

**United States Bankruptcy Court  
District of New Mexico**

**Document Verification**

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**Case Number:** 02-01239  
**Nature of Suit:**  
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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

In re:  
VDP, Inc.,  
Debtor.

No. 11-01-17042 SL

VDP, Inc.,  
Plaintiff,

vs.

Adv. No. 02-1239 S

Kendal M. Emery, et al.  
Defendants.

**MEMORANDUM OPINION ON DEFENDANT  
EARNEST H. RICHMOND'S MOTION FOR  
SUMMARY JUDGMENT and ORDER DENYING SAME**

This matter is before the Court on the Motion for Summary Judgment filed by Defendant Earnest H. Richmond (doc. 69), the Memorandum in Support (doc. 79), Plaintiff's Response (doc. 89) and Defendant Richmond's Reply (doc. 103). Defendant Richmond is represented by Katherine N. Blackett. Plaintiff is represented by Steven E. Schmidt.

Federal Rule of Civil Procedure 56(c) provides, in part, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Therefore, if the Court finds that a material fact is

in dispute, summary judgment should be denied. The Court's task at summary judgment is not to assess the credibility of conflicting testimony. Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1557 (10<sup>th</sup> Cir. 1995)(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.")). Finally, the Court examines the factual record and reasonable inferences therefrom in the light of the nonmovant. Thomas v. International Business Machines, 48 F.3d 478, 484 (10<sup>th</sup> Cir. 1995); Cole v. Ruidoso Municipal Schools, 43 F.3d 1373, 1377 (10<sup>th</sup> Cir. 1994).

Whether a fact is material is determined by the substantive law governing the case. Anderson, 477 U.S. at 248. Therefore, the Court will briefly review Plaintiff's complaint. Count I is for turnover, and alleges that Defendants have computer hardware and software of some value that belongs to the estate, and seeks its return. Count II alleges that Defendants have tangible personal property, intellectual property, and copies of object and source code of software products used by Plaintiff to manufacture its products, in addition to the actual products sold by

Plaintiff; that Defendants took the property to improperly compete against the Plaintiff; and seeks to enjoin Defendants to account for and return the property and to enjoin them from using any property for any purpose. Therefore, the existence of any of Plaintiff's property in the hands of Defendants is a material fact for both counts.

Defendant Richmond's Memorandum in Support of Motion for Summary Judgment, doc. 79, sets forth a Statement of Material Facts ("Facts"). Fact 17 states "All property of VDP, Inc. that Mr. Richmond had in his possession was returned to VDP, Inc. in 2001 through its agents". Fact 17 is evidenced by the Richmond Affidavit ¶20 (Exhibit A to doc. 79). Fact 20 states "Mr. Richmond has no property or copies of property of whatsoever nature, including 'estate funds,' belonging to Plaintiff, with the exception of a copy of a VDP, Inc. Employee Manual, which was given to him when he was hired." Fact 20 is evidenced by the Richmond Affidavit ¶23 (Exhibit A to doc. 79).

Plaintiff's Response (doc. 89) does not follow the procedure set up in NM LBR 7056-1. That Local Rule provides:

[a] memorandum in opposition to the motion shall contain a concise statement of the material facts as to which the party contends a genuine issue does exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and

shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted unless specifically controverted.

Rather, Plaintiff's response simply admits or denies Defendant's facts, comments whether the purported fact is "material", and fails to give any cite to the record where the conflicting evidence appears. Plaintiff does, however, then provide its own "Statement of Contested Material Facts" ("Contested Facts"). Defendant urges the Court to deem all facts admitted because they were not controverted with record references. Because this Court prefers to decide matters on the merits, it has reviewed the Contested Facts to see whether they actually controvert any of Defendant's facts. This involved unnecessary additional work for the Court, and Mr. Schmidt is advised that in the future he should follow the Local Rule when responding to motions for summary judgment, or risk sanctions. See, e.g., Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner, 101 F.3d 145, 151 (D.C. Cir. 1996)(Local rules regarding summary judgment practice should be strictly complied with in order to present a crystallized record for the reviewing court, which then need not sift through a voluminous record searching for fact issues.)

Plaintiff's Contested Fact 1 states "Defendant Richmond and the other defendants retained and have property of the

Plaintiff." Contested Fact 1 refers to: the Black Affidavit (doc. 94); the Weadock affidavit (doc. 93); the Porter affidavit (doc. 96); and the Cogoli affidavit (doc. 92).

While some of the cited references can be argued as supporting Contested Fact 1, two particular items are sufficient. Black Affidavit ¶ 6 states:

VDP, Inc. abandoned the plan to start a new company in conjunction with filing for bankruptcy when the Defendants tried to blackmail my wife and I into giving them control of the company and its software products by refusing to return to VDP, Inc. property including but not limited to the source code for VDP, Inc.'s software products which the Defendants Richmond and Wright admitted to me that they had in their possession at their houses.<sup>1</sup>

Black Affidavit ¶ 36 states "VDP, Inc. never received back the source code for its products from Messrs. Richmond, Wright, Emery or Ms. Lalla."<sup>2</sup>

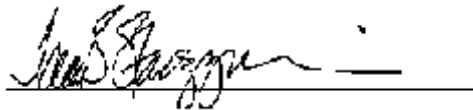
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<sup>1</sup> Defendant argues that ¶ 6 is a "self-serving, conclusory commentary and rhetoric" that lumps all defendants together and does nothing to meet the summary judgment motion. "A party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but is nonetheless competent to support or defeat summary judgment." Cadle Company v. Hayes, 116 F.3d 957, 961 n.5 (1<sup>st</sup> Cir. 1997). And, while part of the paragraph may be conclusory (specifically, the comments about what the defendants "tried to" do), it does contain the specific, non-conclusory fact that defendants Richmond and Wright admitted they had property in their possession at their houses.

<sup>2</sup> Defendant argues that ¶ 36 is a self-serving conclusion. The Court disagrees. The paragraph is a factual statement.

The Court finds that Facts 17 and 20 have been successfully put in doubt by Plaintiff's Response. The Court therefore finds that Defendant Richmond's Motion for Summary Judgment is not well taken.

IT IS ORDERED that Defendant Richmond's Motion for Summary Judgment (doc. 60) is denied.



Honorable James S. Starzynski  
United States Bankruptcy Judge

I hereby certify that on October 15, 2004, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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