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November 14, 2012

via ecf

Honorable Joseph Dickson, U.S.M.J.
United States District Court
U.S. P.O. & Courthouse Building
Federal Square
Newark, New Jersey 07101

Re: *Deborah Fellner v. Tri-Union Seafoods, L.L.C., d/b/a Chicken of the Sea*
Civil Action No. 06-CV-688 (DMC)

Dear Judge Dickson:

Please accept this Reply submission on behalf of defendant Tri-Union Seafoods, L.L.C..

On October 18, 2012, Tri-Union submitted in letter form, at your request, a Motion for Protective Order concerning whether, and to what extent, documents that a co-defendant of Tri-Union produced during the Proposition 65 litigation, under the terms of a Stipulated Protective Order in that case, are subject to production and/or retain the confidentiality afforded by that Protective Order in this case.

On November 8, 2012, your law clerk contacted this office and asked that a Proposed Order be submitted as the Plaintiff had not submitted an Opposition to Tri-Union's Motion. Tri-Union obliged, and submitted its Proposed Form of Order on that date.

Now, twenty-six days after Tri-Union originally filed its Motion for Protective Order, the Plaintiff has filed her Opposition, on November 13, 2012. Tri-Union submits that Plaintiff's Opposition: (1) is untimely, and should not be considered; and (2) does not reflect accurately the parties' telephone conference with the Court on October 11, 2012. Tri-Union addresses these two arguments in turn.

A. The Plaintiff's Opposition to the Motion for Protective Order is untimely.

Tri-Union filed its Motion for Protective Order with the Court and served a copy on the Plaintiff on October 18, 2012, in accordance with Local Rule 7.1(d)(1). Pursuant to Local Rule 78.1, the applicable motion day is November 19, 2012.¹ Accordingly, any Opposition thereto was due on or before November 5, 2012. Local Rule 7.1(d)(2). The Plaintiff neither responded

¹ While the newly-revised Local Rule 7.1(d)(3) requires that any reply brief be filed no later than seven days before the next Motion Day, Tri-Union's submission herein is submitted one day following plaintiff's late submission of November 13, 2012.

by November 5th nor asked for an extension of time within which to respond. In fact, the Plaintiff took no action with respect to the Motion until after Tri-Union served the Proposed Form of Order, in response to the request from the Court. Twenty-six days came and went, with no word from the Plaintiff with regard to the Motion. *See U.S. v. Williams*, No. 09-1491 (GEB), 2009 U.S. Dist. LEXIS 119469, at *8 (D.N.J. Dec. 23, 2009) (Bongiovanni, J.) (“The Court then issued an Order . . . , which held that because Defendants had already missed their deadline to file Opposition Papers, the Court would treat Plaintiff’s Motion as unopposed”), *adopted by* 2010 U.S. Dist. LEXIS 8055 (Brown, J.). Accordingly, Tri-Union respectfully submits that the Plaintiff failed timely to oppose Tri-Union’s Motion, and asks that the Court now treat the Motion for Protective Order as though unopposed.

B. The Plaintiff’s Opposition does not reflect accurately the substance of the parties’ telephone conference with the Court.

Tri-Union maintains that the Plaintiff’s Opposition incorrectly summarizes the October 11th telephone conference between the parties and the Court. Rather, Tri-Union’s understanding from the conference was that the following sequence of events was to occur: Tri-Union was to submit its Motion for Protective Order addressing the propriety and, if merited, timing of producing the three documents in dispute. The Plaintiff was then to respond to the Motion. After considering the submissions from the parties, the Court would then issue a ruling, which, depending on the decision, Tri-Union might then need to serve on the parties from the Proposition 65 litigation to allow them the opportunity to be heard. To perform events in the order suggested by the Plaintiff would have defense counsel forward the Motion for Protective Order to non-parties in this litigation, asking them to argue Tri-Union’s Motion on its behalf in the first instance. Thus, Tri-Union maintains that the Plaintiff has put the events out of sequence.

If, in fact, the Court considers the Plaintiff’s Opposition – which Tri-Union maintains, given its untimeliness, the Court ought not to do – then the first step should be to determine whether, and to what extent the documents at issue are subject to production and/or protection under the terms of the Stipulated Protective Order from the Proposition 65 litigation. The second step should be, if the Court decides against blanket protection, to issue an Order giving 20 days (or more, if necessary) for the interested third parties to respond to the Court’s Order for production. The third step would then be to hold a hearing wherein any of the interested third parties who have requested it would have an opportunity to be heard regarding their arguments against production of the subject documents.

In sum, Tri-Union maintains that the Court should not consider the Plaintiff’s Opposition because it was not filed until nearly a month had passed after Tri-Union filed its Motion for Protective Order, and, even then, not until Tri-Union filed a Proposed Form of Order in response to a request from the Court after the Court. If, however, the Court elects to address the merits of the Plaintiff’s Opposition, Tri-Union asks the Court to follow the procedure as set forth herein, which Tri-Union submits more accurately and logically reflects the substance of the October 11 telephone conference between the parties and the Court.

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Respectfully submitted,

A handwritten signature in blue ink, appearing to be "John A. Kiernan", written over a horizontal line.

John A. Kiernan
Kenneth A. Schoen

cc: Thomas Paciorkowski, Esq. (via ecf)
Stephen Grygiel, Esq. (via ecf)