

Curia Global, Inc. v Eagle Pharms., Inc.

2023 NY Slip Op 33365(U)

September 28, 2023

Supreme Court, New York County

Docket Number: Index No. 651064/2023

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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CURIA GLOBAL, INC., CURIA NEW MEXICO, LLC,

INDEX NO. 651064/2023

Plaintiff,

MOTION DATE 04/21/2023

- v -

EAGLE PHARMACEUTICALS, INC.,

MOTION SEQ. NO. 003

Defendant.

**DECISION + ORDER ON
MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for DISMISS.

The motion to dismiss the breach of contract claim is denied. It is predicated on (i) impermissibly rendering Section 4.3 of the Agreement (hereinafter defined) a nullity (*HTRF Ventures, LLC v Permasteelisa N. Am. Corp.*, 190 AD3d 603, 607 [1st Dept 2021]) or (ii) holding that Section 4.3 is an unenforceable penalty which it is not (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005]).

Pursuant to a certain Master Development and Supply Agreement dated March 26, 2021 (the **Agreement**; NYSCEF Doc. No. 29) between Curia Global, Inc. (**Curia**) and Eagle Pharmaceutical, Inc.'s (**Eagle**), Curia and Eagle agreed the terms upon which Curia would supply and Eagle would purchase pemfexy taking into account Curia's production capacity and the scheduling of order slots. To wit, pursuant to Section 4.2 of the Agreement, Eagle agreed to submit a rolling 18 month forecast of pemfexy. Significantly, the parties agreed that Curia was required to produce, and Eagle was required to purchase, the amount set forth in the first six

months of the forecast. For additional quantities, the parties agreed that Eagle could place additional purchase orders which Curia could accept in its discretion based on its capacity and other commitments. The parties otherwise provided that if Curia could not supply the additional purchase orders, the inability to provide such additional purchase orders was not a breach or otherwise relieve Eagle of its obligations under the Agreement:

4.2 Forecasts and Purchase Orders. At least five (5) days prior to the first (1st) day of each Calendar Quarter, beginning on the date specified in the Product Addendum, Customer shall furnish to AMRI a written eighteen (18) month rolling forecast of the quantities of Product that Customer intends to order from AMRI during such period (“Rolling Forecast”). ***The first six (6) months of such Rolling Forecast shall constitute a firm and binding commitment to order quantities of Product specified therein (“Firm Period Forecast”), and the following twelve (12) months of the Rolling Forecast shall be non-binding, good faith estimates. Each Rolling Forecast shall not be less than eighty percent (80%) or greater than one hundred and twenty percent (120%) of the prior Rolling Forecast, provided that Customer may increase (but not decrease) the Firm Period Forecast by up to twenty percent (20%) by placing additional Purchase Orders with the required lead times as specified below, and AMRI may, in its discretion, supply such additional quantities, subject to AMRI’s other supply commitments and manufacturing and equipment capacity.*** Notwithstanding the foregoing, AMRI may, at its sole discretion, agree to supply Customer with quantities of Product which are in excess of 120% of the Firm Period Forecast. ***In no event shall AMRI’s inability to fulfill Purchase Orders for quantities in excess of the Firm Period Forecast be deemed a breach of this Agreement nor relieve Customer of its obligations under this Agreement.*** Customer shall submit with each Rolling Forecast, a non-cancelable Purchase Order for the Firm Period Forecast (or such portion of the Firm Period Forecast not covered by previously submitted Purchase Orders). Customer may alternatively submit Purchase Orders for certain portions of the Firm Period Forecast subsequent to the submission of the Rolling Forecast, provided the Purchase Orders provide the required lead time for delivery as set forth below. AMRI shall notify Customer of acceptance of the Rolling Forecast and any Purchase Order within ten (10) days of receipt. AMRI shall have the right to reject Rolling Forecasts and Purchase Orders that are inconsistent with this Agreement. Further, the parties agree that AMRI shall have the right at any time to reject a Purchase Order and/or change a Processing Date in the event such actions are necessary in order for AMRI to manufacture product for which it has received a notification from the U.S. Government Department of Defense Operation Warp Speed or other government authority providing that such entity’s product order has been priority-rated under the HRPAS regulation (45 CFR Part 101). All Purchase Orders must be provided to AMRI at least ninety (90) days prior to the requested manufacturing date. Once placed, all Purchase Orders for

Product shall be non-cancelable. No different or additional terms or conditions set forth in any Purchase Order shall modify in any way the terms and conditions of this Agreement or any Product Addendum, and in the event of a conflict between terms in any Purchase Order and this Agreement or any Product Addendum, the terms of this Agreement or the Product Addendum shall control

(*id.*, § 4.2; emphasis added).

With respect to the firm forecast commitment (*i.e.*, the amount that Eagle is required to purchase), pursuant to the Section 4.3, the parties further agreed, if Eagle failed to purchase the quantity set forth in the firm forecast, Eagle would pay Curia what the parties defined as an **Order Deficit** – *i.e.*, the difference between the quantity forecasted in the firm period forecast and the quantity that Eagle actually purchased:

4.3 Failure to Purchase. In the event the quantities of Product purchased by Customer for delivery in a given Calendar Quarter are below the Firm Period Forecast for that Calendar Quarter (the difference in quantities deemed an “Order Deficit”), AMRI shall invoice Customer for the Order Deficit

(*id.*, § 4.3).

By way of contrast, with respect to additional Purchase Orders which Curia accepted, pursuant to Section 7.4 of the Agreement, the parties agreed for different fees as liquidated damages when the mutually agreed upon services/Purchase Orders (*i.e.*, as opposed to Order Deficits invoiced) were cancelled or postponed and provided for reduction in the fees due where Curia secured additional work orders for the slots that were cancelled:

7.4 Rescheduling and Cancellation Fees. For Development Work (including supply of Non-commercial Product), any rescheduling or delay by Customer (including but not limited to delay in performance of Customer’s obligation to

provide documentation, approvals, API and other materials) in Processing of Product, and any cancellation by Customer of *mutually agreed upon services/ Purchase Orders* shall result in the application of rescheduling and cancellation fees (expressed as a percentage of the price for the applicable services or Batch of Product) as set forth below.

...

Should AMRI secure alternative work orders for the manufacturing slot so cancelled (or rescheduled), the amounts payable by Customer under this Article 7.4 shall be reduced in the same proportion as the contract values of new work order(s) bear to the contract value of the rescheduled or cancelled manufacturing slot.

(*id.*, § 7.4 [emphasis added]).

As relevant to the instant motion and as alleged in the complaint, in March 2022, pursuant to Section 4.2 of the Agreement, Eagle submitted to Curia a firm forecast to purchase 18 batches of pemfexy from Curia from April to September 2022 but only submitted Purchase Orders for seven batches of pemfexy resulting in an 11 batch Order Deficit (NYSCEF Doc. No. 2, ¶ 27-28). Subsequently, and pursuant to Section 4.3 of the Agreement, on November 8, 2022, Curia issued an invoice to Eagle for \$4,021,325, reflecting payment due for the 11 batch Order Deficit (*id.*, at ¶ 29). Pursuant to a letter dated November 23, 2022, Eagle refused to pay the Order Deficit invoice. Accordingly, Curia sued for breach of contract and account stated and Eagle moved to dismiss.

As discussed above, Eagle is not entitled to dismissal of the breach of contract claim based on its argument that Section 7.4 applies to Order Deficits. By its terms, Section 7.4 applies to Purchase Orders – quantities mutually agreed upon in excess of the firm forecast. An Order Deficit by definition is the absence of a Purchase Order issued for the amount that Eagle was required to purchase pursuant to the firm forecast that it had submitted and required Curia to commit to

produce. Putting aside the definitional difference between Purchase Orders and Order Deficits which dooms this branch of the motion, Eagle's interpretation of Section 7.4 would impermissibly render Section 4.3 meaningless (*HTRF Ventures, LLC* 190 AD3d at 607 [1st Dept 2021]).

Eagle's argument that Section 4.3 acts as a unenforceable penalty is equally unavailing. A contractual provision fixing damages in the event of a breach should be sustained where the damage amount bears a reasonable proportion to the probable loss (*JMD Holding Corp.*, 4 NY3d at 380). As discussed above, the Agreement reflects a carefully negotiated comprehensive provision reflecting the utilization of Curia's capacity and the time in which commitment would need to be made to fill Eagle's pemfexy requirements. Under the circumstances, the \$4,021,325 (i.e, \$365,575/batch x 11) Curia seeks for the Order Deficit bears a reasonable proportion to the loss – i.e., the underutilization of its capacity and as such Section 4.3 is not a penalty and is enforceable.


The Court has considered Eagle's remaining arguments and finds them unavailing.

Eagle is however entitled to dismissal of the account stated cause of action because this matter is governed by a valid contract (*Suverant LLC v Brainchild, Inc.*, 191 AD3d 513, 515 [1st Dept 2021]).

It is hereby ORDERED that the motion to dismiss is granted solely to the extent that the account stated claim is dismissed; and it is further

ORDERED that the Eagle shall file an Answer to the Complaint within 21 days of this Decision and Order; and it is further

ORDERED that the parties shall appear for a preliminary conference on October 23, 2023 @ 11:30 am



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9/28/2023

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE