SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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HUVEPHARMA, INC.

Plaintiff,

- v -

ZOETIS, LLC,

Defendant.

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INDEX NO. 656517/2017

MOTION DATE 09/16/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 75, 76, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 102, 103, 104, 105, 106, 107

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents and for the reasons set forth on the record (11/15/19), Huvepharma, Inc.'s (**Huvepharma**) motion (seq. 003) pursuant to CPLR 3212 for summary judgment on its first cause of action for breach of contract is granted as set forth below.

RELEVANT FACTUAL BACKGROUND

Reference is made to an Asset Purchase Agreement (the **APA**) dated, December 19, 2015, by and between Zoetis and Huvepharma, pursuant to which Zoetis agreed to sell to Huvephrama its rights to several global animal pharmaceutical products, including the drugs known as Albac, Combiotic and Kaobiotic in various countries in exchange for $40 million (NYSCEF Doc. No. 3). The pharmaceutical products subject to the APA required a variety of regulatory approvals in different global markets. To sell such products in any one particular market, the authorities of each subject country require that the seller must obtain a Marketing Authorization (the

Marketing Authorization) from the country, based on the submission of an original dossier demonstrating that the product has been subject to independent scientific review in order to ensure safety, quality and efficaciousness, among other things. Rather than conduct extensive due diligence on the regulatory files for each product and country at issue, Huvepharma claims that the parties agreed to a contractual solution in Section 2.1(b) of the APA such that if a Marketing Authorization (as defined in the APA and discussed below), including the supporting regulatory dossier, failed to transfer to Huvepharma within twelve months of the Closing Date, Zoetis would pay Huvepharma a certain Offset Payment (defined below and in § 2.1[b] of the APA), as delineated in Exhibit 2.1(b) to the APA (*id.*). In all, the parties anticipated approximately 75 authorizations to transfer in about 50 countries (APA, Ex. 1.1[a][iii], List of Marketing Authorizations, NYSCEF Doc. No. 3; Piron EBT, 27:6-12, 28:8-11).

The deal closed on February 12, 2016 (Compl., ¶ 9, NYSCEF Doc. No. 2). Most of the Marketing Authorizations transferred successfully (Piron EBT, p. 28:8-16, NYSCEF Doc. No. 81). For some of the Marketing Authorizations that did not transfer, Zoetis made appropriate Offset Payments prior to this litigation (*id.*, p. 30:3-13). However, Huvepharma claims that an additional 14 Marketing Authorizations failed to adequately transfer within the requisite twelve-month timeframe and that Zoetis has refused to pay it the designated Offset Payment as required by the APA (*see* NYSCEF Doc. No. 66, 67). Huvepharma alleges that each such refusal constitutes a breach of Section 2.1(b) of the APA.

Section 1.1(a), "Sale and Purchase of Sold Assets" of the APA provides:

> Upon the terms and subject to the conditions of this Agreement, at the Closing, unless delivery is to be later as per the terms of this Agreement, the Seller shall …

> sell, assign, transfer, convey and deliver, or cause to be sold, assigned, transferred, conveyed and delivered, to Purchaser, and Purchaser shall purchase from the Seller and its Affiliates, all of the rights, tittle and interest in and to the assets of the categories set forth below with effect as of the Closing Date, in each case to the extent held or owned by the Seller or any of its Affiliates exclusively in the conduct of the business relating to the Products, existing as of the Closing Date (subject to Section 1.4), and subject to the retained rights of Pfizer Inc. to any Sold Assets as detailed in the Global Separation Agreement and all related Ancillary Agreements, including the contemporaneous Patent and Know-How License Agreement, by and between Pfizer Inc. and Zoetis, both dated February 6, 2013 and available on the SEC's website, and in each excluding the Excluded Assets (the "**Sold Assets**")

(NYSCEF Doc. No. 3).

Section 2.1(b) of the APA provides as follows:

> In the event that any Marketing Authorization transfer for any Product in any market is not successfully completed and fully owned by Purchaser, Purchaser's affiliate, or Purchaser's designated third party by the date that is twelve (12) months after the Closing Date (the "**Transfer Date**") for reasons other than that Purchaser, Purchaser's affiliate, or Purchaser's designated third party (i) requests a delay in the filing of the transfer; (ii) is negligent or otherwise not timely in performing its obligations with respect to facilitating the transfer; or (iii) fails to comply with local law in any way that delays the transfer or causes a regulatory authority to refuse the transfer, Purchaser may notify Seller of Purchaser's desire to not accept transfer of such Marketing Authorization. In such instance, the Parties shall request the appropriate regulatory authority to stop the transfer of such Marketing Authorization. After the Parties have jointly submitted such request, Seller will compensate Purchaser for any such non-transferred Sold Assets (each a "**Non-Transferred Asset**") by paying to Purchaser the amounts detailed on **Exhibit 2.l(b)** (any such payment will be referred to as an "**Offset Payment**" against the values established for the individual Marketing Authorizations set forth on **Exhibit 2.l(b)**). Once the Parties have jointly submitted such request, Purchaser will provide Seller with an invoice for the Offset Payment for any Non-Transferred Assets (the "**Offset Payment Invoice**") which such Offset Payment Invoice shall be payable 60 days from receipt. In the case any Marketing Authorization transfer for any Product is not completed due to Purchaser's failure to cooperate, Purchaser shall not be entitled to payment of the applicable Offset Payment for the respective Non-Transferred Asset from Seller. In the case any Marketing Authorization is not completed twelve (12) months after the Closing Date but comes to completion thereafter, Purchaser will at Seller's option either (i) return the Marketing Authorization to Seller and refund

> gross profits received related thereto or (ii) keep the Marketing Authorization and refund any Offset Payment previously received by Purchaser related thereto.

(NYSCEF Doc. No. 3).

"Marketing Authorization" is defined in the APA as "the marketing authorizations as described in Exhibits 1.1(a)(iii) [] for the Products, ***including the regulatory dossiers*** in electronic or paper form and all such documentations required to be provided by Section 8.5(b) of this Agreement" (*id.*, § 1.1[a][iii] [emphasis added]).

Section 8.5(b), in turn, states:

> To effect the Regulatory Transfers, Seller shall provide within thirty (30) Business Days following the Closing Date, (x) with regard to all Products to be transferred in non-European Union countries, for the two (2) year period prior to the date of this Agreement, and (z) with regard to all Products to be transferred in European Union countries, for the five (5) year period prior to the date of the Agreement, and within six (6) months following the Closing Date, (x) with regard to all Products to be transferred in non-European Union countries, for an additional three (3) year period, for a total of five (5) years prior to the date of this Agreement, and (z) with regard to all Products to be transferred in European Union countries, for an additional five (5) year period, for a total of ten (10) years prior to the date of the Agreement, the following:
>
> > (i) all correspondence with and/or from the relevant governmental authority or third party; and
> >
> > (ii) all pharmacovigilance data, including, at least:
> >
> > > (a) all case data (summaries, original data analysis, correspondence and any other related document);
> > >
> > > (b) all submitted PSUR reports with evaluations by the relevant governmental authorities or third parties; and
> > >
> > > (c) all possible agreements and relevant communications with or from the relevant governmental authorities or third parties.
>
> In addition to the above, for forty eight (48) months following the Closing Date, Seller shall provide to Purchaser any additional available documents listed above

> in electronic form or as paper copies outside of the time periods listed above as may be necessary to respond to specific requests from regulatory authorities

(*id.*, § 8.5[b]).

DISCUSSION

Summary judgment should be granted where the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212[b]). The burden is initially on the movant to make a *prima facie* showing of entitlement to judgment as a matter of law tendering sufficient evidence in admissible form to demonstrate the absence of any material fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a *prima facie* showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once the showing has been made, the burden of going forward with the proof shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a material issue of fact, which requires a trial (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

To establish a claim for breach of contract under New York law, the proponent must establish (1) the existence of a valid contract, (2) the performance by one party, (3) breach by the other party, and (4) resulting damages (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Where parties set down their agreement in a clear, complete document, that writing must be enforced according to its terms, particularly when the agreement in question was negotiated at arms' length by sophisticated businesspeople who were represented by able counsel (*Ashwood Capital, Inc. v OTG Mgmt, Inc.*, 99 AD3d 1, 7 [1st Dept 2012] [citation omitted]).

Here, Section 2.1(b) of the APA is clear and unambiguous that an Offset Payment would be owed by Zoetis for any Marketing Authorization that failed to transfer to Huvepharma within the twelve-month time period as set forth in the APA. The term Marketing Authorization is clearly defined in the APA as including the regulatory dossier for each product/country. Although Zoetis argues that Huvepharma is not entitled to an Offset Payment where Huvepharma is nonetheless able to sell a product (i.e., absent the complete regulatory dossier) or where another country's dossier could potentially suffice for governmental approval where no regulatory dossier has been delivered at all (e.g., as with Bolivia), the APA does not so provide. Put another way, the APA allocated the risks associated with ability to sell these products in foreign countries. And, the parties agreed that since Zoetis, as seller, was not clear about the state of its regulatory dossiers which it wanted to sell, rather than do due diligence prior to the closing or to go to the relevant government and seek an authorization letter or confirmation that the paperwork authorizations (i.e., the Market Authorizations) were sufficient, the parties agreed upon a price upfront (*see* APA, §§ 2.1 [a], [b], NYSCEF Doc. No. 3). If the Market Authorizations were not complete, the parties agreed to an offset payment. Finally, if Zoetis as seller could correct any deficiencies in the Market Authorizations post-closing, Zoetis as seller retained the right to put the Market Authorizations to Huvepharma as purchaser (*see* APA, § 8.5[b]). Having made such a bargain, Zoetis cannot escape its obligation by arguing that providing a complete dossier would be too difficult or commercially unreasonable to produce. In fact, David Medina, who negotiated the APA on Zoetis's behalf, testified that he intended an Offset Payment to be owed by Zoetis ***any time*** that a complete regulatory dossier failed to transfer to Huvepharma (Medina

EBT, pp.19:25-20:14, NYSCEF Doc. No. 45; *see also,* Piron EBT, pp. 44:3-25, 50:4-10, NYSCEF Doc. No. 47).

Contrary to Zoetis's argument, there is also no material issue of fact over the completeness of the regulatory dossiers at issue in this case (Def. Opp. Memo, p. 4). For example, Zoetis does not dispute that it failed to transfer any regulatory dossier for Albac in Bolivia, Ecuador and South Africa or for Combiotic in Switzerland (*see* Chart, Def. Opp. Memo, pp. 4-7). Likewise, Zoetis admits that it did not transfer the complete Regulatory Dossier for Albac in Canada and New Zealand (*id.*). Inasmuch as Zoetis claims that it transferred the complete dossier for Albac in Columbia, Peru or Russia, to the extent that these transfers were not completed within the twelve- month period set forth in the APA, Zoetis is still in breach of Section 2.1(b) of that agreement (*id.*).

With respect to the Philippines, pursuant to Philippine regulations a Marketing Authorization is inextricably linked to the manufacturing site and if a manufacturing site relating to a Marketing Authorization closes, the Marketing Authorization itself is immediately void. As there is no dispute that the Zoetis closed its Chinese manufacturing site that previously manufactured its Albac product for the Philippines prior to the APA's execution, its Marketing Authorization for the Philippines could never be "transferred" since it was invalid as a matter of law. The fact that the plant closed before the APA was signed (and, therefore, the Marketing Authorization was already invalid at the time the APA was executed) is immaterial as Huvepharma had no way to know that Zoetis's Marketing Authorization was already invalid at that time. Huvepharma is entitled to an Offset Payment for Albac in the Philippines.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted and the clerk is directed to enter judgment in favor of plaintiff on the first cause of action; and it is further

ORDERED that amount of the offset payments to which the plaintiff is entitled is referred to a special referee to hear and report; and it is further

ORDERED that a Judicial Hearing Officer (**JHO**) or Special Referee shall be designated to hear and report the issue of offset payments payable to the plaintiffs per this decision and order, which issue is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR unless; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for the plaintiffs shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that, unless otherwise directed by the Special Referee, on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the hearing on the issue specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules).

12/18/2019
DATE

HON. ANDREW BORROK
J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE