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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

Leo E. Strine, Jr.
Vice Chancellor

Court House
Wilmington, Delaware 19801

Date Submitted: July 12, 2004
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RE: Del Pharmaceuticals, Inc. v. Access Pharmaceuticals, Inc.
C.A. No. 314-N

Dear Counsel:

This dispute arises out of a failed attempt by two companies in the pharmaceutical industry to finalize a joint venture. The case comes before the court on a motion to dismiss. The motion to dismiss is premised on a few grounds. In this opinion, I reach only one: the defendant's argument that this case must be dismissed because the parties agreed by contract that any dispute between them would be submitted to the courts of New York for adjudication.

I conclude that the defendant's argument is correct. When the parties' contract is read in light of New York precedent and this court's prior

interpretation of that precedent, that contract reasonably conveys an intention to require the litigation of any dispute between the parties in the courts of New York. In a prior ruling of this court on this area of New York law, this court relied on a particular decision of a New York state court applying New York law, *Babcock & Wilcox Co. v. Control Components, Inc.*,[1] as a reliable interpretation of New York law. That New York decision found a contract provision substantively indistinguishable from the one at issue here to be an exclusive forum selection clause. Preferring to render a ruling that promotes commercial efficiency and jurisprudential consistency, I decline the plaintiff's invitation for me to deviate from *Babcock & Wilcox Co.*'s teaching on the basis of federal court decisions that do not apply New York law and instead adhere to its interpretative approach.

I. Factual Background

The following summary of facts is drawn from the plaintiff's complaint and the documents it incorporates.

Plaintiff Del Pharmaceuticals, Inc. is a pharmaceuticals manufacturer, incorporated in Delaware, which has its principal place of business in

[1] 614 N.Y.S.2d 678, 682 (N.Y. Sup. Ct. 1993).

Uniondale, New York. Del's over-the-counter products include Orajel brand oral analgesics.

Defendant Access Pharmaceuticals, Inc. is a Delaware corporation that maintains its principal place of business in Dallas, Texas. Access develops, manufactures, and sells pharmaceutical delivery systems.

This dispute has its origins in an initiative by Del and Access to combine their strengths in order to produce an improved Orajel oral analgesic. For its part, Del was the manufacturer of the leading benzocaine-based oral analgesic, Orajel, and had considerable experience in developing such analgesics. Meanwhile, Access was in the business of developing novel drug delivery systems, but had no experience in developing benzocaine-based oral analgesics.

In August 2002, they came together to discuss the idea of using a drug delivery product created by Access — an erodable oral disc named OraDisc — as the delivery system for Orajel. The concept was that Access would create a small disc or patch that could adhere to, for example, a canker sore for a period of an hour or so, delivering painkilling benzocaine directly to the injured site.

According to the complaint, both parties understood that they would first attempt to negotiate a term sheet containing the material terms of their agreement. If that was achieved, the parties would then involve counsel to document their agreement more formally in a final contract.

Because of the nature of the contemplated venture, Del was going to have to share highly confidential information with Access regarding its analgesic products so that it and Access could work together to fashion an oral analgesic that could be delivered in an erodable oral disc.[2] The parties contemplated that once the product was developed, Access would manufacture the product and sell it to Del exclusively at a fixed price for a fixed term.

At an early stage, the parties made a decision that helped generate the current dispute. Because they could not be sure how difficult or costly it would be to develop the product they envisioned, Del and Access decided to begin product development work while they were still negotiating the material terms of their relationship. To protect the parties' proprietary

[2] Access argues that it, rather than Del, was the party that shared the most sensitive information. I adhere, as I must, to the rendition of the facts set forth in Del's complaint.

information during this pre-contractual period, the parties entered into what I will call the "First Confidentiality Agreement" on August 22, 2002.[3]

For present purposes, two aspects of the First Confidentiality Agreement are relevant. First, the First Confidentiality Agreement placed severe restrictions on the use of confidential information by the parties and, in summary, contractually prohibited Access from exploiting any information that Del provided it, by sharing that information with third parties or using it to develop products of its own using that information, absent Del's written consent.[4]

Second, the First Confidentiality Agreement contained the following provision addressing conflicts arising under the Agreement:

> 9. Applicable Law; Jurisdiction. This Agreement shall be governed by and construed in accordance with the laws of the State of New York in the United States of America, without regard to its choice of law principles. If any dispute arises under or in connection with the performance of this Agreement which requires recourse to a court by the parties in order to enforce their rights hereunder, then it is expressly understood and agreed that the parties will submit to the jurisdiction of the federal and/or state courts located in the State of New York in the United States of America.[5]

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[3] The First Confidentiality Agreement is attached to and incorporated into the complaint.
[4] First Confidentiality Agreement, ¶¶ 2, 5.
[5] *Id.* ¶ 9.

By spring 2003, Del and Access reached agreement on the key terms to be included in a final contract governing the development, manufacturing, and exploitation of the new product. Del set forth those terms in an unsigned document entitled "Access Pharmaceuticals Benzocaine Erodable Disc Proposed Term Sheet."[6] On or about May 23, 2003, Access's President and Chief Executive Officer, Kerry Gray, informed Del that Access's board of directors had approved the Term Sheet. In the complaint, Del alleges that the parties also orally agreed around that time to work together, with the assistance of their attorneys, to "draft, negotiate and sign a more formal, final version of their agreement."[7]

After that time, Del and Access continued to work on product development. In this process, Del allegedly continued to freely share highly confidential information with Access. During this period, Access informed Del that it intended to use a third-party manufacturer to make the actual product. Therefore, the parties entered into the "Second Confidentiality Agreement," adding the third party as a signatory.

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[6] The Term Sheet was attached to and incorporated into the complaint.
[7] Compl. ¶ 14.

Like the First Confidentiality Agreement, the Second Confidentiality Agreement had strict prohibitions on the use of confidential information, which essentially prevented any party from independently using other parties' information for commercial purposes without written permission. Similarly, the Second Confidentiality Provision had a forum selection and choice of law provision similar to the First Confidentiality Agreement, but with one change that I have highlighted:

> 8. Applicable Law; Jurisdiction; Injunctive Relief. This Agreement shall be governed by and construed in accordance with the laws of the State of New York in the United States of America, without regard to its choice of law principles. If any dispute arises under or in connection with the performance of this Agreement which requires recourse to a court by the parties in order to enforce their rights hereunder, then it is expressly understood and agreed that the parties will submit to the jurisdiction of the federal and/or state courts located in the State of New York in the United States of America. *The parties further acknowledge that any breach of the terms of this Agreement will cause an immediate and irreparable injury that cannot be measured or compensated through the payment of money damages. In light of the foregoing, the parties agree that any breach of the terms of this Agreement shall be redressed through the entry of preliminary and permanent injunctions by a court of competent jurisdiction.*[8]

[8] Second Confidentiality Agreement, ¶ 8.

Later that summer, Del shared confidential information with the third-party manufacturer so that the third-party manufacturer could work with Access and Del on the new product.

In autumn 2003, Del and Access exchanged drafts of the contemplated final agreement, which they labeled the "Exclusive License and Supply Agreement." On November 18, 2003, the negotiators allegedly had settled all their disagreements and Del's counsel circulated a version of the Exclusive License and Supply Agreement that it believed to be an accurate reflection of the parties' bargain (the "Draft License Agreement"). It was not ready for signature as it was highlighted to show changes from prior drafts. The cover memorandum expressly indicates Del's counsel's belief that it "is what should be the final version" and asked Access's counsel whether "this agreement is OK with you and your client."[9] Del expected that Access would sign the Draft License Agreement promptly.

When that did not occur and Del did not hear from Access, Del made repeated phone calls to Access. It was told that Access would report back shortly or that Access's CEO was away on vacation.

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[9] Compl. Ex. D. The Draft License Agreement is attached to and incorporated into the complaint.

Apparently, it was a long respite for Access's CEO because Del did not hear anything until January 8, 2004. But what it heard that day was not that Access had signed the Draft License Agreement. Instead, it read an Access press release announcing that Access had entered into a development, license, and supply agreement with Wyeth Consumer Healthcare, the manufacturer of Anbesol products and Del's leading competitor in the benzocaine-based analgesics market.

On information and belief, the complaint alleges that Access's contract with Wyeth awarded Wyeth the same rights that Access had led Del to believe it would receive from Access once the Exclusive License and Supply Agreement was signed. Also on information and belief, the complaint alleges that Access used Del's confidential information regarding benzocaine-based analgesics to create an oral disc-based analgesic product for Wyeth that was identical to the product that Del and Access were developing.

Del contends that Access's conduct has injured it severely. Anbesol is the second leading oral pain-relieving product — second to Orajel. Rather than Del being the first manufacturer to market an oral pain killer using an oral disc delivery system, Del now faces being second to the market, having

had its potential join venturer, Access, jilt it for a relationship with Del's key rival, Wyeth.

II. Del's Claims

In March 2004, Del filed this action. In its complaint, Del pleads nine counts.

Count 1 is a count seeking "specific performance of [an] agreement to sign a final agreement."[10] Del alleges that Access had bound itself to negotiate in good faith and to sign a final agreement that faithfully incorporated the terms in the Term Sheet, which Del contends represented the "material and essential elements" of the parties' agreement.[11] Del contends the Draft License Agreement it circulated on November 18, 2003 incorporated those material and essential terms and was approved by the parties' negotiators and their counsel. Del thus argues that Access breached binding contractual obligations by refusing to formally sign the document. Because the relationship contemplated by the (unexecuted) Exclusive License and Supply Agreement was a unique and irreplaceable one involving the introduction of a new product in a competitive market, Del

[10] Compl. at 9 (capitalization removed).
[11] *Id.* ¶ 31.

seeks specific performance of Access's promise to sign. Alternatively, in Count 2 of the complaint, Del seeks damages for breach of that promise.

Count 3 of the complaint is based on a theory of unjust enrichment. It is grounded in the view that Access had agreed to work together with Del in good faith to sign a formal agreement consistent with the Term Sheet. To the extent that Access then turned around and used Del's confidential information to pursue an alternative, rival product with Wyeth, Access has unjustly enriched itself at Del's expense.

Del's Count 4 is based on promissory estoppel. Among its other facets, this Count alleges that Del "stopped efforts to develop a new benzocaine-based oral disc product using technology other than that being offered by Access and instead directed all of its time and effort at developing such a product in cooperation with Access."[12] It allegedly made this business decision in reasonable and good faith reliance upon Access's "unambiguous promise to Del that it would sign a fully negotiated, formal exclusive license and supply agreement."[13] As a remedy, Del seeks specific

[12] *Id.* ¶ 53.
[13] *Id.* ¶ 50.

performance of Access's alleged promise to sign a final agreement, as well as injunctive relief. In the alternative, it seeks monetary damages.

Count 5 is pled as a breach of the duty of good faith and fair dealing. This is an odd count in that it appears to allege an explicit promise by Access to sign a final agreement faithful to the Term Sheet and therefore to duplicate Counts 1 and 2 but is framed as a violation by Access of the covenant of good faith and fair dealing that is regarded as implicitly existing within all contracts. Through Count 5, Del seeks injunctive and monetary relief identical to the previous counts but for some reason does not seek specific performance.

Counts 6 and 7 allege breaches of the First and Second Confidentiality Agreements respectively. Del seeks injunctive relief preventing Access from using any confidential information of Del's to improperly benefit itself and monetary damages for any improper use that has already occurred.

Count 8 is a tort claim alleging that Access has misappropriated Del's trade secrets by misusing the information it received under the Confidentiality Agreements. That is, Del alleges that Access's breaches of the Confidentiality Agreements also amount to tortious behavior. Through

this count, Del seeks injunctive and monetary relief similar to that sought under Counts 6 and 7.

III. Access's Motion To Dismiss

Access has moved to dismiss the complaint on two primary grounds. As to the merits, Access alleges that Counts 1 through 5 of the complaint are barred by New York's statute of frauds.[14] Because the final contract that Del and Access were contemplating clearly entailed performance over a multi-year period, Access argues that the statute of frauds is fatal to any of Del's claims that are premised on the failure to sign that unexecuted final agreement. Because each of the first five counts seeks to hold Access responsible for its alleged failure to honor its oral promise to sign a final Exclusive License and Supply Agreement and to in essence subject Access to the same remedial liability as if Access had actually signed and then breached a final agreement of that kind, Access contends that the statute of frauds bars each of those counts.

More technically, Access argues that those counts in the complaint that arise under the First and Second Confidentiality Agreements (Counts 6, 7, and 8), and those counts that are connected to the alleged breaches of

[14] *See* N.Y. GEN. OBLIG. LAW § 5-701.

those Agreements (Counts 1 through 5) must be dismissed because Del is contractually forbidden from pressing those claims in this court. Access argues that the dispute resolution provisions in the First and Second Confidentiality Agreements require that any claim arising under or in connection with those Agreements be brought in state or federal court in New York.

In this opinion, I will only address Access's argument that this is not a proper forum, a motion that arises under Court of Chancery Rule 12(b)(3).[15] "If a forum selection clause validly limits a plaintiff to a single forum, that clause operates to divest a court that otherwise has jurisdiction of its status as a proper venue for the plaintiff to sue."[16] Finding that the parties chose to litigate their disputes in the courts of New York, to the exclusion of this and other courts, I do not reach Access's merits-based arguments for dismissal.

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[15] *See Simon v. The Navellier Series Fund*, 2000 WL 1597890, at *4 (Del. Ch. Oct. 19, 2000) (a motion to dismiss "based on a forum selection clause challenges where the plaintiff may assert his claim" and is "made pursuant to Court of Chancery Rule 12(b)(3)").
[16] *Id.* at *6.

IV. Did Del And Access Choose New York As An Exclusive Forum For The Litigation Of Disputes Arising Under Or In Connection With The Confidentiality Agreements?

Access argues that Del cannot proceed in this forum under Counts 6 to 8 because those counts involve claims of breach of the First and Second Confidentiality Agreements and cannot proceed in this forum under Counts 1 through 5 because those counts involve disputes connected with the performance of those Confidentiality Agreements. Access premises this argument on the language of the First and Second Confidentiality Agreements that provides that if "any dispute arises under or in connection with the performance of [one of the Confidentiality Agreements] which requires recourse to a court by the parties . . . , then it is expressly understood and agreed that the parties will submit to the jurisdiction of . . . courts located in the State of New York." It contends that this language clearly evidences the intent of Del and Access to have any disputes arising under or in connection with the First and Second Confidentiality Agreements litigated exclusively in a state or federal court in New York and to exclude all other possible forums, including this one.

In support of that argument, Access relies upon trial court decisions in New York state and federal courts standing for the proposition that a forum

selection clause is exclusive under New York law if it contains "'[a]ny language that reasonably conveys the parties' intention to select an exclusive forum.'"[17] In particular, Access relies on the New York Supreme Court (i.e., trial court) decision in *Babcock & Wilcox Co. v. Control Components, Inc.*[18] In that case, the following provisions were held to be an expression of the parties' intent to select New York as an exclusive forum:

> 15.5 Jurisdiction. The Purchaser . . . and Seller each hereby (a) agree to submit to the jurisdiction of the Supreme Court of the State of New York and/or of the United States District Court for the Southern District of New York in any action, suit, arbitration or other proceeding arising out of or with respect to the subject matter of this Agreement and that any cause of action arising out of this Agreement shall be deemed to have arisen from a transaction of business in the State of New York . . . and (c) waive any other requirements of personal jurisdiction or venue with respect to any such action, suit, arbitration or other proceeding in New York City.
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> 15.10. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New York.[19]

In further support of its argument, Access notes that this court relied upon the *Babcock & Wilcox Co.* decision as an accurate articulation of New

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[17] *Babcock & Wilcox Co. v. Control Components, Inc.*, 614 N.Y.S.2d 678, 682 (N.Y. Sup. Ct. 1993) (quoting *Water Energizers Ltd. v. Water Energizers, Inc.*, 788 F. Supp. 208, 212 (S.D.N.Y. 1992)).
[18] 614 N.Y.S.2d 678, 682 (N.Y. Sup. Ct. 1993).
[19] *Id.* at 680.

York contract law in interpreting a contractual provision in *Fitzgerald v. Cantor*.[20] Based on these cases, Access contends that Del must sue in New York because the First and Second Confidentiality Agreements reasonably convey the parties' intention to make that state's courts the exclusive forum in which to resolve disputes.

In response to Access's arguments, Del cites to other authority from New York federal courts that points in the other direction. In *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Distributors Inc.*,[21] the U.S. Court of Appeals for the Second Circuit interpreted the following the provision:

> This Agreement shall be governed and construed according to the Laws of Greece.
>
> Any dispute arising between the parties hereunder shall come within the jurisdiction of the competent Greek Courts, specifically of the Thessaloniki Courts.[22]

The U.S. District Court had dismissed claims brought before it in New York, holding that the provision reflected the parties' choice of a mandatory forum. On appeal, the Court of Appeals reversed, finding that the provision

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[20] 1998 WL 842304 (Del. Ch. Nov. 5, 1998). *Fitzgerald* also held that because the agreement at issue had a New York choice of law clause, New York law governed the interpretation of the forum selection clause. *Id.* at *1.
[21] 22 F.3d 51 (2d Cir. 1994).
[22] *Id.* at 52.

merely provided that particular Greek courts had jurisdiction over the parties, but not to the exclusion of other courts that might also have had jurisdiction. In so ruling, the Court of Appeals indicated its view that the "general rule in cases containing forum selection clauses is that '[w]hen only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive.'"[23]

Del also cites *Reliance Insurance Co. v. Six Star, Inc.*,[24] a decision that relied on the teaching of *Boutari*. In *Reliance Insurance Co.*, the District Court for the Southern District of New York held that the following language did not create a mandatory forum:

JURISDICTION AND VENUE

> It is agreed that in the event of the failure of the Company to pay any amount claimed to be due hereunder, the Company and the INSURED will submit to the jurisdiction of the State of New York and will comply with all the requirements necessary to give such court jurisdiction. In the event of direct or indirect conflict between the laws of the State of New York and the laws of the State of Florida, the laws of the State of Florida would apply.[25]

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[23] *Id*. (quoting *Docksider, Ltd. v. Sea Tech., Ltd*., 875 F.2d 762, 764 (9th Cir. 1989)).
[24] 155 F. Supp. 2d 49 (S.D.N.Y. 2001).
[25] *Id*. at 53.

The District Court held that the clause lacked any "clear indication of exclusivity" and thus that the clause should be interpreted simply as a permissive one that merely reflected the parties' consent to jurisdiction in a particular state, New York, without excluding the possibility of litigation in another state.[26]

Based on this precedent, Del asks me to find that the First and Second Confidentiality Agreements do not reflect any clear intention to require the parties to litigate their disputes in New York, merely their acknowledgement that that was a permissible forum. In further support of that argument, Del cites to the portion of the Second Confidentiality Agreement indicating that any breach of that Agreement would give rise to irreparable injury that should be "redressed through the entry of preliminary and permanent injunctions by a court of competent jurisdiction." If, says Del, the parties had clearly chosen the courts of New York as an exclusive forum, why refer to the possibility of injunctions by "a court of competent jurisdiction"? This usage, according to Del, demonstrates the permissive, non-mandatory nature of the forum selection language in the Confidentiality Agreements.

[26] *Id.* at 58.

For the following reasons, I conclude that Access has the better of what is, admittedly, a close argument. Initially, I note that the case law that Del relies upon comes primarily from federal courts which are not applying New York contract law. Its two key cases, *Boutari* and *Reliance Insurance Co.*, were both decided by federal courts in New York. But neither of those cases purported to apply New York contract law. *Boutari* dealt with a contract governed by Greek law. *Reliance Insurance Co.* involved a contract generally governed by New York law, but the court did not rely on decisions applying New York law in interpreting the forum selection clause. Rather, in both *Reliance Insurance Co.* and *Boutari*, the federal courts relied on decisions of other federal courts from a variety of jurisdictions and not the law of any particular forum even though the agreements at issue in both cases contained choice of law clauses.[27] As a result of these factors, the case

[27] Some of the decisions on which *Reliance Insurance Co.* and *Boutari* relied took a similar approach, relying not on the law of any particular forum but instead on the decisions of other federal courts, notwithstanding the presence of choice of law clauses in the agreements at issue. For example, *Boutari* relied on *Docksider, Ltd. v. Sea Tech. Ltd.*, 875 F.2d 762 (9th Cir. 1989), which itself interpreted a forum selection clause in an agreement with a choice of law clause selecting Virginia law. *Id.* at 763. Rather than look to Virginia cases in interpreting that forum selection clause, however, *Docksider* discussed federal court decisions from other jurisdictions which themselves interpreted forum selection clauses in agreements selecting the law of forums as wide-ranging as California, Texas, Utah and New York. *Id.* at 763-64. Similarly, *Reliance Insurance Co.* relied on *Talatala v. Nippon Yusen Kaisha Corp.*, 974 F. Supp. 1321 (D. Haw. 1997), which involved a forum selection clause in an agreement selecting Japanese law. *Id.* at

law Del cites does not aid me in determining how the First and Second Confidentiality Agreements should be interpreted under New York law, the law that the parties chose to govern their relationship.

By contrast, the case that Access relies upon, *Babcock & Wilcox Co.*, was decided by a New York state court applying New York contract law. In that decision, the New York Supreme Court noted New York's public policy, as expressed in its statutory and common law, of respecting forum selection clauses and encouraging the adjudication by New York courts of disputes involving contracts with a New York choice of law and forum selection provisions.[28] This court, in *Fitzgerald v. Cantor*, looked to *Babcock & Wilcox Co.* as a reliable statement of New York contract law. Nothing Del has submitted persuades me that I should disagree with this court's prior decision regarding New York law and therefore I also rely upon *Babcock & Wilcox Co.* as a reliable guide to New York law.

When applying the approach of *Babcock & Wilcox Co.*, I conclude that the First and Second Confidentiality Agreements "'reasonably convey[]

1325. Again, rather than look to Japanese law, *Talatala* applied "ordinary principles of contract interpretation," *id.*, principles which it drew from other federal court decisions — including *Boutari*.

[28] *Babcock & Wilcox Co.*, 614 N.Y.S.2d at 681.

the parties' intention to select an exclusive forum.'"[29] Although the language selected could have been clearer, it does plainly state that if "any dispute arises under or in connection with the performance of this Agreement which requires recourse to a court by the parties . . . , then it is expressly understood and agreed that the parties will submit to the jurisdiction of the . . . courts located in the State of New York." This language is oddly written if it was simply intended to be permissive. Rather, when read in light of *Babcock & Wilcox Co.*, the language indicates that when a dispute among the parties arises, the parties are to "submit" to the jurisdiction of the courts in New York to resolve that dispute. The parties' agreement in *Babcock & Wilcox Co.* to "submit to the jurisdiction of" the New York courts in "any action . . . arising out of" their agreement was found to be mandatory by that court.[30] I cannot rationally distinguish those words from the words used by the parties here. By using the words "will submit to the jurisdiction of" the New York courts in any "dispute" arising under or in connection with the Confidentiality Agreements, Del and Access used words that the New York courts construe as expressing an intent that

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[29] *Fitzgerald*, 1998 WL 842304, at *2 (*quoting Babcock & Wilcox Co.*, 614 N.Y.S.2d at 682).
[30] 614 N.Y.S.2d at 680.

the parties must litigate in New York.[31] Furthermore, I note that this interpretation is not a linguistically strained one. While not a model of drafting clarity, the key language is directed to the "parties" and indicates that if "any dispute arises" and "recourse to a court" is necessary to enforce rights arising under the Confidentiality Agreements, then the "parties will submit" to the jurisdiction of the New York courts. The mandatory phrase "will submit" therefore appears to refer back to the term "dispute" equally as much as it refers forward to the word "jurisdiction."[32] Notably, this interpretation is not only consistent with *Babcock & Wilcox Co.*, but also with the Second Circuit's decision in *Seward v. Devine*.[33]

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[31] I admit that it is hard to square my decision with the decision in *Reliance Insurance Co.* That is because the *Reliance Insurance Co.* and *Babcock & Wilcox Co.* decisions apply different interpretative approaches and are themselves hard to square. I adhere to the interpretation rendered in *Babcock & Wilcox Co.* for the reasons I have stated.

[32] The use of the word "will" rather than the mandatory word "shall" does not render the language permissive, even if will is less common than shall in legal documents. As Access points out, the verb "will" is commonly used to express a "requirement or command" and to indicate "intention." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1968 (4th ed. 2000); *see also* BLACKS LAW DICTIONARY 1433 (5th ed. 1979) (defining "will" as "[a]n auxiliary verb commonly having the mandatory sense of 'shall' or 'must.' It is a word of certainty, while the word 'may' is one of speculation and uncertainty.").

[33] In *Seward v. Devine*, 888 F.2d 957 (2d Cir. 1989), the Second Circuit held that a series of contracts including one stating that a particular New York state court "shall have jurisdiction over all litigation" arising out of a contract and two providing for "venue and jurisdiction" in that court "for all legal matters and disputes" arising from those agreements expressed the intention to make that forum exclusive. *Id*. at 962.

It is also notable that the Draft License Agreement contained a provision expressly entitled "consent to jurisdiction" and providing that the parties would have "consent[ed] to the jurisdiction" of the New York courts in "any action brought under or with relation to" that Agreement.[34] This language shows that the parties knew how to draft a provision that merely addressed consent to jurisdiction and that did not convey a mandatory intention. By contrast, the language in the Confidentiality Agreements provides that "if any dispute arises" then the parties "will submit" to the courts of New York — language of the type involved in *Babcock & Wilcox Co*.

Next, the fact that the language of the Second Confidentiality Agreement refers to "court[s] of competent jurisdiction" in the plural does not persuade me that that forum selection language was permissive only. Because the federal courts of New York are courts of limited jurisdiction, the use of the plural recognizes that a suit filed in federal court in New York might not be sustainable even if the parties had assented to jurisdiction over their persons in that court.

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[34] Compl. Ex. D. § 14.04.

Finally, my decision rests in part on prudential concerns. This court is a court of the State of Delaware. When a prior written decision of this court is well-articulated and relies upon precedent of another state's courts in order to interpret the law of that other state, it makes little sense for this court to quibble with that prior ruling in the absence of new precedent from the other state indicating a new development in its law. Put bluntly, this court is not the New York Court of Appeals and any interpretation of New York law that this court renders can only, by definition, be persuasive precedent. This does not mean that this court should not attempt to interpret another state's law as accurately as possible but it does suggest even more reason to adhere to *stare decisis* in contexts like this. A well-reasoned decision in *Fitzgerald v. Cantor* found *Babcock & Wilcox Co.* an accurate expression of New York law and nothing in this record casts serious doubt on that prior decision. There is no sound reason for me to deviate from *Babcock & Wilcox Co.* now.

Moreover, it is quite possible that the parties drafted the First and Second Confidentiality Agreements in reliance upon *Babcock & Wilcox Co.* (and even this court's decision in *Fitzgerald v. Cantor*). For this court to now diverge from *Babcock & Wilcox Co.* on a New York law question

without the benefit of new teaching from the New York courts (and in particular, from New York's highest court, its Court of Appeals) risks unsettling the expectations of commercial parties with no corresponding benefits, as nothing I write can definitively settle New York law. Given that the only consequence of adhering to precedent is requiring Del to litigate in the state of its principal place of operations and in a state it specifically agreed could adjudicate disputes arising under the Confidentiality Agreements, consistency will impose few, if any, real costs.

Because I conclude that any disputes arising under or in connection with the Confidentiality Agreements must be litigated in New York, I will dismiss this case under Rule 12(b)(3). In its moving papers, Access argued without rebuttal from Del that each of the counts in the complaint either arise directly under the Confidentiality Agreements or in connection with those Agreements. Indeed, as Access points out, all but one of Del's counts (excluding its requests for specific performance) involve a claim for damages premised on Access's alleged misuse of confidential information shared after the First Confidentiality Agreement was executed. And even that excluded count is based on the same conduct at issue in several of the other counts seeking monetary damages of that type. Perhaps because of the

obvious connection between its claims and the Confidentiality Agreements, Del rested its defense of this motion solely on the grounds that the forum selection clause was permissive and did not argue that its claims were not sufficiently connected to the Confidentiality Agreements to implicate that forum selection clause's reach.

Because that decision disposes of this case in its entirety, I need not and therefore do not reach the question of whether Del has stated a claim, leaving that question and other merits questions to the New York courts.

V. Conclusion

For the foregoing reasons, this case is dismissed under Rule 12(b)(3) and without prejudice to Del's right to reassert its claims in a court of competent jurisdiction in New York.

IT IS SO ORDERED.

Very truly yours,

/s/ Leo E. Strine, Jr.

Vice Chancellor

oc: Register in Chancery