

AMERICAN ARBITRATION ASSOCIATION

SYNOGEN MANAGEMENT GROUP,
INC.,

and

NEXTGEN BIOLOGICS, INC.,

Claimants,

v.

ISE PROFESSIONAL TESTING &
CONSULTING SERVICES, INC.,

Respondent.

Case No. 01-19-0002-3786

FINAL AWARD

1. The undersigned Arbitrator was designated by Claimant Synogen Management Group, Inc. (**Synogen**) and Respondent ISE Professional Testing & Consulting Services Inc. (**ISE**) in accordance with their arbitration agreement contained in Section 13 of the License Agreement between ISE and Synogen executed October 16, 2014 and effective September 23, 2014 (**License Agreement**) (Ex.1¹). Subsequently, Claimant NextGen Biologics, Inc (**NextGen**) was added as a Claimant in light of ISE's acknowledgement of NextGen as a sublicensee to Synogen (See Ex.1 at App. A), the agreement that sublicensees survive termination of the License Agreement (Ex.1 at §2.2.1) and the agreement to arbitrate contained in Section 13 of the License Agreement between Synogen and NextGen effective October 15, 2014 (**Sublicense Agreement**) (Ex.2). See Order No. 6 in this matter.

2. Both the License Agreement and the Sublicense Agreement (the **Agreements**) are governed by the laws of the State of Florida (Ex. 1 at §16.1; Ex.2

¹ "Ex." refers to the exhibits submitted at the hearing.

at §16.1). The Federal Arbitration Act applies and the arbitration was conducted pursuant to the Commercial Arbitration Rules (**Rules**) of the American Arbitration Association (**AAA**). Synogen, NextGen and ISE are referred to herein as the **Parties**.

3. Having been duly sworn, the undersigned Arbitrator heard the proofs and allegations of the Parties by, among other things, taking evidence at a hearing conducted on October 23, 2019 at the offices of Veritext-Orange Legal at 633 East Colonial Drive, Orlando, Florida 32803². Claimants were represented by Janelly Crespo, John Huh, and Scott Vernick of DLA Piper. Jamie Grooms, Chairman of Synogen, and Jonelle Toothman, CEO of Nextgen, appeared on behalf of the Claimant companies. Respondent did not appear at the hearing venue either through counsel or through a corporate representative. Respondent was initially represented by Nelson Mullins, which filed a Notice of Change of Representation on September 25, 2019 in which it withdrew from this matter and designated Ryanne Early (**Early**), CEO of Respondent as ISE's contact. Ex. 17. Post-hearing, the firm of Beusse Wolter Sanks & Maire PLLC appeared for Respondent and filed ISE's Post-Hearing Brief on November 15, 2019.

4. The evidence received at the hearing is reflected in the hearing transcript. Claimants moved the following exhibits into the record: Exs. 1-86; and Exs. A (Decl. Michael Lodato), B (Decl. Statement of Jamie Grooms), C (Decl. of Jonelle Toothman) and D (Decl. of John Huh). On October 29, 2019, Claimants submitted a supplement to the Huh Decl. as Ex. E. Claimants' exhibits were accepted into evidence. ISE did not propound evidentiary objections to any of Claimants' exhibits as part of the pre-hearing process (See Order No. 2 ¶10) or at the hearing.

² By agreement, this matter was to be heard at the offices of Veritext located at 37 North Orange Avenue, Suite 500, Orlando, Florida. On October 21, 2019, it was learned that a representative of Erika Birg of Nelson Mullins, former counsel to ISE, contacted Veritext, and, without notice to the AAA, the arbitrator, counsel for Claimants or Claimants, cancelled the arrangements for the hearing. See Hearing Exhibit A, Declaration of Michael Lodato. Veritext provided a nearby location and timely notice was provided by AAA to the Parties via email and Federal Express. Respondent received both notices and in fact communicated with the AAA via that same email address the day of the hearing. See Post-Hearing Brief of Claimants at Ex. 2 and 4.

5. After Claimants presented the Witness Statements of Jamie Grooms and Jonelle Toothman as the direct examinations of these witnesses as permitted under Order No. 2 ¶9(a), the Arbitrator asked questions of Claimants' witnesses. Respondent ISE waived its opportunity to examine Claimants' witnesses and proffered no evidence at the hearing. Claimants noted their intent to question Respondent's representative and principal, RYANNE EARLY, who did not appear. It is acknowledged that Ms. Early submitted material to the AAA (and the same was transmitted to the arbitrator) via email the day of the hearing.

6. The Parties were permitted to submit post-hearing briefing, proposed awards and updated fee and costs petitions by Friday, November 15, 2019, as provided in Order No. 2 (Ex.22). Claimants did so. Respondent, through counsel, submitted a post-hearing brief. The undersigned held the record open over the weekend until Monday, November 18, 2019 to permit Respondent to supply copies of cases and the hearing transcript cited in Respondent's brief. Following receipt of these materials on November 18, 2019 the record was formally closed.

7. The undersigned is cognizant of the provisions of AAA Rule 31. Rule 31 does not permit an award to be made solely on the default of a party. The undersigned, in making this decision on the merits, has reviewed and considered the entire record, including everything submitted by the Parties whether or not timely supplied and regardless of whether it was supplied in accordance with the orders entered in this matter or other procedures applicable to this matter. In addition, in the interest of fairness, the undersigned deferred consideration of sanctions until the Parties' positions were fully presented and the record was closed. See, e.g. AAA Rule 23 and 28.

8. Based on the evidence, proofs and materials submitted by the Parties, the Arbitrator makes the following findings and conclusions and enters the following FINAL AWARD.

The Parties

9. Claimant Synogen is a Florida corporation, with a focus in the tech, med-tech and biotech industries.

10. Respondent ISE is a Florida corporation controlled by its principal and President, Ryanne Early. ISE holds a number of patent applications relating to bio-regenerative growth technology, specific to non-mammalian tissue.

11. Claimant Nextgen is a Delaware corporation, with its principal place of business in Florida. As described below, Nextgen was created with the agreement of ISE for the purpose of holding the rights to certain of ISE's bio-regenerative growth technologies and to develop and bring to market derivative products for human healthcare applications.

The Dispute

12. This dispute relates to allegations of breaches of the Agreements in connection with Synogen's and Nextgen's efforts to utilize ISE's patents and know-how.

Synogen-ISE License Agreement

13. Following months of negotiations (See, e.g. Ex. 61, 43 and 75), on October 16, 2014, Synogen and ISE executed a License Agreement, made effective September 23, 2014 (**License Agreement**) (Ex. 1).

14. Under the License Agreement, ISE provided Synogen an exclusive license to certain patent rights defined therein (**Licensed Patents**) and a non-exclusive license to certain trade secrets defined as "unpatented trade secret process technology, know-how and related proprietary information solely as applied to or used for decellurization of urodele derived tissue." (**Licensed Know-How**). See Ex.1 at §§ 1.7, 1.9, 2.1, 5.2.1, 5.2.2. The Licensed Know-How was also described as "Controlled by ISE." Id. at §1.7. **Control** was defined as intellectual property "that a Party...owns ... and has the ability to grant access, license or sublicense in or to ..." Id. at § 1.3.

15. In exchange for these rights, Synogen agreed, among other things, to:
(a) use "commercially reasonable efforts to pursue the development of the technology

embodied in the Licensed Patents”; (b) cover “past, present, and future costs, fees, and expenses . . . related to the preparation, filing, prosecution, issuance and maintenance of” the licensed technology; (c) pay to ISE fifty percent (50%) “of all consideration received for [any] Sublicense of the Licensed Patents;” and, (d) “prosecute and maintain the Licensed Patents using counsel of [Synogen’s] choice. Ex. 1 at §§ 3.1, 4.1, 4.2 and 9.1.

16. ISE agreed, and the License Agreement specifically contemplated, that Synogen would form Nextgen and sublicense Synogen’s rights to it³.

17. The License Agreement provided for ISE to provide consulting services when reasonably requested to do so. Ex. 1 at § 5.1. The License Agreement further contemplated that ISE would promptly transfer Licensed Know-How upon the request of Synogen (Ex.1 at §5.2.1) and Synogen and ISE would “promptly establish a commercially viable manufacturing procedure which utilizes the Licensed Know-How.” Ex.1 at § 5.2.2.

18. Further, Licensors ISE agreed that it “shall...cooperate in all respects with Licensee’s efforts in preparing and prosecuting the Licensed Patents,” including submitting declarations when requested and making available needed information and specimens, among other things. Ex. 1 §9.3.

19. The License Agreement could be terminated unilaterally without cause by Claimant Synogen on 45 days written notice to ISE. Ex. 1 at §11.2. On the other hand, Respondent ISE’s right to terminate was limited to providing thirty days’ notice of termination following Synogen’s failure to cure after 45 days’ notice past due reports or payments or material breach of the Agreement. Ex. 1 at § 11.3. Section 11.3.2 dealing with material breach further provided that ISE’s right to terminate

³ See Ex. 1 at § 1.12 (defining Sublicense); § 2.2 (“[Synogen] may grant, in its sole discretion, written Sublicenses to third parties which are not Excluded Sublicensees”); § 2.2.1 (Sublicensees granted the right “at the Sublicensee’s option” to survive termination of the prime Synogen-ISE licenses in the event of a dispute between Synogen and ISE); § 3.1 (“[Synogen] agrees and warrants to... pursue the development of the technology . . . principally through sublicensing the Licensed Patents”); §§ 5.2.1, 5.2.2 (contemplating that the Licensed Know-How will be shared with Synogen’s Sublicensees); and, Appendix A (Synogen to “form[] Sublicensee . . . Nextgen” and “enter into a sublicense with Nextgen.”).

would be automatically stayed in the event that, during the cure period, Synogen initiated the License Agreement's dispute resolution process.

20. Synogen and ISE agreed to arbitrate all disputes exclusively pursuant to the Rules of the AAA (Ex. 1 §13) and to require each sublicensee to do the same. Ex. 1 §13.1. The License Agreement also required that any compulsory counterclaim as defined by Fed. R. Civ. Proc. 13 be submitted in the arbitration proceeding or be "forever barred." Ex. 1 § 13.1.

Synogen-Nextgen Sublicense Agreement

21. In accordance with the License Agreement, Synogen entered a Sublicense Agreement with Nextgen, executed January 26, 2015 and made effective October 14, 2014 (**Sublicense Agreement**). Ex. 2.

22. The terms of the License and Sublicense Agreements make clear that Nextgen is a third party beneficiary of the License Agreement, as discussed in more detail below.

23. The License Agreement explicitly provided that sublicensees are provided a right to survive termination of the prime license between Synogen and ISE, "at the Sublicensee's option." Ex. 1 § 2.2.1. Thus, even if the Synogen-ISE License Agreement was properly terminated as to the primary licensee (i.e. Synogen), Nextgen's rights under the licenses "remain valid." Ex. 3.

24. Nextgen became the primary financial beneficiary of the Agreements, retaining 97 to 98.5 percent of Net Sales obtained from any product developed from the Licensed Patents. Ex. 2 § 4.4. Synogen and ISE were to receive only 0.75 to 1.5 percent of Net Sales related to the commercialization of the licensed technologies. Id.; Ex. 1 § 4.2.

25. Synogen and ISE, in drafting and executing the prime License Agreement, intended the sublicensee, specifically identified as Nextgen, to act as the primary point in development and commercialization efforts on any product. In other words, ISE and Synogen clearly intended that Nextgen, as a company, would use the Licensed Patent and Know-How to develop, advance the bio-regenerative growth technology, and ultimately manufacture the resulting products.

The Parties' Claims

26. Synogen and Nextgen Claims. Claimant Synogen asserted four claims in the Amended Demand (9/16/2019). It alleged that ISE breached the License Agreement by failing to transfer the Know-How (Claim 1) and refusing to cooperate in the patent prosecution (Claim 2); it also alleged that ISE breached the covenant of good faith and fair dealing (Claim 3) and violated Florida's Unfair Trade Practices Act (Claim 4). Claimant Nextgen alleged one claim, that ISE breached the License Agreement by failing to recognize that Nextgen's rights of termination survival under the License and Sublicense Agreements (Claim 5).

27. ISE's Counterclaims. In its Amended Answer and Counterclaim (9/16/2019), ISE asserted ten counterclaims against Synogen. ISE requested a declaratory judgment that it properly terminated the License Agreement (Claim 1), that Section 5.2 of the License Agreement (regarding the transfer of Licensed Know-How) was unenforceable (Claim 2) and that ISE is not obligated to enter into a direct license with Nextgen (Claim 3). ISE also asserted claims for breach of contract against Synogen as to Section 9.1 of the License Agreement (regarding patent prosecution) (Claim 4) and failure to pay ISE for hours of consulting time (Claim 5). Further, ISE alleged that Synogen breached its NDA with ISE (Claim 6); and, sought specific performance by Synogen in the form of an accounting (Claim 7), as well as injunctive relief and damages arising from the failure to allow an accounting (Claim 8). Finally, ISE sought recovery of its attorneys' fees (Claim 9) and the disqualification of DLA Piper (Claim 10). No counterclaims were asserted against Nextgen.

Summary of Events

28. Synogen Develops the Product. Following execution of the License and Sublicense Agreements, Synogen, with Nextgen, over a period of some years, developed the intended bio-regenerative growth product, now referred to as NeoMatriX®.

29. Synogen and Nextgen funded the project, carrying the more than \$7.5 million in costs associated with the development and commercialization of the product. Grooms Decl. ¶ 26; Toothman Decl. ¶ 17.

30. During this period, Synogen paid ISE 50 percent of all consideration received from Sublicensees. Grooms Decl. ¶ 29.

31. More than \$1.7 million of Claimants' costs were paid to Seed Biotech Inc. (**Seed**), a company closely related to ISE. Ryanne Early, the principal and President at ISE, is also a principal and the CEO of Seed. Ex. 31; Toothman Decl. ¶ 18.; Ex. 61 (Early described as CSO (Chief Science Officer) and Founder of Seed).

32. ISE Consulting Work. Although Ms. Early did not make always it clear when she was operating on behalf of SEED as opposed to ISE⁴, the record contains no invoices issued by ISE to Synogen or NextGen that purport to relate to the performance of any consulting work by ISE as described in Section 5.1 of the License Agreement.

33. FDA approval. By October 2018, NeoMatriX received 510(k) clearance from the U.S. Food and Drug Administration ("FDA"), the certification required to take a medical device to market. Ex. 4.

34. Patent Prosecution. In addition to developing the product, Synogen continued to pursue the patent rights and, in January 2019, received notice from the USPTO of impending issuance of U.S. patent rights. Ex. 5.

35. ISE fails to transfer the Know-How or to cooperate in developing a manufacturing process. However, ISE failed to transfer the Know-How, even though it was obligated to do so "promptly" after the execution of the License Agreement (See Ex. 1 § 5.2.1) and even though Synogen and Nextgen repeatedly requested that the Licensed Know-How that ISE claimed to own and control, be transferred. See e.g., Exs. 6, 7, 51 (at Exhibit 22) and 62; Grooms Decl ¶ 38. 34.

⁴ Ms. Early conducted ISE business from a Seed ("@seedbiotech.com") account and her signature block for her personal email account refers to her positions at both entities. See Ex. 41. Ms. Early also made payments for ISE and Seed from her personal bank account and directed payments owed to ISE under the License Agreement be instead made to Seed. See Ex. 42.

36. For example, on October 22, 2018, Mr. Grooms communicated directly with ISE President, RYANNE EARLY, to remind her that the Know-How had yet to be provided to Synogen and Nextgen:

I decided to send this note to keep us on track. As mutually agreed we have a compliance issue as it relates to the manufacturing black box requirement in our agreement. We have agreed to sit down to discuss a solution to this issue. My goal is to use our timeline within the agreement (45 days) to resolve so we have an agreement that works for all parties.

Ex. 8.

37. ISE did not meaningfully respond to this request, sent over four years after the effective date of the License Agreement, September 23, 2014. Ex. 1 §5.2.1.

38. ISE now contends that it should be excused from performing this obligation because there was no meeting of the minds as to the meaning of Licensed Know-How. See, e.g., Respondent's Post-Hearing Brief at p.7. This, however, was not cited by ISE as one of its "excuses" during the four plus years Synogen was developing the product. See Grooms Decl. ¶¶35-37.

39. ISE fails to assist in developing the manufacturing process. The License Agreement also obligated ISE to work with Synogen to "promptly establish a commercially viable manufacturing procedure which utilizes the Licensed Know-How for making decellularized Urodele extracellular matrix tissue, which manufacturing procedure will include a black box aspect...." Ex. 1 at § 5.2.2. Like the obligation to transfer the Know-How, there was no evidence that ISE performed this obligation. Grooms Decl. ¶ 33; Toothman Decl. ¶ 22.

40. ISE attempts to terminate Synogen. Instead, on November 7, 2018, Erika Birg of Nelson Mullins⁵, counsel for ISE, sent a letter to Synogen, suggesting, for the first time in the over four years the License Agreement had been in place, that Synogen was in breach of the License Agreement. Ex. 9. Grooms Decl. ¶ 43.

⁵ Nelson Mullins and Ms. Birg appear to have represented ISE for many years, even prior to the execution of the License Agreement. See Ex. 43 (5-8-2014 email exchange with Ms. Birg regarding negotiations of the License Agreement.)

41. There followed correspondence between Gerard Bencen, counsel for Synogen, and Ms. Birg, counsel for ISE, including a letter from Mr. Bencen dated December 22, 2018, responding in detail to ISE's allegations of Synogen's breach. Ex. 59.

42. Over three months later, by letter dated April 5, 2019 (Ex. 10), ISE, through counsel, purported to terminate the License Agreement, claiming that the "period to cure these breaches expired on December 22, 2018." Ex. 10. Exhibit 10, however, made no reference to Mr. Bencen's detailed December 22, 2018 letter of cure (Ex. 59). Further, the record does not reflect that ISE ever provided Synogen with the additional thirty-day notice required by the License Agreement. Ex. 1 at ¶ 11.3.

43. Synogen disputed the purported April 5 termination (Ex. 10) by letter dated May 2, 2019 (Ex. 11) and pointed out, among other things, that ISE had no right to unilaterally terminate and that the April 5 termination was not effective because ISE failed to provide the additional thirty day notice required under the License Agreement.

44. Continued performance by Synogen and Nextgen. Following the exchange of letters regarding the purported termination, Synogen and Nextgen continued to perform their obligations under the Agreements. In May 2019, Synogen retained additional counsel at DLA Piper to assist in the prosecution of the Licensed Patents, as permitted and required by § 9.1 of the License Agreement. Grooms Decl. ¶ 56.

45. Patent Prosecution Continues. In conflict with its April 5, 2019 letter purporting to terminate Synogen, ISE, in June 2019, cooperated with Synogen and supplied Synogen's attorneys at DLA Piper with a Limited Power of Attorney to continue the patent work. See Exs. 37-38. However, by July 10, 2019, the relationship between Synogen and ISE deteriorated; ISE attempted to revoke the Limited Power of Attorney (Ex. 39) and continued to refuse to transfer the Licensed Know-How, preventing Synogen and Nextgen from moving forward with the manufacturing, marketing and sale of NeoMatrix.

46. Synogen initiates this arbitration. By letter dated July 15, 2019 and in

accordance with the License Agreement, Synogen notified ISE of its intent to initiate this arbitration. Ex. 57. The demand was filed by ISE and received by AAA on July 31, 2019. As noted, Nextgen was later added as a Claimant and ISE asserted ten counterclaims against Synogen.

47. Post-arbitration notice conduct. Immediately after receipt of notice of intent to initiate this arbitration, on July 16, 2019, Ms. Birg, writing on behalf of ISE, stated ISE's intent to revoke the Limited Power of Attorney provided to DLA Piper and demanded that Synogen cease prosecution of the patents, citing ISE's purported termination of the License Agreement. See Ex. 40.

48. Later, on Friday, October 4, 2019, ISE's CEO, Ryanne Early threatened to take actions against the patents at issue if Claimants continued to arbitrate this matter. See Grooms Decl. ¶¶ 57-60; the materials submitted by Claimants in support of the October 7 Motion for Interim Relief; and, Order No. 11 (Ex. 49). Thereafter, consistent with ISE's threat, DLA Piper received notice from the USPTO that ISE had formally revoked DLA Piper's power of attorney, and shifted power of attorney at the USPTO to Ms. Birg's firm⁶, Nelson Mullins. *Id.*

49. Following the issuance of interim relief (Order No. 11, Ex. 49), on October 11, 2019, Synogen requested ISE cooperate in amending the power of attorney at the USPTO back to Synogen's chosen counsel, DLA Piper. See Ex. 80. ISE did not respond.

ISE Materially Breached the Agreements and Damaged Claimants

50. ISE breached the License Agreement in several material respects: it breached Section 5.2.1 of the License Agreement by failing to promptly transfer to Synogen the trade secret process, i.e. the Licensed Know-How; it breached Section 5.2.2 of the License Agreement by failing to cooperate in the prompt development of a manufacturing process; and, it breached Section 9.3 of the License Agreement by failing to cooperate with Synogen in the pursuit of the patents. This conduct also breached the licenses ISE granted in Section 2 and, by affirmatively interfering with

⁶ Ms. Birg and Nelson Mullins withdrew from this arbitration by notice on September 25, 2019. Ex.17.

Synogen's patent prosecution and ability to develop a manufacturing process, violated Sections 5 and 9 of the License Agreement. ISE also breached Section 2.2.1 of the License Agreement when it refused to acknowledge that Synogen's sublicensee, Nextgen, has an option to survive the termination of the License Agreement.

51. To establish a breach of contract, a party must establish three elements: "(1) a valid contract, (2) a material breach, and (3) damages." *Havens v. Coast Florida, P.A.*, 117 So.3d 1179, 1181 (Fla. Dist. Ct. App. 2013). Here, the evidence clearly establishes all three elements as to ISE.

52. The License Agreement is a valid, enforceable contract that controls the Synogen-ISE relationship, ISE's arguments about Licensed Know-How, notwithstanding.

53. Meeting of the Minds. The evidence does not support ISE's argument that there was no meeting of the minds as to what the Know-How entailed. ISE's decellularization process, its Know-How, was its trade secret, which it represented it "controlled." Following the execution of the Agreement, ISE described its secret process as an algorithm (Transcript pp. 23-26) and confirmed that it would work with Synogen on the development of a manufacturing process based on this algorithm.

54. In his letter of December 22, 2018, Mr. Bencen, counsel for Synogen discussed ISE's proposal for the disclosure under License Agreement §5.2.2 so that the work on the manufacturing process could proceed. See Ex. 59 pp. 1-2. Mr. Bencen confirmed that the process was a known one when he stated: "Ms. Early/ISE/SEED is and has been already for some time decellularizing axolotl tissue to provide tissue according to Synogen's/Nextgen's specifications/ requirements." *Id.*

55. Every word used in a contract does not have to appear in the definitions section of an agreement to permit a meeting of the minds to occur, particularly where, as here, it is clear that the parties understood what was being discussed. *See Corp. Fin. Inc. v. Principal Life Ins. Co.*, 461 F. Supp. 1274, 2006 US Dist. Lexis 84542 (SD Fla 2006) at p. 17 (headnote 18) (use of language "willing to offer" and "contingent on premium requirements being satisfied" not fatal to finding meeting of minds as to agreement to pay bonus), cited by Respondent in its Post-Hearing Brief.

56. Here, ISE represented that it owned a method for decellularization of urodele derived tissue (Ex.1 §1.3) and agreed it would disclose it to Synogen, after the License Agreement was executed and effective. Ex. 1 § 5.2. ISE/SEED purported to use the Licensed Know-How to generate the very tissue that was provided to Synogen/Nextgen for submission to the FDA, leading to FDA approval. Ex. 59 (12/22/2018 Bencen letter at CLMTS006801 (p.4, footnote 1)). The Know-How is real and known. ISE has simply chosen not to provide it to Claimants as it is required to do.

57. It is undisputed that ISE never transferred the Know-How and never cooperated in connection with the development of a commercially viable manufacturing process and in so doing breached the Agreement.

58. ISE also breached the License Agreement by interfering with and refusing to cooperate in the patent prosecution efforts. Ex. 1 § 9.3 permits Synogen to utilize “counsel of its choice to prosecute the Licensed Patents” and requires that ISE “cooperate in all respects with [Synogen]’s efforts in preparing and prosecuting the Licensed Patents, and . . . have its employees appear before patent offices and submit declarations when requested.” ISE is in breach of this obligation having revoked the limited power of attorney for DLA Piper and otherwise refusing to support Synogen’s patent prosecution work.

59. ISE also breached Section 2.2.1 of the Synogen-ISE License Agreement which (Ex. 1) accords sublicensees, including Nextgen, the option to survive the termination of the prime Synogen-ISE License Agreement “at the Sublicensee’s option.”

60. Synogen and ISE expressly and unambiguously intended § 2.2.1 as a protection to sublicensees against disputes under the prime Synogen-ISE license. Grooms Decl. ¶¶ 19-20; See Ex. 3.

61. Following ISE’s attempt to terminate the License Agreement, on June 27, 2019, Nextgen sent ISE written notice that if “the License Agreement between Synogen and ISE [is] deemed terminated, now or in the future, Nextgen intends, and reserves its right, to exercise its option under Section 2.2.1 of the License Agreement

and survive such termination.” Ex. 12. ISE responded on July 16, 2019, refusing to acknowledge Nextgen’s right of survival. Ex. 13.

62. Nextgen is a Third Party Beneficiary. Nextgen, in addition to Synogen, has standing to complain about ISE’s breaches of the License Agreement, including ISE’s refusal to acknowledge Nextgen’s rights of survival, because Nextgen is plainly an intended third party beneficiary under the License Agreement.

63. “[T]o establish an action for breach of a third party beneficiary contract, [a party] must allege and prove the following four elements (1) existence of a contract; (2) the clear or manifest intent of the contracting parties that the contract primarily and directly benefit the third party; (3) breach of the contract by a contracting party; and (4) damages to the third party resulting from the breach.” *Foundation Health v. Westside EKG Assoc.*, 944 So.2d 188, 194-95 (Fla. 2006) (internal quotation marks omitted).

64. A party is an intended beneficiary if the parties to the contract express, or the contract itself expresses, an intent to primarily and directly benefit the third party. *See Dingle v. Dellinger*, 134 So. 3d 484, 488 (Fla. Dist. Ct. App. 2014).

65. The License Agreement instructs Synogen to sublicense the Licensed Patents and Know-How to a third party and contains multiple provisions confirming that Nextgen is an intended beneficiary. Ex. 1 §§ 2.2 (“[Synogen] may grant, in its sole discretion, written Sublicenses to third parties which are not Excluded Sublicensees”); § 2.2.1 (gives Sublicensees the right, “at the Sublicensee’s option,” to survive termination of the prime Synogen-ISE licenses in the event of a dispute between Synogen and ISE); § 5.2.1 (contemplates that the Licensed Know-How will be shared with Synogen’s Sublicensees).

66. Significantly here, the License Agreement specifically contemplated that Nextgen would be that third party Sublicensee. Ex.1 at Appendix A (providing explicitly for the formation and licensing of Nextgen).

67. Moreover, from the start, ISE, through Ms. Early, was well aware of Nextgen’s intended central role in the development and commercialization of the technology and that Nextgen was relying on the Licensed Patents and Know-How to

perform that role. ISE was informed prior to the execution of the License Agreement, in May 2014, that Nextgen, not Synogen, would be responsible for covering “all past debt and all past and future fees that exist in association with preparation of the [Licensed Patents’] applications.” Ex. 43. As a result, at the time of contracting, ISE was aware that Nextgen would be responsible for much of the financial consideration owed to ISE under the License Agreement. *Id.*; Ex. 1 § 4.1.

68. Consistent with this, under the License Agreement and Sublicense Agreement, Nextgen was a financial beneficiary retaining 97 to 98.5 percent of Net Sales from any product developed from the Licensed Patents. Ex. 2 ¶ 12. By contrast, under the agreements, Synogen and ISE each receive only 0.75 to 1.5 percent of Net Sales related to the commercialization of the licensed technologies. *Id.*; Ex. 1 § 4.2.

69. In sum, Nextgen was to be formed with the specific purpose of holding the rights under the License Agreement and acting as the key point in the development and commercialization of the technologies. Grooms Decl. ¶ 8, 23, 65. As contemplated, Nextgen took the lead relating to development and commercialization of the product efforts, with no complaint from ISE, while Synogen took the lead on patent prosecution with Nextgen covering the costs. Grooms Decl. ¶ 25.

70. ISE was fully aware Nextgen would bear significant costs payable to ISE under the License Agreement and, through Ms. Early, was intimately involved in the development and commercialization efforts surrounding NeoMatriX. Toothman Decl. ¶¶ 10-17.

71. For these reasons, Nextgen is a third party beneficiary of the License Agreement and, in refusing to acknowledge Nextgen’s option to survive the termination of the License Agreement, ISE breached its obligations to both Synogen and Nextgen under both Agreements.

72. Materiality. ISE’s breaches are plainly material as they go to the heart of the Agreements. *MDS (Canada) Inc. v. Rad Source Techs., Inc.*, 720 F.3d 833, 849 (11th Cir. 2013) (a material breach of contract under Florida law is material where that party’s nonperformance “go[es] to the essence of the contract.”); *Faro Techs., Inc. v. Brainlab, U.S.A, Inc.*, 12-177, 2013 WL 12361030, at *2 (M.D. Fla. Jan. 16, 2013)

(material breach has occurred when “an injured party has sustained a substantial injury due to [that] breach.”).

73. Synogen’s and Nexgen’s rights to exercise the license rights granted with respect to the Licensed Patents and Licensed Know-How are at the center of the Agreements (*See Rad Source Techs., Inc.*, 720 F.3d at 849) as is ISE’s obligation to cooperate in the patent prosecution efforts and to meaningfully participate in the development of a manufacturing process for product developed by Synogen and Nextgen. ISE’s refusal to participate in these efforts and its effort to terminate Synogen and eliminate its Sublicensee Nextgen after both spent over four years and millions of dollars developing a product, which could be commercialized, frustrates the very purpose of the Agreements.

74. Harm and Damages. As a result of ISE’s refusal to deliver the promised decellularization process, NeoMatriX has yet to be taken to market, and the significant effort, time and capital expended to produce an FDA-approved product, is now at risk. Grooms Decl. ¶ 49; Toothman Decl. ¶ 28.

75. ISE’s breaches delayed the launch of NeoMatriX by at least fourteen months, causing significant harm to Synogen and Nextgen. For calendar year 2019, NeoMatrix sales were reasonably expected to be upwards of \$1 million. Ex. 32; Toothman Decl. ¶¶ 28-30.

76. Further, because the decellularization process must substantially conform to the process promised by ISE in order to comply with the already FDA cleared 510(k) Claimants may be required to amend and resubmit substantial regulatory materials to again gain clearance by the FDA. The reasonable forecast for costs of resubmission is \$549,000. Ex. 14; Toothman Decl. ¶¶ 33-35.

77. Claimants began to take steps to mitigate their damages and to develop an alternative manufacturing process, when ISE would not provide the Licensed Know-How or participate in the development of the process. To date, Nextgen has expended \$653,683.95 towards the creation of an efficient and commercially viable manufacturing process to replace the one promised by ISE to Synogen. Toothman Decl. ¶ 32-34. These steps by Nextgen were reasonable and appropriate to attempt

to mitigate the harm caused by ISE's decision to essentially walk away from its obligations under the License Agreement. In addition, Nextgen has spent \$214,000.00 in marketing costs that were wasted due to the delays arising from ISE's breaches. Toothman Decl. ¶ 31.

78. Synogen also alleges that ISE's breaches placed it in breach of its obligations to Nextgen, such that it is required to forfeit 7.9 percent of its shares in Nextgen, valued at \$3.1 million. Grooms Decl. ¶ 52. However, Synogen has pointed to no provision of the Sublicense Agreement between Synogen and Nextgen (Ex. 2) that mandates this financial consequence and has provided no documentation of its actual occurrence. Accordingly, I do not address these damages here.

79. ISE's conduct continues to damage Claimants, meaning that Synogen and Nextgen may be entitled to additional damages, including recovery of the stock forfeit described above, if ISE fails to cure its breaches and comply with its contractual obligations going forward.

Respondent ISE's Defenses Have No Basis

80. ISE's defense is essentially that Synogen breached their Agreement, ISE properly terminated it and, therefore, ISE cannot itself have breached the License Agreement. ISE's defenses appear to be based on the same arguments as its Counterclaims.

81. Although Respondent's Counterclaims fail for failure to pay the AAA fees and are barred due to ISE's sanctionable conduct, as discussed below, Respondent, citing Rule 57, quite correctly notes in its Post-Hearing Brief that dismissal of a counterclaim for failure to pay fees does not preclude that party from providing a defense to the claims asserted by the party initiating the arbitration.

82. Effect of Agreement's Bar to Claims Not Asserted. Although I address the defenses on the merits, I note that Respondent, in its Post-Hearing Brief did not discuss the term of the Licensing Agreement which imposes a preclusive effect where a party fails to file and submit compulsory claims as defined in the Federal Rules of Civil Procedure. Ex. 1 at § 13.4 ("Any claim not submitted or filed as required is forever barred"). This language is of importance because Respondent's

Counterclaims are compulsory and the facts underlying those Counterclaims are essentially the same facts cited by Respondent to defend itself against Claimants' claims, i.e., that Respondent was excused from performing because Claimants allegedly breached their agreements and the Agreements were properly terminated. ISE's failure to pursue the Counterclaims, whether for failure to pay fees or otherwise, results in a bar to its arguments and the facts it alleges underlie those claims due to this term of the License Agreement; and, there is a consequential preclusive effect on ISE's use of those arguments and facts as defenses to the Claims asserted here.

83. Nonetheless, I examined the merits of the defenses and, even though I considered everything submitted by Respondent in this matter, even if submitted in violation of the rules applicable to this matter or the orders entered during this proceeding, Respondent's arguments and proofs as to its defenses fail as a matter of law and fact.

84. ISE's attempt to terminate the License Agreement over four years into its term, after Synogen and its sublicensees invested upwards of \$7.5 million into the development of the technology, was not well-founded and was clearly a bad faith effort to avoid the bargain it struck years before.

85. ISE's November 7, 2018 letter of "breach" came only after Synogen's repeated and formal requests for the transfer of the Know-How and was the first time, four years into the term of the License Agreement, that ISE raised any of these supposed breaches. Grooms Decl. ¶ 43. Each of the items listed by ISE were curable and, separately or collectively, were not sufficiently material to warrant the termination of the License Agreement.

86. Cure. Mr. Bencen's December 22, 2018 letter (Ex. 59) makes clear that Synogen cured any deficiencies. Only uncured delinquencies in reporting or payment obligations and material breaches trigger ISE's ability to terminate. Ex. 1 §11. It is notable that Ms. Birg's April 5, 2019 letter (Ex. 10) purporting to terminate the License Agreement, merely lists the same sections recited in the initial notice of breach letter (Ex. 9) dated November 7, 2018 and broadly declares that no cure has

been effected, omitting any explanation of how that can be in light of Mr. Bencen's detailed letter of December 22, 2018. Ex. 59.

87. A close examination of ISE's contentions, including its more refined version of those contentions contained in its September 16, 2019 Amended Answer and Counterclaim (Ex. 29), eliminates any doubt about the lack of any genuine basis for ISE's termination efforts.

88. Payment Reports. ISE claimed that Synogen breached Section 2.2.3 of the License Agreement because Synogen failed to produce reports documenting payments it had received from its Sublicensees. Ex. 29. But, in making this argument, ISE misstated the License Agreement. It provides:

[Synogen] . . . agrees to forward to [ISE] annually a copy of all reports **received** by [Synogen] from its Sublicensees pertinent to payments received under said Sublicense.

License Agrmt. (Ex. 1), § 2.2.3 (emphasis added).

89. Synogen was only required to provide ISE the reports that it received from its sublicensees related to payments it obtained under a sublicense. Synogen never received such reports from Nextgen and the License Agreement provides no obligation on Synogen to manufacture, or demand, such reports. Toothman Decl. ¶ 41. Accordingly, Section 2.2.3 was not breached by Synogen.

90. Insurance. ISE also claimed that Synogen breached Section 14.2 of the License Agreement. Section 14.2 of the License Agreement provides:

Prior to the first use of a Product in a human and thereafter annually between January 1 and January 31 of each year, [Synogen] will present evidence to [ISE] that [insurance] coverage is being maintained with [ISE] listed as an additional insured.

License Agrmt. (Ex. 1), § 14.2(ii) (emphasis added).

91. At this point, NeoMatriX has not yet been taken to market and it is unclear that any obligation to list ISE as an additional insured or submit proof of insurance has been triggered. Consequently, Section 14.2 has not been breached. Toothman Decl. ¶ 42. In addition, breach of the provision, under the circumstances

here, with no indication of harm or damage, would not be material.

92. Development Reports. ISE also claimed Synogen breached § 3.2 regarding Development Reports documenting the efforts taken to develop the Licensed Patents. Mr. Bencen's letter addresses this and a cure was effected to the extent there was any breach. Ex. 59. Nowhere does ISE explain how this remained uncured.

93. In sum, ISE's defenses fail. ISE's supposed termination is ineffective and the License Agreement remains in full force and effect both as to Synogen and Nextgen.

ISE's Counterclaims are Barred

94. Failure to pay AAA filing fees. ISE's ten Counterclaims are subject to dismissal for failure to pay the required AAA filing fees. Rule 57(b) (where one party refuses to comply with payment obligations, the Arbitrator has authority to "limit[that] party's ability to assert or pursue their claim[s]."). By letter dated October 8, 2019, the AAA notified ISE that its Counterclaims would "be returned [and] not presented to the arbitrator" if ISE continued to refuse to pay its fees by October 15. Ex. 68. ISE did not respond to this notice and failed to pay the required fees. Accordingly, ISE's Counterclaims are dismissed for failure to pay fees.

Relief Granted to Synogen and Nextgen

95. Injunctive Relief. Synogen and Nextgen are entitled to permanent injunctive relief as to ISE in the following respects: (a) ISE is to be enjoined from violating Section 5 of the License Agreement by, in accordance with § 5.2.1 of the License Agreement, transferring to Synogen within 10 business days from the entry of this Final Award, the Licensed Know-How and all information owned, controlled or otherwise in ISE's possession that may be relevant to the development of a commercially viable manufacturing process contemplated by the License Agreement; ISE is directed to otherwise cooperate with Synogen and Nextgen in the development of this process; and, (b) ISE is prohibited from violating the patent prosecution provisions of the License Agreement by being prohibited from directly or indirectly, interfering with or impeding Synogen's prosecution and preparation of the Licensed

Patents through counsel of Synogen's choice, and is directed to cooperate with Synogen and its counsel, including executing any documents deemed necessary by Synogen to enable its continued work on the patent prosecution and preparation.

96. Declaratory Relief. Synogen and Nextgen are further entitled to declaratory relief as to Nextgen's rights should ISE attempt to terminate the License Agreement in future. To be entitled to declaratory relief, a party must show [it] is in doubt as to some right or status and that [it] is entitled to have such doubt removed." *Palumbo v. Moore*, 777 So.2d 1177, 1178 (Fla. Dist. Ct. App. 2001); *Orange Cnty. v. Expedia, Inc.*, 985 So.2d 622, 627 (Fla. Dist. Ct. App. 2008); *Orange Cnty. v. Expedia, Inc.*, 985 So.2d 622, 627 (Fla. Dist. Ct. App. 2008). Here, Nextgen clearly has the right at its sole option to survive the termination of the License Agreement and to enter a direct license with ISE substantially the same terms contained in the License Agreement. Ex. 1 § 2.2.1.

97. Damages. ISE has the opportunity to avoid exposure to additional damages which Claimants will incur should ISE continue to breach the Agreements and ignore the injunctive relief granted here. At present, Nextgen is entitled to recover the total of \$867,683.95 from ISE, representing the costs incurred to date in the attempt to develop a manufacturing process and the marketing expenses that were wasted because ISE breached, leaving the Claimants with no product to market.

98. Attorneys' Fees and Costs and Sanctions. The undersigned has the ability to award costs and fees to the prevailing party in this matter under AAA Rules. Under Rule 47(d), "[t]he award of the arbitrator[] may include: . . . (ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement." R47(d) (emphasis added). Here, all parties including ISE (Ex. 29 at p. 15) expressly requested attorneys' fees. In recognition of this fact, Order No. 2 acknowledges that a Final Award "may include an award of attorneys' fees and costs." Ex. 18 at ¶ 14. See also Ex. 78 (the Parties' jointly proposed scheduling order submitted September 10, 2019).

99. The undersigned is also authorized to award fees and costs as a sanction. See Rule 58 (a) ("the arbitrator may, upon a party's request, order appropriate

sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator.”); *Marshall & Co. v. Duke*, 114 F.3d 188, 190 (11th Cir. 1997) (“[A]rbitrators have the power to award attorney’s fees pursuant to the “bad faith” exception to the American Rule.”); *id* (“[E]very judicial and quasi-judicial body has the right to award attorneys’ fees under the common law bad faith exception to the American Rule.”); *First Auto. Serv. Corp. v. First Colonial Ins. Co.*, No. 07-682, 2010 WL 2431889, at *5 (M.D. Fla. Jul. 16, 2010) (applying *Marshall* to an arbitration governed by the Federal Arbitration Act); Rule 23 (“[I]n the case of willful non-compliance with any order issued by the arbitrator, [the arbitrator has authority to] draw[] adverse inferences, exclud[e] evidence and other submissions,” among other sanctions. Here, Claimants have requested sanctions repeatedly, including the bar of ISE’s counterclaims. Ex. 24.

100. To date, the undersigned, in deferring ruling on those requests until the record was fully closed, has taken to the extreme the requirement of Rule 58(b) that the party that may be subject to a sanction be given the opportunity to respond prior to any determination regarding the sanctions application. While frustrating for Claimants, it has been only fair to provide ISE with repeated and explicit opportunities to explain itself and to defer a decision on sanctions until the record is closed.

101. Unfortunately, ISE ignored the multiple requests to provide its position and instead disengaged from much of this Arbitration. The following summarizes the facts and circumstances warranting sanctions.

102. Breach of the agreement to arbitrate. ISE breached its agreement to arbitrate and ignored the AAA Rules applicable thereto. After insisting on a schedule even more abbreviated than the Parties’ agreement required, ISE, both before and after the withdrawal of its counsel, ignored the expedited schedule established in part to work around Ms. Early’s alleged unavailability. Regrettably, ISE has made clear throughout this proceeding that its schedule and convenience is the only one that matters and that it will ignore the rules and rulings of this process.

103. Failure to participate in scheduled mediation. This matter was set for

mediation September 23, 2019. That morning, ISE, through counsel, postponed the mediation on the grounds that Ms. Early was “too ill to travel”. Ex. 16. Later that day, ISE’s counsel informed the mediator and the AAA, but not opposing counsel or the undersigned, that the “clients reached a settlement agreement” by phone. Ex. 16. After the AAA contacted opposing counsel, it was learned that the matter was not in fact settled. Ex. 16.

104. Failure to meet deadlines. That same day, September 23, 2019, ISE failed to file any response to the Amended Demand filed by Claimants. The undersigned communicated with ISE’s counsel over the next few days in an effort to determine the reasons for the lack of a responsive document without success. See, e.g, Ex. 64.

105. Failure to Engage Following Withdrawal of ISE Counsel. On September 25, 2019, ISE’s counsel filed a Notice of Change of Representation, effectively withdrawing from representing ISE in this proceeding. Ex. 17. At that time, Ms. Early was designated as the contact for ISE. But, Ms. Early never meaningfully engaged in this proceeding and essentially withdrew ISE from it.

106. Revocation of participation in direct exchange. Given the approaching deadlines in this matter, including production of documents on September 26 (pursuant to expedited rulings on objections), a status call on September 27 and the hearing itself set to begin October 23, the undersigned reached out to Ms. Early to be sure she had been informed of all deadlines as well as the consequences of not meeting them. See Ex. 21. ISE did not respond to this inquiry; instead, on September 27, 2019, ISE revoked its earlier agreement to the direct exchange program, cutting off direct communication between the arbitrator and the Parties. This meant that, in this fast moving case, all communications required an additional step and had to be directed through the AAA. See Order No. 8 (Ex. 22) at ¶4.

107. No request for postponement. Since late September, Ms. Early has occasionally and selectively communicated with the AAA on behalf of ISE making it clear that ISE received and understood communications from AAA and the undersigned, including that the hearing would be convened consistent with the

schedule ISE agreed to in this matter. ISE at no time requested postponement of the hearing or explained its failure to meet deadlines, despite receiving multiple communications about the consequences of ignoring them. See Order No. 11 (Ex. 49) ¶ 4 (“the AAA has reached out to Ms. Early . . . requesting a response as to Respondent’s intent with regard to this Arbitration. Respondent has ignored these requests.”), ¶ 5 (“Respondent has ignored deadlines in this matter and refused to engage with Claimants in the exchanges required to make this arbitration process work.”), *id.* (outlining Respondent’s disregard for the Orders and deadlines in this Arbitration).

108. ISE’s Failure to Produce Documents. ISE submitted 14 document requests to Claimants in this Arbitration. The undersigned ruled on the objections by Claimants and directed Claimants to produce documents. See Order No. 7 (Ex. 47). During a very short time frame, Claimants reviewed roughly 25,000 documents, and produced nearly 19,000 pages of responsive, non-privileged materials. In contrast, ISE chose to ignore its similar deadline and produced nothing.

109. ISE ignores opportunities to cure. Although ISE never requested an extension to produce, it was provided essentially with three deadlines: the original deadline in Order No. 2 (Ex. 18); a second deadline to cure the failure to produce, established following Claimants’ motion to compel ISE’s production (with the note that ISE’s continued failure to adhere to deadlines may lead to sanctions) in Order No. 8 (Ex. 22) ¶6; and, a final deadline to produce established in Order No. 9 (Ex.25) in connection with Claimants’ attempt to use subpoenas and additional requests to obtain documents. Ms. Early actively avoided service of the subpoenas issued from this Arbitration. See Ex. 72. ISE, SEED and Ms. Early produced nothing.

110. Knowledge of Sanctions. ISE was repeatedly notified that it could not ignore deadlines without risking sanctions. See, e.g., Order No. 8 (Ex. 22) at ¶ 7; Order No. 9 (Ex. 25) ¶¶ 3-4; Order No. 10 (Ex. 48) ¶8 (“Respondent’s conduct at this point appears to be willful non-compliance with the spirit and letter of this proceeding in violation of Respondent’s obligations. I reserve the right to impose sanctions based on this conduct.”).

111. Yet, ISE refused to participate in telephonic status conferences, never requested any extension to permit it to engage new counsel, never offered any explanation for its repeated missed deadlines, and never explained its abrupt shift from aggressively pursuing its position to almost complete disengagement overnight.

112. Then, on October 4, 2019, prior to the hearing set in this matter, Respondent threatened to take actions against the patents at issue and demanded that Claimants cease and disengage from the arbitration of this matter, requiring the issuance of an order granting interim relief to Claimants. Order No. 11 (Ex. 49).⁷

113. In sum, ISE essentially disregarded all deadlines after September 23, 2019, repeatedly ignored the content of Orders as well as messages from the Arbitrator, many of which were intended to ensure that ISE was treated fairly. ISE was aware of the need to respond as well as its responsibilities in this proceeding.

114. Now that the record in this matter is closed, I conclude that ISE's continued misconduct in this proceeding was in bad faith and warrants a full award of Claimants' attorneys' fees and costs to Claimants. This conduct appears to be an extension of ISE's effort to avoid the consequences of its contractual obligations without just cause after the Claimants here performed theirs.

115. Claimants have filed documentation demonstrating that their fees and costs amount to \$903,116.93, consisting of \$844,051.25 in attorneys' fees and non-AAA costs and fees of \$ 59,065.73. Exs. D and E. ISE has offered no evidence to dispute the reasonableness of these amounts and I therefore conclude that the amounts are reasonable, particularly given the accelerated nature of this matter and the conduct of ISE requiring Claimants to file multiple protective motions as well as to defend its counsel from a motion to disqualify.

116. In addition, based on the egregious nature of ISE's conduct in this proceeding, and, in the alternative, I further conclude that ISE's Counterclaims should be barred and otherwise dismissed with prejudice, as a sanction. See also Ex. 1 at § 13.4 which bars compulsory counterclaims regardless of whether they are

⁷ According to Respondent's Post-Hearing Brief, the court confirmed this Interim Award (Order no. 11 (Ex.49)) on November 15, 2019.

asserted. To hold otherwise would condone ISE's unabashed disrespect for its contract obligations, this process and the rule of law.

Disposition of Claims

117. Synogen and Nextgen Claims. In summary, I conclude that ISE breached the License Agreement by failing to transfer the Know-How (Claim 1) and refusing to cooperate in the patent prosecution (Claim 2). I also conclude that ISE breached the covenant of good faith and fair dealing (Claim 3). I do not conclude that ISE violated Florida's Unfair Trade Practices Act (Claim 4) as this was not argued by Claimants in their Hearing Briefs. I further conclude that ISE breached the License Agreement by failing to recognize Nextgen's rights of termination survival under the License and Sublicense Agreements (Claim 5). Synogen and Nextgen are entitled to declaratory and permanent injunctive relief outlined above and damages as well as to be reimbursed their attorneys' fees and costs associated with this proceeding.

118. ISE's Counterclaims. ISE's Counterclaims are barred due to its failure to pay its filing fees and the preclusive effect of the License Agreement for failure to pursue those claims here. These claims are also barred as a sanction. To be clear, ISE is not entitled to the declaratory judgments it requested, i.e. that it properly terminated the License Agreement (Claim 1), that Section 5.2 of the License Agreement (regarding the transfer of Licensed Know-How) was unenforceable (Claim 2) or that ISE is not obligated to enter into a direct license with Nextgen (Claim 3). Synogen did not breach Section 9.1 of the License Agreement (regarding patent prosecution) (Claim 4) or the provision relating to payment to ISE for consulting time (Claim 5). Further, I do not find that Synogen breached its NDA with ISE (Claim 6). Next, ISE is not entitled to specific performance by Synogen in the form of an accounting (Claim 7) or injunctive relief and is not entitled to recover damages from Synogen relating to the alleged failure to allow an accounting (Claim 8). ISE is not entitled to recover its attorneys' fees (Claim 9). ISE's claim regarding the disqualification of DLA Piper (Claim 10) was separately dealt with in Order No. 3,

which order is incorporated herein by reference to the extent necessary to make this Final Award complete.

For the foregoing reasons the Arbitrator finds and declares that:

1. The American Arbitration Association has jurisdiction over this dispute;
2. The Arbitrator finds in favor of Claimants Synogen Management Group, Inc. and Nextgen Biologics, Inc., and against Respondent ISE Professional Testing & Consulting Services, Inc. on all claims and counterclaims in this matter;
3. The Arbitrator issues the following declaratory judgment:
 - A. The Synogen-ISE License Agreement and the Synogen-Nextgen Sublicense Agreement are enforceable contracts and remain in full force and effect. Claimants hold the exclusive license to the Licensed Patents, and are permitted to practice the Licensed Patents;
 - B. Nextgen has the right at its sole option to survive the termination of the License Agreement by ISE and to enter a direct license with ISE on substantially the same terms contained in the License Agreement.
4. The Arbitrator orders the following permanent injunction against ISE :
 - A. ISE is enjoined from breaching Section 5 of the License Agreement. Specifically, in accordance with § 5.2.1 of the License Agreement, ISE shall transfer promptly to Synogen, and not later than 10 business days from the entry of this Final Award, the Licensed Know-How and all information owned, controlled or otherwise in ISE's possession that may be relevant to the development of a commercially viable manufacturing process contemplated by the License Agreement; ISE is directed to otherwise cooperate with Synogen and Nextgen in the development of this process;
 - B. ISE is further prohibited from breaching the provisions of the License Agreement relating to the prosecution of the patents. Specifically, ISE is prohibited from directly or indirectly, interfering with or impeding Synogen's prosecution and preparation of the Licensed Patents through counsel of Synogen's choice, and is directed to cooperate with Synogen

and its counsel, including executing any documents deemed necessary by Synogen to enable its continued work on the patent prosecution and preparation.

5. Claimants are entitled to and ISE shall pay damages and interest as follows:

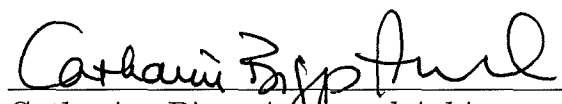
- A. Compensatory damages to be paid to Nextgen in the total amount of \$867,683.95 (consisting of \$653,683.95 for Claimants' costs to date in their attempt to create a manufacturing decellularization process without the Licensed Know-How and \$214,000 for Claimants' costs to date relating to marketing and sales efforts in anticipation of the product's launch);
- B. Interest at a rate of 6.33 percent per annum to accrue on this amount from the date of this Final Award till payment.⁸

6. Claimants are entitled to and ISE shall pay Claimants their reasonable attorneys' fees and costs relating to this Arbitration in the amount of \$903,116.93. The Administrative Fees and Expenses of the AAA totaled \$24,875.00. The Arbitrator's compensation and expenses totaled \$60,037.42. Therefore, ISE shall pay Claimant for the AAA Fees and Arbitrator's compensation the amount of \$74,598.67.

7. Within thirty days of the date of this Final Award, Respondent shall pay Claimant the total of the amounts due under this Award, including the fees and costs and interest; and

8. This Award is in full settlement of all claims submitted to this Arbitration by the Parties. All submitted claims not expressly granted herein are hereby denied.

Dated: December 3, 2019


Catharine Biggs Arrowood Arbitrator

⁸ See *SunTrust Inv. Servs., Inc. v. Thornton*, No. 617CV182ORL22GJK, 2017 WL 11025662, at *3 (M.D. Fla. May 17, 2017) ("In Florida, interest from the date of the arbitral award is required where the award liquidated the amount owed.") (Internal quotations omitted); Fla. Stat. Ann. § 55.03 (West).