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

DALE WIEMERSLAGE,

Plaintiff,

v.

ASTEC, INC.,

Defendant.

OPINION AND ORDER

11-cv-383-wmc

In this civil action, plaintiff Dale Wiemerslage alleges that his former employer, Astec, Inc. ("Astec"), breached the parties' Guaranteed Employment Agreement by stopping payments to him shortly after his retirement. In turn, Astec contends that Wiemerslage breached first, by violating an attached covenant not to compete, and that this breach excuses it from further performance. Presently before the court are the parties' cross motions for summary judgment on liability and damages. Because the court finds the non-compete clause unenforceable, it will grant Mr. Wiemerslage's motion for summary judgment on the issue of liability. The court will deny both sides' motions for summary judgment on damages because disputed material facts remain concerning the proper calculation of the amount owed to Mr. Wiemerslage.

UNDISPUTED FACTS

For the purpose of deciding this motion, the following facts are material and

undisputed.[1]

I. The Original Guaranteed Employment Agreement

In 1998, Dale Wiemerslage, a domiciliary of McGregor, Iowa, began working for Dillman Equipment, Inc. ("DEI") just across the Mississippi River in Prairie du Chien, Wisconsin. DEI is in the business of manufacturing, marketing, and servicing asphalt plant equipment. On October 2, 2000, Bruce Dillman, president and owner of DEI, signed a letter which bears the heading "Guaranteed Employment Agreement - Employee . . . . Dale Wiemerslage," and reads:

> In the event the company (Dillman Equipment Inc) is sold, merged or in the event that I cease to be President, this Guaranteed Employment Agreement will become effective the date the company is sold, merged or the date that I cease to be the President of Dillman Equipment Inc.
>
> Total annual compensation package will be no less than the annual base salary combined with detailed commissions due and bonuses in effect the date the company is sold, merged or from the date that I cease to be President, for a period of four (4) years from the date the company is sold, merged, or from the date that I cease to be President of Dillman Equipment, Inc.
>
> This letter also grants employee a "Buy Out" option equivalent to 50% of the value of initial 4 years employment contract or 50% of any portion of the value of remaining time period.

[1] This court has jurisdiction pursuant to 28 U.S.C. § 1332. Venue is proper pursuant to 28 U.S.C. § 1391(a). The case was properly removed from Wisconsin state court pursuant to 28 U.S.C. § 1446.

> This "Buy Out option may be exercised at any time during the guaranteed four (4) year employment contract at the sole discretion of the employee.
>
> This Guaranteed Employment Agreement will be binding on any initial acquiring entity and any subsequent acquiring entities within the original initial four (4) year period of time.

Although this letter was signed by Mr. Dillman in 2000, Mr. Wiemerslage did not see it or become aware of it until October 2, 2007.

On that date, Mr. Dillman and Mr. Wiemerslage signed a written contract setting out the terms of Wiemerslage's employment, incorporating the 2000 "Guaranteed Employment Agreement" letter. Other relevant terms of the contract provide that:

> The agreement is effective October 1, 2007 through September 30, 2008 and supersedes all prior Employment Agreements.
>
> . . .
>
> The terms set forth in this Employment Agreement will remain in effect until the Employment Agreement is revised or terminated by DEI. Changes require the approval, in writing, by the President or General Manager prior to the effective date of change.
>
> . . .
>
> *Policy Regarding Confidential Information*: . . . For a period of 12 months after the termination of employment by the Employee or Employer . . . [the employee] shall not directly or indirectly, own, manage, operate, control, be employed by, or participate in similar competitive businesses to those engaged in by DEI. . . . Nothing in this agreement shall be construed to prohibit DEI from pursuing any other available remedies [in addition to an injunction] . . . including the recovery of damages from the Employee. "
>
> . . .
>
> This agreement shall inure to the benefit of and be binding upon DEI, its successors and assigns, including, without limitation, any corporation that may acquire all or

> substantially all of DEI's assets and business or into which DEI may be consolidated or merged.
>
> . . .
>
> Income paid will consist of the following: *Basic Salary*: $58,094.40 per annum.
>
> . . .
>
> *Commissions - Parts Sales*: The commission rate for sales of parts will be 0.55% (excluding freight, service). Commissions on Parts Sales will be paid 4-6 weeks after the end of each fiscal quarter.
>
> . . .
>
> *Major Components and Complete Plants*: Dale Wiemerslage will be compensated for contacts and leads given from Dale on the sale of New Equipment. . . . The commission rate for sale of Major Components sold . . . will be no higher than 0.5% of the net price. . . . The commission rate for sale of a complete plant . . . will be no higher than 0.5% of the net price.
>
> . . .
>
> *Service*: Dale will receive 0.5% for all paid service work.
>
> . . .
>
> *Incentive Bonus Schedule*: 1. $500.00 for each additional $100,000.00 of sales over previous year. 2. $100.00 for each new customer that buys a minimum of $10,000 of parts. 3. $75.00 bonus for each day Dale is out of the office traveling.

After they signed the contract, Dillman told Wiemerslage that if DEI were sold the purchaser would have the right to change the non-compete agreement or put its own agreement in place.

II. Continued Employment with Astec

Bruce Dillman passed away on June 8, 2008. By its terms, the Guaranteed Employment Agreement became effective on that date. On October 1, 2008, DEI was sold and merged into its present owner, Astec, which is a Tennessee corporation with its principal place of business in Chattanooga, Tennessee. Astec assumed the obligations of the Guaranteed Employment Agreement when it acquired DEI, though at that time no one at Astec discussed the terms of Mr. Wiemerslage's continuing employment.

Following the acquisition, Mr. Wiemerslage remained in his position and was paid his usual compensation. On or around December 15, 2008, however, Astec President Ben Brock wrote Wiemerslage a letter notifying him of a change in the way he would be paid. The letter states:

> Based upon our discussions and verbal agreement I am giving you this letter to formalize our understanding. . . . Your employment agreement dated 10/2/00 by Bruce Dillman remains in effect, but your pay structure is altered to reflect the information contained in this letter. . . . This letter is a summary of our agreement. This letter is not a contract, and your employment is at will.

The next day Mr. Brock delivered the letter to Wiemerslage. Brock and Wiemerslage did not discuss whether the other terms in the 2007 contract, including the covenant not to compete, remained in effect.

III. Retirement From Astec and Work at Hotmix

Wiemerslage continued to work for Astec until February 12, 2010, when he voluntarily "retired." At the time of this retirement, Wiemerslage had attained the

position of Parts Sales Manager and had acquired detailed knowledge of the scope of DEI's business and the identity of its customers. At that time, Wiemerslage also had 28 months of guaranteed employment remaining under the terms of his Guaranteed Employment Agreement. Accordingly, Wiemerslage informed Human Resources Manager Kim Graf that he would be electing the Agreement's "buy-out" option, entitling him to receive 50% of the value of his yearly compensation package for those 28 months. Graf calculated the compensation package for the buy-out using the base salary listed on Mr. Wiemerslage's 2007 contract, plus the actual commissions and bonuses that were owed to him on the date Mr. Dillman died.

In July of 2010, however, Wiemerslage decided that he wanted to go back to work. Having no job openings, Astec declined to re-employ him. So on or about August 1, 2010, he began working for Contractorsheaven.com, Inc. d/b/a Hotmix Parts ("Hotmix") as a consultant. Hotmix also manufactures and sells asphalt plants, equipment and related products from its headquarters in Kentucky. More to the point, Hotmix is one of Astec's business competitors.

Shortly after Wiemerslage notified Astec that he was working for Hotmix, he received a letter from Daniel Gilmore, attorney for Astec, asserting that Wiemerslage had violated the non-compete clause in his 2007 contract. Further, Gilmore's letter dated August 13, 2010 stated: "Although DEI has not yet been able to determine the full amount of damages it has suffered as a result of your wrongful actions, it has decided to suspend further payments under your Guaranteed Employment Agreement. It is DEI's

position that the damages you have caused serve as an offset to its obligations under this Agreement." Astec then ceased paying Wiemerslage.

Wiemerslage alleges he had received $1,195.31 every two weeks from March 1, 2010 until August 2010. Astec alleges that it paid him $1,195.61 every two weeks, beginning March 5, 2010. Despite this apparent 30 cent and four day discrepancy, the parties agree that as of August 13, 2010, Mr. Wiemerslage had been paid a total of $14,347.56.

IV. Damages to Astec

At his deposition, Ben Brock, president of Astec, acknowledged that DEI's sales did not decrease after Mr. Wiemerslage left the company and went to work for Hotmix. General Manager of the Dillman Division, Tony Schwab, and the employee who filled Mr. Wiemerslage's vacant position, Jason Clark, also indicated at their respective depositions that they were unaware of any sales loss caused by Wiemerslage's employment by Hotmix.

OPINION

The parties have cross-moved for summary judgment on liability and damages.[2] On a motion for summary judgment, if the non-moving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. *See Celotex v. Catrett*, 477 U.S. 317, 322 (1986). When considering a motion for summary judgment, the court must examine the facts in the light most favorable to the non-moving party. *Sample v. Aldi, Inc.*, 61 F.3d 544, 546 (7th Cir. 1995).

I. Liability Under the Contract

Defendant's liability under the Guaranteed Employment Agreement hinges on three questions: (1) whether the covenant not to compete in plaintiff's 2007 contract is valid; (2) whether the covenant was in force in 2010; and (3) whether violation of the covenant constitutes a "material breach" of the Guaranteed Employment Agreement. The court does not reach the second and third questions because it finds that the covenant itself is invalid under Wisconsin law.

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[2] Both sides appear to agree that Wisconsin law applies to the claims in this case, and the court concurs. "A federal court sitting in diversity must apply the choice-of-law rules of the forum state." *Cowley v. Abbott Labs, Inc.*, 476 F. Supp. 2d 1053, 1057 (W.D. Wis. 2007). Wisconsin is the forum state and its choice of law rules apply. By those rules, "the law of the forum should presumptively apply unless it becomes clear that nonforum contacts are of the greater significance." *Id.* (*citing State Farm Mut. Auto. Ins. Co. v. Gillette*, 2002 WI 31 ¶ 51, 251 Wis. 2d 561, 588, 641 N.W.2d 662, 676). Because Wisconsin is the forum state and the contract was executed and largely performed here, Wisconsin contract law controls.

A. **Validity of the Covenant Not To Compete**

In Wisconsin, covenants not to compete are disfavored and are prima facie suspect because they restrain trade. *See Farm Credit Serv's of N. Cent. Wis., ACA v. Wysocki*, 2001 WI 51 ¶9, 243 Wis. 2d 305, 312, 627 N.W.2d 444, 447; *Wausau Med. Ctr. v. Asplund*, 182 Wis. 2d 274, 281, 514 N.W.2d 34, 38 (Wis. Ct. App. 1994). By statute, a covenant not to compete "within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant . . . imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint." Wis. Stat. § 103.465. "[W]hether a restrictive covenant violates § 103.465 [is a] question[] of law." *Frank D. Gillitzer Elec. Co., Ltd. v. Andersen*, 2010 WI App 31 ¶ 5, 323 Wis. 2d 754, 758, 780 N.W.2d 542, 544.

In order to satisfy the requirements of § 103.465, a non-compete agreement "must: (1) be necessary for the protection of the employer or principal; (2) provide a reasonable time restriction; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive to the employee; and (5) not be contrary to public policy." *Chuck Wagon Catering, Inc. v. Raduege*, 88 Wis. 2d 740, 751, 277 N.W.2d 787, 792 (1979). Plaintiff argues that the covenant at issue in this case is invalid because it fails four of these five elements.

First, plaintiff argues that the non-compete clause as a whole is not reasonably necessary to protect defendant's business. A covenant not to compete is only necessary if

the employee presents "a substantial risk either to the employer's relationships with his customers or with respect to confidential business information." *Fields Found., Ltd. v. Christensen*, 103 Wis. 2d 465, 471, 309 N.W.2d 125, 129 (Wis. Ct. App. 1981) (quotation omitted). The employer has the burden of proving this. *Geocaris v. Surgical Consultants, Ltd.*, 100 Wis. 2d 387, 388, 302 N.W.2d 76, 77 (Wis. Ct. App. 1981).

Plaintiff points out that defendant has failed to submit proof of any lost sales as a result of plaintiff's employment at Hotmix. Although this is one factor that may be *considered* in determining whether the covenant was necessary for the employer's protection, there is no support for the argument that an employer's present inability to prove damages in breach is dispositive. *See Fields*, 103 Wis. 2d at 471, 309 N.W.2d at 129 (holding that the covenant need only protect against "a substantial risk" of harm).[3] Instead, whether a provision in a covenant is reasonably necessary must be determined on "the totality of the circumstances." *Hunter of Wis., Inc. v. Hamilton*, 101 Wis. 2d 460, 470, 304 N.W.2d 752, 757 (1981). As a former sales manager, plaintiff appears to have unique access to and familiarity with the market for asphalt equipment, the names of customers likely to require that equipment, and knowledge of the prices typically offered by DEI/Astec. For this reason, defendant's president, Mr. Brock, testified he considers the non-compete provision to be a critical component of plaintiff's contract. Under these

[3] Plaintiff also asserts that "[i]f [a covenant not to compete] was so valuable and essential to defendant, it should have required plaintiff to enter into a non-compete agreement." This argument is unpersuasive if, as defendant contends, the non-compete agreement was still in effect when plaintiff allegedly violated it.

circumstances, the court cannot find that a restrictive covenant was not reasonably necessary to protect defendant's business.

Second, plaintiff claims that the expiration date of the covenant not to compete has passed, and so enforcing such a covenant despite its expiration is against public policy. This argument misses the mark by assuming the essential factual issue: if the covenant has expired, plaintiff need not worry about its enforceability; if the covenant is still in force, the date on which it takes effect (in contrast to the length of the forbearance required) is not material.

Third, plaintiff claims that the covenant not to compete is invalid because it fails to provide a reasonable territorial limit, as required by Wis. Stat. § 103.465, and that the lack of a territorial limit is harsh and oppressive to plaintiff. On this point, the court is inclined to agree. By flatly barring plaintiff from competing with defendant anywhere, the covenant contains *no* territorial limitation. This fails both the statutory requirement that there be some limit to the restriction on competition and the requirement that that limit be reasonable. As a result, the court finds that the limit is both invalid per se, as well as overbroad and unreasonable under the circumstances.[4]

Under § 103.465, territorial limits need not be expressed in geographical terms. *Rollins Burdick Hunter of Wis. Inc. v. Hamilton*, 101 Wis. 2d 460, 466, 304 N.W.2d 752, 755 (1981). In fact, the Wisconsin Supreme Court has noted that "[a] limitation

[4] Having found the covenant invalid for a lack of *any* territorial limitation, the court need not address plaintiff's fourth argument that the lack of a limit is harsh and oppressive.

expressed in terms of particular clients or customers [may even be superior to geographical limits because it] more closely approximates the area of the employer's vulnerability to unfair competition by a former employee and does not deprive the employee of legitimate competitive opportunities to which he is entitled." *Id.* When it is not explicitly geographic, however, the territorial limitation must still describe "specific customers or activities" that delineate a "territory" -- otherwise, it cannot be said the employee is barred from competing in a specified territory as required by the statute. *Id.* at 467.

In *Techworks, LLC v. Wille*, 2009 WI App 101, 318 Wis. 2d 488, 770 N.W.2d 727 (Wis. Ct. App. 2009), the Wisconsin Court of Appeals considered a non-geographic territorial restriction that is both specific and reasonable. *Id.* at ¶¶ 3-16. In particular, the contract before the *Techworks* court contained two non-compete clauses, one of which did not contain a limitation in geographic terms. *Id.* at ¶ 7. That clause was impliedly accepted as a territorial limit because it forbade the former employee from working with a finite list of people: those customers for whom the employee had worked over the last two years. *Id.* at ¶ 12.[5]

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[5] The combination of a customer non-solicitation clause with a backward-reaching time limit is generally upheld as reasonable. *See, e.g.*, *Share Corp. v. Momar Inc.*, No. 10–CV–109, 2011 WL 284273 at *4 (E.D. Wis. Jan. 26, 2011) ("Cases upholding customer non-solicitation clauses have only done so when an explicit backward restriction is included."); *Star Direct, Inc. v. Dal Pra*, 2009 WI 76 ¶ 5, 319 Wis. 2d 274, 282, 767 N.W.2d 898, 902 (upholding restriction on contacting "past customers," defined as those customers who purchased from the defendant within one year prior to the plaintiff's termination); *Rollins*, 101 Wis. 2d at 469-71, 304 N.W.2d at 757 (declining to hold invalid as a matter of law a covenant that prevented employees from soliciting business

Unlike the *Techworks* covenant, the covenant that Wiemerslage signed broadly states that he "shall not directly or indirectly, own, manage, operate, control, be employed by, or participate in similar competitive businesses to those engaged in by DEI." This language is almost identical to the covenant struck down by the Wisconsin Supreme Court in *Holsen v. Marshall & Ilsley Bank*, 52 Wis. 2d 281, 287-88, 190 N.W.2d 189, 192-93 (1971). In *Holsen*, the covenant purported to restrict any activity in "a competing business." Admittedly, the *Holsen* opinion was written at a time when the Wisconsin Supreme Court adhered to the notion that the territorial limitation in § 103.465 had to be defined in explicit geographic terms. Later, in *Rollins Burdick Hunter of Wisconsin. Inc. v. Hamilton*, 101 Wis. 2d 460, 466, 304 N.W.2d 752, 755 (1981), the Supreme Court explained that territorial limitations could be defined in other ways. In doing so, the *Rollins* court again held that the broad "no competing business" restriction cited by *Holsen* was inadequate to supply a territorial limitation using non-geographic terms. *Rollins*, 101 Wis. 2d at 467, 304 N.W.2d at 755. The *Rollins* court explained that a prohibition on working for "a competing business" is not a territorial definition because it does not "contain a limitation expressed in terms of specific customers or activities." *Id.*

Just as the phrase "a competing business," was found inadequate in *Holsen* and *Rollins*, the restriction on working in "similar competitive businesses to those engaged in by DEI" is simply not a territorial limitation. A territorial *limitation* on a general

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from their employer's customers for the lesser of either two years after the employment relationship ended or the duration of the employment relationship).

prohibition on competition, by its very nature, must somehow *restrict or define* the reach of the prohibition. A so-called limitation merely stating "thou shall not engage in competing business," fails to meet this requirement. "[A]n entire absence of limitations as to time and place is fatal to a claim of being within the statutory sanction." *Holsen*, 52 Wis. 2d at 287, 190 N.W.2d at 192. Accordingly, the court finds that the covenant is per se invalid.

B. Reasonableness of the Covenant Not to Compete

Were there a specified territory of any kind, the court would also be required to ask if the size of the restricted territory is reasonably necessary to protect the employer's interests. This is a highly fact-dependent inquiry that requires consideration of "the scope of actual customer contact," whether the employee "is a high-level management employee who is apt to have access to confidential business information," and "the extent to which [the employee's information] . . . is vital to the employer's ability to conduct its business, the extent to which the employee actually had access to such information, and the extent to which such information could be obtained through other sources." *Rollins*, 101 Wis. 2d at 467-70, 304 N.W.2d at 756-57. After making this inquiry, the court must also balance "the protection of the legitimate interests of the employer . . . [against effects] oppressive and harsh on the employee or injurious to the interests of the general public." *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, 162, 98 N.W.2d 415, 419 (1959).

Here, plaintiff's familiarity with the asphalt business arguably gives him a good sense of the number and location of DEI's major competitors, and as a practical matter a

reasonable restriction on competition with DEI may have prohibited plaintiff from a defined territory, numerically- or geographically-speaking. But the record contains insufficient information to determine the scope of the competitive market, and the court assumes that this factual issue would be disputed by the parties at trial. Moreover, DEI's own website suggests that it competes throughout all of North America, hardly a limited market. *See* the territory map at http://www.dillmanequipment.com/index.php.

Ultimately, the court need not wait for trial: defendant does not cite, and this court has not found, a single Wisconsin case upholding as "reasonable" a covenant that places no set territorial limits. In fact, the case law suggests that this would be patently unreasonable. *See Holsen*, 52 Wis. 2d at 287-88, 190 N.W.2d at 192-93 ("[By the literal terms of the covenant] the place or area is as wide as the world . . . . The employer argues that [it] . . . would be reasonable in its application of so obviously unreasonable a restraint. That does not satisfy the statute."). Thus, the court finds that the territorial limit in this case – if it can even be called that – is unreasonable under the circumstances as a matter of law.

C. Wisconsin's Limited "Blue Pencil" Policy

Finally, the court notes that it cannot simply "blue pencil" out the offending clause to save other, divisible portions of the covenant for the benefit of defendant's affirmative defense. While this practice might be legally permissible after *Star Direct, Inc. v. Dal Pra*, 2009 WI 76 ¶62, 319 Wis. 2d 274, 304, 767 N.W.2d 898, 913, it would be

unavailing in this case, where the only clause that plaintiff is alleged to have violated is the very one this court finds invalid.

II. DAMAGES

Both parties agree that plaintiff's contractual right to four years of guaranteed employment irrevocably vested when Mr. Dillman passed away on June 8, 2008. Given the court's ruling that plaintiff is not in breach, Astec continues to have a duty to perform under the parties' contract. The contract states in pertinent part: "Total annual compensation package will be no less than the annual base salary combined with detailed commissions due and bonuses in effect the date [Bruce Dillman ceases to be President]." The parties disagree about how to calculate the total compensation package, differing on what plaintiff's annual base salary is and what it means for commissions to be "due" and bonuses to be "in effect" on a given date.

A. Salary

Plaintiff contends that the term "annual base salary" must be calculated by reference to the salary paid over the 365 days before Mr. Dillman ceased to be president, which is the trigger date for his entitlement to compensation. Defendant argues that the term refers instead to the "Basic Salary" defined on the first page of the 2007 contract. Defendant has the better of this argument. First, the plain language of the term "annual base salary" in the 2000 Guaranteed Employment Agreement appears to refer to plaintiff's "basic salary" for the year, not some vague reference to his earnings in the

previous 365 days, or at least not where his annual base salary is defined by contract. Second, the 2007 contract expressly incorporates the 2000 agreement and, as such, together they form one contract with multiple parts meant to be read in conjunction with each other. *Seitzinger v. Cmty Health Network*, 2004 WI 28 n.34, 270 Wis. 2d 1, 37 n.34, 676 N.W.2d 426, 445. Therefore, the court finds, as a matter of law, that plaintiff's "annual base salary" for the purposes of calculating his compensation package is the basic salary defined in the 2007 contract: $58,094.40.[6]

B. Commissions and Bonuses

The parties also dispute whether the contract requires plaintiff to be paid only the commissions and bonuses actually due to him on the date Mr. Dillman died, or paid according to a pro-rated combination of his 2007 and 2008 yearly bonus and commission totals. The Guaranteed Employment Agreement refers to "commissions due" and "bonuses in effect" on June 8, 2008. Plaintiff contends that the only reasonable reading of the contract would account for the seasonal and fluctuating nature of bonuses and commissions by considering his totals for the 365 days before June 8, 2008.[7] Defendant argues that a literal application of the contract's terms requires that only those

[6] Plaintiff does not allege that basic salary listed in the 2007 contract was changed between 2007 and 2008. If the salary did not change, the different calculations offered by plaintiff and defendant result in the same amount for the annual salary.

[7] Plaintiff would generally have the court use his 2007 and 2008 W2's (because they include his salary, commissions and bonuses) and prorate those amounts to determine the total commissions and bonuses earned during the 365 days prior to Mr. Dillman's death.

commissions or bonuses actually due to be paid to plaintiff *on* June 8, 2008 may be included. By the defendant's lights, even commissions earned earlier in 2008 for which plaintiff had already been paid before June 8, 2008 would be excluded.

Where the terms of a contract are clear and unambiguous, courts construe a contract according to its literal terms. *Md. Arms Ltd. P'ship v. Connell*, 2010 WI 64 ¶ 23, 326 Wis. 2d 300, 311, 786 N.W.2d 15, 20-21 (citing *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis. 2d 493, 506, 577 N.W.2d 617 (1998)). On the other hand, if "a contract provision is ambiguous, [the court must] look to extrinsic evidence to discern its meaning." *Farm Credit Serv's*, 2001 WI 51 ¶ 12, 243 Wis. 2d at 314, 627 N.W.2d at 448.

> Words in a contract are to be read as a reasonable person would under the circumstances. It is the objective meaning of the contract, not the subjective intent of the parties, that controls . . . judicial interpretation of a contract is not to determine what the parties intended to agree to, but what, in a legal sense, they did agree to, as evidenced by the language they saw fit to use.

Seitzinger v. Cmty. Health Network, 270 Wis. 2d 1, 30, 676 N.W.2d 426, 440 (2004).

Unfortunately, unlike the base salary language, the terms "due" and "bonuses in effect" fall short as models of clarity. Indeed, more than one interpretation is reasonable. The commissions and bonuses are arguably "due" or "in effect" on June 8, 2008, if scheduled for disbursement at next payday after that date. Alternatively, a bonus may be said to be "in effect" for an entire year, or at least until the next bonus period. It is also

reasonable to assert that the commissions and bonuses are "due" or "in effect" if earned in the year leading up to June 8.

Because the contract is ambiguous, the court must use extrinsic evidence to determine what the parties meant by these terms.[8] The extrinsic evidence thus far offered by plaintiff includes testimony by a former Astec employee, Jan Lotza, who was (1) present when Mr. Dillman created his Guaranteed Employment Agreements, and (2) claims to have spoken to Mr. Dillman about his intent regarding how commissions and bonuses were to be determined under the Agreement and why bonuses constituted such a large portion of employees' yearly income. (Dep. of Jan Lotza (dkt. #22) 10:6-19; 22:20-23:14.) Plaintiff also offers testimony of another former employee of Astec, Tom Polkingham, who claims that defendants' calculation is inconsistent with his understanding of how yearly commissions and bonuses would be calculated in the "buy out option" of the contract. (Dep. of Tom Polkingham, 11:16-18 (dkt. #25).).

"When a contract provision is ambiguous, and therefore must be construed by the use of extrinsic evidence, the question is one of contract interpretation for the jury." *Mgmt. Computer Serv., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 177, 557 N.W.2d 67, 75 (1996). Because the court requires the use of extrinsic evidence to resolve the ambiguity of the terms "in effect" and "due," and that evidence is subject to

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[8] *Seitzinger*, 270 Wis. 2d at 31, 676 N.W.2d at 441. *See also Capital Inv., Inc. v. Whitehall Packing Co., Inc.*, 91 Wis. 2d 178, 190, 280 N.W.2d 254, 259 (1979) ("After a contract has been found to be ambiguous, it is the duty of the courts to determine the intent of the parties at time agreement was entered into. In resolving ambiguity and determining parties' intent, the court may look beyond face of contract and consider extrinsic evidence." (internal citations omitted)).

dispute by the parties and interpretation by the trier of fact, the court must deny both plaintiff's and defendant's motions for summary judgment on the issue of damages.

III. ISSUES NOT RAISED IN THE COMPLAINT

At briefing on summary judgment, plaintiff argues that in addition to stopping payments in August 2010, in violation of his contract, defendant failed to properly pay the full amount owed to him in semi-monthly payments from March until August 2010. However, plaintiff did not allege this in his complaint; in fact, he asserted just the opposite -- that "Astec made to Wiemerslage the payments due under the Contract." (Compl. (dkt. #2-2) ¶6.)

Plaintiff has indicated that he would now like to amend his complaint to allege the necessary facts and plead the necessary claims. The court will refrain from deciding whether such an amendment is permissible because plaintiff has filed neither a formal motion to amend, nor an explanation for what appears an inordinate delay. Therefore, the issue is not properly before the court.

ORDER

IT IS ORDERED that:

1. plaintiff Dale Wiemerslage's motion for summary judgment is GRANTED on the issue of liability and DENIED on the issue of damages; and

2. defendant Astec, Inc.'s motion for summary judgment is DENIED.

Entered this 7th day of May, 2012.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge