

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Dec 18, 2017

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNIBEST INTERNATIONAL LLC,  
  
Plaintiff,  
  
v.  
  
WINFIELD SOLUTIONS LLC,  
  
Defendant.

No. 4:16-CV-5031-EFS

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

Before the Court is Defendant Winfield Solutions' Motion for Summary Judgment, ECF No. 25. A hearing was held on this matter on October 25, 2017. See ECF No. 56. This Order memorializes and further develops the Court's oral rulings made at the hearing. After reviewing the record, relevant authority, and arguments from counsel for both parties, the Court is fully informed. For the reasons set forth below, the Court grants Winfield's motion in part and denies it in part.

**I. FACTUAL HISTORY<sup>1</sup>**

Plaintiff Unibest International LLC ("Unibest") is a small agricultural products company based out of Walla Walla, Washington. See ECF No. 41 at 2. Unibest develops soil and crop monitoring products designed to "improve crop yields, enhance sustainability, optimize nutrient application timing, and minimize environmental impact." ECF No. 39 at 2. Among other things, Unibest manufactures

<sup>1</sup> The facts are only briefly summarized. Detailed facts are contained in the parties' briefing, statements of undisputed material facts, and responses to both. See, e.g., ECF Nos. 26 & 41.

1 resin capsules under the trade name "Ag Manager," which "act[] like a  
2 synthetic plant root" and allow crop producers to "determine the  
3 amount and type of nutrients a plant is absorbing from the soil." *Id.*  
4 Defendant Winfield Solutions, LLC ("Winfield") is a Delaware limited  
5 liability company that is owned in part by Land O'Lakes, Inc., a large  
6 Minnesota corporation. See ECF No. 26 at 1. Winfield is "in the  
7 business of manufacturing and distributing soil-monitoring products."  
8 See ECF No. 28 at 2.

9 This dispute arises from a "Manufacturer and Distributor  
10 Agreement" between Unibest and Winfield, which they entered into on  
11 February 18, 2013. See ECF No. 28, Exhibit A ("Agreement"). The  
12 Agreement provides that Winfield would have the exclusive rights to  
13 market and distribute Unibest's resin capsule products. See Agreement  
14 at 1. In return, Winfield agreed to purchase more than a certain  
15 annually-increasing number of the resin capsules - the "Minimum Annual  
16 Purchase Quantity" ("MAPQ"). In practice, this obligated Winfield to  
17 purchase at least 60,000 capsules in 2013, at least 80,000 in 2014,  
18 and increasing quantities in the following years. See Agreement at 3.

19 The Agreement also obligated Winfield to "work with [Unibest] to  
20 develop a marketing strategy" for the resin capsules and to use  
21 "commercially reasonable efforts to sell and promote" Unibest's  
22 products. Agreement at 1-2. To that end, Winfield was to "develop  
23 marketing materials and product packaging" for the resin capsules.  
24 Agreement at 2. All marketing materials were to be approved by Unibest  
25 before going to the market. See Agreement at 2.

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1           On June 30, 2014, the parties executed an amendment to the  
2 Agreement. See ECF No. 28, Exhibit C ("Amendment"). The Amendment made  
3 two primary changes to the Agreement: (1) it significantly reduced  
4 Winfield's MAPQ obligations from 2014 onward, purportedly because  
5 Winfield was struggling to sell the requisite amount of resin  
6 capsules; and (2) it permitted the parties to make a subsequent  
7 agreement to allow Unibest to sell the products directly to customers.  
8 See Amendment at 1, 3; ECF No. 26 at 10; ECF No. 50, Exhibit E. It  
9 also established a MAPQ payment schedule under which Winfield would  
10 pay 50 percent of the MAPQ by February 15 of each year (the "First  
11 Product Payment") and the remaining balance of the MAPQ by October 1  
12 of each year (the "Second Product Payment"). See Amendment at 2.

13           To help develop supporting data for the resin capsules, Winfield  
14 decided to use them at "Answer Plots" - small fields for  
15 demonstrations to potential customers - located throughout the  
16 country. See ECF No. 41 at 17. In spite of these efforts, Winfield  
17 faced significant difficulty in selling Unibest products. See ECF  
18 No. 50 at 21.

19           By September of 2015, the relationship between the parties had  
20 begun to break down. On September 29, 2015, Unibest delivered to  
21 Winfield two invoices: Invoice 2666, for the 2015 Second Product  
22 Payment; and 2702, for the "2015 Analysis Reconciliation Payment,"  
23 another of Winfield's obligations under the Agreement. See ECF No. 26  
24 at 12. Winfield paid Invoice 2666, but did not pay Invoice 2702. See  
25 ECF No. 26 at 13. On January 7, 2016, Unibest CEO Mark Riess sent  
26 Winfield Marketing Director Tyler Grenzow a letter requesting payment

1 of Invoice 2702 plus \$13,035.45 of late "service charges" as provided  
2 by the Agreement; this letter also included Invoice 2727, for the 2016  
3 First Product Payment. See ECF No. 28, Exhibit E. Winfield paid  
4 Invoice 2702 plus the requested service charges on January 27, 2016 -  
5 118 days late. See ECF No. 28, Exhibit G.

6       Following Mr. Riess' January 7, 2016 letter, Mr. Grenzow  
7 allegedly contacted him to discuss modifying the Agreement to remove  
8 Winfield's annual purchase obligations and to transition the Agreement  
9 into a research and development partnership. See ECF No. 26 at 14. On  
10 February 12, 2016, Mr. Riess emailed Mr. Grenzow, "checking to see if  
11 [he] had time to catch up." ECF No. 28, Exhibit J. Mr. Grenzow  
12 replied: "Yes, let's plan on talking early next week. Also, per our  
13 last conversation[,] Winfield will not be taking anymore [sic]  
14 physical product under the contract. We have excess inventory that we  
15 will be utilizing for research purposes in 2016 season." ECF No. 28,  
16 Exhibit J.

17       In response to Mr. Grenzow's email, Unibest retained counsel and  
18 sent him a letter on February 23, 2016. See ECF No. 28, Exhibit K. The  
19 letter argued Mr. Grenzow's February 12, 2016 email and Winfield's  
20 subsequent failure to pay Invoice 2727 - the 2016 First Product  
21 Payment - by February 15, 2016, triggered the Agreement's liquidated  
22 damages clause in its entirety, entitling Unibest to \$927,500 in  
23 damages.

24       The parties dispute the exact amount of the payment and the  
25 exact date, but they agree that Winfield eventually made the First  
26 Product Payment plus late fees per the Agreement on April 1, 2016. See

1 ECF No. 41 at 39; ECF No. 51 at 10; see also ECF No. 28, Exhibit Q. On  
2 the same day, Winfield sent a notice "hereby terminating the  
3 Agreement, effective sixty (60) days herefrom, pursuant to Section  
4 4(a) of the Agreement." ECF No. 28, Exhibit P.

5 **II. PROCEDURAL HISTORY**

6 On March 23, 2016, Unibest filed suit in the Eastern District of  
7 Washington, alleging Winfield "breached the Agreement by failing to  
8 pay invoice 2727 for the First Product Payment by February 15, 2016,"  
9 and, in doing so, caused damages of \$927,500 plus costs and attorney's  
10 fees. ECF No. 1 at 5-6. On July 15, 2016, Unibest filed an Amended  
11 Complaint, alleging Winfield "breached the Agreement by: (1) failing  
12 to pay the full amount owed under the Liquidated Damages Clause; (2)  
13 failing to develop a marketing strategy for sales of the Products to  
14 the Market; and (3) failing to use commercially reasonable efforts to  
15 sell and promote the Products to the Market." ECF No. 3 at 5-6. Its  
16 alleged damages remained the same. See ECF No. 3 at 6. Winfield filed  
17 an answer and demand for jury trial on August 9, 2016. See ECF No. 5.  
18 Winfield filed the present Motion for Summary Judgment on September 5,  
19 2017. See ECF No. 25.

20 **III. STANDARD OF REVIEW**

21 Summary judgment is appropriate when, viewing the evidence in  
22 the light most favorable to the nonmoving party, there is no genuine  
23 dispute as to any material fact. *United States v. JP Morgan Chase Bank*  
24 *Account No. Ending 8215 in Name of Ladislao V. Samiengo, VL:*  
25 *\$446,377.36*, 835 F.3d 1159, 1162 (9th Cir. 2016). The district court's  
26 function at summary judgment is "not to weigh evidence and determine

1 the truth of the matter but to determine whether there is a genuine  
2 issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986).  
3 A court shall grant summary judgment if the movant shows that there is  
4 no genuine dispute as to any material fact and the movant is entitled  
5 to judgment as a matter of law. Fed. R. Civ. P. 56(a).

#### 6 **IV. ANALYSIS**

7 Winfield asks the Court to grant summary judgment in its favor.  
8 It relies on two primary arguments: (1) that Unibest's claim for  
9 liquidated damages fails as a matter of law; and (2) that Unibest's  
10 other damages are barred by Minnesota law and the plain language of  
11 the Agreement. See ECF No. 25 at 3, 12, 16. The Court will address  
12 each argument in turn.

##### 13 **A. Liquidated damages**

14 Pursuant to Section 27 of the Agreement and Section 5 of the  
15 Agreement, this dispute is governed by Minnesota law. See Agreement at  
16 12; Amendment at 4; see also ECF No. 25 at 5; ECF No. 38 at 8. Under  
17 Minnesota law, the construction and effect of a contract's terms  
18 presents a question of law. *Brookfield Trade Ctr., Inc. v. Cty. of*  
19 *Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). The primary goal of contract  
20 interpretation is to determine and enforce the intent of the parties.  
21 *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979).  
22 "If a contract is unambiguous, then the language must be given its  
23 plain and ordinary meaning and will be enforced by the courts even if  
24 the results are harsh." *Bank Midwest, Minnesota, Iowa, N.A. v.*  
25 *Lipetzky*, 674 N.W.2d 176, 179 (Minn. 2004) (internal quotations  
26

1 omitted); *but see Brookfield*, 584 N.W.2d at 394 (courts "will not  
2 construe the terms so as to lead to a harsh and absurd result").

3 The meaning of a term is to be determined within the context of  
4 the document as a whole and not in isolation. *Republic Nat'l Life Ins.*  
5 *Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 354 (Minn. 1979).  
6 Accordingly, courts are required to harmonize all provisions of a  
7 contract and to avoid a construction that would render one or more  
8 provisions meaningless. *Current Tech. Concepts, Inc. v. Irie Enters.,*  
9 *Inc.*, 530 N.W.2d 539, 543 (Minn. 1995).

10 The liquidated damages clause is contained in Section 2(c) of  
11 the Agreement. The Agreement provides that the clause would be  
12 triggered "in the event that [Winfield] fails to purchase the  
13 applicable Minimum Annual Purchase Quantity in accordance with Section  
14 2(b)(ii)." If the liquidated damages clause was triggered, Unibest had  
15 two remedies. First, Unibest had the right to revoke Winfield's  
16 exclusive distribution rights. Second, it could be entitled to  
17 liquidated damages, calculated in the following manner:

- 18 (i) Distributor shall promptly pay Manufacturer, as  
19 liquidated damages and not as penalty, an amount equal  
20 to the product of (x) the sum of (A) the applicable  
21 Minimum Annual Purchase Quantity for such calendar  
22 year, minus (B) the number of Product units actually  
23 purchased by Manufacturer in such calendar year. . .  
multiplied by (y) the unit price of the lowest priced  
Product offered to Distributor for such calendar year,  
minus (z) the amount, if any, already prepaid for the  
Products by Distributor in such a calendar year  
pursuant to Section 2(b).

24 Agreement at 4.

25 Unibest initially contended that Winfield's failure to timely  
26 pay the First Product Payment, due February 15, 2016, triggered the

1 liquidated damages clause. See ECF No. 1 at 5. However, Unibest now  
2 focuses its liquidated damages claim on the contention that Winfield's  
3 failure to make the Second Product Payment on October 1, 2016,  
4 constituted a failure to purchase the MAPQ "in accordance with Section  
5 2(b)(ii)," thus triggering the clause. ECF No. 38 at 3, 6. Unibest  
6 argues it is entitled to recover \$683,750 in liquidated damages as a  
7 result of both alleged breaches of the Agreement. ECF No. 38 at 9.

8 1. 2016 First Product Payment

9 As stated above, Unibest originally contended that it was  
10 Winfield's late payment of the First Product Payment - due on February  
11 15, 2016, but not paid until April 1 - that entitled it to liquidated  
12 damages. See ECF No. 1 at 5. Winfield responds that the Agreement  
13 provides a different, express penalty for late payments, and  
14 accordingly, the liquidated damages clause is not controlling.

15 Section 7 of the Agreement, in fact, does provide a remedy for  
16 late payments: "[a]ny invoiced amount not paid when due shall be  
17 subject to a service charge equal to the lesser of one percent (1%)  
18 per month or the maximum rate permitted by law from the due date until  
19 paid." The parties' conduct illustrates the operation of this clause.  
20 After Winfield failed to pay an invoice due on September 29, 2015,  
21 Unibest charged Winfield \$13,035.45 of monthly "service charges,"  
22 calculated from the invoice due date through January 27, 2016, the  
23 time the invoice was actually paid. This conduct is fully in  
24 compliance with Section 7 of the Agreement and demonstrates the  
25 clarity of the clause's language.

1           Moreover, the Court is to harmonize all provisions of the  
2 Agreement and avoid a construction that would render one or more  
3 provisions meaningless. See *Current Tech.*, 530 N.W.2d at 543. Holding  
4 that a late payment of the First Product Payment triggered the  
5 liquidated damages clause would render Section 7 of the Agreement  
6 meaningless. Accordingly, viewing both the liquidated damages and late  
7 payment clauses of the Agreement in harmony, Winfield's late payment  
8 of the First Product Payment did not trigger the liquidated damages  
9 clause.

10           2.     2016 Second Product Payment

11           Unibest's argument regarding the 2016 Second Product Payment  
12 rests on two premises: (1) that Winfield's purchase obligation accrued  
13 in its entirety on January 1, 2016; and (2) that the obligation  
14 survived the Agreement's termination. The plain language of the  
15 Agreement contradicts both premises.

16           a.     Plain language

17           Unibest admits that "the Agreement does not explicitly state  
18 when during the course of 2016 this obligation arose . . . ." ECF  
19 No. 38 at 4. Nevertheless, it argues that a number of the Agreement's  
20 provisions suggest Winfield's purchase obligation vested in full on  
21 January 1 of each calendar year. *Id.* After a thorough review of the  
22 Agreement and Amendment, the Court can find no language supporting  
23 this interpretative theory; there is only language contradicting it.

24  
25           For example, Unibest points to Section (2)(b)(ii) of the  
26 Agreement, which required Winfield to "purchase a number of Product

1 units not less than the [MAPQ]" for "each calendar year." Unibest  
2 contends this reference to each "calendar year" indicates that  
3 Winfield's MAPQ vested on January 1 of each year. It is undeniably  
4 true that a calendar year begins on January 1. However, the context of  
5 Section (2)(b)(ii) indicates that the term simply defines the period  
6 in which Winfield was obligated to make the MAPQ - not that the MAPQ  
7 vested in its entirety on January 1 of each year.

8 As another example, Unibest points to Section 1(c) of the  
9 Amendment, which requires Winfield to "pay [Unibest] the First Product  
10 Payment and the Second Product Payment regardless of whether  
11 [Winfield] submitted purchase orders(s) for such Product units."  
12 Amendment at 2. Unibest argues that this language "shows that the  
13 purchase quantity requirement vested automatically at the commencement  
14 of the year." ECF No. 38 at 5. However, Unibest's argument distorts  
15 the language of the Agreement outside of its plain meaning. This  
16 portion of the Amendment stands for nothing more than what it says:  
17 that Winfield was obligated to make product payments on the schedule  
18 outlined in the Agreement, whether or not it submitted a purchase  
19 order.

20 Further, Winfield correctly points out that under Unibest's  
21 interpretation of the Agreement, Winfield could have sent notice of  
22 termination as late as November 1, 2016, and still be obligated to  
23 purchase the entire MAPQ for 2016. The absurdity of that scenario  
24 illustrates that the parties could not have intended the MAPQ - in its  
25 entirety - vest on January 1 of each year. *See Lakeland Tool & Eng'g,*

1 *Inc. v. Thermo-Serv., Inc.*, 916 F.2d 476, 481 (8th Cir. 1990)  
2 ("Contracts are to be construed as to avoid absurdity.").

3 Rather than vesting on January 1 of each year, the plain  
4 language of the Agreement and Amendment supports the following  
5 interpretation. Although Winfield was obligated to purchase the MAPQ  
6 each year, each year's MAPQ obligation vested in two installments:  
7 Winfield was to purchase at least 50% of the MAPQ on February 15 of  
8 each year and the remainder of the MAPQ on October 1 of each year.<sup>2</sup>  
9 Until those dates came, Winfield had no obligation to purchase any  
10 products from Unibest. Of course Winfield had the option to purchase  
11 the entire MAPQ on January 1, 2016, but it was not obligated to do so.

12 As evidence of this, both the Agreement and the Amendment  
13 repeatedly reference Winfield's ability to "pre-pay" for Products  
14 subject to the MAPQ.<sup>3</sup> If Winfield was obligated on January 1, 2016, to

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15 <sup>2</sup> See Amendment at 2.

16 (A) no later than February 15th of each calendar year during the  
17 Term, Distributor shall pay Manufacturer an amount equal to the  
18 sum of (i) 50% of the product of (x) the applicable [MAPQ]  
19 multiplied by (y) the unit price of the lowest priced Product  
20 offered to Distributor for such year. . . , minus (ii) the amount  
21 already paid to Manufacturer by Distributor for Product units  
22 purchased during such calendar year (the "First Product  
23 Payment"); and (B) no later than October 1st of each calendar  
year during the Term, Distributor shall pay Manufacturer an  
amount equal to the sum of (i) 50% of the product of (x) the  
applicable [MAPQ] multiplied by (y) the Lowest Product Price,  
minus (ii) the amount, if any, already paid to Manufacturer by  
Distributor for Product units purchased during such calendar year  
other than the Frist Product Payment (the "Second Product  
Payment").

24 <sup>3</sup> See Agreement at 3, 4, 6 ("Each invoice will specify the amount that  
25 Distributor has *prepaid* for the Product units. . . .") ("Distributor may use  
26 "*pre-purchased* Capsules and Cylinders. . . .", (Distributor shall pay  
liquidated damages, calculated in part by amount "*already prepaid* for the  
Products by Distributor in [a] calendar year"), (in event of termination,  
Manufacturer must refund "*any and all pre-paid* amounts") (emphasis added);  
see also Amendment at 2 (Manufacturer will provide invoices specifying the

1 purchase the entire MAPQ, as Unibest suggests, the "pre-payments"  
2 referenced would not be "pre-" anything - they would simply be  
3 "payments" for an existing obligation. Instead, the language of the  
4 Agreement and Amendment reference "pre-payments" because the payments  
5 *did not become due* until the enumerated dates of the First and Second  
6 Product Payments (February 15 and October 1 of each calendar year).

7 b. Termination clause

8 Even if the MAPQ did vest in its entirety on January 1, 2016,  
9 the Agreement's termination clause bars Unibest from recovering  
10 liquidated damages for Winfield's failure to make the Second Product  
11 Payment. The clause reads:

12 c. Either party may terminate this Agreement at any  
13 time for any reason upon sixty (60) days prior  
14 written notice to the other party. In the event  
15 [Unibest] terminates this Agreement in accordance  
16 with this Section 4(a), [Unibest] shall refund to  
17 [Winfield] any and all pre-paid amounts  
18 attributable to Product not yet received by  
19 Distributor. In the event [Winfield] terminates  
20 this Agreement in accordance with this Section  
21 4(a), [Unibest] shall have no obligation to  
22 refund [Winfield] any amounts prepaid by  
23 Distributor.

19 Agreement at 6.

20 The plain language of the above clause unambiguously empowers  
21 either party to terminate the Agreement at will at any time.<sup>4</sup> Further,  
22 it directs the disposal of any pending transactions between the  
23 parties at the time of termination: if Unibest terminated, it was to

24  
25 amount that Distributor has "prepaid for the Product units covered by such  
26 invoice").

26 <sup>4</sup> In cases involving similar contract language, Minnesota courts have come to  
the same conclusion. See, e.g., *Banbury v. Omnitrition Intern., Inc.*, 533  
*N.W.2d* 876, 880 (Minn. Ct. App. 1995).

1 refund any pre-paid amounts for product not yet received by Winfield;  
2 and if Winfield terminated, it agreed to forfeit any amounts it had  
3 pre-paid to Unibest. This express settlement of pending transactions  
4 indicates the parties' intent that all obligations – aside from those  
5 expressly included in the survival clause – would cease upon the  
6 Agreement's effective termination.

7 Further, the Agreement's survival clause indicates the parties  
8 did not intend for any purchase obligations to survive termination.  
9 The survival clause contains a list of contract provisions that the  
10 parties expressly agreed would survive termination.<sup>5</sup> Absent from the  
11 list is Section 2 of the Agreement – the original clause obligating  
12 Winfield to purchase the annual MAPQ. The parties also negotiated and  
13 executed an Amendment to the Agreement. *See generally* Amendment. The  
14 Amendment does not amend the survival clause to include Section 1(c)  
15 of the Amendment – the section replacing Section 2 of the Agreement.  
16 These absences are telling. If the parties intended Winfield's MAPQ  
17 obligations to survive termination of the contract, they would have  
18 included the payment provision in the survival clause.

19 Winfield sent notice of termination on April 1, 2016. *See* ECF  
20 No. 28, Exhibit P. Unibest has not disputed the notice's validity, and  
21 the Court can find no facial errors that would render the notice  
22 ineffective. Section 19 of the Agreement provides that all notices are

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23 <sup>5</sup> The survival clause is contained in Section 21 of the Agreement:

24 Survival. Sections 7 through 11, 15, 17, through 28, and any  
25 other provision which by its sense and context is appropriate,  
26 shall survive the termination of this Agreement by either party  
for any reason.

Agreement at 12.

1 deemed to be effective three days after mailing. See Agreement at 11.  
2 Thus, the Agreement was effectively terminated 63 days later, on June  
3 3, 2016. So, regardless of when they vested, Winfield's MAPQ  
4 obligations ended on June 3, 2016.

5 Unibest argues that Winfield remained obligated to purchase  
6 products from Unibest on October 1, 2016 – 6 months from its notice of  
7 termination. Not only is this result contradicted by the plain  
8 language of the termination and survival clauses, it would be  
9 inequitable to Winfield.

10 d. Minnesota law

11 In addition, Unibest's claim for liquidated damages is barred by  
12 Minnesota law. Generally, Minnesota law provides that where a contract  
13 is terminable at will, termination bars recovery for damages incurred  
14 after the date of termination. In *Ag-Chem Equipment Co., Inc. v. Hahn,*  
15 *Inc.*, 480 F.2d 482, 492 (8th Cir. 1973), the Court of Appeals for the  
16 Eighth Circuit affirmed the district court's holding that a  
17 distributor could not recover from a manufacturer damages that were  
18 incurred post-termination. Even though the manufacturer had breached  
19 the contract, the distribution contract in question was terminable at  
20 will by either party. The court noted that "Minnesota law does not  
21 prohibit termination by one who has already breached the contract. As  
22 a consequence, damages incurred after termination . . . were not  
23 recoverable. . . ." *Id.* (citing *Western Oil & Fuel Co. v. Kemp*, 245  
24 F.2d 633 (8th Cir. 1957)).

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1 In a similar case, the Minnesota Supreme Court explained the  
2 crux of the issue was whether the agreement in question was terminable  
3 at will. In *Benson Coop. Creamery Ass'n v. First District Ass'n*, 151  
4 N.W.2d 422 (Minn. 1967), a dairy cooperative made an oral contract to  
5 process milk and deliver the resultant products - butter, skim milk,  
6 and dried milk - to Land O'Lakes and a subsidiary cooperative. After  
7 approximately nine years of deliveries, on March 7, 1963, the  
8 subsidiary informed the dairy cooperative that it was terminating the  
9 contract. *Id.* at 424-25. The dairy cooperative sued, seeking  
10 injunctive relief and damages for milk deliveries from March 27, 1963,  
11 to June 14, 1963.

12 The trial court granted the subsidiary's motion for summary  
13 judgment on damages and held that because contracts in Minnesota are  
14 presumptively terminable at will, the dairy cooperative could not  
15 recover for deliveries that were to be made post-termination. *Id.* at  
16 425. On appeal, the Minnesota Supreme Court Court reversed the trial  
17 court's entry of summary judgment on damages because whether the  
18 contract was terminable was a "crucial issue of fact that must be  
19 determined by trial." *Id.* at 427. The Court explained,

20 [i]f the evidence as finally adduced leads to a  
21 sustainable determination that this contract was  
22 terminable at the will of the Association upon  
23 reasonable notice without cause, there would be  
no cause of action for damages, at least not for  
failure to pick up Benson's milk after March 27,  
1963.

24 *Id.* Here, as discussed above, the termination clause plainly  
25 entitled either party to terminate the Agreement at any time and for  
26 any reason. In other words, it was terminable "at will." Accordingly,

1 Minnesota law arguably bars recovery of all damages incurred by  
2 Unibest after the Agreement was terminated. See *Ag-Chem*, 480 F.2d at  
3 492; see also *Benson*, N.W.2d at 427 (Minn. 1967). In any event,  
4 Minnesota law bars Unibest's claim for liquidated damages. Whether  
5 Winfield had breached the Agreement at the time of termination is  
6 inapposite because Minnesota law does not prohibit a breaching party  
7 from terminating a contract. See *Ag-Chem*, 480 F.2d at 492.

8 For the reasons outlined above, neither the plain language of  
9 the Agreement nor Minnesota law as applied to the facts before the  
10 Court permit Unibest to recover liquidated damages against Winfield.  
11 Accordingly, Winfield's motion for summary judgment is granted insofar  
12 as it relates to Unibest's claim for liquidated damages.

13 3. Anticipatory repudiation

14 Unibest also argues that Winfield's termination of the Agreement  
15 on April 1, 2016, and Mr. Grenzow's February 12, 2016 email<sup>6</sup>  
16 constituted an anticipatory repudiation of the Agreement, which  
17 entitled Unibest to "either elect to sue immediately or wait until the  
18 time when performance is due."<sup>7</sup> ECF No. 38 at 10 (quoting *Space Ctr.,*  
19 *Inc. v. 451 Corp.*, 290 N.W.2d 443, 451 (Minn. 1980)). Unibest explains

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20 <sup>6</sup> The relevant portion of the email reads:

21 Also, per our last conversation[,] WinField will not be taking  
22 anymore [sic] physical product under the contract. We have excess  
23 inventory that we will be utilizing for research purposes in 2016  
season.

24 Look forward to catching up,

25 Tyler Grenzow  
Marketing Manager, WinField

26 <sup>7</sup> Notably, this argument supports the Court's conclusion that Winfield's  
obligation to make the Second Product Payment did vest not until October 1,  
2016.

1 that it "elected to sue immediately rather than wait on Winfield's  
2 failure to pay the Second Invoice . . . ." *Id.*

3 In Minnesota, an anticipatory repudiation first requires "an  
4 unqualified renunciation or repudiation of the contract. A mere  
5 refusal, not of that character, will not obviate the necessity of a  
6 tender." *Space Ctr.*, 298 N.W.2d at 450. Mr. Grenzow's email does not  
7 meet this threshold requirement. The preface "[a]lso, per our last  
8 conversation," indicates Mr. Grenzow qualified Winfield's intent to  
9 withdraw from the Agreement on the premise that Unibest did not  
10 disagree.

11 In a sense, Winfield's April 1, 2016 notice of termination was  
12 an anticipatory repudiation, in that it stated Winfield's intent to no  
13 longer perform its contractual obligations. See ECF No. 28, Exhibit P.  
14 However, as discussed above, Winfield's termination - effective June  
15 3, 2016, relieved it of all its contractual obligations. Moreover,  
16 Minnesota law still bars Unibest's claim for liquidated damages for  
17 Winfield's failure to make the Second Product Payment.

18 4. Enforceability of liquidated damages

19 Because the Court has granted Winfield's motion for summary  
20 judgment as to Unibest's liquidated damages claim, it need not address  
21 whether the damages would be enforceable under Minnesota law.

22 **B. Other damages**

23 Unibest also alleges non-liquidated damages under a variety of  
24 legal theories, which the Court will address in turn.

25 //

26 /

1           1.     Lost profits

2           Unibest's expert report, ECF No. 27, Exhibit C, asserts that  
3 Unibest also suffered "lost profits" of up to \$2,841,300. ECF No. 2,  
4 Exhibit C at 12. These damages appear to consist of the 2016 Second  
5 Product Payment and the entirety of Winfield's MAPQ obligations for  
6 2017 and 2018. See *id.* at 13, 15. Above, the Court held that the plain  
7 language of the Agreement and Minnesota law bar Unibest's claim for  
8 liquidated damages related to the 2016 Second Product Payment. For the  
9 same reasons, the Court grants Defendant's motion as to Unibest's 2017  
10 and 2018 "lost profits."

11           As is common in contract cases, the parties dispute the nature  
12 of these damages. As noted above, Unibest's expert referred to the  
13 damages as "lost profits." *Id.* In its response, Unibest appeared to  
14 back away from this characterization.<sup>8</sup> Winfield, on the other hand,  
15 embraces the term "lost profits" and contends that this claim  
16 constitutes consequential damages, which are barred by the Agreement's  
17 broad limitation of liability clause.<sup>9</sup> See ECF No. 25 at 12-13.

18           It is certainly true that Unibest suffered a significant loss  
19 when Winfield terminated the Agreement; it would no longer receive the

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20 <sup>8</sup> Unibest contends that Winfield's arguments regarding lost profits "are  
21 misplaced because (other than the liquidated damages discussed above),  
22 Unibest is only seeking direct damages incurred prior to termination." See  
ECF No. 38 at 13.

23 <sup>9</sup> The limitation of liability clause is contained in Section 10 of the  
Agreement and reads:

24           In no event shall either party be liable to the other for costs  
25 of procurement of substitute goods or any indirect, incidental,  
26 punitive, or consequential damages (including but not limited to  
loss of revenue or profits) arising from or caused, directly or  
indirectly by such party's failure to perform under this  
agreement, even if advised or aware of the possibility of such  
damages.

1 six-figure Second Product Payment in 2016, and it would not receive  
2 any payments at all from Winfield in 2017 and 2018. So although these  
3 damages do not constitute "lost profits" as they are often thought of  
4 – as resulting from business with third parties – to a certain extent,  
5 they are Unibest's lost profits as a result of Winfield's alleged  
6 breach and subsequent termination of the Agreement.<sup>10</sup>

7 That said, the alleged damages are clearly direct. These Product  
8 Payments are expressly mentioned in the Agreement and Amendment and  
9 arise directly from them. See Agreement at 3; Amendment at 2. For this  
10 reason, Unibest's claim for lost profits is for direct, rather than  
11 consequential, damages.<sup>11</sup> And because the alleged damages are direct,  
12 the limitation of liability clause, which expressly bars "indirect,  
13 incidental, punitive, or consequential damages," does not bar  
14 Unibest's claim.

15 Nonetheless, the damages are barred by the plain language of the  
16 Agreement and Minnesota law. Just as with the Second Product Payment,  
17 Winfield was not obligated to meet the 2017 and 2018 MAPQs until the  
18 product payment dates enumerated in the Amendment. See Amendment at 2.  
19 Winfield's termination of the Agreement, effective June 3, 2016, freed  
20 it from all of its obligations under the Agreement, including those in  
21 2017 and 2018. Unibest incurred or will incur all of its alleged

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22 <sup>10</sup> Black's Law Dictionary and the Uniform Commercial Code define "lost  
23 profits" broadly: "[a] measure of damages that allows a seller to collect the  
24 profits that would have been made on the sale if the buyer had not breached.  
U.C.C. § 2-708(2)." Notably, the definition does not limit a plaintiff to  
claiming only lost profits from a third party.

25 <sup>11</sup> See *Kleven v. Geigy Agric. Chemicals*, 303 Minn. 320, 324, 227 N.W.2d 566,  
26 569 (Minn. 1975) (direct damages "arise out of the breach itself," while  
consequential damages "do not arise directly . . . from the breach of the  
contract itself, but are those which are the consequences of special  
circumstances known to . . . the parties when the contract was made").

1 damages for lost profits after Winfield terminated the Agreement.  
2 Therefore, Unibest's claim for lost profits is barred by the law of  
3 Minnesota; and as to the lost profits, Winfield's motion is granted.  
4 See *Ag-Chem*, 480 F.2d at 492 ("As a consequence, damages incurred  
5 after termination, including lost profits, were not recoverable.").

6 2. "Go-to-market strategy"

7 Unibest also alleges it suffered damages caused by Winfield's  
8 failure to "develop a marketing strategy for sales of the Products to  
9 the Market" and failure to "use commercially reasonable efforts to  
10 sell and promote the Products to the Market." See ECF No. 3 at 6, 9-  
11 10; ECF No. 38 at 15. Unibest claims "the estimated cost of obtaining  
12 replacement services for the ones Winfield failed to provide is  
13 \$975,000 . . . ." ECF No. 41 at 41. Broken out, this amount consists  
14 of "\$401,080 to attend trade shows to market the Products," "\$25,100  
15 to create marketing materials," "\$250,200 to develop new  
16 partnerships," and "\$300,000 to replace data and perform new research  
17 that should have been done under the Agreement." ECF No. 41 at 41-42.  
18 Unibest also claims an additional \$800,208 that Unibest has "already  
19 incurred . . . to develop the Soil Analytics Database that Winfield  
20 should have developed under the Agreement." ECF No. 41 at 42.

21 a. Research and development

22 Unibest asserts that Section (2)(a) of the Agreement, which  
23 obligated Winfield to "develop a marketing strategy for sales of the  
24 Products to the Market," impliedly obligated Winfield to conduct  
25 research and development on product performance and to develop a "Soil  
26 Analytics Database," which would purportedly be "used for marketing."

1 See ECF No. 38 at 14-15; ECF No. 41 at 16, 41-42. After all, Unibest  
2 argues, "[a] contract to build a house does not have to describe every  
3 single nail to be hammered." ECF No. 38 at 15.

4       However, Unibest's interpretation of the terms "marketing  
5 strategy" and "go-to-market strategy" stretches the Agreement's plain  
6 language beyond its breaking point. A contract to build a house need  
7 not describe every nail, but it must at least mention the house. In  
8 the same way, a contract establishing an affirmative duty to conduct  
9 more than a million dollars of research and database development must  
10 at least mention the research and the database.<sup>12</sup> The Court  
11 acknowledges that a marketing strategy can take a variety of forms,  
12 but the language of the Agreement simply does not support Unibest's  
13 claim.

14       Curiously, an example of the requisite language to establish  
15 such a duty is present in a contract that Unibest signed with Midwest  
16 Soil Management in 2010, well before the Agreement with Winfield was  
17 executed. See ECF No. 50, Exhibit B, C; see also Agreement at 1. In  
18 that contract, the parties agreed to following:

19           Midwest Soil is committed to funding and  
20           performing a study that involves the use of  
21           UNIBEST resin technology. The study shall be  
22           performed over a maximum of a 5 year period  
23           spanning 2010 through 2014 and shall encompass an  
          area of at least 10,000 acres with standard  
          sampling frequency. Midwest Soil shall reimburse  
          UNIBEST its cost for the resin product and  
          laboratory analysis as supplied for the study at

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24 <sup>12</sup> The terms "research" and "database" each appear only once in the  
25 Agreement. "Research" is mentioned in the context of describing the Market in  
26 which the products were to be sold. See Agreement at 1. "Database" appears  
only in reference to services that Unibest was obligated to perform in return  
for Winfield's payment of a \$60,000 Manufacturer Services Fee. See Agreement  
at 5.

1 the rate of \$15.00 per sample during the first 3  
2 years. After year 3, the parties agree to a  
3 thorough business review and access all aspects  
to determine if the remaining 2 years of sampling  
is necessary for project success.

4 ECF No. 50, Exhibit B at 2. Because there is no such language in its  
5 Agreement with Winfield, Unibest's claim that a "marketing strategy"  
6 encompasses research and development is unpersuasive.

7 Unibest further supports its claim by arguing that the parties  
8 entered into the Agreement with the understanding that Winfield would  
9 conduct research and build the soil database, a claim Winfield  
10 vehemently denies. See ECF No. 27 at 16-17. Where a contract term is  
11 unambiguous, the Court may not consider extrinsic evidence of the  
12 parties' intent. See *Brookfield Trade Ctr.*, 584 N.W.2d at 392 n. 1. As  
13 discussed above, the terms "marketing strategy" and "go-to-market  
14 strategy" simply do not encompass the research and development claimed  
15 by Unibest. The terms, as a matter of law, are unambiguous in this  
16 regard. Accordingly, the Court may not consider any evidence of the  
17 parties' intent and declines to address this argument.<sup>13</sup> Winfield's  
18 motion for summary judgment is granted insofar as it relates to  
19

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20  
21 <sup>13</sup> Even if the terms were ambiguous, the record contains insufficient  
22 evidence to establish a genuine dispute of material fact as to whether the  
23 parties intended the terms to encompass research and development. In fact,  
24 the record indicates that they clearly did not; Unibest CEO Mark Riess  
25 admitted in a July 14, 2014 email to Midwest Soil Management that "*Winfield  
26 has no involvement in the data side since the agreement only applies to  
hardware. We are free to seek partners on the data and modeling side as we  
see fit with no immediate impact to the agreement . . .*" ECF No. 50,  
Exhibit E (emphasis added). Other evidence in the record leads the Court to  
the same conclusion. See ECF No. 50, Exhibits C, D, F. To whatever degree  
Winfield conducted research and development of Unibest's products (e.g. in  
answer plots) or attempt to create a product database, it did so out of a  
good faith desire to market Unibest products, not out of any obligation under  
the Agreement.

1 Unibest's claims of damages for research and development and the Soil  
2 Analysis Database.

3 b. Failure to market

4 Setting aside the \$300,000 in alleged damages for additional  
5 research and the \$800,208 for development of the Soil Analytics  
6 Database, Unibest claims approximately \$675,000 in alleged damages due  
7 to Winfield's failure to market the products. See ECF No. 41 at 41-42.

8 Viewing all facts in the light most favorable to Unibest, a  
9 genuine dispute of material fact exists as to its damages arising  
10 directly out of Winfield's alleged breach of its contractual duty to  
11 "work with Unibest to develop a marketing strategy for sales of the  
12 Products to the Market." See Agreement at 2. Accordingly, Winfield's  
13 motion for summary judgment is denied insofar as it relates to  
14 Unibest's claim for damages - aside from research and development - it  
15 suffered directly as a result of Winfield's alleged failure to market  
16 the products. See Fed. R. Civ. P. 56(a).

17 Accordingly, **IT IS HEREBY ORDERED:**

18 1. As set forth above, Defendant Winfield Solutions' Motion for  
19 Summary Judgment, **ECF No. 25**, is **GRANTED IN PART AND DENIED IN**  
20 **PART.**

21 2. The parties are directed to **MEET AND CONFER** regarding a  
22 proposed case schedule that will align with one of the  
23 following trial dates: April 16, 2018; April 30, 2018; or June  
24 25, 2018.

25 3. **By no later than January 8, 2018, the parties shall jointly**  
26 **FILE a notice** that indicates their preferred trial date as

well as a proposed amended case schedule, including the following deadlines:

Witness and Exhibit lists: Lists filed and served: Objections filed and served:	
Deposition Designations: Designated Transcripts served: Cross-Designations served: Objections filed and served:	
All motions in limine filed	
Joint Proposed Pretrial Order filed and emailed to the Court	
Confer with Courtroom Deputy regarding JERS	<b>(At least 1 Week Before Pretrial Conference)</b>
<b>PRETRIAL CONFERENCE</b>	<b>Richland</b>
Mediation, if any, must be completed by	<b>(At least 90 Days Before Trial)</b>
Trial briefs, jury instructions, verdict forms, requested voir dire, and list of exhibits admitted without objection, filed and emailed to the Court	
<b>FINAL PRETRIAL CONFERENCE</b>	<b>(9:00 a.m. First day of trial)</b>
<b>JURY TRIAL</b>	<b>April 16, 2018; April 30, 2018; or June 25, 2018</b>

**IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and provide copies to all counsel.

**DATED** this 18<sup>th</sup> day of December 2017.

\_\_\_\_\_  
s/Edward F. Shea  
EDWARD F. SHEA  
Senior United States District Judge