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Case No. 8095-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MEDICIS PHARMACEUTICAL CORPORATION	)	
Plaintiff,	)	
v.	)	C.A. No. 8095-VCP
ANACOR PHARMACEUTICLAS, INC.	)	
Defendant.	)	

OPINION

Submitted: April 24, 2013
Decided: August 12, 2013

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PARSONS, Vice Chancellor.

In this matter, the defendant has moved to dismiss the plaintiff's claims in favor of arbitration. As part of a license agreement, the plaintiff and the defendant agreed to arbitrate certain disputes. They also agreed that each party had the right to institute judicial proceedings to enforce their rights through equitable relief. A dispute arose under the parties' agreement, and the defendant initiated arbitration regarding it. Approximately two weeks later, the plaintiff filed this action seeking specific performance and injunctive relief related to the same alleged breaches of the agreement. The issue before me is whether, under the terms of the parties' agreement, the claims in the plaintiff's complaint in this Court must be arbitrated.

For the reasons that follow, I conclude that the plaintiff's claims are not subject to mandatory arbitration under the parties' license agreement. Hence, I deny the defendant's motion to dismiss. In reaching this conclusion, I recognize that, in the abstract, this result may not be optimal. To conclude otherwise, however, would require the Court to ignore the plain and unambiguous language of the agreement negotiated by two sophisticated business entities. I decline to do that because arbitration is consensual and these parties failed to provide a clear expression of an intent to require that this dispute be arbitrated.

I. BACKGROUND

A. The Parties

Plaintiff, Medicis Pharmaceutical Corporation ("Medicis"), is a Delaware corporation that has for over twenty years developed and distributed dermatological pharmaceutical products including the leading oral antibiotic drug used to treat acne.

Defendant, Anacor Pharmaceuticals, Inc. ("Anacor"), is a biopharmaceutical company engaged in discovering and developing therapeutic antibiotics based on a boron chemistry platform.

B. Facts[1]

On February 9, 2011, Medicis and Anacor entered into a Research and Development Option and License Agreement (the "License Agreement" or "Agreement") for the development of boron-based small-molecule drug candidates for the treatment of acne. Under the terms of the Agreement, Anacor would use "Diligent Efforts" to discover and develop boron-based small-molecule compounds and Medicis would have an option to further develop and commercialize those compounds. The Agreement provides that, after Anacor achieves certain development and sales milestones, it would receive certain milestone payments from Medicis. The first milestone would be met when a Joint Research Committee (the "Committee") determined that "Candidate Selection Criteria"[2] had been met for the first time by an Anacor compound.

The Agreement indicates that once Anacor believes it has developed a compound that satisfies the Candidate Selection Criteria, as defined in the Agreement, it can nominate the compound for consideration by the Committee. If the Committee accepts

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[1] The facts recited herein are drawn from the well-pled allegations in Medicis's Verified Complaint (the "Complaint") and the exhibits to the Complaint.

[2] Candidate Selection Criteria include "required physicochemical properties of the compounds as well as the safety and efficacy properties of the compounds." Compl. ¶ 6; *see also id.* Ex. A, License Agreement, § 2.6.4 & Ex. 2.

the compound, Anacor would have reached the first milestone and it would be entitled to a milestone payment of $5 million.[3] Anacor nominated a compound, AN8903, for the Committee to consider at its April 20, 2012 meeting. The Committee, however, declined to approve AN8903 as a Candidate Selection Compound.[4] Medicis notified Anacor of this decision on May 18, 2012.

As a result, Anacor sent Medicis a letter on May 23, 2012 notifying Medicis that it was invoking the Agreement's dispute resolution process. Under Section 13.1 of the Agreement, in the event of a dispute arising under the Agreement, either party may refer the dispute to an "Executive Officer" who shall attempt in good faith to resolve the dispute. If, within sixty calendar days, the parties are unable to resolve a given dispute, "either Party may have the given dispute settled by binding arbitration pursuant to Section 13.2."[5]

Section 13.2, entitled "Arbitration Request," sets forth the procedure for pursuing arbitration. It contains three subsections: 13.2.1, 13.2.2, and 13.2.3. The first two subsections provide the procedure for adding additional issues to an arbitration and state that disputes relating to Patents and Confidential Information shall be resolved through litigation. Subsection 13.2.3, entitled "Arbitration Procedure," provides, among other

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3 Compl. ¶ 37.

4 *Id.* ¶ 87. "'Candidate Selection Compound' means a Collaboration Compound resulting from the Program that the [Committee] determines meets all of the Candidate Selection Criteria." License Agreement § 1.1.27.

5 License Agreement § 13.1.

things, that any arbitration shall be held in Wilmington, Delaware by JAMS before three arbitrators. It also contains the following disputed language:

> The arbitrators also shall be authorized to grant any temporary, preliminary or permanent equitable remedy or relief the arbitrators deem just and equitable and within the scope of this Agreement, including an injunction or order for specific performance. The award of the arbitrators shall be the sole and exclusive remedy of the Parties (except for those remedies set forth in this Agreement). Judgment on the award rendered by the arbitrators may be enforced in any court having competent jurisdiction thereof, subject only to revocation on the grounds of fraud or clear bias on the part of the arbitrators. *Notwithstanding anything contained in this Section 13.2 to the contrary, each Party shall have the right to institute judicial proceedings* against the other Party or anyone acting by, through or under such other Party, in order *to enforce the instituting Party's rights hereunder through specific performance, injunction, or similar equitable relief.*[6]

C. Procedural History

On November 28, 2012, Anacor sent Medicis a demand for arbitration before JAMS. On December 11, Medicis filed its Complaint in this Court seeking to enjoin Anacor from proceeding with arbitration and seeking specific performance of the Agreement and a declaratory judgment. Anacor moved to dismiss the Complaint on January 16, 2013 for lack of subject matter jurisdiction under Court of Chancery Rule 12(b)(1). After the parties fully briefed that motion, I heard argument on April 24, 2013. This Opinion constitutes my ruling on Anacor's motion to dismiss.

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[6] *Id.* § 13.2.3 (emphasis added).

D. Parties' Contentions

Anacor argues that this Court lacks subject matter jurisdiction because the parties agreed to resolve the claims at issue here in arbitration and Anacor properly invoked arbitration under the Agreement. Medicis does not dispute that the parties agreed to arbitrate certain claims, including claims for equitable relief. It contends, however, that the Agreement reserves for each party the right to pursue claims for equitable relief either in arbitration or in a court. Medicis's Complaint seeks equitable relief in the form of specific performance and an injunction regarding the same issues addressed by Anacor's demand for arbitration. Thus, according to Medicis, this Court has subject matter jurisdiction and Anacor's motion to dismiss should be denied.

II. ANALYSIS

A. Motion to Dismiss Under Rule 12(b)(1)

The Court of Chancery will dismiss an action under Rule 12(b)(1) "if it appears from the record that the Court does not have subject matter jurisdiction over the claim."[7] This Court can acquire subject matter jurisdiction over a case in three ways: (1) the invocation of an equitable right; (2) a request for an equitable remedy when there is no adequate remedy at law; or (3) a statutory delegation of subject matter jurisdiction.[8] The plaintiff "bears the burden of establishing this Court's jurisdiction."[9]

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7 *AFSCME Locals 1102 & 320 v. City of Wilm.*, 858 A.2d 962, 965 (Del. Ch. 2004).

8 *ASDC Hldgs., LLC v. Richard J. Malouf 2008 All Smiles Grantor Annuity Trust*, 2011 WL 4552508, at *4 (Del. Ch. Sept. 14, 2011).

9 *Yancey v. Nat'l Trust Co.*, 1993 WL 155492, at *6 (Del. Ch. May 7, 1993).

If a claim properly is committed to arbitration, "this Court lacks subject matter jurisdiction because arbitration provides an adequate legal remedy."[10] "[I]f the parties contracted to submit claims . . . to arbitration, this Court will dismiss the Complaint for lack of subject matter jurisdiction."[11] Arbitration, however, is consensual. A party cannot be required to submit a dispute to arbitration unless it has agreed to do so.[12] The Supreme Court has recognized that "the public policy of Delaware favors arbitration."[13] Nevertheless, it has cautioned that "[t]he policy that favors alternate dispute resolution mechanisms, such as arbitration, does not trump basic principles of contract interpretation."[14] In that regard, "[a] party cannot be forced to arbitrate the merits of a dispute . . . in the absence of a clear expression of such intent in a valid agreement."[15]

B. The Court Should Decide the Issue of Arbitrability

Before considering whether Medicis's claims must be submitted to arbitration, the Court must answer a threshold question: whether this Court or the arbitrators should

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10 *Carder v. Carl M. Freeman Communities, LLC*, 2009 WL 106510, at *3 (Del. Ch. Jan. 5, 2009).

11 *Id.*

12 *James & Jackson, LLC v. Willie Gary, LLC* (*Willie Gary II*), 906 A.2d 76, 78 (Del. 2006).

13 *Id.* at 79.

14 *Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 156 (Del. 2002).

15 *Willie Gary II*, 906 A.2d at 79; *see also Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396 (Del. 2010) ("We will not enforce a contract that unclearly or ambiguously reflects the intention to arbitrate.").

decide the issue of arbitrability. Under Delaware law, a court must decide such questions of substantive arbitrability unless the parties clearly and unmistakably agree by contract that issues of substantive arbitrability will be answered in arbitration.[16] Here, neither party disputes that this Court should decide the question of substantive arbitrability. Under the Delaware Supreme Court's *Willie Gary*[17] decision, this Court will submit arbitrability issues to an arbitrator where an arbitration clause *both* (1) generally provides for arbitration of all disputes *and* (2) incorporates rules, such as the American Arbitration Association rules, that empower the arbitrator to decide substantive arbitrability.[18]

The License Agreement's arbitration clause does not provide for arbitration of all disputes. Section 13.2.3 states that the parties may institute judicial proceedings "to enforce the instituting Party's rights hereunder through specific performance, injunction or similar equitable relief." In addition, the parties agreed that disputes related to Patents and to Confidential Information, as defined in the Agreement, "shall not be subject to arbitration."[19] Thus, because the parties did not clearly and unmistakably agree that issues of substantive arbitrability would be answered in arbitration and because the

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16 *Willie Gary LLC v. James & Jackson LLC* (*Willie Gary I*), 2006 WL 75309, at *1 (Del. Ch. Jan. 10, 2006), *aff'd*, 906 A.2d 76 (Del. 2006).

17 906 A.2d 76 (Del. 2006).

18 *Id.* at 80.

19 License Agreement § 13.2.2.

arbitration provisions[20] do not provide for the arbitration of all disputes, this Court is responsible for answering questions of substantive arbitrability.[21]

C. Are Medicis's Claims Subject to Arbitration?

The proper approach for analyzing questions of substantive arbitrability is set forth in *Parfi Holding AB v. Mirror Image Internet, Inc*.[22] In *Parfi*, the Supreme Court stated:

> When the arbitrability of a claim is disputed, the court is faced with two issues. First, the court must determine whether the arbitration clause is broad or narrow in scope. Second, the court must apply the relevant scope of the provision to the asserted legal claim to determine whether the claim falls within the scope of the contractual provisions that require arbitration. If the court is evaluating a narrow arbitration clause, it will ask if the cause of action pursued in court directly relates to a right in the contract. If the arbitration clause is broad in scope, the court will defer to arbitration on any issues that touch on contract rights or contract performance.[23]

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20 There are two main "arbitration provisions" at issue in this case: (1) Section 13.1 which provides: "If the Parties are unable to resolve a given dispute pursuant to this Section 13.1[, which sets forth a dispute resolution procedure,] within sixty (60) calendar days of referring such dispute to the Executive Officers, either Party may have the given dispute settled by binding arbitration pursuant to Section 13.2"; and (2) Section 13.2, which includes three subsections and sets forth the agreed upon procedure for arbitration.

21 *Willie Gary II*, 906 A.2d at 81 ("In this case, the arbitration clause . . . expressly authoriz[es] the nonbreaching Members to obtain injunctive relief and specific performance in the courts. Thus, despite the broad language at the outset, not all disputes must be referred to arbitration . . . [and] the trial court properly undertook the determination of substantive arbitrability.").

22 817 A.2d 149 (Del. 2002).

23 *Id.* at 155.

1. The scope of the arbitration provisions

The first issue I must address is whether the arbitration provisions are broad or narrow in scope. The License Agreement provides for arbitration of disputes "arising under this Agreement."[24] As noted above, however, the Agreement contains several exceptions to this agreement to arbitrate. First, the parties agreed that "disputes relating to Patents and non-disclosure, non-use and maintenance of Confidential Information shall not be subject to arbitration."[25] Second, the Agreement provides that "[n]otwithstanding anything contained in this Section 13.2 to the contrary, each Party shall have the right to institute judicial proceedings . . . to enforce the instituting Party's rights hereunder through specific performance, injunction, or similar equitable relief."[26] Based on these exceptions to the parties' agreement to arbitrate, I conclude that the Agreement's arbitration provisions are limited, or narrow, in scope.

2. Do Medicis's claims fall within the arbitration provisions' scope?

The next question I must determine under *Parfi* is whether "the asserted legal claim falls within the scope of the contractual provisions that require arbitration."[27] Medicis asserts claims for: (1) specific performance of the Agreement; (2) declaratory judgment of several issues, including that Medicis properly determined that AN8903 does

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[24] License Agreement § 13.1.

[25] *Id.* § 13.2.2.

[26] *Id.* § 13.2.3.

[27] *Parfi Hldg.*, 817 A.2d at 155.

not satisfy the Candidate Selection Criteria and that Medicis, therefore, is not obligated to make a milestone payment, that Anacor is breaching the Agreement, and that Medicis has not breached the Agreement; and (3) an order enjoining the arbitration proceedings. These claims "aris[e] under" the Agreement as they relate to rights and obligations created by the Agreement. The claims also do not fall within the arbitration carve-out for disputes relating to Patents or Confidential Information. In fact, Medicis effectively concedes that the Agreement permits a party to have claims such as the ones it has brought before this Court settled by binding arbitration.[28] Medicis argues instead that its asserted claims do not fall within the scope of the contractual provisions that, in the words of the *Parfi* decision, "*require arbitration*."[29] Stated differently, Medicis contends that the Agreement gives it a right to litigate in Court its claims for equitable relief that is not abrogated by the arbitration provision in § 13.1.

Medicis makes two arguments as to why the Agreement does not require it to arbitrate its claims. First, Medicis argues that the arbitration provision only provides that either party *may* have its dispute settled by binding arbitration. Specifically, the Agreement states: "If the Parties are unable to resolve a given dispute pursuant to this Section 13.1 . . . either Party *may* have the given dispute settled by binding arbitration

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[28] *See* Pl.'s Answering Br. 6 ("Article 13 of the Agreement sets forth various provisions governing the parties' rights to pursue their claims through both arbitration and litigation. . . [but] the right to seek equitable relief in court trumps the provision that permits arbitration.").

[29] *Parfi Hldg.*, 817 A.2d at 155 (emphasis added).

pursuant to Section 13.2."[30] According to Medicis, this provision is permissive, not mandatory. Thus, Medicis contends that it cannot be required to submit its claims to arbitration because it has not agreed so to submit them.[31] Second, Medicis asserts that, in subsection 13.2.3, the parties carved out a broad exception to their agreement to arbitrate. According to Medicis, this exception permits the parties to press any claim for equitable relief in a court.

Anacor counters that "the Court of Chancery and federal decisions firmly establish that language providing that 'either party' may elect arbitration gives rise to mandatory arbitration."[32] In addition, Anacor argues that Medicis's reading of the equitable carve-out is too broad. According to Anacor, the parties intended the carve-out to allow each of them to seek equitable relief in court, but only to enforce the terms of the arbitration provisions themselves, not the entire Agreement.[33] Anacor maintains that Medicis's reading of the exception in subsection 13.2.3 effectively would read the arbitration provision out of the Agreement and would render other provisions of the Agreement superfluous.

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30 License Agreement § 13.1 (emphasis added).

31 *See Willie Gary II*, 906 A.2d 76, 78 (Del. 2006) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (citation omitted)).

32 Def.'s Reply Br. 4.

33 *See id.* at 5.

a. Does the Agreement provide for permissive or mandatory arbitration?

Several courts have held that arbitration provisions gave rise to mandatory arbitration even when the parties used permissive language in their contracts such as "either party may" elect arbitration. For example, in *In re Winstar Communications, Inc.*,[34] the United States Bankruptcy Court for the District of Delaware (the "Delaware Bankruptcy Court") interpreted a provision almost identical to the one at issue here. That provision stated: "If, after fifteen (15) business days . . . the parties are still unable to resolve the dispute, either party may elect to commence arbitration before a single, mutually approved arbitrator, under the rules and administration of the American Arbitration Association in New York, New York."[35] The Delaware Bankruptcy Court, relying on decisions from several other courts including the Southern District of New York, held that:

> [T]he proper interpretation is that the arbitration provision did not have to be invoked, but once raised by one party, it became mandatory with respect to the other party. A plain reading of the clause supports such an interpretation. If the clause were wholly optional, as defendants contend, it would serve no purpose. Parties can always submit disputes to arbitration if they both agree to do so, therefore, there would be no reason to include such a provision. It follows that the word "may" was used to mandate arbitration at the insistence of any one party to the agreement, but to indicate that

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[34] 335 B.R. 556 (Bankr. D. Del. 2005).

[35] *Id.* at 560. The License Agreement here similarly provides that: "If the Parties are unable to resolve a given dispute pursuant to this Section 13.1 . . . , either Party may have the given dispute settled by binding arbitration." License Agreement § 13.1.

> arbitration was not mandatory absent the invocation of the provision by one of the parties.[36]

I agree with this reasoning, but I do not believe it controls in the circumstances of this case. Instead, for the reasons that follow, I conclude that regardless of whether arbitration otherwise would have been mandatory, the parties to this License Agreement reserved for themselves a broad right to seek equitable relief in court.

b. Does the Agreement carve out claims for equitable relief from mandatory arbitration?

Medicis's second, and ultimately persuasive, argument is that this Court has subject matter jurisdiction because the Agreement permits either party to initiate judicial proceedings to seek equitable relief. Medicis characterizes the Agreement as providing for three types of disputes: (1) disputes that can be litigated only; (2) disputes that can be arbitrated only; and (3) disputes that the parties may either arbitrate or litigate. Falling in the first group are disputes regarding Patents and Confidential Information which the Agreement states "shall not be subject to arbitration, and shall be submitted to a court of competent jurisdiction."[37] The second group comprises claims that are solely legal in nature, while the third group, Medicis avers, are equitable claims that the parties may elect either to arbitrate or litigate. Anacor vigorously disputes this characterization,

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[36] 335 B.R. at 563 (quoting *Chiarella v. Vetta Sports, Inc.*, 1994 WL 557114, at *3 (S.D.N.Y. 1994)). Here, Anacor invoked arbitration by sending Medicis a demand for arbitration on November 28, 2012. Compl. Ex. K. Medicis filed its Complaint in this action on December 11, 2012.

[37] License Agreement § 13.2.2.

arguing that Medicis's interpretation would deprive the arbitration provision of any substance.

i. Contract interpretation

"Under Delaware law, the interpretation of a contract is ordinarily a matter of law, which turns on the meaning that emerges from the contract's words. Contracts are to be interpreted as written, and effect must be given to their clear and unambiguous terms."[38] I begin, therefore, by considering the relevant language in the Agreement. As noted above, Section 13.1 authorizes either party to have a dispute such as the one at issue here settled by binding arbitration pursuant to Section 13.2. The last sentence of Section 13.2, however, provides that:

> *Notwithstanding anything contained in this Section 13.2 to the contrary, each Party shall have the right to institute judicial proceedings* against the other Party or anyone acting by, through or under such other Party, in order *to enforce the instituting Party's rights hereunder through specific performance, injunction, or similar equitable relief.*[39]

This sentence clearly carves out a right to institute some judicial proceedings notwithstanding the parties' agreement to arbitrate certain disputes. But, how broad is the right the parties carved out of their agreement to arbitrate? To resolve this issue, I consider first the meaning of the word "hereunder."

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[38] *Willie Gary I*, 2006 WL 75309, at *5 (Del. Ch. Jan. 10, 2006), *aff'd*, 906 A.2d 76 (2006). Delaware law governs the Agreement. *See* License Agreement § 13.4.

[39] License Agreement § 13.2.3 (emphasis added).

Anacor asserts that "hereunder" means "under this section," and that, therefore, the carve-out was intended to allow for litigation only if necessary to enforce the terms of the arbitration provision. Medicis counters that "hereunder" means under "this entire Agreement." According to Medicis's interpretation, the carve-out allows the parties to seek equitable relief in a court to enforce any right under the Agreement. To support its position, Medicis cites Section 1.2 of the Agreement which provides detailed "Rules of Construction" for the interpretation of the Agreement. Section 1.2 states in relevant part: "the terms 'hereof,' 'herein,' 'hereby,' 'hereto,' 'hereunder' and derivative or similar words refer to this entire Agreement, including the Exhibits hereto." Undeterred by this seemingly devastating blow to its position, Anacor urges the Court to examine the Agreement as a whole and consider other provisions in which the term "hereunder" obviously is used to mean "under this section."

Anacor points, for example, to Section 2.6, entitled "Development of Collaboration Compounds." In part (d) of subsection 2.6.6, the Agreement provides that, in certain circumstances, Medicis can elect to develop a "Back-Up" compound with development services from Anacor. Subsection 2.6.6(d) of the Agreement states, in relevant part:

> Following Medicis's *election hereunder*, at any time during the Back-Up Compound Election Term, Medicis may, upon notice to Anacor, substitute any of the Lead Back-Up Compounds or other Back-up Compounds in lieu of the PoC Compound elected under Section 4.2.1 or substitute a different Collaboration Compound in lieu of the initially

> elected Lead Back-Up Compound or other Back-Up Compound.[40]

Anacor argues that this reference to an "election hereunder" must refer to an election under Section 2.6.6, not to an election under the entire Agreement. I agree that Anacor's interpretation of "hereunder" in Section 2.6.6 is a reasonable one.

"In the absence of anything indicating a contrary intent, it is a general rule of construction that where the same word or phrase is used on more than one occasion in the same instrument, and in one instance its meaning is definite and clear and in another instance it is susceptible of two meanings, there is a presumption that the same meaning was intended throughout such instrument."[41] Here, it appears that the parties used the word "hereunder" at least once, in Section 2.6.6, to refer to an election "under this section." Thus, it conceivably could be appropriate to presume that the parties intended this meaning to apply throughout the Agreement. The parties "indicat[ed] a contrary intent," however, by expressly defining the term "hereunder" to mean under "this entire Agreement." In addition, the parties used the word "hereunder," or similar words, elsewhere in the Agreement to refer to the entire Agreement.[42] Under these

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40 *Id.* § 2.6.6(d) (emphasis added).

41 *State v. Highfield*, 152 A. 45, 52 (Del. 1930).

42 *See, e.g.*, License Agreement § 2.4.1(a) (providing that an "Anacor Diligence Failure Event" would include "failing to commence appropriate toxicology testing on one or more promising Anacor Compounds in accordance with the Research Plan or [] allocating materially insufficient resources for Development activities hereunder"); *id.* § 13.4 ("This Agreement and any disputes arising from the construction, interpretation, performance or breach hereof shall be governed by

circumstances, I am not persuaded that use of the word "hereunder" to mean "under this section" in one or more sections in the parties' sixty-page single-spaced Agreement should raise a presumption that the parties intended "hereunder" to have this same meaning throughout the Agreement. A more likely explanation is that the drafters inartfully used the term "hereunder" one or more times in a way that was contrary to the expressed intent of the parties. Thus, based on the Agreement's Rules of Construction, I will interpret "hereunder" in Section 13.2 to refer to the entire Agreement unless doing so would violate another recognized canon of contract interpretation.

In this regard, Anacor's second argument is that Medicis's interpretation renders other provisions of the Agreement superfluous. "Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court."[43] According to Anacor, if Section 13.2 allowed a party to bring any equitable claim to a court, then Section 9.5 would be superfluous. Article 9 addresses "Confidentiality" and Section 9.5 provides:

> Each Party shall be entitled to seek, in addition to any other right or remedy it may have, at law or in equity, a temporary injunction, without the posting of any bond or other security,

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[Delaware law]."); *id.* § 13.5 ("Either Party may assign this Agreement to any Affiliate of such Party . . . provided that such Party provides the other party with written notice of such assignment and remains fully liable for the performance of such Party's obligations hereunder by such Affiliate.").

43 *NAMA Hldgs., LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007).

> enjoining or restraining the other Party from any violation or threatened violation of this Article 9.

This provision gives the parties the right to seek one form of equitable relief, namely, a temporary injunction to prevent a violation of Article 9. The provision does more than that, however, in that it also provides that the parties may seek such relief without posting a bond or other security.[44] Thus, reading Section 13.2.3 as giving the parties the right to seek equitable relief from a court to enforce their rights under the entire Agreement would not make Section 9.5 superfluous, because Section 9.5 creates a right not provided for in Section 13.2.3.

Anacor also argues that Medicis's interpretation would frustrate the dispute resolution process contemplated by Section 2.4.2, which addresses "Disputes Relating To Alleged Anacor Diligence Failure Events." That section provides, in relevant part, as follows:

> *If* . . . Anacor *decides* to resolve such disputes through arbitration as provided in Section 13.2, and the adjudication by arbitration pursuant to Section 13.2 or settlement of such dispute is solely in Medicis's favor, the license described in Section 2.4.2(c)(i) or (ii) shall be thereafter [] deemed granted . . . and Anacor will be responsible for fifty percent (50%) of

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[44] Ordinarily, a party that obtains an injunction or temporary restraining order would have to post a bond or provide security "in such sum as the Court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Ct. Ch. R. 65(c).

> Medicis's reasonable and documented costs in adjudicating the arbitration . . . .[45]

This language does recognize that disputes related to an alleged "Anacor Diligence Failure Event" might be arbitrated. But, it does not demonstrate that the parties intended to require that such disputes be settled only by binding arbitration. Rather, Section 2.4.2 focuses on the effect of an adjudication on the license described elsewhere in the Agreement and on the payment of attorneys' fees. This Section is not irreconcilable with the possibility that resolution of such disputes also might be pursued in a court.

In addition, Section 2.4.2 uses optional language. The parties articulated the carve-out for equitable relief in Section 13.2 in much more pointed terms: "*Notwithstanding anything contained in this Section 13.2 to the contrary*, each Party *shall have the right to institute judicial proceedings* . . . to enforce the instituting Party's rights hereunder through specific performance, injunction, or similar equitable relief."[46] Thus, even considering the Agreement as a whole, the broadly worded carve-out in Section 13.2 causes me to conclude that Medicis's interpretation of the Agreement is the only

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[45] License Agreement § 2.4.2 (emphasis added). Section 2.4.2 also states that: "If the adjudication by arbitration pursuant to Section 13.2 or settlement of such dispute is solely in Anacor's favor, any license described in Section 2.4.1(c)(i) or (ii) shall be revoked, and Medicis will be responsible for fifty percent (50%) of Anacor's reasonable and documented costs in adjudicating the arbitration . . . ."

[46] *Id.* § 13.2.3 (emphasis added); *see also Cisneros v. Alpine Ridge Gp.*, 508 U.S. 10, 18 (1993) ("[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."); *id.* ("A clearer statement is difficult to imagine." (alterations omitted) (citing *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991))).

reasonable interpretation. That is, the Agreement provides the parties with the option to institute judicial proceedings or to proceed in arbitration when the party seeks equitable relief. Anacor's arguments to the contrary reflect a strained and unreasonably narrow reading of the language the parties used to describe the carve-out in Section 13.2.3.

As a last point, Anacor avers that its interpretation does not read out the carve-out from the Agreement, but rather addresses the question of "how broad the court should interpret that provision"[47] and avoids an absurd result.[48] Delaware law, however, follows a contractarian approach; that is, the Court will interpret a provision as broadly as it is drafted. The parties here chose to use the words "[n]otwithstanding anything to the contrary in this Section 13.2." They also elected to provide for an unqualified right to institute judicial proceedings to obtain equitable relief to enforce rights "hereunder"—a term that the Agreement expressly indicates elsewhere should be construed to "refer to this entire Agreement." Moreover, interpreting Section 13.2 that way does not produce an absurd result. As Anacor complains, it probably does weaken the arbitration provision by effectively limiting its application, if equitable relief is sought, to situations in which both parties prefer to proceed by arbitration. It is possible and, indeed, probable, however, that the sophisticated parties who negotiated this Agreement recognized that fact. In any event, to adopt Anacor's contrary reading, this Court would have to render

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[47] Arg. Tr. 7.

[48] *See* Def.'s Reply Br. 2, 7, 12.

its own judgment on whether the parties should have crafted such a broad equitable relief carve-out. This is not the Court's role.

ii. Case law

Lastly, none of the cases primarily relied upon by the parties were precisely on point. The factual differences between those cases and the current dispute prove to be important.

Arbitration is a creature of contract and contract language controls above all else.[49] Thus, a party attempting to invoke arbitration will not prevail by reciting the message that courts favor arbitration[50] when the contract language they rely on does not demonstrate the parties' intent to submit the dispute in question to arbitration. As discussed below, the arbitration provisions at issue in cases such as *James & Jackson, LLC v. Willie Gary,*

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[49] *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 655 (Del. Ch. 2012) (stating the rule that the strong presumption in favor of arbitration "will not trump basic principles of contract interpretation" (citing *Willie Gary II*, 906 A.2d 76, 78 (Del. 2006))); *see also Pettinaro Constr. Co. v. Harry C. Partridge, Jr., & Sons, Inc.*, 408 A.2d 957, 962 (Del. 1979) ("*Where it is reasonable to construe a contract as requiring arbitration,* Courts will do so in view of the public policy encouraging arbitration." (emphasis added)).

[50] *See SBC Interactive, Inc. v. Corp. Media P'rs*, 714 A.2d 758, 761 (Del. 1998) ("[T]he public policy of Delaware favors arbitration.").

LLC[51] and *GTSI Corp. v. Eyak Technology, LLC*[52] varied materially from each other and from the provisions in the Agreement before the Court in this case.[53]

First, Medicis argued that *Willie Gary* controls this case and requires denial of Anacor's motion to dismiss or stay in favor of arbitration. In *Willie Gary*, this Court denied a similar motion to dismiss and the Supreme Court affirmed. The arbitration provision in that case provided:

> Any controversy or claim arising out of or relating to this Agreement or breach of this Agreement shall be settled by

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[51] 906 A.2d 76 (Del. 2006); *see also Willie Gary I*, 2006 WL 75309 (Del. Ch. Jan. 10, 2006).

[52] 10 A.3d 1116 (Del. Ch. 2010).

[53] The parties also discussed at length *Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417 (Del. Ch. May 24, 2006) and, to a lesser extent, *Terex Corp. v. STV USA, Inc.*, 2005 WL 2810717 (Del. Ch. Oct. 20, 2005). These cases also are distinguishable. In *Delta & Pine* there were two agreements that contained arbitration provisions. A license agreement stated that the parties' dispute would be settled by binding arbitration "in accordance with the provisions of" an earlier-executed option agreement. 2006 WL 1510417, at *3. The option agreement stated that nothing "shall serve to preclude any party from its right to seek any other remedy at law." *Id.* at *2. Because the later-executed license agreement provided for binding arbitration, the Court examined the exclusion in the option agreement in that context. The Court concluded that the language of the two agreements could be harmonized because the exclusionary language in the option agreement allowed parties to seek "remed[ies] at law" that could not be provided by the arbitration process, such as attachment or lis pendens. Here, the Court is not required to interpret two agreements with arguably competing language or a carve-out that states the agreement "shall [not] serve to preclude" a party from seeking "any other remedy at law." Rather, the License Agreement explicitly states that the parties shall have "the right to institute judicial proceedings."

Lastly, I find this Court's one-page Letter Opinion in *Terex* to be distinguishable on the grounds set forth in this Court's Opinion in *Willie Gary*. *See Willie Gary I*, 2006 WL 75309, at *10.

> arbitration . . . . [I]n addition to any other remedy to which the nonbreaching Members may be entitled, at law or in equity, the nonbreaching Members shall be entitled to injunctive relief to prevent breaches of the provisions of this Agreement and specifically to enforce the terms and provisions hereof in any action instituted in any court of the United States or any state thereof having subject matter jurisdiction thereof.[54]

As Medicis highlighted, this arbitration provision is broader in scope than the provisions in the License Agreement here and the equitable carve-out is narrower. Even in those circumstances, this Court and the Supreme Court in *Willie Gary* denied the defendant's motion to dismiss in favor of arbitration. According to Medicis, this compels a similar conclusion that no dismissal or stay in favor of arbitration is warranted in this case.

The provision in *Willie Gary* provided that "[*a*]*ny controversy or claim* arising out of or relating to this Agreement or breach of this Agreement *shall be settled by arbitration*."[55] By contrast, the License Agreement contains exceptions for claims related to disputes pertaining to Patents and Confidential Information. It also provides that the parties "may have the given dispute settled by binding arbitration," rather than requiring that all claims "shall be settled by arbitration." The carve-out in the agreement at issue in *Willie Gary* also was narrower. It provided that a party "shall be entitled to" certain equitable relief in court rather than giving the parties the "right to institute judicial

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54 *Willie Gary II*, 906 A.2d at 79–80.

55 *Id.* at 79 (emphasis added).

proceedings." In addition, the provision in *Willie Gary* provided that only the nonbreaching party was entitled to such relief.

Willie Gary is distinguishable from this case in other ways, as well. First, in that case, the plaintiff filed its complaint in court before the defendant initiated arbitration. Here, Anacor demanded arbitration before Medicis filed its Complaint in this Court. In that regard, the Court of Chancery in *Willie Gary* observed:

> [T]he sentence addressing the right to proceed in a court with subject matter jurisdiction, when read in the context of § 12.12 as a whole, gives a party believing itself aggrieved by a breach to seek non-monetary relief in a judicial forum, and not simply in arbitration. *In a sense, § 12.12 accords the first filing party a choice of forum*, at least in cases when the claim involves one for injunctive relief or specific performance.[56]

Arguably, therefore, *Willie Gary* supports a finding that Anacor's arbitration demand locked in arbitration as the forum for the parties' dispute. Anacor contends that this Court, too, should consider the first-filed status of its arbitration demand, but it does not rely heavily on this point.[57] I do not find, however, that the order of filing is dispositive in this case. Unlike the carve-out in the License Agreement, the carve-out in *Willie Gary* did not expressly provide "the right to institute judicial proceedings" "[n]otwithstanding

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[56] *Willie Gary I*, 2006 WL 75309, at *10 (emphasis added). In affirming the trial court's opinion, the Supreme Court seemed to approve the trial court's analysis. *See Willie Gary II*, 906 A.2d at 80 ("We agree with almost all of the trial court's analysis. We write separately only to address the significance that should be attributed to reference to the AAA rules in an arbitration clause.").

[57] *See* Arg. Tr. 10–12.

anything contained in [the arbitration provision] to the contrary."[58] In addition, the arbitration demand and the Complaint in this dispute were filed less than two weeks apart. Thus, although the first-filed status conceivably could play a role in the Court's decision, I do not find it to be material in this case.[59]

A further distinction between *Willie Gary* and this case is that the arbitration clause in *Willie Gary* did not state expressly that the arbitrators shall be authorized to grant temporary or permanent equitable relief such as specific performance. But, the arbitrator there did have the authority to grant equitable relief and specific performance because the parties had selected the American Arbitration Association ("AAA") rules to govern the arbitration and those rules empower the arbitrator to grant such relief. The fact that Medicis and Anacor expressly delegated this authority to the arbitrator, however, demonstrates that they focused specifically on this point.[60] Furthermore, like the AAA

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58 *See infra* notes 69–71 and accompanying text.

59 Anacor posited a hypothetical situation to demonstrate that Medicis's broad interpretation of the carve-out could lead to an unreasonable result. If either party could bring a claim for equitable relief in court at any time, Anacor argued, then a party who was not faring well in arbitration tactically could initiate judicial proceedings, crafted with a request for equitable relief, to end-run the arbitration proceeding which could have been ongoing for months or years. Such circumstances do not exist in this case. As noted above, Medicis filed its lawsuit on December 11, 2012, after Anacor sent Medicis a demand for arbitration on November 28. As of the time of argument of the motion to dismiss, nothing had happened in the arbitration. Thus, I need not speculate on how much weight a Court might give to first-filed status in Anacor's hypothetical scenario.

60 *See GTSI Corp. v. Eyak Technology, LLC*, 10 A.3d 1116, 1121 (Del. Ch. 2010) ("Unlike in *Willie Gary*, . . . the Arbitration Provision [in *GTSI*] empowers the

rules applicable in *Willie Gary*, the JAMS rules, which Medicis and Anacor selected, also give the arbitrator authority to grant equitable relief.[61]

Lastly, in *Willie Gary*, the plaintiff sought dissolution as one form of relief. This fact was significant to the Court's analysis because several provisions in the parties' agreement contemplated judicial involvement in the dissolution process. Thus, in addition to the distinguishable arbitration provision, several key facts in *Willie Gary* differentiate it from this case. For these reasons, I find that the holding in *Willie Gary*, while instructive, does not dictate the result in this case on Anacor's motion to dismiss or stay.

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arbitrator to award equitable relief, whereas the arbitration clause in *Willie Gary* carved out equitable relief for the courts.").

[61] *See* JAMS Comprehensive Arbitration Rules & Procedures r. 24(c) (Oct. 1, 2010), http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2010.pdf ("The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy."). It also is notable that the parties rejected the standard arbitration clause suggested by JAMS in favor of crafting their own, more narrow arbitration provision with a more broadly worded carve-out for seeking relief from a court. The JAMS Standard Commercial Arbitration Clause suggests the following carve-out: "This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction." *Id.* at 4.

The referenced JAMS documents are not attached or integral to the Complaint. I note, however, that although the Complaint and the documents integral to the Complaint generally define the universe of facts the trial court may consider on a motion to dismiss, the Court may take judicial notice of publicly available facts not subject to reasonable dispute. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006); D.R.E. 201(b).

The parties also discussed *GTSI Corp. v. Eyak Technology, LLC* at length. It too, however, is distinguishable from the facts of this case. In *GTSI*, this Court granted a stay pending an arbitrator's decision on substantive arbitrability.[62] As an initial matter, I note that *GTSI* arose in a different procedural posture. Unlike the situation here, the Court in *GTSI* determined that the arbitration provision "clearly and unmistakably assign[ed] to the arbitrator the task of determining substantive arbitrability."[63] In essentially a gatekeeping context, the Court then addressed the narrow threshold issue of whether the assertion that the underlying dispute was arbitrable was "wholly groundless."[64] That is, before deferring to the arbitrator the issue of substantive arbitrability, the Court sought assurance that the party desiring arbitration had at least some non-frivolous argument in favor of arbitrability to make before the arbitrator.[65]

Unlike the arbitration provisions at issue here, the main arbitration provision in *GTSI* expressly stated that the equitable relief the parties could seek from a court was "provisional relief." The broad arbitration provision at issue in that case was subject to the following carve-out: "Notwithstanding the foregoing agreement to arbitrate, the parties expressly reserve the right to seek provisional relief from any court of competent

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62 *GTSI Corp.*, 10 A.3d at 1120.

63 *Id.* at 1119

64 *Id.* at 1121.

65 *Id.* (citing *McLaughlin v. McCann*, 942 A.2d 616, 626–27 (Del. Ch. 2008)).

jurisdiction to preserve their respective rights pending arbitration."[66] In a separate provision, the parties agreed, in language similar to that in *Willie Gary*, that

> in addition to any other remedy to which the non-breaching Members may be entitled, at law or in equity, the non-breaching Members shall be entitled to injunctive relief to prevent breaches of the provisions of this Agreement and specifically to enforce the terms and provisions hereof in any action instituted in any court of the United States or any state thereof having subject matter jurisdiction thereof.[67]

Because the plaintiff, GTSI, sought more than provisional relief, the Court held that there were non-frivolous arguments that its claims were arbitrable.[68] The Court noted that the separate provision, which it called the Equitable Remedy Provision, did not provide a right of action in any court. It merely addressed the type of relief that a nonbreaching party might obtain in "any court of the United States."[69] By contrast, in this case, the carve-out in Section 13.2.3 of the License Agreement confers upon each party "the right to institute judicial proceedings against the other Party" to enforce its rights "hereunder" through equitable relief. Moreover, unlike the carve-out in both *GTSI* and *Willie Gary*, the carve-out in the License Agreement begins not with the language "*in addition to* any other remedy to which the nonbreaching Members may be entitled, at law or in equity,"[70]

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66 *Id.* at 1118.

67 *Id.* at 1118–19.

68 *Id.* at 1121.

69 *Id.* at 1122.

70 *Willie Gary II*, 906 A.2d 76, 79 (Del. 2006) (emphasis added); *GTSI Corp.*, 10 A.3d at 1118 (same).

but with the stronger language "*Notwithstanding anything* contained in this Section 13.2 *to the contrary*."[71] Thus, both the language of the arbitration provision in *GTSI* and the procedural posture of that case materially distinguish it from this case.

In sum, I find that the License Agreement's broadly worded carve-out controls in this case. The parties reserved for themselves the right to institute judicial proceedings to enforce rights under the Agreement through equitable relief. They did not limit that carve-out to provisional relief or relief in aid of a claimed right to arbitrate. The parties, therefore, did not clearly express an intent to adjudicate the merits of this dispute only through arbitration.[72] Absent such an intent, Medicis has no adequate remedy at law and this Court has subject matter jurisdiction over its claims.

III. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is denied.

IT IS SO ORDERED.

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71 License Agreement § 13.2.3 (emphasis added).

72 *See Willie Gary II*, 906 A.2d at 79 ("A party cannot be forced to arbitrate the merits of a dispute . . . in the absence of a clear expression of such intent in a valid agreement."); *see also Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396 (Del. 2010) ("We will not enforce a contract that unclearly or ambiguously reflects the intention to arbitrate.").