IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PHARMACEUTICAL PRODUCT DEVELOPMENT, INC.,	)	
Plaintiff,	)	
v.	)	C.A. No. 5688-VCS
TVM LIFE SCIENCE VENTURES VI, L.P., LUX VENTURES II, L.P., BRIAN GALLAGHER, DAVID FISHER, CHRISTOPHER WESTPHAL, DAVID SHAW, CHRISTOPHER WALSH, ROBERT LANGER, RA CAPITAL ASSOCIATES, PHILLIP SHARP, ARCH VENTURE FUND VI, L.P., VENROCK ASSOCIATES IV, L.P., VENROCK PARTNERS, L.P., VENROCK ENTREPRENEURS FUND IV, L.P., TVM LIFE SCIENCE VENTURES VI GMBH & CO KG, ALEXANDRIA EQUITIES, LLC, JONATHAN SEELIG, WILLIAM HELMAN, TODD DAGRES, STEVEN GILLIS, WILLIAM SAHLMAN, LUX VENTURES II SIDECAR, L.P., HIGHLAND CAPITAL PARTNERS VI LIMITED PARTNER-SHIP, HIGHLAND CAPITAL PARTNERS VI-B LIMITED PARTNERSHIP, HIGHLAND ENTREPRENEURS' FUND VI LIMITED PARTNERSHIP, IDG VENTURES ATLANTIC I, L.P., IDG VENTURES ATLANTIC II, L.P., and PETER HUTT,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: February 10, 2011
Date Decided: February 16, 2011

R. Judson Scaggs, Jr., Esquire, Christine H. Dupriest, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware, *Attorneys for Plaintiff.*

Gregory P. Williams, Esquire, Geoffrey G. Grivner, Esquire, RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware, *Attorneys for Defendants (except Brian Gallagher).*

STRINE, Vice Chancellor.

I. Introduction

Plaintiff Pharmaceutical Product Development, Inc. ("PPD") brings this suit against the former stockholders of Magen Biosciences, Inc. (the "Magen Stockholders") and Magen's former CEO, defendant Brian Gallagher, seeking money damages incurred as a result of alleged breaches of contract and fraud in connection with PPD's April 2009 acquisition of Magen. All three of PPD's counts center on Magen's lead compound known as MAG-131, a Vitamin D Receptor Modulator ("VDRM") that Magen allegedly represented to PPD as being 60-130 fold more potent than a VDRM currently FDA-approved and on the market to treat psoriasis. This increased potency was allegedly important because it would allow MAG-131 to treat patients' psoriasis without producing the serious side effects produced by existing drugs. Because of MAG-131's possible increased potency, it was hoped that patients could take less, and get the desired result without the adverse side effects of existing treatment. Under the Merger Agreement, to which they are a party, the Magen Stockholders are jointly and severally liable for all losses (subject to certain restrictions) incurred by PPD resulting from "any breach or inaccuracy of a representation or warranty of the Company contained in [the Merger Agreement] . . . ."[1] This opinion addresses the Magen Stockholders' motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6).[2]

[1] Compl. Ex. A (Agreement And Plan Of Merger (April 1, 2009)) ("Merger Agreement") § 2.24(b).

[2] Defendant Gallagher has answered the complaint and has not moved to dismiss.

In Count One of the complaint, PPD alleges that Magen intentionally breached § 2.24(b) of the Merger Agreement that provides that "*The Company [Magen] has provided to PPD all information and data known to the Company relating to safety, efficacy, and toxicity of all Company Products*" because it intentionally withheld certain scientific data and statements by Magen researchers that showed that MAG-131, contrary to the representations made by Magen during the time period before the execution of the Merger Agreement, was barely, if at all, more potent than existing VDRMs.[3] If this was so, its prospects to be a more effective treatment for psoriasis were diminished.

Count Two is a claim for breach of contract, again for breach of § 2.24(b) of the Merger Agreement.

Count Three is a claim for fraud against the Magen Stockholders and Gallagher, based on statements allegedly made by Gallagher and others at Magen regarding MAG-131's purported potency — statements that PPD learned after executing the Merger Agreement, through its own research, were materially false. Count Three also alleges that Gallagher and Magen intentionally withheld material information regarding MAG-131's potency.

II. Standard Of Review

In considering the Magen Stockholders' motion to dismiss under Rule 12(b)(6), I apply a familiar standard. That is, I must determine whether, in accepting all well-pled factual allegations in the complaint as true and drawing all reasonable inferences in

[3] Merger Agreement § 2.24(b) (emphasis added).

PPD's favor, PPD would be able to recover under any "reasonably conceived set of circumstances susceptible of proof."[4]

III. Counts One And Two (Breach Of Contract) Survive The Motion To Dismiss

Because Counts One and Two are for intentional breach of contract and breach of contract, respectively, and further because both causes of action have at their core the requirement that PPD plead a breach of a contractual obligation, I deal with both of those counts together. In other words, if I determine that PPD has pled a claim for intentional breach of contract, it necessarily follows that PPD has also pled a claim for breach of contract.[5]

PPD meets its pleading burden on Counts One and Two and therefore the motion to dismiss those counts is denied.

In order to state a claim for breach of contract, PPD must allege (i) the existence of a contract; (ii) the breach of an obligation imposed by that contract; and (iii) that as a result of that breach, PPD has suffered damages.[6] In order to allege that the breach was an intentional breach, PPD need only allege, in addition to those elements, that the defendant committed a "deliberate act, which act constitutes in and of itself a breach" of the contract, "even if breaching was not the conscious object of the act."[7]

---

[4] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).
[5] *See, e.g., Bakerman v. Sidney Frank Importing Co.*, 2006 WL 3927242, at *19 (Del. Ch. Oct. 10, 2006) (noting that the elements of a breach of contract claim are "the existence of a contract, the breach of an obligation imposed by that contract, and the resultant damage"); *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 747-48 (Del. Ch. 2008) (A breach of contract is intentional when the defendant commits a "deliberate act" that was "in and of itself a breach" of the contract.).
[6] *Bakerman*, 2006 WL 3927242, at *19.
[7] *Hexion*, 965 A.2d at 748 (emphasis added).

The only element at issue here is breach. That is, the parties argue over whether Magen's allegedly intentional failure to disclose all of the information and data known to it regarding the potency of MAG-131 is covered by the representation in § 2.24(b) of the Merger Agreement which requires that "all information *relating to* . . . [MAG-131's] efficacy" has been provided to PPD.[8] As an initial matter, I am not able to consider parol evidence where the language of the contract is clear.[9] If a contract is unambiguous, I must give the language its ordinary meaning.[10] For the following reasons, I find that the representation and warranty in § 2.24(b) is broad enough to have required that Magen disclosed the information identified in the complaint relating to the potency of MAG-131 that was allegedly not disclosed. Or, put in terms of the Magen Stockholders' motion to dismiss, I find that PPD's complaint and the language in § 2.24(b) supports a reasonable inference that information regarding MAG-131's potency is related to its efficacy.

The Magen Stockholders' argument in support of its motion is stark. In their view, the contractual term "efficacy" has no relationship to MAG-131's potency.[11] It is further the Magen Stockholders' view that it is indisputably clear that the term efficacy in § 2.24(b) is used in its most narrow chemical sense, and does not refer at all to how efficacious a drug would be, or could potentially be, in actually treating a real human's condition. As a matter of linguistics, I am asked to conclude that the more common usage of the term as embodying something that actually works well and that has a

[8] Merger Agreement § 2.24(b).
[9] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. Nov. 22, 2006).
[10] *Id.*
[11] *See* Def. Op. Br. at 12-13 (arguing that PPD is seeking to "impermissibl[y] conflate[e]" the "two separate concepts" of efficacy and potency).

comparative aspect must be ruled out. In fact, the Magen Stockholders go so far as to argue that Magen could not have provided PPD with any information relating to MAG-131's efficacy because there was no information in existence that related to MAG-131's efficacy at the time the Merger Agreement was negotiated and executed. According to the Magen Stockholders, information about a drug's efficacy can only be obtained from clinical trials performed on humans. No clinical trials have been performed on MAG-131 for the simple reason that as an experimental compound, it would need to pass several additional tests before expensive human trials would be conducted.[12]

Efficacy means the "[p]ower or capacity to produce a desired effect."[13] But in a broader, more medical sense, efficacy is also defined as "the ability of a drug to produce the desired therapeutic effect" or "the ability of an intervention to produce the desired *beneficial* effect . . . under ideal circumstances."[14] I am cognizant of the fact that a scientist might argue that in the strictest and narrowest of biological senses, efficacy only refers to the ability of a given molecule (such as MAG-131) to seek out, bind to its target receptor (in this case the vitamin D receptor) and react in such a way as to alter a particular biological pathway in a manner that treats or cures a condition. Or, in other words, the scientist might say that efficacy means that if two drugs with different potencies, Drugs A and B, both do XYZ when ingested in sufficient quantities, where

---

[12] *See* Merger Agreement "Schedule of Exceptions for § 2.24" ("No clinical studies have been performed with MAG-131.").

[13] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 570 (4th ed. 2000). *See also* Merriam-Webster, *available at* http://www.merriam-webster.com/dictionary/efficacy (defining efficacy to mean "the power to produce an effect").

[14] Free Online Medical Dictionary, *available at* http://medical-dictionary.thefreedictionary.com/efficacy (emphasis added).

XYZ are physiological responses occurring at a molecular level that may be measurable on a macro level in varying degrees, Drugs A and B have equal efficacies, or are equally efficacious.[15] Putting this in terms of the complaint, MAG-131 and the leading VDRM already FDA-approved and on the market, Dovonex®, both treat psoriasis by seeking out and binding with vitamin D receptors and thereby causing some sort of biological response at the molecular level which is visible to the human eye in the form of healthier skin. In the narrow biological sense just described then, a biologist, as the Magen Stockholders appear to do, might argue that MAG-131 and Dovonex® are equally efficacious in treating psoriasis. But that argument overlooks a reality vital to the Magen's Stockholders' motion to dismiss — that even in its most technical sense, efficacy does in fact "*relate to*" potency.

Indeed, pharmacology textbooks invariably consider a drug's efficacy alongside a drug's potency — "the relative amount of drug needed to produce a given response."[16] That is, as much as efficacy means a drug's ability to produce a biological response by binding to certain target receptors in the body, potency, in scientific terms, measures a drug's *affinity* for those same target receptors.[17] A more potent drug, therefore, will produce a given effect but requires less of the drug to do so because the more potent drug

[15] *See generally* RICHARD A. HARVEY & PAMELA C. CHAMPE, PHARMACOLOGY 30 (4th ed. Lippincott Williams & Wilkins 2009) (observing that two drugs that have varying potencies can nonetheless, at appropriate dosages, have the identical "efficacy" because efficacy is "the ability of a drug to [elicit] a physiological response when it interacts with a receptor").
[16] GARY C. ROSENFELD & DAVID S. LOOSE, PHARMACOLOGY 5 (4th ed. Lippincott Williams & Wilkins 2007). *See also* RICHARD A. HARVEY & PAMELA C. CHAMPE, PHARMACOLOGY 30 (4th ed. Lippincott Williams & Wilkins 2009) ("Potency [is] a measure of the amount of drug necessary to produce an effect of a given magnitude.").
[17] GARY C. ROSENFELD & DAVID S. LOOSE, PHARMACOLOGY 5 (4th ed. Lippincott Williams & Wilkins 2007).

is more "attracted to" the target receptors than its less potent counterpart.[18] In fact, pharmacology textbooks explain that a drug's efficacy is "*dependent on the number of drug-receptor complexes formed*."[19] It does not take a PhD in molecular biology to understand[20] that the greater an affinity a drug has for its receptor, i.e., the more potent the drug is, the greater the number of drug molecules in a fixed set will seek out and bind their target receptors, i.e., the more efficacious the drug will be. That reality in itself makes it improper to rule for the Magen Stockholders now, because that reality seems to imply that the two characteristics (efficacy and potency) are not only related, but in a way integrally linked.

But the Magen Stockholders' restrictive view that efficacy has no relation to potency fails at this plaintiff-friendly pleading stage for another, more common sense reason. That is, it ignores the reality that when people outside the laboratory — e.g., a treating physician — speak about a drug's efficacy, and compare it to other drugs' efficacies, they talk about it in a way that relates not just to a given drug's ability to produce the physiological response on its most basic and molecular level, but instead in a way that gives credence to a drug's many other attributes, including its potency and what repercussions — both positive and negative — a drug's potency may have.[21] Indeed, researchers themselves strive for more "efficacious" treatments — ones that do the trick

[18] RICHARD A. HARVEY & PAMELA C. CHAMPE, PHARMACOLOGY 30 (4th ed. Lippincott Williams & Wilkins 2009).
[19] *Id.* (emphasis added).
[20] Although it would, admittedly, help.
[21] *Cf.* "Treatment And Drugs — The Mayo Clinic.com", *available at* http://www.mayoclinic.com/health/migraine-headache/DS00120/DSECTION=treatments-and-drugs (explaining and recommending certain migraine medications on the basis that certain drugs are "more effective and ha[ve] fewer side effects").

the best.[22] In fact, even chemists likely do this, as they seek to develop more "efficacious" drugs, ones that have the desired effect but at the lowest cost, both in terms of side effects and economics.[23]

For instance, it may well be that an explorer discovers a tree in the rain forest that, if eaten in its entirety by an infant, is effective to cure Childhood Leukemia. Of course if an infant was ever able to ingest an entire tree, it would most likely die (if not from the volume then from the other toxins found within the tree), but the fact remains that eating the tree *would be effective* in curing Childhood Leukemia because the tree contains just enough of a miracle compound. If a doctor told worried parents that eating an entire tree would be "efficacious" to cure their beloved child's cancer, the doctor would rightly receive a rather hostile reaction. The same would be true if a dermatologist offered his pimply patient a bottle of concentrated hydrochloric acid to cure his acne, assuming there was a metal bottle with the anti-corrosive properties to contain it.

These examples show that when one speaks about a new drug's efficacy, efficacy usually means something more than the drug's theoretical ability to achieve the desired

---

[22] *See, e.g.,* REMINGTON: THE SCIENCE AND PRACTICE OF PHARMACY 87 (David B. Troy ed., Lippincott Williams & Wilkins 21st ed. 2006) (observing that drug discovery and research is in response to either an "unmet clinical need" or "the replacement of established therapies in favor of a newer modality that is safer and more efficacious").

[23] *See, e.g.,* THOMAS L. LEMKE & DAVID A. WILLIAMS, FOYE'S PRINCIPLES OF MEDICINAL CHEMISTRY 45 (6th ed. Lippincott Williams & Wilkins 2008) (observing, in a discussion of drug discovery, that "advantage[s]" to testing certain metabolites of already known chemical compounds include the prospect of obtaining a drug with "less toxicity with fewer side effects."); STUART O. SCHWEITZER, PHARMACEUTICAL ECONOMICS AND POLICY 264 (2d ed. Oxford University Press 2007) (analyzing the societal benefits and drawbacks of the use of patents in pharmaceutical products and observing that "[w]hile many therapeutic alternatives," such as drugs, "may produce the same level of benefit, only one does so at a lower cost than the others.").

therapeutic or physiological response. This case presents a typical example of how this plays out in the real world, albeit in a commercial setting.[24] PPD's complaint paints a picture of a VDRM market with two players, Dovonex® and Vectical®, both topical creams. Both are efficacious in treating psoriasis, but both also suffer from a drawback familiar to anyone who has ever been prescribed a drug — they both have side effects. Specifically, each can cause a toxic increase in blood calcium levels known as hypercalcemia.[25] PPD alleges that Magen's sales pitch centered on MAG-131's ability to treat psoriasis just like the other VDRMs already on the market, Dovonex® and Vectical®, but could do so with *"a fraction of the amount of dosing" because MAG-131 is much more potent.*[26]

That increased potency was important to PPD for two reasons, which are understandable to even a lay person, like myself. The first is obvious — that a more

---

[24] Although recourse to extrinsic evidence is generally not appropriate in interpreting an unambiguous contract, that does not mean that the court must be blind to the general business context in which a given contract was negotiated. Given the reality that the same word can have more than one general meaning and that the commercial context can influence which meaning the parties intended, the court must take cognizance of the existence of those general meanings in determining whether a contract has only one plausible meaning. *See USA Cable v. World Wrestling Fed'n Entm't, Inc.*, 766 A.2d 462, 474 (Del. 2000) (holding that where the relevant industry supplies no "gloss" on a word in a contract, courts should give the word its "ordinary dictionary meaning"); *Lorillard Tobacco Co. v. American Legacy Found.*, 903 A.2d 728, 740 (Del. 2006) ("A court must accept and apply the plain meaning of an unambiguous term in the *context of the contract language and circumstances, insofar as the parties themselves would have agreed ex ante*.") (internal citations omitted) (emphasis added); *see also* 17A AM. JUR. 2D *Contracts* § 396 ("Business contracts must be construed with business sense as they naturally would be understood by intelligent persons of affairs, and in the same sense as is uniformly attached to them by the business world. . . . All mercantile contracts should be construed according to their plain meaning, to persons of sense and understanding, and not according to forced and refined interpretations which are intelligible only to lawyers.") (internal citations omitted).

[25] Compl. ¶¶ 41, 99-100.

[26] Compl. ¶¶ 2, 53, 100 (emphasis added).

potent drug has the benefit of reducing the amount of medicine a person has to consume or apply to one's body in order to benefit, i.e., in order for the drug to be effective at curing or treating the ailment.[27] The second reason that increased potency is desirable, as noted in the complaint, is because the less medicine a person must ingest, the fewer or less severe the drug's unwanted side effects will be. Would it be outlandish for a doctor, in treating an elderly patient, to recommend MAG-131 over Dovonex® as being more *efficacious* in treating that patient's psoriasis because (i) the elderly patient will not have to remember to apply the cream every four hours (like Dovonex®) but instead can apply less of the more potent MAG-131 only once a day; and (ii) the elderly patient will not suffer, or will suffer far fewer, toxic side effects? Would it be outlandish that businesses like Magen and PPD, which were engaged in developing marketable pharmaceutical products would use efficacy in this broader sense, more like a physician than a blinkered chemist? The answer to these questions seems to be no at the pleading stage. It is how "we" — the collective term used to refer to everyone that does not wear a lab coat to work each day — talk, and moreover, *think* about what it means for a drug to be effective or efficacious to treat our ailments. It is the reason why we laugh when we think about drinking an entire swimming pool worth of water to cure a hangover or taking care of an unsightly wart with a rusty jigsaw. Those treatments may be effective, but most of us would desire a less potent, more efficacious, alternative.

[27] By way of another example, if one drug was effective at dealing with arthritis and could be taken once a week, it might be, in practical terms, more efficacious than another drug that had to be taken four times daily. The more complicated the pill regimen, the more likely it is that patients (e.g., the elderly) will fail to follow that regimen.

To argue, as the Magen Stockholders here do, that potency indisputably has nothing to do with efficacy, ignores that reality. They go as far to argue that one cannot even measure a new drug's efficacy unless and until clinical trials on humans are performed. Of course, were that the case, the representation concerning "efficacy" contained in § 2.24(b) would be entirely meaningless as no clinical studies on MAG-131 have ever been performed. That is problematic for the Magen Stockholders for a number of reasons. One is a legal reason — because sophisticated contracting parties usually want the words they use to mean something, courts generally do not read contracts in a way that would render portions of it meaningless.[28] The other reason is that Magen knew when it was searching for a new VDRM that the drug market already had two FDA-approved drugs, both VDRMs, that treated psoriasis. It costs an enormous amount of money for a drug company to discover and then test a new drug like MAG-131.[29] Magen knew that the reason MAG-131 was worth pursuing, in the sense that Magen scientists conducted what seems from the complaint to have been extensive research on its potency and other characteristics, was not just because MAG-131 was "efficacious" to treat psoriasis in the mundane and technical sense that MAG-131 treats psoriasis just as well

[28] *Pharmathene, Inc. v. SIGA Techs., Inc.*, 2008 WL 151855, at *11 (Del. Ch. Jan. 16, 2008) (citing *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992)).

[29] According to two 2002 studies conducted by the Pharmaceutical Manufacturers Association of America, it takes on average 12-15 years, and costs an average of $500 million, to develop a new drug. REMINGTON: THE SCIENCE AND PRACTICE OF PHARMACY 94 (David B. Troy ed., Lippincott Williams & Wilkins 21st ed. 2006) (citing Pharmaceutical Manufacturers Association, 2002 Report: *Increased Length and Complexity of the Research and Development Process*, Washington, DC; Pharmaceutical Manufacturers Association, 2002 Report: *Incentives to Discover New Medicines: Pharmaceutical Patents*, Washington, DC). Moreover, only 3 in 10 prescription drugs generate revenues that either meet or exceed the average research and development costs of developing an FDA-approved prescription drug. *Id.*

as Dovonex® or Vectical®. We have a name for drugs that do exactly what other drugs do — *generics*. But Magen did not just see MAG-131 as a generic capable of bringing about exactly the same physiological response as Dovonex® or Vectical®. Instead, it researched MAG-131 extensively because it believed, and allegedly represented to PPD, that MAG-131 was special and had commercial value because its outstanding potency would set it apart from the already existing drugs like Dovonex®. In other words, Magen hoped that somewhere, some day, doctors by the thousands might reach past the tubes of Dovonex® for a smaller tube of MAG-131 while explaining to their patients that due to its increased potency and reduced instance of side effects, MAG-131 would be a more *"effective" or "efficacious"* treatment for that pesky psoriasis. Again, the complaint supports the reasonable inference that that was also PPD's reason for acquiring Magen and its MAG-131 compound.

Buttressing my conclusion that potency does in fact relate to efficacy is the fact that our courts have considered the connector "relating to" to be "paradigmatically broad,"[30] such that at this plaintiff-friendly stage, it would be imprudent to grant the motion to dismiss under the Magen Stockholders' narrow view of what the word "efficacy" means in the Merger Agreement — a view that again renders any inclusion of the term "efficacy" mere surplusage. Additionally, it is not clear to me that the Magen Stockholders' citation to Judge Meanor in *United States v. Ciba-Geigy Corp.* helps the Magen Stockholders any.[31] Judge Meanor's law-trained scientific (i.e., oxymoronic)

[30] *Lillis v. AT&T Corp.*, 904 A.2d 325, 331 (Del. Ch. 2006).
[31] *United States v. Ciba-Geigy Corp.*, 508 F. Supp. 1157 (D.N.J. 1976).

observation, even if correct and even if applicable in all contexts,[32] including a commercial contract as here, that "knowledge of [potency] *does not imply* anything about [efficacy]"[33] does not necessarily mean that a drug's potency *has no relation to, no bearing on, or does not pertain to* a drug's efficacy.[34] That is, two independent metrics might still relate to each other.

For all of these reasons, I find that PPD's breach of contract claims based on the representation and warranty contained in § 2.24(b) of the Merger Agreement survive the motion to dismiss. In doing so, I am cognizant of the fact that the phrase "relating to . . . [MAG-131's] efficacy" may well be ambiguous because it could be susceptible to more than one reasonable meaning.[35] But the Magen Stockholders do not argue, at least in their motion to dismiss, that an ambiguity exists. Instead, they argue the opposite — that § 2.24(b) is so clear on its face that the complaint must be dismissed for failure to state a claim. It is not, at least in the narrow sense that the Magen Stockholders advocate.[36]

---

[32] *Ciba-Geigy Corp.* arose in the context of a patent and its alleged invalidity on the basis of obviousness and fraudulent omissions in the patent application.
[33] *Ciba-Geigy Corp.*, 508 F. Supp. at 1164 (emphasis added).
[34] *See* BLACK'S LAW DICTIONARY 1158 (5th ed. 1979) (defining "relating to" to mean "to have some relation to" or "to have bearing or concern [on]; [to] pertain.").
[35] *Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).
[36] The Magen Stockholders also move to dismiss Count Three for fraud. The only viable ground for dismissal is that the Magen Stockholders limited their duty in the Merger Agreement to indemnify PPD for any fraud committed by Magen and defendant Gallagher to representations and warranties contained in the Merger Agreement. PPD disclaims any intent to hold the Magen Stockholders responsible for fraud except to the extent that the alleged fraudulent misrepresentations and omissions also constitute a breach of the representation and warranty in § 2.24(b) of the Merger Agreement. The Magen Stockholders based their motion to dismiss Count Three on the ground that the complaint does not state a claim for breach of § 2.24(b) of the Merger Agreement. In other words, the Magen Stockholders argue again that information about MAG-131's potency does not relate to efficacy such that any alleged fraud with respect to

IV. It Is Premature To Rule On What Damages PPD May Recover

In a procedurally interesting maneuver, the Magen Stockholders seek to "dismiss" a portion of the damages claimed by PPD. In its complaint, PPD seeks the following damages: (i) $14.866 million PPD paid to acquire Magen; (ii) approximately $7.4 million PPD spent on further research and development of MAG-131 before allegedly discovering the inaccurate information regarding its potency; and (iii) approximately $2 million spent by PPD in winding down the acquired company formerly known as Magen but renamed PPD Dermatology, Inc.[37] The Magen Stockholders have not taken issue with the $14.866 million, but instead focus solely on PPD's post-acquisition expenditures of $7.4 million and $2 million (the "Drug Development Costs"). Therefore, to the extent that PPD has adequately pled damages for each of its counts, which it has, the only question raised by the Magen Stockholders' attack is the ultimate amount, if successful, PPD will be entitled to recover.

The crux of the Magen Stockholders' argument is that the Merger Agreement precludes recovery of certain categories of damages on any claim, including claims for rescission on the basis of fraud.[38] Specifically, the Magen Stockholders point to § 7.4(c), which provides, in all capital letters, that "in no event shall the indemnification

---

MAG-131's potency would be "extra-contractual" and therefore outside the Magen Stockholders' obligation to indemnify. Def. Op. Br. at 17. But, for purposes of the Magen Stockholders' motion to dismiss, I have found that potency may relate to efficacy, and as a result, that the complaint states a claim for fraud based on the falsity of the representation contained in § 2.24(b) of the Merger Agreement. As such, the Magen Stockholders' motion to dismiss Count Three is denied.

[37] Compl. ¶¶ 126, 133, 140.

[38] PPD seeks damages incurred as a result of the alleged breach of contract and fraud, or in the alternative, rescission of the Merger Agreement alongside restitution in the amounts noted. Compl. at 30-31.

obligations . . . cover or include (x) consequential, incidental, special, indirect, or punitive damages . . . ."[39] In the Magen Stockholders' view, the Drug Development Costs represent damages that are special, consequential, or both because "even if purportedly foreseeable at the time of the alleged breach," those amounts are not damages that were the necessary result of the alleged fraud and breach of contract.[40]

General damages are defined as those "as the law itself implies or presumes to have accrued from the wrong complained of, for the reason that they are its immediate, direct, and proximate result, or such as necessarily result from the injury, or such as did in fact result from the wrong, directly and proximately, and without reference to the special character, condition, or circumstance of the plaintiff."[41] Consequential damages, in turn, are defined as damages that do "not flow directly and immediately from the act of the [breaching] party, but only from some of the consequences or results of such act"[42] but were nonetheless "reasonably foreseeable or contemplated by the parties at the time the contract was entered into as a probable result of a breach."[43] Special damages are similar to consequential damages in that special damages are those "which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special

[39] Merger Agreement § 7.4(c).
[40] Def. Op. Br. at 20.
[41] BLACK'S LAW DICTIONARY 353 (5th ed. 1979) (citing *Myers v. Stephens*, 43 Cal.Rptr. 420, 433 (Cal. Dist. Ct. App. 1965)).
[42] BLACK'S LAW DICTIONARY 352 (5th ed. 1979) (citing *Richmond Redevelopment and Housing Authority v. Laburnum Const. Corp.*, 80 S.E.2d 574, 580 (Va. 1954)).
[43] 24 WILLISTON ON CONTRACTS § 64:12 (4th ed. 2010); *see also id.* (noting that consequential damages are those that are recoverable from a breaching party only if that party knew that "particular, though unusual, damages will follow or may follow the [breaching party's] failure to perform its agreement . . . .").

circumstances or conditions."[44] The parties and the authorities seem to agree that consequential and special damages are in large part synonymous.[45]

As discussed at oral argument, § 7.4(c)'s laundry list of precluded damages might have been put in the Merger Agreement by lawyers who themselves were unclear on what those terms actually mean. This is not surprising in light of the amorphous state of the law and its confusing efforts to clearly delineate the difference between general damages, on the one hand, and consequential or special damages, on the other.[46] I must, however, endeavor to give the categories of damages in § 7.4(c) meaning.

As Judge Cardozo explained and is still true many years later, "[a]t the root of the problem is the distinction between general and special damages as it has been developed in our law. There is need to keep in mind that the distinction is not absolute, but relative. To put it in other words, damage which is general in relation to a contract of one kind may be classified as special in relation to another."[47] Judge Cardozo's observation that the distinction between general and special damages is a contextual one takes on added importance at the pleadings stage where all that is required of the plaintiff is that she give

[44] BLACK'S LAW DICTIONARY 354 (5th ed. 1979) (citing *Twin Coach Co. v. Chance Vought Aircraft Inc.*, 163 A.2d 278, 286 (Del. Super. 1960)).
[45] CORBIN ON CONTRACTS § 56.6 at 105-06 (2005); 24 WILLISTON ON CONTRACTS § 64:12 (4th ed. 2010).
[46] *See, e.g.*, 11 CORBIN ON CONTRACTS § 56.6 (2005) (noting courts' struggle to fashion a satisfying distinction between general and special damages, and observing that the appropriate categorization of a claimed damage varies with context).
[47] *Kerr Steamship Co., Inc. v. Radio Corp. of America*, 157 N.E. 140, 141 (N.Y. 1927); *see also* AM. JUR. 2D *Damages* § 41 (citing *Kerr*, 157 N.E. 140 (N.Y. 1927)) ("Distinctions between general and special damage arising from the breach of contract are not absolute, but relative; in other words, damage which is general in relation to a contract of one kind may be classified as special in relation to another.").

notice to the defendant of the nature of the claims against him and the relief she seeks.[48] Indeed, in the venerable Delaware Superior Court case, *Twin Coach Co. v. Chance Vought Aircraft, Inc.*,[49] a case that is often cited by treatises and legal dictionaries for its definition of special damages and their distinction to general damages,[50] the court declined to make a dispositive categorization of alleged damages on a motion to dismiss, on the rational basis that "[i]t would . . . not be expected that the pleadings . . . would set forth the amount of information necessary to formulate nice opinions on such issue."[51]

Consistent with *Twin Coach*, I am chary to make the context-specific determination about the Drug Development Costs given the necessarily limited record. For one thing, it is not at all obvious, especially at the pleadings stage, that the $7.4 million spent on further researching and developing MAG-131 is unique to PPD in the sense that it seems reasonable to infer that any acquiring drug company in PPD's position would want, and most likely need, to continue investing resources in the research and development of the acquired experimental compounds that were the reason the acquirer purchased the company. The situation with respect to the $2 million allegedly spent in winding up PPD Dermatology, Inc. is similar in that it seems plausible that a close down of PPD, Dermatology, Inc. was the only logical step available to PPD, who claims to

---

[48] *See* Ct. Ch. R. 8(a) ("A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the party deems itself entitled."). Although special damages must be pled with specificity, the Magen Stockholders do not argue that PPD has not met that standard. Ct. Ch. R. 9(g) ("When items of special damage are claimed, they shall be specifically stated.").

[49] *Twin Coach Co. v. Chance Vought Aircraft Inc.*, 163 A.2d 278 (Del. Super. 1960).

[50] *E.g.*, BLACK'S LAW DICTIONARY 354 (5th ed. 1979); 11 CORBIN ON CONTRACTS § 56.6 at 105 n.5 (2005).

[51] *Twin Coach*, 163 A.2d at 287.

have been defrauded into buying what turned out to be a worthless company and that such shut-down costs would be a component of a full rescissory damages award.[52] In sum, on a motion to dismiss, I am not able to make the determination that the Magen Stockholders' urge — that the Drug Development Costs are indisputably special damages. As the court reasoned in *Twin Coach*, what is important at the pleadings stage is that PPD has given the Magen Stockholders sufficient notice as to the damages it is claiming.[53] Of course, the Magen Stockholders are free to return to this line of argument after a factual record is established through discovery, with the added benefit of the issue of damages being fully briefed.

V. Conclusion

For all of the foregoing reasons, the Magen Stockholders' motion to dismiss is DENIED. IT IS SO ORDERED.

[52] I am also unsure at this early stage whether PPD Dermatology, Inc. had any other function other than to research and develop MAG-131.
[53] *Twin Coach*, 163 A.2d at 287.