

1 IN THE UNITED STATES DISTRICT COURT  
 2 FOR THE DISTRICT OF KANSAS

3 MARK MONSOUR, SHEILA MONSOUR  
 4 and MONSOUR'S, INC.,

5 Plaintiffs,

6 vs. Case Number 05-1204-MLB

7 MENU MAKER FOODS, INC.,

8 Defendant.

13 DEPOSITION OF KEVIN F. MITCHELSON, a Witness

14 herein, taken on behalf of the Plaintiffs, pursuant to

15 the Kansas Rules of Civil Procedure and Notice To Take

16 Deposition, at Wheeler & Mitchelson, 4th and Broadway

17 Street, Pittsburg, Kansas, on the 22nd day of February,

18 2006, at 1:37 o'clock a.m., before:

19 Patricia K. Smith, C.S.R.  
 20 P.O. Box 1123  
 21 Pittsburg, KS 66762  
 22 (620) 231-5380

1 APPEARANCES:

2 FOR THE PLAINTIFFS:

3 Dustin L. DeVaughn, Esq.  
 4 Richard W. James, Esq.  
 5 McDonald, Tinker, Skaer, Quinn & Herrington, P.A.  
 6 300 West Douglas Avenue, Suite 500  
 7 P.O. Box 207  
 8 Wichita, KS 67201-0207

9 FOR THE DEFENDANT:

10 John Val Wachtel, Esq.  
 11 Klenda, Mitchell, Austerman & Zuercher, L.L.C.  
 12 1600 Epic Center  
 13 301 North Main Street  
 14 Wichita, KS 67202-4888

15 FOR THE WITNESS:

16 Robert S. Tomassi, Jr., Esq.  
 17 Wheeler & Mitchelson  
 18 4th and Broadway  
 19 Pittsburg, KS 66762

20 Also Present: Creighton Cox and Mary Goedeke.

1 INDEX 3

2

3 Direct Examination by Mr. Wachtel-----4

4 Cross Examination by Mr. DeVaughn -----37

5 Redirect Examination by Mr. Wachtel-----38

6 Recross Examination by Mr. DeVaughn-----40

7

8

9

10

11 Exhibit Number Identified

12

13 1 5

14 2 & 3 16

15 4 41

16 5 28

17 6 29

18 7 30

19 8 32

20 9 & 10 42

21

22

23

24

25

1 KEVIN F. MITCHELSON,

2 having been first duly sworn on his oath by the

3 reporter, testified as follows:

4 DIRECT EXAMINATION

5 BY MR. WACHTEL:

6 Q. Mr. Mitchelson, my name is Val Wachtel. I represent

7 Menu Maker Foods in this litigation between Monsour's,

8 Inc., Mark and Sheila Monsour. And I'm not going to

9 waste your time with the usual folderol about

10 depositions. But, please, if I ask you a question that

11 you don't understand, please let me know so that I

12 might be able to rephrase it.

13 A. Yes, sir.

14 Q. For the record, you are Kevin Mitchelson?

15 A. Yes.

16 Q. And the name of your firm, sir, is?

17 A. Wheeler and Mitchelson, Chartered.

18 Q. And how long have you been practicing?

19 A. I graduated from KU Law School in 1982.

20 Q. Do you have any particular area of specialty?

21 A. Most of my work is business and tax and municipal type

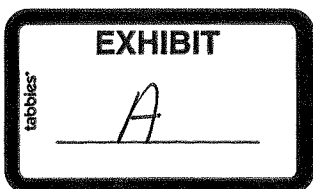
22 transactional work.

23 Q. In late 2001 did you represent Monsour's, Inc.?

24 A. No, I don't think so.

25 Q. Did you represent Mark Monsour?

Patricia K. Smith, C.S.R.



(620) 231-5380

5

1 A. Not until he called about doing some work on a  
 2 transaction that he was working on. And I think that  
 3 occurred in early 02.  
 4 Q. Let me give you what I have identified as Exhibit 1  
 5 Mitchelson depo and represent to you that it is a copy  
 6 of a portion, but not all, of the Asset Purchase  
 7 Agreement that was ultimately signed by Menu Maker  
 8 Foods, Mark Monsour, Sheila Monsour and Monsour's, Inc.  
 9 There may be some portions of it missing, but generally  
 10 it is all there. Is that the transaction that Mark  
 11 Monsour might have asked you to work on?  
 12 A. Yes, sir.  
 13 MR. TOMASSI: Before we get to that part, could we  
 14 just have on the record -- and I understand there's  
 15 been a waiver of the attorney-client privilege between  
 16 Kevin and the corporation, but could we have the  
 17 corporation put on the record that that waiver exists?  
 18 MR. WACHTEL: I don't know that the corporation  
 19 exists, but they can certainly waive it.  
 20 MR. TOMASSI: Or whoever.  
 21 Mr. DeVAUGHN: You bet. Dustin DeVaughn, attorney  
 22 for Mark Monsour individually, Sheila Monsour  
 23 individually and Monsour's, Inc., have all formally  
 24 waived the attorney-client privilege and Mr. Mitchelson  
 25 is free to testify.

1 all of the documents in Exhibit 1, were prepared by Mr.  
 2 Cowherd's office.  
 3 Q. In the course of negotiating this agreement did you  
 4 have any meetings with Richard Jon, J-O-N, otherwise  
 5 known as Dick, Graves?  
 6 A. Telephone calls. I don't think -- I don't think we met  
 7 Mr. Graves personally until the day of the closing.  
 8 Just telephone calls previously. At least, that's my  
 9 recollection.  
 10 Q. Sure. Do you happen to have a recollection of what  
 11 those telephone calls might have been about?  
 12 A. I have notes from them.  
 13 Q. If looking at your notes would help refresh your  
 14 recollection, go right ahead on it.  
 15 A. Well, I made a copy of the notes. You'd subpoenaed  
 16 them and I made a copy of them. I also made a  
 17 photocopy of the bill we sent to Monsour's so I could  
 18 gauge the time, in case you asked about dates. I'm  
 19 sorry, what was your question about then?  
 20 Q. You know, it was probably a pretty bad question. Let  
 21 me go about this another -- in another fashion. In the  
 22 course of your negotiating or being involved in the  
 23 negotiation of this agreement did -- well, just, for  
 24 example, if you'd look at Exhibit 1 on the first page.  
 25 Exhibit 1, first page.

6

8

1 MR. WACHTEL: Thank you very much.  
 2 A. The answer to your question, Val, is yes, this was the  
 3 transaction I was referring to. But as I said that, it  
 4 occurs to me that our firm may have done some  
 5 collection work for Monsour's through the years that I  
 6 didn't have anything personally to do with.  
 7 Q. (By Mr. Wachtel) All right. And I rather doubt that  
 8 that has anything to do with the case.  
 9 A. Right.  
 10 Q. But thank you very much for sharing that. Did you play  
 11 any part in the negotiation of any of the terms and  
 12 conditions found within the Asset Purchase Agreement,  
 13 Exhibit 1?  
 14 A. Yes.  
 15 Q. Could you tell us what part you played?  
 16 A. Well, Mr. Cowherd prepared the agreement, provided it  
 17 to us. I reviewed it with Mr. Monsour, had a couple of  
 18 conference calls with Mr. Graves and Mr. Cowherd and  
 19 the banker from over there and made certain revisions,  
 20 requested and discussed possible revisions, and just  
 21 sort of the normal give and take in a corporate  
 22 transaction.  
 23 Q. The final draft, was that prepared by your office or  
 24 was it by Mr. Cowherd's office, if you can recall?  
 25 A. My recollection is that all of the documents, at least

1 A. Uh-huh.  
 2 Q. Section I, paragraph 1. It says, "All of the seller's  
 3 inventory, except produce, which is in a good and  
 4 wholesome condition and a hundred percent resellable  
 5 condition," that's a parenthetical. Did you and Mr.  
 6 Graves have any discussions about what that language,  
 7 "which is in a good and wholesome condition and a  
 8 hundred percent resellable condition," might mean?  
 9 A. I don't -- I don't know -- I don't know that we made  
 10 any revisions to that from the first draft that Mr.  
 11 Cowherd provided. I know in a number of conversations  
 12 we had discussions and Mr. Graves made it clear that he  
 13 intended to buy Monsour's inventory and he intended to  
 14 buy produce from them going -- on an ongoing basis and  
 15 that's -- you know, that was part of the deal.  
 16 Q. In the very last -- the very last sentence of Section  
 17 I, paragraph 1, the agreement says, "The parties  
 18 estimate that the inventory to be purchased is  
 19 estimated from \$750,000 to \$800,000 in value." Did you  
 20 have any -- did you play any part in arriving at the  
 21 estimate of the value of the inventory to be purchased?  
 22 A. No. I -- that was something that -- I know we were  
 23 discussing that in our conference calls. Mr. Graves  
 24 was familiar with what they had over at Monsour's and  
 25 that's the number that ultimately they gave the lawyers