UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOEL GOTTESFELD, Plaintiff, v. REPLIGEN CORPORATION, a Delaware Corporation, Defendant.	Case No.: 3:17-CV-0249-CAB-AGS **ORDER RE MOTION TO DISMISS** [Doc. No. 9]

This matter is before the Court on Defendant Repligen Corporation's motion to dismiss. The motions have been fully briefed and the Court deems them suitable for submission without oral argument.[1] For the reasons set forth below, the motion to dismiss is **GRANTED**.

I. FACTUAL BACKGROUND

Plaintiff Joel Gottesfeld is a professor of cell and molecular biology and chemistry employed by The Scripps Research Institute. Defendant Repligen Corporation is a publicly-traded life sciences company which focuses on the development, production, and

[1] Accordingly, Plaintiff's request for oral argument is denied.

commercialization of products used in the processing of biologic drugs. On or about March 31, 2007, Gottesfeld and Repligen entered into a consulting agreement. Under the agreement, Gottesfeld would assist Repligen in its efforts to develop treatments for Friedreich's Ataxia ("FA") using the compounds invented by Gottesfeld.

In addition to the consulting agreement, Gottesfeld and Repligen entered into a Common Stock Purchase Warrant (the "Warrant"). The Warrant granted Gottesfeld the right to purchase 150,000 shares of Repligen stock, at a cost of $0.01 per share, in three tranches of 50,000 shares. [Doc. No. 1 at 3-4.][2] The options to purchase each of the three tranches were to be executable upon the occurrence of three separately defined milestones in the Warrant. [*Id.*] The first milestone in the Warrant is entitled "First Patient Dosing," which means "the first patient dosed in a US clinical study sponsored by the [Defendant] with a pharmaceutical for the treatment of Friedrich's Ataxia." [sic] [*Id.* at 4]. The complaint does not allege that any patient in a clinical study in the United States was ever dosed by Repligen with a drug for the treatment of FA, and Gottesfeld does not contend in his opposition that any such study occurred. However, the complaint does allege that in 2012, Repligen conducted a clinical study with a drug for the treatment of FA in Italy. [Doc. No. 1 at 4-6.]

On January 27, 2014, Gottesfeld sent a letter and a check for $500 to Repligen attempting to exercise his option to purchase the first tranche of 50,000 shares—executable upon the "First Patient Dosing"—under the Common Stock Purchase Warrant. [Doc. No. 1 at 7]. Repligen returned Gottesfeld's $500 check because "no patient was ever dosed in a U.S. clinical study." [*Id.*; Doc. No. 9-1 at 11]. After additional unsuccessful efforts to exercise his first option under the Warrant, Plaintiff filed this lawsuit.

[2] Document numbers and page references are to those assigned by CM/ECF for the docket entry.

II. LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). On the other hand, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678; *see also Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001) ("Conclusory allegations of law are insufficient to defeat a motion to dismiss"). Nor is the Court "required to accept as true allegations that contradict exhibits attached to the Complaint or . . . allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). "In sum, for a complaint to survive a [12(b)(6)] motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).

III. DISCUSSION

Both parties concede that the only issue before the Court is whether the phrase "US clinical study," as used within the definition of "First Patient Dosing" in the Warrant, is ambiguous.[3] Repligen argues that the phrase is unambiguous and means a clinical study conducted in the United States. Because no clinical study was ever conducted in the United States, Repligen asserts that the first milestone in the Warrant was not met and Gottesfeld

[3] Because the relevant language from the Warrant was alleged in the complaint, the Court did not review any of the documents included by Repligen with its motion. Accordingly, Gottesfeld's evidentiary objections are denied as moot.

has no right to exercise his option to purchase the first tranche of 50,000 shares of Repligen stock.

For his part, Gottesfeld points out that the Warrant does not define the phrase "US clinical study and argues that the study conducted in Italy was a "US clinical study" because the phrase "includes any study in which it is contemplated that said study will be submitted to the FDA for approval of the drug for use in the United States in accordance with 21 CFR § 312.120." [*Id.* at 4-5]. At the very least, Gottesfeld argues that the phrase "US clinical study" is ambiguous and open to more than one reasonable interpretation.

Whether a contract is clear and unambiguous is a question of law. *United States v. Sacramento Mun. Util. Dist.*, 652 F.2d 1341, 1343-45 (9th Cir. 1981). In determining whether a contract is ambiguous, the Court looks to the terms of the agreement itself. *Greco v. Dep't of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988). "Resolution of contractual claims on a motion to dismiss is proper if the terms of the contract are unambiguous." *Monaco v. Bear Stearns Residential Mortg. Corp.*, 554 F.Supp.2d 1034, 1040 (C.D. Cal. 2008) (quoting *Bedrosian v. Tenet Healthcare Corp.*, 208 F.3d 220 (9th Cir. 2000)).

The parties agree that the Warrant contains a Delaware choice of law provision and that Delaware law controls the interpretation of the Warrant. Under Delaware law, "a contract's construction should be that which would be understood by an objective, reasonable third party." *HIFN, Inc. v. Intel Corp.*, No. 1835-VCS, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007).[4] Contracts are to be read "as a whole," with each provision and term given effect "so as not to render any part of the contract mere surplusage." *Osborn*

[4] Even though there is no dispute that Delaware law governs the interpretation of the contract here, California law on contract interpretation is virtually identical. "'In interpreting an unambiguous contractual provision we are bound to give effect to the plain and ordinary meaning of the language used by the parties.'" *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 132 Cal. Rptr. 2d 151, 158 (Cal. Ct. App. 2003) (quoting *Coast Plaza Doctors Hosp. v. Blue Cross of California*, 99 Cal. Rptr. 2d 809 (Cal. Ct. App. 2000)). "Thus, where 'contract language is clear and explicit and does not lead to absurd results, we ascertain intent from the written terms and go no further.'" *Id.* (quoting *Shaw v. Regents of Univ. of California* 67 Cal. Rptr. 2d 850 (Cal. Ct. App. 1997).

v. Kemp, 991 A.2d 1153, 1159 (Del. 2010) (quoting *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393 (Del. 2010)). "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." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006). The "true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) (citing *Steigler v. Ins. Co. of N. Am.*, 384 A.2d 398, 401 (Del. 1978)).

"A contract is not ambiguous merely because the parties disagree as to its proper construction." *Matria Healthcare, Inc. v. Coral SR LLC*, No. 2513-N, 2007 WL 763303, at *6 (Del. Ch. Mar 1, 2007). "Ambiguity does not exist where the court can determine the meaning of a contract 'without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends.'" *Rhone-Poulenc Basic Chem. Co.*, 616 A.2d at 1196 (quoting *Holland v. Hannan*, 456 A.2d 807, 815 (D.C. 1983)). "When the contract is clear and unambiguous, [the court] will give effect to the plain-meaning of the contract's terms and provisions." *Osborn*, 991 A.2d at 1159–60.

Here, "US clinical study" is not ambiguous. An objective, reasonable third party would understand the term "US clinical study" to mean a clinical study conducted in the United States, and no reasonable third party would understand the term to include a study conducted in Italy. Any alternate definition would render the geographic qualifier "US" mere surplusage. Accordingly, the Court need not review any of the evidence or statutes that Gottesfeld argues support a different interpretation or render the phrase ambiguous. *See United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007) ("[E]xtrinsic, parol evidence cannot be used to manufacture an ambiguity in a contract that facially has only one reasonable meaning.").

Using this interpretation of "US clinical study," the complaint does not state a claim. Because the complaint does not allege (and Gottesfeld does not argue) that a clinical study

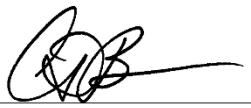
was ever conducted by Repligen in the United States, the first milestone in the warrant was never satisfied. Therefore, Repligen did not breach the Warrant by refusing to allow Gottesfeld to exercise his first option under the Warrant.

IV. CONCLUSION

For the foregoing reasons, the motion to dismiss is **GRANTED** and the complaint is **DISMISSED WITH PREJUDICE**.

It is **SO ORDERED**.

Dated: July 14, 2017



Hon. Cathy Ann Bencivengo
United States District Judge