



FILED
Superior Court of California
County of San Francisco

JAN 25 2013

CLERK OF THE COURT
BY: Craig R. [Signature]
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
DEPARTMENT NO. 305

MEDIVATION, INC., MEDIVATION
PROSTATE THERAPEUTICS, INC.,

Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et. al.

Defendants.

ARAGON PHARMACEUTICALS, INC.,

Intervenor,

v.

MEDIVATION, INC., MEDIVATION
PROSTATE THERAPEUTICS, INC.,

Defendants.

Case No. CGC-11-510715

**ORDER ON MOTIONS FOR
SUMMARY ADJUDICATION BY
THE REGENTS, ARAGON, AND
MICHAEL E. JUNG, Ph.D.**

1 **I. INTRODUCTION**

2 On February 9, 2012, plaintiffs Medivation, Inc. and Medivation Prostate Therapeutics,
3 Inc. (together “Medivation”) filed the operative Second Amended Complaint (“SAC”) against
4 defendants the Regents of the University of California (the “Regents”), Michael E. Jung, Ph.D.
5 (“Jung”), and Aragon Pharmaceuticals, Inc. (“Aragon”). On December 20, 2012, the Court
6 granted summary adjudication in favor of the Regents and Aragon of certain claims asserted
7 against them by Medivation. The motions identified below seek summary adjudication of the
8 remaining claims in the SAC.
9

10 On September 4, 2012, Jung filed a motion for summary adjudication of Medivation’s
11 Fourth, Eighth, Ninth, and Eleventh causes of action on grounds other than those pertaining to
12 damages. On October 3, 2012, Aragon filed a motion for summary adjudication of the claims
13 against it on the ground that Aragon has not caused Medivation any damages.¹ Similarly, on
14 October 4, 2012, the Regents and Jung also filed a joint motion for summary adjudication of the
15 claims against them on the ground that Medivation has suffered no damages in connection with
16 its alleged claims. The Court has treated this latter joint motion as two separate motions brought
17 by the Regents and Jung.
18

19 Having fully considered the matters, the Court rules as follows: The Regents’ motion for
20 summary adjudication is **GRANTED**. Aragon’s motion for summary adjudication is
21 **GRANTED**. Jung’s motion for summary adjudication filed on September 4 is **GRANTED** in
22 part and **DENIED** in part, and Jung’s motion for summary adjudication filed on October 4 is
23 **DENIED**. The Court’s reasoning is set forth below.
24

25 **II. LEGAL STANDARD**

26 Pursuant to California Code of Civil Procedure Section 437c, “any party may move for
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28 ¹ Damages-related discovery was scheduled so as to follow the completion of other discovery.

1 summary judgment in any action or proceeding if it is contended that the action has no merit or
2 that there is no defense to the action or proceeding.” “The party moving for summary judgment
3 bears the burden of persuasion that there is no triable issue as to any material fact and that he is
4 entitled to a judgment as a matter of law.” *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th
5 826, 850.
6

7 The moving party also “bears an initial burden of production to make a prima facie
8 showing of the nonexistence of any triable issue of any material fact.” *Id.* A moving defendant
9 must show that a plaintiff’s claim has no merit. A defendant can meet this burden by presenting
10 evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence, or by
11 offering admissible evidence to support a defense or the absence of an element of the claim. *Id.*
12 at 854-55.
13

14 If the moving defendant “carries his burden of production, he causes a shift, and the
15 opposing party is then subjected to a burden of production of his own to make a prima facie
16 showing of the existence of a triable issue of material fact.” *Id.* at 851. If the defendant shifts the
17 burden of production to the plaintiff and the plaintiff fails to meet it, then the defendant is entitled
18 to a judgment as a matter of law. The plaintiff cannot rely upon the mere allegations or denials of
19 its pleadings, but must set forth admissible evidence of specific facts that demonstrate the
20 existence of a triable issue of material fact. *Id.* There is a triable issue of material fact if, and
21 only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of
22 the party opposing the motion. *Id.* at 850.
23

24 **III. THE REGENTS’ MOTION FOR SUMMARY ADJUDICATION**

25 In light of this Court’s December 20 Order, only the following claims remain against the
26 Regents: 1) that the Regents breached the Exclusive License Agreement (“ELA”) by disclosing
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1 confidential information relating to the RD-series² to third parties; and 2) that the Regents
2 breached the “best efforts” provision of the Sponsored Research Agreement (“SRA”) by failing to
3 disclose to Medivation all the research data generated pursuant to that agreement. The Regents
4 seeks summary adjudication of those claims on the ground that Medivation cannot establish
5 damages.
6

7 Preliminarily, the Court addresses the evidentiary matters raised by this motion. The
8 Regents submitted written objections to Medivation’s evidence filed in opposition to the motion.
9 Each of the objections made by the Regents is sustained, except for the following, which are
10 overruled: Objection numbers 13, 25-27, 44-45, 115-117, 125, 141, 144, 146, 149-50, 152-54,
11 and 159. The Regents requested judicial notice of two documents, Regents’ Exhibits 28 and 29.
12 The Court sustains Medivation’s objection to Exhibit 28 on the grounds of relevance and denies
13 the Regents’ request for judicial notice of it. The Court grants the Regents’ request for judicial
14 notice of Exhibit 29.
15

16 It is axiomatic that in order for Medivation to prevail on its remaining claims, it must
17 prove that the Regents’ alleged breaches caused it harm. Medivation must show that the Regents’
18 alleged disclosures or failure to use best efforts harmed Medivation in some way. Given the
19 nature of Medivation’s remaining claims, proof of such harm would require expert testimony.
20
21 *See Evid. Code § 801.* No party disputes this.

22 In support of its motion, the Regents demonstrated the following: Medivation’s
23 interrogatory responses revealed the absence of any specific information about Medivation’s
24 purported damages, deferring all matters relating to damages to Medivation’s expert witnesses.
25 (Regents’ Ex. 1 [Bualat Decl. ¶¶ 35, 36]; Exs. 31-33.) At their depositions, Medivation’s chief
26 financial officer, Mr. Machado, and president and chief executive officer, Dr. Hung, declined to
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28 ² The RD-series are compounds that the Regents licensed to Medivation.

1 testify as to what damages Medivation had suffered or how any damages were related to any of
2 Medivation's remaining claims, again deferring the issue of damages to Medivation's experts.
3 (Regents' Exs. 12-14 [Machado Dep.]; Ex. 9 [Hung Dep.].) Those experts are Gregory K.
4 Leonard, Ph.D., whom Medivation designated as its sole expert on "monetary remedies," and
5 Karen L. Becker, Ph.D., whom Medivation designated as its sole expert on FDA approval
6 processes. (Regents' Ex. 25.) The deposition testimony of these two experts revealed that they
7 are not offering any specific opinions as to what, if any, damages Medivation suffered (a) as a
8 result of the Regents' alleged disclosures of confidential information to third parties, or (b) as a
9 result of the Regents' alleged failure to report all research data generated pursuant to the SRA to
10 Medivation. (Regents' Ex. 6 [Becker Dep.], Ex. 10 [Leonard Dep.].) With that evidence, the
11 Regents shifted the burden of production to Medivation to set forth specific facts showing that a
12 triable issue of material fact exists on the issue of damages.
13
14

15 In opposition, Medivation presented additional excerpts from the depositions of Drs.
16 Leonard and Becker and new declarations from them. (Med.'s App. Evid. Exs. A, E, 37, 38.)
17 Neither the deposition testimony nor the new declarations creates a triable issue of material fact
18 with respect to any damages resulting from the remaining claims against the Regents.
19

20 Dr. Leonard's deposition fails to create a triable issue of material fact for several reasons:

21 First, all of his opinions on damages assume as a predicate that Medivation has rights to
22 the A-series compounds.³ However, this Court has previously held that Medivation has no such
23 rights. (See Dec. 20 Order.) Accordingly, Dr. Leonard's opinions are irrelevant to whether the
24 remaining claims against the Regents damaged Medivation.

25 The irrelevance of Dr. Leonard's opinions to any matters remaining in the case against the
26

27 ³ The molecules at issue in this case have been identified by different names over time. The "A-series"
28 includes A51 and A52, the latter also known as ARN-509. The RD-series includes RD162, also known as MDV3100 or Xtandi.

1 Regents can also be expressed as follows. The only remaining claims relate to alleged disclosures
2 or non-disclosures of information by the Regents, and Dr. Leonard's damages model bears no
3 relationship to those claims. (Med.'s App. Evid. Ex. A.)

4
5 Moreover, even if Dr. Leonard's deposition testimony were relevant, it suffers from yet
6 another defect, arising from his opinion that there is only a 30% chance that the A-series
7 compounds being developed by Aragon will ever obtain FDA approval. In other words,
8 according to Dr. Leonard, there is a 70% chance that Medivation will never suffer harm. As a
9 matter of law, Medivation must show that the fact of damage is reasonably certain. An opinion
10 stating that there is a 70% chance that no damage will ever arise cannot establish the fact of
11 damage with reasonable certainty. To the contrary, such an opinion demonstrates that the fact of
12 damage is highly unlikely.

13
14 In addition to those deficiencies, and independent of them, Dr. Leonard's entire damages
15 model rests on a series of speculative assumptions lacking sufficient evidentiary support. As
16 recently expressed by the Supreme Court, "the trial court acts as a gatekeeper to exclude
17 speculative or irrelevant expert opinion." *Sargon Enterprises v. University of So. Cal.* (2012) 55
18 Cal.4th 747, 770. Against that background, this Court concludes that Dr. Leonard's opinions on
19 damages, as expressed at deposition, are based upon on a series of unsupported conjectures,
20 stacked one upon the other, relating to events prophesized to occur many years into the future,
21 including: 1) that Aragon somehow, at sometime, and with someone, will enter into a partnership
22 agreement similar to the agreement Medivation years ago entered into with a third party; 2) that
23 Aragon's A-series drug (assuming the 30% chance of FDA approval should materialize) will
24 enter the market in 2017 or 2018; 3) that Medivation and Aragon will both successfully enter the
25 European market; 4) that Medivation and Aragon will someday become wildly successful and
26 profitable companies; 5) that Aragon will eventually generate revenues equal to 31.4% of
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1 Medivation's projected revenues; and 6) that Aragon's eventual sales will someday cause a 20%
2 reduction in Medivation's sales. (See Med.'s App. Evid. Ex. A.) The arbitrary and capricious
3 nature of Dr. Leonard's opinions is shown to be even more pronounced when it is observed that
4 Medivation itself only recently commenced sales of its own drug. Thus, the foundation of Dr.
5 Leonard's opinions is a comparison of predicted market results as between a company which just
6 recently entered the market and one which will not enter it, if at all, until at least four or five years
7 into the future.⁴

9 Medivation does not salvage its damage claims by expressing damages that are not
10 reasonably certain as a royalty rate to be applied to Aragon's uncertain future sales. That
11 approach does not resolve the fundamental flaw in Medivation's damage analysis, to wit, that
12 Medivation cannot prove the fact of damage with reasonable certainty.

14 The deposition testimony of Dr. Becker also fails to raise a triable issue of material fact
15 concerning damages. Her testimony is fairly characterized as an abstract discussion divorced
16 from any specifics relating to the issues in this case, and she makes no attempt to quantify the
17 alleged damage that the Regents caused Medivation. Simply put, that testimony is of no aid to
18 Medivation on the issue of damages.

19 As previously mentioned, in addition to the deposition testimony of Drs. Leonard and
20 Becker, Medivation offered declarations from each of them in opposition to the Regents' motion.
21 (Med.'s App. Evid. Exs. 37, 38.) The opinions contained in the declarations were first disclosed
22 to the Regents on December 3, 2012, months after the parties' stipulated September 17, 2012
23 cutoff date for expert discovery (June 11, 2012 Hr'g Tr. at 31:21-22).⁵ Those untimely opinions
24

26 ⁴ While the *Sargon* case arose in the context of an *in limine* motion, the result was affirmance of the exclusion
27 of speculative and conjectural expert testimony respecting damages. The facts of *Sargon* are strikingly similar to
28 those presented here, and the teachings of that case apply equally here.

⁵ That date was subsequently extended to "the end of September for expert witness depositions." (Aug. 17,
2012 Hr'g Tr. at 5:20-22.) It was not extended further.

1 are starkly at odds with the opinions given by these same experts at deposition. For example,
2 while Dr. Becker testified at deposition that she would not be opining about the probability that
3 the A-series would receive FDA approval, she thereafter opines in her declaration that there is an
4 80% chance of such approval. In his declaration, Dr. Leonard relies on Dr. Becker's 80%
5 opinion, which is contrary to Dr. Leonard's 30% opinion given at his deposition.⁶
6

7 In effect, Medivation seeks to replace a defective damages theory with a new one founded
8 on opinions not timely or fairly disclosed, and indeed contrary to the opinions expressed by its
9 experts before the close of expert discovery. For the Court to consider such declarations in the
10 context here presented would be grossly unfair and prejudicial to the Regents. *See Jones v.*
11 *Moore* (2000) 80 Cal.App.4th 557, 565. Accordingly, the Court has sustained the evidentiary
12 objections to those declarations.
13

14 Even if the opinions in these declarations were properly before the Court (which they are
15 not), they would still fail to raise a triable issue of material fact concerning Medivation's damages
16 for many of the reasons discussed above. For example, in his declaration Dr. Leonard still relies
17 on the incorrect assumption that Medivation has rights to the A-series compounds, and in her
18 declaration Dr. Becker fails to offer any opinion as to what, if any, specific damages Medivation
19 has suffered.
20

21 In sum, the Regents shifted the burden of production to Medivation, and Medivation
22 thereafter failed to meet its burden of setting forth specific facts showing that triable issues of
23 material fact exist on the issue of damages. Accordingly, the Court grants summary adjudication
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25 ⁶ Dr. Leonard rested his 30% opinion primarily on the fact that, based upon industry averages, drugs in Phase
26 II trials, like the A-series, only have a 30% chance of ultimately obtaining FDA approval. Medivation contends that
27 recent data published by Aragon in connection with the Phase II trials improves the prospects for FDA approval of
28 the A-series. However, the A-series remains in Phase II trials and therefore the methodology upon which Dr.
Leonard rested his opinion would leave the FDA approval chances at 30%. In other words, Dr. Leonard, in order to
remain faithful to the only methodology he disclosed, could not have redone his damage model as reflected in his
declaration.

1 in favor of the Regents with respect to the remaining causes of action against it, those being the
2 First and Second causes of action in the SAC.

3
4 **IV. ARAGON'S MOTION FOR SUMMARY ADJUDICATION**

5 Following this Court's December 20 Order, the only claims remaining in this case against
6 Aragon are for: 1) inducing breach of contract; and 2) intentional interference with existing
7 contractual relations, to the extent, and only to the extent, that those claims are predicated on the
8 alleged disclosure by the Regents to Aragon of information about the RD-series compounds. As
9 with Medivation's claims against the Regents, expert testimony would be required to prove what
10 damages Medivation has suffered as a result of Aragon's alleged tortious conduct. This motion
11 seeks summary adjudication of those claims on the ground that Medivation has no such evidence.
12

13 Preliminarily, the Court addresses the evidentiary matters raised by this motion. Aragon
14 requested judicial notice of one document, and the Court grants that unopposed request. Aragon
15 objected to much of the evidence submitted by Medivation in opposition to this motion. The
16 Court sustains the following numbered objections: 2, 47-119, and 128-129. The Court sustains
17 Aragon's objection number 2 to the entirety of the Machado Declaration because proof of
18 Medivation's damages attributable to Aragon requires expert testimony, and Mr. Machado is not
19 a designated expert witness. Moreover, he offers no testimony on how the remaining claims
20 against Aragon damaged Medivation. Accordingly, the remaining numbered objections to the
21 Machado Declaration—objections numbered 3 through 46—are moot. The Court overrules the
22 following numbered objections: 1, 120-127 and 130.
23

24 In support of its motion, Aragon showed that Medivation relied solely on its damages
25 expert, Dr. Leonard, to provide evidence concerning damages. Dr. Leonard's only two measures
26 of damages were based on (a) a proposed royalty rate that he opined should be applied to future
27 sales of ARN-509, or (b) Dr. Leonard's current valuation of ARN-509. (Hacker Decl. Ex. 8
28

1 [Leonard Dep].) Dr. Leonard's testimony did not in any way purport to connect any disclosures
2 of Medivation's confidential RD-series information to any damages. In other words, there is a
3 causative disconnect between Dr. Leonard's theories of damages and Medivation's remaining
4 claims against Aragon.

5
6 Aragon thereby shifted the burden of production to Medivation by showing that
7 Medivation has no evidence of how its remaining claims against Aragon caused damage to
8 Medivation. In response, Medivation, as it did with the Regents, offered deposition testimony by
9 Drs. Leonard and Becker, and new declarations from each of them. (Med.'s App. Evid. Exs. A,
10 E, 37, 38.) With respect to the deposition testimony, that evidence fails to create a triable issue of
11 material fact for the reasons discussed above in connection with the Regents' motion. As to the
12 new declarations, the Court has sustained Aragon's objections to them for the reasons previously
13 discussed. However, even if those declarations were to be admitted into evidence, they would not
14 create a triable issue of fact for the reasons discussed above in connection with the Regents'
15 motion.

16
17 In sum, Aragon shifted the burden of production to Medivation on the issue of damages,
18 and Medivation thereafter failed to meet its burden of setting forth specific facts showing that
19 triable issues of material fact exist on that issue. Accordingly, the Court grants summary
20 adjudication in favor of Aragon with respect to the remaining causes of action against it, those
21 being the Twelfth and Thirteenth causes of action in the SAC.

22 23 **V. JUNG'S MOTIONS FOR SUMMARY ADJUDICATION**

24 As noted above, Jung has filed two motions for summary adjudication, one on non-
25 damages grounds and the other relating to damages. Taken together, those motions seek
26 summary adjudication of the following causes of action in the SAC: 1) the Fourth cause of action
27 for breach of the Stock Option Agreement ("SOA"); 2) the Eighth cause of action for fraudulent
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1 inducement and deceit; 3) the Ninth cause of action for intentional misrepresentation and
2 concealment; and 4) the Eleventh cause of action for conversion.

3 In the Eleventh cause of action, Medivation alleges that it has property rights to the A-
4 series compounds, and that various actions by Jung constituted conversion of those compounds.
5 Since Medivation has no rights to the A-series compounds, any actions Jung may have taken
6 regarding the A-series could not have constituted conversion of Medivation's property as a matter
7 of law. Accordingly, the Court grants summary adjudication in favor of Jung on the Eleventh
8 cause of action.
9

10 Concerning the Fourth, Eighth, and Ninth causes of action, Medivation alleges that Jung
11 misled it through a variety of misrepresentations, omissions, or half-truths concerning the
12 research being performed in his laboratory. In effect, those causes of action constitute a
13 smorgasbord of claims predicated on a smorgasbord of facts not easily parsed. Against that
14 background, the Court denies Jung's motions for summary adjudication of those causes of action
15 in light of disputed issues of material fact, including those identified below.
16

17 With respect to the Fourth cause of action, there are disputed issues of material fact
18 concerning whether Jung breached the SOA's requirement that he "render faithful and efficient
19 services" by misleading Medivation in connection with his successful solicitation of funding of
20 research at his laboratory at U.C.L.A. while a member of Medivation's Scientific Advisory
21 Board. *See* Med.'s Resp. Sep. Stmt. (filed Oct. 22, 2012) Nos. 115 and 180-181.
22

23 In connection with the Eighth and Ninth causes of action, there are disputed issues of
24 material fact as to whether Jung knowingly made any misleading statements relating to the
25 research performed in his laboratory, and whether Medivation reasonably relied on those
26 statements to its detriment in making out-of-pocket expenditures. *See id.*, Nos. 154 and 179.
27

28 As to evidentiary matters, the Court provides the following rulings and remarks. The

1 objections to the evidence reflective of the disputed issues of material fact identified above are
2 overruled. Although the Court sustained the Regents' objections to similar evidence in
3 connection with its December 20 Order, the circumstances here are different. Jung seeks
4 summary adjudication of fraud claims, while the Regents sought summary adjudication of only
5 contract claims. Certain evidence was rendered inadmissible by the parol evidence rule in
6 connection with the Regents' motion, a circumstance not applicable to the fraud claims asserted
7 here. The Court has not ruled on the remaining evidentiary matters raised in connection with
8 Jung's two motions because they would not be outcome-determinative.
9

10 In sum, the Court grants summary adjudication in favor of Jung on, and only on, the
11 Eleventh cause of action for conversion. Because of the disputed issues of material fact identified
12 above concerning the Fourth, Eighth, and Ninth causes of action, the Court denies Jung's motions
13 for summary adjudication as to those causes of action.
14

15 VI. CONCLUSION

16 In light of the Court's rulings reflected in this Order and the December 20 Order, no
17 claims remain against Aragon in the SAC. Accordingly, Aragon is entitled to a judgment.
18 Counsel for Aragon is directed to prepare a proposed form of judgment, present it to all counsel
19 for approval as to form, and then submit it to the Court. Any pending discovery motions by
20 Aragon are taken off calendar as moot.
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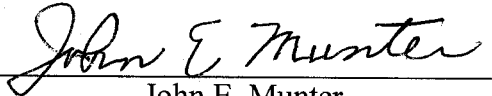
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1 While no claims remain against the Regents in the SAC, the Regents has an unresolved
2 cross-complaint against Medivation. Accordingly, any judgment respecting the Regents must
3 await resolution of that cross-complaint.
4

5 **IT IS SO ORDERED.**
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7 Dated: January 25, 2013
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10 John E. Munter
11 Judge of the San Francisco Superior Court
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MEDIVATION, INC., et. al.,

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ARAGON PHARMACEUTICALS, INC.,

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Case Number: CGC-11-510715

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

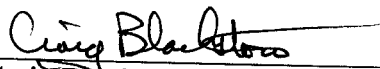
I, Craig Blackstone, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On January 25, 2013, I electronically served the ORDER ON MOTIONS FOR SUMMARY ADJUDICATION BY THE REGENTS, ARAGON, AND MICHAEL E. JUNG, Ph.D. via LexisNexis File & Serve on the recipients designated on the Transaction Receipt located on the LexisNexis File & Serve website.

Dated: January 25, 2013

T. Michael Yuen, Clerk

By:


Craig Blackstone, Deputy Clerk