IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED VACCINES, INC.,

Plaintiff,

v.

DIAMOND ANIMAL HEALTH, INC.
and HESKA CORPORATION,

Defendants.

OPINION and ORDER

05-C-604-C

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In an order dated June 12, 2006, I granted in part and denied in part the motion for summary judgment filed by defendants Diamond Animal Health, Inc. and Heska Corporation. I denied the motion with respect to plaintiff United Vaccine Inc.'s breach of contract claim after concluding that § 8.6 of the manufacturing agreement that governed the parties' commercial relationship was inapplicable to plaintiff's claim. That section limits plaintiff's remedies only "with respect to defective products or any breach of [defendant] Diamond's limited warranty under section 8.1(a)" and does not apply to defendant Diamond's alleged failure to deliver products. Contract Manufacturing Agreement, Exh. C to Aff. of Michael McGinley, dkt.#43, at 8. Now defendants have filed a motion seeking

reconsideration or clarification of the applicability of § 8.6 to plaintiff's breach of contract claim.

First, defendants ask the court to reconsider its conclusion that § 8.6 does not apply to plaintiff's breach claim. Section 8.6 provides in relevant part as follows:

> THE REMEDIES DESCRIBED IN SECTIONS 4.6, 8.3 AND 8.4 ARE EXCLUSIVE AND IN LIEU OF ANY OTHER REMEDY [plaintiff] WOULD OTHERWISE HAVE AGAINST DIAMOND WITH RESPECT TO DEFECTIVE PRODUCTS OR ANY BREACH OF DIAMOND'S LIMITED WARRANTY UNDER SECTION 8.1(a) OF THIS AGREEMENT . . .

On summary judgment, plaintiff argued that defendants breached the contract by failing to deliver vaccine products in accordance with the terms of the agreement. The undisputed facts indicated that, after the parties entered the manufacturing agreement, defendant Diamond had problems manufacturing vaccine products with sufficient potency and was unable to fill plaintiff's purchase orders in a timely manner. In the June 12 order, I stated that § 8.6 was inapplicable to plaintiff's breach of contract claim because plaintiff's claim was grounded in defendant Diamond's failure to deliver, not in its production of defective products. Further, I noted that, if plaintiff could prove that defendants breached the agreement, it would be entitled to "benefit of the bargain" damages under a provision of the Uniform Commercial Code adopted by Iowa. Iowa Code § 554.2713(1).

Plaintiff argues that § 8.6 applies only to defective products that are delivered because the provisions of the agreement referred to in § 8.6, §§ 4.6, 8.3 and 8.4 contain remedies

plaintiff may elect *after delivery*. Section 4.6 allows plaintiff to test products it has received from defendant Diamond and return any non-conforming products to defendant. Section 8.3 sets out plaintiff's options in the event product delivered to plaintiff breaches defendant Diamond's warranty under § 8.1(a). Section 8.4 states that defendant Diamond shall send substitute products to plaintiff in the event plaintiff has to recall products because they do not meet the specifications.

Defendants contend that § 8.6 applies to plaintiff's breach of contract claim because defendant Diamond failed to deliver only those vaccine products that were defective. According to defendants, before sending a batch of products to plaintiff, defendant Diamond sent samples to plaintiff for testing. After the samples were tested, defendant Diamond did not deliver those products that were shown not to meet plaintiff's specifications. Defendants contend that it was error for the court to find in the June 12 order that § 8.6 applies only to instances in which defendant manufactures defective products and ships them to plaintiff. They note that "[i]t would make little sense for the parties to enter into a contract that would limit damages for defective product only it if was physically delivered." Dfts.' Br., dkt. #78, at 4. They add that requiring defendant Diamond to deliver defective products in order to take advantage of § 8.6 would produce an unreasonable result that the parties did not contemplate when they entered into the agreement.

Defendants' argument is unpersuasive. Under the agreement, when plaintiff orders

a certain quantity of vaccine product, defendant Diamond becomes contractually obligated to deliver that quantity of product. If defendant Diamond sends samples of products to plaintiff for testing and the tests show that a portion of the products is defective, defendant Diamond sends only the conforming products. In that circumstance, defendant Diamond is in breach of its delivery obligation. If, on the other hand, products are determined to be defective after they have been delivered, one of plaintiff's options under § 8.3 is to return the defective products to defendant Diamond and have it replace the defective products with conforming products. Regardless whether the defective products are withheld by defendant Diamond or returned by plaintiff, defendant has a contractual obligation to fill plaintiff's order in full. If defendant Diamond fails to fulfill this obligation, plaintiff's remedy is a suit for breach and "benefit of the bargain" damages under Iowa Code § 554.2713(1).

Thus, defendants' concern that the June 12 order produces an unreasonable result is illusory. If defendant Diamond fails to satisfy its delivery obligation because it withholds products that are non-conforming, plaintiff may sue for breach. If defendant Diamond ships non-conforming products, it has still failed to satisfy its delivery obligation. Plaintiff will return the non-conforming products and may elect to have defendant replace them with conforming products under § 8.3. If defendant fails to replace the non-conforming products, plaintiff may sue for defendant's breach of its obligation under § 8.3 to deliver conforming products. In either case, (1) defendant Diamond's obligation to make timely and complete

delivery does not disappear and (2) § 8.6 does not preclude plaintiff from bringing suit for breach of that obligation. Therefore, I decline to reconsider my conclusion that § 8.6 does not preclude plaintiff from suing for breach of contract.

Defendants' second request is that the court clarify the June 12 order to provide that defendants are not precluded from arguing that plaintiff is not entitled to damages under § 554.2713(1) with respect to products that defendant Diamond did not "wrongfully" fail to deliver. In the June 12 order, I noted that Iowa law "allows a buyer to recover damages when a seller wrongfully fails to deliver." Order, dkt. #68, at 27. As used here, the word "wrongfully" is synonymous with fault. Under Iowa law, a party breaches a contract "when, *without legal excuse*, it fails to perform any promise which forms a whole or a part of the contract." Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 224 (Iowa 1998) (citing Magnusson Agency v. Public Entity National Co., 560 N.W.2d 20, 27 (Iowa 1997)) (emphasis added). Defendants' theory of the case is that plaintiff misrepresented the effectiveness of its production outlines, which caused defendant Diamond to produce products that did not meet plaintiff's specifications. Plaintiff's alleged misrepresentations, if proven, might excuse defendants' failure to fulfill its delivery obligation. Certainly defendants may argue that they did not breach the agreement because their failure to deliver was excused by plaintiff's alleged misrepresentations. But defendants may not argue that their failure to deliver was not wrongful merely because the products they failed to deliver

were defective.

Finally, defendants ask the court to make it clear that the June 12 order does not entitle plaintiff to seek damages for products that were delivered untimely. Defendants concede that defendant Diamond delivered some products to plaintiff later than called for under the agreement but allege that plaintiff accepted and paid for the products. They ask the court to rule that plaintiff may not seek damages for products delivered late because, by accepting and paying for untimely delivered products, plaintiff "covered" its losses. Plaintiff contends that it is entitled to damages for untimely delivered products because of the time-sensitive nature of the products. In the June 12 order, I found it undisputed that newborn animals for which plaintiff sells vaccines reach the age for vaccination in June or July. Thus, plaintiff can deliver vaccine product to its customers only if it receives the product from defendant Diamond by May each year. Plaintiff argues that "a late-delivered product cannot adequately cover for a timely-delivered product." Plt.'s Resp. Br., dkt. #80, at 4.

At this stage of the case, I cannot say as a matter of law that plaintiff is not entitled to damages for late delivery. Although the manufacturing agreement does not contain a time of the essence clause, the June 12 order left open the possibility that defendant Diamond's late delivery may have been a breach of the agreement. Plaintiff may be able to show that it was damaged by defendant Diamond's untimely delivery of vaccine products. Moreover, even if plaintiff accepted and paid for the untimely delivered products, its doing so would

not operate as a waiver of defendant's breach because § 12.6 of the agreement provides that no "course of dealing between Diamond and [plaintiff] or delay or failure to exercise any rights hereunder shall operate as a waiver of such rights or preclude the exercise of any rights hereunder." Without knowing plaintiff's theory of damages or what evidence plaintiff might have concerning the harm to its business that resulted from defendant's late delivery, I am unwilling to preclude plaintiff from presenting evidence on the point.

ORDER

IT IS ORDERED that defendants' motion for reconsideration or clarification is DENIED.

Entered this 18th day of August, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge