

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED VACCINES, INC.,

Plaintiff,

v.

DIAMOND ANIMAL HEALTH, INC. and
HESKA CORPORATION,

Defendants.

ORDER

05-C-0604-C

Each side in this lawsuit accuses the other of breaching its obligations under the terms of an agreement in which defendant Diamond Animal Health, Inc., a wholly-owned subsidiary of defendant Heska Corporation, agreed to manufacture animal vaccines for plaintiff United Vaccines, Inc. As a result of this court's entry of partial summary judgment on June 12, 2006, this case has been pared down to these claims: United's claim that defendants breached the contract by failing to fill plaintiff's purchase orders in a timely manner and defendant Diamond's counterclaims for breach of contract; anticipatory breach of contract; breach of the duty of good faith and fair dealing; and breach of contract by fraudulent inducement.

Now before the court is defendant Heska's motion to compel United to provide discovery concerning its organizational structure and finances and those of its parent corporation during the relevant time period, Harlan Sprague Dawley, Inc.¹ Heska wants United to answer these questions:

¹ According to plaintiff's Amended Disclosure Statement (dkt. 75), Harlan Sprague Dawley, Inc. was the sole shareholder of plaintiff. On December 18, 2005, Harlan Sprague sold all its shares of United Vaccines, Inc. to United Vaccines, LLC, an Indiana limited liability company. United Vaccines, Inc. was dissolved effective December 19, 2005. References in this order to "United" are to United Vaccines, Inc.

Who owns United's capital stock and the amount of stock each person owns?

Who are the directors of Harlan Sprague?

Who are the directors of United?

What financing or financial support United has received from Harlan Sprague in the last five years?

What is United's capital?

What losses, expenses or salaries of United have been paid by Harlan Sprague in the last 5 years?

What assets United has that were conveyed to it by Harlan Sprague and what percentage of United's assets are from Harlan Sprague?

In addition, defendant Heska has asked United to

Describe in detail Harlan Sprague Dawley, Inc.'s involvement in any of the events underlying the parties' claims in this matter.

Finally, Heska seeks information concerning United's maintenance of the licenses required to sell vaccines in the distribution area covered by the contract.

As to this last request, United responded that it intends to respond to Heska's requests concerning licensure and that a search for responsive documents is ongoing. United had told Heska it would produce the information by July 6, 2006 but did not keep its promise. Accordingly, that portion of the motion to compel will be granted.

United objects to providing information about its corporate structure and financing on the grounds that this is neither relevant nor material to any issue in the lawsuit and it is not

likely to lead to the discovery of admissible evidence. As for defendant's interrogatory concerning Harlan Sprague's "involvement" in the matters underlying this lawsuit, United also objects on the ground that the question is vague, overly broad and "incapable of a meaningful purpose," a slightly more existential concern than we normally see in civil lawsuits.

F.R. Civ. Pro. 26 permits discovery related to "any matter, not privileged, that is relevant to the claim or defense of any party." Apparently Heska is convinced that Harlan Sprague was United's alter-ego and was calling the shots with respect to United's business strategy, and Heska wants evidence to prove it. Heska justifies the relevance of the financial information it seeks by arguing, "Defendants contend that United repudiated the Agreement because of a decision by United and/or United's parent to shift resources from United's operation to other pursuits, and not because of anything to do with Diamond's performance." Def.'s Mem. in Supp. of Mot. to Compel, dkt. # 73, at 7-8.

Why is United's motivation relevant in a breach of contract action? As I understand this case from the parties' submissions thus far, United is claiming that it is entitled to damages as a result of defendants' failure to deliver vaccines to it on time. Defendants admit that they did not deliver product on time; however, they contend that their actions don't constitute a breach because the delays were caused by United's failure to give defendants the proper information and support to manufacture vaccines that met United's specifications. Is Heska now suggesting that its product actually met United's specifications but United lied and said it didn't as part of a scheme to abrogate the agreement? Is Heska intimating that United intentionally failed to give defendants the support needed to make the vaccines, intending they would fail so that in turn

United or its parent could wriggle out of the manufacturing agreement? I cannot conjecture any other reason United's motive actually might be relevant to the parties' failure-to-perform claims that are at the center of this lawsuit, but Heska has not explicitly leveled allegations of this nature and I will not impute such mendacity to United.

Heska links the relevance of the information it seeks to Diamond's counterclaim for anticipatory breach of the contract. Again, however, Heska has failed clearly to outline its legal theory, or to establish why detailed information about United's finances is relevant to that theory. Diamond's claim appears to be that United has indicated an intent not to fulfill its contractual obligations for the year 2006. (This claim was not the subject of any motion for summary judgment so neither party has adduced any evidence pertaining to it.) However, Diamond has not alleged that United has not been meeting its 2006 contractual obligations. Moreover, the reasons *why* United might have decided that it no longer wants to perform under the contract are irrelevant. Whether there has been a repudiation of the contract terms depends upon what actually was conveyed to the other party: the repudiating party must make a "definite and unequivocal" statement that it cannot or will not perform. *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 241 (Iowa 2001); *Lane v. Crescent Beach Lodge & Resort, Inc.*, 199 N.W.2d 78, 82 (Iowa 1972). A party's mere desire not to perform is not actionable; to constitute a breach, there must be non-performance or an unequivocal statement of intended non-performance. Whether there has been a breach depends on the party's statements and actions, not its motives. *See Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 589 (7th Cir. 2000) (party's motive for terminating contract generally irrelevant in breach

of contract action). United may have had dozens of reasons to free itself from the contract, but unless it actually stopped performing or unequivocally told Diamond or Heska that it no longer was going to perform, these reasons are irrelevant.

The bottom line is that Heska has not offered any persuasive reasons why United's alleged business motive for repudiating the contract could be relevant or admissible at trial on any of the remaining claims and counterclaims. Accordingly, United need not provide information in response to Heska's discovery requests relating to corporate structure, finances, or Harlan Sprague's "involvement" in the events leading up to this lawsuit.

That said, Heska may renew its motion to compel if it can provide a clearer and more persuasive case for disclosure. If Heska renews, not only must it explain why United's motivation is relevant either to the breach of contract claims or anticipatory breach claims at issue or could be admissible for impeachment, Heska must explain why the requested financial information is relevant to establishing motive. Heska already knows that Harlan Sprague was United's sole shareholder. Clearly, as United's sole shareholder, Harlan Sprague was in a position to exercise enormous control over United; indeed, Heska has already discovered some evidence suggesting that Harlan Sprague was involved in United's daily operations. I am not convinced that Heska needs to pry into United's finances in order to establish that Harlan Sprague exercised control over United.

ORDER

It is ORDERED that defendant Heska's Motion to Compel Discovery (dkt. 72) is GRANTED with respect to Interrogatory Nos. 10 and 11 and DENIED with respect to Interrogatory Nos. 2-9 and Requests for Production of Documents Nos. 6-14. Plaintiff must provide its additional information on 10 and 11 to defendant no later than August 4, 2006.

Each party shall bear its own costs on this motion under Rule 37(a)(4).

Entered this 26th day of July, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge