IN THE COURT OF CHANCERY IN THE STATE OF DELAWARE

SAN ANTONIO FIRE & POLICE PENSION FUND, on behalf of itself and all others similarly situated, Plaintiff, v. AMYLIN PHARMACEUTICALS, INC., BANK OF AMERICA, N.A., BANK OF NEW YORK TRUST COMPANY, N.A., DANIEL M. BRADBURY, JOSEPH C. COOK, Jr., ADRIAN ADAMS, STEVEN R. ALTMAN, TERESA BECK, KARIN EASTHAM, JAMES R. GAVIN, GINGER L. GRAHAM, HOWARD E. GREENE, Jr., JAY S. SKYLER, JOSEPH P. SULLIVAN, and JAMES N. WILSON, Defendants. ______________________________ AMYLIN PHARMACEUTICALS, INC. Cross-Claimant v. THE BANK OF NEW YORK TRUST COMPANY, N.A., as Trustee for Indenture Dated as of June 8, 2007 Cross-Claim Defendant	)	C.A. No. 4446-VCL REDACTED VERSION Dated: April 30, 2009

PLAINTIFF'S OPENING PRE-TRIAL BRIEF

OF COUNSEL:

Mark Lebovitch
Samuel J. Lieberman
Amy Miller
BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400

Frank Burney
MARTIN & DROUGHT, P.C.
Martin & Drought, P.C.
300 Convent #2500
San Antonio, Texas 78205
(210) 220-1339

DATED: April 25, 2009

BOUCHARD MARGULES &
FRIEDLANDER, P.A.

Andre G. Bouchard (Bar No. 2504)
Joel Friedlander (Bar No. 3163)
222 Delaware Avenue, Suite 1400
Wilmington, Delaware 19801
(302) 573-3500

Counsel for Plaintiff
San Antonio Fire & Police Pension Fund
as to Counts I and II

ABRAMS & LASTER LLP

J. Travis Laster (Bar No. 3514)
T. Brad Davey (Bar No. 5094)
200 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Counsel for Plaintiff as to Count III

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 5

ARGUMENT 19

I. THE AMYLIN BOARD BREACHED ITS DUTY OF CARE 19

II. INVALIDATION OF THE PROXY PUTS IS THE APPROPRIATE REMEDY 24

CONCLUSION 28

TABLE OF AUTHORITIES

CASE **PAGE(s)**

ACE Ltd. v. Capital Re Corp.,
747 A.2d 95 (Del. Ch. 1999)....25

Albert v. Alex. Brown Management Services, Inc.,
2005 Del. Ch. LEXIS 133 (Aug. 26, 2005)....19

Aronson v. Lewis,
473 A.2d 805 (Del. 1984)....19

Brehm v. Eisner,
746 A.2d 244 (Del. 2000)....2, 19, 22

Hanson Trust PLC v. ML SCM Acquisition, Inc.,
781 F.2d 264 (2d Cir. 1986)....25

Hexion Speciality Chemicals, Inc. v. Huntsman Corp.,
965 A.2d 715 (Del. Ch. 2008)....19

La. Muni. Police Employees' Retirement Sys. v. Crawford,
918 A.2d 1172 (Del. Ch. 2007)....22

Levco Alternative Fund Ltd. v. Reader's Digest Ass'n,
803 A.2d 428, 2002 Del. LEXIS 488 (Aug. 13, 2002)....21, 23

Malpiede v. Townson,
780 A.2d 1075 (Del. 2001)....24

Omnicare, Inc. v. NCS Health Care, Inc.,
818 A.2d 914 (Del. 2003)....24, 25

Paramount Communications, Inc. v. QVC Network Inc.,
637 A.2d 34, 51 (Del. 1994)....24, 25

Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,
506 A.2d 173 (Del. 1986)....25

Sample v. Morgan,
914 A.2d 647 (Del. Ch. 2007)....24

Strassburger v. Earley,
752 A.2d 557 (Del. Ch. 2000)....23, 24

Sutton Holding Corp. v. DeSoto, Inc.,
1991 Del. Ch. LEXIS 85 (May 14, 1991)....23

Unocal Corp. v. Mesa Petroleum
493 A.2d 946 (Del. 1985)....26

In re Walt Disney Co. Deriv. Litig.,
907 A.2d 693 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006)....19, 23, 24

OTHER AUTHORITIES

Restatement (Second) of Contracts § 193 (1981)....25

E. Norman Veasey et al., Delaware Supports Directors With a Three-Legged Stool of Limited Liability, Indemnification, and Insurance,
42 Bus. Law. 399, 403 (1987)....24

Paul L. Regan, *Great Expectations? A Contract Law Analysis for Preclusive Corporate Lock-Ups*, 21 Cardozo L. Rev. 1 (1999)....26

PRELIMINARY STATEMENT

The board of directors of Amylin Pharmaceuticals, Inc. ("Amylin" or the "Company") unknowingly gave creditors powerful debt acceleration rights that effectively prevent shareholders from seeking to unseat a majority of the board (each such right, a "Proxy Put"). The Proxy Puts have trivial if any value to the creditors, yet they strike at the core of shareholder franchise rights. The Proxy Puts were not a product of arm's-length bargaining or informed consideration of alternatives. Indeed, it is hard to believe they ever could be. But even if an informed board facing unique circumstances can permissibly bargain away shareholder voting rights, that did not happen here. On the present facts, the Proxy Puts cannot be sustained.

At the end of January 2009, two significant shareholders of Amylin each notified the Company of their intention to nominate a short slate of five persons to Amylin's 12-person board of directors at the upcoming annual meeting of shareholders. Observers soon realized that election of just six shareholder nominees – no matter how qualified they may be – could bring about the sudden, total elimination of shareholder value. In the words of a Morgan Stanley analyst:

> Nomination of two competing board slates creates some risk that the "fundamental change" clause in bondholder agreements could be reached, which would put extraordinary pressure on the equity (likely wiping it out). . . . [T]here is a chance that a majority of directors could be replaced, which would allow bondholders to put their bonds on the company at par (currently trade meaningfully below par). With $775 mn in debt, $810 mn in YE cash, and a 2009 burn of over >$100 mn, equity investors need to carefully monitor progression of these slates, as they have the potential to create significant risk and transfer full ownership of the company to bondholders. (Foletta Ex. 1) (PX 1)

It was only through the internal distribution at Amylin of the February 2, 2009 Morgan Stanley analyst report that Amylin's senior executives and directors learned of the existence of a Proxy Put embedded in the Indenture for the Company's convertible notes issued in June 2007

for a face amount of $575 million (the "2007 Indenture"). The Company's Chief Executive Officer and Chief Financial Officer both confirmed under oath that prior to February 2, 2009, they had no clue about the Proxy Put.

Discovery revealed that the supposed negotiations over the 2007 Indenture was conducted between Amylin's investment bankers on the one side and Amylin's outside counsel on the other side. Both sides actually reported to Amylin's management and had every incentive to include in the Indenture entrenching anti-takeover provisions that would benefit Amylin's incumbent directors and managers. The original draft proffered by Amylin's investment bankers included the Proxy Put. Amylin's counsel did not attempt to eliminate it.

No Amylin advisor told Amylin's senior executives or directors what they had done. Amylin's financial advisors did not mention the Proxy Put when summarizing the terms of the notes for the Board's Finance Committee, and Amylin's legal advisors stayed mum. The Finance Committee never even saw a term sheet.

There is no dispute over the materiality of the undisclosed information. Amylin CEO Daniel Bradbury testified:

> Q: To the extent that a convertible note would impair the possibility of a change in the majority control of the board that's not accompanied by a corporate acquisition, is that something that you would have wanted to know?
>
> A: Yes.

(Bradbury 43-44) Given the materiality of the proxy-contest negating power of a Proxy Put in a $575 million indenture, Bradbury and the Board cannot avoid invalidation of the Proxy Puts by relying on the "lack of advice" from their advisors on the subject. *Brehm v. Eisner*, 746 A.2d 244, 262 (Del. 2000).

The negotiations and non-disclosures relating to the Company's December 2007 Credit Agreement for a senior secured $125 million term loan and $15 million revolving credit facility (the "Credit Agreement"), and its embedded Proxy Put, are just as troubling. For reasons that are hardly apparent, Amylin thought it desirable to borrow up to $140 million on terms that required Amylin to effectively lock up $280 million. Amylin negotiated for the right to set aside most of the standard negative covenants in the Credit Agreement so long as Amylin maintained a minimum unrestricted cash balance of $400 million. Amylin's promise to keep vast sums available that far exceed the size of the loan rendered the loan risk-free to the lenders. Yet Amylin never asked Bank of America, N.A. ("BOA") to set aside the entirety of the Proxy Put provision! The Board's Finance Committee approved the Credit Agreement by means of a unanimous written consent, without any disclosure to the directors of the Proxy Put or other change-of-control put rights.

At trial, Plaintiff San Antonio Fire & Police Pension Fund will call Michael Roberts, a tenured professor at The Wharton School and a leading authority on debt covenants. Professor Roberts will testify that "poison put" debt instruments arose in the 1980s as an antitakeover device, and that their antitakeover design is reflected in the change-of-control put rights contained in the 2007 Indenture. Professor Roberts will further testify that academic research shows that bondholders forego little yield in exchange for poison put protection. Professor Roberts will opine that only a small fraction, if any, of the yield differential from a poison put is attributable to a Proxy Put component. Professor Roberts will further opine that the Proxy Put in the Credit Agreement is of no value to the Credit Agreement lenders, given the full protection they already enjoy from the minimum cash balance covenant.

Plaintiff previously moved for partial summary judgment on two grounds: (i) the Board can validly disable the Proxy Put in the 2007 Indenture by approving the shareholder nominees (which it has now done, conditioned only on resolution of the legal question); and (ii) any Proxy Put that cannot be disabled is a facially invalid financial penalty on the stockholders' inviolable right to elect a full slate of fully empowered directors at an annual meeting. In this pre-trial brief, we present the factual case for the invalidation of the Poison Puts, both in further support of their invalidity as a matter of law, and also because of the lack of due care exercised by Amylin's directors, as well as the lack of vested rights in the Proxy Puts by either the noteholders or the bank lenders.[1]

[1] Solely for purposes of pursuing the duty of care claim, plaintiff assumes *arguendo* that the 2007 Indenture does not allow a Board to disable a Proxy Put by approving a dissident slate of shareholder nominees in a proxy contest, and that the Proxy Put is not facially invalid under Delaware law. If the Board is entitled to approve a dissident slate, there is no need to reach the question whether it is a breach of the duty of care to unknowingly adopt a Proxy Put that can subsequently be disabled. Further, if the Court agrees that the Proxy Put in the Credit Agreement is invalid as a matter of law, it need not address the duty of care issues.

STATEMENT OF FACTS

A. Amylin's Financial and Strategic Position in May 2007

In May 2007, CEO Dan Bradbury and Amylin management prepared materials for the Board of Directors and the Finance Committee relating to Amylin's financing needs and strategic position.

REDACTED

REDACTED

Amylin's lead underwriters doubled as Amylin financial advisors. Danbury testified, "Goldman Sachs and Morgan Stanley provided a review of the credit markets for us and they provided us their thoughts with regards to what would or not be possible with regards to different forms of financial transactions that we could undertake." (Bradbury 32-33) Goldman Sachs and Morgan Stanley also provided Amylin "on a routine basis their thoughts with regards to strategic options for the company." (Bradbury 33; *see also* Foletta 40-41)

B. Negotiation and Approval of the 2007 Indenture

Amylin had issued convertible notes in 2003 and 2004 that did not include a Proxy Put. (Foletta Ex. 3 § 13.4(2); Lebovitch Decl. Ex. E at 5) (PX 4; PX 5) Amylin used the same outside counsel in 2007 as in 2004 – Cooley Godward – but the 2007 Indenture was based on a different form that included a Proxy Put, and Cooley Godward never advocated to eliminate it. (Foletta 33-34)

On June 1, 2007, counsel for Goldman Sachs and Morgan Stanley circulated a first draft of the description of the notes. It included a Proxy Put. Holders of the notes may demand immediate repayment of the notes at par upon a "fundamental change," which is deemed to occur "any time that our 'continuing directors' (as defined below) do not constitute a majority of our

board of directors." (Foletta Ex. 10 at AMLN0211-12) (PX 6) "Continuing directors" is defined to mean:

> (i) individuals who on the date of original issuance of the notes constituted our board of directors and (ii) any new directors whose election to our Board of Directors or whose nomination for election by our stockholders was approved by at least a majority of our directors then still in office (or a duly constituted committee thereof) either who were directors on the date of original issuance of the notes or whose election or nomination for election was previously so approved.

(*Id.* at AMLN0212)

The afternoon of June 1, Amylin's Finance Committee, acting as the Pricing Committee, met to discuss the terms of the offering. (Foletta Ex. 9) (PX 7) There was no discussion of the Proxy Put at that meeting or at any other meeting in 2007. (Foletta 11-12, 25-26, 55-57; Bradbury 17-18)

On June 2, 2007, Cooley Godward circulated a markup of the description of the notes. (Foletta Ex. 11) (PX 8) The significant changes to the "fundamental change" triggers were to eliminate a put right for stock-for-stock transactions in which Amylin stockholders retained control – a change enhancing the flexibility of the incumbent directors. (*Id.* at AMLN0225, 245, 248, 249)

On June 4, 2007, representatives of Goldman Sachs, Morgan Stanley attended a meeting of the Pricing Committee and gave oral presentations about the proposed offering. (Foletta Ex. 12) (PX 9) Nothing was said about the Proxy Put. (Foletta 66) No written materials were distributed at the meeting, even though the complete offering circular had been drafted. (Foletta 65-66; Foletta Ex. 14) (PX 10) Nevertheless, the Pricing Committee approved the notes on the terms set forth in the offering circular. (Foletta Ex. 12 at AMLN011325-26) (PX 9) The 2007 Indenture was drafted and executed shortly thereafter. (Petta Ex. 4) (PX 11)

The offering circular makes clear that the notes, and their change-of-control triggers, were not designed to shield note holders from events that can lead to credit deterioration:

> The indenture governing the notes does not:
>
> - require us to maintain any financial ratios or specific levels of net worth, revenues, income, cash flows or liquidity and, accordingly, does not protect holders of the notes in the event that we experience significant adverse changes in our financial condition or results of operations;
> - limit our subsidiaries' ability to incur secured indebtedness that is equal in right of payment to the notes;
> - limit our ability to incur secured indebtedness or indebtedness that is equal in right of payment of the notes;
> - restrict our subsidiaries' ability to issue securities that would be senior to the common stock of our subsidiaries held by us;
> - restrict our ability to repurchase our securities;
> - restrict our ability to pledge our assets or those of our subsidiaries; or
> - restrict our ability to make investments or to pay dividends or make other payments in respect of our common stock or other securities ranking junior to the notes.
>
> Furthermore, ***the indenture governing the notes contains only limited protections in the event of a change in control and similar transactions.*** We could engage in many types of transactions, such as acquisitions, refinancings or recapitalizations, that could substantially affect our capital structure and the value of the notes and our common stock but may not constitute a fundamental change that permits holders to require us to repurchase their notes. ***For these reasons, you should not consider the covenants in the indenture or the repurchase features of the notes as a significant factor in evaluating whether to invest in the notes.***

(Foletta Ex. 14 at AMLN05733 (emphasis added)) (PX 10)

C. Negotiation and Approval of the Credit Agreement

In the fall of 2007, Amylin continued a process that had begun in 2006 of reviewing proposals for a syndicated credit facility.

REDACTED

The minimum cash balance covenant in the proposal eventually became Section 6.18 of the Credit Agreement, which reads as follows:

> 6.18 Cash and Cash Equivalents. Maintain, at all times, the Minimum Unrestricted Cash Balance [105% of the outstanding loan], provided, that if for any reason, the aggregate amount of Unrestricted Cash at any time shall be less than $280,000,000 at any other time (an "Activation Event"), the Borrowers shall notify the Administrative Agent shall promptly upon receipt of such notice shall give instructions or issue order under each Account Control Agreement.

(Barnes Ex. 3 § 6.18) (PX 13) In other words, Section 6.18 gives BOA "control" over Amylin bank accounts if the cash balance goes below $280 million – twice the amount of the total borrowings. (Barnes 60)

REDACTED

That large minimum cash balance requirement is itself sufficient to protect the bank lenders, as Professor Roberts will testify. It gives rise to the question why Amylin did not even try to negotiate away the entirety of the Proxy Put.[2]

REDACTED

[2] The $280 million minimum cash balance requirement also raises the question of what legitimate financing purpose is served by borrowing $140 million on terms that require Amylin to tie up at least $280 million. Bradbury testifies that "[a]t the time it provided us another form of financial flexibility." (Bradbury 83) It appears to merely allow Amylin to advertise that it has additional cash on its balance sheet, even though at least $280 million is unavailable for use so long as the Credit Agreement remains in place.

REDACTED

On November 20, 2007, Amylin circulated a draft of the Credit Agreement, in which Amylin struck only the parenthetical from subpart (b) of the definition of "Change of Control," so that the Proxy Put in the Credit Agreement would match the Proxy Put in the 2007 Indenture. (Cuddeback Ex. 5 at AMLN03831) (PX 17) Amylin's counsel's only justification for the edit was to conform to the 2007 Indenture. They never raised shareholder voting rights as a concern. (Barnes 65-66, 68, 82, 86, 88)

Amylin was far more vigorous in removing operational covenants from the Credit Agreement. On December 3, 2007, Amylin presented BOA with a summary of discussion points concerning the Credit Agreement, the "primary topic" of which was a proposed "mechanism that sets aside most of the negative covenants and other provisions that impact Amylin's operational flexibility. However, the provisions would only be set aside / 'fall away' if the Company maintained cash above a certain threshold. The threshold would be in excess of the minimum cash covenant." (Cuddeback Ex. 6 at BANA01594; *see* Cuddeback Ex. 7) (PX 18; PX 19)

What emerged from Amylin's request was the inclusion in the Credit Agreement of a $400 million cash balance threshold. (*See* Barnes Ex. 3 at 8 ("Covenant Triggering Event")) (PX

13) Numerous covenants would fall away and be inapplicable, so long as Amylin maintained $400 million in cash.

Amylin's December 3 memo did not discuss amending or deleting the Proxy Put (Cuddeback Ex. 7 at AMLN03817) (PX 19), though Amylin's markup from that same day sought the deletion of the parenthetical language. (Cuddeback Ex. 8 at AMLN03580) (PX 20)

REDACTED

Amylin's counsel made no substantive rejoinder and backed down. (Cuddeback 57; Barnes 88)

Amylin never responded that BOA had no need to protect itself with any change-of-control put rights, much less a put right that directly interfered with a potential proxy contest. BOA was fully protected by the $280 million minimum cash balance covenant. It would remain in place regardless of any change in Board composition, Board strategy or management turnover. Moreover, the Proxy Put does not serve the only proffered justification of the provision – trust in Amylin's current management and business strategy.

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REDACTED

The members of the Finance Committee of the Board of Directors of Amylin barely knew any of the most basic terms of the Credit Agreement. They signed a Unanimous Written Consent based on an email that identified a handful of the contract terms, and made no mention of any of the change-of-control acceleration rights, much less the Proxy Put. (Cuddeback Ex. 10; Cuddeback Ex. 11) (PX 22; PX 23)

D. The Proxy Puts Frustrate the Proxy Contest

On January 29, 2009, Icahn Partners LP and affiliates ("Icahn"), an approximately 8.8% stockholder, notified the Company of its intention to nominate a slate of five directors to Amylin's 12-person Board. (Lebovitch Decl. Ex. H) (PX 24) On January 30, 2009, Eastbourne Capital Management, L.L.C. ("Eastbourne"), a long-term 12.5% shareholder, notified the Company of its intention to nominate its own slate of five directors. (Lebovitch Decl., Ex. I) (PX 25) Thus, while Icahn and Eastbourne were each careful to nominate a short slate of directors that would not trigger the Proxy Puts, election of a sufficient number from their combined slates would do so.

Triggering the Proxy Puts would devastate shareholder value. As of December 31, 2008, Amylin had approximately $816.8 million in cash, cash equivalents and short term investments. (Lebovitch Decl. Ex. A at 59) (PX 26) Amylin acknowledges that triggering of the Proxy Puts could result in the acceleration of approximately $900 million of indebtedness: the $575 million 2007 notes; the $200 million 2004 notes; and the approximately $125 million in indebtedness

under the 2007 Credit Agreement. (*Id.* at 37, 39-40) Amylin warned shareholders in its most recent Form 10-K: "We may not have sufficient cash funds to redeem the notes upon a designated event or repay the Term Loan upon an event of default." (Id. at 37)

The 2007 Notes recently traded at approximately 55 cents on the dollar (Lebovitch Decl. Ex. C) (PX 27), and the fair value of the 2007 Notes was recorded at $260.4 million as of December 31, 2008. (Lebovitch Decl. Ex. A at F-26) (PX 26) The 2004 Notes recently traded at approximately 83 cents on the dollar (Lebovitch Decl. Ex. F) (PX 28), and the fair value of the 2004 Notes was $150 million as of December 31, 2008. (Lebovitch Decl. Ex. A at F-25) (PX 26) Forced repurchase of the 2007 Notes and the 2004 Notes at par would cost Amylin shareholders hundreds of millions of dollars in excess of fair value. A poll tax of that magnitude guarantees that if the Proxy Puts are not invalidated stockholders will not vote to elect any Icahn or Eastbourne nominees, regardless of their views about the relative merits of the nominees.

As far as the Credit Agreement is concerned, public stockholders are under the impression that Amylin would be harmed if forced to repay $125 million to cash. RiskMetrics Group, Inc., the parent of Institutional Shareholder Inc., issued an advisory note on April 15, 2009, stating that not only would redemption of the notes at par be a "potentially devastating outcome for AMLN," but also that "AMLN shareholders will face threat of immediate repayment of at least the up to $125 million term loan and $15 million revolving credit facility – possibly enough of a residual threat to tip the scales towards incumbents in upcoming director elections." (Amylin Pharmacetuicals Inc. (AMLN): "Poison Put" Litigation, Risk Metrics Group, April 15, 2009) (PX 29)

Icahn and Eastbourne both recognize the danger of electing a majority of new directors. Eastbourne expressed concern that shareholder might not vote for either slate of shareholder

nominees, due to the uncertainty that a majority of new directors might be elected. (Lebovitch Decl. Ex. J at 2) (PX 30) On April 23, 2009, Icahn filed preliminary proxy materials stating that Icahn was seeking the election of only three of his nominees, as well as two Eastbourne nominees. (Icahn Schedule 14A, April 23, 2009) (PX 31) On April 24, 2009, Eastbourne filed preliminary proxy materials stating:

> **Eastbourne does 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.**
>
> Eastbourne intends to make a final determination whether and to what extent to seek authority to vote for any Icahn Nominees **in light of future developments including further actions by the Company or by Icahn, views expressed by stockholders or by proxy advisory services in meetings we expect to have and developments in the Delaware lawsuit described below....**

(Eastbourne Schedule 14A, April 24, 2009) (PX 32) (emphasis in original))

E. BOA Seeks an Unmerited Windfall in Exchange for a Waiver

On April 1, 2009, Amylin requested that BOA either amend the definition of Change of Control in the Credit Agreement or waive the Event of Default that would be triggered by the election of six or more Eastbourne and Icahn nominees. (Barnes Ex. 13) (PX 33) Rather than simply waiving a right that has no intrinsic value, BOA is seeking to extract value from the predicament of a coerced shareholder vote. BOA formally responded on April 22, 2009, by sending Amylin a draft amendment to the Credit Agreement that would unduly enrich BOA.,

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F. The Expert Testimony of Professor Roberts

Plaintiff intends to call as an expert witness Michael Roberts, a tenured Associate Professor of Finance at the Wharton School of the University of Pennsylvania, and a leading authority on debt covenants. Professor Roberts analyzed the Proxy Puts in the 2007 Indenture and Credit Agreement provisions in light of the theoretical and empirical literature covering debt covenants. (Expert Report of Michael R. Roberts, April 24, 2009) (PX 35) Professor Roberts draws four conclusions, which are summarized below:

1. The poison put in the 2007 Indenture reflects the anti-takeover design of early poison puts, by providing some degree of protection in the event of an acquisition of the Company, but no protection from leveraged restructurings or credit deterioration.

2. Poison put covenants have been found to have a marginal impact on reducing the interest rate demanded by creditors (approximately 24 basis points in 1988-1989, at a time when industrial bonds had an average yield of 10.23%).

3. The Proxy Put component of a poison put has little, if any, value to bondholders – and only a small fraction of the yield difference attributable to poison puts. Amylin note holders should prefer the invalidation of the Proxy Put in the 2007 Indenture since it may prevent the implementation of strategies or transactions that should be beneficial to creditors, such as Icahn's urging of a sale of the Company to Eli Lilly and Co. and a 30% cost cut.

4. The Proxy Put in the Credit Agreement provides no incremental value to the banks, given that they are fully protected by the covenant stipulating that Amylin maintain at all times a minimum cash balance of $280 million.

G. BONY's Corporate Representative Agrees With Plaintiff's, Amylin's and BOA's Interpretation of the 2007 Indenture

The corporate representative of the Indenture Trustee, The Bank of New York Trust Company, N.A. ("BONY"), who had reviewed multiple drafts of the 2007 Indenture and whose job it was to understand all of its terms (Petta 41), testified that BONY has no basis beyond reading the plain language of the "Fundamental Change" provision to interpret its meaning. (*Id.* 50-51) She also admitted that Proxy Put is properly read as allowing the Board to approve the nomination of a shareholder designee that the Board is not seeking to elect:

> Q. So the little two ii's is actually dealing with different situations; right?
>
> A. Mmh-hmm.
>
> Q. One is where the directors approve the election of a new director so that that person -- that individual is a continuing director; right?
>
> A. Right.
>
> Q. Okay. And the alternative is where the company -- sorry -- where the original directors approve the nomination for director by the shareholders so that that person then can become a continuing director.
>
> A. Right.
>
> Q. And there's a difference between approving someone's election and approving someone's nomination, and that's the distinction that this provision is trying to draw; right?
>
> A. Yes.

(Petta 65–66) This distinction means that the Board is allowed to "approve" a candidate's nomination without endorsing that candidate's election, as is this case here. To the extent the Court looks to the record at all on this score, the admission of BONY's chosen corporate representative is dispositive.

BOA's expert, Charles M. Fox, submitted an expert report in which he agrees that the language of the Proxy Put in the 2007 Indenture (which does not contain a parenthetical clause found in the Credit Agreement Proxy Put specifically directed to a proxy contest) allows Amylin's Board to approve shareholder nominees in a contested election:

> The logic of including this language in the change of control provision [the parenthetical phrase found in the Credit Agreement Proxy Put], 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 not to avoid giving lenders the type of negotiating leverage that a change of control would trigger.

(Expert Report of Charles M. Fox, April 24, 2009) (PX 36) While Plaintiff disputes the propriety of giving lenders "negotiating leverage" to extract corporate value as a price for shareholders pursuing voting rights, Plaintiff agrees that the different words of the two Proxy Puts have a meaningful difference in interpretation.

ARGUMENT

In the event that the Court does not accept Plaintiff's interpretation of the Proxy Put in the 2007 Indenture, or accept Plaintiff's argument that a Proxy Put that cannot be disabled is facially violative of Delaware law (arguments made in Plaintiff's motion for partial summary judgment and not repeated here), Plaintiff seeks invalidation of the Proxy Puts based on the lack of due care exercised by the Board in approving the Proxy Puts here.

I. THE AMYLIN BOARD BREACHED ITS DUTY OF CARE

"[I]n making business decisions, directors must consider all material information reasonably available[.]" *Brehm v. Eisner*, 746 A.2d 244, 259 (Del. 2000). "Director liability for breaching the duty of care 'is predicated upon concepts of gross negligence.' A court faced with an allegation of lack of due care should look for evidence of whether a board has acted in a deliberate and knowledgeable way in identifying and exploring alternatives." *Albert v. Alex. Brown Management Services, Inc.*, 2005 Del. Ch. LEXIS 133, *13 (Aug. 26, 2005) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). (Exhibit A attached hereto) A plaintiff meets the gross negligence standard by showing that directors were "recklessly uninformed," *id.* at *14 (internal quotation omitted), or with "reckless indifference to or a deliberate disregard of the whole body of stockholders[.]" *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 750 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) (internal quotation omitted). "[N]o showing of knowledge is required." *Hexion Speciality Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715, 747 n.88 (Del. Ch. 2008).

The fiduciary duty question raised by this case is whether directors of a Delaware corporation can act with due care by unknowingly approving a major debt financing without any idea that the documents contain a debt acceleration provision triggered by a successful

shareholder-led proxy fight, which provision can render it practically impossible or economically irrational for stockholders to vote to replace a majority of the board of directors at a single annual meeting or over a series of annual meetings. Here, the directors were not only unaware of the Proxy Puts, their advisers failed to pursue the obvious alternative of negotiating for a debt instrument that did not contain a Proxy Put.

The factual record is clear. Amylin's CEO, Daniel Bradbury, and its CFO, Mark Foletta, both freely admitted that they had no idea about the existence of the Proxy Puts until they read on February 2, 2009, that election of a majority of new directors at the upcoming annual meeting could bring about an economic catastrophe for stockholders. (Bradbury 17-18; Foletta 10; Foletta Ex. 1) (PX 1) By extension, no outside director knew of the Proxy Puts.

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These were not circumstances in which the Board could conceivably plow ahead with a transaction without trying to negotiate away a Proxy Put, much less without considering the implications of a Proxy Put on the future finances of the Company, or on the franchise rights of stockholders. These were circumstances in which any board informed of the Proxy Put would have recognized it had the negotiating leverage and the obligation to eliminate the provision.

Similarly, in December 2007, the only written communication to the members of the Finance Committee about the Credit Agreement was an email seeking their written consent.

(Cuddebank Ex. 10) (PX 22) That email hardly betrays any urgency about the need to borrow up to $140 million on terms with the following "Key Covenants":

> Maintenance of $280 million in cash (restrictions on cash/security accounts become effective below this level); $400 million covenant triggering event while cash is above $400 million, most negative and affirmative covenants are not applicable); Event of Default if cash is lower than $147 million.

(*Id.*) If directors think it financially sensible to lock up $400 million as a condition to borrowing a fraction of that amount, they at least need to know about and consider why another string is attached to the loan – that it immediately accelerates if a majority of new directors are elected or appointed in connection with a threatened or actual proxy contest.

Nor is there any question that a viable alternative existed, which could have been pursued, explored and evaluated. Amylin's lawyers never sought to negotiate away the Proxy Puts. Amylin's lead independent director acknowledged in a letter to shareholders on April 2, 2009, that out of 26 comparable biotechnology companies with convertible securities, 11 of them did not have Proxy Puts in their convertible securities. (Amylin Press Release, April 12, 2009) (PX 39) Amylin itself had issued convertible bonds in 2003 and 2004 that did not contain Proxy Puts. (Foletta Ex. 3 § 13.4(2); Lebovitch Decl. Ex. E at 5) (PX 4; PX 5) As for the Credit Agreement, BOA acknowledges that the Change of Control definition in its Model Form was subject to negotiation (Barnes 88), and that the $400 million cash balance requirement already insulated BOA from virtually any form of change in control risk.

It is a breach of the duty of care if directors fail to give substantial consideration to the effects of its actions on shareholders. In *Levco Alternative Fund Ltd. v. Reader's Digest Ass'n*, 803 A.2d 428, 2002 Del. LEXIS 488 (Aug. 13, 2002) (Exhibit B attached hereto), our Supreme Court issued an injunction observing: "To the extent that the directors did not secure sufficient

information concerning the effect of the recapitalization premium on the Class A shareholders, a serious question is raised concerning the discharge of their duty of care." *Id.* at *6-7. The board "never focused on the specific impact upon the Class A shareholders of [the] payment of $100 million to the Class B shareholders." *Id.* at *6. Here, the Board never focused on how obtaining debt financing could stifle future proxy contests.

The Board cannot avoid a due care violation by blaming their advisors for keeping them in the dark about the Proxy Puts, or by relying on any general statement that the debt instruments contained customary terms. In rejecting a similar defense argument that challenged deal protections that were "no more than a customary set of devices employed regularly by market participants and their lawyers," Chancellor Chandler stated, "this argument by custom fails to convince." *La. Muni. Police Employees' Retirement Sys. v. Crawford*, 918 A.2d 1172, 1181 n.10 (Del. Ch. 2007). Instead, the "court focuses upon the 'real world risks and prospects confronting [directors] when the agreed to" the challenged provisions. *Id.* Here, the Board was not even asked to address the question of what risks and prospects would result from seeking to negotiate away the Proxy Puts. No effort was made to consider the issue, no advice was rendered, and no information was evaluated by the board.

This is a prototypical situation in which a board's advisors failed to bring a critical issue to the directors' attention. As the Delaware Supreme Court explained in *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000), in a due care case when an expert has advised the board in its decision making process, directors are ***not*** fully protected if plaintiff proves that "the subject matter (in this case the cost calculation) that was material and reasonably available was so obvious that the board's failure to consider it was grossly negligent regardless of the expert's advice *or lack of advice*." *Id.* at 262 (emphasis added). This case involved lack of advice.

Here, there can be no question of the materiality of frustrating proxy contests in the event that the Company performs poorly and the value of the 2007 Notes becomes impaired. The Board received no advice on the subject, and they did not ask for, and were not even provided with, an offering circular or term sheet informing them of the existence of change-of-control put rights. The effect of that ignorance is a coerced vote. As Chandler Allen noted in *Sutton Holding Corp. v. DeSoto, Inc.*, 1991 Del. Ch. LEXIS 85, at *5 (May 14, 1991) (Exhibit C attached hereto), which dealt with continuing director provision in a pension plan that could importantly affect the outcome of an election contest, "[a]bsent quite extraordinary circumstances, in my opinion, it constitutes a fundamental offense to the dignity of this corporate office to use corporate power to seek to coerce shareholders in the exercise of the vote." *Id.* at *3. The failure to obtain material information and pertinent advice about how a contract provision works, as a matter of routine practice, cannot protect directors from a claim of coercing a shareholder vote.[3]

It is well-settled that "if the plaintiff shows that the directors breached their fiduciary duty of care . . . . the burden then shifts to the director defendants to demonstrate that the challenged act or transaction was entirely fair to the corporation and its shareholders." *In re Walt Disney*, 906 A.2d at 52. Defendants cannot show entire fairness, given their utter failure to consider the alternative of negotiating away the Proxy Puts, or to consider the foreseeable prospect of foreclosing shareholder-led proxy contests if the Company performs poorly and the 2007 Notes become impaired in value and subject to acceleration. The inclusion of the Proxy Puts weighs

[3] This case, therefore, does not raise the question whether directors can avoid liability by claiming reliance on counsel who advised that directors may authorize a Proxy Put despite its entrenchment effect. The issue here is whether the law can allow counsel to immunize their

entirely against the interests of shareholders and cannot be considered fair. *See Levco*, 2002 Del. LEXIS 488, at *6-7 (failure to consider fairness of transaction to Class A shareholders demonstrated that transaction was unfair); *Strassburger v. Earley*, 752 A.2d 557, 577 (Del. Ch. 2000) ("no fair dealing" where "the players were either indifferent, or had objectives adverse, to [the] interests [of the minority]").

II. INVALIDATION OF THE PROXY PUTS IS THE APPROPRIATE REMEDY

"The existence of an exculpation provision authorized by § 102(b)(7) does not ... eliminate a director's fiduciary duty of care, because a court may still grant injunctive relief for violations of that duty." *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 752 (Del. Ch. 2005) (citing *Malpiede v. Townson*, 780 A.2d 1075, 1095 (Del. 2001), and E. Norman Veasey et al., Delaware Supports Directors With a Three-Legged Stool of Limited Liability, Indemnification, and Insurance, 42 Bus. Law. 399, 403 (1987) (The duty of care continues to have vitality in remedial contexts as opposed to actions for personal monetary damages against directors as individuals.")), *aff'd*, 906 A.2d 27 (Del. 2006). Plaintiffs' claim that the Proxy Puts are facially violative of shareholder voting rights is a separate basis for invalidating the Proxy Puts.

A third party "cannot be [] heard to argue that it obtained vested contract rights by negotiating and obtaining contractual provisions from a board acting in violation of its fiduciary duties. *Paramount Communications, Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1994)). "If a contract with a third-party is premised upon a breach of fiduciary duty, the contract may be unenforceable on equitable grounds and the third-party can find itself lacking the rights it thought it had secured." *Sample v. Morgan*, 914 A.2d 647, 672 (Del. Ch. 2007). In *Omnicare*,

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clients from liability by not informing them of the entrenchment effect of their actions. Such a rule would be bad policy that would invite mischief.

Inc. v. NCS Health Care, Inc., 818 A.2d 914 (Del. 2003), the Court reaffirmed the rule that "the protection of [third party] contractual expectations must yield to the supervening responsibility of the directors to discharge their fiduciary duties on a continuing basis." *Id.* at 939. The Court noted that *Restatement (Second) of Contracts* § 193 (1981) provides that a "promise by a fiduciary to violate his fiduciary duty *or a promise that tends to induce such a violation is unenforceable on grounds of public policy.*" *Omnicare*, 818 A.2d at 936 n.74 (emphasis added in *Omnicare*). This line of cases does not distinguish whether the underlying breach of fiduciary duty is a breach of the duty of loyalty or a breach of the duty of care.

In *Paramount Communications*, an injunction issued where "the Paramount directors chose to wall themselves off from material information which was reasonably available." 637 A.2d at 51. In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), the Court held that the "Revlon directors had breached their duty of care." *Id.* at 175. *See also Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 283 (2d Cir. 1986) (affirming preliminary injunction based on "showing of breach of the duty of care" and absent a showing of breach of duty of loyalty).

This Court refused to enforce a "no-talk" provision in a merger agreement to prevent a board of directors from negotiating with another party for a superior transaction because otherwise the board would have breached its duty of care. *ACE Ltd. v. Capital Re Corp.*, 747 A.2d 95, 108-09 (Del. Ch. 1999). In doing so, the Court relied heavily on the factors identified in a law review article to weigh the equities of whether a third-party contract should yield to a board's exercise of fiduciary duties:

> (1) whether the [third party] knew, or should have known, of the . . . board's breach of fiduciary duty; (2) whether the . . . transaction remains pending or is already consummated at the time judicial intervention is sought; (3) whether the

> board's violation of fiduciary duty relates to policy concerns that are especially significant; and (4) whether the [third party's] reliance interest under the challenged agreement merits protection in the event the court were to declare the agreement unenforceable."

Id. at 105-06 (quoting Paul L. Regan, *Great Expectations? A Contract Law Analysis for Preclusive Corporate Lock-Ups*, 21 Cardozo L. Rev. 1, 115 (1999)). Those factors do not distinguish between underlying violations of the duty of care or the duty of loyalty. Moreover, the factors support declaratory relief in this case respecting the invalidity of the Proxy Puts.

First, Goldman Sachs and Morgan Stanley, the lead initial purchasers of the 2007 Notes, knew or should have known of the Amylin board's breach of the duty of care. After all, they were financial advisers to Amylin management and they were in the board meeting advising the Finance Committee when the notes offering was authorized without consideration of the Proxy Put. BOA had sufficient reason to know that the infringement on stockholder rights that it sought and obtained in the negotiations were not justified or appropriate. BOA was already fully protected and it was seeking to put a price tag on a shareholder vote.

Second, while both the convertible notes offering and the Credit Agreement were consummated immediately and did not remain pending, the operative contracts both contain severability provisions, which expressly contemplate that a court might subsequently invalidate a provision. As discussed in Plaintiff's summary judgment brief, severability provisions are binding under New York law.

Third, the breach of duty here relates to especially significant public policy – the vitality of the fundamental principle: "If the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out."

Unocal Corp. v. Mesa Petroleum, 493 A.2d 946, 959 (Del. 1985). The due care violation here is not a matter of routine mismanagement or corporate waste.

Fourth, invalidating the Proxy Puts has no negative effect on any reliance interests of lenders. As Professor Roberts will testify, the note holders should prefer the invalidation of the Proxy Put in the 2007 Indenture, inasmuch as Icahn's plans for Amylin, if implemented, should increase the value of the 2007 Notes. Icahn has advocated a sale of the Company, which, if it happens, would allow the note holders to put their underwater notes back to the Company at par. Icahn also advocates drastic cost cuts, a strategy that creditors generally prefer because it preserves cash. The bank lenders under the Credit Agreement should not be affected at all, as they are fully protected by the large minimum cash balance covenant. They have no reliance interest in a desire to negotiate better terms in a subsequent amendment or waiver of a covenant that otherwise provides no value.

All relevant factors thereby support invalidation of the Proxy Puts.

CONCLUSION

For all the foregoing reasons, and based on the evidence to be presented at trial, plaintiff San Antonio Fire & Police Pension Fund respectfully requests that the Court enter judgment in favor of Plaintiff and invalidate the Proxy Puts.

OF COUNSEL:

Mark Lebovitch
Jai Chandrasekhar
Samuel Lieberman
Amy Miller
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400

Frank Burney
MARTIN & DROUGHT, P.C.
Martin & Drought, P.C.
300 Convent #2500
San Antonio, Texas 78205
(210) 220-1339

BOUCHARD MARGULES & FRIEDLANDER, P.A.

/s/ Joel Friedlander
Andre G. Bouchard (Bar No. 2504)
Joel Friedlander (Bar No. 3163)
222 Delaware Avenue, Suite 1400
Wilmington, Delaware 19801
(302) 573-3500

Counsel for Plaintiff San Antonio Fire & Police Pension Fund as to Counts I and II

ABRAMS & LASTER LLP

/s/ J. Travis Laster
J. Travis Laster (Bar No. 3514)
T. Brad Davey (Bar No. 5094)
200 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Counsel for Plaintiff as to Count III

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2009, I caused a copy of the foregoing **Redacted Version of Plaintiff's Opening Pre-Trial Brief** to be served on the following counsel via Lexis Nexis File and Serve:

Peter B. Ladig, Esquire
Scott G. Wilcox, Esquire
Stephen B. Brauerman, Esquire
Bayard, P.A.
222 Delaware Avenue, Suite 900
Wilmington, DE 19801

Richard H. Morse, Esquire
Emily V. Burton, Esquire
Young Conaway Stargatt & Taylor, LLP
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, DE 19801

Raymond J. DiCamillo, Esquire
Margot F. Alicks, Esquire
Richards, Layton & Finger, P.A.
One Rodney Square
Wilmington, DE 19801

Kenneth J. Nachbar, Esquire
Morris, Nichols Arsht & Tunnell LLP
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19801

Thad J. Bracegirdle, Esquire
Wilks, Lukoff & Bracegirdle, LLC
1300 North Grant Avenue, Suite 100
Wilmington, DE 19806

/s/ Joel Friedlander
Joel Friedlander (#3163)