IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

BAYER CORPORATION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 02-080-### (MPT)
	:	
CHIRON CORPORATION,	:	
	:	
Defendant.	:	

MEMORANDUM

William J. Wade, Esquire, Richards Layton & Finger, One Rodney Square, P.O. Box 551, Wilmington, Delaware 19899, attorney for Bayer

Josy W. Ingersoll, Esquire, and Christian Douglas Wright, Esquire, Young Conaway Stargatt & Taylor, LLP, The Brandywine Building, 1000 West Street, Wilmington, Delaware 19801, attorneys for Chiron

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Dated: November 8, 2002

Wilmington, Delaware

Thynge, U.S. Magistrate Judge

I. Introduction

In this case, Bayer alleges breach of warranty, fraud, negligent misrepresentation, violation of the duty of good faith and fair dealing and breach of contract claims against Chiron, in connection with Bayer's acquisition of Chiron's wholly owned subsidiary, Chiron Diagnostics Corporation ("CDC"). Chiron filed a motion to dismiss Bayer's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted. On August 19, 2001 the court denied Chiron's motion. Presently before the court is Chiron's motion for reconsideration.

II. Legal Standard

Although a familiar practice in federal courts, the Federal Rules of Civil Procedure do not provide for motions for re-argument. *Oglesby v. Penn Mutual Life Insurance Co.,* 877 F. Supp. 872, 892 (D. Del. 1995). However, the local rules for the District of Delaware allow such motions and provide:

> A motion for re-argument shall be served and filed within 10 days after the filing of the Court's opinion or decision. The motion shall briefly and distinctly state the grounds therefor. Within 10 days after service of such motion, the opposing party may serve and file a brief answer to each ground asserted in the motion. The Court will determine from the motion and answer whether re-argument will be granted.

D. Del. LR 7.1.5.

In *Oglesby v. Penn Mutual*, Judge Schwartz discussed the standards for granting a motion for re-argument. *Oglesby*, 877 F. Supp. 892. Accordingly, a court should

grant such a motion when "the Court has patently misunderstood a party or made with an error not of reasoning but of apprehension." *Id.* Judge Schwartz also noted that such motions should be granted sparingly, and not used to re-litigate matters already addressed by the court. *Id.*

III. Discussion

A. FDA Regulations[1]

Chiron requests re-argument concerning its motion to dismiss for several reasons. First, Chiron asserts that at oral argument, Bayer disclaimed the theory underlying the court's decision. According to Chiron, Bayer conceded that to prove its breach of contract claims, it must show that the RP400 was in violation of FDA regulations.

Bayer retorts that its contentions regarding the use of FDA regulations were clear to the court both before and after oral argument, and that the court reflected its correct understanding of Bayer's position in its reasoning.

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[1]In its motion to dismiss, Chiron sought the dismissal of all counts alleged in Bayer's complaint. In its supporting memorandum, Chiron argued that all four counts should be dismissed since evaluation of the claims would require the court to interpret FDA regulations. Additionally, Chiron asserted that Bayer's fraud and misrepresentations claims should be dismissed because the representations concerning the RP400 were not collateral or extraneous to the contract. *D.I. 11 at 1.* (stating "[w]here, as here, Bayer's state law claims of breach of contract, fraud, negligent misrepresentation and breach of good faith are premised on alleged 'material' violations of federal regulations that only the FDA can enforce, the claims must be dismissed as a matter of law because the FDA has never found any 'material' violation of those regulations.").

In analyzing the motion to dismiss, this court noted that "Chiron moves for dismissal of Bayer's complaint asserting two primary arguments. First, Chiron contends that all claims based on alleged material violations of FDA regulations must be dismissed because a court may not interpret FDA regulations, as per congressional statute. Second, Chiron maintains that the fraud and misrepresentation claims should be dismissed under New York law because the alleged representations are not collateral or extraneous to the terms of the contract." The court then denied defendant's motion to dismiss. Thus, Chiron's understanding that this court denied its motion with respect to each count of Bayer's complaint is correct. Similar to its initial opinion, the court's resolution of Chiron's motion for re-argument applies to each count of plaintiff's complaint.

In its decision, this court stated "Bayer asserts that no review of the FDA procedures is necessary to determine its breach of contract claims, which focus on Chiron's covenant that the CDC business complied with governmental regulations." *D.I. 59 at 8.* Clearly, Chiron argued against any interpretation of FDA regulations by a federal court, while Bayer asserted that only the enforcement of FDA regulations by a federal court was prohibited.[2] Chiron apparently misunderstood this court's characterization of Bayer's contentions. This court understood Bayer's position to be that a court's enforcement of the FDA regulations was prohibited, while a court's evaluation of the regulations for the purpose of determining a party's compliance with "self-imposed obligations" was not. Therefore, this court did not ignore Bayer's intent to show that the RP400 violated the FDA.[3] Thus, under Local Rule 7.1.5, this argument does not serve as the basis for re-argument.

Next, Chiron claims that the court misconstrued its arguments setting forth a preemption theory, and thus misapplied the case law. Chiron asserts:

> Chiron contends that the violations alleged in a suit such as this must be "determined by the FDA, and not in the first instance by a lay jury or court." Accordingly, Bayer's claim fails because Bayer has not alleged that the FDA ever determined that CDC was in material non-compliance with any material statute or regulation enforced by the FDA.

D.I. 62 at 3.

Bayer asserts that the court considered and rejected Chiron's preemption arguments. Further, Bayer alleges that Chiron attempts to re-argue the applicability of

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[2]Indeed at oral argument, Bayer stated that in order to prove breach of contract, it would have to show that the RP400 was not in compliance with FDA regulations. However, such proof would not necessarily entitle Bayer to relief, since other elements are necessary to prove breach of contract.

[3]Since this court understood Bayer's argument, its decision considered that Bayer would try to prove breach of contract by showing that the RP400 violated the FDA regulations.

Medtronic, Sandoz, and American Airlines are improper because the court clearly decided against Chiron after addressing the issue at oral argument.[4]

In support of its argument, Chiron points to language in the August 12th opinion which characterizes its position. "Chiron claims that the evaluation of the plaintiff's breach of contract claim necessarily calls for the review and application of the FDA regulations. Thus, Chiron contends, the claims are preempted by the FDCA and must be dismissed." *D.I. 59 at 8.* This language does not mean that this court decided this matter in the context of preemption. To the contrary, this court understood that Chiron considered the present facts outside the scope of the preemption cases. This was especially evident, since Chiron argued in its briefing and at oral argument that the line of cases concerning the Lanham Act, which included *Sandoz,* were applicable to the present facts, rather than preemption cases like *American Airlines* and *Medtronic*. Additionally, the court addressed this very issue at oral argument. In response to Chiron's arguments regarding the inapplicability of the preemption cases, this court indicated that the distinction Chiron drew between preemption and the inability to assert a state law claim because it would require the court to enforce a federal regulation was, in reality, a legal fiction.

Thus, this court was aware of the distinction in Chiron's arguments, but was unpersuaded by Chiron's argument then, and presently remains unconvinced. Therefore, Chiron's second basis in support of its motion for re-argument is also insufficient.

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[4] *Medtronic, Inc. v. Lohr,* 518 U.S. 470 (1996); *American Airlines,* 513 U.S. 219 (1995); *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.,* 902 F.2d 222 (3d Cir. 1990).

B. Fraud Claims

Regarding the ruling on Bayer's fraud claims, Chiron takes exception to the court's application of *In re Cinar Corp. Securities Litigation,* 186 F.Supp.2d 279 (E.D.N.Y. 2002), a case which the court found controlling, to the present facts. Specifically, Chiron alleges that the court:

> After correctly citing *Cinar* as the "most recent case-law on the issue" before it, and quoting *Cinar's* holding that misrepresentation must be "collateral or extraneous" to a contract in order to support a claim of fraud or misrepresentation related to that contract, the [court] plainly errs in holding that Bayer's allegations meet the *Cinar* standard.

D.I. 62 at 6.

Chiron's position on Bayer's fraud claims is that "the Court should dismiss Bayer's claims of fraud and negligent misrepresentation because all of the misrepresentations Bayer alleged were contained in Chiron's warranties in the contract between Chiron and Bayer." As a result, Chiron argues that the misrepresentations alleged by Bayer were not collateral or extraneous to the contract, as they were memorialized in the contract.

In response, Bayer contends that the issue was discussed extensively at oral argument, was not overlooked, and was correctly decided by the court. Thus, according to Bayer, re-argument on this issue would be inappropriate.

In paragraph 3 of its complaint, Bayer alleges:

> In order to induce Bayer to enter the Agreement for purchase of CDC and for the purpose of allocating the risks associated with that transaction between the parties, Chiron made various representations and warranties to Bayer as set forth in Article II of the Agreement which were to survive the closing of the purchase transaction.

D.I. 8 at ¶ 3.

Later in the complaint Bayer alleges:

> If Chiron had fully disclosed to Bayer the true state of the RP400's

> regulatory compliance as of the Release Date, Bayer would not have paid Chiron in excess of $1.0 billion for CDC. Bayer would have discounted the Purchase Price it was willing to pay Chiron for CDC by a substantial amount, or it would not have entered into the agreement at all.

D.I. 8 at ¶ 49.

Finally Bayer asserts: "Chiron made. . . misrepresentations to Bayer willfully for the purpose of fraudulently inducing Bayer to pay a higher Purchase Price for CDC." ¶ 93.

In reaching its decision, this court acknowledged the requirement that a promise relating to an express contract must be collateral or extraneous to the contract in order to be actionable. As a result, this court found that Bayer stated a claim under *Cinar* because the present representations regarding the RP 400 and CDC's compliance with governmental regulations *were* collateral to the contract.

In *Cinar*, the defendants contended that because the representations and warranties, which formed the sole basis of the plaintiffs' claim for fraud, were incorporated in the stock purchase agreement, then any breach of those representations fell under breach of contract and failed to state an action for fraud. The *Cinar* court noted that under New York law when claims for fraud and breach of contract arise out of the same facts, to state a claim for fraud, which is not duplicative of the claim for contract, "'plaintiff must either: (i) demonstrate a legal duty separate from the duty to perform under the contract; *or* (ii) demonstrate fraudulent misrepresentation collateral or extraneous to the contract; *or* (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages.'" *Cinar*, 186 F. Supp. at 302. (citations omitted)(emphasis added). As a result, a misrepresentation of future intent alone does not constitute fraud, but rather breach of contract. However, when the misrepresentation is of a present fact and not of future intent, collateral or

extraneous to the contract, which is an inducement to the contract, such conduct may give rise to a separate action for fraud. *Id.* In determining whether the defendants alleged misrepresentations were ones of present facts, the court analyzed their conduct. Such conduct evidencing a misrepresentation of a present fact included their statements of the present financial status of their company which did not conceal an intention to avoid their contraction obligations, and their compliance with the contract terms by purchasing plaintiffs' business in exchange for Cinar's stock and cash. The court noted that it was the defendants' *prior* assurances that induce plaintiffs to accept Cinar stock as part of the consideration. As a result, the court concluded that the matter was consistent with those cases where New York courts had refused to dismiss a fraud claim because defendant was alleged to have induced a plaintiff to enter into a contract with fraudulent misstatements of fact. *Id.*

The *Cinar* court similarly refuted the defendants arguments that their alleged misstatements were not collateral or extraneous to the contract because the same misstatements are contained in the agreement itself.

> It simply cannot be the case that any statement, no matter how false or fraudulent or pivotal, may be absolved of its tortious impact simply by incorporating it verbatim into the language of the contract. Once you have told someone that you hold title to the Brooklyn Bridge to entice that person to buy it, executing a contract to sell it that states that you hold title to the Brooklyn Bridge does not make your prior statement any less fraudulent, nor does it convert fraud into a breach of contract. See *First Bank, 257 A.D. at 292* (stating that a fraud claim "[is not] rendered redundant by the fact that [the] alleged misrepresentations breached the warranties made by [defendant] in the Agreement.")

Id. at 303.

As a result, merely mentioning in the complaint that the misrepresentations are included in the agreement does not eliminate the previous fraud.

Therefore, in *Cinar,* the court allowed a class action to proceed because the plaintiffs had alleged that the defendants made misrepresentations regarding the value of their company to induce plaintiffs to sell their business to the defendants in exchange for stock in the defendants' corporation. According to the allegations in Bayer's complaint, Chiron misrepresented CDC's regulatory compliance to induce Bayer to pay a higher price for CDC and to allocate the risks involved in the transactions differently.

Chiron's alleged misrepresentation is functionally equivalent to the defendants' representations in *Cinar*. In *Cinar*, the defendants' representations concerning its business induced the plaintiffs to accept stock, which ultimately devalued the plaintiffs' company. In this case, Chiron's alleged misrepresentations induced Bayer to pay more for CDC and/or to adjust the risk allocation than it would have otherwise. Both misrepresentations concerned present facts as they addressed in *Cinar* the current of defendants' corporation, while in the present matter, they related to CDC's compliance with government regulations. Further, both misrepresentations had the same effect: they induced the *Cinar* plaintiffs and Bayer to agree to contract terms that they otherwise would not have.

At this time, this court is unable to determine the effect of Bayer's assertion that it might not have purchased CDC in the absence its compliance. At this stage of the proceedings, on a motion to dismiss, it does not have to make that decision. Since Bayer has alleged that Chiron's misrepresentation of CDC's regulatory compliance induced it to pay a higher price, and/or allocate the risks differently, Bayer has stated a

claim for fraud and negligent misrepresentation under New York law.

Bayer's burden in responding to the motion to dismiss was to only show that its allegations state a claim for relief. To meet that burden, Bayer cited several cases, primarily relying upon *Medtronic*, a case which the court found controlling. Thus, Bayer has not failed to state a claim for relief. Similarly, with regard to its fraud claims, under *Cinar,* this court cannot hold that Bayer has failed to state a claim.

Accordingly, pursuant to Local Rule 7.1.5, Chiron's request for re-argument is denied.[5]

An order consistent with this opinion will follow.

[5]In denying both theories of Chiron's motion to dismiss (the FDA regulations and application of New York common law) the court has employed the guidance Judge Schwartz set forth in *Oglesby*, that a court should only grant a motion for re-argument only if it has "patently misunderstood a party or made an error not of reasoning but of apprehension." *Oglesby at 892.*

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ORDER

At Wilmington, Delaware, this **8th** day of **November, 2002**, an Opinion dated November 8, 2002, having been issued and entered, therefore,

IT IS HEREBY ORDERED AND ADJUDGED that in light of the findings contained therein, defendant's Motion for re-argument (D.I. 62) is DENIED.

Mary Pat Thynge
UNITED STATES MAGISTRATE JUDGE