IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

ALLAN BLOCK CORPORATION,

Plaintiff,

MEMORANDUM AND ORDER

v.

06-C-476-S

COUNTY MATERIALS CORPORATION,

Defendant.

Plaintiff Allan Block Corporation commenced this breach of contract action against defendant County Materials Corporation seeking monetary and injunctive relief. A jury trial was held beginning December 27, 2006. At the conclusion of trial, the jury returned a verdict in favor of plaintiff finding that defendant had breached covenants not to compete contained within the parties' 1993 and 1997 Production Agreements. Additionally, the jury awarded plaintiff damages in the amount of $290,000.00. On January 3, 2007 the Court entered judgment accordingly and also extended the covenants not to compete through July 15, 2007.

The matter is presently before the Court on: (1) plaintiff's motion for attorneys' fees, (2) plaintiff's motion for a permanent injunction and for an award of prejudgment interest, (3) defendant's motion to alter or amend the judgment to strike the award of attorneys' fees and costs, (4) defendant's motion to alter or amend the judgment to delete the extension of the covenants not to compete, (5) defendant's motion for clarification of the January

3, 2007 injunction; and (6) defendant's Rule 50(b) motion for judgment as a matter of law. The Court will begin by addressing defendant's motion for judgment as a matter of law.

MEMORANDUM

A. Defendant's Rule 50(b) Motion for Judgment as a Matter of Law

Defendant County Materials Corporation moves for judgment as a matter of law requesting that the Court: (1) vacate the January 3, 2007 judgment entered in favor of plaintiff Allan Block Corporation; and (2) enter judgment in its favor pursuant to Federal Rule of Civil Procedure 50(b). Defendant argues it is entitled to such relief based on the following grounds: (1) plaintiff failed to prove damages, (2) plaintiff's claims are barred by its binding judicial statements that defendant did not have any competing block before April 1, 2006, (3) plaintiff's claims are barred by its failure to provide notices of default under the Agreements, (4) plaintiff's claims for breach of contract maturing before December 9, 2005 are barred by Rule 13(a), (5) federal patent law policy preempts the covenants not to compete, (6) plaintiff's claims are barred by laches; and (7) plaintiff's claims are barred by estoppel.

Standard of Review

In considering a motion for judgment as a matter of law pursuant to Rule 50(b), the Court determines whether the evidence presented is sufficient to support the verdict when it is viewed in the light most favorable to the prevailing party and is combined with all reasonable inferences that may be drawn in favor of the prevailing party. Tennes v. Massachusetts Dept. of Revenue, 944 F.2d 372, 377 (7th Cir. 1991)(quoting Christie v. Foremost Ins. Co., 785 F.2d 584, 585-586 (7th Cir. 1986)). However, when deciding a Rule 50(b) motion, the Court does not reevaluate the credibility of witnesses nor otherwise weigh the evidence presented at trial. Id. (citation omitted). Accordingly, defendant (as the losing party in this action) is entitled to judgment as a matter of law only if it can demonstrate that no legally sufficient evidentiary basis supports the verdict. Fed. R. Civ. P. 50(a).

Plaintiff's Damages Evidence

Defendant asserts plaintiff's damages evidence was legally insufficient to sustain the jury verdict of $290,000 because plaintiff failed to introduce any evidence that established its lost royalties were caused by defendant's breach of the covenants not to compete. Accordingly, because proof of damages is an essential element of a breach of contract claim under Minnesota law, defendant argues its Rule 50(b) motion should be granted. However, plaintiff asserts it raised a reasonable inference that it lost $290,000 in royalties because of defendant's "unlawful" competition. Additionally, plaintiff asserts defendant failed to rebut such an inference by demonstrating that its loss was caused by other factors. Accordingly, plaintiff argues the jury's award of $290,000 was proper under Minnesota law and as such defendant's Rule 50(b) motion should be denied.

Under Minnesota law, damages do not flow from the breach of a covenant not to compete as a matter of course. Rather, they must be proven. B & Y Metal Painting, Inc. v. Ball, 279 N.W.2d 813, 816 (Minn. 1979). To establish damages for breach of a covenant not to compete, plaintiff must demonstrate: (1) that profits were lost, (2) the loss was directly caused by defendant's breach of the covenants not to compete; and (c) the amount of such causally related loss is capable of calculation with reasonable certainty rather than benevolent speculation. Faust v. Parrott, 270 N.W.2d 117, 120-121 (Minn. 1978).

However, because the loss of profits in a complex market can rarely be ascertained with certainty, plaintiffs must often rely on reasonable inferences to establish their loss. B & Y Metal Painting, Inc., at 817. If such inferences were not allowed, defendants could "purposely breach a covenant not to compete and remain immune from liability." Id. Accordingly, under Minnesota law "once a plaintiff raises a reasonable inference as to the amount of lost profits caused by a defendant's breach of a covenant not to compete the defendant is liable for such amount unless evidence is presented to rebut the inference and to establish that the loss was caused by factors other than the breach." Id.

At the conclusion of the damages phase of trial, the Court instructed the jury in relevant part as follows:

> Plaintiff Allan Block Corporation claims that it should be awarded lost royalties as a result of defendant County Materials Corporation's breach of the covenants not to compete. Damages do not flow from the breach of a covenant not to compete as a matter of course. They must be proven. To establish damages, Allan Block Corporation must prove by a preponderance of the evidence that one, it lost royalties; two, its los[s] was directly caused by defendant County Materials Corporation's breaches of the covenants not to compete; and three, the amount of such caus[a]l[l]y related loss is capable of calculation with reasonable certainty rather than [be]nevolent speculation.
>
> In terms of calculation, because the loss of royalties in a complex market can r[arely] be ascertained with absolute certainty, [] plaintiffs such as Allan Block Corporation, must often rely on reasonable inferences to establish its loss. Accordingly, once a plaintiff raises a reasonable inference as to the amount of lost royalties caused by a defendant's breach of a covenant not to compete, the defendant is liable for such an amount, unless it can present evidence to rebut the inference and establish that plaintiff's loss was caused by other factors than its breach.
>
> As previously stated, as part of its burden of proof in establishing damages, Plaintiff Allan Block Corporation must establish by a preponderance of the evidence that its loss was directly caused by Defendant County Materials Corporation's breach of the covenants not to compete. A direct loss is a cause that had a substantial part in bringing about the harm.

(Trial Tr. Vol. III pages 590-591, lines 23-25; 1-25). Defendant does not argue that the Court improperly instructed the jury. Rather, defendant argues that plaintiff failed to present any evidence at trial that established causation in accordance with the Court's instruction. However, when the record evidence is viewed in the light most favorable to plaintiff, the Court finds that plaintiff established causation by a preponderance of the evidence.

Reading Rock is one of plaintiff’s licensees. As such, it pays plaintiff a royalty fee. Mr. Gordon Rich serves as president of Reading Rock and he testified by deposition at trial. He testified in relevant part as follows:

> ...Q: What do you believe your sales figures would have been absent County Materials selling an Allan Block knock-off product in the territory?
>
> A: We would probably be – our projections were 40 percent higher than these numbers.
>
> ...Q: And why do you believe that?
>
> A: Tracking what other territories we have, Allan Block sales in the other territories, and what we base our projections on, *past market history*, what our customers had told us was going on in the market – that’s how we based our projections.
>
> ...Q: You say you projected $1.2 million in sales of Allan Block within Illinois and southern Wisconsin – of $1.2 million for 2006?
>
> A: That’s correct.
>
> Q: And so far for 2006, you have $710,000?
>
> A: That’s correct.
>
> Q: And you think the difference is entirely due to County Materials?
>
> A: I would say a large part of it its, yes.
>
> Q: What’s another part of it?
>
> A: I think in the last month or so as the economy started to slow down, I’m sure that’s played a part of it....
>
> Q: Is there anything else that has an impact on it?
>
> A: Not that I can think of.

(Trial Tr. Vol. III pages 457-458, lines 10-25; 1; pages 494-495, lines 17-25; 1-7)(emphasis added). Accordingly, Mr. Rich testified that Reading Rock's sales of plaintiff's Block failed to meet projections by 40% because of defendant's competition. As part of Reading Rock's projections, Mr. Rich testified that he took into account factors such as past market factors, customer input, and sales of Allan Block in other territories. As such, when his testimony is viewed in the light most favorable to plaintiff, it is clear that the evidence presented at trial is sufficient to sustain the jury's finding that plaintiff's lost royalties were caused by defendant's breach.

The Court acknowledges that Mr. Rich likewise testified that the economy played a role in Reading Rock's reduced sales. Accordingly, at first glance it appears this testimony undermines plaintiff's proof of causation. However, under Minnesota law, plaintiff was not required to establish that defendant's competition was the sole factor in bringing about its lost royalties. Rather, plaintiff was required to demonstrate that defendant's competition was a "substantial part in bringing about [its] harm." (Id. at page 591, line 25). Again, in light of Mr. Rich's testimony the Court cannot find as a matter of law that plaintiff failed to meet this evidentiary burden. Accordingly, there was a legally sufficient evidentiary basis to support the jury's finding of causation.

However, the Court's analysis is not complete because establishing causation satisfied only a portion of plaintiff's burden in proving its damages. Additionally, plaintiff needed to raise a reasonable inference as to the amount of lost royalties caused by defendant's breach. The Court finds that the testimony of plaintiff's accounting expert Mr. Arthur Cobb raised such an inference. Mr. Cobb testified that defendant sold approximately 785,000 units of competing block from 2003 through 2005. (Id. at page 547, lines 8-21; page 551, lines 2-12). Additionally, Mr. Cobb testified in relevant part as follows:

> ...Q: And if you applied the lower royalty number of 37 cents to that total of 785,000 units, what would County Materials have paid to Allan Block in royalties if those sales had been out?
>
> A: Approximately $290,000.

(Id. at page 552, lines 3-6). In light of Mr. Cobb's testimony, the Court cannot find as a matter of law that plaintiff's evidence failed to raise a reasonable inference as to the amount of lost royalties sustained because of defendant's breach. As such, having failed to rebut such an inference, defendant likewise failed to establish that no reasonable jury could have found in plaintiff's favor. Accordingly, defendant's Rule 50(b) motion is denied as it concerns plaintiff's failure to prove damages.

Defendant's Remaining Rule 50(b) Motions

As previously stated, defendant argues it is entitled to judgment as a matter of law based on the following remaining grounds: (1) plaintiff's claims are barred by its binding judicial statements that defendant did not have any competing block before April 1, 2006, (2) plaintiff's claims are barred by its failure to provide notices of default under the Agreements, (3) plaintiff's claims for breach of contract maturing before December 9, 2005 are barred by Rule 13(a), (4) federal patent law policy preempts the covenants not to compete, (5) plaintiff's claims are barred by laches; and (6) plaintiff's claims are barred by estoppel. However, these remaining motions are not properly classified as Rule 50(b) motions because the jury never decided these issues one way or the other, and under the rule the standard is whether there was a legally sufficient evidentiary basis for a reasonable jury to find for plaintiff. Accordingly, the Court must determine how to classify the remainder of defendant's motions.

Under well established precedent, any substantive motion filed within ten days of a challenged judgment is deemed a Rule 59(e) motion regardless of how it is characterized by the movant.[1] United States v. Deutsch, 981 F.2d 299, 301 (7th Cir. 1992)(quoting Charles v. Daley, 799 F.2d 343, 347 (7th Cir. 1986)). A motion is substantive if its granting would "result in a substantive alteration in the judgment rather than just in a correction of a clerical error or in a purely procedural order such as one granting

[1]Defendant's "Rule 50(b)" motion was filed within 10 days of judgment.

an extension of time within which to file something." Id. at 301 n.2 (quoting United States v. Gargano, 826 F.2d 610, 611 (7th Cir. 1987)). There is no question that defendant seeks a substantive alteration in the judgment. Accordingly, defendant must satisfy the standard of review under Rule 59(e) to succeed on its remaining motions.[2]

A motion to alter or amend the judgment may be granted if the movant presents newly discovered evidence that was not available at the time of trial or if it points to evidence in the record that clearly establishes a manifest error of law or fact. In re Prince, 85 F.3d 314, 324 (7th Cir. 1996)(citations omitted). Defendant does not assert that it is presenting newly discovered evidence. Accordingly, for defendant to succeed, it must point to evidence in the record that clearly establishes a manifest error of law or fact. Defendant fails in this regard.

A "manifest error" is not demonstrated by the disappointment of the losing party. Oto v. Metro. Life Ins. Co., 224 F.3d 601, 606 (7th Cir. 2000). Rather, a "manifest error" is the "'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" Id. (quoting Sedrak v. Callahan, 987 F.Supp. 1063,

[2]In a footnote contained within its reply brief, defendant recognizes that its "post-trial motion regarding the summary judgment motions are deemed Rule 59(e) motions." However, defendant failed to set forth the appropriate standard of review for Rule 59(e) motions or otherwise treat its motions as such throughout the remainder of its brief.

1069 (N.D.Ill. 1997)). Additionally, motions brought under Rule 59(e) cannot be used to raise arguments which could (and should) have been made before judgment issued. LB Credit Corp. v. Resolution Trust Corp., 49 F.3d 1263, 1267 (7th Cir. 1995)(citation omitted). Further, such motions cannot be used as a vehicle to: (1) argue the case under a new legal theory, FDIC v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986)(citations omitted); or (2) relitigate old matters. Diebitz v. Arreola, 834 F.Supp. 298, 302 (E.D.Wis. 1993)(citations omitted).

The Court has exhaustively reviewed defendant's remaining motions and determined that all of its arguments: (1) were presented to the Court in memorandums filed in support of its motions for summary judgment both in this action and in the 2005 action, (2) were presented to the Court in memorandums filed in connection with various motions in limine; or (3) are arguments which could have been made before judgment issued. Accordingly, because Rule 59(e) motions cannot be used as a vehicle to: (1) relitigate old matters, Id.; or (2) raise arguments which could have been made before judgment issued, LB Credit Corp., at 1267 (citation omitted), the Court finds that defendant failed to meet its burden under Rule 59(e). As such, defendant's remaining Rule 59(e) motions (labeled as Rule 50(b) motions) are denied.

B. Defendant's Rule 59(e) Motion to Alter or Amend the Judgment to Delete the Extension of the Covenants Not To Compete and Plaintiff's Motion for a Permanent Injunction

The Court will address the parties' motions concerning the covenants not to compete together because they are both legally and factually intertwined. Defendant asserts because the jury awarded damages that plaintiff has been put back in the position it would have been had defendant never breached the covenants not to compete. Accordingly, defendant argues plaintiff had an adequate remedy at law rendering injunctive relief inappropriate. Additionally, defendant asserts injunctive relief is awarded only to prevent future injury and it cannot be used to punish past behavior. As such, defendant argues the Court improperly extended the non-competes beyond their temporal terms. Accordingly, defendant argues its Rule 59(e) motion to alter or amend the judgment to delete the extension of the covenants not to compete should be granted. Conversely, defendant argues plaintiff's motion for a permanent injunction should be denied because nothing in the record supports such an extraordinary equitable remedy.

Plaintiff asserts it lacks an adequate remedy at law for defendant's past and ongoing violations of the covenants not to compete. Additionally, plaintiff asserts the Court properly exercised its equitable powers to extend the temporal scope of the covenants not to compete. Finally, plaintiff asserts defendant failed to identify any newly discovered evidence or a manifest error of law or fact which would entitle it to relief. Accordingly, plaintiff argues defendant's Rule 59(e) motion should be denied. Conversely, plaintiff argues its Rule 59(e) motion to alter or amend the judgment to include an award of a permanent injunction should be granted because defendant has repeatedly refused to comply with the terms of the covenants not to compete.

The Court previously enumerated the applicable standard of review for a motion to alter or amend the judgment pursuant to Rule 59(e). Accordingly, in the interest of brevity (something neither party has been interested in throughout the arduous nearly two year tenure of this litigation) said standard will not be repeated here.

Where a court has determined that the prevailing party is entitled to relief, it may fashion both legal and equitable remedies as are necessary to effectuate such relief. Cherne Indus., Inc. v. Grounds & Assoc., Inc., 278 N.W.2d 81, 92 (Minn. 1979).[3] Additionally, if a court determines that injunctive relief is necessary, the granting of an injunction generally rests within the sound discretion of the court. Id. at 91 (citation omitted).

However, in general injunctive relief based on a contract "must be coextensive with the terms of the contract." Id. at 93 (citation omitted). As such, in most situations "if the restrictive period of a covenant not to compete has expired, an injunction will not be granted to enforce the covenant." Id.

[3]Because the parties' motions concern a final as opposed to a preliminary injunction the Court applies the substantive law of Minnesota. *See* Dunkin' Donuts Inc. v. N.A.S.T., Inc., 428 F.Supp.2d 761, 775 (N.D.Ill. 2005)(citing Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules, 837 F.2d 171, 172 (4^{th} Cir. 1988)).

(citations omitted). Accordingly, at first glance it appears the Court committed a manifest error of law when it extended the covenants not to compete through July 15, 2007. However, Minnesota courts have determined that "there may be situations where injunctive relief extending beyond the expiration of the period established by the covenant is appropriate." Id. (citations omitted). This is one of those situations.

At trial, plaintiff's president Mr. Robert Gravier testified in relevant part as follows:

> Q: Why does Allan Block need the non-competition [provision] [] for the 18 months following the termination of production?
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> A: We do go to great lengths to transfer everything we know and everything we continue to learn about how to build better walls with Allan Block products to our producers. And we help them a great deal in setting up distribution networks, sales/marketing promotion and the like, and our brand, our 'Allan Block' product line, then becomes part of what's available in that market place; in this case, let's say Wisconsin. And if we do come to a falling out in our licensing, our production agreements, whether one side or the other decides to pull it out, Allan Block needs enough time, enough reasonable time to, (a) find another supplier, another manufacturer, who can deliver product to market. Remember, these are concrete blocks too, so that's not an easy thing to do. And then, two, get in gear the necessary personnel and the necessary sales team to reestablish selling relationships with the current Allan Block customers in that market place, those who we've helped build up as Allan Block customers. And it takes time.

(Trial Tr. Vol. I page 42, lines 5-24). Accordingly, testimony presented at trial established that the purpose of the covenant not to compete is to establish another producer in the market. This involves not only finding a producer that can manufacture and deliver the Allan Block product but it also involves reestablishing selling relationships with Allan Block customers in the market.

While evidence presented at trial demonstrated that plaintiff found new licensees (Reading Rock and Amcon Block and Precast) to manufacture its product in defendant's former territory, the evidence likewise established that defendant never stopped manufacturing competing products. (Id. at page 126, lines 15-17). Accordingly, there is no question that defendant breached the covenants not to compete for the first sixteen months they were in effect, (Trial Tr. Vol III page 601, lines 8-9), denying plaintiff its full opportunity to reestablish selling relationships with Allan Block customers in the market.

Irreparable harm "'can be inferred from a trial court's actual finding of a breach [of a restrictive covenant] by the defendant.'" Overholt Crop Ins. Serv. v. Travis, 941 F.2d 1361, 1371 (8th Cir. 1991)(Minnesota law)(citation omitted). Accordingly, it was not manifest error for the Court to extend the injunction beyond the life of the covenants not to compete to allow plaintiff an opportunity to reestablish its presence in the market. Id. at 1371-1372. As such, defendant's motion to alter or amend the judgment to delete the extension of the covenants not to compete is denied.

However, it does not necessarily follow that plaintiff is entitled to a permanent injunction extending the covenants not to compete for the full eighteen month term. As previously stated, in general injunctive relief based on a contract "must be coextensive with the terms of the contract." Cherne Indus., Inc., at 93 (citation omitted). While evidence presented at trial supported a slight extension of the covenants not to compete, it did not support a full eighteen month extension. Had the Court found an eighteen month extension was appropriate it would have, in its discretion, awarded relief as such. Id. at 92 (where a court has determined that the prevailing party is entitled to relief, it may fashion both legal and equitable remedies as are necessary to effectuate such relief). However, the Court chose not to, finding that the purpose of the covenants not to compete could be effectuated with an seven month extension. Accordingly, plaintiff's motion for a permanent injunction is denied.[4]

C. Defendant's Motion to Clarify the January 3, 2007 Injunction

Both parties appear to agree (for what the Court believes to be the first time throughout this entire action) that some clarification of the January 3, 2007 injunction is necessary. However, staying true to form, the parties disagree concerning the

[4]Plaintiff alternatively argues that it is entitled to an award of damages in the amount of defendant's "illegal" profits. Plaintiff's justification for such an award is unavailing and the Court will not award this extraordinary relief.

product and territorial scope that should be included in the injunction. The Court agrees that some clarification is required. As such, defendant's motion to clarify the January 3, 2007 injunction is granted. First, it is important to note that on April 4, 2007 the Court clarified the product scope of the injunction to some extent finding that it was no longer equitable to enjoin Keystone Block, County Cub, and standard County block under the extensions of the covenants not to compete.

Additionally, the parties agree that the following products should be specifically included in the injunction: (1) Montego, (2) Terrace Stone, (3) Winston, (4) Newcroft, (5) Stonewall Select, (6) Summit, (7) Allegiance, (8) County Block Junior, (9) County Block Jumbo, (10) Victory Block; and (11) Tribute. Accordingly, the injunction will be clarified to specifically include these identified products. The Court will now address the remaining product and territorial scope of the injunction.

Section 13.1 of the 1993 Agreement (marked as trial exhibit number one) contains the covenant not to compete which provides in relevant part as follows:

> The parties agree that...Producer will not directly or indirectly engage in the manufacture and/or sale of any other mortarless, stackable, concrete block retaining wall product, with the following exceptions: 1) The Versa-lok product line for resale, 2) Manufacture, market and promote the "Wall Block" product currently in production at their facility.

Additionally, Section 17 of the 1997 Agreement (marked as trial exhibit number two) contains the covenant not to compete which provides in relevant part as follows:

> The parties agree that...Producer will not directly or indirectly engage in the manufacture and/or sale of any other mortarless, stackable, concrete block wall products in the Territory...

The language of the covenants not to compete is clear and unambiguous. Defendant is prohibited from directly or indirectly engaging in the manufacture and/or sale of any mortarless, stackable, concrete block retaining wall product with certain exceptions under the 1993 Agreement. Under Minnesota law, the Court is to give contract language its plain and ordinary meaning. Baer Gallery, Inc. v. Citizen's Scholarship Found. of Am., Inc., 450 F.3d 816, 821 (8th Cir. 2006)(Minnesota law)(citation omitted). Additionally, Minnesota law provides that "the primary goal of contract interpretation is to determine and enforce the intent of the parties." Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc., 666 N.W.2d 320, 323 (Minn. 2003)(citation omitted). When the 1993 and 1997 Agreements were executed, the parties intended to be bound by their terms including the covenants not to compete. Accordingly, when the Court extended the covenants post-trial it intended to bind the parties to their agreed upon restrictions and exceptions. As such, the January 3, 2007 injunction will be clarified at the conclusion of this Memorandum and Order to reflect the Court's intent to bind the parties to their contractual language.

Additionally, the same reasoning applies as it concerns the territorial scope of the injunction. Section 13.2 of the 1993 Agreement provides in relevant part as follows:

> The parties intend that this covenant not to compete shall be construed as a series of separate covenants, one for each county, state and/or geographic area where the Block is being sold.

Accordingly, the intent of the parties when they entered into the 1993 Agreement was to temporarily restrict defendant's post-termination activities in areas where it previously sold Allan Block. The Court's primary goal in extending the 1993 covenant not to compete was to enforce the intent of the parties. Id. at 323 (citation omitted). Accordingly, at the conclusion of this Memorandum and Order the Court will clarify the injunction to include a territorial limitation consistent with the parties' intent under the 1993 Agreement.

Additionally, the covenant not to compete contained within the 1997 Agreement provides in relevant part as follows:

> The parties agree that...Producer will not directly or indirectly engage in the manufacture and/or sale of any other mortarless, stackable, concrete block wall products in the Territory...

Exhibit D to the 1997 Agreement includes a circle encompassing approximately twenty counties in southeastern Wisconsin which the Agreement defines as the "Territory." Defendant argues the 1997 Agreement actually fails to explicitly enumerate a "Territory" in Exhibit D because the area is not outlined in red as is required by

Section 3.2 of the Agreement. This argument is one of form over substance. It is apparent from the face of Exhibit D that the parties intended those counties in southeastern Wisconsin to be encompassed by the covenant not to compete. Accordingly, at the conclusion of this Memorandum and Order the Court will clarify the injunction to reflect as such.

D. Plaintiff's Motion for Attorneys' Fees and Prejudgment Interest[5] and Defendant's Motion to Alter or Amend the Judgment to Strike the Award of Costs and Fees

Plaintiff asserts language contained within the Agreements entitles it to an award of attorneys' fees and costs associated with litigating not only this action but also the first Wisconsin action. Additionally, plaintiff asserts its requested fees and costs are reasonable in light of the time expended on this action. Accordingly, plaintiff argues its motion for attorneys' fees and costs should be granted. Plaintiff likewise asserts language contained within the 1993 Agreement entitles it to an award of prejudgment interest because under the plain language of the contract defendant's breach constitutes a default. Accordingly, plaintiff argues its motion for an award of prejudgment interest should be granted.

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[5]Plaintiff's motion for an award of prejudgment interest was included in its motion for a preliminary injunction. However, the Court will address this aspect of plaintiff's motion in connection with its motion for attorneys' fees because any entitlement to fees and interest is controlled by the same provision of the parties' Agreement.

However, defendant asserts plaintiff is not entitled to an award of attorneys' fees because under the plain language of the Agreements recovery of such an award is limited to: (1) actions commenced upon defaults declared after due notice; and (2) actions for collection of sums due under the Agreements and not for breaches generally. Additionally, defendant asserts plaintiff waived any entitlement to attorneys' fees in connection with the first Wisconsin action because: (1) it failed to move for fees within fourteen days of judgment; and (2) it failed to plead any demand for such fees as special damages in this action. Finally, defendant asserts plaintiff's requested attorneys' fees and costs are not reasonable. Accordingly, defendant argues plaintiff's motion for attorneys' fees and costs should be denied and its motion to alter or amend the judgment to strike the award of costs and fees granted. Additionally, defendant asserts plaintiff is not entitled to an award of prejudgment interest because it could not have determined the amount of its liability until after trial. Accordingly, defendant argues plaintiff's motion for an award of prejudgment interest should be denied.

Under Minnesota law, the general rule is that attorneys' fees are allowable if authorized by contract, statute, or if a party acts in bad faith. Material Movers, Inc. v. Hill, 316 N.W.2d 13, 18 (Minn. 1982)(citation omitted). In this action, the Agreements are the sole basis for an award of attorneys' fees. As such, Section 10.2 of the 1993 Agreement provides as follows:

> In case of any default by Producer [defendant] as specified herein, Producer shall pay all of Licensor's [plaintiff's] costs of collecting any sums due to Licensor, including reasonable attorney's fees, and the lesser of 15% or the maximum interest rate or rates charged permitted by law.

Additionally, Section 14.2 of the 1997 Agreement provides as follows:

> In case of any default by Producer as specified herein, Producer shall pay all of Licensor's costs of collecting any sums due to Licensor, including reasonable attorney's fees.

Accordingly, plaintiff is entitled to attorneys' fees under the Agreements if: (1) there was a default by defendant; and (2) this action was brought in connection with collecting any sums due. The parties genuinely dispute whether there was a "case of any default" as said term is specified and defined in the Agreements. However, the Court finds that this dispute need not be resolved because under the plain language of the attorneys' fees provisions it is clear this action was not commenced for the purpose of "collecting any sums due." Accordingly, plaintiff is not entitled to attorneys' fees and its motion is denied.

Courts consistently give a contract its "'plain and ordinary meaning...even if the result is harsh.'" <u>Allete, Inc. v. GEC Eng'g, Inc.</u>, 726 N.W.2d 520, 523 (Minn.App. 2007)(quoting <u>Denelsbeck v. Wells Fargo & Co.</u>, 666 N.W.2d 339, 346-347 (Minn. 2003)). The term due is defined as "[o]wing or payable; constituting a debt." <u>Black's Law Dictionary</u> 538 (8th ed. 2004). When plaintiff commenced this action, it was uncertain whether the jury would award damages to plaintiff and if damages were awarded, the specific amount was unknown until completion of trial. As such, it cannot be said that plaintiff brought this action to collect a debt defendant owed under the Agreements. This conclusion is consistent with Minnesota law.

In Material Movers, Inc., the Minnesota Supreme Court affirmed the trial court's determination that plaintiff was not entitled to attorneys' fees because the amount of alleged debt was different from the amount specified in the agreement. Id. at 18-19. In this action, plaintiff failed to allege that defendant owed a debt under the Agreements such as an unpaid royalty fee for sales of Allan Block product. Accordingly, plaintiff's suit does not qualify as one to "make collections" and its motion for attorneys' fees is denied. Id. at 18. As such, it necessarily follows that defendant's motion to alter or amend the judgment to strike the award of attorneys' fees is granted because the Court committed a manifest error of fact when it awarded plaintiff its attorneys' fees pursuant to the Agreements. In re Prince, at 324 (citations omitted).[6]

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[6]While defendant's motion to alter or amend the judgment is granted as it concerns striking the award of attorneys' fees, it is denied as it concerns striking the award of costs. Plaintiff is entitled to costs. Accordingly, plaintiff is directed to submit a bill of costs to the Clerk of Courts for the United States District Court for the Western District of Wisconsin where plaintiff's entitlement to costs can be determined.

Plaintiff is not entitled to an award of prejudgment interest for the same reason that it is not entitled to an award of attorneys’ fees. Section 10.2 of the 1993 Agreement provides as follows:

> In case of any default by Producer [defendant] as specified herein, Producer shall pay all of Licensor’s [plaintiff’s] costs of collecting any sums due to Licensor, including reasonable attorney’s fees, and the lesser of 15% or the maximum interest rate or rates charged permitted by law.

As previously stated, plaintiff’s suit does not qualify as one to “make collections” under the Agreements because when it commenced this action it was uncertain whether the jury would award plaintiff damages. Material Movers, Inc., at 18. Accordingly, just as plaintiff is not entitled to an award of attorneys’ fees under the plain language of the 1993 Agreement, it is likewise not entitled to an award of prejudgment interest.[7] As such, plaintiff’s motion for an award of prejudgment interest is denied because there is no other basis for such an award. *See* Moosbrugger v. McGraw-Edison Co., 284 Minn. 143, 161, 170 N.W.2d 72, 83 (1969)(where the amount of liability has not been ascertained, there is no liability for interest thereon prior to the time of its ascertainment).

Accordingly,

ORDER

IT IS ORDERED that defendant County Materials Corporation’s Rule 50(b) motion for judgment as a matter of law is DENIED.

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[7]It is undisputed that plaintiff is not entitled to an award of prejudgment interest under the 1997 Agreement.

IT IS FURTHER ORDERED that defendant County Materials Corporation’s Rule 59(e) motion to alter or amend the judgment to delete the extension of the covenants not to compete is DENIED.

IT IS FURTHER ORDERED that plaintiff Allan Block Corporation’s motion for a permanent injunction is DENIED.

IT IS FURTHER ORDERED that plaintiff Allan Block Corporation’s motion for attorneys’ fees is DENIED.

IT IS FURTHER ORDERED that plaintiff Allan Block Corporation’s motion for an award of prejudgment interest is DENIED.

IT IS FURTHER ORDERED that defendant County Materials Corporation’s Rule 59(e) motion to alter or amend the judgment to strike the award of costs and fees is GRANTED in as much as said motion concerns attorneys’ fees and in all other respects is DENIED.

IT IS FURTHER ORDERED that defendant County Materials Corporation’s motion to clarify the January 3, 2007 injunction is GRANTED.

IT IS FURTHER ORDERED that defendant County Materials Corporation is hereby enjoined as follows:

i. Defendant shall not, in either the territory outlined in Exhibit D of the 1997 Agreement or in any county, state and/or geographic area where it sold Allan Block pursuant to the 1993 Agreement, directly or indirectly engage in the manufacture and/or sale of any mortarless, stackable, concrete block retaining wall product including specifically Montego, Terrace Stone, Winston, Newcroft, Stonewall Select, Summit, Allegiance, County Block Junior, County Block Jumbo, Victory Block, and Tribute. However, defendant is not enjoined from directly or indirectly manufacturing and/or selling the following products in said territories: Versa-lok product line for resale, "Wall Block," Keystone Block, County Cub, and standard County Block.

Entered this 23rd day of April, 2007.

BY THE COURT:

S/

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JOHN C. SHABAZ

District Judge