



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CEPHALON, INC.,)
)
 Plaintiff,)
)
 v.) Civil Action No. 3505-VCP
)
 JOHNS HOPKINS UNIVERSITY,)
 DR. DONALD SMALL, M.D., and)
 XANTHUS PHARMACEUTICALS, INC.,)
)
 Defendants.)

MEMORANDUM OPINION

Submitted: August 18, 2009
Decided: December 18, 2009

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PARSONS, Vice Chancellor.

This case involves a research relationship gone sour. Cephalon, Inc. (“Cephalon”) entered into a Sponsored Research Agreement (“SRA”) with Johns Hopkins University (“JHU”) whereby Cephalon would sponsor the leukemia research of Dr. Donald Small, M.D., a JHU employee. Cephalon also entered into a separate consulting agreement with Small individually, the Small Services Agreement (“SSA”). Years after these agreements expired, JHU applied for a patent on an invention of Small’s that allegedly was made using Cephalon property. After learning of the patent application, Cephalon filed this action against JHU, Small, and Xanthus Pharmaceuticals, Inc. (“Xanthus”), a company that acquired a license to the invention described in the patent application (collectively, “Defendants”).

This matter is presently before me on Defendants’ motion for partial summary judgment on Count I of Cephalon’s Amended Complaint, which seeks a declaratory judgment that Cephalon owns the invention described in JHU’s patent application. Defendants’ motion alleges that neither the SRA nor the SSA entitles Cephalon to ownership of the invention. I conclude that Defendants are not entitled to partial summary judgment on Cephalon’s claim that it owns the invention under the SRA because there is a genuine issue of material fact concerning whether Small conceived the disputed invention directly in the conduct of the SRA. I further find that there is no substantial controversy that Small and JHU did not reduce the invention to practice directly in the conduct of the SRA. Accordingly, that fact shall be deemed established for purposes of this litigation. Additionally, I hold that Defendants are entitled to partial summary judgment on the aspect of Count I that claims ownership of the invention at

issue under the SSA. This result follows from my finding that the language providing that JHU owns any intellectual property developed as a result of University support, despite any conflicting provision in the SSA, trumps any contrary language in the Ownership of Results section of that agreement between Small and Cephalon. Thus, I grant in part and deny in part Defendants’ motion.

I. BACKGROUND

A. The Parties

Plaintiff, Cephalon, is a Delaware corporation that has its principal place of business in Frazer, Pennsylvania. “Cephalon is an international biopharmaceutical company specializing in the research, development and production of medications that treat and manage neurological diseases, sleep disorders, cancer, pain and addiction.”¹

Defendant JHU is a private academic and research institution located in Baltimore, Maryland. JHU is a Maryland nonprofit corporation.²

Defendant Small is a medical doctor and research scientist who holds both a M.D. and a Ph.D. from JHU. Small is a Professor of Oncology and Pediatrics at the JHU School of Medicine and serves as the Acting Director of Pediatric Oncology at The Johns Hopkins Hospital. Small focuses his research on the FLT3 receptor (“FLT3”) and is

¹ Am. Compl. ¶ 1.

² JHU Answer ¶ 2.

recognized as a leading expert in the field of FLT3 research, having been the first person to identify and isolate the FLT3 gene that encodes the FLT3 receptor.³

Defendant Xanthus is a Delaware corporation headquartered in Cambridge, Massachusetts. “Xanthus is a biopharmaceutical company focused on the discovery, development, acquisition and commercialization of small-molecule therapeutics for the treatment of cancer and autoimmune disorders.”⁴

B. Facts⁵

Since 1992, Small has focused his research on FLT3. In 1996, Small, together with other JHU researchers, published an article reporting that FLT3 is overexpressed at the protein level in certain leukemia cells. An article Small published in 2000 reported his development of a mouse model potentially useful in investigating possible therapeutic approaches to treating leukemia. Small published multiple articles in 2001 reporting his finding that two small molecule drug compounds, AG1295 and AG1296, function as FLT3 inhibitors in cells with acute myeloid leukemia (“AML”).⁶

³ Small Decl. ¶¶ 2-9. FLT3 is “a member of the receptor tyrosine kinase family. Tyrosine kinase receptors are a class of cellular proteins expressed on the surface of a cell that can trigger a signaling pathway to transfer information from outside of the cell to the cell’s nucleus, thereby allowing the cell to respond to external events as needed.” *Id.* ¶ 6.

⁴ Am. Compl. ¶ 4.

⁵ Because this case is at the summary judgment stage, I have recited the facts in the light most favorable to the nonmoving party, Cephalon.

⁶ Small Decl. ¶¶ 6-13.

In 2000, Small learned of Cephalon's extensive library of tyrosine kinase inhibitors and approached Cephalon with his idea of developing a FLT3 inhibitor to treat AML patients who expressed a certain mutation. Small proposed screening Cephalon's compounds to determine whether any of these compounds were effective FLT3 inhibitors and also offered to conduct research involving the use of Cephalon compounds to treat AML. At this time, "it was [Small's] understanding . . . that Cephalon had no research program directed to the development of a treatment for FLT3 mutant leukemia."⁷

Cephalon and JHU entered into the SRA on July 5, 2000.⁸ Under the terms of the SRA, JHU was to perform for Cephalon a "Project," which was defined as "the study described on **Exhibit A** attached hereto and made a part hereof."⁹ Exhibit A of the SRA, as originally executed, stated that the scope of the Project was "[t]o examine the effects of Cephalon's proprietary compounds on FLT-3 *in vitro* (See attached protocol)."¹⁰ The attached protocol stated that the examination would involve screening approximately 6,000 Cephalon compounds to determine which ones were FLT3 inhibitors that could be used in AML research.

⁷ *Id.* ¶¶ 14-18.

⁸ An employee in the JHU Office of Policy Administration carefully read over the SRA before signing it on behalf of JHU. App. to Resp. in Opp'n to Defs.' Mot. for Partial Summ. J. ("Pl.'s App.") 338.

⁹ DX F, SRA, at 1.

¹⁰ SRA A-1.

The SRA contains an Ownership of Results clause, which states:

Institution [JHU] shall cause the Investigator [Small] to disclose to Cephalon in writing any discovery or invention, whether or not patentable, that is conceived or reduced to practice solely or jointly by the Investigator or any other Institution employee directly in the conduct of the Project (an “Invention”). In consideration of Cephalon’s funding of the Project, Cephalon shall own all rights in and title to: . . . (iii) all Inventions that result from the composition, manufacture or use of the Materials, including any improvement, modification or refinement of the Materials; in each case together with all patent, copyright, trademark and other intellectual property rights related thereto.¹¹

The SRA also contains a provision whereby “Institution and Investigator each acknowledge that it shall be a material breach of this Agreement to use or modify Materials for any purpose other than in performance of the Project.”¹²

In October 2000, Small had a conversation with Dr. Drew Pardoll, M.D., Ph.D., a Professor of Medicine, Oncology, Pathology, Microbiology, and Genetics at JHU, as well as a highly regarded immunologist recognized for his research involving dendritic cells. Dendritic cells are “cells that initiate the body’s immune response by presenting antigens and activating T cells,” a subset of white blood cells that play a key role in the body’s immune response.¹³ A post-doctoral fellow in Pardoll’s lab had recently conducted an experiment that showed FLT3 had a substantial effect on dendritic cells. While discussing the results of this experiment, Small and Pardoll hypothesized that the

¹¹ *Id.* at 3.

¹² *Id.* at 2.

¹³ Small Decl. ¶¶ 46-47.

inhibition of FLT3 could suppress the overactive T cell response characteristic of many immune-related disorders (“autoimmune diseases”). Following this discussion, Small and Pardoll began collaborating on a project that involved studying the use of FLT3 inhibitors to treat autoimmune diseases.¹⁴

After completing the screening process contemplated by Exhibit A of the SRA, Small discussed the possibility of conducting additional sponsored research with Cephalon.¹⁵ On December 15, 2000, Cephalon and JHU entered into an Amendment to the SRA whereby Cephalon would finance Small’s performance of an additional Project. This Project involved looking at the effect of two Cephalon compounds, CEP-5214 and CEP-7055, on FLT3.¹⁶ The protocol attached to the description of this Project called for the use of the Cephalon compounds *in vivo* in mice with leukemia and *in vitro* on human leukemic cells.¹⁷

In January 2001, Small exchanged several emails with Craig Dionne, Cephalon’s Vice President of Neurobiology and Oncology Research. Small mentioned his

¹⁴ Pardoll Aff. ¶¶ 14-17.

¹⁵ Small Decl. ¶¶ 26-28.

¹⁶ DX I at A-1. The SRA includes a no oral modifications clause, but the December 15, 2000 Amendment and all other Amendments to the SRA that expanded the scope of the services to be performed under that agreement were executed in a manner that complied with that clause (*i.e.*, in a writing signed by both JHU and a duly authorized representative of Cephalon).

¹⁷ *In vivo* is defined as “in the living body of a plant or animal,” while *in vitro* is defined as “outside the living body and in an artificial environment.” WEBSTER’S NEW COLLEGIATE DICTIONARY 637 (9th ed. 1987).

autoimmune research to Dionne, and Dionne responded that Small should not use either CEP-5214 or CEP-7055 due to regulatory issues, but should instead wait until an enzyme screening was completed and Cephalon could find a less regulated FLT3 inhibitor.¹⁸

In April 2001, Small first became aware of a Cephalon compound known as CEP-701. Small learned of this compound at a meeting where Cephalon employees told Small that the screening Small had done pursuant to the SRA had indicated that CEP-701 was a particularly good FLT3 inhibitor. Small also learned at this meeting that CEP-701 previously had been used in clinical trials.¹⁹ At his deposition, Small stated that he used CEP-701 exclusively for *in vivo* experiments.²⁰

On April 19, 2001, Cephalon and JHU executed a second Amendment to the SRA. This Amendment expanded the scope of the protocol from the December 15, 2000 Amendment to include the use of CEP-701, as well as two other Cephalon compounds, CEP-751 and CEP-2563.²¹

In May 2001, a member of Pardoll's laboratory conducted experiments on dendritic cells that indicated that AG1295 and AG1296 had the down-regulating effect on

¹⁸ DX U; DX V.

¹⁹ Pl.'s App. 356-57. An email dated August 15, 2001 from Susan Jones-Bolin, a research scientist at Cephalon, to Small notes that CEP-701 was then "in clinical trials in man" and was being used *in vivo*. *Id.* at 239.

²⁰ *Id.* at 377.

²¹ DX M.

T cell response that Small and Pardoll had hypothesized. Both AG1295 and AG1296, however, can be used only *in vitro* and are toxic if used *in vivo*.²²

Cephalon and JHU entered into a third Amendment to the SRA on July 30, 2001. The experiments to be performed under this Amendment involved the study of CEP-701 on AML both *in vitro* and *in vivo* and included an experiment where human leukemic cells were injected into mice as a means of testing the effect of CEP-701 on human AML *in vivo*.²³

On December 20, 2001, Cephalon and JHU executed a fourth Amendment to the SRA. Pursuant to this Amendment, Small would conduct several experiments looking at the effect of CEP-701 on AML, including an experiment where CEP-701 would be combined with chemotherapy *in vivo* in an attempt to cure mice of leukemia.²⁴

A day later, on December 21, 2001, Small and Pardoll conducted an experiment involving the treatment of dendritic cells with CEP-701 similar in design to the May 2001 experiments that were done using AG1295 and AG1296. Later *in vivo* experiments showed that treating mice with CEP-701 decreased an autoreactive immune response.²⁵

²² Small Decl. ¶ 59.

²³ DX O.

²⁴ DX P.

²⁵ Small Decl. ¶¶ 61, 65.

Additional research confirmed that FLT3 inhibitors were effective in treating autoimmune diseases.²⁶

Meanwhile, in March 2001, Cephalon and Small entered into the SSA. Under the SSA, Small was “[to] consult with Cephalon on all aspects of its Oncology program” for a term lasting from January 1 to December 31, 2001 in exchange for a payment of \$5,000 from Cephalon.²⁷ Before Small signed the SSA, he had it reviewed by a JHU administrator who requested certain modifications. Small forwarded the modifications requested by JHU to Cephalon in a March 9, 2001 fax, which stated:

All full-time faculty are required to include in their private written agreements a statement confirming their primary duty to the University. For this reason, the following standard sentences should be added to Section 4 of the agreement: “Cephalon and Consultant [Small] recognize that Consultant’s primary duty as a full-time Johns Hopkins faculty member is to the Johns Hopkins University. Cephalon and Consultant agree that Johns Hopkins policies and Consultant’s obligations to the University shall govern and be afforded primacy in the event a conflict arises with this agreement.”²⁸

Cephalon agreed to include this modification and inserted the requested language at the end of Section 5(a) of the SSA, entitled, “Confidentiality and Insider Trading Policy.”²⁹

²⁶ *Id.* ¶ 67.

²⁷ DX L, SSA, at 1, A-1. Small and Cephalon later agreed to extend the SSA’s term to run until December 31, 2002. DX Q.

²⁸ DX K. For the sake of brevity, I refer to these standard sentences as the “Primacy Clause.” Handwriting appearing in the margin next to this language on a copy of the fax bearing a Cephalon production number appears to read “Section 5(o).” *Id.*

²⁹ SSA 2.

Section 4(a), entitled “Ownership of Results,” states:

All findings, conclusions and data and all inventions, discoveries, trade secrets, techniques, processes and know-how, whether or not patentable, that are made by Consultant, either alone or with others, in the performance of the Services or which result, to any extent, from use of Cephalon’s premises or property (collectively, “Inventions”) shall become the exclusive property of Cephalon. Consultant hereby assigns, transfers and conveys all of his/her right, title and interest in and to any and all Inventions to Cephalon.³⁰

A relevant JHU policy (the “JHU IP Policy”) states: “In general, the University has the right to obtain title to Intellectual Property developed as a result of support either directly from or channeled through the University.”³¹

In the course of obtaining JHU’s approval of the SSA, Small submitted a conflict of interest disclosure form to the JHU Office of Policy Coordination in March 2001. On this form, Small stated that his consulting would involve the use of Cephalon compounds in areas outside of leukemia research and noted that he would be utilizing Cephalon compounds in his autoimmune research.³²

In August 2002, Small filed a Report of Invention Disclosure Form regarding the autoimmune invention with the JHU Office of Technology Licensing. On November 8,

³⁰ *Id.*

³¹ DX FF at JHU012821. “University support is defined as financial or other support, regardless of origin, which is used in the discovery or development of Intellectual Property and is provided through University channels.” *Id.* at JHU012822. Cephalon does not base its claim to ownership of the autoimmune invention under the SSA on any contention that the autoimmune invention was not developed as a result of University support.

³² Pl.’s App. 280.

2002, Small filed a U.S. Provisional Patent Application, entitled “Use of FLT3 Inhibitors as Immunosuppressants.” Neither the JHU Report of Invention nor the Provisional Patent Application explicitly mentioned CEP-701.³³

On July 19, 2004, JHU filed U.S. Provisional Patent Application No. 60/589,511 (the “’511 Provisional Application”), relating to Small’s autoimmune research, and, almost a year later, on July 14, 2005, filed International Patent Application No. PCT/US2005/025318. The International Application claims priority to and incorporates the ’511 Provisional Application (the invention claimed in the ’511 Provisional Application and the International Application is referred to herein as the “autoimmune invention”). Both of these applications claim the use of FLT3 inhibitors to treat autoimmune diseases and specifically refer to CEP-701.³⁴ The International Application remained pending when Defendants filed their opening brief in support of their motion for partial summary judgment.³⁵

In April 2007, JHU granted Xanthus an exclusive worldwide license to the patent rights claimed in JHU’s ’511 Provisional and International Applications.³⁶

³³ Pl.’s App. 76-120. This Provisional Patent Application was later abandoned. POB 21 n.13.

³⁴ Small Decl. ¶¶ 68, 74; Pl.’s App. 156, 161, 179-82.

³⁵ Defs.’ Opening Br. (“DOB”) 17.

³⁶ DX BB.

C. Procedural History

Cephalon filed its initial Complaint on January 29, 2008 and amended it on March 14, 2008. The Amended Complaint (hereinafter, "Complaint") contains eleven separate counts against various combinations of Defendants. Count I seeks a declaratory judgment and a permanent, mandatory injunction against all three Defendants with the goal of securing ownership of the autoimmune invention for Cephalon. Count II is a claim for breach of the SRA and specific performance of this agreement. Count IV mirrors Count II, but alleges breach of the SSA. Counts III and V allege breaches of the implied covenant of good faith and fair dealing as to the SRA and the SSA, respectively. Counts VI, VII, and VIII assert claims for tortious interference with contractual relations. Count IX alleges unjust enrichment, while Count X raises a claim for conversion. Finally, Count XI alleges misappropriation of trade secrets.

Defendants filed separate answers to the Complaint, raising a battery of defenses, including laches and waiver. JHU also brought a counterclaim for a declaratory judgment that it is the exclusive owner and licensor of the inventions claimed in the patent applications in issue.

Early in the course of discovery in this complex action, Defendants sought to file a motion for partial summary judgment as to Count I of Cephalon's Complaint, arguing that this count involved a narrow issue of contract interpretation that would require little discovery and that early resolution of Count I would reduce expenses for all parties. Count I sets out Cephalon's claim that it should be declared the owner of the autoimmune invention. With some apprehension, I permitted Defendants to bring a narrow, partial

summary judgment motion, and they filed their motion as to Count I on December 18, 2008. Defendants' opening brief in support of their motion raised two issues: (1) whether Cephalon was entitled to ownership of the autoimmune invention under the terms of the SRA, and (2) whether Cephalon was entitled to ownership of the autoimmune invention under the terms of the SSA. I permitted the parties to take discovery on these two issues before completing their briefing on Defendants' motion, but the motion focused on the meaning of the two agreements. The pending motion encompasses only those defenses to Count I raised by Defendants that are based on the terms of the SRA or SSA; the motion does not apply to other defenses, such as laches and waiver.

In its opposition brief, Cephalon responded to the issues raised in Defendants' opening brief, but noted that Count I also asserts a claim for ownership of the autoimmune invention as a remedy for Defendants' alleged breach of the SRA. In their reply brief, Defendants raised a series of arguments relating to Cephalon's breach of contract claim. Contending that the arguments in Defendants' reply brief exceeded the scope of their opening brief, Cephalon moved to strike the offending portions of the reply brief.

At the argument on Defendants' motion for partial summary judgment, I granted Cephalon's motion to strike because Defendants raised several arguments for the first time in their reply brief that went beyond the scope of the narrow motion I had authorized and because consideration of those arguments at this preliminary stage of the proceeding would prejudice Cephalon. Specifically, I struck several arguments in Defendants' reply

brief, including those relating to: (1) Dionne giving verbal permission to JHU to use Cephalon compounds for purposes not authorized by the SRA; (2) laches; (3) Xanthus' rights as a bona fide purchaser; (4) the appropriateness of granting Cephalon ownership of the autoimmune invention as a remedy for breach of the SRA; and (5) equitable estoppel.³⁷ Therefore, in addressing Defendants' motion for partial summary judgment, I will focus on whether either the SRA or the SSA (or both), by its terms, gives Cephalon ownership rights in the autoimmune invention.

D. Parties' Contentions

Defendants deny that Cephalon has any ownership rights in the autoimmune invention under the terms of either the SRA or the SSA. The SRA grants Cephalon ownership of only those inventions made "directly in the conduct of the Project." Defendants contend that this agreement does not give Cephalon any right of ownership because the autoimmune invention was created through research unrelated to, and therefore outside the scope of, the SRA. As to the SSA, Defendants assert that the JHU IP Policy conflicts with the SSA's Ownership of Results clause and, thus, trumps the Ownership of Results clause by operation of the SSA's Primacy Clause. Accordingly, Defendants argue that Cephalon cannot claim ownership of the autoimmune invention based on the SSA.

³⁷ Tr. 24-25. Accordingly, this Memorandum Opinion does not attempt to resolve any of those issues.

Cephalon contends that the autoimmune invention was “conceived or reduced to practice” directly in the conduct of the SRA Project, and, thus, it is entitled to ownership of this invention under the SRA. Cephalon also argues that the SRA contains a “Catch-All Provision” that grants it ownership of all inventions related to its materials. According to Cephalon, it also owns the autoimmune invention under the SSA’s Ownership of Results clause because Small created the invention through the use of Cephalon materials. Cephalon contends that the Ownership of Results clause, and not the JHU IP Policy, governs because the Primacy Clause appears in another section of the SSA and does not modify the Ownership of Results clause. Defendants counter, however, that the parties intended the Primacy Clause to be located in the same section as the Ownership of Results clause, and that it would have been in the same section but for a scrivener’s error.

Count I of the Complaint also seeks ownership of the autoimmune invention as a remedy for Defendants’ alleged breaches of the SRA and the SSA. Defendants’ motion does not apply to that aspect of Count I. Accordingly, Cephalon asserts that even if the Court rejects its claim to ownership of the autoimmune invention under the terms of the SRA and the SSA, Defendants still would not be entitled to judgment on Count I.

II. ANALYSIS

A motion for summary judgment may be granted if the moving party shows that there is no genuine issue as to any material fact and it is entitled to judgment as a matter

of law.³⁸ The moving party has the burden of showing the absence of any genuine issue of material fact.³⁹ Nevertheless, the nonmoving party may not rest on the allegations in its complaint, but rather “must set forth specific facts showing that there is a genuine issue for trial.”⁴⁰ The court views all facts in the light most favorable to the nonmoving party.⁴¹ Summary judgment will not be granted when the proffered evidence provides “a reasonable indication that a material fact is in dispute.”⁴²

Under Court of Chancery Rule 56(d), if, after a summary judgment motion, a trial is still necessary, such as where judgment is not rendered upon the whole case or for all the relief requested, the court shall, if practicable, determine what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. If the court finds that there are uncontroverted facts, “[i]t shall thereupon make an order specifying the facts that appear without substantial controversy . . . and direct[] such further proceedings in the action as are just. Upon the trial of the action the

³⁸ Ct. Ch. R. 56(c); *O’Brien v. IAC/Interactive Corp.*, 2009 WL 2490845, at *4 (Del. Ch. Aug. 14, 2009).

³⁹ *Quereguan v. New Castle Cty.*, 2004 WL 2271606, at *2 (Del. Ch. Sept. 28, 2004).

⁴⁰ Ct. Ch. R. 56(e); *Stevanov v. O’Connor*, 2009 WL 1059640, at *4 (Del. Ch. Apr. 21, 2009).

⁴¹ *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002).

⁴² *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

facts so specified shall be deemed established, and the trial shall be conducted accordingly.”⁴³

Here, even if the Court were to grant Defendants’ motion in its entirety, all eleven counts in Cephalon’s Complaint would remain for later adjudication.⁴⁴ Thus, if Defendants’ motion for partial summary judgment is successful in any regard, I will enter an order of the type prescribed in Rule 56(d).

A. Did the SRA Convey Ownership of the Autoimmune Invention to Cephalon?

1. Contract interpretation standard under Maryland law

The SRA provides that it “shall be governed by and interpreted in accordance with laws of the State of Maryland.”⁴⁵ Under Maryland law, interpretation of a contract is a legal question.⁴⁶ Maryland, like Delaware,⁴⁷ follows the objective theory of contract interpretation.⁴⁸ This theory focuses on the written text of the contract, and the court’s

⁴³ Ct. Ch. R. 56(d).

⁴⁴ This is because Defendants’ motion for summary judgment on Count I does not encompass Cephalon’s breach of contract claim. *See* Am. Compl. ¶ 43(a). Accordingly, even if this Court were to grant all the relief requested in the pending motion, that only would narrow the issues in dispute in Count I, but not result in the dismissal of the entire count.

⁴⁵ SRA 5.

⁴⁶ *Nationwide Mut. Ins. Co. v. Regency Furniture, Inc.*, 963 A.2d 253, 259 (Md. Ct. Spec. App. 2009); *Atl. Contr. & Material Co. v. Ulico Cas. Co.*, 844 A.2d 460, 468 (Md. 2004).

⁴⁷ *See Seaford Golf & Country Club v. E.I. du Pont de Nemours & Co., Inc.*, 925 A.2d 1255, 1260 (Del. 2007).

⁴⁸ *Nationwide*, 963 A.2d at 259; *Atl. Contr. & Material*, 844 A.2d at 468.

task in interpreting the contract is to determine from the language of the agreement itself what a reasonable person in the parties' position would have believed the contract meant when they entered into it.⁴⁹ The words used in a contract are to be given their ordinary and usual meaning, taking account of the context of the contracting situation.⁵⁰

If a court determines that a contract is unambiguous, it may interpret the contract as a matter of law.⁵¹ Words in a contract are unambiguous if they reasonably can be understood to have only one meaning.⁵² “[T]he clear and unambiguous language of an agreement will not give way to what the parties thought the agreement meant or was intended to mean.”⁵³ If a contract's language is ambiguous, extrinsic evidence should be admitted and considered, and the interpretation of the ambiguity becomes a question for the trier of fact.⁵⁴

⁴⁹ *Taylor v. NationsBank, N.A.*, 776 A.2d 645, 653 (Md. 2001) (quoting *Gen. Motors Acceptance Corp. v. Daniels*, 492 A.2d 1306, 1310 (Md. 1985)).

⁵⁰ *Wells v. Chevy Chase Bank, F.S.B.*, 768 A.2d 620, 630 (Md. 2001).

⁵¹ *Wash. Metro. Area Transit Auth. v. Potomac Inv. Props. Inc.*, 476 F.3d 231, 235 (4th Cir. 2007).

⁵² *Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A.*, 929 A.2d 932, 951 (Md. 2007).

⁵³ *Atl. Contr. & Material*, 844 A.2d at 469.

⁵⁴ *Univ. of Balt. v. Iz*, 716 A.2d 1107, 1121 (Md. Ct. Spec. App. 1998).

2. Construction of the SRA's ownership of results provision

Paragraph 5(a) of the SRA, entitled "Ownership of Results," states:

Institution [JHU] shall cause the Investigator [Small] to disclose to Cephalon in writing any discovery or invention, whether or not patentable, that is conceived or reduced to practice solely or jointly by the Investigator or any other Institution employee directly in the conduct of the Project (an "Invention"). In consideration of Cephalon's funding of the Project, Cephalon shall own all rights in and title to: . . . (iii) all Inventions that result from the composition, manufacture or use of the Materials, including any improvement, modification or refinement of the Materials; in each case together with all patent, copyright, trademark and other intellectual property rights related thereto.⁵⁵

Cephalon contends that subclause (iii) of this provision specifies two separate classes of things to which it is entitled to ownership. The first is Inventions, as defined earlier in Paragraph 5(a). The second arises under what Cephalon terms the "Catch-All Provision" and includes any improvement, modification, or refinement of Cephalon's Materials. This contention stems from a mistaken reading of subclause (iii).⁵⁶

Subclause (iii) of the Ownership of Results provision grants Cephalon ownership of "all Inventions . . . including any improvement, modification or refinement of the Materials." Cephalon's argument rests on a theory that the word "including" that immediately precedes the "Catch-All Provision" establishes a class of creations that Cephalon owns that is separate and distinct from the Inventions defined earlier in the provision. This construction of the Ownership of Results provision is not plausible. The

⁵⁵ SRA 3.

⁵⁶ See POB 38.

only reasonable reading of subclause (iii) is that the word “including” signals that the list of potential Inventions that follows is exemplary only, and not exhaustive. The “Catch-All Provision” simply makes it clear that improvements, modifications, or refinements of Cephalon’s Materials could be considered Inventions, provided they otherwise meet the definition of Inventions. Subclause (iii) unambiguously gives Cephalon ownership of Inventions as defined in the Ownership of Results provision. The language following the word “Inventions” in this subclause merely clarifies what can be an Invention and does not establish a new class of creations that Cephalon potentially can own. I therefore reject Cephalon’s argument to the contrary as against the plain meaning of the unambiguous language of subclause (iii).

3. Is there a genuine issue of material fact regarding Cephalon’s ownership of the autoimmune invention under the SRA?

In light of the above discussion, the SRA’s Ownership of Results provision grants Cephalon ownership only of “Inventions,” with Inventions defined as “any discovery or invention . . . that is conceived or reduced to practice . . . directly in the conduct of the Project.”⁵⁷ Accordingly, summary judgment may be appropriate if Defendants can show there is no genuine issue of fact as to whether Small conceived the autoimmune invention, or reduced the autoimmune invention to practice, directly in the conduct of the

⁵⁷ SRA 3. The Ownership of Results provision also confirms Cephalon’s ownership of “(i) the Materials furnished by Cephalon to [JHU] for purposes of the Project, including any Materials furnished by Cephalon prior to the date of this Agreement [and] (ii) all technical data, know-how and other information provided by Cephalon for use in the Project.” *Id.* Cephalon has not asserted that the autoimmune invention falls into either of these categories.

Project. The Project, as defined in the SRA and its Amendments, involved: (1) screening Cephalon compounds to determine which ones were FLT3 inhibitors;⁵⁸ (2) examining the effect of CEP-701, CEP-751, CEP-2563, CEP-5214, and CEP-7055 on FLT3 in the AML context both *in vivo* and *in vitro*;⁵⁹ (3) performing a number of experiments with CEP-701 on AML both *in vivo* and *in vitro*, including an experiment that tested the effect of CEP-701 on human AML *in vivo*;⁶⁰ and (4) combining CEP-701 with chemotherapy *in vivo* in an attempt to cure mice of leukemia.⁶¹

Conception and reduction to practice are terms of art in the field of intellectual property law, to which the SRA relates. Because neither of these terms is defined in the SRA and the parties have presented no evidence as to any special meaning assigned to these terms during the course of dealing between Cephalon and JHU, I accord the terms their usual meaning to persons in the field of intellectual property law, and patent law in particular.

Conception is “the formation, in the mind of the inventor, of a definite and permanent idea of the complete and operative invention, as it is thereafter to be applied in practice.”⁶² Cephalon points to several pieces of evidence, which, it alleges, collectively

⁵⁸ *Id.* at A-1.

⁵⁹ DX I; DX M.

⁶⁰ DX O.

⁶¹ DX P.

⁶² *Univ. of Pittsburgh v. Hedrick*, 573 F.3d 1290, 1297-98 (Fed. Cir. 2009) (quoting *Burroughs Wellcome Co. v. Barr Labs., Inc.*, 40 F.3d 1223, 1228 (Fed. Cir.

show that the autoimmune invention was conceived directly in the conduct of the Project. As part of the Project, Small screened thousands of Cephalon compounds to determine which of these compounds were FLT3 inhibitors.⁶³ In April 2001, Small first learned about CEP-701 and the fact that it is both an excellent FLT3 inhibitor and fit for use *in vivo*.⁶⁴ Small then gained access to CEP-701 through the SRA.⁶⁵ In May 2001, a month after learning about CEP-701, Pardoll's lab determined that FLT3 inhibitors suppress T cell response, but did so *in vitro*, using a FLT3 inhibitor that was toxic if used *in vivo*.⁶⁶ On December 20, 2001, Cephalon and JHU executed the fourth Amendment to the SRA, under which Small would conduct his most advanced experiments using CEP-701.⁶⁷ The next day, on December 21, 2001, Small and Pardoll conducted an *in vivo* autoimmune experiment using CEP-701 that was almost identical in design to the *in vitro* experiments done in May 2001. After additional research confirmed the effectiveness of CEP-701 in

1994)). The United States Court of Appeals for the Federal Circuit was created in 1982 and has exclusive jurisdiction over appeals in patent cases. *See* 28 U.S.C. § 1295; THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT: A HISTORY 1982-1990 1-13 (1990). Accordingly, the decisions of the Federal Circuit are relevant authority for matters related to patent law.

⁶³ SRA A-1.

⁶⁴ Pl.'s App. 356-57.

⁶⁵ DX M.

⁶⁶ Small Decl. ¶ 59.

⁶⁷ DX P.

treating autoimmune diseases, JHU, in 2004 and 2005, filed patent applications for the autoimmune invention that relied on the use of CEP-701.⁶⁸

Connecting these dots and taking all facts in the light most favorable to Cephalon, it reasonably can be inferred that the following scenario may have taken place: In October 2000, Small and Pardoll hypothesized that FLT3 inhibitors can be used in treating autoimmune diseases. Small, who at that time was screening Cephalon compounds pursuant to the SRA, knew he soon would have a list of FLT3 inhibitors from Cephalon, as well as access to these FLT3 inhibitors. Small then learned of CEP-701 in April 2001 when Cephalon revealed to him the results of the screening done pursuant to the SRA. The next month, Pardoll performed research *in vitro* that proved the effectiveness of FLT3 inhibitors in treating autoimmune diseases. This research was done, however, with compounds that could not be used *in vivo*. Realizing this finding would be more valuable if it could be replicated *in vivo*, Small may have used the results of the screening done under the SRA to find a FLT3 inhibitor that he knew could be used *in vivo* in his autoimmune research, which turned out to be CEP-701. It was at this point that Small may have conceived the autoimmune invention, as he may have formed in his mind a definite idea of the complete and operative autoimmune invention. Therefore, drawing all inferences in Cephalon's favor as the nonmoving party, this evidence could support a finding that Small conceived the autoimmune invention, including the ability to use CEP-701 for it, directly in the conduct of the SRA Project.

⁶⁸ Small Decl. ¶¶ 61, 68, 74.

These inferences are not the only ones that might be drawn, but they reasonably can be drawn from evidence in the record. Thus, Cephalon has proffered evidence whereby it can claim ownership of the autoimmune invention under the SRA. Conversely, Defendants have not met their burden of showing the absence of a genuine issue of material fact. Therefore, I must deny Defendants' motion for summary judgment as it relates to Cephalon's claim to ownership of the autoimmune invention based on its alleged conception directly in the conduct of the Project.⁶⁹

To demonstrate reduction to practice of an invention claimed in a patent application, "a party must prove that the inventor (1) constructed an embodiment or performed a process that met all the limitations [of the claimed invention] and (2) determined that the invention would work for its intended purpose."⁷⁰ Testing may be required to show the invention will work for its intended purpose.⁷¹ Defendants argue

⁶⁹ Defendants contend that Cephalon's argument that Defendants breached the SRA by using Cephalon materials in research not authorized by the SRA constitutes a judicial admission that the experiments that led to the creation of the autoimmune invention did not occur directly in the conduct of the Project. Defendants' contention is unpersuasive because Cephalon made those arguments in the alternative and, moreover, conceivably could prove both that Defendants breached the SRA and that the invention was conceived directly in the conduct of the Project. These are not necessarily mutually exclusive arguments; Defendants could have conceived the autoimmune invention directly in the conduct of the Project, as defined in the SRA, and later breached the SRA by using CEP-701 to conduct research not authorized by the SRA.

⁷⁰ *In re Omeprazole Patent Litig.*, 536 F.3d 1361, 1373 (Fed. Cir. 2008) (quoting *Z4 Techs., Inc. v. Microsoft Corp.*, 507 F.3d 1340, 1352 (Fed. Cir. 2007)).

⁷¹ *Id.*

that Small reduced the autoimmune invention to practice outside the scope of the Project. Other than the screening procedure, which focused on determining which of Cephalon's compounds were FLT3 inhibitors, all work Small did pursuant to the Project involved AML research. The record indicates that every test Small ran that potentially could have shown that the autoimmune invention worked for its intended purpose of suppressing overactive T cell response was unrelated to AML. Rather, these tests, such as the December 2001 experiment Small and Pardoll conducted involving the treatment of dendritic cells with CEP-701, specifically focused on autoimmune diseases.⁷²

Cephalon failed to produce any evidence that the tests proving the effectiveness of CEP-701 against autoimmune diseases occurred in the course of experiments contemplated by the SRA or its Amendments. In its brief, Cephalon alleged that Small reduced the autoimmune invention to practice “while he was conducting the Project”⁷³ and that the autoimmune invention “directly resulted from his AML work.”⁷⁴ These arguments provide no help to Cephalon, however, because the SRA grants it ownership of the autoimmune invention based on a reduction to practice only if it occurred “directly in the conduct of the Project.”

The evidence presented indicates that the autoimmune invention was reduced to practice in the course of autoimmune research and does not support a reasonable

⁷² Small Decl. ¶ 61.

⁷³ Pl.'s Opp'n Br. (“POB”) 38.

⁷⁴ *Id.* at 35.

inference that a reduction to practice of that invention occurred in the conduct of the SRA Project. Thus, Defendants have satisfied their burden of showing the absence of any genuine issue of fact on the latter point. This does not mean, however, that Defendants are entitled to summary judgment on Count I as it relates to the SRA because Cephalon still could prove JHU or Small conceived the invention directly in the conduct of the Project. Therefore, under Rule 56(d), I will enter an order specifying that it shall be deemed established that the autoimmune invention was not reduced to practice directly in the conduct of the Projects covered by the SRA, and the trial shall be conducted accordingly.

B. Did the SSA Convey Ownership of the Autoimmune Invention to Cephalon?

1. Contract interpretation standard under Delaware law

Under its express provisions, the SSA is governed by Delaware law.⁷⁵ When interpreting a contract under Delaware law, the court's ultimate goal is to determine the parties' shared intent.⁷⁶ "A determination of whether a contract is ambiguous is a question for the court to resolve as a matter of law."⁷⁷ Delaware abides by the objective

⁷⁵ SSA 3.

⁷⁶ *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008); *see also Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2009 WL 3161643, at *6 (Del. Ch. Sept. 30, 2009).

⁷⁷ *HIFN, Inc. v. Intel Corp.*, 2007 WL 2801393, at *9 (Del. Ch. May 2, 2007) (citing *Reardon v. Exch. Furniture Store, Inc.*, 188 A. 704, 707 (Del. 1936)).

theory of contracts.⁷⁸ Thus, a court will look at the most objective indicia of the parties' intent: the words in the written instrument.⁷⁹ "As part of this initial review, the court ascribes to the words their common or ordinary meaning and interprets them as would an objectively reasonable third-party observer."⁸⁰ A disagreement between the parties as to the meaning of a contract will not, by itself, render the contract ambiguous. An ambiguity will only be found if the contract's language is susceptible to two or more reasonable interpretations.⁸¹ While extrinsic evidence cannot be used to manufacture an ambiguity where one does not exist on the contract's face,⁸² "an understanding of the context and business circumstances under which the language was negotiated" is to be considered,⁸³ as "seemingly unequivocal language may become ambiguous when

⁷⁸ See *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007) (citing *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *1 (Del. Ch. Nov. 8, 2007)).

⁷⁹ *Sassano*, 948 A.2d at 462. In determining the intent of the parties, the court looks first at the relevant document, read as a whole. *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2008 WL 151855, at *11 (Del. Ch. Jan. 16, 2008) (quoting *Matulich v. Aegis Commc'ns Gp., Inc.*, 2007 WL 1662667, at *12 (Del. Ch. May 31, 2007)).

⁸⁰ *Sassano*, 948 A.2d at 462.

⁸¹ *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

⁸² *United Rentals*, 937 A.2d at 830 (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

⁸³ *U.S. West, Inc. v. Time Warner, Inc.*, 1996 WL 307445, at *10 n.10 (Del. Ch. June 6, 1996).

considered in conjunction with the context in which the negotiating and contracting occurred.”⁸⁴

2. Is there a genuine issue of material fact regarding Cephalon’s ownership of the autoimmune invention under the SSA?

The parties’ dispute regarding Cephalon’s claim to ownership of the autoimmune invention under the SSA centers on which of two provisions governs this situation. The first provision, Section 4(a) of the SSA, entitled “Ownership of Results,” broadly provides that everything made by Small under the SSA “either alone or with others, in the performance of the Services [defined in the SSA] or which result, to any extent, from use of Cephalon’s premises or property (collectively, “Inventions”) shall become the exclusive property of Cephalon.”⁸⁵ Cephalon alleges that the autoimmune invention resulted from the use of Cephalon’s property and, thus, claims that it now owns the invention under the Ownership of Results clause. Because the evidence is sufficient to support a reasonable inference that Small used Cephalon property, namely CEP-701, in creating the autoimmune invention, I will assume for purposes of this Opinion that the invention falls within the requirements of the Ownership of Results clause such that Cephalon could claim ownership of it.

The other provision at issue is the JHU IP Policy, which states: “In general, the University has the right to obtain title to Intellectual Property developed as a result of

⁸⁴ *Id.*

⁸⁵ SSA 2.

support either directly from or channeled through the University.”⁸⁶ Defendants argue that they are entitled to ownership of the autoimmune invention under this policy because the invention was developed as a result of University support in that JHU funded Small’s autoimmune research. Defendants further argue that the JHU IP Policy overrides the Ownership of Results clause by operation of the Primacy Clause, which appears in the SSA at the end of Section 5(a). Section 5 bears the heading “Confidentiality and Insider Trading Policy.” The Primacy Clause states:

Cephalon and Consultant [Small] recognize that Consultant’s primary duty as a full-time Johns Hopkins faculty member is to the Johns Hopkins University. Cephalon and Consultant agree that Johns Hopkins policies and Consultant’s obligations to the University shall govern and be afforded primacy in the event a conflict arises with this agreement.⁸⁷

Defendants claim that the Ownership of Results clause conflicts with the JHU IP Policy. Thus, according to Defendants, the Primacy Clause requires that the JHU IP Policy be afforded primacy, so that it trumps the Ownership of Results clause. Acceptance of Defendants’ position would negate Cephalon’s argument and defeat its claim of ownership of the autoimmune invention based on the terms of the SSA.

To rebut Defendants’ argument, Cephalon asserts that the general language of the Primacy Clause cannot negate the specific grant of ownership provided by the Ownership of Results clause, especially since the Primacy Clause is not even located in the same

⁸⁶ DX FF at JHU012821.

⁸⁷ *Id.*

section of the SSA. Cephalon argues that by placing the Primacy Clause in Section 5, the parties unambiguously intended the Primacy Clause to modify only that section, and not, for example, Section 4, which contains the Ownership of Results clause.

Defendants vigorously dispute this point, claiming, among other things, that the parties never intended the Primacy Clause to be located in Section 5 and, instead, wanted that provision to appear in Section 4(a). To support their contention, Defendants point to a fax Small sent to Cephalon containing revisions to the SSA that JHU wanted made before it would allow Small to sign the SSA. In the fax, JHU wrote: “All full-time faculty are required to include in their private written agreements a statement confirming their primary duty to the University. For this reason, the following standard sentences should be added to **Section 4** of the agreement.”⁸⁸ The referenced “standard sentences” are the Primacy Clause. The record contains no evidence that Cephalon ever objected to this proposed change or to the suggested placement in Section 4. Accordingly, Defendants assert that the parties always intended the Primacy Clause to appear in Section 4 and modify the Ownership of Results clause. Nevertheless, in the final signed version of the SSA, the Primacy Clause is in Section 5(a).

Regardless of whether the parties intended to put the Primacy Clause in Section 4 or Section 5, I find that the plain language of that clause dictates that it modifies the Ownership of Results clause. The Primacy Clause states: “Cephalon and Consultant agree that Johns Hopkins policies and Consultant’s obligations to the University shall

⁸⁸ DX K (emphasis added).

govern and be afforded primacy in the event a conflict arises *with this agreement.*⁸⁹ This language unambiguously indicates that the Primacy Clause applies to the SSA as a whole, and not merely the provision or section in which it is located. Had the parties wanted to limit the scope of the Primacy Clause to Section 5 only, they could have written the provision accordingly. They did not. Instead, the parties added a provision to the SSA that explicitly states that it applies to the entire agreement. Because the parties have not articulated any other reasonable interpretation, I find that the Primacy Clause applies to the Ownership of Results clause and overrides that clause in the circumstances of this case.

Even assuming, *arguendo*, that the Court could consider extrinsic evidence to determine whether the Primacy Clause also reasonably could be read to modify only Section 5, I find that the available extrinsic evidence shows the parties intended this clause to modify the Ownership of Results clause. The fax from Small to Cephalon that Defendants presented in evidence reflects their clear intent that the clause appear in Section 4 of the SSA. The record suggests only two explanations for how the Primacy Clause ended up in Section 5, rather than Section 4.

The first is that Cephalon's placement of the Primacy Clause in Section 5(a) resulted from a scrivener's error. This would be the case if the parties had agreed to place the Primacy Clause in Section 4, but through the inadvertence of the drafter, here Cephalon, the clause ended up in a different section. Cephalon has presented no evidence

⁸⁹ SSA 2 (emphasis added).

indicating that it did not want the Primacy Clause placed in Section 4 or that it informed JHU of any concern with the placement of the clause in Section 4. Accordingly, one reasonably could infer that Cephalon was simply careless when making the revisions and inadvertently placed the Primacy Clause in the wrong section. If that is true, it confirms that the parties intended the Primacy Clause to apply to the Ownership of Results clause and there is no ambiguity.

The second explanation is that Cephalon defied JHU's request by intentionally placing the Primacy Clause in Section 5. This scenario is made more plausible by the handwritten notes that appear on either side of the Primacy Clause in the copy of the Small-Cephalon fax included in Defendants' exhibits. The note to the right of the Primacy Clause says "ok to add," while the note to the left appears to say "Section 5(o)," but might say "Section 5(a)." ⁹⁰ Because the Primacy Clause appears in Section 5(a) of the SSA, I assume for purposes of the pending motion that the note says "Section 5(a)." Neither party produced any evidence regarding these notes or even mentioned them in their briefs. Given the context, ⁹¹ the most logical inference is that someone at Cephalon

⁹⁰ DX K. I note that this copy of the fax appears to bear a Cephalon Bates number and, therefore, presumably came from Cephalon's files. *Id.* The copy of the fax Cephalon included in its own appendix of exhibits bears a JHU Bates number and does not contain the handwritten notes. *See* Pl.'s App. 204.

⁹¹ DX K contains markings that show it was received as a fax. A phone number at the top of the document that appears to be the sender's number has a 410 area code, the same area code as JHU. This evidence suggests that someone at JHU faxed this document to Cephalon. The fact that this exhibit appears to bear a Cephalon Bates number further supports the inference that a Cephalon representative made the notes.

wrote the notes. From the scant information available on this issue, it is possible that Cephalon deliberately ignored JHU's requested placement of the Primacy Clause in Section 4 and, instead, intentionally placed the clause in Section 5(a).

Even if this explanation were correct, however, it would not advance Cephalon's cause. As stated in the Restatement (Second) of Contracts:

Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made . . . (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.⁹²

In this case, the parties seek to attach different meanings to the Primacy Clause, with JHU viewing the clause as governing Section 4 of the SSA and Cephalon viewing it as only modifying Section 5. Because the Small-Cephalon fax expressly states JHU's position that the Primacy Clause was to appear in Section 4, Cephalon had reason to know JHU's view of the Primacy Clause. JHU, on the other hand, had no reason to know the meaning Cephalon gave to the Primacy Clause, as there is no evidence that Cephalon ever informed Small or anyone at JHU that it was unwilling to insert the Primacy Clause in Section 4, that it was going to insert that provision in Section 5, or that the placement made a material difference in Cephalon's view. In these circumstances, Section 201 of

⁹² RESTATEMENT (SECOND) OF CONTRACTS § 201 (1981). This section has been cited with approval in Delaware. *See, e.g., United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 836 (Del. Ch. 2007); *U.S. West, Inc. v. Time Warner Inc.*, 1996 WL 307445, at *10 (Del. Ch. June 6, 1996).

the Restatement (Second) of Contracts indicates that the SSA must be interpreted in accordance with the meaning JHU attached to the Primacy Clause. Thus, even if Cephalon unilaterally intended the Primacy Clause to apply only to Section 5 of the SSA, under the undisputed facts of this case, I find that the clause must be deemed to apply to Section 4 and the Ownership of Results clause, as well.

Because the only reasonable explanations for why the Primacy Clause appears in Section 5 of the SSA both lead to the conclusion that this clause must be deemed to modify the Ownership of Results clause, the placement of the Primacy Clause cannot support a reasonable inference that the parties intended something at odds with its plain language. Accordingly, I find that the Primacy Clause applies to the Ownership of Results clause. As such, Defendants' view of the situation is the correct one: the Ownership of Results clause conflicts with the JHU IP Policy, meaning the Primacy Clause applies and causes the JHU IP Policy to trump the Ownership of Results clause. Because the Ownership of Results clause has been superseded here, Cephalon's claim that it is entitled to ownership of the autoimmune invention under the SSA, which rests entirely on that clause, is without merit as a matter of law.⁹³ There is no evidence

⁹³ In Count I of its Complaint, Cephalon alleges respondeat superior, which it advanced at argument as another ground for holding that the Ownership of Results clause does not conflict with the JHU IP Policy. Tr. 45. The thrust of Cephalon's respondeat superior argument is that Small was acting as JHU's agent while negotiating the SSA, and, thus, he could bargain away JHU's rights to his inventions. Cephalon, however, produced no evidence that Small acted as JHU's agent in negotiating the SSA. In fact, the evidence shows that the \$5,000 payment was intended to go to Small personally and otherwise supports the view that Small was acting on his own behalf, not as JHU's agent. For example, Small was

pointing to any genuine issue of material fact on the issue of ownership of the autoimmune invention under the SSA. Thus, I grant partial summary judgment in favor of Defendants on the parts of Count I of Cephalon's Complaint that claim ownership of the autoimmune invention based on the terms of the SSA.⁹⁴

III. CONCLUSION

For the foregoing reasons, I grant in part and deny in part Defendants' motion for partial summary judgment. I grant Defendants' motion insofar as it seeks judgment on: (1) Cephalon's claim that it owned the autoimmune invention under the SRA because the invention was reduced to practice directly in the conduct of the Project and (2) Cephalon's claim that the SSA granted it ownership of the autoimmune invention.

required to obtain JHU's blessing of the SSA and was not allowed to sign the agreement unless it was amended to include certain provisions, including one designed to ensure JHU retained ownership rights to Small's inventions. In opposing Defendants' summary judgment motion, Cephalon was required to adduce specific facts demonstrating a genuine issue as to respondeat superior. Cephalon failed to meet that burden. Thus, Cephalon cannot rely on the doctrine of respondeat superior to defeat summary judgment on the narrow issues presented by JHU's pending motion.

⁹⁴ Cephalon complains in its brief that "there is no evidence Cephalon ever once received a copy of [the] JHU IP Policy, and only from a detailed reading of these JHU IP Policies could one infer that JHU prefers to negotiate contracts that grant it ownership" of its employees' inventions. POB 49. This argument lacks merit because Cephalon was on notice of JHU's insistence on the inclusion of the Primacy Clause from Small's fax. Based on that Clause's provision that any applicable JHU policy would override the provisions of the SSA, Cephalon was on at least inquiry notice of the potential importance of JHU's policies. As a sophisticated business entity, Cephalon cannot rely on ignorance of the relevant policy when it has not presented any evidence that it even attempted to determine the nature of the JHU policies in question.

Pursuant to Court of Chancery Rule 56(d), I further determine that (1) it is without substantial controversy that the autoimmune invention was not reduced to practice directly in the conduct of the Project and (2) Cephalon is not entitled to ownership of the autoimmune invention under the terms of the SSA. These two matters shall be deemed established for purposes of further proceedings in this action. In all other respects, I deny Defendants' motion. Thus, for example, I deny Defendants' motion for partial summary judgment on Cephalon's claim that it is entitled to ownership of the autoimmune invention under the SRA because the invention was conceived directly in the conduct of the Project.

IT IS SO ORDERED.