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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BLACK GOLD POTATO SALES, INC.,

Plaintiff,

v.

DISCOVERY GARDENS, LLC, a California
limited liability company; and CALIFORNIA
OREGON SEED, INC. an Oregon
corporation,

Defendants.

AND RELATED COUNTERCLAIM.

) 1:08-cv-1488 GSA
)
) SCHEDULING ORDER (Fed. R. Civ. P. 16)
)
) Discovery Deadlines:
) Initial Disclosures: January 30, 2009
) Non-Expert Discovery: May 31, 2009
) Expert Disclosure: June 30, 2009
) Supplemental Expert Disclosure:
) July 17, 2009
) Expert Discovery: July 31, 2009
)
) Motion Deadlines:
) Non-Dispositive:
) Filing: August 14, 2009
)
) Dispositive:
) Filing: September 11, 2009
)
) Settlement Conference:
) April 13, 2009 at 10:30 a.m.
) Courtroom 9 (DLB), 6th Floor
)
) Pre-Trial Conference:
) October 22, 2009 at 8:30 a.m.
) Courtroom 10, 6th Floor
)
) Trial: December 8, 2009 at 8:30 a.m.
) Courtroom 10, 6th Floor
) Jury Trial - 2-3 days

I. Date of Scheduling Conference

January 8, 2009

II. Appearances of Counsel

Joseph Choate appeared on behalf of Plaintiff Black Gold Potato Sales, Inc. Scott Belden

1 appeared on behalf of Defendant California-Oregon Seed, Inc., and Oregon Corporation.

2 **III. The Pleadings**

3 In February of 2007, BLACK GOLD POTATO SALES, INC. (“Black Gold”),
4 DISCOVERY GARDEN’S, LLC, and CALIFORNIA-OREGON SEED, INC., entered into a
5 written agreement entitled Grower Services Agreement (the “Agreement”). California-Oregon
6 Seed provided Sierra Gold potato seeds to Black Gold, Black Gold grew the potatoes, and
7 Discovery Garden’s was to handle the marketing of the potatoes. The Agreement provided that
8 the potatoes could be used either for Tablestock (i.e., for baking, microwaving or boiling) or
9 Chipstock (i.e., to make potato chips). Sierra Gold potatoes are a special hybrid variety of
10 potatoes.

11 The planting and cultivation of the potatoes are the same irrespective of whether they are
12 to be used for Tablestock or Chipstock. However, there is significant difference in the harvesting
13 process. Potatoes to be used as Chipstock can be harvested, i.e., dug up, immediately. However,
14 when they are to be used as Tablestock, the vines must first be killed with a particular chemical
15 and the potatoes left in the ground to dry out for a period from anywhere between two and three
16 weeks before they can be harvested. The purpose of this vine-killing and the subsequent waiting
17 is to permit the skins of the potatoes to “set,” something not required when they are going to be
18 made into potato chips.

19 _____
20 **1. Black Gold’s Contentions:**

21 It is Black Gold’s position that, under the terms of the Agreement, Black Gold agreed to
22 grow Sierra Gold potatoes for California-Oregon Seed and Discovery Garden’s. It was up to
23 Discovery Garden’s to instruct Black Gold as to the purposes for which the potatoes were to be
24 used. Black Gold asserts that, hoping to sell the potatoes for Chipstock, Discovery Garden’s held
25 off telling Black Gold to harvest the rapidly maturing potatoes until they were in fact already
26 matured, at which point they told Black Gold the potatoes were to be used as Tablestock and to

1 apply the necessary vine-killing chemicals. The lengthy vine-killing process resulted in the
2 harvesting of over-mature potatoes, which Discovery Garden's claims did not meet the quality
3 and condition requirements under the Agreement. It is Black Gold's position that there is no
4 evidence to establish that the potatoes did not meet the requirements at least for Chipstock if not
5 Tablestock, and that in any event, the condition of the potatoes at harvest, whatever they were,
6 was the direct result of the failure of Discovery Garden's to give timely instructions as to
7 harvesting.

8 Black Gold invoiced Discovery Garden's \$56,580 for the potatoes and Discovery
9 Gardens has refused to pay.

10 There are really no novel legal issues in this litigation as it appears to be a straight breach-
11 of-contract action.

12
13 **2. California-Oregon Seed and Discovery Garden's Contentions:**

14 California-Oregon Seed fully performed its obligation to provide Sierra Gold seed to
15 Black Gold under the Agreement. California-Oregon Seed and Discovery Garden's had no
16 obligation with regard to the land, water, irrigation, chemicals, labor, equipment, materials, and
17 facilities used in growing the Variety, or the harvesting, packing, and shipping (other than
18 marketing materials) of the Sierra Golds. Black Gold, and no one else, was obligated to harvest,
19 pack, and ship the Sierra Golds, and Black Gold, and no one else, was obligated to harvest the
20 Sierra Golds within a specific time frame: between May 15, 2007, and June 20, 2007.

21 The Sierra Golds grown by Black Gold did not meet the standards required by the
22 Agreement. Black Gold failed to harvest the Sierra Golds within the specified harvest time in the
23 Agreement. As a result, upon inspection at their destinations, the Sierra Golds grown by Black
24 Gold suffered from 29% soft rot, with total defects of 44% and all loads shipped by Black Gold
25 failed to satisfy 85% US #1 grade on account of their condition. Similar to the potatoes rejected
26 by customers, the remaining Sierra Golds were not suitable for shipment to buyers located by

1 a. California-Oregon Seed has been granted an exclusive license that allows it to sell,
2 distribute, market, or otherwise exploit a potato seed variety developed by the Texas A&M
3 University System as experimental clone TX1523-1 Ru/Y (“Variety”), which Variety results in
4 the production of “Sierra Gold[®]” brand potatoes (“Sierra Golds”).

5 b. On February 5, 2007, Black Gold, Discovery Garden’s, and California-Oregon
6 Seed entered into a written agreement entitled *Grower Services Agreement* (the “Agreement”).

7 c. The Agreement is valid.

8 d. Under the Agreement, California-Oregon Seed was obligated to provide
9 Counterdefendant with 440 hundred weight (“cwt”) of the Variety for planting on 17 acres of
10 Counterdefendant’s land. California-Oregon Seed delivered the potato seeds to Black Gold no
11 later than February 10, 2007.

12 e. Under the Agreement, Black Gold, at its own expense, was responsible for
13 providing the land, water, irrigation, chemicals, labor, equipment, materials, and facilities
14 necessary to plant and grow the Variety on the approximately 17 acres of land.

15 f. Each delivery of Sierra Golds intended for “Tablestock” had to be: (1) comprised
16 of 85% of Sierra Golds in conformity with the US #1 standard; (2) a minimum of two inches; (3)
17 comprised of 95% of Sierra Golds that did not exceed 14 ounces; and (4) comprised of 99.5% of
18 Sierra Golds with no soft rot.

19 g. If the Sierra Golds grown by Black Gold under the Agreement were to be used as
20 “Chipstock,” then they had to conform with US #1 Process Grade.

21 h. Under the Agreement, locating and/or securing purchasers or prospective
22 purchasers of the Sierra Golds grown by Black Gold was the responsibility of Discovery
23 Garden’s.
24

25 i. Discovery Garden’s informed Black Gold of its failure to deliver Sierra Golds that
26 met the standard required by the Agreement and that they would not be accepted or purchased.

1 j. Black Gold grew a total of 4,920 cwt of Sierra Golds.

2 **2. Contested Facts:**

3 While this litigation is in the early stages of discovery, the parties currently feel that the following
4 facts are contested:

5 a. Whether there are facts present in this case to implicate the Perishable Agricultural
6 Commodities Act (“PACA”).

7 b. Whether, if PACA applies to the facts of this case, Black Gold has met all
8 requirements for protection under PACA.

9 c. Whether Black Gold agreed to grow Sierra Gold potatoes for California-Oregon
10 Seed and Discovery Garden’s under the terms of the Agreement.

11 d. Whether California-Oregon Seed and Discovery Garden’s had any obligation with
12 regard to the land, water, irrigation, chemicals, labor, equipment, materials, and facilities used in
13 growing the Variety, or the harvesting, packing, and shipping (other than marketing materials) of
14 the Sierra Golds.

15 e. Whether Black Gold, and no one else, was obligated to harvest, pack, and ship the
16 Sierra Golds.

17 f. Whether Black Gold, and no one else, was obligated to harvest the Sierra Golds
18 within a specific time frame: between May 15, 2007, and June 20, 2007.

19 g. Whether the Sierra Golds grown by Black Gold met the standards required by the
20 Agreement.

21 h. Whether Black Gold failed to harvest the Sierra Golds within the specified harvest
22 time in the Agreement.

23 i. Whether, upon inspection at their destinations, the Sierra Golds grown by
24 Counterdefendant suffered from 29% soft rot, with total defects of 44% and all loads shipped by
25 Counterdefendant failed to satisfy 85% US #1 grade on account of their condition.
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1 j. Whether the remaining Sierra Golds were not suitable for shipment to buyers
2 located by Discovery Garden's due to the same quantity and quality of defects.

3 k. Whether those Sierra Golds actually shipped to Sterman Masser, Inc., and Mrs.
4 Dennis Potato Farm, Inc., were rejected by those buyers.

5 l. Whether Discovery Garden's was responsible for only marketing any satisfactory
6 crop grown by Black Gold in accordance with the Agreement, including locating and/or securing
7 purchasers or prospective purchasers of conforming Sierra Gold's grown by Black Gold.

8 m. Whether Discovery Garden's failed to notify Black Gold in a timely manner that
9 the entire crop was to be used for Tablestock.

10 n. Whether Discovery Garden's failed to instruct Black Gold to apply vine-kill in a
11 timely manner.

12 o. Whether Discovery Garden's failed to notify Black Gold of the customers to whom
13 it was to ship the potatoes in a timely manner.

14 p. Whether Discovery Garden's failed to notify Black Gold in a timely manner to
15 commence harvesting the potato crop.

16 q. Whether, if Black Gold had grown a crop of Sierra Golds that had met the
17 specifications required by the Agreement, Discovery Garden's would have been obligated to
18 compensate Black Gold at the rate of \$11.50 per cwt of Sierra Golds used for Tablestock

19 r. Whether Discovery Garden's had contracted to receive \$18.00 per cwt from each
20 buyer it secured to receive Tablestock Sierra Golds from Black Gold's crop.

21 s. Whether Discovery Garden's would have received a total net profit of \$6.50 per
22 cwt of conforming Sierra Golds delivered to buyers by Black Gold.

23
24 **V. Summary of Contested and Uncontested Legal Issues.**

25 **1. Uncontested Legal Issues:**

26 a. Venue is proper in this Court if subject matter jurisdiction is otherwise present.

- 1 **2. Contested Legal Issues:**
- 2 a. Whether the Court has subject matter jurisdiction;
- 3 b. Whether the Court has supplemental jurisdiction;
- 4 c. Whether California-Oregon Seed fully performed its obligation to provide the
- 5 enumerated quantity of the Sierra Golds to Black Gold.
- 6 d. Whether Discovery Garden’s fully performed its alleged obligation to market and
- 7 provide buyers of the Sierra Golds that Black Gold was obligated to grow under the Agreement.
- 8 e. Whether the Agreement was breached and if so who is liable for the breach and the
- 9 amount of damages.
- 10 f. Whether Discovery Garden’s was obligated to market potatoes that did not meet
- 11 the standards required by the Agreement.
- 12 g. Whether Black Gold breached the Agreement by not growing Sierra Golds that
- 13 conformed to the specifications required by the Agreement.
- 14 h. Whether Discovery Garden's conduct vis á vis the Agreement constituted a
- 15 violation of the implied covenant of good faith and fair dealing.
- 16 i. Whether any failure of the potato crop to meet the quality and conditions required
- 17 under the Agreement were due to an Act of God.
- 18 j. Whether Discovery Garden's failed to mitigate any damages it might have suffered.
- 19 k. Whether COS provided Black Gold with seeds that would meet the size and weight
- 20 specifications called for in the Agreement.
- 21 l. Whether the Perishable Agricultural Commodities Act (“PACA”) applies to the
- 22 facts of this case.
- 23 m. Whether, if PACA applies to the facts of this case, Black Gold qualifies for
- 24 protection under PACA.
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1 **VI. Consent to the Magistrate Judge**

2 Pursuant to 28 U.S.C. § 636(c), the parties have consented to conduct all further
3 proceedings in this case, including trial, before the Honorable Gary S. Austin, U.S. Magistrate
4 Judge.

5 **VII. Discovery Plan and Cut-Off Date**

6 The parties shall exchange the initial disclosures required by Fed. R. Civ. P. 26(a)(1) by
7 **January 30, 2009**. The parties are ordered to complete all discovery pertaining to non-experts on
8 or before **May 31, 2009**. The parties are directed to disclose all expert witnesses, in writing, on or
9 before **June 30, 2009**. The parties also shall disclose all supplemental experts on or before **July**
10 **17, 2009**. The written designation of experts shall be made pursuant to Fed. R. Civ. P. Rule
11 26(a)(2), (A) and (B) and shall include all information required thereunder. Failure to designate
12 experts in compliance with this order may result in the Court excluding the testimony or other
13 evidence offered through such experts that are not disclosed pursuant to this order.

14
15 The parties are directed to complete all expert discovery on or before **July 31, 2009**. The
16 provisions of Fed. R. Civ. P. 26(b)(4) and (5) shall apply to all discovery relating to experts and
17 their opinions. Experts must be fully prepared to be examined on all subjects and opinions
18 included in the designation. Failure to comply will result in the imposition of sanctions, which
19 may include striking the expert designation and preclusion of expert testimony.

20 **VIII. Pre-Trial Motion Schedule**

21 All Non-Dispositive Pre-Trial Motions, including any discovery motions, shall be filed no
22 later than **August 14, 2009**. In scheduling such motions, the parties shall comply with Local
23 Rules 78-230 and 56-260. Counsel must comply with Local Rule 37-251 with respect to
24 discovery disputes or the motion will be denied without prejudice and dropped from calendar.

25 In scheduling such motions, the Judge may grant applications for an order shortening time
26 pursuant to Local Rule 6-142(d). However, if a party does not obtain an order shortening time,
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1 the notice of motion *must* comply with Local Rule 37-251.

2 Counsel or pro se parties may appear and argue non-dispositive motions by telephone,
3 providing a written request to so appear is made to the Magistrate Judge's Courtroom Clerk no
4 later than five (5) court days before the noticed hearing date. In the event that more than one party
5 requests to appear by telephone then it shall be the obligation of the moving part(ies) to arrange
6 and originate a conference call to the court.

7 All Dispositive Pre-Trial Motions shall be filed no later than **September 11, 2009**, and
8 heard in Courtroom 10 before the Honorable Gary S. Austin, United States Magistrate Court
9 Judge. In scheduling such motions, the parties shall comply with Local Rules 78-230 and 56-260.

10 **1. Pre-Trial Conference Date**

11 The pre-trial conference will be held on **October 22, 2009, at 8:30 a.m.** in Courtroom 10
12 before the Honorable Gary S. Austin.

13 The parties are ordered to file a Joint Pretrial Statement pursuant to Local Rule 16-
14 281(a)(2). The parties are further directed to submit a digital copy of their pretrial statement in
15 Word Perfect X3¹ format, directly to Judge Austin's chambers by emailing it to
16 gsaorders@caed.uscourts.gov.

17 The parties' attention is directed to Rules 16-281 and 16-282 of the Local Rules of Practice
18 for the Eastern District of California, as to the obligations of counsel in preparing for the pre-trial
19 conference. The Court will insist upon strict compliance with those rules.
20

21 **2. Trial Date**

22 The trial will be held on **December 8, 2009, at 8:30 a.m.** in Courtroom 10 before the
23 Honorable Gary S. Austin, United States Magistrate Court Judge.

24 a. Plaintiff has requested a court trial.

25 _____
26 ¹ If WordPerfect X3 is not available to the parties then the latest version of WordPerfect
27 or any other word processing program in general use for IBM compatible personal computers is
28 acceptable.

- 1 b. Parties' Estimate of Trial Time: 2-3 days.
- 2 c. Parties' attention is directed to Local Rules of Practice for the Eastern
- 3 District of California, Rule 16-285, for preparation of trial briefs.

4 **3. Settlement Conference**

5 A Settlement Conference is scheduled for **April 13, 2009, at 10:30 a.m.** in Courtroom 9

6 before the Honorable Dennis L. Beck, United States Magistrate Judge.

7 Unless otherwise permitted in advance by the Court, the attorneys who will try the case

8 shall appear at the Settlement Conference with the parties and the person or persons having full

9 authority to negotiate and settle the case on any terms² at the conference.

10 CONFIDENTIAL SETTLEMENT CONFERENCE STATEMENT

11 At least five (5) court days prior to the Settlement Conference the parties shall submit,

12 directly to the Magistrate Judge's chambers by email to dlborder@caed.uscourts.gov, a

13 Confidential Settlement Conference Statement. The statement should not be filed with the Clerk

14 of the Court nor served on any other party, although the parties may file a Notice of Lodging of

15 Settlement Conference Statement. Each statement shall be clearly marked "confidential" with the

16 date and time of the Settlement Conference indicated prominently thereon. The parties are urged

17 to request the return of their statements if settlement is not achieved and if such a request is not

18 made the Court will dispose of the statement.

19 The Confidential Settlement Conference Statement shall include the following:

- 20 A. A brief statement of the facts of the case.

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23 ² Insurance carriers, business organizations, and governmental bodies or agencies whose

24 settlement agreements are subject to approval by legislative bodies, executive committees, boards

25 of directors or the like shall be represented by a person or persons who occupy high executive

26 positions in the party organization and who will be directly involved in the process of approval of

27 any settlement offers or agreements. To the extent possible, the representative shall have the

28 authority, if he or she deems it appropriate, to settle the action on terms consistent with the

 opposing party's most recent demand.

1 B. A brief statement of the claims and defenses, i.e., statutory or other grounds
2 upon which the claims are founded; a forthright evaluation of the parties' likelihood of prevailing
3 on the claims and defenses; and a description of the major issues in dispute.

4 C. A summary of the proceedings to date.

5 D. An estimate of the cost and time to be expended for further discovery, pretrial
6 and trial.

7 E. The relief sought.

8 F. The party's position on settlement, including present demands and offers and a
9 history of past settlement discussions, offers and demands.

10 Should the parties desire an additional settlement conference, they will jointly request one
11 of the court, and one will be arranged. In making such request, the parties are directed to notify
12 the court as to whether or not they desire the undersigned to conduct the settlement conference or
13 to arrange for one before another judicial officer.

14
15 **IX. Request for Bifurcation, Appointment of Special Master, or other Techniques to**
16 **Shorten Trial**

17 No bifurcation is requested by either party.

18 **X. Related Matters Pending**

19 There is no related litigation.

20 **XI. Compliance with Federal Procedure**

21 The parties are expected to familiarize themselves with the Federal Rules of Civil
22 Procedure and the Local Rules of Practice of the Eastern District of California, and to keep abreast
23 of any amendments thereto. The Court must insist upon compliance with these Rules if it is to
24 efficiently handle its increasing case load and sanctions will be imposed for failure to follow the
25 Rules as provided in both the Federal Rules of Civil Procedure and the Local Rules of Practice for
26 the Eastern District of California.

1 **XII. Effect of this Order**

2 The foregoing order represents the best estimate of the Court and the parties as to the
3 agenda most suitable to dispose of this case. The trial date reserved is specifically reserved for
4 this case. If the parties determine at any time that the schedule outlined in this order cannot be
5 met, counsel are ordered to notify the Court immediately of that fact so that adjustments may be
6 made, either by stipulation or by subsequent status conference.

7 Stipulations extending the deadlines contained herein will not be considered unless they
8 are accompanied by affidavits or declarations, and where appropriate attached exhibits, which
9 establish good cause for granting the relief requested.

10 Failure to comply with this order may result in the imposition of sanctions, including but
11 not limited to, dismissal of this action.

12
13 **IT IS SO ORDERED.**

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16 **Dated: January 12, 2009**

/s/ Gary S. Austin

UNITED STATES MAGISTRATE JUDGE