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Re: *Icahn Partners LP v. Amylin Pharmaceuticals, Inc.*
C.A. No. 7404-VCN
Date Submitted: April 18, 2012

Dear Counsel:

By their complaint (the "Complaint" or "Compl."), Plaintiffs Icahn Partners, LP, Icahn Partners Master Fund LP, Icahn Partners Master Fund II LP, and Icahn Partners Master Fund III LP (collectively, the "Icahn Parties" or "Plaintiffs") seek to enjoin the enforcement of the advance notice bylaw (the "Advance Notice Bylaw") of Defendant Amylin Pharmaceuticals, Inc. ("Amylin" or the "Company") in connection with Amylin's 2012 annual stockholders meeting (the "Annual Meeting"). The Complaint also seeks (1) a declaration that certain

members of Amylin's board of directors (the "Director Defendants" and together with Amylin, the "Defendants") have breached their fiduciary duties by refusing to waive the Advance Notice Bylaw in connection with the Annual Meeting; and (2) an award of the Icahn Parties' costs, including reasonable attorneys' fees. The Icahn Parties have moved to expedite this action. Specifically, they have moved to shorten the Defendants' time to respond to the Complaint, and for a preliminary injunction hearing. For the reasons set forth below, the Plaintiffs' Motion for Expedited Proceedings is granted.

* * *

Section 5(a) of Amylin's bylaws states:

> Nominations of persons for election to the Board of Directors of the corporation . . . may be made at an annual meeting of stockholders . . . (iii) by any stockholder of the corporation who was a stockholder of record at the time of giving the stockholder's notice provided for in the following paragraph, who is entitled to vote at the meeting and who complied with the notice procedures set forth in this Section 5; provided, however, that clause (iii) above shall be the exclusive means for a stockholder to make nominations . . . .[1]

[1] Amylin's bylaws are attached to the Complaint as Exhibit B.

Section 5(b), which is the Advance Notice Bylaw, provides:

> At an annual meeting of the stockholders, only such business shall be conducted as shall have been properly brought before the meeting. For nominations . . . to be properly brought before an annual meeting by a stockholder pursuant to clause (iii) of Section 5(a) of these Bylaws . . . the stockholder must have given timely notice thereof in writing to the Secretary of the corporation . . . . To be timely, a stockholder's notice shall be delivered to the Secretary at the principal executive offices of the corporation not later than the close of business on the one hundred twentieth (120th) day prior to the first anniversary of the preceding year's annual meeting; provided, however, that in the event that the date of the annual meeting is advanced more than thirty (30) days prior to or delayed by more than thirty (30) days after the anniversary of the preceding year's annual meeting, notice by the stockholder to be timely must be so delivered not later than the close of business on the later of the one hundred twentieth (120th) day prior to such annual meeting or the tenth (10th) day following the day on which public announcement of the date of such meeting is first made.

Amylin's 2011 annual stockholders meeting was held on May 24, 2011, and the Annual Meeting is scheduled to be held on May 15, 2012. Thus, under the Advance Notice Bylaw, in order for an Amylin stockholder to be able to nominate a candidate for election to Amylin's Board of Directors (the "Board") at the Annual Meeting, that stockholder would have needed to have provided Amylin with notice of the candidate she wished to nominate no later than January 25, 2012, the 120th

day prior to the one year anniversary of the May 24, 2011 meeting. The Complaint alleges that no Amylin stockholder submitted notice of a Board nomination by that date.

* * *

The Icahn Parties contend that no Amylin stockholder submitted notice of a Board nomination by January 25, 2012 because, at that time, "there was no public controversy over corporate control or policy."[2] The Plaintiffs argue that before January 25, 2012, and for weeks thereafter, Amylin's stockholders thought that they and the Board had the same outlook for Amylin's future: namely, that "a key element of the investment thesis for Amylin was the prospect for a value maximizing transaction, and for the Board to faithfully consider a transaction that presented a compelling value when viewed against the considerable risks to the Company as a stand-alone business."[3] The Icahn Parties contend that the Board fundamentally deviated from that outlook in February 2012 when it purportedly rejected, without considering, a proposal from Bristol-Meyers Squibb Co.

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[2] Compl. ¶ 27.
[3] Pls.' Reply Br. in Further Supp. of their Mot. to Expedite ("Pls.' Reply Br.") at 8.

(the "Bristol-Meyers Proposal") to acquire the Company at a significant (approximately 43%) premium over its then-trading price. As Plaintiffs explain:

> The report of the Bristol-Meyers Proposal and the Board's rejection of it and failure to announce plans to sell the Company . . . have radically changed the landscape in a way that, if known before the nomination deadline, would have foreseeably generated controversy and led to the nomination of a dissident slate.[4]

Because, according to the Icahn Parties, the Board has radically altered its outlook for Amylin's future in a way likely to generate controversy, the Icahn Parties argue that, "[s]tockholders of Amylin should be given the choice of electing a board committed to exploration of the Bristol-Meyers Proposal or other sale transactions, or of reelecting a Board that has refused to make any such commitment."[5] In order for Amylin's stockholders to have that choice, the Plaintiffs contend that "the Advance Notice Bylaw must be waived, or not enforced."[6] Moreover, the Icahn Parties assert that this matter needs to be expedited because if Amylin's stockholders are not given the opportunity to elect a new Board that will immediately pursue potential sale transactions, they, and Amylin's other

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[4] Compl. ¶ 27.
[5] *Id.* at ¶ 28
[6] *Id.*

stockholders, may lose forever the opportunity to sell their Amylin stock at a large premium.[7]

* * *

The Defendants make four main arguments in opposition to the Icahn Parties' Motion for Expedited Proceedings. First, the claims raised in the Complaint are not ripe because none of Amylin's stockholders, including the Icahn Parties, has submitted notice of a Board nomination to Amylin—"[a]t best, all that [the] Icahn [Parties] ha[ve] alleged is hypothetical abuse. Neither [the] Icahn [Parties] nor any other stockholder has submitted a notice of nomination that would put enforcement of the Advance Notice Bylaw in issue."[8] Second, the Icahn Parties do not have a colorable claim that the Director Defendants breached their fiduciary duties or that the Board's actions with regard to the Bristol-Meyers Proposal constitute a material change in the Board's outlook. Third, the Plaintiffs will not be irreparably harmed if the Court declines to expedite this matter—"there is no irreparable harm here because . . . if [the] Icahn [Parties are] ultimately . . . successful in challenging the Advance Notice Bylaw, the Court could invalidate

[7] Pls.' Reply Br. at 15.
[8] Defs.' Br. in Opp'n to Icahn's Mot. for Expedited Proceedings ("Defs.' Br.") at 15.

the May 15 election."[9] Fourth, the Icahn Parties waited an unreasonable length of time before bringing the Complaint—"[the] Icahn [Parties] unreasonably waited 12 days . . . [after they learned of the Bristol-Meyers Proposal] to file . . . [the] Complaint . . . . In similar situations, this Court has found that 'plaintiffs' failure to bring on their application for injunctive relief in a timely fashion constitutes laches.'"[10]

* * *

A plaintiff may earn expedited proceedings when she "has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding."[11]

Although the Defendants are correct that the Icahn Parties have not (and, to the Court's knowledge, no other Amylin stockholder has) submitted notice of a Board nomination for the Annual Meeting, the fact that no stockholder "had

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[9] *Id.* at 29.
[10] *Id.* at 31 (citing *In re Blockbuster Entm't Corp. S'holder Litig.*, 1994 WL 89011, at *1 (Del. Ch. Mar. 1, 1994)).
[11] *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994).

attempted to make an untimely notice did not prevent . . . [the Court in *Hubbard v. Hollywood Park Realty Enterprises, Inc.*[12]] from deciding to issue a preliminary injunction 'so as to afford any shareholder who so desires a reasonable opportunity to nominate a dissident slate of candidates for election to the [] board.'"[13] Moreover, during the Court's teleconference with counsel to address Plaintiffs' Motion for Expedited Proceedings, counsel for the Plaintiffs represented to the Court that "if we are permitted to nominate people, we will. And we wouldn't be here otherwise."[14] At least at this juncture, Plaintiffs' counsel's representation quells any fears that the Court might have about an impermissible advisory opinion.

With regard to a colorable claim, the Icahn Parties have explained that the relatively narrow issue they seek to resolve on an expedited basis is "whether the Board's refusal to engage in discussions with Bristol-Myers signals a significant enough change in the expectations of stockholders to warrant reopening of the nomination process so that stockholders can make an informed decision about the

[12] 1991 WL 3151 (Del. Ch. Jan. 14, 1991).
[13] Pls.' Reply Br. at 17 (quoting 1991 WL 3151, at *13).
[14] *Id.* at 18 (quoting Teleconference Tr. (Apr. 13, 2012) at 28).

composition of the Board that will guide the Company's future activities."[15] The Plaintiffs have adequately alleged that, after the Advance Notice Bylaw prevented Amylin stockholders from submitting Board nominations for the Annual Meeting, the Board radically changed its outlook for the Company. Moreover, if the Plaintiffs are able to show a likelihood of success on that claim, they might be entitled to a mandatory injunction under the reasoning of *Hubbard*. Therefore, the Icahn Parties have articulated a sufficiently colorable claim.[16]

The Icahn Parties have also shown a sufficient possibility of threatened irreparable injury. If the Plaintiffs can show that, before the Bristol-Meyers Proposal, a key element of the investment thesis for Amylin was the prospect of a

[15] *Id.* at 2.

[16] The Defendants argue that the Bristol-Meyers Proposal was not material, and therefore, the Board was not required to report it much less act on it. While the Defendants may be correct that the Bristol-Meyers Proposal was not material, in and of itself, the Plaintiffs have alleged that a key element of the investment thesis for Amylin was the prospect of a sale transaction. Thus, the alleged fact that the Board rejected the Bristol-Meyers Proposal without even considering it, indicates that there has (or may have) been a material change in the Board's outlook for Amylin's future.

The Defendants also argue that the Board was disinterested and independent, and that there is no allegation that it has acted in bad faith. Therefore, according to the Defendants, the Plaintiffs cannot allege a colorable claim for breach of fiduciary duty. The narrow issue for these expedited proceedings, however, is not whether the Board was structurally unassailable, but whether, under *Hubbard*, "the Board's refusal to engage in discussions with Bristol-Myers signals a significant enough change in the expectations of stockholders to warrant reopening of the nomination process . . . ." *Id.*

sale transaction, and that the Board has now abandoned interest in a sale transaction, then there is a sufficient possibility that the Plaintiffs will be irreparably injured if enforcement of the Advance Notice Bylaw is not enjoined. "Shareholder voting rights are sacrosanct,"[17] and if the Plaintiffs are correct that the Board radically changed its plans for the Company, then Amylin's stockholders, including the Icahn Parties, will be denied the opportunity to exercise their voting rights at an arguably critical time—"Plaintiffs would be irreparably harmed by having to wait 13 months to effectuate change when no one can predict whether another company will value Amylin as highly over a year from now."[18]

Although the Defendants are correct that, when a "delay in filing . . . imposes additional burdens on the [C]ourt and could prejudice the [C]ourt's ability to adjudicate the matter fairly"[19] the Court may deny a motion to expedite, at least at this preliminary stage, any delay by the Plaintiffs appears to have been justified.

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[17] *EMAK Worldwide, Inc. v. Kurz*, 2012 WL 1319771, at *3 (Del. Apr. 17, 2012).

[18] Pls.' Reply Br. at 15. Defendants' argument that the Plaintiffs will not be irreparably harmed if the Court declines to expedite this matter because the Court could invalidate the May 15 election proves too much. That argument, taken to its logical conclusion, is that the Court should never enjoin the enforcement of an advance notice bylaw because the Court could always later invalidate a tainted election. That is a too definitive principle for an application that almost inevitably depends on context.

[19] *Oliver Press Partners v. Decker*, 2005 WL 3441364, at *1 (Del. Ch. Dec. 6, 2005).

The Icahn Parties learned of the Bristol-Meyers Proposal on March 28, 2012. Shortly thereafter, the Icahn Parties reached out to the Defendants. After what the Plaintiffs describe as "two unproductive conversations,"[20] the Icahn Parties sent, on Wednesday, April 4, 2012, an open letter to the Defendants and requested a response by Thursday, April 5, 2012. After the Defendants did not respond to that letter, the Plaintiffs filed this action on April 9, 2012. Thus, although the Icahn Parties waited twelve days after they learned of the Bristol-Meyers Proposal to file the Compliant, the reason for that delay appears to have been the Plaintiffs' good faith attempt to learn the Defendants' stance on the proposal and to try to persuade them to enter into discussions with potential acquirors.[21]

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[20] Compl. ¶ 22.

[21] Although the Court grants the Plaintiffs' Motion for Expedited Proceedings, the Plaintiffs may still ultimately be thwarted by timing issues. At some point, the time between when a board radically alters its stance and the date of the annual meeting is too short for the Court to grant relief from an advance notice bylaw. Whether that point was reached in this case, remains to be determined.

The Plaintiffs have articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury. Therefore, the Plaintiffs' Motion for Expedited Proceedings is granted.[22]

* * *

Timing is not propitious. A preliminary injunction hearing is scheduled—for the time being—for May 10, 2012, at 2:00 p.m., in Dover. All written submissions shall be filed no later than 4:30 p.m. on May 8, 2012. Counsel are requested to confer and to seek to agree on appropriate interim milestones.[23]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[22] In their briefing, the Plaintiffs and the Defendants each spend several pages discussing a balance of the equities. The Court, however, often waits, and in this case will wait, until a preliminary injunction hearing to consider the equities. *See, e.g.*, *Giammargo*, 1994 WL 672968, at *2.

[23] The Court acknowledges the Defendants' concerns about the scope of discovery. *See* Defs.' Br. at 12. The contours of that potential debate are not yet well-enough defined for its resolution.