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 a developing 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. The matter is presently before the Court on defendants' motion for summary judgment. Following is a summary of the facts viewed favorably to the plaintiff.

FACTS

Defendant Smurfit is in the business of manufacturing paper bags for packaging such items as pet food, bird seed and feed corn. Recently, imported woven polypropylene bags ("WPP bags") have emerged as a competitor to paper bags. When one of Smurfit's major customers, Nestle (the seller of Purina Dog Chow), committed to selling Dog Chow in WPP bags, defendants sought to produce an acceptable WPP bag to retain the account. In 2003 and 2004 defendant Smurfit unsuccessfully attempted to produce its own WPP bags. Defendant Laurence was primarily responsible for the Nestle/Purina Account.

In Spring 2004 Mark Resch and Neil Bretl formed plaintiff for the purpose of importing and producing WPP bags. Plaintiff sought to cultivate relationships with Asian manufactures of WPP bags and equipment to manufacture the bags domestically. Plaintiff also purchased paper bags from Smurfit for resale to its customers.

On July 30, 2004 plaintiff sent a letter to Ron David, a Smurfit regional sales manager, proposing a relationship with Smurfit in the WPP bag market. On August 2, 2004 David e-mailed a description of the proposal to Laurence, who expressed interest in pursuing it. The parties first met on August 24, 2004. After the meeting Laurence sent an e-mail to plaintiff stating in part:

> As we discussed we are interested in establishing a position in this WPP market, If agreeable, we will place orders with you now for this approval process. I will get back to

> you early next week on possible options for doing a longer term arrangement on manufacturing. This is an opportunity we will seriously consider."

Thereafter the parties continued discussions on a possible relationship. Laurence asked plaintiff to procure quotations from Chinese bag producers.

The parties met again on October 5, 2004. At the meeting plaintiff presented its plans to serve the market with WPP bags. Following the meeting Resch sent Laurence a draft copy of a proposed consulting and distribution agreement wherein plaintiff offered to provide Smurfit with consulting services on "importing, market analysis, equipment procurement, production processes foreign relations and supplier relations for the purpose of building a sales and distribution network for the importing and distribution of woven laminated WPP bags and woven fabrics." Laurence gave the proposal to in house counsel Tim Davison for review.

On October 29, the following e-mail exchange took place between Mark Resch, Jim Laurence and Ed Byczynski (Smurfit VP):

> (from Resch to Laurence)
>
> Jim,
>
> Let me know if we are still on for Wednesday. The Chamber booked our ribbon cutting for that day, but we would much rather switch that and get our agreement inked. I just need to know so I can change the ribbon cutting day.
>
> Mark

> ***
>
> (From Laurence to Byczynski)
>
> Ed, have you received the agreement back? I would like to reconfirm next Wed. with Mark.
>
> ***
>
> (From Byczynski to Laurence)
>
> Unfortunately, I think Tim is busy and having trouble getting to it. I would still confirm for next Wed. so we can discuss and wrap up any business issues. Mark sounds like he is getting nervous and I don't want to put him off any longer. He didn't seem overly concerned about the legal issues.

On November 1, 2004 Byczynski sent plaintiff an edited version of plaintiff's proposed agreement. In the accompanying e-mail Byczynski suggested that Defendant Smurfit ordinarily conducted due diligence before entering such an agreement. He further stated "I am very hopeful that we can discuss this openly on Wednesday and reach an agreement that will be amenable to both parties."

The parties met again on November 3, 2004. What was said at this meeting is the subject of considerable dispute. It is Resch's testimony that defendants represented that they wanted to reach a simple agreement so that bag procurement could proceed, leaving further agreement on operational details until later. Resch also testified that defendants represented that they would beat any other offers plaintiff had from other potential partners. Defendants were aware that plaintiff was in active negotiations to

enter an exclusive consulting arrangement with another bag seller. The parties did not discuss or sign the previously circulated proposal.

On or about November 11, 2004 defendants sent plaintiff a one page "Information Agreement" for its review. Under the terms of the proposed agreement plaintiff would provide defendants information on WPP bags, markets and suppliers in exchange for a cash payment. Plaintiff sent the agreement to its attorney for review. According to the testimony of Resch and Bretl, plaintiff refused to sign the information agreement until a consulting contract was in place.

Between November 3 and November 19, Defendant Lawrence prepared drafts of a compensation plan for the relationship. After reviewing the drafts Byczynski stated in an email to Laurence: "It sounds great, do you think you can sell it to Super Group?" On November 19, 2004 defendant Laurence sent plaintiff the following proposal via e-mail:

Super Group Compensation Proposal

1 Annual Base $250,000

- Mark Resch - President
- Neil Bretl - Vice President

2 Sales Commission Plan:

	Units	$/M	Annual $	Commission Payout
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%

On November 19, 2004 the parties conducted a telephone conference during which the proposal was discussed. According to Resch's testimony, plaintiff accepted the proposal after which Laurence said "something to the effect you guys are going to make a lot of money, pop the champaign..."

On November 30, 2005 defendants sent the information agreement to plaintiff with a check for $50,000. Plaintiff signed and returned the agreement.

On December 2, 2004 Laurence circulated a memorandum by e-mail to plaintiff as well as Smurfit sales managers "confirming direction for selling woven polypropylene packaging through Super Group." The memo stated as follows:

- The SSCC/Super Group agreement has been finalized for sales of woven polypropylene bags.
- Mark and Neil will assist in developing price quotes for your customers.
- Direct all pricing inquiries to Mark or Neil.
- Super Group will confirm pricing, lead times, package set, order confirmations.
- Samples, competitive levels, styles, specifications, purchase orders should be overnighted to Super Group.

- All order information should be confirmed in writing with the customer and Super Group.
- All inquiries should be directed and filtered through yourselves to Super Group.
- Sales Reps and Sales Managers should not deal directly with Super Group at this time.
- All invoicing will be direct through SSCC to the customer.
- Order and confirmation documents are being created and are forthcoming.

On December 15, 2004 Resch sent the following e-mail to Laurence:

> Jim,
> I am sending to you today a large box of samples for your upcoming sales meeting. Each sample is labeled with a description showing exactly what the bag is and what special feature it has. This should come in handy for your sales guys to better understand what is available.
>
> I also wanted to verify with you that Jamie is working on the list of names for our invitation letters to China and Taiwan. If we can get this in the next week or 2 that would be great!
>
> Concerning the "due diligence" prior to our trip and once our trip is completed we understand the process as follows:
>
> • Super Group provides to Smurfit Stone our "due diligence" on paper, detailing all we know from our research on the woven market and the vendors who can supply us. We will also supply all of the information we have from Exopack concerning the woven business.
>
> • Smurfit and Super Group jointly travel to China and Taiwan to meet in person our vendors for packaging and equipment.
>
> • Upon returning from our trip to China, Smurfit Stone will evaluate the vendors of both bags and equipment. After this evaluation Smurfit and Super Group will proceed with selling the woven bag and working with the vendors we have provided.

> • Super Group receives the 2nd payment of $100,000 and at the same time signs a 5 year contract based on the terms you emailed to us. This is to begin starting January 2005.
>
> • We begin structuring and staffing the "new" import company.
>
> • Smurfit begins working on the purchase of woven converting equipment for placement at your plants in the United States.
>
> • We all live happily ever after and make a lot of money.
>
> Is this how you see it? Are there more details that we are missing?
>
> Let me know!
>
> Mark

Receiving no response, Resch sent an addition e-mail to Laurence on December 20, 2004 seeking to confirm the status of the relationship. On December 27, 2004 the parties met and plaintiff provided defendant a report entitled "Woven Poly Laminated Bag and Equipment Manufacturers; Research & Recommendations." According to Resch's testimony he and Laurence had several conversations including conversations at the meeting during which Laurence "communicated to us very clearly quit bugging me, you guys; the deal is done; we're going over there to figure out which machines we want to buy; in fact, we don't even need to go to China, it's done, quit worrying about it." Laurence further stated that if defendants failed to perform plaintiff could sue them. According to Resch, Laurence stated that the due diligence process was merely to identify specific suppliers.

During December and January plaintiff received requests for quotations for WPP bags from Smurfit sales personnel and provided quotations from China to Smurfit. In addition, plaintiff provided technical advice and advice for sales meetings to defendant's sales personnel on a daily basis. Resch accompanied Smurfit personnel on sales calls to Smurfit customers.

From January 23, 2005 to January 28, 2005 Byczynski, Laurence and Bretl traveled to China and Taiwan to meet with suppliers, tour manufacturing facilities and evaluate their capabilities.

On January 27, 2005 Resch sent an e-mail to Byczynski which provided as follows:

> Ed,
>
> I am getting many calls while you are away from various Smurfit sales people concerning trips. I have already scheduled a trip to see blue seat with Gary. When can we anticipate getting together to finalize our deal? I know you guys have had an interesting trip. Hopefully you have seen what you needed to. Let me know your thoughts on hooking up in the next few weeks.
>
> Regards,
>
> Mark

In early February Laurence continued to solicit quotes and information from the Asian contacts, advising them to reply only to him. On February 15, 2005 the parties met and Laurence advised plaintiff that it would not proceed with any business relationship with plaintiff. Laurence further advised that Smurfit would undercut any efforts by plaintiff to sell WPP bags to defendant's customers.

Smurfit has concluded the purchase of machinery for the domestic manufacture of WPP bags. Smurfit is currently purchasing WPP bags from Asian vendors for sale to its customers.

MEMORANDUM

Defendants' seek summary judgment on the contract claims contending that the facts are insufficient as a matter of law to support the finding that an agreement had been reached by the parties. Alternatively, defendant argues that a contract claim is barred by the applicable statute of frauds and that evidence of damages is insufficient to sustain a contract claim. Concerning the promissory estoppel and misrepresentation claims, defendants contend that the alleged statements are mere predictions or opinions incapable of supporting either claim. Finally, defendants contend that the unjust enrichment and misappropriation claims are defeated because defendants were entitled to retain and use information obtained from plaintiff under the terms of the information agreement signed by the parties. Plaintiff opposes all these positions, arguing that the evidence is sufficient to create genuine factual issues as to each claim and that the e-mails are sufficient to satisfy the statute of frauds.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of

material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

BREACH OF CONTRACT

The primary argument in support of defendants' motion to dismiss the contract claims is that there is insufficient evidence to support a finding that the parties intended to enter a contract. Whether the parties have entered a contact depends on their intent as determined by a consideration of their words, written and oral, and their actions. American Nat. Property and Casualty Co. v. Nersesian, 2004 WI App 215, ¶18, 277 Wis. 2d 430, 698 N.W.2d 922. "If parties evidently intended to enter a contract the trier of fact should not frustrate their intentions, but rather should attach a 'sufficiently definite meaning' to the contract language if possible." Management Computer Services v. Hawkins, Ash, Baptie

& Co., 206 Wis. 2d 158, 179, 557 N.W.2d 67 (1996). Disputable inferences concerning the parties intent to be bound by a contract, gleaned from what the parties expressed publicly and to each other, create fact issues for the jury. Skycom Corp. v. Telstar Corp., 813 F.2d 810, 814-15 (7th Cir. 1987).

Resolving factual disputes and drawing inferences favorable to plaintiff, as the Court is bound to do for purposes of this motion, there is ample evidence from which a jury could find a binding agreement. The evidence tends to show that both parties were anxious to enter an agreement promptly to take advantage of what both thought was a rapidly expanding market and, in defendants' case, to satisfy the demands of an important customer, Purina. Plaintiff expressed that it was unwilling to disclose information on its contacts in Asia pursuant to the proposed information disclosure agreement and refused to sign the agreement on advice of counsel until a consulting agreement was in place. Defendant forwarded the compensation proposal to plaintiff hoping to convince plaintiff to accept it. Plaintiff accepted the proposal and congratulations from defendant Laurence and promptly signed the information agreement, an act both parties knew was contingent on entering the broader consulting agreement. Defendant Laurence then published an e-mail declaring that the "SSCC/Super Group agreement as been finalized" and providing detailed instruction on how to transmit orders through plaintiff. The parties then acted in

accordance with those instructions to solicit quotes and Laurence repeatedly orally affirmed the contract. Taken in total this evidence is more than adequate to support a jury finding that the parties intended to enter a contract.

Defendants focus primarily on the failure of the parties to execute a more formal written agreement which they had begun negotiating and on subsequent statements that the parties intended to formalize and finalize their agreement. While such evidence could support an inference at trial in defendants' favor, it surely does not compel a finding that a contract does not exist as a matter of law. "The parties are masters of their affairs. They may elect not to be bound by writings, however formal; they also may elect to be bound by writings that call for subsequent memorials." Skycom, 813 F.2d at 814. Whether the parties intended not to be bound pending a formal agreement or whether they intended to enter an agreement and fully memorialize it later is an issue of fact to be resolved by the jury. The circumstances of urgency the parties felt to embark on the importation process amply supports an inference that the latter was intended.

Assuming the parties reached an agreement, the statute of frauds will not bar enforcement. Wisconsin Statute section 241.02(1) provides that "every agreement shall be void unless such agreement or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party charged

therewith." The "note or memorandum" of the agreement may be comprised of more than one document. Kelly v. Sullivan, 252 Wis. 52, 57, 30 N.W.2d 209 (1947). The "Super Group Compensation Proposal" and the memorandum of December 2, 2004, both prepared and subscribed[1] by defendants, are notes or memoranda of the agreement which describe the consideration for the agreement – salary and commissions from defendants, services from plaintiff. Because these documents have each been subscribed, the question of their integration as discussed in Kelly does not arise.

Defendants' final argument in support of its motion for summary judgment on the contract claims is that plaintiff has failed as a matter of law to provide sufficient evidence of damages from the breach because they have failed to provide evidence of projected expenses to offset against lost profits. Plaintiff bears the burden to produce sufficient evidence to base a reasonable inference as to a lost profit damage amount. Mrozek v. Intra Financial Corp., 2005 WI 73, ¶ 38, 281 Wis. 2d 209, 699 N. W.2d 54. This typically includes evidence permitting estimates of a business's revenues and expenses. Id. However, where such estimation is made particularly difficult by the breaching party,

[1] Defendants initially contended that these memoranda lacked a "signature" sufficient to satisfy the statute. They abandoned this argument in reply, apparently conceding that under the Uniform Electronic Transactions Act, Wis. Stat. § 137.15, defendants' electronic transmission of the documents satisfies the requirement.

greater latitude in approximation is acceptable. Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd., 100 F.3d 1353, 1367 (7th Cir. 1996). It is the fact of damages, rather than the amount that must be proven with reasonable certainty. Id.

The facts are sufficient to defeat the summary judgment motion and create a triable issue of fact as to the amount of damages. Initially, there is no dispute that plaintiff's expert's estimate of revenues is sufficient to establish lost revenue to a reasonable certainty. As it concerns plaintiff's expenses, there is a genuine dispute whether plaintiff or defendant Smurfit was to bear the expenses associated with performance. Plaintiff's principal contribution under the contract was the time and effort of its principals, and the information, knowledge and relationships they had previously acquired and established. None of those inputs had associated out of pocket costs. Resch and Bretl testified that the alleged agreement required defendant to pay the cost of facilities acquisition and staff which might be required for the importation and manufacture of bags. Under these circumstances the fact of damages appears amply supported. The determination of the amount of damages remains a fact issue for trial.

PROMISSORY ESTOPPEL

Defendants' motion for summary judgment on the promissory estoppel claim is based on the assertion that defendant Laurence's

statements, even if accepted, are mere statements of opinion rather than a promise of performance which could sustain a claim. See Major Mat Co. v. Monsanto Co., 969 F.2d 579, 583 (7th Cir. 1992). Contrary to defendants' position, the facts are capable of sustaining a finding on the elements of the claim.

> Promissory estoppel is an alternative basis to breach of contract for seeking damages from the breakdown of a relation. If there is a promise of a kind likely to induce a costly change in position by the promisee in reliance on the promise being carried out, and it does induce such a change, he can enforce the promise even though there was no contract.

Cosgrove v. Bartolotta, 150 F.3d 729, 732 (7th Cir. 1998).

While it is possible to view Laurence's statements that defendant would beat any competitor's offer for plaintiff's services, that "the deal is done," and other similar statements as opinions about the existence of a contract, it seems far more likely that they were intended and received as promises to perform in accordance with the compensation proposal. The inference is also readily available that defendants knew these promises would likely induce plaintiff to terminate its opportunity to contract with a third party and to execute the information agreement and deliver valuable confidential information to defendants. Plaintiff's principals have testified that they believed it to be a promise and relied on it. Whether the plaintiff reasonably understood the statements to be a promise is a question of fact that ordinarily cannot be resolved on summary judgment. Garwood

Packaging, Inc. v. Allen & Co., Inc., 378 F.3d 698, 705 (7th Cir. 2004). Because the Court cannot resolve this issue as a matter of law, the motion for summary judgment on the promissory estoppel claim must be denied.

MISREPRESENTATION

A cause of action for misrepresentation, whether intentional or negligent, includes the following three elements: (1) the representation must be of a fact and made by the defendant; (2) the representation of fact must be untrue; and (3) plaintiff must believe such representation to be true and rely thereon to its damage. Whipp v. Iverson, 43 Wis. 2d 166, 169, 168 N.W.2d 201 (1969). Defendants base their summary judgment motion on the asserted absence of the first element. They argue that Laurence's statements as a matter of law are not representations of fact.[2]

A statement is not a representation of fact if it expresses mere opinions on quality, value, authenticity or other matters of judgment. Consolidated Papers, Inc. v. Dorr-Oliver, Inc., 153 Wis. 2d 589, 451 N.W.2d 456, 459 (Ct. App. 1989). In order to sustain a claim the representation must relate to a present or preexisting

[2] Defendants initially asserted that the misrepresentation claims were barred by the economic loss doctrine. They abandoned this argument in reply, apparently conceding that the contract here was for services, therefore not affected by the economic loss doctrine pursuant to Insurance Co. of North America v. Cease Elec. Inc., 2004 WI 139, ¶53, 276 Wis. 2d 361, 688 N.W.2d 462.

fact and cannot be a mere prediction of future events. D'Huyvetter v. A.O. Smith Harvestore Products, 164 Wis. 2d 306, 320, 475 N.W.2d 587 (Ct. App. 1991). However, representations of future conduct are false representations of fact if the person who made the promise had no intention of perform at the time he made it. Stop-N-Go of Madison, Inc. v. Uno-Ven Co., 184 F.3d 672, 677 (7th Cir. 1999).

As previously discussed in the context of promissory estoppel, Laurence's numerous statements affirming the parties' future relationship may well have been given and received as promises of future performance. If defendants made promises and assurances to plaintiff for the purpose of inducing it to disclose information and provide access to WPP bag producers with the present intent to walk away from any relationship with plaintiff, its conduct would constitute actionable misrepresentation. The issue is whether there are sufficient facts from which a jury could reasonably infer that defendants had no intent to perform those promises at the time they were made. The proximity of the assurances to the abrupt termination of the relationship without any apparent intervening event is persuasive evidence that at least some of defendants' promises were made after they had already decided not to proceed with the relationship. The circumstances preclude summary judgment on the issue of present intent.

UNJUST ENRICHMENT AND MISAPPROPRIATION

Claims for unjust enrichment require proof that defendants accepted a benefit under circumstances where it would be inequitable to retain it without compensation. Major Mat, 969 F.2d at 585. A misappropriation claim requires proof that defendants wrongfully appropriated something that plaintiff had created by expending time and money to obtain a competitive advantage. Mercury Record Productions, Inc. v. Economic Consultants, Inc., 64 Wis.2d 163, 174-75, 218 N.W.2d 705 (1974). Defendants correctly point out that their use of information obtained from plaintiff is not wrongful or inequitable if its acquisition and use was in accordance with the information agreement signed by the parties.

This argument, however, assumes the validity of the Information agreement–a premise in substantial doubt in light of the Court's previous denial of the motion to dismiss the misrepresentation claims. If plaintiff is successful in establishing that defendants fraudulently induced it to execute the agreement and provide the information by falsely representing its intent to perform under the compensation proposal, then its acquisition and use of the information might indeed be inequitable and wrongful notwithstanding the apparent right to use it under the agreement. Accordingly, the unjust enrichment and misappropriation claims are intertwined and dependent upon the misrepresentation claims. The former claims having survived summary judgment, so do

the claims which might be defeated by the information agreement which is subject to attack pursuant to those claims.

ORDER

IT IS ORDERED that defendants' motion for summary judgment is DENIED.

Entered this 16th day of September, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge