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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EXCELSIOR METALS, INC., a
California corporation,

Plaintiff,

v.

HAN-KWANG USA, INC., an Illinois
corporation; and DOES 1 through
100, inclusive,

Defendants.

) 1:10-cv-2033 OWW SMS
)
) SCHEDULING CONFERENCE ORDER
)
) Discovery Cut-Off: 8/15/11
)
) Non-Dispositive Motion
) Filing Deadline: 8/30/11
)
) Non-Dispositive Motion
) Hearing Date: 9/30/11 9:00
) Ctrm. 7
)
) Dispositive Motion Filing
) Deadline: 9/15/11
)
) Dispositive Motion Hearing
) Date: 10/17/11 10:00 Ctrm.
) 3
)
) Settlement Conference Date:
) 8/23/11 10:30 Ctrm. 7
)
) Pre-Trial Conference Date:
) 11/21/11 11:00 Ctrm. 3
)
) Trial Date: 1/10/12 9:00
) Ctrm. 3 (JT-10 days)

I. Date of Scheduling Conference.
April 20, 2011.

II. Appearances Of Counsel.
Lang, Richert & Patch by Matthew W. Quall, Esq., appeared on

1 behalf of Plaintiff.

2 Baker Manock & Jensen, PC by Louis D. Torch, Esq., appeared
3 on behalf of Defendants.

4 III. Summary of Pleadings.

5 1. On or about December 20, 2006 Excelsior and Han-Kwang
6 entered into a sales agreement (hereinafter "Original Agreement")
7 for the purchase and sale of two laser cutting machines and an
8 automated loading/unloading system described as Hankwang Model
9 FL3015 (hereinafter "the System"). Pursuant to the terms of the
10 Original Agreement, Excelsior issued a \$150,000.00 installment
11 payment to Han-Kwang - which was to be applied against the
12 \$1,132,687.50 purchase price - on or about January 24, 2007 and
13 the System was shipped to Excelsior shortly thereafter.

14 2. Subsequent to delivery and testing, Excelsior
15 determined that the System did not perform to its satisfaction.
16 After negotiation, the parties entered into a new agreement dated
17 July 21, 2008 (hereinafter "Amended Agreement"). Under the
18 Amended Agreement, Han-Kwang agreed to replace the existing
19 loading/unloading system (hereafter "New System") and to
20 substitute a new purchase price of \$1,002,500.00 taking into
21 account and crediting the previously issued \$150,000.00
22 installment. Excelsior was to make an immediate payment of
23 \$625,000.00 upon execution of the Amended Agreement. Thereafter,
24 two separate payments which would satisfy the remaining purchase
25 price were contemplated. The first payment of \$100,000.00 was to
26 be issued if the New System met the "Successful System"
27 installation and testing provisions articulated in the Amended

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1 Agreement.¹ The second payment of \$127,500 was to be issued if
2 the New System again met the "Successful System" requirements 90
3 days after the first successful test.

4 3. Excelsior claims that the New System failed to meet the
5 requirements of a "Successful System" and therefore, it is
6 absolved of any obligation to remit the final two payments under
7 the Amended Agreement. Additionally, Excelsior claims that it is
8 entitled to receive warranty services from Han-Kwang and in
9 accord with the Amended Agreement, that it is entitled to keep
10 the system at no additional cost. Excelsior also seeks
11 compensation for damages incurred as a result of the alleged
12 system failure, and for declaratory relief regarding its
13 entitlement to warranty services. Contrarily, Han-Kwang contends
14 that the New System performed satisfactorily, that Excelsior
15 indicated to Han-Kwang that the New System met the standards of a
16 "Successful System" as defined in the Amended Agreement, and that
17 Excelsior's failure to remit payment is wrongful. Furthermore,
18 Han-Kwang alleges that Excelsior has failed to reasonably and
19 properly maintain the New System, dispensing with the requirement
20 to render warranty services. Han-Kwang seeks to recover the
21 final two payments totaling \$227,500.00 plus interest, and for
22 declaratory relief regarding its requirement to provide warranty
23

24 ¹ Paragraph 8 of the Amended Agreement defines "Successful
25 System" as one that would function for "24 hours of unmanned
26 operation for two consecutive days subject to system operator's
27 strict compliance with the operation guidelines as set out by Han
28 Kwang and attached herewith as Exhibit B." Pursuant to the
Amended Agreement all testing of the new system would take place
six months from the execution of the Amended Agreement.

1 services.

2 IV. Orders Re Amendments To Pleadings.

3 1. The parties do not anticipate amending the pleadings at
4 this time.

5 V. Factual Summary.

6 A. Admitted Facts Which Are Deemed Proven Without Further
7 Proceedings.

8 1. Plaintiff Excelsior Metals, Inc., is a California
9 corporation qualified to do and doing business in the State of
10 California.

11 2. Han-Kwang USA, Inc., is an Illinois corporation
12 doing business for the purposes of this lawsuit as alleged in the
13 State of California.

14 3. It is uncontested that Excelsior and Han-Kwang
15 entered into an agreement on or about December 20, 2006, for the
16 purchase and sale of two laser cutting machines and an automated
17 loading/unloading system (the "Original Agreement").

18 4. It is uncontested that the purchase price under
19 the Original Agreement was \$1,132,687.50. Further, it is
20 uncontested that the loading/unloading system was installed and
21 Excelsior made a \$150,000.00 installment payment pursuant to the
22 Original Agreement.

23 5. It is uncontested that Paragraph 8 of the Amended
24 Agreement defines "Successful System" as one that would function
25 for "24 hours of unmanned operation for two consecutive days
26 subject to system operator's strict compliance with the operation
27 guidelines as set out by Han-Kwang and attached herewith at
28 Exhibit B." It is further uncontested that all testing of the

1 new system would take place six months from the execution of the
2 Amended Agreement.

3 6. It is uncontested that Excelsior and Han-Kwang
4 entered into an amended agreement dated July 21, 2008 (the
5 "Amended Agreement"). The Amended Agreement called for a new
6 loading/unloading system to be installed with a new purchase
7 price of \$1,002,500.00 to be paid in specified installments.

8 7. It is uncontested that the new loading/unloading
9 system was installed and Excelsior paid the first installment of
10 \$625,000.00 pursuant to the Amended Agreement. It is further
11 uncontested that Excelsior was to pay the sum of \$100,000.00 upon
12 the installation and successful testing of a "Successful System."
13 It is further uncontested that Excelsior was to pay the remaining
14 balance of \$127,500.00 if the New System again met the
15 "Successful System" provisions 90 days after the first successful
16 test.

17 8. It is uncontested that Excelsior has not paid, nor
18 has Han-Kwang received, the remaining \$227,500.00 balance of the
19 purchase price under the Amended Agreement.

20 9. It is uncontested that Paragraph 3 of the Amended
21 Agreement states, "Seller shall include four (4) resonator
22 rebuilt kits, operator training, documentation of machine,
23 automation, and all alarms and system error codes with the new
24 system."

25 B. Contested Facts.

26 1. All other facts are contested.

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1 VI. Legal Issues.

2 A. Uncontested.

3 1. Jurisdiction exists under 28 U.S.C. § 1332.

4 2. Venue is proper under 28 U.S.C. § 1391.

5 3. The parties agree, in this diversity action, the
6 substantive law of the State of California provides the rule of
7 decision.

8 4. It is undisputed that the prevailing party shall
9 be entitled to attorneys fees as articulated in the Amended
10 Agreement.

11 B. Contested.

12 1. It is disputed whether Excelsior and Han-Kwang
13 performed all of their respective obligations under the Amended
14 Agreement.

15 2. It is disputed whether Excelsior accepted the New
16 System following initial testing of said system.

17 3. It is disputed whether Excelsior expressly waived
18 the six month testing deadline.

19 4. It is disputed whether Excelsior is entitled to
20 warranty service from Han-Kwang. Specifically, the parties
21 dispute whether Paragraph 9 of the Amended Agreement is void and
22 unenforceable.

23 VII. Consent to Magistrate Judge Jurisdiction.

24 1. The parties have not consented to transfer the
25 case to the Magistrate Judge for all purposes, including trial.

26 VIII. Corporate Identification Statement.

27 1. Any nongovernmental corporate party to any action in
28 this court shall file a statement identifying all its parent

1 corporations and listing any entity that owns 10% or more of the
2 party's equity securities. A party shall file the statement with
3 its initial pleading filed in this court and shall supplement the
4 statement within a reasonable time of any change in the
5 information.

6 IX. Discovery Plan and Cut-Off Date.

7 1. The parties have met and conferred pursuant to this
8 Court's order and Federal Rule of Civil Procedure 26(f).

9 2. The parties agree that Initial Disclosures will be made
10 within 30 days after the Joint Scheduling Conference.

11 3. Plaintiff and Defendant propose to conduct discovery in
12 accordance with the limits set forth by the Federal Rules of
13 Civil Procedure.

14 4. Plaintiff and Defendant do not seek a timetable for
15 discovery outside of the Court's scheduling order. The parties
16 do not believe that discovery should be conducted in phases or
17 limited to particular issues. Each party needs discovery on all
18 areas relevant to its particular claims.

19 5. The parties propose that any expert witness exchange be
20 simultaneous and that they be made sixty (60) days before the
21 discovery cut-off date, with supplemental disclosure thirty (30)
22 days later.

23 The following schedule is adopted for the case:

24 1. The parties' initial disclosures shall be made on or
25 before May 18, 2011.

26 2. The parties are ordered to complete all non-expert
27 discovery on or before June 15, 2011.

28 3. The parties are directed to disclose all expert

1 witnesses, in writing, on or before June 15, 2011. Any rebuttal
2 or supplemental expert disclosures will be made on or before July
3 15, 2011. The parties will comply with the provisions of Federal
4 Rule of Civil Procedure 26(a)(2) regarding their expert
5 designations. Local Rule 16-240(a) notwithstanding, the written
6 designation of experts shall be made pursuant to F. R. Civ. P.
7 Rule 26(a)(2), (A) and (B) and shall include all information
8 required thereunder. Failure to designate experts in compliance
9 with this order may result in the Court excluding the testimony
10 or other evidence offered through such experts that are not
11 disclosed pursuant to this order.

12 4. The parties are ordered to complete all discovery,
13 including experts, on or before August 15, 2011.

14 5. The provisions of F. R. Civ. P. 26(b)(4) shall
15 apply to all discovery relating to experts and their opinions.
16 Experts shall be fully prepared to be examined on all subjects
17 and opinions included in the designation and their reports, which
18 shall include every opinion to be rendered and all reasons for
19 each opinion. Failure to comply will result in the imposition of
20 sanctions.

21 X. Pre-Trial Motion Schedule.

22 1. All Non-Dispositive Pre-Trial Motions, including any
23 discovery motions, shall be filed on or before August 30, 2011,
24 and heard on September 30, 2011, at 9:00 a.m. before Magistrate
25 Judge Sandra M. Snyder in Courtroom 7.

26 2. In scheduling such motions, the Magistrate
27 Judge may grant applications for an order shortening time
28 pursuant to Local Rule 142(d). However, if counsel does not

1 obtain an order shortening time, the notice of motion must comply
2 with Local Rule 251 and this schedule.

3 3. All Dispositive Pre-Trial Motions are to be
4 filed no later than September 15, 2011, and will be heard on
5 October 17, 2011, at 10:00 a.m. before the Honorable Oliver W.
6 Wanger, in Courtroom 3, 7th Floor. In scheduling such motions,
7 counsel shall comply with Local Rule 230.

8 XI. Pre-Trial Conference Date.

9 1. November 21, 2011, at 11:00 a.m. in Courtroom 3, 7th
10 Floor, before the Honorable Oliver W. Wanger.

11 2. The parties are ordered to file a Joint Pre-
12 Trial Statement pursuant to Local Rule 281(a)(2).

13 3. Counsel's attention is directed to Rules 281
14 and 282 of the Local Rules of Practice for the Eastern District
15 of California, as to the obligations of counsel in preparing for
16 the pre-trial conference. The Court insists upon strict
17 compliance with those rules.

18 XII. Motions - Hard Copy.

19 1. The parties shall submit one (1) courtesy paper copy to
20 the Court of any motions filed. Exhibits shall be marked with
21 protruding numbered or lettered tabs so that the Court can easily
22 identify such exhibits.

23 XIII. Trial Date.

24 1. January 10, 2012, at the hour of 9:00 a.m. in Courtroom
25 3, 7th Floor, before the Honorable Oliver W. Wanger, United
26 States District Judge.

27 2. This is a jury trial.

28 3. Counsels' Estimate Of Trial Time:

1 a. Seven to ten days.

2 4. Counsels' attention is directed to Local Rules
3 of Practice for the Eastern District of California, Rule 285.
4 XIV. Settlement Conference.

5 1. Both parties have not agreed to the Voluntary Dispute
6 Resolution Program, however, an early Settlement Conference will
7 be set as soon as the parties believe enough discovery has been
8 conducted. The parties are directed to contact the Courtroom
9 Deputy for Sandra M. Snyder to schedule an early Settlement
10 Conference.

11 2. A regular Settlement Conference is scheduled for August
12 23, 2011, at 10:30 a.m. in Courtroom 7 before the Honorable
13 Sandra M. Snyder, United States Magistrate Judge.

14 3. Unless otherwise permitted in advance by the
15 Court, the attorneys who will try the case shall appear at the
16 Settlement Conference with the parties and the person or persons
17 having full authority to negotiate and settle the case on any
18 terms at the conference.

19 4. Permission for a party [not attorney] to attend
20 by telephone may be granted upon request, by letter, with a copy
21 to the other parties, if the party [not attorney] lives and works
22 outside the Eastern District of California, and attendance in
23 person would constitute a hardship. If telephone attendance is
24 allowed, the party must be immediately available throughout the
25 conference until excused regardless of time zone differences.
26 Any other special arrangements desired in cases where settlement
27 authority rests with a governing body, shall also be proposed in
28 advance by letter copied to all other parties.

1 5. Confidential Settlement Conference Statement.

2 At least five (5) days prior to the Settlement Conference the
3 parties shall submit, directly to the Magistrate Judge's
4 chambers, a confidential settlement conference statement. The
5 statement should not be filed with the Clerk of the Court nor
6 served on any other party. Each statement shall be clearly
7 marked "confidential" with the date and time of the Settlement
8 Conference indicated prominently thereon. Counsel are urged to
9 request the return of their statements if settlement is not
10 achieved and if such a request is not made the Court will dispose
11 of the statement.

12 6. The Confidential Settlement Conference

13 Statement shall include the following:

14 a. A brief statement of the facts of the
15 case.

16 b. A brief statement of the claims and
17 defenses, i.e., statutory or other grounds upon which the claims
18 are founded; a forthright evaluation of the parties' likelihood
19 of prevailing on the claims and defenses; and a description of
20 the major issues in dispute.

21 c. A summary of the proceedings to date.

22 d. An estimate of the cost and time to be
23 expended for further discovery, pre-trial and trial.

24 e. The relief sought.

25 f. The parties' position on settlement,
26 including present demands and offers and a history of past
27 settlement discussions, offers and demands.

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1 XV. Request For Bifurcation, Appointment Of Special Master,
2 Or Other Techniques To Shorten Trial.

3 1. If the parties agree, the case shall be phased. In the
4 event they do not agree, the issue shall be addressed by motion
5 in limine.

6 XVI. Related Matters Pending.

7 1. There are no related matters.

8 XVII. Compliance With Federal Procedure.

9 1. The Court requires compliance with the Federal
10 Rules of Civil Procedure and the Local Rules of Practice for the
11 Eastern District of California. To aid the court in the
12 efficient administration of this case, all counsel are directed
13 to familiarize themselves with the Federal Rules of Civil
14 Procedure and the Local Rules of Practice of the Eastern District
15 of California, and keep abreast of any amendments thereto.

16 XVIII. Effect Of This Order.

17 1. The foregoing order represents the best
18 estimate of the court and counsel as to the agenda most suitable
19 to bring this case to resolution. The trial date reserved is
20 specifically reserved for this case. If the parties determine at
21 any time that the schedule outlined in this order cannot be met,
22 counsel are ordered to notify the court immediately of that fact
23 so that adjustments may be made, either by stipulation or by
24 subsequent scheduling conference.

25 2. Stipulations extending the deadlines contained
26 herein will not be considered unless they are accompanied by
27 affidavits or declarations, and where appropriate attached
28 exhibits, which establish good cause for granting the relief

1 requested.

2 3. Failure to comply with this order may result in
3 the imposition of sanctions.

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5 IT IS SO ORDERED.

6 Dated: April 20, 2011

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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