UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Ft. Lauderdale Division

CASE NO.: 0:12-cv-60739-CIV-SCOLA/OTAZO-REYES

BIOAXONE BIOSCIENCES, INC.,
a Florida corporation, as successor in
interest to Bioaxone Therapeutique, Inc.,
a Canadian Business corporation,

Plaintiff,

vs.

NORDION INC., a Canadian corporation,
formerly known as MDS INC.,
NORDION (CANADA) INC., a Canadian
corporation, formerly known as MDS (CANADA)
INC., NORDION (US), INC., a Delaware
corporation, formerly known as MDS PHARMA
SERVICES (US) INC.; a Nebraska corporation,
and RICERCA BIOSCIENCES, LLC., a Delaware
Limited Liability Company,

Defendants.
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DEFENDANT NORDION (US), INC.'S MOTION FOR FINAL SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1 of the United States District Court for the Southern District of Florida, Defendant Nordion (US), Inc. ("Nordion US") hereby moves for summary judgment as to the Second Amended Complaint for Money Damages ("Complaint") [DE 63] filed by Plaintiff Bioaxone BioSciences, Inc. ("Plaintiff" or "Bioaxone.") There are no disputed issues of material fact and Defendant Nordion US is entitled to judgment as a matter of law. As grounds for this Motion, Defendant Nordion US states as follows:

I. INTRODUCTION

Plaintiff claims that Bioaxone Therapeutique, Inc. ("Therapeutique") retained Defendant Nordion US to prepare a Bacterial Master Cell Bank to be used in the development of a drug called Cethrin. Plaintiff claims that Nordion US negligently used kanamycin containing animal-derived ingredients in the preparation of the Master Cell Bank, thereby causing the Master Cell Bank to become adulterated and preventing or delaying the development of Cethrin. Complaint, ¶¶ 28, 25, 39. Plaintiff admits that Therapeutique learned of the alleged negligence no later than by October 2008. Plaintiff claims to be entitled to maintain this action against Nordion US based on an Asset Purchase Agreement through which Plaintiff acquired all rights to the drug Cethrin from Therapeutique. But the Asset Purchase Agreement makes no mention of any transfer to Plaintiff of any claim against Nordion US. Nordion US is entitled to final summary judgment because: (1) Plaintiff's single negligence claim is barred by the applicable statute of limitations; (2) Plaintiff lacks standing to pursue this action because it never acquired the right to do so from Therapeutique; and (3) the record evidence of this case demonstrates that there was no breach in the standard of care and Nordion US was not the cause of any damages to Plaintiff; rather, Defendant followed the explicit instructions and approval of Therapeutique in the creation of the Master Cell Bank. In the alternative, the Court should limit Plaintiff's damages, if any, to no more than the amount Therapeutique paid for the preparation, qualification and storage of the Master Cell Bank based on Therapeutique's agreement that it could recover no greater amount under any circumstances.

II. UNDISPUTED FACTS

Pursuant to Local Rule 56.1(a), Nordion US has filed contemporaneously herewith its statement of undisputed material facts, each of which is established by competent evidence in the record.

III. ARGUMENT

A. Applicable Summary Judgment Legal Standard

As the United States Supreme Court has made clear, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the

Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (*quoting* Fed.R.Civ.P. 1). Federal Rule of Civil Procedure 56(a), provides in pertinent part that:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Id. This does not mean that any factual dispute will defeat the motion:

> By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of *material* fact.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). "Summary judgment is appropriate when 'there is no genuine issue as to any material fact . . . and the moving party is entitled to a judgment as a matter of law.'" *Holder v. Nicholson*, 287 Fed. Appx. 784, 790 (11th Cir. 2008) (citations omitted). Further, "the existence of some nonmaterial factual dispute is insufficient to survive a motion for summary judgment." *Id.* (citation omitted). "For a factual dispute to be considered 'material,' there must be 'sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor.'" *Id.* at 1023. As set forth below, there is no genuine issue as to any material fact as to the dispositive issues raised in this Motion and Nordion US is entitled to judgment as a matter of law.

B. Plaintiff's Claim Is Barred By The Statute Of Limitations

In an action brought under federal diversity jurisdiction, a federal court must apply the forum state's conflict-of-laws rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Grupo Televisa, S.A. v. Telemundo Communications Group, Inc.*, 485 F.3d 1233, 1240 (11th Cir. 2007). The first step in the analysis under Florida's conflict-of-laws rules is to determine whether there is a "true" conflict or whether there is merely a "false" conflict. *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1171 (11th Cir. 2009). A "false" conflict exists where the laws of the different possible states are (1) the same; (2) different but would produce the same outcome under the facts of the case; or (3) when the policies of one state would be furthered by the application of its laws while the policy of the other state would not be advanced by the application of its laws. *Federacion Nacional*

Autonoma de Futbol de Honduras v. Traffic Sports USA, Inc., 2008 WL 4056295 (S.D. Fla. Aug. 29, 2008). "Simply stated, [a false conflict occurs] ... when the laws of the competing states are substantially similar ...." *Fioretti v. Massachusetts Gen. Life Ins. Co.*, 53 F.3d 1228, 1234 (11th Cir. 1995). "[A] true conflict exists when two or more states have a legitimate interest in a particular set of facts in the litigation and the laws of those states differ or would produce a different result." *Cooper*, 575 F.3d at 1171 (*quoting Estate of Miller ex rel. Miller v. Thrifty Rent-A-Car System, Inc.*, 609 F.Supp. 2d 1235, 1244 (M.D. Fla. 2009)).

When a false conflict exists, the Court need not undertake any further conflict-of-law analysis but should decide the issue under each of the competing sovereigns' laws. *Fioretti*, 53 F.3d at 1234 ("Simply stated, this principle is that, when the laws of the competing states are substantially similar, the court should avoid the conflicts question and simply decide the issue under the law of each of the interested states."); *Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361, 1368 (S.D. Fla. 2012) ("Under the Florida rule, when the laws of the competing states are substantially similar, the court should avoid the conflicts question and simply decide the issue under the law of each of the interested states."). The analysis is slightly different when the issue is which sovereign's statute of limitations applies because Florida has a borrowing statute, Section 95.10, Florida Statutes, which provides:

> Cause of action arising in another state.—When the cause of action arose in another state or territory of the United States, or in a foreign country, and its laws forbid the maintenance of the action because of lapse of time, no action shall be maintained in this state.

Section 95.10, Florida Statutes, is designed to prevent forum shopping. *Jaisinghani v. Capital Cities/ABC, Inc.*, 973 F. Supp. 1450, 1452 (S.D. Fla. 1997), *aff'd,* 149 F.3d 1195 (11th Cir. 1998). "A cause of action arises in the state having the 'most significant relationship' to the claim." *In re Trasylol Products Liab. Litig.*, 2010 WL 5151579 (S.D. Fla. 2010). Based on the borrowing statute, Florida's statute of limitations cannot be considered because Florida bears no relationship to the claim other than that Plaintiff filed suit in a Florida federal court based on its alleged acquisition of the rights to the claim long after it accrued.[1] In any event, as set forth

[1] In an action brought pursuant to the Court's diversity jurisdiction, Florida courts follow the "most significant relationship" test set out in the Restatement (Second) of Conflict of Laws.

below, applying Florida's statute of limitations leads to the same result as the law of Quebec and Washington, namely, that Plaintiff's claim is time-barred. Accordingly, even if one were to ignore Section 95.10, Florida Statutes, the Court would still be faced with a "false" conflict.

Plaintiff has taken no position as to what law applies to its claim. From the facts of the case, there are only two possibilities as to the substantive law governing this case – Quebec, Canada, or Washington.[2] As set forth below, based on the undisputed facts, regardless of which of these two laws applies, the outcome is the same. Because there is "false" conflict, the Court need not undertake any further conflict-of-laws analysis, but should simply determine that under either possibility – Quebec law or Washington law -- Plaintiff's claim is time-barred and Defendant Nordion US is entitled to judgment as a matter of law.

1. Plaintiff's Claim Is Barred Under Quebec Law

Pursuant to Section 2925 of the Civil Code of Quebec, the statute of limitations for an action to enforce a personal right, such as a claim for negligence, is three years. Civil Code of Quebec, R.S.Q. Book 8, Title 3, § 2925.[3] *See* Declaration of M[e] Patrick Girard, Esq. ("Girard

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Bishop v. Florida Specialty Paint Co., 389 So.2d 999, 1001 (Fla. 1980); *Grupo Televisa, S.A. v. Telemundo Communications Group, Inc.*, 485 F.3d 1233, 1240 (11th Cir. 2007). To determine which state's law applies, the Court must examine four factors to determine which state has the most significant relationship to the events at issue. The four factors are:

> (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.

Schippers v. United States, 715 F.3d 879, 888 (11th Cir. 2013). Even absent the borrowing statute, considering the four factors in this case leads to the inescapable conclusion that the claim did not arise in Florida and that Florida's statute of limitations does not apply.

[2] Quebec is where the relationship between the Nordion Defendants and Therapeutique was centered, Quebec law was selected by the Nordion Defendants and Therapeutique in the Agreement and Quebec is where Therapeutique maintained its principal place of business. Washington State was the place where the Master Cell Bank work was undertaken and completed.

[3] The Civil Code of Quebec, is available on the Quebec government website at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ_1991/CCQ1991_A.html.

Declaration"), at ¶¶ 6-9. The Girard Declaration is attached hereto as Exhibit A.[4] The undisputed facts show that the work done on Study Number: 0307301 was completed in 2003 and that the final report on Study Number: 0307301 was delivered to Therapeutique on October 3, 2003. In the Second Amended Complaint, Plaintiff alleges that:

> In or about October, 2008, Plaintiff informally became aware for the first time of the contamination and was subsequently provided with a formal status report dated October 15, 2008 informing BIOAXONE that the Master Cell Bank was not GMP compliant.

Second Amended Complaint, ¶ 37. Not only does Plaintiff admit that Therapeutique was aware of its claim by no later October 2008 but the Alseres Report issued to Therapeutique on October 15, 2008 advised Therapeutique of the potential claim.[5] Plaintiff filed this case on April 26, 2012, almost nine years after the work was completed and three and a half years after Therapeutique was advised that the Master Cell Bank was allegedly defective. Based on Quebec

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[4] As set forth in the Girard Declaration, M[e] Patrick Girard, Esq. is an attorney practicing in Montreal, Quebec, and who has been a member of the Quebec Bar since 1999. His Declaration is submitted in accordance with Federal Rule of Civil Procedure 44.1. In determining the law of Quebec, the Court may consider the Girard Declaration. *See McGee v. Arkel Int'l., LLC*, 671 F.3d 539, 546 (5th Cir. 2012) (affidavits submitted by plaintiff sufficient to establish Iraqi law on Iraq's statute of limitations); *Moreno v. Martin*, 2008 WL 4716958, *8 n.9 (S.D. Fla. Oct. 23, 2008) (affidavit of foreign attorney is "an acceptable form of proof in determining issues of foreign law").

[5] In the October 15, 2008 report, Alseres stated:

> This assessment [risk assessment based on the alleged discovery of the use of animal-derived raw materials in the Master Cell Bank] revealed apparent transgressions of applicable laws and regulatory guidance by BioAxone's contractor MDS Pharma Services and possibly by BioAxone as well in the following areas:
> • not following the applicable MCB cGMP manufacturing SOP,
> • making potentially misleading regulatory filings, and
> • failing to disclose the presence of animal derived products in the MCB during the CETHRIN licensing due diligence process conducted with Alseres.

Exhibit L to Defendant Nordion (US), Inc.'s Statement of Undisputed Material Facts with Respect to its Motion for Summary Judgment; Bates-Stamp BioAxone 00286.

law, Plaintiff's claim against Nordion US is barred by Quebec's applicable statute of limitations (prescription rules). Girard Declaration, at ¶¶ 6-9.

2. Plaintiff's Claim Is Barred Under Washington Law

Applying Washington law, Plaintiff's claim would also be barred by the statute of limitations. As with Quebec, Washington's statute of limitations for claims for negligence is three years. *See* Wash. Rev. Code § 4.16.080(2); *see also Murphey v. Grass*, 164 Wash. App. 584, 589, 267 P.3d 376, 379 (Wash. Ct. App. 2011) (statute of limitations for accountant negligence is three years); *Cox v. Oasis Physical Therapy, PLLC*, 153 Wash. App. 176, 222 P.3d 119 (Wash. Ct. App. 2009) (claim for negligent infliction of emotional distress subject to three-year statute of limitations); *Clare v. Saberhagen Holdings, Inc.*, 129 Wash. App. 599, 602, 123 P.3d 465, 466 (Wash. Ct. App. 2005) ("RCW 4.16.080(2) sets a three-year statute of limitations for torts, which includes product liability actions."); *Petcu v. State*, 121 Wash. App. 36, 68, 86 P.3d 1234, 1251 (Wash. Ct. App. 2004) (a claim for negligence must be brought within three years of the date the action accrues.); *Sabey v. Howard Johnson & Co.*, 101 Wash. App. 575, 592, 5 P.3d 730, 739 (Wash. Ct. App. 2000) ("[C]laims for negligence and negligent misrepresentation are subject to three-year statutes of limitations."); *Fradkin v. Northshore Util. Dist.*, 96 Wash. App. 118, 122, 977 P.2d 1265, 1268 (Wash. Ct. App. 1999) ("RCW 4.16.080 requires a plaintiff to commence an action for damage to property within three years."); *Cahn v. Foster & Marshall, Inc.*, 33 Wash. App. 838, 842, 658 P.2d 42, 44 (Wash. Ct. App. 1983) ("Actions in fraud and/or negligence have a 3-year statute of limitations."); *Busk v. Flanders*, 2 Wash. App. 526, 531, 468 P.2d 695, 697 (Wash. Ct. App. 1970) (action for legal malpractice subject to three year statute of limitations).

Since Plaintiff admits that Therapeutique became aware of Nordion US's alleged negligence no later than October 15, 2008, the claim in its Complaint filed on April 26, 2012 is also barred under Washington's three year statute of limitations.

3. Plaintiff's Claim Is Barred Under Florida Law

Although it is unlikely that Florida law could apply to this case because none of the events occurred in Florida, none of the parties involved in the transaction were located in Florida, no damage or injury occurred in Florida and Florida has a borrowing statute, Section

95.10, Florida Statutes, even if Florida law were to apply, Plaintiff's claim would be barred by the statute of limitations.

The statute of limitations for negligence in Florida is four years. § 95.11 (3), Fla. Stat. "A cause of action accrues when the last element constituting the cause of action occurs." § 95.031(1), Fla. Stat. The statute of limitations begins to run when the cause of action accrues. § 95.031, Fla. Stat. A cause of action for negligence accrues where a duty is breached and the claimant suffers actual loss or damage. *Krawchenko v. Raymond James Fin. Serv., Inc.*, 2013 WL 489088, *3 (M.D. Fla. 2013). It is not necessary that the claimant's damages be finally determined or even finally set for an action in negligence to accrue; only that the claimant have suffered some injury, loss or damage. *Larson & Larson, P.A. v. TSE Indus., Inc.*, 22 So. 3d 36, 42 (Fla. 2009) ("[T]he cause of action accrues and the statute begins to run from the time when the injury was first inflicted, and not from the time when the full extent of the damages sustained have been ascertained."). If the "delayed discovery" doctrine applies to the claim, the cause of action does not accrue until the claimant "knows or reasonably should have known of the tortious act giving rise to the cause of action." *Krawchenko*, 2013 WL 489088, *3; *Patten v. Winderman*, 965 So. 2d 1222 (Fla. 4th DCA 2007) (claims for accounting and breach of fiduciary duty not subject to the "delayed discovery" doctrine). Otherwise, the claim runs from the time it accrues, regardless of whether the plaintiff knew about it or not. *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002) (claims for fiduciary duty, conversion, civil conspiracy, and unjust enrichment barred by the statute of limitations notwithstanding that plaintiff did not learn of misappropriation until well after it occurred); *Krawchenko*, 2013 WL 489088, *3 (statute of limitations barred negligence claim brought more than four years after broker's negligent handling of client's account notwithstanding that client did not learn of misconduct until more than six years after it occurred).

In Florida, the "delayed discovery" doctrine is established by statute and has limited application. §§ 95.11 (3), 95.031, Fla. Stat. ("delayed discovery" doctrine applies only to cases involving fraud, products liability, professional and medical malpractice and intentional torts based on abuse); *Davis*, 832 So. 2d at 708. In *Davis*, the Florida Supreme Court made it absolutely clear that except in the case of childhood sexual abuse, the "delayed discovery"

doctrine does not extend beyond the categories set by the legislature. *Id.* The "delayed discovery" doctrine does not apply to an action for negligence. *Krawchenko*, 2013 WL 489088, *3.

The undisputed facts conclusively establish that the work done on Study Number: 0307301 was completed in 2003 and that the final report on Study Number: 0307301 was delivered to Therapeutique on October 3, 2003. Accordingly, Bioaxone suffered the alleged loss and its negligence claim accrued no later than October 3, 2003. Under Florida law, assuming it could possibly apply, Therapeutique had until October 3, 2007 to file its negligence claim against Nordion US. Plaintiff did not file this case until April 26, 2012. Under Florida law, Plaintiff's claim would likewise be barred by the statute of limitations.

Based on the undisputed material facts, under any reading of the laws of Quebec, Washington or even Florida, Plaintiff's claim brought nine and a half years after the events are alleged to have occurred and three and a half years after Plaintiff acknowledges that Therapeutique first became aware of its claim, is time-barred. Nordion US is entitled to final summary judgment as a matter of law.

C. Plaintiff Lacks Standing to Pursue this Action

Once again, Plaintiff has taken no position as to which sovereign's law applies as to the whether Therapeutique assigned its potential claims related to the Master Cell Bank to Plaintiff. Section 4.2 of the Asset Purchase Agreement includes a choice of law clause:

> 4.2. This agreement shall be governed by and interpreted in accordance with the laws of the Province of Quebec and the federal laws of Canada applicable therein.

"A choice of law provision in a contract is presumed valid until it is proved invalid. The party who seeks to prove such a provision invalid because it violates public policy bears the burden of proof." *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 223 F.3d 1275, 1280 (11th Cir. 2000) (*quoting Delhomme Indus., Inc. v. Houston Beechcraft, Inc.*, 669 F.2d 1049, 1058 (5th Cir.1982)).

Under Quebec law, absent an express contractual assignment to that effect, an agreement for the sale of an asset does not transfer to the buyer the tort claims associated with the asset prior to the sale. Girard Declaration, at ¶ 10; *see also Cantin v. Hébert*, 2012 QCCS 5974

(Exhibit B to Girard Declaration) (The Superior Court of Quebec held that a contract selling property did not transfer a tort claim against a party who unlawfully removed trees from the property prior to the sale, absent express language in the agreement transferring the claim.).

Bioaxone has not itself suffered any injury as a result of the negligence alleged against Nordion US in the Complaint. All of the events alleged to establish any negligence on Nordion US's part are alleged to have occurred in connection with Nordion US's dealings with Therapeutique at a time before Bioaxone even existed. In addition, all are alleged to have occurred prior to the time when Therapeutique and Bioaxone executed the Asset Purchase Agreement on May 31, 2011. Bioaxone acquired the Cethrin assets from Therapeutique with full knowledge of any and all issues affecting such assets, since Plaintiff admits that Therapeutique became aware of Nordion US's alleged negligence no later than October 15, 2008, and the principal of Bioaxone, Dr. McKerracher, was also a principal of Therapeutique. *See* McKerracher Depo. at 51 (testifying that both Therapeutique and Bioaxone were "absolutely" aware of the issues with the Master Cell Bank at the time they signed the Asset Purchase Agreement).

The Asset Purchase Agreement does not transfer all of Therapeutique's assets to Bioaxone but enumerates the specific assets transferred. The Asset Purchase Agreement omits any reference to the transfer from Therapeutique to Bioaxone of any claims against Nordion US. Accordingly, Bioaxone never acquired such rights and therefore has no standing to maintain this claim against Nordion US.[6]

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[6] The law in most of the United States, including Florida and Washington, is in accord; absent express language doing so, an agreement for the sale of an asset does not transfer claims or causes of action the seller has related to the asset. *See, e.g., Schmidgall v. Jones Boatyard, Inc.*, 526 So. 2d 1042, 1044 (Fla. 3d DCA 1988) ("[O]rdinarily the seller of personal property does not, by such sale, convey to the buyer any causes of action the seller has with respect to such property, at least in the absence of a specific assignment to that effect."); *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1106 (1st Cir. 1994) ("Absent some express language to the effect that Sullivan was selling his football related 'antitrust claims' or, at the very least, 'causes of action' [in connection with the sale of the Patriots football team], we cannot find that Sullivan assigned the present antitrust claim to the buyers of the Patriots."); *Heritage Pac. Fin., LLC v. Monroy*, 215 Cal. App. 4th 972, 156 Cal. Rptr. 3d 26, 39 (Cal. Ct. App. 2013) (bank's assignment of "all right, title and interest in the loan" did not transfer bank's fraud claim against borrower based on the loan application.); *Crystal Lotus Enterprises Ltd. v. City of Shoreline*, 167

D. The Undisputed Material Facts Show That Nordion US Is Not The Legal Cause of Plaintiff's Alleged Damages As A Matter Of Law

Plaintiff's entire claim against Nordion US is that Nordion US was negligent in using kanamycin obtained from Sigma, Catalog No. K0254, in the Master Cell Bank. The undisputed material facts conclusively establish that Therapeutique: (a) received directions from DOW, its drug manufacturer, advising Therapeutique that Sigma kanamycin Catalog No. K0254 should be used in the Master Cell Bank; (b) confirmed that it agreed with DOW's recommendation as to raw materials to be used; (c) specifically and expressly instructed MDS Pharma Services to purchase kanamycin from Sigma on its behalf and for its account to be used in the creation of the Master Cell Bank; and (d) signed off on the Master Batch Record (both the Director of Product Development and the Quality Assurance officer) expressly approving the use of Sigma kanamycin, Catalog No. K0254, as the raw material to be used in the Master Cell Bank. The undisputed material facts establish that MDS Pharma Services followed Therapeutique's instruction to the letter.

Further, although Plaintiff claims that MDS Pharma Services agreed to use only animal-free components in the creation of the Master Cell Bank, the Protocol Order Form does not include any language to that effect but simply states that the Master Cell Bank will be created "in compliance with all applicable GLP [Good Laboratory Practice] or cGMP [(Current) Good Manufacturing Practice] guidelines." Protocol Order Form, Exhibit B to Defendant Nordion (US), Inc.'s Statement of Undisputed Material Facts with Respect to its Motion for Summary Judgment.

Based on the undisputed material facts, Nordion US cannot be determined to have been negligent or the legal cause of any damages allegedly suffered by Plaintiff because it followed Therapeutique's express instructions as to the raw materials to be included in the Master Cell Bank. Accordingly, Nordion US is entitled to judgment as a matter of law.

Wash. App. 501, 505, 274 P.3d 1054, 1056 (Wash. Ct. App. 2012) ("The right to damages for injury to property is a personal right belonging to a property holder, and does not pass to a subsequent purchaser unless expressly conveyed.").

E. Even If Plaintiff Were Entitled To Maintain This Action, Its Damages Are Limited To The Amount It Paid For The Preparation, Qualification And Storage Of The Master Cell Bank

As set forth above, Nordion US is entitled to final summary judgment. However, even if Plaintiff were entitled to maintain this action, its damages are limited to the amount it paid for the preparation, qualification and storage of the Master Cell Bank based on the limitation of liability clause set forth in the Protocol Order Form.[7]

When considering which sovereign's law to apply, "a court makes a separate choice of law determination with respect to each particular issue under consideration." *Trumpet Vine Investments, N.V. v. Union Capital Partners I, Inc.*, 92 F.3d 1110, 1115 (11th Cir. 1996); *see also Valley Forge Ins. Co. v. Olem Shoe Corp.*, 2011 WL 3652561 (S.D. Fla. Aug. 19, 2011). As to contract issues, Florida follows the traditional rule of *lex loci contractus*. *Fioretti v. Massachusetts Gen. Life Ins. Co.*, 53 F.3d 1228, 1235 (11th Cir. 1995); *Oretsky v. Infinity Ins. Co.*, 2012 WL 6738531 (S.D. Fla. Dec. 31, 2012) ("As Florida law pertains to choice of law in the context of contract interpretation, the Florida Supreme Court has 'long adhered' to the rule of *lex loci contractus*."). Under the doctrine of *lex loci contractus*, the interpretation of the terms of a contract is governed by the law of the state in which the contract is made. *Fioretti*, 53 F.3d at 1235. The contract is deemed made "where the last act necessary to complete the contract is done." *Granite State Ins. Co. v. Am. Bldg. Materials, Inc.*, 2011 WL 6025655 (M.D. Fla. 2011), *aff'd*, 504 Fed. Appx. 815 (11th Cir. 2013). "*Lex loci contractus* looks to the place where the contract was executed." *Lanoue v. Rizk*, 987 So. 2d 724, 727 (Fla. 3d DCA 2008); *see also Quantum Measurements Corp. v. Druck, Inc.*, 2011 WL 1832518 (M.D. Fla. 2011) ("The last act necessary to complete a contract is the signature.").

Therapeutique was at all material times located in Montreal, Quebec. McKerracher Depo. at 38. There is no record evidence to suggest that Therapeutique signed the Protocol Order Form

[7] The language on the face of the Protocol Order disclaimed expressed or implied warranties "including merchantability or fitness for a particular purpose of any work performed or information or products supplied" and provided, in pertinent part: "In no event shall MDS Pharma Services' liability, if any, for damages relating or arising out of this Study exceed the fees paid to MDS Pharma Services under this order."

accepting its terms anywhere other than in Quebec. Accordingly, because Therapeutique was located in Quebec, it can be inferred that it signed the Protocol Order Form there. *See Int'l Star Registry of Illinois v. Omnipoint Mktg., LLC*, 510 F. Supp. 2d 1015, 1021 (S.D. Fla. 2007) ("Since Omnipoint's offices are located in Florida, it can be inferred that this final step occurred in Florida."). Based on the *lex loci contractus* rule, Quebec law governs the issue of whether Plaintiff's damages are limited to the amount it paid for the preparation, qualification and storage of the Master Cell Bank.

Under Quebec law, a party can, by agreement, exclude or limit its liability for injury to property caused to another, provided that the injury was not the result of an intentional act or gross negligence. *See* Girard Declaration, at ¶¶ 11-13. Section 1474 of the Civil Code of Quebec provides, in pertinent part:

> A person may not exclude or limit his liability for material injury caused to another through an intentional or gross fault; a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.

Quebec Courts have interpret Section 1474 of the Civil Code of Quebec to mean that as long as the damages limited pursuant to an agreement were not the result of an intentional act or gross negligence, the limitation on damages is enforceable. *See* Girard Declaration, at ¶¶ 11-13.

Based on the undisputed material facts, Plaintiff agreed that, under no circumstances could it recover damages in excess of the amount it paid for the preparation, qualification and storage of the Master Cell Bank. Under Quebec law, such a provision is enforceable. Girard Declaration, at ¶ 13. Accordingly, Nordion US is entitled to a partial summary judgment limiting Plaintiff's recovery, if any, to the amount it paid for the preparation, qualification and storage of the Master Cell Bank.[8]

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[8] In fact, this conflict of laws issue is also likely a "false conflict" as the law of Washington and Florida would again lead to the same result. (A) Washington -- *Yacht W., Ltd. v. Christensen Shipyards, Ltd.*, 2009 WL 1372954 (D. Or. May 14, 2009) (holding that language in a commercial transaction limiting liability is enforceable as long as it is not unconscionable, and such a limitation is *prima facie* conscionable); *see also Puget Sound Fin., L.L.C. v. Unisearch, Inc.*, 146 Wash. 2d 428, 439, 47 P.3d 940, 945 (2002) ("[W]e shifted the presumption from the party seeking to validate the disclaimer to the party seeking to invalidate the liability limitation by presuming that the limitation was prima facie conscionable in a commercial transaction."). (B) Florida -- Contract provisions limiting liability between contracting corporations are fully

IV. CONCLUSION

Based on the foregoing, Defendant Nordion (US), Inc. respectfully requests that the Court grant Final Summary Judgment against Plaintiff Bioaxone Biosciences, Inc. and such other relief as the Court deems appropriate.

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CERTIFICATE OF SERVICE

We hereby certify that on July 17, 2013 we electronically filed the foregoing with the Clerk of the Court by using the CM/ECF System which will send the foregoing to: ALL COUNSEL and/or INTERESTED PERSONS/CORPORATIONS ON THE ATTACHED SERVICE LIST.

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enforceable against claims for breach of contract or negligence. *Mt. Hawley Ins. Co. v. Pallet Consultants Corp.*, 2009 WL 1911722 (S.D. Fla. July 1, 2009) (holding a contract limiting damages recoverable for breach of contract or tort claims against sprinkler company to $875.00 enforceable notwithstanding that sprinkler company's negligence caused loss of over $5 million); *Rollins, Inc. v. Heller*, 454 So.2d 580, 583-84 (Fla. 3d DCA 1984) (damages for tort claims limited to amount agreed upon by the parties in the contract); *see also Progress Energy, Inc. v. U.S. Global, LLC*, 102 So. 3d 768, 771 (Fla. 4th DCA 2012) (reversing judgment awarding benefit-of-the-bargain damages where parties' agreement excluded them).

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