

1 IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

2 SAN ANTONIO FIRE & POLICE :
 3 PENSION FUND, on behalf of :
 4 itself and all others :
 5 similarly situated, :
 6 Plaintiff, :

7 v. : Civil Action
 8 : No. 4446-VCL

9 AMYLIN PHARMACEUTICALS, INC., :
 10 BANK OF AMERICA, N.A., BANK OF :
 11 NEW YORK TRUST COMPANY, N .A., :
 12 DANIEL M. BRADBURY, JOSEPH C. :
 13 COOK, JRL, ADRIAN ADAMS, :
 14 STEVEN R. ALTMAN, TERESA BECK, :
 15 KARIN EASTHAM, JAMES R. GAVIN, :
 16 GINGER L. GRAHAM, HOWARD E. :
 17 GREENE, JR., JAY S. SKYLER, :
 18 JOSEPH P. SULLIVAN, AND JAMES :
 19 N. WILSON, :
 20 Defendants :

21 -----
 22 AMYLIN PHARMACEUTICALS, INC. :
 23 Cross-Claimant :

24 v. :
 25 :
 26 THE BANK OF NEW YORK TRUST :
 27 COMPANY, N.A., as Trustee for :
 28 Indenture Dated as of :
 29 June 8, 2007 :
 30 Cross-Claim Defendant :

31 -----
 32 Chancery Courtroom No. 12A
 33 New Castle County Courthouse
 34 Wilmington, Delaware
 35 Monday, May 4, 2009, 2009
 36 9:35 a.m.

37 BEFORE: HON. STEPHEN P. LAMB,, Vice Chancellor.
 38 TRIAL TRANSCRIPT - VOLUME I

39 -----
 40 CHANCERY COURT REPORTERS
 41 500 North King Street - Suite 11400
 42 Wilmington, Delaware 19801-3759
 43 (302) 255-0525

1 APPEARANCES:

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against Bank of New York, N.A.

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5 ALSO PRESENT:

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11 WARREN J. SCHOTT, CFA
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THE COURT: Good morning, everyone.

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MR. FRIEDLANDER: Good morning, Your Honor. I'd like to begin, Your Honor, by making some introductions. Joining me at counsel table, Mark Lebovitch from Bernstein Litowitz; Warren Schott, the executive director of the fund and, Frank Burney, the outside general counsel for the fund, and also Brad Davey from Abrams & Laster, Sam Lieberman from Bernstein Litowitz and Amy Miller from Bernstein Litowitz.

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THE COURT: Good morning.

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MR. DiCAMILLO: Good morning, Your Honor. I'd like to introduce people seated with me. From the law firm of Sullivan & Cromwell, Robert Sacks and Diane McGimsey. Your Honor knows Mr. Bracegirdle. And from my office, Margot Alicks.

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MR. BRAUERMAN: Good morning, Your Honor. Steve Brauerman on behalf of the Bayard firm. Joining me at counsel table is James Gadsden and Ken Levine.

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MR. DiCAMILLO: Your Honor, I neglected to make one introduction. Seated at the back of the room is Marcea Lloyd, Amylin's general

1 counsel.

2 THE COURT: Good morning.

3 MR. FRIEDLANDER: With that, we're
4 ready to call our first and only witness,
5 Professor Michael Roberts.

6 MICHAEL ROBERTS, having been first
7 duly sworn, was examined and testified as follows:

8 DIRECT EXAMINATION

9 THE COURT: Good morning, Professor.

10 BY MR. FRIEDLANDER:

11 Q. Good morning, Professor Roberts. What
12 is your academic position?

13 A. I'm an associate professor of finance
14 at the Wharton School of Business at the University of
15 Pennsylvania.

16 Q. Do you have tenure?

17 A. I do.

18 Q. For how long have you been a finance
19 professor?

20 A. Approximately eight years.

21 Q. What are the principal areas of your
22 academic research?

23 A. Empirical corporate finance, corporate
24 financial policy, investment policy, as well as

1 financial contracting and security design.

2 Q. To what extent have you analyzed
3 covenants in debt insurance?

4 A. It's been a significant component of
5 my research agenda for approximately seven years now.

6 Q. What aspects of debt covenants have
7 you analyzed?

8 A. I've looked at the role of covenants
9 and covenant violations in shaping corporate policy;
10 in particular, corporate capital structure decisions,
11 investment policy. I've looked at the interplay
12 between covenants at presents and other terms of the
13 loan, such as yield, maturity and amount. And more
14 recently I've written a survey on financial
15 contracting of which covenants play a significant
16 role.

17 Q. There's a binder you have in front of
18 you. Exhibit 35 is a copy of your expert report and
19 CV. I would like to ask: does your CV accurately
20 reflect or describe your academic work?

21 A. Yes, it does.

22 Q. Now, your CV indicates that you've
23 twice won the Brattle Prize and, on the third
24 occasion, you were a finalist for the Brattle Prize.

1 Could you describe for the Court what is that award
2 and the significance of it?

3 A. Sure. The Brattle Prize is an annual
4 award given to the three best papers in corporate
5 finance and the Journal of Finance.

6 Q. What is the Journal of Finance?

7 A. The Journal of Finance is sort of the
8 premier refereed journal in the field of finance.

9 Q. And how many submissions do they get
10 per year?

11 A. Approximately 1200 per year.

12 Q. Have you been recognized in the
13 profession for your work on covenants?

14 A. I have. So I was -- as I mentioned
15 earlier, I was recently asked by the Annual Review of
16 Financial Economics to write a survey paper surveying
17 the financial contracting literature, again, of which
18 covenants is an important component. My research on
19 covenants also was an important component of my tenure
20 case. And finally, one of my papers on covenants was
21 a finalist for the Brattle Prize.

22 MR. FRIEDLANDER: Your Honor, I tender
23 Professor Roberts as an expert in the areas of
24 financial contracting and the role and value of

1 covenants in debt instruments.

2 THE COURT: Any objection?

3 All right. So without objection.

4 BY MR. FRIEDLANDER:

5 Q. Professor Roberts, why do covenants
6 exist?

7 A. The primary rationale for covenants is
8 they are designed to address incentive conflicts.

9 Q. And what is the incentive conflict
10 from the perspective of the lender?

11 A. The creditors are concerned with
12 repayment of their claim, interest and principal,
13 typically; whereas the other party to the agreement,
14 be it managers or shareholders, have other objectives,
15 such as maximizing shareholder value or private
16 benefits associated with controlling the firm.

17 Q. What are some of the examples of
18 covenants that are valuable to lenders to address this
19 incentive?

20 A. As a broad spectrum, a few examples.
21 Restrictions on indebtedness, restrictions on
22 distributions to shareholders, such as dividends,
23 stock repurchase, restrictions on different types of
24 investments as well.

1 Q. Do some types of debt contracts have
2 different covenants than others?

3 A. They do. A useful delineation is
4 perhaps between public debt and private debt, such as
5 private credit agreements.

6 Q. Could you describe the difference?

7 A. Sure.

8 In public debt we typically see
9 relatively less in terms of number and less strict
10 covenants relative to private credit agreements,
11 primarily because of the collective action problems
12 and free rider problems that are associated with a
13 relatively more disbursed investor base.

14 Q. And whereas in private agreements you
15 have what?

16 A. The concentration of lenders, either a
17 sole lender or perhaps a small syndicate of lenders.
18 It's much more easy to renegotiate the contract. And
19 consequently we tend to see more covenants and
20 relatively tighter covenants in terms of how they
21 restrict the behavior of management in the firm more
22 broadly.

23 Q. In terms of public debt, is there a
24 distinction between straight debt and convertible

1 debt?

2 A. There often is. We typically see
3 fewer covenants in convertible debt in part because
4 the conversion option plays a significant role in
5 mitigating the incentive conflict between creditors
6 and shareholders. And so far as creditors believe
7 shareholders are expropriating wealth from the
8 creditors, they can always, assuming it's economically
9 sensible, exercise the conversion option.

10 Q. Professor Roberts, you reviewed the
11 Amylin's 2007 indenture; correct?

12 A. That's correct.

13 Q. How would you describe the role of
14 covenants in the 2007 indenture?

15 A. Minimal. The prospectus outlines a
16 number of explicit transactions and ways in which the
17 creditors can suffer credit impairment.

18 Q. The prospectus, is that PX-10 in your
19 binder?

20 A. That's correct.

21 Q. And page 13, is that the language
22 you're referring to?

23 A. That's correct.

24 Q. What types of covenants don't exist

1 for this indenture?

2 A. There are no covenants restricting the
3 maintenance of financial ratios, limits on
4 subsidiaries' ability to incur indebtedness, doesn't
5 limit their ability to secure indebtedness, et cetera.

6 Q. Okay. What's the significance of that
7 lack of covenants?

8 A. It suggests to me that purchasers of
9 these particular notes were not necessarily as
10 concerned about protection of the interest and
11 principal payments per se, but it appears as if the
12 conversion option was really driving the investment
13 decision.

14 Q. The 2007 indenture contains certain
15 put rights -- correct? --for noteholders?

16 A. That's correct.

17 Q. And are those put rights covenants, as
18 you use the term?

19 A. Yes, they are.

20 Q. How so?

21 A. So the put right confers upon the
22 creditors the right -- not the obligation -- to put
23 the debt back to the issuer at par, slightly better in
24 certain events -- trigger events -- much like any

1 covenant gives creditors the right to accelerate the
2 debt or terminate any unused portion in the case of
3 credit lines or revolvers in certain events. The
4 economic rationale is the same for both.

5 Q. If we could turn to the put rights,
6 that's PX-11, the indenture; correct?

7 A. That's correct.

8 Q. Okay. And would those be the
9 definition of -- under "Fundamental Change" --

10 A. Um-hum.

11 Q. -- that's the provision that describes
12 when the put rights exist?

13 A. Yes.

14 Q. Now, if you could turn to that
15 definition on the bottom of page six, and continues on
16 to page seven, and then on to page eight, there are
17 five separate prongs; correct?

18 A. That's correct.

19 Q. Five separate put rights?

20 A. That's correct.

21 Q. Are any of those -- are you familiar
22 with the term "poison put"?

23 A. I am.

24 Q. Would any of these put rights be

1 poison puts, as you understand the term?

2 A. I view prongs one and three as prongs
3 commonly found, or referred to as poison puts.

4 Q. And could you just briefly describe
5 what are prong one and prong three?

6 A. Prong one is a trigger defining the
7 acquisition of at least 50 percent of voting stock by
8 some person or entity. Prong three is what I often
9 refer to as the proxy put, or the change in a majority
10 of the continuing directors.

11 Q. Could you describe for the Court the
12 history of how those particular proxy puts evolved?

13 A. Sure. Maybe it's easy if I start with
14 what I think of as traditional covenants, even though
15 they persist today.

16 Typically, creditors protected
17 themselves against future credit impairment because of
18 incentive conflicts by restricting, as I mentioned
19 earlier, future indebtedness, certain investments,
20 distributions to shareholders. But in the '80s, the
21 corporate environment changed quite dramatically in
22 terms of the number of leveraged restructuring. We
23 saw a large amount of share repurchases, leveraged
24 buyouts, management buyouts, and hostile takeovers.

1 And the initial response in 1986, I
2 believe, motivated primarily by target management and
3 their lawyers, was what I would like to refer to as
4 the first generation of poison puts or the first
5 version.

6 Q. And what was -- what do those consist
7 of?

8 A. So, these were comprised primarily of
9 two prongs. So there are exceptions, of course.

10 The first prong was similar, in fact,
11 to the first prong in the indenture agreement but for
12 a significant -- subtle but significant difference in
13 that it was a hostile acquisition of beyond some
14 threshold, typically 30 to 50 percent of stock that is
15 unapproved by the board.

16 The other prong was the third prong in
17 the indenture -- that is, a hostile or unapproved
18 change in the majority of directors.

19 Q. And what -- you call that the first
20 generation. What happened after that?

21 A. So in 1988 -- well, October, November,
22 of 1988, there was the RJR-Nabisco leveraged buyout.
23 That really highlighted two facts. First, bondholders
24 were subject to a significant amount of risk when a

1 leveraged restructuring occurred; and, second, no
2 firm, in terms of its size, was really safe from these
3 types of transactions.

4 Q. So what was the response to that?

5 A. There was a change in the poison
6 put -- the form of the poison put -- in particular,
7 the triggers. So the put right remained the same in
8 that the bondholders could still put the debt back at
9 par slightly better, but now the triggering events
10 where any change, or any acquisition of voting stock
11 in excess of some threshold -- again, it was typically
12 30 percent to 50 percent -- and a decline in credit
13 ratings by some prespecified amount. At the time it
14 was often from investment grade to speculative grade.

15 Q. Have you analyzed the role in value of
16 the poison puts in Amylin's 2007 indenture?

17 A. I have.

18 Q. What does the academic literature say
19 about the value of poison puts to lenders?

20 A. That it's relatively small, if any,
21 value to lenders.

22 Q. Could you describe that in more
23 detail?

24 A. Sure. So I'll begin with one study

1 by Leland Crabbe in, I believe, the '91 Journal of
2 Finance.

3 So Leland shows that poison puts and,
4 in particular, focusing on the prong in which there's
5 an acquisition of at least 30 or 50 percent of voting
6 stock, as well as a decline in credit ratings
7 associated with the event, led to a 24 basis point
8 yield differential relative to bonds without it. In
9 other words, shareholders were, in effect, saving
10 approximately 25 basis points in interest.

11 Q. And the other research particularly on
12 point?

13 THE COURT: You said shareholders.
14 You mean the company?

15 THE WITNESS: Yes.

16 THE COURT: All right.

17 THE WITNESS: Ultimately the costs or
18 benefits are passed on to shareholders.

19 THE COURT: But it's the company
20 that's paying the interest, not the shareholder?

21 THE WITNESS: I agree. But maybe I
22 think we're debating semantics. I apologize.

23 THE COURT: I didn't think so.

24 It was confusing. I thought perhaps

1 you meant the bondholders. I was trying to
2 understand. So it's the company is paying less
3 interest when notes are issued with these covenants in
4 the indenture?

5 THE WITNESS: That's correct. That's
6 a more accurate description.

7 BY MR. FRIEDLANDER:

8 Q. Just to follow-up on that.

9 Based on the fact that the company is
10 paying less in interest, does that mean that the
11 poison put is beneficial to shareholders?

12 A. Not necessarily.

13 Q. Why not?

14 A. Well, there's a flip-side to the
15 presence of the poison put, in as far as it hinders or
16 makes more difficult or more costly the replacement of
17 inefficient management, for example.

18 Q. Like a takeover?

19 A. Through a takeover is one example.

20 Q. Now, you mentioned Crabbe in the 24
21 basis points. Is there any other literature you rely
22 on for your opinion?

23 A. Sure. There's a follow-up study by
24 Fields, Kidwell and Klein in the Financial Services

1 Review that looks at a slightly longer time horizon,
2 from, I believe, January of 1987 through June of 1990,
3 sort of encompassing the time period that Crabbe
4 looked at, which was November of 1988 to December of
5 1989.

6 What's interesting about the Fields,
7 Kidwell, Klein studies, they actually show the poison
8 put provides no yield difference or benefit to the
9 company.

10 Q. And why that difference in
11 conclusions?

12 A. I think it's in part -- I think it's
13 in part because of the difference in the sample
14 horizon. What Crabbe did is what an empiricist is in
15 effect trained to do. He looked at the time period
16 just in the aftermath, or the wake of the RJR Nabisco
17 takeover when the credit markets were actually in
18 quite a bit of turmoil. If you're ever going to find
19 value for the poison put, it's going to be right
20 during that time period.

21 Once you broaden the sample and
22 takeovers become less prevalent and the credit markets
23 begin to return to normal, it's not surprising that
24 you find a smaller effect, if any.

1 Q. And Fields, Kidwell and Klein found no
2 effect; is that right?

3 A. That's correct.

4 Q. Now, that Fields, Kidwell and Klein --
5 that report you just referred to -- that study you
6 referred to -- is not in your expert report.

7 A. That's correct.

8 Q. Can you explain why that is?

9 A. So I was able to find a note by
10 Fields, Kidwell and Klein. It was actually, I
11 believe, a letter to Financial Management, which is a
12 journal, but it wasn't a refereed report or journal
13 article, where they seemed to describe the results of
14 a working paper version that eventually came out in
15 the Financial Services Review, I believe, a year or
16 two later.

17 Q. And so that initial note, that is
18 referenced in your report?

19 A. That's correct.

20 Q. And how about the Financial Services
21 Review article? Why is that not in your report?

22 A. I haven't found it.

23 Q. And then you subsequently found it?

24 A. That's correct.

1 Q. Now, do you have an opinion about the
2 value to noteholders of just the proxy put trigger,
3 that prong three of the fundamental transactions
4 definition in the Amylin indenture?

5 A. Do I have an opinion as to the value
6 of that particular prong?

7 Q. Yes.

8 A. Yeah. It likely has zero value.

9 Q. And what's the basis for your opinion?

10 A. There's three reasons, really. First,
11 if we take Fields, Kidwell and Klein's study, their
12 result of no-yield differential for the poison put,
13 broadly speaking. It's not a great leap of logic to
14 assume that this particular prong has no value as
15 well.

16 If we also take Crabbe's study, which
17 in sometimes is an upper bound at the 24 basis points,
18 what Crabbe was identifying is that yield differential
19 offer was not this prong, rather he was focused and
20 his data was focused on the two prongs that I
21 mentioned earlier in the second generation of poison
22 puts -- that is, the prong that gets triggered when
23 there's an acquisition of at least X percent of voting
24 stock and credit rating decline.

1 Q. And do you have any other information
2 to support your opinion?

3 A. Sure.

4 So, two more. The second one is a
5 report by Moody's, I believe, in 2006, that outlines
6 their covenant assessment plan. So Moody's rates
7 covenant protection using CQ ratings -- covenant
8 quality. Nowhere in that report do they make mention
9 of the proxy put as a relevant form of protection for
10 creditors or their value.

11 Q. Now, turn to Exhibit 54 in your
12 binder.

13 A. Okay.

14 Q. Is that the Moody's report to which
15 you just referred?

16 A. Yes, it is.

17 Q. And on the third page, is there a
18 chart there?

19 A. Yes.

20 Q. And can you just sort of describe for
21 the Court what is this chart?

22 A. So this is outlining the
23 considerations for their CQ ratings -- the covenant
24 quality ratings -- one for strong, three, four,

1 minimal. They broadly group specific provisions into
2 a number of categories ranging from restricted
3 payments, change of control, et cetera.

4 This table really summarizes the
5 details later on in the report. But as you can tell
6 from both the table and the remainder of the report,
7 the proxy put prong is really nowhere to be found.

8 Q. Do you have any other basis for your
9 opinion that the proxy put prong has no value?

10 A. Sure. So the third reason I alluded
11 to earlier is based on a response by Moody's in 2008,
12 I believe, to the Credit Roundtable Report.

13 Q. What's the Credit Roundtable Report?

14 A. It's a report outlining standards, if
15 you will, for covenants and indentures.

16 Q. By whom?

17 A. The Credit Roundtable.

18 Q. Okay.

19 A. So Moody's wrote a comment on this
20 report, and it was interesting to note that, in
21 footnote 16 of their comment, they actually isolate
22 the proxy put prong and note, if I can remember
23 correctly, that this particular prong is not useful,
24 or not particularly useful.

1 Q. Can you turn to Tab 55.

2 A. Sure.

3 Q. Is that the Moody's response to the
4 Credit Roundtable to which you just referred?

5 A. Yes, it is.

6 Q. If you turn to footnote 16, can you
7 just read the sentence that you're referring to?

8 A. Sure. "Designed to address hostile
9 takeovers, this 'event' prong is not particularly
10 useful."

11 Q. And why do you believe it's not
12 particularly useful? What do you glean from that
13 about it says "designed for hostile takeovers, not
14 particularly useful"?

15 A. It's not particularly useful for
16 protecting -- either protecting the value of
17 creditor's claims or for averting hostile takeovers.

18 Q. Do you have an opinion about the value
19 today to noteholders -- people holding the notes from
20 the 2007 Amylin indenture -- about the value of the
21 proxy put prong to note noteholders?

22 A. It's likely negative.

23 Q. And why do you believe that the proxy
24 put prong has a negative value to the noteholders

1 today?

2 A. Insofar as it's hindering or
3 preventing a proxy contest, it's hindering the
4 execution of some of Carl Icahn's suggestions of which
5 I'm familiar with.

6 Q. Now, can you turn to Exhibit 56?

7 A. Um-hum.

8 Q. What is that?

9 A. Schedule 14A.

10 Q. Can you flip the page?

11 A. Okay. It looks like a letter to
12 Carl Icahn.

13 Q. Does this refer to the suggestions to
14 which you referred?

15 A. That's correct.

16 Q. And what are they, just to summarize?

17 A. So, first is a drastic cost cut,
18 which, on the surface, would appear to be good for
19 creditors insofar as it preserves liquidity and
20 maintains the capitalization of the firm.

21 Q. That's the second bullet point on the
22 page?

23 A. That's the first one.

24 Q. Okay. And so you're saying that

1 strategy effects would be beneficial to noteholders?

2 A. On the surface.

3 Q. And how about the other bullet point
4 there on that page?

5 A. So, the sale to Eli Lilly would also
6 appear to be beneficial insofar as it triggers the
7 first prong of the poison put -- that is, the
8 acquisition of at least 50 percent of the voting
9 stock. It would at least give the creditors the
10 right -- not the obligation -- to put the stock back
11 at par.

12 Q. Put the note back?

13 A. I'm sorry. Put the notes back at par
14 which, at the last time I checked in April, were
15 trading at \$.56 on the dollar.

16 Q. Now, in that letter Amylin, or the
17 author of the letter, the lead independent director
18 for Amylin, is criticizing those policies saying
19 they're not good for shareholders; correct?

20 A. That's correct.

21 Q. Does that affect your analysis as to
22 whether they're good for noteholders?

23 A. Not at all.

24 MR. FRIEDLANDER: I have no more

1 questions, Your Honor.

2 THE COURT: Who is going to
3 cross-examine?

4 Mr. Gadsden?

5 MR. GADSDEN: Yes, Your Honor. Thank
6 you. I'll take a minute to assemble the materials.

7 THE WITNESS: Your Honor, may I stand
8 for a moment? I have a bad back.

9 THE COURT: Yes, certainly.

10 Feel free to do that whenever you
11 want, Professor.

12 THE WITNESS: Thank you very much.

13 CROSS-EXAMINATION

14 BY MR. GADSDEN:

15 Q. My name is James Gadsden and I'm an
16 attorney with Carter Ledyard & Milburn, representing
17 The Bank of New York and Bank of New York Mellon,
18 N.A., which is the initial trustee under the Amylin
19 2007 indenture.

20 I'm going to ask you a few questions.
21 My first is, isn't it the case that your research
22 hasn't focused on the director turnover and change of
23 control covenants?

24 A. That is correct.

1 Q. And actually, your research is focused
2 on credit agreements rather than debt securities,
3 isn't that correct?

4 A. Most of the empirical analysis is, but
5 the broader discussion encompasses publicly traded
6 debt as well.

7 Q. Do you remember that last Friday you
8 had your deposition taken?

9 A. Yes, I do.

10 Q. You were asked questions by lawyers
11 and the answers were transcribed?

12 A. I do remember.

13 Q. And you were sworn to tell the truth
14 and you gave your answers to the best of your ability
15 at that point?

16 A. I did.

17 MR. GADSDEN: May the transcript be
18 made available to the witness?

19 THE COURT: Yes.

20 BY MR. GADSDEN:

21 Q. Mr. Roberts, could you turn to page 15
22 of the transcript, please.

23 A. I'm there.

24 Q. Page 14, beginning at line -- 15, line

1 21 to 15 line 24.

2 A. Line 24?

3 Q. Yes. Do you remember being asked this
4 question, which is "It seems like your research is
5 more focused on covenants in debt securities, as
6 [opposed to] -- as distinguished from credit
7 agreements; is that fair?"

8 You remember being asked that
9 question?

10 A. I assume you're talking about the
11 question on line 23 of page 14 of my deposition that
12 begins "whether the specific provision"?

13 Q. Backing up to line 16.

14 A. Okay.

15 Q. You remember being asked the question,
16 "It seems like your research is more focused on
17 covenants in debt securities, as distinguished from
18 credit agreements; is that fair?"

19 A. I do recall that.

20 Q. And your answer was "No. Actually
21 most of my research is focused on [creditors]. . . ."

22 Is that correct?

23 A. That is correct.

24 Q. You were asked, "But not specifically

1 on change of control provisions within credit
2 agreements?"

3 And your answer was "The change of
4 control provision has not been a focus of my
5 research."

6 That's right?

7 A. That's correct.

8 Q. And that was your answer --

9 A. That was my answer then, as it is now.

10 Q. Thank you.

11 It's also the case that you've never
12 been personally involved in the negotiation of
13 indentures; is that correct?

14 A. That is correct.

15 Q. And you've never physically observed a
16 negotiation of indentures; is that correct?

17 A. That is correct.

18 Q. And you had no conversations with the
19 noteholders, who purchased the Amylin notes, to
20 determine what they considered to be important, isn't
21 that correct?

22 A. Not that I'm aware of.

23 As you've described on your direct
24 examination, the studies upon which you're basing your

1 opinion and the value of the proxy put covenant in
2 this case is from the time period in 1987 to 1990,
3 isn't that correct?

4 A. Roughly.

5 Q. But it is also your opinion that there
6 are elements of value created in the covenant that are
7 not necessarily captured in the yield analysis, such
8 as a potential consent fee, isn't that correct? Let
9 me restate it. I think I stumbled a little bit as I
10 went through that.

11 It's also your opinion that there are
12 elements of value created in a covenant that are not
13 necessarily captured in a yield analysis, such as a
14 possible consent fee, isn't that correct?

15 A. I don't believe I said that.

16 Q. All right. Could you turn to your
17 deposition transcript section -- or page 71, line 12,
18 please.

19 A. Um-hum.

20 Q. So you remember being asked this
21 question "Okay. But it's possible though there could
22 be elements of value created in that fashion in favor
23 of the creditors, be it in a[n] consent agreement" --
24 I'm sorry -- "be it in a[n] credit agreement or an

1 indenture that isn't necessarily captured in a yield
2 analysis?"

3 You remember being asked that
4 question?

5 A. I do now.

6 Q. Your response was, "Are you asking do
7 the amendment, for example, amendment fees that accrue
8 to lenders in the case of renegotiation, is that a
9 benefit to creditors?"

10 That was your answer?

11 A. That was my clarifying question.

12 Q. And you were then asked, "Correct."
13 And your response was, "It can be."

14 Isn't that correct?

15 A. That is correct.

16 Q. And you're aware that Bank of America
17 received a consent fee for its waiver of the covenant
18 in this case?

19 A. I am.

20 Q. Of 25 basis points fee -- 25 basis
21 points increase in interest rate?

22 A. I'm not aware of the details of the
23 waiver.

24 Q. Now, you agree that the purpose of

1 these covenants is to protect a creditor from a
2 contested proxy contest that leads to a turnover of
3 control, isn't that correct?

4 A. Can you be more specific in terms of
5 which prong?

6 Q. Well, the continuing director prong.
7 The purpose of that is to protect creditors in the
8 event of a contested proxy contest?

9 A. I'm not sure it necessarily protects
10 creditors in terms of preserving the value of their
11 claim. I don't agree to that.

12 Q. But the purpose that the creditors
13 put the clause in the contract for is to provide them
14 protections in the event of a contested proxy fight,
15 isn't that correct?

16 A. I don't know why they put it in
17 exactly. My analysis suggests that it had no value.

18 Q. You agree that there's a trade-off
19 between the amount of protection provided to creditors
20 in the form of covenants and the other dimensions of
21 the deal, such as price, maturity and yield?

22 A. I do.

23 Q. And in this case -- I'll withdraw that
24 question.

1 You testified a little earlier, in
2 response to the questions from plaintiff's counsel,
3 that in your view the creditors might prefer the
4 proposals that Mr. Icahn has made for changes in the
5 business of the company, isn't that correct?

6 A. That is correct.

7 Q. And in the terms of the indenture
8 covenant, you agree that the bondholders are given an
9 option as to whether or not to request repurchase of
10 their bonds, in the event the proxy put comes into
11 effect under the indenture, isn't that correct?

12 A. You mean the creditors are given the
13 option to put them back to the borrower?

14 Q. Yes.

15 A. In that event, that's correct.

16 Q. And they have the option to retain
17 their investment in that circumstance?

18 A. Yes, they do.

19 MR. GADSDEN: No further questions,
20 Your Honor.

21 THE COURT: Thank you.

22 Any redirect?

23 MR. DiCAMILLO: Your Honor, may I ask
24 a few cross questions?

1 THE COURT: You may.

2 BY MR. DiCAMILLO:

3 Q. Good morning, Professor Roberts. You
4 need to stretch for a second?

5 A. I'm all right for now. Thank you for
6 asking.

7 Q. Professor Roberts, you're not aware of
8 any examples of debt being accelerated because of a
9 triggering of a continuing director provision, are
10 you?

11 A. I am not.

12 Q. In connection with your assignment,
13 you didn't do any analysis of the process by which
14 Amylin approved the credit agreement, did you?

15 A. I'm not exactly sure what you mean by
16 "the process." I obviously considered the fundamental
17 tradeoff that the parties make in structuring the
18 contract.

19 Q. But you didn't look at board minutes,
20 did you?

21 A. Of course not.

22 Q. History of negotiations?

23 A. I did not.

24 Q. Same question for the indenture. You

1 didn't do any analysis of the process by which Amylin
2 approved the indenture?

3 A. In the same manner, no, I did not.

4 Q. Mr. Friedlander showed you two
5 examples of suggestions that Mr. Icahn has made for
6 the company; correct?

7 A. That's correct.

8 Q. One of them is an acquisition by
9 Eli Lilly. Do you recall that?

10 A. I do.

11 Q. You've done no analysis of the cost
12 and benefits of an acquisition by Eli Lilly to the
13 company, have you?

14 A. I have not.

15 Q. You've done no analysis of the
16 feasibility of cost cutting in that one, have you?

17 A. I have not.

18 MR. DiCAMILLO: I have no further
19 questions, Your Honor.

20 THE COURT: Redirect.

21 REDIRECT EXAMINATION

22 BY MR. FRIEDLANDER:

23 Q. Professor Roberts, you were asked a
24 question about value of creditor of renegotiating a

1 covenant. Do you recall that a couple minutes ago?

2 A. I do.

3 Q. Does that apply to -- equally -- to
4 public indentures, as it applies to private creditor
5 agreements?

6 A. Not at all. Private creditor
7 agreements are renegotiated frequently. They're, in
8 some sense, structured in that manner to be
9 renegotiated, because of the ease of setting up
10 amendments and waivers with a concentrated group of
11 lenders, as opposed to public debt, as I mentioned
12 earlier, where you generally have a more disbursed
13 group of investors and hence greater collective action
14 problems, free rider problems. So we typically don't
15 see empirically renegotiation of public debt that
16 often.

17 Q. So therefore do you attribute value to
18 the potential renegotiation of public debt in a public
19 indenture?

20 A. Not from a practical perspective.

21 Q. You were also asked about a scenario,
22 I believe, of creditors making a decision whether or
23 not to put the bond notes back to the company in the
24 event of a successful proxy contest. Is that a

1 feasible scenario from which creditors would expect
2 value?

3 A. It's not a very realistic assumption
4 because the proxy put prong is often preventing a
5 successful proxy contest.

6 Q. Why is that, from your frame of
7 reference?

8 A. Because of the potential costs that
9 would be borne from the option to put the debt, as
10 well as the cross default or cross acceleration
11 provisions. There's a potential for a massive debt
12 encumbrance up to \$900 million, as I understand it.

13 Q. And therefore what? Therefore --
14 what? --because there's that much debt that could be
15 incurred? Why does that translate into the creditors
16 not, I guess, putting value on the potential to put
17 their notes to the company because of that event?

18 A. Because we're unlikely to see a
19 successful proxy contest.

20 Q. Now --

21 THE COURT: I have a question,
22 Mr. Friedlander.

23 I gathered from the briefs that this
24 testimony is premised on the assumption that the board

1 of directors of the corporation does not have the
2 power under the indenture to approve Mr. Icahn's
3 nominees, or the nominees of the other stockholder.
4 Is that correct?

5 MR. FRIEDLANDER: Yes.

6 THE COURT: Let's just get that out in
7 the open. All right?

8 MR. FRIEDLANDER: Okay.

9 BY MR. FRIEDLANDER:

10 Q. Well, Professor Roberts, have you made
11 any analysis of how the proxy contest prong works with
12 respect to whether or not -- do you assume that it
13 restricts proxy contests because it can't be -- let me
14 just withdraw that and start again.

15 Isn't it an assumption of your
16 opinions that the way the proxy contest trigger works,
17 for purposes of your analysis, is that it prevents
18 dissidents who are running a slate from succeeding in
19 a proxy contest?

20 A. Yes.

21 THE COURT: That's probably part of
22 the way.

23 You are assuming -- I just want to
24 make it clear on the record -- that the board of

1 directors of Amylin does not have the power, the way
2 this provision is written, to approve Mr. Icahn's
3 directors or nominees, or the nominees of I think it's
4 Westbrook, in order to make that -- have them become
5 continuing directors, in the event that any one or all
6 of them is elected?

7 THE WITNESS: That is correct, Your
8 Honor.

9 THE COURT: Thank you.

10 MR. FRIEDLANDER: I have no more
11 questions, Your Honor.

12 MR. GADSDEN: Nothing further, Your
13 Honor.

14 MR. DiCAMILLO: Nothing further, Your
15 Honor.

16 THE COURT: All right. Thank you,
17 Professor.

18 You're excused.

19 THE WITNESS: Thank you, Your Honor.

20 THE COURT: Thus ends the shortest
21 trial.

22 MR. GADSDEN: Your Honor, we
23 understand that the plaintiff has closed its case in
24 chief?

1 THE COURT: I'm sorry. I didn't hear
2 you.

3 MR. GADSDEN: Do we understand that
4 the plaintiff has closed its case in chief?

5 THE COURT: That's my understanding.
6 I think we need to admit exhibits and depositions and
7 the rest of that.

8 MR. FRIEDLANDER: A couple of
9 technical exceptions. One, as to Bank of America,
10 that's been suspended?

11 THE COURT: Yes, of course.

12 MR. FRIEDLANDER: So there's been
13 no --

14 THE COURT: As to the whole question
15 concerning the credit agreement.

16 MR. FRIEDLANDER: So I didn't ask any
17 questions of Professor Roberts about the credit
18 agreement. I didn't cross him about that.
19 Technically, it's open for that purpose.

20 Secondly, that we do have deposition
21 transcripts and exhibits. Frankly, we have not really
22 yet conferred. I don't know if there are objections.
23 I was hoping we could work that out with the other
24 side.

1 THE COURT: Why don't we leave that
2 open until we reconvene this afternoon.

3 Mr. Gadsden.

4 MR. GADSDEN: The point is that Bank
5 of New York doesn't intend to offer deposition
6 transcripts and exhibits as part of its case. It's
7 not presenting live witnesses, but it's offering the
8 exhibits and deposition transcripts as its case.

9 THE COURT: Yes. I assume the company
10 is as well and the directors.

11 MR. DiCAMILLO: Yes, we are, Your
12 Honor.

13 THE COURT: We'll take that up when we
14 reconvene this afternoon, just to put it on the record
15 in case anyone has any objection.

16 MR. GADSDEN: Including, Your Honor,
17 Bank of New York is offering some of the exhibits
18 designated by the Bank of America and the transcripts
19 of the Bank of America witnesses.

20 THE COURT: I certainly have no
21 problem with that.

22 If anyone else does, we'll find out
23 about it this afternoon. So we'll conclude. We'll
24 deal with the issue of closing the record this

1 afternoon as to this part of the case.

2 And is it 3:00 o'clock we're
3 reconvening?

4 MR. DiCAMILLO: Yes, Your Honor.

5 THE COURT: We'll stand in recess
6 until 3:00 o'clock.

7 (Recess taken at 10:25 a.m.)

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1 AFTERNOON SESSION

2 (Reconvened at 3:00 o'clock p.m.)

3 MR. FRIEDLANDER: Good afternoon, Your
4 Honor. As a housekeeping matter, I'm pleased to say
5 that we have -- no one is objecting to any exhibits.
6 I'll hand up the exhibit list.

7 THE COURT: No objection to their
8 exhibits.

9 MR. FRIEDLANDER: Nobody is objecting
10 to anybody.

11 THE COURT: Are they all on file?

12 MR. FRIEDLANDER: Yes, except with a
13 proviso that everybody is putting in piles of credit
14 agreements. I think it was mostly done by CDs. I
15 understand some of them excerpted pages. Ours we did
16 by CD.

17 THE COURT: Don't worry. It's not
18 going to come up.

19 By consent, all the exhibits are
20 admitted. And all the deposition transcripts that
21 have been lodged.

22 MR. FRIEDLANDER: Right. All nine
23 fact deposition exhibits -- all the fact deposition
24 transcripts are lodged.

1 MR. GADSDEN: We offer the expert
2 deposition transcript of the Bank of America expert
3 witness.

4 MR. FRIEDLANDER: I guess they're
5 consenting. Then we can put in Harvey Pitt as
6 rebuttal, if they're putting in Bank of America's
7 expert.

8 THE COURT: I don't see why not.

9 MR. FRIEDLANDER: We'll lodge
10 Harvey Pitt and Charles Fox.

11 THE COURT: All right.

12 Thank you.

13 Have the parties discussed how this
14 argument is going to be conducted?

15 No. You haven't talked to each other.
16 That's great.

17 MR. FRIEDLANDER: Do you want
18 plaintiffs to go first?

19 THE COURT: I'm happy to have you go
20 first.

21 MR. SACKS: Your Honor, if I could
22 just ask the question. We do have, I guess, two
23 discrete issues to be argued, the first being the
24 question of the interpretation of the indenture

1 clause, and the second being the question of, if it is
2 interpreted to provide the directors to not have the
3 authority, whether, under those circumstances, its
4 adoption in the indenture was either the breach of the
5 duty of care or invalid under Delaware law.

6 In our case those are going to be
7 handled by two different people because of a conflict
8 we have with Bank of America. So I'd only put that
9 out there. I'm going to handle the second issue, not
10 the first issue.

11 THE COURT: Very well.

12 I will hear all of those arguments.
13 But I urge everyone to be brief. I don't think any of
14 this is cause for us being here more than about an
15 hour, or an hour and a half, at the very most.

16 MR. LEBOVITCH: Okay.

17 I'll try, Your Honor. A lot of issues
18 have been raised. I'll try to go as quickly as we
19 can.

20 We do appreciate Your Honor's
21 willingness to hear us on such a quick schedule. As
22 you know, Your Honor, this case is about a provision
23 that's embedded in Amylin's 2007 indenture for its
24 convertible notes, which creates the possibility of

1 acceleration of up to \$900 million of Amylin's debt in
2 the event shareholders exercise their right to remove
3 a majority of Amylin's board. Since the provision
4 allows the creditors to put the debt back, we've been
5 calling it the proxy put. That's what I'll do
6 throughout this argument.

7 The first part of the motion -- first
8 issue to be decided -- is the interpretation of the
9 indenture. We say that the indenture allows the board
10 to approve candidates nominated by shareholders in the
11 context of a contested election, and thereby disable
12 any threat of acceleration that's triggered solely by
13 a change in the majority board.

14 We submit, Your Honor, plaintiff's
15 interpretation of the provision is not only supported
16 by the plain language, it's actually the only
17 interpretation that could render the provision lawful.
18 And Bank of New York's interpretation as indenture
19 trustee, their interpretation would render the
20 provision invalid and violative of Delaware law. So
21 we're receiving a declaration to that effect as well.
22 Before we get to legal points, I want to summarize the
23 facts that got us to the point of filing our summary
24 judgment motion.

1 In June 2007, the board issued the
2 notes -- the convertible notes that included the proxy
3 put.

4 In September 2008, a long-term
5 shareholder of the company, Eastbourne, approached the
6 company privately to discuss putting a minority of
7 members on its board. By early December 2008,
8 Eastbourne was indicating a willingness to run a
9 proxy. Around the same time Carl Icahn, who invested
10 in 2008 in the company, also approached the board
11 about the possibility of putting a minority slate on
12 its board. The result is, if you had two minority
13 slates, you would have a majority trigger. So the
14 board understood that at that point.

15 If the proxy put would be triggered
16 here, there's just no question the noteholders will
17 put -- they will exercise their purchase rights.

18 The notes were issued in a very
19 favorable credit environment for the company in
20 June 2007. Right now the terms would be very
21 different. There's an incentive there. And also
22 they're trading, as I think you heard this morning,
23 at, like, 56 percent of par. So it's a no-brainer for
24 the noteholders, if they can, to put notes back.

1 THE COURT: Is the trading -- what is
2 the conversion price in the indenture?

3 MR. LEBOVITCH: I think the stock
4 price has to go up like 550 percent. I don't know
5 exactly what the conversion price is. Right now the
6 conversion feature is well under water. Okay.

7 THE COURT: All right.

8 MR. LEBOVITCH: So if they can get
9 these back at par, they would be very happy to.

10 THE COURT: I presume, at the time
11 that the notes were issued, the conversion feature was
12 much closer to the market price?

13 MR. LEBOVITCH: That's right, Your
14 Honor. That's right.

15 Obviously, at the end of January, both
16 Icahn and Eastbourne launched their minority slates,
17 and that's when the world realized that it was
18 possible to have a new majority on the board. That
19 possibility didn't last very long. By the next
20 Monday, on February 2nd, Morgan Stanley issued an
21 analyst report that observed that election of a new
22 majority would put extraordinary pressure on the
23 equity, and the analysts were likely wiping it out.

24 I also added that equity investors --

1 shareholders -- have to carefully monitor this
2 because, if they elect a new majority, that could --
3 and I'm quoting -- "transfer full ownership of the
4 company to bondholders."

5 So we submit, Your Honor, once this
6 news got out and people understood the implications,
7 these proxy fights were dead before they got started.
8 There's no chance shareholders would support
9 essentially any of the nominees because they don't
10 know what other shareholders will do.

11 The Morgan Stanley report is also the
12 first time that the company's CEO learned about the
13 proxy puts. It's also the first time that the
14 company's CFO learned about the proxy puts.

15 Now, what did the board do with this
16 information? They didn't act at that point to remove
17 the negative consequences, to the extent they could.
18 They didn't act to approve these nominees so that
19 there could be a vote. They waited.

20 A few weeks later the company issued a
21 Form 10-K that highlighted that the company may not
22 have the financial capacity to bear the triggering of
23 the puts. Plaintiff, the San Antonio Fund, filed this
24 action a few weeks after that and moved for and

1 obtained expedition over the board's objection. At
2 that point pressure grew on the board to approve the
3 nominees so as to minimize the uncertainty and
4 essentially the coercion, allow a proxy vote fight to
5 happen.

6 The Amylin board had optionality at
7 that point. Pressure's building. They found a way to
8 delay, without being blamed and without facing the
9 pressure, and that was to send a letter to Bank of New
10 York as a trustee seeking confirmation that the board
11 could approve the shareholders in the context of a
12 contested election.

13 Now, the confirmation letter did not
14 include an officer's certificate, did not include an
15 opinion of counsel and a supplemental indenture. Bank
16 of New York's corporate representative testified that
17 it was absolutely obvious to her that there would be a
18 nonresponse. It was actually obvious to everyone
19 involved that that letter was not going to get a
20 response. All that letter had the effect of doing was
21 essentially shift blame away from the company for any
22 delay and put it on Bank of New York. It assured that
23 we would be here today, because Bank of New York would
24 not take a position because it was not required or

1 obliged to do anything of that nature.

2 So at that point we filed the motion
3 for partial summary judgment. We didn't anticipate
4 there was any ambiguity about the contract provision.
5 By asking for confirmation and getting a
6 nonresponse -- not a dispute -- it forced us to
7 essentially try to clarify the uncertainty hanging
8 over the election.

9 As I'll get to it, we do think the
10 plain language clearly requires the plaintiff's
11 interpretation, which is that the board can approve.
12 But before I do that, I want to highlight, in
13 assessing this contract, we don't think the Court
14 should look at it. To the extent you go beyond the
15 five words at issue, we don't think the Court should
16 look at this as a business as usual type of contract.
17 The proxy put, by any standard, creates a negative
18 consequence for the company and the shareholders
19 that's triggered directly and solely by the way
20 shareholders vote.

21 It's actually the case, even if the
22 board gets the approval right, because shareholders
23 still depend on the board to know whether they can
24 realistically run a proxy fight.

1 And we submit that that background,
2 the fact that this affects shareholder voting should
3 animate the way that the indenture itself is analyzed.
4 Delaware courts have long obviously protected
5 shareholder rights and have said that basically
6 shareholders are unhappy with one of two options: sell
7 or vote out the board. It always comes back to that.

8 In fact, Your Honor, in the Esopus
9 Creek case that Bank of New York cited to you in
10 discussing how the Court will intervene on behalf of
11 shareholder voting rights said the duty of the Court
12 to protect the stockholder vote is at its highest when
13 the board action relates to the election of directors.

14 And, frankly, that's why any other
15 defensive measure that's been reviewed by this
16 Court -- even the poison pill -- is considered not to
17 be preclusive because you always have the option to go
18 to a proxy fight. You always have the option to
19 remove a board.

20 And what we see here is the economic
21 effect on the -- which is not a shocking result of
22 convertible notes -- the economic effect here is such
23 that it's simply impossible for any rational
24 shareholder not only to vote for a new majority of the

1 board but really even try even to run a majority
2 slate. And that brings us to just one more prefatory
3 point, Your Honor.

4 This Court often hears slippery slope
5 arguments and often it's in the context of
6 shareholders challenging one practice or another --
7 one action by a board. The corporate lawyers always
8 say it's a slippery slope if the Court looks at this
9 practice, or another, then the foundations of the
10 state are going to fall apart if you go down this
11 path. What I'm saying, Your Honor, the arguments here
12 about the proxy puts, this is not a slippery slope at
13 all. These proxy puts are actually the end of the
14 slope, if you look at it from shareholder rights.
15 Because if the proxy put is interpreted the way that
16 Bank of New York wants it to be interpreted and
17 applied that way, and upheld as being legally valid,
18 then there is no ability to run an election.

19 The shareholder proxy contests this
20 year they're over. The rights in the future are going
21 to be over, at least until 2014, because there's just
22 no prospect of shareholders changing the board. We
23 think it's not enough to simply have elections and
24 have one-sided votes going back to the Blasius opinion

1 Chancellor Allen wrote. He listed all the cases where
2 this Court has protected voting rights. He says that
3 the law has a deep concern that a credible form of
4 corporate democracy be maintained. It's not enough to
5 go through the motions. Your Honor, that's what we
6 believe is at stake here with these provisions, if
7 interpreted the way Bank of New York asks the Court to
8 interpret it.

9 It gets to the interpretation of the
10 indenture itself, which we think is very simple. It's
11 governed by New York law. So you look at the plain
12 meaning of the language. But in interpreting the
13 plain meaning, as Your Honor held in the Bank of New
14 York Realogy case, indentures have to be read to allow
15 free and broad borrower action, unless it's expressed
16 the limited. That should be the only principle that
17 should animate the way the words of the indenture are
18 interpreted.

19 Let's look at the indenture. It's
20 PX-11.

21 Do you have that in front of Your
22 Honor?

23 THE COURT: No.

24 MR. LEBOVITCH: Joint Exhibit 11

1 THE COURT: PX-11, you say?

2 MR. LEBOVITCH: Yes. JX 11.

3 THE COURT: I've got it. What page?

4 MR. LEBOVITCH: I just want to walk
5 you through. On page 69 of the indenture, the
6 Section 11.01, that's just the provision that
7 establishes the right to repurchase upon a fundamental
8 change. Paragraph A identifies any fundamental change
9 would give the right to a purchase. The second right
10 of that provision identifies some carveouts.
11 Basically says, as we understand it, if a change
12 pursuant to one, two or three of the definition of
13 fundamental change happens in connection with a
14 stock-for-stock merger of two publicly traded
15 companies, you actually can avoid the repurchase
16 rights. So it seems to be the only limitation on the
17 proxy fight.

18 In other words, if a proxy fight is
19 part of a transaction, there are ways to avoid the
20 acceleration of the debt. If you have a naked proxy
21 fight, meaning shareholders simply try to change the
22 board, there will be a trigger. And that's because
23 the definition of fundamental change includes as point
24 3 -- that's on page seven -- the bottom of page six

1 and page seven of the indenture defines fundamental
2 change. At the bottom of page seven of the indenture,
3 one of the triggers is ". . .at any time the
4 Continuing Directors do not constitute a majority of
5 the Company's Board of Directors. . . ."

6 Any time. This is an indenture that
7 lasts for seven years. So, if at any time the
8 shareholders elect more than at this point five people
9 over a seven-year term, who are not continuing
10 directors, the holders of the notes will have an
11 acceleration and a repurchase right.

12 So now turning to the definition of
13 continuing directors, which is on page four, Your
14 Honor. It says that continuing directors are --
15 there's two subparts. The first one is
16 ". . .individuals who on the Issue Date constituted
17 the Board of Directors. . . ." That obviously means
18 that those -- the board, as of June '07, if they can
19 stay on all the way to 2014, there's never a question.
20 They're always free from any sort of taint.

21 Subpart two, Your Honor, identifies
22 two ways that new directors can be, quote/unquote,
23 cleansed for purposes of being continuing directors
24 and avoiding any repurchase rights of the noteholders.

1 The first clause of subpart two, it
2 says that ". . .new directors whose election to the
3 board. . . ." Then I take out the "or for now." And
4 then it says it was approved by at least a majority of
5 the June 2007 directors, or their chosen successors.

6 So what that means is that anyone who
7 the board itself endorses, be it by appointment,
8 nomination or otherwise, they will necessarily enjoy
9 the approval of their election as directors. But then
10 there's more language. That's really where the rubber
11 hits the road in this interpretation.

12 The second clause of subpart two,
13 after the word "or," it says that any director whose
14 nomination for election by the stockholders was
15 approved by at least a majority of the June 2007
16 board, or their chosen successors. That's the way it
17 reads.

18 We think that language, Your Honor, it
19 contemplates the exact situation you have here, where
20 the board approves a nomination by the shareholders
21 while not approving or endorsing their election.
22 We've had that here because, after the motion for
23 summary judgment was filed -- I mean, the board still
24 had optionality whether it would approve. There were

1 questions. Carl Icahn initially was getting involved
2 in the case and called it a game of Russian roulette
3 because the shareholders didn't know whether the board
4 would approve or not. So they said that's coercive of
5 shareholders.

6 Then there was a partial settlement,
7 the effect which was to remove the board's
8 optionality. The question is whether this Court will
9 essentially endorse or allow the board to approve and
10 thereby defease any rights of repurchase on this
11 upcoming election.

12 Bank of New York argues -- they cite a
13 couple of cases that a court may not interpret
14 indenture in a way that leaves words without force,
15 without effect. You can't render words superfluous.
16 We say that, in order to give the words "whose
17 nomination for election by the stockholders" any
18 purpose, any meaning, the board necessarily has two
19 distinct powers to cleanse new directors: one is to
20 approve their election, and one is to approve their
21 nomination, even if not supporting that particular
22 candidate's election. Because if you were to accept
23 Bank of New York's reading, which is that "nomination"
24 means nomination by directors, well that also means

1 that their election is approved and that all fits
2 under the first clause, by any standard.

3 In fact, it's a little bit
4 surprising -- I don't know if I want to say surreal --
5 but a little surprising that there's even a dispute
6 here, because I took the deposition of Bank of New
7 York's corporate representative. I asked the person,
8 who worked on this transaction and was selected to
9 represent Bank of New York's interest, I asked if the
10 indenture does in fact draw a distinction between
11 approving someone's election and someone's nomination.
12 The answer was in the affirmative.

13 I also asked if she agreed that the
14 stockholders nominate someone for election, so long as
15 the original directors approve that nomination, then
16 those people will be continuing directors, and the
17 answer was yes. We think that's actually dispositive,
18 because approving a shareholder nomination doesn't
19 mean approving as your own.

20 BONY says "approve" means endorse or
21 support. We deal with that in the papers. We cite
22 Brian Garner's dictionary of usage. Bank of New
23 York's dictionary that he relies on, Merriam Webster.
24 One of the definitions of approve is to accept as

1 satisfactory. Accept as satisfactory is not the same
2 as conclude that someone is in the best interests of
3 the shareholders. And that's a critical distinction.
4 Because approved for purposes of the indenture is not
5 the same as approve as being in the best interests of
6 the shareholders. There's a possibility of having a
7 contested election here. That's exactly what this
8 language does.

9 Your Honor, we note it was just a few
10 weeks ago that Your Honor addressed a similar
11 provision in the context of a hostile takeover battle.
12 That was in the energy Exelon litigation. We had a
13 provision exactly not identical, but perhaps in some
14 ways could be distinguished from this one as being
15 more restrictive. The Court in that case looked at
16 the provision. There was a possible question of
17 whether the board, rather than raising a question
18 about whether the board could cleanse, the Court
19 actually just said the energy board can approve of the
20 Exelon nominees and avoid the chance that the change
21 of control provision would be triggered in the future.

22 So we think that the Court
23 contemplated obviously approval of the nomination so
24 that a proxy contest could then go forward. Because

1 it's a hostile takeover fight. I don't think the
2 suggestion was that you can't have an approval until
3 the end of the fight. It was a forward-looking
4 analysis. And we think, as far as the plain
5 interpretation, that really should do it.

6 What I'll do is focus on Bank of New
7 York's arguments. What they do is, they don't look at
8 the language, other than this one argument about the
9 word "approve." They really make arguments on what
10 the intent of the indenture is trying to achieve.

11 First of all, as I said, these are
12 very important issues, as far as Delaware law,
13 Delaware corporate law, and the rights of
14 shareholders. We think that, as you look at the Bank
15 of New York's arguments, you should keep in mind what
16 Vice Chancellor Strine did in the ACE v Capital case,
17 which is he looked at a no-talk provision that had
18 two, in his view, competing reasonable
19 interpretations. And he said, I'm going to accept the
20 one that avoids the fiduciary conflict because
21 accepting in that case the bidder's view of the
22 no-talk provision would render it likely invalid. And
23 we think that can animate the way this Court reads
24 resist contract.

1 You know, we actually don't even have
2 a problem with looking at the overall transaction to
3 understand how to interpret the proxy put. These are
4 convertible notes, Your Honor. The noteholders, as
5 you heard this morning, they're not getting a lot of
6 benefit out of particular protections and not really
7 investing for just the interest in principal. The
8 conversion fee is what drives the value here.

9 If the stock price rises, for whatever
10 reason, then they're going to be creating value. So
11 it's a fair question to ask why would noteholders
12 represented by a trustee be essentially arguing that
13 the purpose of this provision is to entrench the
14 board. Because when you actually sum up all their
15 arguments, that's the only explanation they have, is
16 the purpose is to entrench the board. We want to know
17 who the management is. That doesn't really create
18 value for convertible noteholders anyway.

19 What Bank of New York says is that the
20 purpose is to give a second look, in the event that
21 there's a fundamental change, specifically tying it
22 to -- the inference that the management of the issuer
23 is a key factor in buying a high-yield bond. That's
24 what they say. It's a key factor. There's no record

1 for this assertion. It's in the brief. It actually
2 doesn't make sense, according to the evidence that's
3 in there. It's hard to imagine that noteholders
4 considered management to be a key factor.

5 If you look at the offering circular,
6 it doesn't list who the members of the board are, who
7 management are in any descriptive way. Just the
8 opposite. What the offering circular says -- and I
9 think you saw it this morning. It's JX 10. But at
10 page 13 the offering circular says they should not
11 consider the fundamental change provision as a whole.
12 Just one little part of that. As a whole, they should
13 not consider it a significant factor in their
14 investment decision.

15 So, frankly, it's hard to fathom how
16 these noteholders are actually buying, despite a risk
17 disclosure that says, "Don't consider this," in
18 reliance on a subclause of the fundamental change
19 which doesn't ever mention management but somehow says
20 that these people have a particular interest in this
21 particular management.

22 They don't have any evidence of the
23 intent to be that way. I can tell you why, Your
24 Honor. The change in control provision is being

1 proffered at different places as a common provision.
2 Something that's boilerplate. Okay? And therefore it
3 wasn't negotiated. That's actually not true. There
4 was a lot of negotiation about the change in control
5 provision as a whole -- the fundamental change
6 provision. The only thing that got not a lick of
7 negotiation was the continuing directors provision.
8 And I'll get to that later -- to the way that Amylin's
9 counsel actually negotiated this.

10 As a practical matter, there's no way
11 that Bank of New York, who wasn't even part of the
12 negotiation, can look at this record and say that
13 there's any intent behind the plain language. They
14 just can't. Frankly, these provisions they get in
15 because of what I can only describe is collusive
16 negotiations. Lenders want every protection they can
17 get. They don't care what the provision is. It is up
18 to company counsel to resist with provisions like
19 this. Company counsel just do not resist because they
20 kind of like the effect of these provisions. Beside,
21 even if there was a supposed reliance on management,
22 this provision doesn't do the trick because, as we
23 have witnesses agree, Charles Fox, Bank of New York's
24 expert, and Bank of America, I believe, also agreed

1 the current board can change management. The current
2 board can change strategy. No problem. In fact, so
3 long as the current board doesn't breach any
4 covenants, doesn't breach any restrictions, they can
5 do anything.

6 The creditors, the noteholders in this
7 case, they assume the risk that the board will
8 increase credit risk without breaching a covenant.
9 You have to expect that the board will go right up to
10 the border of covenants and not breach them. You have
11 to live with it. That's the nature of the creditor
12 corporation relationship. There's no sense in saying
13 that these proxy puts help because we know our
14 management. The management can change.

15 There's also no sense in saying that
16 somehow the change of the board changes that
17 assessment of risk. The new board is bound by the
18 same covenants that the old board is bound by.

19 But in the end, really, it is
20 boilerplate. That's a problem for us. We have a
21 problem with that. But it is boilerplate.
22 Vice Chancellor Strine wrote in the Petrohawk case, of
23 particular borrowers and lenders, they do not depend
24 upon particularized intentions of the parties to an

1 indenture. It doesn't make sense.

2 If you wanted to have that protection,
3 though, Mr. Fox explained, there's plenty ways to do
4 it in indentures, in credit agreements. You get a key
5 man provision. If you care about the CEO, make him a
6 designated person and then get a right to revisit if
7 the CEO is replaced. That's a board judgment. The
8 selection of the CEO is done by the board, so the
9 board can limit its own judgment. This proxy put
10 focuses on directors, focuses on its decision that
11 it's solely in the hands of the shareholders.

12 In the end, when you look at the
13 provisions, look at the treatises Bank of New York
14 cites, they don't focus on transactions because
15 transactions affect credit risk. It vet its -- like
16 the change in the board, until they do something, it
17 doesn't affect credit risk. They have to do something
18 that changes the situation and warrants any
19 re-evaluation by the noteholders.

20 That's why it didn't make sense again.
21 It's a math exercise. Right now they're so far under
22 water. With any convertible note, you're either under
23 water or over. That's the only analysis people are
24 going to do and whether they're going to convert.

1 Besides, it's a myth. They're not
2 going to re-evaluate. They're not going to get a
3 trigger here. They're at zero chance of this ever
4 being triggered. The only question is whether
5 shareholders can have a free vote. If Bank of New
6 York's interpretation is upheld, there is no free
7 vote. There is zero chance of anyone actually
8 triggering it.

9 THE COURT: You're sort of overstating
10 it. There's always a chance. Of course there is. If
11 five directors were elected this year and then five
12 out of whatever it is -- 12 or something -- and then
13 two of the continuing directors were killed in an
14 airplane accident, now you've got a change of control.

15 MR. LEBOVITCH: That's about the only
16 way you can have that.

17 THE COURT: That's one way you can do
18 it. Let's not exaggerate. You're somewhat
19 exaggerating when you're saying that it just precludes
20 any kind of proxy contest. Both of these stockholders
21 initially sought to elect only a short slate, didn't
22 they?

23 MR. LEBOVITCH: Right.

24 THE COURT: Icahn is now trying to

1 elect only three directors.

2 MR. LEBOVITCH: Right. We think
3 that's proof of the way these puts actually deter and
4 coerce shareholders --

5 THE COURT: They may change one from
6 seeking to elect a full slate to seeking to elect less
7 than a full slate. Of course, that's true. That
8 doesn't mean that they prevent people from trying to
9 elect some directors. It seems to me that people like
10 Icahn often try to elect a short slate.

11 MR. LEBOVITCH: They do for different
12 reasons.

13 THE COURT: For different reasons.
14 Right.

15 MR. LEBOVITCH: They do for various
16 reasons.

17 THE COURT: Right.

18 MR. LEBOVITCH: The question is,
19 Delaware law doesn't allow shareholders to run a
20 majority slate, in theory. The fact of the matter is
21 here, no one can identify a single instance when any
22 shareholder tried.

23 THE COURT: I'm not saying it
24 undercuts everything you're saying. I'm saying

1 there's no reason to exaggerate the effect. The
2 effect -- it doesn't prevent anyone from running
3 anyone to be a director.

4 MR. LEBOVITCH: When I say it
5 prevents --

6 THE COURT: The only reason this came
7 up was that two shareholders chose simultaneously to
8 conduct short slate elections.

9 MR. LEBOVITCH: Yes. It is a
10 coincidence that they're both running a short slate.
11 That's probably why this hasn't been litigated before,
12 Your Honor. We say it's because at some level
13 shareholders, simply -- if they don't have a
14 transaction -- the cases involve someone pitching a
15 transaction. So they assume the risk of all these
16 change of control triggers.

17 THE COURT: If you come up -- if one
18 shareholder ran a short slate one year and then
19 someone else -- the same shareholder -- wished to
20 elect more directors the next year, you wouldn't have
21 a problem.

22 MR. LEBOVITCH: I don't think that
23 would happen.

24 THE COURT: It would give rise to this

1 issue.

2 MR. LEBOVITCH: But it hasn't -- in
3 other words, no one has tested it. The witnesses
4 said, not just Mr. Fox, who has done hundreds if not
5 thousands of debt agreements, Mr. Pitt never heard of
6 this situation. The witness -- Bank of New York's
7 witness -- was specifically asked, "Have you ever done
8 an amendment on the bases of this particular version?"
9 He said no. Are you aware of anyone even creating the
10 possibility of triggering? No. The cases, they don't
11 go there. The cases involve someone pitching a
12 transaction with one possible exception. DeSoto is
13 just unclear whether they were actually pitching
14 transactions.

15 The point is, Your Honor, I don't
16 think it's good enough under Delaware law for
17 shareholders to maintain the right to run a majority
18 slate, especially on a seven-year contract, which,
19 let's say in 2008, at the election, the first year of
20 this indenture, Icahn ran a five person slate. Got on
21 the board. Okay.

22 THE COURT: Then suddenly you wouldn't
23 be able to elect any other directors for seven years,
24 six years.

1 MR. LEBOVITCH: That does create a
2 tension.

3 THE COURT: Of course it does.

4 MR. LEBOVITCH: No one -- this Court
5 never said it's okay to lose the ability to change the
6 majority of the board. Once you elected five -- if
7 shareholders this year elect five, come next year and
8 all the way through 2014 --

9 THE COURT: That gives rise to the
10 interpretational issue.

11 MR. LEBOVITCH: That's right. The
12 interpretational issue may be able to cure it here
13 because here the board has now approved as part of the
14 partial settlement. They have given the approval.
15 And so the question is: does that approval get effect?

16 If five are elected this year, come
17 next year there might be another question about
18 whether the board is going to give approval. That
19 really is for next year.

20 THE COURT: That is specifically not
21 for this year; right?

22 MR. LEBOVITCH: That's been settled.

23 THE COURT: That issue got settled.

24 MR. LEBOVITCH: Yes, they approved.

1 So the question is just will the Court give effect to
2 that approval to defease any of your purchase rights.
3 We're not litigating they had to do it earlier. We
4 think they should have done it earlier. But they did
5 it when they did it, so that's resolved.

6 We do believe, though, the point is
7 you're not -- with provisions like this, if the
8 economics are more than marginal, people won't try to
9 eke through it. If you're just running to get control
10 of the management of the board -- if you're just
11 trying to get control of the board and don't have a
12 transaction, any kind of marginal cost. For the notes
13 holder -- for the noteholders, this isn't a right
14 they're going to see trigger, other than the example I
15 guess that Your Honor gave: the accident. You know,
16 someone offers a transaction in which case the other
17 part of the change of control provision will be
18 triggered, or an accident where five people get on and
19 an Amylin director dies.

20 THE COURT: Or two people resign.

21 MR. LEBOVITCH: And that can't be good
22 for a company. When you say you have five out of 12
23 that are not continuing directors, and something as
24 random as people getting hit by a bus could actually

1 bring financial catastrophe to the company, that can't
2 make sense.

3 Bank of America says "approve" does
4 mean you can't change your mind. What they say is
5 that they didn't approve it because they really
6 disapprove it. Right? And not just endorse, they say
7 you can't change your mind now because you nominated
8 your own slate.

9 First of all, if that's the case, then
10 the trustee's ripeness arguments make no sense. We're
11 either too late because the board has already
12 disapproved, or we're too early. I don't know how we
13 can be both at the exact same time.

14 THE COURT: It's happened.

15 MR. LEBOVITCH: It's happened. Yes,
16 it has. At least there should be some time period
17 between being too early and too late. Here at the
18 same time they're too early, too late.

19 Why would noteholders care how people
20 are nominated? It just doesn't really matter. And
21 this does go to the DeSoto case. Chancellor Allen
22 said the only difference to the plan beneficiaries
23 here -- and these are plan beneficiaries here -- real
24 rights and interest in getting their money -- he says

1 how you were nominated to the board can't possibly
2 bear. He says whatever interest you have, they are
3 not rationally intertwined with the question of who
4 nominated directors. That's at page 12 of the
5 opinion.

6 We say it's the same thing -- any
7 argument that says how you were nominated makes a
8 difference. It really can't make a difference to
9 noteholders. It didn't make a difference to the ERISA
10 plan beneficiaries in the DeSoto case.

11 THE COURT: Look, it doesn't make --
12 some of your arguments are focused -- they're all
13 focused very intently on this one subpart of this
14 provision, the fundamental change provision. I don't
15 know that that's really the proper way to look at it.

16 Interpretationally, we have to figure
17 out what that particular part means. In terms of its
18 utility, it's part of a larger provision. To say it
19 has no meaning is sort of to say none of it has
20 meaning. I'm not -- I don't understand you'd be
21 making that argument.

22 MR. LEBOVITCH: If -- to be clear, we
23 are not seeking the invalidation of change in control
24 provisions, generally. We're not seeking the

1 invalidation of even proxy puts, if they give the
2 approval right. There's a fiduciary question of how
3 can a board refuse to give the approval. But what
4 we're saying is the proxy put, if interpreted in Bank
5 of New York's way, which basically means you can't
6 have a contested election -- you can only have one
7 slate running every election or people will not be
8 continuing director and there's an increased risk --
9 we're saying that's invalid.

10 You heard from Professor Roberts.
11 That's a vestige of the mid eighties -- the first
12 generation poison puts. How does it get in here?
13 Mr. Fox actually testified this is what his book talks
14 about it. He says plagiarism is good. That's how
15 debt indentures get written. He said he's not aware
16 of a single provision like the one in the credit
17 agreement. But if you interpret the Bank of New
18 York -- if you accept Bank of New York's argument,
19 then this provision is just like that: that there's no
20 real right of approval.

21 He said he's never seen the one that
22 we call the dead hand. Mr. Pitt says he's never seen
23 that. Now, they exist. We don't dispute there's
24 some. They exist. There's some numbers of them. The

1 way they get in is because no one has an incentive to
2 take it out.

3 Mr. Fox said, in these negotiations on
4 the lender side, you think about shareholder rights.
5 No. I said, "Is anyone looking out for the
6 shareholder in these negotiations?" He says, "Not in
7 the usual course." That's the problem. That's why
8 these perpetuate themselves. Not because anyone has
9 any social utility from them. You heard from
10 Professor Roberts -- the only evidence in there --
11 these are absolutely worthless. Zero value.

12 THE COURT: Professor Roberts, that
13 part -- based that part of his opinion on a study he
14 hasn't seen and it wasn't in his report. The part of
15 the study that he does talk about in his report showed
16 it had some utility. It wasn't great, but there was
17 24 basis points.

18 MR. LEBOVITCH: At a time when yields
19 were 10.24 percent. Twenty-four basis points out of a
20 a thousand -- out of over a thousand basis points.

21 As Mr. Pitt testified in -- he put in
22 his opinion and testified that borrower's counsel has
23 a duty to weigh what are you giving up. A board has
24 to say, "What are we giving up?" Let's even assume in

1 1989, which was the height of the takeover boon, the
2 height of the paranoia of hostile takeovers, with huge
3 spreads --

4 THE COURT: It wasn't a question --
5 look, I really do want to get moving along here.
6 Calling the concerns that borrowers' counsel had in
7 the eighties and nineties paranoia is not proper. An
8 awful lot of people lost a lot of money investing in
9 bonds in those days because they didn't have
10 protections against management buyouts, or other
11 changes in controls that destroyed value.

12 MR. LEBOVITCH: We're not challenging
13 any transaction that even affects value. We're just
14 challenging the provision --

15 THE COURT: You're challenging the
16 provision that is some sort of boilerplate provision
17 in a lot of credit agreements and a lot of indentures
18 that deal with generally with the issue of fundamental
19 change, as it may affect the value of debt.

20 MR. LEBOVITCH: Your Honor, in our
21 view, these aren't in contracts because they have
22 value. They're in contracts because they replicate
23 themselves. Industry practice has not been the reason
24 to uphold it.

1 Specifically, I mean the proxy put --
2 the proxy put -- it's not about the RJR concern that
3 bondholders have. It's something different. And the
4 proof, Your Honor, is that in this agreement there's
5 actually carveouts where, if the board is replaced, if
6 that's coming with a transaction, Amylin actually
7 negotiated for there to be -- for the acceleration
8 rights to be defeased. If you replace the board as
9 part of a stock-for-stock deal among two public
10 companies, you don't have the acceleration. That has
11 an economic effect. It's only the shareholders simply
12 want to change their board.

13 We've never understood that the
14 commonalty of a provision -- you know, commonalty of
15 any industry practice -- that's never been accepted
16 for a violation of law. The fact that something has
17 been repeated doesn't make it okay.

18 Chancellor Chandler wrote that when he
19 faced the argument that 3 percent termination fees are
20 just a given. That's market. He says that's not
21 right. That's not the way it works. I'm not aware of
22 any court has said that industry practice is an
23 excuse. Courts have hung out the other way. They
24 said industry practice is no excuse for tax

1 violations, no excuse for securities law violations.
2 I don't think the commonalty alone is enough,
3 especially when there's just no record that these
4 provisions get negotiated by anybody.

5 THE COURT: You know, I beg to differ.
6 There is evidence in this record of negotiation of the
7 provision in the bank credit agreement. This
8 particular provision there was negotiation over. You
9 told me a few minutes ago that there was quite serious
10 negotiation about the rest of this fundamental change
11 provision, but not this particular aspect of it.
12 Presumably one might assume that is because, as it was
13 drafted and presented to issuer's counsel, they were
14 satisfied with it.

15 MR. LEBOVITCH: They were satisfied
16 with it. They were satisfied.

17 THE COURT: They understood it to mean
18 what you want me to say it means, which is that they
19 had the approval right.

20 MR. LEBOVITCH: Well, I'll get to the
21 duty of care issues.

22 I don't -- Mr. Pitt opined that, when
23 he did advise boards, when he would be involved in a
24 debt agreement, he did weigh the lender's interest,

1 the borrowers' interest and the shareholders'
2 interest. He said -- I think it's at page 94 of his
3 deposition -- if the board didn't ask me how this can
4 affect shareholders' right, I would ask them and then
5 answer the question. He said that about debt
6 agreement. That's actually what the counsel to the
7 company are supposed to do, because there is no one
8 who is representing shareholders.

9 THE COURT: Who is on trial here, the
10 lawyers from Cooley Godward or the directors or what?

11 MR. LEBOVITCH: Well, on the duty of
12 care, the directors are on trial and their defense is
13 lawyers didn't tell us. We think, actually, to have a
14 rule that says, if the lawyers -- sophisticated
15 lawyers -- who read a provision and understand that it
16 may affect shareholder voting rights, if they choose
17 to keep the board in the dark, that can't be okay.
18 That's an invitation to mischief. Think of it. Can
19 sophisticated counsel put a 25 percent termination fee
20 in a merger agreement?

21 THE COURT: That's all well and good.
22 Is there evidence that the people who bought these
23 notes were aware of that?

24 MR. LEBOVITCH: They were aware of

1 what?

2 THE COURT: Were aware that the issue
3 hadn't been raised with the issuer's board?

4 MR. LEBOVITCH: They were aware that
5 they were -- asking for -- Goldman, Sachs, they were
6 aware -- I mean, the testimony is they didn't think
7 about it. There's no negotiation. It's not their
8 policy to have it. But they did ask for it. When you
9 ask for a provision in a contract that directly
10 creates negative consequences, based on how
11 shareholders behave, you should be on notice that --
12 you know what? --that might be a problem for the
13 shareholders and for the board to agree to it.

14 It doesn't matter if the board knew.
15 Shareholders have to have a right to challenge that.
16 So you ask for that provision with the risk that it's
17 invalid.

18 THE COURT: I think we're getting off
19 the beam here. You're not asking me to strike the
20 thing down if I interpret it as you ask me to
21 interpret it?

22 MR. LEBOVITCH: That is correct. I'm
23 trying to go through why Bank of New York's arguments
24 can't prevail. I can essentially move on. I don't

1 know -- I can do the invalidity of the statutory
2 argument, which just supports why Bank of New York's
3 argument would render the provision invalid. Then I
4 can turn to the duty of care issues.

5 THE COURT: Why don't you go to the
6 duty of care issues. There is a 102(b)(7) provision
7 here, is there not?

8 MR. LEBOVITCH: There is. And we're
9 not seeking money damages, just seeking invalidation
10 of the provision.

11 THE COURT: As a remedy?

12 MR. LEBOVITCH: What's that?

13 THE COURT: As a remedy for a breach
14 of care by the directors of the issuer?

15 MR. LEBOVITCH: That's absolutely
16 right.

17 THE COURT: To invalidate a provision
18 in an indenture.

19 Is there any authority that suggests
20 that I could invalidate a term of an indenture based
21 on a finding of a breach of the duty of care by the
22 issuer's board of directors?

23 MR. LEBOVITCH: There's, I would say,
24 three key authorities. One that factually is actually

1 pretty close is the second circuit's opinion in
2 Hanson Trust versus Merrill Lynch SCM Acquisition.
3 That's a third-party contract. The Court -- in that
4 case there wasn't a merger. There was no requirement
5 for the board to read the whole contract. It was an
6 asset sale, a lockup. It was just an asset agreement.
7 They had some of the best legal and financial advisors
8 in the world.

9 Now, the board and the advisors --
10 essentially the board didn't ask and the advisors
11 didn't tell about the economics of the deal. And the
12 Court said there was no fraud, no bad faith and no
13 self-dealing. They interpreted this purely under a
14 duty of care analysis, and said that the board's
15 failure to inquire into the value of the assets being
16 sold and the way this worked, and the way this would
17 have an effect was sufficient to support an injunction
18 against the transaction. It's not different.

19 In the Paramount versus QVC case, Your
20 Honor, that board -- the target board -- Paramount
21 board -- they were mistaken as to whether Revlon
22 duties apply. They actually got legal advice. They
23 may be in a better position than the Amylin board,
24 which did not get advise that the proxy puts were

1 okay. The Paramount board was told this was okay. But
2 they were wrong. They were simply mistaken. And that
3 was considered to be good enough to find injunctive
4 relief against Viacom. The Court said, from Viacom's
5 perspective, it cannot be --

6 THE COURT: Is there any authority
7 that would support issuing the kind of relief in the
8 case of an indenture governing publicly traded debt
9 that at some later find -- years later -- that the
10 board of directors of the issuer engaged in a breach
11 of the duty of care, or any -- perhaps any duty that
12 the Court would be at liberty to rewrite the contract?

13 MR. LEBOVITCH: The severability
14 clause in the indenture could be one. It doesn't say
15 that it has to be held in violation of a statute,
16 which we do think -- these provisions are severable.
17 We think, when the noteholders were told -- whatever
18 severability standard Your Honor wants to apply -- if
19 noteholders were told not to make the fundamental
20 change as a whole a significant factor, it has to be
21 severable.

22 So, for any violation -- I mean, I
23 don't know -- we don't have a precedent where someone
24 has in fact changed an indenture or invalidated a

1 specific provision of indenture on the basis of a duty
2 of care. But I don't know what distinction will be
3 drawn between indenture or other third-party
4 contracts.

5 I mean, if people have vested rights,
6 they have vested rights. Here it happens to be a
7 fully severable agreement, which might make the case
8 stronger than merger agreements that may have a
9 stricter view of severability because, like a no-talk
10 provision -- like Vice Chancellor Strine dealt with in
11 Ace -- a no-talk is a very essential term of an
12 agreement. It's not some subpart of a provision that
13 the purchasers were told should not be a
14 fundamental -- a significant factor.

15 So, you know, no, I don't have a
16 precedent exactly on indenture. In the Ace case,
17 Vice Chancellor Strine, he actually said the
18 procedural posture was the bidder asking for a TRO to
19 force -- to enforce the provision. But he said that,
20 if this board mistakenly, and under the erroneous
21 impression that they had an out, entered this
22 agreement, that may be a breach of the duty of care.
23 That's what Vice Chancellor Strine said. I'm sure, if
24 the procedural posture was different, if he had to

1 enjoin that no-talk provision so the board could
2 comply with its fiduciary duties, there's no
3 indication in Vice Chancellor Strine's opinion in Ace
4 that if it was a mere breach of the duty of care
5 because they had a mistaken impression that he would
6 have his hands tied from taking action. I don't think
7 that's the way to go.

8 Again, I do go back to the fact is the
9 indenture -- the indenture says it's severable,
10 negotiated by Goldman, Sachs, which says -- and Bank
11 of New York took the deposition last week. And they
12 asked Goldman, Sachs, "Isn't it your policy to have
13 these provisions?" That would actually make it -- you
14 know, if it's a policy, there might be some importance
15 to it. The person who did this deal and the person
16 who is Goldman, Sachs' representative said, "Not that
17 I'm aware of. I never had any discussions about
18 this."

19 So I don't think that the fact that
20 it's in an indenture that's severable, and noteholders
21 were told not to put any weight in it, is sufficient
22 counterbalance to the harm to shareholders if you find
23 that this is not okay to just put in without knowing.
24 It's not okay for the board to not ask. You know,

1 does this debt agreement affect shareholder voting
2 rights? What's more important than voting rights?

3 It's not okay for the lawyers to not
4 tell, because I mean --

5 THE COURT: All right. I get it.
6 Let's get on.

7 MR. LEBOVITCH: Okay.

8 THE COURT: There's my dream of being
9 out of here by 4:30.

10 MR. LEBOVITCH: Our briefs go through
11 the process here. There's a lot of words about what
12 the board did with respect to, you know, knowing that
13 it was issuing the indenture. But we agree they had
14 meetings. We agree they approved the indenture. What
15 they didn't do is ask if there's anything problematic.
16 The closest that you hear is it's common. Sorry. The
17 closest argument that we have fact is the assertion by
18 the CFO that we wanted the lawyers to tell us -- not
19 that the board asked -- but we wanted the lawyers to
20 tell us if there was anything uncommon or not market.
21 Again, that really doesn't do the trick because, if
22 it's common, that doesn't mean that it's right for
23 this company.

24 Mr. Pitt testified the board has to

1 ask what are we giving up to get something. And in
2 strong credit markets, at a time where the board was
3 told a week earlier, strong credit markets here and
4 they were told also that there was a possibility of
5 take-over activity in the next 12 to 18 months,
6 that's -- I think, JX 2 talks about a May memo from
7 the CEO that says, if we don't pursue a financing
8 event, one might be foisted on us in the next 18
9 months. That's a board that actually knew the
10 possibility that there could be shareholder voting
11 activity going on. They didn't ask does this debt
12 agreement in any way affect our shareholders. I don't
13 really know how you can have a material debt agreement
14 that, again, in a pretty significant way is going to
15 affect shareholders. It will actually deter
16 shareholders from running a majority slate, unless
17 it's part of the transaction.

18 And how do you not ask? The only
19 explanation for how you don't ask is it is actually
20 surprising to a board -- maybe not for the lawyers or
21 the banker, but that the board didn't know to ask
22 because you wouldn't have heard that a debt agreement
23 that they're signing would essentially entrench them.
24 They didn't know. They were surprised when they

1 learned about it in February of '09, for the first
2 time. What they did with that information is a
3 different story. But they were surprised when they
4 learned about it. So that defense really doesn't do
5 it.

6 I can try to speed it up. I can just
7 deal with the standing issues that were raised about
8 Bank of New York and the ripeness --

9 THE COURT: You don't need to deal
10 with either standing or ripeness.

11 MR. LEBOVITCH: Thank you, Your Honor.

12 THE COURT: Thank you, Mr. Lebovitch.

13 MR. LEBOVITCH: Thank you, Your Honor.

14 THE COURT: Who is going to go next?

15 Mr. Bracegirdle.

16 MR. BRACEGIRDLE: Good afternoon, Your
17 Honor.

18 THE COURT: Good afternoon.

19 MR. BRACEGIRDLE: May it please the
20 Court.

21 THE COURT: You should understand,
22 Mr. Lebovitch had the advantage of spending a year in
23 my chambers. I'm sure that on more than one occasion
24 we had discussions about things not unlike this.

1 MR. BRACEGIRDLE: All the more reason
2 for Mr. Lebovitch to lead off, Your Honor.

3 I represent Amylin Pharmaceuticals
4 with respect to its crossclaim in this action against
5 Bank of New York. I'm mindful of the Court's guidance
6 with respect to the timing of this argument, so I'll
7 try to keep this brief. And certainly I'll try not to
8 repeat any points that Mr. Lebovitch has raised. I
9 would just like to address a few points to supplement
10 Mr. Lebovitch's presentation.

11 As Mr. Sacks said earlier, he will be
12 rising to briefly address any remaining claims
13 concerning duty of care and validity.

14 Your Honor, from the company's
15 perspective, it's a motion for summary judgment, and
16 crossclaims really present the Court with a very
17 narrow question, and, that is, whether the continuing
18 director definition in this indenture permits the
19 Amylin board to approve a slate of directors, for the
20 purposes of the indenture, so that the fundamental
21 change is not triggered. Notwithstanding the fact
22 that the board may not support the election of that
23 same slate and has not recommended that the
24 shareholders vote for that slate. Bank of New York

1 says the answer to that is no.

2 However, if you look at the plain
3 language of the indenture, as the Court is required to
4 do under New York law, the answer clearly becomes yes.
5 That's for a couple of reasons. No. 1, Your Honor,
6 what Bank of New York's interpretation fails to
7 recognize is that approval by a board of directors,
8 for the purpose of this indenture, is in and of itself
9 a distinct corporate act from the decision to
10 recommend or not recommend that shareholders vote for
11 a dissident slate. And there are a couple reasons for
12 that.

13 No. 1, if you look at a couple of
14 examples -- Your Honor, there are two cases of this --
15 decisions of this Court which illustrate this very
16 principle. No. 1, you have the Petrohawk case, and,
17 No. 2, another decision by Vice Chancellor Strine, the
18 Hills Stores case. In both of those cases, the Court
19 was presented with a situation where a board of
20 directors had taken a vote on whether or not to
21 approve incoming directors as, quote/unquote,
22 continuing directors for purposes of triggering -- in
23 Hills Stores it was with respect to an employment
24 agreement. In Petrohawk it was concerning notes.

1 In both cases you see examples of the
2 board taking a separate and independent action where
3 it approves continuing directors. For example, in
4 Hills Stores, the directors had made a previous
5 decision, as happened here, not to recommend a
6 dissident slate for election. It then later on took a
7 separate decision whether or not to approve those same
8 directors, who were elected as continuing directors.
9 And in both cases it shows that there is a legal
10 distinction between those two acts, which can only
11 lead to the conclusion that approval for purposes of
12 this indenture is a separate act which the board is
13 committed to do.

14 No. 2, Your Honor, if approval for the
15 purposes of this indenture in the continuing director
16 definition was not intended to include nominees that
17 the board had not endorsed, then certainly that
18 eventually could have been included within the
19 particular language that we have here today. The
20 Court needs to look no further than the credit
21 agreement that Amylin has with Bank of New York. As
22 Your Honor knows, that has its own continuing director
23 provision. And it's different from the continuing
24 director definition in the Bank of New York indenture,

1 with one very important respect, and, that is, it
2 excludes from the definition of continuing directors
3 any individual whose initial nomination for or
4 assumption of office, as a member of that board or
5 equivalent governing body, occurs as a result of an
6 actual or threatened solicitation of proxies or
7 consents for the election or removal of one or more
8 directors by any person or group, other than a
9 solicitation for the election of one or more directors
10 by or on behalf of the board.

11 So the credit agreement right there,
12 Your Honor, demonstrates that, if noteholders and the
13 issuer and the underwriters in this particular
14 indenture had intended to take away the board's power
15 to approve a dissident slate that arose in the context
16 of a proxy solicitation, it could have done so. It
17 did not. There are some other examples of that, Your
18 Honor. We've introduced as evidence in this case
19 literally dozens of continuing director provisions and
20 change of control provisions that are different in
21 material ways from the Bank of New York indenture.
22 There are just a few of those that I wanted to
23 specifically raise and bring to the Court's attention,
24 because they highlight the point that there are ways

1 of addressing a debt situation that Amylin is faced
2 with. Again, it proves the point that if noteholders
3 intended for approve not to include a proxy
4 solicitation slate, there were ways they could have
5 done that.

6 First, Your Honor, if you look at JX
7 479, that's an indenture relating to BMC Software. In
8 that particular indenture, the definition of
9 continuing director includes individuals who are
10 nominated with the approval of the board and without
11 objection to such nomination. Now, that's very
12 important. That demonstrates that, if the board
13 objects to a nomination of a director, they're out.
14 They're no longer subject to approval. That language
15 is not in the Bank of New York indenture.

16 The next one, Your Honor, JX 551.
17 It's an indenture for Life Technologies. In that
18 indenture, continuing director includes a person whose
19 election was recommended or endorsed by a majority of
20 directors. Again, it anticipates the possibility that
21 there could be a nominee who was endorsed by the
22 board. If they're not endorsed, they're not a
23 continuing director. Again, that language is not in
24 this indenture.

1 Finally, Your Honor, JX 590 is the
2 credit agreement for IntercontinentalExchange
3 Incorporated. This one perhaps is the cleanest of
4 them all. This one says that continuing directors are
5 persons who are neither appointed nor nominated by
6 directors. Very simple.

7 THE COURT: Say that again.

8 MR. BRACEGIRDLE: It defines a
9 continuing director as a person who is neither -- I'm
10 sorry. It takes -- I was in error there.

11 It says control takes place when the
12 majority of the board are directors, who are persons
13 who are neither appointed nor nominated by directors.
14 So, again, it contemplates the fact that only those
15 individuals, who are specifically appointed or
16 nominated by the board, can go forward as continuing
17 directors.

18 Again, there are numerous examples.
19 These are just a few and probably the most examples
20 that perhaps are the best why approval in the Bank of
21 New York indenture includes the ability to take a
22 board vote, to approve for the purposes of this
23 indenture the dissident slate so that the fundamental
24 change provision is not triggered.

1 To the extent, Your Honor, you feel
2 it's necessary to go beyond the plain language of the
3 indenture and look at what the intent perhaps is,
4 just, very briefly. Some of the cases I discussed
5 earlier make it very clear that, as this Court has
6 found, the intent of this type of change of control
7 provision is not necessarily to benefit noteholders
8 but specifically to give an incumbent board the
9 authority to determine when the change of control
10 occurs. That's what the Court found in Petrohawk and
11 it's what the court also found in the CalPERS versus
12 Coulter case.

13 In both cases, what the Court
14 recognized is that, as a matter of contract, what
15 noteholders do is they know when they make this
16 contract that they're giving the board a certain level
17 of discretion in determining who continuing directors
18 are and when a change of control takes place. And so,
19 to the extent that the board is acting within the
20 constraints and requirements of that contract, the
21 noteholders have gotten the benefit of their bargain.

22 THE COURT: In that context, in your
23 view, Mr. Bracegirdle, there's a limit on the
24 directors' ability to approve someone without

1 breaching the contract?

2 MR. BRACEGIRDLE: Well, as to the
3 noteholders, Your Honor, the only duties that the
4 company owes to the noteholders is a contractual one.
5 To the extent that good faith and fair dealing --

6 THE COURT: Is there any limit to the
7 board's ability to approve the election of a potential
8 nominee without breaching the contract?

9 MR. BRACEGIRDLE: I could conceive of
10 a situation, Your Honor, where perhaps the board was
11 faced with a situation where incoming directors were
12 so completely incompetent that perhaps the approval of
13 those directors might constitute a breach of good
14 faith and fair dealing that adheres to the contract.
15 But that really would be the limitation on the
16 directors' power, that they would have to take an
17 action which was so contrary --

18 THE COURT: Is it coextensive with the
19 duty of loyalty to the corporation and its
20 shareholders?

21 MR. BRACEGIRDLE: Certainly there may
22 be some overlap there. With respect to -- again,
23 we're talking purely as to what duties, if any, the
24 company has to the noteholders. But in making that

1 determination, there may be some considerations for
2 shareholder interest, but that's not before the Court
3 today.

4 THE COURT: Well, I was asking about
5 the corporation or the shareholders. The directors,
6 when they exercise this power of approval, presumably
7 have to do so in conformity with their fiduciary
8 duties, as well as their contractual duties. I was
9 just trying to figure out whether the position of the
10 company is that sort of the limits of the contractual
11 duty are the reasonable exercise of fiduciary duties.

12 MR. BRACEGIRDLE: Yes. Certainly,
13 when the board has taken that action, I would disagree
14 that there are fiduciary duties that attach to that
15 decision with respect to the corporation and the
16 stockholders. To the extent that that puts some sort
17 of boundary on what the board's actions may be, that
18 may in fact provide some sort of limitation on its
19 contractual rights. But, again, that's corollary to
20 the contract itself. But I wouldn't disagree with
21 Your Honor that there may be an overlay of fiduciary
22 duties that might inform and certainly govern that
23 board decision.

24 THE COURT: All right. Thank you.

1 MR. BRACEGIRDLE: Thank you, Your
2 Honor.

3 THE COURT: Mr. Sacks, are you going
4 to stand at this point?

5 MR. SACKS: Unless Your Honor would
6 prefer to hear from Bank of New York, first, I'll
7 address the duty of care, and I might also answer your
8 last question as well.

9 THE COURT: Why don't you go ahead
10 then?

11 MR. SACKS: Very well. I will try to
12 be brief, Your Honor, as well.

13 Just on your last question, before we
14 move off it, I think there is a fiduciary duty that
15 the corporate directors have, and it's implicit in the
16 standard that they would apply, that they would always
17 act in the best interest of the corporation and its
18 shareholders and that's the standard that would govern
19 their performance under the contract. So in carrying
20 out their decision to approve or not approve, they
21 would have to carry out their fiduciary obligations,
22 like in making any board decision.

23 If you look at the Hills Stores case,
24 you'll see that in fact happened. That's exactly what

1 Vice Chancellor Strine concluded in that case and the
2 case where the board acted and decided not to cleanse
3 the slate.

4 I should add, Your Honor, on that, you
5 heard from Professor Roberts this morning. You heard
6 from Mr. Lebovitch, again, that nobody would ever
7 conduct a proxy fight, would never do this in the face
8 of a clause like this. Well, Hills Stores was just
9 such a case, although the litigation only involved the
10 employment agreement. In Hills Stores there was an
11 indenture of \$225 million, \$160 million credit
12 agreement, both of which had change of control
13 provisions based on majority change in board
14 ownership, and both of which were triggered by that
15 case where the board made the decisions, which was
16 upheld why the Court, that in the fiduciary
17 obligations they didn't have to cleanse those people.

18 THE COURT: In your view, then, does
19 the existence of the fiduciary duty give value to the
20 rights that the debenture holders hold with respect to
21 this provision?

22 MR. SACKS: You can question the value
23 of this clause. But certainly it does, because if,
24 for example, the board were to determine that four

1 felons had been put up for nomination and that they
2 would impair the assets of the -- there's a reasonable
3 risk that they might impair the assets of the
4 corporation if elected, board exercising its fiduciary
5 obligations to its shareholders should not only be
6 recommending against that, but might also be going out
7 saying, "We don't -- we are not going to cleanse these
8 people because we don't think they're suitable. We
9 have a gate-keeping function in this instance. In
10 this particular case, we are not going to cleanse
11 these people." Therefore that would be consistent
12 with it.

13 But the question of the level of
14 protection that is given to noteholders under a
15 provision like this, as opposed to a provision in the
16 credit agreement where the board doesn't make the
17 decision, this is a case where the decision has been
18 delegated to the judgment of the board of directors.
19 And like any decision, the board always has to
20 exercise its discretion in accordance with its
21 fiduciary duties to the shareholders of its
22 corporation.

23 THE COURT: Even though the provision
24 doesn't contain within it any language that defines

1 the standard to be applied by the board in exercising
2 this approval -- at least for the purposes of the
3 contract -- you think it's fair to say that the
4 standard is the same one that governs the board's
5 actions whenever it takes an action?

6 MR. SACKS: Correct. That would be
7 consistent with board actions generally. That would
8 be implicit, and that's what parties would have to
9 expect, because they're asking for a board decision on
10 the subject and the board always has to act in the
11 interest of the shareholder of the corporation.

12 THE COURT: Thank you.

13 MR. SACKS: Your Honor, I'm going to
14 address briefly the issue of the evidence in this case
15 that shows that plaintiffs have not come close to
16 meeting its burden that there was a failure of due
17 care on the part of the directors of the corporation.
18 But first let me say, Your Honor should never have to
19 get to that question in this case. First, because the
20 interpretation should be dispositive of the issue, and
21 then you never have to address that. But second, it
22 has to do with the relief that's being sought in this
23 case, even if the interpretation weren't dispositive.

24 Plaintiffs are seeking no relief

1 against the directors themselves. They're not seeking
2 money and they're not seeking any injunctive relief
3 against the directors. The only relief they are
4 seeking in this case, based upon the board's breach of
5 the duty of care, is the invalidation of a provision
6 in a contract to which the corporation is a party.
7 And the law is very clear that it would not be --
8 there is no authority for the Court to invalidate a
9 corporate contract based upon an undisclosed breach of
10 duty of care in connection with the approval of that
11 contract, or the counterparty on the other side is
12 without notice of that breach and is an innocent
13 third-party, as is the case with respect to the
14 indenture in this case.

15 A breach of the duty of care by
16 directors does not allow the Court to invalidate the
17 corporation's contract. It's not a question of
18 conduct that's ultra vires. It's a defect in
19 formation that's internal to the corporation.

20 Your Honor, the plaintiffs cite one
21 case in their brief, which actually makes this point,
22 the Strassburger case, which was actually a case, I
23 think, really involving stock repurchases. And the
24 Court -- there are a lot of things in the case that

1 aren't terribly relevant. But ultimately, in looking
2 to relief, the Court says the issue of rescission of
3 the contract is not available, one, because the
4 counterparty wasn't a party to the case; but, two, in
5 any event, it wouldn't be appropriate because there
6 was no evidence that the counterparty was complicit
7 and aware of the wrong that had occurred.

8 I'd also like to cite to Your Honor
9 two cases which are not in our pretrial brief, but I'd
10 like to cite them to you now, if I could. The first
11 is Cross Properties v. Brook Realty. It's a case
12 under New York law. And I have extra copies of it, if
13 Your Honor would like me to hand up a copy. The cite
14 is 322 New York Supp. 2d, 773, 37, Appellate Division
15 2d 193. And that was a case involving a real
16 estate -- let me make sure I have the right one. One
17 is a real estate case and the other one --

18 THE COURT: Cross Properties versus
19 Brook Realty sounds like a real estate case to me.

20 MR. SACKS: This is the real estate
21 case.

22 MR. LEBOVITCH: Do you have a copy?

23 THE COURT: And you should hand a copy
24 to my clerk.

1 MR. SACKS: Yes, Your Honor.

2 Your Honor, the question was
3 whether -- and it's on page seven of the printout at
4 the top of the left-hand side. It's, I guess, page
5 seven. It's at 322 New York Supp. 2d, at 781.

6 The Court says -- this was the
7 question of whether the Court could invalidate the
8 contract for the sale of the property. "We did not
9 decide that question, however, because we find that
10 even if a breach of fiduciary obligation by the
11 directors of the Dollar companies could be
12 established, the September 13 contract is valid and
13 enforceable because Brook was a bona fide purchaser
14 without notice of any fraud or misuse of power by the
15 directors. A distinction must be drawn between the
16 absence of power in a corporation to act (*ultra vires*)
17 and the misuse of corporate power by the directors.
18 Where the issue is one of misuse, as in the case at
19 bar, in order to set aside the contract the evidence
20 must establish that the third party had knowledge of
21 the fraud on the shareholders. . . ."

22 In addition, Your Honor, a Delaware
23 Supreme Court case, *Mulco Products v. Black*, 127 A.2d
24 851 -- a little old -- 1956, but it makes the point.

1 Page six of the printout on the top
2 right-hand side, headnote four, "We pass over the
3 question of authority, because even if authority were
4 lacking yet if the corporation received and retained
5 the fruits of the loan it is estopped to deny
6 authority in Welch to borrow the money. This
7 principle is settled beyond question."

8 Then below, "The corporation received
9 and retained the money, and the rule above quoted
10 applies."

11 Seeking to invalidate or rescind a
12 provision in a contract is one, in this particular
13 case, that would be inappropriate. Because even if --
14 and I don't suggest there's any credibility to the
15 claim that there was a breach of a duty of care -- but
16 even if they could establish a breach of the duty of
17 care, that would not serve any purpose as a basis to
18 invalidate any provision of this contract, which was
19 entered into with third parties, who had no knowledge
20 that there was a failure in the process of authorizing
21 and approving the contract in this case, which, again,
22 there was not.

23 Plaintiffs don't cite any cases that
24 remotely come close to authorizing the Court to

1 invalidate a cause in a case like this. They cite
2 all -- all the cases they cite are takeover cases.
3 They all involve cases, in one way or another, where
4 the counterparty is complicit -- not necessarily
5 complicit in the fraud, but on notice that the board
6 is acting for an entrenchment purpose, or something of
7 the sort.

8 Hanson is a perfect example. Putting
9 aside the fact that it's New York law, putting aside
10 the fact that it's before there was substantial
11 development of the body of law in this area, it
12 involves a case where a granting of lock-up options at
13 below market prices, and they were the counterparty to
14 the agreement in the event of a three-way change of
15 control situation. And there is not an independent
16 third-party, so the relevant rule doesn't apply.

17 So for those reasons we don't think
18 Your Honor should even address the issue of the
19 directors' duty of care in this case. But if you do,
20 we don't believe the plaintiffs have met their burden,
21 and it is their burden in this case to demonstrate a
22 breach by the directors of the duty of care. The law
23 is set forth and it's fairly clear: it's the
24 plaintiff's burden, given the presumption that the

1 directors did act -- that their decision was the
2 product of a reasonable business judgment to show they
3 acted with gross negligence or conduct outside the
4 bounds of reason.

5 Plaintiff's argument here is very
6 narrow, focused and ultimately can't stand. They
7 claim that the failure of Cooley Godward to make the
8 board aware of the existence of this clause, if it is
9 interpreted contrary to the way we interpret it --
10 they interpret it, and presumably people at the time
11 interpreted it -- amounts to an absence of due care on
12 the part of the directors. There's no claim in this
13 case that there was any improper purpose or motive for
14 entering into this clause as part of this transaction,
15 or that this transaction was motivated by any improper
16 purpose.

17 Plaintiffs don't claim that the board
18 acted in a hasty or an improvident manner. They don't
19 claim that the board -- I'm not going to go through
20 the facts here. They're set forth in full in our
21 brief, and these all relate to that. They don't claim
22 that the board cannot rely on management, as it did in
23 this case, and as Delaware law specifically authorizes
24 a board to do: to act, rely on the conduct of

1 management in areas within their expertise. They
2 don't claim that the board did not rely on outside
3 counsel. Again, Delaware law encourages directors to
4 engage outside counsel with expertise in a complicated
5 matter like the issuance of convertible notes.

6 They don't claim that outside counsel
7 retained by the company in this case was not expert in
8 this area. Indeed they were. They don't claim that
9 the underwriters selected by the board in this case
10 were not appropriate underwriters to utilize for this
11 type of an offering. They don't claim that the board
12 cannot delegate the authority to proceed with this
13 offering to a subcommittee, or a committee of the
14 board which, in this case, was the finance committee
15 acting as the pricing committee.

16 They don't claim that the decision by
17 the board to borrow money was in any way inappropriate
18 under the circumstances. They don't claim that the
19 decision to engage in a convertible bond offering was
20 in any way inappropriate. They don't claim that the
21 financial terms that were obtained by the board and
22 the corporation in this transaction were not favorable
23 to the company, or a smart decision by the company in
24 this case.

1 Looking to the advisors. They don't
2 claim that Cooley Godward didn't know about this
3 clause. They don't claim that Cooley Godward regarded
4 this clause as anything other than a common and
5 ordinary and customary clause. They don't claim that
6 Cooley Godward didn't summarize for the board the
7 essential terms of the transaction following a full
8 negotiation in many meetings with interaction between
9 the board and its advisors.

10 Although Mr. Lebovitch said it, we'll
11 refer Your Honor to the evidence that we cite. Indeed
12 there was not some question about some vague
13 statement. The testimony in this case is that the
14 pricing committee specifically asked management and
15 the advisors at Cooley Godward, after lengthy
16 discussion of all the essential and financial terms of
17 this transaction, whether there were any terms of the
18 written legal documents for this transaction that were
19 not customary, or that were uncommon, and that the
20 answer provided to the members to the pricing
21 committee was no, there were not.

22 So there were specific inquiry beyond
23 this process by the members of the pricing committee
24 into that.

1 So when you look at this under these
2 circumstances, you have a claim where there's nothing
3 wrong with the process that was followed in this case.
4 There was nothing wrong with the transaction that was
5 entered into in this case. There was nothing
6 identified to the board, or anything that plaintiffs
7 have highlighted to put the board on notice that they
8 were not in a position to rely upon Cooley Godward or
9 management.

10 And Your Honor, in every case where
11 the board -- where Delaware courts have found a board
12 at fault for failing to exercise due care, it's in a
13 situation where there are facts that are known to the
14 board that should have made them ask more. Why? What
15 about that? There's nothing in this case that's been
16 identified by anyone that would have caused the
17 directors in this case to ask anything more as to what
18 turns out to be one term that is not even the object
19 of the principal focus of this contract, which is the
20 borrowing of \$575 million to enable the company to
21 carry out its business plans on terms and conditions
22 that are favorable to the company.

23 THE COURT: I get your point,
24 Mr. Sacks. I suppose what's going on here is that

1 this provision, or provisions like it, you know, have
2 become customary and they are not out of the ordinary
3 or unusual, depending on how this one is interpreted,
4 which is itself maybe the problem the plaintiffs are
5 pointing out by bringing this suit. That provisions
6 that are customarily and routinely entered into
7 between issuers and their underwriter, and counsel
8 chosen by them, that have an effect on shareholder
9 franchise should perhaps be considered and, more than
10 perhaps, it should be considered by everyone as not
11 routine, but as unusual and requiring real
12 justification before lawyers agree to them and boards
13 of directors fully advised of the circumstances
14 authorize them.

15 MR. SACKS: Your Honor may be correct
16 on that point. But the answer to that is not a breach
17 of the duty of care in this case by the directors.

18 THE COURT: I understand.

19 MR. SACKS: It's criticism, Your
20 Honor, if it were valid. And as Mr. Pitt has said in
21 his deposition, Cooley Godward should have brought
22 this to the attention of the board. He would have
23 brought it to the attention of the board. They did
24 not. Their failure to do so under the facts and

1 circumstances of this case cannot make out a breach of
2 the duty of care by these directors, given --

3 THE COURT: I think it's unfair --
4 Cooley Godward happens to have been company counsel
5 here. I think you can shoot around and find most of
6 the other lawyers in the room -- I wonder how many of
7 the other lawyers in the room would have brought the
8 same matter to the attention of an issuer.

9 MR. SACKS: I'm not intending to
10 criticize Cooley Godward in any way, shape or form by
11 saying that. Even hypothetical, if you were to assume
12 Cooley Godward -- again, this is what their claim
13 depends upon -- if you were to assume hypothetically
14 that Cooley Godward should have brought it to the
15 attention of the board but did not, that would not
16 establish a breach of duty claim against the directors
17 of this corporation under the facts and circumstances
18 here.

19 THE COURT: I understand that.

20 MR. SACKS: Okay.

21 I think you understand our point, Your
22 Honor. Thank you very much.

23 THE COURT: Thank you, Mr. Sacks.

24 Mr. Gadsden, I'm going to give you a

1 chance now to stand up. I'll try to confine you to
2 about 20 minutes, if I can. Maybe you won't take that
3 long.

4 MR. GADSDEN: Thank you, Your Honor.

5 It's James Gadsden from Carter
6 Ledyard & Milburn for the Bank of New York Mellon
7 Trust.

8 As I mentioned yesterday, I'll address
9 the indenture construction and other New York law
10 issues, and Mr. Ladig will address the Delaware
11 issues.

12 In the interest of time, maybe I
13 should summarize in bullet points what our arguments
14 are. The first and principal point of standing up
15 here is that the noteholders, who purchased these
16 notes, are now faced with precisely the event risk
17 that they contracted to protect themselves from. This
18 was it. The purpose of the clause --

19 THE COURT: That's kind of putting the
20 rabbit in the hat, isn't it? It assumes that the
21 interpretation that you are proposing is the one that
22 is the correct interpretation, or the one that anyone
23 thought of at the time this indenture was issued.

24 MR. GADSDEN: In a minute, I'll review

1 the commentaries that talk about what the standard
2 reference was about what indenture covenants that say
3 that the purpose of this covenant is to address a
4 change of control of the board.

5 This company is undergoing a raucous
6 contested proxy fight right now that may turn the
7 board up. It's Bank of New York Mellon's position
8 that, read properly, this indenture gives the
9 noteholders the right to elect to put their note if
10 the board is turned over.

11 The next principal point of our
12 argument is that the board has already acted. Faced
13 with the decision as to what to do with the dissident
14 nominees, it went through a process, as described in
15 its proxy materials, of establishing a board to
16 consider who to nominate -- consulting outside experts
17 on who to nominate, evaluating -- excuse me, Your
18 Honor -- evaluating the qualifications of the
19 Eastbourne and -- excuse me.

20 THE COURT: The Icahn nominees?

21 MR. GADSDEN: The Icahn nominees.

22 They concluded on that basis to nominate a slate of 12
23 people, and then to put out proxy materials urging the
24 election of their people and advising the shareholders

1 that it was not in their best interest to vote for the
2 Icahn or Eastbourne nominees.

3 My next point is that, when the
4 plaintiff's counsel stood up, he said the board has
5 approved these nominees. The board has not approved
6 the nominees from the shareholders. What the board
7 has done is it has entered into a contract with the
8 plaintiff in order to terminate the claims asserted
9 directly against the directors individually by the
10 plaintiff, under which the board has agreed to approve
11 -- "approve" in quotation marks. That's what their
12 contract says: solely for the purpose of this
13 indenture, and solely to take away the put rights of
14 the noteholders, only if you authorize it.

15 In the absence of an order from this
16 Court authorizing them to proceed, the board is not
17 approving these nominees. In fact, it's continuing
18 today to put out its proxy materials urging
19 shareholders to vote against the nominees --

20 THE COURT: That will continue to be
21 true, even if I agree with the company and the
22 plaintiffs as to a reasonable interpretation of the
23 indenture. I assume that the company will continue to
24 oppose the election of the stockholder nominated

1 directors and urge the election of its own nominees.

2 MR. GADSDEN: If that's so, Your
3 Honor, then it's the position of Bank of New York
4 Mellon that that is not approval. Approval in the
5 words of plain English dictionary definitions,
6 including the one cited by the plaintiff's lawyer a
7 moment ago, is to accept as satisfactory, to have
8 expressed a favorable opinion on, to take a favorable
9 view.

10 THE COURT: To accept as satisfactory.
11 Does that -- why couldn't you accept someone as
12 satisfactory who has gained election, even though you
13 preferred someone else?

14 MR. GADSDEN: The company's position
15 is, as expressed in their proxy materials -- excuse
16 me, Your Honor. This is after the agreement with the
17 plaintiffs, under which they are going to approve the
18 nomination, if you say that that takes the
19 noteholders' rights away. The Icahn and Eastbourne
20 agenda is not in the best interests of the
21 shareholders. This is from the April 24th company
22 form 14A that was marked as exhibit --
23 Plaintiff's Exhibit 215. Neither Mr. Icahn and
24 Mr. Eastbourne show a serious lack of understanding of

1 Amylin's business and of the value-enhancing
2 opportunities that the company has created in the
3 marketplace.

4 Then, continuing on the next page.
5 Vote for the board's superior nominees on the blue
6 proxy cards. Amylin's slate of director nominees has
7 the experience and qualifications to best guide your
8 company at this critical juncture. We strongly
9 believe that the loss of any of our director nominees
10 would be harmful to your company and to your
11 investment.

12 That's the approval. Here's the
13 approval. And on May 1, the company is speaking
14 again. The dissident shareholders have chosen, at
15 this particular juncture, to replace all of your
16 directors who have requisite diabetes business
17 experience, other than your company's CEO. And
18 directors are also leaders in the diabetes medical
19 unit. These highly qualified directors would be
20 replaced by individuals who have no relevant diabetes
21 experience.

22 And then in bold, such action
23 demonstrates the dissident's fundamental lack of
24 understanding of your company's business and is

1 clearly not in the best interests of the Amylin
2 shareholders.

3 Mr. Icahn and Eastbourne are each
4 advancing an agenda that we believe undermines
5 Amylin's strategy and jeopardizes the potential value
6 creation of exenatide once weekly. In short, their
7 agenda is to drastically cut costs well below our
8 already significant cost reduction initiatives, and
9 push for a sale of the company at a time when it is
10 seriously undervalued. "Protect the value of your
11 investment. Vote for your company's nominees on the
12 blue proxy card today."

13 That's approval.

14 THE COURT: No, that's the proxy
15 material. That's the fight letter. And you want me
16 then to say, someone who holds those views and
17 publishes them cannot at the same time, within the
18 meaning of your contract, approve the election of
19 these people? That's your point.

20 MR. GADSDEN: Yes, Your Honor. They
21 have spoken. The board has spoken. Again, even after
22 agreeing to approve, that's their words. They're
23 expressing, in the strongest possible terms, the view
24 that these people should not be on the board.

1 THE COURT: Well, I'll give you strong
2 terms. I won't give you strongest possible.

3 MR. GADSDEN: Your Honor, just to make
4 a few other points.

5 As I think you recognize, these bonds
6 are registered and they're being --

7 THE COURT: Is that -- let me go back
8 to this point you just raised, though. You're making
9 this argument as an interpretational matter, or is it
10 fact specific to this case? Are you claiming that if
11 they indeed approve -- act to approve these nominees,
12 exercising what they believe is their power under the
13 indenture, that it will be a breach of contract?

14 MR. GADSDEN: Your Honor, my argument
15 is that, on this record, an approval -- an approval,
16 in order to only after you authorize it and only to
17 avoid the personal liability claims put against the
18 directors would be a breach of the -- it would be a
19 misreading of the contract and a breach of the implied
20 duty of good faith and fair dealing in the
21 interpretation and operation of the contract. That's
22 the position.

23 THE COURT: It would be a breach of
24 contract?

1 MR. GADSDEN: Yes, Your Honor, on
2 these facts.

3 THE COURT: Is there a claim? Have
4 you claimed breach of contract, or seek a declaration
5 that it would be a breach of contract?

6 MR. GADSDEN: We've sought -- we've
7 opposed the declaration that is sought by the
8 plaintiffs and the company that you can now authorize
9 the company to --

10 THE COURT: Am I being asked to
11 authorize something, or am I being asked to interpret
12 a contract -- give an interpretation of the meaning of
13 this contract? I thought that's what I was being
14 asked to do.

15 MR. GADSDEN: I think that's fair,
16 Your Honor.

17 THE COURT: All right.

18 MR. GADSDEN: The point that I was
19 going to make is that these bonds are being traded in
20 the secondary market. So the impact of a
21 determination that this contract is unenforceable
22 would have an impact not just to the initial
23 purchasers, but on a broad scale of people in the
24 public market who have no knowledge or notice

1 whatsoever.

2 THE COURT: If I agreed with you as to
3 the interpretation but found that it was, as a matter
4 of remedy for what is alleged, to be a breach of the
5 duty of care, that I should excise that provision from
6 the contract? That's what you're speaking about now.

7 MR. GADSDEN: Yes, Your Honor.

8 THE COURT: All right.

9 Thank you.

10 MR. GADSDEN: Your Honor, on the point
11 of what is the purpose of the intent of the contract,
12 I'll refer to the points that are made in our briefs
13 that cited to the Simpson Thacher & Bartlett indenture
14 instruction manual, to the web book that we cited to,
15 and to the model negotiated covenants published by the
16 ABA section in business law. And in particular, with
17 respect to the latter, that model has exactly this
18 formulation, and characterized it as the foregoing
19 event is designed to pick up the occurrence of a
20 contested proxy fight where there may not be a change
21 of ownership of the stock of the company but a new
22 group of stockholders gains control of the board.

23 We've had the evidence from the Bank
24 of New York witnesses --

1 THE COURT: What's the date of that
2 commentary?

3 MR. GADSDEN: 2006, I believe. And we
4 have the evidence of the Bank of New York lawyers, as
5 to their thinking in seeking a similar clause.

6 THE COURT: They sought quite a
7 different clause. They sought a clause that
8 specifically, in so many words, addressed the issue
9 that you say is addressed implicitly in this clause.

10 MR. GADSDEN: I agree with that, Your
11 Honor. It explicitly speaks in terms of a contested
12 contest. The words in the indenture are the words in
13 the indenture.

14 THE COURT: It specifically negates
15 the power that the company believes it takes the
16 position it has under this indenture, and which you
17 say it doesn't.

18 MR. GADSDEN: Your Honor, I do want to
19 be clear. The plaintiff's lawyer suggested that the
20 position that I was taking was that the board could
21 never have approved the nomination of nominees that
22 were nominated in the first -- could never have
23 approved the election of persons who were nominated in
24 the first instance by the shareholders. That's not

1 the position. The position here is that they didn't
2 do that. They -- as I said before, they disapproved.

3 As I said before, Mr. Ladig will talk
4 about the Delaware issues. I want to speak briefly on
5 the severability. The first point on that is that the
6 plaintiff lacks standing -- the plaintiff lacks
7 standing. This is a contract between the company
8 and --

9 THE COURT: I don't plan to spend much
10 time, if any, on that point, if only because both the
11 company and the plaintiff are here and they're both
12 taking the same position with respect to you.

13 MR. GADSDEN: The company has not
14 sought the severability remedy, Your Honor.

15 THE COURT: All right.

16 MR. GADSDEN: So I'd like to -- as I
17 pointed out in our brief, New York follows the
18 Restatement (Second) of Contracts, which does not
19 permit severance of a contract if the provision is
20 essential to the contract. And it's unsupported by
21 separate consideration. The argument here is because
22 this clause is not -- was not negotiated, that it's
23 not important. It's not valuable.

24 Well, the remedies clause in this

1 indenture wasn't negotiated. But no one would argue
2 that, if there was a payment default, that the
3 enforcement of the remedies available to the
4 noteholders is not important or not key to the
5 contract or could be severed.

6 Here, this was an important economic
7 term: the right to seek the second look, as the
8 plaintiff characterized it, in the event of a dramatic
9 event at the company. And it would have the effect of
10 shortening the maturity of the note. That is a
11 fundamental term that I argue cannot be severed out.

12 We've heard one expert give his
13 opinion that it has no value. But that's inconsistent
14 with the observed behavior of the parties. We have
15 the instance in this precise case of the company
16 seeking a waiver of such a term. It was negotiated at
17 a substantial price. So our experience right here is
18 that these clauses are valuable --

19 THE COURT: I suppose the question is,
20 did -- and I don't really plan to reach this. Of
21 course, at this point, the reason we're in court is
22 that, due to the economic situation of the company and
23 due to the trading values of its securities, these
24 provisions in both the indenture and also the bank

1 credit agreement are clearly valuable. The question
2 is exanti, are they of value when entering into the
3 contract.

4 MR. GADSDEN: Well, the evidence, Your
5 Honor, is also at the time that they were entered into
6 this company, as in the plaintiff's presentation, was
7 considered a takeover target. That's what the
8 company's view was. That it suffered the risk of
9 doing a transaction or having a transaction thrust
10 upon it. And in that context, yes, having fundamental
11 change protection is valuable to the creditor because
12 it isn't just that it turns out that through a
13 dramatic change of circumstances that this company is
14 the subject of fundamental change. It was
15 predictable.

16 Thank you, Your Honor. I turn to
17 Mr. Ladig.

18 THE COURT: Mr. Ladig.

19 MR. LADIG: Yes, Your Honor. Thank
20 you for accommodating my schedule today.

21 THE COURT: Now you have to
22 accommodate mine.

23 MR. LADIG: That is a fair deal, Your
24 Honor.

1 I will say, I had a fantastic
2 presentation on the invalidity question. But
3 Mr. Sacks is so eloquent that I'm going to ignore that
4 for these purposes, and delve right into what I think
5 are the relatively few remaining issues here.

6 This is an odd case from a coercion or
7 entrenchment device standpoint, because this is not
8 the case where the plaintiffs are alleging that the
9 directors actually are at fault for doing this. They
10 made the strategic decision to withdraw those claims.
11 So we're looking at the claim here that there is
12 something wrong, or inherently wrong with this
13 continuing directors provision in a vacuum, so to
14 speak. I don't know that there's ever been a case
15 quite like this where a court has been asked to do
16 this.

17 THE COURT: Right. I'm not a
18 regulatory agency. I'm a court. I have -- there are
19 limitations on the sorts of issues I take up and write
20 decisions about.

21 MR. LADIG: I'm not entirely sure that
22 this is -- that you could reach the question of
23 whether it's an entrenchment device, in the absence of
24 a finding of underlying bad acts by the board, in the

1 first instance, to enter into this deal.

2 With that being said, there isn't
3 anything about this provision that actually prevents
4 the stockholders from electing the directors. It's
5 the unique facts and circumstances associated with
6 this company and its current risk profile that has
7 caused this unique situation.

8 There's nothing that prevents a newly
9 elected board from persuading noteholders not to put
10 the notes back to the company. There's nothing that
11 prevents Carl Icahn, or his board right now, from
12 persuading the current noteholders that this is in
13 fact a good idea to allow this election to happen, and
14 don't put your notes back if we are in fact elected.

15 And there's nothing --

16 THE COURT: Assuming this ever
17 happened and this were triggered, would the decision
18 to put the notes be an individual decision by
19 noteholders, or is it a collective decision.

20 MR. LADIG: It's an individual
21 decision by the noteholder. So an individual
22 noteholder can make that call on his or her own.

23 And there's nothing in the record
24 really to say that the noteholders will put their

1 shares. The plaintiffs make it a fait accompli that
2 that will in fact happen. But there's a lot of other
3 issues here that really aren't in the record at all
4 that would go into a such a decision.

5 Where does the note stand on the level
6 of seniority versus other securities? What would be
7 the possible bankruptcy risk for doing so? Certainly
8 the noteholders wouldn't want to say, "Yeah, let's go
9 ahead and put our notes back," and then cause a trip
10 of whole other indentures and find themselves at the
11 bottom of the barrel finding no money to come down at
12 the end of the day.

13 There's nothing in the record that
14 would prevent the current board, or the new board,
15 from reaching either some sort of refinancing, or any
16 other accommodation to try to work around this
17 provision. It may be that the credit market doesn't
18 permit it at the present time. But that's not in the
19 record. And, frankly, in the absence of that kind of
20 information, I don't know that the Court can conclude
21 that this is, in fact, coercive or preclusive.

22 As Your Honor said, I think the
23 plaintiffs were really overexaggerating the point that
24 they were trying to make on this issue.

1 And, frankly, the plaintiff's whole
2 argument overlooks the fact that the board may approve
3 people. It's never been the Bank of New York's
4 position that the board is limited to approving only
5 people nominated by the directors -- by the current
6 directors or a company slate. It could have chosen to
7 nominate, or to approve Mr. Icahn's slate, come
8 together in the beginning. But on March 30th, they
9 made their call. And so it's not the case that the
10 board has limited --

11 THE COURT: You're suggesting that the
12 board might have nominated only seven and approved
13 Mr. Icahn's nomination of the others?

14 MR. LADIG: It could have done that.

15 THE COURT: It might have, but that
16 would be an unusual thing. More usual would be the
17 board would have reached some agreement with Mr. Icahn
18 to put some number -- his nominees -- his suggested
19 directors on the company's own slate.

20 MR. LADIG: That's right. Right. I
21 think -- in that scenario, I think that we would be --

22 THE COURT: Without him ever having
23 nominated them.

24 MR. LADIG: That's correct. That's

1 correct.

2 And then I just want to make one final
3 point, Your Honor. In the plaintiff's pretrial
4 brief -- reply pretrial brief filed on Saturday
5 morning -- there was a reference to injunctive relief
6 in portions of that brief. It was my understanding
7 that there's never been a request for injunctive
8 relief. The plaintiffs have consistently sought
9 invalidation of the offensive provisions here. And if
10 they're going to want to seek an injunction here,
11 that's a wholly separate form of relief that hasn't
12 been addressed, and it's not in the pretrial order.

13 THE COURT: Thank you, Mr. Ladig.

14 Mr. Lebovitch, you have a few minutes
15 to reply.

16 MR. LEBOVITCH: I'll try to be
17 extremely quick.

18 First of all, investors buy on an
19 indenture. They don't buy on ABA commentaries. Those
20 ABA commentaries, they're written entirely by lenders'
21 lawyers, I think including Mr. Gadsden. We say that
22 the interpretation of the language is completely
23 irrelevant from those commentaries. No one is
24 actually thinking about how they affect shareholder

1 voting rights.

2 The closest language to what Bank of
3 New York wants, they're written by lenders' lawyers.
4 It's not like it's an official statement of what
5 indentures are supposed to be. It's what lenders put
6 in provisions. Mr. Gadsden is one of the authors of
7 that. Bank of New York's witness agreed with our
8 interpretation of the language here -- the plain
9 language -- not about what some ABA commentary says.

10 The language -- one bit of language
11 that was before this Court is in DeSoto. And the
12 language in that provision actually says what Bank of
13 New York wants it to say. It says that the change of
14 control is triggered if one third or more of the board
15 consists of members not nominated for membership by
16 the company or the board. So there the board had to
17 do the nomination. And Chancellor Allen looked at
18 that and he observed that the purpose of these -- the
19 change of control provisions -- is to protect against
20 takeovers.

21 He wrote in footnote three in the
22 opinion, "The most critical defect in my opinion is
23 the fact that the, quote/unquote, enemy here, the
24 raider, includes anyone the shareholders elect but

1 that the board has not nominated." That
2 interpretation is the one that tees up, or at least
3 Chancellor Allen said was a defect.

4 While I'm on DeSoto, on the standing
5 point, I don't know -- we have standing to bring all
6 these claims. Chancellor Allen wrote in footnote
7 two, "Where the offense is to the shareholders right
8 to vote in a fair contest, it probably is sensible to
9 refer to the board's duty directly to shareholders."

10 This isn't a derivative claim. We
11 have the standing to get interpretations affecting
12 shareholder voting rights.

13 The cases that Mr. Sacks cites -- the
14 New York case -- the language that he quoted actually
15 doesn't differentiate between loyalty and care. I
16 don't think Your Honor has suggested that even in a
17 breach of the duty of loyalty shareholders or this
18 Court would be without the power to take action to
19 remedy a wrong like that. So this New York opinion
20 doesn't even talk about a duty of care.

21 This other opinion from the
22 Mulco Products, Supreme Court of Delaware, the
23 question there was the corporation wanted to not have
24 to pay back a loan because they were defrauded by, I

1 guess, a CEO. And so the commentary there is that the
2 fact that there was some breach by your CEO cannot be
3 an excuse to get out of a loan that is a loan of
4 yours. They can't disclaim the loan. We're not
5 trying to do that. We're trying to invalidate one
6 provision.

7 THE COURT: You want me to blue pencil
8 a contract the company entered into with third parties
9 on the basis of an argued finding that the board of
10 directors didn't ask the right questions and breached
11 its duty of care when it authorized the transaction?
12 I don't think you have any authority that supports
13 doing that. Paramount doesn't support it. Ace
14 doesn't support it.

15 MR. LEBOVITCH: Besides this being
16 severable, which I think that alone gives you
17 authority, we put in our briefs the investors know
18 it's severable and they know it's a pretty meaningless
19 provision. So under standard severability, I don't
20 think any court would hesitate.

21 More importantly --

22 THE COURT: I beg to differ with you.
23 I think any court would hesitate to sever provisions
24 in contracts that corporations enter into, just

1 because it's some years later determined that the
2 board didn't think about it carefully enough. That's
3 not a basis for severing provisions in a contract.
4 The severability clause there is in case someone
5 should find that the provision -- any provision in the
6 contract is unenforceable.

7 MR. LEBOVITCH: That's exactly --

8 THE COURT: Not because of a finding
9 that one of the parties didn't properly understand
10 what it meant, but for some other really pertinent
11 reason.

12 MR. LEBOVITCH: Your Honor, in the Ace
13 case, Vice Chancellor Strine said --

14 THE COURT: Ace and Paramount, they
15 deal with takeover context, where the person who is
16 making the argument or defending the contract
17 provision had every reason to know, at the time it was
18 entered into, that perhaps it was unenforceable.
19 Certainly if, as in Ace, as the bidder later argued
20 the contract meant, if that's what the bidder thought
21 it meant at the time that it signed the contract, it
22 should have known it was unenforceable.

23 MR. LEBOVITCH: Your Honor, in those
24 cases --

1 THE COURT: That's what
2 Vice Chancellor Strine was talking about.

3 MR. LEBOVITCH: There was an
4 opportunity to get an injunction. Your Honor says
5 that the breach of the duty is never going to be a
6 basis for relief, then what you have is wrong without
7 a remedy. Let me tell you why. Shareholders don't
8 know the terms of a debt agreement until it's out
9 there. Shareholders can enjoin the merger agreement
10 before the merger is effectuated. So effectively,
11 this Court of equity would be saying that, if a
12 board -- I don't know why we distinguish loyalty and
13 care -- if a board, without the knowledge of the other
14 side -- without the knowledge of the other side --
15 breaches its duty of loyalty, breaches its duty of
16 care, that this Court's without power to correct that,
17 even though shareholders can't challenge it
18 beforehand. They'll only get news of this after the
19 deal is signed --

20 THE COURT: That might be an argument
21 to make in the appropriate case, but this isn't. I
22 know we keep talking -- the arguments here keep being
23 made as to whether I've interpreted the provision to
24 mean one thing, or interpreted it to mean another. It

1 does get a little confusing. I get your point.

2 MR. LEBOVITCH: Okay. Mr. Sacks said
3 that Hills Stores versus Bozic is an example of
4 shareholders fighting through this. It's not. The
5 shareholder there was proposing a huge premium deal.
6 It's not an example. The only case we think on its
7 face could be a shareholder just trying to run a slate
8 is DeSoto, and that's one where the Court said there's
9 a defect in this.

10 It's a common provision, yet the board
11 doesn't know how to interpret it? They had to go to
12 the trustee to ask for an interpretation. However
13 comment it is, this is an important issue that up
14 until now has not been addressed.

15 Now, we have a concern. If it's okay
16 for a board to not ask about how a debt agreement can
17 affect --

18 THE COURT: Lawsuits are not the only
19 way to address problems like this. Your clients are
20 stockholders withstanding. People have the ability to
21 make their views known in the marketplace. A lawsuit
22 is not the only way to bring this kind of problem to
23 the attention of boards of directors. There are
24 advisors and others.

1 MR. LEBOVITCH: If these provisions
2 are held to be irremediable, irrespective of how they
3 were approved, then lawsuits are not an option for
4 shareholders, and the only thing they can do is sell.
5 I don't think that's the way it goes.

6 Again, there's the incentives.
7 There's nothing to stop lawyers from actually going
8 ahead, the way Amylin's lawyers did here, and putting
9 these provisions into debt agreements as a matter of
10 course. And they're not as a matter of course. They
11 exist. They're not as a matter of course. While I
12 said this is not a slippery slope argument, now I will
13 give one and say, if this Court is to say it's without
14 power to remedy a wrong just because the lawyers
15 decided not to tell the board, well, then, I suspect
16 you're going to have a lot of boards that don't know
17 they're signing debt agreements with these provisions.

18 THE COURT: Quite frankly,
19 Mr. Lebovitch, what gives your argument some weight
20 here is that it's a provision that affects the
21 stockholders voting rights. There are provisions in
22 contracts that are entered into every day of the week
23 that affect other interests of stockholders in
24 corporations that are, at least arguably, just as

1 important and which get put in contracts sometimes by
2 mistake.

3 MR. LEBOVITCH: When lenders ask for a
4 provision like this, they know that they are going
5 to -- what Chancellor Allen wrote in Blasius was, he
6 wrote matters involving the integrity of the
7 shareholder voting process involve considerations not
8 present in any other context in which directors
9 exercise delegated power.

10 We agree that a lot of other contract
11 provisions can affect shareholder value, affect
12 shareholder rights.

13 THE COURT: Right. Provisions of this
14 kind -- we're sort of still out in some other world
15 talking about an interpretation of the contract that,
16 quite frankly, it's unlikely I'm going to embrace. So
17 it's -- I'm having to sit here and think with sort of
18 alternative -- what I consider to be not real thoughts
19 in my head.

20 MR. LEBOVITCH: Understood. Again, we
21 cite it in the brief, Your Honor, the Ace analysis.
22 It talks about the public policy -- people who
23 contract with a public company, they understand the
24 fiduciary duties. They take it on notice.

1 Goldman, Sachs, which was advising the company in
2 other respects, they knew when they put this provision
3 in that you're dealing with fiduciaries.
4 Paul Regan's -- Professor Regan's article does set
5 forth the basis.

6 THE COURT: Stockholders have the
7 right to sell their stock, too. And I don't think you
8 would be arguing that a provision that says that if
9 50 percent or more of the shares change hands that
10 that is somewhat -- is somehow unenforceable.

11 MR. LEBOVITCH: We're not arguing 50
12 percent of the shares.

13 THE COURT: I know you're not because
14 that's not this case. But there is such provision in
15 this indenture, isn't there? If someone were making a
16 tender offer, maybe you would be making that argument.
17 People have rights to do lots of things. I understand
18 your argument. And now, I think, unless you have
19 anything that you can say in the next 30 seconds --

20 MR. LEBOVITCH: We cited in our brief
21 Charles Fox describing why acceleration is material.
22 When Mr. Sacks says that the lawyers shared the
23 material terms, they didn't. They didn't talk about
24 the acceleration terms. That's at page seven of our

1 reply pretrial brief. It's a quote from Mr. Fox's
2 book.

3 THE COURT: There's lots of
4 acceleration terms in these.

5 MR. LEBOVITCH: There are, especially
6 one that involves voting rights. In general, it's not
7 clear why a board wouldn't want to know: how can this
8 be accelerated, especially if it deals with
9 shareholder voting rights? I'm not going to give the
10 lawyers or the board a free pass for getting a
11 two-page summary of terms that doesn't include
12 acceleration rights and doesn't include the proxy put.
13 Again, they shouldn't think it's common. They
14 shouldn't think it's okay.

15 THE COURT: But it is common, isn't
16 it? It may not be okay, but it is common, isn't it?
17 You'll give me that. You give them that?

18 MR. LEBOVITCH: I don't give them that
19 it was that common at the time.

20 THE COURT: Two years ago?

21 MR. LEBOVITCH: A lot of the examples
22 that were provided -- in fact, we're not objecting to
23 relevance. A lot of the examples post date June 2007.

24 THE COURT: They're the ones easiest

1 to find. You can be sure it's common and has been
2 common for 20 years.

3 MR. LEBOVITCH: They have been in
4 existence, Your Honor. We submitted, I think, 110
5 credit agreements and something like 40 something of
6 them don't include any sort of proxy put. They're --
7 economically, they're working. Citibank doesn't do
8 them. Mr. Fox said Citibank, if they don't replicate,
9 it doesn't replicate it. That's it. That's what he
10 said. So common, yes. They exist. The question is,
11 do lenders have a right that counterweighs -- it has a
12 greater balance than shareholder rights.

13 THE COURT: They have the right to
14 negotiate what they can get.

15 MR. LEBOVITCH: Who is going to push
16 back?

17 THE COURT: We are going to stand in
18 recess.

19 MR. LEBOVITCH: Okay.

20 (Court adjourned at 5:00 o'clock p.m.)

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1 CERTIFICATE

2 I, DIANE G. MCGRELLIS, Official
3 Reporter for the Court of Chancery of the State of
4 Delaware, do hereby certify that the foregoing pages
5 numbered 3 through 142 contain a true and correct
6 transcription of the proceedings as stenographically
7 reported by me at the hearing in the above cause
8 before the Vice Chancellor of the State of Delaware,
9 on the date therein indicated.

10 IN WITNESS WHEREOF I have hereunto set
11 my hand at Wilmington, this 5th day of May, 2009.

12
13 /s/ Diane G. McGrellis

14 -----
15 Official Reporter
16 CSR No. 108-PS
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