IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SHAREHOLDER REPRESENTATIVE SERVICES LLC, solely in the capacity as representatives of the Securityholders,	)	
Plaintiff,	)	
v.	)	C.A. No. 2024-1246-PAW
BRISTOL-MYERS SQUIBB CO.,	)	
Defendant.	)	

Submitted: June 6, 2025
Decided: September 29, 2025

Upon Defendant's Motion to Dismiss or, in the alternative, to Stay;
GRANTED.

MEMORANDUM OPINION AND ORDER

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WINSTON, J.

I. INTRODUCTION

This breach of contract dispute arises out of Defendant's merger with a private biotechnology company. Plaintiff brought this action as representative of the biotechnology company's former securityholders. The parties effectuated the transaction with a merger agreement, in which the biotechnology company was to receive a large sum of money up-front, and potentially additional payments on reaching certain milestones. In exchange, Defendant received the biotechnology company's laboratory-produced proteins, called monoclonal antibodies.

After the transaction, Defendant developed a monoclonal antibody allegedly based on an antibody acquired from the biotechnology company. Defendant filed several patent applications covering their new monoclonal antibody, which is currently in Phase 1 clinical trials. Plaintiff alleges Defendant's commencement of clinical trials triggered an as-of-yet unpaid milestone payment. Plaintiff also alleges Defendant intentionally manipulated the patent process to deprive the securityholders of owed and future milestone payments.

Before the Court is Defendant's Motion to Dismiss or, in the Alternative, Stay. The Motion seeks dismissal of the entire Complaint, arguing: (1) the merger agreement contains a mandatory arbitration clause covering the parties' dispute; (2) the Court lacks jurisdiction to adjudicate Counts I and II, which implicate exclusively federal issues; (3) no Count states a reasonably conceivable claim; and

(4) Count II is not ripe. Alternatively, Defendant asks the Court to stay this action in favor of contractual arbitration. Plaintiff resists each of these arguments, and maintains the Court can adjudicate each of its well-pled claims. For the reasons discussed below, the Court **GRANTS** Defendant's Motion.

II. BACKGROUND[1]

A. THE PARTIES, THE TRANSACTION, AND THE AGREEMENT

In 2016, Defendant Bristol Myers Squibb Co. ("BMS") merged with Padlock Therapeutics, Inc. ("Padlock") (the "Transaction").[2] The Transaction was governed by an Agreement and Plan of Merger (the "Agreement").[3] As part of the Transaction, BMS "acquired Padlock's cutting-edge monoclonal antibodies."[4]

Plaintiff Shareholder Representative Services LLC ("SRS") is a Colorado LLC with its principal place of business in Denver, Colorado.[5] SRS represents the Padlock securityholders.[6] Before the Transaction, Padlock researched "therapies to

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[1] The facts discussed are drawn from the Verified Complaint, the exhibits attached thereto, and the documents incorporated therein. *See Abbott v. North Shores Board of Governors, Inc.*, 2020 WL 1490880, at *2 (Del. Ch. Mar. 27, 2020) ("[o]n a motion to dismiss, this court may consider documents incorporated by reference or integral to the Complaint.").

[2] *See generally* Verified Complaint (hereinafter "Compl.") (D.I. 1).

[3] *Id.* ¶ 3; *see* Compl., Ex. A (hereinafter "Agreement").

[4] Compl. ¶ 1. Relevant here, BMS acquired Murine Clone [redacted] ("[redacted]"), which "has a partial CDR sequence of [redacted]." *Id.* ¶ 30; Compl., Ex. C. (exhibit H to the Agreement).

[5] Compl. ¶ 9.

[6] *Id.* ¶¶ 1, 10.

target and inhibit the activity of protein-arginine deiminases ("PADs"), a class of enzymes that cause undesirable inflammation in rheumatoid arthritis and other autoimmune diseases."[7] BMS is a global pharmaceutical company incorporated in Delaware, with its principal place of business in Princeton, New Jersey.[8]

In March 2016, the parties effectuated the Transaction by executing the Agreement.[9] Pursuant to the Transaction, BMS took control of Padlock's assets including "antibodies directed to the inhibition of the PAD enzyme."[10] Relevantly, this included the [redacted] antibody.[11]

Under the Agreement, BMS paid the securityholders $150 million in closing consideration,[12] with up to $450 million in additional compensation ("Milestone Payments") to be paid by BMS upon the occurrence of various "Milestone Event[s]," subject to express terms and conditions.[13] The terms governing the Milestone Events are central to the parties' dispute.

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[7] *Id.* ¶ 2. *See also id.* ¶¶ 14-22 (discussing Padlock's research).

[8] *Id.* ¶ 11.

[9] *See* Agreement at Preamble; Compl. ¶¶ 23-28.

[10] Compl. ¶¶ 27, 29; Compl., Ex. C.

[11] Compl. ¶ 30; Compl., Ex. C.

[12] Compl. ¶¶ 3, 25.

[13] Agreement § 1.16.

Section 1.16(b) lists the various Milestone Events and corresponding Milestone Payments.[14] Relevant here is the "Primary Phase 1 Milestone Event" which entitles the Securityholders to "$50 million" upon "[t]he commencement by [BMS] of the first Phase 1 Clinical Trial of a Product."[15] The Agreement defines "Product" as "any product that incorporates, constitutes or contains a Compound (alone or with other active ingredients) in any and all forms[.]"[16] "Compound" is defined in relevant part as "any . . . Monoclonal Antibody."[17] The critical "Monoclonal Antibody" definition reads in part:

> any variants, derivatives, fragments or constructs of any . . . PAD4 Inhibitor or Dual PAD4/PAD2 Inhibitor [specifically identified in Exhibit H to the Agreement] that either (i) has a complementary determining region that is the same as the complementary determining region of any monoclonal antibody specifically identified on Exhibit H or has three or fewer amino acid substitutions in the complementary determining region of any monoclonal antibody specifically identified on Exhibit H . . . provided that . . . the making, use, sale, offer for sale or importation of the foregoing would infringe a Valid Claim of a Milestone Product Patent.[18]

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[14] *See id.* § 1.16(b). The total possible aggregate post-closing consideration, if every Milestone Event occurs, is $450 million. *Id.*

[15] *See id.* § 1.16(b)(1). Notably, while the Complaint represents that "SRS brings this action . . . to force BMS to pay up to $450,000,000 in milestone payments[,]" SRS only makes allegations regarding the Primary Phase 1 Milestone Event. Compl. ¶¶ 1, 92-95, 142-150.

[16] Agreement § 9.1.

[17] *Id.*

[18] *Id.*

A "Valid Claim" means "a claim of (a) an issued and unexpired patent . . . or (b) a pending patent application that has not been abandoned, finally rejected or expired without the possibility of appeal or refiling[.]"[19] Of the extensive "Milestone Product Patent" definition, the relevant portion reads:

> (c) any Patent that is owned by or exclusively licensed to [BMS] . . . that claims the composition of matter of any compound that is a PAD4 Inhibitor or Dual PAD4/PAD2 Inhibitor; and satisfies one or more of the ... following criteria . . . (ii) was solely invented before the Closing Date by or on behalf of [Padlock.] . . . For purposes of the definition of 'Milestone Product Patent,' inventorship shall be determined in accordance with United States patent laws.[20]

Perhaps recognizing the complexity of these nesting definitions, the parties agreed to a contractual dispute resolution process regarding whether something constitutes a Product or Compound.[21] Specifically, Section 1.16(d) provides:

> [i]n the event that [SRS] and [BMS] have a dispute, solely with respect to whether a compound of a product is a Compound or a Product, respectively, for purposes of this Section 1.16, then [SRS] shall promptly deliver to [BMS] written notice thereof (a 'Compound/Product Dispute Notice') . . . . For clarity, any other dispute regarding this Section 1.16 shall be addressed not by this Section 1.16(d) but as otherwise provided in this Agreement.[22] During the thirty (30) days following the delivery of a Compound/Product Dispute

[19] *Id.*

[20] *Id.*

[21] *See id.* § 1.16(d).

[22] Generally, the Agreement refers all other disputes to the Delaware Court of Chancery. *See* Agreement § 10.7 ("[e]xcept and only to the extent set forth in Sections 1.13 . . . each party hereto irrevocably and unconditionally (a) accepts the exclusive jurisdiction and venue of the Court of Chancery of the State of Delaware . . . in any action or proceeding arising out of or related to this Agreement[.]").

> Notice, [BMS] and [SRS] shall attempt in good faith to resolve such dispute. If [BMS] and [SRS] do not reach agreement with respect to any dispute relating to any such matter within thirty (30) days . . . the parties shall submit for arbitration all matters that remain in dispute and that were properly included in the Compound/Product Dispute Notice to a disinterested individual who has appropriate scientific, technical and regulatory expertise [] to resolve any disputes referred to him or her under this Agreement (a "Expert") . . . Buyer and the Representative shall instruct the Selected Expert to determine as promptly as practicable but in no event later than thirty (30) days after such person's appointment (the "Determination Period") whether the disputed Milestone Event has occurred . . . The Selected Expert's determination shall be made based on the submission of documents by the parties unless the Selected Expert determines that an oral hearing is necessary. The Selected Expert shall determine deadlines . . . for submitting documents and dates, if any, of oral hearings . . . Any decision rendered by the Selected Expert shall be final and binding upon the parties.[23]

Section 1.17(d) of the Agreement details BMS's obligations, or lack thereof, to work towards achieving any Milestone Event.[24] That provision states BMS "shall have the right to own, operate, use, license, develop and otherwise commercialize Assets in any way that [BMS] . . . deem[s] appropriate, in its sole discretion."[25] Additionally, BMS has "the exclusive right to determine the terms and conditions of the development and commercialization of any Compound or any Product[.]"[26] BMS explicitly has "no additional obligation to . . . use . . . the Assets in order to

[23] *See id.* § 1.16(d).

[24] *See generally id.* § 1.17(d).

[25] Agreement. § 1.17(d)(i).

[26] *Id.* § 1.17(d)(iii).

achieve any Milestone Event or to maximize or expedite the Milestone Payments."[27] The Agreement also provides "no assurance that any Milestone Event will be achieved or that the Securityholders will receive any Milestone Payments."[28]

B. POST-CLOSING DEVELOPMENT AND PATENT PROSECUTION OF BMS-986454

Post-Transaction, BMS began development of various PAD inhibitors using the assets acquired from Padlock.[29] In a May 31, 2023, letter to SRS, BMS gave notice that it was developing BMS-986454, an antibody allegedly derived from [redacted].[30] In late 2023, BMS began Phase 1 clinical trials on BMS-986454.[31] SRS wrote to BMS arguing those trials constitute a Primary Phase 1 Milestone Event, and demanding a $50 million Milestone Payment.[32] BMS refused to pay, reiterating its position that BMS-986454 cannot trigger any Milestone Events because it "would

[27] *Id.* § 1.17(d)(ii).

[28] Agreement. § 1.17(d)(iv).

[29] Compl. ¶ 29.

[30] *Id.* ¶¶ 31, 33-34; *see* Compl., Ex. D at 3. That letter states "[t]his development candidate is not a Product eligible to trigger and Milestone Payments[.]" *Id.* SRS alleges that BMS-986454 differs from [redacted] by only [redacted] "[redacted] amino acid change." Compl. ¶¶ 34-35, 40. SRS insists that change "is particularly well known" in the pharmaceutical field. *Id.* ¶ 35 (citing Compl., Ex. E).

[31] *Id.* ¶¶ 36, 38-39, 43.

[32] *Id.* ¶ 41.

[not] infringe a Valid Claim of a Milestone Product Patent."[33] SRS alleges these actions breached the Agreement.[34]

SRS also alleges BMS conducted "a convoluted and dishonest patent prosecution scheme [to] [] extinguish any obligation to pay the [] Securityholders for" BMS-986454 triggered Milestone Events.[35] SRS alleges these actions breached the implied covenant of good faith and fair dealing.[36] The specifics of this allegedly nefarious scheme are not relevant to resolving the Motion. At bottom, BMS's patent efforts resulted in: six provisional applications that "explicitly claimed Padlock antibody [redacted] and various related antibodies . . . with many of these claims covering BMS-986454," which BMS allowed to "lapse without asking the Patent Office to examine them" (the "Gilman Provisionals #1-6");[37] a Patent Cooperation Treaty patent application referencing Gilman Provisionals #5 and #6, but not [redacted], in favor of BMS-986454 (the "'770 PCT Application");[38] and a U.S. Patent

[33] *Id.* ¶¶ 42, 44-45.

[34] *Id.* ¶¶ 142-60.

[35] Compl. ¶¶ 44-50, 55-90.

[36] *Id.* ¶¶ 161-71.

[37] *Id.* ¶¶ 47, 44-75. SRS alleges BMS's "bad faith" is evidenced by the fact that the last Gilman Provisional "expired on August 12, 2023, just two months before BMS published the clinical trial notice for BMS-986454[.]" *Id.* ¶ 89.

[38] *Id.* ¶¶ 76-83.

Application materially similar to the '770 PCT Application (the "'007 Application").[39]

C. PROCEDURAL HISTORY

SRS filed its Complaint in December 2024.[40] The Complaint asserts three causes of action: (1) Count I: "Breach of Contract" for failure to pay $50 million upon occurrence of the Primary Phase 1 Milestone Event;[41] (2) Count II: "Anticipatory Breach," seeking a declaration "that BMS is required to pay each Primary Milestone Amount as and when BMS-986454 reaches each Milestone Event";[42] and (3) Count III: "Breach of Duty of Good Faith and Fair Dealing" based on BMS's alleged patent gamesmanship.[43]

The same month BMS filed its Motion to Dismiss, seeking either dismissal of the complaint in its entirety, or alternatively, a stay of the complaint pending resolution of any claims referable to arbitration.[44] SRS filed its brief opposing the

[39] *Id.* ¶¶ 84-85.

[40] *See generally id.*

[41] *See* Compl. ¶¶ 142-50.

[42] *See id.* ¶¶ 151-60.

[43] *See id.* ¶¶ 161-71.

[44] *See* Defendant Bristol-Myers Squibb Co.'s Motion to Dismiss, or in the Alternative, Stay (hereinafter "Op. Br.") (D.I. 6).

Motion,[45] and BMS its reply brief, in March 2025[46] The Court heard oral argument concerning the Motion on June 6, 2025.[47] At oral argument, SRS made several representations relevant to resolving the Motion. First, SRS clarified its "breach of the duty of good faith and fair dealing claim is pleaded in the alternative."[48] Second, SRS conceded Section 1.16(d) at least requires the Expert to determine whether a substance is a "Product or Compound" by comparing it to the Milestone Product Patent.[49] SRS stated such a comparison "would essentially be an infringement analysis" which requires "look[ing] at definitions of monoclonal antibody and other[s]" in the Agreement.[50] Third, SRS acknowledged the Agreement empowers the Expert to determine whether a Milestone Event has occurred, and consequently whether a Milestone Payment is due.[51]

[45] *See generally* Plaintiff's Answering Brief Opposing Defendant's Motion to Dismiss (hereinafter "Ans. Br.") (D.I. 18).

[46] *See generally* Defendant Bristol-Myers Squibb Company's Reply in Support of Its Motion to Dismiss or, in the Alternative, to Stay (hereinafter "Reply Br.") (D.I 20).

[47] *See generally* Transcript of June 6, 2025 Oral Argument on Defendant's Motion to Dismiss (hereinafter "OA Tr.") (D.I. 32).

[48] *Id.* 36:23-24.

[49] *Id.* 40:16-42:19.

[50] *Id.* 41:18-22, 42:20-43:9.

[51] *Id.* 44:4-45:21.

III. STANDARD OF REVIEW

A motion to dismiss in favor of a contractual arbitration provision is properly adjudicated under Court of Chancery Rule 12(b)(3).[52] In evaluating a Rule 12(b)(3) motion, "the court is not shackled to the plaintiff's complaint and is permitted to consider extrinsic evidence from the outset."[53]

This Court evaluates a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6).[54] Under the well settled Rule 12(b)(6) standard:

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are well-pleaded if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences

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[52] *See Gandhi-Kapoor v. Hone Capital LLC*, 307 A.3d 328, 334 (Del. Ch. 2023). In addition to its Rule 12(b)(3) argument, BMS contends Section 1.16(d) also deprives this Court of subject matter jurisdiction. *See* Op. Br. at 18-19 (citing *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 287 (Del. 1999)) (affirming dismissal "on the ground that the Agreement validly predetermined the fora in which disputes would be resolved, thus stripping the Court of Chancery of subject matter jurisdiction."). But as *Gandhi-Kapoor* recognized: "an arbitration provision does not deprive a court of subject matter jurisdiction. An arbitration provision is a special type of forum selection clause. By agreeing to arbitrate, the parties commit contractually to litigate their dispute in a private forum. A court can—and generally will—enforce the arbitration agreement, but that outcome flows from principles of contract law, not the absence of subject matter jurisdiction." *See also Gandhi-Kapoor*, 307 A.3d at 334, 338 ("[b]ecause a court's subject matter jurisdiction derives from a grant of sovereign authority, parties cannot alter it by private ordering."). Therefore, BMS's reliance on *Elf Atochem* is misplaced, because that case held "a court should decline to exercise its subject matter jurisdiction when parties have agreed to an otherwise enforceable arbitration provision[.]" *Id.* at 344. Accordingly, the Court evaluates BMS's Section 1.16(d) argument under Rule 12(b)(3).

[53] *Sylebra Cap. P'rs Master Fund, Ltd. v. Perelman*, 2020 WL 5989473, at *9 (Del. Ch. Oct. 9, 2020) (quoting *In re Bay Hills Emerging P'rs I, L.P.*, 2018 WL 3217650, at *4 (Del. Ch. July 2, 2018)).

[54] *In re General Motors (Hughes) Shareholder Litigation*, 897 A.2d 162, 167-68 (Del. 2006).

> in favor of the non-moving party; and (iv) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.[55]

However, "[c]onclusory allegations unsupported by specific factual allegations [are] not [] accepted as true."[56]

In evaluating a motion to stay, courts consider "(1) the likelihood of success on the merits . . . ; (2) whether the movant will suffer irreparable harm if the stay is denied; (3) whether any other interested party will suffer substantial harm if the stay is granted; and (4) whether the public interest will be harmed if the stay is granted."[57] No factor is dispositive.[58] Rather, the court "consider[s] all of the relevant factors together to determine where the appropriate balance should be struck."[59]

IV. ANALYSIS

BMS's Motion requests dismissal of SRS's entire Complaint, advancing four primary arguments.[60] The Motion asks the Court to dismiss all Counts because the parties consented to arbitrate "any dispute about whether a product is a Product for purposes of the Milestone Payments," which is the exact issue presented in the

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[55] *Id.* at 168 (internal quotations omitted).

[56] *LeCrenier v. Cent. Oil Asphalt Corp.*, 2010 WL 5449838, at *3 (Del. Ch. Dec. 22, 2010).

[57] *DaimlerChrysler Corp. v. Delaware Dept. of Ins.*, 938 A.2d 623, 625 (Del. 2007) (citations omitted).

[58] *See id.*

[59] *Kirpat, Inc. v. Del. Alcoholic Bev. Control Comm'n,* 741 A.2d 356, 357 (Del.1998).

[60] *See* Op. Br. at 1-5.

Complaint.[61] Even if the Agreement does not mandate arbitration, BMS insists the Court must dismiss Counts I and II because it lacks jurisdiction to resolve the patent law dispute underlying those claims—namely the inventorship of a pending patent application.[62] Additionally, the Motion argues all three Counts fails to state a claim under Rule 12(b)(6).[63] Finally, BMS asserts Count II's declaratory judgment claim is not ripe.[64]

SRS disputes each of these arguments, maintaining: (1) the Court has jurisdiction to resolve the parties' non-arbitrable dispute; (2) each Count states a reasonably conceivable claim; (3) its declaratory judgment claim is ripe; and (4) a stay is nevertheless improper.[65] Because the Court holds Counts I and II are subject to arbitration, it need not address whether it has jurisdiction to determine inventorship, Count II's ripeness, or the Motion's Rule 12(b)(6) arguments.[66]

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[61] *Id.* at 3.

[62] *Id.* at 4.

[63] *Id.* at 4-5.

[64] *Id.* at 5.

[65] *See* Ans. Br. at 1-3.

[66] *See James & Jackson, LLC v. Willie Gray, LLC*, 906 A.2d 76, 79 (Del. 2006) ("[s]ubstantive arbitrability issues *are gateway questions* about the scope of an arbitration provision and its applicability to a given dispute." (emphasis added)).

A. SECTION 1.16(d) IS AN ARBITRATION PROVISION WHICH COVERS COUNTS I AND II.

BMS argues Section 1.16(d) compels arbitration of the parties' disputes, thereby making the Court an improper venue under Rule 12(b)(3).[67] BMS stylizes the parties' core dispute as "whether BMS-986454 is a Product under the Agreement for purposes of the Milestone Payments in Section 1.16."[68] The Motion insists the parties unambiguously agreed to arbitrate that exact issue in Section 1.16(d).[69]

SRS argues the Agreement does not compel arbitration of its claims.[70] SRS admits Section 1.16(d) empowers the "Expert" to determine whether a substance is

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[67] Op. Br. at 14-19. The Motion notes Delaware courts "defer to forum selection clauses . . . where the parties use express language clearly indicating that the forum selection clause excludes all other courts[.]" *Scanbuy, Inc. v. NeoMedia Tech., Inc.*, 2014 WL 5500245, at *2 (Del. Ch. Oct. 31, 2014) (internal quotations omitted); *see Gandhi-Kapoor*, 307 A.3d at 334 ("[a]n arbitration provision is a special type of forum selection clause.").

[68] Op. Br. at 15-16. The Motion argues "[t]he Complaint alleges that BMS-986454 is a Product . . . that commenced a Phase 1 Clinical Trial and asks the Court 'to force BMS to pay' certain Milestone Payments based on that premise." *Id.* (quoting Compl. ¶¶ 1, 94, 140). BMS's reply brief also points out that a dispute regarding "whether [a] [] Milestone Event has occurred," is expressly covered by Section 1.16(d). Agreement § 1.16(d); *see* Reply Br. at 2.

[69] Op. Br. at 16-17 (citing Agreement § 1.16(d)); *see In re Bay Hills*, 2018 WL 3217650, at *6 (holding the word "shall" indicates the parties intended a forum selection clause to be mandatory). Indeed, BMS contends SRS's pre-suit correspondence shows Plaintiff recognizes the arbitration requirement. Op. Br. at 17 (citing Compl., Ex. N (letter from Plaintiff's counsel to Defendant's, stating "[w]e write to make one last attempt to resolve the despite amicably before invoking our rights under the dispute resolution procedure of the Agreement and to bring matters outside that limited procedure to the Delaware Court of Chancery.")).

[70] Ans. Br. at 12-22. In the alternative, SRS argues "the Court should defer resolution of the scope of the expert determination [] until the parties can develop a full record." *Id.* at 21. SRS does not support this argument with any facts or law, simply alleging "there is an

a "Product or Compound," but rejects BMS's broader reading.[71] At the outset, SRS disputes BMS's characterization of Section 1.16(d) as an arbitration clause—instead arguing it sets out an expert determination.[72] An arbitration includes:

> An individual or panel of individuals who are usually legal professionals, such as retired judges, practicing attorneys, or law professors . . . [a proceeding] conducted under the ambit of a sponsoring organization, such as the American Arbitration Association [] or JAMS ADR . . . [and] an established set of procedural rules, often promulgated by the sponsoring organization[.][73]

Conversely:

> In the case of a typical expert determination, the authority granted to the expert is limited to deciding a specific factual dispute concerning a matter within the specific expertise of the decision maker . . . . The parties agree that the expert's determination of the disputed factual issue will be final and binding on them. The parties are not, however, normally granting the expert the authority to make binding decisions on issue of law or legal claims, such as legal liability.[74]

Based on these standards, SRS asserts Section 1.16(d) is a provision setting out an expert determination, "not a plenary, sweeping arbitration provision.[75] Even if Section 1.16(d) is an arbitration provision, SRS contends venue is proper because its

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issue of fact concerning the intent of the parties about the scope of the [e]xpert determination procedure." *Id.*

[71] OA Tr. 40:16-42:19.

[72] Ans. Br. at 13-16; *see Terrell v. Kiromic Biopharma, Inc.*, 297 A.3d 610 (Del. 2023) (differentiating between expert determination and arbitration provisions).

[73] *ArchKey Intermediate Hldgs. Inc. v. Mona*, 302 A.3d 975, 990-91 (Del. Ch. 2023).

[74] *Terrell*, 297 A.3d at 618.

[75] Ans. Br. at 16.

"claims are not 'solely with respect to' whether BMS-986454 is a Compound or a Product[.]"[76]

BMS argues Section 1.16(d) is an arbitration clause,[77] because: (1) the Agreement authorizes the decision maker to decide all legal and factual issues regarding whether a disputed Milestone Event occurred;[78] (2) the contractual mechanism is an arbitration in fact;[79] and (3) Section 1.16(d) repeatedly uses "arbitration" and similar words.[80] Therefore, BMS insists "the plain language in

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[76] Ans. Br. at 19-21(quoting Agreement § 1.16(d)). SRS represents that "this case centers on (1) whether any of BMS's patent applications are Milestone Product Patents under the Agreement, (2) whether any Milestone Events have occurred and consequently whether BMS owes any Milestone Payments arising from the BMS-986454 clinical studies as set forth in the Agreement, and (3) whether BMS impermissibly manipulated its patent portfolio to deny the Padlock Securityholders the benefit of their bargain." *Id.* at 20-21. Moreover, SRS maintains that BMS does not show how Section 1.16(d) invalidates Count III. *Id.* at 20. Because SRS argues Section 1.16(d) does not control, SRS contends the Agreement assigns venue for the parties' dispute to this Court. Ans. Br. at 16-19; *see* Agreement § 10.7.

[77] Reply Br. at 3-5; *see Cedres v. Geoffrey Servs. Corp.*, 2024 WL 1435110, at *4 (Del. Ch. Apr. 3, 2024) (holding a clause calls for an arbitration if it "delegate[s] to the decision maker authority to decide all legal and factual issues necessary to resolve the matter . . . [and] create[s] the look and feel of a judicial arbitration.").

[78] Reply Br. at 3-4. Specifically, the arbitrator can decide whether a given antibody is a Product and whether a Milestone Event has occurred. *Id.* Moreover, "[n]othing in Section 1.16(d) limits the arbitrator to determining only 'scientific parameters.'" *Id.* at 4.

[79] *Id.* at 4-5. BMS notes the Agreement: (1) calls for written submissions by each party and "oral hearings"; (2) discusses allocation of the "expenses of arbitration; (2) states where the "proceedings" are to occur; and (4) makes the arbitrator's decision "final and binding upon the parties." Agreement § 1.16(d).

[80] Op. Br. at 5-6 (citing Agreement § 1.16(d)). BMS also points to Section 1.13(c) to show "the parties understood the difference between an expert and an arbitration, and knew how to distinguish the two." *Id.* at 6-7 (citing Agreement § 1.13(c) ("the Accounting Firm shall be functioning as an expert and not an arbitrator.")).

Section 1.16(d) [] renders the arbitration procedure mandatory and binding" regarding SRS's claims.[81]

The threshold issue the Court must resolve is whether Section 1.16(d) is an arbitration or expert determination provision. If Section 1.16(d) is an arbitration provision, the Court is an improper venue for the portion of SRS's claims covered thereby.[82] Whether a provision establishes an arbitration or expert determination "turns on the authority that the ADR mechanism grants to the decision maker."[83] While use of the word "arbitrator" or "arbitration" "provides a strong signal that a legal arbitration is intended,"[84] a provision's terminology "is not dispositive."[85]

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[81] *Id.* at 7 (citing *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) ("where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."). BMS rejects SRS's reliance on the word "solely" as compelling a different result. Reply Br. at 8-10. BMS notes Section 1.16(d) refers "any dispute relating to any such matter [in a Compound/Product dispute]" to arbitration. Agreement § 1.16(d). Per BMS. "[a]ll of Plaintiff's claims, including Count III . . . related to whether BMS-986454 is a Product." Reply Br. at 9-10.

[82] *See Scanbuy*, 2014 WL 5500245, at *2 ("[t]he courts of Delaware defer to forum selection clauses and grant Rule 12(b)(3) motions to dismiss where the parties use express language clearly indicating that the forum selection clause excludes all other courts before which those parties could otherwise properly bring an action.") (internal quotations omitted).

[83] *ArchKey*, 302 A.3d at 982 (citations omitted); *see Paul v. Rockpoint Group, LLC*, 2024 WL 89643, at *10 (Del. Ch. Jan. 9, 2024) ("[t]o properly characterize a dispute resolution mechanism, a court applies the authority test. That test compares the parties' chosen mechanism with the avatars of a legal arbitration or expert determination.").

[84] *Paul*, 2024 WL 89643, at *10.

[85] *ArchKey*, 302 A.3d at 982.

Standing alone, Section 1.16(d)'s terminology is at first glance somewhat internally contradictory. While the provision repeatedly uses words like "arbitration" and "arbitrate," it also calls the decision maker an "Expert."[86] With this in mind, it is axiomatic that "courts must read the specific provisions of [a] contract in light of the entire contract."[87]

Considering Section 1.16(d) in the context of the Agreement as a whole suggests it is an arbitration provision. The Agreement makes this clear by specifically marking a distinction between an "expert" and an "arbitrator" in other provisions. Section 11.3(c) explicitly states an "Accounting Firm shall be functioning as an expert and not as an arbitrator," when resolving a purchase price dispute.[88] This language shows the parties knew how to memorialize an expert determination.[89] That Section 1.16(d) lacks similar language suggests it calls for arbitration, not merely expert determination.[90]

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[86] *See* Agreement § 1.16(d).

[87] *Osios LLC v. Tiptree, Inc.*, 2024 WL 2947854, at *3 (Del. Ch. June 12, 2024) (citing *PR Acqs., LLC v. Midland Funding LLC*, 2018 WL 2041521, at *6 (Del. Ch. Apr. 30, 2018)).

[88] Agreement § 1.13(c).

[89] *See Paul*, 2024 WL 89643, at *10 ("the phrase 'as an expert and not as an arbitrator' strongly signals an expert determination.").

[90] *See Williams Cos., Inc. v. Energy Transfer LP*, 2020 WL 3581095, at *12 n.123 (Del. Ch. July 2, 2020) ("[o]ne principle of contract interpretation in Delaware is that the use of different language in different sections of a contract suggests the difference is intentional—i.e., the parties intended for the sections to have different meanings.").

The powers given to the decision maker under Section 1.16(d) confirm that suggestion.[91] In recent cases, both the Supreme Court of Delaware and this Court extensively discussed how expert determination and arbitration provisions differ in scope and procedure.[92] Critically, an arbitration provision: (1) "include[s] procedural rules affording each side the opportunity to present their case";[93] (2) empowers a decision maker "to decide legal disputes . . . [and] interpret" a contract;[94] which (3) can result in legal liability.[95] All three elements are present in Section 1.16(d). The provision sets out clear procedural rules parties must follow, beginning with SRS delivering to BMS "written notice" of a dispute.[96] Both parties are entitled to submit documents and participate in any oral argument concerning the dispute.[97] The decision maker is expressly empowered to determine whether a subject falls

[91] *See Cedres*, 2024 WL 1435110, at *4 (holding Courts interpret provisions that memorialize "guidelines [that] create the look and feel of a judicial proceeding" as arbitration clauses).

[92] *See Terrell*, 297 A.3d at 618 (quoting *Penton Business Media Holdings, Inc. v. Informa, PLC*, 252 A.3d 445, 464 (Del. Ch. 2018)); *ArchKey*, 302 A.3d at 989-90.

[93] *Terrell*, 297 A.3d at 618-19; *see Ray Beyond Corp. v. Trimaran Fund Mgmt., L.L.C.*, 2019 WL 366614, at *7 (Del. Ch. Jan. 29, 2019) (holding such a right is "a defining characteristic of arbitration provisions.").

[94] *Penton*, 252 A.3d at 466.

[95] *See Pazos v. AdaptHealth LLC*, 322 A.3d 492, 500-02 (Del. Super. Aug. 12, 2024).

[96] *See* Agreement § 1.16(d).

[97] *Id.*

under the Agreement's defined terms of "Compound" or "Product."[98] SRS itself admits as much.[99] Additionally, the decision maker decides "whether [a] disputed Milestone Event has occurred"—a finding that could result in multimillion dollar legal liability as this very case demonstrates.[100] Therefore, Section 1.16(d) details a dispute resolution process that looks like a judicial proceeding. This, coupled with the textual evidence discussed above, shows Section 1.16(d) is an arbitration provision.

The Court must therefore determine whether the parties' dispute falls within Section 1.16(d)'s scope thereby compelling dismissal. With regards to Counts I and II, the answer is yes. Both claims rely on the allegation that "BMS-986454 is a Monoclonal Antibody and *Product* under the Agreement."[101] Count I asks the Court to determine whether the disputed Primary Phase I Milestone Event occurred.[102] Count II seeks a declaration "that BMS is required to pay each Primary Milestone

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[98] *Id.*

[99] OA Tr. 40:16-43:9.

[100] Agreement § 1.16(d). Again, SRS concedes the "Expert" contemplated in Section 1.16(d) determines whether a Milestone Event has occurred, thus triggering a Milestone Payment. OA Tr. 44:4-45:21. Evaluating whether a party owes a contractual payment or damages is a determination of legal liability. *See Bennett v. Plantations East Condominium Ass's, Inc.*, 2010 WL 3065228, at *2 (Del. Ch. July 22, 2010).

[101] Compl. ¶ 146 (emphasis added); *see id.* ¶¶ 152-53 ("BMS informed SRS . . . of its position that BMS-986454 was 'not a Product eligible to trigger any Milestone Payments' . . . SRS communicated its disagreement with BMS's Position[.]" (quoting Compl., Ex. D at 3)).

[102] *See id.* ¶¶ 145-49.

Amount as and when BMS-986454 reaches each Milestone Event."[103] Thus, the Court must determine whether BMS-986454 is a "Product or Compound" and whether a Milestone Event occurred to resolve Counts I and II. These are the exact issues Section 1.16(d) explicitly refers to arbitration.[104] Hence, this Court is not the proper venue to adjudicate Counts I and II.[105] The Court **GRANTS** the Motion regarding Counts I and II.

B. COUNT III IS STAYED PENDING RESOLUTION OF THE ARBITRATION.

Having found Counts I and II are subject to arbitration, the Court must determine how to address the implied covenant claim. SRS admits Count III is pleaded in the alternative to Counts I and II.[106] A count pled in the alternative provides a separate basis for recovery "in the event [the primary claim] falls short."[107] Therefore, the arbitrator's decision regarding Counts I and II may obviate the need for the Court to address Count III. As such, the Court exercises its

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[103] *See id.* ¶¶ 151-60.

[104] *See* Agreement § 1.16(d).

[105] *See BuzzFeed Media Enterprises, Inc. v. Anderson*, 2024 WL 2187054, (Del. Ch. May 15, 2024) (holding courts cannot adjudicate issues subject to a contractual arbitration provision (citing *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 68 (2019))).

[106] OA Tr. 36:23-24.

[107] *Voigt v. Metcalf*, 2020 WL 614999, at *8 (Del. Ch. Feb. 10, 2020); *see In re Asbestos Litigation*, 2007 WL 1651968, at *17 (Del. Super. May 31, 2007) (stating alternative pleadings provide multiple "theories as alternative bases for recovery.").

discretion to stay Count III pending resolution of Counts I and II in arbitration.[108] Staying Count III is appropriate based on this Court's precedent.[109] Accordingly, the Court stays Count III until arbitration addresses Counts I and II.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** BMS's Motion. Counts I and II are dismissed in favor of contractual arbitration. Count III is stayed pending completion of that arbitration.

IT IS SO ORDERED.

/s/ *Patricia A. Winston*
Patricia A. Winston, Judge

[108] *See Parfi Holding AB v. Mirro Image Internet, Inc.*, 926 A.2d 1071, 1075 (Del. 2007) (holding courts have "discretion" to determine whether to grant a stay).

[109] *See Meyers v. Quiz-Dia LLC*, 2016 WL 7048783, at *3 (Del. Ch. Dec. 2, 2016) (holding it is proper to stay a claim "intertwined" with another claim subject to arbitration, such that "arbitration of one claim would produce factual findings" resolving the other claim).