IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MID SOUTH BIOLOGICS, LLC, Plaintiff, v. MIMEDX GROUP, INC., Defendant.	)	No. 2:17-cv-02028-TLP-egb

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Before the Court is Defendant's Motion for Judgment on the Pleadings, filed June 13, 2017. (ECF No. 21.) Defendant argues that the terms of the contract are unambiguous and that it is entitled to Judgment on the Pleadings. For the following reasons, the Court finds that Defendant's former argument is correct because the contract between the parties is unambiguous. But the Court finds that Defendant's latter argument is incorrect. The Court finds that Defendant is not entitled to Judgment on the Pleadings. Thus, the Court DENIES Defendant's Motion.

BACKGROUND

On May 1, 2012, Plaintiff Mid South Biologics, LLC ("Mid South"), and Defendant MiMedx Group, Inc. ("MiMedx") entered into a consulting agreement (the "Agreement") in which Plaintiff agreed to promote Defendant's products to prospective customers ("prospects"). (ECF 21-2 at PageID 68–71.) In return, Defendant agreed to pay Mid South referral fees for

each prospective customer that ultimately purchased products from MiMedx. (*Id.*) The Agreement included specific referral-fee arrangements for two such prospects. (*Id.*)

One of those prospects was AvKARE, Inc. ("AvKARE"). (ECF No. 21-2 at PageID 72.) Concerning AvKARE, the Agreement laid out the following referral-fee arrangement:

> Prospect: AvKARE, Inc.
>
> Referral Fee: 3% of (i) the first $10 Million of Gross Sales of Products to such Prospect during the first 12 month period commencing with the initial sale of Products to such Prospect and (ii) the first $10 Million of Gross Sales of Products in each of the subsequent two 12 month periods.

(*Id.*)

The Agreement also contained an express termination provision. (ECF No. 21-2 at PageID 70.) Under this provision, either party could terminate the Agreement "upon thirty (30) days' written notice to the other party." (*Id.*) However, the Agreement also noted that, in certain circumstances, Defendant's obligation to pay Plaintiff referral fees extended past the Agreement's termination—

> Termination of this Agreement shall not terminate [Defendant's] obligation to make payments to [Plaintiff] with respect to Gross Sales of Products to Prospects to which [Defendant] had sold Products during the Term of this Agreement for the full twelve (12) months after the initial sale of Products to such Prospect. Any period after the end of the Term of this Agreement in which [Defendant] is still obligated to make payments to [Plaintiff] is hereinafter referred to as the 'Residual Period.'"

(*Id.*)

By all accounts, Plaintiff and Defendant fully performed under the Agreement for the first two years after the Agreement took effect. Yet, on May 15, 2014, Defendant sent Plaintiff a letter notifying Plaintiff of its intent to terminate the Agreement, effective one month later. (ECF No. 21-3 at PageID 73.) Per the terms of the Agreement, the Agreement was, in fact,

terminated on June 16, 2014. However, after termination, a dispute arose between the parties concerning the referral fees for AvKARE.

A. The Parties' Dispute

Two things occurred after the Agreement took effect—(1) Plaintiff promoted Defendant's products to AvKARE and (2) Defendant sold AvKARE over $10 million in products in each annual period since May 1, 2012. (ECF No. 1 at PageID 3–4.) Defendant properly paid Plaintiff referral fees of $300,000 in 2013 and 2014 because AvKARE purchased over $10 million of MiMedx's products per year. (*Id.*)

On the Agreement's termination, Defendant paid Plaintiff a referral fee for its sales to AvKARE from May 1, 2014 to June 14, 2014. The issue before this Court is whether Defendant owes further referral fees to Plaintiff under the AvKARE provision. (ECF No. 21-1 at PageID 61, 63.)

1. Plaintiff's Complaint

On January 13, 2017, Plaintiff filed suit against Defendant for breach of contract, alleging that Defendant to pay Plaintiff referral fees for AvKARE. (ECF No. 1.) According to Plaintiff, the parties contracted for a specific three-year period of referral fees for sales to AvKARE. (ECF No. 1 at PageID 3.) Thus, Defendant's obligation to pay Plaintiff referral fees for AvKARE allegedly should have extended until May 1, 2015—about eleven months past the Agreement's termination. (ECF No. 1 at PageID 3–4.) Defendant's May 1–June 14, 2014 referral-fees payment, then, allegedly did not extinguish its obligation to pay Plaintiff further AvKARE-related referral fees. (*Id.*)

2. Defendant's Answer and Motion for Judgment on the Pleadings

Defendant's Motion for Judgment on the Pleadings argues that Plaintiff misinterpreted the Agreement's AvKARE-related referral-fee provision. (ECF No. 21.) Defendant asserts that

it was only required to pay Plaintiff referral fees, after the Agreement's termination if Defendant terminated the Agreement within one year of its taking effect. (ECF No. 21-1 at PageID 65.)

Because Defendant terminated the Agreement over one year after its effective date, Defendant contends that its obligation to pay referral fees extinguished upon the Agreement's termination. (*Id.*)

STANDARD OF REVIEW

After the pleadings close, a party may move for judgment on the pleadings. FED. R. CIV. P. 12(c). For review purposes, a court analyzes a motion under Rule 12(c) as it would for a motion under 12(b)(6). *See Thomas & Betts Intern. LLC v. Burndy LLC*, 2015 WL 5944387 at *1 (W.D. Tenn. 2015). Thus, to survive a motion under 12(c), a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see Engler v. Arnold*, 862 F.3d 571, 575 (6th Cir. 2017).

Though a court will certainly grant a motion for judgment on the pleadings if a plaintiff has no plausible claim for relief, a court must also "construe the complaint in [a] light most favorable to the plaintiff." *Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 512 (6th Cir. 2001). In other words, a court will "accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief." (*Id.*)

Concerning the Agreement's substantive provisions, the Agreement contains an explicit choice-of-law provision stating that it will be construed under Georgia law. (ECF No. 21-2 at PageID 70.) As a result, Georgia law will apply to the Agreement's substantive provisions. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 91–92 (1938).

DISCUSSION

The questions presented by Defendant's Motion are straight forward—what does the Agreement require? Does the Agreement only require that Defendant pay Plaintiff referral fees until termination? Or does the Agreement require something more, namely that Defendant pay Plaintiff referral fees for a set period of time, regardless of termination?

Because the above questions are primarily ones of interpretation, this Court looks to whether Georgia law addresses the issue directly. Section 13-2-2 of Georgia's Code ("OCGA") lays out numerous rules by which a court shall interpret contracts. *See* Ga. Code Ann. § 13-2-2 (2010). According to OCGA § 13-2-2, "[w]ords generally bear their usual and common signification," which shall be construed in a way that "uphold[s] a contract in whole and in every part." *Id*. at § 13-2-2(2), (4). In other words, "the whole contract should be looked to in arriving at the construction of any part." *Id*. at § 13-2-2(4).

Looking to the contract's "plain meaning" under OCGA § 13-2-2 is a simple matter—a court may use a standard dictionary to analyze whether a contract uses a word as it is commonly understood. *See Lafarge Bldg. Materials, Inc. v. Thompson*, 295 Ga. 637, 640 (2014) (using Webster's Dictionary to analyze the meaning of the word "applicant."). However, OCGA § 13-2-2 also states that, if a court cannot easily understand a term's plain meaning then the resulting ambiguity must be construed against the drafter. *See* § 13-2-2(5); *Georgia Farm Bureau Mut. Ins. Co. V. Smith*, 298 Ga. 716, 719 (2016) (noting that when a "provision is ambiguous . . . [it] will be construed strictly against the [drafter].").

But, as will be discussed below, this Court does not find the pertinent language of the Agreement ambiguous.

A. The Agreement's AvKARE Provision Obligates Defendant to Pay Plaintiff Referral Fees for Three Years After AvKARE First Purchases Defendant's Products.

The Agreement's AvKARE Provision states:

> Prospect: AvKARE, Inc.
>
> Referral Fee: 3% of (i) the first $10 Million of Gross Sales of Products to such Prospect during the first 12 month period commencing with the initial sale of Products to such Prospect and (ii) the first $10 Million of Gross Sales of Products in each of the subsequent two 12 month periods.

(ECF No. 21-2 at PageID 72.)

This is a two-part arrangement. The first part of the arrangement obligates Defendant to pay Plaintiff a 3% referral fee of AvKARE's gross sales "during the first 12 Month period commencing with the initial sale of Products." (*Id.*) According to Webster's Ninth New Collegiate Dictionary ("Webster's"), "commencing" is defined as "hav[ing] or mak[ing] a beginning." *Commencing*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1983). Furthermore, "initial" is defined as "of or relating to the beginning." *Initial*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1983). After considering these operative words, the first part of the arrangement is quite clean as to both time and obligation. The first part of the arrangement remains in effect for a full year, beginning when AvKARE makes its first purchase from Defendant. As long as the first part of the arrangement is in effect, Defendant owes Plaintiff a 3% referral fee of the first $10 million dollars in product that Defendant sells to AvKARE.

The second part of the arrangement obligates Defendant to pay Plaintiff a 3% referral fee "in each of the subsequent two 12 month periods." Webster's defines "each" as "being one of two or more distinct [things]." *Each*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1983). Furthermore, "subsequent" is defined as "following in time, order, or place." *Subsequent*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1983). After considering these operative words, the second part of the arrangement is also quite clear. The second part

of the arrangement cements the 3% AvKARE-related referral fee for two, consecutive twelve-month periods immediately following one another in time.

The Provision's two parts clearly relate to each other via the operative word "and." The AvKARE Provision explicitly states that it contains a first part *and* a second part. This Court must thus construe these two parts as consubstantial with each other. Doing so, the AvKARE Provision obligates Defendant to do the following—Defendant must pay Plaintiff a referral fee of 3% of the first $10 million in revenue, per year, that Defendant generates from selling products to AvKARE. This obligation begins when AvKARE first purchases products from Defendant, and extends for three, consecutive twelve-month periods.

B. Defendant's Interpretation of the Agreement is Unconvincing Because It Effectively Negates the Plain Language of the AvKARE Provision.

The Agreement's Term Provision states the following:

> Either party may terminate this Agreement upon thirty (30) days' written notice to the other part. Upon termination the provisions of this Agreement, the provisions hereof that are intended to survive termination or expiration of this Agreement shall so survive. Termination of this Agreement shall not terminate [Defendant's] obligation to make payments to [Plaintiff] with respect to Gross Sales of Products to Prospects to which [Defendant] had sold Products during the Term of this Agreement for the full twelve (12) months after the initial sale of Products to such Prospect. Any period after the end of the Term of this Agreement in which [Defendant] is still obligated to make payments to [Plaintiff] is hereinafter referred to as the 'Residual Period.'"

(ECF No. 21-2 at PageID 70.)

Defendant notes that the above Provision states that "if termination occurs during the Initial Period, [Defendant] still must pay [Plaintiff] a Referral Fee." (ECF No. 21-1 at PageID 65.) However, Defendant argues that it has *no such obligation* to pay Plaintiff referral fees "[i]f termination occurs during one of the Residual Periods." (*Id.*) Thus, according to Defendant's interpretation, the Agreement's Term Provision essentially trumps the AvKARE Provision by

limiting the period in which Defendant is obligated to pay Plaintiff a fee for referring AvKARE to Defendant. (*Id.*)

As previously discussed, Webster's defines "initial" as "of or relating to the beginning." *Initial*, WEBSTER'S *supra*. It further defines "residual" to mean "leaving a residue that remains effective for some time"—defining "residue" as "something that remains after a part is taken, separated, or designated." *Residual*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1983. After considering these operative words, the Term Provision appears to require Defendant to pay Plaintiff referral fees for a year after Defendant first sells a product to a new "prospect." (ECF No. 21-2 at PageID 70.) This obligation remains in effect even if Defendant terminates the Agreement before this year-long period expires. Thus, Defendant's obligation remains as a residue—"something that remains"—after termination until a full year after Defendant's "initial" sale.

Viewing the Term Provision in isolation, one might conclude that Defendant's interpretation of the Agreement should prevail. But Georgia law requires a court to construe a contract in a way that "will uphold a contract in whole and in every part." § 13-2-2(4). Thus, Defendant's interpretation cannot be correct because doing so would (1) negate the plain meaning the AVKare Provision account and (2) controvert Georgia's general principles of construction.

Though the Term Provision appears to contemplate obligations for a year after an initial sale, the specific AvKARE Provision clearly obligates Defendant to pay referral fees for three years after an initial sale. Moreover, the Term Provision also includes the following: "Upon termination the provisions of this Agreement, the provisions hereof that are intended to survive termination or expiration of this Agreement shall so survive." Thus, the Term Provision cannot, limit Defendant's obligation to pay Plaintiff referral fees under the AvKARE Provision because

doing so would negate the second part of the AvKARE Provision's arrangement—that which extends Defendant's obligation to pay Plaintiff referral fees for AvKARE-related purchases by an additional two years.

Furthermore, Defendant's interpretation of the Agreement controverts Georgia's general principles of construction by asking this Court to favor a general provision over a more specific one. Georgia's courts endorse the general principle that when a contract has a "specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language." *Mayor, etc., of Savannah v. Savannah Elect., etc., Co.*, 205 Ga. 429, 436–37 (1949); *see Schwartz v. Black*, 200 Ga. App. 735, 736 (1991).

Here, the Term Provision is general and the AvKARE Provision is more specific. Both provisions concern referral fees in return for customer sales. But, the AvKARE Provision concerns a specific customer—AvKARE—and that customer only. The Term Provision, on the other hand, concerns all customers, designating them all under the umbrella term "Prospects." The Defendant's interpretation of the Agreement, thus, cannot hold because it would require this court to favor an umbrella provision over the specific, more particularized, provisions. The Court declines to follow this path. *See Savannah Elec.*, 205 Ga. at 436–37; *Schwartz*, 200 Ga. App. at 736.

How, then, can this Court reconcile the two Provisions at issue in this case? Using OCGA § 13-2-2 as guidance, a plausible interpretation of these two Provisions is the following—the Term Provision is a default provision to apply when the parties fail to bargain for a specific referral-fee arrangement for a given client. In other words, the Term Provision insures that Plaintiff will always receive *at least* a year's worth of fees for referring prospects

to Defendant if that prospect ultimately purchases products from Defendant. However, the Term Provision does not apply when the parties bargain for a customized referral-fee arrangement, as they did for AvKARE. Therefore, Defendant's Motion for Judgment on the Pleadings is denied.

CONCLUSION

For the reasons noted above, after considering the plain language of the Agreement, this Court finds that Plaintiff's Complaint contains "sufficient factual matter" to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Engler v. Arnold*, 862 F.3d 571, 575 (6th Cir. 2017). Plaintiff's Complaint thus satisfies Rule 12(c). Hence, this Court DENIES Defendant's Motion for Judgment on the Pleadings.

SO ORDERED, this 13th day of April, 2018.

s/ Thomas L. Parker
THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE