IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FORTIS ADVISORS LLC, in its capacity as the Representative of Former Equityholders in Rempex Pharmaceuticals, Inc.,	)	
Plaintiff,	)	C.A. No. 2019-0236-KSJM
v.	)	
THE MEDICINES COMPANY, and MELINTA THERAPEUTICS, INC.,	)	
Defendants.	)	
THE MEDICINES COMPANY,	)	
Cross-Claim Plaintiff,	)	
v.	)	
MELINTA THERAPEUTICS, INC.,	)	
Cross-Claim Defendant.	)	

ORDER RESOLVING MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION TO DISMISS

1. Defendant The Medicines Company ("MedCo") acquired Rempex Pharmaceuticals, Inc. ("Rempex") pursuant to a merger agreement dated December 3, 2013 (the "Merger Agreement").[1] MedCo agreed to pay $140 million up front and $200 million post-closing. The post-closing payments were contingent

[1] C.A. No. 2019-0236-KSJM Docket ("Dkt.") 1, Verified Compl. ("Compl.") Ex. A.

upon achievement of contractually defined "milestone" events relating to the development and commercialization of certain drug candidates acquired through the merger.

2. This litigation concerns a $30 million post-closing payment due upon the completion of "Milestone #4," which the Merger Agreement defines as regulatory approval by the European Medicines Agency of a drug called "Vabomere."[2] Around November 20, 2018, the European Medicines Agency approved Vabomere, thus triggering the $30 million payment obligation.

3. The defendants do not dispute that Milestone #4 has been achieved or that the former Rempex equityholders are owed the corresponding $30 million milestone payment. They dispute only which defendant must make the payment. After MedCo acquired Rempex, but before Milestone #4 was achieved, MedCo sold Vabomere to Defendant Melinta Therapeutics, Inc. ("Melinta") pursuant to a purchase and sale agreement dated November 28, 2017 (the "Melinta-MedCo Agreement").[3] MedCo claims that the Melinta-MedCo Agreement obligates Melinta to make the payment under Milestone #4. Melinta disclaims any such obligation.

[2] Merger Agreement § 2.6(a). Vabomere was formerly called "Carbavance." Compl. ¶ 4.
[3] Compl. Ex. B.

4. The Merger Agreement names Plaintiff Fortis Advisors LLC ("Fortis" or "Plaintiff") as the representative of former Rempex equityholders. On March 28, 2019, Fortis filed a Verified Complaint (the "Complaint") against MedCo and Melinta to recover payment for Milestone #4. The Complaint alleges three counts: Counts I and II against MedCo for breach of the Merger Agreement and Count III against Melinta for breach of the Melinta-Medco Agreement.

5. MedCo answered Counts I and II of the Complaint, and Fortis subsequently filed a motion for partial judgment on the pleadings as to those Counts. Melinta did not answer the Complaint, but instead filed a motion to dismiss Count III. The parties fully briefed both motions, and the Court heard oral arguments on September 19, 2019. MedCo also asserted a cross-claim against Melinta[4] and moved for judgment on the pleadings as to that cross-claim.[5] The parties agreed to present that motion separately.

I. FORTIS'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AS TO COUNTS I AND II

6. Under Court of Chancery Rule 12(c), a motion for judgment on the pleadings may be granted "when no material issue of fact exists and the movant is

[4] Dkt. 6, Def. The Medicines Company's Answer, Defenses and Verified Cross-Cl. ("Answer").

[5] Dkt. 37, Def. and Cross-Cl. Pl. The Medicines Company's Mot. for J. on the Pleadings.

entitled to judgment as a matter of law."[6] A motion for judgment on the pleadings "is a proper framework for enforcing unambiguous contracts,"[7] such as the Merger Agreement in this case. Thus, the Court may "consider the unambiguous terms of exhibits attached to the pleadings, including those incorporated by reference."[8] Under Rule 12(c), "a trial court is required to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party."[9]

7. Fortis argues that it is entitled to judgment as a matter of law on Counts I and II because the Merger Agreement obligates MedCo to make the $30 million payment required upon achievement of Milestone #4. Fortis maintains that MedCo remains responsible for that payment regardless of Melinta's obligations under the Melinta-MedCo Agreement. As discussed above, MedCo concedes that Milestone #4 was achieved,[10] that the applicable milestone payment became due and owing on November 20, 2018,[11] and that neither MedCo nor Melinta has made the

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[6] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).

[7] *OSI Sys., Inc. v. Instrumentarium Corp.*, 892 A.2d 1086, 1090 (Del. Ch. 2006) (quoting *NBC Universal, Inc. v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005)).

[8] *Id.*

[9] *Desert Equities*, 624 A.2d at 1205.

[10] Answer ¶ 38.

[11] *Id.* ¶ 59.

$30 million payment.[12] MedCo argues that it properly assigned its obligations to make milestone payments to Melinta and that, after this assignment, MedCo transformed from a primary obligor for Milestone #4 into a "guarantor of collection."[13]

8. Delaware courts follow the objective theory of contracts, giving words "their plain meaning unless it appears that the parties intended a special meaning."[14] In practice, the objective theory of contracts requires that a court "give priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions."[15]

9. MedCo's argument turns on the plain language of Section 2.6(c)(i) of the Merger Agreement, which conditionally allows MedCo to assign or transfer its obligations under the Merger Agreement:

> [T]he Buyer . . . shall not . . . license, sublicense, assign or transfer the Company Intellectual Property covering the applicable Product or Product Candidate subject to any

[12] *Id.* ¶ 47.

[13] Dkt. 37, Def. and Cross-Cl. Pl. The Medicines Company's Answering Br. in Opp'n to Pl.'s Mot. for Partial J. on the Pleadings and Br. in Supp. of its Mot. for J. on the Pleadings ("MedCo Ans. Br.") at 10–13.

[14] *Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 104 (Del. 2013) (citing *AT & T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008)); *see also Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014) ("A contract's construction should be that which would be understood by an objective, reasonable third party." (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010))).

[15] *In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016) (citing *Salamone*, 106 A.3d at 368).

> such Milestone . . . or otherwise transfer or convey the right to market or sell such Product or Product Candidate, to any Person . . . unless . . . the Buyer remains ultimately responsible for the payment of all applicable Milestone Payments if and as they become due and owing . . . .[16]

Relying solely on the word "ultimately" in the above-quoted provision, MedCo argues the Merger Agreement effectively permitted MedCo to unilaterally convert from a primary obligor to a guarantor. Because Section 2.6(c)(i) requires that MedCo remain "*ultimately* responsible for the payment of all applicable Milestone Payments,"[17] MedCo contends that the Merger Agreement permitted it to transfer its payment obligations provided that MedCo promised to answer for the payment of debt owed by the transferee. MedCo further reasons that when it transferred its obligation to make payments related to Milestone #4 to Melinta, Melinta became "liable in the first instance."[18] MedCo thus insists that Melinta must default before Fortis can resort to collecting from MedCo.

10. MedCo's interpretation of Setion 2.6(c)(i) ignores and conflicts with the remaining language in that provision. In full form, that provision provides that in the event of a transfer or assignment of rights, MedCo "remains ultimately responsible for the payment of all applicable milestone payments *if and as they*

[16] Compl. ¶ 27; Merger Agreement § 2.6(c)(i).

[17] Merger Agreement § 2.6(c)(i) (emphasis added).

[18] MedCo Ans. Br. at 14 (quoting *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 363845, at *12 n.71 (Del. Ch. Jan. 27, 2010)).

become due and owing."[19] Section 2.6(a) of the Merger Agreement provides that "upon . . . achievement" of the milestone events, MedCo "shall pay . . . the applicable Milestone Payment."[20] Put differently, the payment became due and owing upon achievement of the milestone event. Read together, the language in Sections 2.6(a) and 2.6(c)(i) obligates MedCo to make a milestone payment upon the achievement of the corresponding milestone event. To instead interpret Section 2.6(c) as first requiring Fortis to enforce its obligations against Melinta before resorting to payment from MedCo would render meaningless the phrase "as they become due and owing."[21]

11. The plain language of the Merger Agreement obligates MedCo to make payment for Milestone #4 at the time it became "due and owing," which the parties concede has passed. For the foregoing reasons, Fortis's Motion for Partial Judgment on the Pleadings as to Counts I and II is GRANTED.

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[19] Merger Agreement § 2.6(c)(i) (emphasis added).

[20] *Id.* § 2.6(a).

[21] *See NAMA Hldgs., LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007), *aff'd*, 945 A.2d 594 (Del. 2008) (explaining the surplusage canon, which instructs that "[c]ontractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court" (citing *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 588 (Del. Ch. 2006))).

II. MELINTA'S MOTION TO DISMISS COUNT III

12. On a motion pursuant to Rule 12(b)(6), the Court accepts "all well-pleaded factual allegations in the Complaint as true, [and] accept[s] even vague allegations in the Complaint as 'well-pleaded' if they provide the defendant notice of the claim."[22] "A trial court is not, however, required to accept as true conclusory allegations 'without specific supporting factual allegations.'"[23] The Court "draw[s] all reasonable inferences in favor of the plaintiff[s], and den[ies] the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."[24]

13. Melinta argues that it is entitled to dismissal of Count III under this standard because Fortis is neither a party to nor a third-party beneficiary of the Melinta-MedCo Agreement and thus lacks standing to enforce it. In so arguing, Melinta relies on the language of Section 13.7 of the Melinta-MedCo Agreement, which expressly disclaims an intent to benefit third parties subject to certain delineated exceptions:

> No Third-Party Beneficiaries. This Agreement is solely for the benefit of the Parties . . . and no provision of this

[22] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011) (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)).

[23] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65–66 (Del. 1995); *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996)).

[24] *Cent. Mortg.*, 897 A.2d at 168 (citation omitted).

> Agreement shall be deemed to otherwise confer upon any other third parties any remedy, Claim, Liability, reimbursement or other right in excess of those existing without reference to this Agreement, provided that the Financing Sources and their respective successors, legal representatives and permitted assigns shall each be a third party beneficiary with respect to their respective rights . . . .[25]

14. "[A] third person, who is, in effect, a stranger to the contract, may enforce a contractual promise in his own right and name if the contract has been made for his benefit."[26] To adequately plead a third-party beneficiary claim under Delaware law, "(i) the contracting parties must have intended that the third party beneficiary benefit from the contract, (ii) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract."[27] With regard to the first element, Delaware courts "will look to the text of the [relevant] agreement and respect its plain language."[28] In the same

[25] Melinta-MedCo Agreement § 13.7. The term "Financing Sources" does not include Fortis or the former Rempex equityholders. *See* Melinta-MedCo Agreement § 5.12 (defining "Financing Sources").

[26] *Triple C Railcar Serv., Inc. v. City of Wilmington*, 630 A.2d 629, 633 (Del. 1993) (citing *Wilm. Housing Auth. v. Fidelity & Deposit Co. of Md.*, 47 A.2d 524 (Del. 1946)).

[27] *Madison Realty P'rs 7, LLC v. AG ISA, LLC*, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2001).

[28] *Capano v. Capano*, 2014 WL 2964071, at *13 (Del. Ch. June 30, 2014).

vein, Delaware courts will enforce contractual provisions disclaiming an intent to benefit third parties.[29]

15. Fortis responds that Section 13.7's limitation on third-party beneficiaries must be read in light of the more specific language in Sections 2.3 and 9.12 of the Melinta-MedCo Agreement. Those sections expressly define Melinta's obligations by reference to the Merger Agreement. Section 2.3 transfers liability for "Contingent Payment Contracts" to Melinta, and Section 9.12 defines "Contingent Payment Contracts" to include payments under the Merger Agreement.[30] These provisions appear to obligate Melinta to pay *MedCo* for milestone payments that become due and owing under the Merger Agreement. Fortis claims that these provisions also manifest a clear intent to benefit *Fortis and the former Rempex equityholders*.

16. It is true, as Fortis observes, that this Court will disregard "general" or "boilerplate" provisions excluding third-party beneficiaries to give full effect to

[29] *See, e.g.*, *id.* (holding that plaintiff lacked third-party beneficiary standing because the agreement "plainly articulates its drafter's intent to exclude third-party beneficiaries"); *Kronenberg v. Katz*, 872 A.2d 568, 605–06 (Del. Ch. 2004) (rejecting third-party beneficiary claim because the "plain language" of the agreement disclaimed third-party benefits unless "expressly provide[d]" for, and the agreement did not "expressly provide for [the claimant] to benefit from its terms").

[30] Melinta-Medco Agreement § 2.3(i) ("Buyer shall assume and agree to satisfy and discharge . . . all Liabilities to make royalty, milestone or deferred payments or any other contingent payments to third parties after the Closing in connection with the Business or the Products, including pursuant to the terms of the Contingent Payment Contracts . . . .").

more specific provisions that demonstrate an intent to benefit a third party.[31] But Section 13.7 is customized, not boilerplate. While Section 13.7 disclaims the intent to benefit third parties generally, it contains a carve-out providing that "the Financing Sources . . . shall each be a third party beneficiary with respect to their respective rights" under the agreement.[32] The negative implication created by Section 13.7's express inclusion of Financing Sources as third-party beneficiaries is that other third parties are not intended beneficiaries.[33] Put differently, the carve-out reveals that the parties knew how to expressly confer third-party beneficiary status, and the Court presumes that excluding the former Rempex equityholders from the carve-out was intentional.

17. Because the language of the Melinta-MedCo Agreement unambiguously disclaims any intent to benefit the former Rempex equityholders,

[31] *See* Dkt. 41, Pl.'s Opp'n to Def. Melinta Therapeutics, Inc.'s Mot. to Dismiss at 10–11; *see also Branin v. Stein Roe Inv. Counsel, LLC*, 2014 WL 2961084, at *10 n.69 (Del. Ch. June 30, 2014) (disregarding as "boilerplate" a provision that read "No other party shall be deemed a third-party beneficiary of this Agreement"); *Amirsaleh v. Bd. of Trade of City of N.Y., Inc.*, 2008 WL 4182998, at *5 & n.24 (Del. Ch. Sept. 11, 2008) (disregarding a "general provision" that read: "[t]his Agreement is not intended to, and does not, confer upon any Person other than the parties who are signatories hereto any rights or remedies hereunder").

[32] Melinta-MedCo Agreement § 13.7.

[33] *Delmarva Health Plan, Inc. v. Aceto*, 750 A.2d 1213, 1216 & n.12 (Del. Ch. 1999) (recognizing that the *expressio unius est exclusio alterius* maxim applies in the contractual interpretation context).

Fortis lacks standing to claim breach of the Melinta-MedCo Agreement. For the foregoing reasons, Melinta's Motion to Dismiss Count III is GRANTED.

IT IS SO ORDERED.

/s/ Kathaleen St. Jude McCormick
Vice Chancellor Kathaleen St. Jude McCormick
Dated: December 18, 2019