An agreement to agree doth not a contract make

Phytelligence, Inc. v. Washington State University, Case No. 2019-2216 (Fed. Cir. 2020)

By: Barry Irwin & Peggy Herrmann | August 31, 2020

Although Phytelligence. Inc. ("Phytell") and Washington State University ("WSU") entered into a Propagation Agreement ("the Agreement") for Phytell to grow WSU's patented "WA 38" apple trees for research, the Court of Appeals for the Federal Circuit affirmed that the Agreement lacked the language and context permitting Phytell to option commercialization of those trees without an additional agreement between the parties. This case emphasizes the importance of careful drafting of both contract language and communications negotiating that language.

The Agreement, at Section 4, included an option for Phytell to later commercialize those trees but that option required a separate contract.[1] When WSU issued a request for proposals to companies interested in commercializing the trees, Phytell did not submit a proposal. WSU chose a different exclusive licensee as its agent, who was required to provide nonexclusive sublicenses to members of a local agribusiness association, the Northwest Nursey Improvement Institute ("NNII"). When Phytell tried to exercise its option, Phytell was directed by the exclusive licensee to become an NNII member, but Phytell refused. WSU, nonetheless, provided Phytell with three options to commercialize the WA 38 trees (two of which did not require NNII membership), but Phytell rejected them. Phytell sued WSU for breach of the Agreement for entering into the exclusive license and not honoring the option. The district court granted summary judgment in favor of WSU, and the Court affirmed.

The Court rejected Phytell's argument that Section 4 of the Agreement was an enforceable agreement with open terms and not an unenforceable agreement to agree. Under Washington law, which governed the Agreement, an agreement to agree "requires a further meeting of the minds of the parties without which it would not be complete."[2] If an agreement is too indefinite and uncertain, a court will not enforce it so as to avoid catching parties in surprise contractual obligations. In contrast, an agreement with open terms does not require a further meeting of the minds of the parties, as those terms can easily be supplied by the court or other authoritative source, such as an intrinsically supplied formula for calculating the open term or the Uniform Commercial Code. As required by Washington law, the Court looked to the reasonable meaning of the contract language to determine the parties' intent and gave the words in the contract their ordinary meaning. The Court affirmed that the Agreement's plain terms required that Phytell's exercise of the option demanded a future contract between the parties. ("[Phytell] will need to sign a separate contract with [WSU], or an agent of [WSU], to exercise this option.") Because this required a further meeting of the minds with WSU or its agent—the exclusive licensee—and provided no objective method to determine the terms of that separate contract, Section 4 was an unenforceable agreement to agree.

The Court further rejected Phytell's argument that extrinsic evidence supported a different interpretation or created a material factual dispute to prevent summary judgment. Although Washington law does permit the examination of context surrounding an agreement's execution, extrinsic evidence is only used to determine the meaning of specific terms, not to contradict or modify the written language. Phytell argued that the "separate contract" needed was merely WSU's form license which included WSU-approved standard licensing terms. However, Phytell and WSU had numerous communications regarding Section 4, in which WSU repeatedly indicated that it was not sure, at the time of the Agreement, how the WA 38 trees would be licensed and to which Phytell acknowledged that the Agreement was a precursor to another agreement and was satisfactory as is. In arguendo, even if the form license was the separate, required contract, a condition of the form license was membership in the NNII, a condition which Phytell previously refused.

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[1] Section 4 of the Agreement states: "If [Phytell] is an authorized provider in good standing . . . by signing this Agreement, [Phytell] is hereby granted an option to participate as a provider and/or seller of [WA 38 trees], if the Cultivar is officially released by WSU and becomes available for licensing by [WSU] . . . . *[Phytell] will need to sign a separate contract with [WSU], or an agent of [WSU], to exercise this option.*" (emphasis added).

[2] *Phytelligence, Inc.*, at *8.