UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

In re:
ZETIA (EZETIMIBE) ANTITRUST LITIGATION

MDL NO. 2:18md2836

THIS DOCUMENT RELATES TO:
2:18cv23; 2:18cv39;
and 2:18cv71

ORDER

This matter comes before the court on the Merck Defendants' ("Defendants")[1] Joint Motions to Dismiss All Claims, or in the Alternative to Stay All Proceedings, Pending Bilateral Arbitration Pursuant to FAA § 3 ("Motions") filed in each of the three direct purchaser actions on April 2, 2018, prior to consolidation in MDL No. 2836.[2] See Mots., No. 2:18cv23, ECF No. 92; 2:18cv39, ECF

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[1] The Merck Defendants consist of Merck & Co., Inc.; Merck Sharp & Dohme Corp.; Schering-Plough Corp.; Schering Corp.; and MSP Singapore Co. LLC.

[2] All three direct purchaser actions were subject to a Transfer Order by the Judicial Panel on Multidistrict Litigation ("JPML") consolidating these cases for pretrial purposes in this MDL proceeding. Transfer Order, ECF No. 1. As stated in Pretrial Order Number 4, the Motions and corresponding briefing are construed to apply to the Direct Purchaser Plaintiff ("DPP") consolidated complaint. Pretrial Order No. 4 at 2 n.1, ECF No. 106. The DPPs filed a consolidated complaint on September 5, 2018. Consolidated Compl., ECF No. 128.

No. 69; 2:18cv71, ECF No. 80.[3] On April 23, 2018, the Direct Purchaser Plaintiffs ("DPPs")[4] each filed an Opposition to the Merck Defendants' Motion to Dismiss or Stay All Proceedings ("Opposition"). No. 2:18cv23, ECF No. 102; 2:18cv39, ECF No. 78; 2:18cv71, ECF No. 89. On May 7, 2018, the Defendants filed a Reply Memorandum in Support of Joint Motion ("Reply"). No. 2:18cv23, ECF No. 118; 2:18cv39, ECF No. 94; 2:18cv71, ECF No. 105.

On August 10, 2018, the matter was referred to United States Magistrate Judge Douglas E. Miller pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b), to conduct necessary hearings, including the evidentiary hearing that was held on August 23, 2018, and to submit to the undersigned district judge proposed findings of fact, if applicable, and recommendations for the disposition of the Motions. Referral Order, ECF No. 85.

By copy of the Magistrate Judge's Report and Recommendation ("R&R"), filed on September 6, 2018, the parties were advised of their right to file written objections to the findings and recommendations made by the Magistrate Judge within fourteen (14)

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[3] Unless a case number is noted, the ECF numbers referenced in this Order correspond to the MDL docket.

[4] The three named Direct Purchaser Plaintiffs presently before the court are FWK Holdings, LLC, No. 2:18cv23; Cesar Castillo, Inc., No. 2:18cv39; and Rochester Drug Cooperative, Inc., No. 2:18cv71.

days from the date of the mailing of the R&R to the objecting party. R&R at 29-30, ECF No. 129. On September 20, 2018, the Defendants filed Objections to the R&R and a corresponding Memorandum in Support. ECF Nos. 131, 132. The DPPs filed a Response on October 4, 2018. ECF No. 145. The Defendants filed a Reply on October 10, 2018, ECF No. 152, which was not considered by the court as it was stricken from the record pursuant to the court's November 9, 2018 Order, ECF No. 193.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the court, having reviewed the record in its entirety, shall make a de novo determination of those portions of the R&R to which the Defendants have specifically objected. Fed. R. Civ. P. 72(b). The court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

I.

The Defendants first object to the finding in the R&R that the court, rather than the arbitrator, is to resolve the parties' dispute regarding the enforceability of the arbitration agreement. Objs. at 2. "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986). "The 'clear and unmistakable' standard is exacting, and the presence of

an expansive arbitration clause, without more, will not suffice." Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union, 665 F.3d 96, 102 (4th Cir. 2012).

The Defendants try to confuse the issue by repeatedly asserting that the delegation clause of the arbitration agreement reserves issues of "meaning, applicability, and validity" to the arbitrator. See, e.g., Objs. at 2, 5, 6, 7, 9, 10. On the contrary, the delegation clause only explicitly reserves the issues of the "scope, applicability, and meaning" of the arbitration agreement to the arbitrator. R&R at 5 (quoting Decl. Jennifer L. Greenblatt, Ex. A at 4, No. 2:18cv23, ECF No. 96-1). As discussed infra, the court agrees with the conclusion in the R&R that the arbitration agreement's meaning is unambiguous. See R&R at 24-25. Thus, because the DPPs' challenge to the enforceability of the arbitration agreement is not one regarding its scope, applicability, or meaning, the parties did not clearly and unmistakably delegate this challenge to the arbitrator.

The Defendants also assert that the incorporation of the AAA Rules is a clear and unmistakable delegation of issues regarding the scope and validity of the arbitration agreement to the arbitrator. Objs. at 10-14. For support, the Defendants rely on the Fourth Circuit's decision in Simply Wireless, Inc. v. T-Mobile US, Inc., 877 F.3d 522, 527-28 (4th Cir. 2017) (holding that "the explicit incorporation of JAMS Rules serves as 'clear and

unmistakable' evidence of the parties' intent to arbitrate arbitrability," and noting the same conclusion in other circuits that have considered the incorporation of "substantively identical" arbitral rules), petition for cert. filed, No. 17-1423 (Apr. 12, 2018). See Objs. at 13-14. However, the court agrees with the DPPs that the Defendants' reliance on Simply Wireless is misplaced. Resp. at 14-16, 16 n.80. The sister circuit cases cited in Simply Wireless, determining that the incorporation of the 2009 AAA Rules was a clear and unmistakable delegation of arbitrability issues to the arbitrator, are all distinguishable. See Simply Wireless, 877 F.3d at 527-28 (citing cases). Unlike the arbitration agreement in this case, none of the arbitration agreements in those cases contained an express delegation clause. See Resp. at 16 n.80.

Moreover, the court agrees with the R&R's application of the common law rule that "the specific controls the general when interpreting a contract." Trombetta v. Raymond James Fin. Servs., Inc., 907 A.2d 550, 560 (Pa. Super. Ct. 2006); Restatement (Second) of Contracts § 203 ("[S]pecific terms and exact terms are given greater weight than general language.").[5] Because the specific delegation of issues of "scope, applicability, and meaning"

[5] This common law rule generally applies throughout the United States, including in Pennsylvania. Two of the three of Merck's Authorized Distributorship Agreements contain a Pennsylvania choice-of-law clause. The third contains a Puerto Rico choice-of-law clause, but the parties do not argue that issue. See Objs. at 24 n.7; Resp. at 24 n.123.

controls over the general application of the default AAA Rules, the parties have not clearly and unmistakably delegated the issue of enforceability to the arbitrator. Therefore, it is for the court to decide whether the language in the arbitration agreement limiting recovery is an unambiguous waiver of statutory rights that renders the arbitration agreement unenforceable.

II.

Second, the Defendants object to the R&R's conclusion that the language in the arbitration agreement limiting recovery "in excess of compensatory damages" and requiring each side to pay its attorney's fees and costs is an unambiguous waiver of statutory rights that renders the arbitration agreement unenforceable.[6] Objs.

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[6] The arbitration clause, in its entirety, is as follows:

> Arbitration. Any controversy, claim or dispute ("Dispute") that may arise out of or be related to the performance, construction, interpretation or enforcement of this Agreement (including disputes as to the scope, applicability and meaning of this arbitration clause) shall be submitted to mandatory, binding, confidential arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq., under the auspices and Commercial Rules of the American Arbitration Association. The place of arbitration shall be Philadelphia, Pennsylvania. The decision of the arbitrator(s) shall be final and binding as to each Party. The arbitrator(s) is empowered to award equitable relief but not empowered to award damages in excess of compensatory damages and each Party hereby irrevocably waives any right to recover such damages with respect to any dispute within the scope of this clause. Each Party shall pay for all attorney fees and costs it incurs in connection with the arbitration. The costs of the

at 3-4. "[A]rbitration of [a] claim will not be compelled if the prospective litigant cannot effectively vindicate his statutory rights in the arbitral forum." In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 282 (4th Cir. 2007); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985) ("[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."). The court agrees with the analysis in the R&R of the plain language of the arbitration agreement, R&R at 20-26, and finds that the arbitration agreement's limitations on recovery constitute an unambiguous waiver of the DPPs' statutory right to recover treble damages and attorney's fees under the Clayton Act, 15 U.S.C. § 15(a). Thus, the court finds that this unambiguous prospective waiver of statutory remedies renders the parties' arbitration agreement unenforceable.

III.

Third, the Defendants object to the determination in the R&R that the language regarding damages and attorney's fees is not

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arbitration proceeding shall be shared equally between the Parties.

Decl. Jennifer L. Greenblatt, Ex. A at 4-5, No. 2:18cv23, ECF No. 96-1 (emphasis added).

severable from the arbitration agreement. Objs. at 4-5. An unenforceable contract provision may not be severed, if that provision is an essential part of the parties' agreement. See Huber v. Huber, 470 A.2d 1385, 1389-90 (1984) (citing Restatement (Second) of Contracts § 184). Here, the parties' agreement to arbitrate does not only elect a forum for dispute resolution, it also seeks to limit the Defendants' exposure to liability. See Decl. Jennifer L. Greenblatt, Ex. A at 4-5, No. 2:18cv23, ECF No. 96-1. The unenforceable provisions of the arbitration agreement, restricting any recovery to compensatory damages and requiring each party to bear their own costs and attorney's fees, plainly limit the Defendants' exposure to liability. Id.; see also R&R at 27-28, 27 n.10. Further, as the R&R observes, these provisions are undeniably essential to the parties' agreement to arbitrate, as the provisions in these three sentences account for basically half of the six-sentence arbitration agreement. R&R at 28.[7] Because the language at issue is an essential part of the arbitration agreement, the court concludes that the unenforceable provisions are not severable and declines to enforce the arbitration agreement.

[7] See supra note 6.

IV.

In addition to the three specific areas of objection addressed above, the Defendants generally disagree with all conclusions and take issue with the reasoning supporting the conclusions in the R&R. These objections are without merit.

The court, having examined all of the Defendants' Objections to the R&R, and having made de novo findings with respect thereto, hereby **OVERRULES** the Defendants' Objections, ECF No. 131. The court **ADOPTS AND APPROVES IN FULL** the findings and recommendations set forth in the Magistrate Judge's thorough and well-reasoned R&R, ECF No. 129, filed on September 6, 2018. Accordingly, the Defendants' Motions, No. 2:18cv23, ECF No. 92; 2:18cv39, ECF No. 69; 2:18cv71, ECF No. 80, are **DENIED**.

The Clerk is **DIRECTED** to send a copy of this Order to counsel for all parties.

IT IS SO ORDERED.

Rebecca Beach Smith

Rebecca Beach Smith
United States District Judge

December 6, 2018