IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| KOUROSH A. DASTGHEIB, | : | CIVIL ACTION |
| | : | |
| Plaintiff, | : | NO. 04-1283 |
| | : | |
| v. | : | |
| | : | |
| GENENTECH, INC., | : | |
| | : | |
| Defendant. | : | |

M E M O R A N D U M

EDUARDO C. ROBRENO, J. JANUARY 13, 2006

Before the Court is defendant's motion for summary judgment. The facts cited below are either undisputed or viewed in the light most favorable to plaintiff. For the reasons that follow, defendant's motion will be denied.

## I. BACKGROUND

Plaintiff, Dr. Kourosh A. Dastgheib ("plaintiff" or "Dastgheib"), is an ophthalmologist, currently practicing at the Family Eye Group in Lancaster, Pennsylvania. Defendant, Genetech, Inc. ("defendant" or "Genetech"), is a biotechnology company, incorporated in Delaware with its principal place of business in South San Francisco, California. From June 1994 until June 1995, plaintiff was an intern at the Graduate Hospital, Philadelphia, Pennsylvania. During the course of that year, plaintiff took a one-month leave of absence to research the impact of a protein, vascular endothelial growth factor ("VEGF"),

on age-related macular degeneration ("AMD"), a frequent cause of blindness. Plaintiff conducted this research at the Wilmer Eye Institute of the Johns Hopkins University, Baltimore, Maryland, and the National Eye Institute of the National Institutes of Health ("NIH"), Washington D.C. Plaintiff alleges that his research concluded that VEGF causes AMD. Plaintiff published an abstract describing his findings.

Meanwhile, Genetech had begun exploring the possible development of an anti-VEGF drug to treat AMD. Genetech, however, could not proceed until confirming that VEGF affected the disease.

Plaintiff alleges that in 1995, while doing work at Duke University Hospital, Durham, North Carolina, he was approached by Dr. Andrew Cuthbertson ("Dr. Cuthbertson"), a senior scientist with Genetech. Dr. Cuthbertson sought the human tissue samples and research materials used by plaintiff in reaching his conclusion that VEGF causes AMD. According to plaintiff, after rejecting the first two attempts by Dr. Cuthbertson, in December 1995, plaintiff entered into an oral agreement with Dr. Cuthbertson[1] over the telephone. Plaintiff would give the requested samples and research materials to

[1] Plaintiff asserts that Dr. Cuthbertson told him that he received permission from the CEO of Genetech to make this offer. Dr. Cuthbertson denies that he had any conversations with the CEO with respect to his authority to make an offer or that he told plaintiff that he had such conversations.

defendant. In exchange, defendant would give plaintiff recognition in the medical and scientific community for his discovery ("the recognition provision"), as well as one percent of gross sales of any product that would come out of plaintiff's research to treat macular degeneration or any other diseases of the eye. Defendant denies the existence of this oral agreement. Defendant contends that the arrangement with plaintiff did not involve financial compensation (unrelated to basic expenses).[2] There is no writing evidencing the terms of the alleged agreement.

Plaintiff sent Dr. Cuthbertson the requested tissue samples and research. Defendant, however, has not given plaintiff any portion of the gross revenues (if there have in fact been any gross revenues at this point, which is disputed). Nor has defendant given plaintiff express recognition for his discovery. Plaintiff now contends that as a result of his research, defendant has developed a product called "Lucentis," which treats a type of age-related macular degeneration. Lucentis is currently in FDA-sponsored phase III clinical trials for safety and effectiveness.

On March 24, 2004 plaintiff filed his initial

---

[2] Defendant did send plaintiff a check in the amount of $2,000. Neither party asserts that this amount represents a portion of gross sales. Rather, the amount was to cover plaintiff's "expenses."

complaint, which was subsequently amended on July 7, 2004. Plaintiff seeks declaratory relief (count I) and relief based on breach of contract (count II), anticipatory breach of contract (count III), unjust enrichment (count IV), fraud (count V), and North Carolina unfair trade practices (count VI).

Now before the Court is defendant's motion for summary judgment. In support of the motion for summary judgment, defendant makes five main arguments: (1) plaintiff's claims are time-barred; (2) the alleged oral agreement is not an enforceable contract; (3) plaintiff's unjust enrichment claim is incognizable; (4) plaintiff's fraud and unfair trade practices claims are unsubstantiated as there is no evidence of intent or reasonable reliance; and (5) plaintiff's claim for damages is not proper or ripe. For the following reasons, defendant's motion for summary judgment will be denied.

## II. DISCUSSION

### A. Legal Standard and Applicable Law

A court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" if its existence or non-existence

would affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. Id. at 248-49. In determining whether any genuine issues of material fact exist, all inferences must be drawn, and all doubts must be resolved, in favor of the non-moving party. Coregis Ins. Co. v. Baratta & Fenerty, Ltd., 264 F.3d 302, 305-06 (3d Cir. 2001).

As to choice of law, the parties do not dispute that North Carolina is the applicable state law for the purposes of this motion. Plaintiff, while not specifically addressing the choice-of-law question, invokes the substantive law of North Carolina by asserting a claim under North Carolina's unfair trade practices statute (count VI). Plaintiff also focuses on North Carolina law throughout his briefs. Defendant, for the purposes of this motion only, does not dispute the applicability of the substantive law of North Carolina. (Def.'s Mot. Summ. J. 20, 20 n.8.) Under these circumstances, the Court will apply North Carolina law in deciding the motion.

B. Statute of Limitations: Contract-Based Actions

Defendant argues that, even assuming the oral contract exists under the terms contended by plaintiff, the contract-based claims (counts I-IV) are time-barred under the applicable three-

year statute of limitations. See N.C. Gen. Stat. § 1-52(1) (2003). Under North Carolina law, contract-based actions accrue at the time of a breach of a material term. See Pearce v. N.C. State Highway Patrol Voluntary Pledge Comm., 312 S.E.2d 421, 450-51 (N.C. 1984); Long v. Long, 588 S.E.2d 1, 4 (N.C. App. Ct. 2003).

Under the oral agreement alleged by plaintiff, defendant was obligated to provide "express recognition" of plaintiff's work "in the scientific and medical community." Defendant contends that plaintiff was put on notice of the breach in 1997 through 2000 when Genetech scientists published numerous scientific articles relating to AMD, without even mentioning Dastgheib's contribution. According to defendant, the applicable statute of limitations has long expired.

In response, Dastgheib acknowledges that he was aware of these articles, but asserts that the oral contract required express recognition at the time Genetech actually developed an anti-VEGF drug to treat AMD. However, plaintiff contends these articles concerned only basic research, and thus, the statute of limitation was not triggered. Dastgheib contends that the contract was not breached until 2002 when Genetech began to publicize the successful results from its clinical trials and described an actual product. Dastgheib further contends that the

articles appeared in third-party scientific journals,[3] and because the scientific journals were not parties to the agreement between Dastgheib and Genetech, there was no breach which triggered the statute of limitations. Lastly, Dastgheib argues that the statements made in the articles did not constitute a material breach that triggered the limitations period as the express recognition provision was not "such an essential part of the bargain that the failure of it must be considered as destroying the entire contract." Wilson v. Wilson, 134 S.E.2d 240, 242 (N.C. 1964).

Defendant thus contends that the term "recognition in the medical and scientific community" requires recognition of plaintiff at the research stage. Defendant further contends that the term "recognition in the medical and scientific community" required recognition in third-party medical journals because the articles were co-authored by Genetech scientists.

Plaintiff, on the other hand, contends that the term "recognition in the medical and scientific community" required recognition of plaintiff only when defendant actually developed a treatment.[4] Plaintiff further contends that the term

---

[3] Some of the articles, while appearing in third-party journals, were co-authored by Genetech scientists.

[4] Defendant asserts in its reply brief that several articles that appeared in 1999 discuss "clinical trials" being administered by Genetech, which according to Genetech, are the equivalent to the 2002 publicity that plaintiff testified did put

"recognition in the medical and scientific community" required recognition only by Genetech, and recognition in publications in third-party journals, even if co-authored by Genetech scientists, was not called for under the agreement.

The Court concludes that the term "recognition in the medical and scientific community" is ambiguous, i.e., it is subject to at least two reasonable interpretations. Under North Carolina law, interpretation of ambiguous contractual terms are to be performed by the jury, not by the court. See, e.g., Renfro v. Richardson Sports Ltd., 616 S.E.2d 317, 332-33 (N.C. App. Ct. 2005) (quoting Holshouser v. Shaner Hotel Group Prop. One Ltd. P'ship, 518 S.E.2d 17, 23 (N.C. App. Ct. 1999)) ("When the language of a contract is plain and unambiguous then construction of the agreement is a matter of law for the court. However if the terms of the contract are ambiguous then . . . the question is one for the jury."); Barret Kays & Assoc., P.A. v. Colonial Bldg. Co., Inc. of Raleigh, 500 S.E.2d 108, 111 (N.C. Ct. App.

---

him on notice. However, the excerpts from the articles in defendant's reply brief indicate only that clinical trials were conducted, not that they were successful (and thus not suggesting that an actual treatment had been developed). In contrast, plaintiff's affidavit states that he was finally put on notice in 2002 when "Genetech began to publicize the successful results from its clinical trials" (and thus suggests development of an actual treatment). (Pl.'s Resp. Mot. Summ. J. Exh. 20) (emphasis added). The Court finds that, contrary to defendant's assertions, the 2002 disclosures, which plaintiff admits did put him on notice, are not equivalent to the 1999 articles, which plaintiff contends did not put him on notice.

1998) (interpretation of an ambiguous agreement is for the jury).

Likewise, whether defendant's conduct as alleged constitutes a breach of the agreement is a jury question. See Lake Mary Ltd. P'ship v. Johnston, 551 S.E.2d 546, 555 (N.C. App. Ct. 2001). Here, there is genuine issue of material fact with respect to the scope of defendant's contractual obligations. Thus, summary judgment will be denied on this basis.

C. Statute of Limitations: Tort Actions

Defendant argues that plaintiff's fraud (count V) and unfair trade practice (count VI) claims are barred under their respective statutes of limitations. See N.C. Gen. Stat. § 1-52(9) (fraud, three years); § 75-16.2 (unfair trade practices, four years). Defendant contends that plaintiff was put on notice that Genetech had no intention of complying with Dr. Cuthbertson's alleged promise more than four years prior to the 2004 complaint.

The cause of action for fraud "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." Id. § 1-52(9). The statute has been construed to provide that an action for fraud accrues and limitations periods begin running "when the aggrieved party discovers the facts constituting the fraud, or when, in the exercise of reasonable diligence, such facts should haven been discovered." Lynch v. Universal Life Church, 775 F.2d 576, 578

(4th Cir. 1985) (quoting Vail v. Vail, 63 S.E.2d 202, 207 (N.C. 1951)).

Defendant points to three circumstances that it believes, with the exercise of reasonable diligence, should have put plaintiff on notice of the fraudulent conduct. First, "years had passed without any indication from Genetech of the existence of a continuing relationship between Dastgheib and Genetech." Second, in 1997, plaintiff tried to contact Dr. Cuthbertson, who allegedly promised to "keep [him] updated with what's going on," but plaintiff learned that Dr. Cuthbertson left the company and moved to Australia. Third, as further described above, defendant contends that plaintiff was put on notice that his cause of action had accrued when the articles in scientific journals appeared without attribution to plaintiff.

Plaintiff responds that the fact that Dr. Cuthbertson was no longer with the company was of no moment as Dr. Cuthbertson asserted at the time of the agreement that he had the authority from the CEO of Genetech to enter into the agreement. Thus, because the agreement was authorized by the CEO of Genetech, the departure of Dr. Cuthbertson was not sufficient notice that Genetech would not honor its alleged promise. Additionally, plaintiff argues, the mere passage of time, in light of the ten to fifteen year timeline for drug development, did not put him on notice that the cause of action had accrued.

With respect to the publication of the articles without attribution, plaintiff contends that they did not serve as reasonable notice of Genetech's fraud because they were neither published by Genetech, nor do they mention that Genetech actually developed an anti-VEGF product that could be used to treat AMD.

Under North Carolina law,

> a court's determination of reasonable diligence may either be a matter of fact or a matter of law depending on the circumstances of the underlying case. Ordinarily, when fraud should be discovered in the exercise of reasonable diligence is a question of fact for the jury, particularly when the evidence is inconclusive or conflicting. However, where the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the fraud but failed to do so, the absence of reasonable diligence is a matter of law.

State Farm Fire & Cas. Co. v. Darsie, 589 S.E.2d 391, 397 (N.C. App. Ct. 2003) (citations omitted). In this case, the evidence is "inconclusive" and "conflicting" as to whether plaintiff should have discovered the fraud through the exercise of reasonable diligence. For example, a genuine issue of material fact exists as to whether Dr. Cuthbertson told plaintiff that he had authority from the CEO of Genetech to enter into the agreement. Thus, summary judgment will be denied on this basis.

D. Lack of Material Terms

Defendant asserts that the oral contract is unenforceable because the contract was not sufficiently definite.

Defendant points to the absence of the following terms: the definition of "gross sales" subject to royalty, the geographic and product scope of the agreement, the duration of the agreement, the exclusiveness of the agreement, and termination provisions.

Plaintiff responds that defendant is estopped from making this indefiniteness argument because it has accepted the benefits of the contract.[5] See, e.g., Brooks v. Hackney, 404 S.E.2d 854, 858 (N.C. 1991). Plaintiff further contends that, even if not estopped, the material terms of the agreement and Genetech's subsequent actions sufficiently indicate a meeting of the minds. Specifically, plaintiff argues that the few terms agreed upon by the parties were sufficient to constitute an enforceable contract because those terms satisfied the parties' objectives.

The Court finds that viewed in the light most favorable to plaintiff, the evidence proffered by both parties raises an issue of fact concerning the existence of a contract. "It is well-settled in North Carolina that a contract will not be held

[5] The Court finds this argument unpersuasive. At all times, defendant has denied the existence of the oral agreement. Defendant, however, has never denied that it received the research and samples from plaintiff, but only that it received the research and samples under a different context than that contended by plaintiff. Thus, to estop defendant from challenging the validity of the alleged agreement merely because it received the research and samples would be improper.

unenforceable because of uncertainty if the intent of the parties can be determined from the language used, construed with reference to the circumstances surrounding the making of the contract, and its terms reduced to a reasonable certainty." Brawley v. Brawley, 361 S.E.2d 759, 762 (N.C. App. Ct. 1987) (citing Goodyear v. Goodyear, 126 S.E.2d 113 (N.C. 1962); Childress v. Abeles, 84 S.E.2d 176 (N.C. 1954)).

Based upon plaintiff's deposition testimony, as corroborated by the subsequent actions by the parties, with all reasonable inferences drawn and doubts resolved in favor of plaintiff, the Court cannot conclude as a matter of l aw that the parties did not reach a sufficiently definite agreement. See Williams v. Jones, 366 S.E.2d 433, 438-39 (N.C. 1988) (holding that engineer's testimony, corroborated by testimony of accountant, raised jury question as to whether oral contract for financial consultant and investor to capitalize new corporation to sell engineer's technology contained terms sufficiently definite and certain to render contract enforceable). In these circumstances, whether a contract existed is a question for the jury. See Arndt v. First Union Nat'l Bank, 613 S.E.2d 274, 278-79 (N.C. App. Ct. 2005) (citing Goeckel v. Stokely, 73 S.E.2d 618, 620 (N.C. 1952)). Thus, summary judgment will be denied on this basis.

E. Authority to Enter into the Agreement

Defendant argues that the Court should grant summary judgment on plaintiff's contract-based claims because Dr. Cuthbertson was without authority to bind Genetech to the alleged agreement. Defendant contends that Dastgheib's assertion that Dr. Cuthbertson told him that he had received the approval of the CEO of Genetech is not sufficient, because even if accepted as true, apparent authority is only created by representations and actions of the principal (Genetech), not the agent (Dr. Cuthbertson).

"Apparent authority is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses." Id. (emphasis added) (citing Zimmerman v. Hogg & Allen, Prof'l Ass'n, 209 S.E.2d 795 (N.C. 1974)). "[T]he determination of a principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances conferred upon his agent." Id. (quoting Zimmerman, 209 S.E.2d at 799)).

Plaintiff has produced evidence that Genetech directed Dr. Cuthbertson to obtain research confirming that VEGF affected AMD. Plaintiff was thereafter approached on three occasions by Dr. Cuthbertson, a senior scientist with Genetech, who sought

plaintiff's research and tissue samples. On the first two occasions, plaintiff was not offered compensation and he refused Dr. Cuthbertson's requests. On the third occasion, Dr. Cuthbertson allegedly represented that he conferred with the CEO of Genetech and that he was authorized to offer compensation for the requested research and samples, including a payment to cover plaintiff's expenses in acquiring the materials. As promised by Dr. Cuthbertson, plaintiff soon received a Genetech business check for $2,000 to cover his expenses.[6] The authorization of this business check by Genetech suggests that Genetech, the principal, had approved of Dr. Cuthbertson's dealings with plaintiff, albeit the scope of such approval is in dispute. Plaintiff then sent the research and samples, which were subsequently used by Genetech in its studies.

The Court finds that the nature and extent of Dr. Cuthbertson's authority, in these circumstances, is a question of fact to be determined by the jury. Accordingly, summary judgment will be denied on this basis.

F. Ownership of the Materials

Defendant next asserts that the materials plaintiff sold to Genetech were never his to sell, and thus, plaintiff breached (1) the Uniform Commercial Code's implied warranty of

[6] Plaintiff has produced the payment request form submitted to Genetech for the payment to plaintiff. (Pl.'s Resp. Mot. Summ. J. Exh. 45.)

good title, U.C.C. § 2-312, N.C. Gen. Stat. § 25-2-312, and (2) the rules of the institutions at which he conducted his research. Defendant contends that the materials were the property of Johns Hopkins University and NIH, and plaintiff never received permission from the institutions to sell the materials. Thus, according to defendant, because plaintiff breached the warranty and the institution policies from the moment of delivery, Genetech is excused of any obligations.

Without deciding whether the U.C.C. applies to this "sale," the Court rejects defendant's argument. Given the evidence submitted, the Court cannot concluded as a matter of law that plaintiff was not authorized to sell the samples and the research. Dr. Green of Johns Hopkins testified that he gave plaintiff permission to take the materials without any restrictions (although plaintiff was not specifically given permission to sell the slides). (Green Dep. 33-34, 66-68.) Additionally, neither Johns Hopkins nor NIH has ever asserted an ownership interest in the materials in this litigation. In fact, NIH refused to allow its employees to be deposed in this litigation because "[t]he Government is not a party to this litigation and views this dispute as a private matter between the parties." (Pl.'s Resp. Mot. Summ. J. Exh. 66.) Lastly, defendant willingly accepted and exploited the research and samples obtained by plaintiff from the institutions without

questioning ownership interests and without concern for the non-proprietary goals of the public institutions, which it now seeks to protect. Thus, summary judgment will not be granted on these grounds.

G. Public Policy

Defendant next contends that the alleged contract is unenforceable for reasons of public policy. Defendant is concerned that the eye tissue samples were from the archives of a non-profit university, established and maintained to promote academic research and public health, yet were misappropriated by Dastgheib under the guise of conducting academic research. Defendant believes that Dastgheib's conduct "implicate[s] at least two firmly-established state policies: (1) the policy against permitting a seller to convey goods to which he has no title, and (2) the policy in favor of permitting publicly-minded research institutions to participate in financial opportunities derived from their resources."

Plaintiff responds that defendant is barred from advancing this argument because it too has accepted and financially exploited the samples and research obtained from the research institutions without concern for their interests. See Carolina Medicorp, Inc. v. Bd. of Tr. of State of N.C. Teachers' and State Employees, 456 S.E.2d 116, 120 (N.C. App. Ct. 1995) (quoting Redevelopment Comm'n of Greenville v. Hannaford, 222

S.E.2d 752, 754 (N.C. App. Ct. 1976)) ("Where one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it.") Additionally, defendant's public policy arguments flow from the premise that Dastgheib did not have the right to sell the materials, of which there is a genuine issue of material fact. See supra subsec. F. Lastly, plaintiff asserts that defendant does not have standing to champion the policies of Johns Hopkins or NIH.[7]

The Court finds that genuine issues of material fact exist with respect to defendant's knowledge of the potential improprieties surrounding plaintiff's ownership rights of the materials at the time it accepted and exploited those materials. Thus, summary judgment will be denied on this basis.

H. The Unjust Enrichment Claim

Defendant contends that plaintiff's unjust enrichment claim should be (1) dismissed altogether because plaintiff is precluded from asserting an equitable remedy where he has come to the court with "unclean hands,"[8] or (2) limited to the fair

---

[7] The Court does not address plaintiff's argument with respect to defendant's standing to assert the legal rights and interests of John Hopkins and NIH.

[8] As discussed above, whether plaintiff had a right to or title in the samples or methodologies raises a genuine issue of material fact, and thus summary judgment will not be granted as

market value of the services or materials provided. As to the second point, defendant argues that "restitution is to be based on the fair market value of the services or materials provided, not the value of any benefit the defendant may ultimately derive from them." Defendant believes that plaintiff's request for "all the benefits unjustly achieved," i.e., the entire net present value of Lucentis, exceeds the available remedy under an unjust enrichment claim. Defendant argues, at most, plaintiff is entitled to the fair market value of the tissue samples and methodologies, as well as the reasonable value of his time and expenses in procuring them.

Plaintiff responds that defendant has confused a claim for quantum meruit, whose object is to compensate the plaintiff for loss, with unjust enrichment, whose object is to eliminate a defendant's unjust benefit. See Booher v. Frue, 358 S.E.2d 127, 129 (N.C. App. Ct. 1987) (citing Dan B. Dobbs, Law of Remedies § 4.1 (1973)) (Restitution "is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep. A plaintiff may receive a windfall in some cases, but this is acceptable in order to avoid any unjust enrichment on the defendant's part."). Accordingly, plaintiff argues that under North Carolina law, in the appropriate circumstances, disgorgement and profits are available

---

to the unjust enrichment claim in its entirety.

in a claim for unjust enrichment.

The Court finds that it appears that plaintiff's remedies under the unjust enrichment theory are not necessarily limited to the fair market value of the tissue samples and methodologies and the reasonable value of his time and expenses in procuring them. Rather, under North Carolina, in certain circumstances, defendant's profits may be available in a claim for unjust enrichment.[9] See WMC, Inc. v. Weaver, 602 S.E.2d 706, 711-12 (N.C. App. Ct. 2004) (citing Dobbs, Law of Remedies § 4.1(4) (2d ed. 1993)) (damages awarded under a theory of unjust enrichment may be measured by the increased value of the assets unlawfully in the hands of defendant or by the profits earned by defendant). The amount of restitution to which plaintiff is entitled, if any, is ultimately a question of fact for a jury to decide. Thus, summary judgment will be denied on this basis.

I. Fraud and Unfair Trade Practices

Defendant argues that plaintiff's claims for relief

[9] In defendant's reply brief, it cited several cases that have stated, without discussion, that the damages available for claims of unjust enrichment is "the reasonable value of the goods and services to the defendant." See, e.g., Booe v. Shadrick, 369 S.E.2d 554, 556 (N.C. 1988). However, in these cases, plaintiffs were not seeking profits, nor do the cases suggest that a plaintiff is necessarily limited to damages equivalent to the reasonable value of goods and services. In fact, the cases are more consistent with plaintiff's position than that of defendant. In Booe, the amount of damages was not based on fair market value as defendant contends is the rule, but on how valuable the goods and services are "to the defendant." This remedy could encompass potential profits.

under North Carolina's unfair trade practices statute, N.C. Gen. Stat. § 75-1.1, and common-law fraud fail as a matter of law because (1) plaintiff has offered no evidence of fraudulent intent, and (2) plaintiff could not reasonably rely on a materially indefinite promise.[10]

Plaintiff correctly responds that neither fraudulent intent nor reasonable reliance are elements of an unfair trade practice under section 75-1.1. "In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) a defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." Excel Staffing Serv., Inc. v. HP Reidsville, Inc., 616 S.E.2d 349, 355 (N.C. App. Ct. 2005) (quoting Howerton v. Arai Helmet, Ltd., 597 S.E.2d 674, 693 (N.C. 2004)). The "intent of the actor is irrelevant."[11] Id. (quoting Marshall v. Miller, 276 S.E.2d 397,

---

[10] As described above, the Court cannot conclude as a matter of law that the agreement was materially indefinite. See supra subsec. D.

[11] Defendant points out in its reply that UTPA claims based on breach of promise, rather than a misrepresentation of past or existing fact, requires a showing of "substantial aggravating circumstances," Branch Banking & Trust Co. v. Thompson, 418 S.E.2d 694, 700 (N.C. App. Ct. 1992), which includes a showing that "the promisor had no intent to perform when he made the promise," Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond, Charlotte Branch, 80 F.3d 895, 903 (4th Cir. 1996). This argument, while calling the explicit rule that intent is not required in a UTPA claim into question, is of no consequence here. First, plaintiff has established genuine issues of

403 (1981)); see also Lyons P'ship., L.P. v. Morris Costumes, Inc., 243 F.3d 789, 805 (4th Cir. 2001); Leake v. Sunbelt Ltd. of Raleigh, 377 S.E.2d 285, 289 (N.C. 1989). Likewise, reasonable reliance is not an element of a violation of the unfair trade practices statue so long as the unfair or deceptive act proximately causes plaintiff's injury. See Gilbane, 80 F.3d at 903; Cullen v. Valley Forge Life Ins. Co., 589 S.E.2d 423, 431 (N.C. App. Ct. 2003).

With respect to the common-law fraud claim, a reasonable jury could find that plaintiff has established fraudulent intent and reasonable reliance. For example, defendant disregarded its own internal policies in obtaining the materials, including its failure to reduce the agreement to writing and issuing payment to plaintiff and not the research institutions. Thus, summary judgment will be denied on these claims.

J. Damages

Defendant argues that plaintiff should be barred from seeking a damages remedy based on royalties from projected future sales of Lucentis. Defendant asserts that it has yet to, and may

---

material fact as to whether Dr. Cuthbertson or Genetech intended on carrying out the alleged promise, which preclude summary judgment. Second, plaintiff's assertion in his second amended complaint that Dr. Cuthbertson misrepresented Genetech's authorization is a misrepresentation of a past or existing fact, which does not required a showing of intent.

never, succeed in marketing Lucentis, and thus, the claim for royalties is too speculative. Defendant further asserts that Lucentis is only in clinical trials and "that Lucentis will ever reach the market is far from assured." Thus, defendant argues that plaintiff's remedies should be limited to declaratory and injunctive relief. Additionally, defendant asserts that, even if the Court finds that projected future sales are not too speculative, plaintiff is only entitled to a declaration that the alleged contract entitles him to the royalties when and if Genetech brings Lucentis to the market, not a lump sum award of damages based on the present value of future royalties on potential, unrealized sales as sought by plaintiff.

Plaintiff responds that defendant's argument fails to address plaintiff's claims for unjust enrichment and fraud, which are not limited by the contractual terms and legal principles applicable to contracts. Additionally, plaintiff raises the doctrine of anticipatory repudiation to support his argument that a lump sum recovery representing projected future sales is ripe for adjudication, even though Lucentis has not yet been marketed. See Kearns v. Gay Apparel Corp., 232 F. Supp. 475, 478 (M.D.N.C. 1964) ("The total breach of a contract partly performed creates a cause of action in favor of the aggrieved party, entitling him to recover all damages sustained by the breach which include past, present and prospective damages, reasonably flowing from such

breach fairly within contemplation of the parties and capable of being ascertained with a reasonable degree of certainty.").[12] Lastly, plaintiff asserts that it has provided sufficient evidence from which a jury could calculate damages to a "reasonable certainty." See, e.g., State Prop., LLC v. Ray, 574 S.E.2d 180, 188 (N.C. App. Ct. 2002); Largent v. Acuff, 317 S.E.2d 111, 114 (N.C. App. Ct. 1984).

Plaintiff contends that Genetech has already made $46.6 million from licensing Lucentis, that Genetech has set the present value of Lucentis in its internal analysis (SnaPS reports) in excess of $1 billion and projected sales of more than $1 billion per year, and that the rights to Lucentis could be sold right now. Plaintiff has presented the expert testimony of Joseph Gemini, who has identified specific damages due plaintiff based on Genetech's own internal analysis of the value of Lucentis and the money received to date on the Lucentis project.

The Court will not restrict plaintiff's claim for damages at this time. These types of calculations on future projected sales are submitted to juries routinely in patent cases. See, e.g., Interactive Pictures Corp. v. Infinite Pictures, Inc., 274 F.3d 1371, 1384 (Fed. Cir. 2001); TWM Mfg.

---

[12] Plaintiff asserts that defendant became liable for anticipatory repudiation on November 19, 2002 upon receipt of a letter from Genetech senior patent counsel, Gary H. Loeb, notifying plaintiff that Genetech would not honor the alleged contract.

Co. v. Dura Corp., 789 F.2d 895, 899 (Fed. Cir. 1986); cf. Mosley & Mosley Builders, Inc. v. Landin Ltd., 389 S.E.2d 576, 583 (N.C. App. Ct. 1990) (awarding damages for loss of prospective profits on breach of contract claim). If defendant questions the reliability Mr. Gemini's opinion, then they may challenge the admissibility of his opinion at the appropriate time. See State Prop., 574 S.E.2d at 188 (quoting Horne v. Roadway Package Sys. Inc., 497 S.E.2d 436, 438 (N.C. App. Ct. 1998)) ("Challenges to the quality of the data upon which an expert witness based his opinions go to the weight to be accorded that opinion, but are not generally grounds for exclusion."). The Court cannot conclude as a matter of law that plaintiff will not be able to prove damages with a reasonable degree of certainty. Thus, the Court will not disturb plaintiff's claim for damages.

## III. CONCLUSION

Defendant's motion for summary judgment will be denied in its entirety. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| KOUROSH A. DASTGHEIB, | : | CIVIL ACTION |
| | : | |
| Plaintiff, | : | NO. 04-1283 |
| | : | |
| v. | : | |
| | : | |
| GENENTECH, INC., | : | |
| | : | |
| Defendant. | : | |

**O R D E R**

**AND NOW**, this **13th** day of **January, 2006,** it is hereby **ORDERED** that defendant's motion for summary judgment (doc. no. 50) is **DENIED**.

**IT IS FURTHER ORDERED** that plaintiff's motion to strike new evidence, new arguments, inadmissible evidence, and improper factual statements in Genetech's summary judgment reply (doc. no. 60) is **DENIED** as moot.

**AND IT IS SO ORDERED.**

**EDUARDO C. ROBRENO, J.**