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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

NICOLOSI DISTRIBUTING, INC., Plaintiff and Appellant, v. ANNEX SANTA CLARA, INC., Defendant and Respondent.	A144736 (San Mateo County Super. Ct. No. CIV508434)

Appellant Nicolosi Distributing, Inc. (Nicolosi) distributes automotive supplies in the Bay Area. So does respondent Annex Santa Clara, Inc. (Annex). Nicolosi entered into a long-term contract with a customer that had an exclusivity provision, prohibiting the customer from buying automotive supply products from other distributors. The customer had financial problems, causing the relationship with Nicolosi to sour, to the point that Nicolosi would sell only on a "cash and carry" basis. The customer approached Annex, which began selling products to the customer, unaware of its contract with Nicolosi—and which it did not learn of for many months.

Nicolosi sued the customer and Annex, and following various attacks on the pleadings, its claims against Annex were winnowed to two: intentional interference with contract and intentional interference with prospective economic advantage. Annex moved for summary adjudication on both claims, which the trial court granted, entering judgment for Annex. The trial court also entered an order granting Annex's motion for reimbursement of costs, based on Code of Civil Procedure section 2033.420 for

Nicolosi's unjustified denial of two material facts proven in obtaining summary judgment. Nicolosi appeals the judgment and the order. We affirm.

BACKGROUND

The General Setting

In October 2007, Nicolosi, a distributor of automotive products, entered into a contract with Matos Automotive Enterprises, Inc. dba Matos Auto Body (Matos), a supplier of automotive products. The contract had an exclusivity clause prohibiting Matos from purchasing paint and other automotive supply products from other vendors for a period of 102 months, that is, eight years, six months. The contract also provided that if Matos breached the exclusivity provision, it had to repay Nicolosi $120,000 it had invested in Matos's facility, and that Matos could be liable for other damages.

As discussed below, Matos ran into financial trouble, which led Nicolosi to demand payment before delivering supplies to Matos—and ultimately to stop selling supplies to Matos in April 2011. Fernando Matos approached various other distributors, one of which was Annex. Annex began to sell product to Matos, and also installed equipment at the Matos facility. As also discussed below, Annex was unaware of the contract Matos had with Nicolosi, and did not learn of it for many months.

The Lawsuit

On September 15, 2011, Nicolosi filed a complaint naming three defendants: Matos, Fernando Matos, and Annex. Following various attacks on the pleadings, the case came to issue on the third amended complaint (TAC), a complaint that alleged six causes of action: as against Matos, breach of contract, common count, and alter ego liability against Fernando[1]; as against Annex, intentional interference with contract, intentional interference with prospective economic advantage, and unfair competition.

Annex filed a demurrer and then a motion to strike portions of the TAC. The trial court held that the demurrer was improperly directed to the entire TAC, not to any specific cause of action; and since the TAC stated "at least one cause of action," the court

[1] The claims against Matos and Fernando were ultimately settled, and a dismissal was filed in July 2013.

overruled the demurrer without prejudice. The court granted in part the motion to strike, the upshot of which was that two causes of action remained against Annex: the fourth, for intentional interference with contract, and the fifth, for intentional interference with prospective economic advantage.

The Motion for Summary Adjudication/Summary Judgment

On July 31, 2014, Annex filed a motion for summary adjudication or, in the alternative, summary judgment, attacking both the fourth and fifth causes of action. Annex submitted 14 undisputed facts in support of its motion.

Nicolosi filed a lengthy 52-page memorandum in opposition, and also three declarations, from Danny Nicolosi, Tony Nicolosi, and Herman Franck, its attorney. But what Nicolosi did not do was dispute any of the 14 facts put forth by Annex.

Annex filed a reply, along with objections to much of Nicolosi's evidence.

The motion came on for hearing on November 13, and on November 20, the trial court entered a comprehensive, detailed 14-page order granting the motion, and thereafter judgment for Annex.

The Motion for Costs of Proof

Following dismissal of the claims, Annex brought a motion for costs of proof pursuant to Code of Civil Procedure section 2033.420. The trial court granted the motion in part, as to fees and costs for Annex's time spent proving two facts Nicolosi denied in response to requests for admissions, and entered an order awarding Annex $2,890.

On April 2, 2015, Nicolosi appealed the judgment and the order.

DISCUSSION

The Law of Summary Judgment

"Summary judgment is proper where there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) To prevail on a summary judgment motion, the moving defendant has the initial burden to show a cause of action has no merit because an element of the claim cannot be established or there is a complete defense to the cause of action. (*Id.*, at subd. (o); *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) To satisfy this

burden, the defendant must present evidence which either conclusively negates an element of the plaintiff's cause of action, or which shows the plaintiff does not possess, and cannot reasonably obtain, needed evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 855.) Once the defendant has made this showing, the burden shifts to the plaintiff to set forth specific facts which show a triable issue of material fact exists. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476–477.)

"We review the trial court's decision de novo, considering all the evidence presented by the parties (except evidence properly excluded by the trial court) and the uncontradicted inferences reasonably supported by the evidence. (*Merrill v. Navegar, Inc., supra,* 26 Cal.4th at p. 476.) The evidence is viewed in the light most favorable to the plaintiff, liberally construing the plaintiff's submissions while strictly scrutinizing the defendant's showing, and resolving any evidentiary doubts or ambiguities in the plaintiff's favor. (*Saelzler v. Advanced Group 400, supra,* 25 Cal.4th at p. 768.)" (*Namikas v. Miller* (2015) 225 Cal.App.4th 1574, 1581; accord, *Nazir v. United Airlines* (2009) 178 Cal.App.4th 243, 253–254.)

Summary Adjudication Was Proper on the Claim for Intentional Interference with Contract

The fourth cause of action was for intentional interference with contract. "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) As the Supreme Court put it in the leading case of *Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 37, "The act of inducing the breach must be an intentional one. If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts."

That law is dispositive here, where the undisputed evidence demonstrates that Annex did not know of the Nicolosi-Matos contract.

As indicated, Nicolosi entered into its contract with Matos in October 2007. Beginning in early December 2009, Matos failed to pay for all the paint and supplies. Nicolosi apparently nevertheless continued its relationship with Matos until early 2011, when it informed Matos that it would have to make payments on the account balance before Nicolosi would provide any further products, to the point that Nicolosi would only provide supplies on a "cash and carry" or "cash on delivery" basis. Nicolosi stopped selling to Matos in mid-April 2011. And Fernando Matos turned to others for his automotive supplies.

As pertinent here, in April 2011, Fernando Matos called the manager of Milpitas Auto Body, inquiring about possible sources of supplies. The manager told him that Annex supplied Du Pont paint to his shop, and based on this Fernando Matos contacted Annex.[2] Annex began to sell product to Matos, unaware of its contract with Nicolosi, as Fernando Matos did not mention it. Not only did Annex start selling paint to Matos, it also installed a paint color mixer and other equipment at Matos's shop.[3] On July 18, 2011, Nicolosi wrote to Matos, stating that it had breached its contract with Nicolosi by purchasing from Annex and "other suppliers." And on August 1, Nicolosi wrote to Annex, advising it of the exclusivity provision in the Nicolosi-Matos contract and requesting that Annex stop selling to Matos. On August 16, Nicolosi wrote a similar letter to Cook's.

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[2] Fernando Matos approached suppliers other than Annex. For example, Matos needed "clear" sealer to continue operating. And in April 2011 Matos purchased "clear" from Cook's Automotive (Cook's). Nicolosi does not dispute that the exclusivity clause of the Nicolosi-Matos contract prohibited Matos from purchasing clear sealer from another distributor.

[3] On June 6, Nicolosi removed its own paint mixing computer from Matos, stating in a letter to a services provider that "They [Matos] are no longer our customer."

In late 2011, Vincent Rojas, Annex's vice president, visited Nicolosi and asked Danny Nicolosi, "[W]hat's up with the Matos situation." Mr. Nicolosi said that Matos had a sales agreement with Nicolosi. Annex continued to sell to Matos.

Those are the undisputed facts that show Annex had no knowledge of the Nicolosi-Matos contract when it began to sell product to Matos. Thus the claim for intentional interference must fail, as we held in *Dryden v. Tri-Valley Growers* (1977) 65 Cal.App.3d 990, 995 (*Dryden*).

Plaintiffs in *Dryden* sued for various forms of interference. The complaint in *Dryden* admitted that defendant did not learn of the plaintiffs' contract with the customer until the day after the claimed interference. (*Dryden, supra,* 65 Cal.App.3d at p. 995.) The trial court dismissed the action on demurrer. We affirmed, holding that plaintiffs failed to state a claim because they failed to show defendant's knowledge at the time of sale. (*Id.* at p. 996.) And as particularly apt here—and dispositive of Nicolosi's fundamental argument—we rejected plaintiffs' argument that the defendant induced a breach of contract by failing to rescind or cancel the purchase agreement after learning of the existing contract. As we put it: "Appellants' novel proposition that in the counts at dispute a cause of action for tortious interference with contractual rights was stated, because it is alleged that after having learned about the previous contracts between appellants and Irvings respondent failed to rescind or cancel the purchase contract of the plant, is supported by neither reason nor law. While the law rightly prohibits an intentional interference with contractual rights or beneficial economic relations existing between others, there is no equivalent duty to rescind a contract lawfully entered into on the ground that it might offend the legal rights of others (cf. Rest., Torts, § 766, com. c). On the contrary, it is well settled that no actionable wrong is committed where, as here, the defendant's conduct consists of something which he had an absolute right to do. (*Caldwell v. Gem Packing Co.* (1942) 52 Cal.App.2d 80; *Sweeley v. Gordon* (1941) 47 Cal.App.2d 385; *Augustine v. Trucco* [(1954) 124 Cal.App.2d 229]." (*Dryden, supra,* 65 Cal.App.3d at p. 996.)

Nicolosi does not dispute that Annex had no knowledge of the Nicolosi-Matos contract when it began selling to Matos, that Matos did not tell Annex of the agreement. Nicolosi concedes that Annex did not learn of the Nicolosi-Matos contract until Vincent Rojas spoke with Danny Nicolosi.[4] Since Annex had no knowledge of the Nicolosi-Matos contract at the time of the first sale, it cannot be held liable for interference.

Faced with those facts, and the law, Nicolosi urges that we disregard what Annex knew when it began to sell to Matos, and instead hold that each sale was a new breach. As Nicolosi puts it, however inartfully: "On this appeal, the issue is whether a claim can still be made for intentional interference with contract in a commercial business setting where as plaintiff contended, each invoice/purchase incident constitutes another breach of contract, and there are thus successive breaches of contract, and any such inducement by Annex Santa Clara to have Matos breach its contract becomes actionable as of the date when Annex Santa Clara did learn of the contract. [T]hat date was when Mr. Rojas showed up at Nicolosi Distributing Inc.'s San Jose facility, and Danny Nicolosi told him that Matos was under contract with them [citation]."

In claimed support of its argument, Nicolosi relies on four cases: *Della Penna v. Toyota Motor Sales U.S.A., Inc.* (1995) 11 Cal.4th 376 (*Della Penna*); *Zimmerman v. Bank of America* (1961) 191 Cal.App.2d 55; *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479; and *Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731.[5] The cases have no applicability here.

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[4] In its opening brief, Nicolosi improperly attempts to rely on evidence excluded by the trial court, specifically Danny Nicolosi's opinion that exclusive supply agreements are common in the industry, excluded by the trial court, as inadmissible opinion. Since Nicolosi does not challenge the trial court's evidentiary rulings, these excluded facts must be disregarded (*Alexander v. Codemasters Group Limited.* (2002) 104 Cal.App.4th 129, 140)—not to mention because the trial court ruling was right.

[5] Nicolosi also cites to the United States Constitution. The sum total of its discussion is this: "The U.S. Constitution has the following provisions to enforce contract. See U.S. Constitution, Article I, section 10, clause 1, which states: 'No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a

Della Penna was not even an interference case. *Zimmerman* involved a defendant who it was alleged "knowingly, wilfully, intentionally, deliberately, and maliciously induced defendants . . . to breach their contract." (*Zimmerman v. Bank of America, supra,* 191 Cal.App.2d at p. 56.) This hardly describes Annex here. And *Romano* and *Mullins* dealt with successive breaches in the context of a statute of limitations issue, not the issue here. To quote the trial court's apt observation: "In *Romano*, the issue was the triggering and running of the statute of limitations on a claim for wrongful termination. The specific discussion in the case referenced by [Nicolosi] has to [do] with what constitutes a breach of contract. The case has nothing to do with the tort of intentional interference and makes no holding regarding the tort of intentional interference."

Not only are Nicolosi's cases manifestly distinguishable, but its argument has been rejected by the cases.

Hill v. Progress Co. (1947) 79 Cal.App.2d 771 is illustrative. Hill was a hauler who claimed he had an oral contract with The Progress Company (Progress) to be the exclusive hauler of oil drums. (*Id.* at p. 772.) Toland, who worked for Progress, demanded a kickback, which Hill refused. Toland hired Berry and other haulers to haul drums. Hill protested. To no avail. And then sued several defendants, including, as pertinent here, Berry and Toland, who it was claimed "wrongfully induced and caused the breach of" the contract with Progress. (*Id.* at p. 773.)

Hill's case was dismissed on nonsuit. He appealed, and was successful as to his breach of contract claim against Progress and its related defendants. But not as to Berry or Toland, as to whom the Court of Appeal concluded as follows: "While the evidence, considered in the light of the rules relating to nonsuit, would support a judgment in plaintiff's favor as against the defendants Leh, Brown, and The Progress Company, a different situation exists so far as the defendants Toland and Berry are concerned. In

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Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.' See also U.S. Constitution, Article I, section 8 [power to constitute tribunals inferior to the Supreme Court]."

seeking to hold these latter defendants liable for damages plaintiff must establish, by the evidence, that the contract which otherwise would have been performed, was breached and abandoned by reason of their wrongful act and that such act was the moving cause thereof. . . . Likewise, to merely show that Berry continued to haul drums under an arrangement with the company after plaintiff told him he had a contract for all the hauling fails to prove this act to have caused the employers to have breached their contract with plaintiff. Such breach, if any occurred, took place with the hiring of Berry or other truckers and not by, or at the time of, the subsequent conversation complained of." (*Hill v. Progress Co., supra,* 79 Cal.App.2d at p. 780.)[6]

As indicated, we too rejected Nicolosi's position, in our holding in *Dryden* quoted above, describing a similar argument as "novel" and "supported by neither reason nor law." (*Dryden, supra,* 65 Cal.App.3d at p. 996.)

Nicolosi's view would require an entity to terminate its existing contract with a customer upon discovering that the contract may violate the customer's contract with a competitor. That view would interfere with healthy competition. (See *Imperial Ice Co. v. Rossier, supra,* 18 Cal.2d at pp. 36–37, 39 ["[I]f two parties have separate contracts with a third, each may resort to any legitimate means at his disposal to secure performance of his contract even though the necessary result will be to cause a breach of the other contract"].) In short, to adopt the theory advanced by Nicolosi would significantly disrupt business relations: Annex would be forced to breach the contract it lawfully entered into with Matos, not to mention forfeit the money it invested to install paint mixing equipment at Matos.

Based on the above, Nicolosi failed to show at least three of the requisite elements of its claim: that Annex (1) knew of the contract; (2) intended to cause Matos to breach it; and (3) caused Matos to breach it. In summary adjudication terms, Annex showed " 'one or more elements of the cause of action . . . cannot be established.' " (*Aguilar v. Atlantic*

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[6] *Hill* was heavily relied on by Annex, in a brief that describes it as a "dispositive case," and which discusses it at length. Nicolosi's reply brief does not even mention the case.

Richfield Co., supra, 25 Cal.4th at p. 849.) Since it did, summary adjudication was properly granted on the fourth cause of action. Likewise on the fifth.

Summary Adjudication Was Proper on the Claim for Intentional Interference with Prospective Economic Advantage

Nicolosi's fifth cause of action was for intentional interference with prospective economic advantage. As best we understand it, the claim is that Annex has a contract with DuPont, a nonparty, that prohibits Annex from selling DuPont's paint products to unauthorized distributors. Nicolosi clams that Annex breached its contract with DuPont by selling DuPont's paint products to an unauthorized distributor, or "jobber," and that the jobber allegedly resold the paint products to Nicolosi's prospective customers, i.e., body shops in the mid-peninsula area. As Nicolosi describes it in its reply brief, "the conduct of Annex . . . in selling to unauthorized resellers [known as wagon peddlers] was a wrongful act in that it breached a prohibition of such unauthorized reselling activity set out in the Du Pont pain[t] manufacturer's distribution agreement between DuPont and Annex . . . ."

The trial court granted summary adjudication because Nicolosi did not provide any evidence that Annex committed an act "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." That ruling was correct.

The tort of interference with prospective economic advantage imposes liability for "improper methods of disrupting or diverting the business relationship of another which fall outside the boundaries of fair competition." (*Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845.) The tort "protects the same interest in stable economic relationships as does the tort of interference with contract, though interference with prospective advantage does not require proof of a legally binding contract. [Citation.] The chief practical distinction between interference with contract and interference with prospective economic advantage is that a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." (*Pacific Gas & Electric Co. v. Bear Stearns & Co., supra,* 50 Cal.3d at p. 1126, fn. omitted.)

The tort has five elements: (1) economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by defendant. (*Youst v. Longo* (1987) 43 Cal.3d 64, 71, fn. 6.) And, as relied on by the trial court here, a plaintiff seeking to recover for an alleged interference with prospective advantage "must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." (*Della Penna, supra,* 11 Cal.4th at p. 393.)

To begin with, Nicolosi's claim is so attenuated that it does not even attempt to demonstrate how it satisfies any, let alone all, of the elements of the tort. All Nicolosi's brief states is this: "On the merits, Tony Nicolosi submitted a declaration establishing the facts claimed in the [fifth] cause of action," citing the Nicolosi declaration at paragraphs 42–51. These paragraphs merely repeat the claims in the TAC that alleged only a breach of contract with a third party as the basis of the tort. They are nothing more than bald assertions to be disregarded. (See *Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1258 (*Gemini*) ["[W]here a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion."].) Indeed, they should also be disregarded because the trial court sustained Annex's objections to those paragraphs.

In any event, the claim fails because the alleged breach of the Annex-DuPont contract does not measure up: it does not, in the language of the Supreme Court, satisfy the "independently wrongful act" necessary for the tort.

Gemini, relied on by Annex—and also ignored in Nicolosi's reply—is persuasive. Plaintiff Gemini sued for interference with prospective economic advantage. A jury rejected the claim. Plaintiff appealed and the Court of Appeal affirmed, holding that a plaintiff seeking to recover for an alleged interference must plead and prove as part of its

case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself. Citing numerous cases, the court concluded with the following: "We conclude the nebulous 'industry standards' test advanced by Gemini does not satisfy *Della Penna*'s requirement that the defendant's conduct 'was wrongful by some *legal measure* other than the fact of interference itself.' (*Della Penna, supra,* 11 Cal.4th at p. 393, italics added.) The court acknowledged in *Della Penna* that '[b]ecause ours is a culture firmly wedded to the social rewards of commercial contests, the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties.' (*Id.* at p. 392.) The imposition of liability for interference based merely on opinions that the solicitation of a competitor's business was 'unethical' or violated 'industry standards' would create uncertainty and chill, not maximize, competition." (*Gemini, supra,* 95 Cal.App.4th at p. 1259.)[7]

The Ruling on the Costs Was Proper

As indicated, the trial court awarded Annex $2,890 in costs of proof under Code of Civil Procedure section 2033.420. We review that award for abuse of discretion. (*Grace v. Mansourian* (2015) 240 Cal.App.4th 523, 529.) We find none.

Section 2033.420 provides the standard for costs and attorney fees incurred in proving the truth of a denied request for admission, as follows: "(a) If a party fails to admit . . . the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves . . . the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom

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[7]In an ancillary argument buried in its brief (and not in the table of contents), Nicolosi argues that the trial court erred in allowing Annex to rely on the allegations in the TAC, as it constituted an improper motion for reconsideration of Annex's unsuccessful demurrer. Nicolosi cites to no authority that a party cannot seek summary adjudication after an unsuccessful demurrer, and the law is otherwise. In any event, the trial court overruled the demurrer on a procedural basis, doing so "without prejudice." And as to the use of Nicolosi's own pleading on summary adjudication, Annex could properly rely on that pleading. (*24 Hour Fitness v. Superior Court* (1998) 66 Cal.App.4th 1199, 1210–1211.)

the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees."

The court is required to impose a sanction for the unreasonable denial of a request for admission unless the court finds any of the following: (1) an objection to the request was sustained or a response to it was waived under section 2033.290; (2) the admission sought was of no substantial importance; (3) the party failing to make the admission had reasonable ground to believe that that party would prevail on the matter; or (4) there was other good reason for the failure to admit. (§ 2033.420, subd. (b); see also *Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 735–736.)

Annex moved for the costs to prove several facts denied in response to its requests for admissions, included among which were these two:

"Request 8: Admit that around April 2011, YOU ceased all sales to MATOS."

"Request 21: Admit that the reason given by YOU for the June 6, 2011 cancellation of the ColorNet computer system YOU installed was: 'They [MATOS] are no longer our customer.' "

Nicolosi's response to both requests was, "Deny."

The trial court awarded Annex $2,890 in costs to prove the denied facts.

To the extent we understand Nicolosi's position, it vaguely asserts that the motion for summary judgment "had nothing to do with the RFAs that the trial court deemed disproven," and that the denials were not unreasonable. Annex's treatment of the record is myopic.

Nicolosi did not dispute the two requests for admission on summary judgment, and the trial court justifiably found Nicolosi's grounds to deny the requests to be unreasonable, concluding as follows: "In the Opposition, Plaintiff did not raise the issue or assert that the admission was of no substantial importance. Plaintiff does not assert specifically that it had reason to believe that it would prevail on that factual dispute. Rather the only real argument asserted in the Opposition is that the denial was 'not unreasonable.' Plaintiff points to its 'reasons' stated in answers to form interrogatories related to the specific requests for production of documents. The Court views the denials

as founded upon unreasonable alleged confusion and linguistical hair-splitting of straight-forward requests for admission."

The record clearly demonstrates Annex proved request for admission No. 8 in its undisputed fact No. 5: that Nicolosi ceased all sales to Matos around April 2011. The trial court reasonably found Nicolosi's denial to be unjustified. Nicolosi argued that the sales did not "cease" in April 2011 because it would have made later sales to Matos if Matos abided by the cash on delivery term. The trial court found that "[t]he plain meaning of the term 'cease' is to come to an end or to no longer continue. If Nicolosi's final sale to Matos occurred in April 2011, then Nicolosi ceased all sales to Matos in April 2011."

Request for admission No. 21 asked Nicolosi to admit that Nicolosi instructed ColorNet to cancel the DuPont mixing computer system at Matos because "[t]hey (Matos) are no longer our (Nicolosi's) customer." Nicolosi did not dispute this fact, and so the trial court did not err in finding Nicolosi unreasonable for denying request No. 21 based on Nicolosi's other undisclosed reasons for cancelling the Du Pont paint mixing computer system at Matos.

Sanctions Are Appropriate

Annex filed a motion for sanctions, and Nicolosi an opposition, and Nicolosi's counsel addressed the issue at oral argument. We had entered an order that we would decide the motion with the appeal, which we now do, and award Annex $6,133 in sanctions, awarded against both Nicolosi and Herman Franck, its attorney.

Annex's motion for sanctions sought a total of $9,328, comprised of three components: (1) $4,468 for dealing with Nicolosi's improper appellate procedure, including reliance on evidence excluded by the trial court and its inaccurate citation (or noncitation) to the record; (2) $1,530 for dealing with Nicolosi's appeal of the costs award; and (3) $3,330 for preparation of the motion. The motion was supported by a declaration of Annex's attorney, Wendy Hillger, detailing the hours spent.

Nicolosi filed opposition to the motion, essentially contending that the appeal was not frivolous, that Nicolosi sought to make new law, and that the arguments were made in

"good faith." The opposition did not meaningfully address the first, and largest, claim, in Annex's motion: for Nicolosi's violation of proper appellate procedure. As to this, Nicolosi's entire opposition asserted as follows:

"10. Furthermore, any allegations regarding missed citations or unintentionally omitted documents, were unintentional, inadvertent, and were not made in bad faith. [Code of Civil Procedure section 473, subdivision (b)] provides:

" 'The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.'

"These mistakes were merely the result of inadvertent mistake in citation and excusable neglect. This is not sanctionable conduct." Nicolosi's position is unavailing.

The leading appellate commentary describes the law this way:

"Even if the appeal . . . was not 'frivolous' or 'taken solely for delay,' appellate courts have authority to assess sanctions against a party or attorney who has included in the record any matter not reasonably material to determination of the appeal or who has committed *any other unreasonable violation of the Rules of Court* on appeal (or writ review). [Cal. Rules of Court, rules 8.276(a)(2) & (4), 8.492(a)(2); *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566, 570; see also *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185, 194]" (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 11:99.1, p. 11-36.)

Here, the first component of Annex's request for sanctions was based on its counsel being required to deal with various violations of proper appellate procedure. These included Nicolosi's reliance on evidence excluded by the trial court, rulings Nicolosi did not challenge, the effect of which is that excluded facts cannot be considered on appeal. (*Alexander v. Codemasters Group Limited, supra,* 104 Cal.App.4th 129, 140.) Annex's motion devoted some two pages to a specification of such evidence. As noted, Nicolosi did not respond to any of it.

Not only that, in its respondent's brief Annex raised concerns that Nicolosi's opening brief had included such excluded evidence. And as Annex aptly puts it,

"Nicolosi forged ahead and reasserted its reliance on excluded facts in its Reply Brief, which demonstrates the unreasonableness of the violation of the Rules of Court." We agree. This is most improper. (See *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 886 ["We consider the failure to comply with these rules in [appellant's] opening brief to be compounded and unreasonable when, after the respondents pointed out these errors, counsel for [appellants] violated the same rules in the reply brief."].)

Annex also asserted that Nicolosi disregarded the Rules of Court in its citation to the record on appeal, failing to properly cite to the record to support factual assertions in its statement of facts. For example, some paragraphs had no citations at all; other paragraphs cited to general documents in the record, rather than specifically citing to the record after each factual assertion. Such conduct is sanctionable. (See *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29–31, imposing $32,000 sanctions against appellants and his counsel, based in significant part for "unreasonably violating the Rules of Court in preparing briefs including repeated failure to provide record citations to 'factual' statements in the briefs and failure to confine statement of facts to matters in the record.") Based on the above, we award sanctions of $4,468 against Nicolosi and its counsel, Herman Franck. (*Keitel v. Huebel* (2002) 103 Cal.App.4th 324, 342; *Singh v. Lipworth* (2014) 227 Cal.App.4th 813, 830.)

As to the second component of the sanction request, the fees incurred addressing the cost issue, we do not agree that the appeal of this issue was frivolous.

The third component of Annex's sanction request was for $3,330, for preparation of the sanction motion itself. Since we conclude that the motion is in part well taken and in part not, we award Annex half that amount, or $1,665, as an additional sanction. This results in a total sanction award of $6,133.

DISPOSITION

The judgment for Annex is affirmed, as is the order awarding it $2,890 in costs. Annex shall recover its costs on appeal. In addition, Annex is awarded sanctions of $6,133 against Nicolosi and Herman Franck, jointly and severally, such sanctions to be payable within 60 days after this decision becomes final.

Richman, J.

We concur:

Kline, P.J.

Miller, J.