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April 7, 2015

VIA FAX 973-424-6804 & LAWYERS SERVICE
Honorable Ned M. Rosenberg, J.S.C.
Essex County Superior Court
Hall of Records
465 Dr. Martin Luther King, Jr. Blvd., Chambers 224
Newark, New Jersey 07102

Re: Feliciano Tenezaca and Jose Zuna v. Toll Brothers, Inc.
Docket No.: ESX-L-1262-11
Our File: 335-0

1) **Plaintiffs' Motion to Compel Production of Signed Authorizations**
2) **Motion on Short Notice to Intervene by Timothy J. Carlsen**

Currently Returnable April 10, 2015

Dear Judge Rosenberg:

Please allow the following letter brief to serve as a Reply on behalf of Plaintiffs Feliciano Tenezaca and Jose Zuna in support of Plaintiffs' Motion to Compel Production of Signed Authorization as well as serve as a further Reply to the Motion on Short Notice filed by Timothy J. Carlson to Intervene for the Purpose of Opposing Plaintiffs' Motion. These motions are currently returnable before Your Honor on April 10, 2015

What is interesting about Timothy J. Carlsen's most recent submission to the Court is the fact that he refers to himself as "intervenor Timothy Carlsen". Mr. Carlsen, the expert for defendant Toll Brothers, has not been granted status as an intervenor. Said motion is not returnable until this Friday, April 10, 2015. In fact said request to intervene is both procedurally and factually flawed. The courts have clearly articulated the four criteria for intervention as of right under *R.* 4:33-1. To intervene as of right, the movant must establish the following: 1) claim "an interest relating to the property or transaction which is the subject of the transaction"; 2) show that the movant is "so situated that the disposition of the action may as a practical matter, impair or impede its ability to protect that interest"; 3) demonstrate that the movant's interest is not "adequately represented by existing parties"; and 4) make a "timely application to intervene". *See Sutter v. Horizon Blue Cross and Blue Shield of New Jersey*, 406 N.J. Super 86, 106 (App. Div. 2009).

Mr. Carlsen has not satisfied any of the four intervenor criteria nor offered any legal authority which would allow him to intervene in this case for the limited purpose of claiming the documents sought by Plaintiffs are "confidential". The cases cited by Mr. Carlsen are both public interest cases wherein an intervenor was seeking to protect the interests of the public at large. They have no applicability to the case at hand. Here Mr, Carlsen is not trying to protect any public interest but is merely trying to hide the details of his purported expert qualifications. He is attempting to shield himself from scrutiny, not shield the public from some type of injustice. Therefore, since Mr. Carlsen fails to satisfy the requirements under *R.* 4:33-1, his Motion to Intervene should be denied and his opposition to Plaintiff's Motion to Compel Authorizations should not be considered as he has no legal basis to oppose such.

In addition to not providing the requisite basis to become an intervener as of right Mr. Carslen also has no standing to assert any claims or opposition in this litigation. Mr. Carlsen completely ignores the concept of standing in any of his briefs. Standing refers to the plaintiff's "ability or entitlement to maintain an action before the court," and courts will not entertain matters where legal standing is lacking. *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n*, 82 *N.J.* 57, 67, 411 A.2d 168 (1980); *In re Quinlan*, 70 *N.J.* 10, 34, 355 A.2d 647, cert. denied, 429 U.S. 922, 97 S. Ct. 319, 50 L. Ed. 2d 289 (1976). Standing is present where the plaintiff has a sufficient stake in the outcome of the litigation and there is a substantial likelihood that plaintiff will suffer harm in the event of an unfavorable decision. *New Jersey State Chamber of Commerce*, 82 *N.J.* at 67. Mr. Carlsen, in the case *sub judice,* has absolutely no standing as he does not have any stake in the outcome of this litigation, a construction injury case, nor will he suffer harm in the event of an unfavorable decision. (It would not be considered "harm" to be compelled to sign authorizations which would merely provide the foundation for his alleged expert qualifications.)

However if the Court is inclined to accept and consider Mr. Carlsen's opposition to Plaintiff's motion, even though he lacks standing or intervenor status, it is respectfully submitted that said opposition is unsupported by the facts and relevant legal authority. Mr. Carlsen still does not make any showing that the requested discovery is either "confidential" or "privileged." *R.* 4:10-3 provides that the Court may make any Order limiting discovery in the interest of justice upon a good cause being shown. *See Hammock v. Hoffman-LaRoche, Inc.*, 142 N.J. 356, 376, 662 A.2d 546, 556 (1995)("Documents containing trade secrets, confidential business information and privileged information may be protected from disclosure." (emphasis added)) In *Hammock* the New Jersey Supreme Court held that the person who seeks to overcome the strong presumption of access must establish by a preponderance of the evidence that the interest in secrecy outweighs the presumption. *Id.* They further held that the need for secrecy must be demonstrated with specificity as to each document. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient. The Court noted that "the same is required to satisfy the "good cause" requirement of Rule 1:2-1 and Rule 4:10-3 as well as the "justice" requirement of Rule 4:10-3." *Id.* at 380.

Mr. Carlsen does not attempt to make a showing of "good cause" but merely says the Application forms may contain confidential personal information such as Mr. Carlsen's date of birth, marital status, credit card information and reference reports. The Application Instructions for a

Certified Safety Professional require the candidate to submit: 1) Contact information; 2) a Qualifying credential; 3) Experience information; 4) Education information; 5) Application agreement and validation (acknowledging the information is truthful); and 6) Payment. *(Exhibit E to Plaintiffs' Motion p.8 entitled CSP Chapter 3 Application Instructions)*. There is absolutely no confidential or privileged information in the application materials. Other than the credit card information the other information would certainly not be considered "confidential." In fact Mr. Carlsen gave his wife's name in his deposition and much of the other information such as date of birth and address can be gleaned from a quick internet search. References are certainly not considered a confidential record in any form of the imagination. It is undisputed that Mr. Carlsen has not established that "secrecy outweighs the presumption of access". He certainly has not articulated specific examples of harm as is required under *Hammock* which would warrant a court denying access to said information. Furthermore there is no certification nor other competent evidence to support Mr. Carlsen's claim of confidentiality. Just because Mr. Carlsen claims something is "confidential" does not make it so.

It is surprising that Mr. Carlsen is still citing to *Gensollen v. Pareja*, 416 N.J. Super 585 (App. Div. 2010), since it is completely inapplicable to the case at hand. In *Gensollen* the expert was asked by plaintiff to compile and produce documents that were not in existence at the time of the request. The Court denied plaintiff's request to produce but only because the Court found that the request would have required the expert to put a lot of time, effort and money, to prepare these documents from scratch and that it would have been unduly burdensome and expensive for the expert. In the case at hand Mr. Carlsen is not asked to compile or produce any documents that are not in existence at the time of the request. In fact, he is not asked to do any work at all. He is merely asked to sign authorizations, which are not privileged or confidential, which would allow plaintiff to review Mr. Carlsen's applications with the various safety boards and professional organizations. These applications and membership requests have already been completed by Mr. Carlsen and would not require any extra work or money to be expended by Mr. Carlsen or Toll Brothers. A signature, with no other effort to be expended by Mr. Carlsen, would not harass or burden defendant's expert and is certainly within the scope of relevant and pertinent discovery to impeach an expert witness.

The case of *Berrie v. Berrie* 188 *N.J.Super.* 274 (Ch. Div. 1983) relied upon by Mr. Carlsen is also distinguishable from the case at the hand. In *Berrie* the court was faced with a matrimonial matter where the husband, owner of a closely held toy company, wanted his brother who had just sold a rival closely held toy company, to turn over all the contracts and other documents relating to the sale. The husband wanted to use this information to value his interest in his own toy company for the purpose of the divorce. (It is difficult to value a closely held company). The sale documents had trade secrets and proprietary and confidential information which constituted valuable property rights and the disclosure of such would have been detrimental to the newly sold company. *Id.* at 282. The *Berrie* Court articulated several factors to be weighed when considering an application of a non party to limit discovery. *Id.* at 284. Mr. Carlsen does not address any of these factors in his opposition but merely states his Application information is "confidential". This is not the way the legal analysis works. The person seeking to limit discovery has the burden to show that he has satisfied the factors established by the Court. Mr. Carlsen does not set forth the factors nor show in any way, shape or form how he satisfies said criteria. In addition, Mr. Carlsen is defendant's expert. He is not someone, like the brother in *Berrie,* who has no connection to the litigation but is served

a subpoena to produce certain documents.

Mr. Carlsen is the expert of Defendant Toll Brothers and as such it is proper and appropriate to investigate the purported qualifications of an expert. *Lawlor v. Kolarsick*, 92 *N.J.Super.* 309, 312-13 (App.Div.), *certif. denied*, 48 *N.J.* 356 (1966) (cross examination of a purported expert witness may include evidence that the witness's purported qualifications to comment on the issues presented "was less than he claimed, and that such deficiency affected his credibility.") When impeaching an expert in this regard, "the test of relevancy" "is not whether the answer sought will elucidate any of the main issues, but whether it will to a useful extent aid the court or jury in appraising the credibility of the witness."*Id.* at 314 (quoting *Mc-Cormick, Evidence*, § 29, 54-55 (1954).

One of the qualifications Mr. Carlsen relies upon is his being designated a "Certified Safety Professional" by the Board of Certified Safety Professionals. Although Mr. Carlsen represents he has been a "Safety Professional," since at least 2002 he has by all accounts been exclusively testifying for contractors seeking to avoid safety responsibility for safety violations. There is reason to question the accuracy of what Mr. Carlsen represented to the Board in receiving this "Certified Safety Professional" title since a safety professional is one who has a legitimate dedication to safety. However for the last 13 years Mr. Carlsen has devoted his career to protecting contractors whose safety violations needlessly endanger the public after injury has already resulted. In order to become a "Certified Safety Professional" ("CSP") there are certain requirements that must be met such as the candidate must have four years of professional safety experience where professional safety is the primary function of the position. Collateral duties in safety are not counted. Furthermore, the candidate's "primary responsibility must be the prevention of harm to people..., rather than responsibility for responding to harmful events." Furthermore, these "professional safety functions must be at least 50% of the position duties." (*Exhibit E, CSP Application at 3*).

The requirements to be declared a CSP do not match up with Mr. Carlsen's prior and current qualifications and do not comport with his prior deposition testimony, which is set forth at length in Plaintiff's January 4, 2015 letter brief. As such it is clearly a proper area of discovery, cross-examination and impeachment. The Court, counsel and jury are entitled to know what this purported expert told the various professional organizations to obtain the kinds of credentials he relies upon to give expert testimony in this case. When pretrial discovery is sought to be restricted, the principle generally applied permits the widest latitude in the use of discovery tools, *Berrie, supra* at 278, *citing Blumberg v. Dornbusch*, 139 *N.J.Super.* 433, 354 A.2d 351 (App.Div.1976) where the information sought will aid in the preparation of the case or otherwise facilitate proof of progress at trial. *Bzozowski v.Penn.-Reading Seashore Lines*, 107 N.J.Super. 467, 473, 259 A.2d 231 (Law Div.1969). Parties may obtain discovery regarding any matter not privileged. which is relevant to the pending action. *R.* 4:102(a). The relevance standard does not refer only to matters which would necessarily be admissible in evidence but also includes information reasonably calculated to lead to admissible evidence. *Berrie, supra* at 278.

It is absolutely absurd for Mr. Carlsen to state in his recent papers that since he has now provided proof that he is in good standing with his respective safety organizations there is no need for Plaintiffs to conduct a further investigation into the particulars of those safety credentials. There is no dispute that Mr. Carlsen has been designated as a "Certified Safety Professional" or has been accepted into various professional organizations. The issue is what Mr. Carlsen represented to the

Board of Safety Professionals and other organizations to obtain these certifications. If he was dishonest or inaccurate as to the information he represented to these organizations then Plaintiffs should be able to uncover his duplicity.

Furthermore, Mr. Carlsen has not made any showing that the documents are "confidential" or "privileged" which would warrant an *in camera* review. It is Mr. Carlsen's, not Plaintiffs burden to show the necessity for this type of review. Once again Mr. Carlsen has failed to sustain his burden of proof and his unsubstantiated claims of "confidentiality" should be ignored.

Lastly, the position of the Toll Defendants, that sanctions should not be imposed upon them if Mr. Carlsen does not comply with the Court's order if Plaintiffs' motion is granted is not reasonable. Mr. Carlsen is the liability expert for the Toll Defendants. Therefore they are bound by his actions or inactions if same is the case.

Based upon the foregoing reasons, it is respectfully requested the Court grant Plaintiffs' Motion to Compel Mr. Carlsen, the defense liability expert, to produce signed authorizations with respect to the Board of Certified Safety Professionals, International Code Counsel (ICC), American Society of Civil Engineers, National Society of Professional Engineers, New Jersey Society of Professional Engineers and American Society of Safety Engineers, which are attached to Plaintiffs' motion papers as Exhibit G.

Respectfully submitted,

Stephanie Tolnai

STEPHANIE TOLNAI
For the firm

ST:tr

cc: Civil Motions Clerk- Essex County Superior Court (Via Lawyers Service)
Bonnie H. Hanlon, Esq. (Via Electronic & Regular Mail)
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Reply - signed auth and intervenor motion.wpd