


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

FILED

2010 AUG 16 PM 3: 05

CLERK US DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY  DEPUTY

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

HOYT A. FLEMING,  
  
Plaintiff,  
  
vs.  
TOM COVERSTONE,  
  
Defendant.  
  
\_\_\_\_\_  
TOM COVERSTONE,  
  
Counterclaimant,  
  
vs.  
HOYT A. FLEMING; TERESA A.  
FLEMING; and PARK, VAUGHAN &  
FLEMING, LLP,  
  
Counterdefendants.

CASE NO. 08cv355 WQH (NLS)  
**ORDER**

HAYES, Judge:

The matters before the Court are the Motion for Judgment on the Pleadings (Doc. # 134), the Motion for Summary Judgment (Doc. # 139), and the Motion for Leave to Amend Scheduling Order (Doc. # 143) filed by Counterdefendant Park Vaughan & Fleming, LLP and the Motion for Reconsideration (Doc. # 135) filed by Plaintiff Hoyt A. Fleming.

**BACKGROUND**

**I. Procedural History**

This action concerns a dispute over the sale of a patent portfolio. On February 28, 2008, Hoyt A. Fleming ("Fleming") initiated this action by filing a complaint against Tom

1 Coverstone (“Coverstone”). (Doc. # 1). On October 21, 2008, Fleming filed his Second  
2 Amended Complaint (“SAC”). (Doc. # 29). On March 18, 2009, the Court granted  
3 Coverstone’s Motion to Strike pursuant to California’s anti-SLAPP (Strategic Litigation  
4 Against Public Participation) statute and struck the SAC’s cause of action for extortion. (Doc.  
5 # 47). In the same order, the Court also denied Coverstone’s Motion to Dismiss the SAC’s  
6 cause of action for breach of contract, holding that the cause of action stated a claim and that  
7 a third party, Vineyard Boise, was not a necessary and indispensable party pursuant to Federal  
8 Rule of Civil Procedure 19. *Id.*

9 On April 20, 2009, Coverstone filed a First Amended Answer to Plaintiff’s Second  
10 Amended Complaint which included counterclaims against Fleming for fraudulent  
11 misrepresentation and fraudulent concealment; against Teresa A. Fleming, Fleming’s wife,  
12 for declaratory relief; and against the law firm of Park, Vaughan & Fleming, LLP (“Park,  
13 Vaughan & Fleming) for fraudulent concealment. (Doc. # 58). On June 25, 2009, the Court  
14 denied Fleming’s Motion for Partial Summary Judgment seeking summary judgment on the  
15 grounds that emails exchanged on January 22, 2008 between Fleming and Coverstone  
16 constitute a valid contract. (Doc. # 77). In the same order, the Court denied Teresa Fleming’s  
17 Motion to Dismiss for Lack of Jurisdiction. *Id.*

18 On July 1, 2009, Teresa Fleming filed a Motion to Dismiss Defendant’s Declaratory  
19 Judgment Count. (Doc. # 78). On July 28, 2009, the Court granted Fleming’s Motion for  
20 Leave to File Third Amended Complaint (“TAC”). (Doc. # 83). On July 29, 2009, Fleming  
21 filed his TAC, which is the operative pleading in this case. (Doc. # 84). On August 12, 2009,  
22 Coverstone filed his Answer and Counterclaim to Plaintiff’s Third Amended Complaint. (Doc.  
23 # 86). This filing contains the same counterclaims as Coverstone’s previous First Amended  
24 Answer to Plaintiff’s Second Amended Complaint brought against Teresa Fleming and the law  
25 firm of Park, Vaughan & Fleming pursuant to Federal Rules of Civil Procedure 13(h), 19(a)(1),  
26 and 20(a)(2). *Compare Doc. # 58 with Doc. # 86; see also Doc. # 86 at 11.* On December 7,  
27 2009, the Court denied Coverstone’s Motion for Summary Judgment and denied Teresa  
28 Fleming’s Motion to Dismiss Defendant’s Declaratory Judgment Count as moot. (Doc. # 101).

1  
2 On June 17, 2010, the Court granted Teresa Fleming's renewed Motion to Dismiss,  
3 denied Coverstone's Motion for Summary Judgment, and granted in part and denied in part  
4 Fleming's Motion for Summary Judgment. (Doc. # 133 at 22). The Court granted Fleming's  
5 Motion for Summary Judgment as to Coverstone's counterclaims for fraudulent  
6 misrepresentation and fraudulent concealment and denied the motion as to Coverstone's  
7 affirmative defense for fraud in the inducement. *Id.* The Court held that Coverstone cannot  
8 base his counterclaims on damages incurred by a third party because he lacks standing to raise  
9 claims based on damage to another. *See id.* at 12-16. The Court held that the other damages  
10 Coverstone asserted were unavailable as a matter of law. *Id.* at 15-16.

11 On June 21, 2010, Park, Vaughan & Fleming filed its Motion for Judgment on the  
12 Pleadings (Doc. # 134) and Fleming filed his Motion for Reconsideration (Doc. # 135). Park,  
13 Vaughan & Fleming and Fleming also filed an Ex Parte Motion to Shorten Time which  
14 "respectfully submit[s] that the Court will be able to decide Fleming's Motion to Reconsider  
15 and PVF's Motion for Judgment on the Pleadings without opposition from Defendant Tom  
16 Coverstone . . . ." (Doc. # 136 at 2). On June 22, 2010, the Court denied the Ex Parte Motion  
17 to Shorten Time via minute entry. (Doc. # 137). On June 25, 2010, the parties appeared before  
18 the Court for a pretrial conference. *See* Doc. # 138. The Court set a trial date of January 25,  
19 2011 and informed the parties that it would issue a written ruling on the pending motions. *Id.*  
20 On June 28, 2010, Park, Vaughan & Fleming filed its Motion for Summary Judgment. (Doc.  
21 # 139). On July 14, 2010, Park, Vaughan & Fleming filed its Motion for Leave to Amend  
22 Scheduling Order (Doc. # 143).

23 **II. Allegations of the Third Amended Complaint**

24 Fleming and Coverstone are attorneys registered to practice before the United States  
25 Patent and Trademark Office. (Doc. # 84 at 2). Fleming is a resident of Idaho and Coverstone  
26 is a resident of California, with a place of business in California. *Id.* The Court has diversity  
27 jurisdiction pursuant to 28 U.S.C. § 1332. *Id.* Fleming agreed to sell and Coverstone agreed  
28 to purchase U.S. Patent No. 6,204,798, Reissued Patent No. 039,038, Patent Application No.

1 11/196,841, and Patent Application No. 11/924,352. *Id.* Fleming sent an email to Coverstone  
2 on January 22, 2008 (“Plaintiff’s January 22 email”), which stated:

3 Tom,

4 This email confirms that I have agreed to sell and that you have agreed to  
5 purchase U.S. Patent No. 6,204,798, which has been reissued, Reissue Patent  
6 No. 039,038, Patent Application No. U.S. Patent No. 11/196,841, and Patent  
Application No. 11/924,352. The purchase price for the above patents and  
applications is one million dollars.

7 You and I will strive to close the sale by February 1, 2008. However, you and  
8 I will close the sale by February 15, 2008.

9 Both you and I understand that I will assign a 10% interest in the above patents  
10 and applications to Vineyard Boise, a church in Boise, Idaho, and that Vineyard  
11 Boise will then assign its 10% interest to you, or an entity that you designate.  
I will assign my 90% interest directly to you, or an entity that you designate.  
You will then immediately pay me \$900,000 and you will then immediately pay  
Vineyard Boise \$100,000.

12 You and I agree that you and/or your attorneys will draft the necessary  
13 agreements.

14 You agree to wire me ten thousand dollars tomorrow as a deposit on the  
15 purchase price. This deposit will not be refunded if the above sale is not  
completed by February 15, 2008. I agree to work with you and your attorneys  
to close the sale by February 15, 2008.

16 . . .

17 If you agree to the above, then please confirm via email.

18 Thank you,  
Hoyt Fleming

19 *Id.* at 2-3. Coverstone responded via email (“Defendant’s January 22 email”), which contained  
20 the text of Fleming’s email and stated in part:

21 Hoyt,

22 Agreed.

23 I will wire the \$10,000.00 tomorrow to your account.

24 As we discussed on the phone just now, your wife Teresa will sign the  
25 assignment documents or whatever is needed . . . .

26 Best regards,  
Tom

27 *Id.* at 3. This email exchange (“the January 22 emails”) constitutes a binding and enforceable  
28 contract. *Id.* at 4. Coverstone wired \$10,000 to Plaintiff’s bank account on January 23, 2008.

1 *Id.*

2 On February 1, 2008, Coverstone sent an email to Jeffrey A. Hill which stated in part:  
3 "He is going to have all of the paperwork signed and sent to me, with the paperwork signed  
4 by the pastor and chairman of the finance committee, which is who will sign the documents  
5 that receive the 10%." *Id.* On February 6, 2008, Coverstone sent an email to Hank Petri that  
6 stated in part: "Can you please prepare the documents for the Fleming transaction?" *Id.*  
7 Fleming sent an email to Defendant on February 11, 2008, which stated in part: "Tom, I look  
8 forward to working with you to complete this transaction on or before February 15." *Id.* at 5.  
9 Coverstone sent an email to Hank Petri on February 11, 2008 that stated in part: "No need for  
10 you to spend any more time on this matter at this point, I have to go through the prior art." *Id.*  
11 Coverstone sent a second email to Hank Petri on February 11, 2008, which stated in part: "Yes,  
12 hold off on doing any work on this matter." *Id.* Coverstone sent Fleming an email on  
13 February 13, 2008, which stated in part:

14 My understanding is that our exchange of emails and our conversations is only  
15 an outline of a potential, future agreement, and we have since been engaged in  
16 communications and assessment of the price and terms, particularly related to the  
17 10% interest. Therefore, there is no current legal obligation. The prospective  
18 agreement is incomplete until it is reduced to writing, finalized by attorneys and  
19 signed at closing. I don't intend a contract until this is done. . . . Because this third  
20 party assignment for your tax purposes is not only a material term, but is a  
troublesome and unconventional term, a binding agreement has not been formed.  
Even if any contract had been entered, which I don't believe there has, there is no  
severability provision. . . . If you are not interested in this offer, then we need to  
make arrangements for the return of the \$10,000 I put toward the purchase of the  
patents.

21 *Id.* Coverstone sent an email to Fleming on February 14, 2008, which stated in part: "There  
22 is and never was any agreement on the key, material terms for this potential contract. I don't  
23 believe you are negotiating in good faith. I would like the \$10,000 returned." *Id.*

24 Fleming sent Coverstone an email on February 15, 2008, which stated in part: "I am still  
25 willing to meet each and every term included in the agreement dated January 22, 2008. Please  
26 be advised that I will not extend the closing deadline." *Id.* Coverstone sent Fleming an email  
27 on February 15, 2008, which stated in part:

28 Per my previous emails where I outlined in detail why there was not an  
agreement between us, you continue to try to hold that there was an agreement.

1           There was not an agreement, there never was . . . I want my 10k back. And if  
2           you send the 10k back – and the return of the money is based on a matter of  
3           principle – I am willing to sign a mutual release.

4           *Id.* at 6. Coverstone refused to perform the contract despite Fleming’s demand that Coverstone  
5           perform. *Id.* Coverstone failed to pay Fleming “the remaining \$890,000 of the \$900,000 that  
6           Defendant owed Plaintiff.” *Id.*

7           The TAC states a single claim for breach of contract. *Id.* In support of the breach of  
8           contract claim, the TAC alleges Fleming’s performance was excused because Coverstone gave  
9           notice that he would not perform his obligations under the contract. *Id.* at 6-7. The TAC  
10          alleges Fleming was ready, willing, and able to perform his obligations under the January 22,  
11          2008 contract. *Id.* at 7. The TAC alleges Coverstone’s failure to perform was unjustified and  
12          unexcused. *Id.* The TAC alleges Fleming has been unable to mitigate his damages despite his  
13          efforts to find another buyer for the patents. *Id.* at 8. The TAC alleges damages in the amount  
14          of \$890,000 plus interest. *Id.*

### 14          **III. Affirmative Defenses and Allegations of the Counterclaims**

15          Coverstone alleges numerous affirmative defenses, including fraud in the inducement.  
16          (Doc. # 86 at 6). In his fraud in the inducement defense, Coverstone alleges Fleming told him  
17          that a company called Uniden had applied for a patent on a radar detection device and was  
18          rejected because of claims made in Fleming’s patent portfolio. *Id.* at 6-7. Coverstone alleges  
19          Fleming also told him that another company called Escort was blocked from getting a patent  
20          for similar technology. *Id.* Coverstone alleges that, contrary to Fleming’s assertions,  
21          “[n]either Uniden nor Escort were blocked from obtaining patents for GPS-enabled radar  
22          detectors due to Plaintiff’s portfolio.” *Id.* Coverstone alleges these two statements were  
23          material representations which induced him to pay a \$10,000 deposit on the patents. *Id.*

24          Coverstone alleges counterclaims for fraudulent misrepresentation against Fleming and  
25          fraudulent concealment against Fleming and Fleming’s law firm, Park, Vaughan and Fleming,  
26          LLP. *Id.* at 11-13. In support of his counterclaim for fraudulent misrepresentation, Coverstone  
27          alleges he reasonably relied on Fleming’s misrepresentations about Uniden and Escort which  
28          induced Coverstone to pay a \$10,000 deposit on the patents. *Id.* at 11-12. Coverstone alleges

1 Fleming has refused to return the \$10,000 payment. *Id.* at 12. Coverstone alleges the  
2 misrepresentations “were a substantial factor in causing Defendant to undertake and continue  
3 his due diligence and to incur legal fees and expenses in defending the breach of contract claim  
4 filed by Plaintiff . . . .” *Id.* In support of his counterclaim for fraudulent concealment,  
5 Coverstone alleges Fleming failed to reveal the truth about the patents despite an obligation  
6 to do so after Coverstone retained Fleming’s law firm, Park, Vaughan, Fleming, LLP. *Id.* at  
7 13. Coverstone alleges Fleming failed to tell him “that [the patent portfolio] was worth  
8 nowhere near the proposed purchase price, though [Fleming] knew the truth.” *Id.* Coverstone  
9 alleges that Fleming’s concealment “was a substantial factor in causing Defendant to incur  
10 legal fees and expenses in defending the breach of contract claim filed by Plaintiff . . . .” *Id.*  
11 at 14. Coverstone seeks damages for the deposit, the resources expended in conducting due  
12 diligence, the legal fees associated with investigating the patents, legal fees incurred in  
13 defending against this action, and “stress, anxiety, and concern.” *Id.*

14 Coverstone also alleges a counterclaim for declaratory relief against Teresa Fleming.  
15 *Id.* at 15. Coverstone alleges Teresa Fleming held an interest in the patent portfolio because  
16 Idaho is a community property state. *Id.* Coverstone alleges “Plaintiff has alleged that Teresa  
17 Fleming is a signator to a binding contract and Defendant believes that Teresa Fleming agrees  
18 with Plaintiff’s contentions.” *Id.* Therefore, Coverstone alleges, he is at risk of incurring  
19 “inconsistent obligations” unless he sues Teresa Fleming because “the court cannot award  
20 complete relief without her involvement.” *Id.* Coverstone seeks declaratory judgment that he  
21 “owes [Teresa Fleming] no obligations as to the purported contract . . . .” *Id.*

22 **ANALYSIS**

23 **I. Park, Vaughan & Fleming’s Motions**

24 In their motion for judgment on the pleadings, Park, Vaughan & Fleming contend that  
25 the Court’s conclusion that “Coverstone is not entitled to recover any of the damages  
26 Coverstone alleges he suffered in support of his claims for fraudulent misrepresentation and  
27 fraudulent concealment” renders Coverstone’s fraudulent concealment claim against Park,  
28 Vaughan & Fleming moot because it is based on the same damages. (Doc. # 134-1 at 2). Park,

1 Vaughan & Fleming contend that the Court should therefore grant judgment on the pleadings.  
2 *Id.* In their motion for summary judgment, Park, Vaughan & Fleming contend that “[p]ursuant  
3 to the Court’s order granting summary judgment, there is an absence of a genuine issue of  
4 material fact” as to Coverstone’s damages and Park, Vaughan & Fleming are entitled to  
5 summary judgment. (Doc. # 139-1 at 2).

6 In his opposition to the motion for judgment on the pleadings, Coverstone contends that  
7 Park, Vaughan & Fleming’s motion is untimely and should be denied on those grounds. (Doc.  
8 # 142 at 2). Coverstone contends the Court’s previous ruling was in error because Coverstone  
9 “retained rights to recover” money paid to Fleming on behalf of his company, GMT, upon  
10 Fleming’s breach of the contract pursuant to California Civil Code § 1689(b)(1). In his  
11 opposition to the motion for summary judgment, Coverstone states “while Coverstone  
12 recognizes the Court’s prior rulings in its order as to Hoyt Fleming’s motion for summary  
13 judgment, Park Vaughan’s filing an additional motion necessitates a renewal of substantive  
14 opposition arguments in order to preserve them for appeal.” (Doc. # 141 at 3).

15 In their motion to amend the scheduling order, Park, Vaughan & Fleming contend that  
16 the motion for judgment on the pleadings and motion for summary judgment “are a matter of  
17 housekeeping to formally dismiss the Park Firm as a party prior to . . . the trial set to  
18 commence on January 25, 2011.” (Doc. # 143-1 at 2). Park, Vaughan & Fleming contend that  
19 there is good cause to amend the scheduling order pursuant to Federal Rule of Civil Procedure  
20 16(b)(4) because the Court’s prior order makes clear that Coverstone cannot maintain his claim  
21 against the firm. *Id.* at 3. Park, Vaughan & Fleming contend that “[u]nder the Court’s Order,  
22 it makes no judicial or economic sense for the Park Firm to remain as a named party through  
23 trial when there is only one claim for breach of contract between Plaintiff Fleming and  
24 Defendant Coverstone.” *Id.* at 3-4.

25 In his opposition to the motion to amend the scheduling order, Coverstone contends  
26 that Park, Vaughan & Fleming’s failure to follow the Federal Rules of Civil Procedure and  
27 to comply with this Court’s scheduling order should not be excused. (Doc. # 147 at 1).  
28 Coverstone contends that Park, Vaughan & Fleming has failed to provide any explanation



1 of its failure to meet the Court's motion cutoff date. *Id.*

2 This Court's previous ruling that Coverstone could not base his claims against  
3 Fleming for fraudulent misrepresentation and fraudulent concealment on damages incurred  
4 by his company, GMT, precludes Coverstone's claim against Park, Vaughan & Fleming for  
5 fraudulent concealment. *See* Doc. # 133 at 12-16.<sup>1</sup> Although Park, Vaughan & Fleming  
6 failed to file their motions prior to the motion cutoff date, the Court finds that good cause  
7 exists pursuant to Federal Rule of Civil Procedure 16(b)(4) to modify the scheduling order.  
8 Allowing Coverstone's claim against Park, Vaughan & Fleming to proceed to trial in spite  
9 of this Court's ruling that Coverstone does not have any damages would be a waste of time  
10 for the parties, the Court, and jurors. Park, Vaughan & Fleming's motion to amend the  
11 scheduling order and motion for summary judgment are granted.<sup>2</sup>

## 12 **II. Fleming's Motion for Reconsideration**

13 Fleming contends that this Court "did not appear to address Fleming's argument  
14 submitted in the Motion for Summary Judgment that Coverstone lacks standing to assert  
15 the affirmative defense of fraud in the inducement because Coverstone's alleged damages  
16 of the \$10,000 deposit and due diligence costs were incurred on GMT's behalf." (Doc. #  
17 135-1 at 2). Fleming contends that damage is a necessary element of the affirmative  
18 defense of fraud in the inducement and that the Court erred in ruling that Coverstone could  
19 assert the defense despite ruling that Coverstone could not recover the \$10,000 deposit or  
20 due diligence costs. *Id.* at 3-4.

21 Coverstone contends that the Court directly addresses Fleming's standing argument  
22 as to the fraud in the inducement defense. (Doc. # 140 at 1-2). Coverstone contends that  
23 the cases Fleming cites which require damages as an element of fraud deal with fraud  
24 counterclaims, not with the fraud in the inducement defense. *Id.* at 4.

---

25  
26 <sup>1</sup>Coverstone's assertion that the Court erred in its analysis relies on a misinterpretation  
27 of California Civil Code § 1689(b)(1). Coverstone and GMT did not "jointly contract" with  
Fleming, which is required to invoke § 1689(b)(1).

28 <sup>2</sup> Because the Court's ruling that Coverstone has not personally incurred any damages  
was based on facts outside of the pleadings, summary judgment, rather than judgment on the  
pleadings, is appropriate. *See* Doc. # 133 at 16.

1 "A district court may reconsider its grant of summary judgment under either Federal  
2 Rule of Civil Procedure 59(e) (motion to alter or amend a judgment) or Rule 60(b) (relief  
3 from judgment)." *School Dist. No. 1J v. AcandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993).  
4 "Reconsideration is appropriate if the district court (1) is presented with newly discovered  
5 evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if  
6 there is an intervening change in controlling law." *Id.* at 1263.

7 Fleming does not cite to any newly discovered evidence or changes in controlling  
8 law. Fleming must therefore establish that this Court committed clear error. Contrary to  
9 Fleming's assertion that this Court failed to consider his argument, the Court held that  
10 Fleming failed to cite any authority "establishing that a transfer of rights under a contract  
11 prevents the assignor from asserting the defense of fraud in the inducement in an action for  
12 breach of contract." *See* Doc. # 133 at 12. Fleming has not carried his burden of  
13 establishing that this ruling was clear error or that the ruling was manifestly unjust and is  
14 therefore not entitled to reconsideration.

15 In any event, even if the Court entertains Fleming's motion, Fleming's position is  
16 not supported by California law.<sup>3</sup> Assuming a jury finds that the January 22, 2008 email  
17 exchange constitutes a contract, the damage to Coverstone caused by a fraudulent  
18 inducement to enter the contract would be Coverstone's assent to be bound to purchase the  
19 patent portfolio. Fleming's motion for reconsideration is denied.

## 20 CONCLUSION

21 IT IS HEREBY ORDERED that

- 22 (1) Park, Vaughan & Fleming's Motion for Leave to Amend Scheduling Order  
23 (Doc. # 143) is **GRANTED**.  
24 (2) Park, Vaughan & Fleming's Motion for Summary Judgment (Doc. # 139) is  
25 **GRANTED**.  
26 (3) Park, Vaughan & Fleming's Motion for Judgment on the Pleadings (Doc.

---

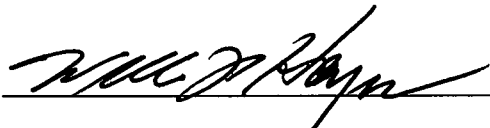
27  
28 <sup>3</sup> According to Fleming's logic, a party who discovers fraud and immediately rescinds  
prior to taking any action to perform a contract may not assert a fraud in the inducement  
defense because he lacks damages.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# 134) is **DENIED AS MOOT.**

(4) Fleming's Motion for Reconsideration (Doc. # 135) is **DENIED.**

DATED: 8/13/10

  
\_\_\_\_\_  
WILLIAM Q. HAYES  
UNITED STATES DISTRICT JUDGE