IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

TRUSTEES OF BOSTON UNIVERSITY, LEON C. HIRSCH, TURI JOSEFSEN GERALD CASSIDY, and LORETTA P. CASSIDY,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 02-1312-SLR
LIGAND PHARMACEUTICALS, INC.	)	
Defendant.	)	

William O. LaMotte, III, Morris Nichols Arsht & Tunnell, Wilmington, Delaware. Counsel for Plaintiffs. John F. Sylvia, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Boston, Massachusetts. Of Counsel for Plaintiffs.

Donald J. Wolfe, Jr., Arthur L. Dent, Brian C. Ralston, and Catherine A. Strickler, Potter Anderson & Corroon LLP, Wilmington, Delaware. Counsel for Defendant. William F. Sullivan and Colleen E. Huschke, Paul, Hastings, Janofsky & Walker LLP, San Diego, California. Of Counsel for Defendant.

MEMORANDUM OPINION

Dated: October 30, 2003
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On December 11, 2001, Trustees of Boston University, Leon C. Hirsch, Turi Josefsen, Gerald Cassidy and Loretta P. Cassidy ("plaintiffs") filed a complaint against Ligand Pharmaceuticals, Inc. ("defendant") in the United States District Court for the District of Massachusetts. (D.I. 1) The complaint included three counts: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) violation of Mass. Gen. L. ch. 93A, § 11 for unfair and deceptive trade practices. (Id.) On April 30, 2003, defendant moved to transfer the case to the United States District Court for the District of Delaware pursuant to 28 U.S.C. § 1404(a). (D.I. 4) Plaintiffs consented to the transfer on May 29, 2003. (D.I. 7)

Plaintiff Trustees of Boston University is a Massachusetts not for profit corporation with its principal place of business in Boston, Massachusetts. Plaintiffs Leon C. Hirsch and Turi Josefsen are residents of the State of Connecticut. Plaintiffs Gerald Cassidy and Loretta P. Cassidy are residents of the District of Columbia. Defendant is a Delaware corporation with its principal place of business in San Diego, California. The court has jurisdiction over this action based upon 21 U.S.C. § 1332(a), diversity of citizenship.

Once before this court, defendant moved to dismiss the

unfair and deceptive trade practices count on September 11, 2002. (D.I. 6) Since the parties submitted documents in support of and in opposition to this motion, the court, however, reviewed the motion as one for summary judgment and granted defendant's motion on April 11, 2003. (D.I. 27)

Defendant's motion for summary judgment and plaintiffs' cross motion for summary judgment with respect to the remaining counts of the complaint are currently before the court. (D.I. 34, 37) For the reasons discussed below, the court denies defendant's motion and grants plaintiffs' cross motion.

II. BACKGROUND

Plaintiffs are a subset of stockholders of the former Seragen, Inc. ("Seragen"). On August 12, 1998, Seragen merged into Knight Acquisition Corporation ("Knight"), a wholly owned subsidiary of defendant. (D.I. 1 at ¶2) Pursuant to the merger, Seragen, Knight, and defendant (collectively referred to as "SKD") entered into an "Agreement and Plan of Reorganization" (the "Merger Agreement") on May 11, 1998 to define their rights and obligations. Under the terms of this agreement, defendant was required to make two specific payments to all former Seragen shareholders. (D.I. 1 at ¶11) The initial payment in the amount of $30 million in cash and Ligand common stock was to be paid upon executing the Merger Agreement. (Id.) The second payment (the "Milestone Payment") in the amount of $37 million was

contingent upon final Food and Drug Administration ("FDA") approval of the primary drug developed by Seragen. (D.I. 1 at ¶12) Because SKD anticipated that some Seragen shareholders might file a lawsuit to attack the merger (D.I. 35 at 4), the Merger Agreement also contained a provision under which such former shareholders must reimburse defendant in the event that defendant incurs damages as a result of Seragen's breach of the representations, warranties, covenants, and agreements contained in the Merger Agreement. (D.I. 36 at 63) Section 8.1(a) recites this set-off provision.

> In no event shall the Identified Company Stakeholders be liable for any Parent Damages unless the aggregate amount of such Parent Damages exceeds Two Hundred Fifty Thousand Dollars ($250,000), in which case each Identified Company Shareholder shall be liable for its Pro Rata Portion of all Parent Damages over an aggregate amount for all Identified Company Stakeholders of Two Hundred Fifty Thousand Dollars ($250,000) (the "Deductible Amount") up to, but not exceeding, an aggregate amount for all Identified Company Stakeholders of Eight Million Seven Hundred Thousand Dollars ($8,700,000) above the Deductible Amount.

(D.I. 36 at 63) The present plaintiffs are a subset of "Identified Company Stakeholders" from whom defendant may seek "Parent Damages." Under Section 8.1(d) of the Merger Agreement, "Parent Damages" are defined to specifically include

> any and all losses, damages, liabilities, obligations, claims, demands, judgments, settlements, governmental investigations, [t]axes, costs and expenses of any nature whatsoever, including the reasonable fees and expense of attorneys, accountants and consultants resulting from, arising out of or attributable to a

> breach of the Company's representations, warranties, covenants and agreements under this Agreement.

(D.I. 36 at 63) Section 8.1(b) of the Merger Agreement permits defendant to reduce the Milestone Payment by any "amounts constituting Parent Damages" up to an aggregate amount of $2,900,000 million. (D.I. 36 at 63) Section 8.1(b) reads:

> Parent shall have the right to reduce each Identified Company Stakeholder's Milestone Consideration due under this Agreement by such Identified Company Stakeholder's Pro Rata Portion of any amounts constituting Parent Damages up to an aggregate amount for all Identified Company Stakeholders of Two Million Nine Hundred Thousand Dollars ($2,900,000) above the Deductible Amount.

(D.I. 36 at 63)

Shortly after the merger was finalized, the common shareholders of Seragen sued Ligand, Knight, Seragen, Seragen Technology, Inc., as well as certain officers, directors, and affiliates of Seragen, including many of the plaintiffs named in the present suit, in the Court of Chancery of the State of Delaware to enjoin the merger (the "Oliver Litigation").[1] (D.I. 35 at 5) Although the case presently remains pending, the Court of Chancery dismissed all claims against Seragen and defendant on July 25, 2000.[2] (D.I. 35 at 7) The Court of Chancery's

[1] Oliver et al. v. Boston University et al., CA No. 16570-NC. Plaintiff Loretta P. Cassidy was not named as a defendant in that suit.

[2] Oliver et al. v. Boston University et al., 2000 Del. Ch. LEXIS 104 (Del. Ch. 2000).

decision, however, is not yet final.[3] In addition, since defendant's wholly-owned subsidiary Seragen is obligated to indemnify certain defendants who remain in the Oliver Litigation, defendant may incur liabilities in the future. (D.I. 35 at 3)

On February 5, 1999, SKD obtained final FDA approval for Seragen's primary drug, triggering payment of the Milestone Payment to all former Seragen shareholders by August 5, 1999. (D.I. 1 at ¶12) Prior to making this payment, defendant notified plaintiffs as Identified Company Stakeholders of its intent to exercise the set-off provision of Section 8.1(a) and withhold $2,100,000 million. (D.I. 1 at ¶14) Defendant contended that the claims asserted by plaintiffs in the Oliver Litigation constituted "claims" or "demands" falling within the definition of Parent Damages under Section 8.1(d) of the Merger Agreement. Defendant explained that "[a]lthough a specific claim for damages [had] not been made, in settlement discussions counsel for plaintiffs [had] demanded as much as $4.00 per share for the affected class which [was], in the aggregate, a claim for about $50,000,000." (D.I. 35 at 7) With regard to the other former Seragen shareholders not considered Identified Company Stakeholders, defendant paid some or all of the Milestone Payment in a pro rata fashion. (D.I. 1 at ¶19) Plaintiffs,

[3]Indeed, trial in the Oliver Litigation is not scheduled to commence until September 2004.

consequently, filed their complaint in Massachusetts to recover the set-off amount of $2,100,000 million. (D.I. 1)

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted).

If the moving party has demonstrated an absence of material fact, then the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pennsylvania Coal Ass'n v. Babbitt, 63

F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, then the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In other words, the court must grant summary judgment if the party responding to the motion fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. See Omnipoint Comm. Enters., L.P. v. Newtown Township, 219 F.3d 240, 242 (3rd Cir. 2000) (quoting Celotex, 477 U.S. at 323).

IV. DISCUSSION

Both plaintiffs and defendant assert that no genuine issues of material fact exist to preclude entry of summary judgment. The parties simply differ on the interpretation of the set-off provision contained in Section 8.1(a) of the Merger Agreement. Plaintiffs contend that this set-off provision entitles defendant to reduce the Milestone Payment due on August 5, 1999 by any actual monetary losses in excess of $250,000 incurred as of the

date of final FDA approval. To this end, plaintiffs argue that defendant did not incur more than $250,000 in monetary loss as of February 5, 1999. Plaintiffs, therefore, charge that defendant materially breached the Merger Agreement by withholding $2,100,000 million from the Milestone Payment.

In contrast, defendant avers that the set-off provision entitles it to withhold a portion of the Milestone Payment in the event that it receives "claims [or] demands . . . resulting from, arising out of or attributable to" a breach of the representations, warranties, covenants, and agreements stemming from the merger. Defendant maintains that, because the plaintiffs in the Oliver Litigation sued defendant alleging that Seragen breached such representations, warranties, and obligations, such claims were brought within the meaning of "Parent Damages." Defendant further argues that it is entitled to withhold $2,100,000 million until such time as a final determination regarding defendant's actual Parent Damages, if any, is made.

The parties agreed in Section 8.8 of the Merger Agreement that the agreement shall be governed by and construed in accordance with the law of the State of Delaware. (D.I. 63 at 66) Under Delaware law, construction of contract language is a question of law. See Pellaton v. Bank of New York, 592 A.2d 473, 478 (Del. 1991). The court's primary consideration is to give

effect to the intent of the parties at the time they contracted. See Myers v. Myers, 408 A.2d 279, 280-81 (Del. 1979). Delaware courts, consequently, attempt to determine intent from the overall language of the contract and adhere to the "objective" theory of contracts. See Cantera v. Marriott Senior Living Servs., Inc., 1999 Del. Ch. LEXIS 26, *12 (Del. Ch. Feb. 18, 1999). Under this theory, a contract should be afforded a construction that may "be understood by an objective reasonable third party." R.E. Haight & Assocs. v. W.B. Venables & Sons, Inc., 1996 Del. Super. LEXIS 445, *9 (Del. Super. Oct. 30, 1996) (quoting Demetree v. Commonwealth Trust Co., 1996 Del. Ch. LEXIS 112, *7-8 (Del. Ch. Aug. 27, 1996)). In other words, "[c]ontract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language." Eagle Indus., Inc. v. DeVilbiss Heath Care, Inc., 702 A.2d 1228, 1232 (Del. 1997).

Consistent with the "objective" theory of contracts, Delaware courts must first determine whether the contractual language in dispute, when read in the context of the entire contract, is ambiguous. Ambiguity exists only when a contractual provision is "reasonably or fairly susceptible of different interpretations or may have two or more different meanings." Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.,

616 A.2d 1192, 1196 (Del. 1992) (citing Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 926 (Del. 1982)). Ambiguity does not exist, however, where the court can determine the meaning of a contract "without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends." Rhone-Poulenc, 616 A.2d at 1196 (quoting Holland v. Hannan, 456 A.2d 807, 815 (D.C. 1983)). Additionally, contract language "is not rendered ambiguous simply because the parties do not agree upon its proper construction" or "because the parties in litigation differ concerning its meaning." City Investing Co. Liquidating Trust v. Continental Cas. Co., 624 A.2d 1191, 1198 (Del. 1993). Finally, "[t]he mere assertion that ambiguity or divergent intent exists will not prevent summary judgment from being entered." 65 Charles Alan Wright et. al., Federal Practice and Procedure, § 2730.1 (1998).

When ambiguity exists, Delaware law permits the court to look beyond the language of the contract to ascertain the parties' intentions. See Eagle, 702 A.2d at 1232. The court may consider evidence of prior agreements, communications of the parties, trade usage, and course of dealing. Id. at 1233. In contrast, where the contract language is unambiguous, "extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity." Id. at 1232.

Applying the above standards to the facts of the instant case, the court concludes that defendant does not have a right to retain the $2,100,000 that it withheld from plaintiffs. The court finds Section 8.1(d) of the Merger Agreement concerning Parent Damages unambiguous when read in light of Section 8.1(b). Section 8.1(b) provides that Identified Company Stakeholders may be liable for "the aggregate **amounts** of such Parent Damages" that exceed $250,000. (Emphasis added) This section also permits defendant to reduce the Milestone Payment "due under the [Merger] Agreement" by this aggregate amount. The court finds that the language in Section 8.1(b) contemplates a specific damage amount. Accordingly, contrary to defendant's position, the court concludes that the terms "claims" and "demands" as used in Section 8.1(d) do not mean a possible future damage amount.

The language of Section 8.1(d) substantiates this interpretation. As noted by plaintiffs, Section 8.1(d) attempts to capture all forms of measurable monetary loss flowing from a breach by Seragen of its representations, warranties, covenants, and agreements under the Merger Agreement. For example, it includes the terms "losses, damages, liabilities, obligations, . . . judgments, settlements, governmental investigations, taxes, costs and expenses of any nature whatsoever." This section does not include actions which do not trigger immediate financial obligation. Therefore, based on the nature of the terms

incorporated into this section, the terms "claims" and "demands" necessarily must refer to immediate requests for money damages.

In considering the definitions for the terms "claim" and "demand" supplied by defendant from Merriam-Webster's Collegiate Dictionary (11th ed. 2003), the court notes these definitions further support the court's interpretation. "Claim" is defined as "a demand for something due or believed to be due," and "demand" is defined as "an act of demanding or asking especially with authority; something claimed as due." The court views the concept of being "due" as key to each definition. Under the instant facts, as noted above, Parent Damages have not been judged due and owing to defendant and may never be judged due and owing. Accordingly, the court grants summary judgment in favor of plaintiffs and against defendant.

V. CONCLUSION

For the reasons stated, the court denies defendant's motion for summary judgment and grants plaintiffs' cross motion for summary judgment. An appropriate order shall issue.

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FOR THE DISTRICT OF DELAWARE

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Plaintiffs,	)	
v.	)	Civil Action No. 02-1312-SLR
LIGAND PHARMACEUTICALS, INC.	)	
Defendant.	)	

O R D E R

At Wilmington this 30th day of October, 2003, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1.) Defendant's motion for summary judgment (D.I. 34) is denied.

2.) Plaintiffs' motion for summary judgment (D.I. 37) is granted.

3.) The Clerk of Court is directed to enter judgment in favor of plaintiffs and against defendant.

Sue L. Robinson
United States District Judge