IN THE SUPREME COURT OF THE STATE OF DELAWARE

SAN ANTONIO FIRE & POLICE PENSION FUND, on behalf of itself and all others similarly situated,	)	No. 268, 2009
Plaintiff Below Appellant,	)	On Appeal from Court of Chancery
v.	)	C.A. No. 4446-VCL
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,	)	**PUBLIC VERSION DATED: August 5, 2009**
Defendants Below Appellees.	)	

APPELLANT'S REPLY BRIEF

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DATED: July 27, 2009

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PRELIMINARY STATEMENT

Delaware law has a long history of protecting the vitality of proxy contests. Yet the Amylin Defendants,[1] BONY and BoA argue for a legal regime that creates no Board accountability for debt agreements that threaten financial disaster – the acceleration of the corporation's outstanding debt – upon a stockholder vote to replace a majority of the Board. Such Proxy Puts are "effective in insulating managers against proxy contests" because even a provision causing "only modest costs in the event of a successful proxy challenge" can deter proxy fights and ensure the incumbent board's re-election.[2]

In 2007, Amylin's Board blindly adopted Proxy Puts in two debt instruments. When the Company's performance lagged and its stock price dropped, those Proxy Puts made it impossible for two of Amylin's largest stockholders, Eastbourne and Icahn, to mount proxy contests in 2009 to remove a majority of the Board. Instead, they each independently sought to elect a minority slate of five of Amylin's twelve directors. The possibility of electing ten new directors and triggering the Proxy Puts prompted an analyst to warn that their election would "put extraordinary pressure on the equity (likely wiping it out)." (A346) Only then did Amylin's Board learn of the Proxy Puts. Over the next three months, the Board failed to disable them. Since no rational stockholder would risk triggering the Proxy Puts, the dissidents narrowed their slates, so that ultimately only a total of five seats were at stake. These facts exemplify how Proxy Puts embedded in debt instruments coerce stockholders and entrench board majorities.

The Court of Chancery recognized that Proxy Puts "can operate as improper entrenchment devices that coerce stockholders into voting only for persons approved by the incumbent board." (Op. 1) The Court described the creation of Proxy Puts as "particularly troubling," given that "there are few events which have the potential to be more catastrophic for a corporation than the triggering of an event of default," and companies routinely negotiate away "rights that belong first and foremost to the stockholders (i.e., the stockholder

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[1] All capitalized terms have the meaning assigned them in Plaintiff's Opening Brief , which is cited as "OB __"; the Answering Brief of the Amylin Defendants is cited as "AAB __"; the Answering Brief of Bank of America, N.A. is cited as "BAB __"; the Answering Brief of Indenture Trustee New York Mellon Trust Company, N.A. is cited as "TAB __".

[2] Marcel Kahan & Michael Klausner, *Antitakeover Provisions in Bonds: Bondholder Protection or Management Entrenchment?*, 40 UCLA L. Rev. 931, 946 (1993) (footnotes omitted).

franchise)[.]" (*Id.* 26, 27) Instead of curing these problems, the Opinion below exacerbates them.

With respect to the Proxy Put in the 2007 Indenture (which gives the Board the power to "approve" stockholder nominees and prevent acceleration), the Court of Chancery held that "the board ***may*** approve the stockholder nominees ***if*** the board determines in good faith that the election of one or more of the dissident nominees would not be materially adverse to the interests of the corporation or its stockholders." (Op. 21 (emphasis added)) This standard gives incumbent directors broad discretion to decline to approve, a decision that serves their self-interest in entrenchment. Even though Amylin's Board conditionally agreed to approve the stockholder nominees in order to facilitate a fair election, the Court of Chancery second-guessed the Board's decision and created a legal standard that strongly discourages incumbents from approving stockholder nominees. No party sought the standard created by the Court of Chancery, and no party has identified any precedent supporting it.

The Board's recent actions illustrate how the Opinion incentivizes incumbents not to approve stockholder nominees. After Plaintiff obtained expedition in the Court of Chancery over Amylin's strenuous objection, Amylin sought a declaration that it was entitled "under the circumstances of this case, to approve the election of any or all members of the Dissident Slates at any time prior to their election as directors of Amylin." (AR69 ¶ 22) Following the Opinion, however, the incumbents changed sides. Amylin's Board has not approved the two stockholder nominees who were elected at the annual meeting. Instead, the Amylin Defendants now seek affirmance of an Opinion that denied them the declaration they had sought.

As discussed in Plaintiff's opening brief, a standard consistent with Delaware precedent would hold that fiduciaries ***must*** approve nominees to facilitate a fair election ***unless*** there is a compelling justification for imposing financial harm on stockholders if they vote to replace directors. This standard takes into account the self-interest of directors in assuring their own re-election, while enabling a board to protect the corporation and its stockholders in exceptional and rare circumstances. *See, e.g.*, *MM Cos. v. Liquid Audio*, 813 A.2d 1118, 1128 (Del. 2003) (discussing *Blasius Indus., Inc., v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988)). Appellees do not contest the appropriateness of *Blasius* scrutiny if a board decides not to approve stockholder nominees.

The Court of Chancery also erred in not invalidating the "dead hand" Proxy Put in the Credit Agreement, which bars incumbents from approving new nominees once a stockholder proxy contest is threatened. The "dead hand"

Proxy Put in the Credit Agreement impermissibly disables the Board's power in an area of fundamental fiduciary importance, *see CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008), intrudes on stockholder voting rights by effectively creating a classified board without stockholder consent in violation of 8 *Del. C.* § 141(d), and violates Section 141(d) by creating voting distinctions between directors respecting the approval of nominees.

Two days after trial, BoA and its bank syndicate granted a limited waiver of the Proxy Put in the Credit Agreement for 2009 only, and not 2010. (A621) Without the benefit of briefing, and without any legal reasoning, the Court of Chancery dismissed as moot Plaintiff's claim respecting the validity of the Proxy Put in the Credit Agreement. (Op. 13 n.14) On appeal, BoA musters virtually no defense of the mootness dismissal and devotes few pages to the substance of the claim. Absent reversal and the entry of summary judgment for Plaintiff, Amylin's stockholders face coercion in the 2010 election, for which nominations are due in December 2009.

All defendants fail to justify the Court of Chancery's ruling that the Board's ignorance of the Proxy Puts when approving the 2007 Indenture and Credit Agreement satisfies the duty of care. Proxy Puts are material provisions, due to the consequence of debt acceleration and the deterrent effect of potential acceleration on any effort to replace a board majority. Defendants have no rationale for why board members should be absolved for failing to inquire into or obtain any information about highly material provisions in material contracts. Nor do they address a problem created by the Opinion – it protects directors if their advisers keep them in the dark about a provision that interferes with a stockholder vote.

The Court of Chancery's Opinion offers no redress for a pressing corporate governance failure and it radically departs from Delaware precedent protecting the stockholder franchise. That result justifies reversal in any circumstances. Given the pendency of federal legislative and regulatory proposals respecting director elections, reversal is especially urgent. Last week, the Delaware State Bar Association sent an unprecedented comment to the Securities and Exchange Commission arguing for maintaining the primacy of Delaware law, especially in light of recent amendments to the Delaware General Corporation Law and the "significant equitable limitations on the power of the board of directors to frustrate stockholder electoral efforts."[3] The Court of Chancery's Opinion imposes no "significant equitable limitations" on Proxy

[3] Letter from James L. Holzman to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission 12 (July 24, 2009).

Puts. To the contrary, the Opinion's failure to scrutinize board action that frustrates proxy contests provides fodder for those who seek a federal takeover of Delaware corporate law.[4] Plaintiff respectfully seeks reversal of the Court of Chancery.

[4] *See* J. Robert Brown, Poison Puts, Shareholder Voting Rights and the Need for an Even Stronger Shareholder Bill of Rights: San Antonio Fire & Police v. Amylin Pharmaceuticals (Introduction) (May 28, 2009), http://www.theracetothebottom.org/shareholder-rights/ ("[A]s long as the case remains good law, it provides yet another reason for federal preemption and expansion of the Shareholder Bill of Rights…. The case provides management with a mechanism for deterring and/or winning any proxy contest").

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN NOT DECLARING THAT AMYLIN'S BOARD WAS ENTITLED TO APPROVE THE EASTBOURNE AND ICAHN NOMINEES IN ORDER TO DISABLE THE PRECLUSIVE PROXY PUT IN THE 2007 INDENTURE

Amylin and Plaintiff each sought declarations in the Court of Chancery confirming the Amylin Board's contractual entitlement to approve the Eastbourne and Icahn nominees and thereby disable the Proxy Put in the 2007 Indenture. The Amylin Defendants and Plaintiff entered into a partial settlement whereby the Board agreed to approve the stockholder nominees upon receipt of the requested declaration. The Court of Chancery did not grant that relief. Plaintiff's opening brief explained how the Court of Chancery's Opinion enables directors to use Proxy Puts to protect their own incumbency. By giving incumbent directors broad discretion to decline approval of stockholder nominees, and by questioning the Amylin Board's determination to approve the Eastbourne and Icahn nominees, the Court of Chancery effectively foreclosed stockholder claims to compel board approval decisions. The Court of Chancery's ruling has this effect notwithstanding the Court's express recognition that Proxy Puts "can operate as improper entrenchment devices." (Op. 1) The standard set by the Court of Chancery for the approval of stockholder nominees represents a significant departure from Delaware law and should be reversed.

The Amylin Defendants embrace the Court of Chancery's rulings. The directors surely realize that if the Court of Chancery is affirmed, they may never be compelled to approve the two newly elected stockholder nominees. The Trustee has not cross-appealed from the Court of Chancery's ruling that the 2007 Indenture permits the approval of stockholder nominees in a contested election. Yet the incumbents have declined to act, even now, to approve the two newly elected directors. Approval would not be in the Board's self-interest. If they did, approve, dissident stockholders could nominate two additional persons in 2010 without triggering the Proxy Put in the 2007 Indenture. Similarly, it serves the continuing directors' self-interest not to appeal from the Court of Chancery's Opinion and Order denying Amylin declaratory relief it requested.

As explained below, this Court should disregard the Amylin Defendants' arguments on appeal, which are diametrically opposed to the relief Amylin sought below. Amylin's reversal of position underscores the Board's conflict of interest and illustrates why incumbent directors should not be afforded much latitude to leave Proxy Puts in place. Amylin's about-face on appeal also

illustrates why Plaintiff has standing to enforce Amylin's rights under the 2007 Indenture. Amylin's incumbent Board cannot be trusted to vindicate the franchise rights of Amylin's stockholders to replace those same incumbents.

On the substance of the appeal, Amylin and BONY have no answer to the plain fact that the Court of Chancery overlooked evidence – in the form of Amylin's public statements – supporting the Board's legitimate purpose in agreeing to approve the stockholder nominees pursuant to the partial settlement. Board action to allow a fair election cannot be a breach of fiduciary duty. Nor have the Amylin Defendants and BONY identified any legal authority supporting the contractual and fiduciary duty standard fashioned by the Court of Chancery. The standard articulated by the Court of Chancery is unworkable and destructive of stockholder voting rights. Every incumbent seeking reelection believes that his removal harm the corporation and its stockholders. Incumbents are not empowered to foreclose a competitive election based on their self-interested assessment of their own value relative to *bona fide* stockholder nominees.

A. The Amylin Defendants Are Improperly Defending a Judgment That Denied Declaratory Relief Requested by Both Amylin and Plaintiff to Enforce the Partial Settlement

This Court will not reach the merits of an argument that is an "about-face" from a position taken below. *In re The Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 55 (Del. 2006). The Amylin Defendants are brazenly and improperly defending a judgment that *denied* them relief they sought below, on grounds they did not fairly raise below. Supr. Ct. R. 8.[5]

In the partial settlement, Amylin and its directors agreed to approve the Icahn and Eastbourne nominees conditioned only on receipt of a final order "declaring that the Board possesses the contractual right under the 2007 Indenture to 'approve' nominees in a contested election other than the ones they are recommending be elected[.]" (A402 ¶5) Amylin and Plaintiff both sought declarations that would satisfy the only condition to that commitment.

[5] The Amylin Defendants are not a prevailing party appellee, who is free to defend a judgment on "an alternative ground, fairly raised below." *In re: Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 67 (Del. 1995); *see Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) ("As the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below[.]").

Amylin filed a cross-claim against the Trustee for a declaration "that Amylin's Directors have the right under Section 1.01 of the 2007 Indenture, under the circumstances of this case, to approve the election of any or all members of the Dissident Slates at any time prior to their election as directors of Amylin." (AR69 ¶ 22). In the Joint Pre-Trial Stipulation and Order Amylin sought the following declaration:

> A declaration that the definition of "Continuing Directors" contained in the 2007 Indenture enables the Board to "approve" the individuals nominated for election by Icahn or Eastbourne so that those individuals will, if elected, be Continuing Directors under that definition, even though the Board is recommending to stockholders against the election of those individuals. (A583-84)

Amylin did not argue below that any fiduciary or contractual duty prevented the Board from approving the Eastbourne and Icahn nominees. Amylin did not argue that the Court of Chancery should deny the declaration Amylin sought in its Cross-Claim, in the partial settlement, and in the Pre-Trial Order. Amylin did not urge the Court of Chancery to adopt a rule allowing Amylin's Board to refuse to approve the Eastbourne or Icahn nominees. (Op. 21) Amylin did not argue that the record inadequately supported the declaratory relief it sought. Yet Amylin is taking those contrary positions on appeal. (AAB 4, 24, 34)

Amylin tries to rewrite history in asserting that Plaintiff did not seek a declaration concerning the effectiveness of the Board's agreement to approve the Eastbourne and Icahn nominees. (AAB 3, 24) Plaintiff's Fourth Amended Complaint explicitly referenced the partial settlement and sought a declaration that Amylin's Board was empowered to approve the Eastbourne and Icahn nominees. (A425, 429)[6] In the Joint Pre-Trial Stipulation and Order, Plaintiff requested the following declaration:

> that the Board of Directors of Amylin possesses the sole right and power under the terms of the 2007 Indenture to approve any nominees proposed by Icahn or Eastbourne in order to nullify the Proxy Put, or, in the alternative that the Continuing Directors Provision in the 2007 Indenture is invalid, unenforceable and severable[.] (A583)

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[6] Plaintiff's Third Amended Complaint sought a declaration of the Amylin's Board "right and power" to approve the Icahn and Eastbourne nominees, as well as an order "requiring the director defendants to approve the nomination of the Icahn and Eastbourne slates[.]" (AR49)

The Court of Chancery correctly articulated the question posed by both Amylin and Plaintiff:

> The Amylin board has already agreed to approve the dissident slates if this court determines that it is entitled to do so. Thus, the central issue in this case is whether or not the Amylin has both the power and the right under the Indenture to approve the stockholder nominees. (Op. 15)

The Court of Chancery divided the declaratory relief sought by Plaintiff and Amylin into two sub-questions. The first was whether the 2007 Indenture afforded the incumbent directors "in the abstract, the power to approve a stockholder-nominated slate and still engage in a proxy contest against that slate[.]" (Op. 19) The second was "whether the Amylin board has properly exercised the *right* to do so in this case." (*Id.* (emphasis in original)) The Court of Chancery granted the declaratory relief sought as to the first sub-question. (*Id.*) The Court fashioned the following rule regarding the second sub-question: "the board may approve the stockholder nominees if the board determines in good faith that the election of one or more of the dissident nominees would not be materially adverse to the interests of the corporation or its stockholders." (Op. 21) Rather than applying that rule and effectuating the Partial Settlement, the Court of Chancery "treat[ed] the issue as unripe." (Op. at 21, 23) The concluding sentence of the Opinion and Order makes clear that the Court of Chancery denied in part relief sought by both Plaintiff and Amylin:

> Count III, seeking a declaration that the board of Amylin is entitled to approve the dissident nominees for the purposes of the Indenture, together with Amylin's substantially similar cross-claim against the Trustee are GRANTED to the extent described in this opinion, and are otherwise held to be unripe for adjudication at this time and therefore DISMISSED WITHOUT PREJUDICE. (Op. 27-28)

Contradicting the pleadings and the Opinion, Amylin contends that the Court of Chancery "granted the Amylin Defendants' and Plaintiff's request for a declaration with respect to the interpretation of the Company's Indenture" and adopted "precisely the rule" sought by Plaintiff and Amylin. (AAB 3, 17) The Court of Chancery did not rule that Amylin's Board was contractually entitled to approve the Eastbourne and Icahn nominees. Moreover, contrary to its current assertions, Amylin's counsel did not urge the Court of Chancery to adopt the standard it adopted. (AAB 18-19) In the same colloquy cited to this Court, Amylin's counsel provided a hypothetical illustrating when, according to Amylin, a board could legitimately withhold approval:

> [I]f, for example, the board were to determine that four felons had been put up for nomination and that … there's a reasonable risk that they might impair the assets of the corporation if elected, [the] board exercising its fiduciary obligations to its shareholders should not only be recommending against that, but might also be going out saying, "We don't – we are not going to cleanse these people because we don't think they're suitable. We have a gate-keeping function in this instance. In this particular case, we are not going to cleanse these people."

(AR139-140) The stockholder nominees are not felons or looters and Amylin never suggested to the contrary. Amylin's directors conducted a "rigorous process" and found no skeletons in any closet. (A392) The Board ran its proxy contest on their nominees' supposedly superior "experience and expertise." (A393) Amylin's cross-claim asserted an entitlement to approve the Eastbourne and Icahn nominees "under the circumstances of this case." (AR69 ¶ 22). The "four felons" hypothetical advanced by Amylin's counsel below is consistent with Plaintiff's position below and on appeal. Incumbents should be "obliged to approve stockholder nominees in virtually all circumstances in order to facilitate a competitive election." (OB 23)[7]

The Amylin Defendants should not be heard to argue here that the Court of Chancery properly denied the declaratory relief they sought below. The about-face by the Amylin Board is an opportunistic attempt to avoid approving the newly elected stockholder nominees, leaving fewer seats at risk for next year.

Relatedly, the Trustee cannot succeed on its standing defense by pointing to the "business judgment" of Amylin not to pursue its right of appeal. (TAB 21) Amylin's decision to oppose Plaintiff's appeal hinders the effectuation of the partial settlement and perfectly illustrates why demand was excused for purposes of seeking declaratory relief under the 2007 Indenture. In *Sutton Holding Corp.*, 1991 Del. Ch. LEXIS 85 (May 14, 1991), Chancellor Allen stated that a proxy contestant could proceed derivatively to enforce the board's conditional exemption of the plaintiff's nominees under a change of control provision in company pension plans. *Id.* at *14. Plaintiff is similarly situated here.[8]

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[7] Plaintiff argued below that "approval is essential if a full and fair election contest is to proceed, unencumbered by the coercive threat of potentially triggering the Indenture Proxy Put." (AR90)

[8] Moreover, BONY cites no case to support the notion that stockholders must sue derivatively to protect voting rights. The law is to the contrary. *See Agostini v. Hicks*, 845 A.2d 1110, 1122 n.54 (Del. Ch. 2004) ("If a corporation wrongfully

B. Amylin's Public Statements Are Record Evidence of the Board's Rationale in Agreeing to Disable the Proxy Put

Plaintiff's Opening Brief demonstrated that the Court of Chancery erred in finding no "evidence that would indicate how the board came to its decision" to enter into the partial settlement. (Op. 21-22) Plaintiff showed that Amylin's public statements of April 2 and April 15 set forth the Board's reasoning. (OB 14-15, 24-25)[9] Ignoring its own public statements, the Amylin Defendants assert that Plaintiff did not adduce evidence supporting the partial settlement. (AAB 24) BONY characterizes the record as "far less than complete" without addressing Amylin's public statements. (TAB 29)

These arguments do not survive scrutiny. The record contained more than sufficient evidence to understand why and how the Board agreed to approve the nominees, and Plaintiff had no burden to create a "complete" record. BONY made a tactical choice not to take discovery into the Board's deliberative process and try to show that Amylin's public commitment to a fair election somehow violated the noteholders' contractual rights. BONY adduced no evidence to support its "inference" that Amylin's directors feared monetary liability if they did not approve the Eastbourne and Icahn nominees. (TAB 29) Nor could it. Plaintiff's pleadings sought only declaratory and injunctive relief, and not monetary damages. (*See, e.g.*, AR22; AR49)

The factual record fully supported Plaintiff's and Amylin's claim for a declaration that the Board was contractually entitled to approve the Eastbourne and Icahn nominees. (Op. 21, 23) As discussed below, the Court of Chancery erred in creating a standard that rendered the Board's agreement to approve reputable nominees insufficient.

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prevents a stockholder from exercising his or her right to vote, the stockholder may assert individual ownership over the claim.").

[9] Amylin stated on April 2 that the Board is "dedicated to having a fair and transparent election and will do what is in its control to accomplish that goal." (A393) Amylin stated on April 15, when announcing the Board's agreement to conditionally approve the stockholder nominees, that it "has always been the view of Amylin and its Board that stockholders should have the right to make decisions on matters such as board composition." (A406)

C. Incumbents Are Not Entitled to Foreclose a Contested Election Based on Their Perception That They Possess More Valuable Experience, Expertise or Business Judgment

Proxy Puts create a powerful deterrent to stockholder efforts to replace a majority of a board of directors. Expert commentators recognize that dissident shareholders such as Eastbourne and Icahn have little choice but to seek to replace less than a majority of incumbent directors to "avoid[] the risk of triggering so-called 'poison puts' – provisions in a registrant's debt documents which would require the registrant to repurchase outstanding debt obligations upon the occurrence of certain defined events, which sometimes include incumbent directors ceasing to constitute a majority of the board."[10] The Court of Chancery's approval standard makes a bad situation worse. Plaintiff's Opening Brief shows that the standard (a) conflicts with Delaware law protecting the stockholder franchise, (b) incentivizes incumbents not to approve stockholder nominees, (c) exacerbates the deterrent effect of Proxy Puts, and (d) ultimately invites federal legislation or regulation to redress the problem of preclusive Proxy Puts. (OB 4, 20-24)

The fundamental flaw in the Court of Chancery's standard is that it justifies a decision not to approve stockholder nominees (and thereby to foreclose a competitive election) based on an incumbent's judgment that election of one or more dissidents "would be harmful to the corporation or the interests of its stockholders." (Op. 23) The Court of Chancery further regarded ordinary criticisms found in incumbents' fight letters as sufficient to support such a negative judgment "if taken at face value." (Op. 22) This standard allows incumbents to guarantee their own reelection in circumstances where a plurality of stockholders could rationally prefer "to replace the incumbents when they stand for re-election." *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127 (Del. 2003). Here, Amylin's Board conducted a "rigorous process" (A393) and did not

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[10] Eduardo Gallardo et al., SEC Grants No-Action Relief to Activist Shareholders, Apr. 19, 2009, Harvard Law School Forum on Corporate Governance and Financial Regulation, http://blogs.law.harvard.edu/corpgov-/2009/04/19/sec-grants-no-action-relief-to-activist-shareholders/. *See also* Letter from Daniel S. Sternberg to Michelle Anderson, Chief, and Christina E. Chalk, Special Counsel, Office of Mergers and Acquisitions, Division of Corporate Finance, Securities and Exchange Commission 3 n.2 (Mar. 30, 2009), http://www.sec.gov-/divisions/-corpfin/cf-noaction/2009/eastbournecapital-033009-sec14-incoming.pdf. ("Eastbourne has no option but to limit itself to a short slate as a result of a 'poison put' in Amylin's outstanding convertible notes and principal senior credit agreement.") [hereinafter "Sternberg Letter"].

find that the stockholder nominees were looters or engaging in a nefarious scheme. Nevertheless, the Court of Chancery second-guessed the incumbents' decision to approve pursuant to the partial settlement and facilitate an unfettered vote. The Court of Chancery's use of heightened scrutiny in this context undermines the stockholders' ability to compel approval of stockholder nominees and affords refuge to incumbents disinclined to aid proxy contestants. Neither Amylin nor BONY cites a case supporting the rule laid down by the Court of Chancery. Nor have they rebutted the policy rationales for limiting the discretion of incumbent directors to foreclose a contested election.

1. Delaware Law

The Trustee and the Amylin Defendants both lean heavily on *Hills Stores, Inc. v. Bozic*, 769 A2d 88 (Del. Ch. 2000), the sole decision cited by the Court of Chancery. (TAB 22-23; AAB 20-21) But as discussed in the opening brief, the board decision challenged in *Hills* did not raise questions about coercion or the fairness of a stockholder vote. (OB 21-22) Nothing in *Hills* allows a board to foreclose a contested election by not approving nominees for purposes of a Proxy Put in a material debt instrument.

The Trustee cites *Harris v. Carter*, 582 A.2d 222 (Del. Ch. 1990), which concerns the obligations of a controlling shareholder when selling a control block. (TAB 23-24) In *Harris*, Chancellor Allen ruled that a controlling shareholder must make inquiry and exercise care "when the circumstances would alert a reasonably prudent person to a risk that his buyer is dishonest or in some material respect not truthful[.]" 582 A.2d at 235. Chancellor Allen expressly insulated the controlling shareholder from minority stockholder claims arising from subsequent losses "that might arise from a risky though honest business plan that the buyer may have in mind." *Id.* at 235 n.17. Likewise, a board of directors must be able to let a stockholder majority vote freely on the merits of a dissident's business plan, notwithstanding the risk that plan may pose. No contractual or fiduciary duty allowed the Board to prevent an unfettered stockholder vote based on mere disagreement with the nominees' plan to cut costs and/or sell the company. (*See* OB 22 n.39)

According to BONY, the Court of Chancery's holding "does not change the long-standing principle that careful judicial scrutiny will be applied to Board action that is alleged to have frustrated or denied the right to vote for directors." (TAB 27) If the Trustee is advocating that a compelling justification must be shown for a board decision not to approve stockholder nominees, Plaintiff agrees. As Chancellor Allen stated in *Sutton Holding Corp. v. DeSoto, Inc.*, 1991 Del. Ch. LEXIS 85, *3 (May 14, 1991), "[a]bsent quite extraordinary circumstances

… it constitutes a fundamental offense to the dignity of this corporate office for a director to use corporate power to seek to coerce shareholders in the exercise of the vote." Those "extraordinary circumstances" are akin to the "four felons" hypothetical suggested by Amylin's counsel at oral argument below. *See Mendel v. Carroll*, 651 A.2d 297, 306 (Del. Ch. 1994) (noting that dilution of controlling stockholder might be justified if controller "was in the process or threatening to violate his fiduciary duties to the corporation"); *see also Black v. Hollinger Int'l*, 872 A.2d 559, 567 n.16 (Del. 2005) (questioning whether "the specific, rather extreme, circumstances" of that case satisfied *Blasius* review). In short, the decision whether to interfere with the effectiveness of a stockholder vote "may not be left to the agent's business judgment." *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 660 (Del. Ch. 1988).

Application of the compelling justification standard would not render the Proxy Put illusory, as Amylin contends. (AAB 19) Noteholders should expect directors to approve stockholder nominees in the ordinary course, so that fair, contested director elections can go forward. Only in a rare case, such as when prospective looters wield sufficient voting power to get themselves elected, should noteholders expect directors to intervene to prevent the control group from replacing the board. That is not this case. In an ordinary proxy contest, directors cannot deprive stockholders of a full and fair election.

2. Public Policy

Plaintiff's opening brief explained why the Court of Chancery's standard creates bad public policy. Incumbent directors are incentivized to save their jobs by making determinations consistent with their fight letters – that election of stockholder nominees would be harmful to the corporation. Stockholders face expensive and risky litigation to challenge that determination and enable a proxy contest to go forward. (OB 22-24) The practical reality is that the Court of Chancery's standard will deter stockholders from seeking to replace a majority of directors in the face of a Proxy Put.

Amylin admits that a decision to disapprove nominees out of entrenchment motivation would be improper. (AAB 23) That response does not address the practical problem that the Court of Chancery's standard creates. Stockholders are denied an effective means of establishing that a board wrongfully failed to approve stockholder nominees. Directors are afforded the discretion not to approve nominees based on their subjective perception that election of the nominees would harm stockholders.

The Amylin Defendants contend that it "cannot be assumed" that incumbents will refuse to disapprove stockholder nominees out of fear of lawsuits by noteholders. (AAB 24) But fear of creditor lawsuits for wrongful approval is warranted under the standard the Court of Chancery fashioned. Plaintiff's opening brief explained how creating potential director liability for wrongful *approval* of reputable stockholder nominees creates perverse incentives. (OB 22-23) The Court of Chancery deemed it "problematic" for directors to approve nominees when their fight letters criticize those same nominees and when the directors were faced with a stockholder claim to compel them to approve the nominees. (Op. 21) Enhanced scrutiny over incumbents' decision to approve nominees opens the door to noteholder claims that approval was wrongful and damaging to noteholders. Not approving nominees avoids such claims while protecting the directors' incumbency. This structure is contrary to the best interests of stockholders. Absent a compelling justification for foreclosing a competitive election, there should be no question about the incumbents' obligation to approve the stockholder nominees.

In sum, the Court of Chancery's standard provides no incentive to approve stockholder nominees and every incentive to disapprove them. Under the Court of Chancery's standard, directors are exposed to noteholder claims for damages, potential securities law claims and scrutiny of their credibility if they approve stockholder nominees while simultaneously criticizing them in fight letters, an incumbent board's textbook response to a dissident campaign. In order to overcome a disapproval decision and disable a Proxy Put, stockholders must wage a difficult and expensive litigation over whether the Board believed that harm would result from the election of stockholder nominees. The operative legal rule should not serve the self-interest of incumbents who may be inclined to foreclose contested director elections. "As long as there have been elections there have been those who seek to gain unfair advantage in them (and those, who like some lawyers today, can suggest and guide that effort). But courts must remain sensitive to the risk and alert to act when they legitimately can to thwart it." *Sutton Holding*, 1991 Del. Ch. LEXIS 85, at *3.

II. THE PROXY PUT IN THE CREDIT AGREEMENT VIOLATES DELAWARE LAW

The first page of BoA's answering brief identifies the critical fact concerning the Proxy Put in the Credit Agreement: it "provides BANA with the *option* of acceleration (*i.e.*, an exit from the loan) in the event of a change of control." (BAB 1 (emphasis in original)) An irrevocable option to accelerate corporate debt upon a stockholder election is an improper grant of power to lenders. Accountability to stockholders is diminished, as the threat of debt acceleration undermines the viability of a proxy contest. The Proxy Put in the Credit Agreement is a weapon given by the Board to BoA, to be wielded against Amylin's stockholders.

A Proxy Put that cannot be unilaterally disabled by the board of directors is most salient when stockholder efforts to replace directors are most likely. Stockholders have the greatest interest in holding incumbents accountable and pursuing a proxy contest when a company is not performing well, and its financial condition is weak. Yet that is also the time when a lender has the greatest incentive to accelerate its loan. The Court of Chancery observed that if an indenture prohibits any change in the majority of a board over the life of the debt instrument, "the court would have to closely consider the degree to which such a provision might be unenforceable as against public policy." (Op. 19) The Credit Agreement grants BoA the option to accelerate a $140 million debt if over a span of two years there is any change in the majority of the Board resulting from any actual or threatened proxy contests. (A576 ¶ 32)

Plaintiff's opening brief explains that the Proxy Put is invalid under *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008), because it does not reserve for the Board the power to approve stockholder nominees in circumstances when discharge of the Board's fiduciary duties would otherwise require approval. The Proxy Put also infringes on the stockholders' statutory right to elect all directors annually, by effectively creating a staggered board without stockholder approval in violation of Section 141(d) of the Delaware General Corporation Law.[11] The Proxy Put also creates voting power distinctions among directors in violation of Section 141(d). (OB 27-30)

[11] A properly classified board requires that a majority of directors be up for election within two election cycles. 8 *Del. C.* §141(d). The two-year lookback in the Credit Agreement Proxy Put is triggered if stockholders replace a board majority "during any period of 24 consecutive months," (A576 ¶ 32), essentially requiring three election cycles to replace a board majority.

BoA argues that this Court should not reach the merits of the Court of Chancery's denial of Plaintiff's summary judgment motion, even though BoA never presented any legal argument of ripeness or mootness to the Court of Chancery. To the contrary, BoA cross-moved for summary judgment on the merits, arguing as follows in the Joint Pre-Trial Stipulation and Order:

> BANA believes that the interpretation of the disputed Continuing Director term in the Credit Agreement can be adjudicated by the Court as a matter of law for the reasons set forth in its previously-filed motion for summary judgment, and that no trial on any issues relating to the Credit Agreement is necessary. (A587)

As discussed below, BoA fails to rebut the legal infirmities of the Proxy Put, and Plaintiff's challenge is ripe and not moot. The appropriate relief is an order reversing the Court of Chancery's denial of summary judgment and declaring that the Proxy Put is invalid and severable from the Credit Agreement.

A. BoA Fails to Rebut the Legal Defects of the Proxy Put

BoA devotes barely four full pages of its lengthy brief to a substantive defense of the Proxy Put. (BAB 26-29) BoA argues that the Proxy Put does not restrict the Board's exercise of fiduciary duties, does not restrict the stockholders' exercise of voting rights, and does not restrict any director's ability to participate in the nomination process. BoA also contends that its Proxy Put is "standard" and "appears in countless credit agreements." (BAB 27)

BoA fails to distinguish *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, and *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998), which BoA characterizes as involving "contracts that intentionally and affirmatively restricted fiduciary conduct[.]" (BAB 27) The Court of Chancery discussed the importance of a board being able to approve a dissident slate for the purpose of disabling a Proxy Put. (Op. 18-19) The Credit Agreement intentionally restricts Amylin's Board from approving any stockholder nominee or approving any Board nominee who assumes office "as a result of an actual of threatened solicitation of proxies or consents." (A576 ¶ 32) BoA writes that "it is the board that controls the decision to approve directors[.]" (BAB 27) Approval is meaningless if the Board is handcuffed by BoA's option to accelerate $140 million in loans upon the election of stockholder nominees.

BoA contends that Plaintiff "mischaracterizes matters" in referring to a "lack of director discretion to prevent debt acceleration in the sensitive context of director elections." (BAB 26; OB 28) BoA argues that by using corporate funds,

a borrower can attempt to negotiate a waiver with the lender. The opportunity to seek a waiver cannot salvage an improper abdication of fiduciary duty or grant of power to a third party. That a board can seek waivers after granting the most preclusive lock-up option does not render the lock-up lawful. A board's theoretical ability to negotiate a waiver is hardly the equivalent of a contractual reservation of "their full power to exercise their fiduciary duty to decide whether or not it would be appropriate, in a specific case," to approve a slate of stockholder nominees and thereby disable the Proxy Put. *CA, Inc.*, 953 A.2d at 240. Amylin has no right to compel a waiver from BoA. BoA can simply refuse. The threat of acceleration hangs over a prospective proxy contest, and deters stockholders from nominating or electing new directors.

The present facts show how an opportunity to negotiate a waiver is not equivalent to a right to approve stockholder nominees. Even if a board acts promptly to seek a waiver, nothing requires BoA to provide a waiver in a timely manner, or at all. If the passage of time causes the loan to become unattractive to the lender, BoA may refuse a waiver, or demand onerous terms in exchange. BoA admits that the Proxy Put allows BoA to "exit from the loan" if what it deems a "reasonable waiver" is not negotiated. (BAB 1, 2)[12] At best, stockholders are forced to bear an annual tax on their franchise rights.

In addition, problems arise because incumbent directors are inherently conflicted about whether or when to remove an impediment to a proxy contest, and a third party can decline to waive its contractual rights. Here, the Board should have sought a waiver from BoA in February 2009, when it first learned that the stockholder nominations made acceleration possible. In fact, BoA expected Amylin to act immediately to request a waiver. (A529) Instead, Amylin's Board did not even contact BoA until nearly two months later, after Plaintiff filed this lawsuit and obtained expedition. (A388-89) Rather than waive unilaterally, BoA made demands in exchange for waiver, and BoA only acceded to a waiver (for a fee) on the last business day before trial on Plaintiff's claim to invalidate the Proxy Put. (A621-35) By then, the months-long proxy campaign had already been hindered by the threat of debt acceleration.[13] The

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[12] As BoA's expert states in his book: "Usually, the mere threat of acceleration is sufficient to cause the defaulting party to make significant concessions in exchange for the lender agreeing not to accelerate." Charles M. Fox, Working with Contracts – What Law School Doesn't Teach You § 2.5.2[B], at 27 (2d ed. 2008).

[13] A leading proxy advisory service had identified the coercion from the Credit Agreement weeks earlier: "AMLN shareholders will face the threat of immediate repayment of at least the up to $125 million term loan and $15 million

limited waiver granted by BoA does not even render the newly elected directors "continuing directors" for the life of the Credit Agreement. Consequently, if the Proxy Put is not invalidated, the election of even a short slate of stockholder nominees in 2010 will trigger BoA's right to accelerate the debt.[14]

BoA writes without irony, "Amylin stockholders are *similarly* free to exercise their voting rights." (BAB 27 (emphasis added)) This similar freedom is hardly unfettered. Stockholders must vote under a threat of debt acceleration, assuming that a contested vote even takes place. The cost of debt acceleration can itself deter the nomination of a competing slate. BoA offers no substantive response to an observation made by scholars who analyzed Proxy Puts:

> A change in control covenant can be especially effective in insulating managers against proxy contests. Shareholder gains in proxy contests are much smaller than their gains in hostile acquisitions. Hence, even a covenant that creates only modest costs in the event of a successful proxy challenge may be sufficient to induce shareholders to vote in favor of incumbent management and ward off some would-be challengers from the outset.

Marcel Kahan & Michael Klausner, *Antitakeover Provisions in Bonds: Bondholder Protection or Management Entrenchment?*, 40 UCLA L. Rev. 931, 946 (1993) (footnotes omitted).

It is no answer for BoA to say that no "witness in this case has ever encountered a situation in which debt was actually accelerated due to a change of control." (BAB 26) The power of the Proxy Put is that it deters proxy contests. Stockholders avoid debt acceleration by not nominating or voting for persons whose election would result in a change in a majority of the Board. *See* Sternberg Letter, *supra* note 10, at 3 n.2 ("In fact, Eastbourne has no option but to limit itself to a short slate as a result of a 'poison put' in Amylin's outstanding convertible notes and principal senior credit agreement."). BoA's expert was unaware of any circumstance when a stockholder who was not a hostile bidder

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revolving credit facility – possibly enough of a residual threat to tip the scales towards incumbents in upcoming director elections." RiskMetrics Group, Inc., Amylin Pharmaceuticals Inc. (AMLN): "Poison Put" Litigation 1 (Apr. 15, 2009).

[14] Since Amylin nominated two new directors in 2009 in the wake of a threatened proxy contest (A393), and since the stockholders elected them as well as two stockholder nominees (B1879), the election of just two additional new directors in 2010 may trigger the Proxy Put.

sought to replace a majority of directors in the face of a Proxy Put. (AR130-131) No one questions the deterrent power of a flip-in poison pill, even though it took 25 years for a stockholder to trigger one. *See* Latham & Watkins LLP, Lessons from the First Triggering of a Modern Poison Pill: *Selectica, Inc. v. Versata Enterprises, Inc.* (Mar. 2009). Unlike a poison pill, the Proxy Put in the Credit Agreement cannot be redeemed or revoked by newly elected directors. The threat of immediate acceleration prevents their election in the first place.

BoA further argues that in the absence of proven entrenchment intent, the effect on stockholder voting "is insufficient." (BAB 28) This Court's precedents teach that a dispositive question is whether a challenged defensive measure "fundamentally restrict[s] proxy contests." *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1387 (Del. 1985) (discussing *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1355 (Del. 1985)); *see also Brazen v. Bell Atl. Corp.*, 695 A.2d 43, 50 (Del. 1997) ("Wrongful coercion that nullifies a stockholder vote may exist 'where the board or some other party takes actions which have the effect of causing the stockholders to vote in favor of the proposed transaction for some reason other than the merits of the transaction.'") (quoting *William v. Geier*, 671 A.2d 1368, 1383 (Del. 1996)); *Mercier v. Inter-Tel, Inc.*, 929 A.2d 786, 808 (Del. Ch. 2007) ("If director action has the effect of precluding the ability of the stockholders from exercising their electoral power on a matter committed to them by statute, charter, or bylaw, that effect suggests that there has been a disenfranchisement."). The grant of an irrevocable acceleration option to lenders inherently restricts stockholders from freely exercising their statutory right to elect a new slate of directors annually, irrespective of director intent.

BoA relies on *California Public Employees Retirement System v. Coulter*, 2005 Del. Ch. LEXIS 54 (Apr. 21, 2005), to argue that the Proxy Put does not create invalid voter power distinctions between continuing directors (who can vote to approve a slate of nominees whose election will not trigger an acceleration right) and newly elected directors (who cannot do so). *Coulter* involved a continuing director provision in employment agreements. The provision at issue was a mechanism by which the company could ***avoid*** paying severance benefits to terminated employees who would otherwise be entitled to those benefits. *Id*. at *4-5. The Court of Chancery observed that the challenged provision in the employment agreements "can only benefit the Company." *Id.* at *21 n.24. There was no issue in *Coulter* of any director being denied participation in a vote of any significance to stockholders – such as a vote to approve a slate of nominees, or, as in *Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180 (Del. Ch. 1998), a vote to redeem a poison pill. No argument was raised that the employment agreements "must have some revocable feature akin to the board's power to redeem a poison pill." 2005 Del. Ch. LEXIS 54, at *21. The

Coulter Court concluded, "the corporate governance considerations underlying *Carmody* are not implicated in the Existing Directors provision at issue here." 2005 Del. Ch. LEXIS 54, at *21. *Coulter* does not help BoA.

The voting disparity among directors at Amylin is stark. Incumbent directors can select any slate without triggering the Proxy Put (so long as the slate is identified in advance of a threatened proxy contest). (A576 ¶ 32) Newly elected directors are forever deprived of the voting power to approve new directors. The votes of newly elected directors for new nominees are expressly *excluded* for purposes of avoiding debt acceleration. (*Id.*) Inability to vote to approve new nominees without incurring debt acceleration is the effective denial of the power to vote. Only the certificate of incorporation, and not a debt instrument, can create discriminatory voting powers among directors. 8 *Del. C.* § 141(d).

Finally, BoA's assertion that the Proxy Put in the Credit Agreement is "standard" is refuted by BoA's own evidence. BoA's expert, Charles Fox, testified that he never encountered such a provision when negotiating many hundreds of credit agreements. (AR131-133) Moreover, BoA possesses the resources to examine many thousands of credit agreements, yet it identified only 54 containing the challenged Proxy Put language. (BAB 9)[15] Some measure of copycat adoption of irrevocable Proxy Puts cannot save the provision from a determination that it is invalid under Delaware law. Moreover, the modest number of dead hand Proxy Puts relative to the thousands of public company debt agreements is no argument against invalidity. Dead hand poison pills were struck down even though, as of 1998, at least 280 dead hand poison pills had been adopted. Katherin I. Gleason & Mark S. Klock, *Is There Power Behind the Dead Hand? An Empirical Investigation of Dead Hand Poison Pills* 7 (Dickinson Sch. Law Legal Studies Research Paper No. 02-2008), *available at* http://ssrn.com/abstract=223729.

B. The Challenge to the Proxy Put Is Ripe and Not Moot

BoA presents a justiciability argument which, if accepted, will effectively shield dead hand Proxy Puts from ever being challenged. BoA argues that a challenge to the validity of the Proxy Put is not ripe until after a stockholder launches a proxy contest in the face of the Proxy Put, and that it is moot the moment when a limited waiver is granted. (BAB 20-21) BoA did not ever press a ripeness defense below. (A581) Nor, for that matter, did BoA

[15] The Amylin Defendants' assertion that Proxy Puts are "ubiquitous" (AAB at 13) is a dramatic exaggeration, to put it mildly.

present any written argument that the limited waiver or any other intervening event mooted the challenge to the Proxy Put. The Court of Chancery cited no law in ruling that Count II was moot. (Op. 13 n.14)

While BoA identifies seven purported reasons why the challenge to the Proxy Put is not ripe, it never addresses the key cases cited in Plaintiff's opening brief for why Count II never became moot. (*Compare* OB 30-31 *with* BAB 19-24) BoA has no answer to the legal rule that "[m]ootness arises when controversy between the parties no longer exists such that a court can no longer grant relief in that matter." *Mentor Graphics Corp. v. Shapiro*, 818 A.2d 959, 963 (Del. 2003).[16] Nothing prevents this Court from invalidating the Proxy Put today. BoA also has no answer to the proposition that a case is not moot if an "alleged injury still exists despite the occurrence of intervening events." *NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417, 435 (Del. Ch. 2007). Here, the Proxy Put still "deters any effort by shareholders to elect a majority of new directors at an annual meeting." (A428 ¶ 74) Nor can BoA distinguish *In re Yahoo! S'holders Litig.*, C.A. No. 3561-CC, let. op. (Del. Ch. Mar. 6, 2009), in which the Court of Chancery approved a settlement that "resulted in the elimination of the dead-hand provision" in a severance plan that "would have prevented a new slate of directors from changing the severance plan." *Id.* at 3. The removal of a barrier to a potential future proxy contest was justiciable even though the bidder withdrew its merger proposal and a prior proxy contest was resolved. Declaratory relief invalidating the Credit Agreement Proxy Put would similarly benefit Amylin's stockholders.

The ripeness cases recognize the same principle. In *Moran v. Household Int'l, Inc.*, 490 A.2d 1059 (Del. Ch. 1985), *aff'd*, 500 A.2d 1346 (Del. 1985), the Court of Chancery found that a challenge to a poison pill was ripe for adjudication "because of its deterrent features, [which] presently affects shareholders' fundamental rights," even in the absence of a takeover proposal. *Id.* at 1072. In *Carmody v. Toll Brothers, Inc.*, the Court of Chancery followed *Moran* and stated that the ripeness defense was "easily disposed of." 723 A.2d at 1187. The Court held that the plaintiff's challenge to a dead hand poison pill was ripe, due to its "*present* depressing and deterrent effect upon the shareholders' interests, in particular, the shareholders' *present* entitlement to receive and consider takeover proposals and to vote for a board of directors capable of

[16] In *Mentor Graphics*, the dispute between the parties was not "moot as a matter of law" even though the claims were "eroded by the subsequent business events," including the hostile bidder's withdrawal from the contest for control. 818 A.2d at 963.

exercising the full array of powers provided by statute, including the power to redeem the poison pill." *Id.* at 1188 (emphasis in original).

BoA's citation to *California Public Employees Retirement System v. Coulter*, 2005 Del. Ch. LEXIS 54, refutes its argument that there "has been no showing of any harm to Amylin or its shareholders." (BAB 21 n.6) In *Coulter*, the Court of Chancery rejected a mootness argument concerning a challenge to a continuing director provision in expired employment agreements. The Court reasoned that "it is not clear that the Change of Control Contracts were harmless," the "possibility that the payments would have come due upon a change of control and may have caused *some* harm cannot be excluded on this record," "mere uncertainty associated with the harm from an alleged breach of fiduciary duty does not allow for dismissal on grounds of mootness," and the company may renew the contracts or enter into similar contracts in the future. 2005 Del. Ch. LEXIS 54, at *10, 11-12 (emphasis in original).

Under *Coulter*, *NAMA Holdings*, *Moran*, and *Toll Brothers*, BoA bears the burden of clearly establishing the absence of any past or present harm from the Proxy Put in the Credit Agreement (or from any similar agreement that Amylin might enter). BoA does not even try to make such a showing. It merely argues that "there is a reasonable possibility that BANA would agree to waive its change of control rights" in the event of a proxy contest in 2010. (BAB 21-22 n.6) That contention is not close to sufficient, given the history of proxy contestants who avoid triggering a Proxy Put, and the failure of BoA to waive its acceleration rights unilaterally and promptly in 2009. *See supra* Section II.A.

Moreover, the Proxy Put remains salient to an ongoing contest for control. Amylin's stockholders elected two stockholder nominees on a platform of change, replacing the Chairman and the Lead Director. The incumbents have so far resisted approving the newly elected stockholder nominees for purposes of the 2007 Indenture, and BoA has not granted a waiver as to them for purposes of the Credit Agreement. Plaintiff asserts that the newly elected directors are subject to an illegal voting classification, all directors are improperly deprived of the authority to disable the Proxy Put in the Credit Agreement, and stockholders are deterred from nominating and electing even a minority of additional nominees in 2010. Under clear Delaware law, those claims never became moot and they would be ripe if asserted for the first time today.

What BoA calls the "novel nature" of Plaintiff's claims is hardly a barrier to justiciability. (BAB 23) *Moran*, *Toll Brothers* and *Coulter* all demonstrate that the claims are neither novel nor non-justiciable. Nor can BoA rely on its characterization of the Proxy Put as not being an "entrenchment

device." (*Id.*) Plaintiff argues to the contrary (OB 7), and the directors' ignorance of the Proxy Put does not negate the entrenchment motive of others or the entrenchment effect of the Proxy Put.

Contrary to BoA's argument, no rule mandates remand of the case to the Court of Chancery. (BAB 24) BoA's sole case on this topic involved a challenge to the amount of a tax assessment, and not a denial of a motion for summary judgment. *General Motors Corp. v. New Castle County*, 701 A.2d 819, 821 (Del. 2007). When summary judgment has been improperly denied, this Court has reversed and directed entry of summary judgment. *Schadt v. Latchford*, 843 A.2d 689, 694 (Del. 2004). That result is appropriate here, given that the Court of Chancery was presented with the opportunity to rule on a fully-briefed motion for summary judgment, and the question posed is legal in nature and subject to *de novo* review.

C. The Proxy Put Is Severable and Unenforceable

Plaintiff pointed out in its opening brief that the Credit Agreement contains a severability provision (A323-24 § 10.12), that contract parties have no vested rights in provisions that violate Delaware law, *Paramount Communications, Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1994), and that the appropriate remedy for a finding of statutory invalidity is entry of summary judgment in favor of Plaintiff and the issuance of a declaration that the Proxy Put in the Credit Agreement is invalid and unenforceable. (OB 19 n.10, 31) BoA does not dispute these points and therefore waives any argument to the contrary. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999). BoA's argument against voiding the Proxy Put is predicated on this Court either not reaching the merits or finding in BoA's favor, or ruling that a declaration of voidness is an inappropriate remedy for a breach of the duty of care by Amylin's directors. The latter argument is addressed in Section III, *infra*.[17]

[17] BONY argues that the 2007 Indenture Proxy Put is not severable. (TAB 32-34) The argument is irrelevant, as Plaintiff does not seek invalidation of that Proxy Put in light of BONY's decision not to cross-appeal the Court of Chancery's decision interpreting the 2007 Indenture as providing the Board with the power to approve stockholder nominees.

III. THE COURT OF CHANCERY ERRED IN FINDING THAT THE BOARD SATISFIED ITS DUTY OF CARE AND IN REFUSING TO INVALIDATE THE PROXY PUT IN THE CREDIT AGREEMENT AS A REMEDY FOR THAT BREACH

A. Amylin's Board Breached Its Duty of Care

The Amylin Defendants provide two reasons why they satisfied their duty of care. First, they point to the amount of attention they devoted to various unrelated aspects of the convertible notes and the Credit Agreement that are not challenged in this litigation. Second, they argue that the Proxy Puts are not material because it was "unforeseeable" that the Proxy Puts would affect stockholders. (AAB 27-31) Neither argument absolves the directors for their ignorance of acceleration provisions that deterred Amylin's largest stockholders from mounting a proxy contest to replace a majority of the directors.

The Amylin Defendants cite *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006), for the proposition that the Board not only satisfied due care, it met each of the "three best practices" identified by the Court: (i) advance circulation of expert-prepared materials, (ii) explanation of the materials to the committee members; and (iii) discussion among the committee members based on those materials. (AAB 27) Amylin conveniently omits a salient distinction. The *Disney* Court analyzed best practices *with respect to the specific contract provision at issue in the litigation* – the non-fault termination benefits in the Ovitz employment agreement. 906 A.2d at 56. This Court similarly analyzed due care based on the information gathered by the directors respecting the value of the non-fault termination benefits. *Id.* at 56-60.

None of the information gathered by Amylin's directors in 2007 regarding the convertible notes or the Credit Agreement concerned the Proxy Puts in those debt instruments. Amylin's CEO, CFO, and the entirety of the Board were ignorant of the Proxy Puts until they received a February 2, 2009 analyst report stating that election of two separate slates of five nominees has "the potential to create significant risk and transfer full ownership of the company to bondholders." (A346; *see* OB 13 & n.5)[18]

[18] No party disputes that the Court of Chancery overlooked the fact that the CEO, Daniel Bradbury, was a member of the Pricing Committee that approved the issuance of Amylin's convertible notes, and that the CFO was the officer responsible for informing the outside directors about the note offering. (*See* OB

The Amylin Defendants attempt to justify their ignorance on the ground that "it was unforeseeable that the change of control provision would have any impact, much less significant impact, on Amylin's stockholders." (AAB 29) That contention is simply untrue. There is nothing unforeseeable about a proxy contest to replace Amylin's non-classified the board of directors. Amylin's CEO testified that he would have wanted to know about the Proxy Puts at the time they were authorized. (AR99) Moreover, the Board was told that Amylin was a potential takeover target. (A66)

Nor is it unforeseeable that a potential proxy contestant would be deterred from seeking the removal of a majority of the board of directors. Eastbourne and Icahn each knew to propose short slates in order to avoid triggering the Proxy Puts. Lazard's stock analyst immediately understood why they had limited the size of their slates and correctly predicted that the Proxy Puts would compel the stockholders to combine their slates to a total of five nominees. (A347) Had the Board inquired in 2007, they would have learned that Proxy Puts have a deterrent impact. BoA's expert was unaware of any proxy contestant who is not also a hostile bidder who sought to remove a majority of directors in the face of a Proxy Put. (AR130-131) The fact that Proxy Puts are not triggered only reinforces their foreseeable deterrent effect.

The Amylin Defendants do not dispute that directors breach their duty of care if do not inform themselves about a subject matter of obvious importance on which experts have provided no advice. *Brehm v. Eisner*, 746 A.2d 244, 259, 262 (Del. 2000). Amylin's directors have themselves to blame for failing to obtain a description of the material terms of the convertible notes and Credit Agreement. Acceleration rights are a material term of any loan, since "acceleration often has catastrophic consequences." Charles M. Fox, Working with Contracts – What Law School Doesn't Teach You § 2.5.2[B], at 27 (2d ed. 2008). The Court of Chancery recognized that "there are few events which have the potential to be more catastrophic ... than the triggering of an event of default" in debt contracts. (Op. 27) The Board was grossly negligent in not inquiring about debt acceleration or disenfranchising provisions in the debt contracts, and thereby learning about the Proxy Puts.

In this regard, Plaintiff does not contend that directors are obliged to read each contract they approve, as Amylin asserts. Rather, directors are obliged to inquire into material terms. Change-of-control provisions in a material debt instrument are of greater import to stockholders than the termination benefits in

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13 n.5) The ignorance of the CEO and CFO has legal salience as well as "shock value." (Op. 25 n.42)

an executive's employment agreement, and no less important than the material terms of a merger agreement, such as any lockup, no-shop and termination right. Amylin's directors were grossly negligent in not learning about provisions that are designed to impede proxy contests.

In *McPadden v. Sidhu*, 964 A.2d 1262 (Del. Ch. 2008), the Court of Chancery held that a board breached its duty of care in approving a transaction, despite its reliance on an advisor's fairness opinion, because it did not consider the lead negotiator's self-interest in the deal or the use of improper projections in the fairness opinion. *Id.* at 1271. The Court found it "so obvious" that "the board would want to consider this information," that "it is equally obvious that the Directors Defendants' failure to do so was grossly negligent." *Id.* at 1272; *see also Levco Alternative Fund Ltd. v. Reader's Digest Ass'n*, 803 A.2d 428, 2002 Del. Ch. LEXIS 488 (Aug. 13, 2002) (board failure to consider "obvious" conflict of interests between classes of shareholders in stock recapitalization raised likely duty of care claim).

Here, the Court of Chancery reasoned that a board "must be especially solicitous to its duties" when negotiating with debtholders, since their interests "may be directly adverse to those of the stockholders." (Op. 27) The Board's failure to inquire into any conflict of interest respecting the negotiation of the debt instruments constitutes gross negligence. Management's willingness to accede to the inclusion of an irrevocable Proxy Put in the Credit Agreement only highlights the importance of requiring directors to make inquiries, and not insulating directors from liability if their counsel chooses not to advise them about a disenfranchising provision that could create liability if adopted knowingly.

B. Invalidation of the Proxy Put in the Credit Agreement Is Appropriate

The Amylin Defendants argue that "the law is clear that a 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." (AAB 32) That is untrue. The Amylin Defendants citation to *In re Walt Disney Co. Derivative Litig.*, 906 A.2d at 66 n.109, is a *non sequitor* since it concerns the unavailability of rescissory damages for breach of the duty of care, a remedy that Plaintiff is not seeking.

This Court has made clear that contract provisions can be invalidated if they were created in breach of a fiduciary duty, without distinguishing whether the underlying breach is of the duty of care. *See Paramount Communications, Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1994) (holding that a third party

"cannot be [] heard to argue that it obtained vested contract rights by negotiating and obtaining contractual provisions from a board acting in violation of its fiduciary duties"); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 175 (Del. 1986) (invalidating a contract provision where the "Revlon directors had breached their duty of care."); *see also Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 283 (2d Cir. 1986) (affirming preliminary injunction based on "showing of breach of the duty of care" and absent a showing of breach of duty of loyalty).

As BoA recognizes (BAB 31), the Court of Chancery has identified four factors for determining whether a breach of fiduciary duty justifies invalidating a contract provision with a third party. *ACE Ltd. v. Capital Re Corp.*, 747 A.2d 95, 105-06 (Del. Ch. 1999) (citing Paul L. Regan, *Great Expectations? A Contract Law Analysis for Preclusive Corporate Lock-Ups*, 21 Cardozo L. Rev. 1, 115 (1999)). These factors weight heavily in favor of invalidating the Proxy Put in the Credit Agreement.

First, BoA is not "an innocent third party." (BAB 30) BoA knew or should have known of the breach of duty. As the Court of Chancery observed, a contract provision "strongly in derogation of the stockholders' franchise rights would likely put the [counterparty] on constructive notice of the possibility of ultimate unenforceability." (Op. 19 n.32) The added parenthetical clause in the Credit Agreement is expressly targeted to restrict a proxy contest. BoA knew or should have known that it was asking the board to place a burden on fundamental stockholder rights. Whether the Board's breach was of the duty of care or of loyalty is of no import. BoA is in no superior position because Amylin's managers and their advisers readily acquiesced to the provision, and then chose to keep Amylin's Board ignorant about what they had done.

Second, although the Credit Agreement has already been executed, there is no concern that the "eggs have been scrambled." The Credit Agreement included an express severability provision, putting the banks on notice that any provision of the Credit Agreement may be subject to subsequent invalidation. (A323-24 § 10.12) BoA was on notice of the potential invalidation of the sole provision targeting stockholder voting rights.

Third, the Proxy Put implicates perhaps the most significant corporate law public policy concern – the availability of "the power of corporate democracy … to replace the incumbents when they stand for re-election." *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127 (Del. 2003).

Fourth, the Proxy Put does not implicate the reliance interests of lenders. BoA's position, repeated throughout its answering brief, is that it is willing to negotiate away its acceleration right for a fee. (BAB 31) In other words, BoA is looking to create hold-up value for itself, and it is has no expectation that it will accelerate the debt. If garnering corporate value as a tax on stockholder proxy efforts is BoA's purpose, then it has no protected interest in the right to accelerate debt upon the election of new directors. Further, Professor Roberts' testimony was unequivocal that a Proxy Put "likely has zero value" to bondholders. (A612) Empirical academic studies demonstrate that lack of value. (OB 7 & n.5) Moody's reports corroborate that lack of value. (*Id.* 7-8) BoA's expert, Charles Fox, offers no opinion on the monetary value of a Proxy Put and no basis to support any finding of significant monetary value. Fox admitted that invalidating the Proxy Put in the Credit Agreement may not have any effect on credit markets or borrowing rates. (AR135)

There is also no logical connection between the election of new directors and a lender' interest in limiting event risk. The Proxy Put does not prevent the incumbent directors from changing management or business strategy. A change in the composition of the board does not alone alter the credit risk of the borrower. (AR134) Additionally, the bank lenders have significant protection against event risk, especially through a minimum cash requirement that is twice the size of the loan. (A576 ¶ 31)

This Court possesses the authority to sever and invalidate the Proxy Put in accordance with the terms of the Credit Agreement. The present circumstances provide a uniquely compelling case for entry of an Order affording stockholders a remedy that redresses the Board's breach of duty, and doing so prior to the December 2009 advance notice deadline for nominations to the Board in 2010.

CONCLUSION

For all the foregoing reasons, and those set forth in the opening brief, the undersigned counsel respectfully requests that this Court reverse the decision of the Court of Chancery in the manner set forth above.

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