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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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CESCA THERAPEUTICS INC.,

No. 2:14-cv-02085-GEB-KJN

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Plaintiff,

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v.

**ORDER DENYING DEFENDANTS' MOTION
TO COMPEL ARBITRATION**

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SYNGEN, INC., PHC MEDICAL,
INC., AND PHILIP COELHO,

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Defendants.*

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Defendants SynGen, Inc. ("SynGen"), PHC Medical, Inc. ("PHC Medical"), and Philip Coelho ("Coelho") (collectively, "Defendants") "move for an order to compel arbitration of all claims asserted against all Defendants in the Complaint filed by Plaintiff Cesca Therapeutics Inc." ("Cesca"). (Defs.' Notice of Mot. 1:5-6, ECF No. 41.) Cesca opposes the motion, arguing "[t]here are no controlling arbitration provisions applicable to this action." (Pl.'s Opp'n to Defs.' Mot. to Compel Arbitration ("Opp'n") 6:9, ECF No. 42.)

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I. FACTUAL BACKGROUND

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The following factual allegations in Cesca's Complaint concern this motion.

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* The caption has been amended according to the stipulated dismissal of Defendants Terrence Wolf and Prince Emmanuel. (ECF No. 40.)

1 "Cesca designs, develops, and commercializes medical
2 products that enable the collection, processing, and
3 cryopreservation of stem cells and other cellular tissues used in
4 research in the practice of regenerative medicine." (Compl. ¶ 15,
5 ECF No. 2.) "Cesca . . . is the surviving entity of a merger
6 between ThermoGenesis Corp. ["ThermoGenesis"] and TotiPotentRX
7 Corporation, which occurred on February 13, 2014." (Compl. ¶ 3.)

8 "Coelho . . . [is a] former employee[] of Cesca who
9 w[as] hired specifically to design, invent and develop new
10 products, product improvements, and inventions for Cesca."
11 (Compl. ¶ 18.) Specifically, "Coelho is a founder and former
12 Chief Executive Officer of Cesca." (Compl. ¶ 20.) In 2007, Coelho
13 and ThermoGenesis entered into an Executive Employment Agreement,
14 which contained an arbitration provision. (Compl. ¶ 20, Ex. 1
15 § 11, ECF No. 11.)

16 "On or about May 1, 2008, ThermoGenesis and Coelho
17 terminated Coelho's employment, and the parties entered into an
18 Employment Severance Agreement." (Compl. ¶ 21.) The Employment
19 Severance Agreement contains an arbitration provision. (Ex. 2
20 § 14.5.)

21 "On or about May 2, 2008, ThermoGenesis and PHC
22 Medical, an entity of which Coelho was President, entered into a
23 [C]onsulting [A]greement including a Proprietary Information and
24 Confidentiality Agreement wherein PHC Medical agreed, *inter alia*,
25 to provide consulting services to ThermoGenesis as an independent
26 contractor." (Compl. ¶ 22.) The Consulting Agreement contains an
27 arbitration provision, (Ex. 3 § 19), whereas the Proprietary
28 Information and Confidentiality Agreement contains a "Governing

1 Law" section, which states in pertinent part: "Any legal action
2 or proceeding relating to this Agreement shall be instituted in a
3 state or federal court in Sacramento County, California." (Ex. A
4 in Ex. 3 § 5.1.)

5 "On or about October 1, 2009, [ThermoGenesis], Coelho,
6 and PHC Medical entered into a Mutual Termination Agreement,
7 which terminated the Executive Employment Agreement, Employment
8 Severance Agreement, and Consulting Agreement, but not the
9 [Proprietary Information and Confidentiality] Agreement." (Compl.
10 ¶ 23.)

11 The Mutual Termination Agreement provides in pertinent
12 part:

13 The Consulting Agreement (dated May 2, 2008),
14 the Executive Employment Agreement (to the
15 extent any provisions survived execution of
16 the Employment Severance Agreement), the
17 Employment Severance Agreement (dated May 1,
18 2008) and any other employment agreements
19 between [ThermoGenesis] and Coelho, whether
20 oral or in writing, (collectively, the "Prior
21 Agreements") are hereby terminated as of
22 [October 1, 2009]. [ThermoGenesis] shall have
23 no further or ongoing obligations to pay any
24 further sums to [PHC Medical] or Coelho under
25 the Prior Agreements, except as explicitly
26 provided for in this Agreement. Neither
27 Coelho nor [PHC Medical] shall have any
28 further or ongoing obligations to
[ThermoGenesis] under the Prior Agreements or
any other agreement, whether written or oral,
between [ThermoGenesis] and Coelho, or
between [ThermoGenesis] and [PHC Medical],
except as explicitly set forth in this
Agreement.

(Ex. 4 § 1.)

26 The Mutual Termination Agreement's "Governing Law and
27 Venue" section further provides: "Any legal action or proceeding
28 relating to this Agreement shall be instituted in a state or

1 federal court in Sacramento, County California." (Ex. 4 § 9.)

2 The Mutual Termination Agreement also contains an
3 "Entire Agreement" section which states in pertinent part: "This
4 Agreement contains the entire agreement and understandings by and
5 between the Parties with respect to the subject matter hereof,
6 and no representations, promises, agreements or understandings
7 concerning such subject matter, written or oral, not herein
8 contained shall be of any force or effect." (Ex. 4 § 10.)

9 "[F]ollowing his employment with Cesca, Coelho formed
10 SynGen." (Compl. ¶ 43.)

11 II. DISCUSSION

12 A. Defendants Coelho and PHC Medical

13 Defendants Coelho and PHC Medical seek to enforce
14 arbitration provisions between ThermoGenesis and Coelho, and
15 ThermoGenesis and PHC Medical, found in the Executive Employment
16 Agreement, the Employment Severance Agreement, and the Consulting
17 Agreement. (Mem. P.&A. in Supp. of Defs.' Mot. to Compel
18 Arbitration ("Mot.") 6:6-10, ECF No. 41-1.) They argue these
19 arbitration provisions survived the October 2009 Mutual
20 Termination Agreement because "[p]arties' duties under an
21 arbitration clause survive contract termination when the dispute
22 is over an obligation the expired contract arguably created."
23 (Mot. 8:22-28 n.2 (citations omitted).)

24 Cesca counters, *inter alia*, that "the intention of the
25 parties is clear from the plain language of the Mutual
26 Termination Agreement—to replace the parties' obligations under
27 [the Executive Employment Agreement, the Employee Severance
28 Agreement, and the Consulting Agreement] with the obligations set

1 forth in the Mutual Termination Agreement. In particular, the
2 parties . . . indicated a desire to forego arbitration by
3 expressly requiring all disputes under the Mutual Termination
4 Agreement to be resolved in state or federal court." (Opp'n 9:11-
5 16.)

6 Defendants Coelho and PHC Medical reply, *inter alia*,
7 that Cesca has sued them "over obligations and rights created by
8 the [Executive Employment Agreement, the Employee Severance
9 Agreement, and the Consulting Agreement]." (Reply in Supp. of
10 Defs.' Mot. ("Reply") 4:17-18, ECF No. 44.) They further respond:
11 "If [Cesca] wants to enforce the [Executive Employment Agreement,
12 the Employee Severance Agreement, and the Consulting Agreement],
13 based on acts or omissions that occurred or rights that accrued
14 while these three contracts were in effect, then it must abide by
15 the arbitration clauses in these agreements." (Reply 5:26, 6:1-
16 3.)

17 A district "court's role under the [Federal
18 Arbitration] Act is . . . limited to determining (1) whether a
19 valid agreement to arbitrate exists and, if it does, (2) whether
20 the agreement encompasses the dispute at issue." Chiron Corp. v.
21 Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000)
22 (citations omitted). Moreover, "[u]nless the parties clearly and
23 unmistakably provide otherwise, the question of whether the
24 parties agreed to arbitrate is to be decided by the court, not
25 the arbitrator." AT & T Technologies, Inc. v. Commc'ns Workers of
26 Am., 475 U.S. 643, 649 (1986).

27 "In deciding these questions, federal courts must
28 'place arbitration agreement on equal footing with other

1 contracts.'" Samson v. NAMA Holdings, LLC, 637 F.3d 915, 924 (9th
2 Cir. 2011) (quoting E.E.O.C. v. Waffle House, Inc., 534 U.S. 279,
3 293 (2002)). "Thus, [t]o evaluate the validity of an arbitration
4 agreement, federal courts should apply ordinary state-law
5 principles that govern the formation of contracts." Id.
6 (alteration in original) (citations and internal quotation marks
7 omitted).

8 Further, "[a]rbitration provisions can survive
9 expiration of an agreement where (1) 'the dispute is over a
10 provision of the [prior] agreement' and (2) the parties have not
11 indicated a desire to forego arbitration either 'expressly or by
12 clear implication.'" Thelen Reid Brown Raysman & Steiner LLP v.
13 Marland, 319 F. App'x 676, 678-79 (9th Cir. 2009) (quoting Nolde
14 Bros. v. Local No. 358, Bakery & Confectionery Workers Union,
15 AFL-CIO, 430 U.S. 243, 255 (1977)).

16 The Mutual Termination Agreement controls here. Coelho,
17 PHC Medical, and ThermoGenesis (Cesca's predecessor) terminated
18 the Executive Employment Agreement, the Employee Severance
19 Agreement, and the Consulting Agreement by subsequently entering
20 into the Mutual Termination Agreement. (Ex. 4 § 1.)

21 Further, the Mutual Termination Agreement supersedes
22 the prior agreements' arbitration provisions, and therefore,
23 those arbitration provisions no longer control the proper forum
24 for this litigation. Specifically, the Mutual Termination
25 Agreement's "Termination of Prior Agreements and Obligations"
26 section provides in pertinent part: "Neither Coelho nor [PHC
27 Medical] shall have any further or ongoing obligations to
28 [ThermoGenesis] under the Prior Agreements or any other

1 agreement, whether written or oral, between [ThermoGenesis] and
2 Coelho, or between [ThermoGenesis] and [PHC Medical], except as
3 explicitly set forth in this Agreement." (Ex. 4 § 1.)
4 Additionally, the Mutual Termination Agreement's integration
5 clause, found in the "Entire Agreement" section, provides in
6 pertinent part: "This Agreement contains the entire
7 agreement [N]o representations, promises agreements or
8 understandings concerning [the] subject matter[hereof], written
9 or oral, not herein contained shall be of any force or effect."
10 (Ex. 4 § 10.) Thus, the integration clause provides that the
11 Mutual Termination Agreement governs the parties' obligations.¹
12 See Granite Rock Co. v. Teamsters Union Local No. 890, No. C 12-
13 02974 MEJ, 2012 WL 5877494, at *4-5 (N.D. Cal. Nov. 20, 2012)
14 (finding later collective bargaining agreement's integration
15 clause "extinguishe[d] Plaintiff's arbitration rights under"
16 earlier collective bargaining agreement, where the integration
17 clause "provide[d] that the parties will not be bound by any
18 previous contracts, and that [the later collective bargaining
19 agreement] constitute[d] the entire agreement of the parties").
20 Thus, the Mutual Termination Agreement, which does not require
21 arbitration, controls the proper forum for this litigation.

22 Moreover, even if the court assumes that this dispute
23 is over provisions of the prior agreements, as Defendants
24 contend, the parties here have expressly indicated a desire to
25 forego arbitration. The Executive Employment Agreement, the
26 Employee Severance Agreement, and the Consulting Agreement

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28 ¹ In turn, the Mutual Termination Agreement cites the Proprietary
Information and Confidentiality Agreement. (Ex. 4 § 3.)

1 contain arbitration provisions, but the Mutual Termination
2 Agreement contains its own "Governing Law and Venue" section. As
3 stated above, this section does not require arbitration and
4 instead provides that "[a]ny legal action or proceeding relating
5 to this Agreement shall be instituted in a state or federal court
6 in Sacramento County, California." (Ex. 4 § 9.) Thus, the Mutual
7 Termination Agreement "indicate[s] a desire to forego arbitration
8 either expressly or by clear implication." See Thelen Reid Brown
9 Raysman & Steiner LLP, 319 F. App'x at 678-79 (citation and
10 internal quotation marks omitted).

11 Thus, Defendants Coelho and PHC Medical cannot compel
12 arbitration under the Executive Employment Agreement, the
13 Employee Severance Agreement, or the Consulting Agreement, since
14 the Mutual Termination Agreement supersedes those prior
15 agreements, and it does not contain an arbitration provision.
16 Therefore, their motion is denied.

17 **B. Defendant SynGen**

18 Both parties agree that "SynGen is not a signatory to
19 the arbitration agreements at issue." (Mot. 9:11-12; Opp'n 9:20-
20 21 ("[T]here is no agreement to arbitrate between Cesca and
21 SynGen.")) Defendant SynGen argues that even though it is not a
22 signatory to the Executive Employment Agreement, the Employee
23 Severance Agreement, the Consulting Agreement, or any other
24 arbitration agreement with Cesca, Cesca must submit its claims
25 against SynGen to arbitration under an equitable estoppel or
26 agency theory. (Opp'n 9:13-21, 10:26-28, 11:19-23.)

27 "[A]rbitration is a matter of contract and a party
28 cannot be required to submit to arbitration any dispute which he

1 has not agreed so to submit." AT & T Technologies, Inc., 475 U.S.
2 at 648 (citations omitted).


3 Here, Cesca and SynGen have not agreed to arbitrate.
4 Further, SynGen's arguments, based on an equitable estoppel or
5 agency theory, rely on the existence of an underlying arbitration
6 agreement, which the court has held does not exist. See, e.g.,
7 Creative Telecomms., Inc. v. Breeden, 120 F. Supp. 2d 1225, 1240
8 (D. Haw. 1999) ("Federal courts have consistently afforded
9 agents, employees, and representatives the benefit of *arbitration*
10 *agreements* entered into by their principals" (emphasis
11 added)); JSM Tuscany, LLC v. Superior Court, 193 Cal. App. 4th
12 1222, 1238 (2011) ("For the doctrine [of equitable estoppel] to
13 apply, the claims plaintiff asserts against the nonsignatory must
14 be dependent upon, or founded in and inextricably intertwined
15 with, the underlying contractual obligations of *the agreement*
16 *containing the arbitration clause.*" (emphasis added) (citation
17 and internal quotation marks omitted)).

18 Therefore, SynGen's motion is denied.

19 **III. CONCLUSION**

20 For the stated reasons, Defendants' motion to compel
21 arbitration is DENIED.

22 Dated: October 7, 2015

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25 _____
26 GARIAND E. BURRELL, JR.
27 Senior United States District Judge
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