Novolex Holdings, LLC v Illinois Union Ins. Co.
2024 NY Slip Op 30175(U)
January 12, 2024
Supreme Court, New York County
Docket Number: Index No. 655514/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

---X

NOVOLEX HOLDINGS, LLC,

Plaintiff,

- v -

ILLINOIS UNION INSURANCE COMPANY, LLOYD'S SYNDICATE 4000, BARBICAN TRANSACTION LIABILITY CONSORTIUM 9804, ARCH REINSURANCE (BERMUDA) LTD.,

Defendants.

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INDEX NO. 655514/2019

MOTION DATE ________

MOTION SEQ. NO. 014 015

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 014) 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 376, 377, 378, 403, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 505, 506, 507, 508, 529, 530, 531, 532, 533, 534, 535, 537, 538, 547, 548

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 373, 374, 375, 380, 382, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 405, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 490, 491, 492, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 543, 544, 545, 546

were read on this motion to/for JUDGMENT - SUMMARY[1].

This action involves an insurance coverage dispute between plaintiff Novolex Holdings, LLC (Novolex) and defendants Illinois Union Insurance Company (Illinois

[1] The court has reviewed and where appropriate considered additional documents mentioned in the parties' papers but omitted in this autogenerated caption.

Union), Lloyd's Syndicate 4000 (Lloyd's), Barbican Transaction Liability Consortium 9804 (Barbican) and Arch Reinsurance (Bermuda) Ltd. (Arch) (collectively, Insurers).[2]

In motion sequence number 014, Novolex seeks partial summary judgment as to liability on counts four, five, six, and seven of the amended complaint, asserting that the Insurers breached their obligations to pay the coverage amount pursuant to insurance policies issued by them. In motion sequence number 015, the Insurers move for summary judgment dismissing counts two through seven of the amended complaint.

Background

Novolex is a packaging manufacturer; nonparty The Waddington Group (TWG) manufactures and distributes consumer table-top products, such as plastic plates, cutlery and cups. (NYSCEF 375, JSUF ¶¶ 1-2.) Nonparty Costco Wholesale Corporation (Costco) was TWG's third largest customer by purchase volume. (*Id.* ¶ 27.) In July 2015, nonparty Jarden Corp. acquired TWG; in April 2016, Jarden Corp. was, in turn, acquired by nonparty Newell Brands, Inc. (Newell). (*Id.* ¶¶ 6-7.)

On May 2, 2018, Novolex and Newell executed an Equity Purchase Agreement (EPA) whereby Novolex agreed to acquire TWG from Newell; the transaction closed on June 29, 2018. (*Id.* ¶¶ 8-10; NYSCEF 354, EPA.) In connection with the TWG transaction, Novolex purchased representation and warranty insurance policies comprising of four policies: primary, first excess, second excess and third excess (RWI Policies). (NYSCEF 375, JSUF ¶ 11; NYSCEF 260, RWI Policies.) Nonparty Euclid

[2] The court implores the parties to review and follow Part 48 Procedures. Describing an exhibit on NYSCEF as "Ex. 034 - NWL00496104," for example, is useless to the court. The parties shall describe what the exhibit is, for example, "April 27, 2018 Email Re: Pegasus Proposal."

Transactional, LLC issued the primary policy which is "subject to a $30 million Limit of Liability and a Retention of $17,062,500" (Primary Policy). (NYSCEF 375, JSUF ¶ 12.) Illinois Union issued the "second tier excess policy," subject to the same representations, covenants and retention as those in the Primary Policy, and incorporating "the same terms, definitions, conditions, exclusions, and limitations" other than the Limit of Liability (Illinois Union Policy). (*Id.* ¶ 13.) The Illinois Union Policy, which indemnifies Novolex up to $50 million of any loss to the extent it exceeds $97,062,500, is subject to a quota share of participation of 70% ($35 million) to Illinois Union; the remaining 30% ($15 million) is shared by Barbican ($2.5 million), Arch ($2.5 million) and Lloyd's ($10 million). (*Id.* ¶¶ 14-15.)

Importantly, the Primary Policy provides "[b]oth the existence of any Breach and the amount of any Losses resulting from such breach shall be determined without giving effect to any 'material,' 'materiality,' 'Material Adverse Effect,' or similar qualification contained in or otherwise applicable to the representations or warranties contained in Article III" in the EPA. (NYSCEF 260, Primary Policy § II.D; *see also* NYSCEF 375, JSUF ¶ 16.) Novolex refers to the above as a "materiality scrape," and alleges that its purpose is "to substantially expand the scope of coverage for breaches of the contractual representations and warranties." (NYSCEF 196, Amended Complaint ¶¶ 3, 93-94.[3]) Novolex alleges that, by means of the materiality scrape, it "obtained the broadest representations and warranties insurance available in the market and paid commensurate premium for such coverage." (*Id.* ¶ 3.)

[3] The parties agreed that the amended complaint e-filed at NYSCEF 196 is the operative amended complaint. (NYSCEF 218, So-Ordered Stipulation.)

On October 8, 2018, several months after the closing of the transaction under the EPA, Novolex submitted a claim to the Insurers asserting that Newell had breached section 3.18 of the EPA; on June 25, 2019, Novolex submitted a supplemental claim asserting that Newell had also breached sections 3.7(a) (i), 3.7 (a) (ii), 3.7 (b), 3.10 (b) and 3.20. (NYSCEF 375, JSUF ¶¶ 31-32; NYSCEF 205, Claim Notice; NYSCEF 206, Supplemental Claim Notice.)

On October 16, 2019, Novolex commenced an action against John Wurzburger, TWG's former CEO, in the United States District Court for the Eastern District of Kentucky for "negligent and fraudulent misrepresentation, conversion, breach of contract and fiduciary duty." (NYSCEF 375, JSUF ¶ 33; NYSCEF 400, Wurzburger Action Complaint.) On October 25, 2019, Novolex commenced an action against Newell in the Superior Court of the State of Delaware for "fraudulent inducement and violation of the South Carolina Unfair Trade Practices Act" (Delaware Action). (NYSCEF 375, JSUF ¶ 34; NYSCEF 399, Delaware Action Complaint.)

On September 23, 2019, Novolex commenced this action, alleging that the Insurers are responsible for providing coverage under the "third tier" insurance policies, but they "utterly rebuked their commitments" to cover Novolex's loss in connection with its purchase of TWG where it incurred in excess of $250 million in losses due to concealments by TWG-Newell of the truth of TWG's business and the false representations in the EPA. (NYSCEF 196, Amended Complaint ¶ 1.)

Novolex alleges that, shortly after the closing in June 2018, it learned that, by early 2018, Costco "had informed TWG of its intent to take substantially all of its business elsewhere, following a lengthy period of repeated failures by TWG to live up to

its side of the bargain." (*Id.* ¶ 4.) Novolex further alleges that Newell breached multiple representations and warranties in the EPA due to TWG's loss of its business relationship with Costco and its repeated failures, such as merchandise and service breakdowns, poor communications and ill-conceived pricing practices, in the period preceding the sale of TWG. (*Id.* ¶¶ 4, 110-127.)

In the amended complaint, Novolex asserts eight causes of action: declaratory judgment (count I); breaches of various provisions of the RWI Policies that correspond to the EPA representations and warranties, including the four specific EPA sections (counts II-VII); and breach of the implied covenant of good faith and fair dealing (count VIII). (*Id.* ¶¶ 226-262.)

Discussion

Legal Standard

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate disputed material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Where this showing is made by the movant, the burden then shifts to the party opposing the motion to produce sufficient evidentiary proof to establish the existence of a material issue of fact which requires a trial of the action. (*Id.*) The motion should be denied if there is doubt about the existence of a material disputed issue of fact. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012].) Where different conclusions may be reasonably drawn from the evidence, the motion should also be denied. (*Jaffe v Davis*, 214 AD2d 330 [1st Dept 1995].) However, bare allegations or conclusory assertions are insufficient to create genuine issues of fact to

defeat the summary judgment motion. (*Zuckerman v City of New York*, 49 NY2d 557 [1980].)

Delaware Law

The parties agree that the EPA is governed by Delaware law. (NYSCEF 376, Novolex's Memo in Support of Its Motion for Partial Summary Judgment at 22;[4] NYSCEF 380, Insurers' Memo of Law in Support of Their Motion for Partial Summary Judgment at 14; see also NYSCEF 354, EPA § 12.10 [a].)

EPA Section 3.18 (Count Six)

Section 3.18 provides,

> "Section 3.18 of the Seller Disclosure Letter sets forth a true and correct list of each of the ten largest customers and ten largest suppliers of the Purchased Companies, taken as a whole (such customers and suppliers, the 'Material Relationships'), as determined, in the case of customers, by payments by each such customer and, in the case of suppliers, by value of sales by each such supplier, during the twelve months ended February 28, 2018. Since December 31, 2017, there has not been any written notice or, to the Knowledge of Parent, any oral notice, from any such Material Relationship that such Material Relationship has terminated, canceled or adversely and materially modified or intends to terminate, cancel or adversely and materially modify any Contract between a Purchased Company and any such Material Relationship."

(NYSCEF 354, EPA at 29-30.) It is undisputed that "Material Relationship" is defined as the ten largest customers and ten largest suppliers of TWG and that Costco was the third largest customer of TWG (i.e. the Purchased Company) by volume of purchase. (NYSCEF 375, JSUF ¶¶ 26-27.) It is also undisputed that "Contract" "means any contract, agreement, license, lease, guaranty, indenture, sales or purchase order or other legally binding commitment in the nature of a contract, whether written or oral."

[4] NYSCEF pagination.

(NYSCEF 354, EPA at 82 [Section 11.1].) The EPA defines "Contracts" that are "Material Contracts," which the parties agree includes "(1) U.S. Vendor Commitment Agreement between Waddington North America, Inc. and Costco Wholesale Corporation, dated August 10, 2016, and (2) Costco Wholesale Basic Vendor Agreement between Waddington North America, Inc. and Costco Wholesale Corporation, dated June 28, 2012." (NYSCEF 375, JSUF ¶ 23]; NYSCEF 354, EPA at 20 [Section 3.10].)

> "Under Delaware law, the principles of contract interpretation are well-established and grounded on the parties' objective intent at the time of contracting as expressed by the plain language contained within their agreement's four corners. The Court construes a contract as a whole, giving purpose to each provision. And the Court accords a contract's clear and unambiguous terms . . . their ordinary meaning. A court must accept and apply the plain meaning of an unambiguous term . . . insofar as the parties would have agreed ex ante. If a writing is plain and clear on its face, i.e., its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent.
>
> Absent some ambiguity, Delaware courts will not destroy or twist [contract] language under the guise of construing it. Ambiguity exists only if a term is fairly or reasonably susceptible of more than one meaning. So a contract is not ambiguous simply because the parties disagree on its meaning. Even if the bargain they strike ends up a bad deal for one or both parties, the court's role is to enforce the agreement as written. It is not the court's role to rewrite the contract . . . [or] allocat[e] the risk of an agreement after the fact . . . .
>
> Where a contract is ambiguous, the interpreting court must look beyond the language of the contract to ascertain the parties' intentions. If a contract is ambiguous, then the Court may consider extrinsic evidence of its meaning. But even when extrinsic evidence is admissible, the Court cannot rely on it unless it speak[s] to the intent of all parties to a contract. If extrinsic evidence fails to forge some connection between the expectations of the contracting parties . . . and the way the contract terms were articulated by those parties[,] then the evidence provides an incomplete guide with which to interpret contractual language."

(*Ahmed Al Balooshi v GVP Global Corp*., 2022 Del. Super. LEXIS 80, at *11-12 [Super Ct Feb. 25, 2022, No. N19C-10-215 CEB] [internal quotation marks and citations omitted].)

Section 3.18 is unambiguous as it is plain and clear on its face. Pursuant to Section 3.18, Newell represented that, since December 31, 2017, Newell had not received any written notice or any oral notice from Costco that Costco terminated, cancelled, or adversely and materially modified its contract with TWG or that Costco intended to terminate, cancel or adversely and materially modify its contract with TWG. The language specifically applies to termination, cancellation, and modification of contracts and not of the general business relationship between TWG and Costco.

Novolex asserts that, even if the court interprets this provision to apply only to contracts, Costco expressed an intent to Newell to modify the June 28, 2012 Basic Vendor Agreements between TWG and Costco. Specifically, Novolex asserts that the Basis Vendor Agreement incorporates purchase orders that have been or will be signed, and thus, when Newell became aware that Costco planned to reduce its volume of business with TWG, Newell was obligated to inform Novolex of this modification of the contract involving future purchase orders not yet signed in accordance with Section 3.18 of the EPA.

There are issues with Novolex's position. First, Novolex's language "purchase orders that will be signed" means there is an intent to actually sign and enter into those purchase orders. However, Novolex's complaint is about Costco not signing a purchase order. Novolex asserts that Newell was required to inform Novolex of Costco's intent to

reduce business, i.e., not sign and enter into future purchase orders in the volume Costco was previously do so.

Second, Costco's failure to enter into future purchase orders is not a modification of the Basic Vendor Agreement. Section A of the Basic Vendor Agreement provides,

> "All sales and deliveries of all merchandise by Vendor to Costco Wholesale (or other purchaser under paragraph C below), and all purchase orders by Costco Wholesale (or other purchaser under paragraph C below) to Vendor, will be covered by and subject to the terms of each of the following documents (collectively the 'Agreement Documents'):
> • This Basic Vendor Agreement;
> • The attached Costco Wholesale Standard Terms United States (2004), as they may be amended in writing by Costco Wholesale from time to time ('Standard Terms'); and
> • Each Vendor Purchase Program Agreement, Item Agreement, or any other agreements (such as warehouse displays, promotions or rebates) that have been or will be signed between Vendor and Costco Wholesale."

(NYSCEF 200, Basic Vendor Agreement at 2.) The Costco Standard Terms provide that the purchase orders, themselves, are contracts – i.e., Costco's acceptance of TWG's offer to sell. (NYSCEF 201, Standard Terms § 2.) Further, the Costco Standard Terms provide that "projections, any past purchasing, prior history and representations about quantities to be purchased are not binding." (*Id.*) Thus, a future purchase order is not a binding contract. The phrase "future purchase order" conflicts with language of the Standard Terms because a purchase order must be accepted in order to be a purchase order. Costco's decision to not entered into purchase orders at the same volume as in the past was not a modification of the Basic Vendor Agreement. Thus, even if Costco informed Newell of an intent to reduce Costco's purchasing volume, Newell's failure to inform Novolex of such was not a violation of Section 3.18 of the EPA.

EPA Section 3.7 (b) (Count Four)

Section 3.7 (b) states that "[d]uring the period beginning on December 31, 2017 and ending on [May 2, 2018], there has not been any Effect which has had or would reasonably be expected to have a Material Adverse Effect." (NYSCEF 354, EPA at 19.) Section 11.1 defines "Material Adverse Effect" as

> "any change, effect or event (each, an "Effect") that, individually or in the aggregate, has been or is reasonably expected to be materially adverse to the condition (financial or otherwise) or results of operations of the Business or the Purchased Companies, taken as a whole... ."

(*Id*. at 86.) "Purchased Companies" is defined to include WTG. (*Id*. at 89.)

Novolex asserts that it is entitled to coverage for Newell's breach of this representation, asserting that TWG's business suffered an adverse change when Costco declined to feature TWG's upscale plastic plates and cutlery products in Costco's October and Thanksgiving multi-vendor mailers (MVMs), products which had be featured in previous MVMs dating back to 2014. (*See* NYSCEF 286-293, 2014-2017 MVMs.) Novolex asserts that TWG's sales were largely drive by TWG's inclusion in the MVMs. Novolex also asserts TWG's business suffered an adverse change as a result of TWG's (1) pricing, asserting that TWG granted lower pricing to Costco's competitors and charged Costco a surcharge, (2) defective packaging and (3) shipment of defective products. (*See* NYSCEF 196, Amended Complaint ¶ 147.)

Materiality Scrape

The parties first dispute whether the "materiality scrape" provision in the RWI Policies applies to Section 3.7(b). Section II D of the RWI Policies provides that "[b]oth the existence of any Breach and the amount of any Losses resulting from such Breach shall be determined without giving effect to any 'material', 'materiality', 'Material Adverse Effect' or similar qualifications contained in or otherwise applicable to the representations or warranties contained in Article III of the Acquisition Agreement." (NYSCEF 260, RWI Policies at 15.) The Acquisition Agreement is the EPA. (*Id.* at 14 [§ 2 A], 12 [Declarations, Item 7].)

The Insurers argue that applying the materiality scrape to Section 3.7(b) would render the representation in that provision meaningless because it would remove the entire phrase "Material Adverse Effect" from the provision. Novolex argues that the Delaware Chancery Court opined on this issue in *Osram Sylvania, Inc. v Townsend Ventures, LLC*, 2013 Del. Ch. LEXIS 281 (Ch Nov. 19, 2013, No. 8123-VCP) and rejected the Insurers' interpretation.

In *Osram*, the Chancery Court declined to dismiss a breach of contract claim for breach of a similar representations provision. The Chancery Court found that the "materiality scrape" contained in an indemnification provision[5] served "to neutralize the effect of any 'materiality qualifiers' in determining whether there have been indemnifiable breaches of the representations and warranties." (*Id.* at 33.) The

[5] This provision provides that the "[s]ellers agreed to indemnify [buyer] for any losses or damages resulting from: 'a breach of or inaccuracy in a representation or warranty made by [Sellers] in Article 3 . . . without giving effect to any qualifications as to 'materiality,' [*13] 'Material Adverse Effect,' or similar words.'" (*Osram Sylvania, Inc.*, 2013 Del Ch LEXIS 281, at *12-13, quoting indemnification provision.)

Chancery Court further opined that, if it "were to dismiss this breach of contract claim on the grounds that the loss of [two salespersons] was not a Material Adverse Change, the Court would have to ignore the adjective 'material' in evaluating the sufficiency of [the] corresponding indemnification claim." (*Id.* at 34.)

Osram, although a Delaware case, is not instructive because the Chancery Court analysis focuses on the phrase "Material Adverse Change," a phrase not specifically mentioned in the indemnification provision at issue in *Osram*. The Chancery Court pointed out that removing the word material from "Material Adverse Change" leaves only the phrase "Adverse Change" which would permit the court to uphold the indemnification clause even if the departure of the salespersons was immaterial. (*Id.*) The Chancery Court did not analyze the effect of removing the entire phrase "Material Adverse Effect," which was specifically mentioned in the materiality scrape of the indemnification clause, from the representation provision and whether that creates an ambiguity.

Here, if the court applies the materiality scrape as it is drafted to this particular provision, the entire phrase "Material Adverse Effect" would be removed from Section 3.7(b) and that creates an ambiguity as it would be impossible to give both Section 3.7(b) of the EPA and Section II D of the RWI Policies, which specifically references Article III of the EPA, meaning. (*See Alliance Indus. v Longyear Holdings, Inc.*, 854 F Supp 2d 321, 332 [WDNY 2012].)

Nevertheless, "ambiguities in a contract should be construed against the drafter." (*Twin City Fire Ins. Co. v Delaware Racing Assn.*, 840 A2d 624, 630 [Del 2003] [citations omitted]; *O'Brien v Progressive N. Ins. Co.,* 785 A2d 281, 288 [Del 2001]

[citation omitted] ["where an ambiguity does exist, the doctrine of *contra proferentem* requires that the language of an insurance policy be construed most strongly against the insurance company that drafted it"].) Here, Section II D of the RWI Policies, which by its own language states its applicability to Article III of the EPA, was drafted by the Insurers. Thus, the materiality scrape must be construed in Novolex's favor.

Adverse Effect

Again Section 3.7(b) provides that "[d]uring the period beginning on December 31, 2017 and ending on [May 2, 2018], there has not been any Effect which *has had or would reasonably be expected* to have a Material Adverse Effect." (NYSCEF 354, EPA at 19 [emphasis added].) On this record, it cannot be determined that, during the time prescribed time period, there was an Effect that has had an Adverse Effect. Further, as to whether any of the adverse effects were reasonably expected presents an issue of fact. Thus, summary judgment is denied as to this provision.

EPA Section 3.10 (b) (Count Five)

Section 3.10 (b) provides, in relevant part,

> "[n]o Purchased Company is in breach or default of, or has received any written notice of any breach or default or event that, with notice or lapse of time, or both, would constitute a default by such Person under any Material Contract, except as would not reasonably be expected to result in [] Liability to the Purchased Companies, taken as a whole, or otherwise [] interfere with the conduct of the Business, taken as a whole, in substantially the manner currently conducted."

(NYSCEF 354, EPA at 22 [emphasis added; showing relevant text after application of the materiality scrape].) Novolex asserts that Newell was in breach of the MFN Pricing Provision of Costco's Standard Terms because, in March 2018, Newell granted lower acquisition pricing to Costco's direct competitors. The MFN Pricing Provision that

Novolex directs the court to is a paragraph of a cover letter to Costco's Standard Terms which states,

> "[i]n addition, [Costco] believe[s] it is important to reiterate our basic merchandising philosophy:
>
> - We expect all suppliers to consistently and voluntarily quote the lowest possible acquisition price available on all items. A supplier who does not consistently and voluntarily quote the lowest prices to our buyers will be permanently discontinued as a purchasing source for Costco Wholesale."

(NYSCEF 201, Costco Standard Terms at 2.) While the Standard Terms is an agreement along with the Basic Vendor Agreement, a statement of Costco's merchandising philosophy, which clearly provides that it is an expectation, is not a binding contract. Further, Novolex does not address how a sentence in a cover letter is a binding agreement between TWG and Costco. In fact, the cover letter clearly delineates the changes to actual provisions of the Standard Terms and Costco's merchandising philosophy, under which the statement at issue falls. (*Id.*) The philosophy statement is not a binding agreement which was breached. Rather, a failure by TWG to quote the lowest prices to Costco would only be a failure to meet Costco's expectation. Novolex cannot state a breach of this provision based on a failure to comply with the "MFN Pricing Provision."

Novolex also argues that Newell and TWG breached the Packaging Specification Provision by shipping to Costco products in defective packaging. Novolex cites Section 1(a) of the Standard Terms, which states, in relevant part,

> "'Merchandise' includes ... all packaging... . Vendor shall comply with all packaging (including pallets) requirements of the carrier and Costco Wholesale ... Vendor shall comply with Costco Wholesale's Structural Packaging Specifications and inspect all Merchandise prior to shipment to

> ensure quality, safety and conformity and to ensure that the Merchandise is property packed and loaded to prevent ransit damage and tampering.

(NYSCEF 201, Standard Terms at 3.) The court agrees that if Newell-TWG failed to comply with this provision, it could constitute a breach. However, there is an issue of fact as to whether there was, in fact, a breach. There are also issues of fact as to whether Newell was sufficiently put on notice that it was in breach or default of this provision when Costco complained of packaging issues, and whether the packaging issues constituted a default under the Standard Terms, except as would not reasonably be expected to result in Liability to TWG, and whether the alleged breach actually interfered with TWG and Costco's business relationship as Novolex asserts.

Novolex further argues that Newell breached Section 5 of the Standard Terms, the "Pricing Notice Provision," by surcharging Costco's products. Again, there are issues of fact as to whether this provision was breached and whether the alleged breach actually interfered with TWG and Costco's business relationship as Novolex asserts.

Summary judgment is denied, in part, as to breaches based on the Packaging Specification and Pricing Notice Provisions. Any claim based on a breach of "MFN Pricing Provision" is dismissed.

<u>EPA Section 3.20 (Count Seven)</u>

Section 3.20, after applying the materiality scrape, provides,

> "[w]ith respect to any express warranty or guaranty as to goods sold, or services provided, by any Purchased Company (a "Warranty"), there is no pending claim or, to the Knowledge of Parent, threatened claim alleging any [] breach of any Warranty (other than individual warranty claims incurred in the ordinary course of business consistent with past practice)."

(NYSCEF 354, EPA at 30.) Plaintiff directs the court to two warranties in the Standard Terms, which require all goods be "shipped and sold in compliance with all applicable industry standards" and "without defect" (Plf. Brief at 25).

In Section 9 of the Standard Terms, "Vendor warranties all Merchandise to be … packaged…shipped and sold in compliance with all applicable industry standards … ." (NYSCEF 201, Standard Terms at 4.) In Section 11, "Vendor warranties and represents … that the Merchandise is without defects… . (*Id.*) Section 3.20 requires a pending claim or threatened claim alleging breach of these warranties. There is no evidence that Costco ever filed a claim. However, it cannot be determined on this record as to whether Costco threatened a claim, and this presents an issue of fact. Summary judgment is denied.

<u>EPA Sections Where Only Insurers Seek Summary Judgment</u>

EPA Section 3.7 (a) (i) (Count Two) and EPA Section 3.7 (a) (ii) (Count Three)

Section 3.7 (a) (i), after applying the materiality scrape, provides,

> "[e]xcept as set forth in Section 3.7 of the Seller Disclosure Letter, during the period beginning on [March 31, 2018] and ending on [May 2, 2018], (i) the Purchased Companies have conducted the Business in the ordinary course, consistent with past practice in all [] respects."

(NYSCEF 354, EPA at 19.) Section 3.7 (a) (ii) provides that "there has not been any action taken that, if taken during the period of [March 31, 2018] through [May 2, 2018] would require Purchaser's consent under section 5.1." (*Id.*) Section 5.1, after applying the materiality scrape, requires Newell, among other things, to (i) "conduct the Business in the ordinary course, consistent with past practice" and (ii) "use commercially reasonable efforts to preserve intact the goodwill associated with the Business . . . with customers, suppliers … ." (*Id.* at 36.)

Delaware courts have interpreted "the contractual term ordinary course to mean the normal and ordinary routine of conducting business." (*Level 4 Yoga, LLC v CorePower Yoga, LLC*, 2022 Del. Ch. LEXIS 49, at *51 [Ch Mar. 1, 2022, No. 2020-0249-JRS] [internal quotation marks and citation omitted].) "[H]owever, when an ordinary course provision includes the phrase 'consistent with past practice' or a similar phrase, the court evaluates the second category only." (*Id.* at *52 [internal quotation marks and citation omitted].)

An analysis of whether TWG conducted Business consistent with past practices is fact intensive inquiry not suited for summary judgment. Neither party has established as a matter of law their entitlement to such on this issue.

Relationship Between Alleged Contractual Breach and Plaintiff's Loss

The Insurers assert that Novolex bears the burden of demonstrating a proximate relationship between Newell's alleged breach of the EPA representations and Novolex's loss, and that the loss must flow from a contractual violation. However, the RWI Policies provide that "'Loss' means the aggregate of (x) any loss, liability, demand, claim, action, cause of action, cost, damage, fee, deficiency, tax, penalty, fine, assessment, interest or expense arising out of or resulting from a Breach … ." (NYSCEF 260, RWI Policies at 16 [§II. P].)

"Under Delaware law, the term 'arising out of' is broadly construed to require some meaningful linkage between the two conditions imposed in the contract. (*Pac. Ins. Co. v Liberty Mut. Ins. Co.*, 956 A2d 1246, 1257 [Del 2008] [citation omitted].) This is a much broader standard than proximate cause.

In their reply, the Insurers fail to address this lower standard. Instead, the Insurers focus on Novolex's alleged failure to submit evidence of proximate cause, which is not the standard the court is required to apply here. The Insurers' argument regarding a failure to show proximate cause is rejected.

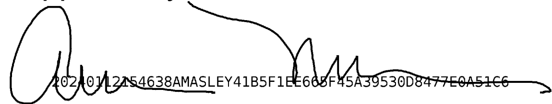
Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that defendants' motion for summary judgment is granted only to the extent that Count Six (Section 3.18) of the amended complaint is dismissed in its entirety and Count Five is dismissed to the extent it is based on a breach of the MFN Pricing Provision, and is otherwise denied; and it is further

ORDERED that the balance of this action is severed and continued; and it is further

ORDERED that the parties shall file motions in limine within 60 days of the date of this decision and appear for a Trial Scheduling Conference on April 18, 2024 at 4 p.m., which conference may be rescheduled if motions in limine are pending. Failure to initiate a motion in limine within 60 days waives the opportunity to file such a motion.



1/12/2024		
DATE		**ANDREA MASLEY, J.S.C.**

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE