ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARY MONSOUR, SHEILA MONSOUR and MONSOUR, INC., Plaintiffs,

vs.

MENU MAKER FOODS, INC. Defendant.

Civil Action Number 05-1204-MLB

D E P O S I T I O N

The deposition of MARSHALL HULL, CPA, CMA taken on behalf of the Defendant pursuant to the Federal Rules of Civil Procedure before Raymond E. Barber, a Certified Shorthand Reporter of Kansas, at 300 West Douglas, Wichita, Sedgwick County, Kansas, on the 27th day of July, 2006 at 1:00 p.m.

A P P E A R A N C E S

The Plaintiff appeared by their attorney, Mr. Dustin DeVaughn of McDonald, Tinker, Skaer, Quinn & Herrington, P. A., Attorneys at Law, 500 R. H. Garvey Building, Wichita, Kansas 67202.

The Defendant appeared its attorney, Mr. Alexander B. Mitchell, II of Klenda, Mitchell, Austerman & Zuercher, LLC, Attorneys at Law, 301 North Main, Suite 1600, Wichita, Kansas 67202.

It is not designated our engagement letter. I do have an engagement letter, but the rate per hour is not included.

Q. What was the purpose of your being retained?

A. Dustin had contacted me to review the information, part of this case, and determine whether his client had the ability to -- had certain facts occurred would have had the cash flow to continue as a business.

Q. You rendered an opinion in this case, a written opinion?

A. Correct.

Q. Have you been retained in any other instance to render expert opinions?

A. No.

Q. This is your first case?

A. This is my first case.

Q. Have you ever had occasion to calculate losses based on -- from a breach of contract, lost profits?

A. No.

Q. Never have?

A. No.

Q. You recognize what I have marked as Exhibit 1 as your report in this case?

A. Yes.
Q. Attached is your resume?
A. Correct.
Q. So in this particular instance you were retained to determine whether Monsour, Inc. would have been able to generate a positive cash flow had Menu Maker purchased the inventory consistent with the asset purchase agreement and, therefore, purchased substantially all of the produce from Monsour?
A. Correct.
Q. Are you advocating that this calculation of cash flow is the correct measure of damages for breach of contract?
A. No. I would assume this would be a significant tool in arriving at that amount, but the purpose of my report was to extend the cash flows.
Q. Cash flow only?
A. Cash flow.
Q. Correct?
A. Correct.
Q. Not to consider what lost profits there may have been, correct?
A. Not specifically lost profit. A lot of the

features of my report of course will be considered in that calculation.

Q. Well, have you arrived at any opinion as to whether there was or was not lost profits on this contract?

A. No. The terms of my engagement were for the cash flow projection.

Q. The opinions that you expressed in Exhibit 1 were within a reasonable degree of accounting certainty or probability?

A. Correct.

Q. What do you mean by that phrase?

A. I was given certain information and extended that based on accounting principles to arrive at an end result of cash flow.

Q. And it is expressed in a reasonable degree of accounting certainty means what?

A. The accounting certainty results -- the practice of accounting, accounting for cash for business, expenditures, certainty is the correctness of that amount. Reasonableness means with a -- I have not done this before. The legal term I am not sure of. Reasonable would mean a high probability.

Q. High probability or more likely than not, which

immediately prior to the asset purchase agreement it was insolvent?
~~A. They had negative equity.~~
Q. The question I asked you calls for a yes or a no.
A. Insolvent being that they didn't have the ability to continue?
Q. Correct.
A. I would say they were not insolvent, as my cash flow analysis demonstrated.
Q. Would you agree they had a negative net worth in excess of a million 3, as shown in Exhibit 1 to your report?
A. I would agree.
Q. Would you agree that the liabilities are in excess of one and a half times the book value of all assets?
A. I would agree.
Q. Do you agree the current liabilities went in 1999 from 364,000 to 3-1/2 million in 2001?
A. I had reviewed historical balance sheet information.
Q. Not what I asked you.
A. I don't recall the specific number of the date you referenced.

Q. As shown on Exhibit 1.0 to your report Exhibit 1?
A. Correct.
Q. That was as of January 31, 2002?
A. Correct. The financial statement may have been dated -- it is actually January 26, 2002.
Q. Okay. Had a negative cash balance of in excess of 452,000?
A. Correct.
Q. Now, as of that date, January 26, 2002, are you saying it was a viable going concern even without the Menu Maker purchase?
A. I wasn't asked to specifically evaluate every --
Q. I am just asking you a yes or a no. You looked at the financials. Can you tell whether it was a viable going concern at the end of January 2002?
A. This purchase agreement was critical to --
Q. Okay. Go ahead. You are answering a yes and no question in a roundabout way, but go ahead.
A. I did not do a forecast to pursue what other options, if any, there may have been available to make that conclusion.
Q. Wouldn't you agree that from your review it was

in financial difficulty?
A. Yes, I would.
Q. And that this asset purchase agreement may have been some resolution of that difficulty?
A. Yes, I would agree with that.
Q. Okay. In your report you assume that the inventory of Monsour was $750,000, correct?
A. That was to be acquired as part of the purchase agreement.
Q. Correct?
A. That was spelled out per the purchase agreement in a range of 750 to 800,000, I recall, and I used the lower end of that range.
Q. So in answer to my question, yes, you used $750,000 as a stated inventory of Monsour as of the asset purchase?
A. The balance in my report shows a total inventory of 797,950 as of that date, which 700 --
Q. That is not what I asked you. Have you got Exhibit 1 there?
A. I do.
Q. Looking at Exhibit 1, which is your report, down at the bottom of the first page you state that you had assumed it was $750,000, correct?

statements that have --

Q. I am not talking about subsequently prepared. I am talking about those that were in existence at or about the time the asset purchase agreement was made.

A. There is another internally prepared financial statement that I think has -- let me find it to say specifically, but the inventory, I believe, is higher on that statement. I will find it specifically.

Q. Let me give them to you here. Let me show you Deposition Exhibit 3. It purports to be an internal balance sheet as of December 29, 2001. Did you review this statement?

A. I have seen that statement.

Q. Shows an inventory of a million 600 some thousand dollars?

A. Correct.

Q. Did you do anything to verify that amount as of December 29th?

A. I did not.

Q. Same date, December 29th, I will have you -- hand you Exhibit 4. Have you seen this before? It is Bates stamped 11688.

A. Yes, I have seen it before.

Q. It has an inventory of $997,950, correct?
A. Correct.
Q. Did you do anything to reconcile the fact that these are 700,000 roughly, 650,000 apart on the same date?
A. I did not.
Q. Let me show you Deposition Exhibit 5, which is a March 30, 2002 balance sheet. Have you seen this before?
A. I have.
Q. It shows an inventory of $527,950, correct?
A. Correct.
Q. Would that have included -- been the inventory after some purchases by Menu Maker, or do you know?
A. I do not know.
Q. That is as of March 30, 2002. Let me show you what I have marked as Exhibit 6. It is a balance sheet as of April 27, 2002?
A. Correct.
Q. And it shows an inventory of $527,950?
A. Correct.
Q. Do you have any explanation as to why it would be that much?
A. Reviewing the internally prepared financial

statements subsequent to the agreement were beyond the scope of what I was engaged to do.

Q. I didn't ask you that. Do you have any explanation for why the figure was 500 and some thousand in that April 27, 2002 statement?

A. I could speculate, but that is all it would be is speculation.

Q. Let me show you another one internally generated from Monsour, been marked as Deposition Exhibit 7, it has the same date, April 27, 2002. Now the inventory is $377,950. Did you do any due diligence to figure out why the discrepancy between Exhibit 6 and 7?

A. I did not.

Q. Would you agree that the inventory amount that you picked would be a driving, significantly driving figure for your cash flow calculations?

A. The purchase price would be a driving factor, as stated in the purchase agreement. That was from information provided to me, the amount of inventory that was expected to have been purchased.

Q. Not what I asked you. I asked you if you would agree that the amount of the inventory that you plugged into your calculations of cash flow is

costs, correct? Paragraph 2.1, I mean.
A. 2.1, correct.
Q. So can we agree that there would be no profit to Monsour for the purchase of its inventory at cost?
A. Correct.
Q. And you have made some comments in your report about the produce being purchased. Do you know what the price was for the produce?
A. Ongoing?
Q. Yes.
A. From Menu Maker was to be cost plus 10 percent, is that what you are referencing?
Q. You mentioned that in your report. I don't find any 10 percent anywhere in this asset purchase agreement. I want to know where you got that.
A. That was through discussions with Dustin and confirmed with Mark Monsour.
Q. He was going to charge 10 percent markup?
A. Correct.
Q. On his produce?
A. Correct.
Q. Let me direct your attention to page 8 of that asset purchase agreement. Subparagraph E,

Q. Which was what?
A. I find specifically 235,000 -- $232,957.
Q. ~~That is from Exhibit --~~
A. That is on page 5 of my report.
Q. Are you talking about the $232,000 figure?
A. Correct.
Q. This is from the inventory. I am talking produce.
A. Okay.
Q. What produce, what money came into Monsour from Menu Maker's produce purchases?
A. Subsequent to the purchase agreement?
Q. Yes.
A. That was not part of my --
Q. You didn't do that calculation?
A. I didn't do that calculation.
Q. Didn't consider that amount?
A. I did not.
Q. Now, when Menu Maker did not purchase what Mr. Monsour claims it should have purchased, something happened to that inventory. Do you know what happened?
A. I do not know specifically what happened.
Q. Do you know where the proceeds are?
A. I do not.

Q. You haven't accounted for those at all in your calculations?
A. I have not. It is beyond the scope of what I was asked to do.
Q. Backing up to the amount of inventory that you used of $750,000 for your calculations, did you review Mr. Monsour's deposition testimony? Let me ask you simply, do you recall or have you been told that these internally generated financial statements exaggerated the inventory and other assets to maintain the credit at the bank?
A. I have heard that, yes.
Q. Was there any reason for you to accept the figure of $750,000 other than that was what was mentioned in the asset purchase agreement as the parties' estimate of value?
A. It was consistent with the balance sheet figure that I used as part of my calculation in the report.
Q. Which balance sheet? Because I have shown you several that have all over the board in inventory from a million 6 to 500 and something.
A. Consistent with the inventory of $797,950.

A. If I can clarify your last question, I was acting upon information given to me. I did not ~~assume that information was provided to me.~~ That was part of my conclusion.

Q. I said assumed. You took as true that $750,000 paid to Monsour, Inc. and $150,000 paid to Mark Monsour for his covenant not to compete would have gone to the bank first to satisfy the shortage of cash, second to be applied on a line of credit?

A. Correct.

Q. Then didn't you assume that the Bank of America would continue to extend credit to Monsour?

A. Mark Monsour indicated that they had discussions going and he expected that to happen, correct.

Q. And did you do any independent due diligence to verify that statement?

A. I did not.

Q. Wasn't that important for your calculations to determine whether or not Monsour would have credit available to continue to do business?

A. That fact is important to my calculation.

Q. Were you furnished any correspondence from the bank indicating that it was not extending

able to extend additional credit?
A. That is beyond the scope of what I was asked to do.
Q. So your answer is no, you can't?
A. Can I say they were going to do --
Q. Yes.
A. No, I understood that to be true from Mark Monsour.
Q. Did you take any steps to inquire of Bank of America directly whether they would have continued to extend credit to Monsour, Inc.?
A. I did not.
Q. Yet while they pulled the plug and stopped loaning money to Monsour was critical to your calculations, wasn't it?
A. Continued financing was critical.
Q. If they didn't get the loan they wouldn't continue; is that a fair statement?
A. That would be a fair statement.
Q. Now, in addition to this $900,000 coming from Menu Maker, you made a calculation in your report as a liquidation of prepaid assets, correct?
A. Part of my calculations did say that prepaid assets would be offset by accrued expenses and

A. Correct.

Q. And that substantially all of the produce of Monsour would have been purchased, correct?

A. Correct.

Q. What collateral then is there for the bank to continue to loan money to Monsour if all of the inventory, produce and other goods, are gone?

A. My calculation doesn't assume this happens overnight. If they are an ongoing business, they purchased additional inventory, they sell the inventory, they would maintain an inventory balance, that would be collateral. They would also have additional customers that would create other receivables. I didn't assume that these receivables would be collected overnight. So the same types of receivables would -- same types of assets could serve as collateral.

Q. I don't think that exactly answered my question. I was asking you what collateral would have been -- would have remained for the bank to continue to extend credit to Monsour. Part of your answer was, as I understood it, they would buy additional inventory and that could be pledged as collateral?

A. Correct.

Q. Is that what you said?
A. Correct.
Q. ~~Now, that would depend upon Monsour's credit~~ worthiness with its vendors, would it not?
A. It would.
Q. Did you do any independent due diligence to determine what that status was between Monsour and its vendors?
A. Other than Mark's representation that that could be established, no.
Q. So you are relying on Mark Monsour to tell you that at Bank of America things are hunky-dorey and the same with the vendors?
A. I didn't say hunky-dorey.
Q. Everything is fine, continue to march, keep the doors open, continue to do business because I know my bank, they will loan me money and I can get the produce from my vendors; is that essentially what he told you?
A. No. He said the bank was willing to work with them. Absent those collateral items, it is in the bank's best interest to work with a customer to help them succeed. That allows them to not only possibly recoup their principal, but continue with a customer.

Q. So you are prepared to give an opinion as to what is the best interest of Bank of America?
A. ~~No.~~
Q. Well, are you saying that Bank of America would have probably loaned money and kept the doors open without any collateral?
A. No.
Q. Did you do any due diligence to determine what the credit worthiness of Monsour was with its vendors?
A. I did not.
Q. Were you made aware of the forbearance agreement, forbearance and settlement agreement entered August 12, 2002, which I have marked as Hull Deposition Exhibit 10?
A. I was aware of the issue, but did not review that agreement as part of my report.
Q. You did not look at the agreement?
A. I don't believe that I did.
Q. Were you made aware that as of August 2002 Monsour owed $402,000 to eight of its produce vendors?
A. What was the date? I am sorry.
Q. August 12, 2002.
A. Okay. Again, my report starts --

efforts, so --

Q. No, you did not?

~~A. I am not for sure specifically what you are --~~

as part of this calculation (indicating)?

Q. Yes. Did you consider any of the expenses saved by the fact that Menu Maker did not pay $750,000?

A. I did not. That was beyond the scope of what I was asked to do.

Q. Would you agree with me that in any calculation of lost profits expenses saved should be considered?

A. You said any calculation. It would be a factor in calculation of lost profits.

Q. Would you also agree that the proper measure of damages for a breach of contract would be lost profits as opposed to lost cash flow?

MR. DeVAUGHN: Objection, calls for legal conclusion.

A. Again, that is beyond what I was asked to do as part of this.

Q. I know, but 16 years as a CPA, wouldn't you agree that breach of contract measure of damages is lost profits?

MR. DeVAUGHN: Same objection.