IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CEPHEA VALVE TECHNOLOGIES, INC. EQUITYHOLDERS' REPRESENTATIVE, ON BEHALF OF THE CEPHEA VALVE TECHNOLOGIES, INC. PARTICIPATING SHAREHOLDERS,	)	Civil Action No. 23-691-GBW-SRF
Plaintiff,	)	
v.	)	
ABBOTT LABORATORIES and ABBOTT VASCULAR, INC.,	)	
Defendants.	)	

REPORT AND RECOMMENDATION

Presently before the court in this civil action for fraud and contract-based claims are the following motions: (1) a motion to compel arbitration, filed by defendants Abbott Laboratories ("Abbott Labs") and Abbott Vascular, Inc. ("Abbott Vascular;" collectively, "Defendants"), (D.I. 9);[1] (2) Defendants' partial motion to dismiss the complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), (D.I. 12);[2] and (3) Defendants' motion to seal the complaint and other filings, (D.I. 7).[3] Plaintiff Cephea Valve Technologies, Inc. Equityholders' Representative ("Plaintiff") seeks leave to file surreply briefs to the motion to compel arbitration and the partial motion to dismiss the complaint. (D.I. 44; D.I. 45)[2] For the following reasons, I

[1] The briefing and related filings associated with the pending motion to compel arbitration are found at D.I. 10, D.I. 11, D.I. 14, D.I. 20, D.I. 21, D.I. 22, D.I. 23, D.I. 24, D.I. 36, D.I. 37, D.I. 44, D.I. 48, and D.I. 53.

[2] The briefing and related filings associated with the pending motion to dismiss are found at D.I. 13, D.I. 25, D.I. 38, D.I. 45, D.I. 48, and D.I. 53.

[3] The briefing associated with the pending motion to seal is found at D.I. 8 and D.I. 19.

[2] The briefing associated with the pending motions for leave to file a surreply is found at D.I. 48 and D.I. 53.

recommend that the court GRANT the motion to compel arbitration and DISMISS this case, DENY the partial motion to dismiss as moot, and GRANT-IN-PART the motion to seal. I further recommend that the court DENY Plaintiff's motion for leave to file a surreply to the motion to compel arbitration for the reasons set forth at § II.A.3, *infra*, and DENY as moot the motion for leave to file a surreply to the partial motion to dismiss.

I. BACKGROUND

This case arises from the efforts of Cephea Valve Technologies, Inc. ("Cephea") to develop and bring to market a minimally invasive transcatheter mitral valve replacement ("TMVR") system for treating mitral valve regurgitation ("MR"), the most common heart valve disease. (D.I. 2 at ¶¶ 36-41, 45) In 2015, Cephea was developing a TMVR system (the "Cephea Valve") that is inserted into the femoral vein in the leg and across the heart through the atrial septum. (*Id.* at ¶ 46) This delivery method, known as the transseptal route, is less invasive and does not require the tools or methods used in open-heart surgery. (*Id.*)

Defendants are medical device manufacturers that have invested in minimally invasive technologies, including TMVR systems, to repair and/or replace mitral valves. (*Id.* at ¶¶ 9, 41-43) In 2009, Defendants acquired the Evalve MitraClip system, which is a product used to repair, but not replace, mitral valves. (*Id.* at ¶¶ 56-57) In June of 2015, Defendants completed the purchase of Tendyne Holdings Inc. ("Tendyne"), which developed a TMVR product (the "Tendyne Valve") to replace the mitral valve via a small incision through the ribs into the tip of the heart, known as the transapical method. (*Id.* at ¶¶ 4, 46, 54-55, 232)

The complaint alleges that Cephea was an attractive acquisition target for Defendants because its Cephea Valve product was the first to use the transseptal approach to mitral valve replacement without the need for surgery. (*Id.* at ¶ 55) To that end, Abbott Vascular entered

into an agreement with Cephea and Plaintiff in July of 2015 called "Warrant To Purchase Common Stock Of Cephea Valve Technologies, Inc." (the "Warrant"). (*Id.* at ¶ 3; Ex. A) Under the terms of the Warrant, Abbott Vascular acquired the right to purchase Cephea as a wholly-owned subsidiary for [redacted]. (*Id.* at ¶ 78) Section 2.11 of the Warrant also provided that Plaintiff would receive an additional [redacted] if Abbott Vascular used commercially reasonable efforts to obtain the European Union's regulatory approval, known as the CE Mark, for the Cephea Valve before the end of 2021 (the "Milestone"). (*Id.* at ¶¶ 78-81) The Warrant was subsequently amended in 2017, 2018, and 2019. (*Id.* at ¶ 87)

On January 16, 2019, Abbott Vascular exercised its right to acquire Cephea. (*Id.* at ¶ 3) The complaint alleges that, after the acquisition, Abbott Vascular stopped all commercially reasonable efforts to obtain CE Mark approval for the Cephea Valve. (*Id.* at ¶¶ 131-32) Instead, Abbott Vascular made modifications to the Cephea Valve which were not necessary for obtaining a CE Mark or otherwise achieving the Milestone. (*Id.* at ¶ 177) Abbott Vascular failed to achieve the Milestone by the end of 2021. (*Id.* at ¶ 121)

Plaintiff and Abbott Vascular executed a tolling agreement, effective as of December 3, 2021, which set forth Plaintiff's contention that Abbott Vascular had materially breached § 2.11 of the Warrant. (*Id.*, Ex. H at 1) The tolling agreement also indicated that Plaintiff had sent a formal notice of the dispute to Abbott Vascular on November 19, 2021 pursuant to the alternative dispute resolution procedure in § 8.9 of the Warrant,[3] which provides that any dispute arising under the Warrant must be resolved by way of binding arbitration:

> The Parties agree that, except as provided in Sections 2.9(c), 5.14 and Section 6.4, any dispute arising under this Warrant shall be resolved by the Alternative Dispute Resolution ("ADR") provisions set forth in this Section 8.9, the result of

[3] Section 8.9 of the Warrant is also referred to as the "ADR provision" throughout the parties' briefing and this Report and Recommendation.

which shall be binding upon the Parties and the Company Equityholders.

(*Id.*; *see also* Ex. A at § 8.9) Section 2.11(b) of the Warrant, which governs the conditions for a [redacted] payment upon satisfaction of the Milestone, is not among the provisions carved out from § 8.9. (*Id.* at ¶ 226; Ex. A at §§ 2.11(b), 8.9) The complaint avers that Abbott Vascular fraudulently obtained Plaintiff's agreement to § 8.9 because it never intended to achieve the Milestone and used the terms of the Warrant to conceal its wrongful conduct. (*Id.* at ¶ 226)

After the tolling agreement and amendments thereto expired, Plaintiff filed this lawsuit on June 23, 2023 instead of pursuing relief under § 8.9 of the Warrant.[4] (D.I. 2; Ex. H) Counts I to V of the complaint assert causes of action for fraud in the inducement and fraud; violations of the civil Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. §§ 1961-1968; breach of contract and the covenant of good faith and fair dealing; unjust enrichment; and fraudulent inducement of § 8.9, respectively. (*Id.* at ¶¶ 280-364) In support of these causes of action, Plaintiff alleges that Defendants never intended to use commercially reasonable efforts to achieve the Milestone under the Warrant, consistent with their course of conduct after acquiring Tendyne. (*Id.*) Counts VI to IX seek a declaratory judgment regarding the inapplicability,

[4] Section 1.1 of the Warrant defines Plaintiff, explaining that the "Equityholders' Representative" means "the Person appointed pursuant to Section 2.12(a) to serve as the agent, representative and attorney-in-fact of the Company Stockholders with respect to the Transaction." (D.I. 2, Ex. A at § 1.1) Section 2.12(a) identifies the initial Equityholders' Representative as Fortis Advisors LLC ("Fortis"). (*Id.*, Ex. A at § 2.12(a)) In the third amendment to the Warrant, dated January 16, 2019, the definition of "Equityholders' Representative" was revised to mean "the Person appointed pursuant to Section 2.12(a) to serve as the agent, representative and attorney-in-fact of the Participating Securityholders with respect to the Transactions." (*Id.*, 3d am. at ¶ 4) The third amendment also defines "Participating Securityholders" as "each Company Stockholder, and each Participating Optionholder and Participating Warrantholder (excluding the Warrant Holder and any wholly-owned Subsidiary of the Warrant Holder)." (*Id.*, 3d am. at ¶ 6) The complaint states that the Participating Securityholders "include some of the top, most prestigious, most talented cardiologists in the world who . . . invented and otherwise assisted in the development of the Cephea Valve[.]" (D.I. 2 at ¶ 8)

invalidity, unenforceability, and unconscionability of § 8.9 and the other dispute resolution provisions of the Warrant to the parties' dispute. (*Id.* at ¶¶ 365-407)

On July 17, 2023, Defendants filed their motion to compel arbitration and partial motion to dismiss,[5] along with the motion to seal the complaint and other filings. (D.I. 7; D.I. 9; D.I. 12) After briefing on the motions was complete, Plaintiff filed its motions for leave to file surreply briefs to the motion to compel arbitration and the motion to dismiss. (D.I. 44; D.I. 45) The pending motions were referred to the undersigned judicial officer on October 4, 2023. (D.I. 57)

II. DISCUSSION

The court first addresses the dispositive motion to compel arbitration and the associated motion for leave to file a surreply brief, in accordance with Third Circuit case authority instructing that "courts should rule on a motion to compel arbitration before resolving the case on alternative, nonjurisdictional grounds." (D.I. 9; D.I. 44); *Hause v. City of Sunbury*, 2022 WL 738611, at *2 (3d Cir. Mar. 11, 2022). Next, the court turns to Defendants' partial motion to dismiss the complaint for failure to state a claim, along with Plaintiff's related motion for leave to file a surreply brief. (D.I. 12; D.I. 45) Finally, the court addresses Defendants' nondispositive motion to seal the complaint and certain other filings. (D.I. 7)

A. Defendants' Motion to Compel Arbitration

1. Legal standard

"Congress enacted the Federal Arbitration Act ('FAA') to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same

[5] Defendants have not moved to dismiss Plaintiff's cause of action for breach of contract at Count III of the complaint. (D.I. 13 at 20) Count III also alleges breach of the covenant of good faith and fair dealing, which is included among the causes of action Defendants seek to dismiss. (*Id.* at 17-19)

footing as other contracts." *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 177-78 (3d Cir. 2010) (internal citations and quotation marks omitted). To facilitate the strong federal policy in favor of resolving disputes through arbitration, the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 178; 9 U.S.C. § 2. A party may request a court order "directing that such arbitration proceed in the manner provided for in such agreement" if the opposing party refuses to pursue arbitration. 9 U.S.C. § 4.

On a motion to compel arbitration, the court must consider: (1) whether the parties entered into a valid arbitration agreement, and (2) whether the specific dispute falls within the scope of the agreement to arbitrate. *See Sapp v. Indus. Action Servs., LLC*, 75 F.4th 205, 212 (3d Cir. 2023) (citing *Flintkote Co. v. Aviva PLC*, 769 F.3d 215, 220 (3d Cir. 2014)). These "questions of arbitrability are presumptively committed to the court[.]" *Puleo*, 605 F.3d at 178. The court may grant a motion to compel arbitration at the pleadings stage by applying the Rule 12(b)(6) standard for failure to state a claim when "it is apparent, based on the face of a complaint, and documents relied upon in the complaint, that certain of a party's claims are subject to an enforceable arbitration clause[.]" *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 776 (3d Cir. 2013) (quoting *Somerset Consulting, LLC v. United Capital Lenders, LLC*, 832 F. Supp. 2d 474, 482 (E.D. Pa. 2011)) (internal quotation marks omitted); *see In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 519 (3d Cir. 2019).

2. Analysis

a. Validity and enforceability of the Warrant's ADR provision

At Counts V to IX of the complaint, Plaintiff challenges the validity and enforceability of the ADR provision at § 8.9 of the Warrant on multiple grounds: (1) the ADR provision is

unenforceable because three of the terms in § 8.9 are ambiguous; (2) the ADR provision is procedurally and substantively unconscionable; and (3) the ADR provision is invalid because it was obtained by fraud. (D.I. 20 at 12-19) The parties agree that the issue of whether Plaintiff's claims are arbitrable should be decided by this court. (D.I. 2 at ¶ 355; D.I. 20 at 3; D.I. 36 at 7)

"Under the FAA, agreements to arbitrate must be treated like 'all other contracts,' " and ordinary state-law principles of contract formation apply. *MZM Constr. Co., Inc. v. N.J. Building Laborers Statewide Benefit Funds*, 974 F.3d 386, 402 (3d Cir. 2020) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). In this case, there is no dispute that Delaware law governs interpretation of the Warrant. (D.I. 2, Ex. A at § 8.3) Because the complaint does not plausibly allege that § 8.9 of the Warrant is invalid or unenforceable, I recommend that the court dismiss Counts V to IX. *See HealthplanCRM, LLC v. AvMed, Inc.*, 458 F. Supp. 3d 308, 337-38 (W.D. Pa. Apr. 28, 2020) ("[I]f neither party requests a stay, the Court may dismiss the case after compelling arbitration." (citing *Somerset*, 832 F. Supp. 2d at 490)); *Shaffer v. Graybill*, 68 F. App'x 374, 376 (3d Cir. 2003) ("Under the FAA, a court, on application of one of the parties to an agreement to arbitrate, must stay a judicial action commenced in that court which is the subject of an arbitration clause or, in the alternative, must dismiss any arbitrable claims.").

i. The ADR provision is not ambiguous on its face.

Plaintiff argues that the ADR provision is unenforceable because three terms appearing in § 8.9 are ambiguous: "Parties," "Company Equityholders," and "Confidential Information." (D.I. 20 at 17-18) Defendants[6] contend that Plaintiff should not be permitted to avoid arbitration

[6] Abbott Vascular is a signatory to the Warrant, and Abbott Labs is not. (D.I. 2, Ex. A) However, Plaintiff does not challenge Defendants' position that Abbott Labs may compel arbitration even though it is not a party to the Warrant. (D.I. 10 at 13-15; D.I. 36 at 7)

on this basis because none of the three terms is ambiguous. (D.I. 10 at 10) Under Delaware law, the proper interpretation of unambiguous contract language is a question of law which may be resolved at the pleadings stage because there is no need to resolve material disputes of fact. *See Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006); *Lillis v. AT&T Corp.*, 904 A.2d 325, 329-30 (Del. Ch. 2006). For the following reasons, the terms identified by Plaintiff are not ambiguous and do not preclude the enforceability of § 8.9 of the Warrant. Consequently, I recommend that the court dismiss Counts VI and VII of the complaint.

The complaint notes that the term "Parties" in the preamble of the Warrant includes Plaintiff, whereas the definition of "Party" at § 1.1 of the Warrant does not.[7] (D.I. 2 at ¶ 376) Thus, Plaintiff alleges it is unclear whether § 8.9 applies to it. (D.I. 20 at 17-18) As Defendants explain, however, the first sentence of § 8.9 unambiguously establishes that the ADR provision applies to Plaintiff: "The Parties agree that, except as provided in Sections 2.9(c), 5.14 and Section 6.4, any dispute arising under this Warrant shall be resolved by the Alternative Dispute Resolution . . . provisions set forth in this Section 8.9, the result of which shall be binding upon the Parties and the Company Equityholders." (D.I. 10 at 10-11; D.I. 2, Ex. A at § 8.9) Although subsequent portions of § 8.9 use the term "Party" in the singular, § 1.3(f) of the Warrant states that "[t]he terms herein defined in the singular will have a comparable meaning when used in the plural, and vice versa." (D.I. 2, Ex. A at § 1.3(f)) Section 8.9 cannot reasonably be construed to exclude Plaintiff, and "[c]ourts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

[7] The preamble defines "Parties" to include Abbott Vascular, Cephea, and Plaintiff. (D.I. 2, Ex. A) Section 1.1 of the Warrant defines "Party" to mean "the Warrant Holder [Abbott Vascular] or the Company [Cephea], as the case may be." (*Id.*)

Moreover, Plaintiff's position that it is not included within the meaning of the term "Party" would render other portions of the Warrant meaningless, contrary to Delaware authority explaining that the court should "not read a contract to render a provision or term meaningless or illusory." *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 56 (Del. 2019) (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)). For example, § 2.12(c) of the Warrant vests Plaintiff with the sole authority to resolve disputes about the Milestone "and to comply with Orders and awards of arbitrators related thereto" after the acquisition of Cephea is complete. (D.I. 2, Ex. A at § 2.12(c)) This provision further confirms that Plaintiff is among the "Parties" subject to the ADR provision at § 8.9 of the Warrant.

The complaint also alleges that the term "Company Equityholders" dictates who is bound by § 8.9, but its meaning is ambiguous because it is not defined or used elsewhere in the Warrant. (D.I. 2 at ¶ 377) However, the Warrant's preamble expressly defines Cephea as the "Company," and § 2.12(a) explains that the "Equityholders' Representative" represents the "Participating Securityholders," a term which includes "each Company Stockholder and each Participating Optionholder." (D.I. 2, Ex. A at §§ 1.1, 2.12(a)) Thus, the meaning of the term "Company Equityholders" is apparent on the face of the Warrant.

Finally, the complaint alleges that the term "Confidential Information" is not defined in the Warrant. (D.I. 2 at ¶¶ 378-79) But Plaintiff does not explain how the meaning of the term "Confidential Information" has any bearing on the parties' agreement to arbitrate. Instead, the term appears at § 8.9(k), which itself explains that "the existence of the dispute, any settlement negotiations, the ADR hearing, any submissions (including exhibits, testimony, proposed rulings, and briefs), and the rulings shall be deemed Confidential Information." (D.I. 2, Ex. A at § 8.9(k)) There is no ambiguity in the terms of § 8.9 that would plausibly render the ADR

provision unenforceable.

ii. The ADR provision is not unconscionable on its face.

There is no dispute that Plaintiff executed the Warrant, which provides that it "will be construed as if drafted jointly by the Parties." (D.I. 2, Ex. A at § 1.3(l)) Nonetheless, Count VIII of the complaint alleges that § 8.9 of the Warrant is unconscionable because Abbott Vascular had superior bargaining power, which it used to force Cephea and Plaintiff to accept the terms of the ADR provision. (D.I. 2 at ¶¶ 385-90) It is well-established that "[s]uperior bargaining power alone without the element of unreasonableness does not permit a finding of unconscionability or unfairness." *Dizon v. J.P. Morgan Chase*, 660 F. Supp. 3d 268, 272 (D. Del. 2023) (quoting *Tulowitzki v. Atl. Richfield Co.*, 396 A.2d 956, 960 (Del. 1978)).

The complaint does not plausibly allege that § 8.9 unreasonably favors Defendants. *See Wells v. Merit Life Ins. Co.*, 671 F. Supp. 2d 570, 575 (D. Del. 2009). Instead, it alleges in a conclusory manner that the terms of § 8.9 "are so grossly imbalanced" and "lopsided," leaving Plaintiff with no recourse against Defendants' decision not to fulfill their obligation to achieve the Milestone. (D.I. 2 at ¶¶ 268, 386-88) But these conclusory allegations are insufficient to plausibly aver unconscionability. *See Robinson v. Gen. Motors LLC*, C.A. No. 20-663-RGA-SRF, 2021 WL 3036353, at *18 (D. Del. July 19, 2021). Plaintiff's complaints about limits on discovery in § 8.9 are "a form of generalized attacks on arbitration as a method of dispute resolution" which are unpersuasive. *Delta Funding Corp. v. Harris*, 466 F.3d 273, 275 (3d Cir. 2006); *see also Kristian v. Comcast Corp.*, 446 F.3d 25, 42-43 (1st Cir. 2006) (explaining that limited discovery in arbitration proceedings is not a valid basis for opposing enforcement of an arbitration clause); *Abbott Rapid Dx N. Am., LLC v. eMed, LLC*, 2022 WL 18027570, at *4 (N.D. Ill. Dec. 30, 2022) ("[T]he law of unconscionability does not invalidate an arbitration term

that imposes significantly pared-down procedures for arbitration[.]"). Consequently, I recommend that the court dismiss Count VIII of the complaint. *See Dizon*, 660 F. Supp. 3d at 274 (rejecting pleaded allegations of unconscionability and granting motion to compel arbitration).

The parties do not dedicate any separate discussion to Count IX of the complaint, which alleges that §§ 2.11(f) and 8.10 of the Warrant are void, inapplicable, unenforceable, and unconscionable for many of the same reasons identified at Count VIII. (D.I. 2 at ¶¶ 392-407) Having determined that Plaintiff's claims are arbitrable, I recommend that the court dismiss Count IX of the complaint, which seeks a declaratory judgment that they are not.

iii. Plaintiff's fraud allegations do not invalidate § 8.9.

Count V of the complaint alleges that Plaintiff was fraudulently induced to accept the arbitration provision of § 8.9 based on Defendants' oral and written representations about Plaintiff's ability to obtain relief under § 8.9 before the Warrant was executed. (D.I. 2 at ¶¶ 356-57) The complaint describes those misrepresentations to include alleged ambiguities in the terms of § 8.9, the alleged unconscionability of the provision, and the procedural limitations on matters such as discovery when pursuing arbitration. (*Id.* at ¶¶ 357-59) For the reasons previously discussed at § II.A.2.a.i-ii, *supra*, these allegations do not give rise to a plausible inference that § 8.9 is invalid.

Count V also fails to plausibly allege Plaintiff's justifiable reliance on Defendants' alleged misrepresentations. A claim for fraudulent inducement requires a showing of: (1) a false representation made by the defendant; (2) the defendant's knowledge that the representation was false or reckless indifference to the truth; (3) an intent to induce the plaintiff to act or refrain from acting; and (4) the plaintiff's action or inaction taken in justifiable reliance on the

representation. *Lynch v. Gonzalez*, 2020 WL 4381604, at *35 (Del. Ch. July 31, 2020). It is well-established that there can be no justifiable reliance on an oral representation that directly conflicts with the plain language of a subsequent written agreement. *See Evans v. Cantor Ins. Grp., L.P.*, C.A. No. 21-1618-MAK, 2022 WL 3908005, at *5 (D. Del. Aug. 30, 2022) (discussing *Black Horse Capital, LP v. Xstelos Holdings, Inc.*, 2014 WL 5025926 (Del. Ch. Sept. 30, 2014)).

With respect to the written representations, the complaint alleges Defendants falsely represented that Cephea and Plaintiff "could obtain relief under Section 8.9 of the Warrant Agreement if [Defendants] did not seek or obtain the CE Mark Milestone and pay the CE Mark Milestone Payment." (D.I. 2 at ¶ 357; *see also* ¶¶ 226, 402) To the extent that this alleged misrepresentation can be construed to conflict with § 8.9 of the Warrant,[8] the complaint does not plausibly allege that Plaintiff was justified in relying on it. "Fraudulent inducement is not available as a defense when one had the opportunity to read the contract and by doing so could have discovered the misrepresentation." *Braga Inv. & Advisory, LLC v. Yenni*, 2023 WL 3736879, at *13 (Del. Ch. May 31, 2023) (quoting *Carrow v. Arnold*, 2006 WL 3289582, at *11 (Del. Ch. Oct. 31, 2006)). Plaintiff's objection to arbitration procedures that were plainly set forth in the Warrant at the time of its execution cannot reasonably sustain a cause of action for fraudulent inducement.

Because Plaintiff has not asserted a viable claim that it was fraudulently induced to agree to the arbitration provision, I recommend that the court dismiss Count V of the complaint.

[8] The complaint does not specifically identify anything in the written communications that contradicts the terms of § 8.9. Instead, the focus of the averments is on the alleged imbalance and unfairness of the arbitration procedures outlined in § 8.9 as they pertain to Plaintiff. Thus, there are no more than conclusory allegations in the complaint that the representations made by Defendants in their pre-Warrant written communications were false.

b. Scope of the agreement to arbitrate

Defendants contend that Counts I to IV of the complaint fall within the scope of the ADR provision at § 8.9 of the Warrant, and those claims are therefore subject to arbitration. (D.I. 10 at 19-20) Plaintiff responds that these fraud-based causes of action do not fall within the scope of § 8.9 because § 6.7 of the Warrant allows Plaintiff to choose how to bring those claims. (D.I. 20 at 10-11) Applying the relevant standard, which provides that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," I recommend that the court grant Defendants' motion to compel arbitration of Plaintiff's claims and dismiss Counts I to IV. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *see Jaludi v. Citigroup*, 933 F.3d 246, 255 (3d Cir. 2019).

Section 8.9 of the Warrant broadly covers "any dispute arising under this Warrant," mandating that those disputes shall be resolved through binding arbitration. (D.I. 2, Ex. A at § 8.9) "Coupled with [the] usual strong presumption in favor of arbitrability . . . a clause providing for the arbitration of all matters 'arising from' an agreement overwhelmingly suggests that a given dispute is arbitrable." *Medtronic AVE Inc. v. Cordis Corp.*, 100 F. App'x 865, 868 (3d Cir. 2004). Here, Counts I to IV of the complaint are based on the same core facts regarding Defendants' promise to pursue the Milestone with no intention of doing so, resulting in the loss of the [redacted] Milestone payment to Plaintiff, the delay of regulatory approval for Cephea's product, and the effective removal of Cephea from the market. (D.I. 2 at ¶¶ 281-83, 304-05, 311, 324-25, 345-50) These allegations arise under the Warrant, which outlines the parties' agreement regarding the Milestone. (*Id.*, Ex. A at § 2.11) The complaint acknowledges as much, stating that the parties discussed how Plaintiff "could obtain relief under Section 8.9 of the

Warrant Agreement if Abbott did not seek or obtain the CE Mark Milestone and pay the CE Mark Milestone Payment." (*Id.* at ¶ 357)

Plaintiff maintains that § 6.7 of the Warrant allows Plaintiff to choose how to bring its fraud-based claims because it provides that "nothing set forth in this Warrant will be deemed to . . . limit a Party's recourse in the event another Party . . . commit[s] fraud, intentional misrepresentation, or willful misconduct." (D.I. 2, Ex. A at § 6.7; D.I. 20 at 10) But Article 6 of the Warrant governs indemnification, and the carve-out in § 6.7 for claims of fraud, intentional misrepresentation, or willful misconduct is in keeping with Delaware law "carv[ing] out deliberate fraud from the limits of the indemnification provision." *Express Scripts, Inc. v. Bracket Holdings Corp.*, 248 A.3d 824, 831 (Del. Feb. 23, 2021). In contrast, Article 8 recites "General Provisions," including "Dispute Resolution" at § 8.9. (D.I. 2, Ex. A at § 8.9) Section 8.9 expressly carves out §§ 2.9(c), 5.14, and 6.4, which pertain to post-closing adjustments, tax matters, and third-party claims, respectively. Section 6.7 is not among the provisions carved out from § 8.9. (*Id.*) The carve-outs from § 8.9 demonstrate that the parties to the Warrant were well-aware of how to carve out binding procedures to resolve a dispute. For instance, § 2.9(c) provides that disputes about the post-closing adjustment will be resolved by an independent accounting firm instead of being subject to binding arbitration under § 8.9. (*Id.*, Ex. A at § 2.9(c)) Thus, the presumption of arbitrability is not overcome, and Counts I to IV fall within the scope of § 8.9. For these reasons, I recommend that the court grant Defendants' motion to compel arbitration.

c. Waiver of objections to arbitrability

Defendants also contend that Plaintiff waived any argument about the inapplicability of § 8.9 to the claims in this case when it invoked the provision in a letter dated November 19, 2021

regarding the same disputed claims. (D.I. 10 at 8-9) Plaintiff responds that the November 19 letter was not referenced in or attached to the complaint, it does not address any of Plaintiff's current claims, and it is inadmissible as a settlement negotiation, among other arguments. (D.I. 20 at 4-5)

Defendants cite no binding authority and no cases from this district supporting their position that the November 19 letter amounts to a waiver of Plaintiff's objections to arbitrability. (D.I. 10 at 8-9; D.I. 36 at 5-6) Having recommended that the court grant the motion to compel arbitration based on an analysis of the validity and enforceability of the Warrant and the scope of the agreement to arbitrate, the court need not reach the issue of whether Plaintiff waived its objections to the application of § 8.9 by invoking that provision in the November 19 letter. The court has not relied on Defendants' attachment of the November 19 letter or any subsequent attachments submitted in response by Plaintiff.[9]

d. Leave to amend

I recommend that dismissal of Plaintiff's complaint be made with prejudice because Plaintiff's request for leave to amend is nothing more than a "bare request in an opposition to a motion to dismiss—without any indication of the particular grounds on which amendment is sought[.]" *U.S. ex rel. Zizic v. Q2Administrators, LLC*, 728 F.3d 228, 243 (3d Cir. 2013); *see*

[9] Under the Rule 12(b)(6) standard, the court may consider documents that are attached or submitted with the complaint, matters incorporated by reference or integral to the claim, and items appearing in the record of the case. *See Verlyn-Teresa v. Wells Fargo & Co.*, C.A. No. 22-1073-CFC, 2024 WL 894890, at *2 (D. Del. Mar. 1, 2024) (quoting *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006)). As discussed at § I, *supra*, Plaintiff's complaint attaches a tolling agreement stating that, "on November 19, 2021, Fortis sent a formal notice of the Dispute to Abbott pursuant to Section 8.9 of the Warrant Agreement[.]" (D.I. 2, Ex. H) Although consideration of this statement is not necessary to resolve Defendants' argument about Plaintiff's alleged waiver of objections to arbitration under § 8.9, the content of the tolling agreement is considered part of the pleadings for purposes of the decision as a whole.

also In re Allergan ERISA Litig., 975 F.3d 348, 358 (3d Cir. 2020) (finding no abuse of discretion in denying request for leave to amend where the plaintiffs "not only failed to include a draft complaint with their request for leave, they failed to say anything at all about how they intended to amend their pleading."). Because a valid arbitration agreement exists that encompasses Plaintiff's causes of action, any proposed amendment to the complaint would be futile. *See Esis, Inc. v. Coventry Health Care Workers Compensation, Inc.*, 2016 WL 928667, at *8 (E.D. Pa. Mar. 9, 2016) (dismissing complaint with prejudice where "any future amendment would be futile in light of the . . . mandatory arbitration provision."); *see also Hickey v. Smith*, 2024 WL 912041, at *2 (S.D.N.Y. Mar. 4, 2024) ("[W]here the court has determined that an arbitration clause applies to a claim, the court lacks subject matter jurisdiction over [the] claim and any amendment . . . would be futile.") (citing cases; internal quotation marks and citations omitted)); *Taylor v. Shutterfly, Inc.*, 2018 WL 4334770, at *8 (N.D. Cal. Sept. 11, 2018) (citing cases).

3. Motion for leave to file surreply brief

I further recommend that the court deny Plaintiff's motion for leave to file a surreply brief in opposition to Defendants' motion to compel arbitration. According to Plaintiff, the surreply brief should be permitted because Defendants' reply brief raises new arguments that were not contained in the opening brief regarding the impact of § 6.7 of the Warrant on the arbitrability analysis. (D.I. 44 at 3) But Plaintiff's motion for leave ignores the fact that the "new" arguments in Defendants' reply brief "involve content that is directly responsive to arguments made in Plaintiff's answering brief." *Int'l Bus. Machines v. The Priceline Grp.*, C.A. No. 15-137-LPS-CJB, 2016 WL 626495, at *1 n.1 (D. Del. Feb. 16, 2016). Consequently, the content of Defendants' reply brief does not open the door to an expansion of briefing.

Plaintiff contends that the court may nonetheless grant leave to file a surreply brief if the brief is "helpful to the Court in resolving the parties' dispute." (D.I. 44 at 2) (citing *Intellectual Ventures I LLC v. Symantec Corp.*, C.A. No. 10-1067-LPS, 2019 WL 1332356, at *4 (D. Del. Mar. 25, 2019); *Auer v. Lanier Worldwide, Inc.*, C.A. No. 08-528-JJF, 2009 WL 2169058, at *2 (D. Del. July 20, 2009)). In support, Plaintiff cites a case in which the court granted leave to file a surreply brief even though the "reply did not contain 'new' argument to the extent it responded to the new argument . . . raised in [the] opposition." *EMC Corp. v. Pure Storage, Inc.*, 154 F. Supp. 3d 81, 103 (D. Del. 2016). But the court's decision to grant the plaintiff's motion for leave in *EMC Corp.* was based in part on the fact that the defendant, as the nonmoving party, had belatedly disclosed one of its invalidity theories. *Id.* Here, in contrast, it is Plaintiff—the moving party—who disclosed a new theory about the impact of § 6.7 on arbitrability for the first time in its answering brief, and now seeks to benefit from its own delayed disclosure of the theory by requesting an expansion of the briefing.

Although there may be occasions where "the most expedient way to handle such matters [is] not to spend time on the collateral issue . . . but to sort through the additional briefing when deciding the underlying motion[,]" the better approach in this case "is to encourage the parties to follow the rules." *Waters Techs. Corp. v. Aurora SFC Sys. Inc.*, C.A. No. 11-708-RGA, 2012 WL 13167829, at *1 (D. Del. Apr. 20, 2012). The arguments raised in Defendants' reply brief are not "new" because they are responsive to arguments made by Plaintiff for the first time in the answering brief. On this record, there is no basis for the court to conclude that Defendants could have anticipated Plaintiff's new theory regarding § 6.7 of the Warrant in their opening brief. Consequently, granting Plaintiff leave to file a surreply brief would only incentivize delayed

disclosure of legal theories and encourage the submission of additional briefing that unnecessarily taxes the resources of both the parties and the court.[10]

B. Defendants' Partial Motion to Dismiss for Failure to State a Claim

Defendants' partial motion to dismiss for failure to state a claim is brought in the alternative, to be considered only "[i]f the Court declines to enforce the arbitration promise[.]" (D.I. 13 at 1) To the extent that the recommendation on the motion to compel arbitration is adopted, I recommend that the court deny as moot Defendants' partial motion to dismiss and the associated motion for leave to file a surreply brief. (D.I. 12; D.I. 45); *see Edmondson v. Lilliston Ford, Inc.*, 593 F. App'x 108, 111-12 (3d Cir. 2014) (holding that the district court erred in denying a motion to compel arbitration as premature pending a decision on a motion to dismiss); *see also Brito v. LG Elecs. USA, Inc.*, 2023 WL 2675132, at *1 (D.N.J. Mar. 29, 2023) (granting motion to compel arbitration and denying as moot a motion to dismiss without analysis of the latter motion).

C. Defendants' Motion to Seal the Complaint and Other Filings

Defendants move to seal the complaint (D.I. 2), the opening brief and declaration in support of their motion to compel arbitration (D.I. 10; D.I. 11), and the opening brief in support of the motion to dismiss (D.I. 13), in their entirety. (D.I. 8) For the following reasons, I recommend that the court grant-in-part Defendants' motion to seal. Specifically, I recommend that the court deny Defendants' motion to seal the documents in their entirety, and grant Defendants' alternative request to permit the sealing of only those portions of the complaint and other filings that reference Defendants' confidential information. I further recommend that the

[10] The court has nonetheless reviewed Plaintiff's proposed surreply brief and finds that it would not alter the recommended outcome on the motion to compel arbitration. (D.I. 44, Ex. 1)

court order Defendants to file redacted versions of D.I. 2, D.I. 10, D.I. 11, and D.I. 13, redacting information only as necessary to avoid "a clearly defined and serious injury to the party seeking closure." *In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019).

It is well-settled that the public has a common law right of access to judicial proceedings and records. *See Littlejohn v. BIC Corp.*, 851 F.2d 673, 677–78 (3d Cir. 1988). However, the presumption of a public right of access may be rebutted if the judicial records are shown to be "sources of business information that might harm a litigant's competitive standing." *Id.* at 678; *see In re Avandia*, 924 F.3d at 672. The party seeking to overcome the presumption of access bears the burden to show with specificity that the "interest in secrecy outweighs the presumption," and the court must balance the likelihood of harm against the presumption of access. *In re Avandia*, 924 F.3d at 672 (internal quotation marks and citations omitted); *see Pa. Nat'l Mut. Cas. Ins. Grp. v. New Eng. Reins. Corp.*, 840 F. App'x 688, 690 (3d Cir. 2020). A district court has the power to unseal documents that were previously sealed through its discretionary powers. *United States v. Wecht*, 484 F.3d 194, 211 (3d Cir. 2007).

Defendants contend that public disclosure of confidential information about their development of TMVR technology, their pursuit of regulatory approval, and their acquisition of Cephea could result in competitive harm. (D.I. 8 at 3-4, Ex. 1 at ¶¶ 3-5) However, the public disclosure of at least some of the information in the complaint weighs against any argument that the filings must remain sealed in their entirety to prevent competitive harm. *In re Application of Storag Etzel GmbH*, C.A. No. 19-mc-209-CFC, 2020 WL 2949742, at *4-5, 29 (D. Del. Mar. 25, 2020) (explaining that there is "little, if any, plausible justification[ ]" for sealing material that is in the public domain); *see also TexasLDPC Inc. v. Broadcom Inc.*, C.A. No. 18-1966-RGA, 2019

WL 8105993, at *1-2 (D. Del. Jan. 29, 2019) (denying motion to seal complaint, reasoning that "Defendants' desire that its information remain confidential does not negate the reality that the information has already been widely disseminated.").

Defendants concede that "some information about these technologies has been disclosed as required by law (such as certain clinical trial information) or in connection with medical conferences to foster innovation." (D.I. 8 at 3, Ex. 1 at ¶ 3) The declaration submitted by Defendants indicates that only 82 paragraphs of the complaint, out of more than 280 paragraphs total,[11] contain confidential information about the technology and regulatory approval. (*Id.*, Ex. 1 at ¶¶ 3-4) And although the declaration represents that it is Defendants' "policy to maintain the confidentiality of the terms of medical device company acquisitions," Defendants also acknowledge that certain terms of prior acquisition agreements with Tendyne[12] and TwistDx, Inc. are publicly available. (*Id.* at 4, Ex. 1 at ¶¶ 5-6) The declaration generally states that the confidentiality of acquisitions may depend on "the size of the acquisition and/or the private ownership of the acquired company," without directly explaining whether these criteria apply to the Cephea acquisition or why they did not apply to the acquisitions of Tendyne or TwistDx, Inc. (*Id.*, Ex. 1 at ¶¶ 5-6) To the extent that the complaint contains comparisons and contrasts between the Cephea acquisition and the terms of the Tendyne and TwistDx acquisitions, Defendants provide no basis to seal or redact the portions of those allegations that contain public information about prior acquisitions. (*Id.*, Ex. 1 at ¶ 6)

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[11] As noted in the declaration, the complaint contains three sets of paragraphs numbered 266 to 282. (D.I. 8, Ex. 1 at ¶ 5, n.1)

[12] In *Tendyne Holdings, Inc. Securityholder's Representative Committee v. Abbott Vascular, Inc.*, C.A. No. 18-1070-CFC-CJB, the first amended complaint contained allegations similar to those asserted here regarding Defendants' efforts to develop and commercialize Tendyne's mitral valve replacement device. (D.I. 24 at 2) Defendants proposed certain limited redactions to the pleading, which were accepted by the court. (D.I. 26; D.I. 27)

Defendants also argue that sealing the documents in their entirety is warranted because Plaintiff's claims should never have been brought in this court in the first instance under the Warrant's provision for confidential arbitration. (D.I. 8 at 5) But Defendants have sought relief to enforce the arbitration provision in this court, which is not bound by the same confidentiality standards as the arbitration tribunal. *In re EWE Gasspeicher GmbH*, 612 F. Supp. 3d 402, 408 (D. Del. 2020) (explaining that the court was not bound by arbitration confidentiality standards even where the parties contractually agreed to confidential arbitration). The existence of the Warrant and the fact that it contains an arbitration provision are not among the types of information that are normally protected. *See bioMerieux, S.A. v. Hologic, Inc.*, C.A. No. 18-21-LPS, 2019 WL 1435905, at *1 n.1 (D. Del. Mar. 31, 2019); *see also In re Storag Etzel*, 2020 WL 2949742, at *16.

Nonetheless, Defendants have identified certain categories of information in the complaint which may result in competitive harm if the information becomes publicly available: (1) nonpublic information about Defendants' continued development of TMVR technology; (2) nonpublic information about Defendants' efforts to obtain regulatory approval; and (3) nonpublic information about Defendants' acquisition of Cephea. (D.I. 8 at 3-4) According to Defendants, competitors could use information about Defendants' development efforts to match their improvements or counter their strategies. (*Id.* at 3) Moreover, Defendants argue that their future acquisition targets could use information about Cephea's acquisition to negotiate terms less favorable to Defendants. (*Id.*) Redactions to any material that "will work a clearly defined and serious injury to the party seeking closure" should therefore be permitted. *In re Avandia*, 924 F.3d at 677-68 (internal quotations and citations omitted).

Defendants suggest that redactions to the complaint and other filings "will be extensive."

(D.I. 8 at 6) However, sealed or redacted information should be circumscribed to material that contains "palpable trade secrets or proprietary business practices that will . . . present commercial and competitive harm[.]" *Genentech, Inc. v. Amgen, Inc.*, C.A. No. 17-1407-CFC *et al.*, 2020 WL 9432700, at *2 (D. Del. Sept. 2, 2020) (citing *In re Avandia*, 924 F.3d at 676). This recommendation should not be construed as an invitation to propose overinclusive redactions, and Defendants should endeavor to minimize the use of redactions to preserve the right of public access to any judicial records and rulings. The documents Defendants seek to seal are integral to this Report and Recommendation, and "it is in the public interest to be able to understand the proceedings before a judge." *Del. Display Grp. LLC v. LG Elecs. Inc.*, 221 F. Supp. 3d 495, 497 (D. Del. 2016) ("[I]f there is a need for redactions, the proposed redactions should be as narrow as possible."). Failure to make a good faith attempt to minimize redactions may result in the court unsealing the entire filing after the expiration of the objections period and the resolution of objections, if any.

III. CONCLUSION

For the foregoing reasons, I recommend that the court: (1) GRANT Defendants' motion to compel arbitration and DISMISS all claims in the complaint pursuant to 9 U.S.C. § 4, (D.I. 9); (2) DENY Plaintiffs' motion for leave to file a surreply brief in connection with the motion to compel arbitration, (D.I. 44); (3) DENY as moot Defendants' partial motion to dismiss the complaint for failure to state a claim and the associated motion for leave to file a surreply brief, (D.I. 12; D.I. 45); and (4) GRANT-IN-PART Defendants' motion to seal the complaint and D.I. 10, D.I. 11, and D.I. 13, (D.I. 7). On or before **March 25, 2024**, Defendants shall file proposed redacted versions of D.I. 2, D.I. 10, D.I. 11, and D.I. 13.

Given that the court has relied upon material that technically remains under seal, the court is releasing this Report and Recommendation under seal, pending review by the parties. In the unlikely event that the parties believe that certain material in this Report and Recommendation should be redacted, the parties shall jointly submit a proposed redacted version by no later than **March 25, 2024**, for review by the court, along with a motion supported by a declaration that includes a clear, factually detailed explanation as to why disclosure of any proposed redacted material would "work a clearly defined and serious injury to the party seeking closure." *See In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) (quoting *Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994) (internal quotation marks omitted)). If the parties do not file a proposed redacted version and corresponding motion, or if the court determines the motion lacks a meritorious basis, the documents will be unsealed within fourteen (14) days of the date the Report and Recommendation issued.

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D. Del. LR 72.1. The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Report and Recommendation. Fed. R. Civ. P. 72(b)(2). The objections and responses to the objections are limited to ten (10) pages each. The failure of a party to object to legal conclusions may result in the loss of the right to de novo review in the District Court. *See Sincavage v. Barnhart*, 171 F. App'x 924, 925 n.1 (3d Cir. 2006); *Henderson v. Carlson*, 812 F.2d 874, 878–79 (3d Cir. 1987).

The parties are directed to the court's Standing Order for Objections Filed Under Fed. R. Civ. P. 72, dated March 7, 2022, a copy of which is available on the court's website, http://www.ded.uscourts.gov.

Dated: March 18, 2024

Sherry R. Fallon
UNITED STATES MAGISTRATE JUDGE