IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LAND O'LAKES, INC.,

Plaintiff,

v.

GRASSLAND DAIRY PRODUCTS, INC.,

Defendant.

OPINION AND ORDER

04-C-197-C

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In this civil action plaintiff Land O'Lakes, Inc. seeks monetary relief for a breach of contract and warranty by defendant Grassland Dairy Products, Inc. in violation of Wisconsin law. In particular, plaintiff seeks relief for defendant's unauthorized substitution of condensed skim milk with an allegedly inferior reconstituted non-fat dry milk product from August to December 2003. Jurisdiction is present. 28 U.S.C. § 1332.

Presently before the court is defendant's motion for summary judgment. Because it is not clear from the record when plaintiff should have known about the alleged breach, I cannot conclude whether it was reasonable for plaintiff to notify defendant of a breach earlier than it did. In addition, I find it unclear whether plaintiff's other plants could have reconstituted *a sufficient amount* of non-fat dry milk to meet the needs of plaintiff's

Greenwood facility. Therefore, I cannot determine the amount of loss from defendant's alleged breach. If plaintiff's other plants could not have supplied a sufficient amount of quality product to plaintiff's Greenwood facility, then plaintiff may have had no choice but to purchase at least some reconstituted non-fat skim milk from defendant at the price to which the parties agreed. Because material facts remains in dispute, I will deny defendant's motion for summary judgment.

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

UNDISPUTED FACTS

A. The Parties

Plaintiff Land O'Lakes, Inc. is a Minnesota cooperative corporation with its principal place of business located in Arden Hills, Minnesota. Plaintiff has a facility in Greenwood, Wisconsin, that manufactures commodity cheddar cheese. The cheese is not intended for retail sale but for use as the main ingredient in processed cheese manufactured at plaintiff's plant in Spencer, Wisconsin. Plaintiff's Greenwood facility sells all of the cheese it makes to the Spencer plant. Jack Strenger manages the Greenwood facility.

Defendant Grassland Dairy Products, Inc. is a Wisconsin business located in Greenwood, Wisconsin. Defendant manufactures and sells butter made from cream and fat

that is skimmed from raw milk, leaving skim milk as a by-product. Defendant uses the skim milk to manufacture other products that it sells, such as condensed skim milk and ultra-filtered condensed skim milk. Trevor Wuethrich is defendant's director of marketing.

B. Plaintiff's Desire to Purchase Skim Milk

Starting in mid-2002 and ending in late 2002 or early 2003, plaintiff conducted a study to determine the suitability of using low cost ingredients such as condensed skim milk and non-fat dry milk in making cheese at its Greenwood facility. As a result of the study, plaintiff approved both condensed skim milk and reconstituted skim milk powder for its cheese making. Plaintiff's Greenwood facility did not have the capacity to reconstitute non-fat milk powder, but plaintiff owns four other plants in the midwest that are capable of doing so.

In early 2003, Strenger began looking for sources of condensed skim milk. Strenger knew that defendant was supplying plaintiff's plant in Denmark, Wisconsin with condensed skim milk. In addition, before May 2003, plaintiff had purchased occasional spot loads of condensed skim milk from defendant. Before 2003, plaintiff had never purchased or discussed purchasing any reconstituted non-fat dry milk from defendant and defendant had never sold any reconstituted non-fat dry milk to any customers. In fact, defendant did not install the equipment to make reconstituted non-fat dry milk until July or August 2003.

Using reconstituted skim milk solids for making cheese requires special precautions, such as monitoring the milk's age, quality, consistency, whey protein, nitrogen level and pH level.

C. The Parties Enter into an Agreement

Strenger had several discussions with Wuethrich before the parties entered into a contract, most of which focused on the pricing structure for the contract. Strenger wanted to buy product at the class 4 price because it was lower than the class 3 price and more stable. The federal government controls class 3 and 4 prices. The parties agreed to use the class 4 powder price, plus a premium of $0.03 per pound.

Defendant drafted the contract and sent it to Strenger. Strenger read and understood the terms of the contract and signed it approximately eight days later. The second paragraph of the contract describes the product that defendant agreed to sell plaintiff's Greenwood facility only as "skim." Strenger did not ask Wuethrich to provide a more specific description of the product, such as "condensed fresh skim milk."

Skim milk solids can be delivered as solids or in liquid form. Defendant sold plaintiff's Greenwood facility a product in liquid form. From May 1, 2003 to some time in August 2003, the product defendant sold and shipped to plaintiff's Greenwood facility was condensed skim milk. In May 2003, defendant sent plaintiff approximately four tanker truck loads of approximately 45,000 pounds each week. In June 2003, the number of

weekly loads increased to seven. During the summer of 2003, the price of liquid milk increased substantially.

D. Defendant Substitutes its Product

On August 9, 2003, defendant began providing plaintiff with reconstituted non-fat dry milk without giving plaintiff any notice that it was doing so. Plaintiff did not detect any difference between the condensed skim milk that it had been receiving and the reconstituted non-fat dry milk because there is no readily noticeable difference between the two products. On August 31, 2003, defendant started including a five-letter notation, "recon," on some of the bills of lading and invoices for the substituted product. Defendant charged plaintiff approximately $0.85 for each pound for reconstituted non-fat dry milk, which was $0.13 a pound more than what it would have cost plaintiff to reconstitute its own non-fat dry milk. Defendant supplied plaintiff with hundreds of thousands of pounds of reconstituted non-fat dry milk.

Strenger first became aware that defendant was shipping reconstituted non-fat dry milk in December 2003, when plaintiff's Greenwood facility diverted a load of product from defendant to plaintiff's plant in Melrose, Minnesota. One of the intake operators at the Melrose plant looked at the bill of lading and showed it to the plant's assistant manager, who then called Strenger and inquired about the word "recon" on the bill of lading. Strenger

replied that he did not know what "recon" meant, but he called Wuethrich immediately and asked whether defendant was shipping product containing reconstituted non-fat dry milk. Wuethrich replied that it was and apologized to Strenger. (It is disputed whether Wuethrich apologized for substituting reconstituted dry milk or for lack of communication.) By the time that plaintiff discovered defendant's product substitution, all of the cheese produced during the fall of 2003 had been processed into other cheese products and sold.

The bill of lading that accompanied the load diverted to the Melrose plant contained the same information that was on the bills of lading that accompanied the loads shipped to plaintiff's Greenwood facility. Under the intake procedure for plaintiff's Greenwood facility, the operator at the intake dock checks the bill of lading against the delivery schedule to insure that the product is correct. Plaintiff's accounting staff review invoices. In addition, staff at plaintiff's Greenwood facility tested the product to insure that it met the contractual requirement for percentage of solids. Between September 1 and December 1, 2003, Strenger reviewed defendant's bills of lading and invoices approximately two times each month. He never noticed the word "recon" on any of defendant's bills of lading or invoices. Plaintiff's Greenwood facility used and paid for every load of product that it received from defendant that contained reconstituted non-fat dry milk and did not object to any of them.

In addition to the bill of lading, each load of product shipped by defendant to plaintiff was accompanied by a detailed certificate of analysis setting forth the description

of the product and various information, including fat content, total solids, antibiotic status and temperature, which is intended to provide buyers with an analysis of the product they are purchasing. Plaintiff's quality assurance personnel review certificates of analysis carefully; they do not review bills of lading or invoices. Every certificate of analysis provided by defendant to plaintiff identified the product consistently as "condensed skim milk" and never made any reference to "reconstituted" or "recon." Before defendant began supplying plaintiff with reconstituted non-fat dry milk, defendant's certificates of analysis contained a fat analysis. After defendant started supplying plaintiff with reconstituted non-fat dry milk, the certificates had no reference to a fat analysis. Plaintiff's staff contacted defendant about the omission of the fat analysis. Defendant did not respond by telling plaintiff that it was shipping reconstituted non-fat dry milk. Instead, it said that it was unable to perform the fat analysis because its testing equipment was broken.

On December 16, 2003, plaintiff wrote defendant, notifying it that it had breached the contract between them. Plaintiff filed the complaint against defendant in this court on March 29, 2004.

OPINION

A. Choice of Law

The parties have assumed in their briefs that Wisconsin law applies. Under Klaxon

Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941), when diversity of citizenship is the basis for subject matter jurisdiction, the district court looks to the law of the forum state to determine which state's substantive law should be applied. Wisconsin courts presume that Wisconsin law applies unless it is clear that non-forum contacts have greater significance. State Farm Mutual Auto Insurance Co. v. Gillette, 2002 WI 31, ¶ 51, 251 Wis. 2d 561, 641 N.W.2d 662. I will follow the parties' lead and make the assumption that Wisconsin law applies. FutureSource LLC v. Reuters Ltd., 312 F.3d 281, 283 (7th Cir. 2002) ("[T]here's no discussion of choice of law issues, and so we apply the law of the forum state.").

B. Reasonable Notice of Breach

Wis. Stat. § 402.607(3)(a) bars any remedy for a buyer who has accepted goods unless the buyer notifies the seller of a breach within a reasonable time after the buyer discovers or should have discovered the breach. Defendant's motion for summary judgment rests on its contention that plaintiff accepted all the reconstituted non-fat dry milk it sent and failed to notify it of the contract breach within a reasonable time after plaintiff should have known of the breach. For support, defendant cites Ross v. Northrup, King & Co., 156 Wis. 327, 144 N.W. 1124, 1128 (Wis. 1914), in which the Wisconsin Supreme Court noted that in the *absence of fraud* or *use of any means to deter the shipper from fully understanding*

the contract, ignorance of the contents of a bill of lading is not sufficient to overcome the presumption that the party receiving and accepting the bill of lading assents to its terms. According to defendant, plaintiff should have known about the substitution of reconstituted non-fat dry milk for condensed skim milk as early as August 2003 when defendant started placing the word "recon" on its bills of lading. Plaintiff contends that "recon" is not a common term in the dairy industry and that even if it had understood the term to mean "reconstituted," condensed skim milk cannot be reconstituted, thus making the notation "condensed skim milk - recon" ambiguous at best.

It remains disputed whether use of the word "skim" in the contract referred to condensed skim milk exclusively or encompassed reconstituted non-fat dry milk as well. If "skim" refers to condensed skim milk exclusively, then according to plaintiff, use of the word "recon" in conjunction with "skim" makes no sense. However, if "skim" also means reconstituted non-fat dry milk, then using "recon" with the word "skim" may make sense, assuming that the word "recon" is itself a common term in the dairy industry. Furthermore, it is not clear from the parties' proposed facts how the word "recon" appeared on the bills of lading. Without more evidence, I am unable to determine whether use of the word "recon" on the bills of lading was ambiguous and as a result, I cannot say whether plaintiff should have known that defendant was substituting condensed skim milk for reconstituted non-fat dry milk when that word began appearing on the bills of lading in August 2003. See,

e.g., All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu, 7 F.3d 1427, 1431 (9th Cir. 1993) ("Bills of lading are contracts of adhesion, usually drafted by the carrier, and are therefore 'strictly construed against the carrier.'").

On the one hand, there is evidence that plaintiff could have noticed the word "recon" on the bills of lading sooner than December 2003. It is undisputed that Strenger reviewed defendant's bills of lading and invoices on a bi-monthly basis and never noticed a reference to "recon" on any of those documents. It is undisputed also that when plaintiff's Greenwood facility diverted a load of product to its Melrose plant in December 2003, one of the intake operators at the Melrose plant looked at the bill of lading and showed the plant's assistant manager, who then called Strenger and inquired about the word "recon" on the bill of lading. If staff at the Melrose plant were able to notice the word "recon" on the bill of lading immediately, one could argue that staff at the Greenwood facility should have noticed the word sooner than December 2003.

However, there is evidence of potential fraud by defendant that may have prevented plaintiff from questioning defendant's product. Plaintiff argues that defendant substituted condensed skim milk with less-costly reconstituted non-fat dry milk in August 2003 because the market price of liquid milk increased dramatically at that time; the price that plaintiff had agreed to pay for defendant's condensed skim milk was lower than the market price. It is undisputed that defendant did not alert plaintiff to the change in product on its certificate

of analysis and that the purpose of the certificate of analysis is to provide buyers with an analysis of the product that they are purchasing. Plaintiff's quality assurance personnel review certificates of analysis carefully; they do not review bills of lading or invoices. Defendant admits that every certificate of analysis it provided to plaintiff consistently identified the product as "condensed skim milk" and never made any reference to "reconstituted" or "recon."

Moreover, it is suspicious that after defendant began supplying plaintiff with reconstituted non-fat dry milk, defendant's certificates of analysis no longer contained a fat analysis. When plaintiff's staff contacted defendant about the omission, defendant did not say that it was providing plaintiff with reconstituted non-fat dry milk but stated that it was unable to perform the fat analysis because its testing equipment was broken.

Even if the bill of lading was the sole operative document to show a change in product, plaintiff may have had no reason to suspect a switch in products. First, it is undisputed that reconstituted skim milk solids can be delivered as solids or in liquid form. Defendant sold plaintiff's Greenwood facility a product in liquid form. Plaintiff did not notice any difference between the condensed skim milk that it had been receiving and the reconstituted non-fat dry milk because there is no readily noticeable difference between the two products. In this respect, the case is similar to Allen Foods Products, Inc. v. Block Bros., Inc., 507 F. Supp. 392, 394-95 (S.D. Ohio, 1980), in which the plaintiff failed to notice that

the defendant's black walnuts were inedible until three months after delivery. The defendant argued that the three-month delay in notice of breach was untimely. Id. at 393. According to the plaintiff, however, the defendant's walnuts appeared satisfactory upon delivery and the only way to discover inedibility is through taste inspection, which is not the usual practice in the industry unless the products appear unsatisfactory. Id. at 395. The court denied defendant's motion for summary judgment because it could not determine whether plaintiff's delay in notifying defendant of a breach was unreasonable. Id. (noting that phrase "should have discovered" not equivalent to "could have discovered" and does not necessarily carry duty to seek out condition to which discovery pertains but connotes that condition may not be considered overlooked or not observed if it is so obvious as to be apparent in normal exercise of perceptory senses).

In this case, defendant's reconstituted non-fat dry milk and condensed skim milk products appeared the same. In previous business dealings with defendant, plaintiff had never purchased reconstituted non-fat dry milk from defendant and had never discussed purchasing such product from defendant. In fact, defendant did not install the equipment to make reconstituted non-fat dry milk until July or August 2003. Finally, defendant did not place the word "recon" on its bills of lading until several weeks after it had begun shipping reconstituted non-fat dry milk. Therefore, one could argue that none of plaintiff's employees, from Strenger to the intake personnel, had reason to suspect that the product shipped by

defendant was anything other than the condensed skim milk plaintiff thought it was getting.

"Courts balance the equities in determining what is a reasonable time for the giving of notice, and this time may vary considerably depending upon the facts and circumstances of the particular case." Paulson v. Olson Implement Co., Inc., 107 Wis. 2d 510, 525, 319 N.W.2d 855, 862 (1982). Because it is not clear from the record when plaintiff should have known about the alleged breach, I cannot conclude whether plaintiff's December 16, 2003 letter to defendant was a reasonable time for notification. As a result, I will deny defendant's motion for summary judgment with respect to its contention that plaintiff's notice was untimely.

C. Provable Damages

When a buyer has accepted goods and given the notification required under Wis. Stat. § 402.607(3), "the buyer may recover damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable." Wis. Stat. § 402.714. Defendant contends that regardless when plaintiff should have discovered the breach, the court should grant its motion for summary judgment because plaintiff seeks monetary relief only and yet has no provable damages; in particular, plaintiff did not have an alternate method of purchasing sufficient amounts of reconstituted non-fat dry milk at below market prices. Defendant argues that

plaintiff's other plants could not have produced enough "quality" milk for plaintiff's Greenwood facility. In addition, even if plaintiff's other plants could have reconstituted enough quality non-fat dry milk, there would be no guarantee that those other plants would have sold the milk to plaintiff's Greenwood facility at below market price. Id. at 13. Therefore, because plaintiff would have paid the same price for reconstituted non-fat dry milk regardless of its source, plaintiff suffered no damages when defendant switched from the more expensive condensed skim milk product to reconstituted non-fat dry milk.

In response, plaintiff contends that its own plants could have produced sufficient amounts of reconstituted non-fat dry milk at a price lower than it paid defendant for the inferior product. Therefore, under Wis. Stat. § 402.714, plaintiff argues, it is entitled to recover the loss that resulted from defendant's breach, which in this case is $0.13 for each pound. (The difference between what defendant charged plaintiff for the reconstituted non-fat dry milk, $0.85 for each pound, and the cost that plaintiff would have incurred had its own plants reconstituted non-fat dry milk, or $0.72 for each pound).

It is undisputed that four plants owned by plaintiff in the Midwest are capable of reconstituting non-fat dry milk and that defendant charged plaintiff $0.13 per pound more than it would have cost plaintiff to reconstitute its own non-fat dry milk. However, a material dispute remains as to whether plaintiff's other plants could have reconstituted *a sufficient amount* of non-fat dry milk to meet the needs of the Greenwood facility. Thus,

plaintiff could have obtained some amount of quality reconstituted non-fat dry milk from its own plants. This amount translates into damages resulting from defendant's alleged breach of contract and breach of warranty. At trial, plaintiff will have to show the exact amount it could have obtained from its own plants or that it had other, less expensive alternatives to purchasing reconstituted non-fat dry milk.

ORDER

IT IS ORDERED that defendant Grassland Dairy Product, Inc.'s motion for summary judgment against plaintiff Land O'Lakes, Inc. is DENIED.

Entered this 8th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge