IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

SUPER GROUP PACKAGING &
DISTRIBUTION CORP.,

Plaintiff,

v.

MEMORANDUM AND ORDER
05-C-156-S

SMURFIT STONE CONTAINER CORPORATION,
SMURFIT STONE CONTAINER ENTERPRISES,
INCORPORATED, and JAMES B. LAURENCE

Defendants.

After defendants Smurfit Stone Container Corporation and Smurfit Stone Container Enterprises, Incorporated (collectively "Smurfit") declined to continue in developing a business relationship with plaintiff Super Group Packaging & Distribution Corp. for the importation and manufacture of woven polypropylene bags, plaintiff commenced this action asserting claims for breach of contract, promissory estoppel, unjust enrichment, misrepresentation and misappropriation. Jurisdiction is based on diversity of citizenship, 28 U.S.C. § 1332. At the conclusion of the liability phase of the bifurcated trial the jury returned a verdict finding the Smurfit defendants liable for breach of contract and misappropriation. Subsequently, the jury found damages in the amount of $3,731,106 and judgment was entered accordingly.

The matter is presently before the Court on defendants' renewed motion for judgment as a matter of law on all liability issues and on their alternative motions to amend judgment or for a remittitur or new trial on damages. Also before the Court are plaintiff's motion for equitable relief on its misappropriation claim, alternative motion for a new trial on misappropriation and punitive damages, motion for double costs and prejudgment interest and discovery sanctions.

In considering a motion for judgment as a matter of law pursuant to Rule 50(b) the court determines whether the evidence presented, viewed in the light most favorable to the prevailing party and combined with all reasonable inferences that may be drawn in favor of the prevailing party, is sufficient to support the verdict. Tennes v. Massachusetts Dept. Of Revenue, 944 F.2d 372, 377 (7th Cir. 1991). The Court does not reevaluate the credibility of witnesses nor otherwise weigh the evidence. Id. A new trial may be granted pursuant to Rule 59 if the verdict is against the weight of the evidence or for some other reason the trial was not fair to the moving party. Forrester v. White, 846 F.2d 29, 31 (7th Cir. 1988).

Defendants' Renewed Motion for Judgment of No Liability

Defendants reassert their previous contention that the evidence at trial was insufficient as a matter of law to support

the finding of a contract or misappropriation. Defendants contend that no agreement was reached between the parties -- virtually the same argument that was rejected on summary judgment. The same evidence that precluded summary judgment apparently persuaded the jury that the parties had reached a contract. Particularly, the evidence of the written proposal, coupled with the e-mail indicating that defendants intended to "sell it" to plaintiff. More persuasive was Laurence's December 2, 2004 memo which announced to defendants' sales staff that the agreement was finalized. Furthermore, market circumstances supported the conclusion that the parties were anxious to promptly finalize an agreement and begin selling WPP bags. Added to all this is the consistent testimony by plaintiff's witnesses that Laurence had repeatedly assured them that a final agreement was in place. Overall the case for the existence of a contract was ample, if not overwhelming.

In support of their position defendants place their greatest reliance on the testimony of Laurence and Byczynski who denied that they entered a contract and denied making statements confirming the contract. Of course, the jury was free to reject all their testimony on the basis of its credibility assessment and this Court is precluded as a matter of law from reassessing credibility. Defendants also point to evidence that the parties contemplated entering into a more formal written document later. However, the

jury was properly instructed in accordance with Skycom Corp. v. Telstar Corp., 813 F.2d 810, 814 (7th Cir. 1987), that parties may enter into a binding contract notwithstanding the expectation a more formal written agreement will be executed later. The evidence presented at trial was surely consistent with this scenario. In conclusion, there is no merit to defendants' argument that the evidence was insufficient to sustain the jury's determination that the parties had entered into a binding contract.

Defendants argue that the misappropriation claim fails as a matter of law primarily because they were authorized to use all the information they received pursuant to the information agreement between the parties. A claim for misappropriation requires unauthorized use of protected information. Mercury Record Productions, Inc. v. Economic Consultants, Inc., 64 Wis. 2d 163, 175, 218 N.W.2d 705, 710 (1974). The information agreement provides defendants extremely broad authorization to use the information provided by plaintiff:

> WHEREAS, Super Group is willing to provide information to SSCE relating to importing, market analysis, equipment procurement, production processes, personal recruitment, foreign relations and supplier relations pertaining to the importing of woven pp bags and woven laminated substrates (the "Information"), all in accordance with the terms and conditions hereof.
>
> NOW THEREFORE, the parties hereto agree as follows:
>
> 1. Super Group shall make the Information available to SSCE....

> 4. Super Group acknowledges that SSCE's acceptance of the Information, and SSCE's entry into this agreement, creates no other express or implied obligation on the part of SSCE other than as specifically set forth in this Agreement. Except for the information supplied to SSCE regarding the source of poly woven, namely Ningbo YongVeng Packaging and Qilu Plastic Products, SSCE may use the Information for any reason whatsoever.

Accordingly, to prevail on its misappropriation claim plaintiff must either avoid the agreement entirely or have demonstrated that defendants used information which falls outside the agreement's broad authorization.

Plaintiff initially contended that the information agreement was void because defendants had fraudulently induced plaintiff to enter into it by representing that the sales contract was enforceable. This argument was eliminated when the jury confirmed the existence of a sales contract between the parties. The affirmation of an enforceable sales contract made the representation true and precluded this fraud in the inducement theory. Recognizing this, plaintiff now attempts to base a fraud in the inducement argument on defendants' alleged intent not to vigorously perform under the sales agreement. However, there is no evidence that plaintiff relied on such representations when entering into the information agreement. Furthermore, such a misrepresentation would more properly be a basis for avoiding the sales agreement itself, not the information agreement, and

plaintiff has affirmed the sales agreement and been awarded full damages as if it had been vigorously pursued. The only possible legal conclusion is that the information agreement is enforceable.

There was no evidence at trial that confidential information was outside the information agreement for competitive purposes. There was no evidence that defendants used any information concerning either of the suppliers named in paragraph 4 nor that they used either as a product source. Plaintiff vaguely suggests that it might have provided other information outside the "Information" defined in the agreement. It offers as a single example the Bretl machine concept drawing. This single piece of information is insufficient to support a misappropriation claim for several reasons. First, it is "relating to ... equipment procurement [and] production processes...." Second, the drawing was created by and acquired from a third party, Simon Hsu, and therefore could not qualify as an appropriation of plaintiff's time effort and money as required for a claim. Mercury Record 64 Wis. 2d at 175. Finally, there was no evidence of use of the drawing to gain a competitive advantage.

In conclusion, there is no evidentiary basis to support a misappropriation claim and defendants are entitled to judgment in their favor on the claim. It follows that plaintiff's related motion for equitable relief on the claim is denied. It also

follows that plaintiff's alternative motion for a new trial on misappropriation and punitive damages must also be denied.

Defendants' Motions on Damages

Central to the proof of damages was defendants' November 19, 2004 five year compensation proposal which provided:

Super Group Compensation Proposal

1 Annual Base $250,000

- Mark Resch - President
- Neil Bretl - Vice President

2 Sales Commission Plan:

Payout	Units	$/M	Annual $	Commission
1st Year $100M	20MM	250.00	5MM	2%
2nd Year $200M	40MM	250.00	10MM	2%
3rd Year $400M	80MM	250.00	20MM	2%
4th Year $500M	100MM	250.00	25MM	2%
5th Year $625M	100MM	250.00	25MM	2.5%

Considered in light of this compensation proposal the jury's damages verdict of $3,731,106 can be conveniently divided into three components: (1) $1,147,020 – present value of the $250,000 base salary for five years; (2) $1,310,384 – present value of the commissions as projected in the proposal; (3) $1,273,702 – present value of commissions in excess of those projected in the proposal.

Defendants concede that the first component is properly recoverable. Defendants argue that the second and third components were too speculative as a matter of law and should be deducted from the verdict or, alternatively should be the basis for a new trial on damages. As to the third component defendants' further argue that the plaintiff is judicially estopped from recovering based on the damages requested by its attorney in closing argument.

Defendants' argument concerning the second component is that any future profits are simply too speculative to be recovered. They argue that the venture between the parties was a new, unproven business and that the estimated sales in the proposal were a mere example of how the compensation formula would work. The argument misstates the appropriate standard and ignores the obvious predictability of success of the venture.

Lost future profits must be proved with reasonable certainty. Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd., 100 F.3d 1353, 1365 (7th Cir. 1996). However, the fact that a venture is new does not preclude satisfying this standard. Id. Rather the evidence as a whole must be assessed to determine if it was reasonable to find that the business would have yielded future profits. Id. at 1366. Furthermore, where difficulty of proof is created by the actions of the defendant it is enough that lost future profits may be approximated through just and reasonable inference. Id. at 1365. The jury was properly instructed on the law as follows:

> Although damages may not be based on speculation, it is not necessary that you should arrive at a conclusion of loss of future profits with mathematical certainty. In the very nature of things, such profits cannot be definitely ascertained or determined. If the wrong itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference or estimation, although the result may only be approximate.

Viewing the venture as a whole it can hardly be seen as a new venture in the sense that success was speculative. While defendant Smurfit had not sold significant quantities of WPP bags it was a dominant competitor in the market for the paper bags they would displace and was in a prime position to sell such bags to its existing customers who had in some cases already expressed a preference for the bags. Knowing this it was vigorously pursing its own source for WPP bags to satisfy customer demands. It was a virtual certainty that defendants would be able to successfully sell WPP bags to its customers.

As far as the quantity of bags likely to be sold, there was ample evidence that the sales would meet or exceed the estimates in the proposal. It is clear that although the proposal did not guarantee the projected sales, the projections were thoughtfully made based on careful consideration by defendants' employees who were in an excellent position to estimate the market for bags. This alone was sufficient to sustain a damages verdict grounded in the compensation proposal projections. Furthermore, Resch's

testimony, which must be accepted for purposes of this analysis, was that Laurence expressed ongoing concern that the Chinese annual production capacity of 300 million bags would be insufficient to meet demand. Resch further testified that Laurence repeatedly expressed his belief that the sales estimates in the compensation proposal were conservative. This evidence was unquestionably sufficient to sustain a verdict for the second component.

Defendants focus their argument on the limitations of the expert testimony at trial. However, expert testimony was largely irrelevant to the critical question in the damages calculation – the likely number of bags that would be sold. In that regard the experts added very little. Apart from demonstrating for the jury how to perform the relatively simple calculation of lost profits once the number of bags was determined and instructing the jury in the concept of present value, expert testimony was unimportant. The parties themselves, particularly Smurfit, possessed much greater knowledge and insight into the WPP bag market and it was that testimony and the exhibits drawn from defendants' business records upon which the jury would have properly relied in determining the likely number of bags sold, which would in turn drive the damage award.

The final issue is whether the third component of damages – lost profits based on projected sales in excess of those in the compensation proposal – was supported by the evidence at trial.

The evidence was sufficient to sustain the verdict. Resch and Bretl testified in detail about defendants' statements concerning sales volumes. Laurence's statements that the estimates in the proposal were conservative generally supports an award above those estimates. There was ample testimony and other evidence that in general WPP bags were very likely to displace paper bags in a significant portion of the market. Laurence expressed concern that the 300 million bag annual manufacturing capacity of the Chinese vendors would be insufficient to meet demand. Smurfit's desire to obtain the exclusive right to purchase the output of these plants supports the factual determination that bag sales were likely to be more than double the average 60 million bag annual sales projected in the proposal. Laurence also expressed the desire to purchase two laminators which would provide domestic annual capacity of 40-50 million bags.

Resch also testified in detail about discussions with Laurence concerning specific Smurfit customers likely to convert to WPP bags. Among the examples of these customers and their annual bag purchases were: Cargill (60 million), Morton (millions), Dollar General (millions), Land O'Lakes (100 million), Purina (70 million).

In addition to the testimony, numerous exhibits were received into evidence which support a finding that future bag sales would exceed the compensation proposal estimate. Among these are Smurfit

e-mails identifying defendants' customers who have partially converted or are interested in converting from paper to WPP bags, a report of the Paper Shipping Sack Manufacturers' Association showing consistent and significant expansion of WPP bag imports, and a Laurence sales presentation showing sales of more than 1 billion bags annually and annual sales of hundreds of millions of bags to customers expressing interest in conversion to WPP. Also among the exhibits received in evidence is a 2005 Smurfit capital expenditure request including the following summary:

> Due to the major Retailer demands, bag customers are converting a portion of their business from the traditional paper/film bags to the stronger 1 ply woven PP with a BOPP laminated ply. We have already lost business to this new construction that is currently manufactured only overseas. The bag group will purchase the needed converting equipment so that we will protect our existing paper business and also participate in the new bag type growth in the U.S. The bag group will purchase 3 SOM converting lines with a single out of line laminator. Very conservatively, this new product line will generate a minimum of 20,000m new bag business per year with at least a 12% margin.

Taken together, the evidence supports the factual conclusion that WPP bag sales over the five year period would be double that in the projections. Simple extrapolation from the expert's calculations would produce the total damage calculation reached by the jury. Since evidence was sufficient to support the verdict and there was a rational connection between the evidence and the verdict there is no basis for judgment as a matter of law on the amount of damages,

a new damages trial or a remittitur. Tullis v. Townley Engineering & Mfg. Co., Inc., 243 F.3d 1058, 1066 (7th Cir. 2001).

Alternatively, defendants argue that plaintiff is estopped from recovering the third component because in closing argument plaintiff's counsel requested an award of $2,457,404 suggesting that it would be "just, fair and reasonable." Defendant's characterize this and similar statements as a judicial admission that damages could not be higher. "Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel..." Soo Line R. Co. v. St. Louis Southwestern Ry. Co., 125 F.3d 481, 483 (7th Cir. 1997). Such binding factual concessions can occur during oral argument. Burgin v. Broglin, 900 F.2d 990, 993 n. 3 (7th Cir. 1990).

However, defendants provide no authority, nor has the Court discovered any, to suggest that an attorney's damages request in closing argument acts as a cap on recovery under a judicial admission theory. Judicial admissions concern the admission of a specific fact. See id. at n. 3 (collecting instances of the doctrine's application to statements in oral argument). In this case, the amount of damages hinged primarily on the vigorously contested factual projections on likely future WPP bag sales, a fact which was not conceded by counsel in closing argument. Indeed, defendants' counsel's closing argument (after plaintiff's alleged "admission") expressly advised the jury that it was the

jury's task to determine sales and compute damages accordingly, whether higher or lower than the estimates presented. Trial Transcript at 4-195-6. Adopting defendants' judicial admission theory would compel attorneys to request the highest conceivable damage recovery or risk capping a client's recovery as a matter of law. Such an approach does not comport with the policy of the judicial admission doctrine or with common sense. The plaintiff is not estopped by a judicial admission from recovering the full damage amount.

Plaintiff's motion to recover double costs

Wisconsin Statutes § 807.01(3) and (4) provide that a plaintiff may make an offer of settlement and, if the offer is not accepted and the plaintiff recovers a judgment greater than the offer, may recover double costs plus 12% interest from the date of offer. In accordance with these provisions plaintiff made an offer of settlement to Smurfit Stone Container Corporation on May 13, 2005 which provided that plaintiff "offers to settle the above-entitled action by payment by Defendant Smurfit Stone Container Corporation to Super Group of the sum of $1,250,000.00, together with Super Group's statutory costs and disbursements." Identical offers were made to the other defendants. The offers of settlement were accompanied by a letter which provided in part:

> Although these statutory offers have been separately stated per defendant in accordance

> with typical Wisconsin practice, please be advised that payment in the aggregate to Super Group from any one or more defendants in the amount of $1.25 million, plus statutory costs and disbursements, will conclude this matter.

Because the judgment exceeded the offer amount, plaintiff now seeks double costs and interest in accordance with § 807.01(4), Wis. Stats. Defendants oppose the award arguing that the offers were invalid because, considered together with the letter, they were ambiguous as to the amount for which any defendant could settle. Ritt v. Dental Care Associates, S.C., 199 Wis. 2d 48, 76 543 N.W.2d 852, 863 (Ct. App. 1995). Specifically, defendants argue that any individual defendant might have believed that it could settle its liability for 1/3 of 1,250,000. The court finds no ambiguity in the offer. Any defendant could settle the case against it by paying $1,250,000 plus costs without consultation with any other defendant. Alternatively, the defendants could agree to split the cost between them if they chose. The amount of offered settlement, and the amount to which the judgment is compared is $1,250,000. By issuing separate offers to each defendant to settle for that amount, each offeree could be certain that it could settle for $1,250,000.

Had plaintiff sent settlement offers without the clarifying letter, the offers might have been invalid as ambiguous concerning whether it was an offer to settle the case for $1,250,000 or $3,750,000. See Cue v. Carthage College, 179 Wis. 2d 175, 178-79,

507 N.W.2d 109 (Ct. App. 1993). Had plaintiff made a single offer to multiple defendants to settle for an aggregate $1,250,000 the offer might have been invalid as ambiguous because no individual defendant could discern its individual liability. See Wilbur v. Fuchs, 158 Wis. 2d 158, 162-63, 461 N.W.2d 803 (Ct. App. 1990). By making its offer as it did plaintiff avoided both ambiguities. In hindsight, defendant Laurence judged correctly that judgment against him would be less than $1,250,000 and therefore he has no liability under the statute. Defendant Smurfit Stone Container Corporation and defendant Smurfit Stone Container Enterprises, Incorporated each incorrectly judged that its liability would be less than $1,250,000 and therefore are liable for double costs and 12% interest from May 13, 2005 on the judgment amount.

Plaintiff's motion for discovery sanctions

Much of the critical evidence in this case consisted of defendants' internal e-mail and e-mail communication with customers and suppliers. Defendants consistently resisted and delayed producing these documents which were in their exclusive control and made half-hearted and inadequate efforts to gather these documents from their employees.

The discovery dispute concerning this evidence was first presented to the Court by plaintiff's motion to compel on July 20, 2005 which the Court granted on July 28, 2005, requiring defendants

to produce the documents forthwith and awarding plaintiff costs and attorneys fees for the motion. Believing that defendants' response to the Courts production order was inadequate plaintiff filed a motion for further discovery sanctions on September 21, 2005, which the Court orally granted on October 7, 2005.

Plaintiff has now submitted affidavits supporting costs and fees in the total amount of $7,365 for the filing of the July motion to compel and additional costs and fees of $3,945 expended in seeking compliance with the Court's July 28 order for production. Defendants do not contest the reasonableness of the fee request but argue instead that they fulfilled their obligation to obtain the e-mails from their employees and promptly provided them to plaintiff. The Court now affirms its prior determination that defendants did not use reasonable efforts to obtain the e-mails or provide them to plaintiff and grants the motion to award sanctions in the amount of $11,310.

ORDER

IT IS ORDERED that defendants' renewed motion for judgment as a matter of law is GRANTED as it concerns plaintiff's misappropriation claim and is in all other respects DENIED.

IT IS FURTHER ORDERED that defendants' alternative motion for a new trial is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for post verdict equitable relief and alternative motion for a new trial on misappropriation and punitive damages is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for double costs and 12% interest is GRANTED.

IT IS FURTHER ORDERED that discovery sanctions of $11,310 are awarded in favor of plaintiff and against defendants.

IT IS FURTHER ORDERED that judgment be amended to include costs, interest and discovery sanctions as provided above.

Entered this 27th day of January, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge