IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

HIGH RIVER LIMITED PARTNERSHIP, ICAHN PARTNERS MASTER FUND, L.P., ICAHN PARTNERS, L.P., VIKING GLOBAL EQUITIES LP, VGE III PORTFOLIO LTD., CR INTRINSIC INVESTMENTS, LLC, SIGMA CAPITAL ASSOCIATES, LLC, MILLENCO, L.L.C., PORTER ORLIN LLC, and ATTICUS CAPITAL LP,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2776-CC
DENNIS H. LANGER, JONATHAN S. LEFF, RODMAN W. MOORHEAD, III, WAYNE P. YETTER, TRANSKARYOTIC THERAPIES, INC., and SHIRE, Plc.,	)	
Defendants.	)	

PLAINTIFFS' MOTION TO COMPEL

Plaintiffs in the captioned matter, by and through their undersigned counsel, hereby respectfully move pursuant to Court of Chancery Rule 37 for an order compelling defendants to respond more fully to the discovery requests served upon them in April 2007. The grounds for this motion are set forth below.

Introduction/Background

1. The Complaint in this matter alleges various breaches of fiduciary duty in connection with the July 2005 merger between Transkaryotic Therapies, Inc. ("TKT") and a wholly-owned subsidiary of Shire Plc. ("Shire"). Those allegations are quite

detailed and include extensive supporting citation to both testimony and documents obtained in the appraisal action relating to that merger, C.A. No. 1554-CC. A consolidated trial of the fiduciary and appraisal claims has been set for May 2008.

2. The evidence cited in the Complaint shows that the merger was forced through by interested TKT fiduciaries who, with material aid from Shire's top executives, ran a tainted process that was timed and priced to ensure Shire's acquisition of TKT at far below its actual value. It was a transaction that transformed Shire's fortunes and boosted its stock price while depriving plaintiffs of the compensation to which they were entitled. The Complaint therefore seeks an award of recissory damages and related relief.

3. Plaintiffs' first sets of interrogatories and document requests (attached as Exs. A – B hereto) were served on April 17, 2007, approximately one week prior to the extended deadline by which defendants were required to answer the Complaint. Those requests focused upon two primary subjects: (i) information relevant to determining damages; and (ii) an explanation of the bases -- both factual and legal -- for whatever affirmative defenses the defendants chose to include in their answers. Neither should have been a controversial or surprising inquiry. The former was needed in connection with the remedy being sought here; the latter in order to understand defendants' position at more than a generic pleading level.

4. Rather than provide the requested information, however, defendants assumed an aggressively non-responsive posture that has affected discovery at macro level. They sidestepped straightforward financial inquiries. They ignored or re-

characterized questions about the core issues in this case. And with one limited exception, they insisted that they were under no obligation to disclose any information about their affirmative defenses.

5. In short, they made clear that judicial intervention is required if this case is to stay on-track for trial -- a point confirmed by defendants' recent confirmation that they see nothing problematic with their approach. This motion therefore discusses the principal issues raised by defendants' stance and addresses the arguments advanced by its lead proponent: Shire. We submit that those arguments should not be given credence, and respectfully request the Court's assistance in causing defendants to refocus their energies toward complying with -- rather than resisting -- their discovery obligations in this case.

Refusal to Explain Affirmative Defenses

6. The most obvious example of that resistance can be seen in defendants' responses to Interrogatory No. 7 and Request for Production No. 38, which sought an explanation of their affirmative defenses and documents relating thereto. (*See* Exs. A - B). It is axiomatic that defendants were required to have both legal and factual bases for each of those defenses before asserting them, and plaintiffs simply requested the disclosure of that information. The answers to our inquiry should have been -- indeed, were required to have been -- readily at hand.

7. Yet every single defendant argued that our requests were "premature" and objected to disclosing any information about their proffered defenses until they had first

gone fishing in discovery. (*See* Exs. C, E, G & I). Only one defendant, Dr. Langer, even attempted to respond subject to his objection, and that response was still far from complete. The rest of the defendants instead chose to pile-on more objections, claiming that the foundation for their claims was "privileged" and that it was otherwise "[in]appropriate" to seek disclosure of such information except in connection with "motion practice and/or briefing" at some undefined future date. (*Id.*).

8. But even that wasn't enough for Shire, which responded as follows for both itself and TKT:

> ANSWER TO INTERROGATORY NO 7: The Shire Defendants object to this Interrogatory as premature, overly broad, unduly burdensome and ***not reasonably calculated to lead to the discovery of admissible evidence.*** Subject to and without waiver of the foregoing objections, the Shire Defendants state that they will provide full support for the affirmative defenses asserted by them at an appropriate time and in an appropriate procedural posture.
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> RESPONSE TO REQUEST NO. 38: The Shire Defendants object to Request No. 38 to the extent that it seeks the production of documents that are protected by various privileges or immunities, including the attorney-client privilege, the work product doctrine, or any other legally recognized privilege or immunity. The Shire Defendants further object to this Request on the grounds that it is cumulative and duplicative of other Requests, overly broad, unduly burdensome, vague, ambiguous and outside the scope permitted by Rule 34(a). Subject to and without waiver of these specific objections or the General Objections, the Shire Defendants will participate in a mutual exchange of information concerning summary judgment and/or trial exhibits at a mutually agreeable time.

(*See* Exs. C – D, emphasis added).

9. Those objections are symptomatic of the larger problem here. It should not take letter campaigns or Court involvement to obtain basic discovery about a party's affirmative defenses. But it took the imminence of this motion to extract even defendants' vague commitment that some sort of "compromise" response would be provided in the indefinite future -- a response that has yet to materialize.

10. We submit that more than enough time has already passed and that plaintiffs should not have to endure another round of motion practice when defendants finally provide whatever limited disclosure they envision making. Substantive responses were due almost two months ago, and defendants should be ordered to immediately provide the information called for in response to Interrogatory No. 7 and Request for Production No. 38.

Shire's Continuing Resistance to Discovery

11. Plaintiffs have met with similar resistance on virtually all of our requests. And since most of our requests are damages-related inquires that only Shire can answer, its refusal to provide the requested information is particularly prejudicial.

12. As set forth below, those requests focused on financial and valuation information about: (i) the assets Shire obtained from TKT in the merger (the "Assets"); (ii) the entity known as Shire HGT ("HGT"), which now runs much of the former TKT business; and (iii) Shire itself. Those requests covered information typically provided in cases of this nature, including financial statements, projections, accounting records, and

materials provided to lenders, bankers or similar advisors. They also sought documents reflecting potential post-merger transactions involving the Assets, HGT or Shire -- information that we know to exist based on the prior testimony of a senior Shire witness.

13. Most of the requested information should have been readily producible from records kept in the normal course of Shire's business. Plaintiffs have received only a handful of documents to date, however, most of which are nothing more than generic presentation "slides" about Shire. And while that fact alone is sufficient to warrant relief, it is Shire's stated intention to withhold information which presents the biggest concern here.

14. That approach is exemplified by Shire's responses to Interrogatory No. 3 and Request for Production No. 8, which sought information about proposals to purchase, license or otherwise acquire rights to any portion of its holdings since the time of the merger -- expressly including all such proposals relating to the Assets. (*See* Exs. A & B). It is information directly relevant to the calculation of damages in this case. Moreover, it is needed to uncover the identity of third parties from whom additional relevant evidence can be obtained.[1] But Shire has refused to provide the requested information, stating that it will only address a far more restricted inquiry about "sale[s] of 'all or substantially all assets' within the meaning of 8 *Del.* C. §271(a)," about matters in which HGT was a "direct participant," or about proposals involving "Shire as a whole." (*See* Exs. C & D).

[1] It should be noted that the requested information is significantly different than what was sought in appraisal discovery, and thus Shire cannot legitimately contend that the requested information has already been provided.

15. Those restrictions are unjustified and should not be permitted. They are useful in the present context, however, because they provide indirect confirmation about the types of information that Shire is trying to keep under wraps. For example, the effort to block discovery of potential transactions involving less than all of the Assets is an indication that such transactions were, in fact, considered during the relevant timeframe. The attempt to further limit discovery to deals in which HGT was a "direct participant" offers similar confirmation that responsive information exists about matters in which HGT was indirectly involved -- such as those in which Shire, as its parent company, would have been the "direct participant." And the refusal to disclose information about any proposed transaction that didn't involve "Shire as a whole" is necessarily predicated on the existence of responsive information about proposals for some subset of the company's holdings. All of that information is relevant here and should have been produced.[2]

16. Related issues are raised by Shire's attempt to evade Request for Production Nos. 9 - 11, which sought documents relating to any valuation work that it received or requested following the merger. (*See* Ex. B). The relevance of that information cannot credibly be disputed and its production is again essential to the identification of third parties from whom further discovery can be obtained. Shire nevertheless maintains that the requests are "neither relevant…nor reasonably calculated to lead to the discovery of admissible evidence." (*See* Ex. D). It also states that it will not produce (or even search

[2] For example, there can be no question about the relevance of the Zuma deal (as discussed in the Complaint) despite the fact that it envisioned a transaction for less than "Shire as a whole." Yet no such transaction would be subject to discovery under defendants' unilateral limitation.

for) anything except "valuation[s] obtained from outside experts or consultants" -- a Shire-devised phrase that necessarily excludes all valuation-related materials other than formal reports, every document that Shire provided to its valuation professionals, and virtually all of the other relevant information sought by plaintiffs' requests. (*Id.*).

17. Plaintiffs advised Shire that the situation was unacceptable, seeking an explanation and noting that it was incumbent upon the defendants to provide a credible basis for each instance in which they attempted to so limit their responses. Shire replied that it would be "unduly burdensome" to provide the requested information because the majority of the "15 key products" that are currently marketed by the company were not acquired from TKT in the merger. To the extent we understand that argument, it appears to be based on a fundamental misunderstanding of the remedy sought in this case.

18. Nor does it provide any explanation for Shire's rejection of Interrogatory Nos. 13 - 15, which sought information about the personal, business and financial relationships between Shire's directors/officers and: (i) members of TKT's board; or (ii) Warburg Pincus, the entity which placed Leff and Moorhead on that board to represent its interests. (*See* Ex. B). Such requests are standard in cases of this nature and are particularly appropriate here given the facts detailed in plaintiffs' Complaint. Shire has refused to provide any factual disclosure about its relationships, however, arguing that our inquiry is irrelevant because Shire has already decided that none of its relationships were "material." (*See* Ex. C). But materiality is an issue for the Court to decide -- not Shire --

and we are entitled to complete responses so that a proper record on the point can be presented at trial.

19. Similar attempts to block discovery can be found in nearly every one of Shire's responses. Indeed, among other things, Shire has sought to limit or avoid production of its internal projections and plans, its accounting records, the documents it provided to outside financial professionals, and the documents used in communicating with investors -- most of which Shire insists are without relevance to this action. (*See, e.g.,* Ex. D at Request for Production Nos. 12 - 26, 30 - 31, 36).

20. In short, Shire's resistance to disclosure is far more pervasive than the approach for which it was admonished during appraisal discovery and it should fare no better now.

Conclusion

21. For the foregoing reasons, plaintiffs respectfully request an order: (i) requiring defendants to provide complete responses to our outstanding discovery requests by no later than July 24th or such other date as the Court deems appropriate; (ii) awarding the costs of this motion in accordance with Rule 37; and (iii) granting further relief as is necessary to secure the defendants' compliance with their discovery obligations.

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