

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

United States District Court
Southern District of Texas

Celltex Therapeutics Corporation,

Plaintiff,

*versus*Human Biostar, Inc., *et al.*,

Defendants.

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Civil Action H-18-1901

ENTERED

March 12, 2021

Nathan Ochsner, Clerk

Opinion on Partial Summary Judgment

1. *Introduction.*

Celltex Therapeutics Corporation sued Human Biostar, Inc., and R Bio Co., LTD, for breach of contract and declaratory judgment. R Bio countersued for breach of contract, patent infringement, and trade secret misappropriation. Celltex and R Bio have counter-moved for partial summary judgment on the breach of contract claims saying the other breached first.

2. *Background.*

On March 19, 2011, Celltex and R Bio entered into a Technology Licence and Purchase Agreement. R Bio would give Celltex use of its stem cell technology for an initial payment plus royalties. In 2012, a disagreement arose, and Celltex sued R Bio in Fort Bend County, Texas, with R Bio counter-suing. In February 2014, that case mediated.

On December 17, 2014, the mediator issued an award creating a Settlement and Release Agreement among Celltex, R Bio, and Human Biostar and a new Technology License Agreement between Celltex and R Bio. The Settlement required the parties to dismiss the active lawsuits within fifteen days of the effective date. Along with allowing Celltex to continue to use R Bio's stem cell technology for royalties, the License required R Bio to "deliver

to Celltex the human clinical trial reports ... or, where there is no clinical trial report, the medical reports/data” for eight trials within twenty days of the effective date. Within five days of delivery, Celltex would then have to pay \$150,000.00 to R Bio. On February 12, 2015, the Fort Bend court confirmed the award, making February 12 the effective date.

3. *Breach of Contract.*

A. *R Bio’s Breach.*

Celltex claims that R Bio breached the TLA first when it failed to deliver three of the eight reports by the March 4, 2015 deadline. Celltex says this was a material breach of the contract. It claims time was of the essence here since the contract specifically included this twenty-day deadline. Celltex argues it was entitled to repudiate and not pay the \$150,000.00 or the royalties because of this material breach.

R Bio argues that it did not breach the contract because it gave Celltex the five reports it had available at the time, access to two sets of data for trials that were still on-going, and that one trial had never occurred making no report or data available. R Bio says it gave this information to Celltex on February 28 and March 2, both before the March 4 deadline. R Bio claims this amounted to a substantial performance of the contract. It argues that it did not breach and that Celltex repudiated without cause by not paying.

The court fails to see how the actions taken by R Bio are anything less than substantial performance of the contract. At the time of delivery, five reports were available; two sets of data were, at a minimum, partially available; and one trial had yet to occur. R Bio gave what it had at the time and gave later reports and data as they became available. Clinical trials must be authorized and can take years to complete, and the court does not expect R Bio to be able to magically start and finish clinical trials. Because it substantially performed under the License, R Bio did not breach.

Celltex continues to argue that it still has not received all eight reports. The court does not expect R Bio to continue to do work under a contract that

Celltex claims has been breached, it repudiated, and has again sued without attempting to resolve the dispute between the parties beforehand.

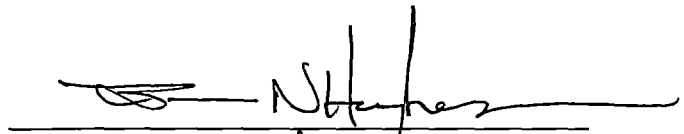
B. *Celltex's Breach.*

R Bio claims that Celltex was the first to breach the Settlement when it did not dismiss its original lawsuits within fifteen days of the effective date. Celltex argues that both parties were required to dismiss those lawsuits because R Bio had counter-sued. For the Fort Bend cases, Celltex was the plaintiff. As the party who brought the claims in the first place, it is Celltex's responsibility to move first in filing the dismissals, and it did not. Hiding behind the notion that counterclaims were present is insufficient to excuse this responsibility. Because it has failed to file dismissals in the Fort Bend cases, Celltex has breached the Settlement.

4. *Conclusion.*

Because R Bio substantially performed under the TLA, Celltex repudiated without sufficient cause, and Celltex breached the Settlement, Celltex will be liable under the Settlement and License for breach of contract.

Signed on March 11, 2021, at Houston, Texas.


Lynn N. Hughes
United States District Judge