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Case No. 8657-CB

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RENA A. KASTIS and JAMES E. CONROY,	)	
Plaintiffs,	)	
v.	)	C.A. No. 8657-CB
WILLIAM A. CARTER ET AL.,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO HEMISPHERX'S MOTION FOR REARGUMENT

The Motion to Amend August 15, 2014 Ruling or for Clarification, Reconsideration or Reargument[1] (the "Reargument Motion" or "Motion") filed by nominal defendant Hemispherx Biopharma, Inc. ("Hemispherx" or the "Company") should be denied because it is a concoction of rehashed arguments, a standing theory not previously raised, and further inequitable attempts to change the rules.

1. The August 15, 2014 ruling provided that if Plaintiffs opted to amend their complaint to challenge the Company's fee-shifting and surety bylaw (the "Bylaw"), the Bylaw claims would be resolved before consideration of the motion

[1] A motion for clarification is treated as a motion for reargument. Ct. Ch. R. 59(f); *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *5 (Del. Ch. Oct. 11, 2006); *Naughty Monkey LLC v. MarineMax Northeast LLC*, 2011 WL 684626, at *1 (Del Ch. Feb. 17, 2011).

to dismiss the derivative claims filed by the special litigation committee ("SLC"). The Court rejected Defendants' repeated arguments that the SLC's motion should be decided first.[2] The Reargument Motion asks the Court to reverse itself, override Plaintiffs' election and let Defendants continue to make up new rules.

2. The Reargument Motion should be denied. First, the Company is only a nominal derivative defendant, and the August 15, 2014 ruling is final as to the SLC and director defendants, who have not moved for reargument. Second, Hemispherx has not met the criteria for reargument. It has not shown that the "Court's decision was predicated upon a misunderstanding of a material fact or a misapplication of the law"[3] such that "the outcome of the decision would be affected."[4] Third, the Reargument Motion simply reasserts the previously rejected argument that the Court should decide the SLC issues first, and the Court will not "grant a motion for reargument or alteration if the plaintiff 'merely restates

[2] Mot. ¶1; August 15, 2014 Transcript ("Tr.") at 18, 26-28, 38-39, 45-46. On August 22, 2014, Plaintiffs filed their motion for leave to amend the complaint, which attached a proposed amended complaint that includes individual claims challenging the Bylaw.

[3] *Fisk Ventures, LLC v. Segal*, 2008 WL 2721743, at *1 (Del. Ch.) (quoting *Forsyth v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2007 WL 3262205, at *1 (Del. Ch.)); *Deloitte & Touche USA LLP v. Lamela*, 2006 WL 345007, at *2 (Del. Ch.); *accord In re Dow Chem. Int'l of Del.*, 2008 WL 4989069, at *1 (Del. Ch.).

[4] *Dow Chem.*, 2008 WL 4989069, at *1; *Fisk Ventures*, 2008 WL 2721743, at *1 (quoting *Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1014 (Del. Ch. 2007)).

arguments already made in slightly different form and rejected by the Court.'"[5] Fourth, the Court may not consider the Company's new standing argument which was raised for the first time on reargument.[6]

The Court's August 15, 2014 Ruling

3. At the August 15 conference, the Court directed that Plaintiffs decide whether to seek leave to file an amended complaint attacking the Bylaw.[7] The Court rejected Defendants' argument that the SLC's motion to dismiss should be decided before the Court considers the Bylaw, stating:

> I'm not sympathetic to the notion – and I think, largely, Mr. Grant, you diffused this, and I appreciate that – of barreling ahead either simultaneously or solely with the SLC-related litigation without sorting out this bylaw issue because I view the bylaw issue to have been a creation of the defendants in the middle of this case to change the rules. And in that context, you know, the rules of the game going forward, as I see, are what I've laid out for you.[8]

4. As Hemispherx admits, the Court "offered Plaintiffs two options to pursue their challenge to Section 5.07 of the Company's Bylaws" and one option was to "amend their Derivative Complaint to assert a challenge to the Bylaw in

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[5] *Anvil Holding Corp. v. Iron Acquisition Co.*, 2013 WL 4447840, at *1 (Del. Ch. Aug. 16, 2013) (quoting *Shell Oil Co. v. Shell Petroleum, Inc.*, 1992 WL 172675, at *1 (Del. Ch. July 20, 1992)).

[6] *Naughty Monkey*, 2011 WL 684626, at *1.

[7] Tr. at 42-45.

[8] Tr. at 45-46.

that pleading."[9] Pursuant to the Court's direction, Plaintiffs filed a motion for leave to file an amended complaint challenging the Bylaw on August 22, 2014. The parties have not agreed how to proceed with the SLC issues.[10] The Court determined that if Plaintiffs filed an amended complaint, the Court would hold the SLC issues in abeyance while the Court resolved the Bylaw claims.[11]

Hemispherx Admits It Does Not Meet the Standards for Reargument

5. Hemispherx has not established "(i) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice."[12] The Company's latest further changes to its positions on waiver of the Bylaw as to the SLC issues and the Bylaw issues do not constitute "new evidence not previously available."[13] Revision of a party's position is not "evidence." Moreover, such

[9] Mot. ¶1.

[10] After conclusion of the August 15 conference, the SLC's counsel told Plaintiffs' counsel there was no prospect for an agreement on how to proceed on the SLC issues. The Defendants have since made no attempt to work out with Plaintiffs any process for resolving the SLC motion. Instead, the SLC's counsel proposed that if Plaintiffs would dismiss the case, Defendants would agree not to make a fee-shifting claim. Under Court of Chancery Rule 23.1(c) and the affidavits Plaintiffs have filed under Rule 23.1(b), Plaintiffs cannot dismiss this action in exchange for Defendants' agreement to relinquish a fee claim.

[11] Tr. at 45-46.

[12] Mot. ¶5.

[13] Mot. ¶¶6, 10, 12.

positions were not previously unavailable because Hemispherx could have adopted those positions earlier.

6. The Company's new position on waiver of the Bylaw if the SLC issues proceed first appears to differ from its position at the August 15 conference that it would waive the Bylaw as to defense fees for "reasonable discovery, briefing and argument on the SLC motion to dismiss"[14] in two respects. First, Hemispherx now says it will waive the Bylaw as to all fees incurred in this Action through the conclusion of the SLC process "if Plaintiffs' claims are unsuccessful."[15] Second, Hemispherx says it will not seek a bond if the SLC's motion to dismiss Plaintiffs' claims is granted.[16]

7. Hemispherx represented that if there was "reasonable discovery," the Bylaw would not be invoked against an as-applied challenge to the Bylaw.[17]

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[14] Tr. at 38-39.

[15] Mot. ¶¶4, 10, 12; Whereas clause on p. 10. In ¶4, Hemispherx says its waiver will apply only "if Plaintiffs' claims are unsuccessful." Hemispherx then states (inconsistently) in ¶12 that the waiver will apply "without regard to the eventual outcome on the Motion to Dismiss."

[16] Mot. ¶4. The bond waiver is not mentioned when the waiver is discussed in ¶¶10 and 12 or in the Whereas clause on page 10.

[17] Tr. at 22-23; *id*. at 38 ("We are willing, if you think it's the right direction for this to go, to have reasonable and limited discovery on the essentially Schnell issue, on the equitable aspects of the bylaw."); *see also id*. at 35 (The Court: "I heard a concession that I'll put it as reasonable discovery on that issue, the bylaw won't be asserted against you").

Hemispherx now says its commitment was also subject to client approval.[18] However, client approval was a condition only if there was to be a "huge discovery program":

> MR. GRANT: . . . .The company's position on that question, Your Honor, is if the amount of discovery required is reasonably cabined so we're not talking about 20 depositions, then, yes, we will commit not to seek to apply the bylaw against plaintiffs for an as-applied or is-it-equitable type of challenge.
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> Now, if -- I don't think they need 10 or 20 depositions, but *if it became a huge discovery program*, I'd like the opportunity to consult with our client before giving a firm answer.[19]

8. Hemispherx now says it will apply the Bylaw if "litigation and discovery expenses" for an as-applied challenge and/or a *Schnell* claim exceed $30,000, acknowledging that this is a change of position.[20] Yet it was Hemispherx that insisted discovery was necessary on the Bylaw issues.[21] Plaintiffs have proposed reasonable discovery: ten document requests related to the Bylaw; a few interrogatories; and a notice for two depositions.[22]

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[18] Mot. ¶8.

[19] Tr. at 22-23 (emphasis added).

[20] Mot. ¶¶8 n.1, 10 n.3.

[21] Response of Nominal Defendant Hemispherx Biopharma to Plaintiffs' Motion to Invalidate, ¶¶3, 32, 34; Tr. at 24.

[22] *See* Exhibits A-C hereto. Once, again, it is Hemispherx that proposes that the scope and expense of the proceedings be increased, making vague suggestions

9. Hemispherx is manipulating application of the Bylaw to coerce Plaintiffs to agree to Defendants' preferred course for this litigation. If Plaintiffs agree to litigate the SLC issues, Hemispherx says it will waive claims for all fees through the determination of the SLC's motion to dismiss and will not seek a bond, provided Plaintiffs lose on that motion. If Plaintiffs defeat the SLC's motion to dismiss, then the waiver will not apply, and Plaintiffs may be subject to a claim for all fees from the beginning of the litigation, including the SLC investigation and the SLC's motion to dismiss. If the Court does not order that the SLC's motion to dismiss be litigated first, Plaintiffs will be subject to a claim for all fees from the start of the litigation. Plaintiffs will also be subject to a claim for fees for litigation over the Bylaw if Defendants' total fees exceed $30,000, which is a certainty unless Plaintiffs abandon all their Bylaw claims except so-called "facial validity" claims, where the standard is virtually impossible for a stockholder to meet. Moreover, the bond requirement will be applicable if Plaintiffs defeat the SLC motion to dismiss and/or proceed to challenge the Bylaw. In short, by its ever-changing and selective waiver and application of the Bylaw, Hemispherx creates a "heads I win, tails you lose" proposition.

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about unidentified experts on unidentified subjects and "additional parties" such as "the U.S. Chamber of Commerce" and "many major corporations," though nobody has moved to intervene or otherwise participate in this Action. Mot. ¶11.

10. There are further reasons to question the purported waiver of the Bylaw if the SLC issues are given priority. First, the waiver representation is made only by Hemispherx, not by the directors who also have rights under the Bylaw. Second, Hemispherx has asserted that a waiver of the Bylaw must be by "clear written agreement on the scope of such waiver."[23] Third, Hemispherx has already changed its position several times and may do so again.

The Argument that the SLC Motion Should Be Decided First Was Already Rejected

11. Reargument must be denied because the argument that the SLC's motion to dismiss should be decided before any challenge to the Bylaw just repeats and rehashes arguments previously made.[24]

12. Defendants' argument that *Zapata v. Maldonado*, 430 A.2d 779 (Del. 1981), "mandates that the SLC's motion to dismiss be decided before any challenge to the Bylaw"[25] is no basis for reargument. First, the argument is just another version of the previously rejected "the SLC motion should be first"

[23] Mot. ¶9.

[24] *Benge v. Oak Grove Motor Ct., Inc.*, 2006 WL 345006, at *1 (Del. Ch.) *aff'd*, 903 A.2d 322 (Del. 2006); *Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d 505 (Del. Ch. 1995). *Gentile v. Singlepoint Fin., Inc*., 2001 WL 167728, at *1 (Del. Ch.); *accord In re HCA Inc. S'holders Litig*., 2006 WL 3480273, at *1 (Del. Ch.); *State of Wis. Inv. Bd. v. Peerless Sys. Corp*., 2001 WL 32639, at *1 (Del. Ch.). *See also* Tr. at 18, 26, 38-39.

[25] Mot. ¶13.

argument. Second, to the extent Hemispherx claims to be making a new "standing' argument, the Court may not consider issues raised for the first time in a motion for reargument.[26] Third, as the Court observed, the Bylaw issue was "a creation of the defendants in the middle of this case to change the rules"[27] so it was Defendants' enactment of the Bylaw that sought to "subvert the special litigation committee process."[28] Fourth, because Defendants created a claim under the Bylaw against the Plaintiffs individually, Plaintiffs have individual standing to assert claims challenging the Bylaw.[29] Fifth, Plaintiffs have standing because the creation of the SLC was an admission that demand was excused.[30]

13. The Court should deny the Reargument Motion and hold Hemispherx to its agreement that the Bylaw will not be invoked against Plaintiffs' challenge to the Bylaw.

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[26] *Naughty Monkey*, 2011 WL 684626, at *1.

[27] Tr. at 46.

[28] Mot. ¶13. Hemispherx's counsel said an amended complaint was necessary for Plaintiffs to challenge the Bylaw. Tr. at 19.

[29] *Abbey v. Computer & Commc'ns Tech. Corp.*, 457 A.2d 368, 375 (Del. Ch. 1983) (Mot. ¶13) involved a refusal to permit discovery into the *same derivative claims* that were the subject of a pending SLC investigation, not a stay of individual claims that were not the subject of the SLC investigation.

[30] *Zapata*, 430 A.2d at 785-89.

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CERTIFICATE OF SERVICE

I, Michael Hanrahan, do hereby certify that on this 26th day of August 2014, I caused a copy of the foregoing **Plaintiffs' Response in Opposition to Hemispherx's Motion for Reargument** to be filed and served via LexisNexis File and Serve*Xpress* upon the following counsel of record:

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