NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CATALENT, INC., Plaintiff,	:	
v.	:	Case No. 3:20-cv-12368-BRM-DEA
SYBIL DANBY, Defendant.	:	**OPINION**

MARTINOTTI, DISTRICT JUDGE

Before this Court is Plaintiff Catalent, Inc.'s ("Catalent") Motion for a Preliminary Injunction to enjoin Defendant Sybil Danby ("Danby") from being employed by, or providing services to, The Discovery Labs, LLC ("Discovery Labs"). (ECF No. 1-2.) Danby filed opposition to the Motion. (ECF No. 12.) Catalent filed a Reply. (ECF No. 14.) Also before the Court is Danby's Motion to Dismiss the Complaint for failure to state a claim for which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). (ECF No. 11.) Catalent filed opposition to the Motion. (ECF No. 15.) Having reviewed the parties' submissions filed in connection with the Motions and having heard oral argument on October 29, 2020 (ECF No. 24), for the reasons set forth below and for good cause having been shown, Danby's Motion to Dismiss is **GRANTED**, and Catalent's Motion for a Preliminary Injunction is **DENIED**.

I. BACKGROUND

A. Factual Background

For the purposes of the Motion to Dismiss, the Court accepts the factual allegations in the Complaint as true and draws all inferences in the light most favorable to the plaintiff. *See Phillips v. Cty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). Furthermore, the Court also considers any "document *integral to or explicitly relied upon* in the complaint." *In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (quoting *Shaw v. Dig. Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996)).

Danby began her employment with Catalent, a globally leading contract development and manufacturing organization ("CDMO") specializing in gene and cell therapies, among other technologies, on May 20, 2019, as Senior Director of Business Development following Catalent's acquisition of her then employer, Paragon Bioservices, Inc. (ECF No. 1 at ¶¶ 4, 7.) Danby lived in Pennsylvania and worked as a remote employee for Catalent in Pennsylvania. (ECF No. 12-1 at 6 n.1.) In this position, Danby earned over $2,200,000.00 in 2019. (ECF No. 1 at ¶ 8.) On July 9, 2019, and again on September 16, 2019, Danby accepted a Restricted Stock Unit Agreement under the Catalent, Inc. 2018 Omnibus Incentive Plan. (*Id.* at ¶ 9.) On September 16, 2019, Danby in addition accepted a Performance Share Unit Agreement Under the Catalent, Inc. 2018 Omnibus Incentive Plan. (*Id.* at ¶ 10.) As part of the Restricted Stock Unit Agreement and the Performance Share Unit Agreement (the "Agreements"), Danby agreed to be bound by certain restrictive covenants. (*Id.* at ¶ 11.) These restrictive covenants included: confidentiality, non-competition, and non-solicitation. (*Id.* at ¶ 12.)

Catalent alleges Danby violated her non-competition clause. (*Id.* at ¶ 13.) The non-competition clause states:

> (II) During the Restricted Activity Period, the Participant will not directly or indirectly:
> (1) engage in any business that competes with the business of the Company or any of its Subsidiaries or Affiliates, including, but not limited to, providing formulation/dose form technologies and/or contract services to pharmaceutical, biotechnology, over-the-counter and vitamins/minerals/ supplements companies related to pre-clinical and clinical development, formulation, analysis, manufacturing and/or packaging, and any other technology, product, or service of the type developed, manufactured, or sold by the Company or any of its Subsidiaries or Affiliates (including, without limitation, any other business that the Company or any of its Subsidiaries or Affiliates have plans to engage in as of the Termination Date) in any geographical area where the Company or any of its Subsidiaries or Affiliates conducts business (a "Competitive Business");
> (2) enter the employ of, or render any services to, any Person (or any division or controlled or controlling Affiliate of any Person) who or which engages in a Competitive Business;
> (3) acquire a financial interest in, or otherwise become actively involved with, any Competitive Business, directly or indirectly, as an individual, partner, shareholder, officer, director, principal, agent, trustee, or consultant; or
> (4) interfere with, or attempt to interfere with, any business relationship (whether formed before, on, or after the Date of Grant) between the Company or any of its Subsidiaries or Affiliates and any customer, client, supplier, or investor of the Company or any of its Subsidiaries or Affiliates.

(ECF No. 1-1 at 5, 17-18.)

Paragraph 19 of the Agreements contain a Delaware choice of law provision, and a New Jersey forum selection clause:

> This Agreement shall be construed and interpreted in accordance with the laws of the State of Delaware, without regard to its principles of conflicts of law. For purposes of litigating any disputes that arise under this grant or this Agreement, the parties hereby submit to and consent to the jurisdiction of the federal and state courts, located in the State of New Jersey, and hereby waive any objection to proceeding in such jurisdiction, including any objection regarding an inconvenient forum.

(*Id.* at 11, 24.)

On January 31, 2020, Danby resigned her position with Catalent. (ECF No. 1 at ¶ 14.) In February and March 2020, Danby's legal counsel sent letters to Catalent, notifying Catalent of Danby's intention to pursue new employment in the biotechnology industry, and but received no response from Catalent until August 2020.[1] (ECF No. 12-2 at 14-15.) On August 3, 2020, Danby was appointed to a management position with the Business Development & Strategy team of Discovery Labs. (ECF No. 1 at ¶ 15.) Discovery Labs is a direct competitor of Catalent. (*Id.* at ¶ 16.) Catalent learned of Danby's employment on August 6, 2020, due to a posting on Danby's LinkedIn account announcing the position. (*Id.* at ¶ 17.) On August 6, 2020, Catalent sent a letter to Danby reminding her of her obligations under the Agreements, and asking her, within 14 days of the date of the letter, to provide proof that she has resigned from or delayed her employment with Discovery Labs until January 31, 2021. (ECF No. 14-3 at 3.) Catalent alleges Danby's employment with Discovery Labs violates the restrictive covenants set forth above. (ECF No. 1 at ¶ 18.)

On August 31, 2020, Danby and Discovery Labs filed a Complaint for a declaratory judgment in the District Court of the Eastern District of Pennsylvania ("EDPA"). (ECF No. 12-2.) Danby's counsel stated they filed the declaratory action because they did not get a response from Catalent after sending the two letters to Catalent's general counsel, and filed in the EDPA because that was where Danby was working and living. (Tr. 13:4-6.) Danby alleges the Agreements are unenforceable and/or inapplicable to Danby's current employment. (ECF No. 12-2 at 2.) Danby also claims Catalent did not maintain Danby's overall compensation or promote her to an officer

[1] In the oral argument, Danby's counsel claimed they sent the letters to the general counsel for Catalent, notifying Catalent Danby was going to work for a competitor. (Draft Tr. Oct. 29, 2020 Oral Arg. ("Tr.") 12:6-8, 11-13.)

position, or provide her with the support and opportunities that Catalent had promised following her retention with Catalent following its acquisition of Paragon. (*Id.* at 9.)

B. Procedural History

On September 4, 2020, Catalent filed a Complaint against Danby for breach of contract, along with an Order to Show Cause with Temporary Restraints seeking a Temporary Restraining Order and Preliminary Injunction to enjoin Danby from being employed by, or providing services to, Discovery Labs. (ECF Nos. 1, 1-2.) Catalent's application for a Temporary Restraining Order was denied on September 8, 2020. (ECF No. 6.) On September 24, 2020, Danby filed a Motion to Dismiss Catalent's Complaint pursuant to Fed. R. Civ. P. 12(B)(6). (ECF No. 11.) Danby then filed her Opposition to the Motion for Preliminary Injunction on September 29, 2020. (ECF No. 12.) On October 5, 2020, Catalent filed a Reply in Further Support of its Motion for Preliminary Injunction (ECF No. 14), and an Opposition to Danby's Motion to Dismiss (ECF No. 15).

II. LEGAL STANDARD

A. Rule 12(b)(6)

In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a district court is "required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [plaintiff]." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). However, the plaintiff's "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan*,

478 U.S. at 286. Instead, assuming the factual allegations in the complaint are true, those "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged." *Id.* This "plausibility standard" requires the complaint allege "more than a sheer possibility that a defendant has acted unlawfully," but it "is not akin to a probability requirement." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Detailed factual allegations" are not required, but "more than an unadorned, the defendant-harmed-me accusation" must be pled; it must include "factual enhancements" and not just conclusory statements or a recitation of the elements of a cause of action. *Id.* (citing *Twombly*, 550 U.S. at 555, 557).

"Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)). However, courts are "not compelled to accept 'unsupported conclusions and unwarranted inferences,'" *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007) (quoting *Schuylkill Energy Res. Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997)), nor "a legal conclusion couched as a factual allegation." *Papasan*, 478 U.S. at 286.

While, as a general rule, the court may not consider anything beyond the four corners of

the complaint on a motion to dismiss pursuant to Rule 12(b)(6), the Third Circuit has held that "a court may consider certain narrowly defined types of material without converting the motion to dismiss [to one for summary judgment pursuant to Rule 56]." *In re Rockefeller Ctr. Props. Sec. Litig.*, 184 F.3d 280, 287 (3d Cir. 1999). Specifically, courts may consider any "document *integral to or explicitly relied upon* in the complaint." *Burlington*, 114 F.3d at 1426 (quoting *Shaw*, 82 F.3d at 1220).

B. Preliminary Injunction

"Preliminary injunctive relief is an 'extraordinary remedy, which should be granted only in limited circumstances." *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014) (quoting *Novartis Consumer Health, Inc. v. Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 586 (3d Cir. 2002)). The primary purpose of preliminary injunctive relief is "maintenance of the status quo until a decision on the merits of a case is rendered." *Acierno v. New Castle Cty.*, 40 F.3d 645, 647 (3d Cir. 1994).

In order to obtain a temporary restraining order or preliminary injunction, the moving party must show:

> (1) a reasonable probability of eventual success in the litigation, and (2) that is will be irreparably injured . . . if relief is not granted . . . . [In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.

Reilly v. Cty. of Harrisburg, 858 F.3d 173, 176 (3d Cir. 2017) (quoting *Del. River Auth. v. Transamerican Trailer Transp., Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974)).

The movant bears the burden of establishing "the threshold for the first two 'most critical' factors . . . . If these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting

the requested preliminary relief." *Id.* at 179. A court may issue an injunction to a plaintiff "only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief." *AT&T v. Winback & Conserve Program*, 42 F.3d 1421, 1427 (3d Cir. 1994); *see also P.C. Yonkers, Inc. v. Celebrations the Party & Seasonal Superstore, LLC*, 428 F.3d 504, 508 (3d Cir. 2005) ("The burden lies with the plaintiff to establish every element in its favor, or the grant of a preliminary injunction is inappropriate."); *Ferring*, 765 F.3d at 210. A preliminary injunction also should not be issued where material issues of fact are in dispute. *Vita-Pure, Inc. v. Bhatia*, 2015 U.S. Dist. LEXIS 42655, 2015 WL 1496396, at * 3 (D.N.J. Apr. 1, 2015) (denying injunction where factual disputes "preclude a determination that Plaintiffs have established a likelihood of success on the merits"); *Watchung Spring Water Co. v. Nestle Waters N. Am. Inc.*, 2014 U.S. Dist. LEXIS 151178, 2014 WL 5392065, at *2 (D.N.J. Oct. 23, 2014), *aff'd*, 588 F. App'x 197 (3d Cir. 2014). The Court must, therefore, weigh each of the four factors to determine whether Plaintiffs have, by a clear showing, carried their burden of persuasion. *See Winback*, 42 F.3d at 1427 (requiring a district court to weigh all four factors prior to granting injunctive relief).

III. DECISION

A. The Agreements are governed by Delaware law

Catalent maintains the Agreements are governed by Delaware law, as provided by the Agreements' choice of law provision. (ECF No. 14 at 7.) Danby claims it is not clear that Delaware law applies here, given the Agreements' failure of consideration. (ECF No. 12-1 at 6.) Danby proposes Pennsylvania law should apply, because the Agreements arose in Pennsylvania where Danby lived as a remote employee for Catalent. (*Id.* at 6 n.1.) The Court disagrees.

"Under the Erie doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 427 (1996). "In cases in

which their jurisdiction depends upon diversity of citizenship, Federal courts must follow conflict of laws rules prevailing in the states in which they sit." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 494 (1941). "In evaluating whether a contractual choice-of-law clause is enforceable, federal courts sitting in diversity apply the choice-of-law rules of the forum state." *Homa v. American Express Co.*, 558 F.3d 225, 227 (3d Cir. 2009) (internal citations omitted). Here, the case is based on diversity jurisdiction, and the Court sits in New Jersey. (ECF No. 1 at ¶¶ 2-3.) Therefore, the Court applies federal procedural rules, and the New Jersey choice of law rules in deciding whether the Agreements' choice of law provision is enforceable.

To apply a contract's choice of law provision, a court need not first ascertain the validity of the contract as a whole. *Hite v. Lush Internet Inc.*, 244 F. Supp. 3d 444, 450 n.3 (D.N.J. 2017). A contractual choice of law can be enforced even though the contract would be invalid for lack of consideration in the state whose law would otherwise apply. Restatement (Second) of Conflicts of Laws § 187(2)(b) cmt. e, illus. 8 (1969). Therefore, at this stage, the Court may apply the Agreements' choice of law provision even if the Agreements are invalid for a lack of consideration.

"The Court will enforce the terms of a contract that is unambiguous on its face." *Brauser Real Estate, LLC v. Meecorp Capital Mkts., LLC*, No. 06-cv-01816, 2008 U.S. Dist. LEXIS 8000 at *9 (D.N.J. Feb. 4, 2008) (citing *Statewide Realty Co. v. Fidelty Mgmt. & Research Co., Inc.*, 259 N.J. Super. 59, 68, 611 A.2d 158 (1992)). "[C]ourts in [the Third Circuit] have repeatedly honored choice-of-law provisions that explicitly state a particular governing law without regard to conflicts of law." *Id.* (citing *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 159 (3d Cir. 1999)). Here, the Agreements' choice of law provision explicitly states "[t]his Agreement shall be construed and interpreted in accordance with the laws of the State of Delaware, *without regard to its principles of conflicts of law*." (ECF No. 1-1 at 11.) This shows the parties' clear and

unambiguous intention to apply Delaware law to the Agreements. Therefore, based on the contract language alone, Delaware law should govern. Though unnecessary, the following choice-of-law analysis leads to the same conclusion.

In New Jersey, a choice of law clause will be upheld "unless either: (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issues and which would be the state of the applicable law in the absence of an effective choice of law by the parties." *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 130 N.J. 324, 342, 614 A.2d 124 (1992) (citing Restatement (Second) of Conflicts of Laws § 187 (1969)). As for the first prong, Catalent is a corporation organized and existing under the laws of the State of Delaware. (ECF No. 1 at ¶ 4.) Therefore, the Court will not conclude Delaware has no substantial relationship to the parties or no reasonable basis for the parties' choice. As for the second prong, Danby argues Pennsylvania law should apply based on the state's connections to the Agreement and herself, and claims Pennsylvania's public policy as disfavoring restrictive covenants. (ECF No. 12-1 at 6 n.1.) This suggests the Court may refuse to enforce the Agreements' choice of law provision, if the Court finds the application of Delaware law is contrary to a fundamental policy of Pennsylvania, and if Pennsylvania has a materially greater interest than New Jersey as to the enforceability of the restrictive covenants and would be the state of the applicable law in the absence of an effective choice of law provision.

In the absence of a choice of law provision, New Jersey adopts the "most significant relationship" test for the choice of law analysis. *Miller v. Samsung Elecs. Am., Inc.*, No. 14-4076, 2015 U.S. Dist. LEXIS 84359 at *10 (D.N.J. June 29, 2015) (citing *Maniscalco v. Brother Int'l*

(USA) Corp., 709 F.3d 202, 206-07 (3d Cir. 2013); Restatement (Second) of Conflict of Laws § 148 (1971)). "This test requires a two-step analysis." *Id.* (citing *P.V. v. Camp Jaycee*, 197 N.J. 132, 143, 962 A.2d 453 (2008)). "First, the Court must 'determine whether an actual conflict' of law exists." *Id.* (citing *P.V.*, 197 N.J. at 143). "If no conflict exists, the law of the forum state applies." *Id.* (citing *P.V.*, 197 N.J. at 143). "Second, if a conflict exists, the Court must determine which state has the most significant relationship to the claim, by weigh[ing] the factors set forth in the Restatement section corresponding to the plaintiff's cause of action." *Id.* (citing *Snyder v. Farnam Cos.*, 792 F. Supp. 2d 712, 717 (D.N.J. 2011)) (internal quotations omitted). "Choice-of-law analysis is performed on a claim-by-claim basis." *Id.* However, a court may find the choice-of-law analysis premature at the motion-to-dismiss stage, and decline to conduct the analysis. *Kearney v. Bayerische Motoren Werke Aktiengesellschaft*, No. 17-13544, 2018 U.S. Dist. LEXIS 147746 at *13 (D.N.J. Aug. 29, 2018). Courts "have done so where either (i) the defendant failed to explain why there was a conflict between the laws of different relevant jurisdictions, or (ii) key facts relevant to a choice-of-law analysis were not available." *Id.* (internal citations omitted); *see also Amato v. Subaru of Am., Inc.*, No. 18-16118, 2019 U.S. Dist. LEXIS 209659 at *11-12 (D.N.J. Dec. 5, 2019).

Here, Danby fails to explain why there is a conflict between the laws of Pennsylvania and Delaware. First, Danby has not clarified what the Pennsylvania law is regarding the restrictive covenants. Danby admits "there do not appear to be any cases directly on point." (ECF No. 12-1 at 6 n.1.) As for the alleged "Pennsylvania's view on restrictive covenants as being disfavored," Dandy cites no relevant authority. *Id.* Second, Dandy has made no comparison between the laws of Pennsylvania and Delaware to show an actual conflict. Therefore, the Court declines to apply the "most significant relationship" test to determine whether the Pennsylvania law should apply in

the absence of a choice of law provision. This renders the Court unable to determine whether the Agreements' restrictive covenants contradict a fundamental policy of Pennsylvania so that the choice of law provision may be unenforceable. Accordingly, the Court finds no basis to disregard the Agreements' choice of law provision, and the Agreements are governed by Delaware law.

B. The Court Declines to Exercise Jurisdiction Under the First-Filed Rule

Danby argues dismissal of this matter is appropriate, because Danby filed an action in the EDPA five days before Catalent filed this matter. (ECF No. 11-1 at 4.) In the EDPA action, Danby is seeking a declaratory judgment that the Agreements are unenforceable. (*Id.*) Dancy claims the two cases are identical, so the first-to-file rule (or synonymously "the first-filed rule") should compel dismissal of this matter. (*Id.* at 5.) Catalent counters the first-filed rule does not apply here, for two reasons: (1) the Agreements contain an exclusive forum selection clause designating the state and federal courts of New Jersey for litigating any dispute arising under them, and Danby unequivocally waived any objection to proceeding in this Court; and (2) Danby forum shopped, anticipatorily filed, and filed in bad faith in order to contravene the forum selection clause. (ECF No. 15 at 8-9.) Danby contends the forum selection clause is: (1) permissive, not mandatory; and (2) not enforceable, since Danby has not received consideration for the Agreements which are therefore unenforceable. (ECF No. 11-1 at 5, 7.) The Court declines to exercise its jurisdiction to hear this matter.

The applicability of the first-filed rule is a procedural question. *Chavez v. Dole Food Co.*, 836 F.3d 205, 210 (3d Cir. 2016). Therefore, federal law governs. *See Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 427 (1996) (holding federal courts sitting in diversity apply federal procedural law). Under the first-filed rule, a district court has the discretion to "enjoin the subsequent prosecution of proceedings involving the same parties and the same issues already

before another district court." *Spellman v. Express Dynamics, LLC*, 150 F. Supp. 3d 378, 386 (D.N.J. 2015) (citing *E.E.O.C. v. Univ. of Pa.*, 850 F.2d 969, 971 (3d Cir. 1988)). "In all cases of federal concurrent jurisdiction, the court which first has possession of the subject must decide it." *Wheaton Indus., Inc. v. Aalto Sci., Ltd.*, No. 12-6965, 2013 U.S. Dist. LEXIS 118524, at *2 (D.N.J. Aug. 21, 2013) (internal citations and quotations omitted). "[T]he rule's primary purpose is to avoid burdening the federal judiciary and to prevent the judicial embarrassment of conflicting judgments." *E.E.O.C*, 850 F.2d at 977 (internal citations omitted). "Yet, fundamental fairness dictates the need for fashioning a flexible response to the issue of concurrent jurisdiction." *Id.* (internal citations and quotations omitted).

Here, the first-filed rule is applicable. First, the EPDA action was filed first. (*See* ECF Nos. 1, 12-2) Second, the two actions involve the same issues. Danby is seeking a declaratory judgement in EDPA that the Agreements are unenforceable (ECF No. 12-2 at 2), and Catalent is attempting to enforce the same Agreements here. (ECF No. 1 at ¶ 1). Third, though Discovery Labs is a plaintiff in the EDPA action but not a party here, the two actions involve essentially the same parties. The crucial inquiry of the first-filed rule is whether there is a substantial overlap of issues; an absolute identify of parties and issues is not required. *Ivy-Dry, Inc. v. Zanfel Labs., Inc.*, No. 08-4942, 2009 U.S. Dist. LEXIS 53307 at *14 (D.N.J. June 24, 2009) (applying the first-filed rule even though the parties in the second-filed suit are not identical because the shared subject matter of two cases is more important); *Siemens Fin. Servs. v. Open Advantage M.R.I. II L.P.*, No. 07-1229, 2008 U.S. Dist. LEXIS 15623 at *9 (D.N.J. Feb. 29, 2008); *GlaxoSmithKline Consumer Healthcare, L.P. v. Merix Pharm. Corp.*, No. 05-898, 2005 U.S. Dist. LEXIS 40007 at *25 (D.N.J. May 10, 2005). "[W]here the overlap between two suits is less than complete, the judgment is made case by case, based on such factors as the extent of overlap, the likelihood of conflict, the

comparative advantage and the interest of each forum in resolving the dispute." *GlaxoSmithKline Consumer Healthcare*, No. 05-898, 2005 U.S. Dist. LEXIS 40007 at *25-26. Here, though not a party, Discovery Labs is substantially involved in the dispute as Danby's current employer. Discovery Labs and Danby share a same interest in preventing the enforcement of the Agreements and are represented by the same legal counsel. (*See* ECF No. 7 at 1, No. 12-2 at 25.) New Jersey has an interest in adjudicating this case, because Catalent's principal place of business is in New Jersey. (ECF No. 1 at ¶ 4.) But Pennsylvania also has a similar legitimate interest in hearing the case, because this is where Danby resides and worked for Catalent, and where the Agreements were executed. (*Id.* at ¶ 5; ECF No. 12-1 at 6 n.1.) Therefore, the Court will not preclude the application of the first-filed rule merely because Discovery Labs is not a party here.

However, several exceptional circumstances may justify a departure from the first-to-file rule. "[T]he presence of a single forum selection clause will almost always render the first-to-file rule inapplicable." *Chemetall US Inc. v. LaFlamme*, No. 16-780, 2016 U.S. Dist. LEXIS 38590 at *9 (D.N.J. March 24, 2016). The reason for this exception is "to prevent a plaintiff from taking advantage of the first-to-file rule by first filing a lawsuit in a forum that the forum selection clause does not permit." *Id.* (citing *Samuels v. Medytox Solutions, Inc.*, No. 13-7212, 2014 U.S. Dist. LEXIS 125525 at *10 (D.N.J. Sept. 8, 2014)). This suggests, to invoke the exception, the second-filed forum must be the exclusive one under the governing forum selection provision(s), otherwise the first-filed forum is also "permitted.[2]" *See Samuels*, No. 13-7212, 2014 U.S. Dist. LEXIS 125525 at *10[3] (Applying the first-to-file rule when the first action was filed in New Jersey and

[2] As discussed below, the Agreement's forum selection clause does not make New Jersey the exclusive forum. The clause is permissive despite a waiver of objection to proceeding in New Jersey.

the second in Florida, because the two agreements in dispute contain competing forum selection clauses which separately provide New Jersey and Florida as the exclusive forum, thereby permitting the first-filed forum); *Koresko v. Nationwide Life Ins. Co.*, 403 F. Supp. 2d 394, 400-01 (E.D. Pa. 2005) (finding a forum selection clause permissive and therefore unable to justify a depart from the first-filed rule). Other exceptions to the first-filed rule include: (1) rare or extraordinary circumstances; (2) inequitable conduct; (3) bad faith; (4) forum shopping; (5) the subsequently filed action further develops the case; and (6) the first party initiated suit in one forum in anticipation of the other party's imminent suit in a less favorable forum. *E.E.O.C*, 850 F.2d at 977. Here, the Court finds the first-to-file rule applies, because none of the above exceptional circumstances exists.

1. The Forum Selection Clause Does Not Trump the First-Filed Rule

The enforceability of a forum selection clause is a procedural issue that is determined by federal law. *Weichert Real Estate Affiliates, Inc. v. CKM16, Inc.*, No. 17-4824, 2018 U.S. Dist. LEXIS 15388 at *15 (D.N.J. Jan. 31, 2018); *Collins v. Mary Kay, Inc.*, 874 F.3d 176, 181 (3d Cir. 2017). "Forum selection clauses are presumptively valid." *Chemetall*, No. 16-780, 2016 U.S. Dist. LEXIS 38590 at *10 (citing *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 202 (3d Cir. 1983)). A court need not await adjudication of the validity of the underlying agreement before enforcing the forum selection clause, "which is designed to determine at the outset of litigation which forum gets to decide such [ultimate] issue." *Radware, Inc. v. U. S. Telepacific Corp.*, No. 18-17266, 2019 U.S. Dist. LEXIS 99651 at *9 (D.N.J. June 11, 2019); *See also CoActiv Capital Partners, Inc. v. Feathers*, 2009 U.S. Dist. LEXIS 56103 at *13 (E.D. Pa. July 1, 2009) (rejecting the argument that the forum selection clause is invalid for want of consideration, as such argument embraces the ultimate issue). Therefore, the Court rejects Danby's argument that the

forum selection clause here is not enforceable because Danby has not received consideration for the Agreements.

In contrast, whether a forum selection clause is exclusive or permissive is a question of contract interpretation. *E.P. Henry Corp. v. Home Depot, Inc.*, No. 07-2783, 2008 U.S. Dist. LEXIS 590 at *15 (D.N.J. Jan. 3, 2008) (citing *Chisso Am., Inc. v. M/V Hanjin Osaka*, 307 F. Supp. 2d 621, 624 (D.N.J. 2003)); *Union Steel Am. Co. v. M/V Sanko Spruce*, 14 F. Supp. 2d 682, 687 (D.N.J. 1998). Therefore, Delaware law governs. "Forum selection clauses may be permissive or mandatory." *Germaninvestments AG v. Allomet Corp.*, 2019 Del. Ch. LEXIS 184 at *15 (Del. Ch. May 23, 2019). "Permissive forum selection clauses, often described as 'consent to jurisdiction' clauses, authorize jurisdiction and venue in a designated forum, but do not prohibit litigation elsewhere." *Id.* "Mandatory forum selection clauses contain clear language that litigation will proceed exclusively in the designated forum." *Id.* "[U]nder Delaware law, if the forum selection provision does not state that it is exclusive in crystalline terms," the provision will be construed as permissive. *Id.* "Parties must use express language clearly indicating the forum selection clause excludes all other courts before which those parties could otherwise properly bring an action." *Eisenbud v. Omnitech*, 1996 Del. Ch. LEXIS 37 at *3 (Del. Ch. March 21, 1996). For example, "a provision stating that a court *shall* have jurisdiction over *any* dispute as a mandatory, rather than permissive, grant of jurisdiction." *Ashall Homes Ltd. v. ROK Entm't Group Inc.*, 992 A.2d 1239, 1250 (Del. Ch. 2010).

The Agreements' forum selection provision[4] is such a permissive "consent to jurisdiction" clause. It does not contain any crystalline term that excludes all other forums. *See In re Bay Hills*

[4] "For purposes of litigating any dispute that arises under this grant or this Agreement, the parties hereby submit to and consent to the jurisdiction of the federal and state courts located in the State

Emerging Partners I, L.P., 2018 Del. Ch. LEXIS 214 at *13 (Del. Ch. July 2, 2018) (finding a forum selection clause permissive when its relevant part states each party "consents to the jurisdiction of" the Kentucky courts and "further consents that venue shall lie in the Franklin Circuit Court located in Franklin County, Kentucky"); *McWane, Inc. v. Lanier*, 2015 Del. Ch. LEXIS 24 at *7, 13 (Del. Ch. Jan. 30, 2015) (determining a forum selection clause to be exclusive as it provides the parties "consents and submits to the *exclusive* jurisdiction" of Delaware courts); *Prestancia Mgmt. Group v. Va. Heritage Found., II LLC*, 2005 Del. Ch. LEXIS 80 at *27, 29 (Del. Ch. May 27, 2005) (concluding as exclusive a forum selection clause that provides "*any* controversy arising" under the disputed agreement "*shall* be in the courts of competent jurisdiction of Loudoun County, Virginia"). The provision's language "hereby waive any objection to proceeding in such jurisdiction" does not make it exclusive. *See Opera Solutions, LLC v. Schwan's Home Serv.*, 2016 U.S. Dist. LEXIS 86183 at *16 (Del. July 1, 2016) (finding a forum selection clause containing the language "waives any objection . . . to the exercise of such jurisdiction over it by any such courts" permissive); *McWane, Inc. v. Lanier*, 2015 Del. Ch. LEXIS 24 at *14 (Del. Ch. Jan. 30, 2015) (finding a forum selection clause providing "each of the parties waives any objection to venue or the convenience of the forum" permissive). Therefore, the forum selection provision in the Agreements is permissive, and therefore unable to preclude the application of the first-to-file rule.

2. Danby Did Not Forum Shop, Anticipatorily File, or File in Bad Faith

Catalent claims the first-filed rule does not apply because Danby forum shopped, anticipatorily filed, and filed in bad faith. (ECF No. 15 at 10.) In particular, Catalent argues Danby

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of New Jersey, and hereby waive any objection to proceeding in such jurisdiction, including any objection regarding an inconvenient forum." (ECF No. 1-1 at 11, 24.)

filed an anticipatory strike in bad faith—when she knew litigation was imminent—in order to litigate in what she believes is a more convenient forum. (*Id.* at 12.) On August 6, 2020, Catalent sent a letter to Danby reminding her of her obligations under the Agreements, and asking her, within 14 days of the date of the letter, to provide proof that she has resigned from or delayed her employment with Discovery Labs until January 31, 2021. (ECF No. 14-3 at 3.) If Danby did not comply, Catalent would pursue "all rights and remedies" against Danby. (*Id.*) Then, 25 days later (i.e., on August 31, 2020), Danby and Discovery Labs filed a Complaint in EDPA. (ECF No. 12-2.) Catalent argues Danby filed the EDPA action shortly after receiving the letter, which renders the first-filed rule inapplicable. (ECF No. 15 at 12.) The Court disagrees.

"[T]he forum shopping exception targets a situation where the defendant, who knows it will be sued, acts quickly and files a declaratory judgment action in a favorable forum to knock out any subsequently filed complaints filed in less favorable fora." *Worthington v. Bayer Healthcare, LLC*, No. 11-2793, 2012 U.S. Dist. LEXIS 44880 at *27 (D.N.J. March 30, 2012). "The mere commencement of an action in a more convenient district is not indicative of forum shopping." *Pai v. Reynolds Foil, Inc.*, No. 10-1465, 2010 U.S. Dist. LEXIS 43960 at *11 (D.N.J. May 4, 2010) (citations omitted). To establish the defendant has engaged in improper forum shopping, the plaintiff must show the defendant is seeking to have the suit heard in a forum solely based on the more favorable judiciary or established law of that forum. *Id.*; *Chemetall US Inc. v. LaFlamme*, No. 16-780, 2016 U.S. Dist. LEXIS 38590 at *10-11 (D.N.J. March 24, 2016); *Depuy Synthes Sales, Inc. v. Gill*, No. 13-04474, 2013 U.S. Dist. LEXIS 154825 at *38 (D.N.J. Oct. 29, 2013) (refusing to find the defendant forum shopped by first filing in the Eastern District of Washington to avoid New Jersey law, because the plaintiff, while insisting the contract in dispute is enforceable under New Jersey law, points to no established precedent showing the contract

would be unenforceable under Washington law); *Violet Pot, LLC v. Lowe's Cos.*, No. 06-4138, 2007 U.S. Dist. LEXIS 20040 at *13 (D.N.J. March 20, 2007). Here, Catalent has not shown Pennsylvania law is more favorable to Danby, or Catalent cannot obtain a fair trial in EDPA. Though Danby mentions Pennsylvania's disfavoring view on restrictive covenants (ECF No. 12-1 at 6 n.1), no party has referred to any relevant legal authority in Pennsylvania or compared Pennsylvania law with Delaware law or New Jersey law. Also, forum shopping is likely not the sole reason for Dandy's choice of EDPA for the first-filed action, because Danby is domiciled in Pennsylvania, which for her may be a more convenient forum. *See In re Maidenform, Inc.*, No. 05-cv-1693, 2005 U.S. Dist. LEXIS 53923 at *8 (D.N.J. Nov. 21, 2005) (declining to find the plaintiff forum shopped when it initiated suit in New Jersey where the plaintiff is headquartered and has extensive contacts). More importantly, an EDPA court may also apply Delaware law to the Agreements, under the Agreements' choice of law provision and Pennsylvania's choice of law rule. *See Depuy Synthes Sales*, No. 13-04474, 2013 U.S. Dist. LEXIS 154825 at *38 (refusing to find the defendant forum shopped by first filing in Washington because a federal judge in Washington is completely capable of interpreting and applying, if applicable, the law of the second-filed forum in New Jersey). And Catalent makes no argument to the contrary. Lastly, though the Agreements' forum selection clause states the parties "waive any objection to proceeding in" New Jersey courts, it does not prove Danby forum shopped when she first-filed in EDPA. *See Depuy Synthes Sales*, 2013 U.S. Dist. LEXIS 154825 at *5, 37-38 (refusing to find the defendant forum shopped when the governing forum selection clause is permissive and contains a waiver of objection to the second-filed forum in New Jersey). Therefore, the Court does not find Danby is engaged in forum shopping.

To establish the bad faith exception, the party that first filed an action must be in apparent

anticipation of "imminent judicial proceedings." *Pai*, No. 10-1465, 2010 U.S. Dist. LEXIS 43960 at *13; *Maidenform*, No. 05-cv-1693, 2005 U.S. Dist. LEXIS 53923 at *6. Courts in the Third Circuit have found evidence of bad faith when a party filed a suit *before* the expiration of a deadline (or a grace period) set out by the opposing party for concluding settlement negotiations or in a cease-and-desist letter. *Sinclair Cattle Co. v. Ward*, 80 F. Supp. 3d 553, 561 (E.D. Pa. 2015) (internal citations omitted); *Church & Dwight v. Mayer Labs., Inc.*, No. 08-5743, 2010 U.S. Dist. LEXIS 103939 at *22 (D.N.J. Sept. 28, 2010) (citing *Keating Fibre*, 416 F. Supp. 2d at 1052); *Pai*, No. 10-1465, 2010 U.S. Dist. LEXIS 43960 at *13 (citing *Keating Fibre Int'l, Inc. v. Weyerhaeuser Co.*, 416 F.Supp.2d 1048, 1052 (E.D. Pa. 2006)). "Courts in the Third Circuit have declined to find bad faith where 'litigation was in the air,' but no definite date had been set." *Bright Ideas Funding Grp., LLC v. Magic*, No. 12-1714, 2012 U.S. Dist. LEXIS 199582 at *19 (D.N.J. Sept. 4, 2012) (citing *Keating Fibre*, 416 F. Supp. 2d at 1052). Here, Catalent in the August 6, 2020 letter set for Danby a grace period, which expired in 14 days (i.e., on August 20, 2020), and threatened imminent judicial proceedings by stating it would "immediately pursue all rights and remedies" had Danby not stopped violating the Agreements by the end of the grace period. (ECF 14-3 at 2-3.) However, Danby filed the EDPA action on August 31, 2020, 11 days *after* the grace period expired. This speaks against finding bad faith in Danby. *See Easton-Bell Sports, Inc. v. E.I. Dupont De Nemours & Co.*, 2013 U.S. Dist. LEXIS 43832 at *16 (N.D. Cal. March 26, 2013) (declining to find bad faith in the party who first-filed suit after missing the deadline to settle); *Smithers-Oasis Co. v. Clifford Sales & Mktg.*, 194 F. Supp. 2d 685, 687 (N.D. Ohio 2002) (concluding the defendant's decision to delay the serving of the summons for the lawsuit until the deadline had passed indicates it was not acting in bad faith.); *Clergy Fin., LLC v. Clergy Fin. Servs.*, 598 F. Supp. 2d 989 (D. Minn. 2009) (suggesting the fact that the plaintiff first-filed the

suit only a day after deadline appears to support finding the plaintiff's bad faith). Moreover, Danby has rational reasons to file first in EDPA. Five months before filing the EDPA action, Danby have tried to contact Catalent twice but got no response. (Tr. 12:6-12.) This led to Danby's filing of the declaratory action. (Tr. 13:4-5.) The action was filed in the EDPA, because that was where Dancy lived, worked for Catalent, and executed the Agreements. (Tr. 13:5-6.) Therefore, the Court does not find Danby filed the EDPA action in bad faith.

"Some evidence that a first-filed case was filed for the purpose of forum shopping [or in bad faith] is necessary before courts find it was improperly anticipatory, and therefore warranted a departure from the first-filed rule." *Eagle Pharm., Inc. v. Eli Lilly & Co.*, No. 17-6415, 2018 U.S. Dist. LEXIS 121527, at *4 (D.N.J. July 20, 2018) (quoting *Koresko v. Nationwide Life Ins. Co.*, 403 F. Supp. 2d 394, 401 (E.D. Pa. 2005)). Since the Court does not find bad faith or forum shopping on Danby's part, it will not depart from the first-filed rule because Danby instituted the EDPA action in anticipation of Catalent's imminent lawsuit.

Because the Court finds no basis to justify a departure from the first-filed rule, the rule applies here. After all, the Agreements' forum selection clause permits filing a suit in EDPA, and Danby did not forum shop, anticipatorily file, or file in bad faith. Because the EDPA action was filed first and addresses the same issue as this case, the Court dismisses Catalent's case under the first-filed rule, and need not address Danby's arguments in support of dismissal based on the Agreements' validity. Accordingly, at this juncture, the merits of Catalent's request for a preliminary injunction will not be addressed.

IV. CONCLUSION

For the reasons set forth above, Danby's Motion to Dismiss is **GRANTED**, and Catalent's Motion for a Preliminary Injunction is **DENIED** as moot. An appropriate order follows.

Date: November 2, 2020

/s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE