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. AMYLIN PHARMACEUTICALS, INC., BANK OF AMERICA, N.A., BANK OF NEW YORK TRUST COMPANY, N.A., 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, and JAMES N. WILSON, Defendants.	)	**CONFIDENTIAL --** **FILED UNDER SEAL** C.A. No. 4446-VCL
AMYLIN PHARMACEUTICALS, INC., Cross-Claimant, v. THE BANK OF NEW YORK TRUST COMPANY, N.A., as Trustee for Indenture Dated as of June 8, 2007, Cross-Claim Defendant	)	

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AMYLIN DEFENDANTS' (CORRECTED) ANSWERING PRETRIAL BRIEF

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PRELIMINARY STATEMENT

Plaintiff San Antonio Fire & Police Pension Fund's (the "Plaintiff") Fourth Amended Complaint ("4AC"), the result of multiple, contradictory iterations of unsubstantiated claims, was ill-conceived from the beginning and now borders on the frivolous. In its first iteration, Plaintiff alleged that Amylin's directors breached their duty of loyalty by inserting certain change of control provisions in the Company's indenture for convertible notes due 2014 ("Indenture") and credit agreement ("Credit Agreement") "*for the sole purpose of entrenching themselves* as directors of the Company and preventing their removal by shareholder vote." (Verified Compl. for Declaratory & Injunctive Relief ¶ 63) (emphasis added).) When Plaintiff, through discovery, learned that its claim had no basis in fact, Plaintiff agreed to dismiss its claim for breach of the duty of loyalty and withdraw any allegations that Amylin's directors acted in bad faith or for entrenchment purposes.[1]

Undeterred by the failure of its first theory, Plaintiff is now seeking to press the opposite claim—that rather than breaching its duty of loyalty by intentionally inserting the change of control provisions for entrenchment purposes, the Board breached its duty of care by unknowingly agreeing to the change in control provisions." (4AC ¶ 8; Opening Br. at 1.) Plaintiff's novel theory and the extraordinary remedy it seeks—invalidation of arm's-length

[1] Perhaps unable to help themselves, hints of these since-abandoned theories surprisingly continue to emerge in violation of the terms of the parties' settlement agreement. (*See* Pl.'s Opening Pretrial Br. ("Opening Br."), 2 ("Both sides actually reported to Amylin's management and had every incentive to include in the Indenture entrenching anti-takeover provisions that would benefit Amylin's Incumbent directors and managers.")) The Court should, of course, disregard these allegations, which Plaintiff has explicitly withdrawn and which have no bearing on Plaintiff's claims.

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agreements between Amylin and *bona fide* third parties—are unprecedented as a matter of Delaware law, unsupported by the facts, and unwise policy.[2]

First, Plaintiff cannot plausibly allege that Amylin's Board breached its duty of care by agreeing to the "Fundamental Change" and "Continuing Directors" provisions in the Indenture because Plaintiff has conceded that the plain language of those provisions gives Amylin's Board unfettered discretion to exercise its fiduciary obligations. In its claim for declaratory judgment against the Bank of New York Trust Company as the Indenture Trustee, Plaintiff argues that "[u]nder the plain terms of the 2007 Indenture, the Board of Directors of Amylin possesses the right and power to approve or 'cleanse' any Eastbourne or Icahn nominees and thereby disable the Indenture Proxy Put and allow a contested election to proceed without the fear of debt acceleration." (Pl. Mem. of Law in Supp. of Mot. for Partial Summ. J. at 10-11; Opening Br. at 17-18; April 16, 2009 Hr'g Tr. 8:23-10:6.) In other words, Plaintiff argues that Amylin's Board breached its duty of care by agreeing to a provision that, according to Plaintiff, grants Amylin's Board the unfettered ability essentially to disable the "Fundamental Change" provision in the Indenture. Plaintiff's argument makes no sense.

Second, even if the Court were to rule today that the "Continuing Director" provision in the 2007 Indenture means something different than the interpretation that both Plaintiff and the Amylin Defendants—and Bank of New York's corporate representative as

[2] Plaintiff's first claim, which seeks an interpretation of the "Continuing Director" provision in the Company's 2007 Indenture, is wholly duplicative of the same claim that Amylin, the actual party to the 2007 Indenture, has itself brought against Bank of New York seeking the same declaration. Although the Amylin Defendants originally challenged Plaintiff's standing to pursue this and other claims, it agreed as part of the partial settlement not to pursue that defense. Bank of New York, the other party to the Indenture, has challenged Plaintiff's right to maintain these claims and asserts that these are corporate, not direct stockholder, claims.

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well—agree is the correct interpretation, Plaintiff has offered no conceivable basis for a finding that the Board breached its duty of care by agreeing to a provision that is interpreted to mean something different than people reasonably believed it to mean.

Third, Plaintiff offers no *facts* to support its assertion that Amylin's Board breached its duty of care. Under Delaware law, allegations that a director has breached his fiduciary duties are evaluated by the business judgment rule, under which directors are entitled to "a presumption that in making a business decision [the directors] acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson* v. *Lewis*, 473 A.2d 805, 812 (Del. 1984). Plaintiff bears the burden of rebutting this presumption, *Emerald Partners* v. *Berlin*, 787 A.2d 85, 91 (Del. 2001) (citation omitted), and can only do so by proving that directors were grossly negligent or took actions that are "without the bounds of reason." *Benihana of Tokyo, Inc.* v. *Benihana, Inc.*, 891 A.2d 150, 192 (Del. Ch. 2005) (citation omitted), *aff'd*, 906 A.2d 114 (Del. 2006). Plaintiff cannot come close to meeting this burden. Both the Indenture and Credit Agreement were "heavily negotiated" by Amylin's advisors and officers. Amylin's Board of Directors and the Finance Committee of the Board ("Finance Committee") thoroughly considered the material elements of each transaction with the advice of senior management and experienced outside counsel. And these transactions provided Amylin with a substantial amount of capital on very favorable economic terms.

Nevertheless, among the scores of negotiated terms, Plaintiff finds fault with a single provision in these instruments—insisted upon by the underwriters and the lenders—that is ubiquitous in the marketplace. Hundreds of recent indentures and credit agreements include identical or substantially similar provisions to the challenge provisions here. (Affidavit of

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Margot F. Alicks ("Alicks Aff.") Ex. 1.) Indeed, they appear in the Model Negotiated Covenants and Related Definitions published by the American Bar Association's Committee on Trust Indentures and Indenture Trustees. (*Id*. Ex. 2; *see* William J. Whelan, III, *Model Negotiated Covenants and Related Definitions*, 61 BUS. LAW. 1450 (2006).) Although Plaintiff complains that the "Fundamental Change" and "Change of Control" provisions are unfavorable to Amylin and should have been excluded, Plaintiff's argument that Amylin's Board breached its duty of care in failing to give sufficient attention to common provisions finds no support under Delaware law.

The record here demonstrates, in the case of the 2007 Indenture, extreme care and rigor on the part of the Board: (i) the Company's Board and/or Finance Committee met numerous times to consider the terms of a convertible notes transaction and the reasons to pursue such a transaction among the various financing alternatives available to the Company; (ii) the Board selected underwriters based on experience, quality and likelihood of consummating a transaction on the most favorable economic terms for the Company; (iii) the Board reasonably delegated to management, including particularly the Company's CFO and General Counsel, working with a reputable and experienced outside law firm, responsibility for negotiating documents to reflect a convertible notes transaction on the terms approved by the Board; (iv) Amylin retained Cooley Godward, a well-known firm with expertise in this area to negotiate, document and advise on this transaction; (v) at the time the 2007 Notes were issued, as now, the "Continuing Director" aspect of the "Fundamental Change" provision being challenged here was a common one, found in many indentures for notes issued by corporations in the biopharmaceutical industry and elsewhere; (vi) the documents for the 2007 Notes were

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negotiated on behalf of the Company by Cooley Godward with counsel for the underwriters; (vii) neither Cooley Godward nor anyone else raised the existence of the Continuing Director/Fundamental Change provision at issue here with the Finance Committee of the Board before it gave final approval to proceed with issuance of the 2007 Notes; (viii) prior to giving that final approval, the Finance Committee of the Company's Board asked Cooley Godward and management whether there were any "unusual or not customary" terms in the documents for the transaction and were told that there were not; and (ix) the economic terms of the 2007 Convertible Notes were favorable to the Company. The Company's directors thus carefully considered whether and how to proceed with a financing, did so with deliberation, retained and relied upon experienced professionals and the appropriate Company management as Delaware law specifically permits (indeed encourages) them to do, and proceeded after considering the benefits to the Company and consistent with the advice they received. This is classic business judgment. Even indulging Plaintiff's apparent suggestion that outside counsel should have identified this clause to and discussed it with the directors, counsel's failure to do so cannot establish a breach by the directors of their duty of care. The Board employed an appropriate process and reasonably relied, as they are specifically authorized to do, on the advice and actions of experts and management.

The record on the 2007 Credit Agreement is equally fatal to any effort by Plaintiff to demonstrate a breach of the duty of care by the Company's directors. It establishes: (i) the Board began considering obtaining a secured credit facility early in 2006 and the benefits to the Company of entering into one; (ii) the Board and/or the Finance Committee of the Board discussed the subject at numerous meetings over an 18-month period; (iii) the Board delegated to

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management, including the Company's CFO, General Counsel and its Director of Finance, who had extensive experience with credit agreements, authority to explore the subject and negotiate a facility of up to $100 million, later increased to $125 million; (iv) the Company retained Cooley Godward, a firm experienced in these matters, to negotiate a credit agreement, which it did with the direct participation of the Company's Director of Finance; (v) Bank of America's original draft contained the challenged "Change of Control" provision as well as other Change of Control provisions; (vi) the Company attempted to negotiate the challenged "Change of Control" provision out of the draft Credit Agreement, striking it and other aspects of the Change of Control language from Bank of America's draft; (vii) in a negotiation that followed, including not only negotiation of that provision but many other provisions of the draft Credit Agreement, Bank of America stressed that the challenged Change of Control provision was important to it because it gave the banks the ability to review the situation if it arose and evaluate the risk to its credit at that time; (viii) counsel for the Company argued to keep the challenged provision out of the draft, arguing that the Credit Agreement should conform to the 2007 Indenture; (ix) ultimately Amylin agreed to re-insert the term it originally struck, and Bank of America agreed to remove other provisions of the Change of Control provision, as part of an overall negotiation of terms in the Credit Agreement; (x) the Company's management and its counsel at Cooley Godward discussed that provisions like this were common in credit agreements, were rarely triggered, could be waived by the banks, and that in light of other concessions and changes Bank of America had agreed to make over the course of the negotiation, and the overall terms of the transaction as a whole, giving on this point was reasonable; and (xi) the challenged clause in the Credit Agreement was not brought to the attention of the Board before the Credit Agreement was

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executed by the Company. Again, even indulging Plaintiff's apparent suggestion that outside counsel or the Company's management should have identified this clause to and discussed it with the directors, their failure to do so cannot establish a breach by the directors of their duty of care.

Fourth, even if Plaintiff could demonstrate that Amylin's directors breached their duty of care, which it cannot, Plaintiff would not be entitled to rewrite validly-executed contracts between Amylin and *bona fide* third parties. Plaintiff has failed to satisfy the Court's request that it identify a single case holding that revision of a binding agreement with a third party is a proper remedy for a breach of the duty of care. (*See* April 16, 2009 Hr'g Tr. 11:13-12:1). The reason is simple, a Delaware court has never invalidated, much less rewritten, an ordinary course contract with an innocent third party based on a breach of the duty of care.

Because Plaintiff's novel theory of this case is unsupported by law or fact, and because the extraordinary remedy Plaintiff seeks is unavailable, this suit should be dismissed.

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STATEMENT OF FACTS

Amylin is a biopharmaceutical company headquartered in San Diego, California. (Alicks Aff. Ex. 3 at 3.) It presently markets two medicines, BYETTA (exenatide) and SYMLIN (pramlintide acetate), for the treatment of diabetes. (*Id.* 1.) In 2008, net sales of BYETTA were $678.5 million, (*id.*) and net sales of SYMLIN were $86.8 million. (*Id.*, 2.) Amylin is also working to develop exenatide once weekly. (*Id.*)

The biopharmaceutical business is a "high-risk business" because of the challenges inherent in the long-term nature of drug development. (Alicks Aff. Ex. 4 ("Bradbury Tr.") at 30-31, 83-84.) Thus, Amylin viewed "having financial flexibility to enable [it] to adjust [its] business plan [as] an important component of being able to ensure that [it] ha[s] the ability to maximize the value for [its] shareholders." (*Id.* at 31.) To that end, Amylin's Board regularly reviewed its financing options in order to ensure that it maintained an optimum level of financial flexibility to carry out its business plan. (Alicks Aff. Ex. 5 ("Foletta Tr.") at 41:7-13.)

A. The Negotiation and Issuance of the Convertible Notes Due 2014.

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At the May 17, 2007 meeting, Amylin's Finance Committee had a full discussion regarding the materials and the various financing alternatives available to Amylin at that time. (Alicks Aff. Ex. 6.)

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Amylin discussed the potential offering with several investment banks, including Goldman Sachs, Morgan Stanley, Bank of America, Bear Stearns and UBS. (Foletta Tr. at 41 & Ex. 7.) In selecting underwriters for the transaction, the Finance Committee reviewed a number of factors, including "the terms that the banks thought would be possible to achieve," the banks' "track record in executing this type of transaction," and the various strategic views the banks previously had provided to the Company. (Bradbury Tr. 75-76.) Ultimately, the Finance Committee selected Goldman Sachs and Morgan Stanley as co-lead underwriters for the 2007 offering, in large part because the purpose of the offering was to obtain the optimal level of financial flexibility for the Company and the Company believed that Goldman Sachs and Morgan Stanley could complete the deal on the best financial terms. (*Id.* at 77.) Contrary to Plaintiff's assertion (*see* Opening Br. at 2-3), neither Goldman Sachs nor Morgan Stanley had been retained as a financial advisor to the Company at the time they were selected as underwriters. (Foletta Tr. 40:6-14.)

On May 26, 2007, Gabe Gelman, the head of capital markets for Goldman Sachs, sent Mr. Foletta an email discussing the possibility of a convertible debt offering. (Foletta Ex. 6.) The email attached two recent convertible note deals underwritten by Goldman Sachs that would serve as precedent for Amylin's convertible debt offering. (*Id.* Ex. 6.) Both of the prospectuses contained Fundamental Change provisions that were materially identical to the provision that was ultimately included in Amylin's 2007 Indenture. (*Id.* at AMLN00000009, 65,

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111, 153.) The issuers of each offering, Viropharma, Inc. and Illumina, Inc., were biopharmaceutical companies, which, like Amylin, had a history of net losses. (*Id.* at AMLN00000026-27, 121.) Mr. Foletta reviewed each of these prospectuses and sent them to Amylin's outside legal counsel, Cooley Godward. (Foletta Tr, 48:18-49:8.) The Board understood that Cooley Godward had substantial experience in convertible debt offerings and was retained to help negotiate the terms of the notes and to secure the best deal possible for the Company. (*Id.* at 20; Bradbury Tr. 32, 71, 79-80.)

On May 30, 2007, Mr. Foletta emailed Amylin's Finance Committee with an update on the possibility of a convertible note offering. (Foletta Ex. 7.) Mr. Foletta described this time as being "an ideal time for a transaction" (*Id.* at AMLN00005853), noting that Amylin's stock had continued to trade strongly and that he anticipated a potential offering the following week. (*Id.*)

On May 31, 2007, Mr. Foletta sent another email to the Finance Committee describing the market for the convertible offering as "very attractive." (*Id.* Ex. 8.) He noted that he had been "working diligently. . . preparing for a possible convertible transaction," outlined the terms proposed by Goldman Sachs and Morgan Stanley, and provided a detailed analysis of the benefits and limits of a potential offering. (*Id.*)

On June 1, 2007, Amylin held a four-hour organizational meeting with Goldman Sachs and Morgan Stanley. (Alicks Aff. Ex. 7.) During this meeting, Amylin, Goldman Sachs and Morgan Stanley engaged in an overview discussion of the structure, timing and process for the offering. (*Id.*)

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Later that day, Joseph Sullivan, a member of Amylin's Board and the Chairman of the Finance Committee, led an hour-long call with Amylin's Pricing Committee. (*Id*. Ex. 8.) During the call, the Pricing Committee engaged in a full discussion of the timing and structure of the proposed transaction, during which time Mr. Foletta and Thomas A. Coll of Cooley Godward discussed the potential terms of the offering and Amylin's compliance with the Investment Company Act of 1940. (Foletta Ex. 9.)

On June 1, 2007, the underwriters' counsel sent Cooley Godward a draft description of notes for inclusion in the prospectus for the offering. (Alicks Aff. Ex. 9 at AMLN0000190.) The description of notes was identical to an offering memorandum for a transaction that Goldman Sachs had just completed, and contained the "Fundamental Change" and "Continuing Director" provisions that are at issue here. (*Id.* at AMLN0000212.) Cooley revised the description of notes and, after discussion with the Company, circulated a revised draft of the document to the underwriters, underwriters' counsel and Amylin. (*Id.* at AMLN00000223-259.)

Cooley continued to negotiate the description of notes on June 2 and 3, with input from Amylin's management and internal counsel. (Foletta Tr. 56-59.) During the negotiations, Messrs. Bradbury and Foletta focused on obtaining the best possible financial terms for the Company, and relied on internal and outside legal counsel to negotiate and evaluate the non-economic terms. (Foletta Tr. 16:13-19, 37:12-19; Bradbury Tr. 69:6-19, 78:2-9.) Messrs. Bradbury and Foletta and the Pricing Committee requested that Cooley, among other things, bring to their attention any terms in the deal that were "unusual or not customary." (Bradbury Tr. 77.) Cooley compared the Amylin convertible note offering to other offerings being done at

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the time (*Id*. at 80), and Mr. Foletta discussed comparable transactions at length with Cooley, (Foletta Tr. 21:25-22:6, 59:10-25).

The negotiations resulted in Cooley circulating a final offering circular on June 4, 2007 to Amylin, Goldman Sachs and Morgan Stanley. Messrs. Foletta and Bradbury, among others, reviewed the offering circular prior to its being circulated. (Foletta Tr. 69:12-20; Bradbury Tr. 61:21-62:16.)

On June 4, 2007, the Finance Committee, acting as the Pricing Committee, held a special meeting to discuss the offering and set the price of the notes. (Bradbury Ex. 6.) Every member of the Pricing Committee, Mr. Foletta, and representatives from Goldman Sachs, Morgan Stanley and Cooley Godward attended the meeting. (*Id.*) During the meeting, representatives of Goldman Sachs and Morgan Stanley made presentations regarding the terms of the offering and likely investor response. (*Id.*; Bradbury Tr. 55-56.) The Pricing Committee then engaged in another full discussion of the offering. (Bradbury Ex. 6.) During the discussion, the Pricing Committee asked whether any of the proposed terms were unusual or not customary. (Bradbury Tr. 77.) The answer was "no." (*Id.*) The Pricing Committee then authorized the issuance and sale of convertible notes for up to $575 million at 3.00% interest with a conversion premium of 40%. (Bradbury Ex. 6.) Cooley and Amylin's officers and employees considered the financial terms of the offering to be very favorable for Amylin. (Foletta Dep., 29:21-30:5, 70:8-14.)

On June 5, 2007, counsel for the underwriters circulated a draft form of indenture to Cooley, paralleling the already-negotiated description of notes. (Alicks Aff. Ex. 10 at AMLN00000802.) The draft indenture circulated by the underwriters' counsel included the

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"Fundamental Change" and "Continuing Director" provisions that appear in the Indenture. (*Id.*) Cooley circulated a revised draft of the indenture on June 6, 2007. (Alicks Aff. Ex. 11.) On June 8, 2007, the parties executed the Indenture.

B. <u>Amylin Negotiates the Credit Agreement with Bank of America</u>

In addition to the issuance of convertible notes, Amylin's Finance Committee discussed the possibility of obtaining funds through a secured debt facility. (Alicks Aff. Ex. 12 ("Cuddeback Tr."), 9:17-22). REDACTED

The Company received proposals from numerous commercial banks regarding a potential secured debt facility, including Bank of America. (Cuddeback Exs. 1, 2.)

REDACTED

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REDACTED

In August or September, 2007, Cooley advised Amylin's management that it was negotiating "a number of issues with the banks," including the specifics of a change of control provision. (Cuddeback Tr. 28:4-29:4.) On September 21, 2007, Bank of America made a proposal to Amylin for a syndicated loan facility and an additional proposal for a revolving credit facility. (*Id.* Ex 3 at AMLN00005803; Alicks Aff. Ex. 14 at AMLN00005811.) The proposals contained "usual and customary" events of default, including a default provision for changes of control. (*Id.* Ex. 3 at AMLN00005809; Alicks Aff. Ex. 14 at AMLN00005818.)

On November 14, 2007, Bank of America's counsel sent a draft credit agreement for the syndicated loan and revolving credit facility to Cooley and members of Amylin's management and legal teams. (*Id.* Ex. 4.) The draft agreement was similar to Bank of America's Model Agreement, which was designed to serve as the basis for all credit agreements prepared by Bank of America. (Barnes Ex. 2.) Like Bank of America's Model Agreement, the draft credit agreement circulated by Bank of America's counsel contained a "Change of Control" provision that is triggered when, over a 24-month period, a majority of Amylin's Board is replaced by directors whose nomination or election to the Board was not "approved" by the existing directors (directors at the time the agreement is executed or whose nomination or election has been "approved" by such directors). (*Id.* Ex. 2 at BANA0002605; Cuddeback Ex. 4

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at AMLN000007620-21.) In each of the Model Agreement and the draft credit agreement, the provision also contained a parenthetical restricting the Board's ability to "approve" directors whose nomination or election to the Board was the result of an actual or threatened proxy contest.

Cooley, in consultation with Amylin's management, revised Bank of America's November 14, 2007 draft of the Credit Agreement and sent the revisions back to Bank of America on November 20, 2007. (Cuddeback Ex 5.) (*Id.*). Among the many revisions, Cooley struck the parenthetical that prohibited Amylin's directors from "approving" nominees whose election resulted from a proxy contest and also struck the entire next section (Section (c)) of the proposed Change of Control provision. (*Id.* at AMLN00003831.)

On December 3, 2007, Cooley again sent a revised draft of the agreement to Bank of America, striking the parenthetical restricting the approval of dissident directors and the entire next section. (*Id.* Ex. 8 at AMLN00003580.) On the same day, Mr. Cuddeback also circulated a list of items for discussion in advance of a call between Amylin, Bank of America and their respective attorneys. (Cuddeback Ex. 7.)

On December 4-5, 2007, as part of a two-day meeting of Amylin's Board of Directors, Amylin's directors discussed the general terms of the secured credit facility from Bank of America. (Bradbury Tr. 92:19-23). Mr. Sullivan, the Finance Committee Chairman, reported on a recent meeting of the Finance Committee, during which the Committee had discussed various financing options, including the potential Bank of America secured debt facility. (Alicks Aff. Ex. 15 at AMLN000011383-84.) Amylin's Board of Directors engaged in a full discussion of these options. (*Id.*)

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On December 12, 2008, Bank of America circulated a revised draft of the Credit Agreement, in which it reinserted the parenthetical restricting the Board's ability to "approve" directors in the context of a proxy contest, although it accepted Amylin's deletion of the next sub-paragraph. (Alicks Aff. Ex. 16 at AMLN00004794.) In discussions with Amylin's counsel, Bank of America's counsel explained that the parenthetical was "an important provision to the bank, and though . . . the frequency of it becoming active is rare, it was an important provision that the bank wanted to have in the document because it would provide the bank with protection in the event of a change in control." (Cuddeback Tr. 53:5-25.) Bank of America wanted to retain the provision because it believed that an election of board members through a proxy solicitation "could introduce into the management of the company, the potential for disruption to the expressed strategy and plan," and thus it was "very important" for Bank of America, under those circumstances, to be able to "have a discussion and assess the situation and determine what [its] best course of action would be." (Alicks Aff. Ex. 18 (Barnes Tr. 58-59.)) Understanding the importance of the provision to Bank of America, that such provisions are rarely triggered, and that the overall transaction was favorable to Amylin, Cooley recommended, and Amylin agreed, that the Company not continue to press on this single negotiating point. (Cuddeback Tr. 53-54.)

On December 18, 2007, Mr. Rowland sent the Finance Committee an email summarizing material terms of the Credit Agreement, attaching a Unanimous Written Consent in connection with the financing and seeking the Committee's approval to execute the Agreement. (*Id*. Ex. 10.) The members of the Finance Committee executed the Unanimous Written Consent

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authorizing management to execute the proposed $125 million syndicated loan facility and $15 million revolving credit facility. (*Id*. Ex. 11.)

C. <u>The Change of Control Provisions</u>

Plaintiff's Fourth Amended Complaint seeks to assert a claim for breach of the duty of care relating to a single fundamental change provision in the Indenture, and a single change of control provision in the Credit Agreement (*see* 4AC ¶8), each of which are common provisions in the indentures and credit agreements entered into by Delaware and other corporations, as reflected in the more than 140 such provisions being submitted as examples to the Court. (Alicks Aff. Ex. 1.)

The "Fundamental Change" and "Continuing Directors" Provisions in the Indenture. Section 11.01 of the Indenture provides that "[i]f a Fundamental Change occurs at any time, then each [noteholder] shall have the right . . . to require [Amylin] to repurchase all of such [noteholder's] notes . . . at a repurchase price equal to 100% of the principal amount thereof. (4AC Ex. A at 69.) The Indenture further states that a fundamental change occurs if, *inter alia*, "the Continuing Directors" do not constitute a majority of [Amylin's] Board of Directors." (*Id.* at 6-8.) The Indenture defines "Continuing Directors" as members of the Board at the time of the issuance, or "any new director whose election or nomination . . . [is] approved by at least a majority. . ." of Continuing Directors. (*Id.* at 4.)

This provision gives Amylin's Board, as a matter of law, "unfettered power and authority" to approve any director they choose and imposes no restriction on the directors' ability to approve nominees. (Pl.'s Mem. of Law in Supp. of Mot. for Partial Summ. J., 11.) Both parties to the Indenture—Amylin and Bank of New York—agree on the plain meaning of this

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provision. (*See* Alicks Aff. Ex. 17 ("Petta Tr.") 63:7-66:11.) The Court should, accordingly, grant Amylin's motion for summary judgment on its cross-claim against Bank of New York seeking a declaration of that interpretation; there should be no reason to consider or try any of Plaintiff's claims relating to the 2007 Indenture.

The "Change of Control" Provision in the Credit Agreement. Under Section 8.01 of the Credit Agreement, a "Change of Control" constitutes an event of default. (4AC Ex. B at 26.) A "Change of Control" is defined as occurring when, *inter alia*, "a majority of members of [Amylin's] board of directors . . . cease to be composed of individuals (i) who were members of the board . . . on the first day [of the 24 month period beginning when the agreement was entered], or (ii) whose election was approved by individuals referred to in clause (i) above constituting . . . at least a majority of that board . . . or (iii) whose election or nomination to that board . . . was approved by individuals referred to in clauses (i) and (ii) above constituting . . . at least a majority of that board . . .." (*Id.* at 7.) The Credit Agreement, however, limits this right of approval where a director's nomination or election to the board is the result of an actual or threatened proxy contest. (*Id.* ("excluding . . . any individual whose initial nomination for, or assumption of office as, a member of that board or equivalent governing body occurs as a result of an actual or threatened solicitation of proxies or consents for the election or removal of one or more directors by any person or group other than a solicitation for the election of one or more directors by or on behalf of the board of directors.").)

Provisions identical to the "Continuing Director" provision under the Indenture and the "Change of Control" provision under the Credit Agreement are ubiquitous in indentures and credit agreements executed by Delaware corporations. (Alicks Aff. Ex. 1.) In fact, Plaintiff

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does not dispute that, for example, out of 26 comparable biotechnology companies with convertible securities, more than half of them had similar change of control provisions in their convertible securities. (Opening Br. at 21.) The Fundamental Change provision was included in Goldman Sachs' prior deals that were used as precedent for Amylin's convertible debt offering. (Foletta Aff. Ex. 6.) And the Change of Control provision in the Credit Agreement is also included in Bank of America's Model Form. (Barnes Ex. 2 at 9, 126.) Such provisions also appear in corporate agreements outside of debt instruments, such as, employment agreements, intellectual property licensing agreements, joint venture agreements, union contracts, and employee stock option plans.

Despite their prevalence, however, change of control provisions triggered by a majority change in the composition of the Board are rarely triggered. Indeed, despite their many years of experience, neither Ms. Petta nor Ms. Barnes could recall a single instance in which a provision of this sort was actually triggered. (*See* Petta Tr. 107:21-108:9; Alicks Aff. Ex. 18; Barnes Tr. 116:6-19; *see also* Cuddeback Tr. 53:21-22.)

D. Carl Ichan and Eastbourne Capital Management, L.L.C. Propose Minority Slates of Directors for Amylin's Board

On January 30, 2009, two Amylin shareholders Icahn Partners, LP ("Icahn") and Eastbourne Capital Management, L.L.C. ("Eastbourne")—purportedly acting independently and not as a group—disclosed that they would each nominate slates (the "dissident slates") of five individuals (the "dissident nominees") for election to Amylin's Board of Directors at Amylin's 2009 annual meeting set to take place on May 27, 2009. (Alicks Aff. Ex. 3 at 37.) On February 27, 2009, Amylin filed its 2008 Form 10-K, which accurately disclosed, as a risk factor to the value of Amylin's stock, that Amylin could be required to purchase the convertible senior notes

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issued pursuant to the Indenture or repay the term loan made pursuant to the Credit Agreement if six or more members of these dissident slates were elected to Amylin's Board and the noteholders and/or lenders elected to demand repayment. (*Id.*)

On March 30, 2009, Amylin filed its Preliminary Proxy Statement nominating 10 of its existing directors for reelection and two new nominees: Paul N. Clark and Paulo F. Costa. (Alicks Aff. Ex. 19 at 6). Amylin's Preliminary Proxy Statement did not contain any of the nominees proposed by Icahn or Eastbourne. (*Id.*) On the same day, Icahn and Eastbourne each submitted no-action requests to the SEC, seeking the ability to solicit proxies that would contain the names of all 10 dissident nominees.

On April 3, 2009, Eastbourne filed a preliminary proxy statement nominating a slate of five dissidents for election to Amylin's board of directors. (Alicks Aff. Ex. 20.) Icahn then changed course, and on April 23, 2009, it filed a Preliminary Proxy Statement reducing the number of its nominees to three and seeking votes on behalf of only two of Eastbourne's nominees. (Alicks Aff. Ex. 21.) Eastbourne, however, has not reduced the number of its nominees. Instead, on April 24, 2009, it filed a Preliminary Proxy Statement soliciting votes for its five nominees and none of Icahn's nominees. (Alicks Aff. Ex. 25.)

E. Amylin Seeks a Waiver of the Change of Control Provisions From Each of The Bank of New York, as Indenture Trustee, and Bank of America

On March 31, 2009, counsel for Amylin sent a letter to Bank of New York detailing the factual circumstances of this litigation, expressing Amylin's view that under the terms of the Indenture it has the ability to "approve" the Icahn and Eastbourne nominees even though it does not support their election to the Board, and seeking confirmation that the Bank of New York, as Indenture Trustee, agreed with Amylin's interpretation. (Alicks Aff. Ex. 22.) On

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April 2, 2009, counsel for Bank of New York declined to take a position on the meaning of the "Continuing Directors" definition. (Alicks Aff. Ex. 23.)

On April 1, 2009, counsel for Amylin sent Bank of America a letter requesting an amendment to the Change of Control provision or a waiver of the Event of Default that could be declared if six or more of the dissident nominees are elected. (Alicks Aff. Ex. 24.) On Tuesday, April 21, 2009, representatives from Bank of America visited Amylin to discuss an amendment to the Credit Agreement that would allow Amylin to avoid a default if six or more dissident nominees are elected. (Barnes Tr. 159:8-17.) As a condition of this amendment, Bank of America proposed material modifications to the economic and structural terms of the agreement as well as a requirement that Amylin obtain confirmation from Bank of New York that its directors can approve the dissident nominees. (Id. Ex. 14). Amylin has not agreed to the amendment proposed by Bank of America. (Alicks Aff. at ¶ 2.)

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ARGUMENT

I. THE BOARD EXERCISED GOOD FAITH AND DUE CARE IN THE NEGOTIATION AND EXECUTION OF THE INDENTURE AND CREDIT AGREEMENT, EACH OF WHICH PROVIDED SUBSTANTIAL ECONOMIC BENEFITS TO THE COMPANY AND ITS STOCKHOLDERS

Plaintiff seeks to invalidate the change of control provisions in the Indenture and the Credit Agreement on the grounds that the directors failed to consider appropriately the consequences of those provisions being triggered apparently not because of any failure by the Board itself but due to a failure of the Company's management and outside counsel to bring this issue to the attention of the Board, and notwithstanding the fact that (1) these clauses are commonly found in indentures and credit agreements, and (2) the undisputed testimony in this case is that the clauses at issue are rarely, if ever, triggered.

The duty of care requires that "in making business decisions, directors must consider all material information reasonably available, and the directors' process is actionable only if grossly negligent." *Brehm* v. *Eisner*, 746 A.2d 244, 259 (Del. 2000) (citation omitted). To demonstrate a breach of due care, a plaintiff must prove that the defendant directors were grossly negligent or took actions that are "without the bounds of reason." *Benihana of Tokyo, Inc.* v. *Benihana, Inc.*, 891 A.2d 150, 192 (Del. Ch. 2005) (citation omitted), *aff'd*, 906 A.2d 114 (Del. 2006). The claim that Amylin's Directors, who relied on expert legal counsel and company management to negotiate and document the legal terms of the transactions and who instructed their advisors to highlight any non-market or uncommon terms, failed to consider sufficiently a single, usual provision whose likelihood of ever being triggered was low, at best, falls far short of establishing such gross negligence. Amylin's directors reasonably relied on Amylin's officers and legal advisors in agreeing to the provisions at issue and, in agreeing to such provisions, no

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more breached their duty of care than did any of the hundreds of other boards of directors of Delaware and other corporations that have similarly agreed to these terms in credit agreements and indentures for debt offerings of various types and sizes, involving many different underwriters and many different lenders.

A. **The Business Judgment Rule Protects Amylin's Directors' Decision**

Plaintiff's duty of care claim is barred by the business judgment rule, under which Amylin's Directors are presumed to have acted on an informed basis and with the good-faith belief that their decision to approve the Indenture and Credit Agreement was in the best interest of Amylin and its shareholders. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006) ("[I]n making a business decision the directors of a corporation [are presumed to have] acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.") (quoting *Aronson* v. *Lewis*, 473 A.2d 805, 812 (Del. 1984)). The burden rests with Plaintiff to rebut this presumption by demonstrating that Amylin's directors were grossly negligent in approving the agreements or acted without a rational business purpose. *See Aronson*, 473 A.2d at 812; *see also Cinerama, Inc.* v. *Technicolor, Inc.*, 663 A.2d 1156, 1162 (Del. 1995) ("As a procedural guide the business judgment presumption is a rule of evidence that places the initial burden of proof on the plaintiff.") The fact that a majority of the directors that approved these agreements were independent, outside directors gives rise to a heightened presumption that they acted with due care and in good faith. *See, e.g., Moran* v. *Household Int'l, Inc.*, 490 A.2d 1059, 1074-75 (Del. Ch. 1985), *aff'd*, 500 A.2d 1346 (Del. 1985).

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Gross negligence in the context of a due care claim against a disinterested, independent board committee means a "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." *Benihana of Tokyo, Inc.*, 891 A.2d at 192 (finding no gross negligence where board approved convertible notes offering after consulting with experienced advisors, discussing financial terms, and considering reasonably available alternatives). Plaintiff must establish that Amylin's Directors were grossly negligent in failing to consider all material information reasonably available, or acted without a rational business purpose. *Brehm*, 746 A.2d at 259. Delaware law is clear that due care "does not mean that the Board must be informed of *every* fact," but rather that the Board is responsible for considering only *material* facts that are *reasonably available*, not those that are immaterial or out of the Boards reach." *Id. See also In re RJR Nabisco, Inc. S'Holder's Litig.*, 1989 WL 7036, at *19 (Del. Ch. Jan. 31, 1989) (noting that "the amount of information that it is prudent to have before a decision is made is itself a business judgment of the very type that courts are institutionally poorly equipped to make.")

Plaintiff plainly cannot satisfy this burden and Amylin's Directors' decision to approve the Indenture and Credit Agreement must be upheld. *See In re Walt Disney Co.*, 906 A.2d at 73-74 ("a Plaintiff who fails to rebut the business judgment rule presumptions is not entitled to any remedy unless the transaction constitutes waste.")

B. Amylin's Directors Acted with Due Care and a Rational Business Purpose in Approving the Indenture and Credit Agreement

Stripped of hyperbole, Plaintiff's sole argument in support of its claim that Amylin's Directors breached their fiduciary duty of care in entering the Indenture and Credit Agreement is that Amylin's Directors failed to consider adequately a single boilerplate provision

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that was unlikely to ever be triggered. This argument finds no support in Delaware law. A director cannot be found to have breached his duty of care so long as "the process employed was either rational or employed in a *good faith* effort to advance corporate interests." *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 122 (Del. Ch. 2009). Both of those standards are easily satisfied here.

1. The Board Did Not Breach its Duty of Care by Failing to Focus on and Negotiate Over Terms That are Commonly Found in Indentures and Credit Agreements.

The Fundamental Change and Change of Control provisions are commonplace terms employed in numerous contracts. *See, e.g., BASF Corp. v. POSM II Props. P'ship, L.P.*, 2009 WL 522721, at *5 (Del. Ch. Mar. 3, 2009); *Hills Stores Co. v. Bozic*, 769 A.2d 88 (Del. Ch. 2000) (holding that fiduciary duties did not require directors to approve a dissident slate in order to avoid triggering a change of control provision.) A search of publicly-filed debt agreements reveals hundreds of identical or substantially similar provisions. (Alicks Aff. Ex. 1.) Indeed, such provisions appear in the American Bar Association's *Model Negotiated Covenants and Related Definitions*. William J. Whelan, III, *Model Negotiated Covenants and Related Definitions*, 61 BUS. LAW. 1450 (2006). Such provisions likewise appear in numerous other types of contracts. *See* Jennifer Arlen & Eric Talley, *Unregulable Defenses and the Perils of Stockholder Choice*, 152 U. P.A. L. REV. 577, 614 (2003) ("Change of control provisions can be—and currently are—incorporated into a variety of contracts, including intellectual property licenses, leases, joint ventures, debt and equity financing, union contracts, and employee stock option plans.") Given the substantial number of other agreements that contain materially identical provisions, Plaintiff cannot plausibly argue that Amylin's Directors were grossly

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negligent or acted outside the "bounds of reason" in failing to negotiate over these change of control provisions. *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1017 (Del. Ch. 2005). (A commonplace provision "assented to by a board fulfilling its fundamental duties of loyalty and care for [a] proper purpose . . . has legal legitimacy."); *In re RJR Nabisco Co. S'holders Litig.*, 1989 WL 7036 (Del. Ch. Jan. 31, 1989).

Moreover, with respect to the Indenture, the Finance Committee asked management and its expert legal advisors whether the documentation included any uncommon or not customary terms. (Bradbury Tr. 77:19-78:9.) The answer was "no." (*Id.*) Plaintiff cites no authority to support the proposition that the failure to pay substantial attention to common terms in a commercial contract—especially where, as here, the Board did so in reliance on its expert legal advisors—constitutes gross negligence. To the contrary, the Delaware Supreme Court has recognized that a director need not "read *in haec verba* every contract or legal document that [he or she] approves." *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 749 n.424 (Del. Ch. 2005) (quoting *Smith* v. *Van Gorkom*, 488 A.2d 858, 883 n.25 (Del. 1985)). The authorities cited by Plaintiff do not hold otherwise. For example, Plaintiff relies on *Louisiana Municipal Employees' Retirement System* v. *Crawford*, 918 A.2d 1172, 1181 n.10 (Del. Ch. 2007) in arguing that the commonness of the change of control provisions should not bear on whether Amylin's Directors acted reasonably in adopting the agreements. (Opening Br. 22.) But the Court in *Crawford* did not even consider the question whether a Board breaches its duty of care when it fails to consider and negotiate over a common commercial term, based on the advice of its expert legal counsel. Rather, *Crawford* dealt with the limited question of whether a break-up

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fee of 3% of deal value in the context of a merger agreement is *per se* reasonable—a question that has no relevance here.

2. The Board is Entitled to Rely on the Expert Advice of its Legal Advisors.

Plaintiff next argues that "[t]he Board cannot avoid a due care violation by blaming their advisors for keeping them in the dark about the [change of control provisions]." (Opening Br. at 22.) It is well settled in Delaware, however, that the Board may rely on the advice of its expert advisors. 8 *Del. C.* § 141(e); *see also In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 132 (Del. Ch. 2009) ("[D]irectors of Delaware corporations are fully protected in relying in good faith on the reports of officers and experts."); *In re MONY Group, Inc. S'holder Litig.*, 852 A.2d 9, 21 (Del. Ch. 2004) (holding that board can rely on officer and need not retain investment banker to satisfy duty of care, even under heightened "reasonableness" standard applicable to change of control); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1142 (Del. 1995) (holding that reliance on expert counsel is "evidence good faith and the overall fairness of the process"); *Van Gorkom*, 488 A.2d at 881 n.22 (stating that, in appropriate circumstances, reliance on counsel could be part of an adequate decision-making process.) Both the Indenture and the Credit Agreement were the result of arm's-length bargaining, led by expert legal counsel and with substantial financial advice provided by officers and employees from Amylin's finance department.

Moreover, the process employed by Amylin's Board and its expert advisors met each of the three best practices that the Delaware Supreme Court has recognized that a board committee should follow in considering a third party transaction: (i) circulation of expert-prepared materials before meeting of the relevant committee, which consider foreseeable

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alternative outcomes of a proposed transaction; (ii) explanation of the materials to the committee members by the expert or knowledgeable members of the committee; and (iii) discussion among the committee based on those materials. *In re Walt Disney Co.*, 906 A.2d at 56.

With respect to the 2007 Indenture, Amylin's Board had considered and discussed various financing alternatives as a regular matter, and delegated to the Finance Committee (acting as a Pricing Committee) in May 2007 the authority pursuant to 8 *Del. C.* § 141(c)(2) to negotiate the terms of an offering if the conditions warranted. (Bradbury Ex. 3.) The Pricing Committee met no less than five additional times to discuss possible capital-raising options and the terms of a convertible debt offering. (Bradbury Tr. 27:23-28:8, 55-58, 77 & Exs. 3 & 6; Foletta 27:19-23, 45:13-24; Alicks Aff. Ex. 7.) Before each of these meetings, Amylin's Directors received materials prepared by Amylin's employees and outside counsel, describing the alternatives available to Amylin and the advantages and disadvantages of each, and the material terms of a potential convertible note offering. (Bradbury Tr. 61:21-62:16; Foletta Tr. 27:19-23, 69:12-20 & Exs. 7 & 8.) At several of these meetings, the Committee received input and advice from financial experts concerning the economic terms of the potential transaction. (Alicks Aff. Exs. 6 & 7; Bradbury Ex. 3; Foletta Ex. 9.) The Committee likewise received extensive advice from its internal and external counsel regarding the terms of the proposed transactions. (Foletta Tr. 16:13-19, 37:12-19, 48:18-49:8, 56-59, 69:6-19, 78:2-9 & Ex. 9.) And in each instance, Amylin's Directors engaged in a full discussion of the proposed transaction. (Alicks Aff Ex. 6; Bradbury Exs. 3 & 6; Foletta Ex. 9.)

The Pricing Committee relied on Mr. Foletta and Cooley to negotiate the specific terms of the Indenture. (Bradbury Tr. 77:19-78:9; Foletta Tr. 56-59; *see Cinerama*, 663 A.2d at

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1142; *In re MONY*, 852 A.2d at 821.) In the period leading up to the pricing of the convertible notes, Mr. Foletta and Cooley kept the Pricing Committee apprised of how the transaction was progressing. (Foletta Tr. 21:25-22:6 & Exs. 7 & 8.) Members of the Pricing Committee specifically requested that Mr. Foletta and Cooley advise them of any provisions in the offering that differed from the prevailing terms in the market at the time. (Bradbury Tr. 77.) The Fundamental Change provision, however, was a common term in the market and was requested by the underwriter. (Foletta Ex. 2.)

With respect to the Credit Agreement, Amylin engaged in an equally robust process. Prior to entering into the Credit Agreement, Amylin's Board and Finance Committee met multiple times to consider the possibility of obtaining a secured credit facility, and actually considered the possibility of doing so over an 18-month period. (Cuddeback Tr. 9:5-7 & Ex. 1.) During a June 2006 meeting, Amylin's Finance Committee delegated to Mr. Cuddeback, Amylin's Director of Finance, the authority to negotiate the agreement, subject to the Committee's final approval. (*Id.* 20:10-13 & Ex. 1.) The Finance Committee was aware that Mr. Cuddeback had prior experience negotiating bank loans. (Bradbury Tr. 84:23-85:3.) Over the next year and a half, Mr. Cuddeback and Cooley engaged in extensive negotiations with Bank of America, as well as other banks, to obtain the secured facility. (Cuddeback Tr. 28:4-29.)

During the course of these negotiations, Bank of America insisted on including the Change of Control provision. (Barnes Tr. 58-9; Cuddeback Tr. 53-54.) As with the Indenture, this provision was common in the market for secured debt. (Barnes Ex. 2.) Despite the commonness of the provision, Cooley actually attempted to remove the limits the provision

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placed on Amylin's directors' ability to cleanse dissident nominees, but Bank of America refused. (Barnes Exs. 5 & 8.) Bank of America's representative testified that this limitation was important because it could best ensure the continued business strategy that Bank of America depended upon when agreeing to the financing. (Barnes Tr. 58-9.) In an overall negotiation of many terms in the Credit Agreement, including other parts of the Change of Control provision, Bank of America conceded some points and Amylin conceded other points. This provision was one that Cooley and Amylin's management determined was not likely to be triggered—no one was aware of such a provision ever being triggered—and a point to be conceded in the overall negotiation. (*See* Petta Tr. 107:21-108:9; Barnes Tr. 116:6-19; *see also* Cuddeback Tr. 53:21-22.) As a whole, however, the secured debt facility Amylin obtained as a result of its negotiations with Bank of America contained terms that Amylin considered very favorable. (Cuddeback Tr. 54:2-10.)

These facts make clear the reasonableness of the Board's reliance on its expert legal advisors, together with management, to negotiate the terms of the Indenture and the Credit Agreement. 8 Del. C. § 141(e); s*ee, e.g., In re Citigroup*, 954 A.2d at 132 ("[D]irectors of Delaware corporations are fully protected in relying in good faith on the reports of officers and experts."). Plaintiff's reliance on *Brehm* v. *Eisner*, 746 A.2d at 261-62, does not help its argument. In *Brehm*, Disney's board hired a compensation expert to advise it on the appropriateness of certain terms in a proposed compensation agreement with a potential executive. *Id.* At the time of the negotiations, neither the expert nor any director undertook to calculate the substantial amount of severance that the executive would receive if he were terminated, a termination that ultimately occurred at a substantial cost to Disney. Nevertheless,

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the Delaware Supreme Court held that the board *could* properly rely on its expert's advice in approving the compensation package. *Id.* Like Disney's board in *Brehm*, Amylin's Board is privileged to rely on the advice of its expert legal advisors that the documentation for the Indenture and the Credit Agreement contained no uncommon, non-market terms, in determining to go forward with what the Board believed were highly favorable economic transactions.

3. No Reasonable Director Would Have Considered These Change of Control Provisions, Which Are Rarely Triggered, to Likely Have a Substantial Impact on Shareholders.

Finally, Plaintiff makes the strained argument that the Board breached its duty of care by failing to consider the impact of the Fundamental Change and Change of Control provisions on Amylin's stockholders. (Opening Br. at 21. citing *Levco Alternative Fund Ltd.* v. *Reader's Digest Ass'n*, 803 A.2d 428 (Del. Aug. 13, 2002)). This claim misapprehends the facts and, like Plaintiff's other arguments, is not supported by the legal authority relied on by Plaintiff.

As a factual matter, at the time Amylin negotiated the Indenture and Credit Agreement, it was unforeseeable that the change of control provisions would have any impact, much less a significant impact, on Amylin's shareholders. *See Brehm*, 746 A.2d at 262 (refusing to apply 20/20 hindsight to board of directors decision). *First*, Amylin, the Bank of New York and *Plaintiff* agree that the plain language of the Fundamental Change provision in the Indenture gives Amylin the unfettered right to approve dissident slates to avoid repurchase rights. Thus, under even Plaintiff's reading of the Fundamental Change provision, the Board has the ability to prevent any harm that could befall the stockholders in the event of a potential change in majority of the Board and the Board has already acted in a manner to do so. *Second,* the undisputed testimony in this case is that these provisions are almost never triggered. Representatives from

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both Bank of New York and Bank of America testified that, despite the inclusion of similar provisions in hundreds of debt agreements, they could not recall a single instance where such provisions were triggered. *Third*, with respect to the Credit Agreement, the conduct of Amylin's directors—which must be evaluated at the time the Credit Agreement was approved—occurred at a time when Amylin had more than $1 billion in cash and cash equivalents. (Norman Aff. Ex. D at 3.) Plaintiff's fail to explain how the potential harm to shareholders, which at the time the agreements were executed was remote, at best, somehow results in stockholder disenfranchisement.

Moreover, *Levco* does not help Plaintiff's argument. In *Levco*, the Delaware Supreme Court preliminarily enjoined a recapitalization of a corporation's stock that would reduce one class of shareholder's equity by $100 million. 803 A.2d 428. The Court noted that the plaintiff, a member of the burdened class, had a reasonable probability of success because the board completely failed to consider the impact of the transaction on that class although the conflicting interests of the various classes of shareholders were "obvious." *Id.* By contrast, Amylin's Directors engaged in substantial negotiations over the material terms of the transaction and properly relied on the representations of its advisors that the remaining, non-negotiated provisions were reasonable, standard provisions, none of which imposed costs outweighing the substantial financial benefits Amylin obtained from the transactions.

Because it cannot be said that Amylin's Directors failed to inform themselves of the material information that was reasonably available, and because they properly relied on competent advisors, Amylin's Board of Directors, like the board in *Brehm*, is entitled to the deference afford by the business judgment rule. Plaintiff's suit should thus be dismissed.

II. PLAINTIFF IS NOT ENTITLED TO THE EXTRAORDINARY REMEDY IT SEEKS

In this case, Plaintiff seeks no relief directly against the Company's directors and has expressly disavowed any claim for damages. During the April 16, 2009 hearing, the Court requested that Plaintiff provide legal authority for the proposition that it can reform arm's-length contracts between Amylin and third parties based on Amylin's Directors purported breaches of their duty of care. Rather than provide this authority—because no such authority exists—Plaintiff attempts to support its argument with a line of cases that it concedes "does not distinguish whether the underlying breach of fiduciary duty is a breach of the duty of loyalty or a breach of the duty of care." (Opening Br. at 25.) Not a single case relied on by Plaintiff involved a pure duty of care claim. And Plaintiff thus has failed to identify a single authority supporting the extraordinary relief it is seeking.

The Court cannot invalidate a third party contract based on a finding that a board of directors failed to exercise due care in agreeing to its terms. As the Delaware Supreme Court has explained:

> Basic to the common law of torts is the distinction between conduct that is negligent (or grossly negligent) and conduct that is intentional. And in the narrower area of corporation law, *our jurisprudence has recognized the distinction between the fiduciary duties to act with due care, with loyalty, and in good faith*, as well as the consequences that flow from that distinction. Recent Delaware case law precludes a recovery of rescissory (as distinguished from out-of-pocket) damages for a breach of the duty of care, but permits such a recovery for a breach of the duty of loyalty.

In re Walt Disney Co., 906 A.2d at 66 n.109 (*citing Cinerama, Inc.* v. *Technicolor, Inc.*, 663 A.2d 1134, 1147-50 (Del. Ch. Oct. 6, 1994), *aff'd*, 663 A.2d 1156 (Del. 1995); Plaintiff Op. Br. at 22.

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This Court has likewise elaborated on the distinction between a breach of the duty of due care "uncomplicated by self-dealing or conflict of interest" and a breach of fiduciary duty including elements of self-dealing or conflict of interest. *Cinerama*, 663 A.2d at 1147. Specifically, in the context of analyzing rescission and rescissory damages, the *Cinerama* Court held that the case law presents "two prevailing 'strains' of the remedy of rescissory damages. The first grows out of . . . restitutionary relief. The second theory . . . employs a liberal application of the compensatory theory of damages against trustees who commit egregious breaches of the express terms of a trust or who self-deal." *Id*. at 1144-1145. In analyzing the "restitutionary" theory, the Court declared that the precedent involved "proposing or effecting self-interested deals" and that "this theory does not reach corporate directors who are disinterested and independent but inadequately informed." *Id.* at 1145-1146 (citing *Lynch* v. *Vickers Energy Corp.*, 429 A.2d 497 (Del. 1981), *overruled in part*, *Weinberger* v. *UOP*, 457 A.2d 701 (Del. 1983).) In addressing the "compensatory theory," the Court explained that "trustees are not held liable for appreciation [i.e. rescissory] damages when they are only guilty of negligence . . . . Only in instances of self-dealing or breach of an affirmative term of the trust is it deemed equitable to impose [rescission or rescissory damages] upon the trustee . . . ." *Cinerama*, 663 A.2d at 1146. Thus, *Cinerama* clearly holds that rescission is not available in cases of a breach of due care absent any self-dealing or conflict of interest, demonstrating the significance Delaware law affords this distinction. *See also Jedwab* v. *MGM Grand Hotels, Inc.*, 509 A.2d 584, 600 & n.12 (Del. Ch. 1986) (explaining that a third party's "contract rights—while not dispositive—present an additional circumstance supporting the denial of" a motion for preliminary injunction because "[h]istorically, courts of equity have accorded great deference to

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the rights of bona fide purchasers from trustees who have no notice of a breach of trust . . . . This limitation is apparently a specific application of the more general principle that 'as between competing equitable claimants [into which class a contract vendee would fall], he that is prior in time is stronger in law'.")

Plaintiff has offered no pertinent authority to support the remedy it seeks. Plaintiff's extensive reliance on *Omnicare, Inc.* v. *NCS Health Care, Inc*., 818 A.2d 914, 939 (Del. 2003) is misplaced. Although the Court in *Omnicare* recognized that "the protection of [third party] contractual expectations must yield to the supervening responsibility of the directors to discharge their fiduciary duties on a continuing basis," *Omnicare* involved facts wholly distinct from the circumstances here. *Omnicare* involved the omission of a fiduciary out clause in a merger agreement, which had the effect of "completely preventing the Board from discharging its fiduciary responsibilities to the minority stockholders when [another party] presented its superior transaction." *Id*. at 936. The combination of voting agreements, a provision in the merger agreement requiring that it be presented to the stockholders for a vote and the absence of a fiduciary out guaranteed that no the stockholders were precluded entirely from voting for the competing merger proposal. *Id*. at 918. By contrast here, the Fundamental Change and Change of Control provisions do not restrict the Board's ability to exercise its fiduciary duties. They merely provide for potential commercial consequences to the Company in the event of a change in the majority of Amylin's Board.

Strassburger v. *Earley*. 752 A.2d 557 (Del. Ch. 2000) (Opening Br. at 24) actually supports the Amylin Defendants' argument. In *Strassburger*, the Court reiterated that

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"rescissory damages should never be awarded as a remedy solely for a breach of a corporate director's duty of care." *Id.* at 581 (citing *Cinerama*, 663 A.2d 1156 (1995)).[3]

And Plaintiff's only other principal authority, *Paramount Communications Inc.* v. *QVC Network Inc.*, 637 A.2d 34 (Del. 1994), is likewise unhelpful to Plaintiff because *Paramount* did not involve the invalidation of a contract with an innocent third party based solely on a board's breach of the duty of care. In *Paramount*, the Supreme Court of Delaware held that directors may not "enter into an agreement in violation of their fiduciary duties [of due care and loyalty] and then render [the company], and ultimately its stockholders, liable for failing to carry out an agreement in violation of those duties." *Id.* at 50. The Court further explained that, while it would have preferred to grant the remedy of rescission based on the self-interested nature of the challenged transaction, the "transaction cannot be rescinded because . . . [there is no] claim or evidence that [the third party] engaged in culpable conduct that would make it equitable to subject it to the rescission remedy." *Id.* at 578.

In fact, the only case Plaintiff cites that even remotely supports its argument is a Second Circuit case applying New York law. (Opening Br. at 25 (citing *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 283 (2d Cir. 1986).) *Hanson* is distinguishable, however, in that it involved parties who had negotiated for unreasonable and draconian terms, as opposed to third party lenders who negotiated with the Amylin Board to include exceedingly common provisions in financial instruments for valid business reasons.

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[3] The Court also explained that, while it would have preferred to grant the remedy of rescission based on the self-interested nature of the challenged transaction, the "transaction cannot be rescinded because . . . [there is no] claim or evidence that [the third party] engaged in culpable conduct that would make it equitable to subject it to the rescission remedy." *Id.* at 578.

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Finally, unable to adduce any legal authority to support its claim, Plaintiff places heavy emphasis on a discussion of a Cardozo Law Review article cited in *Ace Ltd.* v. *Capital Re Corp.*, 747 A.2d 95, 108-09 (Del. Ch. 1999), which analyzes whether "a third-party contract should yield to a board's exercise of fiduciary duties." (Plaintiff Op. Br. at 25.) An academic article opining on the weight to be given to third-party contract rights versus a board's exercise of its fiduciary obligations, however, is insufficient to overcome the consistent judgment of Delaware courts that refuse to invalidate third party contract rights based on an allegation that the counterparty to the contract failed to act with appropriate care.

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CONCLUSION

For the forgoing reasons, the Court should dismiss Plaintiff's suit and enter a judgment in the Amylin Defendants' favor.

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