IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SAN ANTONIO FIRE & POLICE PENSION FUND, on behalf of itself and all others similarly situated,	:	
Plaintiff,	:	
v	:	Civil Action No. 4446-VCL
DANIEL M. BRADBURY, JOSEPH C. COOK, JR., ADRIAN ADAMS, STEVEN R. ALTMAN, TERESA BECK, KARIN EASTHAM, JAMES R. GAVIN, GINGER L. GRAHAM, HOWARD E. GREENE, JR., JAY S. SKYLER, JOSEPH P. SULLIVAN, JAMES N. WILSON, and AMYLIN PHARMACEUTICALS, INC.,	:	
Defendants.	:	

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Chancery Court Chambers
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, April 1, 2009
2:37 p.m.

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BEFORE: HON. STEPHEN P. LAMB, Vice Chancellor.

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TELEPHONIC ORAL ARGUMENT ON PLAINTIFF'S MOTIONS TO AMEND AND TO EXPEDITE PROCEEDINGS and RULINGS OF THE COURT

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APPEARANCES: (via speakerphone)

JOEL FRIEDLANDER, ESQ.
JAMES J. MERKINS, JR., ESQ.
Bouchard, Margules & Friedlander, P.A.
-and-
MARK LEBOVITCH, ESQ.
AMY MILLER, ESQ.
of the New York Bar
Bernstein, Litowitz, Berger & Grossmann LLP
for Plaintiff

RAYMOND J. DiCAMILLO, ESQ.
MARGOT F. ALICKS, ESQ.
Richards, Layton & Finger, P.A.
-and-
ROBERT A. SACKS, ESQ.
of the California Bar
Sullivan & Cromwell LLP
for Defendants

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ALSO PRESENT: (via speakerphone)

KENNETH J. NACHBAR, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
for Icahn Interests

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THE COURT: Good afternoon.

MR. FRIEDLANDER: Good afternoon, Your Honor. This is Joel Friedlander for the plaintiff. Also on the line from my office is James Merkins; from the -- Bernstein Litowitz, Mark Lebovitch and Amy Miller, and Mr. Lebovitch will be arguing this afternoon.

We also have counsel for defendants on the call, and Mr. Nachbar for the Icahn interests.

MR. DiCAMILLO: Good afternoon, Your Honor. It's Ray DiCamillo for defendants. Also with me on the line is Margot Alicks from my office and Bob Sacks from Sullivan & Cromwell. And Mr. Sacks will be speaking on behalf of defendants.

MR. NACHBAR: And Kenneth Nachbar here on behalf of the Icahn interests. We will be intervening promptly.

THE COURT: So I've heard. But I haven't seen anything yet.

All right. I'm not surprised to have you back on the phone. I must say, at the conclusion of the last hearing, those of us here were somewhat surprised by the interpretation being given to the bank credit agreement provisions by -- by the parties.

But I -- maybe the questions I was asking before were ones you weren't prepared to answer. So in any event, we're back on the line, and the question now, Mr. Friedlander, is, you want to proceed with the bank credit agreement part of your case. So I guess it's Mr. Lebovitch.

MR. LEBOVITCH: Yes, yes. First of all, Your Honor, thank you for hearing us again on (Beeping and static on the line) notice.

THE COURT REPORTER: Can't hear.

(Beeping on the line)

MR. LEBOVITCH: Sounds like someone's calling in.

Thank you again for hearing us on short notice. I take it you -- you've received our letter and Mr. DiCamillo's letter.

THE COURT: Well, I have -- I have received your letter, you know, five minutes ago and I received Mr. DiCamillo's letter only a short while ago, and I've had only the briefest chance to look at them both. So ...

MR. LEBOVITCH: Okay. I will then try to summarize -- summarize the issues and deal with the issues that are raised in the letter.

First of all, we -- we are -- we are a bit sheepish over what -- what happened on the last call. Just to explain, in preparing for the teleconference (Beeping on the line) on Monday, we became concerned that our allegations in the complaint about acceleration of the credit agreement may have overstated the way the agreement works. In the interests of being conservative and candid with the Court, you know, we articulated our concern, our view of (Beeping on the line) 24-month provision in the credit agreement. And evidently our efforts to be, I guess, candid and conservative resulted in confusion. And Mr. Sacks can explain, but we've discussed this since the call. He evidently read the 24-month provision on the fly during the argument and he did reach the same view as we did. And then afterwards the parties went back and independently reached the conclusion, which we then discussed together --

THE COURT: All right. Well, let me -- Mr. --

MR. LEBOVITCH: -- that it was the wrong interpretation.

THE COURT: Let me say, Mr. Lebovitch, we've moved beyond that. I don't care to -- I don't

care either party explain --

MR. LEBOVITCH: Uh-huh.

THE COURT: -- how the misunderstanding came about. It did, and so now we're past it.

MR. LEBOVITCH: Okay. So -- so the state of affairs is there is acceleration. There's an event of default and a right of the lenders to demand acceleration if a new majority is elected.

The parties have agreed on the timing for an expedited proceeding schedule. The only issue is the scope. We submit, Your Honor, that the claims on the credit agreement, the validity of the provision should be expedited in terms of discovery and heard on May 4th. The defendants' position all comes back to the idea that they say the company can afford to bear acceleration of the credit agreement or the cost of negotiating a waiver of the credit agreement. And all their other arguments, which I'll deal with, essentially flow from that premise.

We -- we -- we disagree. We -- we think that there's irreparable harm and it's material. If the company pays cash out to a third party here that it should not be obliged to pay, because it's our

argument that it's an invalid provision, the harm is irreparable. It's not good enough to say "Well, you could get back afterwards," assuming that that's -- that that's adequate. Here --

THE COURT: Why -- why is that, Mr. Lebovitch?

MR. LEBOVITCH: Because this is a company that is -- in effect, it's a start-up venture. It's never made any money, and it burns cash rapidly and regularly. And this is $125 million that we're talking about that would be removed from the company's balance sheet and that would be -- if the defendants had their way, sitting, you know, in the banks' coffers with a -- with a contingent right for the shareholders -- for the company to get the money back.

So, first of all, what I'd like to explain is why this amount is very material to the company because of its financial position, and it should not have to face paying out and fighting to get that money back and, second, why creating that contingency actually will still affect the vote in an improper way. The shareholders should know going into the vote whether there's acceleration or not. It's not good enough to kick the can. We think that just

serves the -- you know, the possibility that the directors would be reelected for reasons other than the merits but rather because shareholders don't want to face this problem. So we think the issue should be dealt with right away.

Amylin is a biotech company, and for this type of company cash is king, and this is not a cash-rich company. Having the cash on its balance sheet is -- is essential. The company, as we allege in the complaint, has -- has suffered significant operating losses every year. It lost $300 million last year. It has an accumulated deficit of approximately $1.7 billion.

In terms of cash, the company, according to its last 10-K as of December 31st of 2008, it only had $237 million of cash and cash equivalents. It also had 579 million of short-term investments on its balance sheet. We don't know whether those are liquid or not; but in any event, you know, there's a company with 900 million of debt and about 800 million of potential liquidity. And this is a company that's burning cash and it's not profitable.

So -- so paying out 125 million, it does, in fact, significantly increase risk to

shareholders. The company, in order to become profitable, has to commercialize its product, something it has to spend and is spending a lot of money to do. So -- so not having that access to cash increases the risk to the company's business plan.

It's notable, Your Honor, that the defendants aren't saying that they can replace this credit agreement efficiently or at all. The fact of the matter is that -- that if they could even replace the debt right now, in this credit environment they would probably be paying a far higher rate. And so -- so they have problems on that front.

The -- really, the -- the next argument that the defendants make is that an interim injunction would suffice in the sense of let's have the election first and then if there's a possibility of acceleration, we can -- you know, we can address it then with a quick injunction. That actually tilts the playing field towards the incumbent shareholders. Shareholders, when deciding to vote -- how they're going to vote, they care and they have a right to know whether their vote could result in a payout of $125 million. And in theory, if there's a problem making that payment, there could be cross-default on

all the debt even if the board belatedly cleanses the Icahn/Eastbourne nominees pursuant to the 2007 notes.

You know, frankly, shareholders should not face a choice between voting for a board that they may otherwise want to remove versus voting for change under a threat of debt acceleration. Frankly, this has to be resolved first before the shareholders get their vote.

Now, the next argument that the defendants make is -- is that the claims aren't, you know, sufficiently stated because we don't know how the provision came about. We think the complaint states colorable claims, and it doesn't really matter how the provision came about to at least state a claim that should be expedited.

Frankly, the complaint does support an inference at the very least that the board had an interest in putting the proxy puts in place in mid-2007. It had not done that in 2004, in the 2004 notes, and there was concern and reports of a possible takeover in 2007. It's notable, though, that the 2007 notes that we discussed on Monday have a -- a less restrictive term than the 2007 debt agreement. So -- so you've got actually a kind of cranking off the

infringement on shareholder voting rights. We think it is important to see the negotiating history and be able to litigate that.

If the company -- basically -- their focus notably, also, is that we don't show that the board asked for the provision. But they don't actually say whether management did or whether the company's outside legal or financial advisors did. And -- and the company really doesn't say how the provisions were put in place. Let's assume it wasn't put in place by the company. We submit that shouldn't change the analysis and the propriety of dealing with this right away.

You know, there's what's -- there's a concept of transaction cost efficiency. Bankers and lawyers, you know, they parrot the language of prior similar agreements. So it may well be that this provision appeared in the first iteration of the credit agreement and not a word was said about it by anyone. If the banks put it in, you know, what efforts were made to take it out? We suspect, you know, frankly, if the banks put in none and we suspect that if the company put it in the first place, the banks wouldn't have said anything about it.

You know, we think that the provision that has little, if any, economic value to -- to anyone; but the fact that it appears here now threatens serious infringement on shareholder voting.

The company also says this is actually a derivative claim and that money damages would suffice. I submit they're absolutely wrong about the derivative claim. This case is about voting rights. Voting rights belong to shareholders, not the corporation. That's the definition of a nonderivative claim. And -- and, frankly, Your Honor, whatever the outcome here, we think it's perfectly appropriate and necessary for the Court to decide before a vote takes place whether it was permissible for the Amylin board to bargain away rights that did not belong to the corporation, which is the shareholder voting right, in the course of negotiating a third-party contract.

You know, we think that raises very serious issues of how the board can even negotiate rights that don't belong to the company. In any event, the derivative issue, we think it's a red herring. As you can see, we've -- we've rapidly amended the complaint a couple times already. If there's any concern about it being derivative, that

could be cured with just a few paragraphs.

Money damages really don't suffice here. It doesn't cure the coercion of the vote. Further, a damage claim that's based on gross negligence would be barred by a, you know, 102(b)(7) provision. And it's just very difficult to collect money damages, you know, for breach of fiduciary duty.

On the other hand, it -- it's clear and perfectly appropriate for the Court to grant injunctive relief to prevent harm if -- if there was gross negligence in connection with the approval of any provision. We think, in essence, the argument to -- to -- to kick the can down the road by the defendants, it's really what they -- what they're trying to do is to say we're too early to get relief until we find ourselves too late to get that. And we don't think that's the way the Court should or does handle these things.

The last point that the defendants raise is that -- is that the discovery needed would be, you know, potentially significant and -- and could affect the burden on the company. We don't think that there's any material change in the discovery or the burdens here, and any burdens would be appropriate.

The -- the -- this is a discrete and narrow issue. We -- we will focus on the negotiating history of this credit agreement. And like I said, it may well be that this wasn't negotiated at all because neither the company nor the lenders would have any incentive to challenge how this provision got in.

THE COURT: Well, let's not worry about what may be. I have a limited amount of time here this afternoon. So I appreciate your arguments. Did you have anything else before I hear from Mr. Sacks?

MR. LEBOVITCH: No.

MR. NACHBAR: Your Honor, Ken Nachbar. Just one very minor point, but it may be important.

You know, we talk about 125 million, and it's small compared to 900 million on the notes. That's certainly true, but for this company to replace 125 million in this environment is not necessarily easy or quickly doable.

THE COURT: All right. Thank you.

Mr. Sacks.

MR. SACKS: Yes. Thank you, Your Honor. I'll try to be brief, and I'll try to stay away from the underlying merits and just deal with the

issue of expedition.

I think that the burden is on the plaintiffs here to -- who are seeking it, and I don't think they've made their case for expedition. I don't think you have to go past the first issue of irreparable harm.

The company has -- and nobody has seriously disputed that the company has the wherewithal to, if -- if any of these contingencies occur or all of these contingencies occur, it has the wherewithal to pay this money back; and it will either be right -- the plaintiffs are either right or wrong. It's either a valid provision or invalid provision. If it's a valid provision, the lenders have that right. Invalid provision, then the lenders will have to pay the company back and pay any damages because of it. There is absolutely no reason that this issue about the validity of a term in a contract that has been in existence since 2007 needs to be adjudicated in the course of four weeks.

And I would note, Your Honor, none of the -- this claim, which is entirely different than the other claim, doesn't relate to any ongoing conduct by the directors of this corporation. The plaintiffs

acknowledge that directors don't have the ability to approve the nominees in order to avoid this. Therefore, this clause, which has been in existence for a year and a half at this point in time or longer, could have been the subject of a challenge many, many months ago and could have been adjudicated in due course if, in fact, that was a serious issue that anyone wanted to raise on an expedited time frame. It doesn't need to be done at this point in time.

So I think simply the issue of a lack of irreparable harm should be the beginning and end of it. But going beyond that, there is no reason that if somebody thought later on that they needed to address this, you couldn't address the issue of providing for interim relief to maintain the status quo and resolve this in due course later on if the lenders were to -- if these people were to be elected, if the lenders were to determine they wanted to accelerate and if they were to demand payment and if the company did not want to pay under those circumstances. So, again, no irreparable harm.

This is -- this will change dramatically the scope of the issues that we are going to resolve on an expedited basis. It's a different

agreement, different negotiating history, different decision, different legal issues, new party. And it's not anything that -- that can be affected one way or another by ongoing conduct. And, therefore, I suggest for all those reasons that it be deferred and addressed in the normal course the way a claim of this magnitude would be -- would be brought.

In addition, I don't think it's so simple as to say derivative, direct, who cares, we'll throw in a couple of allegations and be done with it. Fundamentally, this is a claim that has to do with the corporation's obligations under a corporate contract. And the provision that either requires the company to repay money or doesn't require the company to repay money is a corporate obligation that is something that needs to be brought derivatably -- blah; that is derivative is not a derivative at best. And, indeed, since it's not even challenged, the current conduct of the directors, I'm not sure that demand would be excused with respect to this particular claim and something that people would need to give some thought -- give some thought to.

So for all those reasons we would urge the request for expedition as to these claims be

denied.

MR. LEBOVITCH: Your Honor, could I make a quick -- couple of quick points?

THE COURT: Yes.

MR. LEBOVITCH: Okay. First of all, look at the proxy. The company is using the prospect of acceleration of this debt to tilt the playing field. They're telling shareholders that this is possible and this could be bad for the company. So we submit that declining to take up this issue now essentially lets -- lets the board, the incumbent board, get the benefit, you know, of -- of the provision.

Mr. Sacks said this isn't about ongoing conduct. I don't think that has any precedent. In fact, imagine a company that today happens to have a dead hand poison pill and is in the midst of a proxy fight. I don't think there's any doubt that the Court would be willing to expedite and adjudicate that claim, notwithstanding that the board approved the dead hand pill until a year and a half ago. I don't think that makes any difference.

Finally, you know, we -- again, we don't know what will happen with discovery. We

believe it's limited discovery. And -- and it may be that at the end it does prove a legal issue. Like I said, how a board gets the ability to bargain away shareholder voting rights that don't actually belong to the corporation, Your Honor may be able to decide that as a legal matter. We think the limited discovery is appropriate to follow through. The vote should not be conducted under the cloud of the provision and -- and -- and (Inaudible).

THE COURT: I'm sorry. What was that? Someone must be holding the microphone part of the phone close to his or her mouth, because we're -- sounds like we're in a windstorm.

MR. LEBOVITCH: Deep breathing going on.

THE COURT: I think, Mr. Lebovitch, we all missed your last word.

MR. LEBOVITCH: My last word was when -- when all is said and done, this vote, this critical vote should not be conducted under the cloud created by the proxy put in -- the dead hand proxy put in the credit agreement; and -- and -- and, therefore, the question whether this provision should be invalidated we submit should be expedited and heard

along with the question of the waiver under the 2007 note.

THE COURT: I have one question, more of a toss-up, I guess, than for any particular person.

Are there -- are there arguments with respect to the credit agreement that do not depend -- that can be made and decided without there having been discovery on the issue? I mean, are these all sort of better decided in context, or is there some -- either a motion to dismiss or a motion for summary judgment or something that is -- that anyone believes can -- can be decided without reference to discovery?

MR. LEBOVITCH: Your Honor, I'll -- I'll take a crack at that.

I -- I could find myself arguing very easily that as a matter of law, a board -- this board or maybe any board should not be able to negotiate away shareholder voting rights without the shareholders' authority. This is an entrenchment claim, and we could say that this is invalid as a matter of law, and you may find that and we may be able to move for summary judgment, you know, before the trial and you could rule that way. However, the discovery, we do believe, is easy. We assume that it

will be. And -- and we think it will be appropriate to find out the record here.

And -- and on that point, even if the discovery is -- is, you know, significant in a short time frame, we do submit the cost to shareholders, which is allowing this critical vote to potentially be coerced, it's much more significant than the marginal cost of -- of an additional discovery process. This Court expedites -- I mean, prides itself on being able to expedite proceedings. And we just think that -- that the harm to shareholders should be heard.

And then the last thought is, legally this is -- this may raise issues like the Computer Associates, the AFSCME case that the Delaware Supreme Court recently decided. That's under the statute. So it may well be that the Court ultimately decides, hopefully agreeing with us, that this provision is invalid and should not be used at all, should not be replicated. However --

THE COURT: All right. I think --

MR. LEBOVITCH: -- the record --

THE COURT: -- I'm going to have to cut you off there.

Mr. Sacks, do you have anything --

MR. SACKS: Yes, Your Honor.

THE COURT: -- to say?

MR. SACKS: I believe this is an attack on a common type of provision that's in hundreds of debt agreements. We believe it can be decided as a matter of law. If Your Honor were to rule that this is invalid, it's effectively a determination that this type of clause -- this type of provision is an improper provision and cannot be entered into by a Delaware corporation. There's no -- so we believe that's a sort of all or nothing issue, and you can rule on that as a matter of law, which is why we think this claim is susceptible to being dismissed on a motion to dismiss.

THE COURT: All right. Mr. Sacks, just for you, it would seem as if the scope of discovery on this question could be kept relatively narrow. I mean, what -- what is your view of that?

MR. SACKS: I don't think that that's what they have in mind, Your Honor. I think that they're requiring full discovery into the circumstances of the negotiation of this agreement. So that would involve all the lawyers on both sides who were involved in the negotiation of the credit

agreement, depositions about the negotiation of the credit agreement and the circumstances under which it was negotiated. It's going to involve people -- this agreement wasn't negotiated with directors. This agreement was negotiated by, you know, bankers and -- and employees of the corporation as credit agreements typically are. And it's opening up a whole separate can of worms that is adding a -- you know, it's fine in the matter -- in the ordinary matter of course; but given that we're attempting to essentially complete document discovery and depositions in a two-week period of time relating to something that does involve the directors' conduct on a different agreement and a different issue, it does add basically a whole layer of additional complexity in discovery to the entire matter.

THE COURT: All right. I'm going to ask you all to hang on for a few minutes.

(Pause in the proceedings from 3 p.m. until 3:07 p.m.)

THE COURT: Thank you all for waiting.

The other day I didn't expedite the case with respect to this matter because the parties all seemed to be in agreement that there would be a

two-year delay between the -- the election of a majority of new directors and the acceleration of the bank credit agreement, and two years seemed like more than ample time to resolve this question.

The -- as -- as you know, the understanding we were all operating under the other day was incorrect, and the proper reading of the provision is that immediately upon the election of a majority of directors who are not continuing directors, or whatever the phrase is used in the credit agreement, that the banks will have a right to delay an event of default and accelerate the payment.

Now, that being so, it does seem to me to present a more substantial question of whether stockholders, when being asked to vote in this election, will be affected in their decision-making by what is alleged to be the improper existence of this contract. And given the fact that we're now engaged in an expedited proceeding and while I understand Mr. Sacks' concern that this will substantially broaden the scope of discovery needed and broaden the scope of the proceeding in every other way -- and I think he's correct. It will to some extent do so -- I don't see that the burden of dealing with this issue,

which -- which is a, I'm sure in terms of fact, a relatively narrow issue, will make the proceeding too unreasonably unwieldy or costly to the parties or to the Court.

So I think in the circumstances that the -- finding that there is a threat of irreparable injury to the stockholders' voting franchise here, that the better -- the better course at this point is to expedite the matter with respect to this amended complaint and hear it on the schedule that's already in place.

So, Mr. Lebovitch, is the order that you included in your papers -- well, why don't you talk to your opponents and see if that's an appropriate form of order. And if so --

MR. FRIEDLANDER: Your Honor, if I could speak on that? This is Joel Friedlander. The form of order is agreed upon. The only thing that has to be filled in are blanks where it says which counts are expedited. So if it's just Counts I, III, and II, then -- then the parties are otherwise in agreement on the form.

THE COURT: You want it in that order, Mr. Friedlander?

MR. FRIEDLANDER: I'm sorry. I was thinking of I and III, which relate to the credit agreement, and II. But -- so I, II, and III as it relates to the credit -- I and III as it relates to the credit agreement, and Count II. But --

THE COURT: So --

MR. FRIEDLANDER: -- I mean --

THE COURT: -- Counts I, II, and III.

MR. FRIEDLANDER: That's right.

THE COURT: All right. Well, in that event, I will go on-line and enter the order with that notation on the front of it; all right?

MR. LEBOVITCH: Thank you, Your Honor.

THE COURT: If there's nothing else, thank you.

(The proceedings adjourned at 3:11 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 26 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 7th day of April 2009.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent