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United States District Court
Central District of California

MIOTOX LLC,
Plaintiff,
v.
ALLERGAN, INC.; ALLERGAN
BOTOX LIMITED; and DOES 1–25,
inclusive,
Defendants.

Case № 2:14-cv-08723-ODW(PJWx)

**ORDER DENYING PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT [59] AND GRANTING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT [61]**

I. INTRODUCTION

Plaintiff Miotox LLC (“Miotox”) filed a Complaint for breach of contract against Defendants Allergan, Inc. and Allergan Botox Limited (collectively “Allergan”) for failure to make adequate royalty payments under a license agreement. Allergan counterclaimed for patent invalidity, non-infringement, and patent misuse. The parties have filed cross motions for summary judgment on the limited issue of interpretation of the licensing agreement. For the reasons discussed below, the Court **DENIES** Miotox’s Motion for Summary Judgment (ECF No. 59) and **GRANTS** Allergan’s Motion for Summary Judgment (ECF No. 61).

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1 **II. FACTUAL BACKGROUND**

2 In 1992, Dr. William J. Binder (“Dr. Binder”) developed a novel therapy for the
3 treatment of migraine headaches. (ECF No. 70 [“MUF”]¹ ¶ 1.) Dr. Binder filed
4 patent applications based on this therapy, and on February 3, 1998, U.S. Patent No.
5 5,714,468 (“the ’468 Patent”) entitled “Method For Reduction of Migraine Headache
6 Pain” was issued to him. (ECF No. 66 [“AUF”]² ¶ 10.) His method calls for the
7 administration of presynaptic neurotoxins, such as botulinum toxin A (“Botox”), to
8 areas such as the face, neck, and back to reduce or prevent the pain associated with
9 migraine headaches. (AUF ¶ 11.) The ’468 Patent expired on May 9, 2014. (AUF
10 ¶ 13.)

11 Dr. Binder formed Miotech, Inc. (now Miotox) in 1994 to promote his
12 inventions and to enable continued development of novel treatments using Botox®
13 (hereafter, “Botox”). (MUF ¶ 7.) Dr. Binder’s continued research and development
14 efforts have led to additional novel migraine headache therapies. Dr. Binder filed
15 several patent applications in 2012 including:

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- 17 1. U.S. Patent No. 8,420,106, Extramuscular Treatment of Traumatic-
Induced Migraine Headache (“the ’106 Patent”);
 - 18 2. U.S. Patent No. 8,617,569, Treatment of Migraine Headache With
19 Diffusion of Toxin in Non-Muscle Related Foraminal Sites (“the ’569
20 Patent”);
 - 21 3. U.S. Patent No. 8,883,143. Treatment of Traumatic-Induced Migraine
Headache (“the ’143 Patent”).
- 22

23 (MUF ¶¶ 140–45.)

24 Allergan and Miotech entered into an option agreement on July 31, 1997, which
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26 ¹ Statement of Uncontroverted Facts and Conclusions of Law in Support of Miotox LLC’s Motion
for Summary Judgment.

27 ² Allergan Defendants’ Separate Statement of Uncontroverted Facts and Conclusions of Law in
28 Support of Defendants’ Motion for Summary Judgment on Contract Interpretation.

1 gave Allergan the option to acquire an exclusive license to Miotech’s patents relating
 2 to the treatment of migraine headaches using a botulinum toxin or other neurotoxins.
 3 (AUF ¶ 1.) Miotech assigned its patent rights to Plaintiff Miotox on October 23,
 4 1998. On October 30, 1998, Allergan exercised its option and entered into the
 5 License Agreement with Miotech. (AUF ¶ 2.) The parties later amended the License
 6 Agreement to substitute Miotox as the correct licensor. (AUF ¶ 18.)

7 Under the License Agreement, Allergan agreed to pay royalties on “Net Sales”
 8 in exchange for a license to the Licensed Patents. (AUF ¶ 4.) The following are the
 9 relevant terms of the License Agreement and their corresponding definitions:

Term	Definition
Net Sales	The actual selling price of Licensed Product sold by LICENSEE, its Affiliate, or any sublicensee to others in countries in which Licensed Patents have been granted for the Licensed Use . . .
Licensed Product	Any medical product containing Botulinum Toxin or other toxin made, used, or sold by LICENSEE, its Affiliate, or any sublicensee thereof whose use is covered by a Valid Patent Claim.
Valid Patent Claim	A bona fide, unexpired claim in the Licensed Patents for the Licensed Use which has not been held invalid by a final decision of a court or other governmental agency.
Licensed Use	The use of Licensed Products for the treatment of migraine headache[s].
Licensed Patents	All patents and patent applications in the Territory presently owned or later acquired by LICENSOR or which LICENSOR has or may have a right to grant licenses, which cover the Licensed Use.

22
 23 (AUF ¶¶ 6–8.)

24 The License Agreement also contains an integration clause in Section 9(c)
 25 stating that the License Agreement “constitutes the entire agreement and
 26 understanding of the parties relating to the subject matter hereof and supersedes all
 27 prior and contemporaneous agreements and understandings, whether oral or written
 28 relating to the subject matter hereof” (AUF ¶ 9.) At the time the parties entered

1 into the License Agreement, the sole patent covered by the Agreement was the '468
2 Patent. (AUF ¶ 12.) The '468 Patent broadly covered the use of botulinum toxins
3 (such as Botox) for the treatment of migraine headache. (AUF ¶ 11.)

4 On November 21, 2013, less than six months before the expiration of the '468
5 Patent, Miotox contacted Allergan about amending the list of Licensed Patents
6 included in Schedule 1 to the License Agreement. (AUF ¶ 19.) Miotox sought to add
7 four patents and one patent application, which included the '106 Patent, '569 Patent,
8 and '143 Patent that were filed in 2012. (*Id.*) Before agreeing to the amendment,
9 Allergan wished to verify the parties' understanding with respect to the royalty
10 provision in light of the impending expiration of the '468 Patent. (MUF ¶ 147.)
11 Allergan stated that its understanding was that once the '468 Patent expired on May 9,
12 2014, Allergan would only owe royalties on sales of Botox for the purpose of one of
13 the methods covered by a valid claim of the New Patents. (MUF ¶ 148.) Miotox
14 disagreed and interpreted the Agreement to require Allergan to pay royalties on all
15 sales of Botox relating to the treatment of migraine headaches, regardless of the '468
16 Patent's expiration. (MUF ¶ 149.)

17 On October 8, 2014, Miotox filed claims for breach of contract, unjust
18 enrichment, and other related claims in the Los Angeles Superior Court. Allergan
19 removed the case to this Court and counterclaimed for a declaratory judgment of non-
20 infringement of the '106 Patent, non-infringement of the '143 Patent, invalidity of the
21 '569 Patent, and unenforceability of all the New Patents due to patent misuse. (ECF
22 No. 6.) On May 5, 2015, the Court directed the parties to file cross-motions for
23 summary judgment on the limited issue of interpreting the License Agreement. (ECF
24 No. 45.) On June 19, 2015, both Miotox and Allergan moved for summary judgment
25 (ECF Nos. 59, 61); both parties opposed on July 17, 2015 (ECF Nos. 176, 178) and
26 replied on August 8, 2014 (ECF Nos. 211, 213). The Court held a hearing on the
27 Motions on August 17, 2015. The Motions are now before the Court for
28 consideration.

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III. LEGAL STANDARD

Summary judgment should be granted if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). Once the moving party has met its burden, the nonmoving party must go beyond the pleadings and identify specific facts through admissible evidence that show a genuine dispute for trial. *Id.*; Fed. R. Civ. P. 56(c). Conclusory or speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill’s Publ’g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

A genuine issue of material fact must be more than a scintilla of evidence, or evidence that is merely colorable or not significantly probative. *Addisu v. Fred Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000). A disputed fact is “material” where the resolution of that fact might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1968). An issue is “genuine” if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Id.* Where the moving and nonmoving parties’ versions of events differ, courts are required to view the facts and draw reasonable inferences in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The Court may not weigh conflicting evidence or make credibility determinations. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

IV. DISCUSSION

24 Miotox and Allergan disagree on how to interpret of the License Agreement.
25 The crux of the dispute is which Botox sales are royalty-bearing. Miotox contends
26 that Allergan agreed to pay royalties for all sales of Botox related to the treatment of
27 migraine headaches, regardless of whether it is within the scope of the Licensed
28 Patents. Allergan contends that the License Agreement requires Allergan to pay

1 royalties only on the Net Sales of the Licensed Product when Botox is used in a way
2 that is covered by a Valid Patent Claim. During the hearing on these Motions, Miotox
3 spent considerable time explaining and referencing numerous pieces of evidence to
4 support its position that the face of the contract was clear. Unfortunately, Miotox lost
5 sight of the fact that its tortured argument only further proved that the clear language
6 did not support its interpretation in the License Agreement.

7 “The fundamental goal of contract interpretation is to give effect to the mutual
8 intent of the parties as it existed at the time of contracting.” *Miller v. Glenn Miller*
9 *Prods.*, 318 F. Supp. 2d 923, 934 (C.D. Cal. 2004). “The mutual intent of the parties
10 is to be determined from the language of a contract, ‘if the language is clear and
11 explicit, and does not involve an absurdity.’” *F.B.T. Prods., LLC v. Aftermath*
12 *Records*, 827 F. Supp. 2d 1092, 1102 (C.D. Cal. 2011) (quoting Cal. Civ. Code
13 § 1638).

14 Miotox’s interpretation overlooks how the definitional terms in the License
15 Agreement work together. The License Agreement provides that Allergan will pay
16 royalties on percentages of Net Sales. Net Sales, defined in further detail above,
17 means “the actual selling price of Licensed Product sold” Thus, royalties are tied
18 to the sale of Licensed Product. Licensed Product is defined as “any medical product
19 containing Botulinum Toxin or other toxin . . . whose use is covered by a Valid Patent
20 Claim.” Lastly, Valid Patent Claim is defined as an unexpired claim in the Licensed
21 Patent for the Licensed Use. Miotox attempts to argue that royalties are based on
22 sales for the Licensed Use, which does not depend on the scope of any patent claims.
23 What Miotox fails to recognize is that Licensed Use depends on Licensed Product,
24 which as just explained, depends on a Valid Patent Claim.

25 It is undisputed that from the time the License Agreement was created until
26 recently, the ’468 Patent was the primary Licensed Patent for sales in the United
27 States pursuant to the License Agreement. Because the ’468 Patent covered all uses
28 of Botox to treat migraine headache, Allergan paid royalties on all sales of Botox used

1 to treat migraine headache until the patent expired. Therefore, Allergan’s payments
2 were consistent with the terms of the License Agreement. Now that the ’468 Patent
3 has expired, Allergan is only obligated to pay royalties on Net Sales of the New
4 Patents that Miotox holds, which are much more limited in scope.

5 Miotox attempts to introduce extrinsic evidence to support its position that
6 Allergan must continue to pay royalties on all sales of Botox, as long as Miotox holds
7 any patent calling for the use of Botox, administered in any way, for the treatment of
8 migraines. Generally, a contract is governed by its plain language, and parol evidence
9 is inadmissible to vary or contradict the terms of an integrated writing. Cal. Civ. Code
10 §§ 1625, 1856. In determining whether parol evidence is admissible, the Court looks
11 at: (1) whether the writing was intended to be integrated, i.e. a complete and final
12 expression of the parties’ agreement, and (2) whether the agreement is “reasonably
13 susceptible” to the interpretation urged by the party offering the evidence. *Bionghi v.*
14 *Metro. Water Dist.*, 70 Cal. App. 4th 1358, 1364–65 (1999); *see also Pac. Gas &*
15 *Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 37 (1968) (defining
16 the test for admitting parol evidence as whether the offered evidence is relevant to
17 prove a meaning to which the language of the instrument is “reasonably susceptible”).

18 Regarding the first step, there is no dispute that the License Agreement contains
19 an integration clause expressing the clear intent of the parties that the License
20 Agreement is the entire agreement between the parties.³ *See supra*. Thus, the Court
21 must address whether the License Agreement is “reasonably susceptible” to Miotox’s
22 interpretation. In making the determination, the Court considers evidence concerning
23 the parties’ intent in order to determine whether ambiguity exists. *Winet v. Price*, 4

24 ³ “The crucial issue in determining whether there has been an integration is whether the parties
25 intended their writing to serve as the exclusive embodiment of their agreement. The instrument itself
26 may help to resolve that issue.” *Masterson v. Sine*, 68 Cal. 2d 222, 225 (1968). The existence of an
27 integration clause is a key factor in divining that intent. *Grey v. Am. Mgmt. Servs.*, 204 Cal. App.
28 4th 803, 807 (2012). “This type of clause has been held conclusive on the issue of integration, so
that parol evidence to show that the parties did not intend the writing to constitute the sole agreement
will be excluded.” *Id.*

1 Cal. App. 4th 1159, 1165 (1992). “If the court decides, after considering [the]
2 evidence, that the language of a contract, in the light of all the circumstances, is fairly
3 susceptible to either one of the two interpretations contended for . . . extrinsic
4 evidence relevant to prove either of such meanings is admissible.” *Pac. Gas*, 69 Cal.
5 2d at 40 (internal citations and quotations omitted).

6 The Court finds that the evidence presented by Miotox does not support its
7 position that the language of the License Agreement is reasonably susceptible to its
8 interpretation. The key term is “Licensed Product.” Miotox argues that the parties’
9 negotiations reveal that the only substantive negotiation over the term “Licensed
10 Product” was to ensure that unapproved uses would be royalty-bearing and not tied to
11 patent infringement. (Miotox Mot. 13.) That is, Miotox’s interpretation is that
12 Allergan owes royalties for all sales of Botox used for treating migraine headaches so
13 long as there is an unexpired Miotox patent on any method of migraine treatment.

14 As mentioned above, Valid Patent Claim is defined as “a bona fide, unexpired
15 claim in the Licensed Patents for the Licensed Use which has not been held invalid . . .
16 .” Therefore, Botox must be used in a way covered by a bona fide, unexpired claim
17 in a Licensed Patent to be a “Licensed Product.” Miotox’s interpretation effectively
18 broadens the scope of “Licensed Product” by changing “whose use is *covered by a*
19 Valid Patent Claim” to “whose use is *related to any* Valid Patent Claim.” These two
20 interpretations are inconsistent and thus, the evidence must be excluded. *See*
21 *Gerdlund v. Elec. Dispensers Int’l*, 190 Cal. App. 3d 263, 273 (1987) (excluding
22 extrinsic evidence because “[t]estimony of intention which is contrary to a contract’s
23 express terms, however, does not give meaning to the contract: rather it seeks to
24 substitute a different meaning.”).

25 Finding Miotox’s parol evidence inadmissible, the Court limits its interpretation
26 of the License Agreement to the four corners of the document. *See Tahoe Nat’l Bank*
27 *v. Phillips*, 4 Cal. 3d 11, 23 (1971) (“[I]n determining whether substantial evidence
28 supports a judgment, extrinsic evidence inconsistent with any interpretation to which

1 the instrument is reasonably susceptible becomes irrelevant; as a matter of substantive
2 law such evidence cannot serve to create or alter the obligations under the instrument.
3 Irrelevant evidence cannot support a judgment.”). Consistent with current Supreme
4 Court precedent,⁴ California courts have interpreted patent license agreements
5 narrowly so that such agreements are normally construed to only require royalty
6 payments on sales that are covered by an unexpired licensed patent. *Bettis Rubber Co.*
7 *v. Kleaver*, 104 Cal. App. 2d 821, 825 (1951). “There is a presumption that royalties
8 are not to be paid after the expiration of a patent; if the intention is to have them
9 continue longer, the parties should phrase their contract in language from which such
10 intention may fairly be inferred.” *Id.* (quoting *E.R. Squibb & Sons v. Chem. Found.*,
11 93 F.2d 475, 477 (2d Cir. 1937)). There is no language in the License Agreement to
12 suggest that that the parties intended for Allergan to pay royalties beyond the
13 expiration of the ’468 Patent. As Allergan points out, the opposite is true. The
14 License Agreement specifically limits the term “Licensed Product”—and therefore
15 Net Sales (i.e. royalty payments)—to uses covered by a Valid Patent Claim, which is
16 defined as a bona fide, *unexpired* claim. (Allergan Mot. 17.)

17 Miotox argues that its broad interpretation is reasonable because patent
18 applications are included in the definition of “Licensed Patents.” (Miotox Opp’n 9–
19 11.) Specifically, Miotox argues that because “Valid Patent Claim” includes claims in
20 pending patent applications, the phrase “covered by” cannot reasonably be interpreted
21 to mean “infringe” a Valid Patent Claim because one cannot infringe a pending patent
22 claim. (*Id.*) Miotox’s reasoning is unconvincing. The License Agreement does not
23 say that royalty-bearing sales require infringement by Allergan. Rather, Allergan’s
24 royalty obligations are tied to the scope of Botox use covered by the patents. The
25 Court agrees with Allergan that a sale is royalty bearing if it results in a doctor

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27 ⁴ In *Kimble v. Marvel Entertainment, Inc.*, the Supreme Court recently upheld its previous decision
28 in *Brulotte v. Thys Co.*, 379 U.S. 29 (1964) that a patent holder cannot charge royalties for the use of
his invention after its patent term has expired. 135 S.Ct. 2401, 2413–15 (2015).

1 practicing a method covered by an unexpired Miotox patent, regardless of whether as
2 a matter of law that sale involves direct or indirect infringement by Allergan.
3 (Allergan Opp'n 11–12.)

4 Miotox also argues that the License Agreement was not limited to an agreement
5 to pay royalties on Net Sales in exchange for a license to the Licensed Patents.
6 (Miotox Opp'n 18–20.) Miotox contends that the License Agreement granted
7 Allergan an exclusive license to the Licensed Patents, Improvements, and to the use of
8 Clinical Data and therefore justifies Allergan's same royalty payment even after the
9 expiration of the '468 Patent. (*Id.* at 24–25.) As Allergan correctly points out, the
10 language of the License Agreement does not support this broad grant of rights. The
11 royalties in the License Agreement are tied solely and directly to Net Sales **of the**
12 **Licensed Product** which is dependent on a Valid Patent Claim. (Allergan Reply 12.)
13 Further, Allergan does not disagree that it is required to pay for Improvements. But,
14 consistent with the language of the License Agreement, Allergan's payment would be
15 based on royalties on sales of Botox being used to treat migraine headaches in a
16 manner covered by a Valid Patent Claim of an Improvement patent. (Allergan Opp'n
17 9.) Lastly, with respect to Clinical Data, the License Agreement references a separate
18 consulting agreement with Dr. Binder and does not relate to the royalty provision.
19 (Allergan Reply 12.) In fact, Miotox received consideration separate from the patent
20 license royalties for providing clinical data and assistance. (*Id.* at 5.)

21 Throughout the many pages of briefing and exhibits Miotox has presented many
22 tedious and convoluted arguments to support its interpretation. Ironically, in
23 attempting to show the clarity and reasonableness of its interpretation, Miotox has
24 only made its position more obscure and has distracted from the most obvious
25 interpretation of the License Agreement. In contrast, Allergan's position that royalties
26 are tied to the practice of the Licensed Patents is clearly supported by the explicit
27 language of the License Agreement. Miotox has failed to show that there is a genuine
28 dispute of material fact on this point.

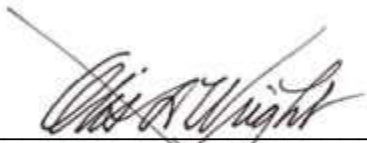
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V. CONCLUSION

For the reasons discussed above, the Court **DENIES** Miotox’s Motion for Summary Judgment (ECF No. 59) and **GRANTS** Allergan’s Motion for Summary Judgment (ECF No. 61). Per the Court’s initial scheduling Order (ECF No. 45) the parties shall file a joint proposed schedule for the remaining issues in the case by October 16, 2015.

IT IS SO ORDERED.

October 5, 2015



OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE