IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

AUTO-WARES, LLC,
a Michigan Limited Liability Company,

Plaintiff,

v.

WISCONSIN RIVER CO-OP SERVICES,
a Wisconsin Membership Cooperative,

Defendant.

OPINION AND ORDER

10-cv-344-slc

In this civil diversity action, plaintiff Auto-Wares, LLC alleges that defendant Wisconsin River Co-op Services ("WRC") breached a supply agreement between the parties when it converted its "Bumper to Bumper" auto parts stores to NAPA auto parts stores before the expiration of the agreement's 10-year term. Before the court is WRC's motion for summary judgment on plaintiff's claim for breach of contract. Dkt. 66. Defendant argues that the Primary Supply Agreement fails to satisfy the statute of frauds because it neither specifies a quantity term nor is a valid requirements contract. Because I agree that the only enforceable agreement between the parties regarding WRC's purchase obligations was the five-year $350,000 minimum purchase requirement set forth in the parties' Business Growth Proposal, and because it is undisputed that WRC met this obligation, I am granting defendant's motion.

One preliminary matter needs mention: on June 24, 2011, Auto-Wares filed a motion for leave to supplement its opposition to the motion for summary judgment with deposition testimony from Tim Diemert, WRC's Chief Executive Officer, that it says supports its position that WRC was required under the Primary Supply Agreement to purchase all of its requirements of auto parts exclusively from Auto-Wares. Dkt. 24. I am denying this motion. This court's

pretrial conference order specifies that the "[p]arties are to undertake discovery in a manner that allows them to make or respond to dispositive motions within the scheduled deadlines." Dkt. 54, ¶3. WRC filed its motion for summary judgment on April 4, 2011. Auto-Wares offers no explanation why it did not depose Diemert until June 20, 2011, roughly 11 weeks after the motion was filed. Further, even if the evidence were to have been timely submitted, it would not have affect the outcome. As discussed below, the Primary Supply Agreement is not ambiguous and therefore parole evidence is not admissible.

From the parties' submissions, I find the following facts to be undisputed and material for the purpose of deciding the instant motion:

FACTS

I. The Parties

Defendant Wisconsin River Co-Op Services (WRC) is a cooperative located in Adams, Wisconsin that provides agronomy, energy, feed, grain, retail and transportation supplies and services to farmers, businesses and individuals. Defendant Auto-Wares, LLC, is a Michigan Limited Liability Company with its principal place of business located at 440 Kirtland SW, Grand Rapids, Michigan. Auto-Wares is a wholesale auto parts supplier.

As part of its retail operation, WRC owns three auto parts stores in the towns of Adams, Necedah and Mauston. WRC opened its Adams store in May 1992. In 2001, it acquired a hardware store in Mauston, which it converted to an auto parts store in September 2004; it purchased the Necedah auto parts business in September 2006.

Between 2003 and 2006, WRC entered into a number of agreements with Auto-Wares.

II. Counterworks Agreements

In early 2003, WRC and Auto-Wares entered into several agreements related to Auto-Wares providing WRC with a license, hardware and maintenance related to the CounterWorks Computer System, a system that allowed WRC to order parts and to track its inventory.

III. The Jobber Agreement

Around this same time, the parties also entered into an Authorized Jobber Agreement. In essence, the Jobber Agreement was a licensing agreement whereby WRC was permitted to use certain trademarked names such as "Bumper to Bumper" and "Parts Master" when advertising and marketing the auto parts that it purchased from Auto-Wares. These marks are owned by Aftermarket Auto Parts Alliance, Inc. ("the Alliance"), which consented to the agreement.

The Jobber Agreement provided that:

> 9. [Auto-Wares] will sell and [WRC] will buy, and at all times maintain, an adequate and representative inventory of products displaying the Mark as is necessary in the sole discretion of [the Alliance] and [Auto-Wares] to properly display and satisfy consumer demand for such products.
>
> 10. [WRC] agrees to promote the sale of, and sell, products displaying the Mark and to participate in the marketing programs made available by [Auto-Wares], in such ways and amounts as will justify the continuation of this agreement, which judgment will be in the sole discretion of [the Alliance] and [Auto-Wares].

The Jobber Agreement provided that it could be terminated ". . . by giving ninety (90) days advance written notice of termination, signed by the party initiating the termination and delivered to the other party by certified mail, return receipt requested, properly addressed to the addressees."

IV. Business Growth Proposal

On August 30, 2004, at the time WRC opened its second auto parts store in Mauston, WRC and Auto-Wares entered into another agreement called the Business Growth Proposal ("BGP"). In the BGP, Auto-Wares agreed to:

> Do all changeovers, dollar for dollar, part number for part number, or any way desired;
>
> include WRC's Mauston store in all Bumper to Bumper warehouse lock-in programs;
>
> replace all outside signage, paint and truck lettering kits as needed up to $8,000;
>
> install a Counterworks II computer;
>
> hold a meeting with employees and dealers at the Mauston location to explain the changeover and to familiarize them with the Bumper to Bumper Certified Service Center program;
>
> provide each employee with three Bumper to Bumper shirts and to paint and stripe the store interior;
>
> warranty all products previously sold by Adams NAPA store for a period of two years; and
>
> refrain from establishing another Bumper to Bumper store, independent or company owned, within two miles, without WRC's approval.

For its part, WRC agreed among other things to do these things:

> changeover to Bumper to Bumper and to qualify and support the program for at least five years;
>
> maintain net purchases in excess of Three Hundred Fifty Thousand Dollars per year for at least five years (both locations); and
>
> provide Auto Wares a ten year supplier agreement which contains a right of first refusal if the business were to be offered for sale.

On August 25, 2006, Auto-Wares and WRC signed an Addendum to the BGP that added terms regarding how business would be conducted with the Mauston store, but otherwise left unaltered the terms of the original BGP.

On September 18, 2006, the parties signed another Addendum that added terms regarding how business would be conducted with the Necedah store.

WRC had net purchases from Auto-Wares exceeding $350,000 in the years 2004-2008 for its Adams and Mauston stores combined. From 2004-2009, WRC's yearly purchases for the Adams and Mauston stores were as follows[1]:

	Aug. 30, 2004-Aug. 29-2005	Aug. 30, 2005-Aug. 29, 2006	Aug. 30, 2006-Aug. 29, 2007	Aug. 30, 2007-Aug. 29, 2008	Aug. 30, 2008-Aug. 29, 2009
Adams	$506,664.14	$323,877.70	$362,925.65	$386,910.44	$253,976.28
Mauston	$115,486.15	$216,838.89	$273,917.95	$315,122.18	$219,282.82
Total	$622,150.29	$540,716.59	$636,843.60	$702,032.62	$473,259.10

V. Primary Supply Agreement

On December 31, 2004, WRC and Auto-Wares executed the 10-year supplier agreement referenced in the Business Growth Proposal. The contract, titled "Primary Supply Agreement," reads in relevant part as follows:

[1]Auto-Wares disputes this evidence, but "only to the extent that Auto-Wares has not kept its accounting records in this fashion and cannot agree or disagree with WRC's claimed amounts." Response to Proposed Findings of Fact, dkt. 73, ¶37. Auto-Wares' response is insufficient to create a genuine dispute of fact. Accordingly, I find WRC's to be accurate.

Background

Customer sells automotive parts and related merchandise and conducts business at an auto parts store located at the address first indicated above. Supplier, and its affiliates is a wholesale distributor of the automotive parts and related merchandise that Customer offers for sale to its customers. It is the intent of the parties that Customer will continue to purchase Supplier's products for both auto parts stores. Therefore, the Customer wishes to retain the supply services of Supplier and [its] affiliates, and Supplier wishes to be the major source of automotive parts and related merchandise to Customer.

Consideration

As well as supplying Customer with its requirements of automotive parts and related merchandise, Supplier also provides financial consideration to Customer in the form of the national Auto Value and Bumper to Bumper affiliation in addition to various marketing campaigns and advertising support that Customer may participate in to promote Customer's business. Further, from time to time as circumstances dictate, Supplier may provide financial assistance to the Customer to further financially support Customer in its business endeavors, therefore the parties hereby agree as follows:

Term

This Agreement shall be in full force and effect on the date first indicated above and shall continue for a minimum period of ten (10) years from the effective date. Customer warrants that it has not and will not enter into a similar agreement with any other distributor of automotive parts and related merchandise that competes either directly or indirectly with Supplier.

Purchase of Inventory and Supplies

1. During the term of this Agreement, Customer agrees to purchase from Supplier its requirement of automotive parts, supplies and related merchandise to satisfy Supplier's marketing program qualifications. It is the intent of the parties that the Supplier will be the Customer's main source of automotive parts, supplies and related merchandise for the term of this Agreement.

* * *

4. If Supplier is unable to provide Customer with its entire requirement of automotive parts, supplies and related merchandise, this shall not be grounds for termination of this Agreement since Customer does have the right to buy replacement parts from other suppliers pursuant to Paragraph 1 above.

5. Supplier shall use its best efforts to deliver all products ordered by Customer within the normal delivery time established by Supplier. Supplier shall have no liability to Customer if, for any reason, it cannot deliver a product order by Customer, or if the manufacturer of such a product cannot deliver the product to Supplier in time for the product to be shipped to Customer . . .

6. Customer agrees to continue participation in the marketing program offered by Supplier and to perform the necessary obligations to be recognized as a member in good standing of the marketing program.

* * *

Non Competition

During the term of this Agreement, Customer shall not engage in or in any manner be directly or indirectly involved in the operation of a wholesale distributor of automotive parts and related supplies similar in operation and product offerings as that of Supplier, either as an agent, partner, shareholder or owner.

* * *

Termination

This Agreement shall remain in full force and effect for its entire ten (10) year term unless the Customer and Supplier mutually agree in writing to the termination or extension of this Agreement. Further, this Agreement shall not be assigned by either party without the prior written consent of each party.

VI. WRC Switches to NAPA

On March 14, 2009, WRC executed an agreement with NAPA to supply it with auto parts. On March 24, 2009, WRC sent a letter to all of its customers that stated:

> Wisconsin River Co-op is pleased to announce that it has entered into an agreement with National Automotive Parts Association (NAPA) to convert the Bumper to Bumper stores in Adams, Necedah, and Mauston to NAPA Auto Parts stores. The Bumper to Bumper stores will officially close at the end of business on Friday, April 24th. We will be closed on Saturday, April 25th so that the conversion may take place . . .

On July 30, 2009, Auto-Wares sued WRC for breach of contract, alleging that WRC breached the Primary Supply Agreement by cancelling the contract before the 10-year term had expired.

OPINION

I. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "'A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party.'" *Sides v. City of Champaign*, 496 F.3d 820, 826 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7th Cir. 2007). Even so, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party that bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires a trial. *Hunter v. Amin*, 538 F.3d 486, 489 (7th Cir. 2009); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When

the moving party has the burden of proof on an issue, it must show that the evidence on that issue is so one-sided that it must prevail as a matter of law. *Johnson v. Hix Wrecker Service, Inc.*, ___ F.3d ____, ___ WL ____, Case No. 09-3023 (7th Cir., July 1, 2011), slip op. at 8.

"If a contract is unambiguous, by definition no material issues of fact exist regarding the contract's interpretation; that interpretation is a question of law for the court." *Metalex Corp. v. Uniden Corp. of Am.*, 863 F.2d 1331, 1333 (7th Cir. 1988). But if the contract is ambiguous, then the contract's meaning is a question for the trier of fact. *Id*.

II. Statute of Frauds

A. Primary Supply Agreement

Auto-Wares claims that WRC breached the PSA when it entered into an agreement with NAPA to supply it with auto parts before the PSA's 10-year term expired. The parties agree that the PSA is a contract primarily for the sale of goods and that therefore, the Uniform Commercial Code (which has been adopted in Wisconsin), applies. *Linden v. Cascade Stone Company, Inc., et al.*, 699 N.W. 2d 189, 196 (Wis. 2005) (if predominant purpose of contract is sale of goods, court applies UCC, not common law).[2]

The UCC statute of frauds provides that "a contract for the sale of goods for the price of $500 or more is not enforceable . . . unless there is some writing sufficient to indicate that a contract for sale has been made between the parties . . .". Wis. Stat. § 402.201(1). To satisfy the statute of frauds, a contract for the sale of goods must be written, signed and include a quantity term. Wis. Stat. § 402.201(1) & comment 1. "The primary purpose of the Statute [of

[2] It seems that the parties agree that Wisconsin law governs this case.

Frauds] is evidentiary, to require reliable evidence of the existence and terms of the contract and to prevent enforcement through fraud or perjury of contracts never in fact made." *Kocinski v. Home Ins. Co.*, 147 Wis. 2d 728, 734-35, 433 N.W.2d 654 (Ct. App. 1988) (*Kocinski I*) (quoting Restatement (Second) of Contracts sec. 131 comment c (1981)). A writing that omits or incorrectly states a term agreed upon may be sufficient to satisfy the statute of frauds, but the contract is not enforceable "beyond the quantity of goods shown in such writing." Wis. Stat. § 402.201(1).

Although WRC appears to concede that the PSA is sufficient to show that a general agreement to do business was reached between the parties, it contends that it is unenforceable for lack of a quantity term. As WRC points out, the PSA does not specify an amount of goods that it was required to purchase from Auto-Wares. All the PSA states is that WRC must purchase enough parts to satisfy Auto-Wares' "marketing program qualifications" and that Auto-Wares will be WRC's "main source" of auto parts. Neither of these terms is quantified in any way. The "marketing program qualifications" are set forth in the Jobber Agreement, but those, too, are unquantified. Under the terms of that agreement, WRC was to buy "an adequate and representative inventory of products displaying the Mark as is necessary in the sole discretion of [the Alliance] and [Auto-Wares] to properly display and satisfy consumer demand for such products." Jobber Agreement, ¶9.

WRC further agreed to promote and sell products and participate in the marketing programs made available by Auto-Wares "in such ways and amounts as will justify the continuation of this agreement, which judgment will be in the sole discretion of the Company and distributor." *Id.*, ¶10. Neither of these obligations gives rise to a numerical term, but leaves

it up to Auto-Wares and the Alliance to determine how much product WRC was required to purchase. Without any promise by WRC to purchase an ascertainable quantity, the contract is unenforceable. *Accord Olympia Express, Inc. v. Linee Aeree Italiane, S.P.A.*, 509 F. 3d 347, 352 (7th Cir. 2007) (agreement stating that quantity was to be determined based on "mutually determined goals" not specific enough to satisfy statute of frauds); *Propulsion Technologies, Inc. v. Attwood Corp.*, 369 F.3d 896, 904 (5th Cir. 2004) (contract stating that party agreed to "establish minimum order requirements" on annual basis not enforceable for lack of quantity term).

Given the plain language of the contract, Auto-Wares cannot and does not argue that the PSA contains a quantity term. Instead, it argues that no such term was required because the agreement is a "requirements" contract. A requirements contract is a contract "in which the purchaser agrees to buy all of its needs of a specified material exclusively from a particular supplier, and the supplier agrees, in turn, to fill all of the purchaser's needs during the period of the contract." *Zemco Mfg., Inc. v. Navistar Intern. Transp. Corp.*, 186 F.3d 815, 817 (7th Cir. 1999) (quoting *Indiana-American Water Co. v. Seelyville*, 698 N.E.2d 1255, 1259 (Ind. Ct. App. 1998)). Wisconsin's version of the UCC addresses requirements contracts in Wis. Stat. § 402.306:

> (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
>
> (2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

Comment 2 to this section states that, with respect to the "quantity term" requirement of the statute of frauds, "a contract for output or requirements is not too indefinite since [quantity] is held to mean the actual good faith output [of the producer] or requirements of [the buyer]."

Most courts (including the Seventh Circuit) have held that a requirements contract does not exist where the buyer did not promise to buy exclusively from the seller. *See, e.g., Propane Industrial, Inc. v. General Motors Corp.*, 429 F. Supp. 214 (W.D. Mo. 1977); *Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough Products, Inc.*, 212 F.3d 373, 379 (7th Cir. 2000) ("In the absence of exclusivity, there can be no valid requirements contract."); *In re Modern Dairy of Champaign, Inc.*, 171 F.3d 1106, 1107 (7th Cir. 1999) (requirements contract means buyer agrees to buy all requirements from seller, and in exchange, seller agrees to supply all requirements); *Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 963 (5th Cir. 1999) ("An essential element of a requirements contract is the promise of the buyer to purchase exclusively from the seller either the buyer's entire requirements or up to a specified amount").[3] As explained in *Zemco*, 186 F.3d at 817, "[a] requirements contract exists only when the contract (1) obligates the buyer to buy goods, (2) obligates the buyer to buy goods exclusively from the seller, and (3) obligates the buyer to buy all of its requirements for goods of a particular kind from the seller." (citations omitted). Wisconsin appears to follow this rule . *See Hamilton Beach/Proctor-Silex, Inc. v. Marvelle Enterprises of America*, 1996 WL 167623, *6 (Wis. App. 1996) (unpublished disposition) (citing *Zayre Corp. v. S.M. & R. Co.*, 882 F.2d 1145, 1155 (7th Cir. 1989)). Indeed, as Auto-Wares recognizes in its brief, "although the buyer [in a requirements contract] does not

[3] Because one purpose of the UCC is to foster nationwide uniformity in the application of commercial law, Wisconsin courts give substantial weight to cases from other jurisdictions interpreting the Code. *See Borowski v. Firstar Bank Milwaukee, N.A.*, 217 Wis. 2d 565, 577 (Wis. Ct. App. 1998).

agree to purchase any specific quantity of goods, the requisite mutuality and consideration for a valid contract is found in the legal detriment incurred by the buyer in relinquishing his right to purchase from all others except the seller." Br. in Opp., dkt. 74, at 11 (citing *Propane Industrial*, 429 F. Supp. at 218-19).

It is clear from the plain language of the PSA that it does not establish an exclusive buyer-seller relationship between WRC and Auto-Wares. The PSA did not oblige WRC to purchase *all* of its requirement of auto parts from Auto-Wares. The PSA did not require Auto Wares to supply WRC with all of its requirements for auto parts. In the PSA, the parties agreed only that Auto-Wares would be WRC's "main" or "major" supplier of auto parts. These terms denote a lack of exclusivity. Indeed, the agreement expressly permitted WRC to obtain auto parts from other suppliers and absolved Auto-Wares of any breach in the event it could not supply WRC with all of its needed auto parts. As the court noted in *Modern Dairy*, 171 F.3d at 1108, "[a] buyer would be unlikely to commit to take all his requirements for some good from the seller if the seller had no reciprocal obligation to supply those requirements." There is no basis to infer from the PSA that WRC put itself at Auto-Wares' mercy and agreed to purchase all of its auto parts requirements from Auto-Wares even though Auto-Wares had no reciprocal obligation to supply those requirements.

Auto-Wares' arguments characterizing the PSA as a requirements contract are unpersuasive. First, although it is true that the existence of an exclusive buyer-seller relationship need not be explicit but can be implied by the contract, *Zayre Corp. v. S.M. & R. Co., Inc.*, 882 F.2d 1145, 1154 (7th Cir. 1989), Auto-Wares does not point to any language in the PSA implying exclusivity. Auto-Wares points to WRC's promise "not [to] enter into a similar

agreement with any other distributor of automotive parts and related merchandise that competes either directly or indirectly with Supplier," but that term only prohibited WRC from entering into a primary supply agreement with one of Auto-Wares' competitors. It did not prohibit WRC from purchasing auto parts from another supplier.

Second, Auto-Wares argues that, to the extent the PSA allowed WRC to look elsewhere for auto parts, this was only a "limited exception" to an otherwise-exclusive requirements contract, and it does not render the PSA unenforceable. Auto-Wares suggests that such an arrangement is permitted by Wis. Stat. § 402.306(2)'s "unless otherwise agreed" clause. The entire subsection reads:

> (2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

Auto-Wares seems to be arguing that the parties to a contract may agree to a non-exclusive dealing arrangement without making their agreement non-exclusive. But as WRC points out, this gloss of the statute essentially removes the exclusivity requirement from exclusive dealing contracts. That can't be right. More logical and persuasive is WRC's reading of § 402.306(2), that the "unless otherwise agreed" language refers to the statute's presumption that the parties will use their best efforts to supply and sell the good at issue. In other words, the statute does not allow the parties to agree to a non-exclusive dealing contract, but they may agree to a standard for supplying and selling the goods that is something other than their "best efforts."

Third, Auto-Wares urges this court to apply the reasoning of *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991), a case that involved Advent's sale to Unisys of hardware

and software making up certain document management systems to be distributed by Unisys. Although the sales agreement between the parties was neither exclusive nor set out a specific quantity term, the court found the writings between the parties sufficient to satisfy the statute of frauds. *Advent*, 925 F.2d at 677-679. In doing so, however, the court explained that it was focusing only on the technical requirements established by the statute of frauds and not on whether the contract was definite enough to support a remedy, which presented a "serious question." *Id*. at 679, 680. The court acknowledged that it was taking a liberal approach to the statute of frauds not followed by most courts and commentators, but found such an approach warranted in light of the arrangement between the parties, which resembled a joint venture or distributorship, *id*. at 679, and the fact that the parties had entered a new, speculative market where uncertainty was inevitable. *Id*.

Auto-Wares has not cited and I have not found any cases from Wisconsin suggesting that the Wisconsin courts would follow a similar approach to the statute of frauds. Further, it does not suggest that the auto parts market was new or speculative, as was the software market at issue in *Advent*. Finally, the inclusion of a fixed quantity term in the Business Growth Proposal, discussed below, is inconsistent with a finding that the PSA is a requirements contract. *Accord Zayre Corp. v. S.M. & R. Co., Inc.*, 882 F.2d 1145, 1155 (7th Cir. 1989) (existence of a requirements contract inconsistent with seller's own claim that agreement and buyer's instructions called for it to purchase stated quantity of merchandise, rather than buyer's actual requirements). For all these reasons, *Advent* is not persuasive authority in this case.

Finally, Auto-Wares attempts to offer parole evidence to counter the force of the PSA's plain language and show that the parties had an exclusive relationship. However, parole

evidence is admissible only when the contract language is ambiguous as to its terms. *Conrad Milwaukee Corp. v. Wasilewski*, 30 Wis. 2d 481, 487, 141 N.W. 2d 240 (1966). Here, there is no ambiguity. The PSA expressly contemplates a non-exclusive relationship. Therefore, it does not establish a requirements contract.

B. Business Growth Proposal

Both sides acknowledge that "the memorandum required by the statute of frauds may consist of several writings," *Kovarik v. Vesely*, 3 Wis.2d 573, 580, 89 N.W.2d 279, 283 (1958), and the PSA is not the only document that addresses WRC's purchase obligations. In the Business Growth Proposal, WRC agreed that it would "maintain net purchases from Auto-Wares in excess of Three Hundred Fifty Thousand Dollars per year for at least five years (both locations)." Where a buyer contracts to purchase up to a specified amount exclusively from the seller, an enforceable requirements contract may exist notwithstanding the buyer's ability to purchase from another seller. *See, e.g.*, *Amber Chemical, Inc. v. Reilly Industries, Inc.*, 2007 WL 512410, 8 (E.D. Cal. 2007) ("It is not essential that a requirements contract containing a minimum purchase quantity also be for exclusive dealings."); *Propane Industrial*, 429 F. Supp. at 219 (requirement of exclusivity can be satisfied if buyer contracts to purchase up to a specified amount exclusively from seller). WRC acknowledges that this term is specific enough to satisfy the statute of frauds, but contends that Auto-Wares can recover no damages because WRC met this quantity requirement.

Auto-Wares does not dispute that WRC's combined purchases for its Adams and Mauston stores exceeded $350,000 for the five-year term set forth in the BGP. It argues,

however, that it is not clear from the parties' writings whether, in entering into the PSA, the parties intended to extend the five-year term set out in the BGP to the 10-year term of the PSA. It argues further that the BGP's "both locations" language is ambiguous as to whether WRC was required to purchase a minimum of $350,000 at *each* of the two stores (for a total of $700,000 per year) or whether it was intended as a total purchase requirement for both stores.

Wisconsin follows well-settled rules of contract interpretation, looking first to the language of the contract as the best evidence of the parties' intent. *Town Bank v. City Real Estate Development, LLC*, 2010 WI 134, ¶33, 330 Wis. 2d 340, 356, 793 N.W.2d 476, 484. Contract language is construed according to its plain or ordinary meaning, that is, what a reasonable person would understand the words to mean under the circumstances. *Seitzinger v. Community Health Network*, 2004 WI 28, ¶ 22, 270 Wis.2d 1, 676 N.W.2d 426. A contract is ambiguous when "it is reasonably and fairly susceptible to more than one construction." *Dieter v. Chrysler Corp.*, 234 Wis. 2d 670, 610 N.W.2d 832, 836 (2000). *See also Conrad Milwaukee*, 30 Wis. 2d at 488, 141 N.W. 2d 240 (contract is ambiguous when a word or term has "some stretch in it–some capacity to connote more than one meaning"). When a contract is ambiguous, the court may consider evidence extrinsic to the contract to determine the parties' intent. *Maryland Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶ 23, 326 Wis.2d 300, 786 N.W.2d 15.

With respect to the five-year term of the BGP, Auto-Wares argues that the parties' writings are ambiguous as to whether the minimum purchase requirement was to be extended to the 10-year term of the PSA. Auto-Wares points out that when the parties signed the BGP, they stated their intention to enter into a 10-year supply agreement, and that when they entered the PSA, they stated their intent that WRC "will continue" to purchase Auto-Wares' products

for both of its auto parts stores. According to Auto-Wares, this is enough to create an ambiguity regarding the term of the minimum purchase requirement.

I disagree. The fact that the parties agreed in the BGP simultaneously to 1) establish a minimum purchase requirement for a five-year term, and 2) enter into a primary supply agreement for a 10-year term, indicates that parties specifically contemplated imposing specific parameters on their relationship for only the first five years. Had they intended the agreements to run coterminously, they could have said so in either the BGP or the PSA. Further, although the parties amended the BGP twice in 2006, they did not extend the term of the $350,000 purchase requirement. Construed together, the parties' writings show plainly that they did *not* intend the minimum purchase requirement to apply for more than five years.

With respect to the term "both locations," however, I agree that the contract is ambiguous. A reasonable person could read the term "(both locations)" as establishing a $350,000 annual minimum purchase requirement for both stores combined. A reasonable person also could read the term as establishing a $350,000 annual purchase requirement for each store individually.

Contrary to Auto-Wares's understanding, however, showing that a contract is ambiguous does not mean that a jury must resolve the ambiguity. Showing that a contract is ambiguous merely means that the court is permitted to look outside the four corners of the document to attempt to ascertain the parties' intent. A trial is necessary only if that evidence gives rise to competing inferences concerning what the parties intended when they entered into the contract. *First Bank & Trust v. Firstar Information Services, Corp.*, 276 F.3d 317, 322 (7th Cir. 2001) (applying Wisconsin law); *Energy Complexes, Inc. v. Eau Claire County*, 152 Wis.2d 453, 469, 449

N.W.2d 35, 41 (1989) ("B]ecause our review of the affidavits and other material provided on summary judgment show that the contract is ambiguous and that the intent of the parties to this contract is disputed . . . the County's motion for summary judgment should have been denied."). If, however, the extrinsic evidence supports only one plausible interpretation of the contract or if the parties fail to point to extrinsic evidence, then there is no dispute for a jury to resolve. *In re Airadigm Communications, Inc.*, 616 F.3d 642, 657 (7th Cir. 2010) (although ambiguous contract presents factual issue, "parties may not rest on their laurels at summary judgment" but must submit extrinsic evidence of intent). *See also Goodman v. National Sec. Agency, Inc.*, 621 F.3d 651, 654 (7th Cir. 2010) (noting that summary judgment is the "put up or shut up" moment in litigation).

Therefore, to be entitled to a jury trial, Auto-Wares must show that the contract is ambiguous *and* must submit extrinsic evidence from which a jury reasonably could conclude that the $350,000 minimum purchase requirement applied to each of WRC's two stores. Auto-Wares has passed the first step but it has failed on the second. Auto-Wares not pointed to any extrinsic evidence that could reasonably support its position regarding what the parties intended when they entered the BGP. This silence is telling, considering that Auto-Wares did not hesitate— even after its deadline expired—to point to extrinsic evidence supporting its interpretation of the PSA. Auto-Wares's actions during motions practice make plain that if such evidence existed with respect to the BGP, Auto-Wares would have submitted it.

In contrast, WRC has submitted extrinsic evidence supporting its argument that the term "both locations" meant the Adams and Mauston stores combined. WRC's purchase record for its Adams and Mauston stores from August 2004 to August 2009 shows that the Mauston store

never achieved the $350,000 mark. The closest it got was the year August 30, 2007 through August 29, 2008, in which its purchases from Auto-Wares totaled $315,122.18; the other years had far lower numbers, ranging from a low of $115,486 to a high of $273,917. Even the better-performing store in Adams failed to hit the $350,000 mark during two of the five years covered by the BGP. This performance history, combined with the absence of evidence showing that Auto-Wares ever called out WRC for breaching the BGP or ever threatened to drop WRC from the marketing program, supports the inference that the parties intended the term "both locations" to mean "both locations combined."[4] Reasonable businesspeople don't agree to patently unreasonable sales goals.

As noted above, a contract that specifies a quantity of goods is not enforceable "beyond the quantity of goods shown in such writing." Wis. Stat. § 402.201(1). Here, it is undisputed that WRC's combined purchases for its Adams and Mauston stores exceeded $350,000 for the five-year term covered by the BGP. Auto-Wares cannot recover anything more under the terms of the parties' agreement.

[4] Evidence submitted by WRC in reply to Auto-Wares' contention that the BGP is ambiguous confirms this understanding of the term. Tim Diemert, WRC's CEO and General Manager who signed the BGP, avers that he understood the quantity term to mean that the Adams and Mauston stores together were required to purchase $350,000 in parts from Auto-Wares. Diemert further avers that he never would have agreed to a term requiring the Mauston store individually to meet a minimum purchase requirement of $350,000 because at the time the BGP was signed, the Mauston store was brand new with no performance history, and because the Adams store, which had been in business since 1992, had never made yearly purchases of auto parts totaling $350,000. Finally, Diemert avers that in spite of the Mauston store's failure to ever hit the $350,000 mark for the five years covered by the BGP, no one at Auto-Wares ever mentioned it.

ORDER

IT IS ORDERED THAT:

1. The motion of plaintiff Auto-Wares for leave to supplement its opposition to the motion for summary judgment, dkt. 85, is DENIED.

2. The motion of defendant Wisconsin River Co-Op Services for summary judgment on Count II of the Amended Complaint, dkt. 66, is GRANTED.

3. Not later than June 30, 2011, Auto-Wares is to advise the court whether any matters remain for trial, which is scheduled for August 15, 2011.

Entered this 5th day of July, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge