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JAMES N. HATTEN, Clerk
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ABV ELECTRONICS, INC. d/b/a SIENNA CORP.,

Plaintiff,

v.

CETON CORP.,

Defendant.

CIVIL ACTION NO. 1:12-CV-2178-ODE

ORDER

This breach of contract case is before the Court on the following motions: ABV Electronics, Inc. d/b/a Sienna Corp.'s ("Plaintiff" or "Sienna") motion for sanctions [Doc. 49], Plaintiff's motion for partial summary judgment [Doc. 71], Plaintiff's motion for leave to supplement [Doc. 82], Plaintiff's motion to compel discovery [Doc. 83], Ceton Corp.'s ("Defendant" or "Ceton") motions for extension of time to respond [Doc. 86] and to file excess pages [Doc. 88], Defendant's cross motion for partial summary judgment [Doc. 91], Plaintiff's motion to consider its motion for partial summary judgment unopposed [Doc. 97], Defendant's motion to withdraw its deemed admissions [Doc. 100], and Plaintiff's motion for leave to file surreply [Doc. 103].

For the reasons discussed below, Plaintiff's motion for sanctions [Doc. 49] is GRANTED, its motion for leave to supplement [Doc. 82] is DENIED AS MOOT, its motion to compel discovery [Doc. 83] is GRANTED IN PART AND DENIED IN PART. Defendant's motion to withdraw deemed admissions [Doc. 100] is GRANTED. The Court

DEFERS ruling on Plaintiff's motion for partial summary judgment [Doc. 71] and on Defendant's cross motion for partial summary judgment [Doc. 91], and DENIES AS MOOT Plaintiff's motion for leave to file surreply [Doc. 103]. Finally, Defendant's motions for extension of time to respond [Doc. 86] and to file excess pages [Doc. 88] are GRANTED NUNC PRO TUNC, and Plaintiff's motion to consider its motion for partial summary judgment unopposed [Doc. 97] is DENIED.

I. Background[1]

According to Sienna, this is a simple breach of contract case arising from Ceton's purported failure to pay for product that it ordered from Sienna and that it then resold at a profit. Regardless of the accuracy of this characterization, it is clear to the Court that, in addition to a multitude of transactions, the instant litigation reflects significant variations in the parties' claims over time. This is so despite the parties' reconciliation efforts and the fact that their relationship effectively ended in September 2011. Not surprisingly, the fluidity of the reconciliation process and the difference in the accounting methods employed by the parties have resulted in diametrically

[1]Because the Court defers ruling on the parties' motions for partial summary judgment, the factual summary below does not constitute a comprehensive account of the undisputed events surrounding the instant litigation. Rather, it is intended to provide sufficient context for the disposition of the parties' remaining motions currently before the Court. Accordingly, any citations evidence in the record have been omitted. These will be supplemented in the Order ruling on the parties' motions for partial summary judgment.

opposed renditions of the parties' account relationship as far down as the line item level.

A. The Inception of the Parties' Relationship

Sienna, a Georgia corporation, manufactures electronic products. Ceton, a Washington corporation, designs and sells digital cable devices that enable a personal computer to decode multiple cable video signals and to distribute different content to different televisions at the same time (the "Ceton product").

One version of the Ceton product was designed for use by hotels. The other was a consumer item in the form of a "card" that the user would insert in the computer in the same manner as a graphics card. Ceton sold its consumer products to large companies, like Amazon, who resold them to consumers. The hotel products were sold to business enterprises such as ATX Networks ("ATX"), which in turn leased or sold them to hotels.

In or around August 2009, Ceton contracted with Sienna to manufacture the Ceton product.[2] At that time, there was no written agreement governing any aspect of the relationship. However, the parties agree they had established certain practices--some of which are now in dispute--with respect to, inter alia, the creation of bills of materials and purchase orders, pricing, invoicing, and demand forecasting. The parties' respective understanding of these practices are discussed below.

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[2]Substantial production did not begin until 2010.

1. Practices Related to the Creation of Bills of Materials and Purchase Orders, Pricing, and Invoicing

For each item and iteration of Ceton product, Ceton would create a bill of materials ("BOM"), i.e., a list of components needed to build a particular Ceton product, each of which is a specially manufactured good. Upon receipt of a BOM, Sienna would determine the cost of the components in the BOM and send Ceton a quote and/or a costed BOM ("CBOM"), which functioned as a quote, to manufacture a particular item and iteration of Ceton product.[3] Upon receipt of a quote or a CBOM, Ceton would send Sienna a purchase order ("PO") reflecting the prices in the quote or the CBOM, although sometimes a PO was sent before the quote or CBOM was received by Ceton.

Upon receipt of a PO, Sienna confirmed to Ceton it would manufacture corresponding quantities of Ceton product and it then did so. According to Ceton, both parties understood that some POs would be filled in the future.

Upon completing manufacturing, Sienna invoiced Ceton at the prices reflected in the final or "frozen" CBOMs, which typically were arrived at after Ceton submitted its POs.[4] The prices would be composed of Sienna's cost to manufacture the products, plus an agreed profit margin, calculated as a percentage of the manufacturing cost.

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[3]Ceton states it participated in preparing the CBOMs as well.

[4]Ceton's payments were being applied to the oldest invoices first.

According to Sienna, each frozen CBOM controlled the price of a Ceton product for the period of time during which the frozen CBOM was in effect. Ceton contends, however, that both parties understood the prices in the CBOMs were not "frozen" and would change as part prices changed during the manufacturing life of the product.[5] Ceton further alleges the existence of an oral agreement with Sienna--based on oral promises made by Sienna employees--pursuant to which Sienna would charge Ceton the cost Sienna paid for the components, plus a mark-up as margin. Sienna denies that an oral agreement existed, that its employees made such promises or that they had any kind of authority--express, implied, or apparent--to do so.

Between July 9, 2009 and November 19, 2011, Ceton sent approximately 28 POs to Sienna, and Sienna generated and sent to Ceton approximately 225 invoices.[6]

2. Practices Related to Demand Forecasting

In addition to sending POs to Sienna, Ceton would inform it of its long-range forecasted demands for Ceton products. Sienna asserts that Ceton's POs and demand forecasts drove Sienna's procurement of the components needed to manufacture Ceton products ("Components").

According to Ceton, the forecasts were tentative and, with the exception of parts with long lead times, there was no need for Sienna to buy Components at the time the POs were issued. It is

[5]Ceton asserts that the credits Sienna gave it from time to time reflect Sienna's acknowledgment of that understanding.

[6]Ceton disputes the accuracy of Sienna's list of invoices.

undisputed that at one point Sienna tendered a contract to Ceton that would have created an obligation to pay for Components but that Ceton would not agree to it.

B. Events Leading up to the Instant Litigation

Ceton lacked the resources to fund major production runs, but Sienna, whose annual revenue is approximately $60 million, had a line of credit with Silicon Valley Bank ("SVB"), which allowed Ceton to finance manufacturing by paying Sienna once Ceton product was sold.

Because of this financing arrangement, on or about March 2010, Sienna and Ceton entered into a Security Agreement. Pursuant to that agreement, Ceton promised that it would cause

> "all collections and proceeds from [Ceton's] Purchase Orders to be deposited by ATX Networks ["ATX"] . . . and any other customer directly into an escrow account [(the "Escrow Account")] in the name of [Ceton] and [Sienna] at [SVB] . . . , [and agreed Sienna would have] a perfected and continuing security interest" in "[a]ll accounts and all rights to payment of a monetary obligation or other consideration owed by ATX and any other customer to [Ceton] . . . subject to [Ceton's] and [Sienna's] rights to certain distributions under the Escrow Agreement . . . ."

[Doc. 1-1 at 23-24].

The Security Agreement does not define the parties' rights to the funds in the Escrow Account. Rather, it merely states that SVB would disburse funds from the account to Ceton and Sienna pursuant to any joint written instructions it received. Disbursements could only be made if both parties agreed on the amount.

Ceton avers there was an oral agreement--which was followed during the course of the parties' dealings--about how disbursements would be made. Specifically, the funds from

customer payments transmitted into the account were distributed to Sienna for the amount owed it by Ceton for the respective product, and Ceton received the rest. In addition, Ceton states it never objected to the disbursements based on "uncorrected invoice amounts" because Sienna promised it would adjust the charges later. Sienna denies the existence of an oral agreement to that effect.

On or about April 29, 2011, Sienna began invoicing Ceton for Ceton product that had been manufactured but not yet sold or shipped to Ceton's customers. This product was also referred to as "consigned inventory" or "CCON." According to Ceton, it was often invoiced for consigned goods before Sienna finished building them. The parties agree, however, that Ceton was not obligated to pay the invoice before Ceton product was actually sold to Ceton customers and before the customer payments were received.

In or around June 2011, Sienna refused to authorize SVB to release funds from the Escrow Account. According to Sienna, it simply requested (and was denied) payment for Ceton products and non-recurring expenses[7] that had accrued since the inception of the parties' relationship.

At some point in 2011, Ceton instructed its customers to stop making payments into the Escrow Account. According to Sienna, this occurred as early as March 2010.[8] Ceton asserts that it did

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[7]Non-recurring expenses presumably pertain to the manufacturing and shipping of Ceton product, as most of the time Sienna, rather than Ceton, shipped the goods directly to Ceton's customers.

[8]Sienna relies on Ceton's deemed admissions to support its contention that Ceton breached the Security Agreement for the

so in July 2011 as a result of Sienna's refusal to authorize SVB to release funds to Ceton from the Escrow Account.

By the summer of 2011, Sienna and Ceton had a six-figure accounting discrepancy that required Ceton to hire an outside CPA. Sienna contends that the workbook internally circulated by Ceton's CPA showed its account payable to Sienna was $768,798.06. At the same time, the accounting Ceton sent to Sienna listed only $278,548.54 in accounts payable--an amount Ceton characterizes as "tentative" and not representative of how much, if anything, it owes Sienna today. The parties agree, however, that Ceton management discussed internally "how much more [than they can pay]."

Over the next two months, Sienna engaged in a comprehensive reconstruction of the account relationship. In early September 2011, Sienna placed a hold on further shipments of Ceton product pending a resolution of the accounting discrepancies, which were increasing as time passed. After September 9, 2011, Sienna only made shipments of Ceton product for which Ceton paid in advance.

On September 13, 2011, Sienna sent Ceton a completely reconstructed account statement that reversed all invoices for CCON inventory and only requested payment for Ceton product that had actually been shipped. According to its accounting reconciliation, that balance was $949,756.59.[9] As of that date, Sienna also had $759,700.08 in Component inventory acquired for

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first time in March 2010. See discussion in Part III.C. infra.

[9]On December 13, 2011, Ceton's internal estimate of its account payable balance to Sienna was $200,000.

the purpose of manufacturing Ceton product, excluding components that Ceton had shipped to Sienna for use in manufacturing Ceton product ("Ceton-supplied inventory"). Ceton disputes the accuracy of both amounts on the grounds of incorrect accounting due to illegitimate charges, pricing overcharges, offsets for defective goods, and offsets for Ceton-supplied inventory.

On September 26, 2011, Ceton cancelled all outstanding POs. According to Sienna, after that date, it repeatedly asked for instructions from Ceton about what to do with the Components, to no avail. Sienna also offered to sell the Components to Ceton's new contract manufacturer, but Ceton refused to agree to this. Ceton responds that it did offer to buy some of the Components but that Sienna never responded.

After having spent several months trying to resolve their account reconciliation differences, the parties reached an impasse and the instant lawsuit was filed. At this stage, the only three items on which the parties appear to agree are that (1) Ceton paid Sienna $4,483,347.17;[10] (2) the variance between the Component prices as invoiced by Sienna and the Component prices actually paid by Sienna is $338,906.49;[11] and (3) Ceton invoiced its

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[10]Even then, Ceton's calculation adds the $4,500 remaining in the SVB Escrow Account to the amount of its payments. The Court will assume, for purposes of the present motions, that the total of the payments made by Ceton does not include the amount in the Escrow Account.

[11]This variance is relevant for the dispute over the price terms governing the relationship--namely, whether the price terms were driven by the invoices, as Sienna submits, or whether there was an oral agreement that Sienna would charge Ceton its actual cost for Components, plus a mark-up margin.

customers for Ceton product in the amount of $4,691,168.26.[12] This is where the parties' concurrence ends and where their disagreement on almost all other aspects of their relationship begins. Below is a summation of the highlights of their discord.

First, according to Sienna, the total invoiced amount of the Ceton product is $5,167.888.70[13] and the total amount Ceton owes it is $637,856.80.[14] By contrast, Ceton's calculation shows that Sienna owes it money, rather than the other way around.[15] Specifically, Ceton fixes the total value of "goods and services furnished by Sienna, at correct prices" at $4,604,930.09. After deducting various charges for product purchased from third parties to replace allegedly defective goods supplied by Sienna, amounts due Ceton for parts it supplied, and payments made by Ceton to

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[12]Although Ceton admits that a spreadsheet it provided to Sienna during discovery valued the product sold to its customers at $4,691,168.26, it contends that the spreadsheet was obsolete and has been since revised based on the correct Component prices paid by Sienna to acquire the same.

[13]Sienna's brief refers to the Ceton product as "Manufactured Goods" and divides its breach of contract claim into a "Manufacturing Goods claim" and a "Component Goods claim."

[14]This amount was derived by deducting the payments made by Ceton and applying a $46,684.83 credit by Sienna. According to Sienna, its claim is only for products actually shipped.

[15]The table contained in Ceton's statement of additional material facts shows a comparison between its figures--which, according to the table are "subject to revision"--and those of Sienna. The Court notes that, at this stage of the litigation, Ceton's calculation should already be finalized and accepts its analysis as the finalized amount underlying its counterclaims.

Sienna on outstanding account payable, Ceton arrives at a total balance owed it by Sienna of $223,588.30.[16]

Second, according to Sienna, as of June 3, 2013, it had $541,222.80 in Components that it has not be able to salvage or otherwise use.

Finally, according to Sienna, as of June 3, 2013, it had $45,548.57 in Ceton-supplied inventory on hand which it tendered to Ceton on that date, but Ceton ignored the offer. Ceton disputes the amount stating the Ceton-supplied inventory is worth $140,918.99 and asserts that the tender comes too late due to purported poor inventory management by Sienna and the fact that many of the items are no longer of any use to Ceton.

II. Procedural History

Sienna filed the instant lawsuit on May 18, 2012 in the Superior Court of Gwinnett County. On May 24, 2012, Ceton was served with Sienna's complaint along with interrogatories, requests for production and requests for admission. The complaint asserts the following claims and requests for relief:[17] (1) suit on open account for the invoiced amount (Count One); (2) breach of contract for expectation and reliance damages for both the Ceton

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[16]Ceton refers to this balance as its "accounts receivable claim."

[17]The amounts set forth in the complaint differ from those asserted in Sienna's briefs and statement of material facts accompanying its motion for partial summary judgment. The Court understands that this variance is due to a decrease of Sienna's account receivable balance as a result of additional payments made by Ceton as well as to adjustments on account of information obtained during discovery.

product and the Components (Count Two); (3) attorney's fees (Count Three); and (4) unjust enrichment (Count Four) [Doc. 1].

At the time of service, Ceton was not represented by counsel. Ceton subsequently retained a Georgia attorney--Michael Dailey--who removed the case on the basis of diversity jurisdiction on June 25, 2012.[18] Ceton's answer filed July 16, 2012 raises fifteen affirmative defenses, including waiver and estoppel, laches and unclean hands, failure to mitigate damages, setoff, and prior material breach of the parties' agreement [Doc. 5].

In addition, Ceton asserts eight counter claims: (1) failure to manufacture and ship Ceton product resulting in damages, including lost profits (Counts One, Two and Seven); (2) conversion for Sienna's purported refusal to return the Ceton-supplied inventory (Count Three); (3) defective manufacturing (breach of contract) resulting in damages, including lost profits and loss of customer good will (Count Four); (4) negligent manufacturing (Count Five); (5) failure to apply pricing credits (Count Six); (6) breach of the implied duty of good faith and fair dealing (Count Eight).

The eight-month discovery track, which was extended twice, ended on August 9, 2013. During the discovery period, each party filed a motion to compel [Docs. 38 & 48]. In addition, on June 14, 2013, Sienna filed a motion for sanctions for violations of Federal Rule of Civil Procedure 30(b)(6).

[18]Mr. Dailey withdrew from the case on December 13, 2012. Ceton's current counsel, Michael Zeno, appeared on Ceton's behalf on December 17, 2012 [Doc. 21].

The second extension of the discovery period was granted on July 10, 2013 to allow the parties "to resolve their discovery disputes by agreement without the Court's involvement" [Doc. 60]. The parties were further cautioned that no additional extensions would be granted and that only select depositions may take place during the 30-day extension. The list of permissible depositions included the Rule 30(b)(6) second deposition of Ceton, "should Sienna's motion for sanctions [Doc. 49] be granted." Finally, the Court denied without prejudice the parties' respective motions to compel and afforded them the opportunity to re-file the same with respect to any unresolved discovery disputes [Id.].

In summary, with the sole exception of Sienna's motion for sanctions, all motions currently before the Court were filed between the close of discovery on August 9, 2013 and October 28, 2013. They will be addressed, for the most part, in the order in which they were filed.

III. Discussion

A. *Sienna's Motion for Sanctions [Doc. 49] and Motion for Leave to Supplement Its Reply [Doc. 82]*

In its motion for sanctions [Doc. 49] filed June 14, 2013, Sienna seeks an order precluding Ceton from introducing evidence on issues for which its corporate designees did not provide testimony during their Rule 30(b)(6) deposition.[19] Specifically,

[19]Federal Rule of Civil Procedure 30(b)(6) provides that an entity named as a deponent must designate a person or persons who "must testify about information known or reasonably available" to the entity with respect to matters set forth in the notice of deposition. FED. R. CIV. P. 30(b)(6).

Sienna avers that Ceton produced Gary and Pam Hammer[20] for a deposition that "consisted almost entirely of the answer 'I don't know'" [Doc. 49]. Alternatively, Sienna requests leave to re-depose Ceton.

Ceton does not dispute the fact that the 30(b)(6) deposition was properly noticed or that it produced the Hammers without objecting to the notice or seeking a protective order. Rather, the crux of its argument is that its discovery conduct as a whole shows no indicia of bad faith, and that Sienna cannot use its 30(b)(6) motion to obtain supplementary interrogatory answers.

Ceton's first contention is rejected as irrelevant. Its second assertion is technically correct. However, Ceton may not use its failure to provide answers to some of Sienna's interrogatories as a shield for the purpose of opposing Sienna's instant motion.

The Court having reviewed the parties' briefs and the 30(b)(6) deposition transcript finds that Ceton's designated representatives were not adequately prepared on the noticed topics. As a result, Sienna was unable to obtain relevant information pertaining to the September 2011 account reconciliation, Ceton's defenses and its counterclaims.

Although the Court is sympathetic to Sienna's frustration, preclusion of evidence is not the appropriate sanction here. Accordingly, Sienna's motion for sanctions [Doc. 49] is GRANTED

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[20]Gary Hammer is the President of Ceton, and Pam Hammer is Ceton's Director of Corporate Development [Doc. 49 at 3].

with respect to its alternative request to re-depose Ceton.[21] Sienna may re-depose Ceton's designated representative(s) within twenty one (21) days from the date of entry of this Order.

Ceton is cautioned to ensure that its designated representative(s) are adequately prepared on the noticed topics. At the same time, Sienna shall avoid deposition questions involving recitation of excessively detailed information that is more properly discoverable through an interrogatory.[22]

Ceton shall bear all reasonable fees and costs associated with this deposition as a sanction for its failure to prepare its designated representatives for the deposition. Counsel for Sienna is DIRECTED to file an itemization of expenses with the Court.

B. Sienna's Motion to Compel [Doc. 83]

Sienna re-filed its motion to compel [Doc. 83] on August 13, 2013. Based on its reply to Ceton's response,[23] it appears that Sienna has already received some of the information subject to the instant motion, albeit approximately ten days after the close of the discovery period. Below is a summary of the interrogatories

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[21]As a result, Plaintiff's motion for leave to supplement its reply [Doc. 82] is DENIED AS MOOT.

[22]Sienna's motion to compel discussed in Part III.B. infra addresses a number of deficiencies in Ceton's answer to Sienna's interrogatories and requests for production. Thus, any lack of information which was requested by Sienna in an interrogatory but was not produced by Ceton should be cured by the Court's ruling on that motion.

[23]Although Ceton's response filed September 16, 2013 is untimely, see LR 7.1.B, NDGa., the Court will consider it. Future omissions of the kind will, however, render the respective motion unopposed.

and requests for production, the responses to which have not been received or are characterized by Sienna as "deficient."

1. **Interrogatories**

Sienna moves to compel responses to interrogatory numbers 10, 12, 13, 14 and 15. It appears that Ceton provided satisfactory responses to interrogatory numbers 13, 14 and 15 on August 21, 2013. Sienna's reply does not mention interrogatory number 10, and the Court assumes that its motion is moot with respect to this interrogatory. Thus, number 12 is the only interrogatory subject to the instant motion.

This interrogatory requests information about the identity of the distributors that were affected by publicly announced production deadlines, the manner in which Ceton's relationship with such distributors was damaged, and, inter alia, the nature of such damages [Doc. 83 at 5]. Ceton's response to that interrogatory--which was identical to its response to several of the other interrogatories--raised a number of objections on the grounds that the information sought is protected under the attorney-client privilege and/or the work-product doctrine, that it is unreasonable in volume, and/or for which Sienna has declined to propose applicable search terms.

In its response to the instant motion, however, Ceton does not assert any of these objections. Instead, it argues that the requested information is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. The problem is that Ceton never asserted this objection in its initial responses. Moreover, regardless of whether its objection is waived, the interrogatory at issue is reasonably calculated to unearth

information concerning Ceton's claim for failure to timely manufacture and ship, and in particular with respect to its request for lost profits. In addition, the Court agrees with Sienna that none of the boilerplate objections stated in Ceton's response to interrogatory number 12 are valid. Accordingly, Sienna's motion is GRANTED as to interrogatory number 12, and Ceton is ORDERED to provide adequate sworn responses to Sienna within ten (10) days from the date of entry of this Order.

2. Requests for Production ("RFP")

The following RFPs are still at issue: 9, 12, 13, 15 and 16, 19 and 29.

RFP 9: Related to the Conversion of Ceton-supplied Inventory

Ceton states it has produced the documentary basis for its determination of the Components purchased and delivered to Sienna. Sienna counters that the "documentary basis" provided to it consists of a spreadsheet identifying the value of these Components without any supporting primary source information.

Ceton is hereby ORDERED to produce for inspection and copying by Sienna the packing slips and other primary source supporting documentation Ceton used to prepare its spreadsheet within ten (10) days from the date of entry of this Order.

RFP 12, 15 and 16: Related to Ceton's Claims for Lost Profits

RFP number 12 requests a fairly broad range of accounting documents and other information related to Ceton's accounts payable from January 1, 2009 until September 30, 2011.[24] RFP

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[24] In its reply, Sienna appears to expand the scope of its RFP by including accounts receivable (A/R) aging reports, among other documents. Although A/R aging reports are relevant to Ceton's

numbers 15 and 16 pertain to Ceton's lost sale claims and request all documents that reflect upon Sienna's failure to timely manufacture and ship Ceton product. In its response to the instant motion, Ceton states it has produced its expert's preliminary report and that it has provided the supporting documents to Sienna.

Ceton is hereby ORDERED to produce all documents requested in RFP numbers 15 and 16 within ten (10) days from the date of entry of this Order. As to RFP number 12, Sienna's request is overbroad with respect to scope and time range.[25] Sienna may refine[26] and submit its request to Ceton no later than five (5) days from the date of entry of this Order. Ceton is ORDERED to then produce the requested documents within ten (10) from the date of receipt of the revised RFP number 12.

RFP 13: Related to Ceton's Claim for Defective Goods

This RFP requested documents reflecting upon defective products and return merchandise authorizations. Ceton states it has provided an itemized list of defective products and a report identifying manufacturing defects.

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lost profit claims, RFP number 12 specifically limits the scope of production to documents "that reflect[] Your accounts payable" [Doc. 83 at 8].

[25]Because both parties agree that substantial production did not commence until 2010, the Court deems the appropriate time range for RFP number 12 to be the period between January 2010 and September 2011.

[26]Any such revisions shall be carried out within the confines of the language of RFP number 12.

The Court finds that the information produced by Ceton is insufficient. Ceton is hereby ORDERED to produce within ten (10) days from the date of entry of this Order the primary source data that it used to prepare its spreadsheet and that was requested in Sienna's July 12, 2013 letter to Ceton's counsel [Doc. 99, Ex. 5]. Alternatively, the information may be produced for inspection and copying by Sienna's counsel at a mutually agreeable time within the ten-day period specified above.

RFP 19 and 29: Related to Ceton's Claim for Defective Goods

To the extent Sienna requests that the Court order Ceton to confirm it has produced all documents requested by RFP number 19, the Court declines to do so. As to RFP number 29 which requests the production of documents related to unauthorized vendors of parts, Ceton is ORDERED to produce the same within ten (10) days from the date of entry of this Order.

In summary, Sienna's motion to compel [Doc. 83] is GRANTED IN PART AND DENIED IN PART with respect to RFP number 19. Ceton is ORDERED to provide responses to Sienna's interrogatory number 12 within ten (10) days from the date of entry of this Order. Ceton is further ORDERED to produce all documents requested in Sienna's RFP numbers 9, 12,[27] 13, 15, 16, and 29 in a manner consistent with this Order within ten (10) days from the date of its entry.

In light of the fact that a significant portion of the information sought by the instant motion was provided after the close of the twice-extended discovery period, the Court awards

[27]Ceton shall produce responsive information to RFP number 12 no later than ten (10) days from the date of receipt of the revised RFP.

Sienna reasonable fees and costs associated with the filing of the motion. Counsel for Sienna is DIRECTED to file an itemization of expenses with the Court.

C. Ceton's Motion to Withdraw Deemed Admissions [Doc. 100]

As stated above, on May 24, 2012, Sienna's served Ceton with its interrogatories, requests for production and requests for admission, along with the complaint. Michael Dailey--Ceton's prior counsel who withdrew from the case in December 2012--answered the interrogatories and requests for production, but did not answer the requests for admission.

Sienna's motion for partial summary judgment discussed infra relies on facts deemed admitted by Ceton's prior counsel's failure to answer Sienna's requests for admission. As a result, on October 8, 2013, Ceton's current counsel, who entered an appearance in this case on December 17, 2012, filed the instant motion to withdraw Sienna's deemed admissions [Doc. 100].

Federal Rule of Civil Procedure 36 governs the withdrawal of admissions; it provides, in pertinent part,

> A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

FED. R. CIV. P. 36(b). Ceton acknowledges that it failed to answer Sienna's requests for admissions, but offers three reasons for its omission: (1) the requests for admission were served along with the complaint; (2) Ceton was unrepresented at the time of service;

(3) the failure to answer the requests for admission was inadvertent.

Ceton's motion does not specify which of the 105 deemed admissions it seeks to withdraw [Doc. 1-1]. Based on Ceton's references to specific facts relied upon in Sienna's motion for partial summary judgment, the Court construes the instant motion as requesting withdrawal of Ceton's admissions that it circumvented escrow beginning in March 2010 through May 2011 [Doc. 1-1, Requests for Admission ¶¶ 80-94].

As outlined above, Federal Rule of Civil Procedure 36 governs the decision to grant or deny the withdrawal of admissions. The United States Court of Appeals for the Eleventh Circuit has explained that "district courts should apply a 'two-part test' in deciding whether to grant or deny a motion to withdraw or amend admissions.

"First, the court should consider whether the withdrawal will subserve the presentation of the merits, and second, it must determine whether the withdrawal will prejudice the party who obtained the admissions in its presentation of the case." Perez v. Miami-Dade Cnty., 297 F.3d 1255, 1264 (11th Cir. 2002)(citations omitted).

The first prong, whether the presentation of the merits is subserved by allowing withdrawal or amendment, "'emphasizes the importance of having the action resolved on the merits,' [Smith v. First Nat'l Bank, 837 F.2d 1575, 1577 (11th Cir. 1998)], and is "'satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case. [Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995)].'" Perez, 297

F.3d at 1266. If the admissions conclusively establish Ceton's liability, withdrawal is most likely proper. Id.

The second prong refers to the prejudice experienced by the non-moving party if the withdrawal is granted; "it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions." Perez, 297 F.3d at 1266.

Here, the Court finds that granting Ceton's motion best serves the interests of Rule 36. As to the first prong, Sienna relied on Ceton's deemed admission in connection with its motion for partial summary judgment. In fact, in its statement of undisputed material facts, Sienna expressly refers to Ceton's breach of the Security Agreement in March, April and May 2010 [Doc. 71-2 ¶ 30].

Second, several factors show that allowing Ceton to withdraw its admissions will not prejudice Sienna: Sienna may re-examine the issue during its 30(b)(6) deposition of Ceton's corporate representative; trial on the merits has not begun; and, in granting in part Sienna's motion to compel, this Court effectively has reopened discovery for the limited purposes set forth herein.

While the Court is less than impressed with Ceton's unexplained delay in filing the instant motion, Sienna will not suffer prejudice if Ceton is permitted to withdraw its admissions. Accordingly, Ceton's motion to withdraw its deemed admissions is GRANTED as to requests for admission numbers 80 through 94.

Ceton has ten (10) days from the date of entry of this Order to submit its amended admissions to Sienna. If Sienna feels

further discovery is necessary following receipt of Ceton's admissions, it may serve upon Ceton one (1) request for production of documents, including sub-parts, reasonable in scope and degree, within five (5) days from the date of receipt of Ceton's amended admissions. Ceton shall then have ten (10) days to produce the requested documentation.

In addition, the Court awards Sienna reasonable expenses related to filing its opposition brief to the instant motion to withdraw. Counsel for Sienna is DIRECTED to submit an itemization of costs and fees with the Court.

D. The Parties' Motions for Partial Summary Judgment [Docs. 71 & 91] and Sienna's Motion for Leave to File Surreply [Doc. 103]

Sienna's motion [Doc. 71] filed August 13, 2013 seeks summary judgment on its breach of contract claim--with respect to both its "Manufactured Goods" and its "Components Goods" claims--all affirmative defenses asserted by Ceton, and all of Ceton's counterclaims. On September 9, 2013, Ceton filed a cross motion for partial summary judgment [Doc. 91] requesting dismissal of Sienna's breach of contract as to its Components claim.

The Court's rulings on Ceton's motion to withdraw admissions and Sienna's motions to re-depose and to compel effectively re-open discovery for a period of twenty-five (25) days from the date of entry of this Order, for the limited purposes stated herein. Accordingly, the Court DEFERS ruling on the pending motions for partial summary judgment [Docs. 71 & 91] until such time.

Upon the expiration of the twenty-five (25) day period and within ten (10) days thereof, Sienna may file a supplemental brief in support of its own motion as well as a supplemental response to

Ceton's cross motion. Ceton shall have ten (10) days from the date of such filings to submit a supplemental response to Sienna's supplemental brief and a reply to Sienna's supplemental response.

Accordingly, all supplemental filings must be submitted within forty-five (45) days from the date of entry of this Order. The supplemental briefs and responses, including a statement of additional material facts or a response thereto,[28] shall not exceed fifteen (15) pages in length each; each supplemental reply is limited in length to ten (10) pages. Finally, Sienna's motion for leave to file surreply [Doc. 103] to Ceton's reply in support of its cross-motion for summary judgment is DENIED AS MOOT.

E. Miscellaneous Motions [Docs. 86, 88 and 97]

Ceton's motion for an extension of time to respond to Sienna's motions for partial summary judgment and to compel discovery [Doc. 86] filed August 27, 2013 is GRANTED NUNC PRO TUNC.

Ceton's motion for leave to file brief in response of Sienna's motion for partial summary judgment in excess of the twenty-five (25) page limit [Doc. 88] filed September 6, 2013 is GRANTED NUNC PRO TUNC. As a result, Sienna's motion to consider its motion for partial summary judgment unopposed [Doc. 97] filed September 23, 2013 is DENIED.

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[28]While the supplemental statement of undisputed material facts and the response thereto may set forth additional facts, they may not alter facts set forth in the statements of material facts accompanying the instant motions for partial summary judgment unless such modifications are necessary on account of information requested and produced as a result of this Order.

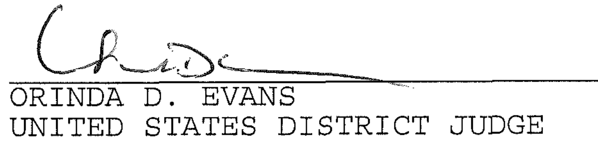
IV. Conclusion

For the reasons discussed above, Plaintiff's motion for sanctions [Doc. 49] is GRANTED, its motion for leave to supplement [Doc. 82] is DENIED AS MOOT, its motion to compel discovery [Doc. 83] is GRANTED IN PART AND DENIED IN PART. Defendant's motion to withdraw deemed admissions [Doc. 100] is GRANTED. The Court DEFERS ruling on Plaintiff's motion for partial summary judgment [Doc. 71] and on Defendant's cross motion for partial summary judgment [Doc. 91], and DENIES AS MOOT Plaintiff's motion for leave to file surreply [Doc. 103]. Defendant's motions for extension of time to respond [Doc. 86] and to file excess pages [Doc. 88] are GRANTED NUNC PRO TUNC, and Plaintiff's motion to consider its motion for partial summary judgment unopposed [Doc. 97] is DENIED.

Discovery is re-opened for a period of twenty-five (25) days from the date of entry of this Order for the limited purposes of (1) amending Ceton's admissions; (2) producing information responsive to Sienna's request for production addressing Ceton's amended admissions; (3) producing information responsive to Sienna's interrogatory and requests for productions as specified supra in this Order; and (4) re-deposing Ceton's designated representative(s). Ceton is directed to respond to all requests in a manner consistent with this Order and in accordance with the time limits set forth herein.

Finally, Sienna is awarded reasonable fees and expenses as discussed above. Counsel for Sienna is DIRECTED to file an itemization of expenses with the Court.

SO ORDERED, this 15 day of January, 2014.



ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE