IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

PATHEON BIOLOGICS LLC, a Delaware Limited Liability Company,	)	
	)	
Plaintiff,	)	
	)	C.A. No. N22C-10-185 MMJ CCLD
v.	)	[redacted]
	)	
HUMANIGEN, INC., a Delaware Corporation,	)	
	)	
Defendant.	)	

Submitted: May 16, 2023
Decided: July 31, 2023
Unsealed with Redactions: August 8, 2023

On Plaintiff's Motion for Judgment on the Pleadings
DENIED

OPINION

Patricia L. Enerio, Esq., Kelly E. Rowe, Esq., Heyman Enerio Gattuso & Hirtzel LLP, Wilmington, DE, Anthony J. Hornbach, Esq. (*pro hac vice*), Ned Babbitt, Esq. (*pro hac vice*) (Argued), Thomson Hine LLP, Cincinnati, OH, *Attorneys for Plaintiff*

Mary S. Thomas, Esq., Thomas Law LLC, Wilmington, DE, Marc P. Miles, Esq. (*pro hac vice*) (Argued), Shook, Hardy & Bacon L.L.P., Irvine, CA, *Attorneys for Defendant*

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

This is a contract dispute. Patheon Biologics LLC ("Patheon") is a contract development and manufacturing organization ("CDMO"). Humanigen, Inc. ("Humanigen") is a biopharmaceutical company. In April 2020, Humanigen prepared a request for proposal ("RFP") to find a CDMO to help Humanigen develop and manufacture a drug called Lenzilumab ("Lenz"). Through the RFP process, Humanigen chose Patheon as its CDMO. On August 5, 2020, Humanigen and Patheon entered into the Umbrella Development Services Agreement (the "Master Agreement"). In simple terms, Humanigen was to provide Patheon the recipe to produce Lenz. Patheon was to manufacture Lenz.

This dispute arose after Patheon allegedly failed to produce Lenz to Humanigen's required specifications. Process-related protein impurities—called HCP's—allegedly were above Humanigen's specifications. Humanigen allegedly requested to know the root cause as to why the HCP levels were above the specifications.[1] Patheon conducted an internal investigation.[2] Patheon's investigation allegedly concluded that Patheon followed the proper processes and

[1] Humanigen's Countercl. at ¶ 23.
[2] Patheon's Compl. at ¶ 47.

was not responsible for the high HCP levels.[3] Humanigen conducted a separate investigation that concluded Patheon did not properly manufacture Lenz.[4]

Patheon alleges one count for breach of contract. Humanigen alleges a counterclaim for breach of contract.

Patheon filed the instant Motion for Judgment on the Pleadings. The Court heard oral argument on May 16, 2023.

JUDGMENT ON THE PLEADINGS STANDARD

In a Rule 12(c) Motion for Judgment on the Pleadings, the Court must consider whether the movant is entitled to judgment as a matter of law.[5] Such a determination by the Court can be made only where there are no material issues of fact.[6] The Court must view the facts in the light most favorable to the non-moving party.[7] The Court also must accept as true all well-pleaded factual allegations.[8] Finally, exhibits attached to the pleadings or incorporated by reference may be considered.[9] "A motion for judgment on the pleadings should be granted if, when viewing the facts alleged in the pleadings and the reasonable inferences to be

[3] Humanigen's Countercl. at ¶ 23.
[4] Humanigen's Countercl. at ¶ 24.
[5] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993) (internal citations omitted).
[6] *Id.*
[7] *Id.*
[8] *OSI Sys., Inc. v. Instrumentarium Corp.*, 892 A.2d 1086, 1090 (Del. Ch. 2006).
[9] *Id.*

drawn therefrom in favor of the non-moving party, no material issue of fact exists and the movant is entitled to judgment as a matter of law."[10]

ANALYSIS

Patheon Argues

Patheon argues that the terms of the Master Agreement are unambiguous, and that no material facts are in dispute.

Humanigen Argues

Humanigen argues that the terms of the Master Agreement are ambiguous, and that material factual disputes exist. Humanigen contends Patheon failed to fully perform under the Master Agreement. Humanigen disputes whether the parties used good faith efforts to resolve the disputes under the Master Agreement. Humanigen disputes the amount of damages resulting from both Patheon's claim, and Humanigen's counterclaim.

Relevant Contract Terms

Section 5(a) of Schedule D of the Master Agreement states:

[redacted]

[10] *V&M Aerospace LLC v. V&M Co.*, 2019 WL 3238920, at *3 (Del. Super.).

[redacted]

Section 2(a)(v) of Schedule A of the Master Agreement states: "[redacted]"

Section 5(c) of Schedule D of the Master Agreement states: "[redacted]"

Section 5(d) of Schedule D of the Master Agreement provides that [redacted]

[redacted]

Section 6(d) of Schedule A of the Master Agreement states:

[redacted]

[redacted][11]

Section 2(a) of Schedule D of the Master Agreement states:

[redacted]

[11] Emphasis in original.

Good Faith Efforts to Resolve Disputes

Patheon argues Humanigen's sole remedy "[redacted]."[12] Patheon contends that the Master Agreement unambiguously requires Humanigen "[redacted]."[13]

Humanigen argues that if it disputed any portion of an invoice, the parties were required to "[redacted]."[14] Patheon conducted an internal investigation concerning why the Lenz contained levels of HCP that were too high.[15] Patheon's investigation allegedly concluded that Patheon followed the proper processes and was not responsible for the high HCP levels.[16] Humanigen conducted a separate investigation that concluded Patheon did not properly manufacture Lenz.[17] Humanigen contends "it rightfully declined to pay certain invoices due to

---

[12] Patheon's Opening Br. at 21 (citing the Master Agreement, Schedule D § 5(a)).
[13] Patheon's Opening. Br. at 19.
[14] Master Agreement, Schedule A, § 2(a)(v).
[15] Patheon's Compl. at ¶ 47.
[16] Humanigen's Countercl. at ¶ 23.
[17] *Id.* at ¶ 24.

Patheon's breaches of the agreements and used good faith efforts to resolve the disputes short of litigation."[18]

The Court finds that pursuant to Section 5(a) of Schedule D of the Master Agreement, the failure of a batch to meet specifications, standing alone, is subject to the sole remedy of either: (1) requesting that Patheon repeat the disputed services at Patheon's cost; or (2) requesting that Patheon rework the product. However, factual disputes prevent the Court from granting summary judgment on the pleadings. There are genuine issues of material fact concerning whether Patheon complied with its contractual obligation to rework Lenz in an effort to achieve results consistent with specifications.

If reworking the product were the only contractually possible remedy for any dispute between the parties, then it would render Section 5(c) of Schedule D of the Master Agreement—which limits Patheon's total liability—superfluous. "The contract must [] be read as a whole, giving meaning to each term and avoiding an interpretation that would render any term 'mere surplusage.'"[19]

Nevertheless, the material factual disputes relevant to this action are relatively narrow. The contract language in Sections 5(a) and 5(d) of Schedule D of the Master Agreement has limited grounds upon which Humanigen can: (1)

---

[18] Humanigen's Answering Br. at 14.
[19] *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019).

deny payments due under the contract; or (2) seek compensation pursuant to the counterclaim.

Amount of Damages

Patheon argues that judgment on the pleadings may be granted because "Patheon's motion is limited to the issue of liability and expressly contemplates the prosecution of limited additional discovery to establish the precise amount of damages."[20] Patheon relies on *Leaf Invenergy Company v. Invenergy Wind LLC*.[21] In *Leaf Invenergy*, the Court of Chancery granted the plaintiff's motion for judgment on the pleadings as to liability, while leaving the issue of damages for future proceedings.[22] The Court of Chancery did not consider the impact of counterclaims in its decision.

Humanigen argues that a factual dispute regarding damages prevents judgment on the pleadings.[23] Humanigen argues that without the fact of damages having been admitted, judgment on the pleadings is inappropriate because proving damages is an essential element of a breach of contract claim.[24] Humanigen disputes not only the amount, but whether damages exist at all.

---

[20] Patheon's Reply Br. at 10 (citing *Leaf Invenergy Co. v. Invenergy Wind Ltd. Liab. Co*., 2016 WL 3566365, at *3–4 (Del. Ch.)).
[21] 2016 WL 3566365 (Del. Ch.).
[22] *Id.* at *3–4.
[23] *See Adchemy, Inc. v. Plateau Data Servs., LLC*, 2017 WL 3412159, at *4 (Del. Super.) ("The issue of damages is a question of fact.").
[24] *See River Valley Ingredients, LLC v. Am. Proteins, Inc*., 2021 WL 598539, at *7 (Del. Super.) (determining damages were properly pled in a breach of contract claim, and concluding it was

Humanigen's counterclaim alleges Patheon breached the Master Agreement "by failing to successfully produce at least seven batches of Lenz . . . ."[25] Humanigen's counterclaim also alleges Patheon breached the implied covenant of good faith and fair dealing.[26] Humanigen's counterclaim alleges damages of over $37 million.[27]

The Court finds that the amount of damages constitutes a material factual dispute where there is a counterclaim for offset. Therefore, it is not appropriate to decide damages separately from the other issues in this case.

CONCLUSION

The Court finds that pursuant to Section 5(a) of Schedule D of the Master Agreement, the failure of a batch to meet specifications, standing alone, is subject to the sole remedy of either: (1) requesting that Patheon repeat the disputed services at Patheon's cost; or (2) requesting that Patheon rework the product. However, factual disputes prevent granting summary judgment on the pleadings. There are genuine issues of material fact concerning whether Patheon complied with its contractual obligation to rework Lenz in an effort to achieve results consistent with specifications.

---

not necessary to show the plaintiff incurred damages in excess of the contracted damages threshold at the motion to dismiss stage).

[25] Humanigen's Counterclaim, at ¶ 30.

[26] *Id.* at ¶ 32.

[27] *Id.* at ¶¶ 33–34.

If reworking the product were the only contractually possible remedy for any dispute between the parties, then it would render Section 5(c) of Schedule D of the Master Agreement—which limits Patheon's total liability—superfluous. "The contract must [] be read as a whole, giving meaning to each term and avoiding an interpretation that would render any term 'mere surplusage.'"[28]

Nevertheless, the material factual disputes relevant to this action are relatively narrow. The contract language in Sections 5(a) and 5(d) of Schedule D of the Master Agreement has limited grounds upon which Humanigen can: (1) deny payments due under the contract; or (2) seek compensation pursuant to a counterclaim.

The Court finds that the amount of damages constitutes a material factual dispute where there is a counterclaim for offset. Therefore, it is not appropriate to decide damages separately from the other issues in this case.

THEREFORE, Patheon's Motion for Judgment on the Pleadings is hereby **DENIED**.

IT IS SO ORDERED.

Mary M. Johnston
The Honorable Mary M. Johnston

[28] *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019).