IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NORTHERN CROSSARM CO., INC.,

Plaintiff,

OPINION and ORDER

03-C-415-C

v.

CHEMICAL SPECIALITIES, INC.,

Defendant.

- -

In this civil action for monetary relief, plaintiff Northern Crossarm Co, Inc. contends that defendant Chemical Specialities, Inc. breached the parties' marketing support agreement (count one), breached its implied duty of good faith (count two) and has enriched itself unjustly (count three). Presently before the court are the parties' cross motions with respect to count one. The contract provides that "CSI will provide marketing support at the rate of $0.50 per pound of ACQ Products sold to other ACQ treaters in your [Northern Crossarm's] region." The parties dispute whether this means that defendant must make market support payments for just those ACQ products that defendant itself sells to treaters other than

plaintiff in the specified region or whether it means that defendant must make payments not only for the ACQ product it sells but for those sold by its licensee as well. Jurisdiction is present. 28 U.S.C. § 1332. (Defendant has filed a supplemental motion for summary judgment with respect to counts two and three. Briefing on this second motion has been suspended pending resolution of the present motion.)

Plaintiff argues that defendant owes it market support payments because the agreement clearly states that plaintiff is entitled to payment for "ACQ Products sold to other treaters in [its] region" and that includes the ACQ products that defendant's licensee, Osmose, has sold to other regional treaters; defendant argues that reading the contract as a whole makes evident the parties' intent to limit payments to the ACQ sales that defendant made within the region. Plaintiff suggests that a failure to specify the seller of the ACQ products means that the provision applies to any seller; defendant suggests that the disputed language can be interpreted by reference to a second agreement, despite the fact that the second agreement is not so closely related to the first as to be part of the same transaction. Neither argument is persuasive.

I conclude that the language is ambiguous, making resort to extrinsic evidence appropriate. Nothing in either the parties' prior negotiations or their subsequent conduct shows that they intended that their agreement reach third party sales. Although such an agreement may have been reasonable and perhaps a natural extension of the agreement the

parties did make, "[a] contract cannot create a legal obligation or a legal duty in either party as to a term that was unknown to both parties and not in the contemplation of either party when a contract was made." Goossen v. Estate of Standaert, 189 Wis. 2d 237, 246, 525 N.W.2d 314, 318 (Ct. App. 1994) (citing Arthur L. Corbin, Corbin on Contracts, § 2, p.3 (1952)). I conclude that plaintiff cannot establish a breach of contract by defendant and that defendant has shown that no reasonable jury could find that the parties agreed that defendant would make market support payments to plaintiff for sales defendant did not make. Accordingly, plaintiff's partial motion for summary judgment will be denied and defendant's partial motion for summary judgment will be granted.

From the parties' proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Northern Crossarm Co., Inc., is a Wisconsin corporation with its headquarters and principal place of business in Chippewa Falls, Wisconsin. It is a wood treating company that sells crossarms, treated wood, laminated columns and underdeck systems used in a variety of outdoor applications in the midwest. Defendant Chemical Specialities, Inc., is a North Carolina corporation with its headquarters and principal place of business in Charlotte, North Carolina. It produces an Alkaline Copper Quaternary (ACQ)

wood preservative and other wood preservative products and sells them to wood treaters nationwide.

Prior to 1994, plaintiff treated its wood primarily with a Chromated Copper Arsenate (CCA) preservative. Since the 1940's CCA has been the most widely used wood treatment product in the world. It contains arsenic and chromium, which are identified as hazardous substances by the Environmental Protection Agency. In 1990, defendant introduced ACQ as an alternative to CCA. ACQ does not contain any substances on the hazardous list. It is a patented product of Domtar, Inc, a Canadian corporation. Domtar has granted defendant an exclusive license to manufacture, use, market and sublicense ACQ in North America in exchange for royalty payments.

When ACQ was first introduced as an alternative to CCA, both of the two other major CCA manufacturers, Osmose, Inc. and Arch, criticized the product openly. In response to this criticism, defendant promoted ACQ with marketing campaigns and lobbied at the state and federal level.

Plaintiff's president, Patrick Bischel, approached defendant in the early 1990's to purchase ACQ. Bischel explained to defendant that profit margins for CCA treated wood were low because of steep competition in the market. In addition, public pressure had been developing throughout the 1990's against the use of CCA, because of its hazardous contents. Plaintiff started treating wood with ACQ in 1994. At the time, plaintiff was the only wood

treater using ACQ in Minnesota, Iowa, Wisconsin, South Dakota or the Upper Peninsula of Michigan. By 1997, plaintiff treated all of its wood with ACQ. Plaintiff has always purchased and continues to purchase all of its ACQ products from defendant.

A. Negotiations

The parties began negotiating a supply agreement in early 1998. Bischel told defendant's representatives, Tom Fitzgerald and Steve Ainscough, that he did not want defendant to sell to any other wood treaters in Minnesota, Iowa, Wisconsin, South Dakota or the Upper Peninsula of Michigan. Defendant refused to give plaintiff a long term exclusive right to purchase ACQ in this region. Instead, Bischel sought marketing support payments for plaintiff's past and future efforts promoting ACQ in the region. The parties reached an agreement in principal and Fitzgerald sent Bischel a letter of confirmation, providing the following:

> This letter is [sic] confirm the meeting that you, Steve Ainscough and I had in Palm Springs where we discussed mechanisms for providing marketing support for ACQ in your region.
> As promised, CSI will provide monies to Northern Crossarm for marketing support based on the incremental volume of ACQ concentrate sold in your region due to events such as the addition of other ACQ treaters.
> The amount and disbursement of these market support monies will be reviewed annually by CSI and Northern Crossarm.

Plaintiff and defendant made the specific terms of their agreement final in two contracts: a supply contract, which they executed initially in May 1998 and modified in November 1998, and a market support agreement, which they executed in November 1998. The parties never discussed the possibility that a third party might start selling ACQ preservative.

B. The May Long-Term Supply Agreement

Under the supply agreement, defendant was to supply plaintiff with ACQ for five years and plaintiff would have exclusive rights for six months to purchase ACQ in a defined territory, which included Minnesota, Iowa, Wisconsin, South Dakota and the Upper Peninsula of Michigan. After six months, defendant could sell ACQ to other wood treaters in the region, but could not enter any long term supply agreements with them so long as plaintiff continued purchasing ACQ at specified minimum levels. "ACQ Products" is defined specifically in the supply agreement to mean "CSI's ACQ wood preservative product or any product that is functionally equivalent to CSI's ACQ wood preservative product." The agreement contains an integration clause, which provides as follows: "This agreement, together with the Exhibits attached hereto and incorporated by reference constitutes the entire agreement between the parties with respect to the subject matter hereof."

The parties did not address the issue of market support payments in the supply agreement because they feared that the payments could have Robinson-Patman Act

implications. Plaintiff and defendant each retained outside counsel to examine this issue. Plaintiff's attorney concluded in a letter sent to defendant's attorney that "by providing such services, the payment of an additional commission based upon *the sales your client achieves in Northern's area* will not violate [the Robinson-Patman Act]." (Emphasis added).

C. The Market Support Agreement and Modified Long-Term Supply Agreement

On or about November 18, 1998, about six months after the initial signing of the supply contract, plaintiff and defendant entered into a market support agreement covering the same five-year term. The market support agreement indicates that its purpose is to "confirm[] [defendant's] agreement with [plaintiff] regarding the level of marketing support for ACQ Products, which [defendant] will provide in [plaintiff's] region." Specifically, it provides that "[defendant] will provide marketing support at the rate of $0.50 per pound of ACQ Products sold to other ACQ treaters in your region." Plaintiff's region is defined as Wisconsin, Minnesota, South Dakota, Iowa and the Upper Peninsula of Michigan (the same territory over which plaintiff's six-month exclusive right to purchase extended). The term was to be the same five-year period specified in the long-term supply agreement. CSI was entitled to "review the marketing support program with Northern Crossarm annually and [] adjust the marketing support program at those times." Pursuant to this obligation, defendant paid plaintiff $24,274.44 for certain sales defendant had made to Innovative Pine

Technologies, a wood treater located in Superior, Wisconsin.

Also on November 18, 1998, plaintiff and defendant revised the long-term supply agreement, deleting a provision that required defendant to coordinate its ACQ marketing with plaintiff and get approval from plaintiff for any significant advertising and promotional programs. No other changes were made. Defendant faxed and mailed copies of both documents to plaintiff on November 20, 1998. The cover memorandum accompanying both documents provides:

> Attached are two copies each of the Long Term Supply Agreement and the Marketing Supply Agreement for your signature. Please sign both copies and return one copy each to me for our files.

D. Sublicensing the ACQ Technology to Osmose

Despite its earlier criticism of ACQ, Osmose, Inc. approached defendant in late 2000, seeking a license to manufacture and sell ACQ throughout North America. In March 2001, defendant sublicensed its ACQ technology to Osmose. Under the license agreement, Osmose is required to make royalty payments to defendant for each pound of ACQ it sells. The agreement does not give defendant direct access to Osmose's financial records but defendant has the right to have an independent audit conducted to insure that Osmose complies with its royalty obligations.

On March 5, 2001, defendant sent a representative to meet with plaintiff's representatives to let them know about the agreement with Osmose before the agreement was announced publicly. Plaintiff's representatives expressed displeasure with the agreement because it would create more competition in the ACQ market. They asked for a support package to insure that they would have an advantage over the wood treaters to whom Osmose might sell ACQ preservative. Defendant agreed to provide plaintiff with promotional support by having one of defendant's salespersons travel to Wisconsin, Minnesota, Michigan, Iowa and northern Illinois to promote ACQ-treated wood there. No one mentioned market support payments for sales that Osmose might make to wood treaters in the region during these conversations.

E. Osmose ACQ Sales to Regional Treaters

Pursuant to its license, Osmose has sold its ACQ preservative to Midwest Manufacturing, a wood treater located in Eau Claire, Wisconsin, since the middle of 2002. Midwest Manufacturing sells the wood it treats with the ACQ preservative supplied by Osmose to Menard's. Osmose's ACQ preservative is the technical equivalent of defendant's product.

At a meeting on January 30, 2003, plaintiff told defendant's representative that it expected market support payments from defendant for the ACQ preservative sold by Osmose

in the region. Defendant's representative had met with plaintiff's representatives on two occasions in 2001 and three times in 2002, without ever indicating that plaintiff would expect market support payments if Osmose began selling to local treaters. Defendant has refused plaintiff's request for market support payments for sales by Osmose, arguing that the market support agreement covers only defendants own ACQ sales to wood treaters in the region. The royalty defendant receives for each pound of ACQ sold by Osmose, minus the royalty defendant must pay to the patent holder, Domtar, is less than $0.50.

OPINION

A. Clear Meaning

"[T]he cornerstone of contract construction is to ascertain the true intentions of the parties." State ex rel. Journal/Sentinel Inc. v. Pleva, 155 Wis. 2d 704, 711, 456 N.W.2d 359, 362 (1990). See also Columbia Propane, L.P. v. Wisconsin Gas Co., 2003 WI 38, ¶ 12, 261 Wis. 2d 70, 661 N.W.2d 776. Wisconsin courts hold that the best indication of party intent is the language of the contract. Pleva, 155 Wis. 2d at 711, 456 N.W.2d at 362. In determining whether a contract is clear and unambiguous, a court looks only at the contract itself. Erickson v. Gunderson, 183 Wis. 2d 106, 117, 515 N.W.2d 293, 299 (Ct. App. 1994). When the language of a contract is clear and unambiguous, a court must construe the contract as it is written. State v. Peppertree Resort Villas, Inc., 2002 WI App.

207 ¶ 14, 257 Wis. 2d 421, 651 N.W.2d 345.

Resolution of the parties' cross motions turns on the proper construction of the market support agreement provision that states that "CSI will provide marketing support at the rate of $0.50 per pound of ACQ Products sold to other ACQ treaters in your region." Both parties argue that the meaning of this language is clear; however, each believes the provision is clear about something different. Plaintiff argues that this provision covers sales of ACQ made by *anyone*. Defendant argues that when read in the context of the entire agreement, the provision applies exclusively to its own sales of ACQ. Generally, "[a] contract provision which is reasonably and fairly susceptible to more than one construction is ambiguous." Jones v. Jenkins, 88 Wis. 2d 712, 722, 277 N.W.2d 815, 819 (1978).

1. Marketing support agreement

Plaintiff's argument is initially compelling. The contract provides that plaintiff is entitled to payments for ACQ products sold in the region without setting any limit on the entities doing the sellers. Why not read this as applying to any and all sellers? A closer look reveals that the relevant clause, "ACQ Products sold to other treaters in your region" is incomplete. The parties have identified the object (ACQ products) and the verb (sold), but not an actor (the entity doing the selling). Under plaintiff's construction, an omission would signify an intent to include everything. Cf. William Strunk Jr. and E. B. White, The

Elements of Style 18 (3d ed. 1979) (when actor is removed from sentence written in passive voice, meaning becomes "indefinite"; unclear whether sentence applies to "some person undisclosed or the world at large"). A term that could apply to anyone or everyone is ambiguous, to say the least. However, plaintiff argues that if contracting parties do not specify to whom the contract applies, their intent is that it apply to anyone and everyone. If this were a well-known rule of construction, plaintiff's argument might have some force, but plaintiff cannot establish that it is.

This is not to say that any omission means that contractual language is ambiguous. Kuehn v. Safeco Ins. Co. of America, 140 Wis. 2d 620, 626, 412 N.W.2d 126, 128 (Ct. App. 1987). In some instances, courts may apply defaults to "fill in" omissions. See, e.g., Schneider v. Schneider, 132 Wis. 2d 171, 175, 389 N.W.2d 835, 837 (Ct. App. 1986) (implying reasonable time for performance when none specified); Wis. Stat. § 402.305 (reasonable price implied where no price is specified in contracts governed by Wisconsin Uniform Commercial Code); North Gate Corp. v. National Food Stores, Inc., 30 Wis. 2d 317, 323, 140 N.W.2d 744, 747-48 (1966) (when obvious term is omitted, construe omission against drafter). However, neither party has argued for the application of any of these interpretation defaults and I see no basis for applying one in this instance. (The rule that ambiguous contract terms should generally be construed against the drafter, In re Spring Valley Meats, Inc., 94 Wis. 2d 600, 609, 288 N.W.2d 852, 856 (1980), might apply in this

case if it were clear which party drafted the agreement. At most, the evidence shows that defendant transmitted the final version of the agreements to plaintiff. The lack of any evidence to show which party drafted the relevant clause and the fact that neither party has argued for the application of the rule suggest that the drafting was likely a collaborative effort.)

Defendant argues that when the clause is read in light of the first sentence of the agreement, the obvious construction is that it applies only to its own ACQ sales. This argument is unpersuasive also. The first sentence states that the purpose of the document is to confirm the parties' agreement "regarding the level of marketing support for ACQ Products, *which CSI will provide in your region*." The parties dispute whether the clause "which CSI will provide in your region" applies to "ACQ Products" or "market support payments." Defendant relies on the last antecedent rule in support of its argument that the clause "which CSI will provide in your region" should apply to "ACQ Products." As defendant notes, under the last antecedent rule, relative and qualifying phrases are to be applied to the immediately preceding words or phrases. Dft.'s Br. in Reply in Supp. M. for Summ. J., dkt. #30, at 4 (citing Peterson v. Sinclair Refining Co., 20 Wis. 2d 576, 588-89, 123 N.W.2d 479, 486 (1963)). Plaintiff suggests that when the two provisions are read together, it is clear that the clause "which CSI will *provide* in your region" refers to market support; the parties use the verb "provides" to refer to market support payments in the disputed provision

("CSI will *provide* market support payments . . . ").

Under either construction of the first sentence, the meaning of "ACQ Products" remains unresolved. Construing the clause "which CSI will provide in your region" to apply to marketing payments does nothing to help define the parties' understanding of the scope of ACQ products covered by the agreement. If the clause "which CSI will provide in your region" is applied to "ACQ Products," it does nothing more than indicate that CSI will provide ACQ products in the region; it does not restrict the scope of the "ACQ Products" subject to the agreement. "Which" is nonrestrictive; in other words, it introduces a clause that merely adds information. Strunk & White, The Elements of Style 59 ("*That* is the defining, or restrictive pronoun, *which* the nondefining, nonrestrictive."); Manual on Usage & Style I:41:1 (Texas Law Review Assn. ed., 8th ed. 1995) (If the information contained in the relative clause is meant to define the modified word or clause or to limit the sense in which the modified word or clause is used, the relative clause is restrictive and should be introduced by *that*. . . . Use *which* to introduce a nonrestrictive clause — one that merely adds information about the person, thing, or idea to which the clause refers.").

2. Long-term supply agreement

Under Wisconsin principles of contract interpretation, "instruments executed at the same time between the same contracting parties in the course of the same transaction will

be construed together." Harris v. Metropolitan Mall, 112 Wis. 2d 487, 496, 334 N.W.2d 519, 523 (1983) (quoting Wipfli v. Bever, 37 Wis. 2d 324, 326, 155 N.W.2d 71, 72-73 (1967)). Defendant argues that this rule of construction requires reading the market support and long-term supply agreements together. It notes several aspects of the agreements that suggest that the agreements are related: (1) both are between the same parties; (2) both are dated November 18, 1998; (3) both were delivered together for execution; (4) the market support agreement refers to the supply agreement in terms of duration; (5) the "region" defined in the market support agreement covers the same states as the "territory" over which plaintiff had exclusive rights for six months under the supply agreement. Dft.'s Br. in Supp. M. for Summ. J., dkt #19, at 8. Defendant concludes that when the market support agreement is read to include the supply agreement definition of "ACQ Products" as "CSI's ASQ wood preservative product or any product that is functionally equivalent to CSI's ACQ wood preservative product," it becomes clear that the relevant clause promises payment only for sales of "*CSI's* ACQ wood preservative."

Plaintiff objects to construing the agreements together. It notes that the supply agreement contained an integration clause and was really executed six months before the supply agreement. In addition, plaintiff argues that the agreements had different purposes: the supply agreement is for the purchase of goods while the marketing support agreement is a contract for services.

The Wisconsin Supreme Court has indicated that contracts are "related" for purposes of this rule if they are dependent; that is, if acceptance of one is contingent on acceptance of the other. DeWitt Ross & Stevens, S.C. v. Galaxy Gaming and Racing Ltd. Partnership, 2003 WI App 190, ¶ 17, 267 Wis. 2d 233, 670 N.W.2d 74 (retainer letter and guarantee should be read together because "retainer letter conditions approval of representation on execution of the guarantee"); Harris, 112 Wis. 2d at 496, 334 N.W.2d at 523 (although documents did not refer to each other, court construed them together because neither would have been executed without the other); Milwaukee Acceptance Corp. v. Kuper, 42 Wis. 2d 515, 518, 167 N.W.2d 256, 258 (1969) (construing earlier case as interpreting contracts together because they were "mutual and dependent rather than independent and collateral").

In this case, the evidence suggests that the agreements were "related" in a broad sense, but it does not show that they were contingent upon each other in any respect. The documents were delivered together but the accompanying letter does not suggest that plaintiff had to accept both or that plaintiff could not accept the market support agreement unless it accepted the modification of the supply agreement as well. All the terms contained in the modified supply agreement had been in effect for six months under the original agreement. During this time, no market support arrangement existed. As plaintiff notes, the supply agreement included an integration clause, expressing the intent of the parties not to construe it in conjunction with any other agreements. Defendant notes that the market

support agreement did not contain an integration clause; nonetheless, it would be a stretch to construe the two agreements as part of one transaction when one agreement expressly excludes the other. Accordingly, I am unable to conclude that the two agreements were part of a single transaction. See, e.g., Conrad Milwaukee Corp. v. Wasilewski, 30 Wis. 2d 481, 487, 141 N.W.2d 240, 243 (1966) (declining to read documents together "because there [was] no express internal connection or reference of incorporation between the contemporaneous documents."). Therefore, I find the text of the supply agreement irrelevant in determining the plain meaning of the market support agreement.

3. Parties' course of conduct to show unambiguous meaning

Defendant argues that plaintiff's course of conduct shows that "ACQ Products sold to other treaters" is unambiguous; it refers only to ACQ products sold by CSI. Defendant quotes William B. Tanner Co., Inc. v. Sparta-Tomah Broadcasting Co., Inc., 716 F.2d 1155 (7th Cir. 1983), for the proposition that "issues of ambiguity can be in part determined from examining whether the actions of the parties to a contract are sufficiently inconsistent as to indicate differing constructions of the contract." Dft.'s Br. in Supp. M. for Summ. J., dkt #19, at 12. Defendant argues that plaintiff's actions demonstrated plaintiff's understanding that the market support agreement did not cover Osmose's regional sales: when plaintiff first learned of the sublicensing agreement, plaintiff requested additional market support.

Defendant suggests that plaintiff would not have asked for this additional market support if it believed that it would be entitled to payments for Osmose's sales under the existing agreement.

In response, plaintiff argues that defendant has misapplied the rule stated in Tanner. Defendant does not address this challenge in its reply brief. Plaintiff is correct that Tanner stands for a more limited proposition than defendant's argument suggests. In Tanner, 716 F.2d at 1158, the court said that language is ambiguous if it is susceptible to more than one meaning and that sufficiently inconsistent party actions may be indicia of the existence of two reasonable meanings. In contrast, defendant suggests that party conduct can be used to show the unambiguous meaning of contractual language. Party conduct is highly probative of intent, Duffey v. Central States, Southeast and Southwest Areas Pension Fund, 829 F.2d 627, 630 (7th Cir. 1987), but it has almost no probative weight in parsing contractual language to determine its plain and ordinary meaning. See Zweck v. D.P. Way Corp, 70 Wis. 2d 426, 435, 234 N.W.2d 921, 926 (1975) ("It is a well-settled principle of Wisconsin law that, *where contract terms may be taken in two senses*, evidence of practical construction by the parties is highly probative of the intended meaning of those terms.") (emphasis added).

B. Extrinsic Evidence

When contractual language is ambiguous, courts turn to extrinsic evidence to determine intent. Kernz v. J.L. French Corp., 2003 WI App. 140, ¶ 10, 266 Wis. 2d 124, 667 N.W.2d 751 (citing Energy Complexes, Inc. v. Eau Claire County, 152 Wis. 2d 453, 468, 449 N.W.2d 35, 41 (1989)). Helpful extrinsic evidence includes "the conduct of the parties and negotiations which took place, both before and after the execution of the documents, and . . . all related documents of the parties." Smith v. Osborne, 66 Wis. 2d 264, 272, 223 N.W.2d 913, 917 (1974).

Although neither party raised the issue, I must address the propriety of granting summary judgment on the basis of extrinsic evidence. When a contract is unambiguous, determining its meaning is a question of law for the judge. Jos P. Jansen Co. v. Milwaukee Area School District Bd., 105 Wis. 2d 1, 13, 312 N.W.2d 813, 818 (1981). But when a contract provision is ambiguous, determining the parties' intent from extrinsic evidence is a question for the factfinder. Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co., 206 Wis. 2d 158, 177-78, 557 N.W.2d 67, 75 (1996). "On summary judgment, the court does not decide an issue of fact; a court merely decides whether there is a disputed issue of fact." Energy Complexes, Inc., 152 Wis. 2d at 468-69, 449 N.W.2d at 41. An issue of fact is disputed and must be submitted to a jury "if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence." Restatement (Second) of Contracts § 212 (1981). However, factual disputes that

are irrelevant or unnecessary will not preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment may be awarded if the court concludes that no reasonable jury could find for the non-moving party. Hayden v. La-Z-Boy Chair Co., 9 F.3d 617, 618 (7th Cir. 1993).

Neither party denies that the agreement covers regional ACQ sales by defendant. The contested issue is whether both parties understood and intended that market support payments would be made to plaintiff for sales made by third parties. "A contract will not be found based on terms unknown to, or outside the contemplation of either party." Kozich v. Employee Trust Funds Board, 203 Wis. 2d 363, 378, 553 N.W.2d 830, 836 (Ct. App. 1996). See also Borchardt v. Wilk, 156 Wis. 2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990) (finding contract to be ambiguous where it did not anticipate scenario in which it was to be applied). "A contract is based on a mutual meeting of the minds as to terms, manifested by mutual assent." Kozich, 203 Wis. 2d at 378; 553 N.W.2d at 836 (quoting Goossen, 189 Wis. 2d at 246, 525 N.W.2d at 318 (citations omitted)). "For a term to be part of a contract, the term must have been in the contemplation of the parties; it must have been the parties' intent to contract for it; and the parties must have had a meeting of the minds as to the term. " Id. Although it is not necessary that the parties agreed to the same interpretation subjectively, Management Computer Services, 206 Wis. 2d at 178, 557 N.W.2d at 75, it must objectively appear that the parties expressed an intent to agree to a

certain term. See id. ("[M]utual assent is judged by an objective standard, looking to the express words used in the contract."); Goossen, 189 Wis. 2d at 246, 525 N.W.2d at 318 ("Whether the parties reached the necessary agreement as to the term depends upon the parties' expression of intention."). "The burden of establishing the existence of a contract [provision] is on the person attempting to recover for its breach." Household Utilities, Inc. v. Andrews Co., Inc., 71 Wis. 2d 17, 28, 236 N.W.2d 663, 669 (1976).

In its motion for summary judgment, plaintiff rests solely on its interpretation of the plain language of the agreement; it does not argue that there is extrinsic evidence showing that the parties intended market support payments to extend to sales by third parties. Plaintiff refers briefly to the relevance of extrinsic evidence in its combined brief in reply, but in too limited a fashion to amount to a fully developed argument that extrinsic evidence supports its construction of the contract. Eby-Brown v. Wisconsin Dept. of Agriculture, 213 F. Supp. 2d 993, 1011 (W.D. Wis. 2001) (arguments raised for first time in reply brief are waived). See also Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments that are not developed in any meaningful way are waived."); Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs, Benefits Review Bd., 957 F.2d 302, 305 (7th Cir. 1992) (court has "no obligation to consider an issue that is merely raised, but not developed, in a party's brief").

Even if I were to address plaintiff's argument, it shows at most that market support payments for third party sales could have been consistent with the agreement the parties did reach. Plaintiff reasons that because defendant had an exclusive license for ACQ products, "it solely controlled whether *any* ACQ would *ever* reach the region. It logically follows that CSI's promise related to *all* ACQ sold in the region." Plt.'s Br. in Reply in Supp. M. for Summ. J., dkt. #27, at 14. Plaintiff's theory makes sense. The equities of the arrangement change little when sales are made by a third party rather than defendant. Under the market support agreement, plaintiff helps develop a market for defendant's product and in exchange, defendant gives plaintiff a competitive advantage over other regional ACQ treaters by making payments commensurate with the increase in supply. Osmose's regional sales create increased competition for plaintiff; defendant benefits from plaintiff's marketing efforts through the royalties it receives under the sublicense contract.

Although plaintiff's argument suggests that the parties *might* have agreed to payments for third party sales had they anticipated such sales, no evidence indicates that either party contemplated such a situation. Neither party mentioned it as a possibility during the negotiations leading up to the execution of the market support agreement. Moreover, the evidence suggests that neither party had any reason to foresee third party sales at the time the contract was executed. Both of the other wood preservative manufacturers in the United States were vocal in their opposition to ACQ as an alternative wood preservative. Plaintiff's

attorney evaluated the legality of the market support agreement and in a letter written shortly before the agreement was executed, indicated that he thought the provision related to "sales [defendant] achieves in [plaintiff's] area."

Although I rejected defendant's assertion that the parties' subsequent acts could be used to prove the plain and ordinary meaning of the relevant contractual language, course of conduct is a strong indicium of intent. Duffey, 829 F.2d at 630. In response to learning of defendant's sublicense arrangement with Osmose, plaintiff sought additional market support from defendant. As defendant suggests, it is not clear why plaintiff would have thought it needed additional market support because of Osmose's entry into the ACQ preservative market if it believed that the existing market support arrangement would cover Osmose's regional sales.

Viewing the evidence from an objective perspective, Management Computer Services, 206 Wis. 2d at 178, 557 N.W.2d at 75, I cannot find that either party expressed an intent or understanding that the market support agreement would cover third party sales. Not only is the language of the contract ambiguous as to this point, but no extrinsic evidence can be gleaned from the parties' prior negotiations or subsequent acts to show their belief that the agreement would extend to sales by third parties. "A contract cannot create a legal obligation or a legal duty in either party as to a term that was unknown to both parties and not in the contemplation of either party when a contract was made." Goossen, 189 Wis. 2d

at 246. Because the record contains no evidence from which a reasonable jury could conclude that the parties contemplated and agreed that market support payments should be made for third party sales, no reasonable jury could find that defendant breached an agreement to make such payments. Accordingly, summary judgment on this count is appropriate. This conclusion makes it unnecessary to address defendant's arguments under the no economic sense, waiver and estoppel doctrines.

ORDER

IT IS ORDERED that plaintiff's partial motion for summary judgment is DENIED and defendant's partial motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment in favor of defendant with respect to count one. The stay on briefing for defendant's supplemental motion for summary judgment is lifted and the standard 21/10 day briefing schedule will apply, running from the date of this order.

Entered this 16th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge