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 MELZER, TOVA INDUSTRIES, LLC, a
 6 Kentucky limited liability company

7

8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

10

11 KENNETH L. CRAWFORD, NEW
 HORIZON FOODS, INC., a California
 12 corporation,

13 Plaintiffs,

14 v.

15 ZACHARIA MELZER, YAEL MELZER,
 TOVA INDUSTRIES, LLC, a Kentucky
 16 limited liability company,

17 Defendants.

CASE NO. C 10-00280 RS

STIPULATED PROTECTIVE ORDER

Judge: Hon. Hon. Richard Seeborg

18

19 1. PURPOSES AND LIMITATIONS

20 Disclosure and discovery activity in this action are likely to involve

21 production of confidential, proprietary, or private information for which special protection

22 from public disclosure and from use for any purpose other than prosecuting this litigation

23 may be warranted. Accordingly, the parties hereby stipulate to and petition the court to

24 enter the following Stipulated Protective Order. The parties acknowledge that this Order

25 does not confer blanket protections on all disclosures or responses to discovery and that the

26 protection it affords from public disclosure and use extends only to the limited information

27 or items that are entitled to confidential treatment under the applicable legal principles.

28 The parties further acknowledge, as set forth in Section 8, below, that this Stipulated

1 Protective Order does not entitle them to file confidential information under seal; Civil
2 Local Rule 79-5 sets forth the procedures that must be followed and the standards that will
3 be applied when a party seeks permission from the court to file material under seal.

4 2. DEFINITIONS

5 2.1 Challenging Party: a Party or Non-Party that challenges the
6 designation of information or items under this Order.

7 2.2 "CONFIDENTIAL" Information or Items: information
8 (regardless of how it is generated, stored or maintained) or tangible things that qualify for
9 protection under Federal Rule of Civil Procedure 26(c).

10 2.3 Counsel (without qualifier): Outside Counsel of Record and
11 House Counsel (as well as their support staff).

12 2.4 Designating Party: a Party or Non-Party that designates
13 information or items that it produces in disclosures or in responses to discovery as
14 "CONFIDENTIAL."

15 2.5 Disclosure or Discovery Material: all items or information,
16 regardless of the medium or manner in which it is generated, stored, or maintained
17 (including, among other things, testimony, transcripts, and tangible things), that are
18 produced or generated in disclosures or responses to discovery in this matter.

19 2.6 Expert: a person with specialized knowledge or experience in a
20 matter pertinent to the litigation who has been retained by a Party or its counsel to serve as
21 an expert witness or as a consultant in this action.

22 2.7 House Counsel: attorneys who are employees of a party to this
23 action. House Counsel does not include Outside Counsel of Record or any other outside
24 counsel.

25 2.8 Non-Party: any natural person, partnership, corporation,
26 association, or other legal entity not named as a Party to this action.

27 2.9 Outside Counsel of Record: attorneys who are not employees
28 of a party to this action but are retained to represent or advise a party to this action and

1 have appeared in this action on behalf of that party or are affiliated with a law firm which
2 has appeared on behalf of that party.

3 2.10 Party: any party to this action, including all of its officers,
4 directors, employees, consultants, retained experts, and Outside Counsel of Record (and
5 their support staffs).

6 2.11 Producing Party: a Party or Non-Party that produces Disclosure
7 or Discovery Material in this action.

8 2.12 Professional Vendors: persons or entities that provide litigation
9 support services (e.g., photocopying, videotaping, translating, preparing exhibits or
10 demonstrations, and organizing, storing, or retrieving data in any form or medium) and
11 their employees and subcontractors.

12 2.13 Protected Material: any Disclosure or Discovery Material that
13 is designated as "CONFIDENTIAL."

14 2.14 Receiving Party: a Party that receives Disclosure or Discovery
15 Material from a Producing Party.

16 3. SCOPE

17 The protections conferred by this Stipulation and Order cover not only
18 Protected Material (as defined above), but also (1) any information copied or extracted
19 from Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected
20 Material; and (3) any testimony, conversations, or presentations by Parties or their Counsel
21 that might reveal Protected Material. However, the protections conferred by this
22 Stipulation and Order do not cover the following information: (a) any information that is in
23 the public domain at the time of disclosure to a Receiving Party or becomes part of the
24 public domain after its disclosure to a Receiving Party as a result of publication not
25 involving a violation of this Order, including becoming part of the public record through
26 trial or otherwise; and (b) any information known to the Receiving Party prior to the
27 disclosure or obtained by the Receiving Party after the disclosure from a source who
28 obtained the information lawfully and under no obligation of confidentiality to the

1 Designating Party. Any use of Protected Material at trial shall be governed by a separate
2 agreement or order.

3 4. DURATION

4 Even after final disposition of this litigation, the confidentiality obligations
5 imposed by this Order shall remain in effect until a Designating Party agrees otherwise in
6 writing or a court order otherwise directs. Final disposition shall be deemed to be the later
7 of (1) dismissal of all claims and defenses in this action, with or without prejudice; and (2)
8 final judgment herein after the completion and exhaustion of all appeals, rehearings,
9 remands, trials, or reviews of this action, including the time limits for filing any motions or
10 applications for extension of time pursuant to applicable law.

11 5. DESIGNATING PROTECTED MATERIAL

12 5.1 Exercise of Restraint and Care in Designating Material for
13 Protection. Each Party or Non-Party that designates information or items for protection
14 under this Order must take care to limit any such designation to specific material that
15 qualifies under the appropriate standards. The Designating Party must designate for
16 protection only those parts of material, documents, items, or oral or written
17 communications that qualify – so that other portions of the material, documents, items, or
18 communications for which protection is not warranted are not swept unjustifiably within
19 the ambit of this Order.

20 Mass, indiscriminate, or routinized designations are prohibited. Designations
21 that are shown to be clearly unjustified or that have been made for an improper purpose
22 (e.g., to unnecessarily encumber or retard the case development process or to impose
23 unnecessary expenses and burdens on other parties) expose the Designating Party to
24 sanctions.

25 If it comes to a Designating Party's attention that information or items that it
26 designated for protection do not qualify for protection, that Designating Party must
27 promptly notify all other Parties that it is withdrawing the mistaken designation.

28 5.2 Manner and Timing of Designations. Except as otherwise

1 provided in this Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise
2 stipulated or ordered, Disclosure or Discovery Material that qualifies for protection under
3 this Order must be clearly so designated before the material is disclosed or produced.

4 Designation in conformity with this Order requires:

5 a. for information in documentary form (e.g., paper or electronic
6 documents, but excluding transcripts of depositions or other pretrial or trial proceedings),
7 that the Producing Party affix the legend "CONFIDENTIAL" to each page that contains
8 protected material. If only a portion or portions of the material on a page qualifies for
9 protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by
10 making appropriate markings in the margins).

11 A Party or Non-Party that makes original documents or materials available
12 for inspection need not designate them for protection until after the inspecting Party has
13 indicated which material it would like copied and produced. During the inspection and
14 before the designation, all of the material made available for inspection shall be deemed
15 "CONFIDENTIAL." After the inspecting Party has identified the documents it wants
16 copied and produced, the Producing Party must determine which documents, or portions
17 thereof, qualify for protection under this Order. Then, before producing the specified
18 documents, the Producing Party must affix the "CONFIDENTIAL" legend to each page
19 that contains Protected Material. If only a portion or portions of the material on a page
20 qualifies for protection, the Producing Party also must clearly identify the protected
21 portion(s) (e.g., by making appropriate markings in the margins).

22 b. for testimony given in deposition or in other pretrial or trial
23 proceedings, that the Designating Party identify on the record, before the close of the
24 deposition, hearing, or other proceeding, all protected testimony.

25 c. for information produced in some form other than documentary and
26 for any other tangible items, that the Producing Party affix in a prominent place on the
27 exterior of the container or containers in which the information or item is stored the legend
28 "CONFIDENTIAL." If only a portion or portions of the information or item warrant

1 protection, the Producing Party, to the extent practicable, shall identify the protected
2 portion(s).

3 5.3 Inadvertent Failures to Designate. If timely corrected, an
4 inadvertent failure to designate qualified information or items does not, standing alone,
5 waive the Designating Party's right to secure protection under this Order for such material.
6 Upon timely correction of a designation, the Receiving Party must make reasonable efforts
7 to assure that the material is treated in accordance with the provisions of this Order.

8 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

9 6.1 Timing of Challenges. Any Party or Non-Party may challenge
10 a designation of confidentiality at any time. Unless a prompt challenge to a Designating
11 Party's confidentiality designation is necessary to avoid foreseeable, substantial unfairness,
12 unnecessary economic burdens, or a significant disruption or delay of the litigation, a Party
13 does not waive its right to challenge a confidentiality designation by electing not to mount
14 a challenge promptly after the original designation is disclosed.

15 6.2 Meet and Confer. The Challenging Party shall initiate the
16 dispute resolution process by providing written notice of each designation it is challenging
17 and describing the basis for each challenge. To avoid ambiguity as to whether a challenge
18 has been made, the written notice must recite that the challenge to confidentiality is being
19 made in accordance with this specific paragraph of the Protective Order. The parties shall
20 attempt to resolve each challenge in good faith and must begin the process by conferring
21 directly (in voice to voice dialogue; other forms of communication are not sufficient)
22 within 14 days of the date of service of notice. In conferring, the Challenging Party must
23 explain the basis for its belief that the confidentiality designation was not proper and must
24 give the Designating Party an opportunity to review the designated material, to reconsider
25 the circumstances, and, if no change in designation is offered, to explain the basis for the
26 chosen designation. A Challenging Party may proceed to the next stage of the challenge
27 process only if it has engaged in this meet and confer process first or establishes that the
28 Designating Party is unwilling to participate in the meet and confer process in a timely

1 manner.

2 6.3 Judicial Intervention. If the Parties cannot resolve a challenge
3 without court intervention, the Designating Party shall file and serve a motion to retain
4 confidentiality under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if
5 applicable) within 21 days of the initial notice of challenge or within 14 days of the parties
6 agreeing that the meet and confer process will not resolve their dispute, whichever is
7 earlier. Each such motion must be accompanied by a competent declaration affirming that
8 the movant has complied with the meet and confer requirements imposed in the preceding
9 paragraph. Failure by the Designating Party to make such a motion including the required
10 declaration within 21 days (or 14 days, if applicable) shall automatically waive the
11 confidentiality designation for each challenged designation. In addition, the Challenging
12 Party may file a motion challenging a confidentiality designation at any time if there is
13 good cause for doing so, including a challenge to the designation of a deposition transcript
14 or any portions thereof. Any motion brought pursuant to this provision must be
15 accompanied by a competent declaration affirming that the movant has complied with the
16 meet and confer requirements imposed by the preceding paragraph.

17 The burden of persuasion in any such challenge proceeding shall be on the
18 Designating Party. Frivolous challenges, and those made for an improper purpose (e.g., to
19 harass or impose unnecessary expenses and burdens on other parties) may expose the
20 Challenging Party to sanctions. Unless the Designating Party has waived the
21 confidentiality designation by failing to file a motion to retain confidentiality as described
22 above, all parties shall continue to afford the material in question the level of protection to
23 which it is entitled under the Producing Party's designation until the court rules on the
24 challenge.

25 7. ACCESS TO AND USE OF PROTECTED MATERIAL

26 7.1 Basic Principles. A Receiving Party may use Protected
27 Material that is disclosed or produced by another Party or by a Non-Party in connection
28 with this case only for prosecuting, defending, or attempting to settle this litigation. Such

1 Protected Material may be disclosed only to the categories of persons and under the
2 conditions described in this Order. When the litigation has been terminated, a Receiving
3 Party must comply with the provisions of section 13 below (FINAL DISPOSITION).

4 Protected Material must be stored and maintained by a Receiving Party at a
5 location and in a secure manner that ensures that access is limited to the persons authorized
6 under this Order.

7 7.2 Disclosure of "CONFIDENTIAL" Information or Items.

8 Unless otherwise ordered by the court or permitted in writing by the Designating Party, a
9 Receiving Party may disclose any information or item designated "CONFIDENTIAL"
10 only to:

- 11 a. the Receiving Party's Outside Counsel of Record in this action, as
12 well as employees of said Outside Counsel of Record to whom it is reasonably necessary
13 to disclose the information for this litigation and who have signed the "Acknowledgment
14 and Agreement to Be Bound" that is attached hereto as Exhibit A;
- 15 b. the officers, directors, and employees (including House Counsel) of
16 the Receiving Party to whom disclosure is reasonably necessary for this litigation and who
17 have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);
- 18 c. Experts (as defined in this Order) of the Receiving Party to whom
19 disclosure is reasonably necessary for this litigation and who have signed the
20 "Acknowledgment and Agreement to Be Bound" (Exhibit A);
- 21 d. the court and its personnel;
- 22 e. court reporters and their staff, professional jury or trial consultants,
23 mock jurors, and Professional Vendors to whom disclosure is reasonably necessary for this
24 litigation and who have signed the "Acknowledgment and Agreement to Be Bound"
25 (Exhibit A);
- 26 f. during their depositions, witnesses in the action to whom disclosure is
27 reasonably necessary and who have signed the "Acknowledgment and Agreement to Be
28 Bound" (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the

1 court. Pages of transcribed deposition testimony or exhibits to depositions that reveal
2 Protected Material must be separately bound by the court reporter and may not be
3 disclosed to anyone except as permitted under this Stipulated Protective Order.

4 g. the author or recipient of a document containing the information or a
5 custodian or other person who otherwise possessed or knew the information.

6 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED
7 PRODUCED IN OTHER LITIGATION

8 If a Party is served with a subpoena or a court order issued in other litigation
9 that compels disclosure of any information or items designated in this action as
10 “CONFIDENTIAL,” that Party must:

11 a. promptly notify in writing the Designating Party. Such notification
12 shall include a copy of the subpoena or court order;

13 b. promptly notify in writing the party who caused the subpoena or order
14 to issue in the other litigation that some or all of the material covered by the subpoena or
15 order is subject to this Protective Order. Such notification shall include a copy of this
16 Stipulated Protective Order; and

17 c. cooperate with respect to all reasonable procedures sought to be
18 pursued by the Designating Party whose Protected Material may be affected.

19 If the Designating Party timely seeks a protective order, the Party served
20 with the subpoena or court order shall not produce any information designated in this
21 action as “CONFIDENTIAL” before a determination by the court from which the
22 subpoena or order issued, unless the Party has obtained the Designating Party’s
23 permission. The Designating Party shall bear the burden and expense of seeking
24 protection in that court of its confidential material – and nothing in these provisions should
25 be construed as authorizing or encouraging a Receiving Party in this action to disobey a
26 lawful directive from another court.

27 9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE
28 PRODUCED IN THIS LITIGATION

1 a. The terms of this Order are applicable to information produced by a
2 Non-Party in this action and designated as "CONFIDENTIAL." Such information
3 produced by Non-Parties in connection with this litigation is protected by the remedies and
4 relief provided by this Order. Nothing in these provisions should be construed as
5 prohibiting a Non-Party from seeking additional protections.

6 b. In the event that a Party is required, by a valid discovery request, to
7 produce a Non-Party's confidential information in its possession, and the Party is subject
8 to an agreement with the Non-Party not to produce the Non-Party's confidential
9 information, then the Party shall:

10 (1) promptly notify in writing the Requesting Party and the Non-
11 Party that some or all of the information requested is subject to a confidentiality agreement
12 with a Non-Party;

13 (2) promptly provide the Non-Party with a copy of the Stipulated
14 Protective Order in this litigation, the relevant discovery request(s), and a reasonably
15 specific description of the information requested; and

16 (3) make the information requested available for inspection by the
17 Non-Party.

18 c. If the Non-Party fails to object or seek a protective order from this
19 court within 14 days of receiving the notice and accompanying information, the Receiving
20 Party may produce the Non-Party's confidential information responsive to the discovery
21 request. If the Non-Party timely seeks a protective order, the Receiving Party shall not
22 produce any information in its possession or control that is subject to the confidentiality
23 agreement with the Non-Party before a determination by the court.¹

24 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

25 _____
26 ¹ The purpose of this provision is to alert the interested parties to the existence of
27 confidentiality rights of a Non-Party and to afford the Non-Party an opportunity to protect
28 its confidentiality interests in this court.

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If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify whatever procedure may be established in an e-discovery order that provides for production without prior privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection, the parties may incorporate their agreement in the stipulated protective order submitted to the court.

12. MISCELLANEOUS

12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the court in the future.

12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.


1 12.3 Filing Protected Material. Without written permission from the
2 Designating Party or a court order secured after appropriate notice to all interested persons,
3 a Party may not file in the public record in this action any Protected Material. A Party that
4 seeks to file under seal any Protected Material must comply with Civil Local Rule 79-5.
5 Protected Material may only be filed under seal pursuant to a court order authorizing the
6 sealing of the specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a
7 sealing order will issue only a request establishing that the Protected Material at issue is
8 privileged, protectable as a trade secret, or otherwise entitled to protection under the law.
9 If a Receiving Party's request to file Protected Material under seal pursuant to Civil Local
10 Rule 79-5(d) is denied by the court, then the Receiving Party may file the information in
11 the public record pursuant to Civil Local Rule 79-5(e) unless otherwise instructed by the
12 Court.

13 13. FINAL DISPOSITION. Within 60 days after the final disposition of
14 this action, as defined in paragraph 4, each Receiving Party must return all Protected
15 Material to the Producing Party or destroy such material. As used in this subdivision, "all
16 Protected Material" includes all copies, abstracts, compilations, summaries, and any other
17 format reproducing or capturing any of the Protected Material. Whether the Protected
18 Material is returned or destroyed, the Receiving Party must submit a written certification to
19 the Producing Party (and, if not the same person or entity, to the Designating Party) by the
20 60 day deadline that (1) identifies (by category, where appropriate) all the Protected
21 Material that was returned or destroyed and (2) affirms that the Receiving Party has not
22 retained any copies, abstracts, compilations, summaries or any other format reproducing or
23 capturing any of the Protected Material. Notwithstanding this provision, Counsel are
24 entitled to retain an archival copy of all pleadings, motion papers, trial, deposition, and
25 hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert
26 reports, attorney work product, and consultant and expert work product, even if such
27 materials contain Protected Material. Any such archival copies that contain or constitute
28 Protected Material remain subject to this Protective Order as set forth in Section 4


1 (DURATION).

2 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

3 DATED: 6/11, 2010 GILMORE, WOOD, VINNARD & MAGNESS

4
5 By: 
6 David M. Gilmore
7 Attorneys for ZACHARIA MELZER, YAEL
8 MELZER, TOVA INDUSTRIES, LLC, a
9 Kentucky limited liability company

10 DATED: 6/10, 2010 SWEENEY, MASON, WILSON &
11 BOSOMWORTH

12
13 By: 
14 KURT E. WILSON, ESQ.
15 SCOTT A. MANGUM, ESQ.
16 Attorneys for Plaintiffs, KENNETH L.
17 CRAWFORD, NEW HORIZON FOODS,
18 INC.

16 PURSUANT TO STIPULATION, IT IS SO ORDERED.

17 DATED: 8/27, 2010

19 
20 ~~HON. RICHARD SEEBORG~~
21 United States District/Magistrate Judge

1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, _____ [print or type full name], of

4 _____ [print or type full address], declare under penalty of perjury that I

5 have read in its entirety and understand the Stipulated Protective Order that was issued by

6 the United States District Court for the Northern District of California on [date] in the case

7 of _____ [insert formal name of the case and the number and initials assigned to it

8 by the court]. I agree to comply with and to be bound by all the terms of this Stipulated

9 Protective Order and I understand and acknowledge that failure to so comply could expose

10 me to sanctions and punishment in the nature of contempt. I solemnly promise that I will

11 not disclose in any manner any information or item that is subject to this Stipulated

12 Protective Order to any person or entity except in strict compliance with the provisions of

13 this Order.

14 I further agree to submit to the jurisdiction of the United States District Court

15 for the Northern District of California for the purpose of enforcing the terms of this

16 Stipulated Protective Order, even if such enforcement proceedings occur after termination

17 of this action.

18 I hereby appoint _____ [print or type full name] of

19 _____ [print or type full address and telephone

20 number] as my California agent for service of process in connection with this action or any

21 proceedings related to enforcement of this Stipulated Protective Order.

22 Date: _____

23 City and State where sworn and signed:

24 _____

25 Printed name: _____

26 [printed name]

27 Signature: _____

28 [signature]