

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, AMYLIN :
PHARMACEUTICALS, INC., BANK OF :
AMERICA, N.A., and THE BANK OF NEW YORK :
TRUST COMPANY, N.A., :

Defendants. :

-----X
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.:

- - -
Chancery Court Chambers
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Thursday, April 16, 2009
3:33 p.m.

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801-3768
(302) 255-0524

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

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3 STATUS AND SCHEDULING TELEPHONE CONFERENCE and RULING
4 OF THE COURT ON PLAINTIFF'S MOTION TO AMEND

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6 APPEARANCES: (via speakerphone)

7 JOEL FRIEDLANDER, ESQ.
Bouchard, Margules & Friedlander, P.A.

8 -and-

9 MARK LBOVITCH, ESQ.
of the New York Bar
Bernstein, Litowitz, Berger & Grossmann LLP
10 for Plaintiff

11 J. TRAVIS LASTER, ESQ.
Abrams & Laster LLP
12 for Plaintiff as to Count V

13 RAYMOND J. DiCAMILLO, ESQ.
MARGOT F. ALICKS, ESQ.
14 Richards, Layton & Finger, P.A.
-and-

15 DIANE L. MCGIMSEY, ESQ.
of the California Bar
16 Sullivan & Cromwell LLP
for Defendants Daniel M. Bradbury, Joseph C.
17 Cook, Jr., Adrian Adams, Steven R. Altman,
Teresa Beck, Karin Eastham, James R. Gavin,
18 Ginger L. Graham, Howard E. Greene, Jr., Jay S.
Skyler, Joseph P. Sullivan, James N. Wilson,
19 and Amylin Pharmaceuticals, Inc. and
Cross-Claimant Amylin Pharmaceuticals, Inc.

20

21 THAD J. BRACEGIRDLE, ESQ.
Wilks, Lukoff & Bracegirdle LLC
for Defendant/Cross-Claimant Amylin
22 Pharmaceuticals, Inc.

23 RICHARD H. MORSE, ESQ.
Young, Conaway, Stargatt & Taylor LLP
24 for Defendant/Cross-Claim Defendant Bank of
America, N.A.

1 APPEARANCES: (Continued)

2 PETER B. LADIG, ESQ.
3 STEPHEN B. BRAUERMAN, ESQ.
4 Bayard, P.A.

-and-

4 JAMES GADSDEN, ESQ.
5 of the New York Bar
6 Carter, Ledyard & Milburn
7 for Defendant Bank of New York Mellon Trust
8 Company, N.A.

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1 THE COURT: Hello. Good afternoon,
2 everyone.

3 MR. LASTER: Good afternoon, Your
4 Honor. This is Travis Laster for plaintiffs. With me
5 on the line is Mark Lebovitch of Bernstein Litowitz
6 and also my cocounsel Joel Friedlander of Bouchard,
7 Margules & Friedlander. And in terms of the
8 plaintiffs, Mr. Lebovitch will be making any
9 presentation or answer any questions Your Honor may
10 have.

11 MR. DiCAMILLO: Your Honor, good
12 afternoon. It's Ray DiCamillo for the Amylin
13 defendants. With me in my office is Margot Alicks.
14 Also on the line is Diane McGimsey from Sullivan &
15 Cromwell.

16 (Telephone beeping sound)

17 MR. MORSE: Your Honor, this is
18 Richard Morse, Young Conaway, for Bank of America.

19 MR. LADIG: Your Honor, this is Pete
20 Ladig and Steve Brauerman of Bayard on the line for
21 Bank of New York Mellon as the trustee of -- the
22 indenture trustee. And also with me on the line is
23 Mr. James Gadsden of Carter, Ledyard & Milburn. He'll
24 be making the presentation today on behalf of the

1 indenture trustee.

2 MR. BRACEGIRDLE: And, Your Honor,
3 this is Thad Bracegirdle on behalf of Amylin
4 Pharmaceutical as well.

5 THE COURT: All right. I -- I wanted
6 to get you all on the phone just to talk about the
7 scheduling and the status. And I suppose there's a
8 few issues. One was the -- the motion to file the
9 fourth amended complaint. I have your letter,
10 Mr. DiCamillo, stating your nonobjection.

11 Is -- is there anyone else who objects
12 to that motion?

13 (No response)

14 THE COURT: Hearing no objections,
15 that motion will be allowed. So I'll grant the motion
16 to amend.

17 UNIDENTIFIED SPEAKER: Thank you, Your
18 Honor.

19 THE COURT: Now, I have to confess to
20 some perplexity in terms of what's going on in terms
21 of motion practice directed to the merits and what, if
22 anything, there is that will be -- it will be
23 necessary to try in this matter.

24 So I -- I think I'm going to let you

1 have a stab at that to start with, Mr. Lebovitch.

2 MR. LEBOVITCH: Yes, Your Honor.

3 The -- this case I guess took a twist last -- I
4 believe it was last week or a week and a half ago when
5 the company asked Bank of New York to -- to agree with
6 its -- with the board's ability to approve the
7 directors for purposes of running a contested
8 election. Bank of New York took no position
9 (Inaudible) the board's right. That's when we filed
10 the motion for summary judgment which essentially --
11 the indenture raises three prongs to -- to an argument
12 to allow the board to do what we believe its fiduciary
13 duties require and what the board has said it will do
14 if allowed to do so.

15 One is an interpretation of the plain
16 language of the contract. The second argument is --
17 is that if the plaintiff and the company and board are
18 wrong about the interpretation of the contract, would
19 validate the provision; and, then, third, if the
20 provision is not per se invalid, then, you know,
21 essentially there's a care claim. So that the Court
22 potentially could invalidate the provision on the
23 facts of this case as opposed to a per se invalidity.

24 We filed the motion for summary

1 judgment on those three bases. It also includes a
2 claim as to the credit agreement, which everyone
3 agrees does not have any sort of fiduciary out or any
4 sort of a leverage for the board to approve.

5 But it's the indenture -- we filed the
6 motion. And we are trying to get a ruling as to the
7 interpretation of the contract in particular, because
8 that would resolve all claims as to the indenture. It
9 would resolve all claims with The Bank of New York and
10 it would resolve the motion.

11 In our letter -- (Inaudible) New York
12 law makes very clear that the construction and
13 interpretation of contract can be done in summary
14 judgment and, here, Your Honor has seen the provision.
15 Basically this dispute is over what does the word
16 "approved" mean. And we believe that there's simply
17 no extrinsic evidence or discovery that need be had.
18 It's simply asking Bank of New York to explain what it
19 believes the word "approved" means and then the Court
20 can -- can make that decision. It's not going to turn
21 on any document that's sitting in a warehouse or
22 anyone's goals or objectives. It's -- it's simply
23 reading the contract.

24 And so we did ask for a expedited

1 ruling on summary judgment in general, but in
2 particular we believe that -- that the question of how
3 the Court will interpret the indenture will simply
4 resolve the claims of the indenture entirely. And --
5 and, frankly, Your Honor, we -- we've now seen a
6 letter from Bank of New York, and they're saying a lot
7 about the intents; but they actually still have not
8 taken a contrary position as to what the word
9 "approved" is really supposed to mean. But to the
10 extent they have that position in the letter, the
11 issue should be ripe for the Court to rule. And --

12 THE COURT: Well, that's all -- okay.
13 Of course it can be made ripe or I can rule on it at
14 some point. But what -- leaving that aside, I mean,
15 I -- I have set on my calendar -- I believe it's
16 May 4th and May 5th which we set on there as potential
17 trial dates.

18 MR. LEBOVITCH: Uh-huh.

19 THE COURT: Now, what's wrong with
20 having these motions heard on that date, No. 1? And
21 No. 2, what issues of fact are there going to be to
22 try?

23 MR. LEBOVITCH: Okay. As to the first
24 question, the -- the scope of the trial will be

1 largely shaped by any prior resolution of the summary
2 judgment motion. Again, you will -- you will hear no
3 evidence and nothing about the indenture if the
4 blanket interpretation of the -- of the indenture, I
5 guess, is ruled in -- in the plaintiff's favor. Only
6 if the Court accepts an alternative interpretation of
7 the word "approved" will we have any other evidence
8 about the validity and enforceability of the
9 provision. That -- again, you know, as we set forth
10 in our summary judgment motion, we do think these
11 provisions, if -- if the alternative interpretation is
12 accepted, then the indenture, as interpreted, and the
13 credit agreement, which doesn't have any approval
14 rights, are per se violations of the statute.

15 THE COURT: Well, then -- look, I get
16 that, too, Mr. Lebovitch; but there's nothing to try
17 on that subject. So --

18 MR. LEBOVITCH: There is nothing to
19 try on that. However, it is possible -- that's why we
20 carved out as part of the partial settlement a care
21 claim, because to the extent that the Court does not
22 agree with us that this is -- that there's nothing to
23 try on the validity of the provision, we carved out
24 the ability to present facts and hopefully persuade

1 the Court that even if this provision is not per se
2 invalid and a violation of the statute and basic
3 Delaware law, that at least on the facts of this
4 particular case, this -- these particular provisions
5 should be invalid. That would be the gist of the
6 factual presentation.

7 THE COURT: But I understand from the
8 information you've sent me that the only basis that
9 you have preserved or reserved to make that last
10 argument is -- is a duty of care claim; is that
11 correct?

12 MR. LEBOVITCH: That -- that is --
13 yes. In order -- in order to get the approval done
14 right away and eliminate that uncertainty, we agreed
15 that we would not present claims of disloyalty or bad
16 faith. And -- and --

17 THE COURT: Well, I mean, I have to
18 say I have a question in my mind as to how, even if I
19 try this matter and you convince me that the board had
20 breached -- as a whole had breached the duty of care
21 in adopting one or the other or both of these
22 provisions, how that would lead to any relief with
23 respect to affecting the contract rights of third
24 parties.

1 MR. LEBOVITCH: Well, Your Honor,
2 one -- one way that that could happen is if -- if the
3 facts showed essentially no negotiation about these
4 provisions. And -- and looking at how the parties
5 approached the negotiation of the provision, we think
6 that -- that essentially an injunction or an
7 invalidation of the provision would be a perfectly
8 appropriate remedy. If the board doesn't understand
9 or didn't even consider what they -- what they were
10 agreeing to, then whatever rights the noteholders, you
11 know, would claim to have would be subordinated to the
12 rights of the shareholders.

13 THE COURT: Do you have some -- do you
14 have some authority for that proposition?

15 MR. LEBOVITCH: For -- for the
16 proposition that the Court can invalidate the
17 provision based on the duty of due care?

18 THE COURT: Based on -- yes, based on
19 pure due care, that -- that someone who negotiates
20 with the board and obtains provisions in a contract
21 stands to lose those provisions if some years later
22 stockholders convince a judge that the board didn't
23 act with due care. You know, not -- not that the
24 board was acting to entrench itself or that there's

1 any violation of the duty of loyalty.

2 MR. LEBOVITCH: I -- I think, Your
3 Honor, in the Quickturn case, in particular the
4 Chancery Court's opinion, but the Supreme Court's
5 opinion, is no inconsistency, that board didn't
6 understand what they were agreeing to (Telephone
7 beeping sound). And that was -- again, Vice
8 Chancellor Jacobs focused his opinion on --

9 THE COURT: But there really were no
10 -- there were no real third-party rights in Quickturn.
11 I mean, I -- you know, in theory. I guess you have
12 rights of holders of the poison pills, but those are
13 just the shareholders. And that's a contract the
14 board imposed on itself.

15 But this -- these are contracts that
16 were negotiated with third parties. And you'll have
17 to get me some authority for the proposition that a
18 finding of a board that acted without appropriate care
19 in agreeing to a contract of this nature with a real
20 third party can -- that the contract can be set aside
21 or -- or blue penciled.

22 MR. LEBOVITCH: Your Honor, okay.
23 There's cases where ESOPs have been enjoined because
24 they violated shareholder rights. And so those are

1 third parties. Those are employees. (Telephone
2 beeping sound) There's also the third-party rights of
3 bidders. I mean, I believe in the Paramount versus
4 QVC case there wasn't a finding of any bad faith.
5 There was just an invalidation of the provision
6 notwithstanding third-party rights.

7 THE COURT: Well, you'll have to --
8 I'll ask you to do this in a letter. In any event --

9 MR. LEBOVITCH: Okay.

10 THE COURT: -- I have some -- so how
11 long will it take to try this case that you want
12 to put on? Is this a one-day presentation?

13 MR. LEBOVITCH: What we envision, Your
14 Honor, if we get -- if we get to that point, if
15 there's no decision on the interpretation of the
16 contract, we've identified an expert, a -- a -- an
17 expert about debt covenants. The other -- we don't
18 know yet -- we haven't gotten to the point yet of
19 whether the other parties will identify their own
20 experts, but we figured there would be a day of expert
21 testimony, and then we would have to put on evidence
22 relating to the process of approval, which will
23 include, you know, the -- the -- we believe the
24 absence of bargaining and the lenders themselves

1 knowing that there was no arm's-length bargaining over
2 this provision. So that -- that can also play in --
3 we believe, into the Court's essentially not only
4 interpretation of the provision but -- but relief --
5 relief as to -- as to invalidation of the provision.

6 THE COURT: Well, that seems to be --
7 you're trying to imply some loyalty issue in what
8 you're saying. I thought you had taken that out of
9 the case.

10 MR. LEBOVITCH: Well, what I'm trying
11 to say, if there's no arm's-length bargaining, I mean,
12 as a matter of equity and with the precedents, you'd
13 say the third parties here basically have a provision
14 in the contract that no one -- that served no purpose
15 other than one that's not allowed under Delaware law.
16 And we think --

17 THE COURT: Well, that's -- that's an
18 argumentative conclusion. I mean, it -- it presumably
19 serves a purpose from the point of view of the
20 lenders. In any event, Mr. Lebovitch, I -- I'm
21 having -- I have trouble seeing how there's a whole
22 lot to try here. I mean, even if there are two
23 competing experts, I would expect them both to be on
24 and off in the space of a half a day. And it's hard

1 to believe you couldn't get the rest of this done in
2 another half a day. But leaving that aside -- and
3 I'll keep the two dates set aside on my calendar --
4 why -- why should I accelerate the summary judgment
5 proceedings faster than -- than -- in order to get
6 everything ready for decision in what is only what,
7 three weeks from today?

8 MR. LEBOVITCH: Your Honor, the -- the
9 focus of the trial when it was scheduled was going to
10 be a -- a pure fiduciary duty question, because the
11 parties at the time all agreed that the board had the
12 ability to approve. There was no cloud of doubt over
13 that. That was going to be the subject matter of the
14 trial then. It then expanded to include the -- the
15 validity of the credit agreement, which, at the time
16 that we argued the expedition, we said that may be
17 appropriate for summary relief, and we envisioned
18 briefs on that. But we don't get to any of that, as
19 to the indenture at least, if the board "approved"
20 means what the plaintiff and the company and the board
21 say it means.

22 THE COURT: All right. Well, now --

23 MR. LEBOVITCH: And as far as the
24 proxy fight --

1 THE COURT: Of course you don't get
2 there. I understand that. But today is the 16th of
3 April. I don't have -- the briefs haven't been filed
4 yet. Certainly the briefing isn't complete, and I
5 understood from Mr. Laster's letter that he -- his
6 purpose of writing to me was that he objected to the
7 defendants taking until next Thursday instead of next
8 Monday to answer a brief so that, I guess, then he
9 could file a brief by the end of the week and what?
10 --I would have a hearing during the last week in April
11 or something? I mean, I've got this hearing set for
12 hearing on May 4th, which is the first Monday in May.
13 That seems like that's soon enough.

14 Now --

15 MR. LEBOVITCH: Your Honor --

16 THE COURT: -- I haven't heard yet
17 from BONY's lawyer, Bank of New York's lawyer.
18 Mr. Ladig, I mean, is your client planning to take a
19 position adverse to the -- to the position the
20 company's taking?

21 UNIDENTIFIED SPEAKER: Your Honor --

22 MR. LADIG: Your Honor, Mr. Gadsden is
23 going to respond to this query.

24 THE COURT: All right, Mr. Gadsden.

1 Are you --

2 MR. GADSDEN: Thank you for hearing
3 us.

4 The Bank of New York agrees that --
5 that the sensible way to handle this litigation is for
6 it to be all -- all brought before you on
7 May 4th after the factual development is complete and
8 the briefing is complete.

9 The position of The Bank of New York
10 here is -- first, we're basically parachuting into
11 this dispute just -- just two weeks ago.

12 THE COURT: Join -- join the crowd.
13 So has everybody else.

14 MR. GADSDEN: And we have -- we have
15 to develop the -- the facts and the presentation. The
16 -- the pleadings in this case are not complete.
17 There -- there -- there's just another pending motion,
18 which you've just resolved, to -- to amend the
19 complaint again. There is ongoing discovery initiated
20 by the plaintiffs seeking documents and depositions
21 from The Bank of New York and from the initial
22 purchasers of the bond and their counsel on how this
23 clause got -- got in here and what its purpose was.
24 We need factual development on -- on what's -- what's

1 happened to date.

2 But the basic position of The Bank of
3 New York is that what is -- what is occurring now is
4 precisely the event which this clause was designed to
5 address, that we have a board which is being met with
6 a proxy fight from people that are characterized as
7 dissidents or insurgents who say their goal is to
8 change the management of the company. And the purpose
9 of the clause is to preserve the -- the continuity and
10 the credit of -- of the -- that was in place at the
11 time that the bonds were sold. That's why it talks
12 about -- it makes it a change of control or a
13 fundamental change if the -- the then-members of the
14 board or people selected by the then-members of the
15 board are -- are no longer the board.

16 And -- and what happened here was,
17 faced with --

18 THE COURT: I -- I, you know --

19 MR. GADSDEN: -- as far as we
20 developed it to date, faced -- faced with a slate from
21 Icahn and Eastbourne, the board deliberated and said
22 it was not in the best interests of the company to
23 have those people go on the board and -- and that a
24 different slate of 12 people were the ones that were

1 approved by the board to proceed.

2 And we -- we would like to -- to
3 develop the full facts, present them to you. We will
4 brief on the schedule that's already been established,
5 which in itself is an extremely accelerated schedule,
6 on what involves put rights for -- or repurchase
7 rights for \$575 million worth of bonds.

8 THE COURT: That -- that -- that are
9 tied -- that are by their nature tied to proxy fights.
10 So the -- the exigency is exactly that which is
11 contemplated by the -- by the provision itself.

12 Now, are you going to be in a position
13 to file your brief by next -- by the 23rd?

14 MR. GADSDEN: We -- we would prefer
15 the schedule that was initially established, which is
16 opening briefs on the 23rd, responding briefs on the
17 27th, and replies on the -- on the 30th. I'm --

18 THE COURT: Maybe I misunderstood.
19 So --

20 MR. GADSDEN: I don't have the
21 schedule right in front of me, but we feel that that
22 was the right schedule. And we would like to proceed
23 on that.

24 THE COURT: Well, what is -- someone

1 tell me what -- someone from the plaintiff's side tell
2 me what the schedule is. Mr. Laster or -- or
3 Mr. Lebovitch.

4 MR. LEBOVITCH: The 23rd, according to
5 the existing schedule, is the date for us to file our
6 pretrial brief, and the 28th was going to be the
7 defendants' opposition briefs, and then May 1st was
8 going to be the reply. We're trying to revise the
9 schedule with all these parties, but we did not plan
10 to change that schedule. So the 23rd would be our
11 opening pretrial brief.

12 THE COURT: You didn't plan to change
13 it?

14 MR. LEBOVITCH: I mean, we -- no party
15 has suggested changing the brief -- the briefing
16 schedule. We're working out deadlines on the
17 discovery. We have to accommodate people, but we were
18 going to file our opening pretrial -- we can move
19 that. We can move that.

20 And, Your Honor, I mean, just --
21 just --

22 THE COURT: Well, I'm reading
23 Mr. Laster's letter, which is really what prompted me
24 to get you all on the phone, and on the third page in

1 the middle paragraph it says, "Plaintiffs asked Bank
2 of New York to file its answering brief on Monday, the
3 20th. Bank of New York insisted on filing its
4 answering brief on Thursday, the 23rd."

5 Now, is that not correct information?

6 MR. LEBOVITCH: No; that -- that's
7 correct information.

8 (Telephone ringing)

9 THE COURT: Well, that's not what
10 Mr. --

11 MR. LEBOVITCH: I understood Your
12 Honor to be asking about the existing schedule which
13 is (Telephone ringing) for a pretrial (Telephone
14 ringing) plaintiffs on April 23rd. There was no
15 schedule for a summary judgment brief (Telephone
16 ringing). So when we filed the summary judgment
17 brief, we had to work out with the -- the -- the
18 counterparties on that motion, which is Bank of New
19 York and Bank of America, a schedule.

20 THE COURT: All right. I'm just going
21 to make this easy. I'm not having separate summary
22 judgment proceedings that aren't tied to the
23 May 4th date. So if you want to call it your pretrial
24 brief or your answering brief, the motion for summary

1 judgment, whatever, work out a schedule that gets me
2 the briefs, you know, in time to have this matter
3 fully understood by me by May -- by May 4th. And I
4 don't see any reason to have separate briefing on
5 the -- this, that, and the other thing. Certainly not
6 from Bank of New York.

7 So ... you know, I may not -- what I'm
8 just saying may not make complete sense, and I suppose
9 in some sense you're going to give me some pretrial
10 materials on matters that aren't covered in your
11 summary judgment briefs. But certainly the core
12 issues that are in this summary judgment I want
13 briefed in the summary judgment briefs. I don't want
14 them in the pretrial briefs. Is that clear?

15 MR. LEBOVITCH: I -- I think so. I
16 think -- well, from here -- it is -- it is, Your
17 Honor, in that Bank of New York should make a
18 submission and Bank of America, to the extent that
19 that's in play, make a submission responding to our
20 summary judgment briefs on April 23rd.

21 THE COURT: Well, is that -- is that a
22 date that's been set or is that what you're asking
23 for?

24 MR. LEBOVITCH: Well -- well, we were

1 asking for the 20th; and -- and our focus with Bank of
2 New York was we wanted to know their position on the
3 contract, because the facts don't matter if -- if
4 their position on the contract was not different from
5 ours. And now what we're hearing is they're going to
6 focus on the intent behind the language, not on the
7 language.

8 But if what I'm hearing from Your
9 Honor is you want them to file essentially one summary
10 judgment response -- I thought -- I thought Your Honor
11 was saying that you wanted the response on the 23rd.
12 Because Bank of New York, by the way, has agreed --

13 THE COURT: I misunderstood -- I
14 misunderstood Mr. Travis -- Mr. Laster's letter. Now,
15 I didn't understand that the existing schedule
16 contemplated The Bank of New York brief on the 27th,
17 but that's what Mr. Gadsden tells me was the schedule.
18 I don't intend to alter that.

19 Now, is that -- am I -- am I
20 expressing myself clearly? Am I contradicting
21 understandings you already had?

22 MR. LEBOVITCH: Well, let me -- since
23 Bank of America is on the phone but wasn't part of --
24 with Bank of America they agreed to file a response to

1 our summary judgment motion on the 22nd.

2 THE COURT: 22nd, all right. Well,
3 then I --

4 MR. LEBOVITCH: On the 22nd. They
5 agreed to provide a response on the 22nd. And --
6 and -- and, again, the reason -- that was an
7 accommodation (Telephone beeping sound); but we wanted
8 to get Bank of New York's position first because they
9 have an issue that doesn't apply to Bank of America,
10 and that's, again, the interpretation of the contract,
11 which we felt was essentially an isolated issue that
12 would resolve everything on the indenture; but that's
13 the existing agreement with Bank of America, the 22nd.

14 MR. MORSE: Your Honor, this is
15 Richard Morse from Bank of America. And -- and the --
16 the agreement that's been attributed to us is exactly
17 right. We had agreed and are agreed to file our brief
18 in response to their summary judgment motion on the
19 22nd. But it sounded a few moments ago like Your
20 Honor would end up getting -- you might just want one
21 brief. Do you want us to combine the summary judgment
22 brief and the pretrial brief, or not? I'm happy to do
23 it either way, but I just want to do it whichever way
24 Your Honor prefers. (Telephone beeping sound).

1 THE COURT: I don't mean to interfere
2 with the schedule you've already agreed to on the
3 summary judgment brief, Mr. Morse.

4 MR. MORSE: Okay.

5 THE COURT: It's a little hard for me
6 to understand -- I mean, does Bank of America plan to
7 have -- put witnesses on at trial?

8 MR. MORSE: Perhaps. Bank of
9 America's current plan is to next week file both an
10 answer to the summary judgment brief and a motion to
11 dismiss for failure to state a claim. And we would
12 file one combined brief that deals with both of those
13 motions.

14 THE COURT: You know, I don't -- with
15 all due respect, what's the point of the motion to
16 dismiss, I mean, if you're entitled --

17 MR. MORSE: We think their complaint
18 does not state a claim.

19 THE COURT: If you're entitled to
20 summary judgment, if -- if when I consider their
21 summary judgment motion I conclude they're wrong and
22 you're right, wouldn't I just enter summary judgment
23 in your favor?

24 MR. MORSE: Yeah, I believe you would.

1 THE COURT: All right.

2 MR. MORSE: I was thinking we would
3 make both, but perhaps you're right. Just call it
4 summary judgment since that's the more appropriate
5 thing to do.

6 THE COURT: It sounds like it. And --

7 MR. MORSE: Okay.

8 THE COURT: -- I don't know why it
9 would require, really, a -- it's the same brief;
10 right?

11 MR. MORSE: Yes, it would be the same
12 brief.

13 THE COURT: It's exactly the same
14 issue. It's the same brief. So if you want to file
15 your motion for summary judgment that way, go ahead.

16 MR. MORSE: Okay.

17 THE COURT: I guess what I mean is,
18 when you -- when you come to filing any pretrial
19 memorandum that you plan on filing, you can omit from
20 that as much or all of the matters that are -- that
21 are covered in your summary judgment briefs as
22 possible. And what I would envision on the pretrial
23 is just whatever sort of factual issues and -- and --
24 will be addressed at trial and whatever legal issues

1 are attendant to those factual issues that are
2 different from those that are covered in the summary
3 judgment briefs.

4 Now --

5 MR. MORSE: Okay.

6 THE COURT: Now, Mr. -- Mr. Gadsden --

7 MR. GADSDEN: Yes, sir. Yes, Your
8 Honor.

9 THE COURT: -- you may have -- why do
10 you need essentially five days more than Bank of
11 America needs to file your response to the summary
12 judgment?

13 MR. GADSDEN: Your Honor, my -- my
14 thought and position was why do you need competing
15 series of briefs? We have a briefing schedule leading
16 to a hearing date. We -- we would comply with that.

17 THE COURT: Well, I suppose the
18 plaintiffs are anxious to see what your position is --

19 MR. GADSDEN: Well --

20 THE COURT: -- and they're --
21 they're --

22 MR. GADSDEN: -- they have it from our
23 letter.

24 THE COURT: Well, they have something

1 from your letter. I guess they were anxious to see
2 your legal position. And -- and I suppose we all are.
3 So if you had -- had you -- what was the agreement you
4 have reached with the plaintiffs up to this point?

5 MR. GADSDEN: None, Your Honor. I
6 mean, they -- they -- they asked for an accelerated
7 briefing schedule, and I -- my -- my -- my response
8 was that we -- we should -- that -- that we would have
9 to -- go to -- speak to you to have the briefing
10 schedule set. And our position is that it should be
11 the existing schedule.

12 THE COURT: All right. If it's coming
13 to me --

14 UNIDENTIFIED SPEAKER: But Your
15 Honor --

16 THE COURT: -- you're going to file
17 your answering brief on the 23rd. You want me to
18 answer the question. That's your answer. And I
19 expect you all to work out a schedule for whatever
20 pretrial submissions are necessary.

21 Now, I do not expect to decide the
22 summary judgment motion briefs in advance of trial.
23 Now, it's possible that I will, but I don't expect to.

24 Is there anything else?

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(No response)

THE COURT: Hearing nothing, we are
adjourned. Thank you.

(The proceedings adjourned at 4:01 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 4 through 2 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 20th day of April 2009.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent