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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KENNETH L. CRAWFORD, et al.,

 Plaintiffs,

 v.

ZACHARIA MELZER, et al.,

 Defendants.

Case No.: CV 10-00280 RS (PSG)

**ORDER DENYING MOTION TO
COMPEL RESPONSE TO REQUEST
FOR PRODUCTION NO. 23;
DENYING RELATED MOTION FOR
SANCTIONS; DENYING MOTION TO
COMPEL RESPONSE TO
INTERROGATORY NO. 5; DENYING
RELATED MOTION FOR
SANCTIONS**

(Re: Docket Nos. 86, 88, 89, 92)

On February 11, 2011, Plaintiff Kenneth Crawford ("Crawford") filed motions to compel Defendant Tova Industries, LLC's ("Tova") to produce further responses to Crawford's request for production of documents no. 23¹ and to special interrogatory no. 5.² Crawford also submitted two related motions for sanctions.³

¹ See 2/11/11 Mot. To Compel Defs.' Further Responses Pls.' Request Prod. Docs. No. 23 (Docket No. 86).

² See 2/11/11 Mot. To Compel Defs.' Further Responses Special Interrog. No. 5 (Docket No. 89).

³ See 2/11/11 First Mot. Sanctions Against Defs. Purusant FRCP 37 Relation Pls.' Mot To Compel Further Responses Pls.' Request Prod. Docs. No. 23 (Docket No. 88); 2/11/11 Mot. Sanctions Against Defs. Pursuant FRCP 37 Relation Pls.' Mot To Compel Further Responses Special

1 Crawford initially served special interrogatory no. 5 on April 23, 2010. Tova responded
2 on June 1, 2010, objecting that “the information sought is neither relevant nor reasonably
3 calculated to lead to the discovery of admissible evidence.” Crawford initially served the request
4 for production of documents no. 23 on October 13, 2010. Tova responded on October 21, 2010,
5 objecting that “it is an exact duplicate of an earlier request,” and stating that “Defendants have
6 produced responsive documents already.” On February 25, 2011, the same day it filed its
7 opposition to these motions to compel, Tova served supplemental responses to these discovery
8 requests.

9 **I. MOTION TO COMPEL RESPONSES TO INTERROGATORY NO. 5**

10 For the reasons below, the motion to compel responses to interrogatory no. 5 is DENIED.

11 Tova’s supplemental response would appear to moot Crawford’s motion. In his reply
12 brief, however, Crawford argues the supplemental responses are themselves flawed and further
13 responses are required. Crawford argues that the preliminary statement prefacing the
14 supplemental responses is a meritless objection that discovery is ongoing, which renders the
15 response and the written oath by the respondent meaningless. Contrary to Crawford’s claims, the
16 preliminary statement is not stated as an objection. Rather it merely states that the responses are
17 based upon information that is presently available to and known by Tova. The preliminary
18 statement also claims that Tova reserves the right to modify and amend its responses as it learns
19 new information, which is merely a restatement of its duty to do so under Fed. R. Civ. P. 26(e).
20 Tova then proceeds to provide the requested discovery. The preliminary statement does not
21 negate the subsequent responses.

22 Crawford also argues that Tova’s supplemental response to interrogatory no. 5 is
23 insufficient because Tova did not withdraw its objection that the interrogatory seeks irrelevant
24 information. Despite its objection, Tova answers the interrogatory in its supplemental response.
25 Crawford does not argue that the information provided is incomplete; Crawford only argues that
26 the objection to relevance makes that information defective. Crawford cites no law that would
27 require a party to withdraw an objection to a request for discovery preserving an admissibility

28 Interrog. No. 5 (Docket No. 92).

1 challenge after it has fully responded to that discovery. Tova has provided the requested
2 disclosure; Crawford has not identified any further discovery for the court to compel.

3 **II. MOTIONS FOR SANCTIONS RELATING TO RESPONSES TO INTERROGATORY NO. 5**

4 For the reasons stated below, the motion for sanctions related to the motion to compel
5 responses to interrogatory no. 5 is DENIED.

6 Crawford filed a motion for sanctions pursuant to Fed. R. Civ. P. 37(a)(5)(A) requesting
7 \$5,000 in sanctions. If a motion to compel is granted, or as in this instance, the requested
8 discovery is provided after the motion was filed, Fed. R. Civ. P. 37(a)(5)(A) provides for “the
9 movant’s reasonable expenses incurred in making the motion, including attorney’s fees.”
10 Sanctions, however, should not be awarded if (1) Crawford filed the motion before attempting in
11 good faith to obtain the disclosure or discovery without court action; (2) Tova’s nondisclosure,
12 response, or objection was substantially justified; or (3) other circumstances make an award of
13 expenses unjust.

14 The court finds that Tova’s objection to the relevance of interrogatory no. 5 was not
15 substantially justified. Tova objected because the interrogatory was irrelevant to Tova’s theory of
16 the case that “the underlying agreement is a sale of some of the assets of New Horizon Foods
17 division of Tova Industries, LLC. [Crawford] continue[s] to treat this as the sale of a business
18 rather than an asset sale.”⁴ In fact, in their motion to dismiss, Defendants argued the same point –
19 that the underlying transaction was only a sale of assets and not of an ongoing business – and
20 Judge Seeborg found the argument unpersuasive.⁵ Despite Tova’s argument about the underlying
21 agreement, the interrogatory is directly relevant to claims in Crawford’s Complaint,⁶ and Tova is
22 “not allowed to limit discovery based merely upon [its] theory of the case.”⁷

23 Tova argues that sanctions are nonetheless inappropriate because Crawford did not make a
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25 ⁴ Decl. David M. Gilmore Supp. Joint Opp’n ¶ 4 (Docket No. 105).

26 ⁵ See Order Denying Mot. Dismiss at 2:12-25 (Docket No. 46).

27 ⁶ See, e.g., Amended Complaint (Docket No. 14) ¶¶ 23-25.

28 ⁷ *Humphreys v. Regents of University of Cal.*, No. 04-0308, 2006 WL 870963, at *2 (N.D. Cal. Apr. 3, 2006).

1 good faith effort to obtain the discovery through non-judicial channels. Tova contends that
2 Crawford merely demanded supplemental responses even after it had already produced the
3 information. Although Tova states it had already provided documents containing the information
4 requested by interrogatory no. 5, Tova failed to comply with the requirement of Fed. R. Civ. P.
5 33(d) to specifically identify those documents in response to the interrogatory. In contrast to
6 Tova's claims about meet-and-confer efforts, Crawford has submitted emails asking Tova for
7 supplemental responses to interrogatories, including interrogatory no. 5, before the motion was
8 filed.⁸ Thus, Crawford has demonstrated that it attempted to obtain the discovery without court
9 action.

10 The court, however, finds that circumstances exist that would make an award of expenses
11 for filing the motion to compel a supplemental response to interrogatory no. 5 unjust. In its
12 response to interrogatory no. 5, Tova claimed to have already produced the requested information,
13 but Tova failed to specify which documents contained that information. The court finds that this
14 failure alone does not justify sanctions. Thus, the motion for sanctions is denied.

15 Furthermore, the motion for sanctions is procedurally defective. Under Civ. L.R. 37-4,
16 when, in connection with a dispute about disclosure or discovery, a party moves for an award of
17 attorney fees or other form of sanction under Fed. R. Civ. P. 37, the motion must be accompanied
18 by competent declarations which itemize with particularity the otherwise unnecessary expenses,
19 including attorney fees, directly caused by the alleged violation, and set forth an appropriate
20 justification for any attorney-fee hourly rate claimed.

21 Crawford has not met this requirement. Crawford did not submit a declaration in support
22 of his motion for sanctions. The only indication of the basis for the amount of sanctions requested
23 is found in the declaration of Scott Mangum ("Mangum") in support of the motion to compel,
24 stating "[m]y billing rate is \$270 and I will spend approximately 10 hours on this motion."⁹ This
25 statement does not provide any justification for sanctions in the amount of the \$5000 requested.

27 ⁸ See Decl. Scott Mangum Supp. Mot. To Compel Defs.' Further Responses Special Interrog.
28 No. 5 Ex. B (Docket No. 90).

⁹ Mangum Decl. ¶ 4 (Docket No. 90).

1 Furthermore, it is unclear from this statement how many hours Mangum actually worked on the
2 motion to compel, as opposed to how many hours he estimated he would work. It is also not clear
3 whether the estimated ten hours includes time for preparing the reply to the opposition to the
4 motion to compel or oral argument regarding the motion to compel, neither of which were
5 necessary after supplemental responses were served.

6 **III. MOTION TO COMPEL RESPONSES TO REQUEST FOR PRODUCTION NO. 23**

7 For the reasons below, the motion to compel responses to request for production no. 23 is
8 DENIED.

9 With regard to the supplemental response to request for production no. 23, Crawford
10 argues it is evasive and contains meritless objections. Request for production no. 23 requires
11 “[a]ll documents that [Tova] contend[s] Mr. Crawford ‘was given the opportunity to review’ as
12 referenced in [Tova’s] response to interrogatory no. 1.”¹⁰ The complete sentence at issue from
13 Tova’s response to interrogatory no. 1 is, “Crawford traveled to Kentucky and was given the
14 opportunity to review all the books and records of New Horizon Foods on premises at Tova.”¹¹
15 In response to request for production no. 23, Tova responded that it objected “on the ground that
16 [this request] is an exact duplicate of an earlier request. However, without waiving the
17 objections, Defendants have produced responsive documents already.”¹² Tova supplemented its
18 response to request for production no. 23 to state that, “Crawford was given the opportunity to
19 review any new Horizon Foods documents he requested that were maintained for the New
20 Horizon Foods division at Tova Industries, LLC. . . . Tova has produced all responsive
21 documents that Mr. Crawford reviewed.”¹³

22 Crawford first took issue with the original response because it is not clear whether Tova
23 produced responsive documents already or produced *all* responsive documents already. Crawford
24 now takes issue with the supplemental response because the phrase “that Mr. Crawford reviewed”

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26 ¹⁰ Mangum Decl. Ex. A at 3:1-3 (Docket No. 87).

27 ¹¹ Mangum Decl. Ex. B at 4 (Docket No. 87).

28 ¹² Gilmore Decl. Ex. 1 (Docket No. 105).

¹³ Gilmore Decl. Ex. 1 (Docket No. 105).

1 qualifies the set of responsive documents that Tova claims it produced. As a result, Crawford
2 argues it is ambiguous whether Tova means that it has already produced all responsive documents
3 or merely all responsive documents *that Crawford actually reviewed*. Crawford asks the court to
4 order Tova to withdraw its objections and preliminary statement and to state, if it can do so
5 truthfully, that “Tova has produced all responsive documents in its possession or control.”

6 Based on Tova’s response to interrogatory no. 1, Crawford had the opportunity to review
7 “all the books and records of New Horizon Foods on premises at Tova.” From Tova’s response
8 to request for production no. 23, it is not clear whether it has produced all the books and records
9 of New Horizon Foods on premises at Tova. Crawford, however, has not established why that
10 entire universe of documents is relevant to Crawford’s claims. Although Tova claims Crawford
11 could have asked to look at any of those documents while he was conducting his due diligence,
12 that fact alone does not justify an order compelling production of every single Tova document in
13 existence at the time of Crawford’s due diligence. This is especially true where Crawford has not
14 identified any *specific* category of documents beyond those Crawford actually reviewed that would
15 be relevant to Crawford’s claims or to Tova’s defenses.

16 **IV. MOTIONS FOR SANCTIONS RELATING TO RESPONSES TO REQUEST FOR PRODUCTION NO. 23**

17 Although Tova’s initial response to request for production no. 23 was not substantially
18 justified, in the absence of an appropriate showing by Crawford, its nondisclosure of documents
19 beyond those Crawford had reviewed was substantially justified. Crawford’s related motion for
20 sanctions is therefore DENIED.

21 Dated: March 23, 2011

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23 PAUL S. GREWAL
24 United States Magistrate Judge
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