IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NORTHERN CROSSARM CO., INC.,

Plaintiff,

v.

CHEMICAL SPECIALTIES, INC.,

Defendant.

ORDER

03-C-0415-C

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Plaintiff Northern Crossarm, Inc. has moved pursuant to Fed. R. Civ. P. 59(e) for amendment of the judgment entered herein on July 27, 2004. Plaintiff wants the court to award it 100% of the net royalty defendant received from its licensee Osmose, Inc. for sales made in plaintiff's sales region during the final two years of the parties' marketing support agreement. In the alternative, plaintiffs asks for resolution of the inconsistency between the judgment and the court's opinion of July 11, 2004 regarding the proper formula for computing damages and to amend the judgment to include an actual damages amount, regardless of the method the court uses to determine the proper formula for computing damages. Defendant objects to any amendment of the judgment, other than to insert a specific damage amount. It argues that plaintiff's disappointment with the court's estoppel

analysis and its weighing of the equities is not a legitimate reason bringing a Rule 59(e) motion.

Contrary to defendant's argument, it is proper for plaintiff to raise its concerns in a Rule 59(e) motion. Such motions are permissible when a party believes that the court has made a manifest error of law or fact or the need exists to prevent manifest injustice, among other reasons. They are useful because they enable courts to correct their own errors and avoid unnecessary appellate litigation. Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir. 1996).

I conclude that the formula incorporated into the judgment was the proper one to use but I will amend the judgment to include a specific dollar amount and amend the July 11 order to correct the discrepancy in the formulae.

Although plaintiff argues that the record evidence weighs strongly in favor of awarding it 100% of the net royalty for Osmose's sales in plaintiff's region for the remaining two years of the market support agreement, I am no more persuaded of this than I was in July. In making this argument, plaintiff ignores the language of the agreement, which allowed defendant to adjust the marketing support program once a year and imposed no restrictions upon the nature or extent of the adjustment. It defies common sense to think that defendant would not have reduced the amount of the marketing support program had it realized that the agreement applied to the Osmose sales. No business would give up all

of the payments from its licensee in a specific region unless it had no other option. Defendant had an option: its once a year right to adjust the support payments. Moreover, the equities of the situation do not justify an award of 100% of defendant's royalties from Osmose; plaintiff worked hard to build the market for defendant's ACQ product but it did not act alone. Defendant invested considerable time and resources in the same effort and provided financial support for much of what plaintiff did.

Plaintiff's backup position is that the court should award it 50% of the Osmose royalties for the final two years of the agreement. It argues that this would still give it much less than it lost in sales and profits as a result of its complete commitment and conversion to ACQ and much less than one would have expected defendant to pay to its most important partner in the development of the ACQ market. Plaintiff maintains that the parties never anticipated that the market support payments would decline on a per pound basis if the overall volume of sales rose because of competition from other wood treaters using ACQ and thus, it was error for the court to assume that the parties would have expected the payment to be reduced as sales volume increased.

In my view, the judicial task was not to give plaintiff everything it wanted in the way of damages but to try to achieve the result the parties would have reached had they known as of November 18, 2001, that defendant was obligated to provide marketing support payments to plaintiff for the sales that Osmose made under its license with defendant. I

concluded that if both parties had had this knowledge, defendant would have used its authority under the agreement to adjust the marketing support payments to take into account the greatly increased sales that would be made in plaintiff's region. It was reasonable to believe that defendant would tie the adjusted payment price to the license fee it was receiving. For the first year, this amount would be 50% of the license fee. It was equally reasonable to believe that in November 2002, when the license sales were continuing to rise, defendant would seek to reduce the payments to plaintiff and the likely reduction would be to 25% of the license fee, in light of the anticipated rise in the quantity of payments. It is irrelevant that the sales were actually reaching a plateau at the end of 2002; the trend indicated that the increases would be continuing and this is what defendant would have considered.

As plaintiff points out, the July 11 opinion contains an error. At pp. 4-5, I wrote that "for the period from January 1, 2002 until the expiration of the market support agreement, I will assume that defendant would have paid plaintiff half its net royalty from Osmose for the sales Osmose was making within plaintiff's region." This is inconsistent with the statements at p. 24 that "defendant would have agreed to pay plaintiff no more than half its net royalty for the 2002 term of the contract and no more than one-quarter of its net royalty for the 2003 year." This second statement is the accurate reflection of the decision that I reached and was properly carried over into the order section and incorporated into the final

judgment. Therefore, I will amend the order to make the two statements consistent with each other.

ORDER

IT IS ORDERED that the order entered herein on July 11, 2004, is AMENDED in two respects: First, by deleting the sentence beginning in the first line from the bottom of page 4 and continuing onto p. 5 and inserting the following sentence:

> Therefore, for the year starting November 18, 2002, I will assume that defendant would have paid plaintiff half its net royalty from Osmose for the sales that Osmose was making within plaintiff's region and for the year starting November 18, 2003 and running until the expiration of the agreement, I will assume that defendant would have paid one-quarter of its net royalty from Osmose for the sales that Osmose was making within plaintiff's region.

Second, by inserting the words "for a total amount of $346,731" after the word "agreement" in the third line of the partial paragraph on p. 25.

FURTHER, IT IS ORDERED that the clerk of court is to vacate the judgment entered on July 27, 2004 and enter an amended judgment conforming to this order.

Entered this 16th day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge