of December 4, 2022; and (3) the email from Hayes that Defendants produced on January 5, 2023. *Id.* Plaintiff explained that this limited production could not be a complete discovery response because if, for example, Lineage was going to market the week of December 4, "offering materials … had to have been prepared with which to go to market" and "Mackie must have had email communications with Lineage" about them, "for example, drafts of offering materials; commentaries on and/or approvals of such drafts," etc. *Id.*

Meeting on February 2, 2023 in response to Plaintiff's January 27 letter, Defendants' counsel reiterated to Plaintiff that the only documents Defendants had evidencing their efforts to obtain debt financing or sell Trellis's equity in Culta were the Lineage engagement letter and the single Hayes email they produced on January 5. Ex. 8 (relevant portions highlighted). Defendants' counsel specifically confirmed that Lineage had prepared no prospectus with which to go to market. *Id.*

On February 10, Defendants' counsel acknowledged Plaintiff's February 7 email memorializing the parties' conferral (without disputing Plaintiff's description of Defendants' representations) and wrote that, in light of Hayes's email and other market data, there "simply is not a market for financing" for Culta's equity. Ex. 9 (portions related to substance of settlement proposal redacted).

Though skeptical of Defendants' claims, Plaintiff held off seeking relief from the Court pursuant to Rule 69(g) in order to seek further evidence about Defendants' claimed inability to use the Culta equity to raise funds. Defendants, for their part, continued to claim they are unable to raise funds, asserting as late as last week that market conditions mean any immediate payment on the judgment is "just not possible." Ex. C.

Third-Party Discovery Reveals Defendants' Deceit

We now know that Defendants' representations about the Hayes email, the lack of a prospectus, and Defendants' supposed inability to monetize their Culta equity were all false. Following the January-February 2023 meet-and-confer communications between the parties, Plaintiff subpoenaed Lineage, in response to which Lineage produced a host of communications that Mackie hid from Plaintiff. First and foremost, Lineage produced another version of Hayes's January 5, 2023 email—a version Hayes sent Mackie 33 minutes ***before*** he sent the version Defendants produced (the "first Hayes email"). The first Hayes email was materially identical to the version Defendants produced, except, critically, it contained an additional sentence:

From: Brooke Hayes <brooke@lineagemerchantpartners.com>
Sent: Thursday, January 5, 2023 6:40 AM
To: Mackie Barch
Cc: Michael Hennessy
Subject: Trellis capital raise
Attachments: viridian charts.png

Mackie,

As discussed, the market to raise equity for cannabis took a turn for the worse in December 2022. See attached charts for some of the key trends. TO that end, we recommend postponing your capital raise until the cannabis market gets some momentum. We hope that will happen over the next couple of quarters. To be clear, cannabis deals can still get done today, but the valuations are highly punitive right now, especially for cash out equity raises like what we are contemplating for Trellis.

Brooke

Ex. 10 (highlighting added). As Hayes explains in his sworn declaration, after Hayes sent Mackie his first email, Mackie called and asked him to delete the highlighted sentence and send him the revised email. Declaration of Brooke Hayes ("Hayes Dec.") ¶ 8 & Att. A-B. Hayes, wishing to accommodate his client's direction, complied. *Id.*[2] Defendants

[2] Hayes's emails, which he provides as attachments to his declaration, appear to have timestamps indicating that they were sent at 8:40 and 9:13 a.m. EST, *see* Hayes Dec., Att. A & B, while other versions of the same documents produced by Lineage show time

then produced only the altered version to Plaintiff. Ex. 6 (Musgrave 1/5/23 email).

The first Hayes email shows that, contrary to Defendants' representations to Plaintiff that "there is simply not a market" for transactions in their Culta equity, Ex. 9, Defendants knew there ***was*** such a market. The valuations just would not be ones Defendants would like. So, Mackie falsified the record by procuring the altered email from Hayes and hiding from Plaintiff the first Hayes email – the version written without Mackie's edits. The first Hayes email was evidence Plaintiff could have used to support a Rule 69(g) motion aimed at the Culta equity four months ago.

But Defendants' discovery misconduct did not stop there. The Lineage production also shows that, contrary to Defendants' direct representations to Plaintiff, Lineage ***did*** prepare a prospectus with which to go to market. Mackie received drafts of the prospectus and communicated with Lineage about it from at least November 11 through November 15, 2022—before Defendants responded to Plaintiff's Rule 69 discovery requests, Ex. 13. Mackie then received the final version of the prospectus on January 31, 2023, two days before Defendants' counsel told Plaintiff it did not exist. Ex. 12.

One possible reason for Defendants' concealment is that the prospectus included statements to potential investors that "***Trellis is not interested in selling shares directly at this time given market conditions and tax considerations***"; it only was willing to "issue convertible notes in Trellis" that would "convert into equity upon a sale of Culta." Ex. 12 at p. Lineage_246 (emphasis added). Once again, Mackie was deceiving Plaintiff: telling Plaintiff that, although he wanted to use Defendants' Culta equity to satisfy the judgment, it was ***not possible***, when in fact Mackie's instruction to Lineage was not to try

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stamps of 6:40 and 7:13 a.m., with no time zone specified (presumably indicating that they were produced from a server located in the Mountain time zone). Exs. 10; 11.

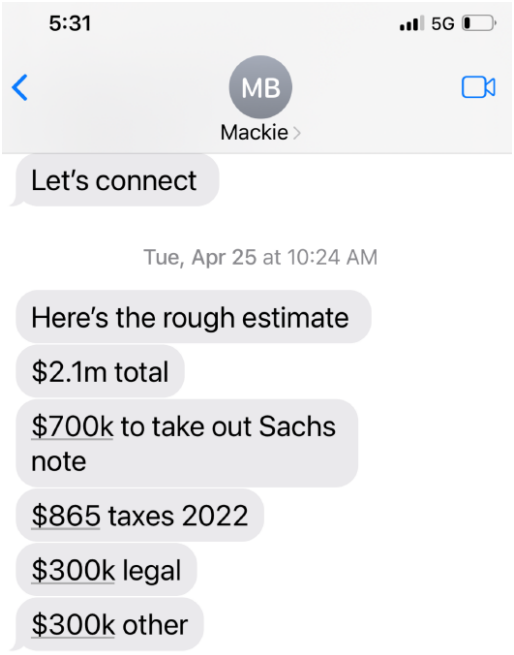
to sell any of Defendants' Culta equity, just to seek a loan transaction secured by the equity—a self-imposed handcuff on Defendants' ability to raise the money necessary to satisfy the judgment. Other documents produced by Lineage corroborate this motive, as at least one investor to whom Lineage made an initial overture advised Lineage that a sale would be more likely to draw their interest. Ex. D ("I don't see why I would want to invest" through convertible debt "as opposed to investing directly into [Culta] itself").

Lineage's documents and Hayes's declaration make it clear, not only that Defendants engaged in blatant discovery deceit, but that Defendants have been able for months to use their Culta equity to pay the judgment. They simply do not want to do so in a down market, because lower cannabis equity valuations mean they will have to sell or encumber more equity than they would in a better market to generate enough money to pay the judgment.

Defendants could not disclose the concealed documents to Plaintiff without making plain their choice to disregard the Court's judgment. So, they suppressed the evidence, knowing (because Plaintiff twice informed them in writing, *see* Exs. 5; 7) that Plaintiff otherwise would have promptly brought the evidence that Defendants were not making good faith efforts to pay the judgment to the Court's attention and would have sought appropriate relief, as Plaintiff does now in his Rule 69(g) motion.

Defendants Attempt to Raise Funds Using Their Culta Equity

Compounding Defendants' brazen evidence tampering and concealment, still more Lineage documents show that Mackie now is taking steps to use Defendants' Culta equity to raise millions of dollars for multiple purposes other than complying with the Court's judgment. The following is an April 25, 2023 text Mackie sent Hayes soliciting Lineage's assistance in raising $2.1 million:



Hayes Dec. Attachment C. According to Hayes, Mackie sent the text in connection with "several phone calls" in which Mackie asked Lineage to "re-engage" and assist him to raise the above-described funds. *Id.* ¶ 9. Conspicuously absent from the itemization of how Mackie intends to use the funds is paying the Court's judgment. Even if the "$300k legal" reference were generously construed to include partial payment of the judgment as opposed to paying Defendants' own attorneys (doubtful, as Mackie would be incentivized to disclose any such intended payment to Plaintiff) it would only be a small part of the Judgment – little more than a year's worth of post-judgment interest and less than half the amount Mackie intends to raise to pay the "Sachs note," apparently a separate debt not subject to a federal court judgment. Moreover, according to recently produced tax filings, Mackie apparently was able to pay $665,000 in tax extension payments despite disclosing no assets from which he might raise those funds. Ex. 18.

Mackie's willingness to use his Culta equity to raise money to pay other debts, and

to provide himself with $300,000 in liquidity for unspecified "other" purposes, underscores his deceptive intent in telling Plaintiff he was incapable of doing so to pay the judgment.

ARGUMENT

Defendants' actions constitute willful and bad faith spoliation of evidence for the express purpose of obstructing and delaying Plaintiff's judgment enforcement efforts – a goal Defendants have achieved at least temporarily. For this conduct, both monetary and issue sanctions are appropriate.

"Spoliation involves the intentional destruction, mutilation, alteration, or concealment of evidence." *Black's Law Dictionary spoliation* (8th ed. 2004). Broader than outright evidence destruction, spoliation includes the precise activity in which Defendants engaged here: "[T]he rule against spoliation of evidence precludes the … alteration of existing responsive documents and substitution of new, more favorable ones." *Geiger v. Z-Ultimate Self Def. Studios, LLC*, No. 14-cv-00240-REB-BNB, 2014 WL 6065612, at *6 (D. Colo. Nov. 12, 2014). Mackie indisputably caused Hayes to alter his first email by having him remove the key sentence that clarified that cannabis transactions can get done even in the challenging market environment. Defendants then substituted the more favorable version and withheld the original email from Plaintiff.

"Spoliation sanctions are proper when (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced" by the spoliation. *Turner v. Public Service Co. of Colo.*, 563 F.3d 1136, 1149 (10th Cir. 2009). Here, litigation was not only imminent, but pending. "A district court has broad discretion in choosing the appropriate sanction" which "should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." *Helget v. City of Hays, Kan.*, 844 F.3d 1216, 1226 (10th Cir. 2017) (citation and

quotation omitted).

"Serious sanctions are warranted in cases where a judge finds willfulness or bad faith." *Geiger*, 2014 WL 6065612, at *5 (citation and quotation omitted). In addition to monetary sanctions, "a court may strike witnesses, issue an adverse inference, or, in extreme circumstances, dismiss a party's claims." *Helget*, 844 F.3d at 1226. In fashioning an appropriate sanction, courts consider "the non-moving party's degree of culpability, the degree of any prejudice to the moving party, and the purposes to be served by exercising the court's power to sanction." *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 621 (D.Colo. 2007).

Mackie's bad faith and culpability cannot reasonably be disputed. Faced with Plaintiff's written notice that, absent a showing of good faith efforts to use Defendants' Culta equity to pay the judgment, Plaintiff would seek a compulsion order from the Court, Mackie fabricated evidence to make it appear that such efforts were not possible. When the first email Hayes sent Mackie contradicted the position his lawyer was about to advance to Plaintiff – that no transaction using the Culta equity was possible – Mackie procured the altered email and his lawyer sent it to Plaintiff the same day.

Nor can there be any doubt that Mackie's concealment of the prospectus was willful. The very same week Mackie had his attorney tell Plaintiff that no prospectus was ever prepared, he asked for and received a copy of the final version of that very document, which he had seen in draft form months earlier. Exs. 8; 9; 12.

While Plaintiff ultimately was able to obtain the documents from Lineage (expending time and resources to do so), Plaintiff nonetheless was substantially prejudiced by Defendants' conduct. As Plaintiff wrote on December 28, 2022 and January 27, 2023, had Plaintiff known (and Defendants not concealed) that Defendants ***could*** use

their Culta equity to raise funds to pay the judgment, but were choosing not to do so because they did not like the valuation they would receive for the equity, Plaintiff would have sought Rule 69(g) relief from the Court immediately. *See* C.R.C.P. 69(g) (empowering court to order judgment debtor to apply its property towards satisfaction of a judgment). Instead, Plaintiff, who still has received essentially no compensation for a breach of contract that occurred more than five years ago, was forced to pursue third-party discovery and delay his Rule 69(g) motion until he discovered Defendants' misconduct. *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992) (affirming a finding of prejudice where spoliation "caus[ed] delay and mounting attorney's fees").

Moreover, believing that he misled Plaintiff successfully, Mackie appears emboldened to monetize his Culta equity for other purposes he deems more important than obeying the Court's judgment (and given his apparent recent tax extension payments, may already have done so). Hayes Dec., Att. C; Ex. 18 (indicating tax extension payments made in April 2023 of $560,000 to the Internal Revenue Service and $105,000 to the State of Maryland). As Defendants' Culta equity is the only asset with any hope of satisfying the judgment in full, Mackie's attempt to use that equity for other purposes, if successful (as it may already have been), reduces the amount of equity that remains available to pay the judgment, imperiling Plaintiff's chances of ever being made whole. Thus, by delaying Plaintiff seeking relief enjoining such a transaction (as Plaintiff now does in his contemporaneous Rule 69(g) motion and would have done months ago but for Defendants' spoliation), Mackie's conduct has prejudiced Plaintiff for reasons beyond the delay itself.

CONCLUSION

In light of Mackie's bad faith spoliation and the resulting prejudice to Plaintiff,

Plaintiff respectfully requests a monetary sanction measured by Plaintiff's costs and attorneys' fees incurred as a result of that spoliation and an issue sanction in the form of an inference, applicable as to, for example, the proceedings on Plaintiff's contemporaneously filed Rule 69(g) motion, that any claim Defendants may make in any proceedings subsequent to this Motion that they are unable to pay the Court's judgment is untrue.

Certificate of Conferral: Pursuant to D.C.Colo.LCivR 7.1, Plaintiff's counsel hereby certifies that Plaintiff conferred with counsel for Defendants before filing this motion and that Defendants oppose the relief requested.

May 9, 2023

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