SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 653590/2013
NEW YORK UNIVERSITY
vs.
PFIZER INC.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 10/5/15
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 5-10
Answering Affidavits — Exhibits _____ No(s). 18-31, 37
Replying Affidavits _____ No(s). 38-41

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____
FOR THE FOLLOWING REASON(S): _____

Dated: 12/18/15

SHIRLEY WERNER KORNREICH, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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NEW YORK UNIVERSITY,

Index No.: 653590/2013

Plaintiff,

DECISION & ORDER

-against-

PFIZER INC.,

Defendant.

----------X

SHIRLEY WERNER KORNREICH, J.:

The plaintiff in this action, New York University (NYU), seeks to compel defendant Pfizer Inc. (Pfizer) to pay it royalties allegedly due under a license agreement for sales of a cancer treatment drug known as Xalkori. Pfizer moves, pursuant to CPLR 3211, to dismiss NYU's Amended Complaint (the AC). Pfizer's motion is granted for the reasons that follow.

I. Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the AC (Dkt. 3) and the documentary evidence submitted by the parties.

NYU is a prominent university located in Manhattan. Pfizer is a global pharmaceutical company. In 1990, NYU's Medical Center hired non-party Dr. Joseph Schlessinger to serve as Professor and Chairman of NYU's Department of Pharmacology. Dr. Schlessinger was "a pioneer and expert in elucidating the mechanism of action of [receptor tyrosine kinases (RTKs)] and other tyrosine kinase as well as the role played by these enzymes and their signaling pathways in cancer and other diseases." AC ¶ 11. "The general objective of his work was to investigate the role of RTKs and their signaling pathways as a means to inhibit or control the growth of cells, such as cancer cells." *Id.* Dr. Schlessinger had a belief, not shared at the time by some in the scientific community, "that novel anticancer agents could be designed by

conducting research in the structure and function of the tyrosine kinase receptor family, including research focusing on elucidating the structural interactions between these receptor proteins in complex with small molecule inhibitors." ¶ 12. The ultimate goal was to change how cancer patients were treated. Rather than treat patients with chemotherapy, which kills both cancerous cells and healthy cells and, as a result, can cause serious side effects and complications, the idea was to develop medication that only targets mutated cell receptors responsible for the cancer. *See* Dkt. 18 at 8-9. To develop such medication, "those targets first needed to be identified." *See* Dkt. 10 at 5. Once identified, drugs could be developed to bind to those targets. NYU and Dr. Schlessinger agreed "that NYU would work to identify possible receptor targets, and [Dr. Schlessinger] would work to develop drugs that bind to those targets." *Id.* Dr. Schlessinger formed a company, Sugen, Inc. (Sugen), to perform his work.

On August 16, 1991, NYU and Sugen executed a license agreement whereby "Sugen agreed to fund an 'NYU Research Project' in the field of certain 'Receptors,' including tyrosine kinases, believed to be useful in the development of drugs to treat cancer"; "NYU granted Sugen an exclusive worldwide license to its 'Research Technology.'" *See* Dkt. 10 at 7. "In exchange for that license, Sugen agreed to pay NYU a royalty on drugs that Sugen developed based on NYU Research Technology that target identified receptors." *Id.* The license agreement was first amended in November 1993. The operative version is the second amended license agreement executed in 1996. *See* Dkt. 8 (the Agreement). The second amended Agreement addressed Sugen's possible acquisition by another pharmaceutical company. This, as discussed below, occurred twice, and is why Pfizer is the defendant in this action.

The Agreement is a robust contract clearly drafted by sophisticated counsel. It is governed by New York law, contains a merger clause, and provides for jurisdiction in this court. *See* Dkt. 8 at 27-28.

The Agreement contains an extensive definitions section, which, as pertinent to this action, defines the following terms in section 1:

> (i) "NYU Know-How" shall mean the Pre-Existing Inventions and any information and materials (including, but not limited to, pharmaceutical, chemical, biological and biochemical products, information, trade secrets, know-how, technical and non-technical data, materials, methods and processes and any drawings, plans, diagrams, specifications and/or other documents containing such information) discovered, developed or acquired by or on behalf of students or employees of NYU (including [Dr. Schlessinger]) during the term and in the course of the NYU Research Project (as hereinafter defined). For the avoidance of doubt, NYU Know-How shall include any of the foregoing that are developed during the term and in the course of the NYU Research Project whether funded by SUGEN or by United States government agencies under Section 4(c) hereof.
>
> (j) "NYU Patents" shall mean NYU's share in all United States and foreign patents and patent applications, and any divisions, continuations, in whole or in part, reissues, renewals and extensions thereof, and pending applications therefor:
>
> > (x) which claim Pre-Existing Inventions and which are identified on Appendix I hereto; or
> >
> > (y) which claim inventions that are made, in whole or in part, by students or employees of NYU (including [Dr. Schlessinger]) during the term and in the course of the NYU Research Project (as hereinafter defined). For the avoidance of doubt, NYU Patents shall include any such inventions that are made during the term and in the course of the NYU Research Project, whether funded by SUGEN or by United States government agencies under Section 4 (c) hereof.
>
> (k) "NYU Research Project" shall mean the investigations during the Research Period into the field of the Receptors under the direction of the NYU Scientist which are funded by SUGEN and include the research programs described in Appendix II hereto which forms an integral part hereof.
>
> (l) "Patentable Invention" shall mean a claim in an issued, unexpired patent that has not been held invalid by any final decision of a court in the relevant country. It also includes claims in a pending application that has priority from a specification filed less than seven years previous.

(m) "Receptor" shall mean:

i) receptor tyrosine kinases, intracellular tyrosine kinases, or receptors that directly or indirectly activate non-receptor tyrosine kinases; and/or

ii) receptor serine/threonine kinases, intracellular serine/threonine kinases, or receptors that directly or indirectly activate serine/threonine kinases; and/or

iii) receptor tyrosine phosphatases, intracellular tyrosine phosphatases, or receptors that directly or indirectly activate tyrosine phosphatases; and/or

iv) molecules that regulate the signaling of the above receptors.

(n) "Research Period" shall mean the [12] year period commencing on the Effective Date hereof and any extension thereof as to which NYU and SUGEN shall mutually agree in writing.

(o) "Research Technology" shall mean all NYU Patents and NYU Know-How.

...

(q) "SUGEN Product" shall mean any product for the diagnosis, treatment or prevention of human disease which contains or comprises:

i) any Receptor (as hereinafter defined); and/or

ii) any substance which activates or prevents activation or otherwise modulates activation of a Receptor; and/or

iii) any substance which induces, prevents or otherwise modulates intracellular activity of either the activated or resting Receptor; and/or

iv) any substance which otherwise physically interacts with a Receptor; and/or

v) DNA or RNA encoding any of said substances, including probes, vectors or cells modified to contain such DNA or RNA;

provided that an Investigational New Drug (IND) application is filed for such SUGEN Product within 4 years from the end of the Research Period. SUGEN Product shall not include any product that is licensed by SUGEN from a third party other than MPG, provided that such product does not act by activating, preventing activation, or otherwise modulating a Validated Target.

(r) "Validated Target" shall mean a Receptor target that has been shown to be correlated with a particular disease in which a small molecule therapeutic would offer a reasonable commercial opportunity, and where inhibition of target function in *in vitro* and *in vivo* models leads to effective inhibition of pathophysiology.

See Dkt. 8 at 7-9 (underline and italics in original; bold added).

Section 8(b) provides:

In consideration for the grant of the License and during the term provided in Section 7(b) provided in Section 7(b) with respect to each SUGEN Product[,] SUGEN shall pay to NYU:

(i) a royalty of 1% of the Net Sales of SUGEN or any Corporation Entity; and

(ii) a portion of License Revenues determined as follows:

(A) 5% of License Revenues with respect to any SUGEN Product; or

(B) 6.25% of License Revenues with respect to any SUGEN Product that is covered under SUGEN's agreements with [REDACTED], and any extensions, modifications, or revisions thereof, provided that with respect to amounts paid to NYU for royalties such amounts shall not exceed 1% of the Sublicensee's Net Sales in any period;

See Dkt. 8 at 15 (underline in original).

As noted earlier, the Agreement – the 1996 second amendment to the original 1991 license agreement – specifically was drafted in contemplation of Sugen being acquired by another company. This is addressed in section 9, titled "SUGEN Ownership Change":

In the event that SUGEN is acquired or merged with another company, or that SUGEN acquires or forms a joint venture with another company, then SUGEN may at its option notify NYU that such other company wishes to make a determination as to which targets shall be included under the terms of the Agreement prior to the effective date of any such acquisition, merger, or joint venture, or as soon as possible thereafter. This determination shall be made in good faith by NYU and SUGEN and shall be based on an examination of SUGEN's lab books and other information available to the parties, full access (under appropriate confidentiality agreements) to which will be provided to NYU. With respect to targets that were adopted by SUGEN into drug discovery prior to the effective date of the acquisition, merger, or joint venture, SUGEN Products developed based on such targets shall be subject to the license payments described

> in Section 8 hereto. SUGEN Products that are developed based on Receptor targets which were not adopted into drug discovery at the time of the effective date of such acquisition, merger, or joint venture shall be subject to a). a royalty of 2.5% on Net Sales of SUGEN, and/or Corporation Entity, which may be offset by 50% of the royalties paid by SUGEN to third parties (other than MPG), provided that the royalties due to NYU shall not be less than 1.5% of Net Sales of SUGEN and /or Corporation Entity and b). 10% of License Revenues with respect to any SUGEN Product, provided that with respect to such SUGEN Product there exists a Patentable Invention with respect to such target and/or its utility which is derived from or based on the Research Technology, and provided further that such SUGEN Product shall include a product irrespective of whether an IND application is filed with respect thereto within 4 years from the end of the Research Period, or not.

See Dkt. 8 at 16-17.[1]

In 1996, during the Research Period, Sugen began researching a target called "c-Met". NYU alleges that Sugen's work on c-Met led to the creation of a substance called "crizotinib", which is the active ingredient in Xalkori. Crizotinib, a "small-molecule inhibitor", can inhibit multiple targets, one of which is c-Met. Sugen's initial development of crizotinib was focused on its specific inhibition of c-Met. That allegedly occurred during the Research Period, which ended on September 1, 2001. In 1999, Sugen was acquired by a company called Pharmacia. In 2003, Pfizer acquired Pharmacia. Pfizer, thus, is the successor to Sugen under the Agreement.

On December 12, 2005, more than four years after the Research Period ended, Pfizer filed an IND application for crizotinib. "An IND Application is a request for authorization from the Food and Drug Administration (FDA) to administer an investigational drug to humans." *See* Dkt. 10 at 8 n.1. The application named c-Met as the target receptor. While that application was pending, in 2007, scientists at a Japanese university published an article in *Nature* identifying another mutated receptor called "EML4-ALK". Pfizer became aware of this article, conducted

[1] Section 11 governs the "Development and Commercialization" of a Validated Target. *See* Dkt. 8 at 17-19.

research on EML4-ALK and identified it as a target for crizotinib. Pfizer amended its crizotinib IND application, changing the target to EML4-ALK.[2] The FDA ultimately approved Pfizer's IND application to sell medicine with crizotinib to target EML4-ALK. Pfizer named that medication Xalkori.

NYU claims it is entitled to royalties of 2.5% of Pfizer's Xalkori sales under section 9 of the Agreement. NYU, however, concedes that it is not entitled to royalties under Section 8 because the IND application for crizotinib was filed in December 2005, more than four years after the Research Period ended in September 2001. Nonetheless, NYU claims that Xalkori is a Sugen Product developed with NYU Know-How. Pfizer disagrees because Xalkori targets EML4-ALK, a receptor not researched or discovered with the benefit of NYU Know-How. NYU does not dispute this, but contends that under section 9, all that is required for Xalkori to be subject to a royalty is that its active ingredient, crizotinib, was developed with Research Technology during the Research Period. As discussed below, NYU is wrong.

On October 16, 2013, NYU commenced this action by filing its original complaint. NYU filed the AC on January 5, 2015, which contains a single cause of action for breach of section 9 of the Agreement.[3] *See* Dkt. 3. Pfizer filed the instant motion to dismiss on January 27, 2015. The court reserved on the motion after oral argument. *See* Dkt. 44 (9/22/15 Tr.).

II. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty*

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[2] Substances such as crizotinib can impact multiple receptors, regardless of the target designated on the IND application. For the purposes of obtaining regulatory approval from the FDA, however, the applicant must identify which receptor the proposed medication will target.

[3] It is undisputed that the Agreement is still in effect between NYU and Pfizer. Pfizer is currently paying royalties to NYU for another drug developed by Sugen, called Sutent.

Corp., 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

III. Discussion

This case turns on the interpretation of section 9 of the Agreement, which applies where, as here, Sugen "is acquired or merged with another company." It is well settled that contracts must be "construed in accord with the parties' intent." *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002). "The best evidence of what parties to a written agreement intend is what they say in their writing. Therefore, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Id.* (citations omitted). "A contract is unambiguous if the language it uses has 'a definite and precise

meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." *Id.*, quoting *Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 (1978). "Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." *Greenfield*, 98 NY2d at 569-70. Moreover, "a contract should be 'read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.'" *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-25 (2007), quoting *Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 (2003). Finally, "a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties." *Cole v Macklowe*, 99 AD3d 595, 596 (1st Dept 2012), citing *In re Lipper Holdings, LLC*, 1 AD3d 170, 171 (1st Dept 2003) (citations omitted).

As noted, NYU admits it is not entitled to royalties under section 8 because Xalkori was not "adopted by SUGEN into drug discovery prior to the effective date of the acquisition, merger, or joint venture" [*see* Dkt. 8 at 16] and the IND application for crizotinib was filed more than four years after the Research Period ended. Rather, NYU claims entitlement to royalties under section 9, which applies to "SUGEN Products that are developed based on Receptor targets which were not adopted into drug discovery at the time of the effective date of such acquisition, merger, or joint venture." *See id.*

NYU's entitlement to royalties under section 9 is subject to the caveats set forth in the concluding language of that section:

> [1] provided that with respect to such SUGEN Product there exists a Patentable Invention with respect to such target and/or its utility which is derived from or based on the Research Technology, and [2] provided further that such SUGEN

Product shall include a product irrespective of whether an IND application is filed with respect thereto within 4 years from the end of the Research Period, or not.

See id. at 16-17 (brackets added).

The parties dispute whether caveat [1] applies to Xalkori. As a threshold matter, under section 9, NYU is only entitled to royalties on SUGEN Products, which are defined in section 1(q) to mean "any product for the diagnosis, treatment or prevention of human disease which contains or comprises:

i) any Receptor (as hereinafter defined); and/or

ii) any substance which activates or prevents activation or otherwise modulates activation of a Receptor; and/or

iii) any substance which induces, prevents or otherwise modulates intracellular activity of either the activated or resting Receptor; and/or

iv) any substance which otherwise physically interacts with a Receptor; and/or

v) DNA or RNA encoding any of said substances, including probes, vectors or cells modified to contain such DNA or RNA;

provided that an Investigational New Drug (IND) application is filed for such SUGEN Product within 4 years from the end of the Research Period. SUGEN Product shall not include any product that is licensed by SUGEN from a third party other than MPG, provided that such product does not act by activating, preventing activation, or otherwise modulating a Validated Target.

See Dkt. 8 at 8-9 (emphasis added).

It is undisputed that the bolded condition does not apply, ether to the initial crizotinib application for the c-Met target or the subsequent application for the EML4-ALK target, both of which were filed more than four years after the Research Period ended. This, however, does not matter, since caveat [2] in section 9 expressly amends the definition of SUGEN Product to eliminate this requirement. Thus, Xalkori meets the definition of SUGEN Product because it is a

cancer treatment drug that contains a substance affecting a Receptor. EML4-ALK is a Receptor because it is a mutated version of ALK, an RTK.

The only disputed material issue is the meaning of the words "with respect to such SUGEN Product there exists a Patentable Invention with respect to such target and/or its utility which is derived from or based on the Research Technology." The parties dispute the significance of the phrase "with respect to such target and/or its utility" and disagree about whether "and/or its utility" modifies the words "such target" or "Patentable Invention". Pfizer contends "and/or its utility" modifies "such target" and argues that since Xalkori targets EML4-ALK, a target discovered by Japanese scientists without the aid of any NYU technology, NYU is not entitled to royalties on Xalkori under section 9. NYU disagrees. NYU avers that "and/or its utility" modifies "Patentable Invention" and contends that since crizotinib, the active ingredient in Xalkori, was developed based on NYU's Research Technology (e.g., X-ray crystallography), NYU is entitled to royalties on Xalkori. Essentially, the parties' disagreement is whether section 9 grants NYU royalties on (1) any drug developed with the benefit of NYU's Research Technology; or (2) only a drug that targets a receptor identified with the benefit of NYU's Research Technology.

Section 9 is not ambiguous. *See Universal Am. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 (2015) ("parties cannot create ambiguity from whole cloth where none exists, because provisions 'are not ambiguous merely because the parties interpret them differently.'"), quoting *Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 352 (1996). The only commercially reasonable way to interpret "and/or its utility" is as a modifier to "target". NYU's interpretation makes no grammatical sense because the expression "a Patentable Invention with respect to its utility" is not a cogent statement. If anything, it is

redundant, as one can only patent something with utility. 35 USC § 101 ("Whoever invents or discovers any new and **useful** process, machine, manufacture, or composition of matter, or any new and **useful** improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title") (emphasis added); *see Alice Corp. v CLS Bank Int'l*, 134 SCt 2347, 2354 (2014) ("abstract ideas are not patentable"). In contrast, the expression "such target and/or its utility" expresses a clear concept, i.e., a target's utility, such as how medication interacts with the target.

That said, regardless of the words modified by "and/or its utility", Pfizer's interpretation is correct. Xalkori was not "derived from or based on the Research Technology" because NYU had nothing to do with Xalkori's target, EML4-ALK. While it is undisputed that NYU's Research Technology did not aid in the discovery of Xalkori's target, NYU contends this does not matter. However, if the parties intended the Agreement to carry NYU's interpretation, the words "with respect to such target and/or its utility" would not have been included. Section 9's caveat [1] would have instead read "with respect to such SUGEN Product there exists a Patentable Invention which is derived from or based on the Research Technology." The court may not interpret section 9 without giving meaning to the words "with respect to such target and/or its utility" because the "law requires that the terms of a contract be read in context." *CT Inv. Mgmt. Co., LLC v Chartis Specialty Ins. Co.*, 130 AD3d 1, 7 (1st Dept 2015). Courts must "avoid an interpretation that would leave contractual clauses meaningless." *TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 204 (1st Dept 2015), citing *Two Guys from Harrison-N.Y. v S.F.R. Realty Assocs.*, 63 NY2d 396, 403 (1984); *see Kolbe v Tibbetts*, 22 NY3d 344, 354 (2013) (rejecting interpretation that "both conflicts with the most natural reading of the sentence and renders meaningless the [subject contractual] provision"); *see also Beal*, 8 NY3d at 245-25

("a contract should be 'read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose"), quoting *Westmoreland*, 100 NY2d at 358.

NYU concedes that EML4-ALK was not identified with the benefit of any of NYU's Research Technology. NYU wrongly focuses on the fact that crizotinib, as well as Xalkori, may both be considered SUGEN Products. That fact would merely satisfy the requirement that the "Patentable Invention ... is derived from or based on the Research Technology." Such fact has no bearing on whether what was "derived from or based on the Research Technology" is a "Patentable Invention **with respect to such target and/or its utility**." NYU has not alleged any Patentable Invention (whether owned by NYU or anyone else) relating to EML4-ALK, the target, which was derived from NYU's Research Technology. To be sure, there may exist a Patentable Invention derived from NYU's Research Technology with respect to crizotinib, but that does not matter. The relevant inquiry is *not* whether the Sugen Product or its active ingredient was produced with the benefit of NYU's Research Technology. What matters is whether that Patentable Invention concerned the target, not the substance that affects that target.

To be clear, the reason NYU is not entitled to royalties on Xalkori does not turn on whether NYU has any connection to the development of crizotinib. Indeed, the court assumes, as it must on this motion, that crizotinib was developed by Sugen with the benefit of NYU technology. However, to be entitled to royalties under section 9, there must be a nexus to the product's target. When section 9 speaks of utility, it is referencing the notion that the product being developed is a cancer drug designed to target a specific receptor. Xalkori, as discussed, was approved by the FDA to target EML4-ALK, not c-Met.

In conclusion, it should be noted that the context of Section 9's addition to the Agreement supports Pfizer's interpretation. Section 9, which did not exist in the prior versions of the Agreement, was specifically added in 1996 in contemplation of Sugen being acquired. It expands the circumstances in which NYU is entitled to a royalty. Unlike royalties due under section 8, royalties under section 9 can apply to products submitted for FDA approval more than four years after the end of the Research Period. The purpose of section 9, captured by the caveats, is that medication targeting a receptor identified as a result of NYU's contributions should be subject to royalties. As discussed, NYU's contribution was to identify targets and Sugen's contribution was to develop medicine for those targets. Therefore, it makes commercial sense for the caveats to limit NYU's entitlement to royalties under section 9 to products developed long after the Research Period ended when the product targets a receptor identified by NYU or by someone else with the benefit of NYU's technology or know-how. Otherwise, the product would not have resulted from NYU's contributions to Sugen. The only commercially reasonable interpretation of section 9 is that NYU must have contributed to the discovery of Xalkori's target. NYU did not. Consequently, it is not entitled to royalties on Xalkori. Accordingly, it is

ORDERED that the motion by defendant Pfizer Inc. to dismiss plaintiff New York University's Amended Complaint is granted, and the Clerk is directed to enter judgment dismissing the Amended Complaint with prejudice.

Dated: December 18, 2015

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C