

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SPECIALTY DX HOLDINGS, LLC,)	
PAS OUTREACH TECHNICAL)	
LABORATORY, LLC, CYTOLOGY)	
OUTREACH, P.C., and PATHOLOGY)	
OUTREACH P.C.,)	C.A. No.: N19C-06-054 EMD CCLD
)	
Plaintiffs,)	
)	
v.)	
)	
LABORATORY CORPORATION OF)	
AMERICA HOLDINGS,)	
)	
Defendant.)	

Submitted: June 9, 2020
Decided: July 27, 2020

Upon Defendant’s Motion to Dismiss Counts I-IV of the Amended Complaint and to Compel Alternative Dispute Resolution Pursuant to Contract
DENIED

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DAVIS, J.

I. INTRODUCTION¹

This a breach of contract action assigned to the Complex Commercial Litigation Division of this Court. Plaintiffs Specialty Dx Holdings, LLC (“Specialty Dx”), PAS Outreach Technical

¹ Capitalized terms not defined herein shall have the meaning ascribed to them in the Opinion issued by the Court on January 31, 2020 (the “Opinion”). D.I. No. 17.

Laboratory, LLC (“POTL”), Cytology Outreach PLLC (“COP”) and Pathology Outreach, P.C. (“POP”)² initially filed the civil action in the Court of Chancery on January 15, 2018. On June 4, 2019, the Court of Chancery entered an order transferring the action to this Court pursuant to 10 *Del. C.* § 1902.³

Defendant Laboratory Corporation of America Holdings (“LabCorp”) filed Defendant’s Motion to Dismiss Counts I-IV of the Amended Complaint and to Compel Alternative Dispute Resolution Pursuant to Contract (the “Second Motion to Dismiss”) on March 24, 2020.⁴ Plaintiffs filed their Answering Brief in opposition to the Motion on April 13, 2020.⁵ LabCorp filed its Reply Brief on April 23, 2020.⁶ The Court held a hearing on the Second Motion to Dismiss on June 10, 2020 (the “Hearing”).⁷

For the reasons set forth below, the Court will **DENY** the Second Motion to Dismiss. The Court—based on the reasoning set out in the Opinion—agrees that the claims asserted in Counts II-IV (and Count V) of the Amended Complaint are subject to arbitration. The Court, however, finds that LabCorp waived its arguments regarding arbitration through its litigation conduct. As volunteered by Specialty DX, the Court will stay proceedings as to Counts II-IV pending arbitration. The Court will allow this civil action to proceed on Count I.

I. BACKGROUND

A. PROCEDURAL BACKGROUND

Plaintiffs seek relief relating to claims arising out of an Asset Purchase Agreement (“APA”) entered into on August 4, 2016.

² The Court will collectively refer to Specialty Dx, POTL, POP and COP as “Plaintiffs.”

³ D.I. No. 1.

⁴ D.I. No. 24 and 25.

⁵ D.I. No. 30.

⁶ D.I. No. 31.

⁷ D.I. No. 36.

On November 15, 2018, Plaintiffs filed a complaint asserting claims against LabCorp in the Court of Chancery. Plaintiffs filed the Amended Complaint on January 25, 2019. Plaintiffs' Amended Complaint sets out claims for: Declaratory Judgment (Count I); Breach of the Implied Covenant of Good Faith and Fair Dealing (Count II); Breach of Contract (in the Alternative)—Section 3.3(g) of the APA (Count III); Breach of the APA (in the Alternative)—Section 3.3(c) of the APA (Count IV); and, Breach of the APA—Section 3.3(e) of the APA (Count V).⁸ On February 12, 2019, LabCorp filed its answer to the Amended Complaint.⁹

On February 21, 2019, LabCorp filed a Motion to Dismiss (the “First Motion to Dismiss”).¹⁰ In the First Motion to Dismiss, LabCorp sought dismissal of Court V, arguing that it was subject to arbitration under the APA. On March 21, 2019, Plaintiffs submitted an opposition.¹¹ On April 3, 2019, LabCorp responded.¹² On March 11, 2019, Plaintiffs filed a Motion for Judgment on the Pleadings (“Motion JP”).¹³ LabCorp opposed the Motion JP on April 10, 2019. Plaintiffs submitted a reply on April 24, 2019.¹⁴

The Court of Chancery entered an order transferring the case on June 4, 2019.¹⁵ The Amended Complaint was docketed in this Court on June 10, 2019.¹⁶

After receiving the transfer, the Court ordered supplemental briefing on the First Motion to Dismiss and the Motion JP.¹⁷ On July 30, 2019, Plaintiffs and LabCorp submitted supplemental briefs regarding the outstanding motions.¹⁸ On August 9, 2019, the Court held a

⁸ D.I. No. 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ D.I. No. 4.

¹⁸ D.I. Nos. 7 and 8.

hearing, upon which the Court took the above Motions under advisement.¹⁹ The Court issued an extensive Opinion granting in part and denying in part the First Motion to Dismiss and denying the Motion JP on January 31, 2020.²⁰ Instead of dismissing Court V, the Court stayed it pending an arbitration.

Almost two months after the Opinion was issued, LabCorp filed the Second Motion to Dismiss.²¹ The Second Motion to Dismiss argues, for the first time in this civil action, that the Court lacks subject matter jurisdiction over Counts II through IV. LabCorp did raise subject matter jurisdiction as a grounds for denying the Motion JP, but the Court denied the Motion JP on other grounds. The First Motion to Dismiss did not seek to dismiss Court I.

B. Factual Background²²

The Court spent almost four full pages on the factual background in the Opinion. The Court incorporates that background by reference for this decision.

II. MOTION TO DISMISS

A. LABCORP'S CONTENTIONS

LabCorp contends that Count IV must be dismissed because the parties agreed that disputes regarding the calculation of Earnouts would be decided by the Independent Accountant Firm. LabCorp argues that the parties are bound by the mandatory dispute resolution procedures set forth in Section 3.3 of the APA. LabCorp further argues that the Court lacks subject matter jurisdiction to decide Count IV because the parties agreed in Section 3.3(g) of the APA that an

¹⁹ D.I. No. 16.

²⁰ D.I. No. 17.

²¹ D.I. No. 24.

²² For purposes of the Second Motion to Dismiss, the Court must view all well-pleaded facts alleged in the Amended Complaint to Plaintiffs. *See, e.g., Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Acad., LLC*, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010). For purposes of the Motion JP, the non-moving party, LabCorp, is entitled to the benefit of any inferences that can be fairly drawn from the proceedings. *See, e.g., Gonzalez v. Apartment Communities Corp.*, 2006 WL 2905724, at *1 (Del. Super. Oct. 4, 2016). The Court will be relying here on the factual background set out in the Opinion.

Independent Accounting Firm would resolve any Earnout disputes. LabCorp then claims that Counts II and III must be dismissed because they raise procedural issues that must be decided by the Independent Accounting Firm. Lastly, LabCorp contends that Count I must also be dismissed for lack of subject matter jurisdiction.

The Court notes that many of LabCorp's contentions are similar to those raised in the First Motion to Dismiss. As noted above, the First Motion to Dismiss sought dismissal of only Court V.

B. PLAINTIFFS' CONTENTIONS

Plaintiffs oppose the Second Motion to Dismiss. Plaintiffs argue that LabCorp waived its right to enforce the APA's alternative dispute resolution provision as to Counts I-IV. Plaintiffs assert that LabCorp failed to raise an affirmative defense on this issue and did not file this Second Motion to Dismiss prior to answering the Amended Complaint. Plaintiffs further argue that LabCorp previously filed the First Motion to Dismiss, addressing Count V but did not include Counts I through IV. Additionally, Plaintiffs contend that the Court already rejected LabCorp's subject matter jurisdiction argument as to Count I in the Opinion.

III. STANDARD OF REVIEW

Upon a motion to dismiss, the Court (i) accepts all well-pleaded factual allegations as true, (ii) accepts even vague allegations as well-pleaded if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.²³ However, the court must "ignore conclusory allegations that

²³ See *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 227 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Acad.*, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010).

lack specific supporting factual allegations.”²⁴ “Unlike the standards employed in Rule 12(b)(6) analysis, the guidelines for the Court’s review of [a] Rule 12(b)(1) motion are far more demanding of the non-movant. The burden is on the Plaintiffs to prove jurisdiction exists.”²⁵

IV. DISCUSSION

The Court is not going to re-engage on the issue of whether Counts I through IV should be dismissed under Section 3.3 of the APA. Applying the analysis in the Opinion, the Court would stay Counts II-IV pending actions by the Independent Accounting Firm. Moreover, Plaintiffs expressed a willingness to abide by a stay as to Counts II-IV in the Opposition. The only question remaining is whether the Court will stay Count I? The Court will not. The Court finds that LabCorp has waived the right to arbitrate Count I through its conduct in this civil proceeding.²⁶

LabCorp, in their papers and during oral argument, contended that Section 3.3 of the APA divests the Court of subject matter jurisdiction. Moreover, LabCorp contends that this lack of subject matter jurisdiction cannot be waived. As discussed extensively at the Hearing, the Court notes that is not the law in Delaware.

An individual or organization “may waive its right to arbitration by expressly waiving that right, actively participating in litigation as to an arbitrable claim, or otherwise taking action inconsistent with the right to arbitration.”²⁷ A party that takes actions inconsistent with his right to arbitration, such as active participation in a lawsuit,

²⁴ *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998).

²⁵ *Appriva Shareholder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 128 n. 14 (Del. 2007).

²⁶ The Court also finds that LabCorp waived its right to arbitrate Counts II-IV; however, Plaintiffs have agreed to stay those counts pending the arbitration process that has been re-commenced as to Count V’s claims.

²⁷ See *Parfi Holding AB v. Mirror Imagine Internet, Inc.*, 842 A.2d 1245, 1260 n.39 (Del. Ch. 2004). See also *Falcon Steel Co. v. Weber Engineering Co.*, 517 A.2d 281, 288 (Del. Ch. 1986).

shows an intent to relinquish its right to arbitration.²⁸ Moreover, an unexcused delay in asserting the right that results in the “waste of the Superior Court’s limited resources . . . [and] [i]t would also defeat the purpose of arbitration – to secure the speedy and efficient resolution of disputes.”²⁹ In determining whether one has waived such a right, Delaware courts also consider whether the actions of the arbitration proponent have prejudiced the other party.³⁰

Though the parties in the present matter have not engaged in discovery, LabCorp cannot “test the waters” and thereafter engage in additional litigation that unfairly places Plaintiffs in a position of addressing similar argument in seriatim motions. Moreover, LabCorp took more than thirteen months before asserting its right to contractual arbitration, needlessly expending the resources of both the Court of Chancery and this Court. LabCorp cost Plaintiffs time and financial resources by not moving to dismiss Counts I-IV back on February 21, 2019 when it filed the First Motion to Dismiss. In addition, the Court would not have had to twice address the same argument, using up resources that could have been focused elsewhere.

Importantly, LabCorp knew of the existence of the APA’s alternative dispute resolution provision but chose not to assert its applicability to Counts II-IV until the Second Motion to Dismiss.³¹ The Court has reviewed LabCorp’s Defendant’s Answer to

²⁸ *Nuttz.com, LLC v. Vertrue Inc.*, 2006 WL 2220971 (Del. Ch. July 25, 2006) (finding waiver due to active litigation); see also *Zaret v. Wamers Moving & Storage*, 1995 WL 56708, at *1 (Del. Ch. Feb. 3, 1995).

²⁹ See *Russykevich v. State Farm Mut. Auto. Ins. Co.*, 1994 WL 369519, at *5 (Del. Ch. June 29, 1994) (plaintiff waited for five months after filing litigation before asserting arbitration rights).

³⁰ See *Halpern Medical Services, LLC v. Geary*, 2012 WL 691623, at *1, *3 (Del. Ch. Feb. 17, 2012) (“[I]t is not merely the inconsistency of a party’s actions, but the presence or absence of prejudice which is determinative of the issue of waiver.”) (quoting *Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir. 1975)). See also *H & S Ventures, Inc. v. RM Technologies, LLC*, 2017 WL 237623, at *1, *3 (Del. Super. Jan. 18, 2017); *Coyle v. Nationwide General Ins. Co.*, 1994 WL 89349, at *1 (Del. Super. Feb. 24, 1994).

³¹ LabCorp did assert lack of subject matter jurisdiction as an argument in connection with the Motion JP; however, LabCorp did not seek to dismiss Count I in the First Motion to Dismiss.

Plaintiffs' Amended Verified Complaint. LabCorp does not assert any affirmative defense relating to the APA's arbitration provision or otherwise contend that the Court lacks subject matter jurisdiction.³² Following the reasoning of Justice Jacobs (then Vice Chancellor Jacobs), the Court asked LabCorp for a "coherent explanation for why it proceeded in this erratic manner, other than to assert that it never intended to waive its right to arbitrate."³³ In response, LabCorp hung on to the claim that lack of subject matter jurisdiction due to an arbitration agreement cannot be waived. That response is just not supported by the applicable law.

While true that Delaware courts favor an expeditious resolution of matters through arbitration, the Court cannot condone the waste of time and resources occasioned by LabCorp's conduct.³⁴ On February 21, 2019, LabCorp filed the First Motion to Dismiss. LabCorp filed an answer. After the transfer from the Court of Chancery, the Court allowed the parties to supplement their pending motions—the Motion JP and the First Motion to Dismiss. Still, LabCorp failed to move to dismiss Counts I through IV. On January 31, 2020, the Court issued the Opinion. Rather than include the remaining Counts in its first motion, however, LabCorp waited until March 24, 2020, roughly two months after the Opinion was issued, to file the Second Motion to Dismiss. This new wave of litigation then forced the parties, and the Court, to expend additional, valuable time and resources to address an issue that could have been previously resolved. Under

³² D.I. No. 1, Defendant's Answer to Plaintiffs' Amended Verified Complaint at 37-38.

³³ *Wilshire Restaurant Group, Inc. v. Ramada, Inc.*, 1990 WL 195910, at *3 (Del. Ch. Dec. 5, 1990).

³⁴ *See Dorsey v. Nationwide General Ins. Co.*, No. 10101, 1989 WL 102493, at *1, *2 (Del. Ch. Sept. 8, 1989) (“[A]n essential purpose of arbitration, which is to provide an alternate dispute resolution mechanism that affords a relatively speedy remedy to the litigants while at the same alleviating congestion in the docket of the court system. Any different result [allowing one to substantially proceed with litigation and then demand arbitration] would run counter to, and frustrate, that purpose.”)

these facts, the Court finds that LabCorp waived its right to arbitrate through active litigation inconsistent with its right to arbitration.

V. CONCLUSION

For the reasons stated above, the Court **DENIES** the Second Motion to Dismiss. The Court will stay Counts II through IV in a manner consistent with staying Court V. The Court will allow Count I to proceed.

IT IS SO ORDERED

/s/ Eric M. Davis
Eric M. Davis, Judge

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