SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT NO. 305

MEDIVATION, INC., MEDIVATION PROSTATE THERAPEUTICS, INC.,

Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et. al.

Defendants.

ARAGON PHARMACEUTICALS, INC.,

Intervenor,

v.

MEDIVATION, INC., MEDIVATION PROSTATE THERAPEUTICS, INC.,

Defendants.

Case No. CGC-11-510715

ORDER ON THE REGENTS AND ARAGON'S MOTIONS FOR SUMMARY ADJUDICATION AND/OR JUDGMENT

I. INTRODUCTION

This is a dispute over the rights to certain chemical compounds designed to treat late-stage prostate cancer. The parties refer to these compounds as the "A-series compounds."

On February 9, 2012, plaintiffs Medivation, Inc. and Medivation Prostate Therapeutics, Inc. (together "Medivation") filed the operative Second Amended Complaint ("SAC") against defendant and cross-complainant the Regents of the University of California (the "Regents") and defendant and intervenor Aragon Pharmaceuticals, Inc. ("Aragon"). The gravamen of the SAC is that the Regents breached certain written agreements with Medivation by licensing the A-series compounds to Aragon and disclosing confidential information to Aragon and others. On August 6, 2012 the Regents filed a Cross-Complaint against Medivation, seeking in effect a declaration that Medivation has no rights to the A-series compounds licensed to Aragon. By Complaint In Intervention, Aragon seeks a declaration that it owns the exclusive rights to develop and commercialize those compounds.

On September 4, 2012, the Regents filed this motion for summary adjudication in connection with various causes of action asserted in the SAC and on various causes of action asserted in its Cross-Complaint. On the same day, Aragon filed a motion for summary judgment/adjudication in connection with the causes of action asserted against it in the SAC, and also moved for summary judgment/adjudication on its Complaint In Intervention.

Having fully considered the matters, the Court **GRANTS** in part and **DENIES** in part the Regents' motion, and **GRANTS** in part and **DENIES** in part Aragon's motion, all as set forth below.

II. BACKGROUND

In August 2005, Medivation and the Regents entered into two written contracts: (1) the Exclusive License Agreement ("ELA"); and (2) the Sponsored Research Agreement ("SRA").

Pursuant to the ELA, the Regents licensed to Medivation the rights to chemical compounds referred to as the RD-series. The RD-series compounds are linked to specific patents or patent applications and identified by chemical structure, all in Appendix A to the ELA. Pursuant to the SRA, Medivation also agreed to fund additional research at the University in exchange for a time-limited first right to negotiate for licenses to other compounds developed in the course of that research. Under the SRA, Medivation thereafter successfully negotiated for licenses to some of these newly developed compounds in the RD-series, the rights to which were included by amendments to Appendix A of the ELA.

In 2005 or earlier, scientists at the University developed the A-series compounds, which include two specific molecules, A51 and A52. Like the RD-series, the A-series was developed to treat late-stage prostate cancer. The Regents did not disclose the existence of the A-series compounds to Medivation either before or after the ELA and the SRA were executed. In 2007, the Regents filed a patent application covering A51 and A52. Unbeknownst to Medivation, the Regents licensed its rights to A51 and A52 to Aragon in 2009.

In 2011, Medivation discovered the Regents' publicly available patent application covering A51 and A52, thereby learning of their existence for the first time. At about the same time, Medivation also discovered that the Regents had licensed its rights in that patent application to Aragon, which has been in the process of developing A51 and A52 into prostate cancer drugs.

In this action, Medivation alleges that it has the rights to A51 and A52 pursuant to the ELA and the SRA, and that the Regents breached those agreements by subsequently licensing the rights to those compounds to Aragon. Aragon subsequently intervened to protect its alleged rights to A51 and A52.

One of the compounds licensed to Medivation by the Regents was RD162' (also known as MDV3100). Medivation has developed RD162' into a drug, known as Xtandi, to treat late-stage

prostate cancer. Xtandi recently received approval for sale from the FDA and is currently available on the market. In other words, Medivation's decision to license these compounds from the Regents has borne fruit. In contrast, Aragon is currently in the early stages of seeking FDA approval for a prostate cancer drug based on the A-series compounds. If successful, Aragon's new A-series-based drug might someday, years into the future, compete commercially against Medivation's Xtandi product.

The principal dispute between the parties can be described as follows: Medivation contends that, pursuant to the ELA and/or the SRA, it obtained, or was entitled to obtain from the Regents, an exclusive license to the A-series compounds. The Regents and Aragon dispute those contentions, asserting to the contrary that Aragon has the exclusive rights to the A-series compounds.

III. EVIDENTIARY MATTERS

The parties submitted a large volume of testimonial and documentary evidence in connection with the instant motions. There were objections to much of that evidence, Medivation filing its objections on October 22, 2012, and the Regents and Aragon filing their objections on November 2, 2012.

The Court overrules each of Medivation's evidentiary objections, and takes judicial notice of the matters as to which Medivation objected. The Court sustains each of the evidentiary objections made by the Regents and Aragon except for the following:

As to the Regents' objections, the Court overrules objections numbered 13 and 107 in their entirety. As respects objections numbered 25, the Court overrules the objections, except that it sustains those directed to the sentence beginning "To achieve this milestone . . . ."

As to Aragon's objections, the Court overrules objections numbered 1, 2, 7, 46 (wrong objections stated), 52, and 56 (improperly supported objection) in their entirety. As respects

objection numbered 18, the Court overrules the objection, except that it sustains the objection as to the last sentence. As to objections numbered 51, the Court overrules the objections to the first Q&A and sustains the objections to the second Q&A.

By way of generalized comments with respect to its evidentiary rulings, the Court adds the following observations. Many of the objections by the Regents and Aragon are founded upon the contentions that the ELA and the SRA are unambiguous and fully integrated contracts that, under the parol evidence rule, cannot be contradicted or varied by the extrinsic evidence proffered by Medivation. As explained below, this Court agrees with those contentions and holds that those contracts are not reasonably susceptible to Medivation's proffered interpretation of them. It follows that the extrinsic evidence is irrelevant and inadmissible under the parol evidence rule.

IV. LEGAL STANDARD

Pursuant to California Code of Civil Procedure Section 437c, "any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." "The party moving for summary judgment bears the burden of persuasion that there is no triable issue as to any material fact and that he is entitled to a judgment as a matter of law." *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.

The moving party also "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of any material fact." *Id.* A moving defendant must show that a plaintiff's claim has no merit. A defendant can meet this burden by presenting evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence, or by offering admissible evidence to support a defense or the absence of an element of the claim. *Id.* at 854-55.

If the moving defendant "carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." *Id.* at 851. If the defendant shifts the burden of production to the plaintiff and the plaintiff fails to meet it, then the defendant is entitled to a judgment as a matter of law. The plaintiff cannot rely upon the mere allegations or denials of its pleadings, but must set forth admissible evidence of specific facts that demonstrate the existence of a triable issue of material fact. *Id.* There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion." *Id.* at 850.

V. THE REGENTS' MOTION

In its motion, the Regents seeks summary adjudication of portions of Medivation's First Cause of Action, and the entirety of Medivation's Second, Third, and Fourteenth Causes of Action, in the SAC. Each of these causes of action is predicated on alleged breaches of the SRA, the ELA, or both, the express terms of which are undisputed. The Regents also seeks summary adjudication of the Second and Third Causes of Action asserted in its Cross-Complaint against Medivation. Those two causes of action seek declaratory relief, also in connection with alleged breaches of the SRA or the ELA.

The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. When a contract is reduced to a writing, such intent is to be ascertained, if possible, solely from the written provisions of the contract. If contractual language is clear and explicit, it governs. Civil Code §§ 1638-39. The parol evidence rule, codified in Civil Code section 1625 and Code of Civil Procedure section 1856, generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument. The rule does not, however, prohibit the introduction of extrinsic evidence

"to explain the meaning of a written contract . . . [if] the meaning urged is one to which the written contract terms are reasonably susceptible." *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal. 4th 336, 343 (internal citations omitted). The resolution of whether the parol evidence rule applies is one of law to be determined by the court. *Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 872. "The application of the rule has been characterized as having a two-part analysis: (1) was the writing intended to be an integration, i.e., a complete and final expression of the parties' agreement, precluding any evidence of collateral agreements; and (2) is the agreement susceptible of the meaning contended for by the party offering the evidence?" *Id.* at 873 (internal citations omitted).

The first issue for this Court to determine is whether the ELA and the SRA are fully integrated contracts. It is undisputed that Paragraph 31.4 of the ELA provides as follows:

> This Agreement embodies the entire understanding of the parties and supersedes all previous communications, representations or understandings, either oral or written, between the parties relating to the subject matter hereof, except for the Secrecy Agreement dated April 12, 2005 by and between the Regents and the Licensee, which shall survive; provided, however, that in the case of any conflict between provisions of the Secrecy Agreement and this Agreement, this Agreement shall govern.

(Regents' UMF No. 21.) Similarly, it is undisputed that Paragraph 20 of the SRA provides as follows:

> This document constitutes the entire agreement between the parties, and may be modified or amended only by written agreement signed by both parties.

(Regents' UMF No. 4.)

Applying the foregoing legal principles to the instant case, the Court holds that the SRA and the ELA are fully integrated agreements (*i.e.*, they are the complete and final expression of the agreements between Medivation and the Regents) and subject to the parol evidence rule. As a consequence, the written provisions of those agreements govern. The Court now turns to an

analysis of those provisions.

A. Exclusive Licensing Agreement

Medivation contends that the Regents granted it rights to the A-series compounds by the terms of the ELA, including Appendix A thereto. The Court disagrees.

Paragraphs 1.1 and 2.1 of the ELA unambiguously grant Medivation an exclusive license to the Regents' patent rights based only upon those patent applications listed in Appendix A to the ELA. To further limit the patent rights being licensed to Medivation, Paragraph 17.4d of the ELA unambiguously provides as follows:

> Nothing in this Agreement will be construed as: . . . Conferring by implication, estoppel or otherwise any license or rights under any patents of The Regents other than Regents' Patent Rights as defined herein, regardless of whether such patents are dominant or subordinate to Regents' Patent Rights.

(Regents' UMF No. 20.) Read together, paragraphs 1.1, 2.1 and 17.4d make clear that Appendix A to the ELA circumscribes the universe of patent rights being licensed to Medivation.

It is undisputed that the Regents owns a patent application covering the A-series compounds. It is also undisputed that this A-series patent application is not listed in Appendix A to the ELA.[1] (Regents' UMF Nos. 24-25; Aragon's UMF Nos. 13, 14). Applying paragraphs 1.1, 2.1 and 17.4d to the undisputed evidence, it follows that Medivation obtained no rights to the Regents' patent application covering the A-series compounds.

The granting provisions of the ELA (paragraphs 2.1 *et seq.*) further limit Medivation's license by providing that Medivation may "use, sell, offer for sale and import Licensed Products and to practice Licensed Methods *in the Field of Use* to the extent permitted by law." (Regents' Ex. 9 at ¶ 2.1 (emphasis added)). "Field of Use" is defined in the ELA as follows: "The **'Field of**

[1] It is undisputed that the A-series compounds are subject to the Regents' patent Application Number 12/294,881 ("the '881 patent"), and that the '881 patent is not listed in Appendix A. (Regents' UMF Nos. 22-25, *see also* Regents' Request for Judicial Notice Ex. B.)

Use' means the treatment or prevention of disease using the compositions of matter *with the chemical structures identified in Regents' Patent Rights*." (Regents' Ex. 9 at ¶ 1.4)(bold in original, italics added.)

The Court determines that the Field of Use term in the granting provisions operate as a limitation on the scope of the rights being licensed. It does so by specifying that Medivation's license extends only to those compounds identified by chemical structure in Appendix A. This is consistent with the fact that Appendix A contains a specific list of diagrammed chemical structures. (Regents' Ex. 8.) It is undisputed that the chemical structures of the A-series compounds are not identified anywhere in any executed version of Appendix A to the ELA. (*See* Regents' UMF Nos. 27, 79, and Regents' Exs. 47, 49.)

It follows from the foregoing that Medivation obtained no rights to the A-series compounds from the ELA. This left the Regents free to license the A-series compounds to others. Accordingly, the fact that the Regents subsequently licensed the A-series compounds to Aragon does not constitute a breach of the ELA.

In support of its contention that the ELA granted it rights to the A-series compounds, Medivation offered evidence of various purported promises or representations by the Regents that the ELA was intended to, and does in fact, cover the entire family of thiohydantoin molecules being developed by the Regents, not just a limited subset of them.[2] Because the A-series compounds are thiohydantoins, Medivation contends that the ELA granted it rights to them. This contention is unpersuasive.

To the extent such purported promises or representations are claimed to constitute collateral agreements, the Court holds them to be legally irrelevant because the ELA is a fully integrated agreement. Further, the evidence proffered by Medivation does not render the ELA

[2] It is undisputed that the RD-series and the A-series are all thiohydantoins.

reasonably susceptible to an interpretation under which Medivation has rights to the A-series compounds. Rather than providing Medivation with a broad license to an entire family or genus of chemical substances, the ELA only grants Medivation rights to those chemical structures specifically identified in the patents or patent applications listed in Appendix A to the ELA. The evidence offered by Medivation that it was told or understood that the ELA was intended to grant it anything more than that is clearly at odds with the express terms of that fully integrated agreement. For example, Medivation's broad reading of the licenses granted to it in the ELA is inconsistent with the ELA's Field Of Use provision, which limits the rights granted thereunder to those in "compositions of matter with the chemical structures identified in Regents' Patent Rights." (Regents' Ex. 9 at ¶ 1.4.) As previously noted, it is undisputed that the chemical structures of A51 and A52 are not identified in any patent or patent application in Appendix A to the ELA.

Moreover, apart from the Field of Use provision, Medivation's interpretation of the ELA would produce a result prohibited by the unambiguous language of Paragraph 17.4d. As previously quoted, that paragraph expressly prevents the ELA from granting Medivation "by implication, estoppel or otherwise any license or rights under any patents of the Regents other than Regents' Patent Rights as defined herein." Even though Medivation concedes that the chemical structures of the A-series compounds are not identified in Appendix A, Medivation nevertheless contends that a so-called '529 patent application listed in Appendix A is broad enough to encompass the A-series compounds. That contention, in effect, seeks to accomplish exactly what Paragraph 17.4d expressly prohibits, namely, granting Medivation rights to the A-series compounds by implication, estoppel or otherwise. It is precisely this kind of contention that the parol evidence rule was designed to foreclose.

In conclusion, the Regents successfully shifted the burden of production to Medivation

with respect to (1) those claims in the Second Cause of Action of the SAC which are predicated on Medivation having obtained a license to the A-series compounds, and (2) the Regents' Second Cause of Action in its Cross-Complaint. Thereafter, Medivation failed to set forth admissible evidence of specific facts that demonstrate the existence of a triable issue of material fact within the meaning of California Code of Civil Procedure section 437c. Accordingly, the Court grants the Regents' motion for summary adjudication of those matters.

The Regents also seeks summary adjudication of Medivation's claim in the Second Cause of Action that the Regents breached the terms and conditions of the ELA by disclosing confidential information. Having determined that Medivation has no rights to the A-series compounds, there was no breach by reason of any disclosure of those compounds or information about them.

However, Medivation also claims that the Regents improperly disclosed to Aragon, its predecessors, and/or related third parties information about the RD-series compounds licensed to Medivation. As to this latter claim, there are one or more disputed issues of material fact, such as whether any such disclosures violated the ELA and, if so, whether Medivation thereby suffered damages. *See* Medivation's Resp. Sep. Stmt. Nos. 33-35. Accordingly, the Regents' motion is denied to the extent it seeks summary adjudication of the claims in the Second Cause of Action involving the disclosure of information about the RD-series.[3]

B. Sponsored Research Agreement

Having determined that Medivation received no rights to the A-series compounds under

[3] The Court recognizes that Code of Civil Procedure section 437c(f) generally allows summary adjudication to be granted only when it disposes of an entire cause of action. However, in the circumstances of this case, the Court determines that granting summary adjudication of only a portion of the Second Cause of Action here is warranted and supported by numerous authorities, including *Lilienthal & Fowler v. Sup. Ct.* (1993) 12 Cal.App.4th 1848, *Edward Fineman Co. v. Sup. Ct.* (1998) 66 Cal.App.4th 1110, 1118, *Exxon Corp. v. Sup. Ct.* (1997) 51 Cal.App. 4th 1672, 1688 n.11, *Southern Calif. Edison Co. v Sup. Ct.* (1995) 37 Cal.App.4th 839, 845-47, and *Supervalu, Inc. v. Wexford Underwriting Mgrs., Inc.* (2009) 175 Cal.App.4th 64, 81-82.

the ELA, the Court now turns to the part of the Regents' motion that seeks summary adjudication of Medivation's claims that the Regents breached the SRA and that Medivation has rights to the A-series compounds arising from the SRA. Specifically, the Regents seeks summary adjudication with respect to the following two contentions advanced by Medivation: (1) that the Regents breached the SRA by failing to disclose the A-series compounds to Medivation; and (2) that Medivation obtained exclusive rights to the A-series compounds pursuant to the SRA.

As discussed above, the Court has determined that the SRA, like the ELA, is a fully integrated agreement, subject to the parol evidence rule. Accordingly, whether the Regents breached the SRA and what rights Medivation may have pursuant to the SRA are to be determined by examining the four corners of that agreement.

Under the express terms of the SRA, Medivation agreed to fund certain research to be performed by the Regents in exchange for "a time-limited first right to negotiate an option or license, which may be exclusive" with respect to "Subject Inventions." (Regents' Ex. 11, ¶ 9.) The SRA obligated the Regents to disclose all Subject Inventions to Medivation.

A "Subject Invention" is defined in the SRA to be an invention that satisfies specific criteria, including that it be (1) first conceived *and* (2) actually reduced to practice (3) *during* the Performance Period. (Regents' Ex. 11, ¶ 9.) Paragraph 3 of the SRA expressly provides that the Performance Period was to begin on November 1, 2005. Medivation's representative, C. Patrick Machado, acknowledged the November 1, 2005 starting date by separately initialing paragraph 3 of the SRA. (Regents' Ex. 11.) As previously quoted, the SRA expressly provides that it "may be modified or amended only by written agreement signed by both parties," and it is undisputed that there was no amending written agreement. Although Medivation now contends that the Performance Period began in August 2005, the plain language of the SRA and the parol evidence rule combine to show that there is no genuine dispute that the Performance Period began on

November 1, 2005. Thus, the Regents was obligated to disclose to Medivation only those inventions first conceived and actually reduced to practice on or after November 1, 2005.

As shown above, an invention is not a "Subject Invention" if it was first conceived before the commencement of the Performance Period. The SRA expressly provides that when a Subject Invention is "first conceived . . . under [the SRA] will be determined in accordance with U.S. Patent Law." (Regents' Ex. 11, ¶ 9). Under Federal patent law, a subject invention is first conceived on the date of its "conception." Conception is complete when an "idea is so clearly defined in the inventor's mind that only ordinary skill would be necessary to reduce the invention to practice, without extensive research or experimentation." *Burroughs Wellcome Co. v. Barr Laboratories, Inc.* (Fed. Cir. 1994) 40 F. 3d 1223, 1228. Proof of the date of conception can be established by exhibits and/or drawings memorializing the idea combined with testimonial evidence of the same. *Mahurkar v. C.R. Bard, Inc.* (Fed. Cir. 1996) 79 F. 3d 1572, 1577-78; *Price v. Symsec* (Fed. Cir. 1993) 988 F. 2d 1187, 1194-96.

The Regents submitted evidence establishing the following: Dr. Samedy Ouk, a scientist working for the Regents, worked on both A51 and A52. He conceived of A51 and reduced it to practice no later than February 2005. (Regents' UMF 6.) At his deposition, Dr. Ouk testified that he developed the idea for A52 no later than October 2005 and corroborated this with a copy of a letter he had written on October 27, 2005 in which he discussed and diagramed the chemical structure of A52. (Regents' Ex. 52 (Ouk Depo.) at 92:17 – 95:10; Regents' Ex. 23 (Ouk Depo. Ex. 72).) Dr. Ouk also testified at his deposition that he was in the process of synthesizing A52 on October 28, 2005 and corroborated this with a copy of his lab notebook. (Regents' Ex. 52 (Ouk Depo.) at 100:2-16, Regents' Ex. 37 (Ouk Depo. Ex. 67).)

With that evidence, the Regents shifted the burden of production to Medivation by making a *prima facie* showing that A51 and A52 were "first conceived" prior to November 1, 2005. In

order to meet that burden, Medivation was required to set forth admissible evidence of specific facts demonstrating the existence of a triable issue of material fact with respect to when A51 and A52 were first conceived. Medivation failed to do so.

Medivation does not contest that A51 was first conceived prior to November 2005. It follows that A51 is not a compound that the Regents was required to disclose under the SRA.

Turning to A52, as noted above, in response to Dr. Ouk's testimony and documents establishing the conception date of A52, Medivation failed to present any evidence whatsoever. Instead, Medivation counters with the legal argument that under federal patent law the Regents could only establish the date of conception by proving that Dr. Ouk disclosed his idea for A52 to others. That is not the law. As previously shown, the date of conception can be established by testimonial evidence corroborated by physical exhibits, such as Dr. Ouk's deposition testimony, letter, and lab notebooks here. The law does not require more. Accordingly, Medivation's failure to rebut the Regents' *prima facie* showing warrants summary adjudication in the Regents' favor of the Second Cause of Action in the SAC to the extent it is predicated on a failure to disclose A51 or A52 or related information.

In the Fourteenth Cause of Action, Medivation alleges that it obtained an exclusive license to the A-series compounds under the SRA and seeks a declaration to that effect. (SAC ¶ 175.) The Court rejects that contention.

As set forth above, it is this Court's conclusion that the SRA did not provide Medivation any rights with respect to the A-series compounds, not even a time-limited right to negotiate for a license to those compounds. However, even assuming that the SRA did confer such a time-limited right to negotiate, the declaration sought by Medivation would not be an available remedy under the law. That this is so follows from the elementary principle that "[r]eliance damages are the only form of recovery available in an action on a contract to negotiate an agreement."

Copeland v. Baskin Robbins U.S.A. (2002) 96 Cal.App.4th 1251, 1263.

In conclusion, the Court grants the Regents' motion for summary adjudication with respect to: (1) those claims in the First and Fourteenth Causes of Action of the SAC which are predicated on an alleged failure by the Regents to disclose the A-series compounds or related information; (2) the Fourteenth Cause of Action in the SAC; and (3) the Regents' Third Cause of Action in its Cross-Complaint for declaratory relief.

The Court observes that the Regents is not seeking summary adjudication of every claim contained in the First Cause of Action of the SAC. *See* Regents' Mot. at pp. 15-16, n. 8, 9. To the extent, if any, that other claims remain in the First Cause of Action, this Order does not address them.

C. Implied Covenant of Good Faith and Fair Dealing

The Regents also seeks summary adjudication of the Third Cause of Action in the SAC. In that cause of action, Medivation alleges that the Regents breached the implied duty of good faith and fair dealing in the ELA by "using and disclosing the technology associated with Medivation's licensed molecules for the development of competing molecules A51 and A52." (SAC ¶ 114.) More specifically, as shown by Medivation's opposition brief, Medivation contends that the Regents breached the covenant by sharing information and data about the RD-series with scientists at Memorial Sloan-Kettering Cancer Center ("MSKCC") for purposes that included testing that data against A52. (Medivation's Opp'n to Regents' Mot. at pp. 25-26.) According to Medivation, such use and disclosure constitute a breach of Paragraph 2.3 of the ELA. The Court disagrees.

In paragraph 2.3 of the ELA, the Regents reserved the right to use information licensed to Medivation under the ELA for "*educational, research and clinical purposes* including publication of research results and sharing research results with other non-profit institutions, and allowing

other non-profit research institutions to use Regents' Patent Rights and associated technology for the same purpose." (Italics added). The phrase "educational, research and clinical purposes" obviously contemplates a situation in which the use of the shared information could ultimately lead to commercial applications. While the duty of good faith and fair dealing, implied in every contract, prevents one party from unfairly frustrating the other party's "right to receive the benefits of the agreement actually made" (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 349-50), that implied covenant cannot be used "to prohibit a party from doing that which is expressly permitted by the agreement itself" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1120).

Medivation does not dispute the Regents' evidence establishing that MSKCC is a non-profit institution, or that the work done by scientists at MSKCC is "research" as that term is used in the ELA. (Regents' UMF Nos. 40-41.) Even if the information shared with MSKCC were ultimately used for commercial purposes, the disclosure of that information to MSKCC would not have constituted a breach of the implied covenant. As explained above, Paragraph 2.3 permitted the Regents to share information with non-profit institutions whether or not that information would ultimately lead to commercial applications. The Court rejects Medivation's attempt to use the implied covenant as a tool to impose on the Regents limitations which would prevent the Regents from doing that which it was expressly permitted to do.

The Court observes that Medivation also contends that the Regents breached the implied covenant by failing to disclose or license the A-series compounds to Medivation in violation of the ELA. (Medivation's Opp'n to Regents' Mot. at p. 25.) As previously held, Medivation did not obtain any rights under the ELA to the A-series compounds, and the Regents did not breach the ELA by failing to disclose those compounds. Medivation cannot use the implied covenant in a way that produces a result inconsistent with the express terms of the ELA. Accordingly, the

Court rejects Medivation's contention.

In conclusion, the Court determines that there was no breach of the implied covenant of good faith and fair dealing. Thus, the Court grants the Regents' motion for summary adjudication of the Third Cause of Action in the SAC.

VI. ARAGON'S MOTION

As an initial matter, the Court addresses Medivation's contention that Aragon's motion should be denied because Aragon's Notice of Motion did not comply with California Rule of Court 3.1350(b). A court's power to deny summary judgment or adjudication on the basis of failure to comply with Rule 3.1350(b) is discretionary, not mandatory, in the absence of prejudice to the objecting party. *Truong v. Glasser* (2010) 181 Cal.App.4th 102, 118. Medivation does not contend that it was prejudiced by the defects in Aragon's Notice. Nor could it, in light of Aragon's detailed opening brief fairly identifying the issues raised by the motion. Indeed, Medivation's opposition papers demonstrate that it was fairly apprised of the issues, despite any procedural defect in the Notice. The Court therefore exercises its discretion in the direction of declining to deny Aragon's motion on procedural grounds.

A. Medivation's Eleventh and Fourteenth Causes of Action Against Aragon

In its motion, Aragon in part seeks summary adjudication of: (1) Medivation's Eleventh Cause of Action for Conversion, and (2) Medivation's Fourteenth Cause of Action for Declaratory Relief. Medivation's Eleventh and Fourteenth Causes of Action are predicated on Medivation's express allegations that it has contractual rights to the A-series compounds under the ELA, the SRA, or both.

As to these matters, Aragon presented essentially the same facts as did the Regents to establish the existence and contents of the ELA and the SRA. *See* Aragon's UMF Nos. 1-8, 13-

16, 18, 21-24. That evidence shifted the burden of production to Medivation. In response, Medivation failed, as it did with the Regents' motion, to present evidence establishing the existence of a triable issue of material fact.

As discussed above in connection with the Regents' motion, the Court determines that Medivation has no rights to the A-series compounds under the ELA, the SRA, or both. That determination applies with equal force here. Because Medivation's Eleventh and Fourteenth causes of action against Aragon in the SAC depend on a determination that Medivation has rights to the A-series compounds, those causes of action fail as a matter of law. Accordingly, the Court grants summary adjudication in favor of Aragon on those causes of action.

B. Medivation's Twelfth and Thirteenth Causes of Action Against Aragon

In its motion, Aragon also seeks summary adjudication of: (1) Medivation's Twelfth Cause of Action for intentionally inducing breach of the ELA, and (2) Medivation's Thirteenth Cause of Action for intentional interference with existing contractual rights under the ELA. Those causes of action fail to the extent that they are predicated on Aragon's obtaining a license to the A-series compounds or the Regents' disclosure to Aragon or others of information about those compounds.

To the extent that those causes of action relate to the allegedly improper disclosure by the Regents to Aragon, its predecessors, and/or related third parties of information about the RD-series compounds licensed to Medivation, there are one or more disputed issues of material fact. Those issues include: (1) whether Aragon had knowledge of the ELA between Medivation and the Regents; (2) whether any breach of the ELA occurred; (3) whether Aragon induced any such breach or otherwise interfered with the contract; and (4) whether Medivation thereby suffered any damage. *See* Medivation's Resp. Sep. Stmt. Nos. 37-46.

Accordingly, the Court grants in part, and denies in part, summary adjudication of the

Twelfth and Thirteenth causes of action, consistent with the conclusions just expressed.

C. Aragon's Complaint In Intervention

In its Complaint In Intervention, Aragon seeks a declaration that it has exclusive rights to the A-series compounds under its separate contract with the Regents. Aragon has shifted the burden of production with respect to the requested declaration (*e.g.*, Aragon's UMF Nos. 35-36, and Hacker Decl. Ex. 37), and in response Medivation has failed to create a triable issue of material fact. Accordingly, the Court grants summary adjudication in favor of Aragon on its Complaint In Intervention.

VII. CONCLUSION

The Court **GRANTS** the Regents' motion for summary adjudication in favor of the Regents and against Medivation on the following causes of action or portions thereof:

(1) Medivation's First Cause of Action for Breach of Contract (Sponsored Research Agreement) to the extent it is predicated on an alleged failure to disclose the A-series compounds or related information;

(2) Medivation's Second Cause of Action for Breach of Contract (Exclusive License Agreement) to the extent it is predicated on Medivation's claims that (a) it obtained a license to the A-series compounds under the ELA or (b) the disclosure by the Regents to Aragon or others of information about those compounds;

(3) Medivation's Third Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing;

(4) Medivation's Fourteenth Cause of Action for Declaratory Relief;

(5) The Regents' Second Cause of Action in its Cross Complaint for Declaratory Relief (Exclusive License Agreement); and

(6) The Regents' Third Cause of Action in its Cross Complaint for Declaratory Relief (Sponsored Research Agreement).

The Court **DENIES** the Regents' motion for summary adjudication as follows: (1) as to the First Cause of Action to the extent it is predicated on the alleged failure by the Regents to perform work on a "best effort" basis and (2) as to the Second Cause of Action to the extent it is predicated on the alleged disclosure by the Regents of confidential information about the RD-series.

The Court **GRANTS** Aragon's motion for summary adjudication in its favor and against Medivation on the following causes of action, or portions thereof:

(1) Medivation's Eleventh Cause of Action for Conversion;

(2) Medivation's Twelfth Cause of Action for Intentionally Inducing Breach of Contract to the extent it is predicated on Aragon's obtaining a license to the A-series compounds, or the Regents' disclosure to Aragon or others of information about those compounds;

(3) Medivation's Thirteenth Cause of Action for Intentional Interference with Existing Contractual Rights to the extent it is predicated on Aragon's obtaining a license to the A-series compounds, or the Regents' disclosure to Aragon or others of information about those compounds; and

(4) Medivation's Fourteenth Cause of Action for Declaratory Relief.

The Court **DENIES** Aragon's motion for summary adjudication as to the Twelfth and Thirteenth Causes of Action to the extent they are predicated on the alleged disclosure by the Regents to Aragon of confidential information about the RD-series compounds.

The Court **GRANTS** summary adjudication in favor of Aragon on its Complaint In Intervention.

To the extent Aragon seeks judgment in its favor with respect to the entire action, its motion is **DENIED.**

VIII. FURTHER PROCEEDINGS

As previously discussed, the parties are directed to confer about a mutually convenient date for an early Case Management Conference to discuss future proceedings, and to advise this Department about their availability for such a conference.

IT IS SO ORDERED.

Dated: December 20, 2012

John E. Munter
Judge of the San Francisco Superior Court

Superior Court of California
County of San Francisco

MEDIVATION, INC. et. al., Plaintiff(s) vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA., et al Defendant(s)	Case Number: CGC-11-510715 **CERTIFICATE OF ELECTRONIC SERVICE** (CCP 1010.6(6) & CRC 2.260(g))
ARAGON PHARMACEUTICALS, INC., Intervenor vs. MEDIVATION, INC. et. al., Defendants	

I, Craig Blackstone, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On December 20, 2012, I electronically served the ORDER ON REGENTS AND ARAGON'S MOTIONS FOR SUMMARY ADJUDICATION AND/OR JUDGMENT via LexisNexis File & Serve on the recipients designated on the Transaction Receipt located on the LexisNexis File & Serve website.

Dated: December 20, 2012

T. Michael Yuen, Clerk

By: Craig Blackstone
Craig Blackstone, Deputy Clerk