IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WIS-PAK, INC.,

OPINION AND ORDER

Plaintiff,

01-C-0657-C

v.

NATIONAL UTILITY SERVICE, INC.,

Defendant.

- -

This is a civil action for declaratory relief in which plaintiff Wis-Pak, Inc. is seeking a declaration of its rights and obligations under an April 28, 1995 utility cost consulting agreement that it entered into with defendant National Utility Service, Inc. Plaintiff contends that it is not required to pay anything to defendant as a result of the savings it achieved in its sewer billings for its Quincy, Illinois bottling plant after it investigated the reasons why it was not receiving credit on its sewer bills for the water it used in its products and learned that the city had not been reading plaintiff's "deduct meter," which measures the amount of water plaintiff puts into its products. Defendant argues that the parties' contract covers the sewer bill savings because defendant identified the fact that the city of Quincy was billing plaintiff for sewer charges on the assumption that plaintiff was

discharging to the sewer 100% of its incoming water, it made recommendations to plaintiff for addressing this problem and the recommendations encompassed the actions plaintiff took to remedy the overbilling.

Originally, plaintiff filed its cause of action in the Circuit Court for Jefferson County, Wisconsin. On November 21, 2001, defendant removed the lawsuit to this court, alleging diversity jurisdiction, and filed a counterclaim for breach of contract and unjust enrichment. Defendant seeks monetary and declaratory relief. Jurisdiction is present under 28 U.S.C. § 1332.

Presently before the court are plaintiff's and defendant's cross-motions for summary judgment. I conclude that plaintiff did not implement any of the recommendations defendant made in its November 23, 1999 report. Plaintiff achieved savings as a result of investigating the city's erroneous sewer billings and its failure to deduct from the sewer bills the 80% of incoming water that went into plaintiff's product and should have been reflected on the deduct meter, not because it followed any of defendant's recommendations. Therefore, I will grant plaintiff's motion for summary judgment and deny defendant's motion for summary judgment.

From the proposed findings of fact and the record, I find the following facts material and undisputed.

UNDISPUTED FACTS

A. The Parties

Plaintiff Wis-Pak, Inc. is a Wisconsin corporation with its principal place of business in Watertown, Wisconsin. Plaintiff is a soft drink bottler with plants in several states, including Quincy, Illinois. Defendant National Utility Service, Inc. is a New Jersey corporation with its principal place of business in Park Ridge, New Jersey. Defendant solicits companies such as plaintiff and contracts with them to review their utility bills and split any savings.

B. The Contract

On June 20, 1995, plaintiff entered into a contract under which defendant is to review utility bills submitted by plaintiff and recommend potential savings or refunds. The contract states in part in the Addendum:

> Any recommendation you [defendant] make will be considered by us [plaintiff] and shall be subject to our approval. We will advise you in writing [of] our intent to pursue or not pursue each of your recommendations, and in the latter case, detail the reasons. However, if any recommendation made by you is accepted by us and is subsequently implemented, we will pay you as outlined below after such savings and refunds are achieved. All information pertaining to your recommendations that we accept, including correspondence with our suppliers, will be sent to you promptly for your evaluation and further advice. However, you shall not have authorization to communicate or negotiate with third party suppliers except with our express written consent.

Plaintiff paid a one-time fee of $12,000 at the commencement of the contract. Under the terms of the contract, for any recommendation received and adopted, plaintiff is entitled to recapture its initial $12,000 fee; after that, it is obligated to pay defendant 50% of each refund or credit received and 50% of the savings realized for a period of 60 months.

C. Water and Sewer

Plaintiff pays water and sewer charges to the city of Quincy for its bottling plant located in that city. The water portion of the bill is based on the volume of water provided to the plant and the sewer portion is based on the volume of water discharged by the plant. Most of the water that is provided to the plant goes into soft drink products.

The Quincy plant has a water meter that measures the volume of water supplied to the plant from the municipality. It has a deduct meter inside the plant, which measures the volume of water used to fill the soft drink cans and bottles. The sole purpose of installing a deduct meter is to be able to calculate discharge to the sewer in order to compute the municipal sewer bill properly. (A deduct meter measures the water diverted for bottling from the water supplied; the difference between the diverted water and the incoming water is the volume of water discharged to the sewer.) At plaintiff's La Crosse, Wisconsin and Mankato, Minnesota plants, the city retrieves the data from either a deduct or flow meter and assesses the sewer portion of the water and sewer bill. (A flow meter measures discharge to the sewer

directly.) At plaintiff's Watertown, Wisconsin and Norfolk, Nebraska plants, plaintiff retrieves the data from the meters, subject to periodic checks by the city, and gives it to the city for sewer billing.

When plaintiff decided to build the Quincy plant, it learned through discussions with the city of Quincy that the city preferred a deduct meter over a flow meter or any other type of measuring device. On July 30, 1998, the city of Quincy sent plaintiff's engineers the specifications for a Neptune deduct meter.

In November 1998, plaintiff installed a Neptune deduct meter at the Quincy plant. On December 8, 1998, the Quincy Sanitation Committee conducted an industrial user inspection of the plant that would have included an inspection of both the incoming and deduct meters. Plaintiff assumed that the city would be reading the deduct meter and adjusting plaintiff's sewer bill accordingly. This assumption was incorrect.

The city sent the following quarterly water and sewer bills directly to plaintiff's accounts payable department in Watertown, Wisconsin: $27,230.91 for December 21, 1998; $29,166.73 for March 15, 1999; $40,207.85 for July 6, 1999; $69,282.80 for October 4, 1999; and $70,044.86 for January 25, 2000. It did not send any of the bills to the Quincy plant. In January 1999, plaintiff began sending defendant copies of the Quincy plant's water and sewer bills.

On November 24, 1999, defendant sent plaintiff a report dated November 23, 1999,

which reads as follows:

> We note at the [Quincy plant] location you are currently receiving your water service requirements from the City of Quincy. We note that the sewer charges applied are based on the presumption that 100% of the water delivered is being discharged into the sewer system. In many cases, we have found the discounts on these charges can be obtained when it is determined that not all the waste water is being returned to the sewer system.
>
> That is, where there is a significant loss of water due to use in processing, steam heat, recirculation, cooling towers, evaporation or any means, relief can be obtained in proportion to the amount of water which is consumed in lieu of being discharged into the sewer system.
>
> We would suggest investigating this possibility by having the appropriate personnel at this facility determine the approximate amount of water that is retained (not eventually deposited into the sewer system.)
>
> If your findings indicate a sizable amount of water remains in your operation as to warrant consideration of this proposal, we believe that additional action would be advisable. It has been our experience that some utilities accept a certain percentage of water that is retained in your operation, often based upon industry standards or some other estimate, while others may require the installation (either temporary or permanent) of a sewer outflow meter. Our analysis (based upon the period 9-14-98 to 3-15-99*)* indicates annual savings of approximately $2,400, based on the assumption that 4% of your metered water is not returned to the sewer system. Of course, this is an estimate and actual savings may vary based upon factors such as usage, rate revisions, etc.
>
> Included with this report is a draft of a suggested letter to assist you in contacting the utility in this regard. Kindly transpose the contents of this letter onto your own stationery, and provide us with a blind copy upon its release, as well as copies of any ensuing replies for our review and evaluation.
>
> Should the supplier decide to respond with a personal visit or telephone call, it is

> strongly suggested that you request that they confirm such a visit/call in writing. Of course, kindly provide us with a copy of any such confirmation for our review.
>
> Please note that our suggested letters are investigatory in nature and do **not** commit your organization to the proposal(s) contained therein. Rather, they merely request that the supplier confirm our findings/provide additional information concerning the above.

John Uttech, plaintiff's vice president of operations, received defendant's report but did nothing with it because the Quincy plant already had a deduct meter installed and he believed that Michael Zeman, plaintiff's project manager who oversaw the Quincy plant construction, was aware of the water and sewer bills at that location. On January 25, 2000, the city of Quincy sent a letter directly to the Quincy plant, advising plaintiff that because the "strength" of the plant's sewer discharge was higher than normal domestic waste (which causes additional transporting and treatment costs), there would be a surcharge on the next water and sewer bill. This letter was brought to Zeman's attention. Zeman told Mark Kimmel, plaintiff's director of operations, that the sewer bill would increase as a result of this surcharge.

On March 30, 2000, defendant wrote plaintiff, advising it to "review recommendations again" and reminding plaintiff that "all recommendations presented maintain their viability and savings potential." (In addition to the November 23 report, defendant had made other utility recommendations to plaintiff that are not relevant to this

lawsuit.) At no time between plaintiff's receipt of defendant's November 23, 1999 report and its receipt of the March 30 letter did plaintiff advise defendant that it did not intend to pursue the sewer cost savings recommendations or tell defendant that it was rejecting the recommendation, that it did not understand the recommendation or that it had any criticism of it.

When Kimmel reviewed the company-wide financial statements for the first four months of 2000, he realized that the water and sewer expenses were too high at the Quincy plant. In May 2000, Kimmel obtained a copy of the April 3, 2000 water and sewer bill for the Quincy plant and showed it to Zeman. When Zeman reviewed this bill, which totaled $86,798.44, he knew that it was too high regardless of any surcharge. Zeman spoke with the city of Quincy and discovered that the city had not been reading the deduct meter and, as a result, was billing for outgoing sewer at the same volume as incoming water.

From May to December 2000, plaintiff and the city ran tests and readings on both the incoming and deduct meters. During this same time period, plaintiff and the city negotiated the amount of the retroactive credit due plaintiff for sewer overcharges and discussed how to handle future billing. The city concluded that 80% of the water delivered to plaintiff goes into the soft drink product and 20% is discharged to the sewer. Testing also revealed that the city's meter had been under-registering incoming water by 17.7%. The city

concluded ultimately that plaintiff had been under-billed for incoming water by $23,394.90 and over-billed for outgoing sewer by $236,763.15.

In December 2000, plaintiff and the city agreed that in the future plaintiff would be billed for sewer at 20% of the volume of its incoming water. The 20% figure for future billings is an estimate based on actual meter readings.

On January 9, 2001, plaintiff and the city agreed that plaintiff would receive a credit of $241,763.15, which would be applied against future water and sewer bills. Plaintiff never informed defendant that it was discussing with the city of Quincy the terms of the credit for sewer overpayments and the basis for adjusting future sewer billings.

In October 2001, defendant invoiced plaintiff for $120,881.58 (the $241,763.15 credit multiplied by 50%). Defendant also invoiced plaintiff for $215,539.26, defendant's perceived share of the savings realized from June 21, 2000 to September 21, 2001 (15 months), representing 50% of the gross savings after recapture of the balance of the initial $12,000 fee. Defendant estimates that the total sewer bill savings realized over the remaining 45-month period (from September 21, 2001) will be $1,297,130.55 (the average quarterly savings of $86,475.37 multiplied by 15 quarters) and that its share of the remaining 45-month period will be $648,565.28 ($1,297,130.55 multiplied by 50%).

OPINION

It is undisputed that plaintiff received the November 23, 1999 report before Zeman asked the city about the erroneous sewer billing. Moreover, it is undisputed that under the contract, plaintiff must pay defendant a pro rata share of any savings achieved if plaintiff accepts any recommendation made by defendant and subsequently implements it. (Neither plaintiff nor defendant contends that the contract is ambiguous and defendant does not contend that plaintiff is bound by defendant's recommendations simply because plaintiff failed to respond to them in writing. Dft.'s Reply, dkt. #29, at 16 n.9.) The question is whether plaintiff accepted and implemented the action recommended in the report. In defendant's view, this is exactly what happened. Defendant advised plaintiff in its November 23 report that "the sewer bills were incorrect because they were based on the faulty assumption that 100% of the water was returned to the sewer." Dft.'s Reply, dkt. #29, at 6. Defendant noted that in many cases, sewer savings can be found where there is a "significant loss of water due to use in processing, steam heat, recirculation, cooling towers, evaporation or any means" and that such losses might amount to as much as 4% of total incoming water volume. Defendant suggested investigating "this possibility by having the appropriate personnel at [the Quincy] facility determine the approximate amount of water that is retained (not eventually deposited into the sewer system.)." Defendant advised

plaintiff that some utilities will agree to an estimate of retained water on the basis of industry standards or something else, while others would require the installation of an outflow meter, and recommended that plaintiff talk to the water utility about obtaining a discount on the sewer charges.

Plaintiff argues that defendant's report was nothing more than a generic letter, that it was not tailored to the actual operations of a bottling plant, as shown by the lack of any apparent realization that the water consumed in bottling soda would be far more than the 4% loss of water that defendant was contemplating, and that it contained no specific recommendations that plaintiff could use to correct the overcharge problem. The recommendation to install an outflow meter was of no value; plaintiff had installed a deduct meter at the Quincy plant during construction that should have had the same effect on its bill as an outflow meter. In an effort to circumvent that fact, defendant argues that its recommendation would encompass the need to read the meter or to check its function because "an unread or malfunctioning meter is the equivalent of no meter." Dft.'s Br. in Opp. to Ptf.'s Mot. for Summ. Jmt., dkt. #19, at 2. However, defendant never said that plaintiff should fix its meter or make sure that the city was reading it properly. Had defendant done so, its position would be far stronger. Rather, it recommended installing a meter or making a determination of the amount of water lost in the course of its operations.

As plaintiff points out, these two recommendations had been effectuated before defendant sent its report. Obviously, they had not remedied the problem that defendant noted. Just as obviously, neither one led to the savings plaintiff achieved. Defendant provided no more assistance when it suggested that plaintiff approach the city to discuss a flat rate discount. What was the sense of doing that when plaintiff had installed a deduct meter to make a specific determination of the water consumed during operations? In the end, the savings plaintiff achieved did not come from installing a meter, estimating the water consumed during operations or negotiating a discount for operational water losses, but from talking to the city about the existing deduct meter.

Hoping to bolster its case, defendant notes in its brief the respects in which plaintiff "dropped the ball," Dft.'s Br., dkt. #19, at 2: it did not check the water and sewer bills to determine whether the city was using the meter readings, id.; it did not put into place an appropriate bill monitoring system, id. at 5; and it did not take any steps to insure that the bills reflected the amount of discharge, id. at 2. Appropriate as these criticisms might be, they are irrelevant to the determination of defendant's entitlement to a share of plaintiff's sewer savings because defendant never made any of them the subject of a recommendation. It is to defendant's credit that it noted the overcharge that had escaped the attention of plaintiff's employees, but defendant does not contend that merely noting this point

constituted a "recommendation" covered by the contract.

Defendant argues, correctly, that it does not have to prove a causal connection between the recommendation made and the savings achieved; it need only show that it made a recommendation and the customer took action consistent with that recommendation that led to savings. Otherwise, it would be all too easy for the customer to say that it had come up with the same plan of action before defendant made the recommendation or that someone other than defendant had suggested the same idea. See, e.g., National Utility Service, Inc. v. Callahan Mining Corp., 799 F. Supp. 1004, 1006 (N.D. Cal. 1990) (observing that if causation requirement applied as rule of law, it would permit contracting party to engage in "shenanigans"); National Utility Service, Inc. v. J.R. Sexton Inc., 1989 WL 343048 at *2 (D. Conn. 1989) (unpublished) (holding that contract does not require "an inquiry into the state of mind of Sexton or its officials to determine the degree to which they were influenced by factors other than the N.U.S. report to adopt the course of action recommended by N.U.S.").

I agree with defendant and with the other courts that have held that defendant need not prove a causal connection in order to recover. This does not mean, however, that defendant need not show that it made specific recommendations and that plaintiff took action consistent with those recommendations. To take an easy example, if defendant had

recommended to plaintiff that it could save money on its electric bill by asking its electric company for a better electric rate and, instead, plaintiff had asked the gas company for a better gas rate, defendant could not contend that plaintiff owed it money for the gas savings.

In this case, defendant made recommendations to plaintiff that plaintiff did not implement or "take action consistent with." Instead of installing a deduct meter as defendant recommended, directing its employees to look for evidence of water that was not returning to the sewer or proposing a flat rate discount to the city, plaintiff investigated the city's failure to take into account the deduct meter readings showing the amount of water going into plaintiff's product. Although defendant tries to characterize this investigation as the natural result of its recommendation to install a meter, it cannot succeed without stretching the ordinary meaning of "installing a meter" beyond recognition. Defendant makes a second effort to fit plaintiff's action within one of its recommendations, asserting in its brief that "Wis-Pak did exactly what NUS recommended – it obtained a determination from the City of Quincy of the amount of water delivered to the facility that was not returned to the sewer system." Dft.'s Br., dkt. #19, at 10. Again, defendant's effort is unsuccessful because it fails to acknowledge that it did not recommend that plaintiff obtain "a determination from the City of Quincy of the amount of water delivered to the facility that was not returned to the sewer system," which would have required the city to examine

its procedures, directives, oversight and meter reading capabilities; rather, defendant recommended that *plaintiff's employees* identify amounts of water that might be consumed during operations and not going into the sewer. Defendant never suggested that plaintiff ask *the city* to determine why the city's records did not take the deduct meter readings into account.

Finally, defendant argues that because plaintiff's negotiations with the city culminated in a flat rate arrangement, plaintiff implemented defendant's third recommendation, but a close look at defendant's recommendation shows the lack of correspondence between it and the action plaintiff took. Plaintiff approached the city to determine why it was not receiving credit for the amounts measured by the deduct meter, not to propose a discount based on a deduction for minor amounts of water consumed in operations. The "flat rate" it received is an averaging of plaintiff's bills. (The record does not disclose whether this averaging is a benefit the city gave plaintiff in an effort to make up for its lengthy overbilling or whether the city decided it was easier to handle the bill this way than to try to read the deduct meter on a regular basis.)

(Even if defendant were correct in asserting that plaintiff had implemented defendant's recommendation when it worked out a flat rate with the city, it would make little difference to the outcome of the case. Once the city recognized the problem in its

billing, it had to adjust the past bills it had sent to plaintiff and develop a reliable method for charging plaintiff in the future. It could have chosen a meter reading or an average based on the meter readings that it took during the investigation stage or, presumably, simply made some sort of estimate. Nothing in the record indicates that the method of averaging that it chose produced savings for plaintiff greater than regular and correct meter readings would have produced. Without proof of savings, there is nothing for defendant to split with plaintiff.)

Defendant cites three cases from other jurisdictions in support of its position that no causal connection is required. As defendant points out, in none of these cases does the court require a showing that defendant's recommendation was the exclusive or even motivating cause of the savings achieved. In all three cases, the parties had agreed to contract language similar to that at issue in this case. However, in each of the cases, the court found that National Utility Services made a recommendation that its customer implemented subsequently and in doing so, achieved savings. In J.R. Sexton, Inc., 1989 WL 343048, the customer "made a change identical to that recommended by [National Utility]." Id. at *2. In fact, the court held that the contract made it clear that if National Utility Service "recommends a course of action and [the customer] subsequently takes that course and achieves a utility bill savings as a result, [the customer] is obligated to compensate N.U.S."

Id. In Sexton, the customer had made an earlier request for an "interruptible rate" with its gas company and nothing happened. After receiving a recommendation as to interruptible rates from National Utility, the customer made another request, this time successful, using National Utility's suggested letter verbatim.

In Callahan Mining Corp., 799 F. Supp. 1004, the customer had already asked for a specific rate change (from a large rate to an extra-large rate). After National Utility proposed the same rate change, the customer asked the utility again for the extra-large rate, using National Utility's suggested letter. The court stated that it would not apply "[the customer's] causation theory," requiring National Utility to prove that the savings resulted from its efforts rather than the customer's. Id. at 1005-06. The reasoning in Callahan is nearly identical to that in Sexton; each court concluded that the contract did not require an exclusive recommendation.

Finally, in National Utility Service, Inc. v. Savannah Foods & Industries, Inc., No. 91-2891, slip op. (D. N.J. Sept. 9, 1994) (unpublished), National Utility recommended that if the customer's current gas supplier was unwilling to renegotiate its contract, the customer should investigate other ways of receiving natural gas from wellhead producers depending on the outcome of hearings that were currently before the Federal Energy Regulatory Commission. After finding that the customer investigated the exact option that National

Utility had recommended, namely, receiving natural gas from other wellhead producers, the court held the customer liable under the contract. Id. at 26.

None of these cases changes my conclusion that defendant must prove that the action it recommended was the action that plaintiff took, if defendant is to prove its entitlement to a share of plaintiff's savings in sewer charges. Because defendant has failed to do this, and plaintiff has proved that the action it took was not one that defendant had recommended, I will grant plaintiff's motion for summary judgment and deny defendant's cross motion for summary judgment.

Defendant has raised claims of breach of the implied covenant of good faith and fair dealing as well as quantum meruit and unjust enrichment. All of these claims rise and fall with defendant's showing that plaintiff implemented one of defendant's recommendations, making it unnecessary to discuss them independently at any length. It is questionable whether defendant can bring an independent action for breach of the covenant of good faith. Wisconsin does not recognize such an action; apparently New Jersey does. I need not resolve the conflict of laws question because the only possible ground for a breach of the covenant of good faith is plaintiff's failure to provide defendant with additional information regarding defendant's recommendations on the sewer billing. (Defendant does not suggest that plaintiff was not sending it utility bills as required under the contract.) According to

the contract, however, such a duty would not attach until plaintiff had accepted a recommendation and I have found from the undisputed facts that plaintiff never accepted any of defendant's recommendations. The same analysis applies to defendant's claims of quantum meruit and unjust enrichment: if defendant had proposed an action that plaintiff took, plaintiff would be liable under the contract, making application of the concepts of quantum meruit or unjust enrichment unnecessary. If, as I have found, plaintiff never acted on any of defendant's recommendations, defendant is not due any money either because plaintiff was enriched unjustly or because plaintiff owes defendant the fair value of defendant's services.

ORDER

IT IS ORDERED that

1. Plaintiff Wis-Pak, Inc.'s motion for summary judgment is GRANTED; and IT IS DECLARED that plaintiff owes nothing to defendant National Utility Service, Inc. for any recommendations defendant made to plaintiff about plaintiff's sewer bills for its Quincy, Illinois facility through January 2000, under the parties' utility analysis and consulting contract;

2. Defendant National Utility Service, Inc.'s motion for summary judgment is

DENIED; and

3. The clerk of court is directed to enter judgment in favor of plaintiff and close this case.

Entered this 16th day of September, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge