

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

E.A. RENFROE & CO., INC.

Plaintiff,

v.

CORI RIGSBY and KERRI
RIGSBY,

Defendants.

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No. 2:06-cv-1752-WMA

**DEFENDANTS' REPLY TO RENFROE'S AMENDED
RESPONSE TO THE COURT'S QUESTIONS**

On January 30, 2009 Renfroe filed what was entitled "Renfroe's Amended Response to the Court's Questions raised in its January 20, 2009 Memorandum Opinion and Order, and Response to the Court's January 28, 2009 Order" ("Amended Response"). In this document, Renfroe, among other things, referred to its original response as "imprecise," "inaccurate," and "confus[ing]." This filing also indicated that its previous response may have left the Court with a "misperception of Renfroe's intentions," and "unintentionally led the Court to believe that it would be conducting a trial by affidavit on the question of its attorneys' fees," and that its response "expect[ed] the Court to read [Renfroe's counsel's] minds." Given Renfroe's Amended Response, the Defendants believe that they too may

have fallen prey to an incorrect interpretation of Renfroe's original response and are likewise now unclear as to Renfroe's intentions in connection with the Joint Stipulations of the Parties ("Joint Stipulation") that was filed on January 14, 2009 [Dkt. No. 409] and the briefing the Court ordered on January 28, 2009 [Dkt. No. 414]. As such, the Defendants submit this reply.

In its Amended Response, Renfroe represents that it is not seeking attorneys' fees as damages for breach of contract. This acknowledgement should narrow the remaining issues to be resolved. However, in its Amended Response, Renfroe also indicated that it intends to go beyond the scope of the Court's January 28, 2009 Order and brief its entitlement to attorneys' fees as some sort of equitable relief that has never been asserted. This request is inconsistent with Renfroe's pleadings, inconsistent with the Court's orders and inconsistent with what Defendants understood the parties were trying to accomplish with the Joint Stipulation – namely to submit the issue of damages sought for breach of contract on papers instead of a trial.

In light of what seems to be universal confusion, at least among the parties and their counsel, and at the risk of being verbose, a brief recitation of how we got here may be warranted. Renfroe asserted two causes of action for damages in this lawsuit: Count 1: Breach of Contract; and Count 2: Violation of Alabama Trade Secrets Act. (Amended Complaint for

Injunctive Relief and Damages, Dkt. No. 2). After substantial and thorough briefing on summary judgment motions and cross summary judgment motions on both of these claims, the Court entered an Order on October 29, 2008 [Dkt. No. 403] which (1) granted Defendants' Motion for Summary Judgment as to Renfroe's claim under the Alabama Trade Secrets Act; (2) granted Renfroe's Motion for Summary Judgment as to liability on its breach of contract claim; and (3) ordered a trial to permit Renfroe to "prove damages proximately caused by the said breach [of contract]." Based on the Court's Order [Dkt. No. 403] and accompanying Memorandum Opinion [Dkt. No. 402], the Defendants understood that the sole remaining issue to be resolved at trial was whether Renfroe could carry its burden of proof that it was entitled to damages for breach of contract under Alabama law.

In their motions for summary judgment, the Defendants argued that the types of damages sought by Renfroe were not the types of damages that are recoverable for breach of contract under Alabama law. In its Order and Memorandum Opinion, the Court did not address the merits of these arguments and instead stated that they did not need to be determined at that time. (Memorandum Opinion at 5-6.)

Subsequently, counsel for the parties had conversations regarding the damages Renfroe was seeking. Ultimately, counsel for Renfroe represented

to the Defendants' counsel that it was limiting the damages it sought to two categories: (1) the consulting fees paid to the Defendants by Scruggs; and (2) the attorneys' fees paid by Renfroe to its own attorneys in connection with the prosecution of the breach of contract claim. Based upon this understanding, the Defendants agreed that, if the parties could come to certain agreements regarding evidentiary issues, that the case could be decided on motions, stipulations and documentary evidence, including declarations, if necessary.

Subsequently, Renfroe advised that the only damages it intended to prove initially were damages in the form of the consulting fees. Renfroe stated that it would wait until after a decision was made on consulting fees before addressing its entitlement to attorneys' fees, as is traditionally done in cases where attorneys' fees are sought. As such, at the time the Joint Stipulation was filed with the Court, the only category of damages the parties proposed to address in the initial briefing schedule was whether Renfroe could recover the consulting fees as damages.¹

¹ The Defendants were (and still are) willing to stipulate to the amount of these fees as evidenced by the IRS form 1099s. However, the Defendants specifically reserve the right to challenge whether these damages are recoverable for breach of contract under Alabama law and, even if they are, whether Renfroe can carry its burden of proof to prove said damages, including causation.

Following the filing of the Joint Stipulation, the Court entered its Order asking three questions. Subsequently, counsel for the parties discussed again the issue of litigating the remaining damage issues without a trial. In these discussions, Renfroe changed its position from earlier discussions and expressed its desire to have the attorneys' fee issue submitted to the Court at the same time as the consulting fees issue. The Defendants were still agreeable to this so long as certain documents would be produced and a stipulation could be reached regarding evidentiary issues. Renfroe's counsel stated that they would prepare a new stipulation for review and provide the requested attorneys' fees documents. The Defendants were waiting for these documents and a new proposed stipulation to be provided by Renfroe when it received Renfroe's Amended Response (and Defendants are still waiting for these documents as of the time of this filing).

Given Renfroe's Amended Response, the Defendants are unclear how the Court wishes the parties to proceed. Indeed, while the Court's Order of January 28, 2009 [Dkt. No. 414] permits Renfroe to prove its entitlement to attorneys' fees as a result of Defendants' breach of contract, the only stipulation between the parties that has been filed relates only to consulting fees. Defendants' willingness to submit the attorneys' fee issue on paper

was conditioned upon reaching an agreement on evidentiary issues and receiving certain requested documents. Such an agreement has not been formalized nor have any documents been produced.

Moreover, by its Amended Response, Renfroe appears to have changed the scope of the briefing ordered by the Court to include claims that were not contemplated by the Court's Order of October 29, 2008, were not provided for in the Court's Order of January 28, 2009, and were not set to be tried. In fact, in its Amended Response, Renfroe acknowledges that it is not seeking attorneys' fees as damages for breach of contract. Rather, Renfroe appears to seek leave to prove an entitlement to "damages" for certain equitable claims that have never been asserted. If Renfroe is no longer seeking its own attorneys' fees as damages for breach of contract, which is what it says, then the only remaining damage issue relates to the consulting fees and the portion of the Court's Order of January 28, 2009 dealing with attorneys' fees appears to be moot.

As the Defendants have previously asserted to this Court and as the Defendants advised Renfroe's counsel previously, the Defendants believe that, as a matter of law, Renfroe is not entitled to recover the consulting fees damages it represented it was seeking for breach of contract. If the Defendants are correct in this assertion, all other issues are moot.

As such, contemporaneously with the filing of this reply, the Defendants are filing a Motion to Strike Damages. Given Renfroe's Amended Response, and to streamline what is now developing into a much more complex process than initially envisioned, Defendants believe that the pure legal issue of whether the consulting fees damages sought by Renfroe for its breach of contract claim are recoverable under Alabama law should be addressed by the Court prior to Renfroe being put to proof on other issues, like whether the consulting fees were proximately caused by the breach.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2009 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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And, I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: None

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