IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILLOW BAY ASSOCIATES, LLC, a Nevada limited liability company, Plaintiff v. IMMUNOMEDICS, INC., a Delaware corporation Defendant-Counterclaimant v. THE ZANETT SECURITIES CORPORATION, a New York corporation, Additional Defendant on the counterclaim.	)	C.A. No. 00-99-GMS

MEMORANDUM AND ORDER

I. INTRODUCTION

On February 17, 2000, the plaintiff, Willow Bay Associates, LLC ("Willow Bay") filed the above-captioned complaint alleging breach of a "non-circumvention" contract or "reciprocal confidentiality agreement" by the defendant Immonmedics, Inc. ("Immunomedics"). Presently before the court are Immunomedics' Motion for Dismissal or, Alternatively, for Summary Judgment (D.I. 120) and Willow Bay's Motion for Summary Judgment Dismissing the Counterclaim (D.I. 118). For the reasons that follow, the court will deny Immunomedics' motion and grant the motion

of Willow Bay.[1]

II. BACKGROUND

Willow Bay is a private firm which locates investors for public companies. Immunomedics, a publicly traded bio-pharmaceutical company, sought financing for working capital and research and development. The parties entered into a reciprocal confidentiality agreement ("RCA") on August 20, 1999. The agreement contained "Exhibit A," listing ten potential investors, which were reduced to eight by Immunomedics. In exchange for Willow Bay's disclosure of such investors, Imunomedics agreed to refrain from directly negotiating with any of these eight investors without Willow Bay's written consent for a period of six months. Willow Bay alleges that Immunomedics breached the RCA by secretly and directly negotiating with Paramount Capital ("Paramount"), one of the investors listed in Exhibit A. Those negotiations culminated in a multi-million dollar investment in Immunomedics by Paramount. The plaintiff seeks damages resulting from such alleged breach of the RCA. In turn, the defendant urges that the RCA is void for failure to satisfy the statute of frauds. In addition, Immunomedics filed a counterclaim against Willow Bay and The Zanett Securities Corporation ("Zanett"), which owns Willow Bay. The counterclaim alleges that the failure of Willow Bay and/or Zanett to timely secure the desired funding caused damages to the defendant. The plaintiff seeks to dismiss the counterclaim.

II. STANDARDS OF REVIEW

[1] The court granted leave to file further summary judgment motions following reconsideration of an order granting summary judgment to the defendant. For a discussion of the procedural history of the case, see *Willow Bay Associates, LLC v. Immunomedics, Inc.*, 2002 WL 1300032 (D. Del. 2002).

A. Failure to State a Claim[2]

Immunomedics moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Dismissal is appropriate pursuant to this Rule if the complaint fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In this inquiry, the court must accept as true and view in the light most favorable to the non-movant the well-pleaded allegations of the complaint. *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 183-84 (3d Cir. 2000). The court 'need not accept as true "unsupported conclusions and unwarranted inferences."' *Id.* (quoting *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 263 n.13 (3d Cir. 1998)) (quoting *Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997)). It is the duty of the court, however, 'to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation which is or is not justiciable.' *Id.* at 184 (quoting *City of Pittsburgh*, 147 F.3d at 263). The court 'may consider an undisputably authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document.' *Steinhardt Group, Inc. v. Citicorp*, 126 F.3d 144, 145 (3d Cir. 1997) (quoting *Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993)) (citations omitted).

B. Summary Judgment

Alternatively, and should the court look to facts outside the complaint, the defendant moves

[2] The plaintiff suggests that the defendant is barred from renewing a motion to dismiss by the court's June 12, 2002 order, in which it vacated an order granting summary judgment to the defendant and granted leave to both parties to file further summary judgment motions. *See supra* note 1; *see also* Willow Bay's Opposition to Immunomedics' Motion for Dismissal at 6-7. Although the court did not affirmatively grant leave to file further motions to dismiss, it does not perceive that the June 12 order bars the defendant from doing so. In any case, Willow Bay's objection appears moot in light of the court's denial of the defendant's motion to dismiss.

for summary judgment pursuant to Federal Rule of Civil Procedure 56. The court may grant summary judgment "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); *see also Boyle v. County of Allegheny Pa.*, 139 F.3d 386, 392 (3d Cir. 1998). Thus, summary judgment is appropriate only if the moving party shows there are no genuine issues of material fact that would permit a reasonable jury to find for the non-moving party. *Boyle*, 139 F.3d at 392. A fact is material if it might affect the outcome of the suit. *Id*. (citing *Anderson v. Liberty Lobby*, *Inc.,* 477 U.S. 242, 247-248 (1986)). An issue is genuine if a reasonable jury could possibly find in favor of the non-moving party with regard to that issue. *Id*. In deciding the motion, the court must construe all facts and inferences in the light most favorable to the non-moving party. *Id*.; *see also Assaf v. Fields*, 178 F.3d 170, 173-74 (3d Cir. 1999).

III. DISCUSSION

A. Defendant's Motion to Dismiss or in the Alternative for Summary Judgment

1. Motion to Dismiss

The defendant asserts that the statute of frauds bars the present action. The New York statute of frauds states that "every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith." N.Y. Gen. Oblig. L. § 5-701 (2002).[3] The statute applies to only ten types of contracts, including "a contract to pay compensation for services rendered in negotiating a . . . business opportunity." *Id.*

[3] The parties agree, and the RCA states, that New York law governs the interpretation of the contract.

§ 5-701(a)(10). Immunomedics contends that the contract at issue in the present case, the reciprocal confidentiality agreement ("RCA"), constitutes such a contract. Because the RCA does not include essential terms as to the broker's commission, the defendant continues, it is void pursuant to § 5-701. The court disagrees.

This is a breach of contract case. In exchange for the disclosure of potential investors and efforts in attempting to secure financing for Immunomedics, the defendant agreed to provide confidential business information to Willow Bay. In addition, the agreement obligated the defendant to refrain from negotiating with any of the potential investors identified in Exhibit A for a period of six months. In this action, the plaintiff merely asserts that Immunomedics breached the RCA by secretly pursuing a business opportunity with one of the identified potential investors. Willow Bay seeks damages resulting from such alleged breach. Assuming as true all of its well-pleaded allegations, the plaintiff has stated a claim for relief. *See*, *e.g.*, *Retrofit Partners I, L.P. v. Lucas Industries, Inc.*, 201 F.3d 155 (2d Cir. 2000) (upholding validity of non-circumvention and reciprocal confidentiality agreement); *Eden Hannon & Co. v. Sumitomo Trust & Banking Co.*, 914 F.2d 556 (4th Cir. 1990) (upholding non-circumvention agreement and imposing constructive trust on profits resulting from breach thereof); *BNY Capital Markets, Inc. v. Moltech Corp.*, 2001 WL 262675 (S.D.N.Y. 2001) (holding defendant liable for breach of non-circumvention agreement).

The defendant's briefing is replete with references to an oral agreement, and to cases in which courts refused to give effect to alleged oral agreements. The plaintiff's complaint, however, is in no way founded on an oral agreement. Rather, it is based solely upon the RCA itself, a complete and valid written contract. The RCA does not violate the statute of frauds because it is

written and signed by all relevant parties. In addition, it is not a contract to pay compensation for brokering a business opportunity; rather, as it plainly states, it is a confidentiality and non-circumvention agreement.[4] The RCA prohibits either party from disclosing confidential information, and provides a remedy for any breach of such obligation. Because the agreement is in writing, because the plaintiff does not attempt to enforce an oral agreement, and because the RCA is not a brokerage agreement of the kind comprehended by § 5-701, the court must conclude that it is not subject to the New York statute of frauds. The defendant's motion to dismiss on this basis is denied.

The court's conclusion is not altered by the fact that there is no language in the RCA as to the fee Willow Bay would be entitled to if it had secured the desired financing for Immunomedics. The statute of frauds does not dictate which terms must be included in a writing, but leaves it to the fact-finder to determine those terms that are material in any given context. *Rothberg v. Bernstein*, 1990 WL58902 (S.D.N.Y. 1990) ("The Practice Commentary to the New York statute of frauds states that while the general rule is that a writing must contain all the essential terms of the agreement to be sufficient, 'some elements may be left to construction . . . .' If the agreement on

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[4] Indeed, in other briefing and testimony, the defendant and its witnesses have repeatedly and vigorously asserted that the RCA is not a brokerage services agreement. *See*, *e.g*., Brief in Support of Motions in Limine to Dismiss Based on FRCP 17 or to Preclude the Expert Testimony of David McCarthy, Exh. E at 10 ("[The RCA] is not an agreement to provide brokerage services."); Exhibit J-2 to Eagle Decl. ("The RCA between Willow Bay and Immunomedics is not a brokerage services agreement, but rather an agreement by both parties not to divulge each other's confidential information."); Sullivan Dep. (July 5, 2001) at 224:25-225:8 ("I consider this agreement overall to be a confidentiality agreement."); Goldenberg Dep. (June 28, 2001) at 5:9-24 ("[The RCA] was just a confidentiality agreement."). Although parties are free, to an extent, to assert inconsistent positions, the defendant's previous and present positions are so utterly and diametrically opposed that they strain any sense of credibility. Out of a great sense of charity, the court will not pursue the plaintiff's proposal that the defendant be judicially estopped from even raising its current position that the RCA is a contract for broker's fees. The defendant's Janus-like countenance, however, is duly noted.

its face can be construed as reasonably complete, this is sufficient.") (quoting N.Y. Gen. Oblig. Law § 5-701, Practice Commentary at para. II B(1) (McKinney 1989)) (citing cases).

Furthermore, courts have held that a specific compensation term is not material to a non-circumvention agreement. For example, in *Cura Financial Services N.V. v. Electronic Payment Exchange, Inc.*, the court confronted the issue of whether a non-circumvention agreement, similar to the one at issue in the present case, constituted a valid, independent contract, notwithstanding the absence of a provision regarding compensation. It answered in the affirmative:

> The Non-Circumvention Agreement is a binding contract. In exchange for valid consideration – the right to learn [the plaintiff's] sources – [the defendant] . . . agreed to specific restrictions on [its] conduct toward those sources. This arrangement was a commercially reasonable way to proceed in a context in which [the defendant] was uncertain about the ultimate compensation [the plaintiff] and it could receive, and in which [the defendant] therefore argued that [the plaintiff's] compensation could not be determined until the terms of a deal with an acquiring bank could be negotiated. In the presence of uncertainty, [the plaintiff] protected himself by extracting a veto power over [the defendant's] ability to exploit his bank sources without his permission. [The defendant] was interested enough in obtaining access to [the plaintiff's] sources that it agreed to this unambiguous provision. Any further term regarding compensation was not essential to this arrangement.

Cura, 2001 WL 1334188, at *17 (Del. Ch. 2001).[5] Likewise, in *Retrofit Partners*, the appellate court reversed the district court's conclusion that a non-circumvention and reciprocal confidentiality agreement was not a valid contract, but merely an invitation by the plaintiff to make an offer. *Retrofit Partners*, 201 F.3d at 160. "To the contrary," the court concluded, "we think it clear that

[5] Cura was decided according to Delaware law. Nonetheless, the holding is persuasive, as the contract principles at issue are analogous under New York and Delaware law. *See*, *e.g.*, *Meritxell, Ltd. v. Saliva Diagnostic Systems, Inc.*, 1998 WL 40148, at *5 n.6 (S.D.N.Y. 1998) ("New York law is consistent with Delaware's general principles of contract interpretation.").

the 1992 Agreement was a binding contract. It was a written instrument executed by both parties pursuant to which the plaintiffs divulged proprietary information and the defendant agreed to refrain from sharing that information with others and from competing with the plaintiffs' project." *Id*.

Similarly, the court concludes that the present reciprocal confidentiality agreement is a binding contract. As it is not a contract for brokering fees, the presence or absence of terms regarding a specific broker's fee is not fatal. Of course, as the court noted in *Cura*, the absence of a term regarding compensation may "complicate the court's determination of the appropriate remedy," but does not render the non-circumvention agreement non-binding or void. *Cura*, 2001 WL 1334188, at *17. The defendant's motion to dismiss for lack of a material term or indefiniteness is denied.

2. Motion for Summary Judgment

In its alternative motion for summary judgment, the defendant reasserts that the RCA is void pursuant to the statute of frauds. In response, the plaintiff asserts three defenses.[6] Because the court has determined that § 5-701 does not apply to the RCA, it need not address these arguments. In any case, at minimum, an examination of trial testimony and other evidence is necessary to understand the nature of the RCA and to determine whether it falls within the ambit of the statute of frauds. For example, the defendant contends that the RCA is indefinite. A definiteness inquiry, however, entails examination of extrinsic evidence such as industry custom and practice. *Lee v. Joseph E. Seagram & Sons, Inc.*, 413 F. Supp. 693, 698 (S.D.N.Y. 1976), *aff'd*, 552 F.2d 447 (2d Cir. 1977) ("[A]n agreement will not fail for lack of definiteness where it can be rendered certain by reference to

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[6] The plaintiff defends the contract on grounds of partial performance, the existence of an integrated and complete written agreement, and judicial estoppel. *See* Plaintiff's Opposition to Immunomedics' Motion for Dismissal at 15-16.

extrinsic sources."). Summary judgment as to the applicability of the statute of frauds to the non-circumvention agreement therefore is inappropriate.

B. Plaintiff's Motion for Summary Judgment Dismissing the Counterclaim

Immunomedics asserts a four-count counterclaim against Willow Bay, alleging misrepresentation, lost opportunity, breach of contract, and breach of the implied covenant of good faith and fair dealing. Each of these counts relies upon the same set of facts as alleged in the counterclaim, which may be summarized in the following way:

1) "Immunomedics informed Zanett's and/or Willow Bay's representative, Mark Corroon, that Immumomedics needed funding in order to redeem by purchase Immumomedics' Series F convertible preferred shares of stock so as to avoid the holders of those shares converting their preferred shares into common shares, thereby diluting Immonomedics' common stock, driving the share price down, and making it more difficult for the company to raise needed operational capital and/or to form strategic alliances, and potentially causing NASDAQ to delist Immunomedics if its stock fell below $1.00 per share." Amended Answer, Affirmative Defenses, and Counterclaim ("Counterclaim") ¶ 11.

2) Willow Bay and/or Zanett "represented to Immunomedics that all of the entities listed on the said 'Exhibit A,' including but not limited to Paramount Capital, were 'investors or co-investors' of Willow Bay." Counterclaim ¶ 5. Such representation was false, and the plaintiff either knew it was false and intended Immumomedics to rely on it, or negligently made the false representation with knowledge that Immunomedics "would probably rely on it" in deciding to sign the RCA. *Id*.

3) As a result of the representations of Willow Bay and/or Zanett regarding their attempts to secure financing for Immunomedics, the defendant "did not contact Paramount Capital or any of the other entities listed on the said 'Exhibit A," and, consequently, there was a delay in the time that Immunomedics eventually succeeded in obtaining its desired financing . . . . During the period of the delay, and as a result thereof, holders of Immunomedics' Series F convertible preferred shares converted a substantial number of their shares, which had the effect of diluting the value of Immunomedics common stock, depressing the share price and adversely affecting the ability of Immunomedics to raise needed operating capital and/or form strategic business alliances and otherwise causing it damages." *Id*. ¶ ¶ 12-13.

The defendant seeks damages on behalf of itself and its common shareholders.

The plaintiff moves for summary judgment dismissing the counterclaim for lack of causation. Causation, of course, is an essential element of any breach of contract claim. *Point Productions A.G. v. Sony Music Entertainment, Inc.*, 2002 WL 1766557, at *6 (S.D.N.Y. 2002); *Sevel Argentina, S.A. v. General Motors Corp.*, 46 F. Supp. 2d 261, 266 (S.D.N.Y. 1999) ("Under New York law, 'an action for breach of contract requires proof of (1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages' resulting from the breach.") (quoting *First Investors Corp. v. Liberty Mut. Ins. Co.*, 152 F.3d 162, 168 (2d Cir. 1998)) (citation omitted). In other words, "a plaintiff must prove its injury was proximately caused by the defendant's breach." *Point Productions*, 2002 WL 1766557, at *6.

Immunomedics has failed to show that it suffered any injury that was proximately caused by any breach, misrepresentation, or other alleged conduct by Willow Bay. The gravamen of the defendant's counterclaim is that the alleged delay caused by Willow Bay's inability to locate financing for Immunomedics between August 20, 1999 (the date the RCA was executed) and December 14, 1999 (the date Immunomedics reached an agreement for funding with Paramount) allowed the defendant's preferred shareholders to convert some of their shares to common stock, thereby diluting existing shareholders more than they would have been diluted had the financing occurred earlier. As support, the defendant submits the testimony of Barry Pearl, whose firm, The Volume Investor, Inc., is alleged by Immunomedics to be the "finder" of the financing transaction with Paramount in December 1999. Pearl has opined that "if Zanett/Willow Bay had approached Paramount in late August or early September, the Private Placement would probably have taken place in September, instead of mid-December." Pearl Report, Exh. B to Affidavit of Denise Kraft, at 3. Pearl also estimated Immumomedics' damages resulting from the alleged delay in receiving

financing as over $27 million.[7]

Pearl's testimony must be weighed in light of the testimony of Dr. Lindsay Rosenwald, Chairman of Paramount Capital.[8] When asked whether Paramount would have invested the same amount in Immunomedics in September 1999 as it did in December 1999, Rosenwald answered, "I have no idea." Rosenwald Dep. (Nov. 12, 2001), Exh. F to Affidavit of Denise Kraft, at 46. Later, in response to a question about whether Paramount would have invested *any* money in Immunomedics in September 1999, Rosenwald answered, "It's impossible for me to know." *Id*. at 49. In the face of such testimony by the undisputed Chairman and sole shareholder of Paramount that it was entirely unknown whether Paramount would have invested in Immunomedics any earlier than it did, Pearl's testimony becomes wholly speculative, if not irrelevant, regarding the issue of causation. There is simply no evidence whatsoever, beyond Pearl's "market predictions," made before the deposition of Rosenwald, to show that Paramount would have invested in Immunomedics in September 1999. Nor has the defendant offered any affirmative and nonspeculative evidence that, barring the alleged misrepresentations by Willow Bay which induced the defendant to enter into the RCA, an investment from any other source would have occurred before December 1999.

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[7] In their briefing, the parties spend much time debating the validity of Pearl's damages calculations. The court views this as a mere rehashing of Willow Bay's Motion to Preclude the Expert Testimony of Barry Pearl (D.I. 71), which was denied on June 22, 2001. In addition, the court views the debate as moot, given the lack of causal connection between Immunomedics' alleged damages and the alleged breach or other conduct by Willow Bay. Without a showing of proximate cause, there is no need to debate the validity of Pearl's damages calculations.

[8] Notably, the deposition of Rosenwald occurred after the filing, briefing, and ruling of the motion to exclude the testimony of Pearl. Thus, the court's denial of the motion to exclude Pearl's testimony does not bear upon, and certainly does not control, the subsequently-developed evidence adduced by Rosenwald's testimony. Furthermore, the court's ruling on the admissibility of Pearl's testimony at trial is distinct from the determination of the weight accorded such testimony in the summary judgment process.

The defendant makes much of the fact that, as the defendant paraphrases, Rosenwald "saw no reason why Paramount would not have made the same investment in September 1999 that it made in December 1999." Answering Brief of Defendant in Opposition to Plaintiff's Motion for Summary Judgment Dismissing the Counterclaim at 10. The absence of negating evidence is insufficient to withstand a motion for summary judgment. Indeed, summary judgment is warranted when the moving party shows an absence of affirmative evidence to support the non-movant's position. *Lawrence v. National Westminster Bank N.J.*, 98 F.3d 61, 69 (3d Cir. 1996) ("'[T]he moving party is [entitled to summary judgment] because the nonmoving party has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof.'" (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Immumomedics has not produced sufficient affirmative evidence adducing a genuine issue of material fact for trial. The testimony of Barry Pearl is inadequate for such purpose, as it is wholly speculative, and Immunomedics has offered no other evidence of a causal connection between its alleged damages and the alleged conduct of Willow Bay. There is no triable issue as to causation. *See*, *e.g.*, *Tse v. Ventana Medical Systems, Inc.*, 123 F. Supp.2d 213 (D. Del. 2000) (granting summary judgment and dismissing plaintiffs' claim for failure to establish causation: "In this case, the Tse plaintiffs cannot show that the defendants' alleged conduct caused them to miss an actual and nonspeculative opportunity to convert at a better rate."). Without any triable issue of fact as to causation, of course, there is no need to address whether there exists a triable issue of fact as to damages.

IV. CONCLUSION

The Non-Circumvention Agreement is a binding contract. It is not barred by the New York Statute of Frauds; nor is it indefinite for failure to include a material term. Therefore, the

defendant's motion to dismiss or, in the alternative, for summary judgment, is denied.

As to the counterclaim, there is no genuine issue of material fact as to the proximate cause of Immunomedics' alleged damages. The defendant has not adduced any affirmative nonspeculative evidence to support its claim that it suffered damages as a result of a breach of contract or other conduct by Willow Bay. Therefore, summary judgment is warranted, and the defendant's counterclaim must be dismissed.

For the aforementioned reasons, IT IS HEREBY ORDERED that:

1. The defendant's Motion for Dismissal or, Alternatively, for Summary Judgment (D.I. 120) is DENIED.

2. The plaintiff's Motion for Summary Judgment Dismissing the Counterclaim (D.I. 118) is GRANTED.

Dated: March 21, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE