

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

SAN ANTONIO FIRE & PENSION FUND, )  
on behalf of itself and all others similarly situated, )  
 ) No. 268, 2009  
 )  
 ) Plaintiff Below, Appellant, )  
 ) On Appeal from  
 ) Court of Chancery  
 ) C.A. No. 4446-VCL  
 )  
 )  
 ) v. )  
 )  
 ) AMYLIN PHARMACEUTICALS, INC., )  
 ) BANK OF AMERICA, N.A., BANK OF )  
 ) NEW YORK TRUST COMPANY, N.A., )  
 ) DANIEL M. BRADBURY, JOSEPH C. COOK, Jr., )  
 ) ADRIAN ADAMS, STEVEN R. ALTMAN, )  
 ) TERESA BECK, KARIN EASTHAM, JAMES R. )  
 ) GAVIN, GINGER L. GRAHAM, HOWARD E. )  
 ) GREENE, Jr., JAY S. SKYLER, JOSEPH P. )  
 ) SULLIVAN, and JAMES N. WILSON, )  
 )  
 ) Defendants Below, Appellees. )

**REDACTED**

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## NATURE OF THE PROCEEDINGS

This case initially presented an unprecedented effort by a common stockholder to nullify a standard – and entirely legitimate – provision of a syndicated credit agreement. Bank of America, N.A. (“BANA”), as agent for a syndicate of lenders, entered into a credit agreement (the “Credit Agreement”) with Amylin Pharmaceuticals, Inc. (“Amylin” or the “Company”) in December 2007. The Credit Agreement granted BANA standard rights upon a change of control of Amylin, including the right, but not the obligation, to accelerate Amylin’s outstanding indebtedness in the event of a change of control. These rights have long been staples in credit agreements for a variety of reasons, most of which are self-evident. “Know your borrower” is perhaps the most basic concept in lending, and BANA relies on the expertise, credibility, and business plans of directors and senior management in making substantial commercial loans. It is principally for this reason that BANA’s standard form of credit agreement – and the Credit Agreement at issue here – provides BANA with the *option* of acceleration (*i.e.*, an exit from the loan) in the event of a change of control.

Plaintiff began the litigation with the mistaken premise that the change of control rights in the Credit Agreement are management entrenchment provisions, planted in the agreement by Amylin to thwart contests for corporate control. Plaintiff later stipulated that there was no self-interest or entrenchment motive on the part of Amylin’s board and has dropped its loyalty claim against the board. Discovery in any event established that there was no entrenchment motive. BANA – not Amylin – proposed the provision, and it did so from its standard form book. BANA was never accused of any wrongdoing or improper motive. It was named solely because it is the counterparty to the Credit Agreement.

Nevertheless, Plaintiff persisted in seeking to invalidate a portion of the change of control provision in the Credit Agreement, which – in broad strokes – allowed BANA to exit the financing through acceleration of the Credit Agreement in the event that a majority of Amylin’s directors were replaced in a proxy contest. This litigation was, in fact, precipitated by the announcement earlier this year that two dissident stockholders of Amylin were each proposing slates of directors to replace existing directors. Plaintiff claimed that BANA’s acceleration right upon a change of control – although not intended as an entrenchment device or defensive measure – would have the impermissible effect of coercing stockholders to support the existing directors at Amylin’s annual meeting in May of this year. Throughout the expedited litigation in the Court of Chancery, BANA responded that Plaintiff had misapprehended the nature and purpose of its change of control rights. BANA explained that its contractual rights were legitimate and standard. They were intended as a safeguard against unpredictable changes in leadership at Amylin that might increase credit risk. Moreover, unlike the bonds

at issue in this appeal, the size of the loan is small relative to Amylin's available cash and it was likely that a reasonable waiver of BANA's acceleration right could be negotiated.

BANA's view of the situation proved correct. Well before the annual meeting, and just before trial was to start in this case, BANA and Amylin entered into an amendment that waived BANA's change of control rights for the 2009 director election in exchange for a modest fee and adjustment to the loan pricing. The total cost to Amylin for this waiver should a change of control occur would be less than \$1 million. The waiver obviously mooted Plaintiff's case with respect to the Credit Agreement, although its case with respect to the 2007 bond indenture (which has no connection with BANA) continued. With no change of control rights in place with respect to the 2009 director elections, Plaintiff and BANA had nothing left to litigate. The Court of Chancery quickly and correctly recognized this and dismissed BANA from the proceedings. Inexplicably, Plaintiff now appeals the dismissal, arguing that its claims concerning the Credit Agreement still are not moot because – hypothetically – BANA's change of control rights could interfere with director elections in 2010 (the Credit Agreement expires at the end of 2010).

There is no dispute that Plaintiff's claim is moot with respect to the 2009 annual meeting, which was held at the end of May. Indeed, subsequent to the announcement that BANA would waive its change of control rights, the dissident stockholders reduced the number of directors they sought to replace, thereby doubly mooting the case against BANA because the number of directors they sought to replace would not have triggered BANA's change of control rights even absent a waiver. Undeterred, Plaintiff asks this Court to reverse the Court of Chancery's mootness determination and invalidate BANA's change of control rights as they apply to an election that will not take place for nearly a year.

Plaintiff's argument is without merit. Plaintiff's purported concerns about the 2010 director elections are not ripe. In the unlikely event of another proxy contest next year, and in the similarly unlikely event that a waiver could not be negotiated between BANA and Amylin on mutually acceptable terms, Plaintiff would be free to return to the Court of Chancery and press its claims. But, as of now, there is nothing to litigate between Plaintiff and BANA. Delaware law is clear that the courts are not a forum for academic debates. Such debates waste judicial and party resources and present a risk that important legal questions will be decided without the benefit of a fully and appropriately developed factual record. There is only one year left under the Credit Agreement and whether there will be a proxy contest involving Amylin next year is a matter of pure conjecture. Statistics suggest that there will not be a proxy contest. According to Plaintiff's own expert, less than one percent of public companies are the subject of proxy contests each year.

Plaintiff's own brief makes clear that this litigation was a product of a number of circumstances involving Amylin that were unique to 2009. There is no basis to conclude that this course of events will occur again next year, and, if it did, Plaintiff would have ample time to raise and litigate its concerns. Significantly, Plaintiff cannot identify *any* prejudice that will result from waiting to see whether further litigation is actually necessary. Indeed, despite the fact that change of control provisions have resided in credit agreements for decades, this appears to be the first case in which a stockholder found cause to challenge them. That is a telling fact and belies Plaintiff's claim that creditors' change of control rights present a clear and present danger to shareholder rights. The fact that none of the experts in the case had ever heard of a credit agreement being accelerated on the basis of a change in directors further belies Plaintiff's claim that change of control rights are a significant interference with stockholder voting. In truth, there can be no debate that lenders are entitled to negotiate for the right to reconsider their financing commitments upon a change of corporate leadership. It is generally not in their interest to accelerate a performing loan or cause a borrower financial distress, and that is why accelerations are so rare. Waivers generally are granted, and that, of course, is what happened here.

The Court of Chancery correctly held that the case against BANA was moot, and Plaintiff's attempt to drag out this litigation by raising hypothetical concerns about director elections in 2010 is contrary to settled precedent. Dismissal should be affirmed. And, even assuming *arguendo* that this Court believes that Plaintiff's claims with respect to the Credit Agreement are not moot, and that issues related to the 2010 director elections should be litigated now, the case with respect to the Credit Agreement plainly should be remanded to the Court of Chancery for further proceedings, since summary judgment was never ruled upon, there are new facts, no trial was held, and the case would concern a different year's election. Plaintiff's suggestion that this Court should enter judgment on the merits in its favor in the context of this appeal and strike down the change of control provision (a provision of the sort that appears in countless other credit agreements across the economy) should be rejected out of hand.

In the event that this Court were to reach the merits of Plaintiff's claim with respect to the Credit Agreement, the claim clearly should fail. Nothing in Delaware law supports the notion that a third party's contract rights can be rescinded where, as here, there is no allegation of improper motive or aiding and abetting the breach of a fiduciary duty, no claim that any party breached a duty of loyalty, and no evidence that any stockholder rights are being impaired at all, let alone so substantially as to justify overriding a freely-negotiated contract right. That should be especially clear where, as here, there is no live controversy and BANA waived its relevant change of control rights just months ago to accommodate the request of its borrower.

Change of control provisions have been fixtures of credit agreements and all manner of significant business contracts for decades. The dearth of case law concerning their purported impact on voting rights suggests that they have functioned appropriately. This Court should decline Plaintiff's invitation to rewrite the arm's-length contractual arrangements of sophisticated business entities based on hypothetical concerns about 2010. Even this outlier case proves that commercially reasonable waivers are available to accommodate the particular circumstances of corporations with contested elections. In sum, this case is moot and without merit as to the Credit Agreement.

Turning to the procedural history, on April 16, 2009, Plaintiff filed its fourth amended class action complaint for declaratory relief with respect to the Credit Agreement and an indenture agreement for convertible notes issued by Amylin with Bank of New York Trust Company, N.A. as trustee (the "Indenture"). Plaintiff sought, among other things, a declaration that the Amylin board of directors breached its fiduciary duty of care by entering into the Credit Agreement, and that the change of control provision in the Credit Agreement was invalid because it, among other things, "deters any efforts by shareholders to elect a majority of new directors of Amylin at an annual meeting." (A428.)<sup>1</sup> Under the change of control provision in the Credit Agreement, BANA had the right, but not the obligation, to call the \$125 million syndicated loan in the event of a change in the majority of the Amylin board of directors through a shareholder proxy contest.

The action proceeded on an expedited basis in advance of the Amylin annual meeting on May 27, 2009. The parties engaged in discovery over the course of a three-week period in late April and early May 2009. The parties filed motions for summary judgment and pre-trial briefs in advance of the scheduled May 4, 2009 trial.

On May 1, 2009, after several weeks of negotiation, Amylin and BANA executed an amendment to the Credit Agreement whereby BANA waived its rights under the change of control provision in the Credit Agreement in the event of a change of control of the Amylin board of directors at the May 27, 2009 annual meeting. The total monetary cost to Amylin under the amendment, only to be incurred in the event that a change of control had actually occurred, would have been less than \$1 million. Because the board did not change control at the May 27, 2009 annual meeting, Amylin was not required to pay anything for the amendment.

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<sup>1</sup> Citations to "A" refer to the Appendix to Appellant's Opening Brief. Citations to "D" refer to the Appendix to BANA's Answering Brief.

At the pre-trial conference on May 1, 2009, counsel for BANA and Amylin informed the Court of Chancery that BANA and Amylin had agreed in principle to the amendment, but that BANA still needed to obtain consent of a majority of the lending syndicate in order for the waiver to take effect. Concurring that the action as to the Credit Agreement would be moot if the amendment was fully executed, the Court of Chancery agreed to hold the trial in abeyance for one week pending the requisite consents. BANA obtained and filed the necessary consents on May 6, 2009.

By Memorandum Order and Opinion, dated May 12, 2009, the Court of Chancery formally dismissed the claim for declaratory judgment as to the Credit Agreement as moot. This appeal followed.

## SUMMARY OF ARGUMENT

1. BANA takes no position on issues raised in this appeal that relate exclusively to the 2007 Indenture.

2. Denied. The Court of Chancery correctly concluded that the Plaintiff's claim that the continuing director portion of the change of control provision in the Credit Agreement should be invalidated is moot. Any claim associated with the possibility that the change of control provision will impact the 2010 annual meeting is contingent on circumstances that do not yet exist, and is therefore unripe and should not be adjudicated. Were this Court to decide that the Court of Chancery erred in dismissing the claim as moot, the claim should be remanded to the Court of Chancery for further proceedings. Alternatively, summary judgment should be granted to BANA, as the change of control provision does not impermissibly restrict the conduct of Amylin's board or the rights of its stockholders.

3. Denied. The board's conduct in approving the Credit Agreement did not approach the gross negligence required for a finding a breach of the duty of care. Moreover, even if a duty of care violation could be established, there is no legal basis supporting Plaintiff's request that a contractual right belonging to BANA, a concededly innocent third party, should be stricken from the Credit Agreement.

## STATEMENT OF FACTS

### **A. The Credit Agreement and Change of Control Provision**

In December 2007, after months of negotiation, Amylin and certain of its subsidiaries entered into a credit agreement with BANA and other lenders providing for a \$125 million term loan and \$15 million revolving credit facility (the "Credit Agreement").<sup>2</sup> (A419.) The Credit Agreement carries a three-year term and expires in December 2010.

Under the Credit Agreement, a "Change of Control" of Amylin constitutes an "Event of Default." (A420; A304.) In relevant part, the Credit Agreement provides that a "Change of Control" shall occur if a majority of the Company's board of directors ceases to be composed of directors either (1) who were in place when the Credit Agreement was signed ("Original Directors"), or (2) whose election or nomination was approved by (i) Original Directors or (ii) directors whose election or nomination was either approved by Original Directors ("Approved Directors") or by Approved Directors. Subsection (b) of the change of control provision – the subject of this litigation as to BANA – specifically excludes as an Approved Director any director whose nomination or election resulted from a proxy contest. This provision includes what the court below termed a "two-year sliding-window lookback," so that an unapproved director who has served for two years is no longer counted in determining whether the board is composed of a majority of unapproved directors. Because the Credit Agreement expires in December 2010, the change of control provision in the Credit Agreement is only operative for one more board election – the 2010 election.

If an Event of Default, such as a change of control, "occurs and is continuing," the lenders under the Credit Agreement are entitled to various remedies, including the right (but not the obligation) to declare the unpaid principal and interest under the agreement immediately due and payable. (A304.) Nothing in the Credit Agreement obligates any Amylin director or other person to do or not do anything with respect to the nomination or election of directors. Nor does the agreement grant BANA, or any other lender, the right to veto, control, or direct any decision with respect to director nominations and elections. Rather, the agreement confers on the lenders certain contractual rights *if* a change of control occurs. All of the experts in the case agreed that change of control remedies are routinely waived when an actual change of control occurs or is imminent. (D286 (Rebuttal Expert Report of Harvey Pitt ("Pitt Reb. Rep.")); D817 (Expert Report of Charles M. Fox ("Fox Rep.")); D820 (Expert Report of Michael Roberts

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<sup>2</sup> A copy of the Credit Agreement is attached to the Complaint as Exhibit B.

("Roberts Rep.")).) Indeed, not one of the experts was aware of a loan ever being accelerated on the basis of a change of a control. (D901-902 (Deposition Transcript of Harvey Pitt ("Pitt Dep.")); D895 (Deposition Transcript of Michael Roberts ("Roberts Dep.")).)

**B. Change of Control Provisions Are Standard Loan Terms**

All of the parties agree that change of control provisions are standard in syndicated credit agreements, such as the agreement at issue in this action. (D73 (Affidavit of Charles M. Fox ("Fox Aff.")); D822-823 (Roberts Rep.); D825 (Pitt Rep. Rep.)) According to Plaintiff's brief, such provisions have been standard – and non-controversial – features of loan agreements for decades. (Appellant's Opening Brief ("Pl. Br.") at 1.) BANA's model form syndicated credit agreement contains the identical change of control provision that appears in the Credit Agreement with Amylin. (D79 (Affidavit of Heather McCann, Ex. A.)) BANA's model form has included this identical change of control provision since at least January 2007. (*Id.*) BANA generally will not enter into a syndicated credit agreement without change of control and associated remedies provisions identical or similar to the provision at issue here. (D266 (Affidavit of Karin S. Barnes ("Barnes Aff.")).)

BANA bargains for – and almost invariably insists upon – change of control provisions for good reasons. When BANA makes a decision to extend credit to a corporate borrower, it relies directly and materially on its evaluation of the expertise, competence, experience, reputation, and credibility of the borrower's management. (D266 (Barnes Aff.)) The inclusion of change of control rights is sufficiently important to BANA that it requests that credit agreements include change of control provisions even where another bank is agent for the syndicate. (D267 (Barnes Aff.)) And, where – as here – BANA acts as agent, its experience is that inclusion of change of control rights can be material to other banks' willingness to join the syndicate and provide the amount of financing the borrower requires. (*Id.*)

It is a corporation's directors who select senior management, determine and approve the corporation's fundamental business plans and objectives, and make a corporation's most important business and financial decisions. (D266 (Barnes Aff.)) BANA's credit decisions are largely a function of its assessment of those plans because the success of the plans usually determines whether a borrower will be able to perform its repayment obligations. (*Id.*) As BANA's expert witness, Charles Fox, explained, "[P]art of the credit analysis that's made by lenders when they go into the loan, among many other things, is to get a certain comfort level with the management and policies and direction of the company." (D883 (Deposition Transcript of Charles Fox ("Fox Dep.")).) In the event of a change of control – either through a corporate transaction or a change in a major-

ity of the existing directors – BANA faces the risk that the persons upon whose credibility, skill, and plans upon which it relied in extending credit will be replaced. (D266 (Barnes Aff.))

BANA cannot prevent or veto a change in directors or management. It can, however, reduce the risk associated with a change of control by bargaining for the right to declare its funding obligations terminated and the existing debt accelerated when a change of control occurs, as reflected in Sections 8.02(a) and (b) of the Credit Agreement. The presence of the right to exit from the financing upon a change of control provides BANA (and all lenders in this context) with the opportunity to assess the impact of the change on its credit exposure and the ability to seek modification of loan terms as appropriate to account for new circumstances and risks. For its part, the borrower can negotiate, explain its new circumstances, or seek to refinance with another lender. In the uncommon event that these efforts fail, BANA can withdraw from the transaction. (D75 (Fox Aff.))

BANA is hardly alone in negotiating for change of control provisions. Such provisions are extremely common in syndicated credit agreements. (D815 (Fox Aff.)) Even a cursory review of public filings of other companies reveals that the change of control rights included in the Credit Agreement are common. BANA submitted to the court below fifty-four examples of credit agreements from just the last five years with substantially identical change of control provisions, including the proviso concerning directors nominated in connection with proxy contests. (D667 (Affidavit of Elena C. Norman (“Norman Aff. 1”) Ex. B.); D832 (Supplemental Affidavit of Elena C. Norman (“Norman Aff. 2”) Ex. A.))

For their part, corporate borrowers make business judgments as to whether to enter into credit agreements – or other types of significant contracts – that trigger rights and remedies upon a change of control. (D75 (Fox Aff.)) Considerations may include whether alternative financing on otherwise similarly attractive terms is available, whether financing would be more expensive under an agreement with no change of control provision, the likelihood that the lenders will renegotiate or elect not to exercise their remedies, and the ability of the company to refinance its debt with another lender in the event of a change of control. (*Id.*) As Mr. Fox testified, the unavailability of the continuing director provision may make credit more expensive and, potentially, unavailable. (D885-886 (Fox Dep.)) Here, after substantial negotiation, and with the benefit of sophisticated legal counsel, Amylin made a business decision to enter into the Credit Agreement on the terms set forth in the executed version of the Credit Agreement.

**C. Negotiation and Terms of the Credit Agreement**

**1. Amylin Considered Alternative Lenders and Loans**

Before entering into the Credit Agreement with BANA, Amylin discussed possible financings with several other banks. (D12 (Deposition of Daniel Bradbury (“Bradbury Dep.”)).) According to Amylin’s president and CEO, Daniel Bradbury, Amylin entered into the Credit Agreement because “it provided [Amylin] another form of financial flexibility.” (D11 (Bradbury Dep.)) This was important to Amylin because it was “not a profit-making company” and required significant liquidity over long periods of time to develop its products. (*Id.*) Amylin also sought a loan, in part, to finance a portion of the cost of a facility to manufacture Amylin’s sustained-release diabetes drug, which Amylin expected would receive regulatory approval in 2009. (D258 (Barnes Aff.))

**2. BANA’s Reliance on Amylin’s Leadership in Entering the Credit Agreement**

**REDACTED**

**3. Negotiation of the Change of Control Provision**

**REDACTED**

The initial draft of the Credit Agreement circulated by BANA on November 14, 2007 included the change of control provision, taken – as was the entire initial draft – from BANA’s model form syndicated credit agreement. (D269 (Barnes Aff. Ex. A.)) Amylin’s counsel specifically informed Amylin’s

executives that the change of control provision was one of the issues to be negotiated with BANA. (D14 (Deposition Transcript of Gregory Cuddeback (“Cuddeback Dep.”)).) On November 20, 2007, Amylin returned a mark-up of the Credit Agreement, striking the clause in Subsection (b) of the change of control provision (the “continuing director” provision) that stated that a person whose nomination to the board of directors was initially the result of a proxy contest would not be a continuing director, even if that person’s nomination was later approved by the board. (D403 (Barnes Aff. Ex. B.)) On December 6, 2007, BANA circulated a further draft reinserting the stricken proxy clause. (D521 (Barnes Aff. Ex. C.)) The change of control provision in the final Credit Agreement survived in this form.<sup>3</sup>

BANA informed Amylin that the change of control language it declined to strike from the agreement was important to the bank. (A489; D88 (Deposition Transcript of Staci Rosche (“Rosche Dep.”) (BANA outside counsel told Amylin “it was important to the bank . . . so that the bank could get back to the table in case [a change of control] happened”).) In particular, BANA explained to Amylin “that it was important for [BANA] to be familiar with and understand and know the management team” and “a change to that was something that the bank wanted to have a perspective on . . . .” (D16 (Cuddeback Dep.))

**REDACTED**

Mr. Fox, an attorney with two decades of experience negotiating similar credit agreements, and BANA’s

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expert witness, confirmed [redacted] the rationale for retaining the standard proxy contest language in the change of control provision:

The logic of including this language in the change of control provision, from the standpoint of a lender, is unassailable. Without it, a board of directors has the ability to prevent a change of control from occurring merely by approving the election of the candidates proffered in a proxy solicitation. Even in a rancorous proxy contest, in which situation a lender might be particularly concerned about a change of control, a board could approve directors so as [redacted] to avoid giving lenders the type of negotiating leverage that a change of control would trigger. It is thus unsurprising that this language is included in the Credit Agreement.

(D818 (Fox Rep.))

**4. The Change of Control Provision's Purpose Was Understood By the Parties**

The experts for both Plaintiff and BANA are in agreement that debt acceleration upon a change of control is unusual and perhaps unprecedented. They also agree that the fundamental purpose of such provisions from the perspective of the lender is to obtain a contractual basis to engage the borrower in dialogue upon a change of control, assess the impact of the change, and negotiate for modified loan terms as appropriate. (D817 (Fox Rep.); D823 (Roberts Rep.); D825 (Pitt Rep.)) Amylin understood this when it entered into the Credit Agreement. It was advised by its experienced counsel (the Cooley Godward law firm) during the negotiation of the Credit Agreement that change of control provisions are rarely triggered and that if the provision were triggered, Amylin "would have an opportunity to work with the bank to cure the default in some fashion." (D15 (Cuddeback Dep.))<sup>4</sup> That, in fact, has occurred here. BANA and Amylin negotiated a waiver of the change of control provision in the Credit Agreement with respect to the 2009 election.

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<sup>4</sup> Also, as Plaintiff's expert Professor Michael R. Roberts confirmed in his report, credit agreements often have more restrictive covenants than do bond indentures because bank lenders are more likely to renegotiate agreements should terms be breached. Covenants in bond indentures are correspondingly less restrictive because waivers are substantively and logistically harder to get. (D821-822 (Roberts Rep.); see also D815-816 (Fox Rep.) ("the terms of credit agreements are generally more restrictive than those of bond indentures with the same borrower" in part because companies "can frequently negotiate a waiver with the lenders."))

**5. Amylin Accepted the Change of Control Provision Because It Was Satisfied That the Credit Agreement Was Favorable as a Whole**

There was extensive negotiation of the Credit Agreement, of which the change of control provision was just one part. In recommending to Amylin that it proceed with the transaction with the change of control provision proposed by BANA, the Cooley firm explained that: “in the context of the overall economics of the transaction that it was reasonable for [the proxy exclusion] to stay in as part of the overall group of other negotiating points so that [Amylin] would give on that, because the other points gave [Amylin] a favorable transaction, good economics.” (A490.) Ultimately, after discussing the change of control provision with its counsel, reviewing industry publications, and discussing the matter internally, Amylin determined that “the economics [of the transaction] being favorable, that reinserting [the proviso concerning proxy contests in the change of control provision] was acceptable.” (*Id.*) Amylin’s integrated approach of weighing the costs and benefits of various loan provisions collectively is strongly supported by Mr. Fox’s expert reports, which describe how borrowers in real-world credit agreement negotiations make rational business judgments. (D816-817 (Fox Rep.); D828 (Rebuttal Expert Report of Charles M. Fox (“Fox Reb. Rep.”))).) Mr. Fox testified that, when he represented lenders, change of control provisions typically were not heavily negotiated “[i]n the absence of some specific facts or expectations that something is going to happen along those lines.” (D881 (Fox Dep.)) Plaintiff’s expert, Harvey Pitt, testified that it is reasonable for a borrower to take into account the improbability of the occurrence of a particular event in negotiating a credit agreement, and that there were fewer than 20 disputed elections per year among the thousands of public companies. (D897-898 (Pitt Dep.)) Mr. Pitt also testified – consistent with all the witnesses who testified in this matter – that he was unaware of any instance in which debt was actually accelerated following a change of control or where a borrower was unable to procure a waiver of a “proxy put” such that dissident shareholders were deterred from putting forward a slate of candidates. (D900 (Pitt Dep.))

**6. The Minimum Cash Requirement in the Credit Agreement Does Not Provide the Lenders with Complete Protection**

Plaintiff claims that the change of control provision had no value to BANA, citing other protections in the Credit Agreement. (Pl. Br. at 11.) In particular, Plaintiff references that, under the Credit Agreement, if Amylin’s cash falls below \$280 million, Amylin must notify BANA and BANA, as agent for the syndicate, may require Amylin’s banks to transfer substantially all of Amylin’s cash to an account controlled by BANA. Falling below this cash threshold, however, does not constitute a breach of the agreement; that occurs only when

Amylin's cash falls below \$147 million. (A290.)

**REDACTED**

In his deposition, Mr. Fox provided additional reasons why the cash maintenance requirement did not provide the level of protection that Plaintiff claims: BANA's "ability to obtain dominion and control over the cash . . . is based on them getting a notice from the company," which the Company obviously may not wish to provide; "the company might, in anticipation of liquidity issues or other financial distress, tell all of its depository banks to transfer their cash to some bank outside of the control of Bank of America in order to maintain control over their cash;" and the Company may declare bankruptcy in which case, even if BANA "had dominion and control and therefore a perfected security interest . . . that does not necessarily ensure that the lenders will get a complete recovery in the bankruptcy." (D884 (Fox Dep.))

**D. Events Precipitating the Litigation**

On January 29, 2009, Icahn Capital, L.P. ("Icahn"), holder of approximately 8.8% of Amylin's outstanding shares, notified Amylin that it intended to nominate a slate of five directors to stand for election at Amylin's 2009 annual meeting, scheduled for May 27, 2009. (A377-78.) On January 30, 2009, Black Bear Fund I, L.P., a fund managed by Eastbourne Capital Management, LLC ("Eastbourne"), a 12.5% shareholder, advised Amylin that it also intended to nominate five directors at the 2009 annual meeting. (A378.)

On February 27, 2009, Amylin filed its Form 10-K for the year ended December 31, 2008. Amylin included a discussion of the impending proxy con-

test and discussed, as one of several considerations, the change of control provisions in the Indenture and Credit Agreement. (*See* D1-5.)

On March 9, 2009, Eastbourne sent a public letter to Amylin's board of directors expressing concern over what Eastbourne characterized as an effort to "subvert the shareholder franchise" through the change of control provision and the similar "fundamental change" provision in the indenture under which Amylin had issued debt in 2007 (the "Indenture"). (D6.) Eastbourne urged Amylin's board, *inter alia*, to seek a waiver of the change of control provision (which Amylin ultimately obtained with respect to the Credit Agreement, thereby moot-ing the issue). On March 17, 2009, Amylin announced the tentative date for its annual meeting as May 27, 2009.

On March 24, 2009, Plaintiff brought the action below in an effort, *inter alia*, to invalidate the change of control provision and the similar "fundamental change" provision in the indenture for the Indenture.

**E. Relevant Events Subsequent to the Commencement of the Litigation**

On April 13, 2009, Plaintiff and Amylin entered into a partial settlement, wherein Amylin agreed to "approve" the Icahn and Eastbourne director nominees so as to avoid triggering the "fundamental change" clause of the 2007 bond indenture should a majority of such nominees be elected. (D660 (Norman Aff. Ex. A.)) In exchange, Plaintiff agreed "to remove [from this case] any allegations of lack of good faith, bad faith, disloyalty, entrenchment motivation or intentional interference with voting rights [and not to] introduce at trial any evidence regarding the Board's motive or intent." (*Id.*)

On April 16, 2009, Plaintiff filed its final amended complaint, the Verified Fourth Amended Class Action Complaint for Declaratory Relief (the "Complaint"), alleging three causes of action: breach of the duty of care as to the Amylin board of directors in entering into the Credit Agreement and Indenture, declaratory judgment with respect to the change of control provision in the Credit Agreement, and declaratory judgment with respect to the change of control provision in the Indenture. The gravamen of the Complaint is that the change of control provisions in the Indenture and the Credit Agreement "prevent Amylin shareholders [from] voting for directors on either the Icahn or Eastbourne slates of directors" at the 2009 annual meeting. (A424.) Plaintiff sought, among other things, invalidation of the respective change of control provisions in the debt agreements, and a declaration that Amylin's board of directors breached its duty of care in approving the provisions.

On April 23, 2009, Icahn filed a proxy statement soliciting votes for a three-person slate of directors (reduced from five persons) and sent a letter to

Amylin's lead independent director reiterating his contention that "common ground" could be reached. (D798.) The next day, Eastbourne filed preliminary proxy materials soliciting shareholder votes for its five nominee directors, but stating that it did "not currently intend to solicit proxies or seek authority to vote for more stockholder-proposed nominees than would represent a minority of the Board if elected." (D812.)

#### **F. Waiver Negotiations and Agreement**

On April 1, 2009, Amylin's counsel wrote a letter to BANA requesting that BANA "consent to either amend the definition of Change of Control or, alternatively, waive the event of default that would be triggered by a Change of Control in the event six or more of Icahn's and Eastbourne's nominees are elected at the upcoming stockholders' meeting." (D41 (Barnes Dep. Ex. 13).) BANA and Amylin then held discussions about the terms of a potential waiver of the change of control provision with respect to the upcoming director election. (D22 (Barnes Dep.)) On April 22, 2009, BANA sent Amylin a proposed amendment to the Credit Agreement providing the terms upon which it would agree to such a waiver. (D44 (Barnes Dep. Ex. 14).)

On May 1, 2009, after further negotiation, BANA and Amylin executed an amendment to the Credit Agreement. (A623-628.) Under the amendment, in the event of a change in the majority of the board of directors, Amylin would pay to the lending syndicate a 50 basis point fee on the outstanding balance under the Credit Agreement and a 25 basis point fee to BANA for obtaining the requisite lender consents to the amendment. In exchange, BANA agreed to waive the event of default under the Credit Agreement that would otherwise have been triggered in the event of a change of control. The economic terms of the waiver – which would cost Amylin less than \$1 million in the event of an actual change of control – were below market and thus favorable to Amylin. (D891 (Rosche Dep.)) And, because no change of control ultimately occurred, Amylin paid BANA nothing for the amendment.

#### **G. The Trial and the Court of Chancery's Decision**

On May 1, 2009, prior to the execution by BANA and Amylin of the Credit Agreement amendment, the Court of Chancery held a pre-trial conference. During the course of that conference, BANA informed the court that BANA and Amylin had just reached an agreement in principle pursuant to which BANA would agree to waive its relevant change of control rights in exchange for a modest fee. BANA argued that the proposed amendment would "obviate and moot [Plaintiff's] claim."<sup>5</sup> (A566.1.) In support of its position, BANA stated that the

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<sup>5</sup> Plaintiff's brief incorrectly states that BANA never argued mootness in the Court of Chancery. (Pl. Br. at 30.)

proposed amendment provided “precisely the relief that the plaintiffs have asked for, which is a waiver of the [change of control] condition.” (D907.) Addressing the fact that the amendment did not permanently eliminate the change of control provision, BANA emphasized to the Court that the Credit Agreement expired in December 2010, and argued that the proper procedure should be to “to see if that issue ever ripens” with respect to the 2010 election cycle before proceeding with further litigation. (*Id.*) Plaintiff did not dispute that the cost of the amendment was so small as to have no potential impact on the 2009 vote. Instead, Plaintiff argued that the change of control provision could impact the 2010 election, and that the parties should proceed to trial as scheduled. (A567.)

The Court of Chancery agreed with BANA and ruled that the claims concerning the Credit Agreement would be held in abeyance pending the outcome of the ongoing negotiations between BANA and Amylin and BANA’s efforts to obtain consents of the lending syndicate members to the amendment and waiver. (A569.) The amendment was executed later the same day, and the requisite consents were filed with the court on May 6, 2009.

On May 4, 2009, the court held a trial of Plaintiff’s claims with respect to the Indenture. Consistent with the court’s ruling, BANA did not participate in the trial. The only trial witness was Plaintiff’s expert, Professor Roberts. Professor Roberts testified that, in general, there’s a “trade-off between the amount of protection provided to creditors in the form of covenants and the other dimensions of the deal, such as price, maturity and yield.” (Transcript of Trial (“Trial Tr.”) D907.) Professor Roberts further testified that private debt agreements – like the Credit Agreement – are typically “much more easy to renegotiate” than bond indentures and “consequently we tend to see more covenants and relatively tighter covenants in terms of how they restrict the behavior of management in the firm more broadly.” (D906 (Trial Tr.)) He stated that private creditor agreements are “renegotiated frequently” and are “structured in that manner to be renegotiated, because of the ease of setting up amendments and waivers. . . .” (D908 (Trial Tr.)) Professor Roberts could cite no “examples of debt being accelerated because of triggering of a continuing director provision.” (*Id.*)

On May 4, 2009 – the same day on which the trial was held – Eastbourne filed a definitive proxy statement in which it reduced the number of candidates that it was nominating to the Amylin board from five to three. (Court of Chancery Opinion (“Op.”), at 14, dated May 12, 2009.) On May 6, 2009, Icahn filed a definitive proxy statement in which it reduced the number of candidates it was nominating from five to two. (*Id.*) As a result, even if all the shareholder-nominated directors were elected, no change of control would have occurred under the Credit Agreement or Indenture as there would be a maximum of five such directors elected to Amylin’s twelve-member board. (*Id.*)

On May 12, 2009, the Court of Chancery issued its decision. With respect to BANA, the court noted the terms of the amendment to the Credit Agreement and the fact that the syndicate lenders had provided the requisite consents and ruled that “Count II of the fourth amended complaint, which seeks a declaration of the invalidity and unenforceability of the Continuing Directors provision of the Credit Agreement, has thus been rendered moot.” (*Id.* at 13 n.14.)

The court – while focusing on the non-moot claims involving the Indenture – made additional findings as to BANA relevant to this appeal. The court noted that change of control provisions:

are somewhat less concerning in syndicated lending agreements than they are in public debt instruments because of the relative ease with which consents or waivers are obtained in bank lending than in public debt instruments. Witness the consent and waiver agreement obtained from BANA and the [syndicate lenders] on May 6, compared to the understandable lack of any attempt by Amylin to obtain amendment from the noteholders.

(*Id.*, at 18 n.30.) As to the terms of the Credit Agreement, the court favorably compared the “two-year sliding-window lookback” in the Credit Agreement’s change of control provision – meaning that unapproved directors who have served on the board for two years are no longer unapproved directors for determining if a change of control had occurred – with the Indenture’s provision in which unapproved directors remain as such for “the life of the notes.” (*Id.* at 18.)

Turning to Plaintiff’s claim that Amylin’s board members breached their duties of care in approving the Indenture’s change of control provision, the court framed the issue squarely as follows: “was the board of Amylin (or its delegate, the Pricing Committee) grossly negligent in failing to learn of the existence of the Continuing Director provisions?” (*Id.* at 25.) The court answered the question as squarely: “The answer must be no.” (*Id.* at 26.) The court referenced the board’s retention of “highly-qualified counsel” and the advice it sought from its “management and investment bankers as to the terms of the agreement.” (*Id.*) Counsel informed the board that there was nothing in the Indenture’s terms that was “unusual or not customary.” (*Id.*) The court thus dismissed Plaintiff’s breach of the duty of care claim.

#### **H. The 2009 Board Election**

On May 27, 2009, Amylin held its annual shareholder meeting. On June 2, 2009, Amylin announced that one of the three Eastbourne board nominees and one of the two Icahn board nominees had been elected.

## ARGUMENT

### I. THE COURT OF CHANCERY CORRECTLY DISMISSED PLAINTIFF'S CLAIM AGAINST BANA AS MOOT

#### A. Question Presented

Whether the Court of Chancery properly dismissed Plaintiff's claim against BANA as moot. (A566-68; D893; Op. at 12-13).

#### B. Scope of Review

This Court reviews questions of justiciability *de novo*. *Crescent/Mach I Partners, L.P. v. Dr. Pepper Bottling Co.*, 962 A.2d 637, 641 (Del. 2007).

#### C. Merits of Argument

##### 1. Plaintiff's Claim Against BANA Is Moot and Not Ripe

"Delaware law requires that a justiciable controversy exist before a court can adjudicate properly a dispute brought before it." *Warren v. Moore*, 1994 Del. Ch. LEXIS 104, at \*4-5 (Del. Ch. July 6, 1994). ("[W]here by an act of the parties a controversy has come to an end[,] the case becomes moot and the court is without power to proceed further.") *The Library, Inc. v. AFG Enters., Inc.*, 1998 Del. Ch. LEXIS 137, at \*8 (Del. Ch. July 27, 1998), (quoting *Southern Production Co., Inc. v. Sabath*, 87 A.2d 128, 131 (Del. 1952)).

Plaintiff does not dispute that its case concerning the Credit Agreement and BANA is entirely moot with respect to the election of directors in 2009. (Pl. Br. at 30-31.) Indeed, the claim is moot for at least three reasons. First, BANA (and its fellow lenders under the Credit Agreement) agreed to an amendment to the Credit Agreement that waived their relevant change of control rights for the 2009 director election. This was the basis for the Court of Chancery's finding of mootness. Second, Amylin's stockholders ultimately did not seek to nominate enough directors in 2009 even to implicate the Credit Agreement. Third, the 2009 director election vote has already occurred.

The reason for and focus of this litigation is – and always has been – Amylin's 2009 proxy contest and director election. Plaintiff itself emphasizes this on the second page of its appellate brief, where it acknowledges that events surrounding the 2009 proxy contest and director election "necessitate[d] this . . . litigation." (Pl. Br. at 2.) This is equally clear from the operative complaint in the case and all previous versions thereof. For example, the "Summary of Action" section of the complaint, which serves as the introduction to the document, focuses entirely on the 2009 proxy contest launched by Icahn and Eastbourne.

(A410-412.) The complaint makes no mention of the 2010 director election. (*Id.*)

Plaintiff nevertheless argues that its claims are not moot because there is a *theoretical* possibility of another Amylin proxy contest in 2010, a *theoretical* possibility that the change of control provision in the Credit Agreement could bear upon that hypothetical contest, and a *theoretical* possibility that BANA might accelerate the debt under the Credit Agreement in 2010 upon a hypothetical change of control rather than agree to a waiver as it did in 2009. (Pl. Br. at 30-31.) This is a textbook example of an unripe claim. “An action is not ripe for adjudication when it is ‘contingent . . . [and requires] the occurrence of some future event before the action’s factual predicate is complete’.” *Multi-Fineline Electronix*, 2007 Del. Ch. LEXIS 21, at \*27-28 (Del. Ch. Feb. 2, 2007) (quoting *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 Del. Ch. LEXIS 182, at 28 (Del. Ch. Oct. 11, 2006)) (quotation marks and citations omitted). In the highly unlikely event that all of the above contingencies come to pass in 2010, and there is an actual controversy concerning the Credit Agreement that cannot be resolved through a waiver, Plaintiff can return to the Court of Chancery and reassert its challenge to the Credit Agreement. See *Saito v. McCall*, 2004 Del. Ch. LEXIS 205, at \*25 (Del. Ch. Dec. 20, 2004) (claim not ripe when its facts have “not yet matured to a point where judicial action is appropriate”) (quoting *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 480 (Del. 1989)). Plaintiff offers no reason why it – or any party – would be prejudiced by waiting to see if there is anything for the Court of Chancery to resolve in 2010. There are multiple reasons in this case why concerns about the 2010 director election are particularly unripe:

*First*, statistically speaking, the likelihood of another proxy contest in 2010 is extremely remote. Plaintiff’s own expert, Harvey Pitt, testified that each year less than one percent of all public corporations in America become engaged in proxy contests. (A543-544.) Plaintiff’s brief emphasizes that it was a confluence of factors unique to Amylin’s condition in 2009 that “necessitate[d] this . . . litigation.” (Pl. Br. at 2.) Whether this combination of factors will be present again in 2010 is a matter of pure conjecture. Indeed, as Plaintiff repeatedly emphasizes in its brief, this appears to be the first case where a shareholder has *ever* felt it necessary to challenge a change of control provision in a credit agreement. (Pl. Br. at 1.) That is true despite the fact that similar or identical provisions have been present in credit agreements for “a generation.” (*Id.*) There is simply no basis to assume that lightning will strike twice in the same place in two consecutive years. Moreover, nothing would stop Plaintiff and its counsel from filing suit in 2010 if they deemed it necessary to do so based upon an objective assessment of subsequent events. Under Delaware law, for a court to consider a claim “[t]here must be in existence a factual situation giving rise to immediate, or about to become immediate, controversy between the parties.” *Ackerman v. Stemer-*

man, 201 A.2d 173, 175 (Del. 1964). There is nothing “immediate” about the 2010 director election, and no actual “controversy” with respect to that election as yet exists. Furthermore, to entertain jurisdiction, a court must be convinced that the “actual controversy in all probability would result in litigation sooner or later.” (*Id.*) Plaintiff offers no evidence that another proxy contest involving Amylin is probable, let alone a controversy that “in all probability” will occur next year.

*Second*, Plaintiff’s contention that a new slate of directors cannot be elected in 2010 “without accelerating the loan” under the Credit Agreement (Pl. Br. at 5.) is demonstrably incorrect. All expert witnesses in this case agreed that change of control remedies are routinely waived, and not one of the experts was aware of a credit agreement ever being accelerated as a result of a change of control. (*See supra* at 7-8.) With respect to the 2009 election, BANA and the other Credit Agreement lenders agreed to waive their change of control remedies in exchange for modest adjustments to the economic terms of the financing. (*See supra* at 16.) Given market practice, and given the specific history here, there is no reason for this Court to assume that Amylin and its lenders would not agree upon a mutually acceptable waiver in 2010 in the unlikely event that a waiver is necessary. The normal course of borrower-lender negotiations – which have transpired for a generation or more with respect to potential changes of control without the need for litigation – should be permitted to take their course. Where, as here, “future events may obviate the need for declaratory relief, then the dispute is not ripe, and declaratory relief should not be granted.” *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 632 (Del. Ch. 2005).<sup>6</sup>

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<sup>6</sup> Plaintiff cites *California Public Employees Retirement System v. Coulter*, 2005 Del. Ch. LEXIS 54 (Del. Ch. April 21, 2005) (“*CalPERS*”) as support for the proposition that, because the alleged harm stemming from Credit Agreement’s change of control provision is capable of repetition in 2010, Plaintiff’s claim against BANA is not moot. (Pl. Br. at 30 n.12.) Plaintiff’s reliance on *CalPERS* is misplaced for several reasons. *First*, the court in *CalPERS* concluded that the golden parachute payments triggered by the change of control provisions at issue there may have been sufficiently large as to prohibit potentially beneficial corporate transactions, and in fact may have scuttled one such transaction. *Id.* at \*3. Here, in contrast to these allegations of actual and significant harm, BANA and the syndicate agreed to waive their change of control rights for a small, contingent payment, and there has been no showing of any harm to Amylin or its shareholders. *Second*, the employee-beneficiaries of the agreements at issue in *CalPERS* would have had no incentive to waive their change of control benefits, so that a change of control would almost certainly have triggered the large golden parachute payments. Here, as occurred with respect to the 2009 election, there is

*Third*, Amylin's structure and business circumstances could well be different in 2010 and different in a way that could render the so-called "proxy puts" irrelevant. As the Court of Chancery noted, "[i]f the dissident nominees are successful in fostering a sale of the company [which was part of their platform in seeking election], the issue of Continuing Directors may become irrelevant long before next year's annual stockholder meeting." (Op. at 24.) Furthermore, Amylin has stated that it has more than enough available cash to pay off the Credit Agreement and has the potential to refinance the agreement as well.<sup>7</sup> That, too, would eliminate any potential controversy involving the Credit Agreement in 2010. As this Court has held, "before a court should declare the rights of parties in a dispute, it must not only 'be convinced that litigation sooner or later appears to be unavoidable,' but also that the material facts are static and that the rights of the parties are presently defined rather than future or contingent." *Stroud v. Milliken Enterprises, Inc.*, 552 A.2d 476, 481 (Del. 1989). Here, the following questions all remain open: (1) whether there will be a proxy contest, (2) whether Amylin will be sold, (3) whether the Credit Agreement will be refinanced or paid off prior to the 2010 annual meeting, and (4) whether the change of control provision will again be waived. Any one of these factors would render Plaintiff's concerns academic. Accordingly, the 2010 director election currently presents the opposite of the "static" record necessary for this Court to consider declaratory relief.

*Fourth*, the fact that the Credit Agreement expires at the end of 2010 argues further against judicial intervention. There is only one year left in which a

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a reasonable possibility that BANA would agree to waive its change of control rights in the unlikely event that the 2009 situation repeats itself in 2010, eliminating the need for judicial review. *Third*, in *CalPERS* the court noted that there were allegations that the ten executive employment agreements were "implemented as part of a scheme to entrench existing management," *id.* at \*1 n.2, and could reasonably have determined it to be expedient to address such repeatable and suspect conduct. Plaintiff here has explicitly waived any such allegations. *Fourth*, the employment agreements in *CalPERS* did not involve a true third party not alleged to have had an improper motive. More fundamentally, Plaintiff reads too much into *CalPERS*. Virtually every dispute is capable of repetition. If that were all it took to establish ripeness, the courts would be flooded with hypothetical disputes.

controversy under the agreement could arise, which further reduces any significance of the change of control provision to Amylin's stockholders.

*Fifth*, any analysis of the enforceability of the change of control provision in the Credit Agreement is necessarily fact-intensive. Plaintiff relied on two expert witnesses in the Court of Chancery, and, had it not been dismissed from the case, BANA was scheduled to call an expert witness and two fact witnesses at trial. Furthermore, Mr. Pitt, one of Plaintiff's experts, cited extensively in his deposition testimony to the particulars of Amylin's disclosures concerning the Eastbourne and Icahn proxy challenges of 2009. (D899, D902-903 (Pitt Dep.)) This fact pattern very easily could be different in 2010. Accordingly, this Court should not address Plaintiff's claims without the benefit of the facts as they develop between now and the 2010 director election. "Whenever a court examines a matter where facts are not fully developed, it runs the risk not only of granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law." *Stroud*, 552 A.2d at 480. There will be ample opportunity for Plaintiff, or any other Amylin stockholder, to pursue claims in 2010 if they deem that necessary based on the facts as they develop. Neither this Court nor the Court of Chancery should be asked to adjudicate a moving target. And that should be particularly clear where, as here, there is no reason to expect that the controversy will repeat itself in 2010, there are numerous contingencies that could eliminate the possibility of a controversy, and Amylin and its lenders remain free to negotiate a waiver of the change of control provision in 2010 just as they did in 2009.

*Sixth*, the novel nature of Plaintiff's challenge to the Credit Agreement argues further against resolving Plaintiff's claim before an actual controversy has occurred. "Delaware courts should be especially cautious when the request for relief in a declaratory judgment raises 'novel and important [issues] to Delaware Corporate law.'" *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 Del. Ch. LEXIS 182, at \*42-43 (Del. Ch. Oct. 11, 2006). As noted previously, the change of control provision in the Credit Agreement is commonplace in the syndicated lending industry. Based on a limited search of syndicated loan agreements, BANA submitted to the Court of Chancery fifty-four such agreements containing a change of control provision that is substantially identical to the provision in the Credit Agreement. (*See supra* at 9.) If the enforceability of these standard and important provisions is to be addressed, that should happen in the context of a fully ripe dispute, based on a complete and up-to-date factual record. Change of control provisions have resided in credit agreements largely without legal incident for at least 20 years. Surely their evaluation, if any, can and should await a live controversy that parties actually need resolved.

*Seventh*, and finally, Plaintiff's claim that change of control rights are nefarious "entrenchment devices" that warrant immediate judicial attention is not

even implicated by the facts of this case. Plaintiff has *stipulated* that the operative change of control provision was not the product of any entrenchment motive or disloyalty to stockholders. This, too, negates any pressing need to adjudicate Plaintiff's claim.

The Court should affirm the dismissal of Plaintiff's claim against BANA as moot.

**2. If This Court Finds That a Justiciable Controversy Exists With Respect to the Credit Agreement, the Claim Should Be Remanded to the Court of Chancery**

For the reasons just discussed, no justiciable controversy exists with respect to the Credit Agreement, and the dismissal of BANA should be affirmed. Assuming *arguendo* that the Court finds that a justiciable controversy still exists under the Credit Agreement, then the case against BANA should be remanded to Court of Chancery for further proceedings.

Amylin and BANA agreed to the amendment and waiver of the change of control provision for 2009 on the last court day before trial. (*See supra* at 16.) Both BANA and Plaintiff had filed competing motions for summary judgment and were scheduled to call live witnesses at trial. The court never decided the summary judgment motions, and no trial was held on the claims concerning the Credit Agreement. Because the Court of Chancery agreed that the amendment and waiver would moot Plaintiff's claims with respect to the Credit Agreement, BANA was excused from the trial. (*See supra* at 16-17.) BANA did not have the opportunity (or need) to call or examine any witnesses or provide oral argument to the court. The court did not reach the merits of the claims against BANA, and its opinion does not reach BANA's arguments beyond the finding of mootness.

In the event that the Court finds a justifiable controversy with respect to the Credit Agreement, the appropriate procedure is to remand for further proceedings on the merits in the Court of Chancery. *See Gen. Motors Corp. v. New Castle County*, 701 A.2d 819 (Del. 2007) (reversing and remanding for adjudication on merits where claim was found not to be moot). There, the discovery record could be supplemented to address subsequent events, summary judgment motions could be supplemented and ruled upon, and trial could be held to the extent necessary. The case is no longer in an expedited posture given that the 2009 director election is over. Plaintiff cites no authority suggesting that this Court should decide summary judgment (1) before the Court of Chancery has had the opportunity to rule on summary judgment, (2) without a trial record in a case where the Court of Chancery intended to hold a trial with live witnesses before deciding the case, (3) where the factual record may be incomplete, and (4) where no exigent circumstances exist.

**II. PLAINTIFF IS NOT ENTITLED TO A DECLARATION THAT THE CHANGE OF CONTROL PROVISION IN THE CREDIT AGREEMENT IS VOID**

**A. Question Presented**

Whether Plaintiff is entitled to summary judgment on its claim that the change of control provision should be declared void by this Court. (A397-98).

**B. Scope of Review**

This Court reviews dispositions as a matter of law *de novo*. *Crescent/Mach I Partners, L.P. v. Dr. Pepper Bottling Co.*, 962 A.2d 637, 641 (Del. 2007). However, as noted previously, this question presented by Plaintiff was not decided at all by the Court of Chancery.

**C. Merits of Argument**

Plaintiff asks this Court to grant it summary judgment on its claim that the continuing director portion of the change of control provision in the Credit Agreement should be declared void. In addition, Plaintiff argues that the Court of Chancery erred in dismissing its claim that the Amylin Board breached the duty of care in approving the Indenture and Credit Agreement. (Pl. Br. 32-34.) Although BANA is not a party to that claim, it is a basis for Plaintiff's demand for a declaration that the continuing director portion of the change of control provision is void. As explained in Point I, *supra*, Plaintiff's attempt to void the change of control provision was properly dismissed as moot. Accordingly, the Court need not reach Plaintiff's demand for summary judgment. As also explained in Point I, *supra*, even if the claim were not moot and were ripe, the appropriate result would be remand to the Court of Chancery. If the Court nevertheless reaches Plaintiff's request for summary judgment, the request should be denied on the merits. Indeed, if summary judgment were to be entered in this Court at all, it should be entered in favor of BANA.

**1. The Change of Control Provision in the Credit Agreement Does Not Violate Delaware Law**

Plaintiff seeks summary judgment with respect to the Credit Agreement on the ground that the change of control provision violates Delaware law. According to Plaintiff, the provision impermissibly interferes with board approval of director nominees and stockholder voting rights and impermissibly creates a classified and/or staggered board. (Pl. Br. at 27-30.)

This claim fails. The change of control provision does not violate Delaware law. It is a commonplace third-party contract right that in no way restricts

fiduciary or stockholder conduct. Moreover, Plaintiff has failed entirely to justify the extreme remedy it seeks: invalidation of an innocent third party's arm's-length contract rights.

The change of control provision does not restrict – let alone restrict impermissibly – the board's exercise of fiduciary duties or stockholder voting rights. Amylin's board is free to approve nominations as it sees fit, and its shareholders are free to vote as they so choose. No classified or staggered board is created or required. The Credit Agreement does not confer on BANA or any other lender the right to veto, restrict, select, or even question the nomination or election of any director. Only contractual provisions that directly “require a board to act or not act” in a manner that would violate its fiduciary duties are potentially subject to challenge. *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1292 (Del. 1998) (emphasis added) (citation omitted). Nor does the Credit Agreement contain any provision calling for a classified or staggered board. It says nothing on the subject.

Plaintiff mischaracterizes matters when it cites the “mandatory nature of a debt acceleration provisions triggered by the election of a majority of new directors” and the “lack of director discretion to prevent debt acceleration” as the reasons that the change of control provision must be invalidated. (Pl. Br. at 28.) A change of control does not automatically result in debt acceleration; rather, it entitles the lenders to discuss the situation with the borrower and to accelerate the debt should they be unable to successfully renegotiate the agreement's terms. The distinction is critical, as it means that debt acceleration can be avoided. No witness in this case has ever encountered a situation in which debt was actually accelerated due to a change in control. (*See supra* at 7-8.)

Amylin's directors in no way lack “discretion to prevent debt acceleration.” (Pl. Br. at 28.) This Court need look no further than the record in this case – in which Amylin negotiated a waiver of the change of control provision at a cost, assuming a change of control had occurred, of less than \$1 million (*see supra* at 16) – for proof that Amylin's directors retained the ability to prevent acceleration. As BANA's expert witness explained, “If a proxy solicitation was being launched, [a board] could have discussions ahead of time with their existing lenders to get the lenders to waive the event of default, number one. Number two, they could go out and line up or have discussions relating to the lining up of alternative financing. . . .” (D882 (Fox Dep).)

Furthermore, while Plaintiff speaks of catastrophic consequences of acceleration in the abstract,

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cases upon which Plaintiff relies, (Pl. Br. at 29,) generally involved contracts that intentionally and affirmatively restricted fiduciary conduct and had numerous other controversial features not present here. See, e.g., *CA, Inc. v. AFSCME*, 953 A.2d 227 (Del. 2008) (finding violation of Delaware law where proposed by-law automatically *compelled* board of directors to reimburse proxy expenses without exercising discretion); *Quickturn*, 721 A.2d at 1281 (invalidating “no hand” provision that affirmatively *prohibited* directors from removing rights plan put in place by predecessor board).

Plaintiff does not contend that either Amylin or BANA acted with coercive intent or knowledge of any other party’s coercive motive. There is no claim that Amylin agreed to the Credit Agreement for any reason other than to borrow money to fund its business. There is no claim that BANA entered into the agreement for any reason other than to make a syndicated loan. No entrenchment motive is claimed and no breach of the duty of loyalty is asserted. There is no claim that BANA aided and abetted any breach. The change of control remedies reflect the unremarkable fact that BANA wished to limit its credit exposure to Amylin in the event Amylin’s leadership changed. Thus, Plaintiff mistakenly relies on *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994). (Pl. Br. at 29.) *QVC* involved a *direct* contractual restriction on fiduciary conduct, duty of loyalty claims, and allegations that Viacom knowingly induced Paramount to violate its fiduciary duties by insisting upon deal protections that coerced a closing with Viacom. None of those factors is present here. Furthermore, in *QVC*, the Court was concerned about a series of “unusual” provisions in a merger agreement allegedly designed to impede competitive bidding for QVC. *Id.* at 49. In contrast, the provision at issue here is a standard change of control provision that appears in countless credit agreements.

In sum, there is nothing coercive in the change of control provision in the Credit Agreement. Directors remain free to exercise their fiduciary duties and shareholders are free to exercise their franchise rights. Virtually every corporation must assess and contend with its pre-existing contractual obligations and covenants in making ongoing corporate decisions. In deciding whether to approve the proposed director slates, Amylin’s board can *consider* the potential that BANA will exercise change of control remedies. But it is the board that controls the decision to approve directors, as well as the related recommendations and disclosures it deems appropriate for stockholders. These are quintessential business judgments, and contract terms that necessitate such judgments are common and enforceable.

Amylin’s stockholders are similarly free to exercise their voting rights. In *Moran v. Household Int’l, Inc.*, 490 A.2d 1059 (Del. Ch. 1995), *aff’d*, 500 A.2d 1346 (Del. 1985), plaintiffs argued that the company’s preferred stock rights dividend plan unlawfully restricted the ability of stockholders to engage in

proxy contests. Despite finding that the plan substantially disadvantaged proxy contest participants, the court found that the plan was not primarily *intended* to achieve entrenchment, and that the plan did not “directly affect the individual voting rights.” *Id.* at 1079. Plaintiff’s claims here are far weaker than those in *Moran*. Plaintiff does not argue that there was an intent to achieve entrenchment through the change of control provision in the Credit Agreement. Nor is there a genuine claim that the Credit Agreement directly impairs stockholder voting rights. The fact that stockholders’ votes allegedly *may* be influenced by BANA’s change of control rights is insufficient. *See Brazen v. Bell Atl. Corp.*, 695 A.2d 43, 50 (Del. 1997) (“[A]lthough the termination fee provision may have influenced the stockholder vote, there were ‘no structurally or situationally coercive factors’ that made an otherwise valid fee provision impermissibly coercive in this setting.”) (citation omitted); *Orman v. Cullman*, 2004 Del. Ch. LEXIS 150, at \*31 (Del. Ch. Oct. 20, 2004) (“The public shareholders were free to reject the proposed deal, even though, permissibly, their vote may have been influenced by the existence of the deal protection measures.”).

Finally, Plaintiff argues that the change of control provision is “facially invalid” because newly elected, unapproved directors “have fewer powers than their fellow directors.” (Pl. Br. at 30.) Namely, Plaintiff states that these unapproved directors cannot vote to approve board nominees in future years for purposes of the change of control provision – in this case, the only relevant year is 2010 – and that this alleged voting power distinction among directors creates an invalid classified board. (*Id.*) Plaintiff is incorrect. Unapproved directors can freely participate in the selection of director nominees to the same extent as can continuing directors. As explained in *California Public Employees’ Retirement System v. Coulter*, 2005 Del. Ch. LEXIS 54 (Del. Ch. April 21, 2005) (“*CalPERS*”), discussed below, the fact that a contractual change of control provision *references* a board vote with respect to nominee approval to determine whether the provision has been triggered does not result in any voting rights distinctions among directors.

In support of its argument, Plaintiff cites only one case, *Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180 (Del. Ch. 1998). Plaintiff, however, ignores *CalPERS*, which involved a contractual change of control provision virtually identical to that at issue here and which distinguished *Carmody* in a manner entirely applicable to this case. The *CalPERS* change of control provision triggered the employees’ rights to “change of control payments” should a majority of the board of directors cease to be composed of “continuing directors.” Whether a new board member was considered a “continuing director” was determined by reference to an independent board vote on whether to approve the nomination or election of the director at issue. *Id.* at \*5. The court found that the provision “neither limit[ed] or expand[ed] the voting power of any director,” but rather

“require[d] reference to the results of a vote by the Board” in determining whether a contractual remedy had been triggered. *Id.* “That the specific reference required by the Existing Directors provision may be to less than all of the directors who voted does not differentiate among directors . . . . Moreover, nothing in the Existing Directors provision [of the executive employment agreements] restricts the ability of any director to participate fully in the process of selecting directors.” *Id.* at 5 n.23. The same is true here. The change of control provision in the Credit Agreement “references” the results of various director actions, but does not “limit” them. *Cf. Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1292 (Del. 1998) (contractual provisions that “require a board to act or not act” are potentially subject to challenge) (emphasis added) (citation omitted).

The *CalPERS* court readily distinguished *Carmody*, writing:

Crucial to an understanding of *Carmody* is an understanding of the unique nature of the dead hand poison pill because of its impact on potential business combinations or acquisition opportunities. Delaware requires that the board retain the power to redeem the poison pill in order to fulfill its fiduciary duties as circumstances change. The Court in *Carmody* concluded that, by purporting to limit the right of new directors to vote on whether to redeem the pill, the dead hand provision materially interfered with the ability of the directors to manage the business affairs of the corporation.

*Id.* at \*4.<sup>8</sup> The *CalPERS* court concluded that, as “the Existing Directors provision neither limits nor expands the voting power of any director, . . . the corporate governance considerations underlying *Carmody* are not implicated in the Existing Directors provision at issue here.” *Id.* at \*5. As such, that provision “contravenes neither *Carmody* nor 8 *Del. C.* § 141(d).” *Id.*

As in *CalPERS*, under the change of control provision at issue here, Amylin’s board is free to approve and recommend director nominations and elections as it sees fit. The provision does not grant BANA the right to veto, restrict, recommend, or oppose any action related to the nomination or election of directors, nor does it restrict any director’s ability to fully participate in that process.

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<sup>8</sup> The *CalPERS* court also distinguished the contractual provision at issue there from the one in *Carmody* on a separate ground, namely the *Carmody* provision’s duration. “Because [the *Carmody*] rights plan was to exist for more than a decade, it would ‘embed structural power-related distinctions between groups of directors that no successor board could abolish’ for an extended period of time.” *Id.* at \*4. That consideration is absent here, as the Credit Agreement expires in 2010.

In sum, the provision does not create voting distinctions among board members and does not create a classified board.

**2. The Amylin Board Did Not Breach Its Duty of Care in Approving the Credit Agreement**

Plaintiff contends that Amylin's directors breached their duty of care by approving the change of control provision in the Credit Agreement. (Pl. Br. at 32-34.) Plaintiff does not contend that BANA knew of or aided and abetted any alleged breach of the duty of care. But the duty of care claim nonetheless concerns BANA because it is a purported reason to invalidate the change of control provision in the Credit Agreement.

In the interest of brevity, BANA relies on the Amylin defendants' brief to establish that there was no breach of the duty of care. BANA notes, however, that (1) the claim is subject to dismissal on the grounds articulated in this case by the Court of Chancery, and (2) the change of control provision in the Credit Agreement was, in fact, negotiated by Amylin's counsel and accepted in its operative form by Amylin's senior management because they viewed the transaction to be favorable as a whole (*see supra* at 10). That is a classic business judgment and one that the board properly delegated to counsel and financial executives.

**3. There Are No Grounds To Void the Change of Control Provision in the Credit Agreement**

Plaintiff argues that the appropriate remedy for a breach of the duty of care by Amylin's board in approving the Credit Agreement is the invalidation of all or portions of the change of control provision in the Credit Agreement. (Pl. Br. 27-34.) Plaintiff urges this remedy despite the fact that it would strip BANA – a concededly innocent third party – of an otherwise valid and binding contract right. For the reasons explained above, the Court need not even reach this question because (1) the claim is moot, (2) if not moot, the claim should be remanded, and (3) there is no valid duty of care claim. But even assuming Plaintiff could overcome all of that, there is no basis for the drastic relief that Plaintiff seeks. Plaintiff's request for a declaration voiding the change of control provision fails on the multiple, independent grounds set forth below.

**a. Plaintiff Concedes That BANA Is an Innocent Third Party**

Plaintiff's complaint states: BANA "is named as a defendant solely for the purpose of obtaining declaratory relief relating to the Credit Agreement." (A414.) There is no suggestion that BANA engaged in any wrongful conduct. Nor is there any suggestion that BANA aided and abetted or knew about any

party's breach of duty. Plaintiff cites no cases supporting an order stripping a party of its contractual rights under these circumstances.

In *Ace Ltd. v. Capital Re Corp.*, the court reviewed the factors to be considered in determining whether to enforce a contract that results from an alleged fiduciary breach or other violation of Delaware law. 747 A.2d 95 (Del. Ch. 1999) (citing Paul L. Regan, *Great Expectations? A Contract Law Analysis For Preclusive Corporate Lock-Ups*, *Cardozo L. Rev.* 1 (Oct. 1999)). The court in *Ace* recognized four factors as relevant: (1) whether the third party knew or should have known of the board's breach of fiduciary duty; (2) whether the transaction in question was pending or already consummated when judicial intervention was sought; (3) whether the board's fiduciary duty related to especially significant policy concerns; and (4) whether the party's reliance interest in the challenged agreement merited protection if the court were to declare the agreement unenforceable. *Id.* at 105-06. Application of these factors to this case demonstrates overwhelmingly that BANA is entitled to judgment as a matter of law.

*First*, Plaintiff does not assert facts showing that BANA knew or should have known of any breach of fiduciary duty. To the contrary, the Complaint expressly asserts that BANA is named solely for the purposes of obtaining the declaratory relief as requested. (A414.)

*Second*, the transaction has been consummated, and BANA and the other syndicate lenders have made available to Amylin \$140 million in reliance on the terms of the Credit Agreement, including the change of control provision.

*Third*, Plaintiff has not identified any especially significant policy concerns. The notion that the change of control provision is a draconian restraint on stockholder voting has proven illusory. BANA and the other syndicate lenders under the Credit Agreement waived the provision for 2009 for a modest sum. Nor is there evidence in the record that similar provisions have impaired stockholders in the past.

*Fourth*, BANA and the other syndicate lenders have fulfilled their contractual obligations and have not been accused of any wrongdoing. Their rights – which they bargained for at arm's-length and relied upon – certainly deserve protection. There is no dispute that BANA had no entrenchment or improper motive and did not collude with Amylin. There is no dispute that BANA's motive in insisting on change of control rights was to protect itself against the credit risk associated with a change of leadership at Amylin. (*See supra* at 10-11.) The fact that BANA waived the right for a reasonable modification of the loan's pricing demonstrates further that its motives were legitimate and that it sought to exercise its remedies judiciously.

Application of the four *Ace* factors demonstrates that Plaintiff is not entitled to disrupt BANA's contractual rights. Furthermore, Delaware law does not require contracting parties to conduct due diligence of each other's fiduciary conduct and does not penalize them for failing to do so. This issue was addressed most recently in the *Hexion* case, where the Court of Chancery explained the rationale for not penalizing a party for a breach of fiduciary duty by the board of the company with which it contracted:

In the absence of such a rule, third parties would negotiate business dealings with a corporation at their peril. Because whether a particular act by a board constitutes a breach of fiduciary duty is highly context specific, such third-parties would have to undertake extensive due diligence in order to assure themselves that the board had not breached a duty in authorizing the transaction. The rule requiring actual knowledge that the transaction would constitute a breach removes the friction and facilitates the commercial interaction of corporate entities.

*Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 748 (Del. Ch. 2008); see also *L A Partners, L.P. v. Allegis Corp.*, 1987 Del. Ch. LEXIS 501 (Del. Ch.). It is difficult to imagine a fact pattern more befitting this rule than the one presented here. The essence of the purported breach of fiduciary duty is reliance by Amylin's board on the Company's executives and lawyers with respect to the non-monetary terms of the Credit Agreement, such as the change of control provision. (Pl. Br. at 32.) These discussions necessarily occurred outside of BANA's view and likely were attorney-client privileged. What BANA did know was that Amylin's counsel's attempted to modify the change of control provision. (See *supra* at 10-11.) Thus, far from suggesting obliviousness to the change of control provision, BANA's interactions with Amylin actually confirmed to BANA that the Company was focused on the provision through appropriate agents.

Plaintiff's demand that the Court invalidate BANA's contract rights also contravenes basic principles of agency law. There is no allegation – let alone evidence – that BANA had any reason to doubt the delegated authority of those who negotiated on behalf of the board. Nor was there a reason to doubt that the board would appropriately consider the transaction. Where, as here, the agents of the corporation had apparent authority, the corporation is bound by the agents' conduct. *Int'l. Boiler Works Co. v. Gen. Waterworks Corp.*, 372 A.2d 176, 177 (Del. 1977).

**b. There Is No Claim of Entrenchment  
Motive, Self-dealing, Bad Faith, Breach of  
the Duty of Loyalty, or Collusion**

In its partial settlement with Amylin, Plaintiff agreed to “remove [from this case] any allegations of lack of good faith, bad faith, disloyalty, entrenchment motivation or intentional interference with voting rights . . . .” (D664.) Discovery confirmed that such allegations would be meritless in all events. The change of control clause in the Credit Agreement is in BANA’s model form agreement, and BANA proposed the provision to Amylin. (*See supra* at 10-11.) Amylin unsuccessfully sought to modify the provision through arm’s-length negotiation. (*Id.*) These facts sharply distinguish this case from the cases upon which Plaintiff relies in its argument that the contract provision at issue should be invalidated. Cases addressing take-over defenses, stockholder vote coercion, management entrenchment, allegedly over-reaching deal protections against rival bidders, and the like (*see generally* Pl. Br. at 27-29) largely share the common feature of entrenchment motive or a desire to limit the conduct of others.<sup>9</sup>

**c. Plaintiff’s Assertion That BANA Did Not  
Need the Change of Control Provision is  
No Basis to Invalidate the Provision**

Plaintiff asserts that the change of control provision is of no value to BANA and the other lenders under the Credit Agreement. (Pl. Br. at 11-12.) This contention appears to be based principally on Plaintiff’s claim that the minimum cash balance covenant fully protects BANA’s ability to be repaid and that, as a result, no further protections or rights are needed. (*Id.*) Apart from being based on an incorrect premise – that the provision has no value to BANA – Plaintiff’s request that the Court invalidate the change of control provision because BANA supposedly does not need it finds no support in the law.

Plaintiff cites no case suggesting that a court can or should invalidate a contractual provision freely entered into by sophisticated commercial parties on the ground that the provision provides one party with a better bargain or more rights than it needs. Indeed, the opposite is true. An otherwise valid contract is enforceable “whether or not the bargain was a bad one [for one party]. The exercise of bad business judgment . . . would not render such a contract illegal.” *Del-*

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<sup>9</sup> This Court has recognized in other contexts that harsh equitable remedies, such as Plaintiff seeks here, are inappropriate in cases involving an alleged breach of the duty of care as distinguished from cases involving allegedly disloyal conduct. *See Strassburger v. Earley*, 752 A.2d 557, 581 (Del. Ch. 2000) (citing *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134 (Del. Ch. 1994)).

*collo Elec., Inc. v. Jack Eckerd Drug Co. of Del.*, 1988 Del. Super. LEXIS 208, at \*8 (Del. Super. Ct. June 28, 1988). It is beyond debate that a party is “entitled to bargain to obtain the best price for itself” even where the corporation on the other side of the contract obtained a “price that was unfairly low from the standpoint of [the other corporation’s] stockholders.” *McGowan v. Ferro*, 2002 Del. Ch. LEXIS 3, at \*16-17 (Del. Ch. Jan. 11, 2002); see also *In re Frederick’s of Hollywood, Inc. S’Holders Litig.*, 1998 Del. Ch. LEXIS 111, at \*21 (Del. Ch. July 9, 1998).<sup>10</sup>

Accordingly, there is no basis to invalidate BANA’s contractual remedies under the Credit Agreement. There is no claim that BANA was complicit in any wrongdoing or effort to coerce or limit voting rights. The undisputed record is that it bargained for its rights as a legitimate credit protection and even agreed to waive those rights when a potential for change of control actually arose. That is not a fact pattern that can or should support an exercise of equitable power to override a third party’s contract rights.

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<sup>10</sup> Plaintiff also claims that, as a general matter, “proxy puts” have no monetary value to creditors. (Pl. Br. at 7.) As support for that proposition, Plaintiff largely relies on its expert, Professor Michael Roberts, (Pl. Br. at 7-8,) but Professor Roberts’ testimony was equivocal on the subject. He rested his opinion principally on two studies using data from the late 1980s, neither of which he conducted himself, and one of which showed that borrowers received reduced interest rates by agreeing to change of control provisions (the study did not evaluate the reduction associated with proxy puts specifically). (A608-612.) In contrast, BANA’s expert, Charles Fox, testified unequivocally that proxy puts have significant value to creditors, a position supported by the BANA banker and BANA outside counsel responsible for the negotiation of the Credit Agreement. While Mr. Fox, who has negotiated hundreds of credit agreements whereas Professor Roberts has negotiated none, did not quantify the specific interest rate reduction associated with proxy puts, he clearly stated that such protections affect the economic terms of credit agreements. (A522; D885.) He further explained that, in real world negotiations, borrowers and creditors do not assign theoretical monetary values to individual contractual provisions such as a change of control provision. (A523.)

**CONCLUSION**

For the foregoing reasons, the undersigned counsel respectfully requests that this Court affirm the decision of the Court of Chancery in the manner set forth above.

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**CERTIFICATE OF SERVICE**

I, Emily V. Burton, Esquire, do hereby certify that on July 23, 2009, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below:

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