

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

SCHWAN'S HOME SERVICE, INC.)
 Plaintiff, Counterclaim Defendant,)

v.)

C.A. No. N11C-11-008 MJB

MICROWAVE SCIENCE, JV, LLC)
 Defendant, Counterclaim Plaintiff.)

Submitted: March 22, 2013
Decided: June 24, 2013

*Upon Schwan's Home Service Inc.'s Motion for Judgment on the Pleadings as to
Microwave Science, JV, LLC's Counterclaim, **GRANTED**, after hearing oral argument
as to a limited issue.*

OPINION AND ORDER

Herbert W. Mondros, Esq., Margolis Edelstein, Wilmington, Delaware, Attorney for
Plaintiff, Counterclaim Defendant.

Richard L. Renck, Esq., Ashby & Geddes, Wilmington, Delaware, Attorney for
Defendant, Counterclaim Plaintiff.

BRADY, J.

INTRODUCTION

This is the Court's ruling on a remaining issue in a Motion for Judgment on the Pleadings as to counterclaims in a dispute arising from a licensing and service agreement (the "Agreement") that called for Defendant Microwave Science, JV, LLC ("MS") to provide Plaintiff Schwan's Home Service, Inc. ("Schwan's") certain microwave technology in exchange for payments and marketing exposure. The Court partially granted the Motion finding that Schwan's lawfully terminated the parties' Agreement. It deferred decision on the issue of the remaining obligations of the parties pursuant to the Agreement's survival clause for the purpose of hearing oral argument, which was held on March 22, 2013.

BACKGROUND FACTS

On December 31, 2009, the parties entered a Service and License Agreement.¹ Pursuant to the Agreement, MS agreed to create codes for Schwan's products, grant Schwan's a license to use its microwave oven technology, and provide technical support.² Among other things, Schwan's agreed to: use, promote, and market MS's technology³ and provide "reasonable exposure" of MS technology in its product catalogs.⁴ The marketing provision at issue sets forth:

SHS,⁵ at no charge to MS, shall provide reasonable exposure of MS Technology in SHS Product Catalogs which shall consist of, at a minimum:

- i) A President's Letter regarding MS Technology, to be published at an SHS-determined time of launch for a line of Enhanced Products; and

¹ Compl. Ex. A. [hereinafter "Agreement"]

² Agreement ¶ 5.

³ *Id.* ¶ 14.

⁴ *Id.* ¶ 8.A.

⁵ In the Agreement, Schwan's Home Services, Inc. is referred to as "SHS." *See* Agreement, p. 1.

- ii) A one (1) page insertion, the subject of which is primarily MS Technology, to be published in the same SHS Product Catalog as the President's Letter described in Paragraph 8-A-I at the SHS-determined time of launch for a line of Enhanced Products; and
- iii) A one (1) page insertion, the subject of which is primarily MS Technology, in a subsequent SHS Product Catalog published within twelve (12) months of the SHS-determined time of launch for a line of Enhanced Products.⁶

Though the term of the Agreement was three years, Schwan's could terminate the Agreement at any time, without cause, giving MS at least 90 days notice, provided Schwan's make all outstanding payments due, regardless of termination.⁷ In such event, Schwan's right to use MS's trademarks would terminate and immediately revert back to MS, and Schwan's would immediately discontinue its use of MS technology at no cost to MS.⁸ The Agreement contained a survival clause which provided:

Upon termination or expiration of th[e] agreement, the obligations set forth elsewhere herein for any actions or omissions made by either party prior to the date of termination" would survive.⁹

The Agreement also contained a "Nonliability" provision which barred the parties' abilities to recover special, incidental or consequential damages absent certain circumstances. The nonliability provision specifies that,

IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING ANY DAMAGES RESULTING FROM LOSS OF USE, LOSS OF DATA, LOSS OF PROFITS OR LOSS OF BUSINESS, EVEN IF THEY HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING LIMITATION ON LIABILITY SHALL NOT APPLY TO: (1) INDEMNIFICATION OBLIGATIONS; (2) BREACHES OF CONFIDENTIALITY; (3) DAMAGES

⁶ *Id.* ¶ 8.A.

⁷ *Id.* ¶¶ 2.A, 16.E, 16.F.

⁸ *Id.* ¶ 17.B.

⁹ *Id.* ¶ 16.F.

THAT ARE COVERED BY THE INSURANCE COVERAGES SET FORTH HEREIN; OR (4) A PARTY'S INTENTIONAL MISCONDUCT.¹⁰

On June 27, 2010, Schwan's sent MS an email stating Schwan's would launch TrueCookPlus in November.¹¹ A mock-up insert ad was attached to the email.¹² The ad features statements about the convenience of microwaving Schwan's meals with TrueCookPlus technology, as well as registered trademark symbols following the words "SCHWAN'S" and "TrueCookPlus." Such statements include: "As convenient as microwaving your SCHWAN'S® meal already is, it'll get even simpler when you purchase any new microwave with TrueCookPlus® technology;" "Over 50 SCHWAN'S® products feature the convenience of TrueCookPlus® technology;" and "Schwan's Home Service is pleased to recommend this innovative Product Partner."¹³

On August 11, 2010 Schwan's provided MS a letter of written notice to terminate the Agreement without cause.¹⁴ In the same letter, it demanded that MS return the unused balance of the retainer, \$76,000, and announced Schwan's would not produce any packaging bearing MS trademarks beyond what had been printed up to that point.¹⁵ MS responded to Schwan's in a letter dated September 8, 2010, in which it demanded Schwan's carry out the remaining marketing obligations listed in Paragraph 8 of the Agreement.¹⁶ In the same letter, MS required Schwan's to confirm in writing within

¹⁰ *Id.* ¶ 21.P. "Intentional misconduct" is not defined within the agreement. *See id.*

¹¹ Am. Countercl. Ex. 1.

¹² *Id.*

¹³ *Id.*

¹⁴ Compl. Ex. B.

¹⁵ *Id.*

¹⁶ Am. Countercl. Ex. 2. MS reproduced Paragraph 8 in its entirety in the letter.

seven days that it would fully honor its commitments, pursuant to the Agreement's survival clause.¹⁷ Schwan's never printed marketing exposure for MS.

PROCEDURAL HISTORY

On November 1, 2011, Schwan's filed its Complaint, seeking the unused balance of Schwan's Code Creation Retainer, less un-invoiced code creation costs, about \$76,000, and alleging breach of contract and unjust enrichment.¹⁸ On November 30, 2011 MS filed its Answer and Counterclaims. On February 15, 2012, with leave of the Court, MS filed its Answer and Amended Counterclaims. MS alleges Schwan's failed to honor its obligations to provide marketing exposure and include MS's technology in its November 2010 catalog, causing MS damages in excess of \$500,000 arising from the loss of exposure of its technology to potential customers, as well as future business and revenues. MS also alleges Schwan's published advertisements in its November 2010 catalog for companies, products, and services unrelated to Schwan's products and services.

On December 19, 2011, Schwan's filed a Motion for Judgment on the Pleadings as to MS's Counterclaim. Schwan's re-noticed its Motion on December 22, 2011. On February 7, 2012, Schwan's submitted a supplemental submission to its Motion. The Court heard argument on February 9, 2012. The Court reserved decision and ordered the parties to make additional submissions on the issue of whether MS may recover consequential damages. MS filed its submission on February 29, 2012. Schwan's filed its submission on March 6, 2012.

¹⁷ *Id.* ¶ 16.F.

¹⁸ *See* Compl.

In their submissions, each party cited to information outside the pleadings. In accordance with the parties' wishes, the Court has considered the Motion as a Motion for Judgment on the Pleadings and did not reference information outside the pleadings in reaching its decision.¹⁹²⁰

In its Opinion dated November 8, 2012, the Court granted Schwan's Motion in part, finding that Schwan's lawfully terminated the parties' Agreement. However, there remained the issue of the survival clause contained in paragraph 16.F of the Agreement, under which MS contends Schwan's owes MS remaining obligations. At the time, a reasonable and unambiguous interpretation of the parties' intent for the survival clause of their Agreement was not objectively apparent to the Court. Accordingly, the Court deferred decision for the purpose of hearing oral argument as to the limited issue of remaining obligations of the parties, if any, pursuant to the survival clause.²¹ Oral argument on the issue was held on March 22, 2013. This is the Court's opinion as to that limited issue.

PARTIES' CONTENTIONS

At oral argument, Schwan's repeated its contention that MS's Counterclaim fails to state a claim for relief and must be dismissed. Schwan's argued it was futile and would have been commercially unpractical for Schwan's to include a president's letter

¹⁹ The Court wrote to the parties requesting that each party provide notice of whether or not they opposed the Court considering information outside the pleadings, as well as any supplemental information they believed the Court should consider in deciding the Motion. Letter from Court dated June 11, 2012, Transaction ID 44732493 (June 11, 2012). Both parties notified the Court that they opposed the Court converting the Motion or Judgment on the Pleadings into one for Summary Judgment. *See* Def. Opp'n to the Court's Conversion of Pl.'s Mot., Transaction ID 45718993 (Aug. 3, 2012); Letter from Plaintiff dated Aug. 3, 2012, Transaction ID 45720578 (Aug. 3, 2012).

²⁰ Pleadings consist of complaints, counterclaims, and answers and replies thereto, as well as cross-claims and third party complaints. Super. Ct. Civ. R. 7(a). The Court also considers exhibits to pleadings as part of the pleadings for any purpose. Super. Ct. Civ. R. 10(c).

²¹ November 8, 2012 Opinion, at 10-11.

and insert its November 2010 catalog, because it knew as of August 11, 2010 that it would not use MS technology in its products. Schwan's argued such inclusion would have been misleading and would have breached the trademark provision of the Agreement. Schwan's further contended that consequential damages are barred under the Nonliability provision of the parties' Agreement, and that Schwan's exercise of its contractual right to terminate the Agreement without cause does not constitute intentional misconduct. Schwan's contended that the parties' true intent was to market a product line. That line never made its way to the market; therefore, the marketing the parties contracted for was never required.

MS contended that a material issue of fact exists as to whether the Agreement's provision on survival of obligations compelled Schwan's to fulfill its marketing obligations, even after terminating the Agreement. MS argued Schwan's did nothing during the 90-day termination period or any time to fulfill its ongoing obligations to provide reasonable exposure of MS technology, despite the fact that Schwan's had been prepared to place materials in the November 2010 catalog. MS further contended that the Agreement provision pertaining to consequential damages is not subject to dismissal at the pleading stage because it is ambiguous as to application because it contains certain exclusions, including one for intentional misconduct. At oral argument, MS also contended that Schwan's November 2010 catalog should have contained the items listed in ¶8.A(i) and (ii), or at the least some form of "marketing exposure" because the November 2010 catalog was prepared and released within 90 days of the notice of termination on August 11, 2010. MS went on to argue that because Schwan's had advertisements for things unrelated to the products they make, that it would not be far-

fetched to feature an ad for MS despite termination of the Agreement.²² MS finally argued that even if consequential damages are barred under the parties' Agreement, direct damages in the form of advertising value remain at issue.

At oral argument, the Court noted that the fourth "Whereas"²³ clause contemplated that until the enhanced line of products was developed, there was no marketing obligation. The Court also considered the "SHS-determined" language and noted that it implicated that marketing was not going to happen until the launch of the enhanced products line which never occurred.

Also at oral argument, the Court found MS's argument regarding advertisements for other products in the Schwan's catalog to be irrelevant. The Court stated that if MS wanted only advertisements, it should have contracted for them. The Court noted that MS could have requested Schwan's to simply include an ad for MS without mention of Schwan's in the ad in the November catalog, but they did not. Finally, the Court dismissed the argument that Schwan's was receiving all of the benefit under the contract, finding the contract to be mutually beneficial.

STANDARD OF REVIEW

Superior Court Civil Rule 12(c) provides:

Motion for judgment on the pleadings. -- After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings,

²² See also Opp'n to Pl.'s Mot. at p. 2. ("[W]ith the deletion of a sentence here or there and word here or there, the previously approved Microwave ads which were to appear in the November catalog, could have appeared without any claimed reference to Schwan's products.").

²³ Agreement p. 1:

WHEREAS, SHS and MS anticipate entering into an agreement which would mutually benefit both parties by significantly increasing the number of products available to consumers encoded for use with MS Technology, and SHS products would receive promotion and recognition as being enhanced with MS Technology.

matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.²⁴

In determining a motion for judgment on the pleadings, the Court must accept, as true, all well-pleaded allegations and extend the benefit of reasonable inferences drawn from the pleadings to the non-movant.²⁵ The Court considers exhibits to a pleading as part of the pleading for any purpose.²⁶ In addition, a party may introduce an exhibit as part of a motion attacking a pleading.²⁷ In order for the Court to grant judgment on the pleadings, it must find that, under no reasonable interpretation of the alleged facts and reasonable inferences, could the plaintiff state a claim for which relief might be granted.²⁸

Exhibits attached to the pleadings here include: the Agreement,²⁹ the termination letter,³⁰ an email dated June 27, 2010 informing MS it will launch “TrueCook” in the November catalog, along with a mock-up ad,³¹ and MS’s response to the notice of termination.³² The Court provided the parties the opportunity to object to the Court’s consideration of this Motion as one for summary judgment.³³ Both Schwan’s and MS objected. Therefore, the Court will not consider other materials, including those

²⁴ Super. Ct. Civ. R. 12(c).

²⁵ *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.d 1175, 1180 (Del. Ch. 1999).

²⁶ Super. Ct. Civ. R. 10(c); *Willis v. City of Rehoboth Beach*, 2004 WL 2419143 (Del. Super. Oct. 14, 2004).

²⁷ Super. Ct. Civ. R. 10(c); *Willis v. City of Rehoboth Beach*, 2004 WL 2419143 (Del. Super. Oct. 14, 2004).

²⁸ *Wallace*, 752 A.d at 1180.

²⁹ Compl. Ex. 1.

³⁰ Compl. Ex. 2.

³¹ Answer & Am. Countercl. Ex. 1.

³² Answer & Am. Countercl. Ex. 2.

³³ *See Furman v. Delaware Dept. of Transp.*, 30 A.3d 771, 774 (Del. 2011).

referenced by the parties in their supplemental submissions of February 29, 2012 and March 6, 2012, to determine whether MS may conceivably recover on its counterclaims.

DISCUSSION

Delaware Courts' goal in interpreting contracts is to effectuate the parties' intent.³⁴ "Delaware adheres to the 'objective' theory of contracts: a contract's construction should be that which would be understood by an objective, reasonable third party. When measuring whether parties to an agreement intend to be bound to it, their overt manifestations of assent, rather than their subjective desires, control."³⁵ Under the objective theory of interpretation, Courts assign unambiguous contract provisions or terms their plain meaning.³⁶ If the Court finds it may reasonably ascribe more than one meaning to a provision or term, it will deem the contract ambiguous and apply the doctrine of *contra proferentem* against the non-drafting party.³⁷

Paragraph 8

The language of the Agreement is controlling.³⁸ Paragraph 8.A explicitly states that the insert and President's letter (and subsequent insert) were "to be published at an SHS-determined time of launch for a line of Enhanced Products."³⁹ This phrase implicates marketing will not happen until the launch. MS contends that the time of launch was determined, as evidenced by the June 27, 2010 email and attached mock-up. However, the fact remains that the line was never launched.

³⁴ *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

³⁵ *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088 (Del. Ch. Feb. 3, 2009).

³⁶ *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

³⁷ *Id.*

³⁸ The Agreement contains a merger clause in which the parties agreed that the Agreement "is the complete and exclusive statement of the agreement between the parties." Agreement ¶ 21.

³⁹ Agreement ¶ 8.A.

Under, Paragraph 8.C, MS was required to “create a special Schwan’s Home Service section link on the front page of its website . . . which section and link will remain there for the duration of this Agreement.”⁴⁰ It is MS’s contention that despite sending notice of termination of the Agreement, Schwan’s was still required to market MS until termination became effective. Based on this argument, MS would have been required to maintain this special link on the front page of its website until 90 days after notice of termination. The Agreement is silent as to when MS was to create this special link. If the Court is to accept MS’s interpretation, MS would have been required to create the link before the Enhanced Products line was launched, or even before the November 2010 catalog came out. From the point-of-view of a reasonable third-party, this cannot have been the intention of these parties. The Court finds the link was to be created when the line was launched. This is an objectively reasonable interpretation.

“At a Minimum”

MS’s contention that Schwan’s failed to fulfill its obligation to, among other things, provide reasonable exposure of MS technology fails. The Agreement explicitly states that “reasonable exposure . . . shall consist of, *at a minimum*:” the president’s letter, a one-page insertion in the same catalog as the letter, and a subsequent one-page insertion.⁴¹ This language is important to understand the parties’ intent. MS’s contended at oral argument and in its response to Schwan’s Motion that the June 27, 2010 mock-up ad could have been included in the November catalog despite the termination of the Agreement if Schwan’s had deleted a sentence here or there. This argument is irrelevant. The explicit language of the Agreement required Schwan’s to, *at a minimum*, publish a

⁴⁰ *Id.* ¶ 8.C.

⁴¹ Agreement ¶ 8.A.

letter from their president regarding MS technology and a one-page insertion advertising MS technology in the same catalog. These things constituted the *minimum* reasonable exposure.

According to the unambiguous language of the Agreement, publishing a letter from its president regarding MS technology, was only part of the least Schwan's was required to do. The Court cannot accept MS's argument that Schwan's marketing obligations survived during the period the November catalog was prepared and published. If that argument is accepted, it would mean that a company intended to require its president to publicly endorse another company with which it had chosen to terminate a business relationship. The Court cannot infer that the parties intended, if the Agreement was terminated, that Schwan's president would publish a letter endorsing MS along with a full page ad, at no cost to MS subsequent to the termination. The objectively reasonable interpretation of this provision is that Schwan's would incur these obligations once the Enhanced Product line was launched.

Use of Trademarks

Schwan's argued that the version of the Agreement MS proposes to the Court would require Schwan's to complete advertising for which it had no authority, in accordance with the terms of the actual Agreement, to do. This, Schwan's contended, would force Schwan's to breach the Agreement – specifically, ¶ 17.C which prohibited Schwan's from using MS's trademarks and technology after termination of the Agreement. It is MS's contention that ¶ 17.C prohibited Schwan's from using MS's trademarks and technology post-termination of the Agreement.

In interpreting a contract's clear and unambiguous terms, the Court “must be mindful that [a] contract should be read as a whole, and every part should be interpreted

with reference to the whole.”⁴² In referring to the contract as a whole, the contract “should be so interpreted as to give effect to its general purpose. In this regard, the court must interpret the contract so as to conform to an evident consistent purpose and in a manner that makes the contract internally consistent.”⁴³

MS’s contentions imply that Schwan’s intended to advertise MS products and use MS’s name and trademarks *after* termination of the Agreement, or at least after notice of termination. From an objective, reasonable standpoint, and interpreting the Agreement as a whole, these contentions are inconsistent with other provisions of the Agreement. Further, in ¶ 17, MS specifically carved out protection for its trademarks, and in ¶ 16.E the parties agreed to a carve-out provision regarding payments to MS. Both of these provisions carve out these rights in the event of termination of the Agreement. There is no carve-out provision for the ¶8 Marketing obligations, indicating that the parties did not intend for the marketing obligations to survive.

The June 27, 2010 Email

The mock-up ad, as it appeared in the June 27, 2010 email, makes three references to the Schwan’s name, the ad is titled “Product Partner” and explicitly states Schwan’s “recommend[s]” True Cook Plus.⁴⁴ As it appeared, the mock-up could not be published in the November catalog because MS was no longer a product partner and the product was not recommended.

MS refers to the June 27, 2010 email and the mock-up as evidence that Schwan’s had determined the launch to be in the November 2010 catalog. At oral argument,

⁴² *Anguilla RE, LLC v. Lubert-Adler Real Estate Fund IV, L.P.*, 2012 WL 5417101, *5 (Del. Super. Nov. 5, 2012)(citing *Doe v. Cedars Acad., LLC*, 2010 WL 5825343, *5 (Del. Super. Oct. 27, 2010)(citations omitted).

⁴³ *Id.*(citing *Cedars Acad., LLC*, 2010 WL 5825343 at *5.

⁴⁴ Am. Countercl. Ex. 1.

Schwan's contended that the email discussed a *proposed* November 2010 launch and presented a *proposed* mock-up of the launch announcement. However, this proposal was rescinded by the August 11, 2010 termination letter. It is Schwan's contention that by the date of the August 11, 2010 termination letter they had still not made a determination to launch, and, instead, determined not to launch.

Schwan's contended that the "SHS-determined" language from ¶ 8 is key. While it is true that the email stated "we will be launching TrueCook in the November catalog," the fact remains that Schwan's determined *not to launch*.⁴⁵ Therefore, there was no SHS-determined time of launch. Because the explicit language provides that the marketing obligations are related to the date of launch, and Schwan's determined not to launch the product line, the ¶ 8 obligations never became binding on Schwan's. Since Schwan's had no obligations, MS cannot invoke the survival clause in the Agreement.

The Court finds the Agreement to be clear and its terms to be controlling. The Agreement itself is silent on the launch date, but is clear that Schwan's was to determine the launch date. Because Schwan's chose not to launch, it incurred no obligations under the ¶ 8 Marketing section and Paragraph 16.F.'s survival clause does not apply.

CONCLUSION

The Court has heard argument and considered the pleadings, and finds that the Agreement clearly and unambiguously reflects the parties' intentions. The Agreement is not susceptible to differing interpretations. MS has failed to state a claim for which relief might be granted. The Agreement was a licensing and servicing agreement that contained a marketing provision. If the marketing was as important to MS as they have

⁴⁵ Indeed, the email indicates to the Court that, until Schwan's determined otherwise, Schwan's was proceeding, in good faith, with its obligations under the contract.

contended, then they would have been better served by a separate agreement exclusively for marketing. The true intent of the parties was to launch and market a product line. The line was never launched. Therefore, the marketing obligations in ¶ 8 of the Agreement never became binding.

Undertaking an objectively reasonable interpretation of the Agreement, the Court finds the ¶ 8 Marketing obligations not to have survived under ¶ 16.F. Pursuant to the Nonliability provision of the Agreement, MS is entitled to special, consequential or incidental damages only upon certain circumstances.⁴⁶ MS has contended that Schwan's wrongful termination of the Agreement and its failure to perform its marketing obligations amounted to intentional misconduct. Because the Court finds Schwan's had no marketing obligations, and, having previously found that Schwan's lawfully terminated the Agreement, Schwan's has not committed any intentional misconduct and MS's claims for lost profits are barred pursuant to Paragraph 21.P.'s Non-liability provision. MS's counterclaim is dismissed in its entirety.

For all the foregoing reasons, Schwan's Motion for Judgment on the Pleadings as to MS's Counterclaim is **GRANTED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

⁴⁶ Indemnification of obligations, breaches of confidentiality, damages that are covered by the insurance coverages set forth in the Agreement and either party's intentional misconduct. Agreement ¶ 21.P.