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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

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

Plaintiffs,

v.

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

Defendants.

CASE NO. C 10-00280 RS

STIPULATION AND REQUEST TO MODIFY DISCOVERY SCHEDULE BY EXTENDING BY 32 DAYS THE EXPERT DISCLOSURE DATES; [~~PROPOSED~~] ORDER THEREON

Judge: Hon. Hon. Richard Seeborg

Pursuant to Federal Rule of Civil Procedure 16(b)(4), Plaintiffs Kenneth L. Crawford and New Horizon Foods, Inc. and Defendants Zacharia Melzer, Yael Melzer and Tova Industries, LLC hereby stipulate and request from this Court an order modifying the

discovery schedule in this case to extend the expert disclosure dates 32 days.

After extensive meeting and conferring between Plaintiffs and Defendants, Defendants have agreed to, and are, compiling and producing information and documents supporting their contention that the representations to Plaintiffs respecting gross profit margins, cost of sales and EBITDA were accurate, including, for example, in compliance with this Court's Order (copy attached as **Exhibit A**), which Plaintiffs believe requires such production. Plaintiffs' expert, Dana Basney, must review the information and these documents in order to prepare his expert report, which is currently due by January 28, 2011. Due to the delays in the production of this information and these documents, the PMQ depositions for Tova and its accountants needed to be continued from Mid-January to February 16, 2011 and February 17, 2011, respectively, so that Defendants would have enough time to provide Plaintiffs the information and documents prior to the depositions. Mr. Basney believes that information obtained at the depositions may also impact his opinions and expert report.

Counsel for the Parties have met and conferred respecting the above. A true and correct copy of Counsels' correspondence is attached hereto as **Exhibit B.** The Parties agree that, given the delay in the production of documents, it is necessary to modify the current discovery schedule, as set forth in this Court's September 2, 2010 Case Management Scheduling Order. A true and correct copy of the September 2, 2010 scheduling order is attached hereto as **Exhibit C**. As a result, the Parties hereby stipulate to the following modified discovery schedule:

1. On or before March 1, 2011, Plaintiffs shall disclose expert testimony and reports in accordance with Federal Rule of Civil Procedure 26(a)(2);
2. On or before March 15, 2011, Defendants shall disclose expert testimony and reports in accordance with Federal Rule of Civil Procedure 26(a)(2);
3. On or before April 18, 2011, all discovery of expert witnesses pursuant to Federal Rule of Civil Procedure 26(b)(4) shall be completed;

4. On or before April 18, 2011, all non-expert discovery shall be completed by the parties in accordance with the provisions set forth in this Court's Case management Scheduling Order, dated September 2, 2010.

5. All pretrial motions shall be heard not later than May 2, 2011.

6. All other discovery and trial dates shall remain as set in the Court's September 2, 2010 Case Management Scheduling Order.

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

DATED: January 19, 2011 **GILMORE, WOOD, VINNARD & MAGNESS**

By: /s/
David M. Gilmore

Attorneys for ZACHARIA MELZER, YAEL MELZER, TOVA INDUSTRIES, LLC, a Kentucky limited liability company

DATED: January 19, 2011 **SWEENEY, MASON, WILSON & BOSOMWORTH**

By: /s/
KURT E. WILSON, ESQ.
SCOTT A. MANGUM, ESQ.

Attorneys for Plaintiffs, KENNETH L. CRAWFORD, NEW HORIZON FOODS, INC.

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[~~PROPOSED~~] ORDER MODIFYING DISCOVERY SCHEDULE

The Court, having reviewed the Parties' Stipulation to Modify the Discovery Schedule in this case, and good cause appearing therefor, IT IS SO ORDERED that:

1. On or before March 1, 2011, Plaintiffs shall disclose expert testimony and reports in accordance with Federal Rule of Civil Procedure 26(a)(2);
2. On or before March 15, 2011, Defendants shall disclose expert testimony and reports in accordance with Federal Rule of Civil Procedure 26(a)(2);
3. On or before May 1, 2011, all discovery of expert witnesses pursuant to Federal Rule of Civil Procedure 26(b)(4) shall be completed;
4. On or before May 1, 2011, all non-expert discovery shall be completed by the parties in accordance with the provisions set forth in this Court's Case management Scheduling Order, dated September 2, 2010.
5. All pretrial motions shall be heard not later than May 2, 2011.
6. All other discovery and trial dates shall remain as set in the Court's September 2, 2010 Case Management Scheduling Order.

DATED: 1/20, 2011

HON. RICHARD SEEBORG
United States District/Magistrate Judge

EXHIBIT A

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.: C 10-0280 RS (PSG)

ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL FURTHER RESPONSES TO PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS NOS. 13, 17, 21 & 22

(Re: Docket No. 59)

On January 4, 2011, the parties appeared for hearing on Plaintiffs' Motion to Compel Further Responses to Plaintiffs' Request for Production of Documents Nos. 13, 17, 21 & 22. Based on the briefs and arguments submitted,

IT IS HEREBY ORDERED that Plaintiffs' motion is GRANTED as to Document Request Nos. 13 and 17. Defendant shall produce all computer data files (in native format) in the possession of Defendant Tova Industries, LLC's ("Tova") accountants concerning any information since January 1, 2006 referring or referencing the New Horizon Foods division of Tova Industries, LLC. Defendant shall further produce all computer data files (in native format) evidencing any work by William Ruf, Stuart Robinson or Welenken Himmelfarb & Company related to the New Horizon Foods division. Each of these productions shall be made no later than January 31, 2011.

It is undisputed that Tova has been able to obtain hard copies of documents from its

accountants, and Tova has made no showing that it is unable to obtain documents in the possession of its accountants that are in native electronic format. Indeed, in its papers and at the hearing, counsel for Tova was unable to apprise the court whether Tova had even requested that the accountants provide copies of the electronic documents sought in this motion, or that the accountants have refused production of such copies. Citing Federal Rules of Civil Procedure 34(b)(2)(E), Tova argues it was not required to produce electronic copies of documents it already produced in hard copy. But even if the requested documents did not go beyond mere electronic copies of documents previously produced–which they do– the electronic documents contain discoverable information, such as metadata, that is clearly not included in the hard copies of the documents produced to date. Tova made no showing that such a production would impose any burden whatsoever.

IT IS FURTHER ORDERED that Plaintiffs' motion is GRANTED as to Document Request Nos. 21 and 22. No later than January 31, 2011, Toya shall produce all computer data files (in native format) supporting Tova's contention that its representations of cost of goods sold, gross profit, gross profit margins and EBITDA were accurate and true. On their face, the requests are limited to documents supporting Defendants' contentions, and thus are inherently narrowly tailored to seek only relevant information. Although Plaintiffs improperly raised new issues regarding these requests in their reply,[1] Tova did not request any opportunity to brief those issues. At the hearing Tova did not articulate any particular burden associated with responding to these requests. An order compelling production of responsive documents is therefore warranted.

Dated: *January 6, 2011*

Paul S. Grewal
PAUL S. GREWAL
United States Magistrate Judge

[1] Plaintiffs' failure to adequately meet and confer regarding whether Tova had responded to these two requests resulted in moving papers that erroneously claimed Tova had never responded to the requests. Understandably, Tova's only response to this portion of the motion was to point out that it *had* responded. Plaintiff then made its substantive arguments as to these requests for the first time in its reply brief, leaving Tova no opportunity to brief those arguments in advance of oral argument. Plaintiffs are cautioned that in the future failure to adequately meet and confer before filing a motion to compel may well result in summary denial of the motion.

EXHIBIT B

Scott Mangum

From: Kurt Wilson
Sent: Monday, January 17, 2011 1:34 PM
To: Scott Mangum
Subject: FW: K. Crawford v. Melzer (Expert)

From: David Gilmore [mailto:dgilmore@gwvm.com]
Sent: Monday, January 17, 2011 11:44 AM
To: Kurt Wilson
Subject: RE: K. Crawford v. Melzer (Expert)

Yes, it does. I agree that a delay to analyze the documents is appropriate.

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dgilmore@gwvm.com

From: Kurt Wilson [mailto:kwilson@smwb.com]
Sent: Monday, January 17, 2011 10:34 AM
To: David Gilmore
Cc: Scott Mangum
Subject: K. Crawford v. Melzer (Expert)

David,

Given the "problems" we have had getting Tova to finally disclose its documents and information respecting the financial representations/warranties it made to Plaintiffs, I think we should agree to extend the deadline on the expert report until after Tova finally completes this disclosure. Obviously, Plaintiffs' expert cannot complete his analysis until at least a week or two after Tova finally produces the documents and discloses the information.

I'm thinking that we extend the deadline to 3/1. Does that make sense to you?

Kurt

Kurt E. Wilson, Esq.

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www.smwb.com

EXHIBIT C

E-Filed 9/3/10

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

KENNETH L. CRAWFORD, ET AL.,

Plaintiffs,

v.

ZACHARIA MELZER, ET AL.,

Defendants.

/

No. C 10-00280 RS

CASE MANAGEMENT SCHEDULING ORDER

Pursuant to the Federal Rule of Civil Procedure 16, the parties attended a Case Management Conference on September 2, 2010. After considering the Joint Case Management Statement submitted by the parties and good cause appearing, IT IS HEREBY ORDERED THAT:

1. DISCOVERY.

On or before March 04, 2011, all non-expert discovery shall be completed by the parties. Discovery shall be limited as follows: (a) twelve (12) non-expert depositions per party (although each side is limited to fourteen (14) hours total of 30(b)(6) testimony from the other side); (b) thirty (30) interrogatories per party, including all discrete subparts; (c) a reasonable

number of requests for production of documents or for inspection per party; and (d) and thirty (30) requests for admission per party.

2. EXPERT WITNESSES. The disclosure and discovery of expert witness opinions shall proceed as follows:

A. On or before January 28, 2011, plaintiff shall disclose expert testimony and reports in accordance with Federal Rule of Civil Procedure 26(a)(2).

B. On or before February 11, 2011, defendant shall disclose expert testimony and reports in accordance with Federal Rule of Civil Procedure 26(a)(2).

C. On or before March 4, 2011, all discovery of expert witnesses pursuant to Federal Rule of Civil Procedure 26(b)(4) shall be completed.

3. FURTHER CASE MANAGEMENT CONFERENCE. A Further Case Management Conference shall be held on **February 24, 2011 at 10:00 a.m.** in Courtroom 3, 17th Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California. The parties shall file a Joint Case Management Statement at least one week prior to the Conference.

4. PRETRIAL MOTIONS. All pretrial motions must be filed and served pursuant to Civil Local Rule 7. All pretrial motions shall be heard no later than March 18, 2011.

5. PRETRIAL STATEMENTS. At a time convenient to both, counsel shall meet and confer to discuss preparation of a joint pretrial statement, and on or before April 28, 2011, counsel shall file a Joint Pretrial Statement.

6. PRETRIAL CONFERENCE. The final pretrial conference will be held on **May 12, 2011, at 10:00 a.m.**, in Courtroom 3, 17th Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California. Each party or lead counsel who will try the case shall attend personally.

7. TRIAL DATE. Jury trial shall commence on **May 23, 2011, at 9:00 a.m.**, in Courtroom 3, 17th Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California.

IT IS SO ORDERED.

Dated: 9/2/10

RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE